

**Fundamental Fairness in Sexual Misconduct Adjudications: Evaluating Private  
Universities for Due Process Rights in their Policies and Procedures**

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**Abstract**

There is a national debate on how universities should respond to sexual assault, specifically the advantages and shortcomings of the campus adjudication Process. One major critique of university adjudication is that it does not provide the necessary due process rights to the accused and is therefore not fundamentally fair. This study seeks to assess this validity of this critique by seeing if sexual misconduct policies lack due process and if so, to what extent. This investigation is a comparative case study of 14 private higher education institutions, belonging to the Ivy Plus Society, analyzing their policy and procedure documents for indicators of due process. Findings show that schools are complying between 45% and 85% of due process indicators with an average of 65%. Colleges do lack due process rights and need to revise their policies and procedures to clearly present these rights. Key recommendations include guaranteeing a hearing procedure with impartial decision-makers and the opportunity to submit evidence and witnesses.

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## Introduction

*Today colleges and universities around the country enjoy a moment of special opportunity: a chance to change slipshod, dismissive and actively malign handling of sexual harassment claims, and to offer genuine remedies for victims. But it is also a moment of danger: because...the rule must define misconduct to include the conduct we want to sanction and deter, and to process complaints in a way that is fair to all parties. The new [Harvard] University Policy and Procedures realizes these dangers...they are defective on every known scale of equal procedural treatment of the parties and due process."*

-Janet Halley, Harvard Law School Professor, *A Call to Reform the New Harvard University Sexual Harassment Policy and Procedures*

Campus sexual assault has gained enormous national attention as a frightening epidemic affecting 20-25% of women. It has engaged major news publications including the New York Times, Washington Post, and Huffington Post, as hundreds of op-eds and investigative pieces have revealed the atrocities of sexual violence perpetrated on college campuses. In the past year alone *The Hunting Ground*<sup>1</sup>, a chilling expose-style documentary on the injustices of campus assault, was nominated for an Oscar. Jon Krakauer's *Missoula*<sup>2</sup>, a non-fiction novel looking at rape and the justice system focusing on one college town, became a national bestseller. President Obama and Vice President Biden have created the "It's On Us" campaign encouraging all citizens to take ownership of this issue, and established the White House task force on Sexual Assault. Furthermore 124 colleges are under federal investigation for their handlings of sexual assault cases.<sup>3</sup>

Victims' stories of injustice are enraging as they are frightening. This moment of time is historic as the cry for action is piercing, carrying great momentum. However, the work of

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<sup>1</sup> *The Hunting Ground*, ro\*co Films Educational, 2015.

<sup>2</sup> John Krakauer, *Missoula : Rape and the Justice System in a College Town* (New York: Doubleday, 2015).

<sup>3</sup> Tyler Kingkade, 124 Colleges, "40 Schools Districts Under Investigation For Handling of Sexual Assault," *Huffington Post*, July 24, 2015, accessed April 10, 2016, [http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault\\_us\\_55b19b43e4b0074ba5a40b77](http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_us_55b19b43e4b0074ba5a40b77)

pursuing justice has proved difficult. The push for much needed victim-centered policies has been met with criticism thereby exposing just how complex responding to sexual violence is.

Campus adjudication has been at the center of recent debate. Proponents of using campus processes state that the university has a basic responsibility of creating a safe learning environment. University adjudication processes are quicker, around 60 days as recommended by the Office of Civil Rights, than law enforcement's minimum of two years to complete a trial. In the mean-time colleges can also provide interim measures, such as relocating dorms or changing class schedules. But these arguments are matched with tough questions and legitimate concerns: Do Universities really have the expertise and resources to properly investigate and resolve a complaint for sexual misconduct? Are victim-centered policies biased against the accused? Because rape and sexual assault are criminal offenses, should law enforcement handle these cases for the sake of public safety? The harshest sanction a university can give a perpetrator is expulsion; however, given the gravity of the crime, should the punishment be more severe and therefore handled by institutions that can impose such punishment?

Colleges have received limited guidance from the federal government on how exactly to respond to campus sexual violence, resulting in varied responses, policies, and procedures between Universities. The campus adjudication process has become so contentious that it has attracted involvement from national policymakers. In efforts to reconcile the university adjudication versus law enforcement response argument, the Safe Campus Act of 2015 was proposed. This act would prohibit higher education institutions receiving federal funding to carry out disciplinary action in response to a sexual misconduct violation unless the victim also

reported to law enforcement.<sup>4</sup> In return, this bill became the spotlight of feud between proponents and opponents of campus adjudication further highlighting the shortcomings between both processes in responding to sexual violence.

This study focuses on one major critique of the university adjudication system: procedures lack due process rights for the accused. This study is the first attempt to see and quantify if university adjudication indeed lacks fundamental fairness and if so, to what extent. It seeks to answer whether or not privately-funded colleges afford due process rights to the accused.

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<sup>4</sup> Safe Campus Act of 2015, H. 3403, 114th Cong., 1st sess. (July 29, 2015): H1.

## Literature Review

### Brief Overview of Sexual Violence on College Campuses

Multiple studies have revealed, and confirmed, that between one in four or one in five women will be victims of rape during their time at college.<sup>5</sup> Researchers like David Lisak have helped characterize the nature of sexual violence and the people who perpetrate such crimes. Contrary to popular belief, a small percentage of sexual assaults and rapes are perpetrated by strangers. Most sexual assault and rape is committed by someone a person knows; in a national survey 40.8% of female rape victims stated that their rapists was an acquaintance.<sup>6</sup> David Lisak and Paul Miller conducted a study that discovered that rapists are serial offenders who perpetrate, on average, 6 rapes each. Furthermore, the interviews from this study revealed that these men are insidious in their nature, refusing to accept the criminality of their actions, and designing their crimes intelligently.<sup>7</sup>

Alcohol plays a significant role in campus sexual assault and rape. Rapists often utilize the overuse of alcohol and the alcohol-culture present on campuses to facilitate sexual violence. Studies have linked alcohol use and sexual assault with records showing that “a total of 53% of

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<sup>5</sup> Meichun Mohler-Kuo et al. "Correlates of Rape While Intoxicated in a National Sample of College Women \*," *Journal of Studies on Alcohol*, (April 2004).

Heather M. Karjane, Bonnie S. Fisher, and Francis T. Cullen, *Sexual Assault on Campus: What Colleges and Universities Are Doing About It* (Washington, DC: National Institute of Justice, 2005).

Christopher P. Krebs et al., "College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault before and since Entering College," *Journal of American College Health* 57, no. 6 (2009): 639-47. <http://dx.doi.org/10.3200/JACH.57.6.639-649>.

<sup>6</sup> MC Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention; 2011).

<sup>7</sup> David Lisak and Paul M. Miller, "Repeat Rape and Multiple Offending among Undetected Rapists," *Violence and Victims* 17.1 (2002): 73.

women were under the influence of alcohol at the time that they were victimized.”<sup>8</sup> In college there is a plethora of opportunities to abuse alcohol matched with intense peer pressure to do so. Many times students drink without knowing the potency of the alcohol or their own limits; furthermore, drunkenness can be glorified on college campuses. Alcohol can be a debilitating drug thus making it easier to coerce victims. However, reporting an assault that took place during intoxication often results in the perpetrator being held less accountable, and the victim more responsible.

Research has dispelled the belief that “women cry wolf” when it comes to rape. Lisak studied 10 years of sexual assault cases reported to one major university and found that 5.9% of reported cases were coded as false allegation. He used this number in addition to previous research to estimate that false allegations are actually between 2% and 10%, comparable to other crimes.<sup>9</sup>

Sexually violent crimes are largely underreported. The Rape Abuse and Incest National Network quantifies that about 68% of sexual assault go unreported, drawing from data from the Justice Department’s National Crime Victimization Survey.<sup>10</sup> Of the cases that are reported, 7% lead to an arrest<sup>11</sup>, 3% are referred to prosecutors<sup>12</sup>, and 2% lead to a felony conviction<sup>13</sup>. In 2014, 91% of colleges reported zero incidents of rape, even though other studies have shown

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<sup>8</sup> Kathy Hotelling and Allen J. Ottens, ed., *Sexual Violence on Campus: Policies, Programs, and Perspectives* (New York: Springer, 2001), 33.

<sup>9</sup> David Lisak et al., "False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases," *Violence against Women*, 16.12 (2010): 1318-34.

<sup>10</sup> “Reporting Rates,” Rape Abuse & Incest National Network, accessed March 1, 2016, <https://rainn.org/get-information/statistics/reporting-rates>.

<sup>11</sup> Rape Abuse & Incest National Network, “Reporting Rates.”

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

sexual assault and rape occur frequently, implying that this crime is grossly underreported on college campuses.<sup>14</sup>

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<sup>14</sup> Amy Becker, "91 Percent of Colleges Reported 0 Incidents of Rape in 2014," Issues Campus, last modified November 23, 2015, accessed April 1, 2016, <http://www.aauw.org/article/clery-act-data-analysis/>.

## Relevant Federal Laws

There are three two federal policies and one federal clarification that have shaped how colleges prevent, act, and respond to sexual violence: The Jeanne Clery disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act),<sup>15</sup> Title IX Education Amendments of 1972<sup>16</sup>, and the Dear Colleague Letter.<sup>17</sup>

The Clery Act is a federal law requiring colleges to report crimes that occur on campus. This information must be available each year in an Annual Security Report on the school's website. The Clery Act includes the Campus Sexual Assault Victim's Bill of Rights requiring colleges to disclose educational programming, campus disciplinary processes and rights afforded to victims in regards to sexual violence complaints. This legislation requires schools to explain their policies and procedures on campus to all members of the institution, including who victims should report to, and the sanctions that might be incurred. It should also list resources and inform victims of their right to request reasonable accommodations. Finally it describes victims' rights during campus disciplinary proceedings which include: proviso that students are entitled to have other present during campus disciplinary proceedings; the right to be informed of the outcome of any campus disciplinary proceeding; and the right to be notified about the options to involve law enforcement.

Title IX is landmark legislation that, in conjunction with the Dear Colleague Letter, has transformed how colleges address respond to sexual assault. Title IX is part of the federal Education Amendments of 1972 that prohibits sex discrimination in education. Although

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<sup>15</sup> *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 1990*, Public Law 101-542, 101st Cong.

<sup>16</sup> *Title IX Education Amendments of 1972*, Public Law 92-318, 92nd Cong.

<sup>17</sup> Office for Civil Rights U.S. Department of Education. *Dear Colleague Letter*, by Russlynn Ali, 2011.

originally aimed at reducing gender inequality in sports, it has evolved into a tool to address sexual violence in colleges receiving federal funding. Title IX defines sexual violence as attempted or completed rape or sexual assault, as well as sexual harassment, stalking, voyeurism, exhibitionism, verbal or physical sexuality-based threats or abuse, and intimate partner violence. Even though college student misconduct policy, local, and state legislation differ in their terminology and definitions regarding sexual assault, Title IX makes it clear what Universities are accountable for and therefore encourages schools to adopt a comprehensive definition of sexual violence. Title IX in essence requires schools to be proactive in ensuring the campus is free of sex discrimination. As such, it must have an established procedure for handling complaints, and it must take immediate action to ensure a victim can continue their education free of ongoing sex discrimination, harassment or violence. A school may not retaliate against someone filing a complaint and must keep a victim safe from other retaliatory harassment or behavior. The college cannot encourage mediation rather than formal hearing of the complaint.

The Dear Colleague Letter (DCL) is a clarifying document that holds the weight of law detailing the requirements of schools receiving federal funds and recommendations for compliance. It was issued by the Office of Civil Rights under the Department of Education in 2011 to provide further guidance to schools on how to implement Title IX. In context of university adjudication proceedings, Title IX and DCL have created the following requirements and recommendations:

1. Eliminate harassment, prevent its recurrence, and address its effects.
2. Publish a notice of non-discrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities. The notice must be widely distributed.

3. Adopt and publish grievance procedures. These procedures must elaborate the procedures for resolving complaints of sex discrimination, including sexual harassment, must be easily understood, easily located, and widely distributed. The Office of Civil Rights recommends the procedures be prominently posted on school web sites, sent electronically to all members, and summarized or attached to handbooks and codes of conduct.
4. Schools' inquiry to a complaint of sexual violence must be prompt, thorough, and impartial. This includes notice to students, as well as adequate, reliable, and impartial investigation of complaints. This includes the opportunity for both parties to present witnesses and other evidence, designated and reasonably prompt time frames for the major stages of the complain process, and notice to parties of the outcome of the complaint. The complainant and the alleged perpetrator must be afforded access to any information that will be used at the hearing.
5. Obtain consent from the complainant before beginning an investigation.
6. Inform a complainant that the institution's ability to respond may be limited if the complainant insists of confidentiality.
7. Even though Title IX does not require a college to adopt a policy specifically prohibiting sexual harassment or sexual violence, the Office of Civil Rights recommends that a school's nondiscrimination policy state the prohibited sex discrimination covers sexual harassment, including sexual violence, and the policy include examples of the types of conduct that it covers.
8. Clarify that mediation will not be used to resolve sexual assault complaints.

9. Evaluate complaints using the preponderance of evidence standard.<sup>18</sup>

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<sup>18</sup> *Dear Colleague Letter*, 2011.

## Overview of Due Process

The United States Constitution refers to due process in the Fifth Amendment, “no person shall...be deprived of life, liberty, or property, without due process of law”<sup>19</sup> and again in the Fourteenth Amendment which states, “nor shall any state deprive any person of life, liberty, or property without due process of law.”<sup>20</sup> Since the constitution’s inception, due process has come to represent the basic fairness inherent in American democracy and law.

Due process is not confined to a courtroom setting; it can apply to administrative and executive proceedings.<sup>21</sup> Even in non-state settings, like privately-funded educational institutions, a fundamental fairness is expected before depriving individuals of their liberty<sup>22</sup> or property interests,<sup>23</sup> as defined in stated rules and regulations. While private institutions are not required to provide constitutional rights, they are bound by contract law, as well as legislation like Title IX Education Amendments of 1972, the Jeanne Clery Act of 1990, and the Dear Colleague Letter. This study is evaluating due process in private institutions, even though they do not have to provide such rights, because Universities as a whole have been criticized for lacking fundamental fairness. Due process represents fundamental fairness and is an obvious measurement of fairness in policies and proceedings.

