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An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings

William J. Migler*

INTRODUCTION

“Colleges Face Legal Backlash from Men Accused of Sex Crimes.”¹ “In Battling Sexual Misconduct, Colleges Build a Bureaucracy.”² “UC President Napolitano to keep close tabs on Berkeley’s actions against sexual Misconduct.”³ “Biden, Gaga team up to raise awareness of sexual assault.”⁴

These headlines were taken from news stories regarding on-campus sexual assaults published within just one week, March 23, 2016 to March 30, 2016, by several mainstream news outlets. This recent level of headline volume tracks the rising public interest in the topic of on-campus assaults, with internet searches on the topic peaking around November 2015 and maintaining a high level of searches up to the time of writing.⁵

Spurred on by such media attention and public awareness of the issue, many universities have recently implemented new

* J.D. Candidate 2017, Chapman University Dale E. Fowler School of Law. The author would like to thank his father James Migler, mother Valerie Migler, sister Amy Migler, and brother Matthew Migler for their love and support. The author would also like to thank Professor Lawrence Rosenthal for his invaluable guidance with this Note.

¹ Associated Press, *Colleges Face Legal Backlash From Men Accused of Sex Crimes*, N.Y. TIMES (Mar. 23, 2016, 1:57 PM), http://www.nytimes.com/aponline/2016/03/23/us/ap-us-universities-sexual-assault.html?_r=0.

² Anemona Hartocollis, *In Battling Sexual Misconduct, Colleges Build a Bureaucracy*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html>.

³ Teresa Watanabe, *UC President Napolitano to keep close tabs on Berkeley’s actions against sexual misconduct*, L.A. TIMES (Mar. 26, 2016, 2:46 PM), <http://www.latimes.com/local/lanow/la-me-ln-napolitano-sexual-misconduct-20160326-story.html> [<http://perma.cc/6UJ8-5H66>].

⁴ Josh Lederman, *Biden, Gaga team up to raise awareness about sexual assault*, BOS. GLOBE (Mar. 30, 2016), <http://www.bostonglobe.com/arts/2016/03/30/biden-gaga-team-raise-awareness-about-sexual-assault/eoCroOODVMwiZ1D9aZHy3L/story.html> [<http://perma.cc/L5KN-PSCJ>].

⁵ See GOOGLE TRENDS, <http://www.google.com/trends/> (last visited May 10, 2016) (search “campus sexual assault,” “college sexual assault,” “university sexual assault policies”). All three search terms show a low in and around June 2013 followed by acceleration in interest peaking around November 2015 with only a moderate decline through April 2016.

policies and procedures addressing sexual assault claims on their campuses.⁶ While many of these policies have created new departments or procedures to counsel victims and offer psychiatric help and other accommodations,⁷ many of these policies altered universities' procedures relating to the investigation and adjudication of sexual assault complaints. These alterations include varying types of procedural safeguards available to accused students in an accompanying disciplinary hearing.⁸ Critics of these policies have expressed concern that universities have overreached in their attempts to address this issue and that universities now give the accused too little protection with few procedural safeguards.⁹

This Note examines an accused student's right to one such procedural safeguard in a university disciplinary proceeding: the cross-examination of adverse witnesses. In Part I, this Note addresses the current magnitude of sexual assault on U.S. university campuses and also presents a survey of current university polices addressing this issue.

Part II discusses the relevant considerations in assessing whether an accused student should be permitted to cross-examine adverse witnesses, including the complainant, in a sexual assault case, either personally or through a representative, including counsel. This discussion includes studies on the effectiveness of cross-examination in general and the potential further harm vigorous cross-examination may inflict on a sexual assault victim in particular.

Lastly, Part III discusses the two primary sources of law governing university disciplinary proceedings, Title IX of the Education Amendments of 1972 ("Title IX") and an accused student's rights under the Due Process Clause.

⁶ See *infra* Part I(A).

⁷ As an example, the University of Washington makes available online brochures, a 24/7 hotline, and several counseling centers for sexual assault victims, available at Title IX – Resources, UNIV. OF WASH., <http://compliance.uw.edu/titleIX/resources> [<http://perma.cc/J42K-FDBE>]. Many universities offer similar services.

⁸ See *infra* Part I(B).

⁹ See, e.g., Hans Bader, *Proof and Campus Rape: Standards for Campus Disciplinary Proceedings*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (July 8, 2014), <http://www.thefire.org/proof-and-campus-rape-standards-for-campus-disciplinary-proceedings/> [<http://perma.cc/3WNQ-WEQH>]; Stuart Taylor Jr. & KC Johnson, *The New Standard for Campus Sexual Assault: Guilty until Proven Innocent*, NAT'L REV. (Dec. 30, 2015, 4:00 AM), <http://www.nationalreview.com/article/428910/campus-rape-courts-republicans-resisting> [<http://perma.cc/UC56-M97Y>].

I. THE PRESENT STATE OF UNIVERSITY DISCIPLINARY PROCEEDINGS

A. Magnitude of Sexual Assault on U.S. Campuses

Under federal law, both private and public universities receiving federal financial assistance must collect and publicize campus crime statistics annually.¹⁰

In 2014, the last year in which data was available at the time of writing, 11,688 forcible sexual offenses were reported to have occurred either on U.S. university campuses or in university student residence facilities.¹¹ Divided into separate categories, 8122 rapes¹² and 3566 other forcible sexual assaults were reported.¹³ It is important to note, however, that these numbers are likely far lower than the actual incidents of rape and sexual assault on campus, both of which are notoriously underreported crimes.¹⁴

Sexual assault has also been under-investigated on U.S. campuses. A recent report by Senator Claire McCaskill's office found that 41% of universities surveyed did not conduct one investigation into a sexual assault claim within the past five years, and 21% of responding schools had made fewer investigations than reported incidents of sexual assault on their campuses.¹⁵

There have been other recent attempts to better quantify the frequency of sexual assault on U.S. campuses. A 2015 survey by the Association of American Universities found that 27.2% of

¹⁰ 20 U.S.C. § 1092(f) (2016) (popularly known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act) [hereinafter Clery Act]. The database for these statistics is available at *Campus Safety and Security*, U.S. DEP'T. EDUC., <http://ope.ed.gov/campussafety/#/> (last visited May 12, 2016) [<http://perma.cc/F8ZV-32LM>]. This database allows an end-user to filter Clery Act data by year, type of crime, public or private university, on-campus or off-campus, etc.

¹¹ *Campus Safety and Security*, *supra* note 10 (follow "DICT" hyperlink). The Department of Education defines forcible sexual offenses to encompass "Forcible Rape," "Forcible Sodomy," "Sexual Assault with an Object," and "Forcible Fondling."

¹² *Id.* The Department of Education defines rape for Clery Act purposes as "the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *Id.*

¹³ *Id.* This number reflects what the Department of Education has called "forcible fondling." *Id.* Fondling is defined as "[t]he touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity." *Id.*

¹⁴ In 2014, only 33.6% of rapes/sexual assaults were reported to the police. Jennifer L. Truman & Lynn Langton, *Criminal Victimization, 2014*, BUREAU OF JUST. STAT. (2015), <http://www.bjs.gov/content/pub/pdf/cv14.pdf> [<http://perma.cc/3APC-AHDF>].

¹⁵ CLAIRE MCCASKILL, SEXUAL VIOLENCE ON CAMPUS 8–9 (2014), <http://www.mccaskill.senate.gov/imo/media/doc/SurveyReportwithAppendix.pdf> [<http://perma.cc/N8XM-3UZ3>].

responding female seniors attending U.S. universities had been subjected to some form of sexual assault.¹⁶ Separate surveys have found 90% of sexual assaults were perpetrated by individuals the victim knew before the assault,¹⁷ and about 50% of on-campus sexual assaults involved the use of alcohol.¹⁸ Alcohol, liberally available on college campuses, is known to reduce judgment and impulse control, and impair physical faculties, often leading to non-consensual sexual encounters.¹⁹

Numerous universities and student activist groups have, in recent years, intensified their efforts to illuminate the vulnerability of college students to sexual assault on campus.²⁰ As a response, many U.S. universities have introduced new policies, or revamped existing ones, to better combat this problem.²¹ This heightened awareness may also be due to several high profile on-campus sexual assault news stories²² and

16 Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html>; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (Sept. 21, 2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf [<http://perma.cc/T7MN-4U9Q>].

17 *Victims and Perpetrators*, NAT'L INST. FOR JUSTICE (Oct. 26, 2010), <http://www.nij.gov/topics/crime/rape-sexual-violence/pages/victims-perpetrators.aspx> [<http://perma.cc/V7SU-G9QY>].

18 Antonia Abbey et al., *Alcohol and Sexual Assault*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> [<http://perma.cc/U5HG-A7KK>].

19 See *College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (Dec. 2015), <http://pubs.niaaa.nih.gov/publications/CollegeFactSheet/CollegeFactSheet.pdf> (noting that about 60% of college students drink alcohol once a month and about two-thirds of those engaged in binge drinking during that time) [<http://perma.cc/M8GD-33M7>].

20 See, e.g., Sarah Ortlip-Sommers, *Students Start Sexual Assault Awareness Group After SoCo*, STANFORD DAILY (Oct. 23, 2015), <http://www.stanforddaily.com/2015/10/23/students-start-sexual-assault-awareness-group-after-soco/> [<http://perma.cc/59CV-YLYC>]; Micaela Corn, *New Pitt Initiatives Address Sexual Assault and Misconduct, Aim to Promote Safety and Awareness*, PITT CHRONICLE (Sept. 14, 2015), <http://www.chronicle.pitt.edu/story/new-pitt-initiatives-address-sexual-assault-and-misconduct-aim-promote-safety-and-awareness> [<http://perma.cc/E9MH-WCHS>].

21 See, e.g., Madison Mills, *Harvard creates new sexual assault policy*, USA TODAY (July 4, 2014, 11:35 AM), <http://college.usatoday.com/2014/07/04/harvard-creates-new-sexual-assault-policy/> [<http://perma.cc/WDJ5-R5T4>]; Samantha Cooney, *Columbia unveils new sexual assault policy*, COLUMBIA SPECTATOR (Aug. 15, 2014, 12:08 PM), <http://columbiaspectator.com/news/2014/08/15/columbia-unveils-new-sexual-assault-policy> [<http://perma.cc/QWY6-426M>]; Alison Fu & Sophie Ho, *University of California releases new sexual harassment and violence policy*, THE DAILY CALIFORNIAN (Mar. 10, 2014), <http://www.dailycal.org/2014/03/07/university-california-releases-new-sexual-assault-violence-policy/> [<http://perma.cc/TVY8-NDYE>].

