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# Gender Equity and Due Process in Campus Sexual Assault Adjudication Procedures

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**ABSTRACT**

Title IX prohibits sex discrimination in federally funded education programs. In 2011, the Department of Education under President Obama issued a Dear Colleague Letter (DCL) advising schools of their obligation to protect Title IX rights by more effectively responding to campus sexual assault. Many observers hoped that this would promote gender equity. Yet it also generated a backlash, as critics charged schools with stripping accused students of due process rights in campus adjudication procedures. We conducted content analysis of the 2016–17 sexual misconduct policies of 381 American colleges and universities to analyze how well adjudication procedures created in response to the DCL attended to both gender equity and due process requirements. The state of adjudication at this pivotal moment provides an empirical baseline from which to assess equity in university sexual misconduct procedures. We found that most school procedures for investigating and adjudicating complaints of sexual misconduct included *hybrid* models that incorporated due process protections while acknowledging (but often not fully meeting) Title IX obligations. To our knowledge, this is the only large-scale national study of how schools have reconciled Title IX and due process rights in adjudication procedures.

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Gender equity in higher education is of core concern to scholars and practitioners (Allan, 2011). Title IX, the U.S. civil rights law that prohibits sex discrimination in federally funded education programs, has been hailed as an important tool for achieving gender equity (Ferree & Hess, 1995). For twenty-five years, the law was interpreted by schools, courts, the Department of Education (ED), and the public to apply primarily to athletics and academics (Anderson et al., 2006). Starting in 1980, the courts responded to increasing evidence of the prevalence of sexual violence on campuses *and its harm* (to students' physical and mental health, as well as their academic success) by interpreting Title IX to include protections from sexual harassment and assault (Reynolds, 2019). And yet, thirty years after the courts' intervention, roughly one in five

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undergraduate women experience sexual assault while on campus (Cantor et al., 2020). In 2011, the Obama administration sought to change this: the Office for Civil Rights (OCR), the federal agency responsible for enforcing Title IX, released a 19 page "Dear Colleague" letter (DCL), citing research on the prevalence of sexual violence on campuses and stating that a failure to provide an educational environment free from sexual violence constitutes a violation of student civil rights (Lewis et al., 2019). The OCR followed the DCL by dramatically increasing enforcement (Anderson, 2016).

After the DCL, universities engaged in a flurry of activities—hiring new staff, rolling out new educational programs, designing new websites, and updating policies. But the changes that generated the most heated—and politically significant—response were those involving procedures for adjudicating reported incidents of sexual misconduct. Some credited the new guidance for finally bringing attention to the ways in which university adjudication procedures should attend to the unique traumas of sexual violence (Anderson, 2016; Clark & Pino, 2016; Lewis et al., 2019). Others, including law professors (Halley, 2015; Rudovsky et al., 2015), civil liberties organizations, defense attorneys, and men's rights organizations (Brake, 2017), argued that schools overcorrected for earlier deficiencies in procedures for adjudicating sexual assault by stripping away due process protections for the accused (Ellman-Golan, 2017).[1] Critics took particular issue with adjudication models that eschewed a live hearing in favor of trained professionals to investigate and resolve reports of sexual misconduct, stating that these models situated a single individual as the "investigator, judge, and jury" (Melnick, 2018, p. 204). The media amplified claims that men were falsely accused without a meaningful chance to defend themselves (Smith, 2014; Watanabe, 2014; Yoffe, 2014). By the time Betsy DeVos took over as Secretary of Education under President Trump in 2017, the "overcorrection" story dominated the media (Behre, 2019). In September 2017, DeVos rescinded the DCL and other Obama-era OCR guidance (U.S Department of Education 2017 2017) and in May 2020 issued new regulations rolling back victim protections and prioritizing the due process rights of accused students (Behre, 2019; Holland et al., 2020). In June 2021, the Biden Administration's Department of Education held a public hearing on Title IX and announced plans to initiate a rulemaking session to amend the regulations.

The outcry sparked by the DCL raises two interrelated questions: (1) Did universities respond to the DCL by creating procedures that stripped students of their due process rights? (2) Did the adjudication procedures motivated by the DCL serve the goal of gender equity? The answers to these questions matter because while universities are obligated to protect both gender equity and student due process rights, those rights can in some cases conflict. Title IX requires schools receiving federal funding to provide an education free from

sexual violence, but extensive procedural protections for accused students (e.g., protections that approach those provided for criminal defendants) may make it difficult to protect victims or sanction perpetrators.

