

# Spotlight on Due Process *2018*

The  
Foundation  
for Individual  
Rights in  
Education



# Table of Contents

02

Executive Summary

04

Methodology

12

Ratings

32

Trends

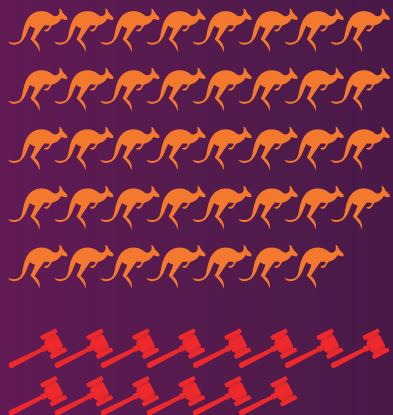
# Executive Summary

Colleges and universities across the country are failing to afford their students due process and fundamental fairness in their disciplinary proceedings. These institutions investigate and punish offenses ranging from vandalism and housing violations to felonious acts of sexual assault, handling many cases that are arguably better left to courts and law enforcement. But their willingness to administer what is effectively a shadow justice system has not been accompanied by a willingness to provide even the most basic procedural protections necessary to fairly adjudicate accusations of serious wrongdoing.

In November 2018, the Department of Education's Office for Civil Rights proposed new federal regulations that would require schools to provide many procedural safeguards in sexual misconduct cases. If the regulations are enacted as proposed, a fairer status quo might be on the horizon. But for now, most institutions of higher education maintain disciplinary policies and procedures that fail all students involved.

Last year, for the first time, the Foundation for Individual Rights in Education rated the top 53 universities in the country (according to *U.S. News & World Report*) based on 10 fundamental elements of due process. Our findings were troubling; most institutions lacked most of the procedural safeguards we looked for in written policies. This year, we assessed the same institutions, but slightly adjusted our criteria in order to better capture the varied ways that universities adjudicate misconduct cases.

39 of 53 institutions do not presume the innocence of accused students



## Like last year, the findings are dire:

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Nearly three quarters (73.6%) of America's top 53 universities do not guarantee students that they will be presumed innocent until proven guilty.

Only slightly more than half of schools (52.8%) require that fact-finders—the institution's version of judge and/or jury—be impartial.

Fewer than one-third of institutions (30.2%) guarantee a meaningful hearing, where each party may see and hear the evidence being presented to fact-finders by the opposing party.

47 out of the 53 universities studied receive a D or F grade from FIRE for at least one disciplinary policy, meaning that they fully provide no more than 4 of the 10 elements of a fair procedure that FIRE rated.

Most institutions have one set of standards for adjudicating charges of sexual misconduct and another for all other non-academic charges. 86.8% of rated universities receive a D or F for protecting the due process rights of students accused of sexual misconduct.

Of the 104 policies rated at the 53 schools in the report, not a single policy receives an A grade.

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FIRE has publicly led the fight to restore due process to our nation's campuses by highlighting abuses and bringing the attention of media, lawmakers, and the public to the problem. We were motivated to undertake this project by our success in working with colleges and universities to reform policies that violate students' free speech rights. The dramatic drop in restrictive speech

codes in the years since FIRE first began rating university speech policies—and challenging institutions to improve them—has encouraged us to strive towards similarly positive results in the due process context. It is our hope that our due process ratings will provide universities with clear criteria for improving the fairness of their student conduct processes.

# Methodology

For this report, FIRE analyzed disciplinary procedures at the 53 top-ranked institutions nationwide according to *U.S. News & World Report's* National University Rankings for 2017, the year our first report was released. (The last four institutions were each ranked #50.)

Where institutions maintain different policies for academic and non-academic cases, we analyzed only the procedures for non-academic cases. Where institutions maintain different policies for cases in which suspension or expulsion may result and for cases limited to less severe sanctions, we analyzed only the procedures for cases involving potential suspension or expulsion. Where institutions maintain different policies for different colleges or graduate schools, we analyzed the policy for the undergraduate arts and sciences school at the main campus, unless otherwise specified. We did not consider faculty disciplinary procedures, which may differ significantly from those used for students.

Where institutions maintain different policies for cases involving alleged sexual misconduct and other cases, we analyzed both sets of policies. The vast majority of

schools have maintained separate policies since the Office for Civil Rights issued its April 4, 2011 “Dear Colleague” letter, which imposed extensive new obligations on universities with regard to their handling of sexual misconduct claims. (This letter was rescinded on September 22, 2017, and, as noted above, the Department of Education has released new proposed regulations to replace the rescinded instructions.)

During the time it has taken FIRE to prepare this report, some institutions may have revised their policies and procedures. Accordingly, this report might not reflect very recent policy changes.

In analyzing each set of disciplinary procedures, FIRE looked for 10 critically important procedural safeguards. For each element, institutions received zero points if the safeguard was absent, was too narrowly defined to substantially protect students, or was subject to the total discretion of an administrator; one point if the policy provided some protection with respect to that element; and two points if the safeguard was clearly and completely articulated.

FIRE recognizes that distilling the concept of due process down to 10 elements is necessarily reductive. In order to be truly “fair,” some proceedings may require elements we did not list, or stricter adherence to those we did. In other proceedings, some of the safeguards we list may not prove to have an effect on the ultimate outcome. We welcome discussion about what we might include in future reviews, or what was included that should not have been.

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**After each institutional policy set was awarded  
zero to 20 points, it was graded as follows:**

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A

17 – 20  
POINTS

B

13 – 16  
POINTS

C

09 – 12  
POINTS

D

05 – 08  
POINTS

F

00–04  
POINTS

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Because each policy is written differently, points awarded to institutions often depended on nuances in wording, the overall structure of the proceedings described, and FIRE’s decision to resolve ambiguities against the institution where more clarity could reasonably be expected. Vaguely written provisions, or those that grant broad discretion to administrators, may easily be abused to deprive students of their right to a fair hearing, and therefore FIRE considers them inadequate to protect students and secure fundamentally fair proceedings.

## **We awarded points for the following safeguards:**

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### **01. A clearly stated presumption of innocence, including a statement that a person's silence shall not be held against them.**

In order to receive any points, the institution must explicitly include one of these elements in its policies. A statement that a respondent is allowed to not answer questions was not sufficient to earn full points, since this could simply mean the student wouldn't be punished for that choice as a separate matter from the pending case.

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### **02. Timely and adequate written notice of the allegations before any meeting with an investigator or administrator at which the student is expected to answer questions. Information provided should include the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.**

For this safeguard to be meaningful, and thus earn one point, notice must include information about both the policy at issue and the underlying behavior, and it must explicitly be granted in advance of questioning. Where no time frame was specified, FIRE did not assume information would be given with sufficient time to prepare for interviews. An additional point was awarded for specificity of information and a guarantee of three or more days to prepare.