22 There are several notable examples. In the “Duke Lacrosse Case,” three members of the Duke Lacrosse team were accused of rape and other sexual offenses in 2006. Duke University maintains a website chronicling both the news reports and public reaction to the story. See, e.g., *Looking back at the Duke Lacrosse Case*, DUKE OFFICE OF NEWS & COMM., <http://today.duke.edu/showcase/lacrosseincident/> [<http://perma.cc/AZY8-5RDT>].

lawsuits filed against universities, some resulting in six and seven-figure settlements.²³

On-campus sexual assault has also garnered state and federal governmental scrutiny. In 2014, the Department of Education launched a probe into 55 universities' practices regarding how they conduct campus sexual assault claim investigations.²⁴ Separate from this probe, the Department of Education's Office of Civil Rights ("OCR") has issued several publications directing universities receiving federal financial assistance on how to comply with Title IX's requirements for investigating and adjudicating sexual assault complaints.²⁵

Another example is the University of Virginia Rolling Stones magazine article. The magazine ultimately had to retract and apologize to the school for its erroneous reporting of an alleged gang rape of a woman named "Jackie" by members of a UVA fraternity. *See, e.g.,* Roger Yu, *Rolling Stone backs off from U. Va. Rape story*, USA TODAY (Dec. 6, 2014, 8:09 AM), <http://www.usatoday.com/story/money/business/2014/12/05/rolling-stone-retracts-uva-story/19954293/> [<http://perma.cc/U5PC-3S7Y>].

Lastly, many news outlets chronicled the story of Emma Sulkowicz, known to some as the "Mattress Girl." Sulkowicz carried around a mattress wherever she went to protest Columbia University's allegedly inadequate response to her complaint that she was raped by a fellow student. *See, e.g.,* Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, NYMAG.COM (Sept. 14, 2014, 9:00 PM), <http://nymag.com/the-cut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html> [<http://perma.cc/UWW3-295R>].

²³ *See* Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html?_r=0 (stating that plaintiff and defendant university agreed to a \$950,000 settlement over a claim that the university did not adequately investigate plaintiff's rape complaint); Allison Sherry, *CU settles case stemming from recruit scandal*, DENV. POST (Dec. 6, 2007, 1:00 AM), <http://www.denverpost.com/2007/12/05/cu-settles-case-stemming-from-recruit-scandal/> (reporting that University of Colorado settled with a former student for \$2.85 million after she was gang raped at a party held for University of Colorado football recruits) [<http://perma.cc/SX4K-7NJZ>]; Anita Wadhvani & Nate Rau, *Sweeping sex assault suit filed against University of Tennessee*, TENNESSEAN (Feb. 14, 2016, 4:34 PM), <http://www.tennessean.com/story/news/2016/02/09/sweeping-sexual-assault-suit-filed-against-ut/79966450/> (reporting that six plaintiffs filed a complaint against University of Tennessee, alleging the university failed to adequately respond to claims of sexual assault) [<http://perma.cc/98E6-8VRS>]; Andrew M. Duehren & Daphne C. Thompson, *Recent Graduate Sues Harvard Over Sexual Harassment Case*, HARV. CRIMSON (Feb. 18, 2016, 2:15 AM), <http://www.thecrimson.com/article/2016/2/18/lawsuit-sexual-harassment-2016/> (reporting that plaintiff filed suit for, among other Title IX violations, a failure to "follow federal guidance on university sexual harassment investigations") [<http://perma.cc/4CWY-ELMS>].

²⁴ *Press Release: Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEPT OF EDUC. OFF. FOR CIVIL RIGHTS (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i> [<http://perma.cc/ZW6J-FC4Q>].

²⁵ *See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT OF EDUC. OFF. FOR CIVIL RIGHTS (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<http://perma.cc/EW26-57Y9>]; Russlynn Ali, *Dear Colleague*, U.S. DEPT OF EDUC. OFF. FOR CIVIL RIGHTS 1, 4 (Apr. 4, 2011), www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter *2011 Dear Colleague Letter*] [<http://perma.cc/F87R-ZK74>]; Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT OF EDUC.

Additionally, California and New York have recently passed new “affirmative consent” legislation that raises the standard for what constitutes consent in an on-campus sexual encounter.²⁶

B. Current University Policies

There is no Clery Act equivalent when it comes to reporting how many university disciplinary proceedings have arisen from alleged sexual assaults, though it has been posited that the amount of such disciplinary proceedings numbers in the thousands per any given year.²⁷ Universities are not obligated by federal law to track and report how many disciplinary proceedings they perform a year or how they conduct said proceedings.²⁸ There have been three surveys regarding how universities conduct their disciplinary proceedings within the past two decades.²⁹ According to the 1999 Berger & Berger article survey, 86.2% of responding schools allowed an accused student to cross-examine or otherwise confront “witnesses”³⁰ for an academic misconduct charge.³¹ Senator McCaskill’s survey, specifically assessing university policies pertaining to sexual assault, found that 67% of responding schools allow a student

OFF. FOR CIVIL RIGHTS (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/J5MX-FNSF>].

²⁶ See CAL. EDUC. CODE § 67386(a)(1) (West 2016) (“Affirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.”); N.Y. EDUC. CODE § 6441 (McKinney 2016) (substantially similar to the California statute).

²⁷ See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 50 (2013).

²⁸ While one may think that Clery Act statistics would be a good proxy for disciplinary proceedings data, that is not the case. The Clery Act requires disclosure of all crimes committed on-campus, including those perpetrated by non-students. Additionally, Clery Act statistics do not track the eventual university disposition, if any, of a reported crime.

²⁹ See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 295–96 (1999); MCCASKILL, *supra* note 15, at 10–12.

³⁰ The term “witnesses” is vague in both the Berger & Berger article and the McCaskill report because it is not clear whether this includes the complainant, which technically a complainant is a witness, or if it only means other witnesses called by the complainant or university. See Berger & Berger, *supra* note 29, at 297–300; MCCASKILL, *supra* note 15, at 108.

³¹ Berger & Berger, *supra* note 29, at 356–58. According to this survey, 93.1% of public institutions afforded students the right to cross-examine witnesses, contrasted against 81.8% of private institutions. *Id.* Note that the Berger & Berger article was concerned only with adjudicating academic misconduct and not sexual misconduct.

accused of sexual assault to “question and call witnesses.”³² And in a recently published article, Professor Tamara Rice Lave surveyed the top fifty “flagship” U.S. universities regarding their disciplinary procedures and found that only 10% of those surveyed afford an accused student an unlimited right to cross-examination, while 72% allow for some questioning through a panel or investigator.³³

For this article, the author has conducted a separate survey³⁴ examining publicly available university student handbooks and codes of conduct to determine what schools, based on their stated policies, allow an accused student to cross-examine their accuser and other adverse witnesses. The vast majority of these policies are current through the 2015–16 academic year.

According to their stated policies, 29% of universities explicitly allow an accused student to directly question the complainant or other adverse witnesses.³⁵ Furthermore, 27% of universities do not allow for direct cross-examination of the complainant by the accuser or his/her representative, but do allow for some questioning through either written submissions or via an intermediary party, such as the members of a hearing panel.³⁶ Lastly, 44% of universities either do not allow

³² MCCASKILL, *supra* note 15, at 108. Similar to the Berger & Berger survey, the McCaskill survey found public institutions offered cross-examination more readily than private institutions. 87% of responding public schools offer the ability to question witnesses, while only 67% of private not-for-profit schools do so.

Unfortunately, and similarly to the Berger & Berger article, it is ambiguous as to who constitutes a “witness” and what constitutes “questioning” for the purposes of the McCaskill study. As will be noted in the footnotes below, “questioning” may take the form of either the accused student’s representative directly questioning witnesses or the accused student being required to first pose questions through the hearing administrators, who will then ask the questions they deem appropriate to a given witness. It is also unclear from the McCaskill survey if the witnesses the accused student is allowed to question are adverse witnesses or only the witnesses the student calls on his behalf.

³³ Tamara Rice Lave, *Ready, Fire, Aim: How Universities are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 658 (2016).

³⁴ See *infra* App. A for the details of this survey’s sampling and research methodology.

³⁵ See *infra* App. B for the list of universities. It is important to note that this number only includes those schools that allow the accused or his/her representative to directly ask witnesses questions or do not have explicit language to the contrary. This is different than merely allowing the accused and the complainant to be in the same room during a hearing.

³⁶ See *infra* App. C for the list of universities. See, e.g., *Code of Student Rights, Responsibilities & Conduct*, IND. UNIV. (2016), <http://studentcode.iu.edu/procedures/iu-wide/sexual-misconduct.html> (“No one other than the hearing panel members, the complainant, and the respondent may pose questions during the hearing. The complainant and respondent may not directly question each other, but may submit questions to the Chair, to be asked of the other party. The Chair or other panel members will review questions prior to posing to the other party to prevent questioning that is not permitted under these proceedings.”) [<http://perma.cc/9NP2-MZQ4>].

questioning of witnesses of any kind or do not explicitly give accused students the ability to pose questions to adverse witnesses, be it directly or through a panel.³⁷ It is necessary to note that these statistics reflect only the stated policies of these universities; some schools allow administrators to adjust the procedures given the facts of a particular case.³⁸

In summation, this survey found 56% of schools, in their stated policies and procedures, allow an accused student some form of questioning, while 44% do not. This is a number lower than those found in the McCaskill and Lave surveys.³⁹

There may be several reasons for these discrepancies.⁴⁰ First, the McCaskill survey was conducted in 2014, a time at the relative beginning of the recent heightened awareness of this issue and before many universities had instituted their new policies.⁴¹

Second, this Note's survey relied solely on the language of the sampled universities' stated policies and procedures, whereas both the McCaskill and Lave surveys relied on answers given by the universities.⁴² It is possible a school which does not provide for an accused student to question witnesses in their stated policies may still, in practice, allow for questioning.

Lastly, the most likely compelling reason for the discrepancies between this Note's survey and the McCaskill and Lave surveys is due to statistical sampling. The McCaskill survey divided the university population into various strata based on enrollment size and equally distributed sampling in those

³⁷ See *infra* App. D for the list of universities. This number includes universities that, in their stated policies, allow the adjudicating body to ask questions of, or interview, the accused, the complainant, and other witnesses, but does not give that right to the accused in any form. See, e.g., *Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy*, HARV. UNIV. (2014), http://hls.harvard.edu/content/uploads/2014/09/harvard_sexual_harassment_procedures_student1.pdf (allowing only the university's "Investigative Team" to conduct interviews of the accused, complainant, and other witnesses) [<http://perma.cc/36K6-D64X>].

³⁸ See, e.g., *Student Conduct System*, BOS. COLLEGE § 5.4 (2016–17), http://www.bc.edu/publications/student_guide/judicial.html ("The Dean of Students or designee has the discretion of what format a formal hearing will take based upon the complexity of the case, availability and type of evidence, and the sensitivity of the incident.") [<http://perma.cc/4YB8-2VUB>].

³⁹ See *supra* notes 32, 33 and accompanying text.

⁴⁰ Because the creators of both the McCaskill and Lave surveys obtained their information on the basis of anonymity, the surveys leave the identities of the responding schools confidential. It is thus impossible to know exactly how a given school responded and to verify if a given school responded to the survey in the same manner this Note's survey has found. MCCASKILL, *supra* note 15, at 4; Lave, *supra* note 33, at 654.

⁴¹ Several high-profile universities announced their new sexual assault policies after the commencement/publication of the McCaskill survey. See *supra* note 21 and accompanying text for several examples.

