

DUE PROCESS FOR WHOM?:  
EVALUATION OF SEXUAL MISCONDUCT POLICIES  
AT INSTITUTIONS OF HIGHER EDUCATION  
FROM THE LENS OF THE RESPONDENT

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SYBIL BRIANNE WYATT

B.S. Northwest Missouri State University, 2003  
J.D., University of Missouri-Kansas City, 2011  
M.A., University of Missouri-Kansas City, 2014  
M.S., University of Central Missouri, 2015

Kansas City, Missouri  
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Sybil Brianne Wyatt, Candidate for the Doctor of Education Degree  
University of Missouri-Kansas City, 2019

ABSTRACT

Critics of the implementation of Title IX at institutions of higher education (IHEs) argue that due process in the investigation and adjudication of sexual misconduct is severely lacking. In response, the Office for Civil Rights proposed amended regulations in November 2018 that require a greater focus on the due process rights of the accused (the Respondent) at IHEs. The present study sought to examine the content of Title IX policies from the perspective of the Respondent, asking (1) to what extent do policies provide due process to Respondents as measured through the frequency of inclusion of words and/or phrases comprising six due process themes; and (2) in examining these policies, are there differences in due process provided when policies are categorized by institution size or federal appellate jurisdiction?

A coding instrument was developed for a content analysis of institutional Title IX policies in consideration of the six themes: proper notice, the right to an advisor, the

opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness. Determination of the sample was through use of homogenous non-probability sampling of an entire population that included all IHEs that met seven criteria. The 238 policies were accessed via institutional websites and were hand-coded with multiple checks on inter-rater reliability. The resulting nominal data was analyzed using descriptive statistics to identify patterns in the text.

The findings indicate that the current state of due process in regard to most sample policies is on par with expectations in many areas, such as the provision of multiple aspects of proper notice to the Respondent and to the campus community, the ability to have an advisor and to be heard in one's own defense, the right to review information gathered by the investigator(s), the right to appeal, and numerous characteristics of impartiality and fairness. However, there remain pockets of inadequacies from the perspective of a Respondent, including the lack of advisor participation, the submission of anonymous or confidential complaints, the lack of amnesty for Respondents, and the charged terminology used within the policies themselves.

## APPROVAL PAGE

The faculty listed below, appointed by the Dean of the School of Education, have examined a dissertation titled “Due Process for Whom?: Evaluation of Sexual Misconduct Policies at Institutions of Higher Education From the Lens of the Respondent,” presented by Sybil Brianne Wyatt, candidate for the Doctor of Education degree, and certify that in their opinion it is worthy of acceptance.

### Supervisory Committee

Tiffani Riggers-Piehl, P.h.D., Committee Chair  
Department of Educational Leadership, Policy & Foundations

Michelle Maher, P.h.D.  
Department of Educational Leadership, Policy & Foundations

Carolyn Barber, P.h.D.  
Division of Counseling and Educational Psychology

Allen Rostron, J.D.  
School of Law

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## DEDICATION

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## CHAPTER I

### INTRODUCTION

Sexual assault is interwoven in the fabric of American history as evidenced by legal documents, first- and third-person accounts, and commentators' written perspectives (Block, 2012). However, it was not until the late 1950s that sexual assault on college campuses would be systematically studied. Pioneering research undertaken by Kirkpatrick and Kanin in 1957 found that over half of female college students surveyed had experienced "erotic offensiveness" by males. Of the 291 female students in the sample, 162 recounted over 1,000 separate incidents of sexual harassment, ranging from comments to "aggressively forceful attempts at sex intercourse in the course of which menacing threats or coercive infliction of physical pain were employed" (Kirkpatrick & Kanin, 1957, p. 53). However, it was not until the seminal research study by Koss, Gidycz, and Wisniewski (1987) on the incidence and prevalence of sexual violence and victimization of post-secondary students that the topic was further examined. Koss et al. (1987) surveyed 3,187 women<sup>1</sup> from 32 institutions of higher education (IHEs) in the United States and found that as many as one out of every four traditional college-aged women had reportedly been the victim of rape or attempted rape. Subsequent studies of college and university students found sexual assault rates that ranged from 21% (Easton, Summers, Tribble, Wallace, & Lock, 1997) to 42% (Synovitz & Byrne, 1998) among individuals identifying as female, and using data from a national telephone survey of college women with a sample size of 4,446, Fisher, Cullen, and Turner (2000) found that in an institution of 10,000 students, there could be upwards of 350 sexual assaults

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<sup>1</sup> Individuals identifying as cis-gender heterosexual females are not alone in experiencing sexual assault. However, studies on the incidence and prevalence of sexual assault against individuals identifying as non-cis-gendered, non-heterosexual females and males is substantially lacking from the literature and remains limited as compared to research on cis-gender heterosexual female victimization.

each year. As evidence mounted in regard to the rate of occurrence of sexual assault among students at IHEs, the federal government began to take an interest in the prevention of and response to sexual misconduct at colleges and universities across the country.

### **The Federal Government's Response**

When initially passed by Congress, Title IX of the Education Amendments of 1972 was meant to address the “marked educational inequalities” (U.S. Department of Justice, 2012, p. 2) faced by women in higher education: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (P.L. 92-318). Then in the 1990s, the focus shifted to the obligation of colleges and universities to address sexual harassment, which includes sexual assault (Meloy, 2014). Under the Higher Education Amendments of 1992 (P.L. 102-325), amending the Higher Education Act of 1965 (P.L. 89–329), IHEs were to provide a statement of policy regarding sexual misconduct prevention programming and grievance procedures as part of their annual crime statistics disclosure to satisfy their required duties under Title IX. Next came the Higher Education Amendments of 1998 (P.L. 105-244), the Campus Sex Crimes Prevention Act of 2000 (P.L. 106-386), and the Campus Sexual Violence Act (P.L. 13-4, Sec. 304); each of these laws modified, clarified, and added to the obligations of post-secondary institutions under Title IX.

In addition, agency guidance has been issued by the federal government over the years, including the U.S. Department of Education's Office for Civil Rights' (OCR) 1997 directive on the applicability of Title IX to conduct of a sexual nature that limits a student's ability to participate in educational programs and activities. OCR then provided further

direction through its *Revised Sexual Harassment Guidance* in 2001, as well as its subsequent 2011 “Dear Colleague” Letter (DCL), and the 2014 *Questions and Answers on Title IX and Sexual Violence* (Q&A), meant to supplement law and prior guidance on Title IX requirements as they pertained to sexual harassment and sexual violence. On September 22, 2017, OCR issued interim guidance, *Q&A on Campus Sexual Misconduct*, which supersedes the 2011 DCL and the 2014 Questions and Answers and reverts policy requirements back to OCR’s 2001 guidance. OCR plans to issue new regulations on Title IX implementation after a public comment period (U.S. Department of Education, 2017b), with the proposed amended regulations released for review by the public on November 15, 2018 (OCR, 2018).

### **Sexual Misconduct Policies at Colleges and Universities**

As might be expected due to the aforementioned myriad of legal updates and agency guidance in regard to the application of Title IX, the development of a sexual misconduct policy is complicated and uncertainties are most assuredly present at every post-secondary institution, even when experts in the field of higher education law are called upon to assist or provide assurances that an IHE’s policy meets the requirements as set forth by law and OCR. It should not be a surprise, then, to learn that although there are “best practices” from organizations such as the Association of Title IX Administrators (ATIXA), the National Center for Higher Education Risk Management (NCHERM), and the Association for Student Conduct Administration (ASCA), there is no universally-accepted procedural structure for the grievance processes used when an institution receives a complaint of sexual misconduct. As such, policies vary widely in many aspects, though there is the expectation that specific components are in place at every institution.

This lack of standard procedures to be used by all colleges and universities is evidenced by the closures of OCR investigations into the mishandling of sexual misconduct complaints at IHEs since the issuance of the 2011 DCL. Several resolutions are known to have led to voluntary or required sexual misconduct policy revisions, as have many of the compliance reviews conducted by OCR (Lipka, 2016; Chronicle of Higher Education, 2016). Additionally, as of August 31, 2018, there were 128 open investigations into Title IX “Procedural Requirements” at IHEs per OCR’s pending cases list and 286 investigations into Title IX “Sexual Violence” complaints filed with the agency against colleges and universities throughout the country, many of which target institutions for the mishandling of reports of sexual misconduct under their Title IX policies (OCR, 2018). Despite widespread evidence of deficiencies in the sexual misconduct policies of post-secondary institutions, few studies have analyzed the actual content of these policies to determine where the inconsistencies lie.

### **Problem Statement**

Studies in the area of campus sexual misconduct have focused on the prevalence and incidence of sexual assault (Koss et al., 1987; Easton et al., 1997; Synovitz & Byrne, 1998; Fisher, Cullen, & Turner, 2000; Krebs et al., 2007; Forsman, 2017; Mellins et al., 2017), female victimization (Combs-Lane & Smith, 2002; Jordan, Combs, & Smith, 2014; Stoner & Cramer, 2017), the relationship between sexual misconduct and alcohol (Abbey, McAuslan, & Ross, 1998; Larimer, Turner, Mallett, & Geisner, 1999; Combs-Lane & Smith, 2002; Holloway & Bennett, 2017; Drouin, Jozkowski, Davis, & Newsham, 2018), and the prevention of sexual assault (Anderson & Whiston, 2005; Jozkowski, Henry, & Sturm, 2015;



Azimi & Daigle, 2016). However, few studies<sup>2</sup> have undertaken systematic examinations of the substantive content of sexual misconduct policies of IHEs through the use of content analysis (see Appendix A). In reviewing these studies, identifiable gaps in the research became apparent. First, the sample sizes of these content analyses were often very small in relation to the number of colleges and universities in the country, especially in regard to public, four-year IHEs, of which there were 2,363 during the 1999-2000 academic year (National Center for Education Statistics, 2018) when the first study was conducted, up to 3,004 by 2015-2016, the year in which the most recent studies were undertaken. Second, the Karjane et al. (2002) study with the largest sample of public, four-year institutions was completed over 16 years ago on policies written prior to the 2001 DCL, and with the wealth of guidance provided by OCR in the years since, is significantly outdated. Third, much of the data collected in a majority of these content analyses focused on information and services provided to Complainants during the grievance process, with little regard for Respondents. Finally, none of the content analyses focused on due process in the procedures used during the investigation and adjudication of complaints of sexual misconduct at post-secondary institutions, nor did any of these compare such data by institution size or appellate jurisdiction. This final point regarding due process is especially salient, as critics of the 2011 DCL and 2014 Questions and Answers denounced the lack of consideration for Respondents' rights in institutional Title IX grievance processes (Bartholet et al., 2014; Rudovsky et al., 2015; Alexander et al., 2016; Hansen, 2017), as did current Education Secretary Betsy DeVos in her speech on September 7, 2017, addressing what she felt was a "failed system" in regard

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<sup>2</sup> Eleven prior content analyses on student sexual misconduct policies at IHEs were identified. However, three studies were conducted by organizations with missions indicating possible biases in favor of Complainants (Students Active for Ending Rape/V-Day, 2013) or Respondents (FIRE, 2017b; FIRE, 2018b). Such possible biases drove the decision to exclude the results of these content analyses from examination in the present study.

to Title IX enforcement and the handling of complaints of sexual misconduct at colleges and universities (Svrluga, 2017, para. 56). Additionally, the 2017 Q&A indicated the need for IHEs to strike a balance between supporting the Complainant and recognizing the rights of the Respondent in consideration of due process (OCR, 2017b), as do OCR's 2018 proposed amended regulations.

### **Statement of Purpose**

The purpose of the present study is threefold. The first objective is to provide updated research on the content of sexual misconduct policies at a greater number of public, four-year colleges and universities, which have an estimated total enrollment of over 7.6 million students per year, just short of half of the entire yearly student enrollment at all public and private two- and four-year post-secondary institutions in the United States (National Student Clearinghouse, 2017). The second objective is to examine the content of Title IX policies from the perspective of the Respondent in regard to the provision of due process during the investigation and adjudication of complaints of sexual misconduct, as no prior study has addressed this aspect of the grievance process. The time is ripe for such a policy examination in consideration of the following: (1) due process and fairness were mentioned repeatedly by current Education Secretary DeVos during the speech she gave on September 7, 2017, regarding the implementation of Title IX at colleges and universities (Svrluga, 2017); (2) due process was noted by OCR as an issue of concern in a press release issued on September 22, 2017, in conjunction with the 2017 Q&A; and (3) due process rights are at the heart of OCR's proposed amended regulations on Title IX implementation, released on November 15, 2018. The third objective is to compare policies' due process by institution size and appellate

jurisdiction. In regard to institution size, per Paul (2016), larger<sup>3</sup> institutions may be more likely to have the financial means and caseload to justify employing an individual whose main role is Title IX Coordinator and to hire and train at least one investigator, which may ultimately have an effect on the level of due process afforded to Respondents.<sup>4</sup> As to appellate jurisdiction, a decision rendered by a federal appeals court in one jurisdiction, applicable to the IHEs within that geographical area, does not apply to IHEs in other jurisdictions, which may lead to significant differences in the handling of complaints of sexual misconduct at colleges and universities across the country (Johnson & Taylor, 2017).

### **Research Questions**

To determine the degree of due process afforded to Respondents by post-secondary institutions in regard to the investigation and adjudication of Title IX complaints, three research questions were considered:

- (1) To what extent do sexual misconduct policies at public, four-year colleges and universities provide due process to Respondents as measured through the frequency of inclusion of words and/or phrases comprising six themes: proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness?
- (2) In examining these policies, are there differences in due process provided when policies are categorized by institution size as determined by total student enrollment?
- (3) In examining these policies, are there differences in due process provided when policies are categorized by federal appellate jurisdiction?

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<sup>3</sup> Classified as “four-year, large” based upon Carnegie Size and Setting Classification definitions (Indiana University Center for Postsecondary Research, 2018).

<sup>4</sup> For additional detail, see Chapter III: Population and Sample.

## Definitions of Key Terms

To address the research questions and understand the conceptual framework, it is necessary to introduce the operational definitions of key terms used in the present study.

1. **Adjudication** is the second step in the grievance process and includes the consideration of evidence and testimony and results in a determination of a Respondent's culpability for an alleged violation of an institution's sexual misconduct policy.
2. An **adjudicator** is the decision-maker in the grievance process and may include a single individual or a group of panelists as part of a hearing.
3. An **advisor** is an individual that acts in support of the Complainant or Respondent during the grievance process and may be a family member, friend, college or university employee, or attorney.
4. An **appeal** is a request by the Complainant or Respondent to review and reverse the decision of the adjudicator in the grievance process.
5. The **Complainant** is the party in the grievance process alleged to have experienced an act or acts of sexual misconduct committed by the Respondent against their person in violation of an institution's sexual misconduct policy.
6. **Consent** is the act of giving express or implied permission to another and does not include permission obtained through coercion, threat, or intimidation (Mo. Rev. Stat. § 556.061, 2017; Black et al., 2017).
7. The **grievance process** includes the investigation and adjudication of allegation(s) of sexual misconduct made against a Respondent at a college or university.

8. **Impartiality** refers to the objectivity of the institutional actors, i.e., the investigator(s) and adjudicator(s), in the grievance process.
9. **Incapacitation** is a temporary or permanent impairment of a person who is unable to “appraise the nature” of their actions or unable to communicate their “unwillingness to an act” (Mo. Rev. Stat. § 556.061.28, 2017) and may be due to use of drugs or alcohol, disability, unconsciousness, illness, sleep, “blackout,” “brownout,” or “involuntary physical restraint” (Black et al., 2017, p. 15).
10. An **investigation** is the first step in the grievance process and involves the gathering of evidence and the recording of the testimony of the parties and any witnesses.
11. **Notice** is a declaration or announcement meant to inform a party of pending action by the institution to be taken during the course of the grievance process.
12. The **opportunity to be heard** refers to a party’s chance to provide testimony and evidence on their own behalf as part of the grievance process.
13. The **right of confrontation** refers to a party’s chance to hear testimony and review evidence provided against them and to question this testimony and evidence during the course of the grievance process.
14. **Sexual misconduct** is any act of a sexual nature committed by one individual against another that is unwelcome or carried out without consent or through use of force and may include dating/domestic violence, indecent exposure, nonconsensual sexual touching (fondling, frothing, and oral copulation), nonconsensual sexual intercourse, sexual exploitation, and stalking on the basis of sex (for definitions of these acts, see Appendix B).

15. The **Respondent** is the party in the grievance process alleged to have committed an act or acts of sexual misconduct against the Complainant in violation of an institution's sexual misconduct policy.

Equipped with an understanding of key terms, the conceptual framework below introduces due process, the centering concept of this study.

### **Conceptual Framework**

At the heart of the present study is the idea of due process, a concept that traditionally involves providing an individual accused of a violation of law or policy with proper notice (Wood & Wood, 1996; Dutile, 2001; Bach, 2003; Reilly, 2016) and an impartial and fair process (Meares, 2005; American College of Trial Lawyers, 2017), as well as recognizing their rights to an advisor (Johnson, 2016; American College of Trial Lawyers, 2017), to be heard (*Goss v. Lopez*, 1975), to confront adverse evidence and testimony (Bach, 2003; *Doe v. Brandeis University*, 2016; American Bar Association, 2017; American College of Trial Lawyers, 2017; McGowan, 2017), and to appeal the outcome of the process (Robertson, 2013; Lobsenz, 1985). As noted by Stevens (1999), “[T]he constitutional concept of due process demands fundamental fairness in the method by which discretionary power is exercised” (para. 1). When a post-secondary institution must make a discretionary decision based upon oft-disputed facts, due process is essential to meet the “legal challenges of contract and constitutional law and the pedagogical demand for justice” (Stevens, 1999, para. 1). Due process protects the rights of the accused under the Fifth and Fourteenth Amendments of the U.S. Constitution, especially when the deprivation of an interest related to life, liberty, or property is involved (Grindle, 2009). Under the Fifth Amendment, no person “shall be compelled in any criminal case to be witness against himself, nor be

deprived of life, liberty, or property, without due process of law...” (U.S. Const. amend. V). In the Fourteenth Amendment, the federal government provided that no “State” shall “deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV).

What does this mean in regard to public colleges and universities? Over the course of time, the courts have issued decisions that have developed the relationship between due process and student disciplinary action, the focus of the present study (Grindle, 2009). Early on, educators were allowed a great deal of discretion in doling out discipline to their students, as they stood *in loco parentis*, or in place of the student’s parents (Grindle, 2009). Then in *Dixon v. Alabama State Board of Education* (1961), a case heard by the U.S. Court of Appeals for the Fifth Circuit, the court suggested that students attending public IHEs have a Constitutional right to due process and equal protection under the Fifth and Fourteenth Amendments, due to the holding of the U.S. Supreme Court in *Brown v. Board of Education* (1954), recognizing that education is one of the most important aspects of a “democratic society” (p. 493; Grindle, 2009).

Per Stevens (1999), “[A]ny members of the institutional community who face official action adverse to their protected interests [must] receive proper notice and a meaningful opportunity to present and respond to evidence, and [be assured] that academic and disciplinary decisions are made by unbiased officials” (para. 9). In *Dixon* (1961), the Fifth Circuit ruled that students at public colleges and universities should be provided notice that includes at least a summary of the specific charges and the policies that are alleged to have been violated, the names of any witnesses that may provide opposing testimony and a report of said testimony, the ability to question any evidence presented against them, and a

notification of the decision of the administrators or campus officials in charge of student conduct adjudication. These components of due process are considered to be procedural in nature and have been repeatedly enforced by the courts (Grindle, 2009).

Then in *Mathews v. Eldridge* (1976), the U.S. Supreme Court set a three part test to determine whether due process procedures were sufficient: (1) what interest the student has that may be affected by the actions of the institution, (2) the risk of the institution making an error through use of their established procedures, thus depriving the student of their interest, as well as whether a modification or substitution of procedures would make much of a difference in the outcome, and (3) the interest of the IHE (as an arm of the government), including what burdens may be placed on the institution should procedures be required to be modified or substituted (Nisenson, 2016). When implemented, these three factors often caused courts to defer to decisions made by colleges and universities regarding student conduct, because although students had a strong interest in not being suspended or dismissed, which could occur if found in violation of an institution's sexual misconduct policy, an IHE's procedures guaranteed "substantial protection against wrongfully imposed...punishment" (Dutile, 2001, p. 246). Further, the imposition of modifications or substitutions in conduct procedures "would intrude unduly upon the educational responsibility vested primarily in public-school officials" (Dutile, 2001, p. 247). The U.S. Supreme Court also noted in *Mathews* (1976) that a hearing may not be required because this model of adjudication may not be the most effective based upon the circumstances, thus creating a due process that is malleable and "context sensitive" (Nisenson, 2016, p. 965).

In modern courts, for a student accused of a conduct violation, such as nonconsensual sexual intercourse or dating violence, that may deprive them of the right to an education



through suspension or dismissal from their post-secondary institution, it is assumed that Respondents ought to be granted many of the components of due process that were outlined in *Dixon* (1961) in order to protect their property or liberty interests in accessing their education (Nisenson, 2016). This includes providing notice of any disciplinary process and the opportunity to be heard in some manner, though IHEs are granted a great deal of leeway in determining what “to be heard” actually means, because as the U.S. Supreme Court noted in *Mathews* (1976), a hearing may not be the best option for adjudication (Stevens, 1999).

Per the American Association of University Professors (AAUP) (1992), although fairness under procedural due process in sexual misconduct grievance procedures requires students be given the opportunity to be heard, the method used to provide such an opportunity may be dependent upon the seriousness of the behavior leading to the alleged policy violation(s). This speaks to the flexibility of the procedures utilized by a college or university, as evidenced in *Mathews* (1976). Typically, a student must have the opportunity to refute any evidence, but this may be as simple as a meeting with a single official acting as the decision-maker, or as complicated as a full hearing, where testimony and evidence may be presented (AAUP, 1992). As to serious allegations, the AAUP (1992) argued that Respondents should be granted a hearing with sufficient notice to prepare their defense and to have an advisor of their choice to assist in said defense, and the hearing panel should only base their decision on information introduced formally into evidence, without consideration of “improperly acquired evidence” (sec. 4). The U.S. Court of Appeals for the First Circuit has observed that for any hearing to be fair, the student must be given the opportunity to “respond, explain, and defend” (Dutile, 2001, p. 271). The U.S. Supreme Court also recognized in *Cleveland Board of Education v. Loudermill* (1985) the importance of having

an impartial decision-maker, whether it be a single adjudicator or a hearing panel, both utilized in Title IX grievance processes, and providing the accused with notice as to the outcome of the process (Nisenson, 2016).

Additionally, the AAUP (1992) contends that pending a decision, students should not have their status, i.e., their right to attend classes or be on campus, suspended “except for reasons relating to the student’s physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, faculty, or institutional property” (sec. 3), and it is under the second caveat that colleges and universities often employ interim suspensions during sexual misconduct grievance processes. Grindle (2009) also argues that students should be given the opportunity to appeal a decision made by university officials, though this is not a requirement under Title IX or current guidance from OCR. With the aforementioned requirements set forth by the courts and many of the best practices offered by AAUP and others, student conduct procedures were typically thought to provide adequate due process, especially when said procedures included hearings and appeal rights (Nisenson, 2016).

However, because of OCR’s 2011 DCL and 2014 Questions and Answers, many IHEs developed policies that focused more on the needs of the Complainant rather than guaranteeing the due process rights of the Respondent, under the auspices of attempting to address and prevent sexual misconduct on college and university campuses, an important interest of the IHE (Nisenson, 2016). Lawsuits have resulted from the implementation of these policies, with Respondents filing against their post-secondary institutions for having been suspended or dismissed due to sexual misconduct policy violations. The argument has been that these suspensions and dismissals have prevented the Respondent from accessing

their education, an aforementioned important interest of any student, without due process procedures that ensure an error-free decision, as is required by *Mathews* (1976). Under current Education Secretary DeVos, Respondents may find themselves with more due process incorporated into sexual misconduct policies as OCR issues updated regulations, but whether IHEs properly implement said regulations is a question of much concern to not only the Respondents, but others such as the AAUP and FIRE, an organization whose mission includes protecting the due process rights of students in post-secondary conduct matters. As stated by Nisenson (2016), colleges and universities “have an obligation, both legally and morally, to provide proper due process protections to their students...” despite the alleged policy violation(s) having involved sexual misconduct (p. 975).

### **Importance of the Study**

There is arguably a shift in focus by OCR under current Education Secretary DeVos from what she believes is a “failed system” (Svrluga, 2017, para. 56) that many contend afforded much deference to Complainants in Title IX grievance processes (Alexander et al., 2016; Lieberwitz et al., 2016; Baker, 2017) to a system that per Secretary DeVos “protect[s] every student’s right to learn” and prevents “unjust deprivations of that right” (Svrluga, 2017, para. 9). As a method of providing a baseline in regard to the current state of due process in sexual misconduct investigation and adjudication procedures at a sample of public, four-year colleges and universities, and to determine whether Title IX policies at these institutions are in fact deficient in affording Respondents a “fair” process (Svrluga, 2017, para. 128), the present study undertakes an examination of institutional policies prior to any further regulations being issued by OCR. This baseline and evidence of any due process deficiencies will be important in gauging whether there is an existing lack of due process for Respondents

in regard to published Title IX procedures at the sample institutions. If these due process deficiencies are evidenced within the sexual misconduct policies themselves, the direction of OCR's final regulations, and the response of IHEs, should be toward remedying the actual *content* of the policies, with the expectation that proper policies, when followed, lead to fair procedures. However, if the present study fails to find deficiencies within the text of the policies, i.e., sexual misconduct procedures as published afford sufficient due process to Respondents, then the updated regulations from OCR, and thus the response of colleges and universities, should skew more toward addressing *adherence* to institutional policies and procedures in investigations and adjudications, rather than focusing on the content or text of the policies as the root of the problem.

As to individual public, four-year institutions within the sample, the present study will help assess where an IHE falls in providing due process as compared to its peers as a method of benchmarking prior to any institutional policy updates suggested or required by OCR's final amended regulations.

### **Conclusion**

Chapter One introduced the issue of sexual misconduct at colleges and universities in the United States and outlined the involvement of the federal government in its attempts to mandate and guide these institutions' prevention and response efforts. The problem statement noted that the focus of much of the research into sexual misconduct at IHEs has revolved around the prevalence and incidence of sexual assault, female victimization, the relationship between sexual misconduct and alcohol, and the prevention of sexual assault, without much consideration of the content of post-secondary Title IX policies themselves. In regard to the prior published content analyses of sexual misconduct grievance procedures at IHEs, there

were four gaps in the research as identified in the problem statement: small sample sizes, outdated findings, a focus on the information and services provided to the Complainant, and zero investigation of due process in regard to Respondents. The statement of purpose discussed the goals of the present study, which are to update the research and to examine whether Respondents are afforded due process in institutional Title IX investigations and adjudications. The research questions introduced the six due process themes: proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness; key terms of the present study were also defined. The conceptual framework provided the history and underscored the importance of due process in student misconduct processes, and the study's importance was discussed in regard to use of the results by IHEs.

Chapter Two provides a review of the literature on the implementation of Title IX at post-secondary institutions and a discussion of due process issues faced by Respondents when accused of sexual misconduct, including notable criticisms of current Title IX policies at IHEs and a review of prior content analyses as they apply to the six due process themes. Chapter Three describes the chosen research design, the determination of the sample, the development of the coding instrument, the method of analysis employed, and the ethical considerations. Chapter Four presents the results of the present study, and Chapter Five provides a discussion of these results and the implications for practice, as well as limitations and suggestions for future research.

## CHAPTER II

### LITERATURE REVIEW

The present study seeks to determine the degree to which due process is afforded to Respondents who have been accused of violating their post-secondary institutions' sexual misconduct policies. In fulfilling this goal, Chapter Two presents an abridged summary of the passage of Title IX and its subsequent implementation at colleges and universities in the United States in the form of a timeline of federal laws, regulations, and agency guidance. Also discussed are the predominant due process concerns faced by Respondents in sexual misconduct grievance processes at institutions of higher education (IHEs) by relevant theme and include corresponding criticisms of implementation and findings of prior content analyses.

#### **The Development of Sexual Misconduct Policy in Higher Education**

Laws, regulations, and agency guidance, as well as the legal interpretation of such elements, determine the baseline content of sexual misconduct policies at a vast majority of the IHEs throughout the country. Thus, the historical development of Title IX through Congressional action, federal agencies, and the courts is important to one's understanding of the current state of said policies. The following review of the progression over time of legislation, regulations, guidance, and court decisions serves to inform the present study by providing a basic understanding of the implementation of Title IX in regard to sexual misconduct policies at colleges and universities receiving Title IV federal funding. To note, this review is limited in its scope to aspects of Title IX-related legal mandates and agency guidance germane to the formation of sexual misconduct policies, specifically to published grievance processes at colleges and universities, with the understanding that numerous

components of an IHE's compliance with Title IX are required by coexisting laws, regulations, and guidance.

I first present the genesis and early implementation of Title IX, from the introduction of legislation in Congress to the initial regulations from the Department of Health, Education, and Welfare (HEW) and the inaugural guidance from the Department of Education's Office for Civil Rights (OCR). Next is a discussion of the development of Title IX through Congress and the Supreme Court of the United States. I then outline OCR's oversight of Title IX implementation in the late 1990's through 2011, including its regulatory guidance and framework for specific policy obligations, followed by a summary of the Campus Sexual Violence Elimination Act (SaVE Act) and its effect on sexual misconduct policies at IHEs. I then further discuss OCR's guidance in regard to its 2014 *Questions and Answers on Title IX and Sexual Violence* and 2017 *Q&A on Campus Sexual Violence*.

### **The Genesis and Early Implementation of Title IX (1970-1981)**

From its Congressional debut in 1970 through its interpretation by federal agencies into the late 1980s, the development of Title IX encountered multi-faceted resistance in the form of political agendas and court decisions limiting the scope of the law (Samuels & Galles, 2003; Staurowsky, 2003). This resistance, coupled with an initial lack of authority afforded to OCR regarding Title IX (Talbert, 2015), made for fairly tumultuous beginnings for the law and its implementation.

**Introducing legislation.** The legislation that would in time become known as Title IX was initially meant to address what a growing number of women in the 1960s felt was discrimination on the basis of sex in educational employment (Lieberwitz et al., 2016). One such woman, Bernice Sandler, a part-time professor at the University of Maryland College

Park, is credited with having had a significant influence on the genesis of Title IX, as she filed a formal complaint in 1969 with the U.S. Department of Labor after being denied one of seven full-time positions at the university, despite possessing the necessary qualifications (Kline, 2012). Sandler was told she came on “too strong for a woman” (Kline, 2012, para. 5). Within a short time, after having researched discrimination against women at universities across the country, Sandler filed complaints against over 250 additional IHEs which led to seven days of hearings by a Congressional committee on the employment of women in education, led by Rep. Edith Green (D-OR) (Kline, 2012).

Following these hearings, Rep. Green, in her capacity as chairwoman of the House committee overseeing higher education, drafted a bill in 1970 that in part prohibited sex discrimination against women at post-secondary institutions (Kline, 2012; Lieberwitz et al., 2016). This portion of the original version of the Education Amendments of 1972 was meant to amend Title VI and Title VII of the Civil Rights Act of 1964 and to extend protections afforded by the Equal Pay Act to cover administrators, professionals, and executives employed in higher education (Lieberwitz et al., 2016; Valentin, 1997). However, due in part to a fear held by African American leaders and their supporters that amending the Civil Rights Act would weaken its power to curb discrimination, Rep. Green altered course to propose a piece of legislation separate from the 1964 Act (Lieberwitz et al., 2016; Valentin, 1997). This bill, reconciled with the Senate version penned by Sen. Birch Bayh (D-IN) and Rep. Patsy Mink (D-HI), would ultimately become known as Title IX and was applicable to discrimination against women in all educational capacities, including employment, admissions, financial aid, and collegiate athletics (Kline, 2012; Lieberwitz et al., 2016; Salomone, 1986; Valentin, 1997;). On June 23, 1972, President Richard Nixon signed the bill



into law, and under the newly minted Title IX, any college or university receiving Title IV federal financial aid under the Higher Education Act of 1965 (P.L. 89-329), could not discriminate on the basis of sex in any educational program or activity (Valentin, 1997).

**Initial regulations.** The Department of Health, Education, and Welfare (HEW) took nearly three years to offer up specific regulations to implement Title IX (Valentin, 1997). The resulting 1975 regulations, which at the time were required to be approved by Congress, focused on institutional compliance with Title IX in regard to sex discrimination but provided no guidance as to grievance processes or procedures nor the due process rights of Respondents in such cases (34 C.F.R. § 106). Despite proposed legislation in Congress meant to limit the scope of Title IX, as well as the “palpable resistance” evidenced by the thousands of responses received by the HEW during the public comment period, the regulations as initially proposed became effective on July 21, 1975 (Staurowsky, 2003, p. 101; 34 C.F.R. § 106). Execution of these Title IX regulations was required to be completed in regard to colleges and universities by July 21, 1978 (Durrant, 1992). By the time Title IX was fully integrated, OCR, tasked with ensuring its proper implementation, had received approximately 100 complaints against more than 50 IHEs (Espy, 1998).

**Inaugural guidance.** In 1981, OCR issued its first guidance on Title IX in the form of a policy memorandum expanding the application of the law to cover sexual harassment, defined as:

Verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient [of Title IV federal funds] that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX. (Lieberwitz et al., 2016, p. 74)

However, as OCR's memo was not considered to be legally binding, it failed to provide firm legal ground for students alleging sex discrimination in the form of sexual harassment as actionable under Title IX (Dziech & Hawkins, 2012).

Even though the implementation of Title IX had been addressed by HEW and OCR, at least in a cursory fashion, there was little concrete guidance on the procedures to be used by colleges and universities upon receiving sexual misconduct complaints, and zero direction as to the due process rights of Respondents in these cases.

### **Further Developing Title IX through Congress and the U.S. Supreme Court (1984-1992)**

Just three years after the release of the 1981 OCR memo, the U.S. Supreme Court, in *Grove City v. Bell* (1984), severely limited the scope of Title IX to only those programs or departments directly receiving federal funding, i.e., the financial aid and admissions offices, thus relieving IHEs from the requirement to prevent institution-wide discrimination on the basis of sex (Lieberwitz et al., 2016). At the same time, other courts attempted to limit the protections afforded to individuals under Title IX. A chief example is the decision in *Lipsett v. Rivé-Mora* (1987). In *Lipsett* (1987), the District Court of Puerto Rico found that a female intern in a residency program at the University of Puerto Rico's School of Medicine who was subjected to "flattering remarks" from male supervisors that stemmed from "romantic attraction" rather than a "desire to discriminate because of gender" did not have a cause of action under Title IX as the behavior did not amount to sex discrimination in the form of sexual harassment (669 F. Supp. 1188 (D.P.R. 1987)).

In response to these court decisions, the jurisdiction and application of Title IX were expanded through Congressional action in 1987 and 1992, as well as a U.S. Supreme Court decision in *Franklin v. Gwinnett County Public Schools* (1992). First, to reverse the *Grove*

*City* holding and reestablish Title IX jurisdiction as applicable to IHEs in their entirety, Congress passed the Civil Rights Restoration Act (CRRA) of 1987 (P.L. 100-259), in spite of a veto by then-President Ronald Reagan (Lieberwitz et al., 2016; Villalobos, 1990). The CRRA, sponsored by Sen. Edward Kennedy (D-MA), clarified that Title IX was meant to prohibit institution-wide discrimination when any part of an IHE receives federal financial aid (Lieberwitz et al., 2016). Then in February 1992, the U.S. Supreme Court handed down a decision applicable to all schools receiving federal financial aid in *Franklin v. Gwinnett County Public Schools* (1992). The petitioner in *Franklin* (1992), a high school student, argued that sexual harassment in the form of “sexually-oriented conversations,” forcible kissing, and “coercive intercourse,” perpetrated against her by her coach, of which her high school was aware and had failed to address for over a year, constituted a form of sex discrimination under Title IX; the U.S. Supreme Court agreed (503 U.S. 60 (1992)). The *Franklin* (1992) decision was important to the future of Title IX as it established sexual harassment as a form of prohibited sex discrimination in educational settings. Further, by allowing monetary damages in suits brought against schools, the U.S. Supreme Court “provided the powerful deterrent of monetary liability to encourage educational institutions to address sex discrimination more effectively” (Vargyas, 1993, p. 373).