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### **03. Adequate time to prepare for a reasonably prompt disciplinary hearing. Preparation shall include access to all evidence to be used at hearing.**

For this safeguard to be meaningful, and thus to earn one point, an institution's policy must explicitly state that evidence is shared in advance of the hearing. Access only to summaries of evidence was not sufficient to earn points. Any allowances for new evidence to be introduced after evidence is initially shared with the respondent must be narrowly written and should



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ensure that the respondent has adequate time to review the new evidence. Ideally, students would have at least seven days' notice of the hearing date, at least five days with the evidence to prepare, and the ability to photocopy documents. Full points were awarded to schools whose policies substantially encompass those elements.

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## 04. **The right to impartial fact-finders, including the right to challenge fact-finders for conflicts of interest.**

To receive any points, the institution must explicitly include one of these elements in its policies. Provisions instructing fact-finders to recuse themselves were not sufficient to earn a second point. Boilerplate language in policy introductions broadly promising a fair or unbiased procedure was not sufficient to earn points.

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## 05. **The right to a meaningful hearing process. This includes having the case adjudicated by a person or group of people—ideally, a panel—distinct from the person or people who conducted the investigation (i.e., the institution must not employ a “single-investigator” model).**

Key characteristics of a live hearing are that each party is able to directly witness all other parties (including an institutional prosecutor, complainant, and respondent) as they present evidence to the fact-finder, and that the parties are able to respond to that evidence in real time. Institutions that purport to employ a hearing but whose procedures left ambiguous whether a respondent would have the opportunities described above, or whose policies clearly impede those opportunities, were not awarded any points. For example, where the respondent is not able to see and hear as evidence is presented against him or her, or is allowed to respond only in a written statement, points were not awarded. Institutions earned only one point if they employ a hearing but the fact-finder is only one person.

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## 06. **The right to present all evidence directly to the fact-finder.**

For this safeguard to be meaningful, and thus to earn points, students must be granted an opportunity to present all relevant evidence to the fact-finder—the person or people who decide whether or not the accused student committed the offense. Institutions received zero points if they limit the amount of information a respondent can provide fact-finders directly, such as by imposing hard limits on how many words or minutes students may use for their arguments. Institutions also received zero points if they allow someone other than the fact-finders and the respondent to determine what exculpatory evidence will be considered by the fact-finders (other than determining relevance). This includes policies that grant broad discretion to exclude the respondent’s choice of witnesses. Institutions received one point if a respondent may present all relevant evidence to a fact-finder whose determination has to receive final approval from an administrator or other individual.

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## 07. **The ability to question witnesses, including the complainant, in real time, and respond to another party’s version of events.**

Institutions were awarded full points for this safeguard if they explicitly allow respondents to cross-examine adverse witnesses in real time, either directly or through an advisor or chair who relays all relevant questions as submitted. Institutions received one point if respondents may cross-examine adverse witnesses through a third party, but the institution’s policy does not specify to what extent all relevant questions are relayed as submitted. Institutions received zero points where it is not clear that respondents have an opportunity to question adverse witnesses, where a third party has broad discretion to omit or reword questions, where questioning does not occur in real time, or where the respondent or fact-finder cannot see and hear the person testifying.

08.

**The active participation of an advisor of choice, including an attorney (at the student's sole discretion), during the investigation and at all proceedings, formal or informal.**

For this safeguard to be meaningful, and thus to earn points, institutions must allow an advisor to speak on behalf of the respondent, including cross-examining witnesses. Institutions were awarded one point if a non-attorney advisor may participate fully or if an attorney advisor may participate with minor limitations.

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09.

**The meaningful right of the accused to appeal a finding or sanction.**

Institutions were awarded full points if grounds for appeal include (1) new information or evidence that was previously unavailable, (2) procedural error, and (3) findings that are clearly not supported by the evidence. Institutions received one point if grounds for appeal include only two of these circumstances. To receive any points, the appellate decision-making body or individual must be different from the original fact-finders.

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10.

**A requirement that factual findings leading to expulsion be agreed upon by a unanimous panel or supported by clear and convincing evidence.**

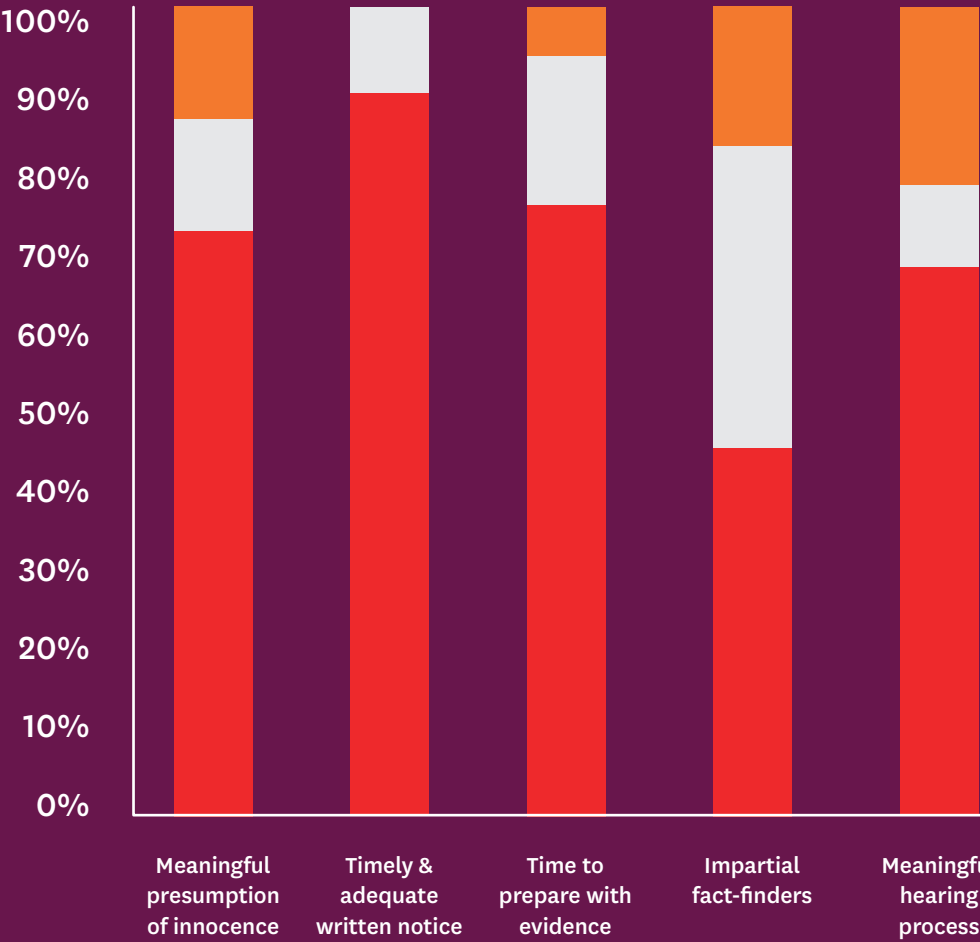
In order to earn points for requiring a unanimous fact-finding panel decision, panels must consist of three or more individuals.