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<sup>19</sup> U.S. Constitution, amend. 5.

<sup>20</sup> U.S. Constitution, amend. 14.

<sup>21</sup> *Ballard v. Hunter*, 255, (Supreme Court of the United States 1907); *McMillen v. Anderson*, (Supreme Court of the United States 1877).

<sup>22</sup> D. Rubin and S. Greenhouse, *The Rights of Teachers: The Basic ASIU: Guide to a Teacher’s Constitutional Rights* (New York: Bantam Books, 1983). Protected liberty interests include engaging in constitutionally protected speech, associating with fellow students, seeking employment, and maintaining one’s good name and reputation.

<sup>23</sup> Ed Stevens, *Due Process and Higher Education: A Systemic Approach to Fair Decision Making*, ASHE-ERIC Higher Education Report, (Washington, DC: The George Washington University, Graduate School of Education and Human Development, 1999), 20. “‘Property’, not only includes the money or possession one has acquired, but also can refer to ‘entitlements,’...Property interests are not created directly but the U.S. Constitution but must flow from and be defined by an existing rule (as in a school regulation)...”

There are two subcategories of due process: substantive due process and procedural due process. Substantive due process “prohibits the government from infringing on fundamental constitutional liberties,”<sup>24</sup> it “involves the overall fairness of a school’s regulations and policies as well as the fairness of their operation in each particular case.”<sup>25</sup> On the other hand procedural due process refers to the disciplinary process and its specific safeguards. Procedural due process assures all parties that decisions restricting or taking away liberty or property interests are not made arbitrarily or capriciously and are based on established rules.<sup>26</sup>

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<sup>24</sup> “Substantive Due Process,” *West’s Encyclopedia of American Law, edition 2*. S.v., accessed February 2, 2016, <http://legal-dictionary.thefreedictionary.com/Substantive+Due+Process>.

<sup>25</sup> Stevens, *Due Process and Higher Education: A Systemic Approach to Fair Decision Making*, 17-19.

<sup>26</sup> *Ibid.*, 17-19.

## Relevant Court Cases

There are two types of court cases: those that address due process as a concept, and court intervention in higher education. Both are important to determine appropriate due process rights in sexual misconduct adjudication.

Before 1960, courts stayed out of the fairness of school's disciplinary actions, affording great discretion to institutions. This legal relationship is referred to as *loco-parentis*. The civil rights movement of the 1960's initiated a distinct change in the courts involvement with higher education institutions. Modern courts have diminished schools' discretionary authority requiring that university policies and regulations do not infringe upon the constitutional rights of students.<sup>27</sup>

The Supreme Court has left the definition of due process rights in the context of higher education flexible<sup>28</sup>. In *Mathews v. Eldridge*, the Supreme Court set rules, the Mathews Factors, for determining the applicable due-process requirements in an unclear context. It directed lower courts to weigh three factors when determining the proper scope of constitutionally protected due-process rights:

- 1) Private interest that will be affected by the official action
- 2) Risk of erroneous deprivation of such interest through procedures used, and the probably value, if any, of additionally or substitute procedural safeguards
- 3) State interest, including the function involved and fiscal and administrative burdens the additional or substitute procedural requirement would entail.<sup>29</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> *Mathews v. Eldridge*, 335, (Supreme Court of United States 1976).

In essence, the Supreme Court asks that when determining what due process rights should be afforded, the property and liberty interests at stake are evaluated and the due process rights are proportional to the stakes. Furthermore, the institution should establish procedural safeguards to guarantee the appropriate due process rights as long as they are not overly burdensome for the institution.

There are other important lower-court rulings that have started to shed light on what exactly due process means for colleges. *Dixon v. Alabama State Board of Education* (1961) established that campus adjudicatory systems are distinct from the criminal law context and that “public universities cannot arbitrarily take action that would negatively impact the interests of students and instead must have clear processes and procedures.”<sup>30</sup> In *Danso v. University of Connecticut*,<sup>31</sup> the court built upon the Dixon reasoning to hold that student’s procedural due process rights arise from liberty interests in their reputations and academic good standing.

Other court cases like *Addington v. Texas* (1979), *Donohue v. Baker* (1997), *Gorman v. University of Rhode Island* (1986), *Cloud v Trustees of Boston University* (1983), *Ross v. Pennsylvania State University* (1978) deal with right to counsel, burden of proof, and cross examination. These cases, and like cases, will be discussed further in the Due Process Criteria.

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<sup>30</sup> *Dixon v. Alabama State Board of Education*, 150, 156-57, (United States District Court M.D. Alabama 1961).

<sup>31</sup> *Danso v. University of Connecticut* (Connecticut, U.S. 2007).

## Legal Perspectives

Since the constitution was written, due process has transformed into a complex legal concept. Scholars agree that the courts have left it ambiguous as to what specific due process rights are actually guaranteed in higher education settings. Legal scholar Ed Stevens argues that “courts have intentionally retained flexibility in the interpretation of the requirements of due process in higher education, and no exact formula exists for the process due in any individual situation.”<sup>32</sup>

Because no exact definition exists, Stevens recommends that due process requires that “all official inquiries into disputed facts are conducted in a predictable and dignified manner... [Receiving] proper notice and a meaningful opportunity to present and respond to evidence and that...disciplinary decisions are made by unbiased officials.”<sup>33</sup> He believes that the university should create and disseminate clear and equitable policies that protect against an arbitrary imposition of an institution’s authority. However, he also insists that policies and procedures have certain flexibility in order to respond to different situations and evolve as standards change.

Another researcher, Matthew Triplett, argues that the preponderance of evidence standard is justified and is the best standard to use in sexual misconduct adjudication; cross-examination should be embraced as an affirmative right of the accused; discovery is necessary; and that there should be equal access to counsel between the complainant and the accused.<sup>34</sup>

Triplett and Stevens highlight that providing due process rights in disciplinary procedures, even in private institutions, is crucial to the university’s wellbeing. Triplett points

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<sup>32</sup> Stevens, *Due Process and Higher Education: A Systemic Approach to Fair Decision Making*, iv.

<sup>33</sup> *Ibid.*, v.

<sup>34</sup> Matthew R. Triplett, "Sexual Assault on College Campuses: Seeking the Appropriate Balance between Due Process and Victim Protection," *Duke Law Journal* 62, (2012).

out that Universities may be legally vulnerable as more and more expensive and reputation-damning lawsuits are opened up. Furthermore he points out that equitable disciplinary procedures are paramount to Universities' overall mission statements which value the pursuit of knowledge and therefore the discovery of truth.<sup>35</sup>

Legal scholars may disagree on the specific due process rights Universities provide; however, they point to the Mathews factors<sup>36</sup> and agree that colleges must provide a fundamentally fair process that includes notice, and a meaningful opportunity to be heard.

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<sup>35</sup> Triplett, "Sexual Assault on College Campuses," 515.

<sup>36</sup> See Relevant Court Cases

## Due Process Criteria

The Due Process Criteria are tools to evaluate fundamental fairness in sexual misconduct policies and procedures. To create the criteria, this study reviews cases involving due process and higher education, considers relevant federal legislation (Title IX, Clery Act, DCL), and reads articles from legal journals that address due process in higher education.

As stated before, the motivator for assessing due process rights in private universities is criticism of university adjudication processes for lacking fairness when resolving sexual assault and rape complaints. In the context of higher education, especially at private institutions, requirements of due process do not exist. The following is a 14-item list that constitutes due process and a description of what the policy or procedure must include to satisfy each criterion.

### 1) *Rules and procedures are easily accessible*

It is crucial that students are aware of what sexual violence is, what is prohibited, and the disciplinary consequences of their actions. Additionally, in order to meaningfully prepare a defense, the accused needs to know the disciplinary procedure.

The Clery Act compels universities to create policy detailing campus sexual assault programs; procedures once a sex offense has occurred; possible sanctions that may be imposed; and procedures for on-campus disciplinary actions in cases of alleged sexual assault.<sup>37</sup> Additionally Title IX and the Dear Colleague letter requires schools to adopt and publish a grievance procedure outlining the disciplinary process for sexual violence.<sup>38</sup>

Title IX requires that schools prominently display (e.g. digitally or on paper) a notice of nondiscrimination, “stating that the recipient does not discriminate on the basis of sex in its

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<sup>37</sup> *Clery Act*, section 8.

<sup>38</sup> *Dear Colleague Letter*, 2011, 6.

education programs and activities.”<sup>39</sup> Even though Title IX does not require universities to adopt a policy specifically prohibiting sexual harassment or sexual violence, the Office of Civil Rights recommends that the institution’s nondiscrimination policy define sexual violence and offer examples of the type of conduct that it covers.<sup>40</sup>

The Dear Colleague Letter suggests that grievance procedures are, “written in language appropriate to the age of the school’s students, easily understood, easily located, and widely distributed...posted on school web sites; sent electronically to all members;... available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students.”<sup>41</sup> Furthermore, legal scholars argue that a fundamental concept of substantive due process is policies that “clearly specify what kinds of conduct are prohibited and explain what steps will be taken when students engage in prohibited conduct.”<sup>42</sup>

**Due to resource restrictions this criterion will be satisfied if the sexual misconduct policy and procedures in its entirety is the first google search result of, “[Insert Institution’s Name Here]’s sexual assault misconduct policy.”**

## 2) *Notice provided*

Notice is “an elementary and fundamental requirement of due process in any proceeding that is to be accorded finality... [in order] to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>43</sup> Civil cases require that

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<sup>39</sup> *Title IX Education Amendments of 1972*, 1972.

<sup>40</sup> *Dear Colleague Letter*, 2011, 6.

<sup>41</sup> *Ibid.*, 9.

<sup>42</sup> Stevens, *Due Process and Higher Education: A Systemic Approach to Fair Decision Making*, 17.

<sup>43</sup> *Mullane v. Central Hanover Trust Co.*, (United States 1950); *Richards v. Jefferson Country*, (United States, 1996); *Jones v. Flowers*, (United States, 2006).

notice be given to the defendant that includes “what is being proposed and what he must do to prevent the deprivation of his interest.”<sup>44</sup>

In a higher education setting, the court held that procedural due process necessitates, at minimum, “notice and an opportunity for a hearing appropriate to the nature of the case.”<sup>45</sup> DCL and the OCR Revised Sexual Harassment Guidance (2001) says that a complainant’s wish for confidentiality should be respected; however, not to the extent that it violates the due process right of the accused to know the accuser and nature of the allegation in order to defend against charges. The DCL further states that the “institution [must afford] identical opportunities to both parties...to be aware of the charges.”<sup>46</sup>

**The sexual misconduct policy must indicate that notice will be given to the accused detailing what the violation is, and who is making the claim.**

### 3) *Right to a hearing*

The sixth amendment of the U.S. constitution elaborates that “in all criminal prosecutions, the accused shall enjoy the right to a...public trial.” However in the landmark case, *Dixon v. Alabama State Board of Education (1961)*, the court recognized that the campus adjudicatory system is distinct from the criminal law system. Therefore civil context is a better corollary to the higher education system where property and liberty interests at stake are comparable and less severe than criminal proceedings. In civil cases, a hearing is required where the accused is “entitled to be heard.”<sup>47</sup>

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<sup>44</sup> *Goldberg v. Kelly*, (United States 1970).

<sup>45</sup> *Ross v. Pennsylvania State university* (United States 1978), 153.

<sup>46</sup> Amanda Young, “Executing Justice in Higher Education: How Have Universities Implemented the Dear Colleague Letter in their Sexual Misconduct Policies?” (Undergraduate Honors thesis, Duke University, 2013), 23.

<sup>47</sup> *Mathews v. Eldridge*, (The Supreme Court of the United States 1976).

*Ross v. Pennsylvania State University (1978)* added that the hearing must be “appropriate to the nature of the case.”<sup>48</sup> The specifics of a hearing may differ between contexts; however, mediation is not a hearing for sexual misconduct violations. DCL states that mediation, often a form of resolution in administrative and educational settings, is not appropriate in this context. The OCR recommends that institutions clarify that mediation will not be used to resolve sexual assault complaints.

The first and second Mathew factors<sup>49</sup> are to identify the private interests at stake and to establish procedures that protect against the erroneous deprivation of this interest. “The accused students have liberty interests in preserving their good names and reputations... This interest in protecting one’s reputation from false accusations and preserving one’s unblemished scholastic record is vitally important... because false accusations can have lasting implications... being found responsible for sexual assault by a judicial panel can endure throughout one’s lifetime.”<sup>50</sup> Since the private interest that will be affected by official action is substantive, a hearing is appropriate. The second factor, in this case the risk of erroneous deprivation of the accused student’s liberty interest, is also significant because sexual assault cases’ evidentiary record consists of accuser’s testimony. Witness credibility is essential, and oral evidence is very important. Without such evidence, risk of erroneous deprivation of liberty is high.<sup>51</sup> A hearing would combat the high risk of erroneous deprivation.

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<sup>48</sup> *Ross v Pennsylvania State University*, (United States, 1978), 153.

<sup>49</sup> Refers to the Mathews factors established by the Supreme Court in *Mathews v. Eldridge*. First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

<sup>50</sup> Triplett, *Duke Law Journal*, 512.

<sup>51</sup> Triplett, *Duke Law Journal*, 513.

**The opportunity to a hearing with impartial decision-makers must be stated in the sexual misconduct policy.**

4) *Right to a speedy procedure*

The sixth amendment and the Federal Speedy Trial Act affords criminal defendants the right to a speedy trial, specifically 70 days of when the prosecutor files the indictment. As mentioned before in *Dixon v. Alabama State Board of Education*, criminal proceedings are distinct from the higher education context. However, parallels can be drawn from both situations that would justify a right to a speedy procedure in a university setting. For example, interim measures like removing the accused from on-campus housing to ensure no interaction with the complainant, can infringe on the alleged perpetrator's life. Measures like these, although not equivalent to arrest, should allow for a speedy resolution.