⁴² MCCASKILL, *supra* note 15, at 3; Lave, *supra* note 33, at 654.

strata.⁴³ The McCaskill survey also specifically included the top fifty most-attended public U.S. institutions and the top forty most-attended private U.S. institutions in its survey, thus giving these schools an outsized weight in the survey's results.⁴⁴ Similarly, the Lave study solely included responses from the fifty "flagship" U.S. universities, as defined by the *Journal of Blacks in Higher Education*.⁴⁵ This Note's survey made no similar limitation on sampling of the U.S. college and university population and gave no special weight to the top fifty public and forty private universities.

II. CONSIDERATIONS BEARING ON THE USE OF CROSS-EXAMINATION IN UNIVERSITY DISCIPLINARY PROCEEDINGS INVOLVING ALLEGED SEXUAL ASSAULT

The right to counsel, the right against self-incrimination, and the preponderance of the evidence standard in the context of university disciplinary proceedings have been examined thoroughly by other commentators.⁴⁶ This Part focuses on the cross-examination of witnesses in such proceedings adjudicating sexual assault claims, and examines both the possible virtues and disadvantages of requiring universities to give the accused student some use of this venerable fact-finding instrument.

A. Cross-examination as a Test of Credibility

The process of cross-examination has been dubbed the "greatest legal engine ever invented for the discovery of truth"⁴⁷ and is one of the main points of distinction between Anglo-American common law trials and continental civil law proceedings.⁴⁸ A criminal defendant's right to confront and

⁴³ *Id.* at 3–4.

⁴⁴ *Id.* at 4.

⁴⁵ Lave, *supra* note 33, at 654.

⁴⁶ See Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289, 298–302 (1989) (discussing a student's Due Process right to have counsel present at a disciplinary proceeding); Paul E. Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1260–68 (1997) (discussing whether a student's silence during a university disciplinary proceeding should be allowed as evidence against him); Barclay Sutton Hendrix, *Feather on One Side, a Brick on the Other: Tilting the Scale against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 610–15 (2012) (discussing the implications of the preponderance of the evidence standard in university disciplinary proceedings, particularly in sexual assault cases after the 2011 Dear Colleague Letter).

⁴⁷ *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)); see also JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1967 (1904).

⁴⁸ See *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.").

cross-examine his accuser is enshrined in the Sixth Amendment to the U.S. Constitution,⁴⁹ and all U.S. jurisdictions generally allow for cross-examination of opposing witnesses in adversarial civil litigation.⁵⁰

The main purported function of cross-examination is to test the veracity of a witness, be it on the stand or at a deposition.⁵¹ This allows the examining party not only a chance to “catch” a witness in a falsehood or half-truth,⁵² but it also allows the trier-of-fact to observe the demeanor of the witness and to gauge body language, inflection, and other potential indicia of untruthfulness that comes only with contemporaneous observation.⁵³ The need for the fact-finder to both listen to and physically observe the testifying witness during questioning is one of the justifications advanced for the rule barring the use of hearsay evidence.⁵⁴

An accused student in a university disciplinary proceeding could benefit from cross-examining his accuser in several ways. First, the only practical defenses to a charge of sexual assault are an outright denial of the underlying facts or consent from the victim to the encounter.⁵⁵ Because most sexual assaults occur in a place of seclusion, the complainant may be the only person (other than the perpetrator) with knowledge or information as to the existence of the incident or the identity of the attacker.⁵⁶ As

49 U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

50 See, e.g., FED. R. EVID. 611(b); CAL. EVID. CODE §§ 711, 773 (West 2016).

51 See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”); *Crawford*, 541 U.S. at 61–62 (“[O]pen examination of witnesses . . . is much more conducive to the clearing up of truth.”) (quoting SIR WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 373 (13th ed. 1800)); Dan Simon, *Adjudicating the Guilty Mind: More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 L. & CONTEMP. PROBS., 167, 171 (2012) (“[C]ross examination could improve the diagnosticity of the trial . . . by exposing mistakes or lies in the course of [the] cross-examination itself.”).

52 Simon, *supra* note 51, at 170.

53 See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951) (“[M]aterial facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct . . .”); FED. R. EVID. 804(b)(1) advisory committee’s note (“[O]pportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination.”).

54 See FED. R. EVID. Article VIII advisory committee’s note (“Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination . . . The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental.”).

55 See LYNDA LYTLE HOLSTROM & ANN WOLBERT BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 171 (1974); LAURIE L. LEVENSON & ALEX RICCIARDULLI, *CALIFORNIA CRIMINAL LAW § 7:24* (2015) (noting that aside from consent or denial of the events, there are very few other practical defenses to sexual assault).

56 Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 299 (2002). *But see* Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1088

to the question of the complainant's consent (or lack thereof), the complainant has particular knowledge as to her state of mind leading up to, during, and after the alleged assault.⁵⁷ Allowing the accused the opportunity to question the complainant about any contradictory words or actions of the complainant related to the issue of her consent before, during, and after the alleged assault may buttress the accused's defense. Cross-examination would also allow the accused to bring out any potential bias or ulterior motives of the complainant or other adverse witnesses.⁵⁸

Additionally, many schools have adopted a preponderance of the evidence standard for determining liability in sexual assault cases,⁵⁹ tracking the Department of Education's guidance.⁶⁰ Given the typical lack of physical evidence or other eyewitness testimony, allowing the accused the ability to vigorously question the complainant's testimony may be, in some cases, the best way for the accused to show it is more likely that he did not commit the alleged sexual assault.⁶¹

(1986) (recounting her own rape, the author notes that she could not easily identify her rapist later because "[n]o one had ever told me that if you're raped, you should not shut your eyes and cry for fear that this really is happening. You should keep your eyes open focusing on this man who is raping you so you can identify him when you survive.").

⁵⁷ See Charlow, *supra* note 56, at 299 ("[T]he dynamics of intimate social interaction between the sexes, in which one's desires may be mixed and are frequently unspoken, only adds to the complexity of the problem, as it often may not be clear whether or not sex was desired."); Alan Wertheimer, *What is Consent? And is it Important?*, 3 BUFF. CRIM. L. REV. 557, 559 (2000) (noting that individuals have their own internal perceptions as to what events are taking place in a sexual encounter).

⁵⁸ See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness . . . 'is always relevant as discrediting the witness and affecting the weight of his testimony.'") (internal citation omitted); *State v. Texter*, 594 A.2d 376, 377–78 (R.I. 1991) (finding it was error to preclude defendant, on cross-examination, from questioning the victim as to the potential that she and her husband fabricated a sexual assault claim in retaliation for the defendant accusing the husband of theft).

⁵⁹ The vast majority of those schools cited to in Appendices B, C, and D use the preponderance of the evidence standard for sexual assault claims. See, e.g., *Sexual Violence and Sexual Harassment*, UNIV. OF CA. 1, 12 (Dec. 18, 2015), <http://policy.ucop.edu/doc/4000385/SVSH> ("For all other matters the report will include an analysis and determination by the investigator of whether this [sexual assault] Policy has been violated. The investigator will apply the preponderance of evidence standard.") [<http://perma.cc/7YAY-97D9>].

⁶⁰ 2011 *Dear Colleague Letter*, *supra* note 25, at 11 ("[P]reponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.").

⁶¹ See Barclay Sutton Hendrix, *A Feather on One Side, a Brick on the Other: Tilting the Scale against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 617 (2012) (arguing that given the lower evidentiary threshold of a preponderance of the evidence standard, cross-examination is a means to "reduce the risk of an erroneous finding of guilt").

Lastly, a study found that a witness's susceptibility to common cross-examination "techniques," such as leading questions and double negative questions, can be mitigated if the witness is made aware, even minimally so, of what to expect during cross-examination, improving the witness's ability to accurately testify.⁶²

B. Cross-Examination May Actually Hinder Fact-Finding in a Sexual Assault Case

There are numerous potential issues with applying courtroom-style cross-examination to a university disciplinary proceeding in general and to cases involving sexual assault victims in particular. By not allowing cross-examination of student sexual assault complainants, issues inherent to cross-examination and issues arising from psychological trauma could be avoided.

1. General Issues with Cross-Examination

The first issue is that cross-examination, despite the reverence it receives in the American legal system, is not as effective at finding "the truth" as believed. Research, which virtually all speaks against cross-examination's effectiveness, suggests several things. First, cross-examination does little to affect the testimony of a prepared and/or skillful lying witness.⁶³ Due to an observed phenomenon known as the "probing effect,"⁶⁴ a trier-of-fact may gain false confidence in the testimony of an inaccurate witness when it observes the witness deftly answer questions posed to him/her, despite the witness's actual inaccuracy.⁶⁵

Relatedly, cross-examination does little to affect the testimony of witnesses with mistaken memory.⁶⁶ Cross-examination will not be effective in eliciting the "truth" from a witness who honestly, yet mistakenly, believes their memory and relies on that false

⁶² Jacqueline M. Wheatcroft & Louise E. Ellison, *Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy*, 30 BEHAV. SCI. & L. 821, 833–36 (2012). The authors note that witness accuracy rose dramatically even when the "preparation" was something as simple as a guidance leaflet detailing what happens during cross-examination. *Id.*

⁶³ Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 249 (2006).

⁶⁴ *Id.* at 249. The "probing effect" "suggest[s] that watching a potential liar being probed causes [triers-of-fact] to become falsely confident that they can distinguish truth from falsity, thereby creating a 'truth bias' that leads them to assume—because they are focusing on the wrong cues—that the liar is telling the truth." *Id.* at 249–50 n.45.

⁶⁵ *Id.* at 249.

⁶⁶ See Simon, *supra* note 51, at 170.

memory for their testimony.⁶⁷ This is further exacerbated if the witness is the only witness to a particular fact.⁶⁸ In a sexual assault case, cross-examination would do little to derive the truth of an assailant's identity or the grant of consent if the complainant is a skillful liar who has plotted a plausible (but inaccurate) version of the facts or is relying on an honest but false memory.

Second, cross-examination itself may often force witnesses to change their testimony only because of the pressure put on them by the cross-examining attorney.⁶⁹ In a 2011 study, 73% of participating witnesses recanted at least one accurate fact stated in their testimony after forceful questioning,⁷⁰ 84% of the witnesses conceded at least once that they may have been mistaken as to one fact about which they were actually correct, and 68% of the witnesses conceded they may have been mistaken as to two or more facts.⁷¹ Many commentators note that the use of common cross-examination techniques, such as leading questions, negative feedback,⁷² and double or triple negative questions, lead either to confusion, memory distortion, or the witness just relenting and agreeing with the examining attorney.⁷³

It is not difficult to imagine that on cross-examination a student sexual assault complainant may become confused and change her testimony if she is subjected to a "rapid-fire mode of questioning" and forced to give quick answers without

⁶⁷ *Id.* ("Memory research indicates that people tend to trust their memories, regardless of the accuracy of those memorial accounts. Given that mistaken witnesses perceive themselves to be accurate, they are unlikely to be deterred from recounting their (actually false) memories any more than accurate witnesses would be deterred from recounting their (truly correct) ones.")

⁶⁸ *Id.* at 171.

⁶⁹ It is important to note that a cross-examining attorney is not always trying to elicit the "truth." Rather, he/she is trying to further the interests of his/her client. See Sara D. Schotland, *Rape Victims as Mockingbirds: A Law and Linguistics Analysis of Cross-Examination of Rape Complainants*, 19 *BUFF. J. GENDER L. & SOC. POLY* 1, 28 (2010) (noting that a cross-examining criminal defense attorney has "no reason or duty to be polite: rather, the attorney's duty of loyalty requires that (s)he take all ethical steps to secure acquittal").

