SPOTLIGHT ON
DUE PROCESS
2019–2020

FIRE

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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. At the time of this report's publication, those regulations were expected to be finalized in late 2019. 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.

In 2017, 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; the vast majority of institutions lacked most of the procedural safeguards we looked for in written policies. In 2018 and 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.

Again, as in the past two years, our findings are dire:

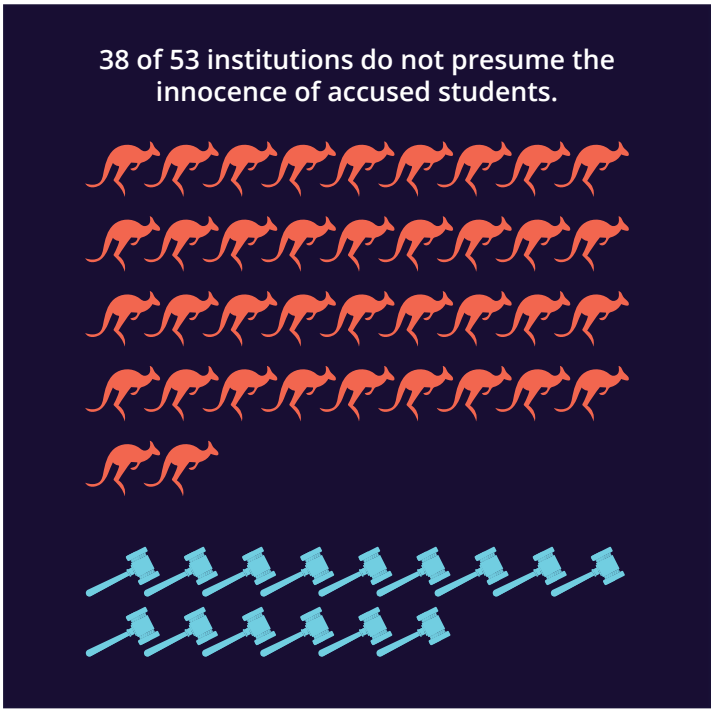
- Over two thirds (71.7%) of America's top 53 universities do not explicitly guarantee students that they will be presumed innocent until proven guilty.
- More than four out of every 10 schools (41.5%) do not explicitly require that fact-finders—the institution's version of judge and/or jury—be impartial.
- Fewer than one third of institutions (28.3%) guarantee a meaningful hearing, where each party may see and hear the evidence being presented to fact-finders by the opposing party, before a finding of responsibility.
- 49 out of the 53 universities reviewed receive a grade of D or F from FIRE for at least one disciplinary policy, meaning that they fully provide no more than 4 of the 10 elements that FIRE considers critical to a fair procedure.
- Most institutions maintain one set of standards for adjudicating charges of sexual misconduct and another set for adjudicating 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.
- From 2017 through this year, there was no significant change overall in safeguards provided by the rated universities to students.

Nine institutions received an F for both of their policies: Pennsylvania State University, Rice University, Tulane University, Rensselaer Polytechnic Institute, California Institute of Technology, Massachusetts Institute of Technology, Harvard University, Boston College, and the University of Notre Dame.

In contrast, the University of North Carolina at Chapel Hill's disciplinary policies best incorporate the procedural safeguards in FIRE's checklist, earning 15 points and 11 points, respectively, for non-sexual and sexual misconduct procedures. The university's non-sexual misconduct procedures earned at least one point for all safeguards except the one that is rarest among the 53 universities: the active participation of an advisor, which is guaranteed fully only at the University of Wisconsin-Madison.

FIRE has publicly led the fight to restore due process on our nation's campuses by highlighting abuses and bringing the attention of media, lawmakers, and the public to the problem. With this report, we hope to make clear to students, administrators, and due process advocates across the country how badly reform is needed, and what kind of changes could benefit campus communities most.

There is much work to be done. Disappointingly, we did not see a significant change overall in the safeguards the rated universities guarantee students from 2017 through this year. Despite accused students filing hundreds of lawsuits alleging unfair treatment by their institutions—including several institutions rated for this report—more is needed to spur our nation's universities to adopt policies that provide a fundamentally fair process to students. Students and others who care about procedural rights should demand that colleges and universities take the necessary steps to protect those rights.



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.)

Some institutions may have revised their policies and procedures as FIRE was finalizing our research. 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 did not receive any points if the safeguard was absent, was too narrowly defined to substantially protect students, or was subject to the total discretion of an administrator; received one point if the policy provided some protection with respect to that element; and received 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.

After each institutional policy set was awarded 0 to 20 points, it was graded as follows:

A = 17–20 points	C = 9–12 points	F = 0–4 points
B = 13–16 points	D = 5–8 points	

Because each policy is written differently, points awarded to institutions are contingent upon 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:

> **1. 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 decline to 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.

> **2. 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.

> **3. Adequate time to prepare for a reasonably prompt disciplinary hearing. Preparation shall include access to all evidence to be used at a hearing as well as any other relevant evidence possessed by the institution.**

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. Providing parties 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 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. Additionally, students should receive access to all evidence gathered, including not only evidence to be used against the respondent, but also exculpatory evidence. Full points were awarded to schools whose policies substantially encompass those elements.