We investigated how universities responded to these competing legal mandates through content analysis of the sexual misconduct policies of a nationally representative sample of 381 American colleges and universities. We draw on theories of organizational responses to law to guide our analysis. By focusing on 2016–17 policies, we observed school procedures five years after the DCL (allowing time for schools to make changes to their policies), but before the DeVos changes went into effect. The status of the field at this juncture provides insights into how universities respond to legal and political pressure to create an equitable learning environment for all students. This case offers lessons not only for administrators seeking to create fair sexual misconduct procedures, but for scholars and practitioners interested in the way the law both drives and impedes efforts to achieve equity.

## Conceptual framework

Higher education scholarship has long drawn on organizational and institutional theories to explain changes in the field (Cai & Mehari, 2015). We draw on work in this tradition, particularly Lauren Edelman's legal endogeneity theory, for our conceptual framework (Edelman, 2016). This body of scholarship is relevant, as it takes as a central concern why civil rights laws are rarely successful in eradicating discrimination. Liliana M. Garces and colleagues similarly find sociolegal theory useful in the analysis of "the role of law in educational policy related to equity, diversity, and inclusion" (Garces et al., 2021, p. 1062; see also, Garces & Bilyalov, 2019; Garces & Cogburn, 2015).

Edelman and colleagues (Dobbin, 2009; Dobbin & Sutton, 1998) challenge the view that laws work by exerting a top-down, coercive pressure on organizations, and instead posit that compliance with the law is mediated by actors within the organization (Edelman, 2008). Most civil rights mandates are ambiguous about what they specifically require for compliance, and yet organizations face liability if they are found to be noncompliant (Edelman, 2016). Organizational actors respond to this quandary by providing their own interpretations of what the law requires, typically developing policies or practices that are *minimally disruptive* to the organization and that demonstrate *symbolic*, rather than substantive, compliance with the law. After a period of experimentation, some policies or practices become widely adopted, taken-for-granted ways of signaling legal compliance, ultimately weakening the potential of laws to produce reform (Edelman et al., 2011). Because organizations have the capacity to shape the meaning of law in this way, legal scholars often refer to law as *endogenous* or "generated within the social realm that it seeks to regulate" (Edelman, 2008, p. 339).

Before the field converges on a resolution to ambiguities in new legal mandates, organizations will experiment with different compliance solutions, typically interpreting new legal requirements in the context of existing policies and practices (Dobbin, 2009; Kelly, 2010). In some cases, organizations will simply fail to update their existing policies to reflect new legal requirements; in other cases, existing policies mediate how or to what extent organizations comply with new requirements (Kelly, 2010). But rarely do new mandates simply vanquish old policies and practices.

Legal endogeneity theory thus suggests that it was unlikely that universities would have responded to the DCL with the wholesale overcorrection described by critics (Harris & Johnson, 2019). To understand the context in which schools responded to the DCL, we outline the legal mandates shaping adjudication procedures, what sociolegal scholars sometimes call "law on the books." We show that universities were responding not only to the ambiguous directives of Title IX, but also to constitutional due process requirements that were deeply embedded in university systems for adjudicating complaints of student misconduct. We then describe the range of ways schools interpreted and reconciled these legal mandates.

## Law on the books: The legal landscape for investigating and resolving sexual misconduct complaints

Schools are responsible for navigating a complex mix of statutory, regulatory, and legal mandates for adjudicating campus sexual misconduct. We focus here on the legal obligations posed by Title IX and due process jurisprudence (Konradi, 2017).

### *Title IX protections for students*

Title IX of the Education Amendments of 1972 states, "No person . . . 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 for activity receiving Federal financial assistance." Almost all higher education institutions receive federal funding, thus the civil rights protections afforded by Title IX extend to virtually all colleges and universities. Courts have defined sexual harassment and sexual violence as forms of sex discrimination prohibited by Title IX (*Alexander v. Yale University, 1979/1780*; Reynolds 2019), and held schools liable for failing to take appropriate action in response to reports of sexual assault (*Davis v. Monroe County Board Of Education, 1999*; Gebser v. Lago Vista Independent School District, 1998).