Soon thereafter, in July of 1992, Congress passed the Higher Education Amendments of 1992 (P.L. 102-325), amending the Higher Education Act of 1965 (P.L. 89-329), which addressed specific content of sexual misconduct policies under Title IX for the first time. The 1992 Amendments required IHEs to provide a statement of policy regarding sexual assault prevention programming and grievance procedures with specific areas to be addressed, including available sanctions for policy violations, how and to whom a sex offense should be

reported, and the importance of preserving evidence (P.L. 102-325). In addition, the 1992 Amendments provided a Campus Sexual Assault Victims' Bill of Rights, which required an institution's policy to outline the rights of student Complainants as noted in the Amendments and to notify said Complainants (but not Respondents) of available interim measures in the form of support services (P.L. 102-325). The sole mention of the rights of Respondents was to indicate that a student Complainant should be allowed to have the same rights as said Respondent during any adjudication proceedings in regard to legal assistance, the presence of others, and notification of the outcome of said proceedings; there was no mention of any due process that should be afforded to Respondents, an omission especially significant to the present study (P.L. 102-325).

Taken as a whole, these requirements as outlined under the 1992 Amendments would form the skeleton of today's sexual misconduct policies at IHEs. However, despite the aforementioned legislation, regulations, guidance, and court decisions, schools were not provided with much more than a minimal level of instruction, thus creating the need for OCR to issue further guidance, provided in 1997.

### **OCR Promulgates Regulatory Guidance (1997)**

In 1997, 16 years after OCR's initial policy memorandum on Title IX and sexual harassment, the agency issued guidance on the law's application to student complaints of sexual harassment reported to any public or private educational institution, including colleges and universities, and unlike the 1981 memo, this guidance held the force of law as codified federal regulations (62 Fed. Reg. 12034). The regulations stated that conduct of a sexual nature creating a hostile environment for a student, i.e., sexual harassment rising to the level of being "sufficiently severe, persistent, or pervasive" which limits a student's ability to

participate in educational programs and activities, is prohibited under Title IX (62 Fed. Reg. 12034). The guidance also outlined a school's liability in cases of sexual harassment by its employees versus students or third parties; the need for the sexual conduct to be “unwelcome;” an explanation of the terms “severe,” “persistent,” and “pervasive;” and the requirement for a school to take “prompt and appropriate action” in cases of sexual harassment (62 Fed. Reg. 12034).

Though OCR released various guidance documents on Title IX and sexual harassment in the years between 1997 and 2011, most notably the 2001 *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, germane to this study, none specifically addressed policies or procedures for handling complaints of sexual misconduct in any substantial way, especially in regard to due process for Respondents.

### **OCR Provides Framework for Specific Policy Obligations (2011)**

On April 4, 2011, OCR issued an 18-page “Dear Colleague” Letter (DCL), meant to clarify and supplement prior guidance on Title IX requirements as they pertained to sexual harassment and sexual violence at colleges and universities (OCR, 2011). While this document did not transition from a guide to a federal regulation, it was said to have the force of law through the President’s Office of Management and Budget, specifically the OMB’s *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (OCR, 2011; Schow, 2015).

Various obligations of post-secondary institutions in regard to sexual misconduct investigation and adjudication processes were noted in the Letter, and the document provided IHEs with an idea of how OCR would administratively enforce Title IX when the agency

received complaints from students or initiated its own compliance reviews (OCR, 2011). Prior to 2011, no previous OCR guidance, Congressional action, or court decision had required an IHE to publish a policy on the handling of sexual misconduct complaints, a situation that would not be remedied by the Letter. However, although the 2011 DCL did not explicitly require that a sexual misconduct “policy” was to be crafted, the understanding among Title IX practitioners was that the obligations listed in the Letter were to form the substantive basis of an institution’s published procedures (Atkins, 2013; Foerster & Keller, 2012). These procedures, then, would be considered an IHE’s policy on handling the investigation and adjudication of sexual misconduct complaints.

The obligations noted in the 2011 DCL covered a variety of issues, from the more basic aspects of a sexual misconduct policy to the more nuanced. The following paragraphs discuss the obligations as they are relevant to the present study, with a focus on those that speak to the due process rights of Respondents, including the anonymity of an accuser, interim remedies that may be considered sanctions, the requirement of notice, the right to be heard and to present evidence, the impartiality of any decision-maker(s), the right to cross-examine, the standard of evidence, the right to appeal a decision, and the possibility of double jeopardy.

**Anonymous reporting.** Though the Letter did not specifically note that an IHE could or should accept anonymous reports of sexual misconduct, many colleges and universities interpreted the requirement to act upon notice to mean that an IHE was to accept reports made by any party, even those who did not want to be identified (Kateman, 2016; OCR, 2011). However, in considering due process, the acceptance of an anonymous report by an IHE may come at the expense of allowing the accused Respondent to know the identity of

their accuser. This becomes especially important in ensuring due process for Respondents, as they may be unable to determine whether the motive for the report was malicious or if the reporting party had made prior false accusations against others; false reporting may lead to “life-altering consequences” (Kirkpatrick, 2016, p. 167) such as damage to one’s reputation resulting in limited educational and employment opportunities (FIRE, 2018a).

**Complainant confidentiality and interim measures.** Per the 2011 DCL, in instances where the Complainant did not want to initiate an investigation or wanted their “name or other identifiable information” to be kept confidential, i.e., not disclosed to the Respondent, an IHE had the option (and often the obligation<sup>5</sup>) to take action affecting the Respondent without first determining whether a policy violation had occurred. This became an issue of neutrality and equity, as the institution’s response may fail to respect the due process rights of the Respondent in favor of providing support to the complaining party (OCR, 2011; Yoffe, 2017). For example, an institution could use its discretion in determining whether the course or work schedule(s) of a Respondent should be modified so the Complainant would not be required to attend classes or work with the Respondent, or the Respondent could be relocated to a separate residence hall from the Complainant or banned from campus housing altogether, and all without (1) having disclosed the name of the Complainant to the Respondent, or (2) having made a finding of a sexual misconduct policy violation (OCR, 2011; Yoffe, 2017). These “interim steps” or measures that may be put into place prior to the conclusion of any grievance process, were meant to “protect the Complainant as necessary,” and IHEs were

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<sup>5</sup> As first addressed in the 2001 Guidance and again in the 2011 DCL, IHEs were to evaluate a Complainant’s request for confidentiality against a number of factors, including the seriousness of the alleged conduct, the age of the Complainant, and whether there were prior complaints made against the same Respondent. If, after consideration of these factors, an IHE determined that in order to meet its “responsibility to provide a safe and nondiscriminatory environment for all students” (OCR, 2011, p. 5), an investigation was warranted, the IHE could conduct such an investigation without the consent of the Complainant.

warned to take care to “minimize the burden” placed on the Complainant whenever possible, thus seemingly placing the brunt of any inconvenience on the Respondent before the conclusion of any investigation (OCR, 2011, pp. 15-16).

**Notice.** In cases where an investigation was requested by the Complainant or deemed to be necessary by the IHE, formal notice was to be provided to the Respondent upon initiation of the grievance process, a key aspect of due process for an individual accused of a policy violation with serious and often detrimental consequences (Kirkpatrick, 2016; OCR, 2011).

**Equity and impartiality.** The 2011 DCL also noted that grievance procedures were expected to be equitable to both the Complainant and the Respondent, and each party was to be allowed to present witnesses and evidence as applicable (OCR, 2011). This “opportunity to be heard” is considered to be one of the most vital aspects of due process, in conjunction with the provision of notice to the accused (Kirkpatrick, 2016). The Letter further addressed due process in stating that the “fact-finders,” i.e., the investigators, and the “decision-makers” (OCR, 2011, p. 12), or the student conduct officers or hearing panel members, for example, were to be impartial and not act as advocates for either party, thereby providing for a neutral and equitable grievance process (FIRE, 2018a).

**Cross-examination.** The 2011 DCL also strongly discouraged schools from allowing either party to cross-examine or question the other party during a hearing (OCR, 2011). Though the due process right of an accused individual to cross-examine witnesses is guaranteed by the Confrontation Clause of the Sixth Amendment of the U.S. Constitution, said right only applies to criminal action and not to grievance processes at colleges and universities (CampusClarity, 2014; *Dixon v. Alabama State Board of Education*, 1961; U.S.



Const. amend. VI). However, proponents of allowing a Respondent to cross-examine witnesses as part of the sexual misconduct grievance process, including the Complainant, argue that this right is “fundamental” in nature and is “essential to an accused’s ability to elicit unfavorable information...and to show that a witness is biased, prejudiced, or untrustworthy” (Bach, 2003, p. 20).

**Standard of evidence.** In regard to a final determination of a sexual misconduct policy violation, IHEs were to use a “preponderance” standard (OCR, 2011, p. 11), otherwise known as a “more likely than not” standard (Block, 2012, p. 67). Here, if and when an IHE determined that the evidence showed with just over 50% certainty that a Respondent violated school policy by perpetrating sexual misconduct against the Complainant, said Respondents were subject to the IHE’s applicable disciplinary procedures as determined by their institution’s policy (Bach, 2003; Block, 2012). Prior to 2011, many schools had been using a “clear and convincing” standard of evidence (Block, 2012, p. 67), but this higher standard was deemed by the U.S. Supreme Court to be inappropriate with regard to civil rights violations, interpreted by the courts and OCR to include sex discrimination under Title IX (Bach, 2003). Thus, the lesser “preponderance” was the appropriate standard to be used in complaints of sexual harassment and sexual violence at post-secondary institutions (Block, 2012). Opponents of the lower standard argue that because of the severity of the sanctions faced by Respondents alleged to have acted in violation of their IHE’s sexual misconduct policy, due process calls for a higher degree of proof in order to support a fair and equitable grievance process (Bach, 2003; Edwards, 2015). Yale professor Jed Rubenfeld, in an opinion piece written for *The New York Times*, went so far as to state his belief that “mistaken findings” of responsibility for sexual misconduct policy violations are “high possibilities”

(Edwards, 2015, p. 130) because of the use of the lower “preponderance” standard by college and universities.

**Appeal rights.** The 2011 DCL did not require an IHE to allow the appeal of a decision in a sexual misconduct case by a Respondent, despite the fact that the right to appeal is considered by many to be a vital “characteristic” of due process (Baker, 2017, p. 536; OCR, 2011). Even though the U.S. Supreme Court has thus far declined to recognize an individual’s right to appeal as being integral to due process, proponents of said right have argued that it is necessary to safeguard one’s individual rights, as it is “meant to protect the unusual or rare case in which justice has been denied” (Robertson, 2013, p. 1221). As elucidated in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, one such individual right is the right to one’s property, under which the U.S. Supreme Court held that students have a “legitimate entitlement to a public education”<sup>6</sup> (*Goss v. Lopez*, 1975, p. 565). Though the U.S. Supreme Court has not specifically extended this protection to students at college and universities in regard to the adjudication of sexual misconduct policy violations, with sanctions as serious as suspension and expulsion being possible in these cases, the right to an appeal seems to be an essential due process right of Respondents.

Though the Letter did not require the option of an appeal be provided, it did recommend that if there was an appeals process in place, both parties be provided the opportunity to challenge the decision of the adjudicator (OCR, 2011). Under this directive, if a Respondent is allowed to appeal the sanctioning decision as being too harsh, a Complainant must then be given the opportunity to argue that the sanction was too lenient (Weizel, 2012).

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<sup>6</sup> Public educational institutions have been considered by the courts to be “instruments of the state” and thus must afford greater due process rights to students as compared to private institutions, where these rights tend to be more limited (“An Overview,” 1970, p. 795).

This Complainant right of appeal has been defended as creating a more “equitable” process, but those opposing the right argue that it is “victim-centered” (Henrick, 2013, p. 66) and could create a situation where the Respondent was made to defend against the same allegations more than once. Though the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution prohibits the retrial of a person after an acquittal or a conviction in a criminal case, IHEs and their student conduct processes have thus far been considered exempt from this due process provision (Judy, 2013; Kloster, 2012). To note, the plaintiff, or the aggrieved party, in a civil lawsuit may file an appeal of the court’s decision, similar to the Complainant’s right to appeal the resolution of a Title IX complaint.

Ultimately, in an attempt to address Complainants’ allegations of sexual misconduct, which had in the years leading up to 2011 been “swept under the rug” by “callous universit[ies] trying to ease tensions and protect [their] reputation[s]” (Garrett & Scott, 2017, para. 3), critics argued that post-secondary institutions, in following OCR’s 2011 DCL, shifted toward grievance processes that favored the Complainant at the detriment of the Respondent, especially in consideration of the aforementioned due process rights of the accused. The present study seeks to determine whether such criticisms hold true, as a majority of the sexual misconduct policies at IHEs throughout the country were written in deference to the obligations of the 2011 DCL.

### **The Campus Sexual Violence Elimination Act (2013)**

The appearance of partiality toward Complainants continued with the passage of the Campus Sexual Violence Elimination Act in 2013 (P.L. 13-4, Sec. 304). Some, though not all, of the provisions in the 2011 DCL were codified into law in 2013, when the Violence Against Women Reauthorization Act (VAWA) (P.L. 13-4) was enacted by Congress (Duncan,

2014); VAWA included a provision entitled the Campus Sexual Violence Elimination Act (SaVE Act) (P.L. 13-4, Sec. 304). One of the main purposes of the SaVE Act in regard to campus sexual misconduct was to clarify or modify existing procedural requirements and also to create new obligations, necessitating policy revisions for many post-secondary institutions (Marshall, 2014).

Some of these clarifications, modifications, and new obligations dealt with elements of Respondents' procedural due process rights, including the standard of evidence and appeals rights. Ultimately, due to pressure from students' rights groups and others, the mandates to use a "preponderance" standard and to offer appeals rights to both parties were removed from the final version, i.e., the SaVE Act requires that an IHE's policy must provide a statement of the applicable standard of evidence to be used in investigations, but there is no mention of what said standard should be, nor is the right of appeal guaranteed to either party (Duncan, 2014; Marshall, 2014; P.L. 13-4, Sec. 304). Despite the SaVE Act's silence on a required standard of evidence, and the 2011 DCL lacking the authority of law or regulation, many colleges and universities continued using "preponderance," even as critics argued of its likelihood to end in false decisions to the detriment of Respondents (Chmielewski, 2013; Edwards, 2015). Further, IHEs offering appeal rights to Complainants were urged by industry best practices to continue to do so, ignoring the due process tenet against double jeopardy by exposing the Respondent to the possibility of being required to defend themselves twice for the same policy violation, as noted above (Henrick, 2013; Lewis, Schuster, Sokolow, & Swinton, 2013).

Though the SaVE Act did not call for any particular standard of evidence or the right of appeal, other due process-related requirements pertinent to this study were explicitly

stated: (1) notice must be provided to Respondents regarding “sanctions or protective measures” that may result from a finding of a policy violation, with this notice being published in an IHE’s sexual misconduct policy, (2) colleges and universities must afford the Complainant and Respondent the opportunity to have a support person or advisor of their choice present at any adjudication proceedings, and (3) when a decision has been made, the Complainant and Respondent must be notified of the outcomes and any appeals process “simultaneously” and “in writing” (American Council on Education, 2014, pp. 2-3; P.L. 13-4, Sec. 304). Even with these additional requirements in place, there remained a number of loose ends in regard to the handling of complaints of sexual misconduct at colleges and universities, and in response, OCR issued further guidance in April 2014 (OCR, 2014).

#### **OCR Further Clarifies Policy Obligations (2014)**

As a response to requests for “technical assistance” in interpreting Title IX, OCR issued what was to be a document of clarification, entitled *Questions and Answers on Title IX and Sexual Violence* in April 2014; as with the 2011 DCL, this document did not carry with it the weight of law or regulation. The 2014 Questions and Answers provided guidance on various topics, including those related to due process such as confidentiality of the Complainant, implementation of interim measures prior to a finding of a policy violation, and procedural requirements under Title IX, i.e., the right to an appeal, to have an advisor, to confront adverse witnesses and evidence, and to be heard (OCR, 2014).

**Complainant confidentiality and interim measures.** Confidentiality of the Complainant was addressed in greater detail in the 2014 Questions and Answers as compared to the 2011 DCL (OCR, 2014). OCR noted that a Respondent had a right to review any information about the allegations if such information is maintained as an educational record,

and in this instance, the IHE must either redact the Complainant's name in the case of written documentation or if providing verbal details to a Respondent, must refrain from sharing the Complainant's identity (OCR, 2014).

The 2014 Questions and Answers also encouraged colleges and universities to address allegations of sexual misconduct by utilizing interim measures, even in cases where an investigation was not conducted and without the release of the Complainant's name to the Respondent. For instance, institutions could choose to "counsel" Respondents and possibly subject them to changes in living arrangements or class schedules (OCR, 2014) without any due process, a particularly germane concern of the present study. The 2014 Questions and Answers went so far as to instruct IHE's "not [to] wait to take steps to protect its students" in order to avoid further depriving Complainants of educational opportunities by "taking interim steps before the final outcome of any investigation" (OCR, 2014, p. 3) which may include relocating the on-campus residence of a Respondent or modifying a Respondent's class or work schedules. As with the 2011 DCL, OCR again seemed to be focusing on an IHE's responsibility to Complainants without taking into consideration the rights of Respondents; the 2014 Questions and Answers reiterated the importance of providing the Complainant support in the form of interim measures with an urging to create the least burden on the Complainant, and with no mention of possible interim measures that might be afforded to the Respondent (OCR, 2014; Yoffe, 2017).

**Appeals rights.** The 2014 Questions and Answers also encouraged colleges and universities to allow "appeals of hearing results [by both parties] where procedural error or previously unavailable relevant evidence could significantly impact the outcome, or where a sanction is substantially disproportionate to the findings" (Husch Blackwell, 2014, para. 4),

again in contrast with the idea of a Respondent's due process right against double jeopardy (Carle, 2016).

**Advisors.** If the IHE allowed one party to have an advisor or support person, including an attorney, be present and/or actively participate during any portion of the grievance process, the other party was to be given the same opportunity (OCR, 2014). Though the Sixth Amendment of the U.S. Constitution guarantees a right to counsel only in criminal trials, allowing an attorney to be present and offer advice is considered by Respondents' advocates to be integral to due process (FIRE, 2018a).

**Right of confrontation.** The right to confront an accuser and to question witnesses is also guaranteed by the Sixth Amendment but is again only applicable to criminal proceedings, and any due process right of confrontation through cross-examination has not been found to be guaranteed in student conduct hearings (CampusClarity, 2014; FIRE, 2018a). However, the 2014 Questions and Answers stated that should one party be given the chance to cross-examine witnesses, including the other party, during adjudication proceedings, then both the Complainant and Respondent must be afforded such an opportunity (OCR, 2014). OCR also stated that schools could choose to allow questions to be submitted by one party to the adjudicator, screened for relevance and appropriateness, and then presented to the other party, so long as both the Complainant and Respondent were allowed to do so (OCR, 2014). Notably, access to any information used to determine whether the Respondent violated the IHE's sexual misconduct policy is an important aspect of the right of confrontation, as the Respondent should be aware of and be allowed to address any testimony or evidence that may be presented against them. OCR does not guarantee this right, but should a college or university allow access by either party to information that may

be used during adjudication, including an investigation report or other evidentiary information, it must do so with both parties (OCR, 2014).

**Opportunity to be heard.** Related to the right of confrontation is the opportunity to be heard, including the option to present one's own testimony, evidence, and witnesses, which is guaranteed under the Due Process Clause of the Fifth and Fourteenth Amendments, and courts have generally agreed that the same right should be afforded to Respondents in student conduct cases where serious consequences could result, such as suspension or expulsion (*Dixon v. Alabama State Board of Education* (1961); *Goss v. Lopez* (1975)). OCR noted this right in guidance released in 2001, and the 2011 DCL and the 2014 Questions and Answers reiterated its importance (OCR, 2001; OCR, 2011; OCR, 2014). Equally of value is the right to be present; the Respondent should be given the opportunity to hear the testimony and evidence presented against them. The 2014 Questions and Answers also afforded both parties the right to be present for the entirety of an adjudication hearing, should either be given the option (OCR, 2014).

The 2014 Questions and Answers did more to encourage due process for Respondents than any previous OCR guidance or regulations, going so far as to state that "...schools must provide due process to the alleged perpetrator" (OCR, 2014, p. 12), but critics alleged Respondents' rights and those afforded to Complainants were still at a significant imbalance in sexual misconduct grievance processes (Hansen, 2017). To address these concerns, OCR issued guidance on September 22, 2017, rolling back the 2011 DCL and the 2014 Questions and Answers and implementing interim guidance on Title IX (OCR, 2017b).



### **Shifting Focus through OCR's Interim Q&A (2017)**

Early in her tenure as Secretary of Education, Betsy DeVos took a stance against OCR's prior sexual misconduct guidance in her agreement with a 2014 letter published by a group of Harvard law professors. Both DeVos and the professors contended that the 2011 DCL and 2014 Questions and Answers were issued without proper notice and a comment period allowing for public input, were "in no way required by Title IX law or regulation," (Bartholet et al., 2014, para. 4) and had "created a system that lacked basic elements of due process and failed to ensure fundamental fairness" (U.S. Department of Education, 2017b, para. 6). Thus, in September 2017, OCR released interim guidance for IHEs entitled *Q&A on Campus Sexual Misconduct*; this document rescinded both the 2011 DCL and the 2014 Questions and Answers, though provisions of the 2011 DCL that were enacted as part of the SaVE Act remained in force (OCR, 2017b). Per the 2017 Q&A, colleges and universities were to revert back to OCR's 2001 *Revised Sexual Harassment Guidance* but could update their sexual misconduct policies to reflect the information provided by the 2017 Q&A, as the interim guidance did "not add requirements to applicable law" (OCR, 2017a, p. 2; Hansen, 2017).

The 2017 Q&A noted several aspects of investigating and adjudicating sexual misconduct complaints related to the principles of due process, providing guidance to IHEs on the standard of evidence to be used, the appeals process, the implementation of interim measures, and the need for impartiality in the grievance process.

**Standard of evidence.** The 2017 Q&A allows post-secondary institutions to choose whether to continue to apply the "preponderance" standard, as was required by the 2011 DCL, or move to a "clear and convincing" standard, which sets a higher burden of proof for

the Complainant but is often considered more appropriate in cases where consequences can be severe, such as suspension and expulsion (American Council on Education, 2017; Bach, 2003; Edwards, 2015). As noted by Baker (2017), some consider “preponderance” to offer the Complainant an unfair advantage by requiring less evidence than would be necessary under a “clear and convincing” standard, with Baker (2017) arguing “...preponderance of the evidence makes convictions easier to reach” (p. 559). The court in *Doe v. University of Massachusetts-Amherst* (2015) remarked in a similar fashion, “...the choice of standard may tip the scale in favor of the Complainant in cases where testimony from both parties is credible” (p. 14).

**Appeals rights.** Under the 2017 Q&A, in a major change from the 2011 DCL, a school may decide to offer an appeal of the adjudication decision to only the Respondent, as opposed to requiring any appeal to be offered to both parties (OCR, 2011), thus eliminating the possibility of an institution requiring the Respondent to face the same charges more than once in a double jeopardy scenario (Kreighbaum, 2017).

**Interim measures.** The 2017 Q&A explicitly states that interim measures must not “favor one party over another” (OCR, 2017b, p. 3), which is in stark contrast to the 2011 DCL, which mentioned notifying the Complainant of their right to “avoid contact with the alleged perpetrator” and the need of the institution to take steps to “minimize the burden on the Complainant” when implementing interim measures (OCR, 2011, p. 15-16). When considering due process rights of a Respondent, the change is significant in that IHEs should not automatically require Respondents to be subjected to the burden of moving residences or modifying class or work schedules prior to any finding of responsibility, for instance. Additionally, IHEs are not to “make such measures available only to one party” (OCR,

2017b, p. 3), thus requiring colleges and universities to offer interim measures to Complainants and Respondents alike. Although the idea of “fundamental fairness” associated with due process under the Fourteenth Amendment typically applies only to the procedures used in a court of law (Meares, 2005, p. 106), rather than to adjacent aspects of an adjudication such as the provision of support measures, offering such measures to both parties is in line with providing due process to all.

**Impartiality.** The language of the 2011 DCL indicated the need for investigations and adjudications to be “adequate, reliable, and impartial” but did not mention the concepts of objectivity or fairness (OCR, 2011, p. 9). However, in the 2017 Q&A, there is a significantly greater focus on the impartiality, objectiveness, and fairness of an institution’s grievance processes; within the seven-page document, derivatives of these three terms are mentioned on 16 occasions (OCR, 2017b), whereas the 2011 DCL uses only the term impartial and only on four occasions within the text of the 19-page document (OCR, 2011). To satisfy due process, courts have long upheld the need in criminal trials for an impartial adjudicator operating under procedures that are fair and consider the evidence from a neutral, objective lens (Meares, 2005). Respondents should be entitled to the same allowances when complaints of sexual misconduct are investigated and adjudicated (American College of Trial Lawyers, 2017), as the consequences of these grievance processes may be nearly as dire. For example, if a student is suspended and does not return or is expelled outright, their potential for future employment will likely suffer, as would their ability to seek a graduate or professional degree.

At the heart of the present study is an effort to explore the current state of due process afforded to Respondents through a review of sexual misconduct policies at colleges and

universities. Having reviewed the legal landscape, the next section will provide a discussion of the principles of due process and their applicability to sexual misconduct grievance processes at IHEs, along with notable criticisms of these processes and the findings of prior research into the content of Title IX policies in relation to due process.

### **Due Process and Sexual Misconduct Policies at Colleges and Universities**

In response to the 2017 Q&A, many proponents of OCR’s prior guidance expressed concern regarding the heightened focus of the agency on due process for the “wrongfully accused” (Svrluga, 2017, para. 122). However, critics of the 2011 DCL and the 2014 Questions and Answers supported the shift in focus, with Robert Shibley, executive director of an organization focused on supporting accused students in conduct proceedings, stating his hope that future OCR guidance would continue to “serve the needs of victims while also respecting the rights of the accused” (FIRE, 2017a, para. 4). Interestingly enough, the 2001 *Revised Sexual Harassment Guidance* from OCR expressly stated the need to provide due process to Complainants and Respondents:

*Procedures that ensure the Title IX rights of the Complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions...steps to accord due process rights [should] not restrict or unnecessarily delay the protections provided...to the Complainant [emphasis added]. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment. (p. 111)*

Though the text of OCR’s 2001 Guidance would seem to balance the rights of both parties, a debate exists between the advocates of Complainants and those of Respondents.

Complainants’ advocacy groups, such as End Rape On Campus, the Victim Rights Law Center, and SurvJustice, have argued that colleges and universities do not go far enough to protect victims, despite an increased focus on encouraging reports of sexual misconduct and providing support services to Complainants (Rock, 2018; Sumter, 2017). A counter-

argument, shared by groups like FIRE, Save Our Sons, and Title IX for All, is that the Title IX enforcement practices of colleges and universities have placed priority on the considerations offered to Complainants in the investigation and adjudication of complaints of sexual misconduct, thereby negatively affecting the level of due process afforded to Respondents (American Association of University Professors, 2016; Joyce, 2017).

In my work as a Title IX practitioner, I have explored sexual misconduct policies at a number of IHEs, analyzed Respondents' lawsuits and supporting amicus briefs, examined OCR resolutions and peer-reviewed research, and read a host of news articles and opinion pieces published by mainstream media outlets, and in response, I would posit that there is a high likelihood that sexual misconduct policies at colleges and universities across the country are deficient in at least one aspect of due process. To explore this possibility, the following section discusses six major themes of due process and their applicability to IHEs' Title IX policies and discusses possible deficiencies under current iterations<sup>7</sup> of these policies at post-secondary institutions.

### **Due Process Deficiencies in Sexual Misconduct Policies**

In reviewing the aforementioned materials, I noted six due process-related themes that are of importance to sexual misconduct grievance processes and ultimately inform the creation of the coding instrument used in the present study: proper notice, the right to have an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness. Each of these themes will be addressed in turn below, with a note on the current state of OCR guidance in regard to each theme where applicable. Also

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<sup>7</sup> To note, many institutions have retained their sexual misconduct policies as drafted under the 2011 DCL and 2014 Questions and Answers despite updated guidance provided by OCR in the 2017 Q&A (Hansen, 2017).

discussed are the findings of the nine prior content analyses<sup>8</sup> of sexual misconduct policies as they correspond with each due process theme.<sup>9</sup>

**Proper notice.** Proper notice as a due process theme encompasses a significant number of subparts of IHEs' sexual misconduct policies as noted below.

*Of the complaint.* At public post-secondary institutions, due process requires notice of the allegations made against the Respondent, including at least a brief description of the conduct that led to the complaint; said notice must also alert the accused to the pending grievance process (Reilly, 2016; Wood & Wood, 1996). Implementing a minimum notification period, or providing timely notice to a Respondent of each step in the grievance process so as to allow them to prepare a sufficient defense, is also important to providing notice of the complaint under due process (Bach, 2003; Dutile, 2001), especially in cases that are “particularly complex” (Wood & Wood, 1996, p. 5).

*Notable criticisms.* A letter to state and federal lawmakers, post-secondary administrators, and OCR, penned by 26 law professors from colleges and universities throughout the country, criticized the implementation of Title IX at IHEs by noting that the provision of notice to Respondents of the charges lobbied against them was not standard practice during sexual misconduct grievance processes (Alexander et al., 2016).

*Prior research.* Karjane et al. (2002) conducted content analysis on materials that were considered to encompass the sexual misconduct policies of 817 IHEs and determined that Respondents were notified of the complaint by 62% of institutions and provided with

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<sup>8</sup> Iverson (2015) conducted a sexual misconduct policy content analysis to determine how said policies frame violence against women; as this analysis was unrelated to the procedural components of the grievance process, it was not included in the survey of prior research.

<sup>9</sup> No prior content analysis specifically focused on due process for Respondents; as such, not all aspects of the due process themes of the present study have corresponding findings from prior studies.

information regarding the allegations by a majority of these (Karjane et al., 2002). The U.S. Senate Subcommittee on Financial & Contracting Oversight (U.S. Senate Subcommittee) (2014) found that policies at 87% of colleges and universities required written notice of the allegations be provided to the Respondent prior to any adjudication of the complaint.

*Of grievance procedures.* Under the 2001 Guidance and the 2017 Q&A, colleges and universities are required to provide notice to the campus community of their “grievance procedures” (OCR, 2017b, p. 3), though neither guidance document elaborates to much degree on what should be included and how detailed the procedures ought to be, other than to note in the 2001 Guidance that they should be “strong” and “effective” to alert students that the IHE “does not tolerate sexual harassment” or “sex discrimination” (OCR, 2001, p. iii, 14). However, notice of grievance procedures should, at minimum, include a list of Respondents’ rights, the standard of evidence used and the definition of this standard, and the type(s) of adjudication available, i.e., a single adjudicator or a hearing panel.

*Timeframes.* As part of the published grievance procedures, the 2001 Guidance requires an IHE to designate “reasonably prompt timeframes” (p. 20) for the investigation and adjudication of complaints based upon the “complexity of the investigation and the severity and extent of the harassment” (p. 20).

*Prior research.* Karjane et al. (2002) found that only 46% of the 817 policies analyzed included disciplinary procedures. Richards (2016), in updating the research of Karjane et al. (2002), found that 79% of policies (n = 820) included procedures for their institutions’ grievance processes. Regarding the rights of Respondents, the U.S. Senate Subcommittee (2014) noted that 92% of policies required notice of such rights be provided prior to any adjudication. As to notice regarding the standard of evidence, Karjane et al.

(2002) and the U.S. Senate Subcommittee (2014) found that the evidentiary standard used varied among the IHEs in their respective samples, from the lower threshold of “preponderance” to the higher standard of “beyond a reasonable doubt,” with a majority of colleges and universities employing a “preponderance” standard. Finally, the U.S. Senate Subcommittee (2014) determined that most colleges and universities in their sample indicated the type of adjudication available in complaints of sexual misconduct, while Karjane et al. (2002) found that 46% of institutions provided a written description of their hearing process itself when this form of adjudication was available.

***Of conduct jurisdiction.*** Schools are required to provide notice to the campus community of the types of conduct that are covered under the jurisdiction of the policy, i.e., “what constitutes sexual harassment” (OCR, 2001, p. 19) and to whom the policy applies. According to Bach (2003), “Institutions owe students a duty to inform them of the actions for which they will be held accountable,” and ideally, a policy will not be “overly broad” but instead will “put students on notice of the conduct expected of them” (p. 4). Thus, to satisfy due process, an IHE’s policy should include, at minimum, a list of the types of behaviors that may lead to a sexual misconduct complaint (Association for Student Conduct Administration, 2014).

A policy should also define each behavior adequately to prevent confusion regarding the school’s meaning of the terminology used (Association for Student Conduct Administration, 2014). Not only should an IHE list and define the behaviors constituting sexual misconduct, but the policy need also explicitly define “consent” in order to provide the Respondent with an understanding of what acts, when non-consensual, may amount to a violation of the institution’s Title IX policy (Rudovsky et al., 2015).



*Notable criticisms.* Sixteen professors at the University of Pennsylvania Law School, in an open letter widely reproduced online, criticized the lack of “clear rules” in regard to definitions of prohibited conduct and “valid consent,” stating that “there are too often troubling ambiguities” leaving students “vulnerable to sometimes unpredictable, after-the-fact assessments of their behavior” (Rudovsky et al., 2015, p. 1). Additionally, a group of faculty from Harvard Law School disparaged the adoption of excessively broad policy definitions of sexual misconduct within sexual misconduct policies as being inappropriate under due process (Bartholet et al., 2017).

*Prior research.* Potter, Krider, and McMahon (2000) found that only 25% of their sample noted the specific conduct covered by the policy, and Karjane et al. (2002) determined that one-third used only generic terminology to describe the behaviors prohibited by their policies. Murphy (2011) found that all seven of the IHEs in his sample utilized some form of specific terminology when defining sexual assault, but the terms were inconsistent among the schools studied. In the study by Beyer (2015), 48% of the sample provided fewer than five definitions of conduct under the jurisdiction of the policy.

All seven schools in the study by Murphy (2011) included a definition of consent and some form of discussion on the relationship between alcohol consumption and non-consent. Richards et al. (2017) determined that the consent policies of 62% of their sample were “affirmative consent” policies, i.e., those that require “the person initiating a sexual encounter receive a yes (verbal or otherwise) from the other party or parties for the sexual contact to be consensual, and that the consent be ongoing” (p. 110). Graham et al. (2017) found that of the 100 policies in their sample, the most encompassing definition of consent

listed 27 aspects of behavior illustrating incapacitation and thus the inability to consent, whereas the least comprehensive policy provided only one concept of consent.

***Of physical jurisdiction.*** Proper notice also entails alerting the campus community to the physical jurisdiction of the school’s sexual misconduct policy. In *Davis v. Monroe County Board of Education* (1999), the U.S. Supreme Court held that the physical jurisdiction of a school under Title IX may be limited “based on the recipient's degree of control over the harasser and the environment in which the harassment occurs” (p. 644). The 2017 Q&A provides additional guidance, stating that colleges and universities are obligated to address a “hostile environment that occurs on campus even if it relates to off-campus activities” (p. 1). In response to these rather vague directives, some policies restrict an IHE’s physical jurisdiction to conduct occurring within the confines of the main campus or property owned or maintained by the institution, while other policies allow for more extensive coverage beyond the property of the college or university.

***Of the final disposition.*** Per the 2001 Guidance, proper notice requires providing the parties with the final disposition, or “the outcome of the complaint” (p. 20). Under the 2017 Q&A, OCR also requires IHEs to furnish “simultaneous written notification” to both parties of “final decision by the institution; any sanctions imposed by the institution; and the rationale for the result and the sanctions” when handling complaints of sexual assault (p. 6). When the allegations are covered under Title IX but unrelated to sexual assault, such as is the case with sexual harassment creating a hostile environment, the 2017 Q&A specifically limits the information released to the Complainant to comply with the FERPA rights of the Respondent, which is also expected under the 2001 Guidance. In these instances, notice of the outcome should include only the final decision and the sanctions imposed on the

Respondent that “directly relate” to the Complainant, but the Respondent is still entitled to notice of any decision(s) and sanction(s) and the rationale for both (OCR, 2017b, p. 6).

*Prior research.* Of the 817 policies reviewed by Karjane et al. (2002), one-third failed to mention providing the outcome of the complaint to Respondents. However, more recent content analyses found that a majority of IHEs required both parties to be informed of the final disposition of the complaint (Richards, 2016; U.S. Senate Subcommittee, 2014). As to sanctions, Potter et al. (2000) found that 56% of their sample listed within their policies institutional sanctions or criminal penalties used as disciplinary measures. Murphy (2011) found that only one of seven IHEs in his study provided possible sanctions.

*Of appeals procedures.* IHEs are required by the 2001 Guidance and the 2017 Q&A to provide notice of any appeals procedures, when available; the 2017 Q&A also requires notification to both parties of any changes in the result of the appeal, where applicable.