4. 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. General language in policy introductions broadly promising a fair or unbiased procedure was not sufficient to earn points.

5. 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"), before a finding of responsibility.

Live hearings are best equipped to secure fair, reliable proceedings when they allow each party to directly observe all other parties (including an institutional prosecutor, complainant, and respondent) as they present evidence to the fact-finder, and 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.

6. The right to present all evidence directly to the fact-finders.

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-finders—the person or people who decide whether or not the accused student committed the offense. Institutions did not receive any 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 did not receive any 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 fact-finders whose determination has to receive final approval from an administrator or other individual.

7. The ability to question witnesses, including the complainant, in real time, and respond to another party's version of events.

Institutions were awarded a full two 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 did not receive any 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.

8. 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 two points, institutions must allow an attorney/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.

9. 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.

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.

RATINGS

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.

Institution	Total Score of 20	Meaningful presumption of innocence	Timely and adequate written notice	Time to prepare with evidence	Impartial fact-finders
Boston College	F* 2/20	🔴	🔴	🔴	🟡
Boston College *sexual misconduct*	F* 2/20	🔴	🔴	🔴	🔴
Boston University	D 6/20	🔴	🔴	🔴	🟡
Boston University *sexual misconduct*	D* 5/20	🔴	🟡	🔴	🟢
Brandeis University	D* 8/20	🟡	🔴	🔴	🟢
Brandeis University *sexual misconduct*	F 4/20	🟡	🔴	🔴	🟢
Brown University	D 6/20	🔴	🔴	🔴	🟢
Brown University *sexual misconduct*	F 3/20	🔴	🔴	🔴	🟢
California Institute of Technology	F* 2/20	🔴	🔴	🔴	🔴
California Institute of Technology *sexual misconduct*	F 4/20	🔴	🟡	🔴	🟢
Carnegie Mellon University	D 6/20	🔴	🔴	🔴	🟢
Carnegie Mellon University *sexual misconduct*	D 6/20	🔴	🔴	🔴	🟢
Case Western Reserve University	D 7/20	🔴	🔴	🟢	🔴
Case Western Reserve University *sexual misconduct*	D 8/20	🔴	🔴	🟡	🟢
College of William & Mary	C 11/20	🔴	🟡	🔴	🟢
College of William & Mary *sexual misconduct*	D 6/20	🟢	🔴	🔴	🟢
Columbia University	F* 4/20	🟡	🔴	🔴	🔴
Columbia University *sexual misconduct*	D 7/20	🟢	🔴	🔴	🟢
Cornell University	B 14/20	🔴	🔴	🟡	🟢
Cornell University *sexual misconduct*	C 10/20	🟢	🔴	🟢	🟢
Dartmouth College	D 6/20	🔴	🟡	🔴	🟢
Dartmouth College *sexual misconduct*	C 9/20	🟢	🟡	🔴	🟢

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-ex	Active participation of advisor	Meaningful right to appeal	Unanimity or clear and convincing evidence
🔴	🔴	🔴	🔴	🟡	🔴
🔴	🟡	🔴	🔴	🟡	🔴
🟢	🟢	🔴	🔴	🟡	🔴
🔴	🟡	🔴	🔴	🟡	🔴
🟢	🟢	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟡	🔴	🟢	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🔴	🟡	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟢	🔴	🔴	🔴	🟢	🔴
🟢	🔴	🔴	🔴	🟢	🔴
🟢	🟢	🔴	🔴	🟡	🔴
🟢	🟢	🔴	🔴	🟡	🔴
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🔴	🔴	🔴	🔴	🟢	🔴
🔴	🟢	🔴	🔴	🟡	🔴
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🟢	🟢	🟡	🟢	🟢	🟢
🟢	🔴	🔴	🔴	🟢	🔴
🟢	🔴	🔴	🔴	🟡	🔴
🔴	🟢	🔴	🔴	🟢	🔴