⁷⁰ Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 *APPLIED COGNITIVE PSYCHOL.* 554, 557–59 (2011) (finding 36% of mock witnesses changed their answer to one fact, 23% changed two answers, and 14% changed three answers, although none of the witnesses changed all four answers).

⁷¹ *Id.* at 559.

⁷² Negative feedback in the Valentine & Maras study took the form of the examining attorney "feigning disbelief" as to what the witness just testified to or accusing the witness of lying because they had contradicted another (non-existent) witness. *Id.* at 558–59.

⁷³ *Id.* at 559; Simon, *supra* note 51, at 172; Mark R. Keibell & Shane D. Johnson, *Lawyers' Questioning: The Effect of Confusing Questions on Witness Confidence and Accuracy*, 24 *LAW & HUM. BEHAV.* 629, 634, 637 (2000); Jacqueline M. Wheatcroft et al., *The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy*, 9 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 83, 83 (2004).

being able to thoroughly explain facts that help support her side of the story.⁷⁴

2. Cross-examination of Sexual Assault Complainants

Allowing cross-examination of a sexual assault complainant raises issues separate than those relayed above—it may cause further psychological harm to the complainant.⁷⁵ This harm may then cause the complainant to provide inaccurate testimony.⁷⁶ It has been posited that cross-examination is one of the reasons sexual assault is vastly underreported,⁷⁷ both on campus⁷⁸ and in the general population.⁷⁹

It is undebatable that rape is “without question one of the most terrifying crimes in which the victim survives. Its consequences remain with the victim for many years or perhaps a lifetime, often accounting for deep psychological problems.”⁸⁰ Rape Trauma Syndrome (“RTS”) is a form of posttraumatic stress disorder set off by a sexual assault or attempted sexual assault.⁸¹ There are two phases of RTS: the acute phase⁸² and the

⁷⁴ Schotland, *supra* note 69, at 28.

⁷⁵ See *State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997) (“It has been said that the victim of a sexual assault is actually assaulted twice—once by the offender and once by the criminal justice system.”); Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants: Does Washington’s Proposed Legislation Sufficiently Protect Both Sides?*, 22 CORNELL J.L. & PUB. POL’Y 491, 493 (2012) (noting that cross-examination may cause “revictimization” because it forces a complainant to “relive” the assault).

⁷⁶ See *Maryland v. Craig*, 497 U.S. 836, 857 (1990) (citing *Coy v. Iowa*, 487 U.S. 1012, 1032 (Blackmun, J., dissenting) (noting that face-to-face confrontation between the accused and a child abuse victim disserves the truth-seeking ends of the Confrontation Clause because the confrontation might so overwhelm the witness as to “prevent the possibility of effective testimony”)).

⁷⁷ See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1357 (2005) (“[V]ictim’s willingness to report crimes varies inversely with their fear of embarrassment during cross-examination.”); Mohammadian, *supra* note 75, at 503 (“Sexual assault victims . . . fear the legal system because the trial often forces the victims, who may already suffer from psychological trauma, to relive the experience of the attack.”).

⁷⁸ MCCASKILL, *supra* note 15, at 4 (citing to Department of Justice statistics, stating that less than 5% of on-campus rapes are reported to law enforcement).

⁷⁹ In 2014, only 33.6% of rapes/sexual assaults were reported to the police. Truman, *supra* note 14.

⁸⁰ Mohammadian, *supra* note 75, at 502–03.

⁸¹ See Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 425–26 (1986).

⁸² The acute phase occurs immediately after the attack and is usually indicated by feelings of “shock, fear, humiliation, vulnerability, powerlessness, anxiety, and disgust” as well as physical reactions, such as sleeping disorders, general soreness, headaches, fatigue, gastrointestinal irritability, and genitourinary disturbances. *Id.* at 426–27. The acute phase may last between three and four months. Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 BEST PRAC. & RES. CLINICAL OBSTETRICS AND GYNAECOLOGY, 27, 31 (2012).

long-term reorganization phase.⁸³ The symptoms of RTS may manifest differently in each individual sexual assault victim,⁸⁴ and it is these disparate manifestations that may sometimes result in behavior that triers-of-fact may not “expect” from a sexual assault victim.⁸⁵

These RTS symptoms may also affect the ability of the complainant to testify. Because of the trauma, complainants may give contradictory or incomplete testimony that appears to be at odds with their accusations.⁸⁶ Such issues may only compound if the complainant’s alleged assailant is in view.⁸⁷

Another issue is that in many sexual assault adjudications, the defense’s best strategy is to shift the trier-of-fact’s attention away from the defendant and onto the complainant, exposing every personal flaw possible in order to undermine her credibility.⁸⁸ Such evidence is typically only used to attack the credibility of the complainant and does not necessarily aid the trier-of-fact in determining the truth about what actually occurred.⁸⁹ This hard-charging exploration into the sexual assault victim’s personal life, as well as the general inference

⁸³ In the long-term reorganization phase, the sexual victim is trying to reorganize her life but may develop anxiety, depression, sexual and interpersonal dysfunction, and may experience “traumatophobias”—defensive avoidance reactions to the circumstances of their sexual assault. Massaro, *supra* note 81, at 426–28.

⁸⁴ See Mason, *supra* note 82, at 31.

⁸⁵ For instance, during an assault, many women do not resist their assailant and many do not immediately report the assault due to disbelief or denial, which is contrary to how most people believe they would react under similar circumstances. *Id.* at 29–30, 32. Additionally, while some women are emotionally demonstrative in the immediate hours and days after their assault, many others remain calm and controlled. *Id.* at 31; Massaro, *supra* note 81, at 425.

⁸⁶ See Mason, *supra* note 82, at 32 (arguing that while a sexual assault complainant’s inconsistent or incomplete testimony is typically misinterpreted to be evidence of fabrication, the inverse should be inferred given the nature of PTSD).

⁸⁷ See *id.* at 33 (noting that being reminded or required to recount their sexual assault in a courtroom setting, where their assailant is likely to be, may exacerbate symptoms of PTSD); Lininger, *supra* note 77, at 1360 (noting that a trial may be a complainant’s first face-to-face encounter with her assailant and that she may perceive cross-examination as an another attack on her through the defense counsel); see also Mohammadian, *supra* note 75, at 493–94 (recounting a case where a sexual assault complainant contemplated suicide rather than be cross-examined by her alleged assailant who was a *pro se* defendant).

⁸⁸ See Lininger, *supra* note 77, at 1361 (noting that cross-examination of a sexual assault witness is akin to “public psychoanalysis” of the complainant because cross examination may explore “[h]er most private affairs—including her past romantic relationships, her sexual mores, her psychological fortitude, and her loyalty to family members . . .”); Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1461 (2005) (noting that the character of a sexual assault complainant is heavily emphasized by the defense because the issue at trial “is not whether a rape actually occurred, but whether people believe a rape occurred”).

⁸⁹ See Lininger, *supra* note 77, at 1360 (noting that defense attorneys will explore any real or perceived character flaws of the complainant during cross-examination).

that she is either lying or willingly brought about the acts she claims was an assault, may only lead to further trauma.⁹⁰

III. LEGAL ISSUES SURROUNDING UNIVERSITY DISCIPLINARY PROCEEDINGS

There are several sources of law that bear most directly on the procedural safeguards afforded to accused students in university disciplinary proceedings. A student may have contractual rights to be dealt with in accordance with good faith and fair dealing,⁹¹ or he may have rights under state law.⁹² Two other sources of law, and those examined in Part III, are Title IX and the Due Process Clause of the Fourteenth Amendment.

A. Title IX Rights of Both the Accused and the Complainant

Title IX states “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁹³ Assuming they are enrolled in a university that receives federal funding, both the complainant and accused student have the same general right to be free from sex discrimination by their university. How their respective Title IX rights can be implicated in the context of a university disciplinary proceeding, however, is vastly different.

1. Complainant’s Rights Under Title IX

Title IX provides student complainants a private cause of action against their universities when the university has been “deliberately indifferent” to their sexual assault,⁹⁴ thereby subjecting complainants to a “hostile environment” on account of

⁹⁰ See Mason, *supra* note 82, at 33 (noting that some women suffer severe anxiety when recounting their sexual assault).

⁹¹ See, e.g., Berger & Berger, *supra* note 29, at 313–17, 331–37 (arguing, *inter alia*, that Due Process is a contractual right private university students have under the doctrine of good faith and fair dealing). This theory may be available provided that there is no direct, express policy governing disciplinary proceedings.

⁹² Several states have passed statutes on what types of procedures schools and universities must use in disciplinary proceedings. 22 PA. CODE § 505.3 (2016); S.C. CODE ANN. § 59-63-240 (2016); WASH. ADMIN. CODE § 478-120-095 (2016). Additionally, courts in several states have judicially determined what level of safeguards are required in disciplinary proceedings. See *infra* Part III(B).

⁹³ 20 U.S.C. § 1681(a) (1972).

⁹⁴ Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (concluding that Title IX grants students a private cause of action against their school for student-on-student sexual harassment when the school “act[s] with *deliberate indifference* to known acts of harassment,” so long as the harassment is “so severe, pervasive, and objectively offensive” that it effectively bars the victim’s access to an education) (emphasis added).

their gender.⁹⁵ A student complainant may suffer a deprivation of her Title IX rights if the university fails to timely adjudicate, or improperly adjudicates, her sexual assault claim.⁹⁶

The OCR has addressed the use of cross-examination in university disciplinary proceedings in one of its “Dear Colleague” letters, a series of publications addressed to universities which offer guidance⁹⁷ on Title IX compliance.⁹⁸ In the 2011 Dear Colleague Letter, the OCR stated it “strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.”⁹⁹ The OCR’s reasoning is that “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”¹⁰⁰ The 2011 Letter was later supplemented by a 2014 “Questions and Answers on Title IX and Sexual Violence” FAQ which,

⁹⁵ In this context, a “hostile environment” is one in which a university’s deliberate indifference to the sexual harassment of a student causes the student to suffer a constructive deprivation of his or her education. There is a split amongst the authorities as to what constitutes a sufficient level of harassment “so severe, pervasive, and objectively offensive” to create a hostile environment. In *Davis*, the Court, in dicta, theorized that, while one incident of student-to-student harassment could be said to implicate Title IX, “it [is] unlikely Congress would have thought such behavior sufficient to rise to this level.” *Id.* at 652–53.

Some courts, however, have held that a single incident of rape or violent sexual assault was sufficient to create a hostile environment. *See Jennings v. U. of N.C.*, 482 F.3d 686, 720–21 (4th Cir. 2007); *Albiez v. Kaminski*, No. 09-CV-1127, 2010 WL 2465502, at *6 (E.D. Wis. June 14, 2010) (one incident of sexual assault by the plaintiff’s resident advisor sufficient to create hostile environment); *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. App. 2008) (plaintiff “did not have to be raped twice before the university was required to appropriately respond to her requests for remediation and assistance. In the Title IX context, there is no ‘one free rape’ rule.”).