Title IX is enforced by the Department of Education's Office for Civil Rights, which occasionally issues official regulations and guidance documents to clarify actions that schools should or must take to protect students from sex

discrimination. In the 1997 Guidance, the OCR advised schools that they were required to post a notice of nondiscrimination, and to adopt and publish grievance procedures for cases involving sexual harassment, defined as "unwelcome conduct of a sexual nature about which the school knows or should know" (U.S. Department of Education, 1997). The 1997 Guidance also required schools to conduct "prompt, thorough, and impartial" investigations of sexual harassment and to designate an employee to coordinate Title IX compliance. While legal observers note that the 1997 Guidance, reaffirmed in 2001 Guidance (U.S. Department of Education, 2001), applied to sexual violence in addition to sexual harassment, many schools did not change their procedures to specifically address campus sexual assault (Dauber & Warner, 2019).

The 2011 DCL sought to both clarify school responsibilities for addressing sexual violence and outline a comprehensive approach to prevention (Lewis et al., 2019). The DCL advised schools to use the "preponderance of the evidence" standard in cases involving sexual harassment or violence (U.S. Departement of Education, 2011, p. 11), a standard that schools widely used in campus adjudication proceedings at the time (Karjane et al., 2002; Stoner & Cerminara, 1990), and recommended that schools provide "interim remedies" (e.g., no-contact orders or alternative housing or class schedules) while investigations were ongoing. The DCL specified that both parties should have "equal opportunities" to present relevant witnesses and evidence and advised that if an appeal is provided, it must be available to both parties. The DCL suggested that civil rights investigatory procedures could be applied to student sexual misconduct instead of more traditional adversarial hearing models. Finally, the DCL discouraged schools from allowing parties to personally cross-examine each other. Three years later, in an additional 46-page Q&A guidance, the OCR recommended that university employees involved in the adjudication process should be trained in the impact of trauma on victims and advised that the Title IX coordinator must have knowledge of all Title IX complaints at the school (U.S Department of Education, 2014).

### *Due process rights for students*

Since 1961, courts have held that students at public universities are constitutionally entitled to due process protections in serious disciplinary hearings.[2] But the question of what process is due remains an unsettled area of law. *Dixon v. Alabama State Board of Education,* (1960/1961) and Goss v. Lopez, (1975) together established that due process requires, at minimum, written notice, an opportunity for a hearing, and substantial evidence to support the penalty. Beyond those requirements, courts have disagreed on what procedural protections are necessary, including the right to counsel, the right to confront witnesses, and the right to invoke privilege against self-incrimination

(Dutile, 2001; Swem, 1987). While courts have disagreed, they have historically been consistent in holding that students are *not* entitled to all the procedural safeguards given to criminal defendants (Amar et al., 2014; Stoner & Cerminara, 1990).

In the wake of controversies around the DCL, accused students began suing their schools, alleging due process violations in university proceedings, unfair disciplinary sanctions, or anti-male bias in cases where decision makers were trained in trauma-informed procedures (Behre, 2019; Buzuvis, 2017). Many of these claims proved legally meritless, but some have raised due process issues that courts considered legitimate (Dauber & Warner, 2019; Harris & Johnson, 2019). At the same time, courts have held schools liable for failing to adequately investigate claims of sexual violence or to protect victims from being further harassed or retaliated against by their assailant or third parties (Cantalupo, 2009). The rate of litigation has proven to be significant for colleges and universities, resulting in sizable financial settlements for both complainants and respondents (Anderson, 2019).

Caught between the requirements of Title IX to provide an educational environment free from sexual violence and the mandate to ensure that all disciplinary procedures safeguard the due process rights of accused students, schools received little specific guidance from OCR on how to handle sexual misconduct complaints. Until recent lawsuits (e.g., *Doe v. Baum,* (2017/2018) and the 2020 regulations, both the Department of Education and the courts granted schools broad discretion in the design of student disciplinary procedures (Stoner & Cerminara, 1990). The ambiguity of these legal mandates—and their potential conflicts—enabled organizational actors to interpret the law in a range of ways.