Institution	Total Score of 20	Meaningful presumption of innocence	Timely and adequate written notice	Time to prepare with evidence	Impartial fact-finders
Duke University	D 7/20	🔴	🔴	🔴	🟢
Duke University *sexual misconduct*	D 8/20	🟡	🔴	🔴	🟢
Emory University	D 6/20	🔴	🔴	🔴	🔴
Emory University *sexual misconduct*	C 9/20	🟡	🔴	🟡	🟡
Georgetown University	D 5/20	🔴	🟡	🟡	🔴
Georgetown University *sexual misconduct*	F 2/20	🔴	🟡	🔴	🔴
Georgia Institute of Technology	C* 11/20	🟢	🟡	🔴	🟢
Georgia Institute of Technology *sexual misconduct*	B 14/20	🟢	🟡	🟡	🟢
Harvard University	F 3/20	🟢	🔴	🔴	🔴
Harvard University *sexual misconduct*	F 3/20	🔴	🔴	🔴	🔴
Johns Hopkins University	D* 5/20	🔴	🔴	🔴	🟢
Johns Hopkins University *sexual misconduct*	D 5/20	🔴	🔴	🔴	🟢
Lehigh University	C* 10/20	🟡	🔴	🔴	🟢
Lehigh University *sexual misconduct*	F 2/20	🔴	🟡	🔴	🔴
Massachusetts Institute of Technology	F* 4/20	🔴	🔴	🔴	🔴
Massachusetts Institute of Technology *sexual misconduct*	F 2/20	🔴	🔴	🔴	🔴
New York University	D* 7/20	🟡	🟡	🟡	🟡
New York University *sexual misconduct*	D* 6/20	🔴	🔴	🟡	🟡
Northeastern University	C* 10/20	🔴	🟡	🟡	🟢
Northeastern University *sexual misconduct*	D* 6/20	🟢	🟡	🔴	🟢
Northwestern University	D 6/20	🟢	🔴	🔴	🟢
Northwestern University *sexual misconduct*	F 4/20	🔴	🔴	🔴	🟢
Pennsylvania State University	F 4/20	🟡	🔴	🔴	🔴
Pennsylvania State University *sexual misconduct*	F 4/20	🟡	🔴	🟢	🔴

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-ex	Active participation of advisor	Meaningful right to appeal	Unanimity or clear and convincing evidence
🟢	🔴	🔴	🔴	🟡	🟢
🟢	🔴	🔴	🔴	🟡	🟢
🟢	🟢	🔴	🔴	🟢	🔴
🟢	🟢	🔴	🔴	🟢	🔴
🟢	🔴	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟡	🟡	🟢	🔴	🟢	🔴
🟢	🟢	🟢	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🔴	🟢	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🟢
🔴	🔴	🔴	🔴	🟡	🟢
🟢	🟢	🟢	🔴	🟡	🔴
🔴	🔴	🟢	🔴	🟡	🔴
🟢	🔴	🔴	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🟢	🔴	🔴	🔴	🟡	🔴
🟡	🟢	🔴	🔴	🟡	🔴
🟢	🟡	🟢	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🔴	🟢	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴

Institution	Total Score of 20	Meaningful presumption of innocence	Timely and adequate written notice	Time to prepare with evidence	Impartial fact-finders
Pepperdine University	F 4/20	🔴	🟡	🔴	🟡
Pepperdine University *sexual misconduct*	D 5/20	🔴	🔴	🔴	🟡
Princeton University	C* 12/20	🟢	🟡	🔴	🟡
Princeton University *sexual misconduct*	D 6/20	🟢	🔴	🔴	🟡
Rensselaer Polytechnic Institute	F 3/20	🔴	🔴	🔴	🔴
Rensselaer Polytechnic Institute *sexual misconduct*	F 4/20	🟡	🔴	🔴	🟡
Rice University	F* 4/20	🔴	🔴	🔴	🟢
Rice University *sexual misconduct*	F 4/20	🔴	🔴	🔴	🟢
Stanford University	B 13/20	🟡	🔴	🟡	🟢
Stanford University *sexual misconduct*	C 10/20	🔴	🔴	🟢	🟢
Tufts University	D 7/20	🟡	🔴	🟡	🟢
Tufts University *sexual misconduct*	F 3/20	🔴	🔴	🔴	🟢
Tulane University	F 4/20	🔴	🔴	🔴	🟡
University of California, Berkeley	D* 8/20	🟢	🟡	🟡	🔴
University of California, Berkeley *sexual misconduct*	F 4/20	🟢	🔴	🔴	🟡
University of California, Davis	C 9/20	🟢	🟡	🟡	🟢
University of California, Davis *sexual misconduct*	F 4/20	🟢	🔴	🔴	🟡
University of California, Irvine	C 9/20	🟢	🔴	🔴	🔴
University of California, Irvine *sexual misconduct*	F 4/20	🟢	🔴	🔴	🟡
University of California, Los Angeles	C 10/20	🟢	🟡	🔴	🟢
University of California, Los Angeles *sexual misconduct*	F 4/20	🟢	🔴	🔴	🟡
University of California, San Diego	B* 14/20	🟢	🟢	🔴	🟢
University of California, San Diego *sexual misconduct*	F 4/20	🟢	🔴	🔴	🟡

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-ex	Active participation of advisor	Meaningful right to appeal	Unanimity or clear and convincing evidence
🔴	🔴	🔴	🔴	🟢	🔴
🟢	🔴	🔴	🔴	🟢	🔴
🟢	🟢	🔴	🟡	🟡	🟢
🔴	🟢	🔴	🔴	🟡	🔴
🔴	🟢	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🟢	🟢	🟢	🔴	🟡	🟢
🔴	🟢	🔴	🔴	🟢	🟢
🟢	🔴	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🔴	🟢	🔴	🔴	🟡	🔴
🟢	🔴	🔴	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🔴	🔴	🟡	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟢	🟢	🟢	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟢	🟢	🔴	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟡	🟢	🟢	🟡	🟢	🔴
🔴	🔴	🔴	🔴	🟡	🔴