⁹⁶ 2011 *Dear Colleague Letter*, *supra* note 25, at 4 (“If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”); *see also Davis*, 526 U.S. at 633–35, 653–54 (finding a school may be liable for money damages under Title IX for failing to timely address numerous reports of a student’s repeated acts of sexual harassment upon the plaintiff).

⁹⁷ One very important aspect to note is that these guidance “Letters” are not binding law or even controlling regulations. They are likely to be seen by courts as having *Skidmore* deference—courts can refer to them as a source of persuasive authority but are under no obligation to follow them. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (“We consider that the rulings, interpretations and opinions of the [Wage and Hour Division] Administrator . . . while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

⁹⁸ All of the OCR’s “Dear Colleague Letters” and other guidance publications are available at *Sex Discrimination*, U.S. DEPT OF EDUC. <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> [<http://perma.cc/L24Z-UMZR>].

⁹⁹ 2011 *Dear Colleague Letter*, *supra* note 25, at 12.

¹⁰⁰ *Id.* Under the OCR’s guidance then, allowing the accused to cross-examine the complainant directly would open up the university to potential liability under Title IX.

among other topics, reiterated the OCR's position on cross-examination,¹⁰¹ but offered a potential alternative:

A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.¹⁰²

It should be noted that according to this Note's survey, this is the approach that 27% of schools have taken with their disciplinary proceedings.¹⁰³

As of right now, these OCR publications are only guidance documents and are not binding on any university.¹⁰⁴ However, it is likely within the authority of the Department of Education to promulgate binding regulations¹⁰⁵ on how universities can conduct their disciplinary proceedings, despite the plain language and legislative history of Title IX being silent on the matter. In the plurality decision of *Guardians Ass'n v. Civil Service Comm'n of the City of N. Y.*,¹⁰⁶ the U.S. Supreme Court held that an implementing regulation exceeding the original scope of its statute is valid, so long as it is consistent with the underlying purpose of that statute.¹⁰⁷ In *Guardians*, the Court held that while Title VI itself did not proscribe unintentional racial discrimination, regulations that Title VI implemented to that effect were valid because they were consistent with Title VI's purpose of proscribing racial discrimination in general.¹⁰⁸ As applied to this issue, a Department of Education regulation proscribing cross-examination in disciplinary proceedings for sexual misconduct would likely also be held valid. While Title IX, modeled after Title VI,¹⁰⁹ itself may not address the procedures of

¹⁰¹ Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 31 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/9JZC-BKQ4>].

¹⁰² *Id.*

¹⁰³ See *supra* note 36 and accompanying text.

¹⁰⁴ Indeed, as Part I(B) demonstrates, 29% of schools sampled currently allow an accused student to directly question the complainant, which the OCR has directly advised against. See *supra* note 35 and accompanying text.

¹⁰⁵ A regulation promulgated by an executive branch agency and codified in the Code of Federal Regulations is due deference as long as it is reasonably in furtherance of the statute it is interpreting. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

¹⁰⁶ 463 U.S. 582 (1983).

¹⁰⁷ See *id.* at 591–92.

¹⁰⁸ *Id.* at 582, 590. The majority opinion of Justice White based this holding on the fact that Title VI provided the Department of Labor “sufficient discretion to enforce the statute,” so long as such regulations were “not inconsistent with the purpose of Title VI.” *Id.* at 591–92.

¹⁰⁹ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (noting that Title IX was modeled after Title VI).

university disciplinary proceedings, if the Department of Education can show that these (as of yet hypothetical) regulations further the goal of proscribing sex-based discrimination, such regulations would likely be upheld under *Guardians*.

2. Accused Student's Rights Under Title IX

Under Title IX, an accused student does not have an analogous deliberate indifference/hostile environment cause of action that would otherwise be available to a complainant if a university fails to properly address her sexual assault claim. Rather, an accused student can bring an “erroneous outcome discrimination” claim under Title IX which requires he show that, in the course of his discipline, he was the victim of: (1) a flawed procedure, that (2) led to an adverse and erroneous outcome with (3) “particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.”¹¹⁰ To support the third element, the accused student must present more than conclusory allegations that the university found against him because of his gender, a standard many accused students fail to meet.¹¹¹ While other causes of action may exist for a flawed adjudication process, for an accused student to have a claim under Title IX, he must show a causal link between his gender and his punishment.¹¹² Thus, if a school

¹¹⁰ *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). “Such allegations [of gender bias] might include . . . statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.” *Id.*

¹¹¹ *See, e.g., Mallery v. Ohio Univ.*, 76 Fed. Appx. 634, 639–40 (6th Cir. 2003) (holding there was no erroneous outcome discrimination where accused student plaintiff unsuccessfully argued that the school focused on the complainant’s ability to consent rather than other potentially exculpatory evidence); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 476–77 (S.D.N.Y. 2015) (holding that there was no erroneous outcome discrimination where the school did not give great weight to Facebook messages the complainant sent to the accused student the day after the assault); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 WL 4306521, at *8 (D. Mass. July 14, 2015) (finding that, while the plaintiff’s pleaded facts may suggest his university “treated [the complainant] more favorably than the Plaintiff,” he had not alleged facts showing the unfavorable treatment “was *because of Plaintiff’s sex*”) (emphasis in original). *But see Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 (D. Md. 2015) (holding that the male accused plaintiff pleaded sufficient facts to state an erroneous outcome discrimination cause of action where he alleged that the university’s sexual assault awareness program, influenced in part by the OCR’s policy guidance, may have led Salisbury University administrators to conduct a disciplinary proceeding that did not follow the university’s stated procedures).

¹¹² To further illustrate this point, imagine the following scenario:

A university has a policy of adjudicating sexual assault complaints solely by way of coin-toss. On Monday, the university flips a coin as to Complainant A’s sexual assault complaint against B. B wins the coin toss, and therefore the university finds that B did not commit a sexual assault and he is due no discipline. On Tuesday, the university flips a coin as to Complainant C’s sexual assault complaint against D. C wins the coin toss, and the university therefore finds D has committed a sexual assault and expels him.

does not allow an accused student, male or female, the right to some form of cross-examination in a disciplinary proceeding, a male student has no claim to it under an erroneous outcome discrimination theory under Title IX.

B. Accused Student's (Potential) Due Process Right to Cross-Examination

Because a university disciplinary proceeding is not a criminal prosecution, an accused student has no Sixth Amendment right to cross-examination in such a proceeding.¹¹³ Rather, constitutional claims lie in the Due Process Clause of the Fourteenth Amendment, which reads in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." ¹¹⁴

A procedural Due Process claim requires the plaintiff to have either a liberty or property interest at issue, a deprivation of that interest by a State, and that such deprivation occur pursuant to inadequate government procedures.¹¹⁵ A liberty or property interest can arise not only from the U.S. Constitution, but also from a person's rights under a state law entitling them to some benefit.¹¹⁶

In *Goss v. Lopez*,¹¹⁷ the U.S. Supreme Court held that students in a state's public school system have a property interest in the education to which they are entitled, pursuant to a state statute.¹¹⁸ The Court went on to find that students have a

Complainant A likely has a claim under Title IX because the school has been deliberately indifferent to her complaint by leaving their investigation and adjudication up to mere chance. Conversely, D likely does not have a Title IX erroneous outcome discrimination claim. Because the university adjudicates all sexual assault complaints via coin-toss, D cannot say that the procedures and outcome, as clearly flawed as they are, were done on account of his gender.

¹¹³ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

¹¹⁴ U.S. CONST. amend. XIV, § 1.

¹¹⁵ See Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000).

¹¹⁶ See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¹¹⁷ 419 U.S. 565 (1975). *Goss* involved a class action lawsuit brought by nine Ohio public school students who were suspended up to ten days for non-academic misconduct. *Id.* at 568-69. Ohio law granted a school principal the right to suspend a student for ten days or expel a student without any form of hearing or notice to either the student or the student's parents. The students in *Goss* were suspended immediately after their alleged misconduct with no hearing as to the underlying facts surrounding each suspension. *Id.* at 570.

¹¹⁸ *Id.* at 573-74 ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.").

liberty interest in having their reputation free from inaccurate charges of misconduct.¹¹⁹ While never explicitly holding as such, the U.S. Supreme Court has assumed the existence of such constitutional protections for students attending public universities.¹²⁰ Such constitutional protections, however, have not been found to exist for students enrolled in private institutions.¹²¹

There are two Supreme Court cases that guide a court's determination as to what process is due to an accused student when charged with non-academic misconduct: *Goss v. Lopez*¹²² and *Mathews v. Eldridge*.¹²³ In *Goss*, the Court held that when a student is facing a short-suspension (ten days or less), Due Process requires at a minimum that "the student be given oral or

¹¹⁹ *Id.* at 575 ("If [charges of misconduct are] sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.") (internal footnote omitted).

¹²⁰ See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985). Several lower federal courts and state courts have explicitly held public university students have a constitutional right to their education. See, e.g., *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961); *Woodis v. Westark Cmty. Coll.* 160 F.3d 435, 440 (8th Cir. 1998); *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 52 (AK 1999); *Danso v. Univ. of Conn.*, 919 A.2d 1100, 1106 (Conn. Super. Ct. 2007).

¹²¹ See Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 278 n.2 (2009) ("Private colleges generally are not state actors for purposes of due process.").

A private university could be liable for a Due Process claim only if it was found to be a "state actor." While there are several tests for determining whether a private entity becomes a "state actor" based on the underlying facts of a given case, the test most relevant to a private education institution is the "fair attribution" test laid out in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). A private entity performs a state action when they have acted in accordance with a "rule of conduct imposed by the State or by a person whom the State is responsible," and the entity can "fairly be said to be a state actor" because it "has acted together with or has obtained significant aid from state officials." *Id.* at 937. The mere fact that a private entity acts in accordance with a state rule or regulation does not mean they become a state actor, however. *Id.* Therefore, even in the instance where a private university follows the OCR's guidance and does not allow for cross-examination, it is unlikely that a court would find a private university has become a state-actor based solely on this fact.

However, it is not difficult to see a future scenario wherein the OCR or another government entity actively puts pressure, via threat of lawsuit, on private universities to limit procedural protections afforded accused students. Such pressure may meet the "acted together" prong of the *Lugar* test.

Several commentators have argued that an equivalent to the right to Due Process in private university disciplinary proceedings may be founded on theories of contract law or associations law. See, e.g., Berger & Berger, *supra* note 29, at 313–17, 331–37 (arguing, *inter alia*, that Due Process is a contractual right private university students have under the doctrine of good faith and fair dealing).

¹²² 419 U.S. 565 (1975).

¹²³ 424 U.S. 319 (1976).

written notice of the charges against him,” an “explanation of the evidence the authorities have [against him],” and the “opportunity to present his side of the story.”¹²⁴ In these short-suspension instances, cross-examination and other trial-type procedures would impose too much of a burden on schools.¹²⁵ The *Goss* Court did posit, though, that in situations where a student was facing a longer suspension or expulsion, Due Process “may require more formal procedures.”¹²⁶

However, despite this language, the Court has not considered all long-term punishments deserving of “more formal procedures.” In two post-*Goss* cases, *Board of Curators of University of Missouri v. Horowitz*¹²⁷ and *Regents of University of Michigan v. Ewing*,¹²⁸ the Courts held that students facing permanent expulsions for failing to meet academic standards were not due any more than the *Goss* requirements of notice and opportunity to be heard.¹²⁹ What can be inferred from *Horowitz* and *Ewing* then is that it is not only the length of the punishment that determines what procedural protections are due, but also the length of the punishment coupled with whether the decision to discipline turns on subjective evaluative information or objective fact-based determinations.¹³⁰ *Horowitz* and *Ewing* control those cases in the former, while *Goss* controls those in the latter, where there is some dispute of fact that requires fact-finding.