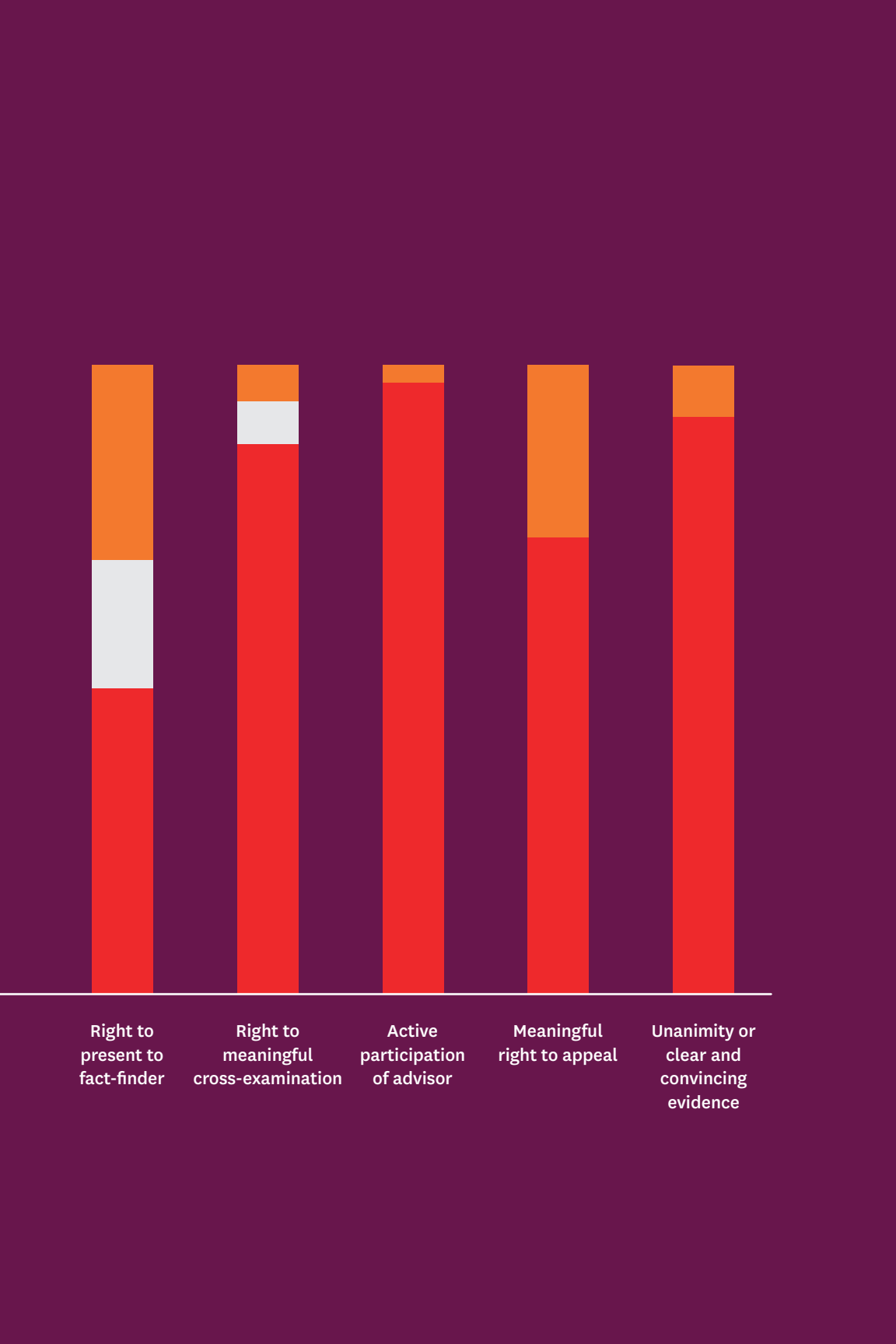
In addition to these guidelines for awarding points, FIRE has placed an asterisk by institutions whose policies grant an administrator or judicial body discretion to have a case adjudicated through a different, less protective procedure, or to not follow written procedures, without clear guidelines as to how such a decision may be made. We rated the more protective procedure and awarded an asterisk only where the disciplinary policy, as a whole, suggests that that procedure is the one ordinarily used. Where a student is very likely to be subjected to the less protective procedure, that was the one rated for this report.

Finally, where institutions provide certain procedural safeguards only on appeal, and appeals are allowed only on certain grounds, the institutions did not earn points for those safeguards.

Procedural safeguards guaranteed at institutions

■ none    ■ limited    ■ full





Right to  
present to  
fact-finder













































Right to  
meaningful  
cross-examination

Active  
participation  
of advisor



































































Meaningful  
right to appeal













































Unanimity or  
clear and  
convincing  
evidence

# Ratings

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
Boston College	D* 08/20				
Boston College SEXUAL MISCONDUCT	F 03/20				
Boston University	D 06/20				
Boston University SEXUAL MISCONDUCT	D 05/20				
Brandeis University	C* 09/20				
Brandeis University SEXUAL MISCONDUCT	F 03/20				
Brown University	C* 11/20				
Brown University SEXUAL MISCONDUCT	F 02/20				
California Institute of Technology	F* 04/20				
California Institute of Technology SEXUAL MISCONDUCT	F 03/20				
Carnegie Mellon University	C 10/20				













































\* FIRE has placed an asterisk by institutions whose policies grant an administrator or judicial body discretion to have a case adjudicated through a different, less protective procedure, or to not follow written procedures, without clear guidelines as to how such a decision may be made. \*

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
					
					
					
					
					
					
					
					
					
					
					













































Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
<b>Carnegie Mellon University</b> SEXUAL MISCONDUCT	<b>C</b> 10/20				
<b>Case Western Reserve University</b>	<b>D</b> 05/20				
<b>Case Western Reserve University</b> SEXUAL MISCONDUCT	<b>D</b> 08/20				
<b>College of William &amp; Mary</b>	<b>D</b> 07/20				
<b>College of William &amp; Mary</b> SEXUAL MISCONDUCT	<b>D</b> 06/20				
<b>Columbia University</b>	<b>F</b> 03/20				
<b>Columbia University</b> SEXUAL MISCONDUCT	<b>D</b> 07/20				
<b>Cornell University</b>	<b>B</b> 14/20				
<b>Cornell University</b> SEXUAL MISCONDUCT	<b>C</b> 11/20				
<b>Dartmouth College</b>	<b>D</b> 07/20				
<b>Dartmouth College</b> SEXUAL MISCONDUCT	<b>D</b> 06/20				