Institution	Total Score of 20	Meaningful presumption of innocence	Timely and adequate written notice	Time to prepare with evidence	Impartial fact-finders
University of California, Santa Barbara	D 8/20	🟢	🔴	🔴	🟡
University of California, Santa Barbara *sexual misconduct*	F 4/20	🟢	🔴	🔴	🟡
University of Chicago	D* 6/20	🔴	🔴	🟡	🟢
University of Chicago *sexual misconduct*	D 7/20	🟡	🔴	🟡	🟢
University of Florida	D 8/20	🔴	🟡	🟢	🔴
University of Illinois Urbana-Champaign	D 7/20	🔴	🟡	🔴	🟢
University of Illinois Urbana-Champaign *sexual misconduct*	C 10/20	🔴	🟢	🟢	🟢
University of Miami	D 7/20	🔴	🔴	🟡	🟢
University of Miami *sexual misconduct*	D 8/20	🔴	🟡	🟡	🟢
University of Michigan-Ann Arbor	C 10/20	🟢	🔴	🟡	🔴
University of Michigan-Ann Arbor *sexual misconduct*	D 8/20	🟡	🟡	🟢	🟢
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	F 1/20	🔴	🔴	🔴	🔴
University of Notre Dame *sexual misconduct*	F 2/20	🟡	🔴	🔴	🔴
University of Pennsylvania	B 13/20	🟡	🔴	🟡	🟢
University of Pennsylvania *sexual misconduct*	D 5/20	🟢	🔴	🔴	🟢
University of Rochester	D* 5/20	🔴	🔴	🟡	🔴
University of Rochester *sexual misconduct*	D 5/20	🟡	🔴	🔴	🟢
University of Southern California	D* 7/20	🟢	🟡	🔴	🔴
University of Southern California *sexual misconduct*	D 7/20	🟡	🔴	🔴	🟢
University of Virginia	C 12/20	🔴	🔴	🔴	🟢
University of Virginia *sexual misconduct*	D 8/20	🟢	🟡	🟡	🟢

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-ex	Active participation of advisor	Meaningful right to appeal	Unanimity or clear and convincing evidence
🟢	🟡	🟡	🔴	🟡	🔴
🔴	🔴	🔴	🔴	🟡	🔴
🟢	🔴	🔴	🔴	🟡	🔴
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🔴	🟡	🔴	🔴	🟡	🔴

Institution	Total Score of 20	Meaningful presumption of innocence	Timely and adequate written notice	Time to prepare with evidence	Impartial fact-finders
University of Wisconsin-Madison	D 7/20	🔴	🔴	🔴	🔴
University of Wisconsin-Madison *sexual misconduct*	D 5/20	🔴	🔴	🔴	🔴
Vanderbilt University	D 5/20	🔴	🔴	🔴	🟡
Vanderbilt University *sexual misconduct*	F 2/20	🔴	🔴	🔴	🔴
Villanova University	D 6/20	🔴	🔴	🟡	🟢
Villanova University *sexual misconduct*	D* 6/20	🔴	🔴	🟡	🟢
Wake Forest University	D 7/20	🟡	🔴	🟡	🔴
Wake Forest University *sexual misconduct*	D 5/20	🟡	🟡	🔴	🔴
Washington University in St. Louis	D 5/20	🟡	🔴	🔴	🔴
Washington University in St. Louis *sexual misconduct*	F 0/20	🔴	🔴	🔴	🔴
Yale University	D 7/20	🟢	🟡	🟡	🟢
Yale University *sexual misconduct*	D 5/20	🔴	🔴	🟢	🟢