## Interpreting the law: Procedural models for adjudicating complaints

Adjudication procedures prior to the DCL were designed primarily in response to constitutional due process requirements and paid little attention to victim rights. The DCL motivated schools to create adjudication processes more protective of victim's civil rights under Title IX (Amar et al., 2014; Konradi, 2017; Smith, 2017; Wilgus & Lowery, 2018). These two general approaches to adjudication—what we refer to as the Adversarial Hearing model and the Civil Rights Investigative model—respond to distinct bodies of law and are rooted in distinct histories of managing student and faculty/staff conduct. They rely on different forms of professional expertise and protect rights in different ways. Legal scholars have also identified hybrid models that incorporate aspects of both hearing and investigative procedures, and which attempt to reconcile both bodies of law (Cantalupo, 2020).

### *Adversarial hearing models*

Historically, campus sexual assault procedures were administered by student conduct or student affairs professionals who viewed discipline through the lens of education and moral learning (Gehring, 2001; Lancaster, 2012). The primary purpose of disciplinary proceedings, according to this perspective, is student learning and development (Association for Student Conduct Administration, 2014; Gehring, 2001). But the regulation of student conduct took a legalistic turn in the 1960s when the courts required colleges and universities to provide elements of due process (*Dixon v. Alabama State Board of Education* (1960/1961) and *Goss v. Lopez* (1975). In his 10-year longitudinal study of student discipline, Dannells (1997) documented a "creeping legalism," as schools formalized disciplinary procedures, created detailed rules, and incorporated aspects of adversarial civil litigation proceedings into their processes. The Adversarial Hearing model was the dominant approach to adjudicating complaints of sexual misconduct prior to the DCL (Amar et al., 2014; Bohmer & Parrot, 1993; Karjane et al., 2002).

Adversarial Hearing models (see Figure 1 for key characteristics) rely on a hearing, where parties present information to a hearing board made up of faculty, staff, and sometimes students (Konradi, 2017; Wilson, 2015). Student handbooks often describe elaborate procedures for these hearings, with significant due process protections for accused students, including a trial-like setting that allows parties to confront and question evidence provided by witnesses (Dannells, 1997). The university generally does not conduct an independent investigation. Instead, the parties themselves are responsible for

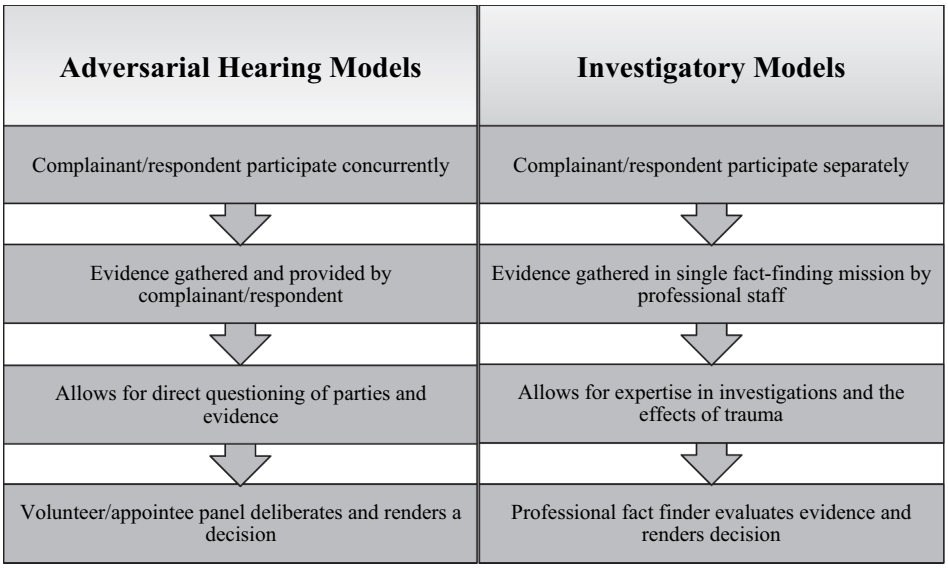



**Figure 1.** Key characteristics of adversarial hearing and civil rights investigatory models.

gathering and producing evidence. The hearing board assesses whether a violation occurred, and if the board finds the accused responsible, it also recommends a sanction (Smith, 2017).