Additionally DCL requires that schools set a time frame for complete investigation, and set a time frame for both parties to receive outcome notifications. DCL suggests an investigation time frame of 60 days; nonetheless, the OCR recognizes that the time frame may be longer or shorter depending on the complexities of the case.

**The sexual misconduct policy must state an overall time frame.**

5) *Opportunity to submit evidence*

Due process commands that defendants have the right to mount their own evidence and present their own theory of the facts.<sup>52</sup> DCL supports that notion stating that for an equitable resolution of sexual violence complaints, both parties must have the opportunity to present evidence<sup>53</sup>.

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<sup>52</sup> "Criminal Procedure," Legal Information Institute, accessed February 2, 2016, [https://www.law.cornell.edu/wex/criminal\\_procedure](https://www.law.cornell.edu/wex/criminal_procedure)>.

<sup>53</sup> *Dear Colleague Letter*, 2011, 9.

**The sexual misconduct policy must indicate that the accused can submit any evidence he/she wishes as long as it does not violate the Family Education Rights and Privacy Act which deals with educational and disciplinary records.<sup>54</sup>**

6) *Discovery: all evidence presented is given to both parties before the hearing*

In criminal and civil proceedings evidence must be made available to both parties. The court states that “evidence used to prove the...case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”<sup>55</sup> Additionally, DCL mandates that the “institution affords identical opportunities to both parties to...be aware of...what the other party has stated.”

**The sexual misconduct policy must indicate that all presented evidence will be available to both parties before the hearing.**

7) *Opportunity to present witnesses*

The evidentiary record for sexual assault cases on college campuses generally consist of primarily oral evidence. In these types of “he said, she said” situations, it is essential that both parties can present as much evidence as possible to prove their points respectively. This evidence can constitute witness testimony which can help a judiciary panel gain a clearer understanding of the assault and the events surrounding the assault.

The courts have said students do not have the right to compel witness testimony.<sup>56</sup> The third Mathews factor, involving administrative burden, would be violated if the accused were to compel witness testimony. The court elaborated that the institution has a need for

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<sup>54</sup> Ibid., 11, Access to information must be consistent with FERPA...access should not be given to privileged or confidential information. For example, the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant’s sexual history”

<sup>55</sup> *Greene v. McElroy*, (United States 1959).

<sup>56</sup> *Danso v. University of Connecticut* (Connecticut, U.S. 2007).

discretion and inconspicuousness to maintain a productive learning environment. Both parties should be afforded the right to call upon witnesses but not compel their testimony.

**The sexual misconduct policy must state that parties can present witnesses.**

8) *Right to cross-examination indirectly*

DCL strongly discourages schools from granting parties the opportunity to directly cross-examine one another during judicial proceedings<sup>57</sup>. The courts have disagreed on whether a student has the due process right to cross-examine in a university adjudication hearing. In *Donohue v. Baker* (1997) the court recognized that students have the right to confront the accuser<sup>58</sup>. However in other cases like *Danso v. University of Connecticut* (2007) and *Gorman v. University of Rhode Island* (1986) the courts came to a different conclusion, stating that “[the] right to unlimited cross examination has not been deemed [an] essential requirement of due process.” Concerns for cross-examination include overly burdening the campus adjudicatory process or affirmatively harming the victim. As stated by XXX, “due to the highly personal nature of a rape charge and the emotional toll it exacts on the victim, no procedural design issue generates more administrative angst than cross examination.”

However, in the context of sexual assault, “witness credibility may be a determinative factor; a student’s legal defense—and academic and professional future—may turn on the ability to cross-examine the accuser.”<sup>59</sup> The investigator agrees that concerns for the victim’s wellbeing are reasonable and should be taken into account. Nonetheless, she thinks these concerns need to be balanced with the alleged perpetrator’s due process rights to confront evidence or testimony against him/her. In *Donohue v. Baker* (1997), the accused student

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<sup>57</sup> *Dear Colleague Letter*, 2011, 12.

<sup>58</sup> *Donohue v. Baker* (United States, 1997).

<sup>59</sup> Triplett, *Duke Law Journal*, 522.

directed questions to his accuser through the panel. Institutions should implement creative indirect cross-examination techniques like screens separating the complainant and the accused, or using a panel as an intermediary.

**The sexual misconduct policy must afford parties the right to *indirectly* cross-examine and respond to allegations.**

9) *Equal access to counsel*

The Clery Act and DCL emphasize that the accuser and accused are entitled to the same opportunities in campus disciplinary proceedings. DCL requires that institutions afford identical opportunities to both parties to have equal access to advisors and/or attorneys, if permitted at all by universities. In criminal and civil cases, defendants have the right to counsel and are assigned one if they cannot afford it. While requiring colleges to provide licensed attorneys violates Mathew's third factor by imposing a financial burden on the college, restricting access to counsel is a violation of due process.

**The sexual misconduct policy should specify that parties can use counsel. The lawyer's services may be limited by the institution (i.e. not allowed to speak during a hearing) but policies should state that parties can have counsel present.**

10) *Burden of Proof: Preponderance of the Evidence*

Preponderance of Evidence means that is more likely that not that an event occurred. It is "a requirement that more than 50% of the evidence points to something."<sup>60</sup> The Preponderance of the Evidence standard is used in civil cases and military cases. Additionally it is the norm in administrative law. *Dixon v Alabama* recognizes campus adjudicatory system is distinct from the

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<sup>60</sup> "Preponderance of the Evidence," Cornell University Law School, [https://www.law.cornell.edu/wex/preponderance\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/preponderance_of_the_evidence). For example: At the end of civil case A v. B, 51% of the evidence favors A. Thus, A has a preponderance of the evidence, A has met their burden of proof, and A will win the case.

criminal-law context and therefore the standard of proof should also be distinct. In the proverbial “he said, she said” environment, the burden of proof should be higher, not lower. “When combined with a presumption of innocence in favor of the accused, any standard above a preponderance would produce an insurmountable obstacle for victims with meritorious claims.”<sup>61</sup> Furthermore this standard satisfies the two Mathews factors by adequately protecting against wrongful findings. Title IX and DCL has mandated that schools adopt the preponderance of the evidence standard when resolving a complaint of sexual misconduct.

**The sexual misconduct policy must specify that the burden of proof being used is the preponderance of the evidence standard.**

*11) Impartial decision-makers*

It is a sixth amendment right in criminal cases to have an impartial jury. It has already been established that university proceedings are different than criminal; however, in order to guarantee fairness in university adjudication proceedings, the university must provide impartial decision makers so that they are not arbitrarily depriving the accused of their liberty rights or basing decisions on prejudice or personal bias.<sup>62</sup> “The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find him guilty.”<sup>63</sup>

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<sup>61</sup> Triplett, *Duke Law Journal*, 517.

<sup>62</sup> See criterion 3, “Right to a hearing”

<sup>63</sup> *Marshall v. Jerrico*, (United States 1980); *Schweiker v. McClure*, (United States 1982).

**Sexual misconduct policies must indicate that hearings will be judged by a panel of multiple people (greater than or equal to 3) that consist of impartial individuals. These individuals should receive training on how to judge such cases. These individuals should include students.**

*12) The Right to Not Self-Incriminate*

The Fifth Amendment protects against self-incrimination. Incriminating oneself is giving information that admits to the crime, or details that might prove the crime.

**Sexual Misconduct Policies must state that non-admission of information by either party will not lead to the automatic assumption of guilt.**

*13) Opportunity to appeal*

The Supreme Court has not explicitly recognized a constitutional right to appeal a case even though the current judicial system has increasingly relied on the appellate courts to uphold life, liberty, and property. Cassandra Burke Robertson, a legal scholar, argues that the Supreme Court should guarantee the right to appeal, at least initially. The appeals process can be used as a safeguard, a review of sorts, to ensure that the original decision was made impartially, fairly, and based on the facts presented. Forty-seven states through state law provide the right to appeal in both civil and criminal cases.<sup>64</sup> Additionally the DCL enumerates that a school must provide the opportunity to appeal a decision.<sup>65</sup>

**Sexual misconduct policy must specify the ability to appeal the decision.**

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<sup>64</sup> Cassandra Burke Roberston, "The Right to Appeal," *North Carolina Law Review* 91.4 (2012-2013): 1219-1282.

<sup>65</sup> *Dear Colleague Letter*, 2011, 12.

*14) Notice of Outcome Given*

Section 8 of the Clery Act states, “both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging sexual assault.”<sup>66</sup> In criminal and civil cases the outcome is delivered more obviously, in a court setting. In campus settings, parties may be subject to interim measures like changing the location of dorms, no contact orders, etc. It is therefore essential that parties know the outcome of their case, and if applicable the appropriate sanctioning, to conduct their daily lives.

**The Sexual Misconduct Policy must state that notice of the outcome of the sexual misconduct case will be given to both parties.**

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<sup>66</sup> *Clery Act*, 1990.

## Methods

This investigation used a document analysis method in a comparative case study of 14 schools. Document analysis was an inexpensive and accessible way to evaluate schools on their due process rights because universities' policies and procedures are available to the public online. A comparative case study was utilized because it allowed for an in depth evaluation of each policy while also identifying relative strengths and weaknesses to produce policy recommendations.

### *The Sample*

The Ivy Plus Society is a group of higher education institutions that includes Ivy League colleges and other comparable schools. These schools were identified for sharing some of the same values, such as “appreciation of academic and professional excellence; intellectual curiosity; leadership; and civic and philanthropic engagement.”<sup>67</sup> These schools were chosen because of the attention they receive nationally as leaders of higher education. These schools are often under a “microscope,” receiving media scrutiny for issues going beyond academics, like sexual assault. For example, the Duke Lacrosse Scandal was covered by the New York Times, the Washington News, ABC News and a hundred other publications.<sup>68</sup> According to the American Journalism Review, three of the four major news networks devoted more time to the Duke Lacrosse Scandal than to the Iraq War in April 2006.<sup>69</sup> Just last year, Columbia undergraduate student Emma Sulkowicz gained national attention for her senior thesis performance art in which she carried a 50 pound mattress wherever she went, saying she would

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<sup>67</sup> “About,” Ivy Plus Society, accessed March 1, 2016, <http://ivyplussociety.org/about/>.

<sup>68</sup> “Archive of Sample Media Coverage,” Duke News and Communications, last modified 2006, accessed April 1, 2016, [http://today.duke.edu/showcase/mmedia/features/lacrosse\\_incident/media\\_archive.html](http://today.duke.edu/showcase/mmedia/features/lacrosse_incident/media_archive.html).

<sup>69</sup> Rachel Smolkin, “Justice Delayed,” *American Journalism Review*, September 2007, <http://ajrarchive.org/Article.asp?id=4379>.

stop only when her alleged rapist was expelled from the university.<sup>70</sup> The public pays attention to what Ivy Plus institutions do, and other schools take cues from these institutions, modeling their programs, policies, and actions off of them.

The original list included 59 colleges/universities provided by the Ivy Plus Society's webpage.<sup>71</sup> The final sample excluded any school that was affiliated with the military because members of the military are not afforded the same due-process rights as civilians, religiously-affiliated schools because it can be argued that certain due-process rights may exist or not exist for religious reasons, single-sex schools because the circumstances and conditions around sexual assaults that occur on these campuses are different, and public institutions because publically-funded colleges and universities are seen as extensions of the state and are therefore subject to state-law. Even though the Fourteenth Amendment extends equal protection and due process to each state, states have their own laws on due process and therefore due process can vary among public institutions. Specialized schools, like business schools, were also excluded because the study is specific to undergraduate populations. After these exclusions, 34 schools were left.

The final list was imported into R Studio to generate a random sample<sup>72</sup> of 15 schools: Princeton, Massachusetts Institute of Technology, Emory University, University of Chicago, Johns Hopkins University, Boston University, Brandeis University, Brown University, Cornell University, Northeastern University, Duke University, University of Southern California, California Institute of Technology, Stanford University, and Bucknell University. Brandeis

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<sup>70</sup> Soraya Nadia McDonald, "It's hard to ignore a woman toting a mattress everywhere she goes, which is why Emma Sulkowicz is still doing it," *The Washington Post*, October 29, 2014, accessed April 1, 2016, <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/29/its-hard-to-ignore-a-woman-toting-a-mattress-everywhere-she-goes-which-is-why-emma-sulkowicz-is-still-doing-it/>.

<sup>71</sup> "About," Ivy Plus society.

<sup>72</sup> Random Sample function was used

University was eventually excluded because data collection revealed that the school is affiliated to Judaism as a non-sectarian Jewish community sponsored coeducational institution.<sup>73</sup>

The remaining 14 school's policies and procedures on sexual misconduct were read in their entirety. After the first read-through, each document was re-read and was flagged for indicators of due process based on the Due Process Criteria. The indicators were categorized as one of five options: explicitly stated that the right was given, implicitly stated that the right was given, explicitly stated that the right was not given, not stated, or unclear. For example at Duke University, the criterion, "policy must state that notice will be given" was marked as explicitly stated that right was given because under section 6, Hearing Procedures, the policy stated, "Both the complainant and the respondent will be notified at least 120 hours in advance of the date and time of the hearing and the names of the hearing panelists."<sup>74</sup>

An example of an "implicitly given right" is the right to have an attorney; many schools allow counsel to be present but do not specify what counsel entails. For example Princeton's misconduct policy states, "During the disciplinary process, both parties (complainant and respondent) have equivalent rights, including the opportunity...to be accompanied by an adviser of their choice."<sup>75</sup> The policy does not specify what qualifies as an adviser and does not mention the term "attorney" anywhere else in their policy. It is implicit because an "adviser of [the party's] choice" can be interpreted to mean an attorney.

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<sup>73</sup> "Defining Brandeis," Brandeis About page, last modified 2016, accessed March 13, 2016, <http://www.brandeis.edu/about/defining.html>.