Meaningful hearing process	Right to present to fact-finder	Right to meaningful cross-ex	Active participation of advisor	Meaningful right to appeal	Unanimity or clear and convincing evidence
🔴	🟢	🔴	🟢	🟡	🟢
🔴	🟢	🔴	🟢	🟡	🔴
🔴	🟢	🔴	🔴	🟢	🔴
🔴	🔴	🔴	🔴	🟢	🔴
🟢	🔴	🔴	🔴	🟡	🔴
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🟢	🔴	🔴	🔴	🟡	🔴
🟢	🟢	🔴	🔴	🔴	🔴
🔴	🔴	🔴	🔴	🔴	🔴
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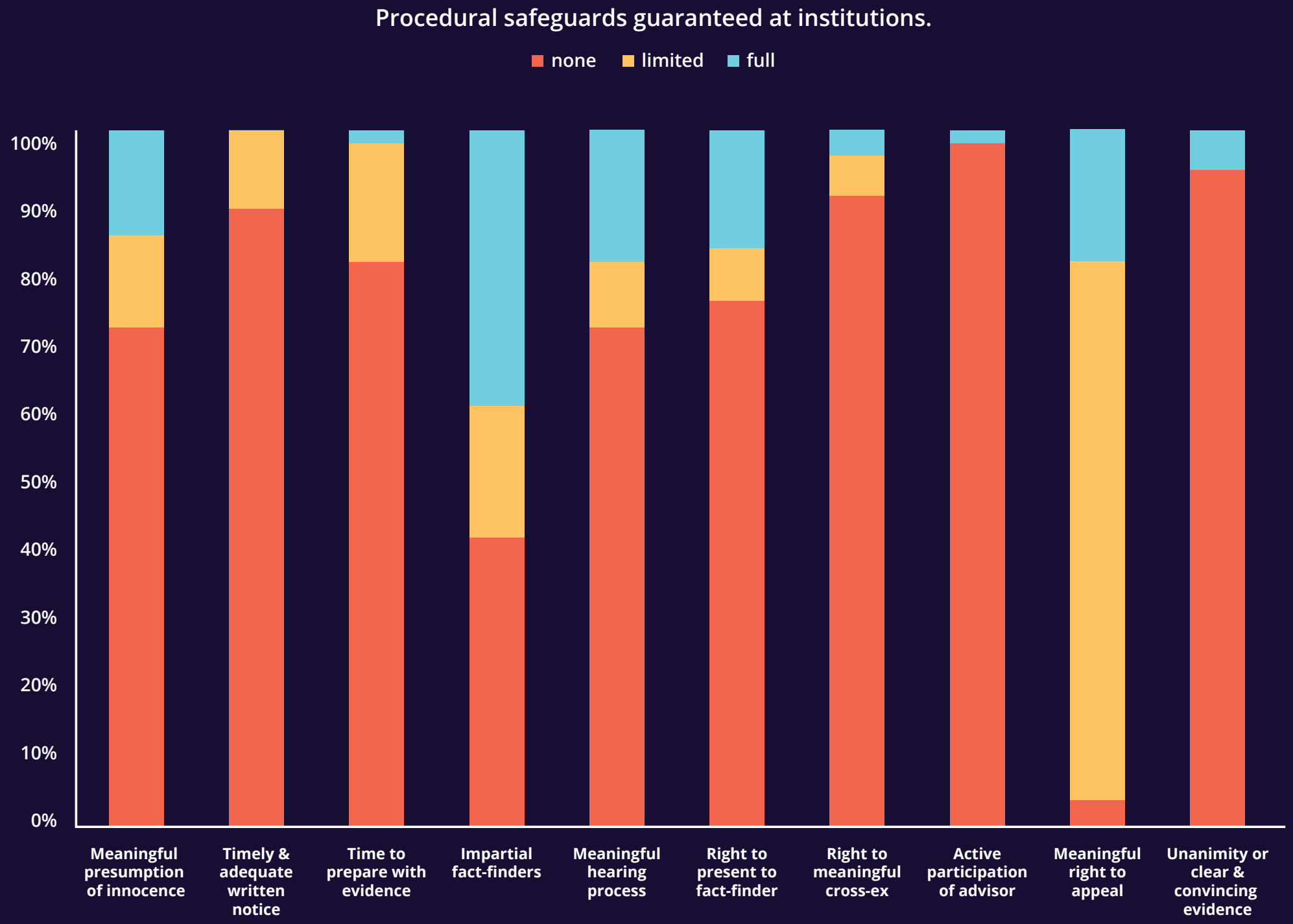
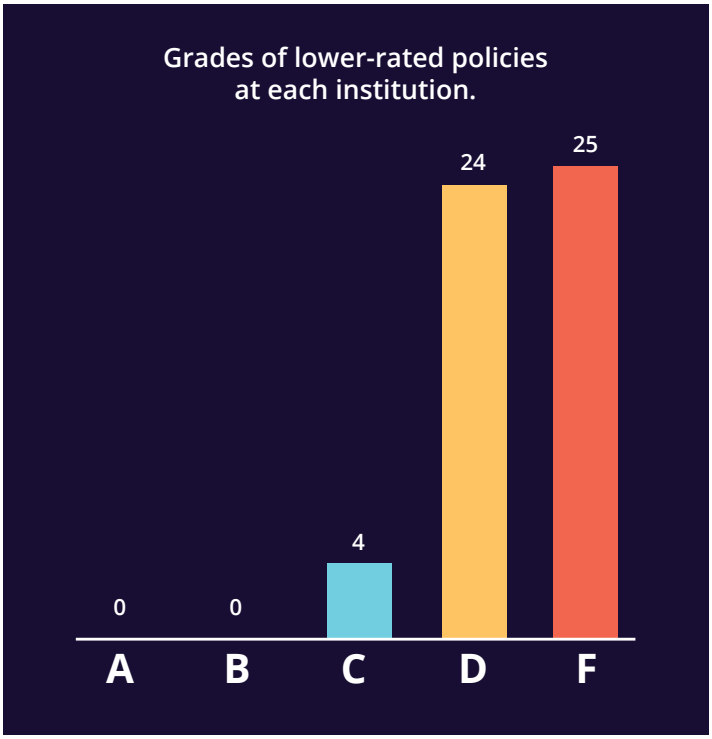

Procedural safeguards guaranteed at institutions.
none
limited
full
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Meaningful presumption of innocence
Timely & adequate written notice
Time to prepare with evidence
Impartial fact-finders
Meaningful hearing process
Right to present to fact-finder
Right to meaningful cross-ex
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.