*Prior research.* Karjane et al. (2002) found that of the 509 IHEs with an appeals process, over half included a written description of the process in their policies.

*Proper notice and the present study.* The present study seeks to narrow or fill the gaps in the research that remain in regard to whether IHEs provide for proper notice within their sexual misconduct policies. As such, the coding instrument created for the present study contains questions and corresponding answers meant to allow for a more thorough examination of notice as it pertains to (1) the complaint, (2) grievance procedures, (3) conduct jurisdiction, (4) physical jurisdiction, (5) the final disposition, and (6) appeals procedures.

**Right to an advisor.** To satisfy due process, a Respondent should be allowed the support of an advisor, including an attorney, during the grievance process (American College

of Trial Lawyers, 2017); this right is guaranteed by the Campus Sexual Violence Elimination (SaVE) Act in regard to complaints of sexual misconduct (P.L. 13-4, Sec. 304). As for OCR guidance, the 2001 DCL is silent on this issue, but the 2017 Q&A states that an institution must not limit a party's choice of advisor or prevent the Complainant or Respondent from having said advisor present at any meetings or proceedings related to the grievance process.

***Active participation.*** The courts have not supported the idea that due process requires institutions to allow the active participation of an attorney in the grievance process, i.e., providing representation to the Respondent as one would in a court of law. Additionally, under the 2017 Q&A, an IHE may restrict the extent to which an advisor/attorney participates in the grievance process, as long as the restrictions apply to both parties' advisors.

***Notable criticisms.*** According to Johnson (2016), the "denial of meaningful legal representation" is ultimately a "denial of due process," making it "much easier to 'convict' an accused student" (p. 8). Similarly, in a 2016 report prepared in part by the Committee on Women in the Academic Profession for the American Association of University Professors, the authors argued that Respondents have a due process right to have an attorney as an advisor in a "full representative capacity" (p. 79).

***Prior research.*** Karjane et al. (2002) found 37% of the policies reviewed noted that both the Complainant and Respondent could have advisors or support persons present during the hearing, but the study did not mention whether these individuals were permitted to participate in the grievance process, whereas the analysis by the U.S. Senate Subcommittee (2014) found that 75% of IHEs' policies allowed Respondents and Complainants to have an advisor or attorney present.

***Right to an advisor and the present study.*** As is evidenced above, the right to an advisor, especially in regard to whether the advisor is allowed to participate in the grievance process, has not been a focus of prior content analyses. As such, the present study seeks to determine whether this principle of due process is addressed in current sexual misconduct policies of colleges and universities through use of a coding instrument that speaks to whether an institution allows (1) Respondents to have an advisor, (2) this advisor to be an attorney, and (3) active participation by this advisor in the grievance process.

**Opportunity to be heard.** The U.S. Supreme Court decided in *Goss v. Lopez* (1975) that at minimum, public institutions must provide Respondents an opportunity to be heard, in some manner, as to their standpoint on the evidence, but depending upon the grievance process utilized, an interview during an investigation may be the only chance for a Respondent to mount a defense, i.e., to be heard and to respond to opposing testimony and evidence. The 2001 Guidance stated that for an institution to provide an “adequate, reliable, and impartial investigation,” their procedures must include “the opportunity to present witnesses and other evidence” (p. 20); the 2017 Q&A reiterates this requirement in support of due process. However, due process necessitates a Respondent be given the opportunity to provide testimony, evidence, and witnesses in their own defense directly to an adjudicator prior to any punitive actions being taken by their institution.

***Notable criticisms.*** The Committee on Women in the Academic Profession for the American Association of University Professors (2016) argued that sexual misconduct policies at colleges and universities have allowed the erosion of due process by preventing Respondents from presenting evidence on their own behalf, and Alexander et al. (2016)

contend that Respondents involved in sexual misconduct grievance processes are often denied the opportunity to present evidence supporting the facts as they believe them to be.

***Prior research.*** The U.S. Senate Subcommittee (2014) found that 67% of IHEs allow Respondents to call witnesses to speak in their defense during the adjudication process.

***Opportunity to be heard and the present study.*** As no prior content analyses of sexual misconduct policies have examined a Respondent's opportunity to be heard, the present study will address this gap in the research by use of a coding instrument that includes questions and corresponding answers on whether IHEs provide Respondents with the opportunity to speak on their own behalf and to submit evidence and present witnesses in their own defense throughout the grievance process.

***Right of confrontation.*** To satisfy the right of confrontation, Respondents must be given the opportunity to question the Complainant and other witnesses, because cross-examination as a check on credibility is "fundamental" to due process (Bach, 2003, p. 20; American College of Trial Lawyers, 2017). While many victims' advocates argue that requiring a Complainant to subject themselves to questioning by the Respondent is "improperly traumatic" and causes them to possibly "relive the experience," Kirkpatrick (2016) rebuts this contention in that the argument "assumes the outcome (the truthfulness of the Complainant's words) without even giving the accused any semblance of an opportunity to challenge it" (p. 173). Additionally, some have suggested that the right to confront the Complainant in sexual misconduct complaints is a vital component of due process, especially considering that many times the ultimate decision is based on a "he-said, she-said" situation where the Respondent should be given the opportunity to cross-examine the Complainant to

“uncover biased, untruthful, incomplete, and inaccurate allegations” (McGowan, 2017, p. 1190).

***Direct questioning.*** Some courts have held that the right of the Respondent to confront their accuser must be provided as part of the grievance process, especially where the testimony of witnesses is integral to the findings of the adjudicator (*Dillon v. Pulaski County Special School District*, 2009), though the confrontation does not necessarily need to be in the form of direct questioning (*Doe v. University of Southern California*; 2016). However, Rudovsky et al. (2015) contend that any option other than direct questioning, such as the submission of questions to a hearing panel, is not “an adequate substitute for the far more informative and effective cross-examination” by a Respondent or their representative (p. 4). The 2001 Guidance provides no direction on the right of confrontation, but the 2017 Q&A states that when an institution’s sexual misconduct policy allows the questioning of one party by another, either directly or through indirect means, it must provide the same opportunity to both parties.

***Prior research.*** Karjane et al. (2002) determined that of the 817 policies analyzed, 324 stated a “possibility” of cross-examination (p. 115), though the study did not provide any further detail as to how this might be accomplished, i.e., direct questioning versus alternate methods such as the submission of questions to the adjudicator. Additionally, the U.S. Senate Subcommittee (2014) found that 9% of institutions do not compel Complainants to participate in the adjudication process, thereby eliminating the possibility of the Respondent directly questioning the Complainant.

***Confidentiality of Complainants.*** When institutions allow Complainants the option of remaining confidential after reporting a Respondent’s alleged act(s) of sexual misconduct,

i.e., the school does not release the name of the Complainant to the Respondent but opens an investigation and pursues adjudication, the right of confrontation is essentially denied.

Kirkpatrick (2016) argues that when Respondents are prevented from knowing the name of their accuser, they are unable to determine whether the complaint stems from a malevolent motive or was made by an individual known to manufacture false accusations, and when the consequences to the Respondent include damage to reputation, denial of the opportunity to earn a degree, and/or limiting future employment opportunities, a single unwarranted accusation can “devastate the life of the student [Respondent]” (p. 167). Though some may contend that Complainants “have little to no motivation to create untrue accusations” (Kirkpatrick, 2016, p. 173), the possible consequences justify the due process right of the Respondent to confront their accuser, thus requiring an institution to reveal the name of the Complainant to the Respondent. The 2001 Guidance states that a school is to “take all reasonable steps to investigate and respond” to reports of sexual misconduct, even when a Complainant does not want their name shared with the Respondent, but also acknowledges the possibility of false complaints and the resulting damage to a Respondent’s reputation.

*Prior research.* Several prior content analyses assessed policies to determine whether anonymous and/or confidential reporting was given as an option. Save the Karjane et al. (2002) study that found just 43% of IHEs allowed anonymous reporting, prior analyses determined that between 63-90% accepted reports from anonymous sources (Richards, 2016; Richards et al., 2017; U.S. Senate Subcommittee, 2014). All prior analyses that included information on confidential reporting found that at least 63% of colleges and universities had this as an option (Karjane et al., 2002; Richards, 2016; Richards et al., 2017), with one study



finding that 92% of institutions allowed confidential reports of sexual misconduct (U.S. Senate Subcommittee, 2014).

*Access to testimony and evidence.* Another aspect of the right of confrontation is the Respondent's right to access any testimony and evidence that is presented by the Complainant and/or used in the adjudication of a complaint in order to counter said testimony and evidence and mount a proper defense. Again in *Doe v. University of Southern California* (2016), the court determined that the Respondent was denied due process when he was not provided access to evidence that supported the accusations of the Complainant without first submitting a written request. The American Bar Association (2017) also supports a Respondent's due process right to access any investigation report and review any evidence, even if it is not considered relevant for those adjudicating the complaint. In *Doe v. Brandeis University* (2016), the court held that despite the adjudication of a sexual misconduct complaint not being a "criminal proceeding," a Respondent should not be required to defend himself in an "inquisitorial process" where he was not allowed to view the evidence until after the grievance process had concluded (p. 570). Further, the 2017 Q&A supports the right of a Respondent to "have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings" (p. 4).

*Notable criticisms.* Alexander et al. (2016) contend that many institutions deny Respondents "access to witnesses or potentially exculpatory evidence" (p. 4). Further, Bartholet et al. (2017) argue that procedures tend to be "overwhelmingly stacked against the accused" (p. 10) as sexual misconduct policies often fail to provide the Respondent any indication of the evidence used to make a decision, thereby preventing the accused from countering opposing evidence.

*Prior research.* The U.S. Senate Subcommittee (2014) found that 86% of IHEs in their sample allowed the Respondent to be present during a hearing; though not specifically noted in this study, it would follow that the Respondent was then privy to the witnesses and evidence presented to the adjudicator.

***Right of confrontation and the present study.*** As noted above, prior content analyses have reviewed sexual misconduct policies to determine whether (1) a Respondent is allowed to question the Complainant and (2) the institution allows for anonymous or confidential reporting. However, neither topic was studied in any great detail, especially in regard to the manner of questioning or the release of a Complainant's name to the Respondent before implementation of interim measures adverse to the Respondent, e.g., temporary suspension or modifications in class or work schedules or on-campus living arrangements, or prior to the initiation of the grievance process. Additionally, no analyses examined whether Respondents were given the opportunity to review evidence or access any report resulting from the investigation. Thus, the present study seeks to provide a more thorough analysis of the inclusion of the right of confrontation within the sexual misconduct policies of post-secondary institutions.

**Right to appeal.** Although the U.S. Supreme Court has repeatedly declined to recognize a Constitutional right to appeal, the right has been recognized as integral to due process in all fifty states in regard to criminal proceedings. Though not equal to a criminal proceeding, due process would seem to require a right of Respondents to appeal in regard to the adjudication of sexual misconduct complaints at colleges and universities despite Congress' failure to support this right when the SaVE Act was passed (Robertson, 2013; P.L. 13-4, Sec. 304, 2013).

***Findings and sanctions.*** The 2001 Guidance mentioned that at the time, many institutions offered the option to appeal the findings of the adjudicator and/or the sanctions rendered, but there was no indication by OCR as to whether this right to appeal should be afforded to both parties, or to only the Respondent. However, in determination letters issued to schools following investigations by OCR, the agency made known that “it is permissible to allow an appeal only for the responding party because “he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation”” (OCR, 2017b, p. 7). Further, in the 2017 Q&A, OCR stated that colleges and universities may decide whether to provide the right “solely to the responding party” (p. 7) or to both the Complainant and Respondent.

***Adverse interim measures.*** Neither the 2001 Guidance nor the 2017 Q&A speak to whether a Respondent should be allowed to appeal any adverse interim measures implemented, e.g., temporary suspension of a Respondent.

***Notable criticisms.*** Alexander et al. (2016) argue that to be in line with due process, Complainants should not be allowed to appeal decisions where a Respondent was found not to have violated an institution’s sexual misconduct policy. Further, Carle (2016) contends that if a Complainant is allowed to appeal a decision because they do not agree with the findings, the Respondent is necessarily subjected to “double or even triple jeopardy” (p. 447).

***Prior research.*** Karjane et al. (2002) and Richards (2016) found that although a majority of polices allowed for appeals of the findings and/or sanctions, there was no indication as to whether an appeal was available to both parties. However, in the content analysis conducted by the U.S. Senate Subcommittee (2014), both the Respondent and

Complainant were typically granted the right of appeal in regard to the findings of the adjudicator.

***Right to appeal and the present study.*** A number of prior content analyses looked at the prevalence of appeals as an option in sexual misconduct grievance processes, but a majority of these studies did not ascertain whether the right to appeal was provided to both parties. In an attempt to expand the research in this area, the coding instrument used in the present study contains questions and corresponding answers regarding the availability of an appeal to Complainants and Respondents, as well as the right of the Respondent to appeal the adverse interim measure of interim suspension.

***Impartiality and fairness.*** Treatment of the Respondent and Complainant as equal throughout the grievance process is a matter of fairness and is evidence of the impartiality of an institution's grievance process. As noted in the 2017 Q&A, the "rights and opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms" (p. 4). Further, Rudovsky et al. (2015) contend that institutions that take "shortcuts in [their] adjudicatory processes" may fail to "provide a fair process that is calculated to yield a reliable factual determination" (p. 5).

***Interim measures.*** Suggesting interim measures to the Respondent and Complainant should be commonplace as a matter of impartiality and fairness, and in implementing interim measures, the Complainant's needs should be balanced with the rights of the Respondent as much as possible, e.g., when class schedules need to be rearranged for the comfort of the Complainant, it would not be appropriate to require a Respondent to withdraw completely from the course while allowing the Complainant to continue to attend during the grievance process (OCR, 2017b).

*Prior research.* Karjane et al. (2002), Richards (2016), and Richards et al. (2017) found that Complainants were significantly more likely to be provided with information on interim measures as compared to Respondents, and in most cases, the policies failed to mention the availability of such measures to Respondents altogether.

*Concerns of bias or conflict.* Another issue related to fairness is allowing the Respondent to raise concerns of bias or conflicts of interest in regard to those involved in the grievance process, as due process requires adjudicators to be objective and to consider the evidence presented through an impartial lens (Meares, 2005). In the 2017 Q&A, OCR states that the investigator should be “free of actual or reasonably perceived conflicts of interest and biases for or against any party” (p. 4). Additionally, from my perspective, an individual assigned to investigate complaints of sexual misconduct should be prohibited from also serving as an adjudicator, as the investigator must act as a neutral factfinder rather than thinking ahead to the rendering of a decision. The American College of Trial Lawyers (2017) seem to support this idea, as they emphasize the importance of impartial factfinders and the avoidance of “actual impropriety and the appearance thereof” (p. 12).

*Notable criticisms.* Per the American Bar Association (2017), having an investigator who also serves as an adjudicator muddies the waters of due process and “carries inherent structural fairness risks especially as it relates to cases in which suspension or expulsion is a possibility” (p. 2).

*Prior research.* The U.S. Senate Subcommittee (2014) found that 82% of schools provided an opportunity for Respondents to raise concerns of conflicts of interest or bias regarding hearing panelists.

***Amnesty.*** From the lens of a Title IX practitioner, one of the additional aspects of an institution's grievance process that affect a Respondent's due process is the provision of amnesty for both parties in that if the Complainant and/or Respondent exhibit conduct that would otherwise violate an IHE's student conduct code, this violation can be forgiven in order to encourage parties to be honest and forthright without the fear of discipline for minor violations such as the underage consumption of alcohol or the use of illegal drugs.

***Prior research.*** In prior content analyses, most policies did not note the availability of amnesty, but those IHEs that did allow for a reprieve in regard to parallel student conduct violations offered the benefit only to Complainants (Beyer, 2015; Richards, 2016; Richards et al., 2017).

***Retaliation.*** The prohibition on retaliation by one party against the other should be extended to the Complainant and Respondent as a matter of impartiality and fairness, as any individual who participates in the grievance process should be free from retaliatory conduct.

***False reports.*** Another aspect to consider under due process and fairness is the inclusion of a provision for handling false reports by allowing for consequences to be rendered against a Complainant under an IHE's sexual misconduct policy should it be determined that the allegations against the Respondent were known to be false or were lodged with malicious intent.

***Prior research.*** Richards (2016) and Richards et al. (2017) found that 69% and 75% of their sample, respectively, included provisions within their policies to protect Respondents wrongly accused of sexual misconduct.

***Impartiality and fairness and the present study.*** When compared to the due process themes noted previously and to the right to appeal as discussed below, the theme of

impartiality and fairness stands out as one that has been included as part of prior content analyses of sexual misconduct policies at colleges and universities. However, the present study seeks to update the research and to examine in greater detail this due process theme as it relates specifically to Respondents.

### **Conclusion**

Chapter Two opened with a timeline of the passage of Title IX and the development of laws, regulations, and agency guidance regarding its implementation at IHEs. The timeline was followed by a discussion of the due process concerns of Respondents when a complaint of sexual misconduct is lodged against them, with said concerns organized into six themes: proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to an appeal, and impartiality and fairness of the process. This discussion also included notable criticisms regarding the deficits of colleges and universities in providing due process to Respondents as applicable to the aspects of each theme, as well as a notation of the findings of prior content analyses of sexual misconduct policies at post-secondary institutions as they relate to each theme. Having addressed existing literature in light of the present study, Chapter Three explores the methodology used to determine whether colleges and universities throughout the country have policies in place that support Respondents due process rights in the investigation and adjudication of complaints of sexual misconduct.

CHAPTER III  
METHODOLOGY

In reviewing the sexual misconduct policies of colleges and universities with the purpose of determining what, if any, due process is afforded to Respondents, content analysis is utilized as the appropriate research methodology, as explained in Chapter Three. Also included in this chapter is a discussion of the population and sample of the present study, the manner of data collection, and the creation of the coding instrument used to evaluate the policy components. Finally, the process of coding and analyzing the data is presented, as are the ethical considerations of the present study.

**Research Questions**

As noted previously, the purpose of the present study was to determine the level of due process afforded to Respondents by post-secondary institutions in the investigation and adjudication of Title IX complaints. In aligning with this purpose, three research questions were considered:

- (1) To what extent do sexual misconduct policies at public, four-year colleges and universities provide due process to Respondents as measured through the frequency of inclusion of words and/or phrases comprising six themes: proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness?
- (2) In examining these policies, are there differences in due process provided when policies are categorized by institution size as determined by total student enrollment?
- (3) In examining these policies, are there differences in due process provided when policies are categorized by federal appellate jurisdiction?



## Research Design

To address the research questions, I utilized content analysis, defined by Berelson (1952) as “a research technique for the objective, systematic and quantitative description of the manifest content of communication” (p. 18). Shapiro and Markoff (1998) further define the research method as “any methodological measurement applied to text (or other symbolic materials) for social science purposes” (p. 17-18) which allows a researcher to reduce words and phrases “to numbers representing the frequencies of different categories.” As noted by Duriau, Reger, and Pfarrer (2007), content analysis has developed as “a class of methods at the intersection of the qualitative and quantitative traditions” (p. 5).

The first step in conducting a content analysis is to determine the research objectives. When using this method in a quantitative fashion, as in the present study, the main objective is to answer the question of “What?” rather than “Why?” (U.S. General Accounting Office, 1989, p. 8) with the goal being to provide a summary of the written content of the sample. Ultimately, the researcher conducts a “manifest analysis” in describing what the text says, rather than a “latent analysis,” which includes interpreting any “underlying meaning” of the text (Bengtsson, 2016, p. 10). My objective in the present study was to determine what due process is provided to Respondents in the investigation and adjudication of Title IX complaints at colleges and universities by examining the text itself, and as such, I conducted a quantitative, manifest content analysis of sexual misconduct policies at IHEs.

The second step is to identify data sources (U.S. Government Accountability Office, 2013). Any source, from text to transcribed interviews, can be analyzed so long as the source is available for future researchers to review in checking the reliability of a study (U.S. General Accounting Office, 1989). In the present study, I analyzed the sexual misconduct

policies of post-secondary institutions as being representative of the institutions' procedures used in handling Title IX complaints against Respondents; though changes in law, regulations, and guidance necessitate modifications and updates in these policies, former versions are typically archived by IHEs as historical records and thus should remain accessible for any future examination.

The third step of a content analysis is to identify (1) the "units of context" meant to "set limits on the portion of written material that is to be examined for categories of words or statements," (2) the "units of analysis," defined as "the specific segment of the context unit in the written material that is placed in a category," i.e., single words, groups of words or phrases, sentences, paragraphs, or entire documents, and (3) the "coding categories," which create a structure to allow the grouping of the units of analysis (U.S. General Accounting Office, 1989, p. 10). In the present study, the units of context were the sexual misconduct policies of post-secondary institutions in their entirety; a "policy" as defined in this study typically encompasses a number of related statements, codes, guidelines, protocols, and/or procedures that, when taken as a whole, dictate an IHE's full grievance process. For example, the University of Missouri-Kansas City has a chapter system, with two subsections of Chapter 600: Equal Employment/Educational Opportunity, 600.020 and 600.030, comprising their Title IX policies as they apply to Respondents (University of Missouri System, 2018).

In determining the coding categories and units of analysis in a process that will be described in greater detail in a later section of Chapter Three, I first ascertained which of the traditional principles of due process were integral to include as themes in the present study through a review of U.S. Supreme Court cases, a lecture given by a preeminent law scholar, recent Title IX-related lawsuits filed by Respondents, and criticisms by academics and

attorneys of Title IX implementation at IHEs. The principles of due process that became the coding categories were as follows: proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness. I then reviewed eight sexual misconduct policies of select public, four-year colleges and universities as well as model sexual misconduct policies, procedures, and checklists and logged the words and/or phrases that I believed to be most representative of each of the six due process themes; these words and phrases encompassed the study's units of analysis. Finally, I created the coding instrument itself by formulating questions and answers based on the units of analysis (see Appendix C).

The fourth step of a content analysis is to code the sample, which begins with the creation of a set of instructions and a pretest to check for reliability and concludes with a coding of the units of analysis (U.S. General Accounting Office, 1989) as is discussed in a later section of this chapter. Before detailing the process of coding, I present the population and sample of the present study.

### **Population and Sample**

Since only those institutions receiving Title IV federal financial aid are required by law to comply with Title IX laws and regulations, the present study was limited to policies from IHEs listed in the Federal School Code List provided by the Department of Education's Federal Student Aid Office, of which there were 6,642 as of August 1, 2018 (U.S. Department of Education, 2017a). Homogeneous non-probability sampling of an entire population was then used to focus on policies from colleges and universities that share similar characteristics as noted below.

Based on prior research on risk factors associated with sexual misconduct at post-secondary institutions (Frinter & Rubinson, 2015; Humphrey & Kahn, 2000; Krebs et al., 2007; McCray, 2015; Mellins et al., 2017; Murnen & Kohlman, 2007; Young, Desmarais, Baldwin, & Chandler, 2017), I narrowed my sample to policies from IHEs that shared in common all four of the following characteristics: (1) conference of undergraduate degrees, (2) provision of on-campus housing, (3) offering of institutionally-sanctioned Greek life in the form of social fraternities and sororities, and (4) offering of opportunities to participate in NCAA or NAIA athletics. In addition, as football and men's basketball often act as "the public face of the university" (Pappano, 2012, para. 8), and as athletes participating in these sports programs have often been cited in the media as perpetrators of sexual violence against women in the recent past (Ladika, 2017; Ridpath, 2016; Wade, 2017), the policies in the sample had to be from post-secondary institutions that offer at least one of these two sports at the NCAA or NAIA level.

To further narrow the sample to a manageable size, I identified two additional characteristics of the institutions from which policies in the sample were derived. The first characteristic is that only those policies from institutions operating under primary state-level control are included, based on the idea that public colleges and universities are "considered to be instruments of the state" ("An Overview," 1970, p. 795) and as such, courts expect these institutions to afford their students a higher degree of due process as compared to private IHEs (Faccenda & Ross, 1975; Reilly, 2016), where students often receive little, if any, due process on the basis of Constitutional protections.

Second, policies in the sample must be from institutions with a total enrollment of more than 10,000 students, as larger<sup>10</sup> institutions are likely to have the financial means and caseload to justify employing at least one individual whose main role is Title IX Coordinator (Paul, 2016) as compared to smaller<sup>11</sup> institutions. Having a Title IX Coordinator serving in multiple roles, a more typical scenario at smaller colleges and universities, may create serious challenges (Paul, 2016). In her research on Title IX Coordinators at small and medium-sized private four-year colleges, Paul (2016) found that a multi-tasking Title IX Coordinator may not be able to dedicate any significant portion of time to staying current on legislative updates and best practices, and smaller institutions may be less likely to have the financial means to fully support their Title IX Coordinators. This lack of funds would be prohibitive to regularly attending costly trainings held by organizations with expertise in Title IX-related issues, which offer opportunities for consultation and collaboration with these experts as well as other Title IX Coordinators, and as Paul (2016) found, these opportunities are otherwise limited due to time constraints on the part of the Title Coordinators at smaller IHEs. A lack of funding also affects an institution's ability to hire support personnel dedicated to Title IX-related issues, specifically qualified, neutral investigators (Paul, 2016), thus often requiring the Title IX Coordinator to operate as both investigator and adjudicator, a less-than-ideal situation in regard to due process. Finally, as a multi-tasking Title IX Coordinator, implementing an appropriate "infrastructure" (Paul, 2016, p. 36), or a standard

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<sup>10</sup> Classified as "four-year, large" based upon Carnegie Size and Setting Classification definitions (Indiana University Center for Postsecondary Research, 2018).

<sup>11</sup> Includes institutions with enrollments of up to 9,999 degree-seeking students, classified as "four-year, small" or "four-year medium" by Carnegie Size and Setting Classification definitions (Indiana University Center for Postsecondary Research, 2018).

grievance process for Title IX complaints that takes into consideration all of the tenets of due process, may be a distinct challenge.

Although these challenges do not necessarily have a direct effect on the due process afforded to Respondents, any one of them may indirectly affect an institution's sexual misconduct policy. For instance, if a Title IX Coordinator has little experience in conducting investigations because their main role is serving their institution in an unrelated capacity, or if they do not have the time to attend training to become qualified to investigate such nuanced complaints, and if a qualified investigator is not available, the result may be a failure to conduct an adequate and impartial investigation (Miltenberg & Byler, 2016). In turn, a Respondent may be found responsible for violating their institution's Title IX policy, resulting from insufficient due process. In deciding to include only those policies from larger IHEs with enrollments greater than 10,000 students in my sample, I have attempted to reduce the potential for due process to be circumvented by a factor other than the structure of the written policy itself.

With the implementation of each of the above restrictions, the final sample consisted of the sexual misconduct policies applicable to student Respondents at 239 colleges and universities (see Appendix D) having an approximate total student enrollment of 5.6 million, or roughly 30% of the 19.8 million students enrolled in degree-granting post-secondary institutions receiving Title IV federal funds (National Center for Education Statistics, 2017). These institutions represent 11 of the 12 federal appellate courts<sup>12</sup>, save the District of

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<sup>12</sup> As noted previously, a decision rendered by a federal appeals court only applies to those IHEs within the geographic region where the court issuing the decision has jurisdiction, which may lead to significant differences in the handling of complaints of sexual misconduct at colleges and universities across the country.

Columbia in Washington D.C., and are distributed in the following three categories<sup>13</sup> as determined by total student enrollment: 10,000-19,999; 20,000-29,999; and 30,000+.

### **Data Collection**

The 239 policies included in the sample were initially collected via the websites of the associated post-secondary institutions as publicly-available data between the dates of September 4, 2018, and November 5, 2018, with the idea being to secure policies published in a location readily available to students accused of sexual misconduct and others in the campus community searching for information on their institutional Title IX policies. Searches were performed using (1) a widely-utilized internet search engine and (2) the search function on institutional websites. With both methods, search terms<sup>14</sup> included the following: “Title IX policy,” “sexual assault policy,” “sexual harassment policy,” “sexual misconduct policy,” and “sexual violence policy.” Policies available in Portable Document Format (PDF) were directly downloaded for analysis. Those presented in a format other than PDF, e.g., a Microsoft Word document, or those posted in text form on an institution’s website, were preserved by utilizing the “Print-Save as PDF” function.

Additionally, during the coding period (November 5, 2018, to February 28, 2019), supplementary policy documents were gathered in light of these documents being referred within to the policies themselves as applicable to the sexual misconduct grievance process. For example, if it was discovered as a policy was being coded that the sanctions for a violation of said policy are contained within the student conduct code rather than within the policy itself, a second data collection was conducted at the time of the coding to retrieve the

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<sup>13</sup> Delineated based on enrollment categories used by the National Center for Education Statistics’ (n.d.) College Navigator.

<sup>14</sup> When using the internet search engine, the name of the institution was also included as a search term.

institution's student conduct code as a document that would be considered a component of the IHE's sexual misconduct policy. The date of the most recent modification of any policy component pulled after the initial data collection was noted to ensure that there had been no significant updates to the terms and conditions of the policy component since the collection of the initial policy documents.

### **Coding Instrument**

The coding instrument was cultivated through a multi-step process. First, I studied several landmark cases decided by the Supreme Court of the United States where the principles of due process under the Fifth and Fourteenth Amendments were established or clarified, including *Turney v. Ohio* (1927), *Mullane v. Central Hanover Trust Co.* (1950), *Greene v. McElroy* (1959), *Goldberg v. Kelly* (1970), and *Mathews v. Eldridge* (1976), among others, as well as reviewing a lecture on due process given in 1975 by Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit, a well-known legal scholar. I also conducted a review of recent Title IX-related lawsuits filed by Respondents against their post-secondary institutions alleging, at least in part, violations of due process in investigating or adjudicating complaints of sexual misconduct (National Association of College and University Attorneys, 2018), and I examined in detail the criticisms of Title IX implementation at IHEs as noted in Chapter Two (Alexander et al., 2016; American Association of University Professors, 2016; American Bar Association, 2017; American College of Trial Lawyers, 2017; Bartholet et al., 2017; Carle, 2016; Kirkpatrick, 2016; National Association of College and University Attorneys, 2017; Rudovsky et al., 2015). I then created coding categories based on six major themes of due process as detailed in



Chapter Two, i.e., proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness.

After determining the coding categories, I searched within sexual misconduct policies at eight public, four-year colleges and universities<sup>15</sup> for words and phrases that I believed to be most representative of each of the six themes. I also reviewed model sexual misconduct policies, procedures, and checklists to cross-check working policies against industry best practices to ensure the inclusion of all applicable words and phrases (Association for Student Conduct Administration, 2014; Association for Title IX Administrators, 2016; Sokolow, Lewis, Schuster, & Swinton, 2015a; Sokolow, Lewis, Schuster, & Swinton, 2015b). The resulting conglomeration of words and phrases comprised the present study's units of analysis. As a measure meant to confirm these coding categories as thorough and units of analysis as appropriate, I requested review by legal and professional experts, including those in the fields of due process, Title IX, and/or student conduct, and made modifications upon receiving feedback. Finally, I reviewed the coding instruments and units of analysis used in prior content analyses of sexual misconduct policies at IHEs as conducted by Karjane et al. (2002), Murphy (2011), Beyer (2015), and Richards et al. (2017) to assist me in developing a structural basis for my coding instrument. To conclude the process, I converted the units of analysis into the form of questions and corresponding answers to craft the actual coding instrument itself (see Appendix C).

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<sup>15</sup> The eight institutions were as follows: the University of Missouri-Kansas City, an institution in the University of Missouri System and my current employer and educational institution; the University of Kansas, my former employer; Northwest Missouri State University and the University of Central Missouri, two of my alma maters; and the University of Cincinnati, the University of Montana, James Madison University, and Illinois State University, four institutions that recently were alleged to have violated Respondents' due process rights.

## **Coding and Data Analysis**

The first step in coding the data was to develop the coding instrument to reflect the established coding categories and units of analysis in the form of questions and answers to allow recording of the frequency of inclusion of each unit of analysis within the sample of sexual misconduct policies. Where there was ambiguity as to whether a particular unit was present or absent within a given policy, I made a notation on the coding instrument to provide clarification in the form of instructions to the coders.

### **Coding and Inter-rater Reliability**

To determine the adequacy of these instructions and the reliability of the coding instrument itself, a pretest was conducted through an independent hand-coding by myself and a research assistant (RA-1) of a subset of 30 of the sexual misconduct policies from the sample, obtained through selecting every tenth institution in the alphabetical list of IHEs. Use of a second coder increases the reliability of the coding instrument in its “ability to result in consistent categorization of content” (Lacy, Watson, Riffe, & Lovejoy, 2015, p. 10) regardless of the individual coding the data.

The inter-rater reliability was measured using Cohen’s Kappa, resulting in a value of 0.78, or a “substantial” agreement (Landis and Koch, 1977, p. 165). I decided to require the minimum Kappa value to conclude the pretest be 0.81, or an “almost perfect” agreement (Landis and Koch, 1977, p. 165), causing us to review the coding instructions, compare our responses on the initial subset, and hand-code five additional policies, selecting the ninth, 19th, 29th, 39th, and 49th policy in the alphabetical list. Kappa was calculated for a second time with a resulting value of 0.84, inclusive of all 35 coded policies. The pretest was concluded, and RA-1 continued by coding a second subset of 45 policies within the sample. I

then coded five randomly-chosen policies of this subset; to check inter-rater reliability, I calculated Kappa using data from all twice-coded policies, with  $n=40$ . The resulting value of Kappa was 0.82, and as with all checks on reliability, discrepancies were discussed and a consensus reached as to the coding of the response in question. I then took on the role of the main coder<sup>16</sup> and proceeded to code 50 additional policies, with RA-1 coding five of these policies, chosen at random, to allow for a reliability check; the value of Kappa was 0.83, again inclusive of all twice-coded policies, or  $n=45$ . After coding differences were addressed, a second subset of 50 policies was coded by myself with a check by RA-1, and the resulting value of Kappa was 0.84 with  $n=50$  twice-coded policies.

Then a second research assistant (RA-2) became available to act as a third coder. After a review of the coding instrument and its instructions as well as five of the policies coded during the initial pretest, RA-2 then independently coded the remaining 30 of the initial 35 pretest policies to allow for a check on inter-rater reliability, with a resulting Kappa of 0.81, inclusive of the coding results of myself and RA-2 for these 30 policies.

From that point on, I continued acting as the main coder operating under the process as noted above, coding a subset of 50 policies with RA-1 coding five of each subset and RA-2 coding five additional policies within a subset. I conducted a reliability check after each subset had been coded, resulting in two Kappa values, 0.85 for policies coded by myself and RA-1, and 0.83 for policies coded by myself and RA-2. Of the 239 policies in the sample, 230 had been coded inclusive of this final subset of 50 policies. Eight policies were coded by RA-2 to conclude the coding process, as a significant portion of the components of the sexual misconduct policy from the University of Puerto Rico-Rio Piedras was in Spanish and could

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<sup>16</sup> RA-1 was unavailable to code for much of the break between fall and spring academic semesters.

not be coded without translation, which was not readily available, requiring this policy to be removed from the final sample. In totality, 238 policies were coded as part of the present study.

### **Data Analysis**

To analyze the data gathered through the coding process, I first tallied the responses for each question and created a corresponding frequency distribution table, followed by a cross-check of the same data by RA-2. I utilized descriptive statistics to report this nominal data in the form of (1) the frequency of discrete responses, or the number of “0” and “1” responses counted for each question on the coding instrument, with some questions having up to five discrete responses, and (2) the corresponding percent of the sample of each discrete response for an individual question. The use of these descriptive statistics is meant to illustrate patterns and summarize basic features within the text (Vogt, Vogt, Gardner, & Haefflele, 2014), and in the present study, allows qualitative words and phrases, or the units of analysis, to be quantified for analysis.

To further organize the data, I segmented the results into categories based on (1) institution size as determined by total student enrollment in alignment with the National Center for Education Statistics’ (n.d.) College Navigator classifications of IHEs by size, or 10,000-19,999; 20,000-29,999; and 30,000+; and (2) the location of the institution and its corresponding U.S. Circuit Court of Appeals. As noted previously in Chapter Three, there may be a relationship between the size of an institution and the likelihood that it has the financial means to appropriately staff the office or unit responsible for handling complaints of sexual misconduct (Paul, 2016), which may ultimately influence the due process provided to Respondents in the grievance process. Although the results of the present study do not

allow for an inference of any such relationship, organizing the data in this manner does provide an opportunity to consider the results by size classification.