<sup>74</sup> "Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX," Student Conduct, last modified 2016, accessed March 16, 2016, <https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix>.

<sup>75</sup> "Sex Discrimination and Sexual Misconduct," Rights, Rules, and Responsibilities, last modified 2015, accessed March 11, 2016, <http://www.princeton.edu/pub/rrr/part1/index.xml#comp13>.

A criterion was coded as “explicitly stated right not given” when the policy unambiguously prohibited a certain right. For example, Northeastern University clearly prohibits the use of an attorney as enumerated in their policy, “Attorneys, parents, or guardians are not permitted in Student Conduct Board Hearings.”<sup>76</sup> A criterion was coded as “not stated” if there was simply no indication of it in the policy. For example, Boston University did not mention whether written testimony could be provided and was therefore coded as “not stated.”

The criterion “unclear” was used to describe any criterion that the researcher believed to be ambiguous on whether or not due process is truly guaranteed. For example, it was unclear whether the “opportunity to present evidence” was actually a right guaranteed to the accused. At Johns Hopkins an investigator will gather facts and prepare an investigation report that is reviewed by the hearing panel:

During the first phase of its investigation, the University will gather facts related to the allegations of sexual misconduct. The Title IX Coordinator will designate one or more trained internal or external investigators to interview the complainant, respondent, and witnesses. . . Investigators will also gather pertinent documents and other evidence identified by either party or that comes to their attention. . . Upon completion of the fact-gathering process, the investigators will prepare a report summarizing the interviews conducted and evidence reviewed. The investigators will consider all relevant evidence. The report will include the investigators’ findings of fact, an assessment of the credibility of the parties and witnesses where appropriate, and a recommended determination as to whether the respondent is responsible for the alleged violation(s).<sup>77</sup>

It is ambiguous if the evidence presented by the accused to the investigator will be in the investigation report.

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<sup>76</sup> “Undergraduate Student Handbook,” Northeastern University, last modified 2014, accessed March 13, 2016, 22, <http://www.northeastern.edu/osccr/pdfs/Code%20of%20Conduct/2014-15%20UG%20Handbook.pdf>.

<sup>77</sup> “Policies and Laws,” Sexual Assault Response and Prevention, last modified 2014, accessed March 12, 2016, <http://sexualassault.jhu.edu/policies-laws/>.

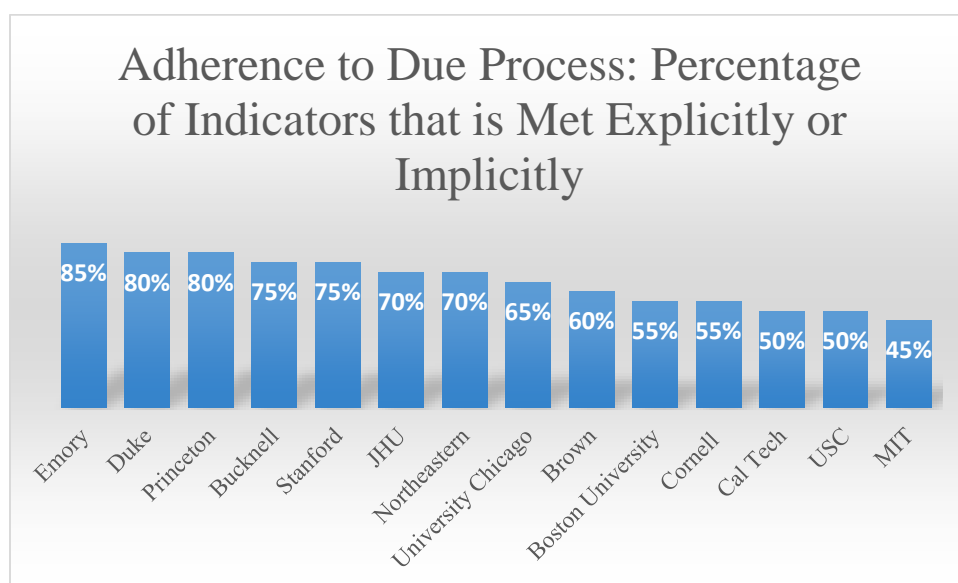
The first school coded, Duke University, was coded again at the end to see if the methods changed. Initially there were only three categories of indicators: yes, no, and kind of. During data collection, the categories were expanded, to include the ones stated above because yes, no, and kind of did not fully describe the nature of the student misconduct policies and procedures to the extent that was needed. The initial coding was slightly different than the second coding: the second coding utilized the “unclear” category to describe compliance with a criterion, airing on the side of caution. For example the opportunity to present evidence was initially flagged as “yes,” and then later flagged as “unclear.” After discovering that many schools hire investigators and these investigators have the discretion to include and exclude any evidence, the right to present evidence may not be guaranteed if the presentation of this evidence is subject to the investigator’s discretion.

Two indicators were excluded: right to have an advocate present and right to submit written testimony. “Advocate” initially was intended to mean an individual whose profession was as an advocate, for example a victim’s advocate. However, an advocate can also be interpreted as someone who advocates on behalf of the student in adjudication proceedings. It is unclear what the school refers to when their policies state “advocate” and therefore this indicator was removed. Written testimony was initially included as written witness testimony. Schools used “written testimony” to include character references, or testimony from the complainant or respondent themselves. During data collection, any explicit mention of “written testimony,” was flagged. Because of this confusion, the written testimony indicator was removed.

## Findings

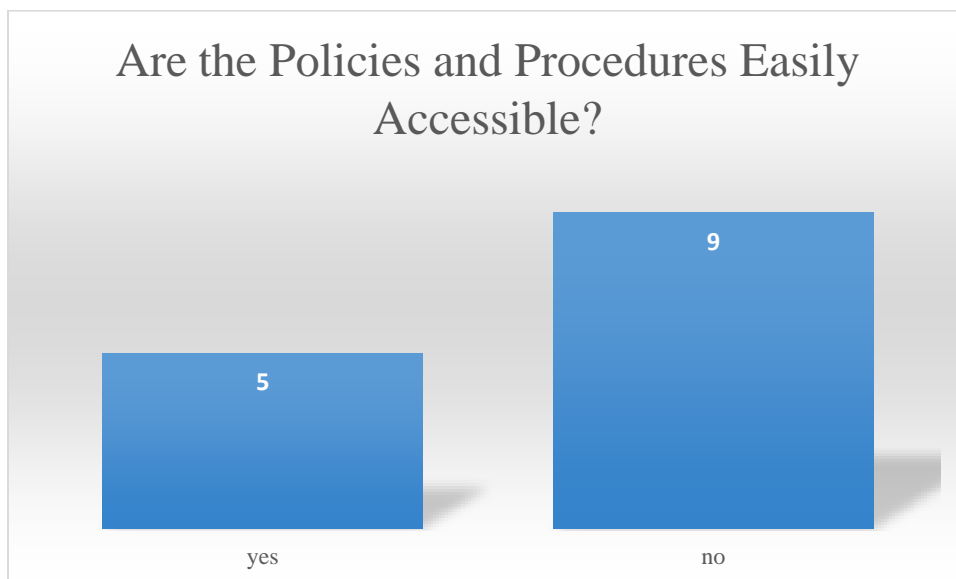
This section will first show each school's overall adherence to the Due Process Criteria. The remainder of this section will be organized by indicator, identifying trends, and providing examples of the language used in the sexual misconduct policies and procedures. Please contact the researcher to see the full data set.<sup>78</sup>

The measure of a school's compliance with due process rights is how many indicators are marked as "explicitly stated that right is given" or "implicitly stated that right is given." Of the 14 schools that were investigated, no school was 100% compliant. Emory was the closest with 85% of indicators flagged as "explicitly stated that right is given" or "implicitly stated that right is given". This University met every criterion except for the right to not self-incriminate (was coded as not stated), notice including who is making the claim (was coded as unclear), and students serving on the hearing panel (was coded as unclear). MIT was the least compliant at 45%.



<sup>78</sup> Medha Gudavalli, [mgudaval@gmail.com](mailto:mgudaval@gmail.com).

1) *Easily Accessible*



This criterion was met if the policy and procedure was the first result of the Google search “[name of the institution] sexual assault misconduct policy.” Often the first hit was a fragment of the sexual misconduct policy and provided links to other pages like the Title IX page, or the Student Handbook. For some schools, the various parts of policies and procedures were separated out into multiple pages, making it difficult to identify one clear policy or one clear procedure. For example, Northeastern’s “Policy on Rights and Responsibilities under Title IX,”<sup>79</sup> the third Google search result, directed the reader to the Office of Student Conduct and Conflict Resolution. This website then directed the reader to the student handbook<sup>80</sup> to find more information. The Office of Student Conduct and Conflict Resolution also had an additional page on Student Conduct Board Hearings.<sup>81</sup> Additionally, there is a separate document for Grievance

<sup>79</sup> “Policies on Rights and Responsibilities under Title IX,” Northeastern University, last modified October 27, 2014, accessed March 15, 2016, [https://www.northeastern.edu/policies/pdfs/Title\\_IX\\_Policy.pdf](https://www.northeastern.edu/policies/pdfs/Title_IX_Policy.pdf).

<sup>80</sup> Northeastern University, “Undergraduate Student Handbook.”

<sup>81</sup> “Student Conduct Board Hearings,” Office of Student Conduct and Conflict Resolution, last modified 2012, accessed March 13, 2016, <http://www.northeastern.edu/osccr/student-conduct-board-hearings/>.

Procedures<sup>82</sup> which includes similar information as the resources mentioned before. At Northeastern information about disciplinary procedures is segmented into various documents and website pages.

Many times the first Google result was victim-centered, providing links for resources such as how to file a complaint, where to receive a forensic exam, who to contact, etc. For example, the first Google result for searching “Northeastern University Sexual Assault Misconduct Policy,” was the Northeastern Police Department’s page on Sexual Violence and Sexual Harassment.<sup>83</sup> This page focused on defining sexual assault, defining consent, what to do if an assault takes place, what to expect when reporting, phone numbers, and resources among many other things. This page is geared towards responding to the victim and their immediate needs.

2) *Policy must indicate that notice will be given*

All schools explicitly stated that notice will be given to both parties (complainant and respondent) of a student misconduct violation. For example, this right is enumerated in Section Three and Ten of Boston University’s Student Sexual Misconduct Procedures:

The Office of Judicial Affairs (“OJA”) will give the complainant and respondent, respectively, a written explanation of their rights and options, and any available accommodations, as soon as possible after a complaint is reported. . . Unless the complainant requests and is granted confidentiality, the respondent will be notified in writing that a complaint alleging sexual misconduct has been filed against him or her.<sup>84</sup>

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<sup>82</sup> “Grievance Procedures for Discrimination and Harassment,” Northeastern University, last modified July 5, 2013, accessed March 13, 2016, <http://www.northeastern.edu/oidi/wp-content/uploads/2014/03/GrievanceProcedureUpdatedJuly20131.pdf>.

<sup>83</sup> “Sexual Violence and Sexual Harassment,” Police Department, accessed March 13, 2016, <http://www.northeastern.edu/nupd/services-programs/sexual-violence/>.

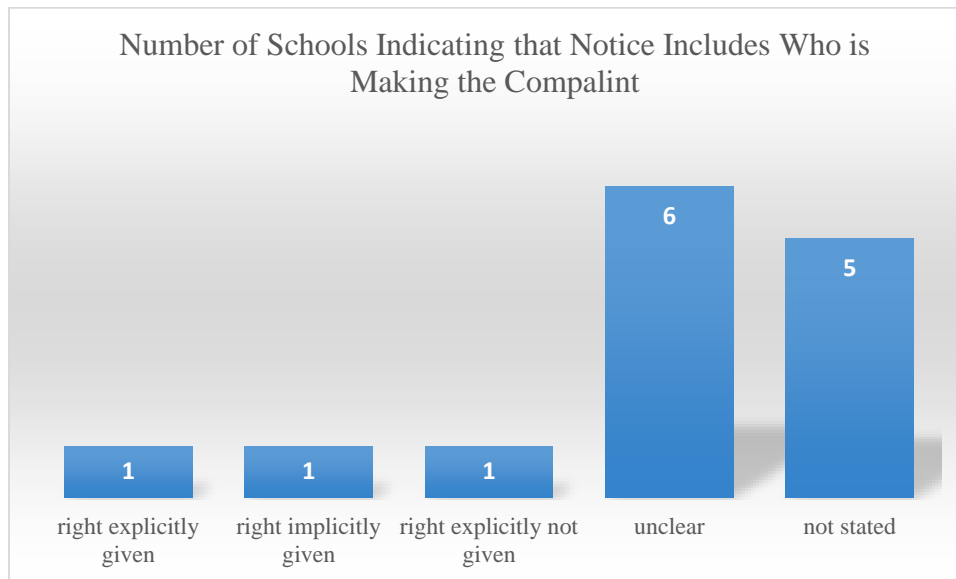
<sup>84</sup> “Student Sexual Misconduct Procedures,” Boston University Sexual Misconduct, last modified January 1, 2015, accessed March 14, 2016, <http://www.bu.edu/safety/sexual-misconduct/title-ix-bu-policies/student-sexual-misconduct-procedures/>.

Some schools invite the complainant and respondent for separate meetings with the appropriate office to discuss rights, the nature of the complaint, etc. For example, Boston University requires that respondent meets with their Office of Judicial Affairs (OJA),

Within seven (7) calendar days of receiving notice of the complaint, the respondent must arrange to meet with OJA. At that meeting, OJA will: Provide the respondent with the information regarding the Rights of the Complainant and Respondent; provide the respondent with a copy of the complaint; explain the prohibition against retaliation; discuss the nature of the complaint; explain the rights and responsibilities of the Complainant and Respondent; explain the process for investigating and resolving the complaint (including the available appeal procedures); instruct the respondent not to destroy any potentially relevant documentation in any format; give the respondent a copy of the relevant policies; provide the respondent with a list of on-campus and off-campus support resources.<sup>85</sup>

All schools state that the respondent will be given notice in some capacity (in writing, via email, in person, etc.).