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 24 (45.3%) received at least a D for both policies, and 25 (47.2%) received an F for at least one policy. Number ratings ranged from 0 to 15 out of 20. The median rating for each institution's lower-rated policy is a 5 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; it earned a B (15 points) for its procedures for non-sexual misconduct cases and a C (11 points) for its procedures for sexual misconduct cases. Georgia Institute of Technology and Cornell University each earned a B (14 points) for one policy and a C (11 points and 10 points, respectively) 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.

The University of Pennsylvania earned 13 points—a B grade—for its non-sexual misconduct policy, but earned only a D grade for its sexual misconduct policy. The University of California, San Diego earned 14 points for its non-sexual misconduct policy, but earned an F grade for its sexual misconduct policy. All other schools earned 12 points—a C grade—or lower for their higher-rated policy.

Nine institutions received 4 points or fewer—an F grade—for both of their policies: Pennsylvania State University, Rice University, Tulane University, Rensselaer Polytechnic Institute, California Institute of Technology, Massachusetts Institute of Technology, Harvard University, Boston College, and the University of Notre Dame. Notre Dame received only a 1 for its non-sexual misconduct policy, and Washington University in St. Louis earned a 0 for its sexual misconduct policy.

Safeguard-specific trends

Alarmingly, 38 institutions (71.7% of rated schools) do not explicitly 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.

Most rated institutions simply allow students to have an advisor of their choice accompany them to meetings and hearings, so long as the advisor doesn't participate. But a few have provisions that stand out—for example, at Tufts University, respondents "may have one advisor of their choice, except that the advisor may not be a member of the media." Today, just about any student can draw significant public attention via social media or other means—whether they identify as a "member of the media" or not. Therefore, this restriction seems to provide administrators an excuse to reject someone's choice of advisor without any real benefit. At Vanderbilt University, students may choose advisors who are part of the campus community as long as they have "not had formal legal training (except in cases concerning students in the Law School)." It is unclear how a formally trained advisor would be a detriment to proceedings involving an undergraduate student, but not to proceedings involving a law school student. (Of course, FIRE believes formally trained advisors are beneficial in both cases.)

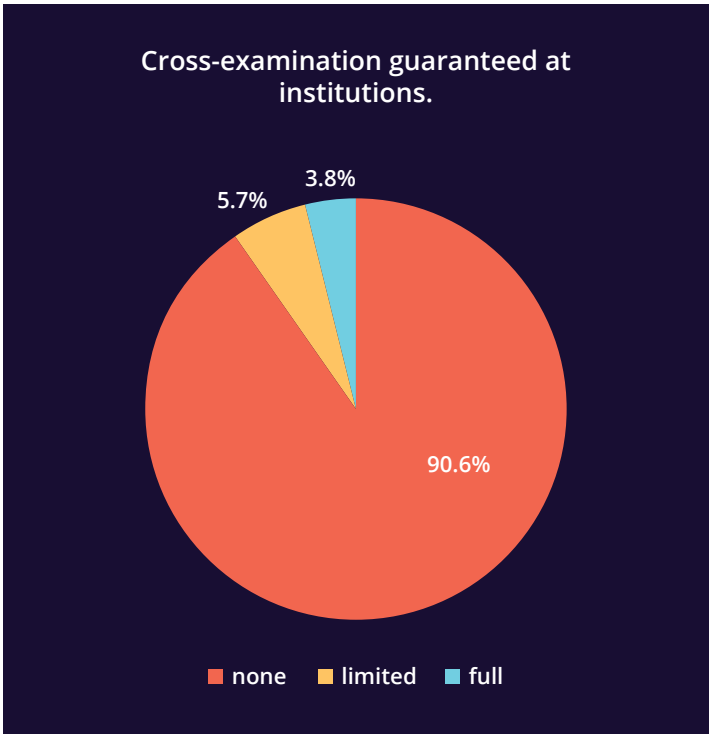
Only 3 institutions (5.7%) require that a student's expulsion be preceded either by a unanimous fact-finding panel decision or by a finding based on clear and convincing evidence: Duke University, Johns Hopkins University, and Stanford University. Several judges have questioned whether, in the high-stakes setting of a sexual misconduct adjudication, preponderance of the evidence is a sufficiently high standard to effect due process; they did so in *Doe v. University of Mississippi*, 361 F. Supp. 3d 597, 613 (S.D. Miss. Jan. 16, 2019) and *Doe*

v. DiStefano, 2018 U.S. Dist. LEXIS 76268, at *6 (D. Colo. May 7, 2018).