Categorizing the results by federal appeals courts corresponding to the institutions from which sample policies were derived relates to the possibility of Title IX implementation being guided by court decisions made at the federal appellate level, applicable only to those institutions under the jurisdiction of the appeals court issuing the holding. For example, a Sixth Circuit Court of Appeals decision on an issue related to the right of confrontation in sexual misconduct grievance processes applies to IHEs in Michigan, Kentucky, Tennessee, and Ohio, but not to those institutions in any other states (Bauer-Wolf, 2018). Regarding any relationship between institutions' sexual misconduct policies and appeals court jurisdictions of the corresponding IHEs, said relationships cannot be inferred from the results of the present study; however, this categorization provides another mechanism of examining the data.

### **Ethical Considerations**

The sexual misconduct policies examined in the present study are published on the websites of the sample colleges and universities and are publicly available. No protected information or information from human subjects was collected.

### **Conclusion**

In this chapter, I discussed content analysis as an appropriate research methodology in the examination of sexual misconduct policies at post-secondary institutions. I also presented the manner of data collection, the multi-step development process used to create the coding instrument, and the procedures used in coding and analyzing the data. Finally, I noted the

ethical considerations of the present study. In Chapter Four, I present the results of the coding and analysis.

## CHAPTER IV

### RESULTS

To understand how the tenets of due process for Respondents are addressed in post-secondary institutions' handling of sexual misconduct complaints, a quantitative content analysis of Title IX policies at 238 institutions of higher education (IHEs) was conducted. As noted in Chapter Three, all policies were derived from institutions meeting the following criteria: receiving Title IV federal financial aid, operating under primary state-level control (public), having a total student enrollment of 10,000 or more, conferring undergraduate degrees, providing on-campus housing, and offering institutionally-sanctioned opportunities to participate in Greek life and NCAA or NAIA football or men's basketball. Data gathered was analyzed using descriptive statistics, specifically univariate frequency distribution.

#### **Descriptive Statistics**

Data gathered through the coding process provided a tally of the responses to each question on the coding instrument. In this section, I present the findings first in totality, followed by an examination of the data by institution size, defined as total student enrollment, and then federal appellate court jurisdiction, or the federal court of appeals presiding over each IHE, as determined by the physical location of the college or university.

#### **In Totality**

Data is first compared in its totality, organized by the due process themes of proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the impartiality and fairness of the grievance process.

**Proper notice to respondent.** Seven questions of the coding instrument focused on whether the policy requires proper notice to the Respondent (Table 1). Of the 238 policies

coded, 90.3% mandate Respondents be provided with notice of the charges/allegations. However, in regard to notice of the pending investigation and the pending adjudication, policies fall short at 58.0% and 61.8%, respectively (Table 1). Nearly all (97.5%) require notice of the outcome of the grievance process be provided to Respondents, but only two-thirds (63.0%) require the rationale behind the decision, or the facts upon which the outcome was based, to be a component of said outcome. A majority of policies (85.7%) dictate sanctions resulting from the grievance process be provided to Respondents, but just 56.3% require notice be presented regarding the right to appeal the outcome.

Table 1  
*Proper Notice to Respondent (n = 238)*

Question	Response Tally (%)	
	Yes	No Mention <sup>a</sup>
1a.1 Notice of Charges/Allegations Required	90.3	9.7
1a.2 Notice of Pending Investigation Required	58.0	42.0
1a.3 Notice of Pending Adjudication Required	61.8	38.2
1a.4 Notice of Outcome of Grievance Process Required	97.5	2.5
1a.5 Notice of Rationale for Outcome Required	63.0	37.0
1a.6 Notice of Resulting Sanctions Required	85.7	14.3
1a.7 Notice of Right to Appeal Outcome Required	56.3	43.7

<sup>a</sup> During the pretest, it became apparent that in regard to Questions 1a.1-1a.7, few “No” responses were likely to be coded to any significant extent, and thus for ease of coding, “No” and “No Mention” responses were coded as a single response on the coding tool.

**Proper notice to campus community.** Twenty-four questions of the coding instrument centered around proper notice to the campus community, provided via the online publishing of a sexual misconduct policy by an IHE (Tables 2 and 3). Nearly all policies coded (99.2%) mention their applicability, varying from students-only policies to the entirety of the campus community, inclusive of students, employees, visitors, volunteers, and any other third party associated with the institution. Most policies (87.8%) provide notice as to



the timeline or timeframe of the grievance process, but less than half (45.8%) indicate a required minimum period of time between the notice of a pending adjudication being provided to a Respondent and the date of the adjudication itself. A majority of policies outline the procedures used in the investigation (95.8%) and the adjudication (97.9%) of a complaint of sexual misconduct which is important to due process, as notice of these procedures provide a Respondent an idea of what to expect in the institution's grievance process. Although nearly all policies (95.8%) state the standard of evidence to be used by the decision-maker(s) in adjudicating the complaint, just 78.6% define said standard. Of the policies coded, half (50.4%) include a list of Respondent's Rights (Table 2). A more in-depth discussion of the specific rights noted in these policies is provided following Table 2.

Of the 238 policies coded, 98.3% mention the method(s) of adjudication available and/or utilized in the grievance process, i.e., a single decision-maker, usually the Title IX Coordinator or another student affairs administrator, or a hearing panel typically comprised of faculty and staff, though some IHEs do include students as panelists. As to conduct jurisdiction, nearly all policies (97.5%) note the specific acts that would be considered policy violations, with 97.1% providing definitions of these acts (Table 2). Further, a majority of policies define consent (96.6%), as well as listing the reason(s) an individual may not be able to consent (96.6%). Most policies (86.6%) define incapacitation, but only 31.5% list the possible indicators displayed by an incapacitated individual such as unstable gait, slurring of words, vomiting, and periods of unconsciousness, among others. Additionally, just 58.0% of policies note the standard used by the institution to determine whether the Complainant was incapacitated at the time of the incident(s), e.g., whether a reasonable person would know the Complainant was unable to consent due to incapacitation (Table 2).

The physical jurisdiction of the policy, which may be limited to campus property and institutionally-sponsored activities, or may be expanded to include, for example, electronic communications or conduct occurring at students' off-campus residences, is outlined in 81.9% of policies coded (Table 2). Possible sanctions are noted in most policies (93.7%) and typically include a range of disciplinary actions, from a verbal or written warning to expulsion from the IHE. However, only 49.6% of policies state the factors that may be considered by the institution in determining appropriate sanctions, e.g., the Respondent's history of policy violations at the IHE, known prior criminal activity, the severity of the conduct, the need to prevent similar violations in the future, etc. Notice of the right to appeal is included nearly all policies coded (97.5%), as are the procedures to be followed by a Respondent who chooses to appeal the outcome of the grievance process (93.7%). Most policies (89.5%) provide notice to the campus community of the availability of interim measures such as academic, safety, housing, and/or employment modifications. Finally, 65.5% of the policies coded note the conditions that may lead to an interim suspension of a Respondent, with most policies noting a serious concern for the safety of the campus community as a likely trigger for such a suspension (Table 2).

Table 2  
*Proper Notice to Campus Community (n = 238)*

Question	Response Tally (%)	
	Yes	No Mention <sup>a</sup>
1b.1 Notice of Applicability of Policy	99.2	0.8
1b.2 Notice of Timeline/Timeframe for Grievance Process	87.8	12.2
1b.3 Notice of a Minimum Notification Prior to Adjudication	45.8	54.2
1b.4 Notice of Procedures Used in Investigation	95.8	4.2
1b.5 Notice of Procedures Used in Adjudication	97.9	2.1
1b.6 Notice of Standard of Evidence	95.8	4.2
1b.7 Notice of Definition of Standard of Evidence	78.6	21.4
1b.8 Notice of Respondent’s Rights in Grievance Process	50.4	49.6
1b.10 Notice of Method of Adjudication Available/Utilized	98.3	1.7
1b.11 Notice of Specific Acts Under Conduct Jurisdiction	97.5	2.5
1b.12 Notice of Definitions of Specific Acts	97.1	2.9
1b.13 Notice of Definition of Consent	96.6	3.4
1b.14 Notice of Reason(s) an Individual May Be Unable to Consent	96.6	3.4
1b.15 Notice of Possible Causes/Definition of Incapacitation	86.6	13.4
1b.16 Notice of Indicators of Incapacitation Due to Alcohol/Drug Use	31.5	68.5
1b.17 Notice of Standard Used to Determine Incapacitation	58.0	42.0
1b.18 Notice of Physical Jurisdiction of Policy	81.9	18.1
1b.19 Notice of Possible Sanctions if Policy Violation	93.7	6.3
1b.20 Notice of Factors Considered in Determining Sanctions	49.6	50.4
1b.21 Notice of Right to Appeal Outcome of Grievance Process	97.5	2.5
1b.22 Notice of Appeal Procedures	93.7	6.3
1b.23 Notice of Availability of Interim Measures	89.5	10.1
1b.24 Notice of Specific Conditions Giving Cause to Issue Respondent Interim Suspension	65.5	34.0

<sup>a</sup> During the pretest, it became apparent that in regard to Questions 1b.1-1b.24, few “No” responses were likely to be coded to any significant extent, and thus for ease of coding, “No” and “No Mention” responses were coded as a single response on the coding tool.

As noted in Table 2, of the 238 policies coded, 50.4% provided a list of Respondent’s Rights; the specific rights noted within these 120 policies are tallied in Table 3. The most common right of the Respondent listed within the policies coded is the Right to an Advisor (91.7%) (Table 3). Tied for second are the Right to Be Heard (87.5%) and the Right of Notice (87.5%). The Right to Appeal is noted in 66.7% of the applicable policies, and the Right of

Confrontation is listed within 60.8% of said policies. Rounding out the list is the Right to an Impartial/Fair Process, present in over half (53.3%) of the policies coded.

Table 3

*Proper Notice to Campus Community: Respondent's Rights (n = 120)*

Question	Response Tally (%)	
	Yes	No
1b.9 Policy Lists Right to Advisor in Respondent's Rights	91.7	8.3
1b.9 Policy Lists Right to Be Heard in Respondent's Rights	87.5	12.5
1b.9 Policy Lists Right of Confrontation in Respondent's Rights	60.8	39.2
1b.9 Policy Lists Right to Appeal in Respondent's Rights	66.7	33.3
1b.9 Policy Lists Right to Impartial/Fair Process in Respondent's Rights	53.3	46.7
1b.9 Policy Lists Right of Notice in Respondent's Rights	87.5	12.5

**Right to an advisor.** The third category of the coding instrument was the right to an advisor (Table 4). Of the 238 coded policies, 97.1% note that a Respondent can have an advisor during the grievance process, and 71.8% allow this advisor to be an attorney, as determined by either an explicit statement regarding attorneys as advisors or a blanket statement allowing a Respondent to choose their advisor. However, only 15.5% of policies allow an advisor to participate in the grievance process in some manner.

Table 4

*Right to an Advisor (n = 238)*

Question	Response Tally (%)	
	Yes	No Mention <sup>a</sup>
2.1 Allows Respondent to Have Advisor Present	97.1	2.5
2.2 Allows Respondent to Have Attorney as Advisor	71.8	28.2
2.3 Allows Advisor to Participate in Grievance Process	15.5	86.6

<sup>a</sup> During the pretest, it became apparent that in regard to Questions 2.1-2.3, few "No" responses were likely to be coded to any significant extent, and thus for ease of coding, "No" and "No Mention" responses were coded as a single response on the coding tool.

**Opportunity to be heard.** Within the category of the coding instrument focused on the opportunity to be heard, there were two questions and associated responses (Table 5). The first dealt with whether a Respondent is provided the opportunity to present evidence and/or witnesses in their defense as part of the investigation; nearly all policies (91.6%) provide this opportunity to be heard during the investigation. The coding instrument also noted whether a Respondent is given the same opportunity as part of the adjudication of a complaint of sexual misconduct under the policy as written, and of the 238 policies, 85.3% mention this as a component of the adjudication process.

Table 5  
*Opportunity to Be Heard (n = 238)*

Question	Response Tally (%)	
	Yes	No Mention <sup>a</sup>
3.1 Respondent Has Opportunity to Be Heard in Investigation	91.6	8.4
3.2 Respondent Has Opportunity to Be Heard in Adjudication	85.3	14.7

<sup>a</sup> During the pretest, it became apparent that in regard to Questions 3.1-3.2, few “No” responses were likely to be coded to any significant extent, and thus for ease of coding, “No” and “No Mention” responses were coded as a single response on the coding tool.

**Right of confrontation.** The next section of the coding instrument spoke to the ability of a Respondent to confront their accuser, to review testimony and evidence presented against them, and to directly question a Complainant and/or witnesses, either personally or via an advisor (Table 6). Of the policies coded, 86.1% allow for anonymous or confidential complaints to be reported to the institution. In these cases, the Respondent may not be provided the name of the individual who has accused them of what may be a serious policy violation, which could prevent the Respondent from determining what might be the motive for such a complaint. Along the same vein, 83.6% of policies allow an institution to proceed

with an investigation without Complainant participation, based on the information at their disposal; this may seriously limit the Respondent from having the ability to confront their accuser, a main component of due process.

Out of 238 policies coded, 81.1% provide the Respondent with an opportunity to review the testimony and evidence gathered during an investigation at some point before a finding is rendered by the decision-maker(s). In regard to the direct questioning of a Complainant by a Respondent, 13.4% of policies allow this type of interaction, with 7.6% allowing direct questioning of a Complainant by a Respondent’s advisor. As to the direct questioning of witnesses, 21.4% of policies allow a Respondent to do so, though few (5.9%) allow the same of a Respondent’s advisor.

Table 6  
*Right of Confrontation (n = 238)*

Question	Response Tally (%)		
	Yes	No	No Mention
4.1 Allows Submission of Anonymous/Confidential Reports	86.1	5.9	8.0
4.2 Allows Investigation Without Complainant Participation	83.6	1.3	15.1
4.3 Allows Respondent to Review Testimony/Evidence Gathered During Investigation Prior to Finding Rendered	81.1	0.4	18.5
4.4 Allows Direct Questioning of Complainant by Respondent	13.4	51.3	35.3
4.5 Allows Direct Questioning of Complainant by Respondent’s Advisor	7.6	77.7	14.7
4.6 Allows Direct Questioning of Witnesses by Respondent	21.4	43.7	34.9
4.7 Allows Direct Questioning of Witnesses by Respondent’s Advisor	5.9	79.4	14.7

**Right to appeal.** The questions within this section of the coding instrument focused on a Respondent’s right to appeal both the outcome of the grievance process and an interim suspension, as well as whether the same right to appeal the outcome is afforded to a

Complainant (Table 7). Nearly all policies in the sample (97.1%) allow an appeal of the outcome by a Respondent; the same is true for an appeal by a Complainant (92.4%).

Conversely, only 52.1% of the 238 policies coded note the ability of a Respondent to appeal an interim suspension.

Table 7  
*Right to Appeal (n = 238)*

Question	Response Tally (%)	
	Yes	No Mention <sup>a</sup>
5.1 Provide Respondent Right to Appeal Outcome	97.1	2.9
5.2 Provide Complainant Right to Appeal Outcome	92.4	7.5
5.3 Provide Respondent Right to Appeal Interim Suspension	52.1	47.9

<sup>a</sup> During the pretest, it became apparent that in regard to Questions 5.1-5.3, few “No” responses were likely to be coded to any significant extent, and thus for ease of coding, “No” and “No Mention” responses were coded as a single response on the coding tool.

**Impartiality and fairness.** The coding instrument concludes with 14 questions centered on whether the grievance process and ancillary policy terms and conditions are impartial and fair to both parties (Tables 8 and 9). Three-quarters of the coded policies (76.9%) state the investigation will be impartial, either through the exact wording or use of a synonym such as “unbiased,” “equitable,” or “neutral,” in contrast to 52.9% containing a similar statement regarding the adjudication of a complaint. Of the 238 policies coded, 60.1% allow a Respondent to raise a concern of bias or conflict of interest by those involved in the grievance process. Of the policies in the sample, 71.0% allow for a summary resolution or the dismissal of a complaint, a likely occurrence should the decision-maker(s) determine that even if the facts as presented are true, a violation of the sexual misconduct policy could not be found. Most of the policies (75.6%) omit a provision that allows or requires an investigator, as an individual expected to be neutral, to provide possible or recommended

sanctions as part of the investigation report (Table 8; Question 6.5), a determination that is ultimately left to the decision-maker(s) after an independent review of the testimony and evidence contained within said report.

Just over half of policies reviewed (54.2%) refer to the Complainant as a victim and/or survivor; reference to the Respondent as an offender and/or perpetrator is contained within roughly a quarter of the policies coded (26.9%) (Table 8). Many of the policies coded (74.8%) have a caveat to address false reports, or those complaints with no basis in fact and/or those reported maliciously or with knowledge of their falsity. Approximately two-thirds of policies in the sample note a requirement of training for the investigator(s) (60.9%) and decision-maker(s) (67.6%).

Also under the umbrella of impartiality and fairness is the standard of evidence utilized by an IHE in adjudicating complaints of sexual misconduct. In this regard, there are three possible options: 1) a “preponderance,” where a Complainant has to prove only that the conduct by a Respondent was more likely than not to have occurred, or just a fraction over 50% likelihood; 2) “clear and convincing,” i.e., substantially more probable than not, or a firm belief of the truthfulness of a Complainant’s evidence; or 3) “beyond a reasonable doubt,” or near absolute certainty as to a policy violation. Under the latter two standards, a Respondent is less likely to be found in violation of an institution’s sexual misconduct policy without substantial evidence, as would be required if the report has been made to law enforcement and adjudicated in a court of law. The higher standard of evidence better preserves a Respondent’s liberty interests in regard to their access to a public education, as the likelihood of a mistake by the decision-maker(s) in wrongfully finding against the Respondent is lessened (Bach, 2003; Edwards, 2015). To address this tenet of due process,



the coding instrument questioned whether a policy indicated the standard of evidence as “clear and convincing” or “beyond a reasonable doubt;” only 9.2% of policies reviewed utilized one of the two higher standards (Table 8).

In regard to retaliation protection, OCR requires Complainants be protected from bad acts that could be seen as being in reprisal for reporting conduct under an institution’s sexual misconduct policy (OCR, 2001), and thus in order to maintain fairness in the grievance process, the coding instrument looked to whether a policy noted a similar protection for Respondents. Out of 238 coded policies, 86.6% mention such a protection, either explicitly or by stating a blanket directive against retaliation for any individual participating in the grievance process. Finally, the imposition of an interim suspension against a Respondent prior to a violation of policy being found could be seen as a breach of an accused individual’s due process rights. In considering this possibility, the coding instrument contained a question that spoke to whether a policy allowed for said suspension, with most (87.4%) indicating that a Respondent may receive an interim suspension per the IHE’s sexual misconduct policy.

Table 8  
*Impartiality and Fairness (n = 238)*

Question	Response Tally (%)		
	Yes	No Mention <sup>a</sup>	No
6.1 Policy Statement on Impartial Investigation	76.9	23.1	n/a
6.2 Policy Statement on Impartial Adjudication	52.9	47.1	n/a
6.3 Allows Respondent to Raise Concern of Bias/Conflict	60.1	39.9	n/a
6.4 Allows Summary Resolution/Dismissal of Complaint	71.0	29.0	n/a
6.5 Investigation Report Submitted w/Possible or Recommended Sanctions	24.4	75.6	n/a
6.6 Complainant Referred to as Victim or Survivor	54.2	45.8	n/a
6.7 Respondent Referred to as Offender or Perpetrator	26.9	73.1	n/a
6.8 Provision for Handling False Reports	74.8	25.2	n/a
6.9 Policy Requires Investigator(s) to Be Trained	60.9	39.1	n/a
6.10 Policy Requires Adjudicator(s) to Be Trained	67.6	32.4	n/a
6.11 Policy Indicates Standard of Evidence as Clear and Convincing or Beyond a Reasonable Doubt	9.2	2.5	88.2
6.12 Policy Prohibits Retaliation Against Respondent	86.6	13.4	n/a
6.13 Policy Allows Interim Suspension of Respondent	87.4	12.6	n/a

<sup>a</sup> During the pretest, it became apparent that in regard to Questions 6.1-6.10 and 6.12-6.13, few “No” responses were likely to be coded to any significant extent, and thus for ease of coding, “No” and “No Mention” responses were coded as a single response on the coding tool.

Finally, the equitable provision of amnesty and interim measures to Complainants and Respondents was reviewed as a component of impartiality and fairness (Table 9). Amnesty for minor conduct violations, e.g., alcohol or drug use in on-campus housing that occurs parallel to the alleged incident of sexual misconduct, may be provided to encourage reporting by Complainants without fear of sanctions for said parallel conduct. To promote fairness and impartiality, the same level of amnesty should be offered to Respondents in consideration of due process. Of the policies coded, 39.9% offer amnesty to Complainants only and 20.2% to both parties (Table 9; Question 6.14). Along a similar vein, interim measures, or academic, housing, safety, and employment accommodations provided to or arranged for Complainants post-report, should also be made available to Respondents during the grievance process as a

matter of fairness; 60.1% of policies state the availability of interim measures for both parties, with just 23.1% limiting these accommodations to Complainants.

Table 9  
*Impartiality and Fairness: Amnesty and Interim Measures (n = 238)*

Question	Response Tally (%)		
	Complainant Only	Respondent Only	Both Parties
6.14 Amnesty for Minor Conduct Violations	39.9	2.1	20.2
6.15 Provision of Interim Measures	23.1	0.0	60.1

### By Institution Size

After examining the data in totality, the policies were grouped by institutional size as determined by total student enrollment: 10,000 to 19,999 students (10-19.9); 20,000 to 29,999 (20-29.9) students; and 30,000 or more students (30+). Outlined below are the results for these three groups.<sup>17</sup>

**Proper notice to Respondent.** The coding instrument sought responses to seven questions within the due process theme of proper notice to the Respondent (Table 10). Most policies with all three groups are likely to require a Respondent be provided notice of charges/allegations and notice of a pending investigation (88.0% to 93.0%). Of the policies coded, 58.3% to 69.5% require notice of a pending adjudication be communicated to a Respondent. Nearly all institutions' policies (97.2% to 98.3%) require notice of the outcome of the grievance process be provided to a Respondent; however, notice of the rationale is less likely (58.3% to 70.4%) to be required by these same policies. The requirement to provide a

<sup>17</sup> As the technique of homogenous non-probability sampling of an entire population used in the present study does not provide a random sample, parametric statistical tests are not recommended because this type of sampling violates the assumption of independence; thus, the following section offers data comparing policies by institution size but does not discuss the statistical significance of said comparisons.

Respondent notice of any sanctions resulting from a policy violation is present in most policies, regardless of institution size. Finally, policies from institutions with lower total student enrollments are less likely than those from IHEs with higher enrollments to require notice of the right to appeal the outcome be provided to a Respondent (Table 10).

Table 10  
*Proper Notice to Respondent by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
1a.1 Notice of Charges/Allegations Required	88.0	93.0	91.5
1a.2 Notice of Pending Investigation Required	53.7	65.0	57.6
1a.3 Notice of Pending Adjudication Required	58.3	60.6	69.5
1a.4 Notice of Outcome of Grievance Process Required	97.2	97.2	98.3
1a.5 Notice of Rationale for Outcome Required	58.3	70.4	62.7
1a.6 Notice of Resulting Sanctions Required	86.1	87.3	83.1
1a.7 Notice of Right to Appeal Outcome Required	49.1	56.3	69.5

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

**Proper notice to campus community.** Under the umbrella of proper notice to the campus community, there were 24 questions on the coding instrument (Tables 11 and 12). Out of the entirety of the policies coded, nearly all (98.3% to 100.0%) state the applicability of the policy, i.e., the individuals to which the policy applies. Most policies also state the timeline or timeframe of the grievance process (85.9% to 89.8%). Approximately half of the policies in any of the three groups note a minimum time period between notice to the Respondent of a pending adjudication and the adjudication itself. Nearly all institutions' policies (1) state the procedures used in both an investigation and an adjudication and (2) note the standard of evidence used to adjudicate complaints of sexual misconduct, but

slightly fewer provide the definition of said standard. In regard to Respondent's Rights being listed within a policy, approximately half of all policies coded in each group include such a list. The specific Rights listed within these policies are noted below in Table 12.

Most policies in each group contain a mention of the method of adjudication available or utilized and include the specific acts that make up the policy's conduct jurisdiction, as well as definitions of said acts (Table 11). Nearly as many institutions' policies provide the definition of consent as well as the reason(s) individuals may not be able to consent. Over 85% of policies within each group provide the definition of incapacitation, whereas just one-quarter to two-fifths include possible indicators of an individual's incapacitation. Between 56.5% and 64.4% of all institutions' policies cite the standard used to determine incapacitation. Approximately three-fourths of all institutions' policies state the physical jurisdiction.

Most policies within each group (> 88%) provide notice of the possible sanctions that may be handed down when a violation is found, but the factors that are considered in determining said sanctions are much less likely (< 54%) to be included in a policy for all three groups (Table 11). The right to appeal is noted in nearly all policies within every group as are the procedures used to appeal. Policies coded mention the availability of interim measures at least 84% of the time regardless of institution size, and two-thirds of the policies within each group state the conditions under which a Respondent would be suspended on an interim basis during the grievance process.

Table 11

*Proper Notice to Campus Community by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
1b.1 Applicability of Policy	99.1	100.0	98.3
1b.2 Timeline/Timeframe for Grievance Process	89.8	85.9	86.4
1b.3 Minimum Notification Period Prior to Adjudication	42.6	45.1	52.5
1b.4 Procedures Used in Investigation	93.5	98.6	96.6
1b.5 Procedures Used in Adjudication	97.2	98.6	98.3
1b.6 Standard of Evidence	94.4	97.2	96.6
1b.7 Definition of Standard of Evidence	77.8	76.1	83.1
1b.8 Respondent's Rights in Grievance Process	50.9	50.7	49.2
1b.10 Method of Adjudication Available/Utilized	98.1	98.6	98.3
1b.11 Specific Acts Under Conduct Jurisdiction	98.1	95.8	98.3
1b.12 Definitions of Specific Acts	97.2	95.8	98.3
1b.13 Definition of Consent	97.2	94.4	98.3
1b.14 Reason(s) Individual Unable to Consent	97.2	95.8	96.6
1b.15 Possible Causes/Definition of Incapacitation	85.2	88.7	86.4
1b.16 Indicators of Incapacitation	26.9	31.0	40.7
1b.17 Standard Used to Determine Incapacitation	56.5	54.9	64.4
1b.18 Physical Jurisdiction of Policy	83.3	83.1	78.0
1b.19 Possible Sanctions if Policy Violation	88.9	97.2	98.3
1b.20 Factors Considered in Determining Sanctions	53.7	47.9	44.1
1b.21 Right to Appeal Outcome of Grievance Process	96.3	98.6	98.3
1b.22 Notice of Appeal Procedures	91.7	95.8	94.9
1b.23 Notice of Availability of Interim Measures	84.3	94.4	93.2
1b.24 Specific Conditions Giving Cause to Issue Respondent Interim Suspension	64.8	66.2	66.1

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

As noted above, the coding instrument included a question on whether a policy contained a list of Respondent's Rights (Table 11; Question 1b.8); 56 of the 108 institutions' policies in the 10-19.9 group contained such a list, as did 36 of 71 and 28 of 59 policies in the 20-29.9 and 30+ groups, respectively. Within each list, there were six possible rights that may be included: Right to an Advisor, Right to Be Heard, Right of Confrontation, Right to

Appeal, Right to an Impartial/Fair Process, and Right of Notice (Table 12). Most policies (> 87%) include Right to an Advisor; the same is true regarding the Right to Be Heard (> 83%). However, the Right of Confrontation is most likely to be noted in policies from institutions in 10-19.9 (66.1%) and 20-29.9 (61.1%), as compared to those in 30+ (50.0%). In contrast, a Respondent's Right to Appeal the outcome of the grievance process is stated most often in policies from 30+ (71.4%), followed closely by 20-29.9 (66.7%) and 10-19.9 (64.3%). Policies from institutions in 20-29.9 are the least likely (47.2%) to note a Respondent's Right to an Impartial/Fair Process as compared to those policies from 30+ (67.9%). Concluding the list of possible rights is the Right of Notice, with between 82.1% and 91.7% of institutions' policies across all groups noting this right.

Table 12  
*Proper Notice to Campus Community by Institution Size: Respondent's Rights*

Question	Response Tally (%)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
1b.9 Right to an Advisor	87.5	97.2	92.9
1b.9 Right to Be Heard	83.9	88.9	92.9
1b.9 Right of Confrontation	66.1	61.1	50.0
1b.9 Right to Appeal	64.3	66.7	71.4
1b.9 Right to Impartial/Fair Process	50.0	47.2	67.9
1b.9 Right of Notice	87.5	91.7	82.1

*Note:* Institution size as determined by total student enrollment, in thousands.

*Note:* Included are the policies listing the specific Respondent's Right.

<sup>a</sup> n = 56 policies

<sup>b</sup> n = 36 policies

<sup>c</sup> n = 28 policies

**Right to an advisor.** There were three questions on the coding instrument related to a Respondent's right to an advisor throughout the grievance process (Table 13). Nearly all institutions' policies allow said advisor (> 95%), but considerably fewer policies in each

group allow this advisor to be an attorney (65.7% to 77.5%). Policies coded rarely allow participation by a Respondent’s advisor in the grievance process regardless of institution size.

Table 13  
*Right to an Advisor by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
2.1 Allows Respondent to Have Advisor Present	95.4	98.6	98.3
2.2 Allows Respondent to Have Attorney as Advisor	65.7	77.5	76.3
2.3 Allows Advisor to Participate in Grievance Process	13.0	16.9	10.2

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

**Opportunity to be heard.** Most institutions’ policies within each of the three groups provide for the Respondent to be heard in regard to presenting personal and witness testimony and evidence in both the investigation and the adjudication of a complaint of sexual misconduct (Table 14).

Table 14  
*Opportunity to Be Heard by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
3.1 Respondent Opportunity to Be Heard in Investigation	89.8	91.5	94.9
3.2 Respondent Opportunity to Be Heard in Adjudication	88.0	84.5	81.4

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies



**Right of confrontation.** Respondents' right to confront their accusers as well as the testimony and evidence presented against them is a significant component of due process, and the coding instrument addressed a number of related questions (Table 15). Most institutions' policies across the three groups allow for the submission of anonymous or confidential complaints, and most also allow an investigation into a complaint without the participation of the Complainant. Approximately three-quarters of policies coded across all groups (76.9% to 84.7%) allow a Respondent to review the testimony and evidence gathered during the investigation before a decision-maker renders a finding.

The final area of interest under the right of confrontation is the ability of a Respondent or their advisor to directly question a Complainant and/or witnesses (Table 15). Very few institutions within any of the three groups (12.7% to 13.9%) allow the questioning of a Complainant directly by a Respondent. Policies reviewed are also not likely to allow the direct questioning of a Complainant by a Respondent's advisor (3.4% to 10.2%, with a median of 7.0%). In lieu of direct questioning, IHEs may allow questions to be passed through the adjudicator to be presented to the Complainant for response. As to the direct questioning of witnesses, institutions' policies are more likely to allow Respondents the opportunity (20.4% to 22.5%) than their advisors.

Table 15  
*Right of Confrontation by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
4.1 Allows Submission of Anonymous/Confidential Reports	88.0	87.3	81.4
4.2 Allows Investigation Without Complainant Participation	82.4	84.5	84.7
4.3 Allows Respondent to Review Testimony/Evidence Prior to Finding Rendered	76.9	84.5	84.7
4.4 Allows Direct Questioning of Complainant by Respondent	13.9	12.7	13.6
4.5 Allows Direct Questioning of Complainant by Respondent's Advisor	10.2	7.0	3.4
4.6 Allows Direct Questioning of Witnesses by Respondent	20.4	22.5	22.0
4.7 Allows Direct Questioning of Witnesses by Respondent's Advisor	7.4	5.6	3.4

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

**Right to appeal.** Of the institutions' policies coded, almost all offer both Respondents and Complainants the right to appeal the outcome of the grievance process, but considerably less (46.3% to 66.1%, with a median of 49.3%) allow a Respondent to appeal an interim suspension (Table 16).

Table 16  
*Right to Appeal by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
5.1 Respondent Right to Appeal Outcome	95.4	98.6	98.3
5.2 Complainant Right to Appeal Outcome	90.7	94.4	93.2
5.3 Respondent Right to Appeal Interim Suspension	46.3	49.3	66.1

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

**Impartiality and fairness.** The theme of impartiality and fairness encompasses a variety of issues related to the equitable treatment of Respondents (see Tables 17 and 18). Approximately three-quarters of institutions' policies in all groups note the impartiality of the investigation, but just half of the policies coded in each group mention the same for the adjudication of complaints (Table 17). The number of policies allowing a Respondent to challenge the impartiality of those involved in the grievance process by raising a concern of bias or conflict of interest ranges from 58.3% to 66.1%. Of the policies reviewed, 65.7% to 77.5% allow for summary resolution or dismissal of a complaint should a decision-maker believe that no violation could be found, even if the facts as presented were wholly true. Investigator(s), as neutral parties to the grievance process, should remain impartial (American College of Trial Lawyers, 2017) and thus refrain from providing possible or recommended sanctions within their report outlining the investigation; most of the institutions' policies in the three groups do not require investigators to recommend or provide sanctions as part of their report.

Of the three groups, the most likely to use the terms "victim" and/or "survivor" in regard to the Complainant is 10-19.9 (Table 17). However, those in 30+ use the terms "offender" and/or "perpetrator" to refer to Respondents more often than the policies of institutions in the remaining two groups. The inclusion of a provision against false reporting is another important factor in Respondents' due process, discouraging malicious or untruthful reports, and in light of this, three-quarters of policies coded across the three groups have such a provision. The institutions' policies coded note a requirement of training for investigator(s) less often (51.9% to 74.6%) than training for adjudicator(s) (61.1% to 76.3%) (Table 17).

As noted previously, the “preponderance” standard of evidence allows a Complainant to more easily prove a Respondent’s violation of a sexual misconduct policy, in contrast to the evidentiary standards of “clear and convincing” or “beyond a reasonable doubt,” and when a Respondent is facing severe consequences, such as suspension or expulsion, some argue that the latter two standards are more appropriate under due process (American Council on Education, 2017; Bach, 2003; Edwards, 2015). However, the present study found that most institutions’ policies across the three groups allow for a “preponderance,” with very few (4.2% to 11.9%, with a median of 11.1%) listing either “clear and convincing” or “beyond a reasonable doubt” as the standard utilized (Table 17), which is in line with the 2011 Dear Colleague Letter from OCR, as well as a directive by the U.S. Supreme Court regarding the standard to be used in most civil cases such as those involving discrimination, which includes sexual harassment and sexual misconduct (Loschiavo & Waller, n.d.).

In regard to retaliation protection, most policies coded within each of the three groups afford Respondents said protection as a matter of fairness, either directly or as a participant in the grievance process. Most also allow Respondents to be suspended prior to any finding of responsibility for the alleged sexual misconduct violation, which is contrary to due process as no investigation or adjudication of the underlying complaint has yet occurred to determine the Respondent’s culpability (Table 17).

Table 17  
*Impartiality and Fairness by Institution Size*

Question	Response Tally (% Yes)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
6.1 Policy Statement on Impartial Investigation	77.8	76.1	76.3
6.2 Policy Statement on Impartial Adjudication	52.8	53.5	52.5
6.3 Allow Respondent to Raise Concern of Bias/Conflict	58.3	57.7	66.1
6.4 Allow Summary Resolution/Dismissal of Complaint	65.7	77.5	72.9
6.5 Investigation Report Submitted w/Possible or Recommended Sanctions	28.7	25.4	15.3
6.6 Complainant Referred to as Victim or Survivor	60.2	46.5	52.5
6.7 Respondent Referred to as Offender or Perpetrator	25.0	23.9	33.9
6.8 Provision for Handling False Reports	74.1	77.5	72.9
6.9 Policy Require Investigator(s) to Be Trained	51.9	63.4	74.6
6.10 Policy Require Adjudicator(s) to Be Trained	61.1	70.4	76.3
6.11 Policy Indicates Standard of Evidence as Clear and Convincing or Beyond a Reasonable Doubt	11.1	4.2	11.9
6.12 Policy Prohibit Retaliation Against Respondent	88.9	84.5	84.7
6.13 Policy Allow Interim Suspension of Respondent	83.3	93.0	88.1

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

The final two aspects of impartiality and fairness are the provision of amnesty and interim measures to both parties (Table 18). Across all three groups, policies most often call for amnesty for Complainants only (36.6% to 42.4%), whereas amnesty is provided to both parties in less than a quarter of policies reviewed (16.9% to 26.8%). As to the provision of interim measures, between 52.8% and 66.2% of the institutions' policies in the three groups offer academic, housing, safety, and employment accommodations to both parties, but nearly a quarter of each group's policies mention Complainant-only interim measures (Table 18).