Because the Adversarial Hearing model was the product of court orders to incorporate due process protections in disciplinary proceedings (Dixon v. Alabama State Board of Education (1960/1961) and Goss v. Lopez (1975), it is often held up as the model best suited to protecting the rights of students accused of sexual misconduct. The student conduct hearing is staffed by volunteer members of the university community rather than by the administration. The hearing board's deliberations also permit panel members to challenge biases, assumptions, or mistakes, enhancing the impartiality and fairness of the proceedings (Smith, 2017).

Critics, however, have noted the failure of this model to attend to the trauma of sexual violence (Bohmer & Parrot, 1993; Cantalupo, 2020). Adversarial Hearing models were developed to protect students from being arbitrarily expelled at the whim of the institution. Due process rights were necessary to protect the weaker party—the student—from the greater power of the school (O'Toole, 1972). Administrators did not anticipate that the procedures would be used to adjudicate peer sexual assault—cases where the harm inflicted by one student on another could be severe and often unobserved by witnesses (Stoner & Cerminara, 1990). Adversarial Hearing models in their pure form thus include few victim protections. Because the university does not investigate, the burden is on the parties to find and present evidence. Features of Adversarial Hearing models lauded for their due process protections — such as in-person cross-examination by the respondent or respondent's lawyer — are known to be re-traumatizing for survivors of sexual assault (American Bar Association Commission on Domestic & Sexual Violence, 2019; Cantalupo, 2020; Konradi, 2017; Parsons & Bergin, 2010). Hearing participants are typically required to reveal personal information to multiple people, and potentially in the presence of the student accused of perpetrating the violence—all of which can be re-traumatizing (Cantalupo, 2020). Finally, hearing procedures typically require the complainant to recount (as many as six times) the trauma of the assault (Cantalupo, 2020).

### *Civil rights investigative models*

U.S. civil rights laws motivated a second approach to adjudicating complaints of sexual misconduct. Starting in the late 1970s, employers began responding to legal and political pressure to reduce sexual harassment in the workplace by creating new antidiscrimination policies and grievance procedures and hiring new personnel to investigate and resolve complaints (Edelman, 2016). The Civil Rights Investigative model (Cantalupo, 2020) of adjudicating complaints of misconduct (sometimes referred to as a "single investigator" model) has its lineage in the administration of workplace antidiscrimination laws (Wilgus &

Lowery, 2018). Courts extended the logic of sexual harassment from the workplace to the educational context (*Alexander v. Yale University*, 1979/1980; *Davis v. Monroe County Board of Education*, 1999; *Gebser v. Lago Vista Independent School District*, 1998), and the DCL suggested that procedures in place in the university employment context could be applied to student sexual misconduct (ED, 2011).

In this approach, a professional trained in the administration of civil rights law handles the investigation in its entirety (see Figure 1). The investigator interviews the parties and witnesses, and reviews documents and physical evidence (Konradi, 2017). Attuned to the unique challenges of sexual misconduct, contact between the parties is avoided; the complainant and respondent do not cross-examine each other or witnesses (Ellman-Golan, 2017). In its pure form, the investigator decides the finding of responsibility and recommends a sanction without the evidence being adjudicated in a live hearing.

There are advantages and disadvantages to Civil Rights Investigative models. They bring expertise to the fact finding and complaint resolution process (Ellman-Golan, 2017). There are fewer people involved, greater consistency across cases, cases are resolved more quickly, and perhaps most critically, processes may be less traumatizing for victims (Cantalupo, 2020; Smith, 2017). Civil Rights Investigative models also remove the burden of marshaling evidence from the student parties. Critics have argued that the model is less transparent than the Adversarial Hearing model. There can be fewer opportunities for parties to provide input during the process. And with no direct cross-examination, critics allege that there are fewer due process protections for accused students (Hendrix, 2012; Lave, 2016). Finally, placing both the investigation and finding of responsibility in the hands of one person—without check or review—introduces the potential for bias (Smith, 2017).

### *Hybrid models*

Critics of the DCL asserted that schools abandoned Adversarial Hearing models in favor of Civil Rights Investigative models (Halley, 2015; Lave, 2016). But legal endogeneity theory suggests that university actors would not simply abandon due process protections. Instead, we might expect schools to meet the demands of multiple legal statutes by layering or integrating models—creating hybrid procedures that combine aspects of investigative and adversarial hearing approaches. And indeed, in 2018, the prestigious American Law Institute (ALI) produced a *Preliminary Draft of its Principles of the Law on Student Misconduct* in which they argued that hybrid procedures might preserve the advantages of both models.