3) *Policy must indicate that notice will be given of who is making the complaint.*



<sup>85</sup> Boston University, "Student Sexual Misconduct Procedures."

Northeastern was the only school that stated notice will include the name of the complainant: “charged student is e-mailed a Pre-Hearing Meeting Notice to the student’s university e-mail account, which notifies the student of the alleged violation(s), the date of the incident, the location of the incident, and the name of the complainant.”<sup>86</sup>

Most schools were unclear or did not state whether notice would include the identity of the complainant. For example, USC was coded as “unclear”,

If an investigation is pursued against a respondent, however, information will need to be shared with the respondent and, as appropriate, with relevant witnesses. The university will, if so requested, keep as private as possible the identity of complainants to the fullest extent of the law, but will inform complainants that keeping their name private may limit the university’s ability to investigate or discipline the responsible individual.<sup>87</sup>

In this case it is unclear whether the violation will be pursued by the university if the complainant wants his/her identity kept confidential. This kind of wording implies that if a complainant wishes to continue with the university process, their identity will be disclosed to the accused. However, nowhere in the policy does it state whether the accused has a right to know the identity of their complainant if an investigation is opened up. The language of this policy is vague and USC has left it ambiguous as to whether the complainant will actually receive notice with the name of the complainant, and what exactly will happen if a complainant wishes to move forward with the disciplinary process and maintain confidentiality.

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<sup>86</sup> Northeastern University, “Undergraduate Student Conduct.”

<sup>87</sup> “Part E Discrimination, Harassment, Retaliation, Sexual Misconduct, Dating Violence, Domestic Violence, Intimate Partner Violence, Stalking and Child Abuse,” University of Southern California Policy, accessed March 17, 2016. <https://policy.usc.edu/student/scampus/part-e/>.

4) *Right to a Hearing*

School	Right to a hearing
<b>Bucknell</b>	explicitly stated right given
<b>Princeton</b>	explicitly stated right given
<b>Duke</b>	explicitly stated right given
<b>Emory</b>	explicitly stated right given
<b>University of Chicago</b>	explicitly stated right given
<b>Northeastern</b>	explicitly stated right given
<b>Stanford</b>	explicitly stated right given
<b>Cornell</b>	explicitly stated right given
<b>Brown</b>	explicitly stated right given
<b>Johns Hopkins</b>	explicitly stated right not given
<b>Caltech</b>	explicitly stated right not given
<b>MIT</b>	explicitly stated right not given
<b>Boston University</b>	unclear
<b>USC</b>	unclear

Schools have different processes for adjudicating sexual misconduct violations. 9 of 14 colleges include a hearing as part of their adjudication process. 3 of 14 schools do not include a hearing, and the remaining 2 schools are ambiguous. Johns Hopkins is an example of a school in which the accused does not have a right to a hearing,

The Title IX Coordinator or a designee will convene a resolution panel at the conclusion of an investigation to determine whether the respondent is or is not responsible for violation(s) of the Policy. Upon review of the investigative report, the resolution panel may (i) determine that the case can be decided without hearing from witnesses or receiving further evidence, (ii) remand the case for further investigation or clarification of the investigative report, or (iii) convene a hearing. If the resolution panel determines that a case can be decided without hearing from witnesses or receiving further evidence, both the complainant and respondent will nonetheless have the opportunity to make a statement to the resolution panel if they so choose.<sup>88</sup>

The right to a hearing is not necessarily guaranteed because the resolution panel has discretion to decide on a case with or without a hearing.

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<sup>88</sup> Johns Hopkins, "Policies and Laws."

An example of a school's policy that was unclear on this indicator was Boston University. At Boston University, the Dean of Students has jurisdiction and will determine whether or not a student has violated the Sexual Misconduct/Title IX Policy. However, the student has the right "to appeal the decision made or any sanctions imposed by the Dean of Students to a Hearing Panel of the University Board on Student Conduct."<sup>89</sup> The question then arises, are appeals unconditional? Can the student appeal if they simply disagree with the decision? These ambiguities make it unclear to whether the right to a hearing is actually guaranteed at Boston University. If the student can appeal the Dean's decision, no matter what the reason, then the right to a hearing is guaranteed. However, the policy does not specify whether this is the case.

#### 5) *Right to a speedy procedure*

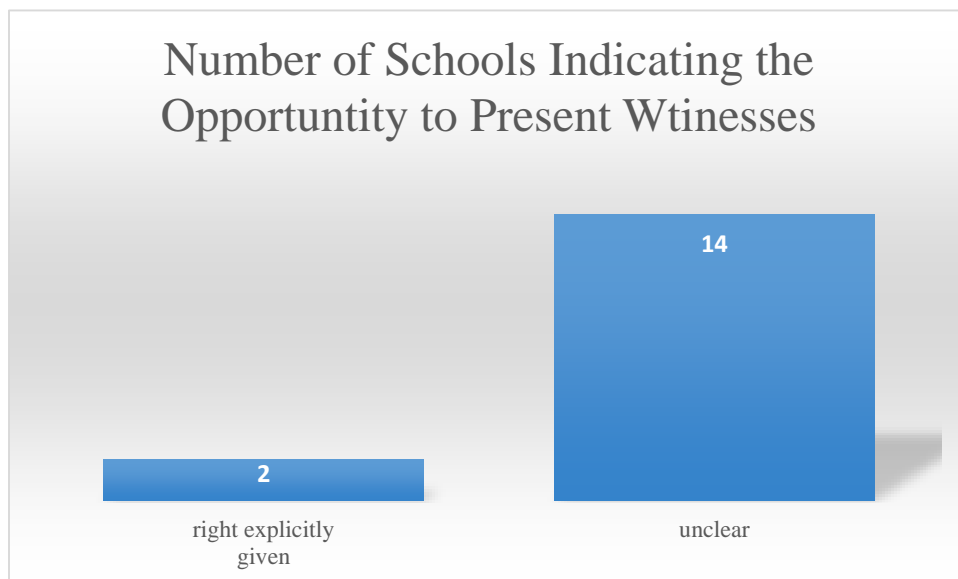
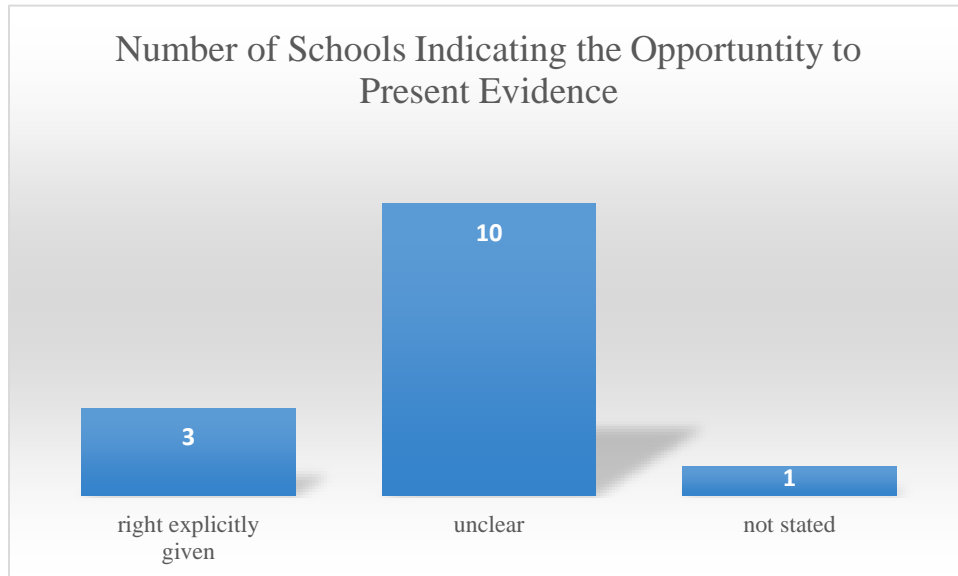
All schools use words like "prompt;" however, the right to a speedy procedure was only satisfied if the school provided a time frame for the process. Most schools, 11 of the 14, provide a time frame. Some schools even specify how long each part of the process would take. For example, in Stanford's procedures the investigation and charging decision is given 20 calendar days.<sup>90</sup> Bucknell provides time frames for various parts of their process but fails to provide an overall time frame and was therefore flagged as unclear. MIT and Northeastern do not state a timeframe.

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<sup>89</sup> Boston University, "Student Sexual Misconduct Procedures."

<sup>90</sup> "1.7.3 Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking, Relationship Violence, Violation of University or Court Directives, Student-on-Student Sexual Harassment and Retaliation," Stanford Administrative Guide, last modified March 11, 2016, accessed March 17, 2016, <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-3>.

6) *Opportunity to Submit Evidence and Opportunity to Present Witnesses*



Many schools have an investigation stage as part of their adjudication process. Generally, during this investigation stage the investigator meets with the complainant and respondent, interviews relevant witnesses, and collects evidence. After the investigation the investigator prepares a report that is reviewed by the decision-makers. The investigator has discretion as to what to include or exclude from the report. It is important to note that the process mentioned

before is not the exact process for all schools; however, many of the schools that fall under the “unclear” category contain this type of investigation process. What makes the opportunity to present evidence and witnesses unclear is the question of whether there is truly an opportunity to present evidence and witnesses if the investigator has the discretion to exclude it from their report, and if the decision-makers will ever see the evidence or hear witness testimony that the respondent wants.

For example, Bucknell University’s policy states, “The Hearing Panel Chair will review the Student Conduct Investigative Report with the Investigator and will determine which witnesses, documentation, and other information will be called or presented at the hearing.”<sup>91</sup> The researcher marked this as unclear because it is not guaranteed that evidence and witness testimony the respondent finds relevant will be presented at the hearing. In the case of Bucknell, the Hearing Panel Chair and Investigator have full discretion.

A unique resource Stanford uses was evidentiary specialists. The policy enumerates that Evidentiary Specialists are third parties that will review the evidence upon either party’s request. “Parties [can] bring forward evidentiary concerns regarding the Hearing File to the Evidentiary Specialist, if any (and to offer new evidence and/or rebuttal evidence, if any)... the Evidentiary Specialist to provide a written response to the evidentiary concerns.”<sup>92</sup>

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<sup>91</sup> “Sexual Misconduct Policy,” Bucknell University, accessed March 20, 2016, <http://www.bucknell.edu/Documents/DeanOfStudents/SexualMisconductPolicy.pdf>.

<sup>92</sup> “Student Title IX Process,” Stanford University, last modified February 2016, accessed March 17, 2016, <https://stanford.app.box.com/student-title-ix-process>.

### 7) *Discovery*

Every college, except for Northeastern University,<sup>93</sup> states that both parties would have the opportunity to review the evidence, and list of witnesses before a decision is made. For example Cornell University's policy states,

Before making any decision, the reviewer must first forward to the complainant and the accused, copies of the summary of the investigation report, and give both parties a reasonable opportunity...to submit written comments and ask the reviewer to review the evidence, determination, and/or recommended sanctions or remedial measures contained in the final investigation report. The reviewer will conduct such a review, and may accept, modify, or reject the determination or recommended sanctions and/or remedial measures because of that review.<sup>94</sup>

### 8) *Right to have counsel present*

All schools, except for MIT, explicitly state that both parties could have counsel present. MIT was coded as unclear because an "advisor" is only mentioned once in the following statement, "During the investigation, all parties are required to affirm that materials they submit to the COD are their own work. Outside collaborators, including an advisor, must be cited."<sup>95</sup> There is no indication whether an adviser may be present during proceedings in MIT's policies.

Schools vary in their definitions of counsel. Some schools, like Johns Hopkins, Boston University, and Brown University (to mention a few) are broad, referring to counsel as "adviser," or "person of choice." Other schools placed restrictions on what kind of counsel is available, like Northeastern:

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<sup>93</sup> It was not stated in Northeastern's policy

<sup>94</sup> "Prohibited Discrimination, Protected-Status Harassment, Sexual Harassment, and Sexual Assault and Violence," Cornell University Public Library, last modified February 25, 2016, accessed March 15, 2016, [https://www.dfa.cornell.edu/sites/default/files/vol6\\_4.pdf](https://www.dfa.cornell.edu/sites/default/files/vol6_4.pdf).

<sup>95</sup> "XII. Special Procedures for Handling Sexual Misconduct Complaints," MIT Committee on Discipline, accessed March 13, 2016. <http://cod.mit.edu/rules/section13>.

Attendance at hearings is limited to parties involved and University officials as deemed necessary by the board and/or by the Office of Student Conduct and Conflict Resolution. Attorneys, parents, or guardians are not permitted in Student Conduct Board Hearings.<sup>96</sup>

Northeastern implies that attorneys, parents, or guardians cannot count as counsel, but created “Hearing Advisers” that effectively act as counselors,

Each party may have any one member of the University community serve as a hearing advisor. During the Pre-Hearing Meeting, the Hearing Administrator will provide a list of members from the University community who have volunteered to serve as a hearing advisor and been trained in the conduct process. Staff or faculty who are hired as a student’s legal counsel outside the conduct process may not also act as a student’s advisor in the University process. The charged student or complainant may act without an advisor if the student wishes. The role of the advisor includes:

- a. Assisting the advisee in understanding how the hearing will proceed.
- b. Assisting the advisee with understanding the resolution process.
- c. Attending the Hearing (Administrative, Student Conduct Board or Admitted Responsibility), if the advisee prefers and if schedules permit.
- d. Providing emotional support before, during, and after a hearing. At no time is the advisor permitted to address the board directly.<sup>97</sup>

Some schools, like USC, outlined potential counsel,

...the student being interviewed may have one adviser present. The adviser may be any person of the student’s choosing, such as the student’s parent or guardian, a mental health professional, a certified victim’s advocate, an attorney, or an adviser provided by the university at the student’s request.<sup>98</sup>

In other misconduct policy and procedures, colleges provided counsel. For example, Duke University provides Disciplinary Advisers, in addition to having the option to adviser-of-choice.