Table 18

*Impartiality and Fairness by Institution Size: Amnesty and Interim Measures*

Question	Response Tally (%)		
	10-19.9 <sup>a</sup>	20-29.9 <sup>b</sup>	30+ <sup>c</sup>
6.14 Amnesty Provided to Complainant Only	40.7	36.6	42.4
6.14 Amnesty Provided to Complainant and Respondent	17.6	26.8	16.9
6.15 Interim Measures Provided to Complainant Only	22.2	23.9	23.7
6.15 Interim Measures Provided to Complainant and Respondent	52.8	66.2	66.1

*Note:* Institution size as determined by total student enrollment, in thousands.

<sup>a</sup> n = 108 policies

<sup>b</sup> n = 71 policies

<sup>c</sup> n = 59 policies

### By Appellate Jurisdiction

Institutions were also categorized by appellate jurisdiction, as there may be variances in sexual misconduct policies based on court decisions rendered by the federal courts of appeals and applicable to colleges and universities in select states, especially in regard to due process at IHEs (Bauer-Wolf, 2018; Harris, 2018). To note, the responses reported below in the text are offered as ranges rather than as individual data for all eleven appellate jurisdictions, with full reporting of tabular results located in accompanying tables arranged by due process theme.

**Proper notice to Respondent.** Table 19 provides the results of the coding instrument's examination of proper notice to the Respondent. Of the 11 appellate jurisdictions, institutions' policies in the Third were least likely to provide notice of charges to Respondents (80.0%), with the most likely being the First and Seventh (100.0%). Fewer policies require notice of a pending investigation be provided to Respondents, with a range of 30.0% to 75.0% and a median of 61.5%. Those policies requiring notice of a pending

adjudication were least likely to be from institutions in the Tenth (41.2%) and most likely from those in the First (83.3%).

Most policies require notice of the outcome of the grievance process be provided to Respondents, with the lowest number of policies being from institutions in the First (83.8%), and in five of the 11 jurisdictions, every policy requires such notice (100.0%). Jurisdictions varied widely on whether the rationale for an outcome was required to be provided to a Respondent, from 40.0% to 86.7%, with a median of 60.0%. Sanctions are to be included in the notice of outcome in 72.0% to 100.0% of policies reviewed by jurisdiction (median of 82.4%). A wide range of results was garnered in regard to notice of the right to appeal, from 16.7% to 82.2%, with a median of 56.3% (Table 19).

Table 19

*Proper Notice to Respondent by Appellate Jurisdiction*

Question	Appellate Jurisdiction (% Yes)										
	1 <sup>st</sup> n=6	2 <sup>nd</sup> n=11	3 <sup>rd</sup> n=10	4 <sup>th</sup> n=24	5 <sup>th</sup> n=25	6 <sup>th</sup> n=32	7 <sup>th</sup> n=21	8 <sup>th</sup> n=23	9 <sup>th</sup> n=45	10 <sup>th</sup> n=17	11 <sup>th</sup> n=22
1a.1 Notice of Charges/Allegations Required	100.0	84.6	80.0	91.7	92.0	84.4	100.0	87.0	95.6	82.4	90.9
1a.2 Notice of Pending Investigation Required	66.7	61.5	30.0	75.0	56.0	62.5	71.4	60.9	44.4	41.2	68.2
1a.3 Notice of Pending Adjudication Required	83.3	69.2	70.0	66.7	56.0	46.9	42.9	52.2	80.0	41.2	77.3
1a.4 Notice of Outcome of Required	83.3	100.0	100.0	95.8	100.0	96.9	100.0	100.0	97.8	94.1	95.5
1a.5 Notice of Rationale for Outcome Required	66.7	76.9	60.0	66.7	40.0	56.3	71.4	56.5	86.7	41.2	54.5
1a.6 Notice of Resulting Sanctions Required	83.3	100.0	80.0	87.5	72.0	81.3	90.5	78.3	97.8	82.4	81.8
1a.7 Notice of Right to Appeal Outcome Required	16.7	53.8	70.0	62.5	32.0	56.3	76.2	17.4	82.2	35.3	68.2



**Proper notice to campus community.** Results from the coding instrument regarding the due process theme of proper notice to the campus community are found in Tables 20 and 21. Policies in nine of the 11 jurisdictions always provide notice of the applicability of the policy; only the Fifth (96.0%) and Seventh (95.2%) fall below this threshold (Table 20). At least 66.7% of policies also provide a timeline or timeframe for the grievance process, though one jurisdiction does so in 100.0% of the policies reviewed (median of 87.0%). The provision of a minimum notification period between notice of a pending adjudication and the adjudication itself is less likely to be noted within institutions' policies in the Tenth (29.4%) and Third (30.0%), with the high end of the range being the 83.3% in the First (median of 38.5%). Most institutions' policies across jurisdictions provide notice to the campus community of the procedures used in an investigation and in an adjudication. The standard of evidence and its definition are provided by nearly all institutions' policies across jurisdictions. A list of Respondent's Rights is often lacking in institutions' policies in the Fifth (36.0%) and Seventh (38.1%), with the Second at the high end of the range (69.2%) and a median of 52.2% (Table 20). The occurrence of the specific rights in policies containing such lists are reported in Table 21.

Table 20 continues the results of the coding instrument in regard to proper notice to the campus community. Only three of the 11 jurisdictions have less than 100.0% of their institutions' policies providing notice of the method of adjudication available or utilized as part of the grievance process. Similar results were found in regard to the listing of specific acts that fall under the conduct jurisdiction of the policies, as well as to the definitions of these acts.

Six of 11 jurisdictions have institutions with policies that define consent 100.0% of the time, with the remainder of jurisdictions ranging from 88.2% to 95.8% (Table 20). Similarly, when examining institutions' policies regarding the reason(s) an individual may not be able to consent, six jurisdictions are at 100.0% and the range of the remainder at 88.2% to 96.0%. At least 72.0% of policies coded define incapacitation, though the indicators of said incapacitation are not provided within institutions' policies as often with a range of 16.7% to 42.2% and a median of 27.3%. The standard used to determine whether a Complainant was incapacitated at the time of the alleged policy violation is noted by between 50.0% and 72.7% of policies (median of 60.0%), save the Second as an outlier (15.4%).

The physical jurisdiction of the policy is noted in at least 70.6% of those coded with the exception of the Ninth, as only 46.7% of policies from institutions in that jurisdiction provide notice of the location(s) to which the policy applies, i.e., on-campus only or encompassing off-campus activities and locations (Table 20). The percent of policies providing a list of sanctions that may apply should a Respondent be found responsible for a sexual misconduct policy violation range from 69.2% to 100.0%, with a median of 96.0%. However, institutions' policies are less likely to provide the factors that may be considered when determining sanctions (20.0% to 70.8%, with a median of 50.0%).

Most policies across all jurisdictions provide notice of the right to appeal the outcome of an institution's grievance procedures as well as the procedures necessary to appeal (Table 20). Policies often note the availability of interim measures (66.7% to 100.0%, with a median of 90.0%), but are less likely to provide the specific conditions that may give the IHE cause to place a Respondent on interim suspension during the grievance process (58.3% to 83.3%, with a median of 65.2%).

Table 20

*Proper Notice to Campus Community by Appellate Jurisdiction*

Question	Response Tally (% Yes)										
	1 <sup>st</sup> n=6	2 <sup>nd</sup> n=11	3 <sup>rd</sup> n=10	4 <sup>th</sup> n=24	5 <sup>th</sup> n=25	6 <sup>th</sup> n=32	7 <sup>th</sup> n=21	8 <sup>th</sup> n=23	9 <sup>th</sup> n=45	10 <sup>th</sup> n=17	11 <sup>th</sup> n=22
1b.1 Applicability of Policy	100.0	100.0	100.0	100.0	96.0	100.0	95.2	100.0	100.0	100.0	100.0
1b.2 Timeline for Grievance Process	66.7	92.3	70.0	100.0	92.0	87.5	95.2	87.0	86.7	82.4	81.8
1b.3 Minimum Notification Prior to Adjudication	83.3	38.5	30.0	45.8	36.0	37.5	38.1	43.5	60.0	29.4	63.6
1b.4 Procedures Used in Investigation	83.3	92.3	90.0	95.8	96.0	93.8	100.0	100.0	100.0	82.4	100.0
1b.5 Procedures Used in Adjudication	100.0	92.3	100.0	95.8	100.0	90.6	100.0	100.0	100.0	100.0	100.0
1b.6 Standard of Evidence	100.0	100.0	100.0	95.8	100.0	93.8	90.5	87.0	97.8	100.0	95.5
1b.7 Definition of Standard of Evidence	83.3	69.2	100.0	75.0	92.0	75.0	61.9	87.0	88.9	76.5	54.5
1b.8 Respondent's Rights	66.7	69.2	50.0	66.7	36.0	43.8	38.1	52.2	46.7	52.9	59.1
1b.10 Adjudication Available/Utilized	100.0	92.3	100.0	95.8	100.0	93.8	100.0	100.0	100.0	100.0	100.0
1b.11 Specific Acts Under Conduct Jurisdiction	100.0	100.0	100.0	95.8	100.0	96.9	100.0	100.0	91.1	100.0	100.0
1b.12 Definitions of Specific Acts	100.0	100.0	100.0	100.0	96.0	93.8	100.0	100.0	91.1	100.0	100.0
1b.13 Definition of Consent	100.0	100.0	100.0	95.8	100.0	100.0	100.0	95.7	93.3	88.2	95.5
1b.14 Reason(s) Unable to Consent	100.0	100.0	100.0	95.8	96.0	100.0	100.0	100.0	93.3	88.2	95.5
1b.15 Causes/Definition of Incapacitation	100.0	100.0	90.0	91.7	72.0	81.3	76.2	100.0	86.7	76.5	95.5
1b.16 Indicators of Incapacitation	16.7	38.5	20.0	41.7	28.0	34.4	19.0	26.1	42.2	23.5	27.3
1b.17 Standard for Determining Incapacitation	66.7	15.4	60.0	62.5	52.0	50.0	52.4	69.6	64.4	58.8	72.7
1b.18 Physical Jurisdiction of Policy	100.0	92.3	80.0	91.7	84.0	90.6	95.2	100.0	46.7	70.6	95.5
1b.19 Possible Sanctions if Violation	100.0	69.2	100.0	100.0	96.0	90.6	90.5	87.0	97.8	100.0	95.5
1b.20 Factors Considered in Determining Sanctions	33.3	53.8	50.0	70.8	20.0	50.0	47.6	56.5	44.4	47.1	68.2
1b.21 Right to Appeal Outcome	100.0	92.3	100.0	91.7	96.0	93.8	100.0	100.0	100.0	100.0	100.0
1b.22 Appeal Procedures	100.0	92.3	100.0	91.7	92.0	81.3	90.5	100.0	100.0	94.1	95.5
1b.23 Availability of Interim Measures	66.7	76.9	90.0	100.0	96.0	84.4	90.5	82.6	95.6	82.4	90.9
1b.24 Specific Conditions Giving Cause to Issue Interim Suspension	83.3	69.2	60.0	58.3	56.0	68.8	61.9	65.2	64.4	70.6	77.3

As previously noted, a list of Respondent's Rights was provided by between 36.0% and 69.2% of institutions' policies across jurisdictions (with a median of 52.2%). The specific rights varied by policy, with the following six being included in the coding instrument with results provided in Table 21: Right to an Advisor, Right to Be Heard, Right of Confrontation, Right to Appeal, Right to an Impartial/Fair Process, and Right of Notice. The percent of policies that include the Right to an Advisor ranges from 66.7% to 100.0%, with a median of 92.9%; the Right to Be Heard has the same range but with a median of 87.5%. The Right of Confrontation, Right to Appeal, and Right to an Impartial/Fair Process were less likely to be found within institutions' policies. The Right of Confrontation was included in the fewest policies in the Ninth (14.3%) and the most in the Second (100.0%) with a median of 66.7%. Conversely, the Ninth was the most likely to include the Right to Appeal (100.0%) with the lower end of the range being the Second and Tenth (44.9%) and the 11 jurisdictions having a median of 60.0%. The Right to an Impartial/Fair Process was included in institutions' policies between 21.4% and 100.0% of the time, with a median of 53.8%. Finally, the Right to Notice was listed in at least 60.0% of policies coded, with the range extending to 100.0% (median of 88.9%) (Table 21).

**Right to an advisor.** Table 22 provides the results of the coding instrument as to the due process theme of right to an advisor. Nearly all institutions' policies across jurisdictions allow a Respondent to have an advisor for the grievance process. Respondents may choose attorneys as advisors in all jurisdictions, but most often in the Tenth (94.1%) and least in the Sixth (50.0%), with a median of 76.9%; however, most policies regardless of jurisdiction do not allow advisors to participate in the grievance process (Table 22).

Table 21

*Proper Notice to Campus Community: Respondent's Rights by Appellate Jurisdiction*

Question	Response Tally (%)										
	1 <sup>st</sup> n=3	2 <sup>nd</sup> n=9	3 <sup>rd</sup> n=5	4 <sup>th</sup> n=16	5 <sup>th</sup> n=8	6 <sup>th</sup> n=14	7 <sup>th</sup> n=10	8 <sup>th</sup> n=12	9 <sup>th</sup> n=21	10 <sup>th</sup> n=9	11 <sup>th</sup> n=13
1b.9 Right to an Advisor	100.0	100.0	100.0	93.8	87.5	92.9	90.0	83.3	100.0	66.7	92.3
1b.9 Right to Be Heard	66.7	100.0	80.0	75.0	87.5	85.7	90.0	91.7	100.0	66.7	92.3
1b.9 Right of Confrontation	66.7	100.0	60.0	68.8	50.0	78.6	40.0	75.0	14.3	55.6	92.3
1b.9 Right to Appeal	100.0	44.4	60.0	68.8	62.5	57.1	60.0	50.0	100.0	44.4	69.2
1b.9 Right to Impartial/Fair Process	66.7	88.9	100.0	37.5	62.5	21.4	30.0	33.3	85.7	33.3	53.8
1b.9 Right to Notice	100.0	100.0	80.0	81.3	75.0	85.7	60.0	100.0	95.2	88.9	92.3

Table 22

*Right to an Advisor by Appellate Jurisdiction*

Question	Response Tally (% Yes)										
	1 <sup>st</sup> n=6	2 <sup>nd</sup> n=11	3 <sup>rd</sup> n=10	4 <sup>th</sup> n=24	5 <sup>th</sup> n=25	6 <sup>th</sup> n=32	7 <sup>th</sup> n=21	8 <sup>th</sup> n=23	9 <sup>th</sup> n=45	10 <sup>th</sup> n=17	11 <sup>th</sup> n=22
2.1 Allows Respondent to Have Advisor	100.0	100.0	100.0	95.8	92.0	96.9	100.0	95.7	97.8	100.0	95.5
2.2 Allows Respondent to Have Attorney as Advisor	83.3	76.9	80.0	75.0	56.0	50.0	57.1	65.2	86.7	94.1	81.8
2.3 Allows Advisor to Participate in Grievance Process	100.0	69.2	100.0	91.7	100.0	93.8	61.9	87.0	84.4	76.5	90.9

**Opportunity to be heard.** Table 23 provides the results of the coding instrument in regard to the right of a Respondent to be heard in their defense and to present related evidence and witness testimony. A majority of policies across the jurisdictions (66.7% to 100.0%, with a median of 91.7%) provide a Respondent the opportunity to be heard as part of the investigation, as do most policies in regard to the adjudication of complaints of sexual misconduct (73.3% to 100.0%, with a median of 88.2%).

**Right of confrontation.** The results corresponding to the right of confrontation are provided in Table 24. Most institutions' policies across the jurisdictions allow for the submission of anonymous and/or confidential reports of sexual misconduct (82.6% to 100.0%), though the First is an outlier at just 66.7%; the same is true for most jurisdictions in allowing institutions to move forward with the investigation with the participation of the Complainant (71.9% to 100.0%), with the First again serving as an outlier at 33.3%. Policies often provide the opportunity for Respondents to review testimony and evidence gathered during the investigation, prior to the adjudication of the complaint by the decision-maker(s) (52.9% to 96.0%, with a median of 77.3%).

Few institutions' policies across jurisdictions allow a Respondent to directly question a Complainant (0.0% to 38.1%, with a median of 6.3%), and most do not allow direct questioning of a Complainant by an advisor of the Respondent (0.0% to 38.1%, with a median of 0.0%). As to the direct questioning of witnesses, most jurisdictions do not allow the practice by either Respondents or their advisors. However, the Seventh (42.9%) and Ninth (44.4%) are outliers, in that they are more likely to allow Respondents to directly question witnesses as compared the other nine jurisdictions. Similarly, the Seventh is again

an outlier at 38.1% in regard to the direct questioning of witnesses by a Respondent's advisor (Table 24).

**Right to appeal.** Table 25 provides responses to the questions in the coding instrument within the theme of right to appeal. Nearly all policies across the 11 jurisdictions allow a Respondent the right to appeal the outcome of a grievance process (91.7% to 100.0%); Complainants are allowed a similar appeal less often (84.6% to 100.0%). Respondents are given the right to appeal an interim suspension between 30.8% and 68.2% of the time, with the median at 52.4%.

Table 23

*Opportunity to Be Heard by Appellate Jurisdiction*

Question	Response Tally (% Yes)										
	1st n=6	2nd n=11	3rd n=10	4th n=24	5th n=25	6th n=32	7th n=21	8th n=23	9th n=45	10th n=17	11th n=22
3.1 Opportunity to Be Heard in Investigation	66.7	92.3	100.0	91.7	96.0	87.5	100.0	87.0	95.6	82.4	90.9
3.2 Opportunity to Be Heard in Adjudication	83.3	92.3	100.0	87.5	92.0	75.0	85.7	91.3	73.3	88.2	95.5

Table 24

*Right of Confrontation by Appellate Jurisdiction*

Question	Response Tally (% Yes)										
	1st n=6	2nd n=11	3rd n=10	4th n=24	5th n=25	6th n=32	7th n=21	8th n=23	9th n=45	10th n=17	11th n=22
4.1 Submission of Anonymous or Confidential Reports	66.7	92.3	100.0	87.5	92.0	90.6	85.7	82.6	77.8	88.2	86.4
4.2 Investigation Without Complainant Participation	33.3	100.0	80.0	87.5	100.0	71.9	76.2	82.6	88.9	88.2	77.3
4.3 Respondent Review of Testimony/Evidence Prior to Finding Rendered	66.7	84.6	90.0	87.5	96.0	68.8	85.7	69.6	71.1	52.9	77.3
4.4 Direct Questioning of Complainant by Respondent	0.0	0.0	0.0	8.3	0.0	6.3	38.1	8.7	35.6	11.8	0.0
4.5 Direct Questioning of Complainant by Respondent's Advisor	0.0	30.8	0.0	8.3	0.0	0.0	38.1	0.0	6.7	5.9	0.0
4.6 Direct Questioning of Witnesses by Respondent	0.0	0.0	0.0	20.8	12.0	9.4	42.9	21.7	44.4	11.8	18.2
4.7 Direct Questioning of Witnesses by Respondent's Advisor	0.0	0.0	0.0	8.3	0.0	0.0	38.1	0.0	6.7	5.9	0.0



Table 25

*Right to Appeal by Appellate Jurisdiction*

Question	Response Tally (% Yes)										
	1st n=6	2nd n=11	3rd n=10	4th n=24	5th n=25	6th n=32	7th n=21	8th n=23	9th n=45	10th n=17	11th n=22
5.1 Respondent Right to Appeal Outcome	100.0	92.3	100.0	91.7	96.0	96.9	95.2	95.7	100.0	100.0	100.0
5.2 Complainant Right to Appeal Outcome	100.0	84.6	90.0	87.5	96.0	90.6	85.7	95.7	97.8	88.2	95.5
5.3 Respondent Right to Appeal Interim Suspension	66.7	30.8	40.0	50.0	36.0	50.0	52.4	56.5	57.8	58.8	68.2

**Impartiality and fairness.** Tables 26 and 27 provide tabular data for the results corresponding to the due process theme of impartiality and fairness in the coding instrument. At least 66.7% of policies across jurisdictions include a statement on the impartiality of the investigation; in regard to a similar statement on the adjudication of sexual misconduct complaints, the results range from 32.0% to 84.6% with a median of 58.8%. Between 46.2% and 77.3% of policies allow a Respondent to raise a concern of bias or conflict of interest (median of 58.8%) (Table 26). Most IHEs' policies do not allow or require an investigator to submit possible or recommended sanctions as part of the investigation report; of the 11 jurisdictions, the range is 0.0% to 39.1% with a median of 25.0%.

Policies are more likely to refer to the Complainant as a “victim” or “survivor” (43.5% to 84.6%, median of 51.1%) than to the Respondent as an “offender” or “perpetrator” (16.7% to 46.2%, median of 23.8%) (Table 26). The inclusion of a provision for handling false reports varies considerably by jurisdiction, with the Second (46.2%) and the First (100.0%) forming the range and the Third being the median (80.0%). The requirement that investigator(s) and adjudicator(s) be trained is not as prevalent in some jurisdictions as others, with the Tenth being the least likely to include such a requirement in regard to either investigators or adjudicators (35.3%). Few jurisdictions require the standard of evidence to be “clear and convincing” or “beyond a reasonable doubt” (0.0% to 19.0%, with a median of 8.7%). Across all jurisdictions, at least three-quarters of the policies offer retaliation protection to Respondents; with regard to interim suspensions, 81.0% to 100.0% of institutions' policies allow the practice (median of 87.5%).

Regarding amnesty, 16.7% to 71.4% (median 37.5%) of institutions' policies include a provision for amnesty to Complainants only, whereas 0.0% to 36.4% (median 17.4%)

provide amnesty to both parties (Table 27). Interim measures are offered to Complainants only by 0.0% to 40.0% (median 25.0%) of institutions' policies across jurisdictions; 16.7% to 71.4% (median 56.5%) of policies note the availability of interim measures to both Complainants and Respondents.

Table 26

*Impartiality and Fairness by Appellate Jurisdiction*

Question	Response Tally (% Yes)										
	1st n=6	2nd n=11	3rd n=10	4th n=24	5th n=25	6th n=32	7th n=21	8th n=23	9th n=45	10th n=17	11th n=22
6.1 Statement on Impartial Investigation	66.7	100.0	100.0	79.2	79.2	75.0	71.4	73.9	86.7	52.9	81.8
6.2 Statement on Impartial Adjudication	66.7	84.6	70.0	45.8	32.0	56.3	42.9	65.2	37.8	58.8	72.7
6.3 Respondent May Raise Concern of Bias	66.7	46.2	50.0	70.8	70.8	62.5	57.1	65.2	53.3	58.8	77.3
6.4 Summary Resolution/Dismissal	100.0	61.5	50.0	87.5	87.5	59.4	57.1	73.9	71.1	70.6	81.8
6.5 Investigation Report Submitted w/Possible or Recommended Sanctions	16.7	7.7	0.0	25.0	25.0	34.4	38.1	39.1	11.1	29.4	31.8
6.6 Complainant as Victim/Survivor	50.0	84.6	70.0	45.8	45.8	50.0	52.4	43.5	51.1	58.8	50.0
6.7 Respondent as Offender/Perpetrator	16.7	46.2	20.0	25.0	25.0	18.8	23.8	26.1	40.0	23.5	27.3
6.8 Provision for Handling False Reports	100.0	46.2	80.0	83.3	83.3	75.0	71.4	87.0	60.0	76.5	86.4
6.9 Requires Investigator(s) to Be Trained	50.0	69.2	60.0	50.0	50.0	71.9	61.9	43.5	68.9	35.3	63.6
6.10 Requires Adjudicator(s) to Be Trained	66.7	92.3	70.0	62.5	62.5	75.0	57.1	73.9	80.0	35.3	63.6
6.11 Indicates Standard of Evidence as Clear & Convincing/Beyond Reasonable Doubt	0.0	7.7	10.0	12.5	12.5	12.5	19.0	8.7	8.9	5.9	0.0
6.12 Prohibits Retaliation Against Respondent	100.0	84.6	80.0	83.3	83.3	81.3	100.0	91.3	75.6	100.0	90.9
6.13 Allows Interim Suspension of Respondent	100.0	84.6	80.0	87.5	87.5	81.3	81.0	95.7	91.1	88.2	90.9

Table 27

*Impartiality and Fairness by Appellate Jurisdiction: Amnesty and Interim Measures*

Question	Response Tally (% Yes)										
	1st n=6	2nd n=11	3rd n=10	4th n=24	5th n=25	6th n=32	7th n=21	8th n=23	9th n=45	10th n=17	11th n=22
6.14 Amnesty to Complainant Only	16.7	69.2	50.0	41.7	68.0	37.5	47.6	30.4	24.4	35.3	31.8
6.14 Amnesty to Complainant and Respondent	33.3	0.0	30.0	25.0	16.0	25.0	14.3	17.4	11.1	29.4	36.4
6.15 Interim Measures to Complainant Only	0.0	30.8	40.0	25.0	37.5	28.1	14.3	26.1	13.3	17.6	22.7
6.15 Interim Measures to Complainant and Respondent	16.7	53.8	40.0	66.7	48.0	59.4	71.4	56.5	71.1	52.9	68.2

## Summary of Results

The coding instrument allowed for a review of six themes of due process: proper notice, right to an advisor, opportunity to be heard, right of confrontation, right to appeal, and the provision of impartiality and fairness. They are summarized below first in totality, then by institution size, and finally by appellate jurisdiction.

In regard to proper notice to the Respondent, the most important of aspects of notice, i.e., notice of charges/allegations, notice of outcome, and notice of sanctions, were provided by most of the institutions' policies reviewed (Table 1). As to proper notice to the campus community, of the 24 questions on the coding instruments, 16 questions yielded "yes" responses in regard to nearly all of the institutions' policies coded (Table 2). Within this set of questions was a review of policies' inclusion of a list of Respondent's Rights; the most often noted Right by those policies with such a list was the right to an advisor (Table 3). Nearly all institutions' policies allow Respondents to have an advisor present during the grievance process (Table 4), and most provide Respondents an opportunity to be heard in the investigation and adjudication of complaints of sexual misconduct (Table 5). As to the right of confrontation, most policies allow (1) submission of anonymous or confidential complaints and (2) investigations to be initiated without participation by the Complainant, but most do not allow direct questioning of Complainants or witnesses by Respondents or their advisors (Table 6). Respondents and Complainants are almost always provided the opportunity to appeal the outcome of a grievance process, but Respondents are only allowed to appeal an interim suspension by approximately half of policies coded (Table 7). The impartiality and fairness provided to Respondents varied greatly by question on the coding instrument; for instance, 86.6% of policies coded prohibit retaliation against Respondents in

support of fairness, but 87.4% allow Respondents to be suspended on an interim basis during the grievance process, which would seem to favor the Complainant by assuming the allegations justify such a suspension prior to the conclusion of an impartial investigation and adjudication (Table 8). In continuation of the theme of impartiality and fairness, only 20.2% of policies reviewed allow amnesty for both Complainants and Respondents, though 60.1% provide interim measures to both parties (Table 9).

The data was further examined by separating the IHEs from which the policies in the sample were derived into three groups by institution size as determined by total student enrollment (Tables 10-18). Results were consistent across groups for a majority of the questions on the coding instrument; those questions that elicited responses that were inconsistent tended to fall within a 10- to 15-percent spread. For example, in regard to proper notice to the campus community and the factors considered in determining sanctions, the range was 44.1% (30+) to 53.7% (10-19.9), or a spread of 9.6%. Of the 61 questions on the coding instrument, 11 questions had a response spread of 10% to 15%, and four questions had a spread of over 15%.

The final analysis of the data was by appellate jurisdiction of the IHEs from which the policies reviewed were derived (Tables 19-27). In contrast to the results by institution size, those tallied by appellate jurisdiction were often inconsistent, with spreads of 4.8% to 66.7% between jurisdictions. For example, in regard to proper notice to the campus community, the range for responses in regard to whether the timeline for the grievance process was provided within the policy was 95.2% to 100.0%, or a spread of 4.8%. Under the umbrella of right of confrontation, institutions' policies allowed for an investigation to

proceed without the participation of the Complainant from 33.3% to 100.0% of the time, or a 66.7% spread.

In Chapter Five, I provide discussion of the results in dialogue with the literature and existing policy guidance, regulations, and laws, as well as noting recommendations for future research and implications for practice.



## CHAPTER FIVE

### DISCUSSION AND IMPLICATIONS

In an attempt to determine the degree to which due process is afforded to Respondents by institutions of higher education (IHEs) in regard to the investigation and adjudication of sexual misconduct complaints, three research questions were considered:

- (1) To what extent do sexual misconduct policies at public, four-year colleges and universities provide due process to Respondents as measured through the frequency of inclusion of words and/or phrases comprising six themes: proper notice, the right to an advisor, the opportunity to be heard, the right of confrontation, the right to appeal, and the need for impartiality and fairness?
- (2) In examining these policies, are there differences in due process provided when policies are categorized by institution size as determined by total student enrollment?
- (3) In examining these policies, are there differences in due process provided when policies are categorized by federal appellate jurisdiction?

Integrating the results of the present study with the practice of Title IX implementation at colleges and universities in this chapter, I first provide a summary of key findings by due process theme in discussion with prior research and in dialogue with federal law and guidance and notable criticisms of the current state of sexual misconduct policies at IHEs. Next, I provide the limitations of the present study in conjunction with recommendations for future research. Finally, I discuss implications in practice and provide observations of the research itself from the lens of students-as-consumers.

## Summary of Key Findings

Key findings are summarized below regarding the six themes of due process that were examined in the present study: proper notice, right to an advisor, opportunity to be heard, right of confrontation, right to appeal, and impartiality and fairness. Additionally, findings of interest in relation to the 2018 OCR proposed amended regulations for the implementation of Title IX are provided.

### Proper Notice

The coding instrument was segmented into two subsets of questions on proper notice, with one subset on proper notice to the Respondent and a second subset on proper notice to the campus community. I provide a discussion of the key findings of each subset in turn below.

**Proper notice to Respondent.** I had anticipated that all policies would note, at minimum, a requirement to provide notice of charges/allegations to Respondents, as this is a “core” aspect of due process under the 14<sup>th</sup> Amendment (Justia, 2019, para. 5). Further, I expected to find that policies would also require notice of the outcome of the grievance process be provided to Respondents, as this is mandated by the Campus Sexual Violence Elimination Act (2013) (“SaVE Act”) and OCR’s 2001 Revised Sexual Harassment Guidance (“Guidance”). The SaVE Act (2013) also mandates that IHEs provide notice of any appeals procedures to Respondents, if applicable; thus, I expected that if the present content analysis indicated a majority of policies provide the right to appeal to Respondents, then a notice of this right would also be required within a majority of the policies.

***Notice of charges/allegations.*** Out of the 238 policies coded, 90.3% mentioned a requirement to provide Respondents with notice of the charges/allegations. In regard to

institution size, policies at institutions with 10,000-19,999 students were slightly less likely to provide such notice as compared to their larger peers, and in considering appellate jurisdictions, those IHEs in the Tenth were the least likely to have policies that required the provision of notice of the charges/allegations (82.4%).

The present findings represent an improvement in comparison to previous research. Karjane et al. (2002) found that approximately 62% of IHEs' policies provided the "Accused" with notification of the nature of a complaint submitted to the institution (p. 110), and in the content analysis by the U.S. Senate Subcommittee (2014), 87% of policies required written notice of allegations be provided to a Respondent. The increase as to the provision of notice of the charges/allegations over time (from 61.9% in 2002 to 90.3% in the present study) may have to do with the heightened focus on the issue of sexual misconduct at IHEs, or it may simply be that the sample for each study had unknown variances that affected the findings. Interestingly, an open letter penned in 2016 by 26 law professors from various post-secondary institutions contends that provision of notice of the charges/allegations to Respondents is not a common practice during sexual misconduct grievance processes (Alexander et al., 2016). This contention, when compared to the findings of the present study, would seem to suggest one of two things: (1) although policies are written to require such a notice, Title IX practitioners may not be following their own institutional mandates, or (2) the data upon which these law professors relied was incomplete.

***Notice of outcome.*** 97.5% of policies coded require notice of the outcome of the grievance process be provided to Respondents. Policies at institutions of all sizes were just as likely to provide notice of the outcome as their peers, and the range of results across

appellate jurisdictions was 83.3% to 100.0% (median of 97.8%). Content analyses conducted by the U.S. Senate Subcommittee (2014) and Richards (2016) found similar results.

***Notice of right to appeal.*** Nearly all policies (97.1%) in the present study provide Respondents with the right to appeal, but 104 of the 238 policies coded did not mention whether a notice of this right was to be provided to these individuals. Colleges and universities with 30,000 or more students were considerably more likely to have policies that mentioned the requirement of notice of the right to appeal than their smaller peers. Policies by appellate jurisdiction ranged from 16.7% to 82.2% (median of 56.3%).

***Proper notice to campus community.*** Within the subsection of proper notice to the campus community were 25 questions on the coding instrument; the key findings related to these questions are provided below.

***Procedures used.*** Prior research by Karjane et al. (2002) found that of the 817 policies reviewed, less than half (46%) specified the procedures utilized in the sexual misconduct grievance process. Richards (2016) coded policies using an instrument similar to that of Karjane et al. (2002) and found that 79% included an outline of grievance procedures used to address sexual misconduct complaints. In considering the intense focus on Title IX procedures at IHEs in recent years, I anticipated a rise in the number of policies providing notice of grievance procedures used in the investigation and adjudication of complaints of sexual misconduct at post-secondary institutions. Indeed, of the 238 policies coded in the present study, 95.8% and 97.7% provided such notice of the investigative and adjudicative procedures, respectively, with no considerable differences among institutions by size or appellate jurisdiction.

***Standard of evidence.*** The SaVE Act (2013) requires IHEs to provide notice of the standard of evidence utilized in their sexual misconduct grievance processes. As I expected, nearly all institutions are in compliance with the requirement, as notice of the standard utilized is provided by 95.8% of the 238 IHEs' policies coded in the present study, with no differences of any consequence among policies by institution size or appellate jurisdiction. Interestingly however, only 78.6% of policies provide a definition their chosen standard of evidence, and though differences by institution size are minimal, the range by appellate jurisdiction in regard to the provision of said definition varies widely from 54.5% to 100.0% (median of 76.5%).

***Respondents' Rights.*** Just half of IHEs' policies in the present study provided a list of Respondents' Rights, though 92% of policies in the study conducted by the U.S. Senate Subcommittee (2014) required notice of such rights be provided to Respondents prior to the adjudication of a complaint of sexual misconduct. There were no differences of any considerable magnitude in regard to institution size, but the range by appellate jurisdiction was 36.0% to 69.2% (median 52.2%).

***Conduct jurisdiction and definitions.*** Potter et al. (2000) found that only 25% of policies analyzed in their study noted conduct jurisdiction, and Karjane et al. (2002) determined that generic terms were used to describe prohibited behaviors in approximately one-third of policies coded. However, under the 2001 Guidance, IHEs are required to identify the specific acts that fall under the conduct jurisdiction of their sexual misconduct policies, and per the Association for Student Conduct Administration (ASCA) (2014), policies should also include definitions of said acts to prevent ambiguities. As such, I expected results of the present study to be more in line with the 2001 Guidance and the ASCA recommendations

than with the findings of the prior research. Of the 238 policies reviewed in the present study, 97.5% provided notice of the specific acts under the conduct jurisdiction of the policies, and 97.1% included definitions of said acts. To note, there were no substantial differences among policies by institution size or appellate jurisdiction.

Additionally, policies should define the term “consent” (Rudovsky et al., 2015) to provide Respondents with the knowledge necessary to determine when conduct may be unwelcome. Murphy (2011) found that all seven IHEs in his study included a definition of consent; in the present study, 96.6% of institutions’ policies had such a definition. Further, of the 238 policies presently coded, 96.6% mentioned at least one reason an individual may be unable to consent, typically citing incapacitation as an example, and policies often provided the possible causes of incapacitation (86.6%), or a definition for the term. Though few differences were found among IHEs’ policies by institution size, the range in regard to appellate jurisdictions was 72.0% to 100.0% (median of 90.0%). Fewer than one-third of policies coded (31.5%) noted the indicators of incapacitation due to drugs and/or alcohol, and just over half (58.0%) provided the standard used by the institution to determine an individual’s level of incapacitation. As to the indicators of incapacitation, there were variances by institution size (26.9% to 40.7%), as well as by appellate jurisdiction (16.7% to 42.2%, median of 27.3%). The provision of the standard used to determine incapacitation also varied moderately by institution size, from 54.9% to 64.4%, and by appellate jurisdiction, from 15.4% to 72.7% (median 60.0%).