The defining characteristic of hybrid models is what we call a *handoff*. Handoffs involve either a change in the approach (or model) used to adjudicate a complaint or the introduction of additional forms of expertise. For

example, a policy might require a Title IX officer to investigate a complaint before a hearing board considers the evidence—this would involve a shift between investigative and hearing approaches. Or the office or individual responsible for decision-making within the complaint process might change. For example, a Title IX officer might investigate, but a Student Conduct officer decides the finding and sanction.

To date, researchers have identified two distinct ways to combine the strengths and weaknesses of investigative and hearing approaches—although one signals a greater understanding of gender-based violence and therefore advances the goal of gender equity more readily than the other. The Investigation-and-Hearing-Hybrid (Cantalupo, 2020) relies on a trained investigator to produce an initial report and uses a live hearing to review the findings, hear testimony from parties and witnesses, and make a determination. From the perspective of advancing gender equity, this approach improves on Adversarial Hearing models, as it brings the expertise of a civil rights investigator and shifts the burden of presenting the case from the student parties to university personnel. From the perspective of due process advocates, a hearing provides robust opportunities for the accused to contest evidence, question witnesses, and avoid the potential biases of a single decision maker. Nevertheless, the use of a hearing in this hybrid model risks re-traumatizing survivors.

A second hybrid—the Investigation-and-Deliberative-Panel-Hybrid (Cantalupo, 2020)—more clearly advances the goals of equity promised by Title IX than the Investigation-and-Hearing-Hybrid, while also incorporating more due process protections than Civil Rights Investigative models. In this approach, a professional investigator prepares a report (like the Civil Rights Investigative model), and then hands off the report to a "deliberative panel." The panel is typically constituted by non-student members of the community, and its objective is to review the investigator's report and decide whether a policy violation has occurred (Cantalupo, 2020). The panel may require the investigators to appear for questioning—and sometimes the parties as well—but unlike with Adversarial Hearings, parties generally appear separately (Cantalupo, 2020). Like the other hybrid model, the Investigation-and-Deliberative-Panel-Hybrid avoids the potential biases of a single decision maker and offers additional due process protections for the accused, but it importantly avoids the re-traumatization of a hearing (Cantalupo, 2020).

It is also possible for hybrid procedures to combine the weaknesses of both investigatory and hearing models. Handoffs can introduce the need for repetitive testimony and multiple rounds of review (Smith, 2017). The more handoffs there are—from investigation to finding of responsibility to sanctioning to appeals—the more a case becomes a war of attrition, with victims of sexual assault (who often experience adjudication as re-traumatizing) more likely to give up (Cantalupo, 2020; Khan et al., 2018).

Given the variety of adjudication models that colleges and universities might have adopted after the DCL, how did the field respond? Did schools, as critics asserted, shift toward Civil Rights Investigative models in response to the DCL? To our knowledge there has been no systematic, nationally representative analysis of sexual misconduct adjudication procedures in the post-DCL period, making it impossible to assess claims of widespread overcorrection. This is the task of this paper.

## Research design and methods

To determine how schools attempted to reconcile Title IX and due process rights five years after the DCL, we collected and coded the 2016–17 sexual misconduct policies of 381 American colleges and universities. By examining policy documents, we trace university responses to pressures to simultaneously improve gender equity and protect student due process rights.

### *Sample*

The sample was drawn from the population of degree-granting, public and private not-for-profit, 4-year institutions with undergraduate enrollments of 900 or more. From this list, we selected two overlapping samples: a random sample of 268 schools and a certainty sample of 114 schools. The certainty sample was constructed to capture peer effects among public state flagships, athletic conferences (Big 10, Big 12, NESCAC, and Peach Belt), Ivy League schools, and the ten most selective Historically Black Colleges and Universities, women's colleges, and Christian colleges. (The full list of schools and a table with full sample descriptive characteristics are available in an online supplement). This study is of relatively elite institutions and thus cannot speak to policy responses at smaller, two-year, or for-profit institutions not captured by our sampling criteria. However, we describe the procedures of a much broader array of institutions than typically referenced in the national conversation, which has focused primarily on Ivy League and flagship schools.