The Court’s decision in *Mathews v. Eldridge* provides a separate analytical framework to determine how much process is

¹²⁴ *Goss*, 419 U.S. at 581; see also *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961) (fourteen years before *Goss*, the court held that college students were due notice of the accusations against them and an investigative hearing wherein the university could hear and weigh facts from both sides).

¹²⁵ *Goss*, 419 U.S. at 583. This concern of overburdening schools and universities has been cited by many state appellate courts and lower federal courts as a reason not to extend more trial-type protections beyond what *Goss* requires. See, e.g., *Dixon*, 294 F.2d at 159; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); *Scanlon v. Las Cruces Pub. Sch.*, 172 P.3d 185, 191–92 (N.M. Ct. App. 2007).

¹²⁶ *Goss*, 419 U.S. at 584.

¹²⁷ 435 U.S. 78 (1978).

¹²⁸ 474 U.S. 214 (1985).

¹²⁹ *Horowitz*, 435 U.S. at 85–86 n.2 (“We stop short, however, of requiring full trial-type procedures in [academic disciplinary proceedings] . . . [A]n informal give-and-take between the student and the administrative body dismissing him . . . would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context.”) (internal citations omitted); *Ewing*, 474 U.S. at 227.

¹³⁰ See *Horowitz*, 435 U.S. at 89–90 (“Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement . . . [T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking [sic].”).

due to an accused student in a disciplinary proceeding.¹³¹ In *Eldridge*, the Court articulated a three-factor test for courts to determine whether administrative procedures comport with due process requirements: (1) the private interest that will be affected; (2) the risk of “erroneous deprivation” of the private interest through the use of the administrative procedures; and (3) the government’s interest in using its set procedures.¹³² The Court has applied these factors to a myriad of cases where the central issue was what level of due process protection was sufficient.¹³³ Aside from Justice Marshall’s concurrence and dissent in part in *Horowitz*, the Court has yet to apply the *Eldridge* factors to the question of due process in university disciplinary proceedings.

Lower federal courts and state courts have applied both *Goss* and *Eldridge* (or similar reasoning behind these cases) to the question of whether cross-examination is a due process requirement in university disciplinary proceedings, resulting in a split amongst the jurisdictions. Among the states that have directly decided on the issue,¹³⁴ courts in eleven states have held that an accused student has the right to some form of cross-examination of witnesses.¹³⁵ Likewise, the Ninth Circuit

¹³¹ In his concurrence in part and dissent in part to the *Horowitz* decision, Justice Marshall argued that *Eldridge* supplied a better means to analyze the issue of what due process was required when a student faces an expulsion, rejecting the majority’s “academic” versus “disciplinary” distinction. *Id.* at 99–100, 103–07 (Marshall, J., concurring in part and dissenting in part).

¹³² *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹³³ *See, e.g., id.* at 335–47 (applying the three-factor test to the Social Security Administration’s appeals process); *Santosky v. Kramer*, 455 U.S. 745, 758–69 (1982) (applying the *Eldridge* factors to determine the standard of proof in parental rights termination proceedings); *Ake v. Oklahoma*, 470 U.S. 68, 77–83 (1985) (applying the factors to the question of an indigent criminal defendant’s access to expert psychological testimony); *Wilkinson v. Austin*, 545 U.S. 209, 224–30 (2005) (applying the factors to the procedures Ohio used to classify prisoners for placement in “Supermax” prison facilities).

¹³⁴ The following states, along with the District of Columbia, have yet to have a court directly address this issue: Alabama, Alaska, Arizona, California, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Wisconsin, and Wyoming. Several of these twenty-three states have had decisions in which cross-examination is briefly mentioned in a list of procedures the accused student was afforded, but the courts in such cases generally gave a conclusory statement that the student’s due process rights were protected without determining what listed procedures were actually constitutionally required. *See, e.g., Burch v. Moulton*, 980 So. 2d 392, 400–01 (Ala. 2007); *Shuman v. Univ. of Minn. Law Sch.*, 451 N.W.2d 71, 75 (Minn. Ct. App. 1990); *Braesch v. DePasquale*, 265 N.W.2d 842, 846 (Neb. 1978).

¹³⁵ *Nichols ex rel. Nichols v. DeStefano*, 70 P.3d 505, 508 (Colo. App. 2002) (holding that a student’s inability to question students who gave statements against him amounted to a denial of an “opportunity to be heard”); *Bd. of Educ. of New Castle Cty. Vocational Tech. Sch. Dist. v. Clark*, 1988 WL 47096, at *1 (Del. Super. Ct. May 3, 1988) (holding that because student was facing expulsion, *Goss* minimum requirements were expanded and student had right to cross-examine witnesses to fully present his case); *Colquitt v. Rich Tp. High Sch. Dist.* No. 227, 699 N.E.2d 1109, 1116 (Ill. App. Ct. 1998)

and district courts in the First, Second, Third, and Eighth Circuits have held accused students have the right to some form of cross-examination.¹³⁶

Conversely, courts in sixteen states,¹³⁷ the First, Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, and district

(“[I]n expulsion proceedings, the private interest is commanding, the risk of error from the lack of adversarial testing of witnesses through cross-examination is substantial, and the countervailing governmental interest favoring the admission of hearsay statements is comparatively outweighed.”); *Smith v. Miller*, 514 P.2d 377, 387 (Kan. 1973) (holding that cross-examination is required “when the outcome is directly dependent on the credibility of two witnesses (possibly including the student threatened with expulsion) whose statements are directly conflicting, then cross-examination is imperative in establishing the truth, absent compelling reasons for dispensing with it”); *Ryan v. Hofstra Univ.*, 328 N.Y.S.2d 339, 341 (Sup. Ct. 1972) (finding that a student in a private university had the right to cross-examine witnesses against him in a disciplinary proceeding); *Alexander v. Cumberland Cty. Bd. of Educ.*, 615 S.E.2d 408, 415 (N.C. Ct. App. 2005) (holding that students are due the right to cross-examination if school seeks to impose “long-term suspensions”); *Ruane v. Shippensburg Univ.*, 871 A.2d 859, 862 (Pa. Commw. Ct. 2005) (in a case where the accused student was charged with sexual assault, noting that a Pennsylvania state statute, 22 PA. CODE § 505.3, mandates universities to allow the accused student to question witnesses); *Stinney v. Sumter Sch. Dist. 17*, 707 S.E.2d 397, 399 (S.C. 2011) (noting that South Carolina state statute § 59-63-240, which allows accused student to cross-examine witnesses at an expulsion hearing, is “constitutionally sufficient”); *Texarkana Indep. Sch. Dist. v. Lewis*, 470 S.W.2d 727, 736 (Tex. Civ. App. 1971) (holding that cross-examination may be required in situations where witness credibility is at issue); *Stone v. Prosser Consol. Sch. Dist. No. 116*, 971 P.2d 125, 128 (Wash. Ct. App. 1999) (weighing *Eldridge* factors in favor of accused student and finding that cross-examination is required in an expulsion hearing); *North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 417 (W. Va. 1977) (holding that accused student has the right to cross-examine witnesses in a university expulsion hearing).

¹³⁶ *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (holding that members of a black student union had the right to cross-examine witnesses in their expulsion hearings); *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 623 (D.P.R. 1973) (including cross-examination in a list of procedures that should be afforded to students before being suspended or expelled); *Gomes v. Univ. of Maine System*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) (holding student accused of sexual assault and facing expulsion had the right to cross-examine complainant and other witnesses); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D. N.Y. 1997) (holding that because sexual assault cases turn on credibility of complainant, accused university student had the right to question complainant in some form during expulsion hearing); *Furey v. Temple Univ.*, 730 F. Supp. 2d 380, 396 (E.D. Penn. 2010) (finding that student had the right to question police officer whom he allegedly got into an altercation with, particularly after hearing panel aggressively questioned accused student); *Fielder v. Bd. of Educ. of Sch. Dist. of Winnebago*, 346 F. Supp. 722, 730 (D. Neb. 1972) (while not concluding that cross-examination is a constitutional requirement, the court held that affording accused student the right to cross-examination is “good technique”); *Hardie v. Churchill Cnty. Sch. Dist.*, No. 3:07-CV-310-RAM, 2009 WL 875486, at *4 (D. Nev. Mar. 30, 2009) (recognizing *Black Coalition* affords students facing expulsion the right to cross-examine witnesses).

¹³⁷ *Smith v. Denton*, 895 S.W.2d 550, 559 (Ark. 1995) (holding that cross-examination in disciplinary proceeding was not required “in this context”); *Danso v. Univ. of Conn.*, 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007) (citing *Dixon*, the court held that due process is met as long as accused has an opportunity to review statements of accusers and offer a rebuttal); *Life Chiropractic Coll., Inc. v. Fuchs*, 337 S.E.2d 45, 48 (Ga. Ct. App. 1985) (holding implicitly that there was no right to cross-examination because plaintiff could not show his case would have benefited from it); *Reilly v. Daly*, 666 N.E.2d 439, 444–45 (Ind. Ct. App. 1996) (holding, in an academic disciplinary proceeding, “all that is required is that the student have an opportunity to elicit the truth about the facts and events at

courts in the Seventh and Eighth Circuits,¹³⁸ have found that cross-examination is not required to protect a student's Due Process rights in a disciplinary proceeding.