Though the above results indicate that Respondents are provided with specific acts that are prohibited, as well as the institutional definitions of these acts, deficits remain in regard to fully informing them of the signs of incapacitation or the standard an institution

would use to determine whether the Complainant was incapacitated at the time of the alleged policy violation(s). Ultimately, as argued by Rudovsky et al. (2015), policies could be said to lack “clear rules” (p. 1) as to the full extent of their conduct jurisdiction, causing a lack of predictability on the part of Respondents as to how to avoid violating institutions’ sexual misconduct policies.

***Physical jurisdiction.*** In light of the fact that the physical jurisdiction of one IHE’s sexual misconduct policy may be very different than that of another IHE, i.e., limited (on-campus conduct only) versus more comprehensive (inclusive of on-campus, off-campus, and electronic conduct), it is important to provide notice of physical jurisdiction within the institution’s published policy to satisfy the due process theme of notice. Of the policies coded in the present study, most (81.9%) provide the physical jurisdiction with no substantial difference found by institution size. However, in reviewing the policies coded by appellate jurisdiction, a considerable outlier was the Ninth at 46.7% as compared to the policies in the other 11 jurisdictions, which had a range of 70.6% to 100.0% (median of 92.0%).

***Sanctions.*** Potter et al. (2000) found that just 56% of their sample provided possible sanctions issued when a Respondent is found in violation of an institution’s sexual misconduct policy, and only 14% of those institutions in the sample studied by Murphy (2011) included such sanctions in their policies. However, the SaVE Act (2013) requires IHEs to provide within their policies the sanctions that may be imposed on a Respondent should a policy violation be found; thus, I expected a majority of policies in the sample to provide said sanctions. Of the 238 policies coded in the present study, 93.7% contained a list of sanctions possible should a Respondent be found in violation of the institution’s Title IX policy. There were not considerable differences by institution size, but with appellate

jurisdiction, IHEs' policies in the Second were substantially less likely to provide sanctions (69.2%) as compared to those from the other 11 jurisdictions (range of 87.0% to 100.0%).

*Appeals procedures.* Per the 2001 Guidance and the 2017 Q&A, an IHE that allows for an appeal of the outcome of a sexual misconduct grievance process is required to provide notice of the procedures used to appeal. Though prior research did not indicate a high level of compliance with the 2001 Guidance (Karjane et al., 2002), I expected a majority of institutions to publish appeals procedures as part of their Title IX policies in consideration of the 2017 Q&A; of the 238 policies coded, 93.7% included such procedures. No substantial differences were noted among policies by institution size, but in regard to appellate jurisdiction, those policies from the Sixth were less likely (81.3%) than those from all other jurisdictions (range of 90.5% to 100.0%) to contain appeals procedures.

### **Right to an Advisor**

The SaVE Act (2013) requires that both parties be allowed to have an advisor of their choosing during the sexual misconduct grievance process; OCR's 2017 Q&A on Campus Sexual Misconduct ("Q&A") also states that an IHE must not limit either party's choice of advisor or prevent the parties from having advisors present during the grievance process. As such, I anticipated that all institutions would note the right to an advisor for Respondents within their policies and that all would state that this advisor could be (1) any individual chosen by the Respondent, indicating that the advisor could be an attorney or (2) an attorney specifically. Of the IHEs' policies in the present study, 97.1% mentioned Respondents' right to an advisor, but only 71.8% noted the ability to choose this advisor or that this advisor could be an attorney. There were no considerable differences in the findings based on institution size or appellate jurisdiction regarding the right to an advisor.



As to prior research, Karjane et al. (2002) found that only 37% of the policies reviewed noted that both parties were allowed an advisor during the adjudication of a sexual misconduct complaint. Just over a decade later, the U.S. Senate Subcommittee (2014) found that 75% of policies allowed the parties to have an advisor or attorney present. This increase over time, up to 97.1% in the present study, may be related to the change in law and related guidance, to the societal focus on Title IX complaints at IHEs, or in response to Respondents and their supporters arguing for a higher level of due process in the resolution of complaints of sexual misconduct at colleges and universities.

### **Opportunity to Be Heard**

The U.S. Supreme Court, in *Goss v. Lopez* (1975), held that public institutions must provide Respondents an opportunity to be heard, but depending upon the grievance process utilized, an interview during an investigation could be considered enough to meet this requirement, with no opportunity for the Respondent to provide testimony, evidence, and witnesses in their own defense directly to the decision-maker during the adjudication of a sexual misconduct complaint. The 2001 Guidance stated a need for IHEs to provide Respondents “the opportunity to present witnesses and other evidence” (p. 20), and the 2017 Q&A reiterates this mandate. As such, I anticipated most institutions’ policies would provide Respondents the opportunity to be heard during either the investigation or adjudication component of the grievance process, with many providing the opportunity in both. The findings aligned with this projected outcome, as 91.6% and 85.3% offered the opportunity to be heard in the investigation and adjudication, respectively. There were no noteworthy differences among policies of different institution sizes. However, in regard to appellate jurisdictions, those IHEs’ policies from the First were considerably less likely than their peers

in other jurisdictions to provide Respondents the opportunity to be heard during an investigation, and those in the Ninth were least likely to provide the opportunity during the adjudication.

Though prior research was limited in regard to the opportunity to be heard, the content analysis by the U.S. Senate Subcommittee (2014) found that just 67% of IHEs allow Respondents to offer supporting witnesses as part of the adjudication process. These findings would seem to support the position taken by the Committee on Women in the Academic Profession for the American Association of University Professors (2016) and Alexander et al. (2016) in regard to the opportunity to be heard, as each group criticizes the sexual misconduct grievance process, arguing that IHEs prevent Respondents from presenting evidence to support their position and in defense of themselves. However, in the years between the U.S. Senate Subcommittee's (2014) study and the opinions published by the Committee on Women (2016) and Alexander et al. (2016), policies may have changed, as is supported by the findings in the present study, and the policies' use in practice may also more closely align with the written text.

### **Right of Confrontation**

Two questions addressing the right of confrontation were of interest in the present study: (1) Does the policy allow submission of anonymous and/or confidential complaints? and (2) Does the policy allow the Respondent to review the testimony and evidence gathered during the investigation prior to a finding being rendered? The findings resulting from each question are discussed below.

**Submission of anonymous and/or confidential complaints.** When complaints are received by anonymous reporters or those who wish to remain confidential,

Kirkpatrick (2016) argues that Respondents are unable to determine whether the motive for the complaint was malicious or whether the complaint was made by an individual known to fabricate accusations; in essence, a Respondent is denied the right of confrontation in having the ability to confront the motivation of their accuser when an IHE accepts anonymous or confidential complaints. Additionally, the 2001 Guidance acknowledges the possibility of false complaints and the resulting reputational damage to a Respondent.

In the present study, most institutions' policies allow the submission of anonymous and/or confidential complaints, which at 86.1% is on the high end of the range of findings in regard to prior content analyses conducted by Karjane et al. (2002), the U.S. Senate Subcommittee (2014), Richards (2016), and Richards et al. (2017). No substantial difference was noted in the present study among IHEs' policies by institution size, and most of the colleges and universities in each appellate jurisdiction allowed the submission of anonymous and/or confidential complaints, with a range of 66.7% to 100.0% (median of 87.5%).

**Access to testimony and evidence.** Alexander et al. (2016) contend that IHEs often fail to provide Respondents with an indication of the evidence used by the decision-maker to determine whether there was a Title IX policy violation. Despite this contention, I approached the present study with the thought that most post-secondary institutions would provide Respondents the right to confront the evidence and testimony against them as their ability to mount an adequate defense and address what are likely to be serious allegations is based upon knowing what has been provided by the Complainant and others as part of the investigation. This expectation is supported by the 2017 Q&A, which notes the need for a Respondent to be provided the right of confrontation in regard to "timely and equal access" to testimony and evidence that will be used during the sexual misconduct grievance process

(p. 4), as well as by *Doe v. Brandeis University* (2016), where the U.S. District Court for the District of Massachusetts held that Respondents should be allowed to view evidence against them. In alignment with what I anticipated, I found that 81.1% of institutions' policies allow Respondents to review the testimony and evidence gathered during the investigation prior to the adjudication, even though the 2017 Q&A does not have the weight of law, but instead is simply OCR guidance for IHEs, and the decision in *Doe* (2016) is controlling in only one of 94 federal districts.

Though the findings did not indicate any considerable difference among IHEs' policies based on institution size, a noteworthy finding was observed in regard to the Respondent's right to confront inculpatory testimony and evidence when viewing the results by appellate jurisdiction. Most institutions in the Fifth (96.0%) have policies that note the ability of the Respondent to review this testimony and evidence, while just 35.6% of IHEs' policies in the Ninth allow the same access.

### **Right to Appeal**

The coding instrument asked whether institutions' policies provided the right to appeal the outcome of a sexual misconduct grievance process to (1) a Respondent and/or (2) a Complainant. The key findings addressing the responses to each question are provided below. To note, there was little difference among IHEs' policies as to either party's right to appeal when reviewed by institution size or appellate jurisdiction.

**Respondents' right to appeal.** The findings of the present study indicate that nearly all IHEs' policies coded (97.1%) provide Respondents with the right to appeal the outcome of the grievance process in regard to complaints of sexual misconduct. This is in line with what I anticipated, as the right of the Respondent to appeal is considered by many to be a basic

tenet of due process (Robertson, 2013) although no guidance or regulations from OCR nor the SaVE Act (2013) require such a right be provided in Title IX grievance processes.

**Complainants' right to appeal.** OCR's 2011 "Dear Colleague" Letter ("DCL") and 2014 Questions and Answers on Title IX and Sexual Violence ("Questions and Answers") required that if an IHE provided the right to appeal to one party, the IHE had to provide the same right to the other. Prior to the 2017 Q&A, the 2011 DCL and 2014 Questions and Answers were considered the controlling documents for institutional sexual misconduct policies, and as many IHEs have not yet revised their policies to align with the 2017 Q&A, choosing instead to wait for the final version of the 2018 proposed amended regulations from OCR that will modify the implementation of Title IX, I anticipated that most policies coded would also allow Complainants to appeal the outcome of the grievance process. This anticipated finding was realized, in that 92.4% of the policies provide Complainants with the right to appeal.

To note, under the 2017 Q&A, colleges and universities are no longer required to provide Complainants with a right to appeal, and traditional due process does not require such a right be provided to a Complainant. Additionally, Carle (2016) and Alexander et al. (2016) argue that Complainants should not have the right to appeal where the decision-maker found the Respondent not to have violated the institution's policy on sexual misconduct; Carle (2016) contends that allowing a Complainant to appeal amounts to double jeopardy for Respondents. Thus, I would anticipate that if the present study was repeated in the future, a different result may be obtained in regard to Complainants' right to appeal.

### **Impartiality and Fairness**

Equitable treatment of the Respondent and the Complainant in any sexual misconduct grievance process is a matter of fairness and evidence of impartiality on the part of the IHE as elucidated by the 2017 Q&A, in that the “rights and opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms” (p. 4). To address this due process theme, the coding instrument asked 24 questions regarding impartiality and fairness; key findings resulting from these questions are noted below.

**Concern of bias or conflict of interest.** Allowing a Respondent to raise a concern of bias or conflict of interest in regard to those involved in the sexual misconduct grievance process is a matter of impartiality, as per the 2017 Q&A, investigators and adjudicators should be free from “reasonably perceived conflicts of interest and biases for or against any party” (p. 4). Prior research by the U.S. Senate Subcommittee (2014) found that of the policies coded in their sample, 82% provided Respondents the opportunity to raise a concern of bias or conflict of interest. However, in the present study, only 60.1% of IHEs’ policies note the same opportunity for Respondents. Though there was not a considerable difference found among policies by institution size, the findings by appellate jurisdiction do show such a difference, with a range of 46.2% to 77.3% (median of 58.8%).

**False reporting.** Prior research resulted in varied findings regarding whether IHEs’ sexual misconduct policies contained provisions for handling false reports, i.e., wrongful or malicious accusations against Respondents. Richards (2016) and Richards et al. (2017) found that 69% and 75% of policies coded, respectively, noted such provisions. In the present study, my findings were in line with the Richards’ studies, in that 74.8% of policies reviewed had a provision for handling false reports of sexual misconduct. There were no notable differences

by institution size, but the range for policies by appellate jurisdiction was 46.2% to 100.0% (median of 80.0%).

**Amnesty.** Amnesty provisions in IHEs' Title IX policies provide individuals with protection from discipline for minor conduct violations that may occur in conjunction with an act of sexual misconduct, with the idea being to encourage reporting and participation in the investigation of the act of sexual misconduct by Complainants and witnesses. However, in respect of fairness, the same provisions should apply to Respondents who participate in the investigation so as to eliminate the possibility of them declining to testify in their defense due to a fear of being disciplined for minor violations of institutional policy, e.g., alcohol or drug use on campus. Prior research by Beyer (2015), Richards (2016), and Richards et al. (2017) found that of the IHEs that had an amnesty provision within their Title IX policies, the provision did not apply to Respondents. As such, I anticipated that of the 238 policies coded in the present study, few would provide amnesty to Respondents.

As I had projected, I found that 39.9% of institutions' policies provided amnesty to Complainants only, whereas just one-fifth applied the provision to both parties. No substantial difference was noted in the analysis of policies by institution size; however, the range of IHEs' policies providing amnesty to Complainants only by appellate jurisdiction was 16.7% to 69.2% (median of 37.5%). Those institutions' policies providing amnesty to both parties, when reviewed by appellate jurisdiction, had a range of 0.0% to 36.4% (median of 17.4%).

**Interim measures.** As a matter of fairness and impartiality, interim measures, or accommodations in the area of academics, safety, employment, and/or housing, should be offered by IHEs to Complainants and Respondents during the grievance process; these

measures should also take into consideration the rights of both parties when decisions are made that effect one party more so than the other, per the 2017 Q&A. In prior research, Karjane et al. (2002), Richards (2016), and Richards et al. (2017) found that most policies reviewed failed to mention the availability of interim measures to Respondents. However, in the present study, 60.1% of policies noted interim measures being made available to both parties, with just 23.1% mentioning Complainants only when stating the availability of such measures. In regard to institution size, policies from institutions with 10,000 to 19,999 students were least likely to note the provision of interim measures to both parties as compared to their larger peers. When reviewing the findings based on appellate jurisdiction, the range for policies stating the availability of interim measures to both parties was 16.7% to 71.4% (median of 56.5%).

**Terminology.** One aspect of impartiality that was of interest to me dealt with the terminology used to refer to the parties within the policies coded, i.e., the use of “victim” or “survivor” for Complainants and “offender” or “perpetrator” for Respondents. Counter to fairness, one could make the argument that the use of the certain terms sets an expectation that allegations are truthful, as Complainants would only be considered victims or survivors and the Respondents’ offenders or perpetrators if the Respondent did in fact violate the IHE’s sexual misconduct policy. When charged terms such as “victim” and “perpetrator” are used in the text of policies, these terms may create a fundamentally skewed process in favor of Complainants. Of the 238 policies in the sample, 54.2% used the terms “victim” or “survivor” in reference to the Complainant, beyond just the definition of “Complainant” with in the policy. In contrast, just 26.9% referred to the Respondent as “offender” or “perpetrator” within the text.



There were notable differences among IHEs' policies in regard to the institution size, with those colleges and universities with 20,000 to 29,999 students being least likely to use either set of terms. Differences were also noteworthy by appellate jurisdiction, with the range for the use of "victim" or "survivor" being 43.5% to 84.6% (median of 51.1%), and the range for the terms "offender" or "perpetrator" being 16.7% to 46.2% (median of 23.8%).

### **Findings of Interest to OCR's 2018 Proposed Amended Regulations**

Beyond the key findings noted above, there are additional results of interest in the present study that are best understood in dialogue with OCR's 2018 proposed amended regulations implementing Title IX at IHEs. These results fall under two of the six due process themes, right of confrontation and impartiality and fairness, and are discussed in greater detail below.

**Right of confrontation.** Under the umbrella of the right of confrontation, there were key findings in the areas of Complainants' participation, advisors' participation, and direct questioning. Below I present relevant findings of prior research and the present study, followed by a discussion of the due process policy considerations that will be necessary should the 2018 proposed amended regulations go into effect as written.

***Relevant findings: Complainants' participation.*** Prior research by the U.S. Senate Subcommittee (2014) found that 91% of IHEs in their sample did not require Complainants to participate in the adjudication process. Similar results were found in the present study (83.6%) in regard to whether an IHE may investigate a complaint of sexual misconduct without participation of the Complainant, with no notable differences among policies by institution size. However, when the findings were examined by appellate jurisdiction, the range was 33.3% to 100.0% (median of 82.6%).

***Relevant findings: advisors' participation.*** Prior research has not examined whether sexual misconduct policies allow advisors to actively participate in the grievance process; however, in the present study, I found that of the 238 policies coded, 15.5% noted that advisors to the parties were allowed to participate beyond simply supporting the Complainant or Respondent. Although there were no differences of note among policies by institution size, differences were observed by appellate jurisdiction, with a range of 0.0% to 38.1% (median of 9.1%).

***Relevant findings: direct questioning.*** Karjane et al. (2002) found that of the 817 policies coded, nearly 40% mentioned that cross-examination of one party by the other was a “possibility” (p. 115), though no indication was given as to whether direct questioning was the required mode of such an examination. In the present study, two questions on the coding instrument addressed direct questioning of the Complainant. The first question focused on whether a Respondent was allowed by the policy to directly question the Complainant; just 13.4% of IHEs' policies provided this opportunity. The second question asked whether a Respondent's advisor could question the Complainant directly; of the 238 policies coded, 7.6% allowed such questioning. Review of the results by institution size yielded no noteworthy differences, but findings by appellate jurisdiction revealed some variances. For both questions, institutions' policies in the Seventh were consistent in their provisions, allowing both Respondents and their advisors the opportunity to directly question Complainants at 38.1% for each question. Those IHEs' policies in the Ninth were also more likely than those of their peers in other jurisdictions to allow such questioning by Respondents (35.6%), whereas those in the Second were more likely to allow advisors' direct questioning (30.8%).

***Due process policy considerations.*** These findings are important in consideration of the 2018 proposed amended regulations, which state, "...grievance procedures must include live cross-examination at a hearing" (OCR, 2018, p. 57). Further, "At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions" (OCR, 2018, p. 52). Additionally, "Cross-examination conduct by the parties' advisors (who may be attorneys) must be permitted..." (OCR, 2018, p. 57). These statements have been interpreted by some to mean that a Complainant must be "available for and subject to direct cross examination by an advisor of a party in a live hearing..." (Women's Law Project, 2019, p. 10). If this understanding proves correct, then Complainants would be required to participate in the grievance process and to submit to direct questioning by the Respondent's advisor, who may be an attorney, which would be a major shift from most policies as currently written. Though opponents to the 2018 proposed amended regulations argue against such a shift (American Association for Access, Equity and Diversity, 2019; Gersen, Gernter, & Halley, 2019; Women's Law Project, 2019), the result would be a sexual misconduct grievance process that is much more aligned with Respondents' due process right of confrontation.

***Impartiality and fairness.*** Within the scope of the due process theme of impartiality and fairness lies the standard of evidence used by IHEs in the sexual misconduct grievance process.

***Standard of evidence.*** Impartiality would seem to indicate that the use of a standard of evidence that offers both the Complainant and the Respondent an equal opportunity to have a finding in their favor in the adjudication of a complaint of sexual misconduct is most appropriate, as is the case with the "50% plus a feather" evidentiary standard of

“preponderance” (Stephens, 2017, para. 5). However, in light of the seriousness of the consequences associated with such complaints, some argue that a higher standard of evidence, such as “clear and convincing,” is more appropriate (Baker, 2017), as it does not offer the Complainant an unfair advantage over the Respondent in requiring only the minimum amount of evidence to prove the allegations. In support of this argument, the court in *Doe v. University of Massachusetts-Amherst* (2015) noted that, “...the choice of standard may tip the scale in favor of the Complainant in cases where testimony from both parties is credible” (p. 14), and per Baker (2017), “...preponderance of the evidence makes convictions easier to reach” (p. 559).

In prior content analyses of sexual misconduct policies, researchers found that evidentiary standards varied between the lower threshold of “preponderance” to the higher standard of “beyond a reasonable doubt,” although a majority of IHEs’ policies used a “preponderance” standard (Karjane et al., 2002; U.S. Senate Subcommittee, 2014). Though the 2011 DCL indicated “preponderance” as the acceptable standard, the 2017 Q&A offered IHEs the option of “preponderance” or “clear and convincing,” an option that is also contained in OCR’s 2018 proposed amended regulations. In the present study, I found that 88.2% of the 238 policies coded utilized “preponderance,” with the remaining indicating a “clear and convincing” or “beyond a reasonable doubt standard” or failing to mention an evidentiary standard altogether. To note, IHEs’ policies utilizing a standard of “clear and convincing” or “beyond a reasonable doubt” by institution size have a range of 4.2% to 11.9%. By appellate jurisdiction, the range is 0.0% to 19.0%. If a number of IHEs make the determination to use the higher standard of “clear and convincing” as would be allowed

under the 2018 proposed amended regulations, there may be a significant shift in these findings should the present study be repeated.

### **Limitations and Recommendations for Future Research**

There are seven limitations in the present study: (1) inferences cannot be made from results gathered through use of descriptive statistics, (2) the use of homogeneous non-probability sampling of an entire population limits the use of inferential statistics, (3) coding of duplicative policies may violate the assumption of independence, preventing further statistical analysis of the descriptive data, (4) small data sets limit statistical comparisons among appellate jurisdictions, (5) researcher bias may have skewed the development of the coding instrument, (6) the versions of the policies coded may not be the most recent published by the IHEs, and (7) adherence to published policies is not guaranteed in practice at IHEs. In attempting to address these limitations and in consideration of furthering the knowledge base concerning due process in IHEs' handling of sexual misconduct complaints, I provide recommendations for future research regarding modifications to the methodology of the present study and by proposing potential future studies of interest to researchers and practitioners in this area.

### **Modifications to Methodology**

To address the limitations created by my choice of methodology, I provide suggested modifications to the present study below.

**Descriptive statistics.** The use of descriptive statistics, including frequency and percent, limits the ability of the researcher to make inferences about relationships between two or more variables or between the sample and the population (Vogt et al., 2014). Johnson (1953) states this idea well in that the “results of descriptive research present a

limited picture of the area studied, and often the picture is a reflection of the surface only” (p. 241). With descriptive statistics, the sample is non-generalizable, and results apply only to those policies within the sample but not necessarily to those in the greater population. For example, although the data may indicate that institutions within one size category are less likely to provide proper notice than their peers, descriptive statistics does not allow any conclusions to be drawn as to why this may be the case. Additionally, regarding the present study, should the data indicate that most policies in the sample provide a certain right of due process to Respondents, one cannot then generalize the data to other institutions in the population by inferring that there is a high probability that a majority of all Title IV-funded colleges and universities also provide the same right. This limitation can be further explained by examining the difference between publicly-controlled and privately-controlled IHEs, with the first operating as an extension of the state (“An Overview,” 1970) and thus being expected to offer a great deal more due process than the latter.

To address the limitation on identifying relationships among variables in future studies, one could utilize inferential statistics to analyze the findings, e.g., one-way or factorial ANOVA to compare multiple data sets or interactions between multiple factors, respectively, and to strengthen the generalizability of the sample in future studies, one could be more inclusive in regard to the institutional criteria used to create the sample, such as eliminating the requirement to offer social sororities and fraternities.

**Homogenous non-probability sampling.** When determining the sample of the present study, I considered a number of institutional criteria that defined the parameters for inclusion of a policy, and the final sample was comprised of all Title IV-funded public IHEs that offer undergraduate degrees, provide on-campus housing, have opportunities for students

to participate in Greek life and NCAA or NAIA football or men's basketball, and have a total enrollment of 10,000 or more students. This use of homogenous non-probability sampling of an entire population leads to a non-random, uniform sample of institutions' policies, which violates the assumption of random samples, an important component of the use of inferential statistics, such as ANOVA or t-tests. Policies were chosen for the present study based on specific criteria of the institutions from which the policies were derived and included all policies from IHEs meeting these criteria; thus, the ability to utilize inferential statistics, all of which require samples to be random, is limited.

To avoid this limitation in the future, one could eliminate one or more of the institutional inclusion criteria used in creating the sample and then consider comparisons across groups of institutions from which the policies were derived. For example, the sample of a future study could include a random sampling of policies from public institutions receiving Title IV federal financial aid that confer undergraduate degrees and provide on-campus housing. Then in comparing the findings, groupings of policies could be delineated by institutional criteria such as those that have social fraternities and sororities versus those that do not, or by total student enrollment inclusive of IHEs of all sizes, where comparison groups would include colleges and universities segmented by institution size.

**Duplicative policies.** The coding of duplicative policies in the sample stemmed from the fact that a portion of the institutions meeting the necessary sample inclusion criteria as noted previously in Chapter Three operate as entities within a system, such as the University of Missouri System and the IHEs that are part of California State University. The sexual misconduct policies at these system institutions come in a variety of formats, such as a single sexual misconduct policy utilized by all system IHEs, a guiding policy that provides a basis

for each system institution's individual policy and allowing for differences within each of these policies, or a stand-alone policy with little similarity to policies at other system institutions. To eliminate a complicating factor in policy collection, the decision was made to obtain one policy for each institution that met the inclusion criteria, and in doing so, the sample likely includes a small number of duplicative policies that were coded as independent policies within the sample, such as those of the University of Missouri-Kansas City, the University of Missouri-Columbia, and the University of Missouri-St. Louis, as these three IHEs share a single policy governing the sexual misconduct grievance process at all three universities.

The coding of these duplicative policies may be a violation of the assumption of independence (McDonald, 2014) in that the sample contains observable data that is not independent, i.e., a single policy utilized by multiple institutions appears more than once in the sample. However, the violation of the assumption of independence is less significant in the present study for two reasons: (1) frequency and percentage, the descriptive statistics used to analyze data in the present study, apply to nominal data, are non-parametric, and are not based on a set of assumptions, and (2) the inclusion of duplicative policies in the present study serves a noteworthy purpose, in that I am seeking to determine how many IHEs of those with policies in the non-random, homogenous sample afford Respondents due process as measured through use of the coding instrument to quantify proper notice, the opportunity to be heard, the right of confrontation, the right to an advisor, the right of appeal, and impartiality and fairness in the grievance process in regard to institutions' sexual misconduct policies.



If inferential statistics were utilized in a future study, this violation of the assumption of independence may have a significant effect on the analysis of data, similar to the effect previously noted regarding the assumption of random samples. To address this limitation, one could review all policies for similarities prior to coding and remove any that are identical from the final sample.

**Small data sets.** When seeking to compare policies by appellate jurisdiction, statistical analysis is limited due to the size of the data sets, i.e., the number of IHEs by jurisdiction ranges from  $n = 6$  to  $n = 45$ , with only two jurisdictions containing 30 or more IHEs, which may result in non-normal distribution within each data set. In addressing this limitation, one could expand the number of IHEs within each appellate jurisdiction to a minimum of  $n = 30$  by eliminating one or more of the institutional inclusion criteria used in creating the sample.

### **Potential Future Studies**

In considering potential future studies, I next address the non-statistical limitations of the present study, as well as suggesting additional possibilities for research in the area of due process in the handling of complaints of sexual misconduct at colleges and universities in the United States.

**Researcher bias.** Researcher bias may play a role in the use of descriptive methods in regard to the determination of the coding categories and the units of analysis, in the creation of the coding instrument (Center for Innovation in Research and Teaching, n.d.), and in the reliability of the coding itself. In the present study, steps were taken to decrease the effect researcher bias may have had on the findings, i.e., use of objectivity in the development of the coding categories and the units of analysis, followed by a review of the coding instrument

by experts in the fields of due process, Title IX, and student conduct. However, the coding instrument was ultimately based upon my own understanding of the relationship between Title IX and due process, developed through my work as a Title IX practitioner and legal professional. My unconscious biases may have guided the decisions I made that led to the creation of the instrument and could have influenced the coding itself in regard to the research assistants' training and the calibration of the responses during the reliability checks conducted during the pretest and subsequently throughout the study. In order to address this limitation in future studies, the coding instrument could be derived through utilization of an independent developer possessing no significant knowledge of Title IX nor having worked in the fields of due process, Title IX, or student conduct, operating from what would essentially be a clean slate, unlikely to be influenced by the possible unconscious biases that manifest through being immersed in the work of a Title IX practitioner on a daily basis, and the coding could be performed by independent coders trained by said developer.

**Coding of outdated policies.** The 238 policies in the present study were gathered between September 5, 2018, and November 5, 2018,<sup>18</sup> and were subsequently coded through February 28, 2019. Hence, the results of the present study are simply a timestamped snapshot of the status of due process afforded by those sexual misconduct policies included in the sample and do not take into consideration any revisions to due process provisions that may have occurred thereafter. To address this limitation, one could conduct a final check on the most recent date of revision for each policy at the conclusion of the coding period; any

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<sup>18</sup> As noted previously in Chapter Three, additional policy components were gathered between November 5, 2018, and February 28, 2019; however, all components reviewed in the present study were published by the IHEs prior to November 5, 2018, per the most recent date of revision for each component.

policies that had been updated within the period between data collection and coding could be downloaded and coded, with the resulting data being used in place of the outdated findings.

**Adherence to policy in practice.** Although many policies as published provide at least a minimal level of due process for Respondents as noted in Chapters Four and Five, the adherence to such policies may vary widely by institution based upon the individuals tasked with administering them. To allow for a review of due process in action at IHEs regarding the implementation of their sexual misconduct policies, a survey could be distributed to Title IX Coordinators, investigators, and others who have knowledge of the day-to-day procedures and processes of handling sexual misconduct complaints. This survey might include modified versions of the questions asked in the coding instrument, e.g., Question 1a.1 asks, “Does the policy require notice be provided to the Respondent of the charges/allegations?” but could be modified to ask, “Do you provide notice to the Respondent of the charges/allegations?”. Such a survey, especially if conducted in partnership with a content analysis of institutional sexual misconduct policies, would likely result in a more robust representation of the actual due process afforded to Respondents by post-secondary institutions.

**Additional research suggestions.** Future studies might review policy content by state, in addition to or rather than appellate jurisdiction, as state legislatures are beginning to consider laws that would influence sexual misconduct policies at IHEs within that state (McKinley, 2019). Independent of or in conjunction with a state-by-state examination, one could also look across all indicators, i.e., institution size, appellate jurisdiction, and state, for indicators of patterns, then undertake an exploration of possible factors influencing such patterns. Another possibility would be to conduct a longitudinal study of the same sample at some point after OCR’s amended Title IX regulations go into effect to determine whether the

findings of a second content analysis would be significantly different than those in the present study.

### **Implications for Practice**

In considering the implications of the present study in regard to the implementation of Title IX at post-secondary institutions, the following section speaks to the findings and what they might mean for IHEs in practice. I also include reflections on the issues encountered in the process of conducting the research itself from the lens of a student consumer.

### **Findings in Practice**

Below I provide general observations related to my findings and the practice of Title IX implementation at IHEs, followed by a more specific discussion of the interplay between written policies and the importance of balancing the needs of Complainants and Respondents.

**General observations.** There were three general observations that emerged from the present study in regard to the practices related to Title IX implementation at colleges and universities. First, as I had expected, the 238 policies coded are largely in line with OCR's 2011 "Dear Colleague" Letter and 2014 Questions and Answers. Considering OCR's 2017 Q&A was presented by the agency as suggested guidance rather than newly established mandates, and the 2018 proposed amended regulations are yet to be finalized, many IHEs have likely not taken steps to modify their policies from what was required under the 2011 DCL and the 2014 Questions and Answers. As such, upon release of the final regulations by OCR, should a majority of the proposed amended regulations be codified, many colleges and universities are likely to require significant updates to their written sexual misconduct policies.

Second, regardless of the findings as to the written content of IHEs' sexual misconduct policies, the execution of these policies by an institution's Title IX practitioner(s) may not be in line with the tenets of due process. The content of a policy amounts to a step-by-step guide that is in place to move a complaint to resolution and is meant to implement a law of just 37 words<sup>19</sup> but does not guarantee that policy directs practice. Thus, one cannot assume that simply because the findings of the present study indicate that most post-secondary institutions provide at least a moderate level of due process to Respondents, that this is the case in practice.

Finally, on occasion, the findings by institution size and appellate jurisdiction seem to demonstrate a clustering effect, in that institutions that are comparable in total student enrollment and/or in close geographic proximity with one another display similarities in their sexual misconduct policies. There are likely a number of explanations for these similarities, including the following three possibilities noted here. Regarding total student enrollment, larger IHEs of greater financial means may be more likely to have full-time Title IX Coordinators who are up-to-date on best practices and legal requirements. Thus, as discussed in more detail in Chapter Three, employing a dedicated Title IX Coordinator may have an effect on the level of due process provided to Respondents by their institutional sexual misconduct policies. With regard to appellate jurisdiction, the policies of all IHEs within one geographic region, operating under the same federal circuit court of appeals, would be expected to align based on court rulings in the areas of due process and the investigation and adjudication of Title IX complaints, as noted in Chapter Three. However, a third possible

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<sup>19</sup> The text of Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

explanation for the clustering of findings by institution size and appellate jurisdiction is that when any IHE develops and revises its Title IX policy, there is likely an examination of the policies of peer institutions, whether it be by size or by geographic region, and as the popular idiom states, there is no need to “reinvent the wheel” by writing a policy from scratch. Therefore, the similarities that exist in the findings of the present study regarding institution size and appellate jurisdiction may be due to the existence of what could be considered “copycat” policies.

**Balancing parties’ needs.** In the realm of Title IX implementation at colleges and universities as it pertains to sexual misconduct grievance processes, there has been always been a struggle to meet the needs of both Complainants and Respondents (Henrick, 2013; Kihnley, 2000; Jesse, 2019; Odendahl, 2018; Safko, 2016). Victim advocacy groups contend that not enough is being done by IHEs to support Complainants, from not providing adequate support services to victim-blaming in prevention programming and re-traumatization of the Complainant in the grievance process (As One Project, 2016; End Rape on Campus, n.d.; Know Your IX, 2017).

Although it may seem that IHEs could easily take action to remedy these issues, the reality as presented by advocates for Respondents is that for every step taken toward Complainant support, due process for Respondents is being violated (Harris, 2019; Save Our Sons, 2019). For example, if a Complainant feels unsafe in a classroom because the Respondent is also enrolled in the same course, the appropriate action, from the perspective of the Complainant, would be to remove the Respondent to allow the Complainant to enjoy their educational pursuits without experiencing further mental and emotional trauma at the hands of the Respondent. However, per OCR’s 2017 Q&A and 2018 proposed amended

regulations, IHEs have to balance the rights of both parties to access their education, especially when a Respondent has not been found to have violated a policy, typically for one of two reasons: (1) a Complainant chooses not to pursue an investigation, or (2) the outcome of the grievance process found in favor of the Respondent. Another example is the direct questioning of a Complainant by a Respondent or their advisor; Complainants may experience severe mental or emotional distress by being required to participate in a live hearing where they will be cross-examined as if in a court setting (Jesse, 2019). However, the 2018 proposed amended regulations, if codified as written, would include this mandate as part of the Title IX grievance process out of consideration for the due process rights of Respondents.

Ultimately, no IHE's sexual misconduct policy will solve every issue encountered in the implementation of Title IX at colleges and universities when considering the needs of both Complainants and Respondents. However straightforward a policy may seem, when an institution is faced with such a divided issue which boils down to tension between believing a Complainant over a Respondent's right to impartiality and due process, words on paper will never be sufficient. Though my findings are unlikely to provide concrete answers to the difficult questions associated with balancing parties' needs, if what results from a review of these findings is an institution's thorough consideration of their own policies in regard to (1) their provision of due process and (2) their policy implementation practices, my main goal in the present study has been achieved.

### **Researcher Experiences in Consideration of Students-as-Consumers**

After working to gather data and code the sample policies, I had three main reflections that I feel are worthy of sharing in consideration of IHEs' handling of sexual

misconduct complaints from the perspective of our most important stakeholder: our students. First, there were policies within the sample that had not undergone any revisions of note in a number of years, per their last published revised date. In lieu of the fact that federal guidance and best practices in the area of Title IX implementation have changed significantly since the issue began its climb to national importance in the mid- to late 2000s, I would encourage all IHEs to conduct annual reviews of their sexual misconduct policies to ensure compliance with federal law and in consideration of best practices in the field. Only through regular review and continuous improvement do we properly serve our students.