[illegible]

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
Duke University	C 10/20				
Duke University SEXUAL MISCONDUCT	C 11/20				
Emory University	D 08/20				
Emory University SEXUAL MISCONDUCT	D 08/20				
Georgetown University	D 06/20				
Georgetown University SEXUAL MISCONDUCT	F 03/20				
Georgia Institute of Technology	C* 11/20				
Georgia Institute of Technology SEXUAL MISCONDUCT	B 14/20				
Harvard University	F 03/20				
Harvard University SEXUAL MISCONDUCT	F 03/20				
Johns Hopkins University	D* 05/20				













































[illegible]

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
<b>Johns Hopkins University</b> SEXUAL MISCONDUCT	<b>D*</b> 06/20				
<b>Lehigh University</b>	<b>C*</b> 10/20				
<b>Lehigh University</b> SEXUAL MISCONDUCT	<b>F</b> 02/20				
<b>Massachusetts Institute of Technology</b>	<b>F*</b> 04/20				
<b>Massachusetts Institute of Technology</b> SEXUAL MISCONDUCT	<b>F</b> 04/20				
<b>New York University</b>	<b>D*</b> 07/20				
<b>New York University</b> SEXUAL MISCONDUCT	<b>D*</b> 06/20				
<b>Northeastern University</b>	<b>C</b> 11/20				
<b>Northeastern University</b> SEXUAL MISCONDUCT	<b>D*</b> 06/20				
<b>Northwestern University</b>	<b>D</b> 06/20				
<b>Northwestern University</b> SEXUAL MISCONDUCT	<b>F</b> 04/20				

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
Red	Red	Red	Red	Yellow	Green
Green	Green	Green	Red	Yellow	Red
Red	Red	Red	Red	Yellow	Red
Green	Red	Red	Red	Green	Red
Green	Red	Red	Red	Green	Red
Green	Green	Red	Red	Yellow	Red
Yellow	Green	Red	Red	Yellow	Red
Green	Yellow	Green	Red	Yellow	Red
Red	Red	Red	Red	Yellow	Red
Red	Green	Red	Red	Green	Red
Red	Red	Red	Red	Green	Red

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
Pennsylvania State University	F* 03/20	<div></div>	<div></div>	<div></div>	<div></div>
Pennsylvania State University SEXUAL MISCONDUCT	F 01/20	<div></div>	<div></div>	<div></div>	<div></div>
Pepperdine University	D 05/20	<div></div>	<div></div>	<div></div>	<div></div>
Pepperdine University SEXUAL MISCONDUCT	F 04/20	<div></div>	<div></div>	<div></div>	<div></div>
Princeton University	C 10/20	<div></div>	<div></div>	<div></div>	<div></div>
Princeton University SEXUAL MISCONDUCT	D 06/20	<div></div>	<div></div>	<div></div>	<div></div>
Rensselaer Polytechnic Institute	F 03/20	<div></div>	<div></div>	<div></div>	<div></div>
Rensselaer Polytechnic Institute SEXUAL MISCONDUCT	F 01/20	<div></div>	<div></div>	<div></div>	<div></div>
Rice University	F* 04/20	<div></div>	<div></div>	<div></div>	<div></div>
Rice University SEXUAL MISCONDUCT	D 06/20	<div></div>	<div></div>	<div></div>	<div></div>
Stanford University	B 13/20	<div></div>	<div></div>	<div></div>	<div></div>

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
Green	Red	Red	Red	Yellow	Red
Red	Red	Red	Red	Yellow	Red
Green	Red	Red	Red	Green	Red
Green	Red	Red	Red	Green	Red
Green	Green	Green	Yellow	Yellow	Green
Red	Green	Red	Red	Yellow	Red
Red	Green	Red	Red	Yellow	Red
Red	Red	Red	Red	Yellow	Red
Red	Red	Red	Red	Green	Red
Red	Green	Red	Red	Green	Red
Green	Green	Green	Red	Yellow	Green













































Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
<b>Stanford University</b> SEXUAL MISCONDUCT	<b>C</b> 10/20				
<b>Tufts University</b>	<b>C*</b> 09/20				
<b>Tufts University</b> SEXUAL MISCONDUCT	<b>D</b> 05/20				
<b>Tulane University</b>	<b>D</b> 05/20				
<b>University of California, Berkeley</b>	<b>C*</b> 11/20				
<b>University of California, Berkeley</b> SEXUAL MISCONDUCT	<b>D</b> 06/20				
<b>University of California, Davis</b>	<b>B*</b> 13/20				
<b>University of California, Davis</b> SEXUAL MISCONDUCT	<b>D</b> 06/20				
<b>University of California, Irvine</b>	<b>C</b> 09/20				
<b>University of California, Irvine</b> SEXUAL MISCONDUCT	<b>D</b> 06/20				
<b>University of California, Los Angeles</b>	<b>C</b> 10/20				














































Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
University of California, Los Angeles SEXUAL MISCONDUCT	D 06/20	<div></div>	<div></div>	<div></div>	<div></div>
University of California, San Diego	B+ 14/20	<div></div>	<div></div>	<div></div>	<div></div>
University of California, San Diego SEXUAL MISCONDUCT	D 06/20	<div></div>	<div></div>	<div></div>	<div></div>
University of California, Santa Barbara	D 08/20	<div></div>	<div></div>	<div></div>	<div></div>
University of California, Santa Barbara SEXUAL MISCONDUCT	D 06/20	<div></div>	<div></div>	<div></div>	<div></div>
University of Chicago	D 08/20	<div></div>	<div></div>	<div></div>	<div></div>
University of Chicago SEXUAL MISCONDUCT	D 08/20	<div></div>	<div></div>	<div></div>	<div></div>
University of Florida	D 08/20	<div></div>	<div></div>	<div></div>	<div></div>
University of Illinois Urbana-Champaign	C 10/20	<div></div>	<div></div>	<div></div>	<div></div>
University of Illinois Urbana-Champaign SEXUAL MISCONDUCT	F 04/20	<div></div>	<div></div>	<div></div>	<div></div>
University of Miami	D+ 08/20	<div></div>	<div></div>	<div></div>	<div></div>