A complainant and a respondent have access to Disciplinary Advisers trained by the Office of Student Conduct to guide them through the disciplinary process, though complainants and respondents may consult with anyone they wish (including an attorney) during any stage of this process. One advisor of the complainant’s/respondent’s choice (either the university-appointed Disciplinary Advisor or another advisor of their choice) may accompany the complainant/respondent to any meeting with Office of Student Conduct staff, the investigator, or to a hearing.<sup>99</sup>

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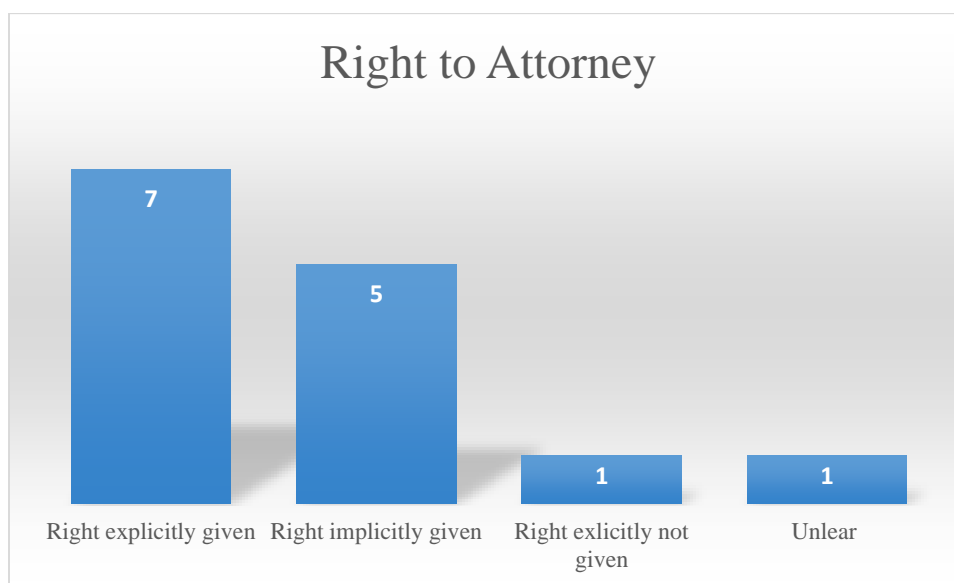
<sup>96</sup> Northeastern University, “Undergraduate Student Conduct.”

<sup>97</sup> Ibid.

<sup>98</sup> University of Southern California, “Part E Discrimination.”

<sup>99</sup> Duke University, ““Student Sexual Misconduct Policy and Procedures.”

Besides Northeastern and MIT, all colleges either explicitly or implicitly allowed for Attorneys to act as counsel.

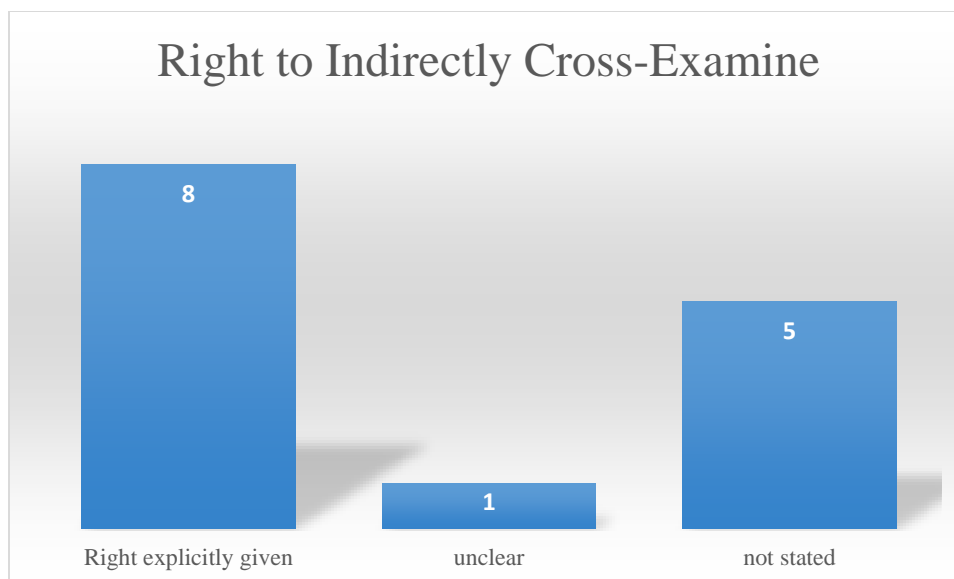


The extent to which counsel can participate in the investigation and/or hearing process varies between schools. Nonetheless, all schools limit counsel's contribution to the adjudication process. All schools prohibit counsel from directly participating in proceedings. For example at Boston University,

[An adviser] may provide support during such meeting or hearing. During meetings and interviews, the Adviser may quietly confer or pass notes with the party in a non-disruptive manner. The Adviser may not intervene in a meeting or interview, or address the Investigator.<sup>100</sup>

<sup>100</sup> Boston University, "Student Sexual Misconduct Procedures."

### 9) *Right to Indirectly Cross-Examine*



Most schools allowed for indirect cross-examination. At Bucknell University, “The Parties may ask the Investigator to pose additional questions or inquire further into specific matters by submitting these requests in writing or orally, at the discretion of the Chair. The Chair is empowered to reframe or disallow any questions that are irrelevant, redundant, or otherwise inappropriate.”<sup>101</sup> Other colleges follow similar procedures for indirect cross-examination.

### 10) *Opportunity to Respond to Allegations*

A school was coded as the explicitly stated right was given, if the policy states that parties have the opportunity to indirectly cross-examine or if they could respond to allegations at any point of the adjudication process. Every school examined, except for USC and Boston University, gives parties the right to respond to allegations. In the case of USC, it is not stated. At Boston University, “the Dean of Students may, in his or her discretion, provide the complainant and the respondent with an opportunity to meet, accompanied by the party’s

<sup>101</sup> Bucknell University, “Sexual Misconduct Policy.”

Adviser. If the Dean of Students meets with one party, he or she will offer the other party the chance to meet.”<sup>102</sup> This was coded as unclear because it is the Dean of Student’s discretion to allow the respondent or complainant the opportunity to respond to allegations.

The opportunity to respond to allegations was presented in different ways. Schools such as Duke, Princeton, Johns Hopkins, Brown, Cornell, Caltech, and Stanford prepare a type of “investigative report” that summarizes the findings (summaries of interviews with parties, witnesses, and evidence collected) of a pre-hearing investigation. These universities allow both the complainant and respondent to review the report and submit a written response. For example, at Cornell before any decisions are made, both parties can review the investigation report and “submit written comments and ask the reviewer to review the evidence.”<sup>103</sup> During the investigation stage, as well, the accused is presented the charges, all evidence supporting the charges, and is asked to provide an explanation of the alleged behavior.<sup>104</sup>

Other schools, like University of Chicago, Brown, and Cornell present the opportunity to respond to allegations by allowing the respondent to submit a written response upon notice of the charges. For example University of Chicago’s policy states, “The Associate Dean of Students in the University will inform the accused student of the allegation...and ask the accused student to prepare a written response to the accusation.”<sup>105</sup>

Bucknell University’s procedure includes closing statements, which is the only opportunity in the hearing, as enumerated by the policy, to respond to any allegations.

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<sup>102</sup> Boston University, “Student Sexual Misconduct Procedures.”

<sup>103</sup> Cornell University, “Prohibited Discrimination, Protected-Status Harassment, Sexual Harassment, and Sexual Assault and Violence.”

<sup>104</sup> Ibid.

<sup>105</sup> “Policy on Harassment, Discrimination, and Sexual Misconduct,” University of Chicago Student Manual, accessed March 14, 2016, <https://studentmanual.uchicago.edu/page/policy-harassment-discrimination-and-sexual-misconduct>.

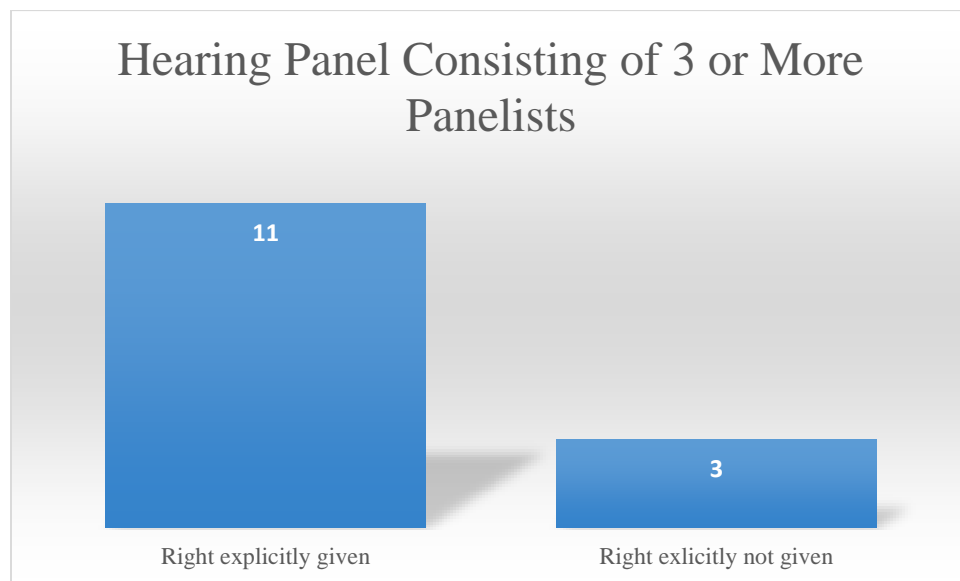
### *11) Burden of Proof: Preponderance of Evidence*

All schools use the preponderance of evidence standard in their policies and procedures. For schools that have multi-step adjudication processes, for example an investigative stage and then a hearing stage, the researcher did not note at which stage the preponderance of evidence standard was used.

### *12) Impartial Decision-Making*

The researcher identified four parts to impartial decision making: a hearing panel consisting of 3 or more panelists, stated impartiality, trained decision-makers, and students serving as panelists on the hearing panel. Only four schools satisfy all four conditions: Duke, University of Chicago, Northeastern, and Emory.

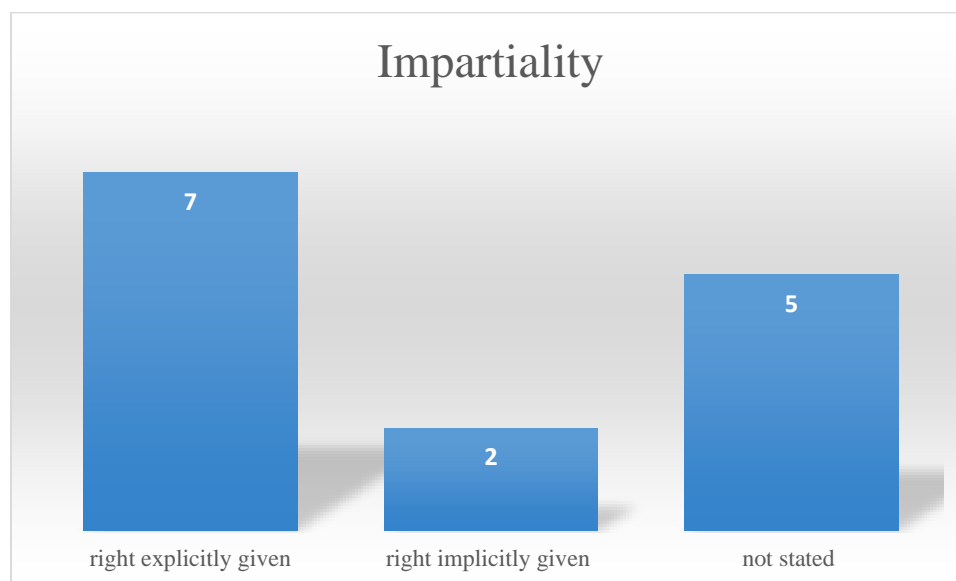
#### *a. A Hearing Panel Consisting of 3 or More Panelists*



Boston University, Caltech, and USC do not provide a hearing panel of three people or more. At Boston University, the Dean of Students makes a determination after reviewing the investigation

report.<sup>106</sup> Similarly at Caltech, one Caltech official will resolve the complaint.<sup>107</sup> At USC the panel consists of two people.<sup>108</sup>

*b. Impartiality*



In order to be coded as explicit or implicit, the policy had to indicate that the panelists would be unbiased. Schools accomplished this in a variety of ways. For example Brown University includes an entire section on Conflict of Interest, implying that panelists are impartial,

The Brown University Conflict of Interest and Commitment Policy and its related guidelines apply to all members of the Brown community and to all processes and procedures, including all investigative and disciplinary procedures in place to support and implement this policy. A conflict of interest may arise when a member of the Brown community may be able to use the authority of their position to influence a University decision, action or outcome with regard to the implementation and enforcement of this policy, including associated investigative and disciplinary procedures. It is the responsibility of all members of the Brown community involved in any aspect of a report of Prohibited Conduct to read the University's Conflict of Interest and Commitment

<sup>106</sup> Boston University, "Student Sexual Misconduct Procedures."

<sup>107</sup> "Sexual Violence," Caltech Institute Policy, last modified July 2015, accessed March 16, 2016, <https://policy.usc.edu/student/scampus/>.