Second, in collecting policies for coding, it quickly became apparent that most institutions have multiple components that form their Title IX policies, and in many instances, these components are difficult to find using basic terminology. For example, one IHE had five separate documents that were part of their sexual misconduct policy, and simply identifying which applied to students was a trying exercise, even for someone experienced in reviewing legal texts. In some instances, policies applicable to students were found in employee handbooks or within lengthy and legalistic state boards of curators' manuals that were unwieldy to navigate and difficult to decipher. There is understandably an argument for presenting a policy in language that will limit an institution's exposure should defense of the policy be required in a court of law, but just as important is the ability of students to comprehend the expectations of the institution as illustrated in written form by the chosen policy language. Along the same lines, it may be helpful to provide a more student-friendly version of our sexual misconduct policies in the form of an FAQ or Q&A that offers policy provisions in plain language; additionally, a guide for support persons/advisors may be appropriate, as parents, friends, and advisor-attorneys could likely benefit from such a guide.



Finally, as noted in the above limitations, the present study cannot speak to whether policies are followed in practice. As someone who operates on a daily basis under a nuanced policy that could yield various approaches to implementation based on its interpretation, as may be the case with most of my fellow Title IX practitioners, I would recommend a thorough review of institutional sexual misconduct policies with an eye to the “how.” In other words, what does one’s policy say, and does it align the execution of the policy in practice? Consistency is key to students meeting our expectations in regard to their behavior, and what we publish as policy should match what we do in practice.

### **Conclusion**

This study focused on the coding and analysis of the content of sexual misconduct policies at the 238 colleges and universities in the United States that met the following criteria: Title IV federal financial aid recipients operating under primary state control (public), conferring undergraduate degrees, offering on-campus housing, providing opportunities for participation in institutionally-sanctioned social sororities and fraternities and NCAA or NAIA football or men’s basketball, and having a total enrollment of over 10,000 students. The coding instrument was created by studying landmark U.S. Supreme Court cases, a lecture on due process by a well-known legal scholar, recent Title IX-related lawsuits filed by Respondents, and criticisms of the implementation Title IX at IHEs, as well as through a review of sexual misconduct policies at eight public, four-year colleges and universities and of model policies, procedures, and checklists thought to be best practices in the field, with a final review of the instrument by legal experts and Title IX professionals. In process, I coded policies based on the provision of due process to Respondents in six areas of interest: proper notice, right to an advisor, right of confrontation, opportunity to be heard,

right to appeal, and impartiality and fairness. Next, I examined findings in relation to prior content analyses of sexual misconduct policies conducted between 2000 and 2017 by academic and non-academic researchers on samples of varying size with a high level of diversity in regard to the inclusion characteristics of the IHEs from which the policies were derived, and in consideration of the results in totality and by institution size and federal appellate jurisdiction. Finally, a discussion of findings was presented, inclusive of a summary of the key findings of the study, the study limitations in concert with recommendations for future research, and the implications for practice.

In conclusion, I offer the following observations in light of the findings of the present study. First, the current state of due process in regard to most of the sample policies is on par with expectations in many areas, including the provision of proper notice to Respondents of charges/allegations and the outcome of the grievance process, proper notice to the campus community of conduct jurisdiction and related definitions as well as the procedures utilized in the investigation and adjudication of complaints, the ability to have an advisor and to be heard via the presentation of testimony and evidence in one's own defense, the right to review and confront the information gathered as part of the investigation, the right to appeal, and in regard to numerous aspects of impartiality and fairness. Thus, OCR's current focus on policy content and due process may be somewhat misplaced; instead, as I noted in Chapter Two, the agency's final amended regulations should perhaps focus more on *adherence* to institutional policies in practice.

Although it may be more essential that OCR guidance focus on adherence to policies in practice, there are pockets of content-based inadequacies from the perspective of a Respondent, including the inability of an advisor to participate in the grievance process,

prohibiting the full representation of the Respondent; the ability of Complainants to submit anonymous or confidential complaints, thereby preventing Respondents from confronting their accusers; the ability of the Complainant to appeal a decision, possibly causing the Respondent to submit to double jeopardy; the lack of amnesty in regard to minor conduct violations committed by Respondents; the consistent provision of interim measures to Complainants but not Respondents; and the charged terminology used to refer to each party within the policies. As such, OCR's final amended regulations on Title IX implementation at IHEs should also address these specific content-based due process inadequacies.

Finally, it is my belief that IHEs owe a duty of care to our students to: (1) review and revise sexual misconduct policies on a regular basis in consideration of best practices and the due process needs of both parties and in respect of students-as-consumers of said policies; (2) be transparent in the application of our policies on sexual misconduct; (3) offer academic, health, safety, housing, and employment accommodations, where applicable and reasonable, to both parties equitably; (4) provide an option for confidential support services for both parties beyond formal mental health counseling; and (5) balance supporting a Complainant with treating a Respondent as innocent until such time as a finding of responsible for a policy violation is found.

## EPILOGUE

On November 15, 2018, the Office for Civil Rights released its proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972 (OCR, 2018). OCR's (2018) proposed amendments that are likely to have the greatest effect on Respondents' due process rights, if mandated by the pending final regulations, are as follows: (1) the IHE would be required to "provide for a live hearing" (p. 52) in the adjudication of complaints of sexual misconduct, to include cross-examination of one party by the other, conducted by the "party's advisor of choice" (p. 52), e.g., an attorney, and if one party refused to submit to questioning by the other, the testimony provided by the refusing party as part of any investigation could not be considered by the decision-maker in determining whether a Respondent violated the institution's sexual misconduct policy; (2) IHEs would be given the option of "preponderance" or "clear and convincing" for their evidentiary standard; (3) a Respondent subjected to an interim suspension would be allowed to immediately file an appeal to have their status restored; (4) policies would be obligated to include a requirement that investigators and adjudicators be free of bias and/or conflicts of interest; (5) policy language would need to contain a statement indicating the presumption that a Respondent is not responsible for violating the IHE's policy until a finding is made at the conclusion of the adjudication; (6) IHEs would be obligated to provide interim measures to both parties; (7) policies would be required to provide notice to the campus community of possible sanctions; (8) IHEs would need to have provisions for handling false reports; (9) all evidence would have to be made available electronically throughout the investigation to both parties for their review; and (10) neither the investigator nor Title IX Coordinator could serve as adjudicator.

As of the publication of this dissertation, the Department of Education has not yet provided an expected release date for the final amended regulations, although it was suggested in an email sent to IHEs on May 21, 2019, from the Association for Title IX Administrators (ATIXA) that these regulations would be released in June 2019, with an expected implementation deadline of August 2019. Considering the current status of a majority of the policies in the present study in regard to the above-noted proposed mandates, compliance with this timeline may be difficult to achieve for many IHEs across the country, as extensive procedural changes are likely to be required.

APPENDIX A: PRIOR CONTENT ANALYSES OF SEXUAL MISCONDUCT POLICIES

Table A1

*Prior Content Analyses of Sexual Misconduct Policies at Colleges and Universities*

Authors	Published	Sample Size	Type of Study	Notes
Potter et al.	2000	14	Academic	Sample included non-Title IV institutions <sup>a</sup>
Karjane et al.	2002	264	Academic	Included policy materials and related documents submitted by institutions
Murphy	2011	7	Academic	Sample limited to Oregon University System institutions
Students Active for Ending Rape & V-Day	2013	141 <sup>b</sup>	Non-academic	Mission of organizations conducting study indicates possible bias for Complainants
U.S. Senate Subcommittee on Financial & Contracting Oversight	2014	236/50 <sup>c</sup>	Governmental	Institutionally self-reported content analysis of policies
Beyer	2015	25	Academic	Sample limited to land-grant institutions
Richards	2016	65	Academic	Updated study by Karjane et al. (2002)
Richards et al.	2017	65	Academic	Conducted from a “feminist perspective”
Graham et al.	2017	100 <sup>d</sup>	Academic	Analysis limited to consent definitions
FIRE	2017/2018	53/53 <sup>e</sup>	Non-academic	Mission of organization conducting studies indicates possible bias for Respondents

*Note:* Unless indicated, sample size indicates the number of public, four-year colleges and universities included in the analysis.

*Note:* “Academic” indicates studies published in peer-reviewed journals or conducted as part of a graduate thesis.

<sup>a</sup> Institutions not subject to compliance with Title IX.

<sup>b</sup> Total public institutions included in sample; may be two- or four-year colleges or universities.

<sup>c</sup> Total primary sample included 236 public and private four-year colleges and universities, stratified by total student enrollment and proportionately allocated across the nine strata; secondary sample included the 50 largest public, four-year post-secondary institutions in the United States.

<sup>d</sup> Random subsample of the policies of 100 colleges and universities; 995 Title IV-funded public and private four-year post-secondary institutions made up the sample in regard to the overall research study.

<sup>e</sup> Samples included 53 top-ranked universities in the United States in 2017 per *U.S. News & World Report*.

## APPENDIX B: ADDITIONAL DEFINITIONS

As defined in Chapter One, sexual misconduct is any act of a sexual nature committed by one individual against another that is unwelcome or carried out without consent or through use of force and may include the following:

1. *Dating violence* is abuse or the threat of abuse of a sexual or physical nature committed against one individual by another where the parties are in a romantic or intimate relationship (U.S. Department of Education, 2016);
2. *Domestic violence* is abuse or the threat of abuse of a sexual or physical nature committed against one individual by another where the parties are or have been married or in an intimate partner relationship and are cohabitating or have cohabitated and/or share a child (U.S. Department of Education, 2016);
3. *Indecent exposure* is the revealing of one's genitals to another or having sexual contact in the presence of another with the knowledge that it may cause distress or alarm or having contact of a sexual nature in a public location while another is present (Mo. Rev. Stat. § 566.093, 2017);
4. *Sexual intercourse* is the penetration of one's anus or vagina by another with any body part or object (U.S. Department of Education, 2016);
5. *Sexual touching* is contact of a sexual nature with one's body by another and may include the following:
  - a. *Fondling* is the touching of any part of one's body by another for the purposes of sexual pleasure or fulfillment (U.S. Department of Education, 2016);
  - b. *Frottering* is the rubbing of one's genitals against the body of another;
  - c. *Oral copulation* is the touching of one's mouth to the genitals of another;

6. *Sexual exploitation* is taking sexual advantage of another person without consent and may include prostitution; voyeurism; distribution of sexual pictures or videos; use of alcohol or predatory drugs to encourage sexual contact; or knowingly, recklessly, or purposefully transmitting a sexually-transmitted infection/disease; and
7. *Stalking* is exhibiting unwelcome conduct, i.e., “two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property,” against another due to the sex or gender of the other which is likely to cause a reasonable person (1) to be fearful of their safety or that of others or (2) to suffer significant mental distress (U.S. Department of Education, 2016, p. 3-38-3-39).



APPENDIX C: CODING INSTRUMENT

Institution Name:	
Policy/Policies Coded:	
Date Policy/Policies Updated: <sup>20</sup>	

**1a. PROPER NOTICE to Respondent**

For all questions in this section, mark “No mention” if the policy either (1) explicitly states not required or (2) does not mention.

1. Does the policy require notice be provided to Respondent of the charges/allegations?<sup>21</sup>
  - 0 No mention
  - 1 Yes
2. Does the policy require notice be provided to Respondent of the pending investigation?
  - 0 No mention
  - 1 Yes
3. Does the policy require notice be provided to Respondent of the pending adjudication?
  - 0 No mention
  - 1 Yes
4. Does the policy require notice be provided to Respondent of the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
5. Does the policy require notice be provided to Respondent of the rationale for the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
6. Does the policy require notice be provided to Respondent of any sanctions resulting from the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
7. Does the policy require notice be provided to Respondent of the right to appeal the outcome of the grievance process?
  - 0 No mention
  - 1 Yes

<sup>20</sup> Date of most recent substantial modification, not to include departmental/personnel name changes.

<sup>21</sup> Charges/allegations may include the policy alleged to have been violated and/or the specific conduct or behavior leading to the complaint.

**1b. PROPER NOTICE to Campus Community<sup>22</sup>**

For Questions 1b.1-1b.8 and 1b.10-1b.24, mark “No mention” if the policy either (1) explicitly states not required or (2) does not mention.

1. Does the policy provide notice to the campus community as to whom the policy applies?<sup>23</sup>
  - 0 No mention
  - 1 Yes
2. Does the policy provide notice to the campus community of the timeline/timeframe<sup>24</sup> for the grievance process?
  - 0 No mention
  - 1 Yes
3. Does the policy provide notice to the campus community of a minimum notification period between notice of the pending adjudication and commencement of the adjudication?
  - 0 No mention
  - 1 Yes
4. Does the policy provide notice to the campus community of the procedures used in the investigation?
  - 0 No mention
  - 1 Yes
5. Does the policy provide notice to the campus community of the procedures used in the adjudication?
  - 0 No mention
  - 1 Yes
6. Does the policy provide notice to the campus community of the standard of evidence used in the grievance process?
  - 0 No mention
  - 1 Yes
7. Does the policy provide notice to the campus community of the definition of the standard of evidence used in the grievance process?
  - 0 No mention
  - 1 Yes
8. Does the policy provide notice to the campus community of a list of specific Respondent’s rights in the grievance process?
  - 0 No mention [skip Q9]
  - 1 Yes

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<sup>22</sup> Notice = publication within policy.

<sup>23</sup> Policy must be applicable to students to be coded.

<sup>24</sup> Only code as “yes” if policy states number of days; code as “no” if general timeline/timeframe provided, such as “reasonable timeframe” or “as expeditiously as possible.”

9. If Yes on Question 8, which of the following specific Respondent's rights, if any, are listed? [mark all applicable responses]
- 0 Right to an advisor<sup>25</sup>
  - 1 Right to be heard<sup>26</sup>
  - 2 Right of confrontation<sup>27</sup>
  - 3 Right of appeal
  - 4 Right to an impartial/fair process<sup>28</sup>
  - 5 Right of notice<sup>29</sup>
10. Does the policy provide notice to the campus community of the method of adjudication available/utilized?
- 0 No mention
  - 1 Yes
11. Does the policy provide notice to the campus community of the specific act(s) of sexual misconduct that fall under the conduct jurisdiction of the policy?
- 0 No mention
  - 1 Yes
12. Does the policy provide notice to the campus community of the definition(s) of the specific act(s) of sexual misconduct that fall under the conduct jurisdiction of the policy?
- 0 No mention
  - 1 Yes
13. Does the policy provide notice to the campus community of the definition of consent?
- 0 No mention
  - 1 Yes
14. Does the policy provide notice to the campus community of reason(s) an individual may be unable to consent?<sup>30</sup>
- 0 No mention
  - 1 Yes
15. Does the policy provide notice to the campus community of the definition, i.e., possible causes, of incapacitation?<sup>31</sup>
- 0 No mention
  - 1 Yes
16. Does the policy provide notice to the campus community of the indicators of incapacitation due to use of alcohol and/or drugs?<sup>32</sup>
- 0 No mention
  - 1 Yes

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<sup>25</sup> May include "support" person.

<sup>26</sup> May be right to present testimony/evidence/witnesses.

<sup>27</sup> May be right to review evidence presented against Respondent or right to respond to evidence presented against Respondent.

<sup>28</sup> May use synonyms such as "neutral," "equitable," or "unbiased."

<sup>29</sup> May be right of notice to allegations, to investigation, to adjudication, to outcome, to appeal, etc.

<sup>30</sup> May include incapacitation, disability, illness, sleep, age, coercion/threats/forces, unconsciousness, etc.

<sup>31</sup> May include drug/alcohol use, unconsciousness, sleep, disability, etc.

<sup>32</sup> Indicators may include bloodshot eyes, vomiting, slurred speech, instability when walking, etc.

17. Does the policy provide notice to the campus community of the standard used to determine incapacitation?<sup>33</sup>
  - 0 No mention
  - 1 Yes
18. Does the policy provide notice to the campus community of the physical jurisdiction of the policy?<sup>34</sup>
  - 0 No mention
  - 1 Yes
19. Does the policy provide notice to the campus community of the possible sanctions if Respondent is found to have violated the policy?
  - 0 No mention
  - 1 Yes
20. Does the policy provide notice to the campus community of the factors that may be considered in the determination of sanctions?<sup>35</sup>
  - 0 No mention
  - 1 Yes
21. Does the policy provide notice to the campus community of the right to appeal the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
22. Does the policy provide notice to the campus community of the procedures used to appeal the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
23. Does the policy provide notice to the campus community of the availability of interim measures?
  - 0 No mention
  - 1 Yes
24. Does the policy provide notice to the campus community of the specific conditions that may give cause to suspend Respondent on an interim basis during the grievance process?
  - 0 No mention
  - 1 Yes

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<sup>33</sup> May be objective or “reasonable person” standard or subjective standard.

<sup>34</sup> May be on-campus, off-campus, off-campus with parameters, etc.

<sup>35</sup> May include nature of violation, degree of severity of violation, intent of Respondent, etc.

**2. RIGHT TO AN ADVISOR**<sup>36</sup>

For all questions in this section, mark “No mention” if the policy either (1) explicitly states not allowed or (2) does not mention.

1. Is Respondent allowed to have an advisor present during the grievance process?  
0 No mention  
1 Yes
2. Is Respondent allowed to have an attorney as an advisor during the grievance process?  
0 No mention  
1 Yes
3. Is Respondent’s advisor allowed to actively participate in the grievance process?  
0 No mention  
1 Yes

**3. OPPORTUNITY TO BE HEARD**

For all questions in this section, mark “No mention” if the policy either (1) explicitly indicates “no” or (2) does not mention.

1. Does the policy provide Respondent the opportunity to be heard as part of the investigation?  
0 No mention  
1 Yes
2. Does the policy provide Respondent the opportunity to be heard as part of the adjudication?  
0 No mention  
1 Yes

**4. RIGHT OF CONFRONTATION**

1. Does the policy allow submission of anonymous and/or confidential complaints<sup>37</sup>?  
0 No mention  
1 Yes  
2 No
2. Does the policy allow investigation of a complaint without the participation of the Complainant in the grievance process?  
0 No mention  
1 Yes  
2 No
3. Does the policy allow Respondent to review the testimony and evidence<sup>38</sup> gathered during the investigation prior to a finding being rendered?  
0 No mention  
1 Yes  
2 No

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<sup>36</sup> Advisor may be referred to as advocate or support person.

<sup>37</sup> May be referred to as “complaints” or “reports.”

<sup>38</sup> May be in the form of an investigation report.

4. Does the policy allow direct questioning of the Complainant by Respondent as part of the adjudication process?
  - 0 No mention
  - 1 Yes
  - 2 No
5. Does the policy allow direct questioning of the Complainant by Respondent's advisor during the adjudication of the complaint?
  - 0 No mention
  - 1 Yes
  - 2 No
6. Does the policy allow direct questioning of witnesses by Respondent during the adjudication of the complaint?
  - 0 No mention
  - 1 Yes
  - 2 No
7. Does the policy allow direct questioning of witnesses by Respondent's advisor during the adjudication of the complaint?
  - 0 No mention
  - 1 Yes
  - 2 No

5. **RIGHT TO APPEAL**

For all questions in this section, mark "No mention" if the policy either (1) explicitly states not required or (2) does not mention.

1. Does the policy provide Respondent a right to appeal the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
2. Does the policy provide Complainant a right to appeal the outcome of the grievance process?
  - 0 No mention
  - 1 Yes
3. Does the policy provide Respondent with a right to appeal any interim suspension?
  - 0 No mention
  - 1 Yes

## 6. IMPARTIALITY & FAIRNESS

For Questions 6.1-6.10 and 6.12-6.13, mark “No mention” if the policy either (1) explicitly states not required or (2) does not mention.

1. Does the policy state that the investigation will be impartial?<sup>39</sup>
  - 0 No mention
  - 1 Yes
2. Does the policy state that the adjudication will be impartial?<sup>40</sup>
  - 0 No mention
  - 1 Yes
3. Does the policy allow Respondent to raise a concern of bias or conflict of interest by those involved in the grievance process?
  - 0 No mention
  - 1 Yes
4. Does the policy allow for a summary resolution/dismissal of complaint?
  - 0 No mention
  - 1 Yes
5. Does the policy allow or require the investigation report to provide possible or recommended sanctions?
  - 0 No mention
  - 1 Yes
6. Does the policy refer to the Complainant as the victim and/or the survivor?<sup>41</sup>
  - 0 No mention
  - 1 Yes
7. Does the policy refer to Respondent as the offender and/or the perpetrator?<sup>42</sup>
  - 0 No mention
  - 1 Yes
8. Does the policy have a provision for handling false reports?
  - 0 No mention
  - 1 Yes
9. Does the policy require the investigator(s) be trained?
  - 0 No mention
  - 1 Yes
10. Does the policy require the adjudicator(s) be trained?
  - 0 No mention
  - 1 Yes
11. Does the policy indicate the standard of evidence as clear and convincing or beyond a reasonable doubt?
  - 0 No mention of standard of evidence
  - 1 Yes
  - 2 No

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<sup>39</sup> If policy notes impartiality of grievance process generally, mark “Yes.” May use synonyms such as “neutral,” “equitable,” or “unbiased.”

<sup>40</sup> If policy notes impartiality of grievance process generally, mark “Yes.” May use synonyms such as “neutral,” “equitable,” or “unbiased.”

<sup>41</sup> Beyond any initial definition of “Complainant.”

<sup>42</sup> Beyond any initial definition of “Respondent.”

12. Does the policy protect Respondent against retaliation?<sup>43</sup>
- 0 No mention
  - 1 Yes
13. Does the policy allow the imposition of an interim suspension of Respondent?
- 0 No mention
  - 1 Yes
14. Does the policy allow amnesty for Complainant and/or Respondent regarding minor student conduct violations?<sup>44</sup>
- 0 No mention
  - 1 Complainant only
  - 2 Respondent only
  - 3 Both Complainant and Respondent
  - 4 Neither Complainant or Respondent
15. Does the policy provide interim measures to Complainant and/or Respondent during the grievance process?
- 0 No mention
  - 1 Complainant only
  - 2 Respondent only
  - 3 Both Complainant and Respondent
  - 4 Neither Complainant or Respondent

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<sup>43</sup> May have blanket protection for all involved in grievance process or may mention Respondent specifically.

<sup>44</sup> Concurrent to incident, e.g., alcohol or drug violations.



APPENDIX D: LIST OF INSTITUTIONS OF HIGHER EDUCATION

Table D1

*List of Institutions of Higher Education from Which Sample Policies Were Derived*

Institution Name	Total Enrollment	Appellate Jurisdiction
Appalachian State University	17,932	Fourth
Arizona State University-Downtown Phoenix	10,952	Ninth
Arizona State University-Skysong	20,273	Ninth
Arizona State University-Tempe	51,984	Ninth
Arkansas State University-Main Campus	13,410	Fifth
Arkansas Tech University	12,054	Eighth
Auburn University	27,287	Eleventh
Austin Peay State University	10,099	Sixth
Ball State University	21,196	Seventh
Boise State University	22,086	Ninth
Bowling Green State University-Main Campus	16,908	Sixth
Bridgewater State University	11,089	First
California Polytech State University-San Luis Obispo	20,944	Ninth
California State Polytechnic University-Pomona	23,717	Ninth
California State University-Chico	17,220	Ninth
California State University-Dominguez Hills	14,635	Ninth
California State University-East Bay	15,528	Ninth
California State University-Fresno	24,136	Ninth
California State University-Fullerton	38,948	Ninth
California State University-Long Beach	37,446	Ninth
California State University-Los Angeles	27,680	Ninth
California State University-Northridge	41,548	Ninth
California State University-Sacramento	30,284	Ninth
California State University-San Bernardino	20,024	Ninth
California State University-San Marcos	12,793	Ninth
Central Connecticut State University	12,086	Second
Central Michigan University	26,825	Sixth
Clemson University	22,698	Fourth
Cleveland State University	16,915	Sixth
Coastal Carolina University	10,263	Fourth
College of Charleston	11,531	Fourth
Colorado State University-Fort Collins	30,614	Tenth
CUNY Brooklyn College	17,410	Second
CUNY City College	15,778	Second
CUNY Hunter College	22,918	Second
CUNY Queens College	19,520	Second

Table D1 (continued)

Institution Name	Total Enrollment	Appellate Jurisdiction
East Carolina University	28,289	Fourth
East Tennessee State University	14,334	Sixth
Eastern Kentucky University	16,844	Sixth
Eastern Michigan University	21,824	Sixth
Eastern Washington University	12,361	Ninth
Ferris State University	14,715	Sixth
Florida Atlantic University	30,380	Eleventh
Florida Gulf Coast University	14,833	Eleventh
Florida International University	49,782	Eleventh
Florida State University	40,830	Eleventh
Fort Hays State University	14,210	Tenth
George Mason University	33,929	Fourth
Georgia Institute of Technology-Main Campus	25,034	Eleventh
Georgia Southern University	20,459	Eleventh
Georgia State University	32,058	Eleventh
Grand Valley State University	25,325	Sixth
Idaho State University	13,078	Ninth
Illinois State University	20,760	Seventh
Indiana State University	13,584	Seventh
Indiana University of Pennsylvania-Main Campus	13,835	Seventh
Indiana University-Bloomington	48,514	Seventh
Indiana University-Purdue University-Fort Wayne	12,719	Seventh
Indiana University-Purdue University-Indianapolis	30,105	Seventh
Iowa State University	35,714	Eighth
James Madison University	21,227	Fourth
Kansas State University	24,146	Tenth
Kean University	14,112	Third
Kennesaw State University	33,252	Eleventh
Kent State University at Kent	30,067	Sixth
Lamar University	14,965	Fifth
Louisiana State University and Ag & Mech College	31,524	Fifth
Louisiana Tech University	12,371	Fifth
Marshall University	13,621	Fourth
Miami University-Oxford	19,076	Sixth
Michigan State University	50,538	Sixth
Middle Tennessee State University	22,511	Sixth
Minnesota State University-Mankato	15,313	Eighth
Mississippi State University	20,873	Fifth

Table D1 (continued)

Institution Name	Total Enrollment	Appellate Jurisdiction
Missouri State University-Springfield	22,273	Eighth
Montana State University	15,236	Ninth
Montclair State University	20,465	Third
Morehead State University	10,872	Sixth
Murray State University	10,998	Sixth
New Jersey Institute of Technology	11,325	Third
New Mexico State University-Main Campus	15,490	Tenth
North Carolina A & T State University	10,852	Fourth
North Carolina State University at Raleigh	34,015	Fourth
North Dakota State University-Main Campus	14,516	Eighth
Northern Arizona University	29,021	Ninth
Northern Illinois University	20,130	Seventh
Northern Kentucky University	14,699	Sixth
Oakland University	20,261	Ninth
Ohio State University-Main Campus	58,663	Sixth
Ohio University-Main Campus	29,012	Sixth
Oklahoma State University-Main Campus	25,930	Tenth
Old Dominion University	24,672	Fourth
Oregon State University	29,576	Ninth
Pennsylvania State University-Main Campus	47,307	Third
Portland State University	27,488	Ninth
Purdue University-Main Campus	40,472	Seventh
Rowan University	16,155	Third
Rutgers University-New Brunswick	49,428	Third
Rutgers University-Newark	11,720	Third
Saint Cloud State University	16,096	Eighth
Sam Houston State University	20,031	Fifth
San Diego State University	34,254	Ninth
San Francisco State University	30,256	Ninth
San Jose State University	32,773	Ninth
South Dakota State University	12,576	Eighth
Southeast Missouri State University	11,987	Eighth
Southeastern Louisiana University	14,581	Fifth
Southern Connecticut State University	10,473	Second
Southern Illinois University-Carbondale	17,292	Seventh
Southern Illinois University-Edwardsville	14,265	Seventh
Stephen F Austin State University	12,606	Fifth
Stony Brook University	25,272	Second

Table D1 (continued)

Institution Name	Total Enrollment	Appellate Jurisdiction
SUNY at Albany	17,178	Second
SUNY at Binghamton	16,913	Second
SUNY Buffalo State	10,330	Second
Tarleton State University	12,330	Fifth
Temple University	38,007	Third
Tennessee Technological University	10,900	Sixth
Texas A & M University-College Station	63,813	Fifth
Texas A & M University-Commerce	12,928	Fifth
Texas A & M University-Corpus Christi	11,661	Fifth
Texas State University	37,979	Fifth
Texas Tech University	35,859	Fifth
The University of Alabama	37,098	Eleventh
The University of Montana	13,044	Ninth
The University of Tennessee-Chattanooga	11,387	Sixth
The University of Tennessee-Knoxville	27,845	Sixth
The University of Texas at Arlington	41,988	Fifth
The University of Texas at Austin	50,950	Fifth
The University of Texas at Dallas	24,554	Fifth
The University of Texas at El Paso	23,397	Fifth
The University of Texas at San Antonio	28,787	Fifth
The University of Texas Rio Grande Valley	28,584	Fifth
The University of West Florida	12,763	Eleventh
Towson University	22,101	Fourth
Troy University	17,765	Eleventh
University at Buffalo	29,796	Second
University of Akron Main Campus	23,101	Sixth
University of Alabama at Birmingham	18,333	Eleventh
University of Alaska Anchorage	16,798	Ninth
University of Arizona	42,595	Ninth
University of Arkansas	26,754	Eighth
University of Arkansas at Little Rock	11,891	Eighth
University of California-Berkeley	38,189	Ninth
University of California-Davis	35,186	Ninth
University of California-Irvine	30,836	Ninth
University of California-Los Angeles	41,908	Ninth
University of California-Riverside	21,385	Ninth
University of California-San Diego	32,906	Ninth
University of California-Santa Barbara	23,497	Ninth

Table D1 (continued)

Institution Name	Total Enrollment	Appellate Jurisdiction
University of California-Santa Cruz	17,868	Ninth
University of Central Arkansas	11,754	Eighth
University of Central Florida	62,953	Eleventh
University of Central Missouri	14,395	Eighth
University of Central Oklahoma	16,910	Tenth
University of Cincinnati-Main Campus	36,042	Sixth
University of Colorado Boulder	33,056	Tenth
University of Colorado Colorado Springs	11,988	Tenth
University of Connecticut	27,043	Second
University of Florida	50,645	Eleventh
University of Georgia	36,130	Eleventh
University of Hawaii at Manoa	18,865	Ninth
University of Houston	42,704	Fifth
University of Idaho	11,372	Ninth
University of Illinois at Chicago	29,048	Seventh
University of Illinois at Urbana-Champaign	45,842	Seventh
University of Iowa	30,844	Eighth
University of Kansas	27,259	Tenth
University of Kentucky	29,727	Sixth
University of Louisiana at Lafayette	17,508	Fifth
University of Louisville	21,294	Sixth
University of Maine	10,922	First
University of Maryland-Baltimore County	13,839	Fourth
University of Maryland-College Park	38,140	Fourth
University of Massachusetts-Amherst	29,269	First
University of Massachusetts-Lowell	18,047	First
University of Memphis	20,585	Sixth
University of Michigan-Ann Arbor	43,651	Sixth
University of Minnesota-Duluth	10,878	Eighth
University of Minnesota-Twin Cities	50,678	Eighth
University of Mississippi	23,212	Fifth
University of Missouri-Columbia	35,424	Eighth
University of Missouri-Kansas City	16,685	Eighth
University of Missouri-St Louis	16,738	Eighth
University of Nebraska at Omaha	15,526	Eighth
University of Nebraska-Lincoln	25,260	Eighth
University of Nevada-Las Vegas	28,600	Ninth
University of Nevada-Reno	20,898	Ninth

Table D1 (continued)

Institution Name	Total Enrollment	Appellate Jurisdiction
University of New Hampshire-Main Campus	15,351	First
University of New Mexico-Main Campus	27,285	Tenth
University of North Carolina at Chapel Hill	29,084	Fourth
University of North Carolina at Charlotte	27,983	Fourth
University of North Carolina at Greensboro	19,393	Fourth
University of North Carolina Wilmington	14,918	Fourth
University of North Dakota	14,951	Eighth
University of North Florida	15,675	Eleventh
University of North Georgia	17,289	Eleventh
University of North Texas	37,299	Fifth
University of Northern Colorado	12,216	Tenth
University of Northern Iowa	11,981	Eighth
University of Oklahoma-Norman Campus	27,428	Tenth
University of Oregon	24,032	Ninth
University of Rhode Island	16,613	First
University of South Alabama	16,211	Eleventh
University of South Carolina-Columbia	33,724	Fourth
University of South Florida-Main Campus	42,067	Eleventh
University of Southern Indiana	10,671	Seventh
University of Southern Mississippi	14,551	Fifth
University of Toledo	20,377	Sixth
University of Utah	31,592	Tenth
University of Vermont	12,815	Second
University of Virginia-Main Campus	23,883	Fourth
University of Washington-Seattle Campus	45,408	Ninth
University of West Georgia	12,834	Eleventh
University of Wisconsin-Eau Claire	10,592	Seventh
University of Wisconsin-La Crosse	10,490	Seventh
University of Wisconsin-Madison	42,716	Seventh
University of Wisconsin-Milwaukee	26,726	Seventh
University of Wisconsin-Oshkosh	14,051	Seventh
University of Wisconsin-Whitewater	12,360	Seventh
University of Wyoming	12,648	Tenth
Utah State University	28,622	Tenth
Valdosta State University	11,302	Eleventh
Virginia Commonwealth University	30,918	Fourth
Virginia Polytechnic Institute and State University	32,663	Fourth
Washington State University	29,686	Ninth

Table D1 (continued)

Institution Name	Total Enrollment	Appellate Jurisdiction
Wayne State University	27,140	Eighth
Weber State University	25,955	Tenth
West Chester University of Pennsylvania	16,597	Third
West Virginia University	28,776	Fourth
Western Carolina University	10,340	Fourth
Western Illinois University	11,094	Seventh
Western Kentucky University	20,063	Sixth
Western Michigan University	23,529	Sixth
Wichita State University	14,240	Tenth
William Paterson University of New Jersey	10,862	Third
Wright State University-Main Campus	17,070	Sixth
Youngstown State University	12,442	Sixth

## REFERENCES

34 C.F.R. § 106.

Abbey, A., McAuslan, P., & Ross, L. T. (1998). Sexual assault perpetration by college men: The role of alcohol, misperception of sexual intent, and sexual beliefs and experiences. *Journal of Social and Clinical Psychology, 17*(2), 167-195.

Alexander, L., Bibas, S., Barnhizer, D., Caine, B., Bartholet, E., Candeub, D. A.,... Wilmarth, Jr., A. E. (2016). *Law professors' open letter regarding campus free speech and sexual assault*. Retrieved from <http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf>

American Association of University Professors. (1992). *Joint statement on rights and freedoms of students*. Retrieved from <https://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm#b11>

American Association of University Professors. (2016). *The history, uses, and abuses of Title IX*. Retrieved from <https://www.aaup.org/file/TitleIXreport.pdf>

American Bar Association. (2017). *ABA Criminal Justice Section task force on college due process rights and victim protections: Recommendations for colleges and universities in resolving allegations of campus sexual misconduct*. Retrieved from <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf>

American College of Trial Lawyers. (2017). *White paper on campus sexual assault investigations*. Retrieved from <http://www.nacua.org/docs/default-source/new-cases-and-developments/New-Cases-April-2017/white-paper-re-sexual-assault-investigations.pdf>



- American Council on Education. (2014, April 1). *New requirements imposed by the Violence Against Women Reauthorization Act*. Retrieved from <http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf>
- American Council on Education. (2017). *Issue brief: U.S. Department of Education Office for Civil Rights withdraws 2011 Dear Colleague letter, confirms intention to issue new Title IX regulations, and issues interim guidance in the form of a Q&A*. Retrieved from <http://www.acenet.edu/news-room/Documents/Issue-Brief-Title-IX-QA-2017.pdf>
- Anderson, L., & Whiston, S. C. (2005). Sexual assault education programs: A meta-analytic examination of their effectiveness. *Psychology of Women Quarterly*, 29(4), 374-388.
- An overview: The private university and due process. (1970). *Duke Law Journal*, 1970.
- As One Project. (2016). *Victim blaming*. Retrieved from <https://asoneproject.org/victim-blaming/>
- Association for Student Conduct Administration. (2014). *Student conduct administration & Title IX: gold standard practices for resolution of allegations of sexual misconduct on college campuses*. Retrieved from <http://www.theasca.org/Files/Publications/ASCA%202014%20Gold%20Standard%20Report.pdf>
- Association for Title IX Administrators. (2016). *Title IX policy and grievance procedure checklist*. Retrieved from <https://atixa.org/wordpress/wp-content/uploads/2013/05/Title-IX-Policy-and-Grievance-Procedure-Checklist.pdf>
- Atkins, L. K. (2013, July 25). *The basics of complying with the “Dear Colleague” letter issued by the U.S. Department of Education on April 4, 2011*. Retrieved from

- <https://ogletree.com/shared-content/content/blog/articles/the-basics-of-complying-with-the-dear-colleague-letter-issued-by-the-us-department-of-education-on-april-4-201120130725>
- Azimi, A. M., & Daigle, L. E. (2017). Mental health and victimization: Does risky lifestyle matter? *Journal of Interpersonal Violence*.
- <https://doi.org/10.1177/0886260517724255>
- Bach, J. J. (2003). Students have rights, too: The drafting of student conduct codes. *Brigham Young University Education and Law Journal*, 2003(1), 1-36.
- Baker, B. A. (2017). When campus sexual misconduct policies violate due process rights. *Cornell Journal of Law and Public Policy*, 26(3), 533-563.
- Bartholet, E., Brewer, S., Clark, R., Dershowitz, A., Desan, C., Donahue, C....Wilkins, D. (2014, Oct. 15). *Rethink Harvard's sexual harassment policy*. Retrieved from <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>
- Bartholet, E., Gertner, N., Halley, J., & Gersen, J. S. (2017). *Fairness for all students under Title IX*. Retrieved from <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1>
- Bauer-Wolf, J. (2018, Sept. 10). *An 'unprecedented' direction for Title IX*. Retrieved from <https://www.insidehighered.com/news/2018/09/10/appeals-court-ruling-opens-door-boosted-due-process-rights>
- Bengtsson, M. (2016). How to plan and perform a qualitative study using content analysis. *NursingPlus Open*, 2, 8-14.