Parsing through these decisions reveals two important aspects to note. The first is how some courts applied the *Eldridge*

issue" and cross-examination is not required for that purpose); *Stathis v. Univ. of Kentucky*, No. 2004-CA-000556-MR, 2005 WL 1125240, at *3 (Ky. Ct. App. May 13, 2005) (finding that due process was not lacking when student was not allowed to directly cross-examine witnesses); *Miller v. Bd. of Educ. of Caroline Cnty.*, 690 A.2d 557, 560–61 (Md. Ct. Spec. App. 1997) (construing strictly *Goss* and finding that a student is only due notice and an informal hearing); *Ding ex rel. Ding v. Payzant*, No. 03-5847, 2004 WL 1147450, at *12 (Super. Ct. Mass. May 20, 2004) (holding that the *Goss* minimum requirements are sufficient to protect an accused's due process rights); *Lee v. Univ. of Michigan-Dearborn*, No. 284541, 2009 WL 1362617, at *4 (Mich. Ct. App. May 12, 2009) (finding that the plaintiff failed to [explain] why cross-examination was required in her case given the burden it would have imposed on the university); *Hinds Cnty. Sch. Dist. Bd. of Tr. v. R.B.*, 10 So.3d 387, 400–401 (Miss. 2008) (holding that due process requires only notice of statements against the accused student and not direct confrontation and cross-examination); *Knapp v. Junior C. Dist. of St. Louis Cnty., Mo.*, 879 S.W.2d 588, 592–93 (Mo. Ct. App. 1994) (finding no state authority that cross-examination is a due process requirement); *State v. Clapp*, 263 P. 433, 437 (Mont. 1928) (holding, in a case decided almost fifty years before *Goss*, that expulsion was not arbitrary and plaintiff had no right to confront and cross-examine accusing witnesses because university president had no subpoena power); *Rockwell v. William Paterson U.*, 2015 WL 9902440 (Super. Ct. N.J. App. Div. Jan. 25, 2016) (noting that *Goss* provided the "definitive interpretation" of a student's due process rights and accordingly held that cross-examination is not required because *Goss* did not hold so); *Scanlon v. Las Cruces Public Sch.*, 172 P.3d 185, 191–92 (N.M. Ct. App. 2007) (citing its concern for the burden cross-examination would place on schools and the potential for retaliation against witnesses, court held there is no right to cross-examination); *Anderson v. Stanton*, No. E2009-01081-COA-R3-CV, 2010 WL 2106218, at *8 (Tenn. Ct. App. May 26, 2010) (holding the only requirements for due process are the *Goss* minimum requirements); *Nzuve v. Castleton State C.*, 335 A.2d 321, 324 (Vt. 1975) (citing *Dixon*, held that cross-examination is not required because a student is not entitled to a "full-dress judicial hearing"); *Woods v. Winchester Sch. Bd.*, No. 98-213, 1999 WL 33732641, at *7 (Va. Cir. Ct. July 15, 1999) (holding that only *Goss* minimum requirements are required to protect due process).

¹³⁸ *Gorman v. Univ. of R.L.*, 837 F.2d 7, 16 (1st Cir. 1988); *Winnick v. Manning*, 460 F.2d 545, 549–50 (2nd Cir. 1972) (holding cross-examination was generally not "essential" in university disciplinary proceedings, but did leave open the possibility it may be required if there is an issue as to witness credibility); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 73–74 (4th Cir. 1983) (holding that cross-examination is not required in expulsion hearing due to failure to meet university academic requirements); *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that only notice and an informal hearing is required, and a student is not entitled to a "full-dress judicial hearing" in a disciplinary proceeding); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005) (finding cross-examination not required in case where student could not show issue of witness credibility); *B.S. ex rel. Schneider v. Bd. of Sch. Tr., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 899–900 (N.D. Ind. 2003) (holding that student facing expulsion due sexual assault claim had no right to cross-examination complainant because school administrators could judge the veracity of the witness through her statements to them); *Caston v. Benton Public Sch.*, No. 4:00CV00215WKU, 2002 WL 562638, at *4–5 (E.D. Ark. Apr. 11, 2002); *Brown v. Univ. of Kansas*, 599 Fed. Appx. 833, 837–38 (10th Cir. 2015) (*Goss* requirements sufficiently protected due process rights of law student expelled for falsifying information in application); *Nash v. Auburn Univ.*, 812 F. 2d 655, 664 (11th Cir. 1987) (holding that ability of accused student to present his own case through his own witnesses was sufficient to protect student's due process rights and cross-examination was not required).

factors to this issue.¹³⁹ While there is disagreement on the ultimate outcome, the courts applying *Eldridge* generally were in agreement on what constituted the competing interests. The accused student's private interest is the continuation of their education and the benefits derived from it, as well as their interest in not bearing the label of a sexual assaulter.¹⁴⁰ The second factor is cross-examination's propensity to be a hedge against erroneous fact-finding.¹⁴¹ Lastly, the third factor is the university's interest in applying its set procedures and limiting additional administrative costs.¹⁴²

The second noteworthy aspect of this survey is the general treatment of cross-examination itself. In all of the cited cases, not a single court questioned cross-examination's ability to aid a fact-finder, nor made any reference to social science studies similar to those cited in Part II(B) illuminating cross-examination's flaws. Rather, the courts mostly towed the line of rhetoric cited in Part II(A) of cross-examination's unassailable ability to elicit the truth. The courts that held against a right to cross-examination did so mostly out of concern for practical considerations of administering cross-examination,¹⁴³ and a recognition that a

¹³⁹ In the above cited cases, the following decisions applied the *Eldridge* factors to the question of cross-examination of witnesses in university disciplinary proceedings: Bd. of Educ. of New Castle Cty. Vocational Tech. Sch. Dist. v. Clark, 1988 WL 47096, at *1-2 (Del. Super. Ct. May 3, 1988); Stone v. Prosser Consol. School Dist., 971 P.2d 125, 126-27 (Wash. Ct. App. 1999); Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005); Furey v. Temple Univ., 730 F. Supp. 2d 380, 396 (E.D. Pa. 2010); Hinds Cty. Sch. Dist. Bd. of Trustees v. R.B., 10 So. 3d 387, 399-401 (Miss. 2008); Rockwell v. William Paterson Univ., 2015 WL 9902440, at *8-9 (N.J. Super. Ct. App. Div. Jan. 25, 2016); Scanlon v. Las Cruces Pub. Sch., 172 P.3d 185, 191 (N.M. Ct. App. 2007); Gorman v. Univ. of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988); Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005); B.S. ex rel. Schneider v. Bd. of Sch. Trustees, Fort Wayne Cmty. Sch., 255 F. Supp. 2d 891, 899-900 (N.D. Ind. 2003); Caston v. Benton Pub. Sch., No. 4:00CV00215WKU, 2002 WL 562638, at *5 (E.D. Ark. Apr. 11, 2002); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987).

¹⁴⁰ See, e.g., *Gomes*, 365 F. Supp. 2d at 16 (finding the accused student's private interest "compelling" because the charges could have "a major immediate and life-long impact on their personal life, education, employment, and public engagement") (internal citations omitted).

¹⁴¹ See, e.g., *Stone*, 971 P.2d at 127 (noting that cross-examination would allow an accused student to test a witness's credibility).

¹⁴² See, e.g., *Scanlon*, 172 P.3d at 191 ("Under the third [*Eldridge*] factor, we weigh the burden that the practice of allowing cross-examination of student witnesses would place on [schools]. The burdens on a school district of having to hold trial-like disciplinary hearings in which they must employ the technical rules of evidence are significant, and could potentially have serious consequences both for school administration and for the safety of the student body.").

¹⁴³ See, e.g., *id.* ("Under the third [*Eldridge*] factor, we weigh the burden that the practice of allowing cross-examination of student witnesses would place on [schools]. The burdens on a school district of having to hold trial-like disciplinary hearings in which they must employ the technical rules of evidence are significant, and could potentially have

school disciplinary proceeding does not require similar treatment as trial courts due to a lesser amount of interests at stake.¹⁴⁴

CONCLUSION

This Note has shown there is no consensus as to whether an accused student should have the right to cross-examine adverse witnesses in a university disciplinary proceeding, and that many considerations, both legal and psychological, converge on this issue.

While there is seemingly no scientific evidence supporting the notion that cross-examination is the “greatest legal engine” for determining the truth, it is an unquestioned institution in the American adversarial legal system. Its absence or restriction in proceedings that are adversarial in all but name and whose outcome could determine the course of a young person’s life, is quite striking. At the same time, however, forcing a complainant to directly answer questions from the very individual who may have assaulted her is a prospect that rightly makes reasonable people hesitate.

It is unfortunate then, that the legal discussion regarding the right to cross-examination has largely failed to truly explore the costs and benefits of affording an accused student the right to cross-examination in a disciplinary proceeding given the evidence presented by this Note. The numerous opinions cited in this Note are resoundingly conclusory in their reasoning for allowing cross-examination or denying it. Much of the discussion of a right to cross-examination in this context has focused more on the nature of the proceeding itself and the implications of its outcome rather than whether cross-examination, with the limitations presented by this Note, would actually help or hinder the fact-finding aspect of such proceedings.

The increasing significance of the question of how to properly adjudicate campus sexual assault claims requires a far more thorough examination. Universities have become more strident in their investigations and adjudications of these claims, and at the same time, more accused students are arguing that the procedural safeguards afforded them are lacking. Courts, university officials, legislators, and litigants must make note of the sensitivities of the accused and the complainant implicated

serious consequences both for school administration and for the safety of the student body.”).

¹⁴⁴ See, e.g., *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that only notice and an informal hearing is required, and a student is not entitled to a “full-dress judicial hearing” in a disciplinary proceeding).

by this issue and construct proper legal reasoning, informed in part by the evidence cited in Part II, for why cross-examination should or should not be allowed in disciplinary proceedings.

This Note makes no judgment on what outcome ultimately should be reached after such a thorough examination has taken place; this Note has only sought to present and discuss the legal and psychological considerations bearing on this issue in order to help guide university officials, litigants, and courts to a well-reasoned outcome. However, for the benefit of both the accused students and the complainants, the dissonance between the legal system's veneration of cross-examination and the actual scientific evidence regarding its fact-finding accuracy must be ended, and a true consideration of whether it is proper for a student accused of sexual assault of another student to cross-examine the victim and other adverse witnesses must finally occur.

APPENDIX A: SURVEY METHODOLOGY

Study Population: The population for this study consisted of 1062 universities, colleges, and community colleges, representing those institutions of higher learning with enrollment of at least 5000 students as of 2014, the last year data is available. This list was derived from the Department of Education's Clery Act statistic database, wherein a Microsoft Excel Spreadsheet of schools with an enrollment exceeding 5000 students was downloaded, resulting in a list of 3794 schools. Excel's "Remove Duplicates" feature was used to remove the many duplicate entries contained in the list (it appears that the Clery Act database creates a new entry for each different mailing address for a given university), resulting in the list of 1062 unique school entries.

Sampling Methodology: Each school entry was alphabetically assigned a whole number. Then, using Excel's "RANDBETWEEN" function, a random whole number between 1 and 1062 was produced in a separate Excel cell. The author would then use that number to find the correspondingly numbered school. The author followed these steps to produce the 100 school population used in this study.

Research Methodology: Once the school was identified, the author would perform an internet search for that school's student handbook/code of conduct, which the entirety of the 100 schools sampled had available online, looking particularly for a school's disciplinary proceeding procedures and/or procedures on investigating and resolving sexual misconduct claims.