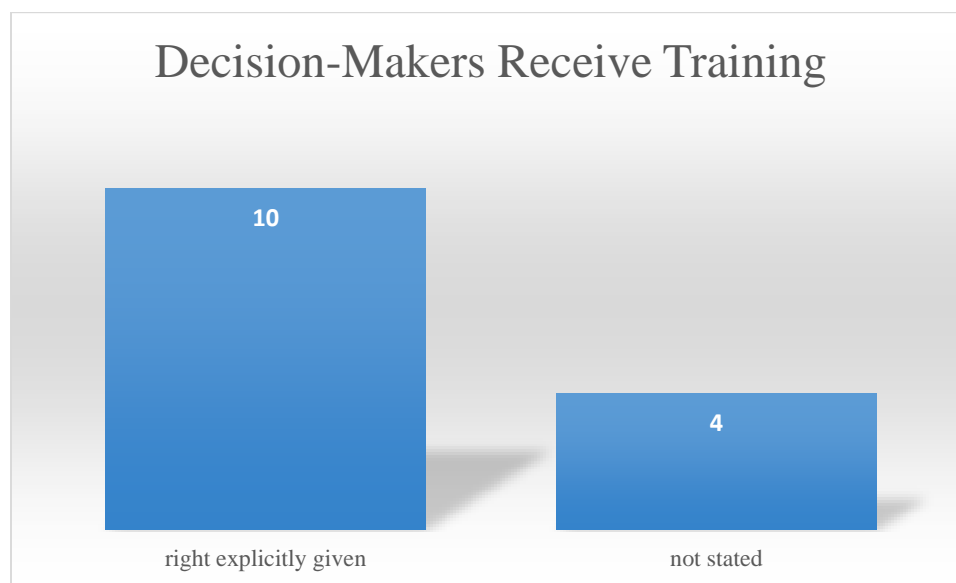
<sup>108</sup> University of Southern California, "Part E Discrimination."

Policy and to disclose potential or actual conflicts as they arise to Title IX Program Officer or Human Resources.<sup>109</sup>

Other schools, like Bucknell University, afford the complainant and respondent the opportunity to remove panelists if they identified a potential bias,

Each Party shall have an opportunity to challenge Hearing Panel members for bias or conflict of interest. The challenge must be rooted in a specific bias or conflict of interest (e.g., the proposed Hearing Panel member is someone with whom a Party has had a previous conflict or relationship) rather than a general objection (race, religion, gender, etc.). A challenge must be made in writing to the Investigator within two (2) calendar days of notification of the composition of the Hearing Panel. The Dean of Students, in the Dean's sole discretion, shall determine whether a Hearing Panel member will be removed for possible bias or conflict of interest.<sup>110</sup>

*c. Decision-Makers are Trained*



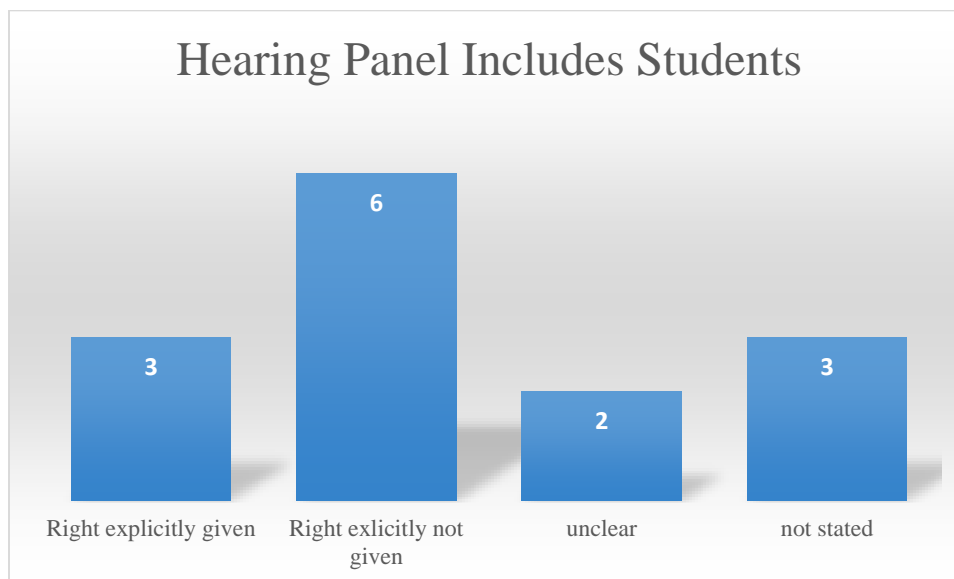
Four schools did not mention training. The schools that were coded as “explicitly stated right was given,” did indicated that decision-makers were trained, but did not specify what

<sup>109</sup> “Sexual and Gender-Based Harassment, Sexual Violence, Relationship, and Interpersonal Violence and Stalking Policy,” Brown University Title IX and Gender Equity, accessed March 14, 2016, <https://www.brown.edu/about/administration/title-ix/policy#policy5>.

<sup>110</sup> Bucknell University, “Sexual Misconduct Policy.”

training was received. For example Stanford’s policy states, “Responsibility for charge conduct is decided at a hearing by a Hearing Panel using trained decision-makers (Panelists).”<sup>111</sup>

*d. Hearing Panel Includes Students*



Only three schools, Duke, University of Chicago, and Northeastern explicitly state that students would be guaranteed to be on the hearing panel. Schools like Brown and Emory select panelists from a pool that includes faculty, staff, and undergraduate students. For example at Emory the “Title IX Coordinator for Students will appoint a hearing panel of three individuals, drawn from a pool of faculty, staff, and students with appropriate knowledge and training, to determine if the respondent is responsible for violations in the Notice of Charges.”<sup>112</sup> Other schools that use multiple decision-makers employ administrators, faculty, and staff. For example Cornell uses three faculty members.<sup>113</sup>

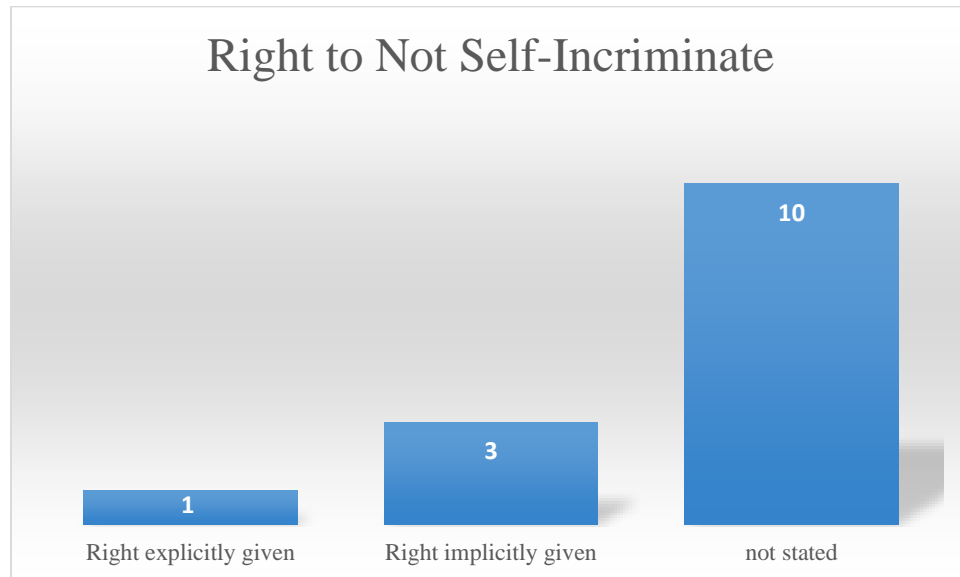
<sup>111</sup> Stanford University, “Student Title IX Process.”

<sup>112</sup> “Policy 8.2 Sexual Misconduct,” Emory University Policies and Procedures, last modified September 15, 2015, accessed March 13, 2016, <https://policies.emory.edu/8.2>.

<sup>113</sup> Cornell University, “Prohibited Discrimination, Protected-Status Harassment, Sexual Harassment, and Sexual Assault and Violence.”

Schools like Caltech and Boston University have one decision-maker that was an administrator. A unique finding was that outside investigators serve on the panel at Princeton.

### *13) Right to Not Self-Incriminate*



The right to not self-incriminate was mostly not mentioned in this sample. 10 of 14 schools did not refer to this right in their policies or procedures. Boston University is the only school to guarantee this right explicitly, “Throughout this process, both the complainant and respondent have the following rights...To refrain from making self-incriminating statements.”<sup>114</sup> Bucknell, Princeton, and USC implicitly guarantee the right to not self-incriminate. For example USC’s policy says, “All students and employees have the responsibility to participate fully and truthfully in university investigations. If the respondent declines to present information on his/her own behalf, this will not be construed as an admission of responsibility.”<sup>115</sup>

<sup>114</sup> Boston University, “Student Sexual Misconduct Procedures.”

<sup>115</sup> University of Southern California, “Part E Discrimination.”

#### *14) Right to Appeal*

13 out of the 14 schools state that either party has the right to appeal the decision.

(University of Chicago does not state that parties have the right to appeal) However some schools specified conditions in which an appeal would be granted. For example at Duke,

A respondent or complainant may submit a written appeal of the hearing panel's decision. Appeals are limited to 1500 words based on one or more of the following: 1) new information not reasonably available before the hearing that could significantly affect the finding (defined as the hearing panel's decision of "responsible" or "not responsible") and/or sanction(s); 2) procedural errors within the investigation or hearing process which may have significantly affected the finding (as defined above); and/or 3) the finding (as defined above) has no plausible basis in the record before the hearing panel. An appeal is not a re-hearing of the case.

It was not within the scope of this study to review the appeals processes. Therefore schools were coded as "explicitly stated right was given," if the policy mentioned that there was an appeals process. The researcher started to notice in the middle of data collection that schools were specifying conditions for appeals and started taking note of it at that point.

#### *15) Notice of Outcome*

All schools stated that notice of the complaint outcome would be given to both parties.

Schools varied in what would be included in the outcome. Some schools included the process for appeals, the sanction if the decision-maker also determined the sanction, or the time frame in which notice would be given. For example Caltech's policy regarding notice of the outcome was, "The complainant and respondent simultaneously will be informed in writing of the results of the investigation, any change to the results that occurs prior to the results becoming final, and when such results become final, and their right to appeal and the procedures for appeal."<sup>116</sup>

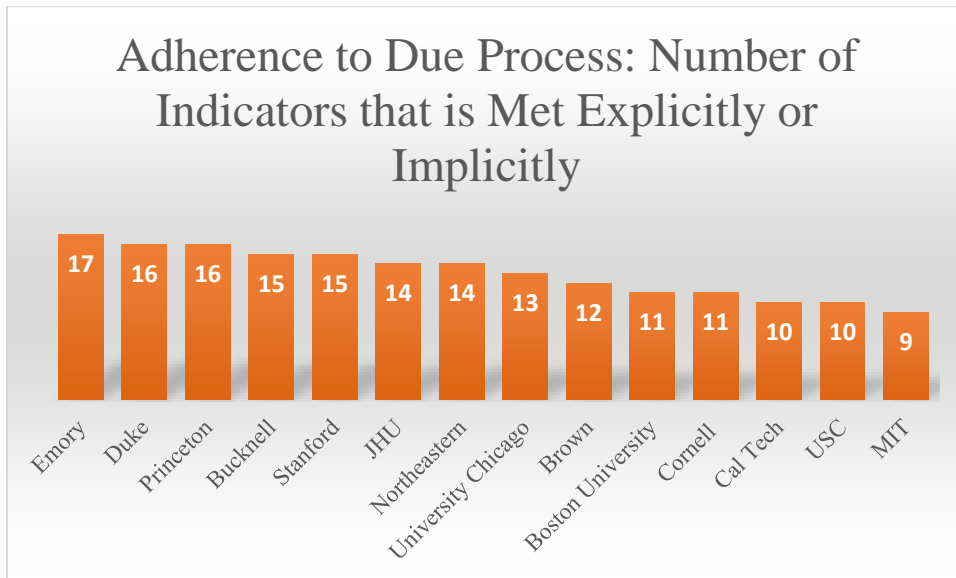
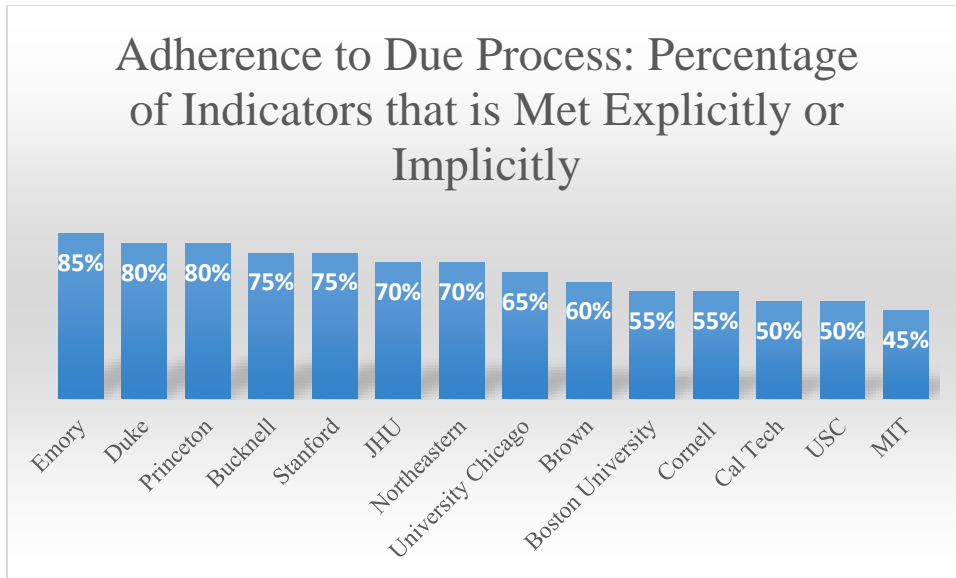
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<sup>116</sup> California Institute of Technology, "Sexual Violence."

## **Conclusion and Policy Recommendations**

The purpose of this study was to see if the nation's top schools contained due process rights for the accused in their sexual misconduct adjudication policies and procedures. Private institutions legally are not required to provide due process rights; they are bound by contract law meaning they only have to provide what is specified in their policies, procedures, and bylaws. So if privately-funded schools are not legally responsible for providing due process, why look for it? Due process is an indicator in itself of fundamental fairness. Even though private institutions are not required by the law to provide due process rights, they should, given the recent implications and harsh critique of noncompliance. The university is no longer an extension of unlimited parental authority: in recent times, students, in addition to their families, professors, policymakers, and reporters, have publically questioned and challenged institutions in a way that is damaging to an institution's reputation. Furthermore, the sexual assault and rape survivor movement has demanded more attention than ever, insisting that colleges, among other institutions, adequately respond to sexual violence. Compounded with the requirements of federal legislation, which colleges do have to fulfill, it is simply in colleges' best interests to provide fundamental fairness, which can be seen as due process rights, in efforts to address sexual violence.