- Berelson, B. L. (1952). *Content analysis in communications research*. Glencoe, IL: Free Press.
- Beyer, A. (2015). *An investigation into Title IX sexual assault policy compliance at land grant institutions* (Master's thesis). Retrieved from Educational Administration: Theses, Dissertations, and Student Research.  
<http://digitalcommons.unl.edu/cehsedaddiss/241>
- Black, N., Henry, M., Lewis, W. S., Morris, L., Oppenheim, A., Schuster, S. K., Sokolow, B. A., & Swinton, D. C. (2017). *The ATIXA playbook: Best practices for the post-regulatory era*. Berwin, PA: NCHERM Group, LLC.
- Block, J. (2012). "Prompt and equitable" explained: How to craft a Title IX compliant sexual harassment policy and why it matters. *College Student Affairs Journal*, 30(2), 61-71.
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- CampusClarity. (2014, Jan. 10). *Is there a right to cross-examine in campus sexual-assault hearings?* [Blog post]. Retrieved from <https://home.campusclarity.com/is-there-a-right-to-cross-examine-in-campus-sexual-assault-hearings/>
- Campus Sex Crimes Prevention Act of 2000, Pub. L. No.106-386 (2000).
- Campus Sexual Violence Elimination Act, Publ. L. No. 13-4, Sec. 304 (2013).
- Carle, R. (2016). The strange career of Title IX. *Academic Questions*, 29(4), 443-453.  
doi:10.1007/s12129-016-9590-8
- Chmielewski, A. (2013). Defending the preponderance of the evidence standard in college adjudications of sexual misconduct. *Brigham Young University Education and Law Journal*, 2013(1), 143-173.

Chronicle of Higher Education, The. (2016). *Title IX: Tracking sexual assault investigations*.

Retrieved from <https://projects.chronicle.com/titleix/>

Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1987).

*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Combs-Lane, A. M., & Smith, D. W. (2002). Risk of sexual victimization in college women:

The role of behavioral intentions and risk-taking behaviors. *Journal of Interpersonal Violence*, 17(2), 165-183. <http://dx.doi.org/10.1177/0886260502017002004>

*Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

*Dillon v. Pulaski County Special School District*, 468 F.Supp. 54 (2009).

*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (1961).

*Doe v. Brandeis University*, 177 F.Supp.3d 561 (2016).

*Doe v. University of Massachusetts-Amherst*, Civil Action No. 14-30143-MGM (D. Mass. Jul. 14, 2015).

*Doe v. University of Southern California*, 246 Cal.App.4th 221 (2016).

Drouin, M., Jozkowski, K. N., Davis, J., & Newsham, G. (2018). How does alcohol consumption affect perceptions of one's own and a drinking partner's ability to consent to sexual activity? *Journal of Sex Research*.

doi:10.1080/00224499.2018.1509290

Duncan, S. H. (2014). The devil is in the details: Will the Campus SaVE Act provide more or less protection to victims of campus assault? *Journal of College and University Law* 40(3), 443-466.

Duriau, V. J., Reger, R. K., & Pfarrer, M. D. (2007). A content analysis of the content analysis literature in organization studies: Research themes, data sources, and

- methodological refinements. *Organizational Research Methods*, 10(1), p. 5-34.  
doi:10.1177/1094428106289252
- Durrant, S. (1992). Title IX: Its power and its limitations. *Journal of Physical Education, Recreation, and Dance*, 63(3), 60-64.  
<https://doi.org/10.1080/07303084.1992.10604138>
- Dutile, F. N. (2001). Students and due process in higher education: Of interests and procedures. *Florida Coastal Law Review*, 243(2000-2001), 243-290.
- Dziech, B. W., & Hawkins, M. W. (2012). *Sexual harassment and higher education: Reflections and new perspectives*. New York, NY: Routledge.
- Easton, A. N., Summers, J., Tribble, J. Wallace, P. B., & Lock, R. S. (1997). College women's perceptions regarding resistance to sexual assault. *Journal of American College Health*, 46(3), 127-131. <http://dx.doi.org/10.1080/07448489709595598>
- Edwards, S. (2015). The case in favor of OCR's tougher Title IX policies: Pushing back against the pushback. *Duke Journal of Gender Law & Policy*, 23, 121-144.
- End Rape on Campus. (n.d.). *Title IX: Learn about a Title IX complaint*. Retrieved from <https://endrapeoncampus.org/title-ix>
- Espy, I. P. (1998). *A history and analysis of sports-related Title IX legislation and litigation from 1972 to 1997* (Doctoral dissertation). Retrieved from ProQuest Dissertations & Theses A&I. (304411508).
- Faccenda, P. J., & Ross, K. (1975). Constitutional and statutory regulation of private colleges and universities. *Valparaiso University Law Review*, 9(3), 539-559.

- FIRE. (2017a). *Dear colleague: It's over! Education department rescinds controversial 2011 letter*. Retrieved from <https://www.thefire.org/dear-colleague-its-over-education-department-rescinds-controversial-2011-letter/>
- FIRE. (2017b). *Spotlight on due process 2017*. Retrieved from <https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2017/>
- FIRE. (2018a). *FIRE's guide to due process and campus justice*. Retrieved from [https://www.thefire.org/first-amendment-library/special-collections/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#\\_RefHeading\\_2568\\_2127946742](https://www.thefire.org/first-amendment-library/special-collections/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#_RefHeading_2568_2127946742)
- FIRE. (2018b). *Spotlight on due process 2018*. Retrieved from <https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2018/>
- Fisher, B. S., Cullen, F. T., & Turner, M. G. (2000). *The sexual victimization of college women*. (NIJ Report No. NCJ 182369). Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>
- Foerster, A.C., & Keller, J. A. (2012). *OCR's "Dear Colleague" letter on Title IX and sexual violence-first steps for compliance*. Retrieved from <http://counsel.cua.edu/fedlaw/nacuanotetitleixsexualviolence.cfm>
- Forsman, R. L. (2017). Prevalence of sexual assault victimization among college men, aged 18-24: A review. *Journal of Evidence-Informed Social Work, 14*(6), 421-432.  
doi:10.1080/23761407.2017.1369204
- Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Friendly, H. J. (1975). Some kind of hearing. *University of Pennsylvania Law Review*, 123, 1267-1317.

Frinter, M. P., & Rubinson, L. (1993). Acquaintance rape: The influence of alcohol, fraternity membership, and sports team membership. *Journal of Sex Education and Therapy*, 19(4), 272-284. <https://doi.org/10.1080/01614576.1993.11074089>

Garrett, C., & Scott, A. (2017, Aug. 15). *USC case reveals the travesty of justice under today's Title IX*. Retrieved from <https://www.washingtonexaminer.com/usc-case-reveals-the-travesty-of-justice-under-todays-title-ix>

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

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

Graham, L.M., Treves-Kagan, S., Magee, E. P., DeLong, S.M., Ashley, O.S., Macy, R.J., Martin, S.L., Moracco, K.E., & Bowling, J.M. (2017). Sexual assault policies and consent definitions: A nationally representative investigation of U.S. colleges and universities. *Journal of School Violence*, 16(3), 243-258. <https://doi.org/10.1080/15388220.2017.1318572>

Green, E. L. (2018, Aug. 29). *New U.S. sexual misconduct rules bolster rights of accused and protect colleges*. Retrieved from

<https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>

*Greene v. McElroy*, 360 U.S. 474 (1959).

Grindle, C. C. (2009). *An analysis of court cases involving student due process in dismissal from higher education* (Doctoral dissertation). ProQuest Dissertations & Theses Full Text. (ED513661)

*Grove City v. Bell*, 465 U.S. 555 (1984).

- Hansen, C. (2017, Sept. 26). *New Title IX guidance gives schools choice in sexual misconduct cases*. Retrieved from <https://www.usnews.com/news/education-news/articles/2017-09-26/new-title-ix-guidance-gives-schools-choice-in-sexual-misconduct-cases>
- Harris, S. (2018, July 27). *Appeals court declines to expand universities' obligations under Title IX*. Retrieved from <https://www.thefire.org/appeals-court-declines-to-expand-universities-obligations-under-title-ix/>
- Harris, S. (2019, Jan. 17). *Court: Exclusion of evidence, biased training, lack of cross-examination, low evidentiary standard may have violated student's due process rights*. Retrieved from <https://www.thefire.org/court-exclusion-of-evidence-biased-training-lack-of-cross-examination-low-evidentiary-standard-may-have-violated-students-due-process-rights/>
- Henrick, S. (2013). A hostile environment for student defendants: Title IX and sexual assault on college campuses. *Northern Kentucky Law Review*, 40(1), 49-92.
- Higher Education Act, Pub. L. No. 89-329 (1965).
- Higher Education Amendments of 1992, Pub. L. No. 102-325 (1992).
- Higher Education Amendments of 1998, Pub. L. No. 105-244 (1998).
- Holloway, K., & Bennett, T. (2017). Alcohol-related rape among university students. *Victims & Offenders*, 13(4), 471-486. <https://doi.org/10.1080/15564886.2017.1377655>
- Humphrey, S. E., & Kahn, A. S. (2000). Fraternities, athletic teams, and rape: Importance of identification with a risky group. *Journal of Interpersonal Violence*, 15(12), 1313-1322. <https://doi.org/10.1177%2F088626000015012005>



- Husch Blackwell. (2014, April 30). *Department of Education answers 52 questions on Title IX and sexual violence for colleges and universities*. Retrieved from <http://www.huschblackwell.com/businessinsights/department-of-education-answers-52-questions-on-title-ix-and-sexual-violence-for-colleges-and-universities>
- Illinois State University. (2016). *Code of student conduct*. Retrieved from <https://deanofstudents.illinoisstate.edu/conflict/conduct/code/Code%20of%20Student%20Conduct%202016%20FINAL%20August%2031%202016.pdf>
- Indiana University Center for Postsecondary Research. (2018). *The Carnegie classification of institutions of higher education*. Retrieved from <http://carnegieclassifications.iu.edu/>
- Iverson, S. V. (2015). The risky subject: A policy discourse analysis of sexual assault policies in higher education. In S. C. Wooten & R. W. Mitchell (Eds.), *The crisis of campus sexual violence: Critical perspectives on prevention and response* (pp. 15–32). New York: Routledge.
- James Madison University. (2018). *Policy 1340: Sexual misconduct*. Retrieved from <http://www.jmu.edu/JMUpolicy/policies/PDFs/1340.pdf>
- Jesse, D. (2019, Feb. 3). *As Devos pushes for campus sexual assault hearings, both sides describe trauma*. Retrieved from <https://www.freep.com/story/news/education/2019/02/03/campus-sexual-assault-hearings/2719254002/>
- Johnson, K. C. (2016, Aug. 22). *How American college campuses have become anti-due process*. Retrieved from <https://www.heritage.org/education/report/how-american-college-campuses-have-become-anti-due-process>

- Johnson, K. C. & Taylor, S. (2017, Feb. 1). Campus due process in the courts. *The Washington Post*. Retrieved from [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/01/campus-due-process-in-the-courts/?noredirect=on&utm\\_term=.d14d7984f59a](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/01/campus-due-process-in-the-courts/?noredirect=on&utm_term=.d14d7984f59a)
- Johnson, L. H. (1953). Limitations of the descriptive method. *The Phi Delta Kappan*, 34(6), 241-242. <https://www.jstor.org/stable/20332351>
- Jordan, C. E., Combs, J. L., & Smith, G. T. (2014). An exploration of sexual victimization and academic performance among college women. *Trauma, Violence, & Abuse*, 15(3), 191-200. doi:10.1177/1524838014520637
- Joyce, K. (2017, Dec. 5). *The takedown of Title IX: Inside the fight over federal rules on campus sexual assault*. Retrieved from <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html>
- Jozkowski, K. N., Henry, D. S., & Sturm, A. A. (2015). College students' perceptions of the importance of sexual assault prevention education: Suggestions for targeting recruitment for peer-based education. *Health Education Journal*, 74(1), 46-59. <https://doi.org/10.1177/0017896913516298>
- Judy, L. (2013, Oct. 10). *Student discipline not double jeopardy, university officials say*. Retrieved from [https://www.purdueexponent.org/city\\_state/article\\_9ef221c6-972d-5d8a-af8-ba96f190fdb0.html](https://www.purdueexponent.org/city_state/article_9ef221c6-972d-5d8a-af8-ba96f190fdb0.html)
- Justia. (2019). *Justia: U.S. law: U.S. codes and statutes: U.S. Constitution annotated: Fourteenth Amendment—rights guaranteed: Privileges and immunities of citizenship, due process, and equal protection › procedural due process civil*. Retrieved from

- <https://law.justia.com/constitution/us/amendment-14/05-procedural-due-process-civil.html>
- Karjane, H. M., Fisher, B. S., & Cullen, F. T. (2002). *Campus sexual assault: How America's institutions of higher education respond*. Final Report, NIJ Grant # 1999-WA-VX-0008. Newton, MA: Education Development Center, Inc.
- Kateman, H. (2016, Mar. 17). *Debate brews over role of anonymous Title IX-related complaints in course evaluations*. Retrieved from <https://www.columbiaspectator.com/news/2016/01/20/anonymous-title-ix-complaints/>
- Kihnley, J. (2000). Unraveling the ivory fabric: Institutional obstacles to the handling of sexual harassment complaints. *Law & Social Inquiry*, 25(1), 69-90.  
<https://doi.org/10.1111/j.1747-4469.2000.tb00151.x>
- Kirkpatrick, C. (2016). Campus sexual misconduct due process protections. *Channels: Where Disciplines Meet*, 1(1), 163-177. doi:10.15385/jch.2016.1.1.2
- Kirkpatrick, C., & Kanin, E. (1957). Male sex aggression on a university campus. *American Sociological Review*, 22(1), 52-58. doi:10.2307/2088765
- Kline, K. (2012, June 20). *Forty years later: The impact of Bernice Sandler on Title IX*. Retrieved from <http://www.fullcourt.com/kelly-kline-fullcourtwbball/21402/forty-years-later-impact-bernice-sandler-title-ix>
- Kloster, A. (2012). The Violence Against Women Act and double jeopardy in higher education. *Stanford Law Review Online*, 65, 52-58.
- Know Your IX. (2017). *State policy playbook for ending campus sexual assault*. Retrieved from [https://advocatesforyouth.org/wp-content/uploads/2018/10/Know\\_Your\\_IX\\_State\\_Policy\\_Playbook.pdf](https://advocatesforyouth.org/wp-content/uploads/2018/10/Know_Your_IX_State_Policy_Playbook.pdf)

- Koss, M. P., Gidycz, C. A., & Wisniewski, N. (1987). The scope of rape: Incidence and prevalence of sexual aggression and victimization in a national sample of higher education students. *Journal of Counseling and Clinical Psychology, 55*(2), 162-170. <https://psycnet.apa.org/doi/10.1037/0022-006X.55.2.162>
- Krebs, C. P., Lindquist, C. H., Warner, T. D., Fisher, B. S., & Martin, S. L. (2007). *The campus sexual assault (CSA) study*. Washington, D.C.: National Institute of Justice.
- Kreighbaum, A. (2017, Sept. 25). New instructions on Title IX. *Inside Higher Ed*. Retrieved from <https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance>
- Lacy, S., Watson, B. R., Riffe, D., & Lovejoy, J. (2015). Issues and best practices in content analysis. *Communication Studies Faculty Publications and Presentations, 8*, 1-36. <https://doi.org/10.1177%2F1077699015607338>
- Ladika, S. (2017). Sports and sexual assault: Can colleges and pro leagues curb abuse by athletes? *CQ Researcher, 27*(16), 361-384.
- Landis, J. R., & Koch, G. G. (1977). The measurement of observer agreement for categorical data. *Biometrics, 33*(1), 159-174.
- Larimer, M. E., Turner, A. P., Mallett, K. A., & Geisner, I. M. (2004). Predicting drinking behavior and alcohol-related problems among fraternity and sorority members: Examining the role of descriptive and injunctive Norms. *Psychology of Addictive Behaviors, 18*(3), 203-212. <http://dx.doi.org/10.1037/0893-164X.18.3.203>
- Lewis, W. S., Schuster, S. K., Sokolow, B. A., & Swinton, D. C. (2013). *The top ten things we need to know about Title IX (that the DCL didn't tell us)*. Berwyn, PA: The NCHERM Group, LLC, and ATIXA.

- Lieberwitz, R. L., Jaleel, R., Kelleher, T., Scott, J. W., Young, D., Reichman, H.,...Levy, A. (2016). *The history, uses, and abuses of Title IX*. Washington, D.C.: American Association of University Professors.
- Lipka, S. (2016, Jan. 15). *How 46 Title IX cases were resolved*. Retrieved from <https://www.chronicle.com/article/How-46-Title-IX-Cases-Were/234912>
- Lipsett v. Rivé-Mora*, 669 F. Supp. 1188 (DPR 1987).
- Lobsenz, J. E. (1985). A Constitutional right to an appeal: Guarding against unacceptable risks of erroneous conviction. *University of Puget Sound Law Review*, 8, 375-410.
- Loschiavo, C., & Waller, J. L. (n.d.). *The preponderance of evidence standard: Use in higher education campus conduct processes*. Retrieved from <https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>
- Marshall, R. (2014). Will it really SaVE you? Analyzing the Campus Sexual Violence Elimination Act. *Legislation and Policy Brief*, 6(2), 271-293.
- Mathews v. Eldridge*, 424 U.S. 319 (1976).
- McCray, K. (2015). Intercollegiate athletes and sexual violence: A review of literature and recommendations for future study. *Trauma, Violence, & Abuse*, 16, 438-443. <https://doi.org/10.1177%2F1524838014537907>
- McDonald, J. H. (2014). *Handbook of biological sciences* (3rd ed.). Baltimore, MD: Sparky House Publishing.
- McGowan, C. (2017). The threat of expulsion as unacceptable coercion: Title IX, due process, and coerced confessions. *Emory Law Journal*, 66, 1175-1208.

- McKinley, E. (2019, Jan. 30). Proposed Missouri Title IX changes would give accused more power than any other state. *The Kansas City Star*. Retrieved from <https://www.kansascity.com/news/politics-government/article225240190.html>
- Mearns, T. L. (2005). Everything old is new again: Fundamental fairness and the legitimacy of criminal justice. *Ohio State Journal of Criminal Law*, 3, 105-123.
- Mellins, C. A., Walsh, K., Sarvet, A. L., Wall, M. Gilbert, L., Santelli, J., ...Hirsch, J. S. (2017). Sexual assault incidents among college undergraduates: Prevalence and factors associated with risk. *PLOS ONE*, 12(11).  
<https://doi.org/10.1371/journal.pone.0186471>
- Meloy, A. (2014, Sept. 9). *Legal watch: What Title IX has to do with sexual assault*. Retrieved from <https://www.acenet.edu/the-presidency/columns-and-features/Pages/Legal-Watch-What-Title-IX-Has-To-Do-with-Sexual-Assault.aspx>
- Miltenberg, A. T., & Byler, P. A. (2016). Eight steps in representing an accused in college sexual misconduct disciplinary proceedings. *Litigation*, 43(1), 1-6.
- Mo. Rev. Stat. § 556.061, 2017.
- Mo. Rev. Stat. § 566.093, 2017.
- Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).
- Murnen, S. K., & Kohlman, M. H. (2007). Athletic participation, fraternity membership, and sexual aggression among college men: A meta-analytic review. *Sex Roles*, 57(1), 145-157. doi:10.1080/07448481.2013.781026
- Murphy, M. W. (2011). *Campus sexual assault: How Oregon University System schools respond* (Order No. 1497797). (Master's thesis). Retrieved from ProQuest Dissertations & Theses Full Text. (888057229).

- National Association of College and University Attorneys. (2018). *New cases and developments*. Retrieved from <http://www.nacua.org/cases-developments>
- National Center for Education Statistics. (2017). *Table 303.20. Total fall enrollment in all postsecondary institutions participating in Title IV programs and annual percentage change in enrollment, by degree-granting status and control of institution: 1995 through 2016*. Retrieved from [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_303.20.asp?current=yes](https://nces.ed.gov/programs/digest/d17/tables/dt17_303.20.asp?current=yes)
- National Center for Education Statistics. (2018). *Fast facts: Educational institutions*. Retrieved from <https://nces.ed.gov/fastfacts/display.asp?id=84>
- National Center for Education Statistics. (n.d.). *College Navigator*. Retrieved from <http://nces.ed.gov/collegenavigator/>
- National Student Clearinghouse. (2017). *Current term enrollment estimates: Spring 2017*. Retrieved from <https://nscresearchcenter.org/wp-content/uploads/CurrentTermEnrollment-Spring2017.pdf>
- Nisenson, A. (2016). Constitutional due process and Title IX investigation and appeal procedures at colleges and universities. *Penn State Law Review*, 120, 963-976.
- Northwest Missouri State University. (2018, Aug. 30). *Sexual misconduct policy and procedures*. Retrieved from <https://www.nwmissouri.edu/policies/student/Title-IX-Sexual-Misconduct.pdf>
- Odendahl, M. (2018, Oct. 17). Students accused of sexual misconduct suing colleges, universities. *Indianapolis Business Journal*. Retrieved from <https://www.ibj.com/articles/70918-students-accused-of-sexual-misconduct-suing-colleges-universities>

- Office for Civil Rights. (1997). *Sexual harassment guidance 1997*. Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>
- Office for Civil Rights. (2001). *Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties*. Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>
- Office for Civil Rights. (2011, April 4). *Dear colleague letter*. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>
- Office for Civil Rights. (2014, April 29). *Questions and answers on Title IX and sexual violence*. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>
- Office for Civil Rights. (2017a). “Dear Colleague” letter. Retrieved from <https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf>
- Office for Civil Rights. (2017b). *Q&A on campus sexual misconduct*. Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>
- Office for Civil Rights. (2018). *Title IX of the Education Amendments of 1972* (archived information). Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>
- Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432.
- Pappano, L. (2012, Jan. 20). *How big-time sports ate college life*. Retrieved from <https://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html>



- Paul, C. (2016). Title IX coordinators in dual roles: Challenges, experiences, and sources of support. *Journal of Campus Title IX Compliance and Best Practices*, 2, 32-42.  
<https://doi.org/10.3390/bs8040038>
- Potter, R. H., Krider, J. E., & McMahon, P. M. (2000). Examining elements of campus sexual violence policies: Is deterrence or health promotion favored? *Violence Against Women*, 6(12), 1345-1362. <https://doi.org/10.1177%2F10778010022183686>
- Reilly, M. T. (2016). Due process in public university discipline cases. *Penn State Law Review*, 120(4), 1001-1025.
- Richards, T. N. (2016). An updated review of institutions of higher education's responses to sexual assault: Results from a nationally representative sample. *Journal of Interpersonal Violence*, 1-30. doi:10.1177/0886260516658757
- Richards, T. N., Branch, K. A., Fleury-Steiner, R. E., & Kafonek, K. (2017). A feminist analysis of campus sexual assault policies: Results from a national sample. *Family Relations*, 66(February 2017), 104-115. doi:10.1111/fare.12236
- Ridpath, B. D. (2016, Sept. 15). *The attitude toward sexual and athlete violence in college sports must change*. Retrieved from <https://www.forbes.com/sites/bdavidridpath/2016/09/15/the-attitude-toward-sexual-and-athlete-violence-in-college-sports-must-change/#518462595eaf>
- Robertson, C. B. (2013). The right to appeal. *North Carolina Law Review*, 91, 1219-1282.
- Rock, A. (2018, Jan. 26). *Civil rights groups sue DeVos over campus sexual assault guidance*. Retrieved from <https://www.campussafetymagazine.com/university/civil-rights-groups-betsy-devos-lawsuit/>

- Rudovsky, D., Bibas, S., Balganes, S., Berman, M., Burbank, S. B., Fisch, J. E.,... Wax, A. (2015). *Open letter from members of the Penn Law School faculty: Sexual assault complaints: Protecting Complainants and the accused students at universities*. Retrieved from <http://media.philly.com/documents/OpenLetter.pdf>
- Safko, E. D. (2016). Are campus sexual assault tribunals fair: The need for judicial review and additional due process protections in light of new case law. *Fordham Law Review*, 84(5), 2289-2333.
- Salomone, R. C. (1986). *Equal education under law: Legal rights and federal policy in the post-Brown era*. New York, NY: St. Martin's Press.
- Samuels, J., & Galles, K. (2003). In defense of Title IX: Why current policies are required to ensure equality of opportunity. *Marquette Sports Law Review*, 14(1), 11-47.
- Save Our Sons. (2019, Mar. 25). *Courts ruling on side of students accused of sex & against universities: Here's why* [Blog post]. Retrieved from <https://helpsaveoursons.com/courts-ruling-on-side-of-students-accused-of-sexual-assault-heres-why/>
- Schow, A. (2015, Mar. 2). *Members of civil rights commission oppose 'disregard for rule of law' over campus sexual assault rules*. Retrieved from <https://www.washingtonexaminer.com/members-of-civil-rights-commission-oppose-disregard-for-rule-of-law-over-campus-sexual-assault-rules/article/2560906>
- Shapiro, G., & Markoff, J. (1998). *Revolutionary demands: A content analysis of the cahiers de doléances of 1789*. Stanford, CA: Stanford University Press.
- Sokolow, B. A., Lewis, W. S., Schuster, S. K., & Swinton, D. C. (2015a). *ATIXA sex/gender-based harassment, discrimination and sexual misconduct model policy*. Retrieved from

[http://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Model-Policy\\_07-02-15\\_Final.pdf](http://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Model-Policy_07-02-15_Final.pdf)

Sokolow, B. A., Lewis, W. S., Schuster, S. K., & Swinton, D. C. (2015b). *ATIXA sex/gender-based harassment, discrimination, and sexual misconduct model resolution procedures*.

Retrieved from <https://atixa.org/wordpress/wp-content/uploads/2015/05/ATIXA-Model-Civil-Rights-Procedures-2015-Final1.pdf>

Staurowsky, E. J. (2003). Title IX and college sport: The long painful path to compliance and reform. *Marquette Sports Law Review*, 14(1), 95-121.

Stephens, B. (2017, Sept. 8). Betsy DeVos ends a campus witch hunt. *The New York Times*.

Retrieved from <https://www.nytimes.com/2017/09/08/opinion/betsy-devos-title-iv.html>

Stevens, E. (1999). *Due process and higher education: A systemic approach to fair decision making*. Washington, D.C.: George Washington University. (ERIC Digest No. ED435311).

Stoner, J. E., & Cramer, R. J. (2017). Sexual violence victimization among college females:

A systematic review of rates, barriers, and facilitators of health service utilization on campus. *Trauma, Violence, & Abuse*. <https://doi.org/10.1177/1524838017721245>

Students Active for Ending Rape & V-Day. (2013, Oct. 13). *Making the grade? Findings*

*from the Campus Accountability Project on sexual assault policies*. Retrieved from

<https://www.vday.org/~assets/downloads/2013-Campus-Accountability-Project-Full-Report.pdf>

Sumter, K. (2017, July 14). *Advocacy groups react after Title IX summit with Betsy DeVos*.

Retrieved from <http://college.usatoday.com/2017/07/14/advocacy-groups-react-after-title-ix-summit-with-betsy-devos/>

- Synovitz, L. B., & Byrne, T. J. (1998). Antecedents of sexual victimization: Factors discriminating victims from nonvictims. *Journal of American College Health*, 46(4), 151-158. <http://dx.doi.org/10.1080/07448489809595602>
- Svrluga, S. (2017, Sept. 7). Transcript: Betsy DeVos's remarks on campus sexual assault. *The Washington Post*. Retrieved from [https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?utm\\_term=.d1b1ad6ae5fa](https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?utm_term=.d1b1ad6ae5fa)
- Talbert, K. (2015). Behind the scenes: A closer look at OCR's enforcement authority. *Engage*, 16(3), 17-20.
- Title IX of the Education Amendments of 1972, Pub. L. No. 92-318 (1972).
- Turney v. Ohio*, 273 U.S. 510 (1927).
- U.S. Const. amend. V.
- U.S. Const. amend. VI.
- U.S. Const. amend. XIV.
- U.S. Department of Education. (2016). *The handbook for campus safety and security reporting*. Retrieved from <https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf>
- U.S. Department of Education. (2017a). *2018-2019 Federal School Code List in Excel format*. Retrieved from <https://ifap.ed.gov/ifap/fedSchoolCodeList.jsp>
- U.S. Department of Education. (2017b). *Department of Education issues new interim guidance on campus sexual misconduct*. Retrieved from

<https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>

U.S. Department of Education. (2018). *Pending cases currently under investigation at elementary-secondary and post-secondary schools as of August 31, 2018 7:30a.m. search*. Retrieved from

<https://www2.ed.gov/print/about/offices/list/ocr/docs/investigations/open-investigations/tix.html>

U.S. Department of Justice. (2012, June 23). *Equal access to education: Forty years of Title IX*. Retrieved from

<https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>

U.S. General Accounting Office. (1989). *Content analysis: A methodology for structuring and analyzing written material*. Retrieved from

<http://archive.gao.gov/d48t13/138426.pdf>

U.S. Government Accountability Office. (2013). *Content analysis: Principles and practices*.

Retrieved from

[https://www.ignet.gov/sites/default/files/files/02\\_Content\\_Analysis\\_Principles\\_and\\_Practices.pdf](https://www.ignet.gov/sites/default/files/files/02_Content_Analysis_Principles_and_Practices.pdf)

U.S. Senate Subcommittee on Financial & Contracting Oversight. (2014, July 9). *Sexual violence on campus: How too many institutions of higher education are failing to protect students*. Middletown, DE: United States Senate.

University of Central Missouri. (2015). *Sexual misconduct policy and complaint resolution procedures*. Retrieved from <https://www.ucmo.edu/offices/general-counsel/university-procedures>

- [policy-library/procedures/sexual-misconduct-policy-and-complaint-resolution-procedures/index.php](http://policy-library/procedures/sexual-misconduct-policy-and-complaint-resolution-procedures/index.php)
- University of Cincinnati. (2018). *Title IX and university policy: UC Title IX grievance procedure for students and third parties*. Retrieved from <https://www.uc.edu/titleix/policies-definitions.html>
- University of Kansas. (2018). *Institutional opportunity & access procedure: Sexual harassment and sexual violence*. Retrieved from <http://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures>
- University of Montana. (2018). *Discrimination, harassment, sexual misconduct, stalking, and retaliation*. Retrieved from <http://www.umt.edu/policies/browse/personnel/discrimination-harassment-sexual-misconduct-stalking-and-retaliation>
- University of Missouri. (2017). *600.030 equity resolution process for resolving complaints of discrimination, harassment, and sexual misconduct against a student or student organization*. Retrieved from [https://www.umsystem.edu/ums/rules/collected\\_rules/equal\\_employment\\_educational\\_opportunity/ch600/600.030\\_equity\\_resolution\\_process\\_for\\_resolving\\_complaints\\_of\\_harassment](https://www.umsystem.edu/ums/rules/collected_rules/equal_employment_educational_opportunity/ch600/600.030_equity_resolution_process_for_resolving_complaints_of_harassment)
- Valentin, I. (1997). *Title IX: A brief history*. Newton, MA: Women's Educational Equity Act Resource Center.
- Vargyas, E. J. (1993). Commentary: *Franklin v. Gwinnett County Public Schools* and its impact on Title IX enforcement. *Journal of College and University Law*, 19(4), 373-384.

- Villalobos, P. M. (1990). The Civil Rights Restoration Act of 1987: Revitalization of Title IX. *Marquette Sports Law Review*, 1(1), 149-169.
- Violence Against Women Reauthorization Act, Pub. L. No. 13-4 (2013).
- Vogt, W. P., Vogt, E. R., Gardner, D. C., & Haeffele, L. M. (2014). *Selecting the right analyses for your data: Quantitative, qualitative, and mixed methods*. New York, NY: The Guilford Press.
- Wade, L. (2017, Mar. 6). *Rape on campus: Athletes, status, and the sexual assault crisis*. Retrieved from <http://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255>
- Weizel, L. M. (2012). The process that is due: Preponderance of the evidence as the standard of proof for university adjudications of student-on-student sexual assault complaints. *Boston College Law Review*, 53(4), 1613-1655.
- Wood, N. L., & Wood, R. A. (1996). Due process in student discipline: A primer. *The Journal of College and University Housing*, 26(1), 11-18.
- Yoffe, E. (2017, Sept. 6). *The uncomfortable truth about campus rape policy*. Retrieved from <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/>
- Young, B-R., Desmarais, S. L., Baldwin, J. A., & Chandler, R. (2017). Sexual coercion practices among undergraduate male recreational athletes, intercollegiate athletes, and non-athletes. *Violence Against Women*, 23(7), 795-812.  
doi:10.1177/1077801216651339

## VITA

Sybil Brianne Wyatt was born and raised in Maryville, Missouri. She is the daughter of Michael and Patricia Wyatt and David and Carol Heflin and is a sister to six siblings. Early on in her life, Sybil was taught the value of education by her grandmother, Karen “Nanny” Sovereign, and from the time she was old enough to read, Sybil has had a thirst for knowledge, as evidenced by her educational pursuits.

After graduating from Maryville High School, Sybil attended Northwest Missouri State University (NWMSU) on a full-ride academic scholarship. She graduated with a degree in broadcasting and a minor in psychology but knew even then that she had not yet accomplished all she was meant to achieve in higher education. Soon Sybil returned to NWMSU and worked to complete a graduate degree in microbiology with a plan to attend medical school. During this time, Sybil first became exposed to the idea of higher education as a career through her role as a graduate teaching assistant, assigned to instruct introductory-level biology and botany laboratory courses.

Due to hours spent shadowing physicians and talking through possibilities with mentors in the medical field, Sybil made the decision to forgo her plan to pursue a degree in medicine, shifting instead to the field of law. Sybil attended the University of Missouri-Kansas City (UMKC) School of Law while also serving the University as both a part-time academic advisor for undergraduate students interested in attending law school and an instructor for a first-year experience course with a legal focus. In addition to advising and teaching, Sybil interned with the Missouri Commission on Human Rights (MCHR), working to assist investigators in addressing complaints of discrimination based on protected class.



Upon graduation from law school, Sybil took on a full-time position with the MCHR as an investigator. However, she remained interested in serving post-secondary students and thus worked concurrently as a part-time academic advisor at Metropolitan Community College-Blue River. During this time, Sybil began exploring the idea of becoming a faculty member at a research university and chose to continue her education by pursuing a graduate degree in criminal justice, with the first step being a Master's degree at the University of Central Missouri.

Within a year, Sybil found herself drawn back into the administrative side of higher education, first accepting a position at The University of Kansas as an investigator of complaints of protected class discrimination and sexual misconduct under Title IX and then choosing to enroll in a second graduate program, this time at the UMKC School of Education (SOE). Sybil completed both graduate programs with honors, and although many would consider taking time away from their education to pursue other interests, Sybil chose to return to the SOE for an educational doctorate in higher education administration. She was soon offered a position with UMKC as a full-time senior investigator and deputy Title IX Coordinator, and within a few short years, Sybil was promoted to Associate Director of Affirmative Action and Title IX Coordinator for UMKC. Just one year later, Sybil was again promoted, this time to Director of Affirmative Action, while continuing in her position as Title IX Coordinator. Upon graduation, Sybil plans to continue serving the University in her current role while considering her next educational opportunity.