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
University of Miami SEXUAL MISCONDUCT	C 09/20				
University of Michigan, Ann Arbor	C 12/20				
University of Michigan, Ann Arbor SEXUAL MISCONDUCT	D 08/20				
University of North Carolina at Chapel Hill	B 15/20				
University of North Carolina at Chapel Hill SEXUAL MISCONDUCT	C 11/20				
University of Notre Dame	D 05/20				
University of Notre Dame SEXUAL MISCONDUCT	F 02/20				
University of Pennsylvania	B 13/20				
University of Pennsylvania SEXUAL MISCONDUCT	D 05/20				
University of Rochester	D* 06/20				
University of Rochester SEXUAL MISCONDUCT	D 06/20				

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
Yellow	Green	Yellow	Red	Red	Red
Yellow	Green	Green	Red	Green	Green
Red	Green	Red	Red	Green	Red
Green	Green	Green	Red	Green	Green
Green	Green	Green	Green	Yellow	Red
Green	Green	Red	Red	Yellow	Red
Red	Red	Red	Red	Green	Red
Green	Green	Green	Red	Yellow	Green
Red	Red	Red	Red	Yellow	Red
Green	Yellow	Yellow	Red	Yellow	Red
Red	Red	Red	Red	Yellow	Red

Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
University of Southern California	D+ 07/20				
University of Southern California SEXUAL MISCONDUCT	D 07/20				
University of Virginia	B+ 13/20				
University of Virginia SEXUAL MISCONDUCT	D 08/20				
University of Wisconsin, Madison	C 10/20				
University of Wisconsin, Madison SEXUAL MISCONDUCT	D 07/20				
Vanderbilt University	F 03/20				
Vanderbilt University SEXUAL MISCONDUCT	F 02/20				
Villanova University	D 08/20				
Villanova University SEXUAL MISCONDUCT	D 07/20				
Wake Forest University	D 05/20				

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●

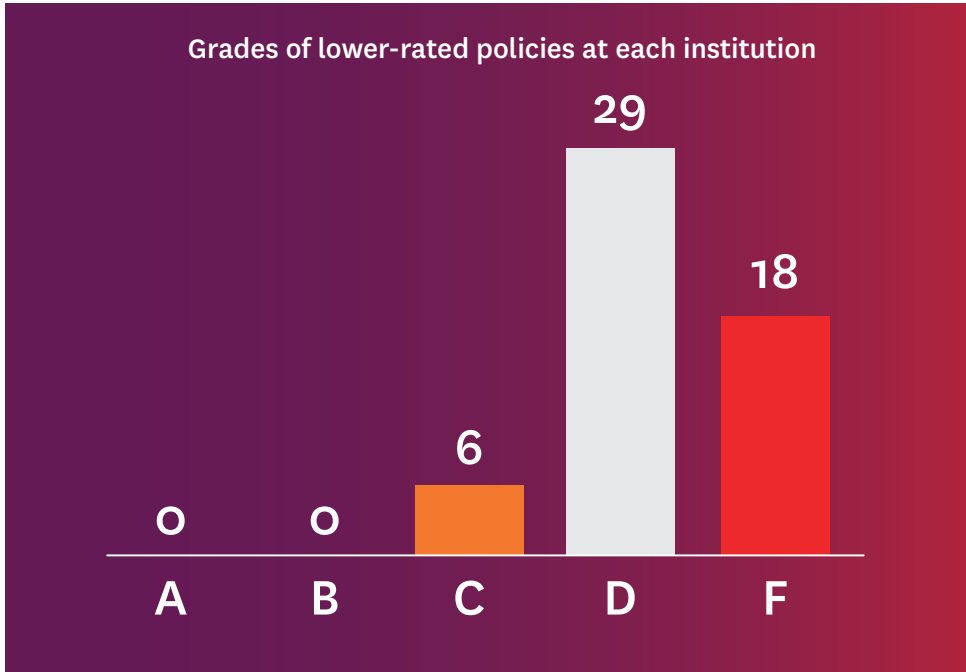
Institution	Total Score	Meaningful presumption of innocence	Timely & adequate written notice	Time to prepare with evidence	Impartial fact-finders
Wake Forest University SEXUAL MISCONDUCT	D 05/20	<div></div>	<div></div>	<div></div>	<div></div>
Washington University in St. Louis	D 05/20	<div></div>	<div></div>	<div></div>	<div></div>
Washington University in St. Louis SEXUAL MISCONDUCT	F 01/20	<div></div>	<div></div>	<div></div>	<div></div>
Yale University	D 07/20	<div></div>	<div></div>	<div></div>	<div></div>
Yale University SEXUAL MISCONDUCT	D 05/20	<div></div>	<div></div>	<div></div>	<div></div>



Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-examination	Active participation of advisor	Meaningful right to appeal	Unanimity or clear & convincing evidence
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●
●	●	●	●	●	●

# Trends

Written disciplinary policies and procedures varied greatly among the 53 schools FIRE rated for this report. There were, however, some notable trends.



## 1. Rating distributions, best institutions, and worst institutions

Of the 53 institutions and 104 policies rated for this report, none received an A grade.

No schools received a B for both their policies governing alleged sexual misconduct and non-sexual misconduct. Four schools (7.5%) received a B for one policy and a C for

the other policy. An additional two (3.8%) received at least a C for both policies, 29 (54.7%) more received at least a D for both policies, and 18 (34.0%) received an F for at least one policy. Number ratings ranged from 1 to 15 out of 20. The median rating for each institution's lower-rated

policy is a 6 out of 20, or a D.

The University of North Carolina at Chapel Hill's disciplinary policies best incorporate the procedural safeguards in FIRE's checklist, earning a B (15 points) for its procedures for non-sexual misconduct cases and a C (11 points) for its procedures for sexual misconduct cases. Cornell University and Georgia Institute of Technology each earned a B (14 points) for one policy and a C (11 points) for the other, and Stanford University earned a low B (13 points) for its non-sexual misconduct policy and a C (10 points) for its sexual misconduct policy.

Four institutions earned 13 or 14 points—a B grade—for their non-sexual misconduct policy, but earned only a D grade for their sexual misconduct policy: the

University of California, San Diego; the University of Virginia; the University of California, Davis; and the University of Pennsylvania. All other schools earned 12 points—a C grade—or lower for their higher-rated policy.

Six institutions received 4 points or fewer—an F grade—for both of their policies: Pennsylvania State University, Rensselaer Polytechnic Institute, Vanderbilt University, Harvard University, California Institute of Technology, and the Massachusetts Institute of Technology. Three institutions received scores of only 1 for their sexual misconduct policies: Pennsylvania State University, Rensselaer Polytechnic Institute, and Washington University in St. Louis.