The rights to conduct meaningful cross-examination and receive advance written notice of the allegations against a student—including the policy at issue and underlying behavior—were also exceedingly rare. For cross-examination, 48 out of 53 schools (90.6%) did not receive any points, and for advance notice, 47 schools (88.7%) did not receive any 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; these cases 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). This August, the U.S. Court of Appeals for the First Circuit issued a decision in *Haidak v. University of Massachusetts Amherst*, quoting FIRE's *amicus curiae* brief to hold that "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"

Yet 48 institutions (90.6%) 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 access to all relevant evidence, to prepare for a hearing is not guaranteed at 43 institutions (81.1%), and it is guaranteed as robustly as FIRE believes is appropriate at only 1 institution (1.9%). The importance of guaranteeing access to all relevant evidence, including exculpatory evidence, is highlighted by cases such as one accused student's lawsuit against the University of Mississippi, in which the plaintiff alleges the university's Title IX coordinator deliberately refused to consider certain exculpatory evidence. *Doe v. University of Mississippi*, 361 F. Supp. 3d 597 (S.D. Miss. 2019). And in 2018, a judge overturned a guilty finding by the University of California, Santa Barbara, holding that it denied an accused student access to critical evidence in his case. 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 10 institutions (18.9%). An additional 5 schools (9.4%) have hearing processes where only one or two individuals were fact-finders. Thirty-eight institutions (71.7%) do not provide a meaningful hearing before making a finding of responsibility. Of these, many call their core proceedings a "hearing" but do not provide 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 Investigator will make a finding of fact and determine whether or not there was a violation of the Sexual and Gender-Based Harassment 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 21 institutions (39.6%). An additional 10 institutions (18.9%) 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 court 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 13 institutions (24.5%). At an additional 4 institutions (7.5%), students present evidence to a fact-finder whose decision must be finalized by another party. Students at 40 institutions (75.5%) 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, 10 schools (18.9%) allow for appeals based on new information or procedural errors, or if the finding is not consistent with the record. Additionally, 41 institutions (77.4%) 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 0 in this category, guaranteeing the right to appeal 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, such as the presumption of innocence, specifically protect accused students against erroneous findings of responsibility, 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.

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 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).

Moreover, "adversarial" exchanges may be necessary in order for fact-finders to determine which of two competing factual narratives is more truthful. Finally, 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. In order to maintain a presumption of innocence in practice, institutions must acknowledge the inherently adversarial nature of any case where the accused student does not admit responsibility.

Boston College, Brown University, The College of William & Mary, Emory University, Harvard University, Johns Hopkins University, Pepperdine University, Tufts University, and the University of Miami are just some of the institutions that describe their procedures as educational and/or not adversarial in nature.

A few institutions do, however, understand what the aim of disciplinary procedures should be. The University of Rochester, for example, states: "The purpose of a formal conduct hearing is to determine the truth about a respondent's alleged misconduct." The safeguards sought for this report further exactly this purpose.

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 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 channels 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 unsure of which safeguards are fully guaranteed at their institutions, and makes it all too easy for institutions not to provide respondents with a fair hearing.

Many of the policies reviewed grant discretion to administrators to omit procedural safeguards, without adequate guidelines to limit that discretion. Massachusetts Institute of Technology grants broad discretion to disallow evidence or change procedures. New York University, Northwestern University, Rice University, the University of Chicago, and the University of Notre Dame, among others, all grant discretion to include or exclude requested witnesses in the investigation or fact-finding process. At many colleges, including New York University and the University of Michigan, an administrator is granted discretion to determine the format of the hearing. In the University of Michigan's sexual misconduct procedures, for example, a hearing "may include" elements like questioning by the respondent—but such questioning is not guaranteed. At the University of Miami, "incriminating or exonerating" evidence "may be explained" to respondent before a hearing. There is no explanation of when such evidence would not be explained; the institution could have simply stated that evidence *will* be explained when it exists, but it did not.

Sometimes this discretion is framed as the discretion to provide certain safeguards, which is no better than the discretion to withhold them, as it still facilitates unequal application of policies among students facing similar charges. For example, at the University of Pennsylvania, advisors may be allowed to question witnesses at the hearing officer's discretion.

Limiting witnesses, questions, and evidence to that which an administrator deems "appropriate" similarly leaves administrators free to follow their whims without any guidelines to ensure equal and equitable application of policies. At New York University and Villanova University, for example, questions are screened for appropriateness. At Princeton University, questions will be omitted if they are "out of order." In the University of Pennsylvania's sexual misconduct procedures, witnesses will be excluded if they are "inappropriate." In sexual misconduct cases at the University of Illinois, questions may be reworded if they are "asked in an inappropriate manner." It is unclear what, exactly, would trigger these provisions, but certainly different administrators will interpret them differently.

Princeton University asserts in its disciplinary policy that "rigid codification and relentless administration of rules and regulations are not appropriate to an academic community … ." And scattered throughout other policies among these 53 schools, words like "generally," "normally," "ordinarily," "typically," and "usually" provide opportunities for administrators to ignore written procedures in favor of *ad hoc* decision-making that may be arbitrary at best, or discriminatory at worst.

Sexual misconduct versus all other non-academic misconduct

All but 2 institutions rated for this report—Tulane University and the University of Florida—maintain separate policies and procedures for the adjudication of cases alleging sexual misconduct.