APPENDIX B

List of sampled schools that allow direct cross-examination
of witnesses

School Name	Web Address of Source
Alabama A&M University	http://www.aamu.edu/campuslife/studentresources/Documents/Code%20of%20Conduct.pdf
Bentley University	http://www.bentley.edu/files/2015/09/22/SAF.423.15%20UG%20Student%20Handbook_R5.pdf
Central Washington University	http://www.cwu.edu/student-rights/student-rights-appeals
Cincinnati State Technical and Community College	http://catalog.cincinnati.state.edu/studentrightsandresponsibilities/studentresponsibilities/
Colorado Christian University	http://www.ccu.edu/uploadedFiles/Pages/Campus_Life/handbook.pdf
Cuyamaca College	http://cctest.cuyamaca.edu/campus-life/student-affairs/discipline/disc-hearprocess.aspx
Davenport University	http://www.davenport.edu/system/files/STUDENT_CODE.pdf
Eastern Michigan University	http://www.emich.edu/policies/policy.php?id=124
El Centro College	http://pol.tasb.org/Policy/Download/358?filename=FMA%28LOCAL%29.pdf
Everett Community College	https://www.everettcc.edu/files/students/student-activities/student-rights-responsibilities-and-policies.pdf
Gaston College	gaston.edu/student-code-of-conduct/
Indian River State College	https://www.irsc.edu/uploadedFiles/Admissions/DatesandDeadlines/Student-Handbook.pdf
Joliet Junior College	jjc.edu/academic-behavior-standards/Pages/code-of-conduct.aspx
Norco College	http://www.rccd.edu/administration/board/New%20Board%20Policies/5520AP.pdf

School Name	Web Address of Source
Norfolk State University	https://www.nsu.edu/student-affairs/student-judicial/student-conduct-process
North Central Texas College	http://nctc.smartcatalogiq.com/en/2011-2012/Catalog/North-Central-Texas-College-Student-Handbook/Section-II/Discipline-and-Penalties-Discipline-Hearing-Procedure/Hearing-Committee
Northeastern University	https://issuu.com/northeasternuniversity/docs/code_of_conduct_5-29?e=2831976/13566121
Roane State Community College	http://www.roanestate.edu/?9244-RSCC-Policy-SA-06-01-Student-Discipline
Stockton University	http://intraweb.stockton.edu/eyos/ossr_site/content/docs/Campus%20Conduct%20Code.pdf
The City University of New York - Lehman College	http://policy.cuny.edu/bylaws/article_xv/text/#Navigation_Location
The Community College of Baltimore County	http://catalog.ccbcmd.edu/content.php?catoid=26&navoid=1574#protections
University of California-Irvine	http://www.dos.uci.edu/conduct/students/code-of-student-conduct-discipline-procedures.php
University of Houston	http://www.uh.edu/dos/pdf/student_code_of_conduct.pdf
University of Louisiana - Monroe	http://catalog.ulm.edu/content.php?catoid=21&navoid=2540
University of Missouri	https://www.umsystem.edu/ums/rules/collected_rules/programs/ch200/200.020_rules_of_procedures_in_student_conduct_matters
University of Montana	http://www.umt.edu/vpsa/documents/Student%20Conduct%20Code%20PDF-%20FINAL%208-27-13.pdf
University of North Georgia	http://ung.edu/dean-of-students/student-code-of-conduct/article-4-procedures.php#Rights
University of Wisconsin (System)	https://www.students.wisc.edu/doso/reporting-allegations-of-sexual-assault-datingdomestic-violence-and-stalking/
Winston-Salem State University	http://www.wssu.edu/administration/legal-affairs/policies/students/student-code-of-conduct.pdf

APPENDIX C

List of sampled schools that allow for questioning via disciplinary panel/investigation team

School Name	Web Address of Source
Angelo State University	http://www.angelo.edu/student-handbook/code-of-student-conduct/conduct-procedures-student.php
Arkansas State University	http://www.astate.edu/a/student-conduct/files/Student+Handbook+1.8.16.pdf
Bloomsburg University of Pennsylvania	http://www.bloomu.edu/policies_procedures/4790
Boise State University	https://deanofstudents.boisestate.edu/scp-codeofconduct/scp-codeofconduct-section5/
Boston College	http://www.bc.edu/publications/studentguide/judicial/boardprocedures.html
California State University (System)	http://www.csus.edu/student/Policies_Procedures/Student%20Conduct%20Procedures.html
Chapman University	http://www.chapman.edu/students/policies-forms/student-conduct/student-conduct-procedures.aspx
Columbia University in the City of New York	http://sexualrespect.columbia.edu/files/sexualrespect/content/080-03147%20Gender%20Based%20Misconduct_JL_v3.pdf
Community College of Allegheny County	https://www.ccac.edu/Academic_Rules_and_Regulations.aspx
Hofstra University	https://www.hofstra.edu/StudentAffairs/DeanOfStudents/commstandards/commstandards_policies_sexualassault.html
Illinois Institute of Technology	https://web.iit.edu/student-affairs/handbook/fine-print/conduct-discipline
Indiana University	www.studentcode.iu.edu/procedures/iu-wide/sexualmisconduct.htm
Kennesaw State University	http://scai.kennesaw.edu/procedures/sexual-misconduct/formal-resolution.php
Marquette University	http://www.marquette.edu/osd/policies/conduct/conduct_procedures.shtml#Conduct_Hearing_Procedures

School Name	Web Address of Source
Missouri State University – Springfield	http://www.missouristate.edu/studentconduct/12331.htm#Article6
Modesto Junior College	https://www.yosemite.edu/trustees/board_policy/5500%20Standards%20of%20Student%20Conduct.pdf
North Dakota State University	https://www.ndsu.edu/fileadmin/policy/601.pdf
Rowan University	http://www.rowan.edu/studentaffairs/communitystandards/documents/StudentCodeofConduct09-10Web1.pdf
Rutgers University	https://slwordpress.rutgers.edu/studentconduct/wp-content/uploads/sites/46/2016/03/StudentPolicyProhibitingSexualHarassment.pdf
State University of New York (System)	http://system.suny.edu/sexual-violence-prevention-workgroup/policies/response/
Temple University	http://policies.temple.edu/PDF/394.pdf
Texas Christian University	http://www.studenthandbook.tcu.edu/student_handbook.pdf
UC Berkeley	http://policy.ucop.edu/doc/2710641/PACAOS-Appendix-E
University of Central Oklahoma	http://www.uco.edu/student-affairs/conduct/files/codeofconduct.pdf
University of Cincinnati	https://www.uc.edu/conduct/Code_of_Conduct/nonacademic-misconduct.html
University of New England	http://www.une.edu/sites/default/files/Student%20Handbook_8-5-15_FINAL.pdf
University of Toledo	http://www.utoledo.edu/policies/main_campus/student_life/pdfs/3364_30_04_Student_code_of_conduct.pdf

APPENDIX D

List of sampled schools that do not (explicitly) afford the right to question witnesses

School Name	Web Address of Source
Auburn University	https://sites.auburn.edu/admin/universypolicies/Policies/CodeofStudentDiscipline.pdf
Benedictine University	https://www.ben.edu/student-life/student-handbook.cfm#Disciplinary-and-Counseling-Records-Procedure
Blinn College	http://pol.tasb.org/Policy/Download/1204?filename=FMA%28LOCAL%29.pdf
California Baptist University	http://www.thezonelive.com/SchoolStructure/CA_CaliforniaBaptistCollege/handbook.pdf
Central Connecticut State University	http://web.ccsu.edu/studentconduct/codeofconduct.asp
Cerritos College	http://cms.cerritos.edu/uploads/Board/Board%20Policies/Chapter%205/AP_5520.pdf
College of San Mateo	collegeofsanmateo.edu/collegepolicies/disciplinaryprocedures-step2.aspx
College of William and Mary	http://www.wm.edu/offices/compliance/policies/proposed_policies/student_misconduct_procedure/index.php#vi
Daytona State College	https://www.daytonastate.edu/files/Student_Handbook.pdf
Florence-Darlington Technical College	www.fdtc.edu/academics/registrar/student-code-of-conduct-manual-august-2015.pdf
Frederick Community College	http://frederick.edu/jobs-hr/policies-and-procedures/policyproceduredocuments/code-of-student-conduct.aspx
Frostburg State University	http://www.frostburg.edu/fsu/assets/File/titleix/Procedures.pdf
Gadsden State Community College	http://www.gadsdenstate.edu/SexualMisconductPolicy.pdf
Harvard University	http://titleix.harvard.edu/files/titleix/files/harvard_student_sexual_harassmnt_procedures.pdf?m=1441919500

School Name	Web Address of Source
Indiana Institute of Technology	http://registrar.indianatech.edu/wp-content/uploads/sites/13/Student-Handbook.pdf
Kansas State University	https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures
Kutztown University of Pennsylvania	http://www.kutztown.edu/about-ku/administrative-offices/student-conduct/policies-and-procedures.htm
Lewis University	http://www.lewisu.edu/welcome/offices/hr/sexualmisconduct.htm
Luzerne County Community College	http://www.luzerne.edu/studentlife/LCCC2014-15StudentHandbook.pdf
Madison Area Technical College	http://madisoncollege.edu/harassmentdiscrimination
Millersville University of Pennsylvania	http://www.millersville.edu/services/judicialaffairs/files/Student%20Code%20of%20Conduct.pdf
Monmouth University	http://www.monmouth.edu/uploadedFiles/Content/University/student-life/student-services/SexualMisconductPoliciesAndProcedures.pdf
Nashville State Community College	http://www.nsc.edu/content/resources/Student_Code_of_Conduct_Policy.pdf
Pitt Community College	http://www.pittcc.edu/experience-pcc/student-services/forms-and-documents/Student-Code-of-Conduct-Policy.pdf
Pulaski Technical College	http://www.pulaskitech.edu/current_students/student_handbook.pdf
Rowan-Cabarrus Community College	https://www.rccc.edu/catalog-2015-2016/wp-content/uploads/sites/74/2012/06/Title-IX-Reporting.pdf
Salt Lake Community College	http://www.slcc.edu/policies/docs/Student_Code_of_Conduct.pdf
Southwest Tennessee Community College	http://catalog.southwest.tn.edu/content.php?catoid=8&navoid=417
Stephen F. Austin State University	http://www.sfasu.edu/policies/2.13_Sexual_Misconduct_-_dcd_edits_-_updated.pdf

School Name	Web Address of Source
Syracuse University	https://issuu.com/syracuseosrr/docs/student_conduct_system_handbook_fin
The City College of San Francisco	https://www.ccsf.edu/en/student-services/StudentAffairs/Conduct/_jcr_content/col2parsys/documentlink_1/file.res/Student%20Code%20of%20Conduct%20&%20Due%20Process.pdf
Touro College	https://www.touro.edu/title-ix-policy/
Tufts University	http://oeo.tufts.edu/wp-content/uploads/Sexual-Misconduct-Adjudication-Process-12182015.pdf
University of Alaska Anchorage	https://www.uaa.alaska.edu/deanofstudents/studentconduct/judicialreview.cfm#CP_JUMP_1635105
University of Hawaii (System)	studentaffairs.manoa.hawaii.edu/policies/conduct_code/
University of Maryland	http://umuc.edu/policies/studentpolicies/stud15100.cfm
University of Minnesota-Duluth	http://regents.umn.edu/sites/regents.umn.edu/files/policies/Student_Conduct_Code.pdf
University of Texas at Austin	http://www.policies.utexas.edu/policies/prohibition-sexual-discrimination-sexual-harassment-sexual-assault-sexual-misconduct#responsibilities-procedures
University of the Cumberland	https://www.ucumberlands.edu/downloads/students/handbook.pdf
West Georgia Technical College	http://www.westgatech.edu/catalog/studenthandbook.pdf
Worcester Polytechnic Institute	https://www.wpi.edu/Images/CMS/CampusLife/code-of-conduct.pdf
Worcester State University	http://www.worcester.edu/Student-Conduct/
Yavapai College	https://www.yc.edu/v5content/policies/docs/4-student/4.01.pdf
York Technical College	https://www.yorktech.edu/uploadedFiles/Pages/Campus_Life/_content/Student%20Code.pdf