## 2. Safeguard-specific trends

Alarmingly, 39 institutions (73.6% of rated schools) do not guarantee accused students the right to be presumed innocent until proven guilty. The presumption of innocence is perhaps the most fundamental right that can be granted to students accused of misconduct. Without it, other procedural safeguards still may not be enough to protect students from the risk of inaccurate findings of guilt. (For purposes of this

section, unless otherwise specified, institutions are deemed to afford the safeguard being discussed if they guarantee that right in both cases involving allegations of sexual misconduct and other non-academic misconduct.)

Of the procedural safeguards enumerated in FIRE's checklist, the rarest among surveyed schools is the right to active assistance from an advisor of the student's choice. Only the University of Wisconsin-

Madison allows attorneys to participate without significant limitations in all non-academic cases.

Only three institutions (5.7%) require that a student's expulsion be preceded either by a unanimous fact-finding panel decision or by a finding based on clear and convincing evidence: Duke University, Johns Hopkins University, and Stanford University.

At least one judge has suggested that in the high-stakes setting of a sexual misconduct adjudication, preponderance of the evidence may be an unconstitutionally low standard. In *Lee v. University of New Mexico*, one of hundreds of lawsuits by students found responsible for sexual misconduct who allege that they were denied a fair process, a federal judge in New Mexico held that “preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to [the student plaintiff’s] expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on [the student plaintiff’s] transcript.” No. 17-cv-01230 (D.N.M. Sept. 20, 2018).<sup>1</sup>

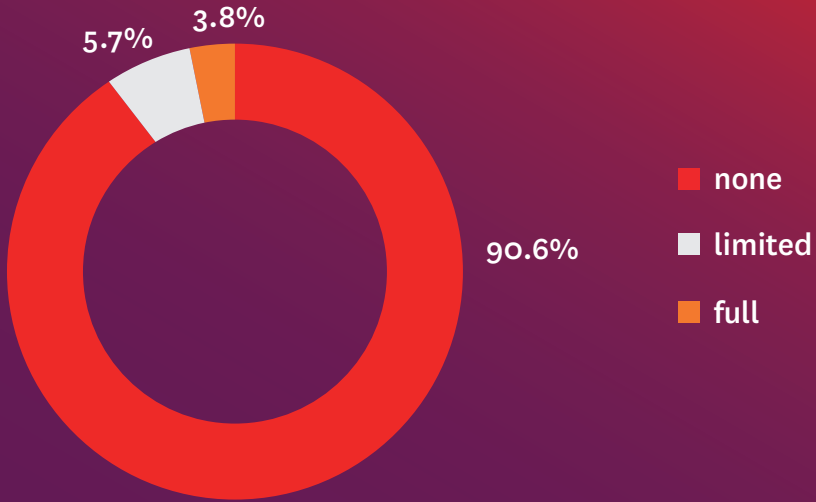
The rights to conduct meaningful cross-examination and receive advance written notice of the allegations against a student—including the policy at issue and

the underlying behavior—were also exceedingly rare. For each safeguard, 48 out of 53 schools (90.6%) received zero points, meaning that they do not guarantee students these safeguards in at least some non-academic cases.

As a number of courts have recognized, the ability to cross-examine witnesses in real time is particularly crucial in campus sexual assault cases, which often lack witnesses and physical evidence and therefore may rely heavily on the relative credibility of the accuser and the accused. In September 2018, the U.S. Court of Appeals for the Sixth Circuit held in *Doe v. Baum* that cross-examination is an essential element of due process in campus judicial proceedings turning on credibility. The court wrote that “if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.” 903 F.3d 575, 578 (6th Cir. 2018). Similarly, in *Lee v. University of New Mexico*, the court held that the student-plaintiff’s allegations “plausibly support a finding that his sexual misconduct investigation resolved into a problem of credibility such that a formal or evidentiary hearing, to include the cross-examination

1. Since this report was published online, the court amended its September 2018 order to remove this quoted language. No reason was given for this change. However, other courts have also questioned the constitutionality of the preponderance standard in campus sexual misconduct adjudications. See *Doe v. University of Mississippi*, 361 F. Supp. 3d 597, 613 (S.D. Miss. Jan. 16, 2019); *Doe v. DiStefano*, 2018 U.S. Dist. LEXIS 76268, at \*6 (D. Colo. May 7, 2018).

### Cross-examination guaranteed at institutions



of witnesses and presentation of evidence in his defense, is essential to basic fairness.” No. 17-cv-01230, at 2–3 (D.N.M. Sept. 20, 2018).

Yet 47 institutions (88.7%) do not provide students a meaningful opportunity to cross-examine witnesses in cases of sexual misconduct. Only two institutions (3.8%) provide an opportunity for cross-examination in all non-academic cases and clear guidelines that ensure all relevant questions are relayed to the party being questioned.

The right to sufficient time with all relevant evidence to prepare for a hearing is not guaranteed at

41 institutions (77.4%), and it is guaranteed as robustly as FIRE believes is appropriate at only 2 institutions (3.8%). In California, a judge recently criticized the University of California, Santa Barbara, for denying an accused student access to critical evidence in his case, including a medical report about which a detective testified at his hearing. In overturning UCSB’s finding of responsibility, the judge ruled that “without access to the [medical] report, John [Doe, the accused student] did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The

accused must be permitted to see the evidence against him. Need we say more?” *Doe v. Regents of the University of California*, No. B283229, at 19 (Cal. Ct. App. Oct. 9, 2018).

A meaningful hearing in front of a fact-finding panel is guaranteed at only 11 institutions (20.8%). An additional 5 schools (9.4%) have hearing processes where only one or two individuals were fact-finders. Thirty-seven institutions (69.8%) do not provide a meaningful hearing. Of these, many call their core proceedings a “hearing,” but these proceedings do not have the critically important elements described in the Methodology section above, such as an opportunity for each party to observe the evidence being presented to fact-finders by the opposing party.

Courts have taken notice of the problematic nature of the “single investigator model” that has replaced disciplinary hearings at many schools, particularly in sexual misconduct cases. Harvard University’s sexual misconduct policy provides a good example of this model: “At the conclusion of the investigation, the Investigative Team will make findings of fact, applying a preponderance of the evidence standard, and determine based on those findings of fact whether there was a violation of the

Policy.” In upholding an accused student’s challenge to a similar policy at Brandeis University, a federal judge in Massachusetts wrote: “The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.” *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 606 (D. Mass. 2016).