Of the remaining 51 institutions, sexual misconduct policies are less protective of students' rights at 29 institutions (54.7% of all rated institutions), non-sexual misconduct policies are less protective at 13 institutions (24.5%), and the two policies receive the same number of points at 9 institutions (17.0%). 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. As the Sixth Circuit wrote in a predecessor to *Baum*, *Doe v. University of Cincinnati*, "[W]e acknowledge that witness questioning may be particularly relevant to disciplinary cases involving claims of alleged sexual assault or harassment. Perpetrators often act in private, leaving the decision maker little choice but to weigh the alleged victim's word against that of the accused." 872 F.3d 393, 406 (6th Cir. 2017).

The mean score for non-sexual misconduct policies is 7.23 out of 20, while the mean score for sexual misconduct policies is 5.49. Only 17 institutions provide a meaningful hearing in sexual misconduct cases, while 37 institutions provide a meaningful hearing in non-sexual misconduct cases. The largest discrepancy between procedures for sexual misconduct cases and other cases was at the University of California, San Diego. The university's sexual misconduct policy earned only 4 points, 10 points less than its non-sexual misconduct policy.

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

Numerous, inconsistent, unclear, and inaccessible policies

Students' ability to obtain a fair hearing is hindered not just by policies that 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. Multiple policies confuse students and make it harder for them to assert their rights to fair disciplinary proceedings. They also increase the potential for procedural inconsistency among similar cases.

As in this report last year, the 6 rated campuses of the University of California system follow system-wide policies, but also maintain their own overlapping disciplinary policies. As a result, students may have to read several different policies for a full understanding of their rights, and students attending different institutions within the UC system are left with drastically different procedural rights. Students in the UC system would be well served if the system consolidated its overlapping policies and ensured 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.

Similarly, Northwestern University has on its website both a harassment and discrimination policy as well as a sexual misconduct policy, each of which describe disciplinary procedures. When institutions have multiple similar, but not identical, iterations of policies and procedures on their websites, it is harder for members of the campus community—both students and administrators—to know exactly what steps must be followed. This, in turn, creates a higher risk that different students facing similar charges will not be treated equally or will not know how to assert their rights.

Poorly drafted policies

Policies at several institutions, including Boston College, California Institute of Technology, and the University of California, Irvine, lack important details about what exactly happens during hearings and other proceedings. Because of these omissions, it is difficult 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. Administrators who are aware of such discrepancies should aim to codify into written policies all the procedural safeguards they provide in practice. This way, students can be confident that all respondents receive the same procedural protections, and that administrators' successors will enforce a given 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.

Brown University, for example, details "Respondent Rights" in a policy that, if written with more specificity, could provide students with robust procedural protections. Among other points, it guarantees that respondents will receive information about the charges and the evidence against them, but it does not specify when this information will be shared. A respondent's experience will be drastically different depending on the timing of those disclosures, and because many institutions do not provide that information early enough in advance, FIRE cannot give institutions the benefit of the doubt for the purpose of this report.

Some institutions may better protect students simply by eliminating unnecessary and problematic alternatives to standard hearing formats, or by eliminating unnecessary provisions granting administrators discretion in certain areas. The University of California, Davis allows individuals to testify via videoconferencing—which can be utilized to separate a complainant and respondent without violating any student's rights—or, alternatively, with a physical partition. As a result of the physical partition option, not all respondents will necessarily be able to see and hear witnesses and the complainant as they testify. UC Davis also gives its hearing authority permission to limit the length of testimony. But because it already has the power to limit repetitious testimony, this provision would seem to add only the ability to limit testimony that is not repetitious but merely lengthy. This does not further the goal of ensuring fact-finders have all relevant evidence in front of them for their consideration.

Still other institutions initially appear to grant students procedural rights, but then maintain provisions that serve to negate those rights. Tufts University's policy, for example, purports to allow parties to present and question witnesses, but then states: "At any time, the chair determines whether certain witnesses should appear and decides whether any particular question, statement, or information will be allowed during a hearing." Without any guidance to limit the chair's discretion, students are not truly guaranteed the right to present and question witnesses.

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.

Harvard University, for example, keeps its policies and procedures on several different pages on its website, each of which has several drop-down menus, many of which require a user to click "More" and navigate to a separate page in order to read the entirety of the section. Pennsylvania State University also keeps its policies on a page with different sections, of which a user may only view a single section at a time. The University of Virginia's information about disciplinary procedures is spread among several web pages, as well.

Thankfully, the trend of policies that cannot be copied and pasted or searched at all may be faltering. This year, several institutions whose policies previously were in image form or copied and pasted incorrectly are now available in normal text.

Incorrect links on university websites can also cause confusion for students and administrators. For a few examples, Northeastern University, Boston College, and the California Institute of Technology all had broken or incorrect links on their student conduct websites or in their conduct documents. Broken or incomplete pages and links leave students wondering whether they are missing important information about their rights and the disciplinary process.

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. This makes it easier for members of the campus community to find, learn, enforce, and abide by school policies, and it allows administrators to update the website with new policies without a high risk of broken links and old policies remaining visible.

CONCLUSION:

Policies Nationwide Require 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.**

Administrators or students who would like to work with FIRE in support of fair policies are encouraged to contact us at dueprocess@thefire.org.

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