There were 14 due process criterion points and 20 indicators. Out of the 14 schools that were evaluated, no school's policies and procedures fulfilled every indicator that was presented.



Sample Statistic	Percentage of Indicators	Number of Indicators
<b>Mean</b>	65%	13
<b>Standard Deviation</b>	13%	2.59
<b>Minimum</b>	45%	9
<b>Maximum</b>	85%	17

The mean number of indicators fulfilled was 13, or 65% of indicators. The highest compliance was Emory at 17, or 85% of indicators. The lowest compliance was MIT at 9, or 45% of indicators. These sample statistics illustrate that schools are not fully complying and on average provide a bit over half of the due process rights that should be guaranteed.

The overall compliance of these 14 schools indicates that universities in general do not have the most fair policies and procedures that guarantee the accused due process rights. While the sample taken in this study is not representative and therefore not generalizable to all U.S. colleges, it is representative of the Ivy Plus Society (that is not military or religiously affiliated, single-sex, publicly funded, or specialized) providing a glimpse into what the nation's top schools best practices and shortcomings are.

Most indicators were not met because the school was either unclear or did not state the policy. In fact, out of 14 schools and 280 total indicators flagged, only 29 indicators were flagged as "right explicitly not given." It is not accurate to say that schools are out-right denying due process rights. The full picture shows that schools are addressing these due process rights ambiguously or not addressing them at all. There were 73 indicators that were flagged as either unclear or not stated. It is especially important at private universities to have clear policies, procedures, and rights. Privately funded constitutions function through contract law, and the rights enumerated in their policies are the only rights that students are afforded. If private schools want to be fundamentally fair in their adjudication processes, they must explicitly afford basic due process rights in their policies and procedures.

For example, the opportunity to present evidence was coded as unclear for the majority of schools. Many schools had some sort of investigation stage as part of their adjudication process. In this stage an investigator would collect evidence to be summarized and compiled in a report.

This report is reviewed by the decision-makers. In this case it is unclear if there is truly a right to present evidence if it is unclear what actually makes it into the investigation report because the investigator has discretion to exclude or include whatever evidence he/she finds relevant.

Almost universally, schools complied with the following criteria: notice will be given; discovery; right to have counsel present; and notice of outcome will be given. The other criteria revealed considerable discrepancies that help inform policy changes.

### *Easily Accessible Policies and Procedures*

The majority of schools' sexual misconduct policies and procedures were not the first search result on Google. Furthermore, schools like Northeastern had their policies and procedures spread out on multiple different websites and pages. It is difficult to find all the necessary information, and this poses a real problem for universities. One possible reason policies and procedures are so disaggregated is because schools may have multiple offices and entities addressing sexual misconduct. For example the police department, the Title IX office, the office for student misconduct, and the Women's Center are some of the few potential actors that play a part in response to sexual misconduct.

It is not necessarily wrong that colleges use multiple players to address sexual violence; however, the policies and procedures should be consolidated between all offices. Schools with the most accessible policies were the first Google search result and had their policy and procedures detailed in one document. For example, Duke had all their information on one page and had a table of contents in the beginning to direct readers to specific parts of the procedure and policy. Furthermore, this page was linked whenever referring to the official sexual misconduct policies, such as the student misconduct page.

An interesting finding was that sometimes the first search result would be a resource page for victims. It is of utmost importance that victims can find immediate support and assistance in the aftermath of an assault. Separating a misconduct policy from a victim's support page may be a good idea in that it gives importance to healing as its own entity without tying it to reporting and the potential stresses of the adjudication process.

The Clery Act and DCL recommend that colleges publish their policies and grievance procedures in the student handbook, one of multiple locations. Schools may not be able to control the order of Google search results; however, they can put sexual misconduct policies and procedures in logical places like the Office of Student Misconduct homepage. The student handbook is a logical resource to place the policies and procedures because it also details other prohibited conduct.

Policy Recommendations: (1) Policies and procedures are consolidated into one document so that there is one official document that contains all the details of the adjudication process. (2) The policies and procedures are within the first two search results on Google. (3) The policies and procedures, in their entirety, are found in the student handbook.

*Notice must include who is making the complaint*

The majority of schools are unclear or do not state if notice would include who is making the complaint. Universities used similar language, "keeping [the complainant's] name private may limit the university's ability to investigate or discipline the responsible individual." This perhaps implies that universities need to disclose the complainant's identity to adjudicate a violation; however, it is unclear what exactly will happen if the complainant wants to maintain confidentiality. Universities may want to be flexible in this policy so that they can investigate

dangerous circumstances without maintaining confidentiality, like when multiple victims have been identified and the alleged perpetrator poses a clear and imminent threat to the community.

Nonetheless it is essential to know the complainant's identity to adequately respond to allegations. Universities must balance victim's desire for confidentiality but cannot withhold their identity if they intend on pursuing adjudication processes.

Policy Recommendation: (1) Policies and procedures should explicitly state that notice will include the name of the complainant. (2) The university should specify that they are unable to adjudicate a sexual misconduct violation if the complainant is not willing to disclose their identity to the accused, unless the university is the complainant and the identified victims act as witnesses. The university could then theoretically disclose the names of these victims in discovery (another due process right) so that the accused still has the ability to adequately respond to allegations.

### *Right to a hearing*

One of the most basic due process rights is the meaningful opportunity to be heard. In *Mathews v. Eldridge*, a landmark case in determining appropriate due process rights, the court stated that "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." It was alarming that 3 schools explicitly do not afford the right to a hearing and 2 other schools are unclear. Schools, like Boston University, have the one sole decision-maker, an administrator, review the investigation report and then make a decision. This is unacceptable in terms of due process rights.

Furthermore, this puts into question what exactly a hearing is. What constitutes as a meaningful opportunity to be heard? It is an advantage that schools are hiring investigators and

trying to gather facts; however, it is not a suitable replacement for a hearing. Investigation reports can have “second-hand” information and investigators often have the discretion to exclude evidence and testimony. The report is an excellent resource for the hearing and the panelists but, again, does not replace a hearing. At the essence of a hearing is the opportunity to present evidence, make statements, ask questions, and hear from witnesses. Universities must have these rights clearly stated in their policies.

An interesting finding is that while the DCL mandates that schools do not use mediation as a means of resolving complaints, some schools would list, and even encourage, “informal resolution” as an option if both parties agreed. This finding shows that some schools are offering mediation as a solution under a different name.

Policy Recommendations: (1) After an investigation, a hearing should be the first place where a decision is made about a complaint. (2) The hearing should include the presentation of evidence, witness testimony, opportunity for parties to make statements, opportunity for decision-makers to direct questions, and indirect cross examination.

#### *Opportunity to Submit Evidence and Opportunity to Present Witnesses*

The opportunity to submit evidence and present witnesses is essential to presenting the facts and responding to allegations. These two indicators were overwhelmingly categorized as unclear because the university includes the opportunity to submit evidence and offer the names of potential witnesses during the investigative stage. As said before, many universities give the investigator full discretion in what to include in the investigative report. Is this truly an opportunity to submit evidence and present witnesses if what the parties submitted may not get to the hearing panel, or if it is told in the words of a third party? It is unclear what exactly is in an

investigative report; for example, in reference to witnesses will there be transcripts of the interviews or just a summary? How detailed will the summary be? There is an advantage to hearing witnesses in person, and parties and the decision-makers having the ability to ask questions and clarify facts presented by the witness.

As mentioned before, investigators and investigative stages should be an additive resource to the hearing process rather than the sole source of information. In order to have due process, the parties must have a true opportunity to provide evidence and witness testimony.

Policy Recommendations: (1) Parties should be able to review the investigative report (if there is an investigation stage) and submit any additional evidence to be considered by the panel as long as it does not violate the confidentiality set forth in Family Rights and Educational Rights and Privacy Act and does not include non-essential sexual history of either parties. This right should be explicitly stated in the policies and procedures. (2) Parties do not have the right to compel witness testimony but are allowed to call upon witnesses to testify at the hearing in addition to providing names to the investigator if there is an investigative stage. The school should have the right to limit the number of witnesses if the administrative burden becomes too great.

#### *Right to have an attorney*

All schools afford students the option to have counsel in some form and every school, except for Northeastern and MIT, allow for an attorney to serve as counsel. Every college limited the capacity of counsel, such as not allowing them to directly participate in proceedings. This is not a violation of due process rights. The university is distinct from a Court and limiting

counsel's role is not violating any of the Mathew's factors<sup>117</sup> because the limitations do not debilitate the student from adequately responding to the charges. This may be one of the advantages of university adjudication systems over the Criminal Justice System. In court, victims' rights are often disregarded through ruthless cross-examinations and statements. In this way the university is allowing for an adviser to help students navigate the system while also maintaining civility in proceedings.

Policy Recommendations: (1) Counsel should be allowed but in a limited capacity. They should not be allowed to directly participate in any proceedings and only address their student. (2) If they write statements on behalf of the student it must be disclosed that counsel wrote it.

### *Impartial Decision-Making*

Only four schools satisfy all four indicators for impartial decision-making. This is a large violation of due process because the lack of impartial decision-making suggests that property and liberty interests may be taken away arbitrarily and unfairly.

Only three schools do not have three or more panelists. Boston University and Caltech use one decision-maker. This violates due process because one person's decision-making process is uncontested and their decision is vulnerable to their individual biases. Five schools do not demonstrate that decision-makers were impartial. It should be clearly stated in the policy how unbiased, unprejudiced decision-makers will be guaranteed. Ten schools say that decision-makers will be trained but did not elaborate on what training they receive. The majority of

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<sup>117</sup> Refers to the Mathews factors established by the Supreme Court in *Mathews v. Eldridge*. First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

schools do not include students on their panel. Students should be included on a panel because they provide a perspective about the university that cannot be matched by an administrator, faculty, or staff member.

Policy Recommendations: (1) The policy must state that the hearing panel consists of at least 3 members; (2) at least one student must be a panelist; (3) and all panelists must receive training on how to fairly evaluate sexual assault and rape cases and how to make a decision based solely on the facts presented.(4) If a member of the hearing panel has a conflict of interest they must recuse themselves .(5) A list of the names of the hearing panelists should be provided to both parties and parties may submit a written request explaining why they believe a panelist exhibits a conflict of interest and should subsequently be removed from the panel

### *Right to appeal*

The right to appeal is part of a fundamentally fair process. However the right to appeal unconditionally is not. Schools present the right to appeal in their policies often based on conditions like “new evidence,” “proof of bias,” or “procedural errors.” This is appropriate because an additional review of adjudication procedures ensures the chance that a complaint was resolved arbitrarily or unfairly. The Supreme Court has not guaranteed the right to appeal but the majority of states, through state law, have. It is good practice and a further guarantee of fairness to include an appeals process in sexual misconduct policies.

Policy Recommendation: (1) The sexual misconduct policy outlines the process to submit an appeal. That is, the conditions (if any) to make an appeal, the time frame for an appeal to be granted, and those who will make the decision to grant the appeal (2) The policy should include

the appeals process in the same document or provide the information to easily access the appeals procedure.

Due process of the law and the resulting rights and procedural safeguards are the means to achieve fundamental fairness in any context where an individual's interests are at stake. There are very specific criteria set forth for due process in colleges' adjudication of sexual misconduct, like right to be notified, or right to counsel; however, universities have the liberty to be and have been innovative in providing fundamental fairness. For example, Stanford University provides Evidentiary Specialists, a third party whose expertise is in evaluating evidence. Upon request, Evidentiary Specialists will review the evidence collected for relevance, biases, credibility, etc. It is an additional resource for the university and the students to ensure better fact-finding and a fair process. Northeastern uses Hearing Advisers, instead of attorneys and outside counsel. The purpose is to provide students with an adviser who is an expert in their own university's adjudication process. This is an innovative way to combat the inequities of hiring counsel. Both students are presented with the same options, and maybe even a better option than an attorney because the hearing adviser specializes in that specific school and has experience dealing with other cases in that specific setting.

## **Limitations and Recommendations for Further Study**

The data collection, specifically the process of categorizing, was difficult and sometimes subjective. Often the distinction between unclear, explicitly stated right not given, and not stated was ambiguous which may have resulted in false negatives, or inconsistent coding. It calls into question whether a right was not afforded by virtue of it being unclear or not stated. Further investigations should consider using a more definitive, objective, and unambiguous way of categorizing.

This study utilized document analysis. The policies and procedures were found using a Google search. Schools may or may not have control of search results or the order in which they appear. This affects the first criterion, "Easily Accessible." This criterion should be revised to say that the document is easily accessible if it is found in the student handbook, a logical place for misconduct policies to be located. Furthermore the search results were not exhaustive. Many schools had multiple links, and multiple documents. During data collection, the entire policy may not have been reviewed because it was not a search result or could not be found as a link within the documents that were discovered.

The official policies and procedures state what theoretically should happen in a disciplinary proceeding; it is not representative of what happens in reality. Future studies should interview school officials, students, investigators, and attorneys to provide a clearer picture of due process rights that are afforded and implemented.

This study only looked at the rights of the accused; however, in order to be truly equitable both the victim and accused rights should be up to par. Future studies should look at both parties' rights.

The sample size was very small and limited to the Ivy Plus Society. It is not generalizable to all colleges and future studies should expand the sample size so that it is representative of more colleges. Perhaps investigations can study schools by location to account for vast number of colleges to be studied.

The resources between schools vary and the content and quality of training for decision-makers is important. In the future, research should be done on how decision-makers are trained and how effective it is in creating an impartial decision-making process.

## **Closing Statement**

Sexual assault policies and procedures matter. The university adjudication process has the potential to provide victims with safety and a sense of justice. However, this process is flawed. This study revealed that among the schools analyzed, there was significant variety and lack of clarity in policies and procedures leading to a lot of confusion on what rights are guaranteed and if this process is actually fundamentally fair. Universities need to revise and clarify their documents, making procedures transparent and rights afforded explicit.

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