The right to challenge fact-finders for bias or partiality is guaranteed at only 20 institutions (35.8%). An additional 8 institutions (15.1%) specify that fact-finders should be impartial, but do not specifically provide a mechanism for students to challenge their participation in a case. Yet the impartiality of fact-finders is something that courts take very seriously. Several recent decisions favorable to accused students, for example, have involved allegations that the university used biased materials to train its Title IX hearing panels. In *Doe v. University of Mississippi*, for example, the court held: “This is a he-said/she-said case, yet there seems to have been an assumption under [the] training materials that an assault occurred. As a result, there is a question whether the

panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered.” 2018 U.S. Dist. LEXIS 123181, at \*28–29 (S.D. Miss. July 24, 2018). Similarly, in *Doe v. Trustees of the University of Pennsylvania*, the court held that “the Complaint’s allegations regarding training materials and possible pro-complainant bias on the part of University officials set forth sufficient circumstances suggesting inherent and impermissible gender bias to support a plausible claim” that the university discriminated against the accused student on the basis of sex. 270 F. Supp. 3d 799, 824 (E.D. Pa. 2017).

Students have the right to present all relevant evidence directly to fact-finders at 16 institutions (30.2%). At an additional 11 institutions (20.8%), students present evidence to a fact-finder whose decision must be finalized by another party. Students at 26 institutions (49.1%) are limited in what relevant evidence they may present to fact-finders, or cannot present evidence directly to fact-finders at all.

The most commonly granted procedural safeguard is the right to

appeal, particularly based on new information or procedural errors. Of 53 rated institutions, 14 schools (26.4%) allow for appeals based on these two factors or if the finding is not consistent with the record. Additionally, 37 institutions (69.8%) allow for appeals based on two of the three grounds enumerated in FIRE’s checklist. Only 2 institutions—Washington University in St. Louis and the University of Miami—received scores of zero in this category, allowing appeals on no more than one of these grounds.

FIRE believes these safeguards are essential in order to ensure fair proceedings for all students. While some safeguards specifically protect accused students against erroneous findings of responsibility, such as the presumption of innocence, most safeguards are tailored to allow all parties and fact-finders to receive all relevant information in an organized fashion so that the findings of fact are as accurate as possible. This goal serves all students and the rest of the campus community. Yet, at most surveyed institutions, disciplinary policies and procedures do not appear designed to reach that goal.

### 3. Educational versus adversarial processes

Many institutions emphasize in their written policies that the disciplinary process is meant to be an educational one, not an adversarial one. But with students facing sanctions as serious as expulsion, and with alleged facts in dispute, many of the cases that institutions adjudicate are necessarily going to be adversarial. To characterize the process as merely “educational” is to ignore the very serious impact that the outcomes can have on students’ lives. Indeed, in response to a University of Notre Dame administrator’s testimony that the university’s sexual misconduct adjudication process was an “educational” process (and thus that important procedural safeguards were unnecessary), a federal judge in Indiana put it bluntly: “This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester’s worth of tuition is ‘punishment’ in any reasonable sense of that term.” *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at \*34–35 (N.D. Ind. May 8, 2017).

Additionally, the presumption that all students accused of misconduct have a lesson to learn from the process makes

sense only if one is presuming that the student is guilty of some sort of wrongdoing. Columbia University writes, for example, that the disciplinary process “is not meant to be an adversarial or legal process.” It continues: “Through the process, students discuss accountability for their behavior as well as the impact their behavior may have on their own lives and the greater community.” This provision seems to assume respondents have, in fact, engaged in whatever misbehavior of which they are accused. Johns Hopkins University similarly seems to presume guilt. It states that its process has “two major objectives: to hold students and student groups/organizations accountable for unacceptable behavior and to modify those behaviors deemed unacceptable by the University.”

Emory University writes: “The proceedings shall be non-adversarial in nature. The chairperson of the Council is empowered to take such steps as may be necessary to preserve the non-adversarial character of the hearing.” But “adversarial” exchanges may be necessary in order for fact-finders to determine which of two competing allegations of fact are more truthful. Purposefully



omitting these exchanges creates a higher risk of inaccurate findings and, therefore, unfair case outcomes. Villanova University also aims “to preserve the educational tone of the proceedings and to avoid creation of an adversarial environment,” and accordingly allows questions to be relayed through its hearing board, which will omit questions that are not “appropriate.” While minimizing tension between parties can be helpful in certain circumstances, universities that make this their priority above all else ultimately hurt the integrity of the process and work against the interests of all their students.

California Institute of Technology acknowledges the truth-seeking purpose of disciplinary hearings. Ironically, though, it does so in the context of warning against too much notice to the respondent, writing, “If the person is warned about an investigation, evidence and testimony could be destroyed or altered, hindering the ability to discover the truth essential in making a fair decision.” Though there is always the possibility that a party will destroy evidence, students need notice in order to obtain and offer for consideration the best evidence they can. Thus, even in articulating a correct goal of the process, Caltech impedes it.

## 4. Discretion to omit procedural safeguards

Written provisions designed to help fact-finders do their job well and to protect against inaccurate findings should be guaranteed fully for all students subjected to the disciplinary process. These safeguards may not help students if administrators are granted broad discretion to omit them, or if there are exceptions to guarantees of those safeguards that threaten to swallow the rule. Unfortunately, this is the case at many universities.

As noted above, the institutions marked by an asterisk are those at which an administrator

or judicial body decides between two or more potential avenues through which a case can be resolved. Provisions allowing for alternative procedures often do not describe the alternative procedures or explain when the judicial entity would choose one procedure over another. Each of these shortcomings leaves students not knowing what safeguards are fully guaranteed at their institutions, and makes it all too easy for institutions not to provide respondents with a fair hearing.

At some institutions,

regardless of whether there is an established alternative procedure, administrators are explicitly allowed to make changes to the written procedure. Massachusetts Institute of Technology writes, for example: “The hearing usually proceeds as follows, although the Chair may vary the procedure at their discretion.” Johns Hopkins University writes: “In general, hearings will proceed as follows, although the board has discretion to alter the order or manner in which it hears or receives evidence, and to impose time limits on any stage of the process . . . .” Particularly in complex cases, and particularly where students are not given sufficient time and information to prepare in advance for presenting their defenses, time limits may seriously harm a student’s ability to defend himself or herself. Language like “usually,” “generally,” and “typically” provides a window for administrators to ignore written procedures in favor of ad hoc decision-making that may be arbitrary at best, or discriminatory at worst.

Many institutions also provide for certain procedural safeguards, but then maintain provisions that potentially negate those safeguards. This phenomenon was especially common with cross-examination provisions. In New York University’s sexual misconduct proceedings, for example, questions

are screened for “appropriateness,” although the policy does not explain what would make a question “appropriate” or “inappropriate.” A number of schools, including Case Western Reserve University, Emory University, and Wake Forest University, purport to provide an opportunity to cross-examine witnesses but nevertheless allow testimony via written or recorded statement alone. At these schools, students cannot be sure that they will be allowed to ask all relevant questions of witnesses, including follow-up questions in real time.

Safeguards granted to students at an administrator’s “sole discretion” are not guaranteed and did not earn institutions points for this report. In Lehigh University’s sexual misconduct proceedings, for example, it is “within the sole discretion of the Conduct Investigators to determine the evidence to consider and the witnesses to interview.” At many schools, language like this creates the risk that fact-finders will never see evidence—either inculpatory or exculpatory—that could shed significant light on the facts of a case. Where a party besides the fact-finders can exclude evidence from consideration, there must be guidelines in place to govern such decisions; ideally, all relevant evidence would be available for consideration by the fact-finders.

## 5. Sexual misconduct versus all other non-academic misconduct

All but two institutions rated for this report—Tulane University and the University of Florida—maintain separate policies and procedures for cases alleging sexual misconduct.

Of the remaining 51 institutions, sexual misconduct policies are less protective of students' rights at 37 institutions (69.8% of all rated institutions), non-sexual misconduct policies are less protective at 7 institutions (13.2%), and the two policies receive the same number of points at 7 institutions. While policies governing alleged sexual misconduct generally provide fewer procedural safeguards, these are often the cases in which procedural safeguards are most needed in order to ensure fundamental fairness and protect accused students against the life-changing effects of erroneous findings of responsibility. For example, cross-examination is a critically important tool in cases of alleged sexual assault, where cases are more likely to hinge on

witness credibility because of the frequent lack of concrete evidence and the presence of few or no outside witnesses.

The largest discrepancy between procedures for sexual misconduct cases and other cases was at Brown University, whose sexual misconduct policy earned only 2 points, 9 points less than its non-sexual misconduct policy. Safeguards that Brown discarded in sexual misconduct cases include the explicit presumption of innocence, timely written notice of accusations, adequate time with access to evidence to prepare for a hearing, and a meaningful hearing with an opportunity to cross-examine witnesses.

The Department of Education's proposed Title IX regulations include many of the procedural safeguards we sought in rating institutions for this report. Accordingly, this trend might be reversed by next year.

## 6. Numerous, inconsistent, unclear, and inaccessible policies

Students' ability to obtain a fair hearing is hindered not just by policies that clearly lack procedural safeguards, but also by confusing, contradictory, poorly-drafted, or difficult-to-access policies. In assessing disciplinary procedures for this report, the following problems became readily apparent and require attention.

### MULTIPLE POLICIES

Some institutions rated in this report maintain not one policy, or two, but several that overlap and sometimes conflict with each other. This will inevitably confuse students and make it harder for them to assert their rights to fair disciplinary proceedings. It also increases the potential for procedural inconsistency among similar cases.

Six campuses of the University of California system are included in this report. The system maintains policies pertaining to disciplinary proceedings, including multiple policies pertaining to sexual misconduct, but individual UC schools also maintain overlapping policies that differ, sometimes in significant ways. The UC system would be well served by consolidating overlapping policies and ensuring that safeguards granted in some cases at some

campuses are guaranteed at all campuses in all non-academic cases where suspension or expulsion are potential sanctions.

Even at institutions that include all relevant disciplinary provisions in a single document, incorrect links on their websites can cause confusion for students and administrators. For example, Lehigh University's website still links to an outdated handbook, although a more recently dated handbook is linked elsewhere. All institutions should take care to remove from their websites or place prominent notices on all policies that are no longer in effect, including those that are not linked but that have been indexed by search engines. Several institutions also had linked cross-references in their policies—both in PDFs and on HTML web pages—that did not lead to a functioning page. This leaves students wondering whether they are missing important information about their rights and the disciplinary process.

### POORLY-DRAFTED POLICIES

Policies at several institutions, including the College of William & Mary and Yale University, lack important details about what exactly happens during hearings and other proceedings. Because of

these omissions, it can be hard to tell whether students are guaranteed an opportunity to question witnesses or present evidence directly to fact-finders. Like other ambiguous or vague provisions, these insufficiently detailed policies create an opportunity for administrators to treat cases differently based on a desire for a certain outcome or prejudice against a certain party or type of allegation.

Students at many institutions may be generally afforded greater procedural safeguards than they are explicitly guaranteed. For example, most schools do not specify how much time students are afforded to prepare for initial interviews, and many do not specify that written notice of the allegations is provided in advance. While we could not award points to institutions with ambiguous policies, some of these schools may, in practice, consistently provide sufficient advance notice to respondents. Administrators who are aware of such discrepancies should aim to codify into written policies all the procedural safeguards they provide so that students can be confident all respondents receive the same procedural protections, and so that administrators' successors will enforce the policy in an equally protective way. Moreover, where institutions' ratings have suffered because of imprecise language or administrators' reliance on the

mere implication of a safeguard, those schools may easily improve their ratings by simply revising the language of their policies to be clear and explicit.

#### INACCESSIBLE POLICIES

Finally, while a majority of institutions post each set of policies governing disciplinary procedures in one searchable PDF or on one searchable HTML page, some institutions split policies into many pages or sub-pages that cannot be searched, printed, or conveniently viewed all at once.

Tufts University, for example, maintains a "Student Judicial Process" web page containing over 60 separate sections, each only accessible individually via drop-down segments within the page. Harvard University, Pennsylvania State University, and Pepperdine University maintain similar web pages. Students are far better served when their schools present information in a straightforward and easily-accessible format.

A few institutions post policies in formats that look easy to read, but that cannot be copied and pasted accurately. For example, the University of Southern California's sexual misconduct policy copies and pastes backwards in part, and Boston College's sexual misconduct policy is formatted at least partially as images. There is no reason why

this should be the case at any institution; it serves only to make it more difficult for members of the campus community to find, learn, enforce, and abide by school policies.

**In order to best protect students' right to fundamentally fair disciplinary proceedings, institutions should strive to unify all applicable disciplinary policies and procedures into one clear and internally consistent document. This document should be searchable and easily found on the university website.**

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## **Conclusion: Policies nationwide need revisions to protect student rights**

Disciplinary procedures at institutions nationwide share many shortcomings. However, most of the deficiencies discussed above may be readily fixed through policy revisions. Just as FIRE has helped numerous institutions reform their speech-restrictive policies to better protect freedom of expression on campus, we stand ready to help institutions revise their disciplinary policies and procedures to better protect due process rights and fundamental fairness.





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**Administrators or students who would like to work with FIRE in support of fair policies are encouraged to contact us at [dueprocess@thefire.org](mailto:dueprocess@thefire.org).**

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One Washington Square  
510 Walnut Street, Suite 1250  
Philadelphia, PA 19106  
PHONE: 215 – 717 – 3473  
FAX: 215 – 717 – 3473

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