### *Developing and testing the coding instrument*

Relevant policy documents were scattered across school websites in student codes of conduct (23%), sexual harassment policies covering both employees and students (15.5%), standalone sexual misconduct policies (49%), administrative handbooks (4.5%), and websites dedicated to sexual assault (7%). Like previous studies of sexual assault policy information on university websites (Dunlap et al., 2018; Konradi, 2017), we used content analysis to document variation in adjudication procedures (Hsieh & Shannon, 2005). Beginning

with 15 schools differing in size, sector, and region, we used conventional content analysis to inductively generate categories that described the range of procedures (Hsieh & Shannon, 2005). We identified seven distinct phases of the adjudication process (reporting, complaint evaluation, fact finding, determination of finding, sanction, appeal, final review). We also found that it was common for the complaint to be handed off to different university officials within and across the phases. These handoffs often accompanied procedural changes in how the complaint was adjudicated (e.g., from an investigatory to a hearing approach). These inductive observations informed the second phase of instrument development, as this process revealed the complex hybridization, and the need to code *each phase* of the process for whether an investigative, adversarial, or deliberative approach was used, and which university officials were involved.

We input the coding scheme into Qualtrics and tested the instrument with our research team of faculty and graduate students to refine wording, answer choices, and flow. We paired team members and assigned each to code one of four schools to 1) test whether both coders could arrive at the same answers and 2) to identify situations where the policy did not fit into any response category, indicating the need for additional options. In full team meetings we reviewed coder disagreements, policy features not captured by the instrument, and areas of confusion. The team revised the instrument, added additional schools to test, and discussed until the instrument reliably captured procedures. (The final coding instrument is available as an online supplement).

### Coding the policies

We recruited and trained 51 undergraduate coders to code the policy documents from all 381 schools. Every policy was initially coded by two students independently in a supervised research lab. Every week, student coders gathered for lab meetings to compare coding results and review policy language to settle divergent interpretations. Each pair presented their joint work to the first author who verified coding for consistency across the entire sample. Every school was coded and reviewed three times, increasing the validity and reliability of the data. Here we focus on questions that meaningfully distinguished school adjudication models.

### Analysis of adjudication models

Two questions reflecting how schools handled investigations and determinations about responsibility allowed us to construct measures of each school's adjudication model. To determine how schools approached fact finding, coders were asked "Which policy choice best reflects how the school conducts

fact finding for cases of sexual misconduct?" Coders were given options to select an investigator, a live hearing, or a combination of an investigator and a live hearing (see online supplement for question details). To assess how the finding was determined, coders were directed to indicate whether a—and what type of—handoff was involved, specifying whether the complaint was given to a university official or panel/board, and whether the handoff involved a live hearing (see online supplement for question details).

Schools that used an investigation for fact finding and *did not* include a handoff for determining responsibility were classified as Civil Rights Investigative models. Schools that used a live hearing for fact finding *and* determination of responsibility were classified as Adversarial Hearing models. Schools that used an investigation for fact finding *and* included a handoff were classified as hybrid models and labeled according to the type of handoff. Handoffs to another decision maker or review board that *did not* include a hearing were categorized as Investigation-and-Deliberative-Panel-Hybrids. Post-investigation handoffs to a live hearing were categorized as Investigation-and-Hearing-Hybrids. Schools that allowed students to reject the investigation finding and hold a hearing to re-start the case were labeled Reject-and-Restart-Hybrids. Schools lacking information on either or both variables measuring fact finding and determinations of responsibility were categorized as Incomplete models. Three schools presented coders with two separate models (one investigative and one hearing) with no handoffs across the approaches, leading us to label them as Dual Process models. We identify schools by name because these documents are in the public domain.

### Limitations

Our analysis cannot speak to how schools adjudicated cases in practice. We suspect that procedures in practice are rarely better than described on paper, and thus by focusing on written policies, we capture the "best case" for how well schools handled cases. A small but growing body of research exists on how survivors (Harris, 2020), Title IX officers (Cruz, 2021), victim advocates (Brubaker, 2019), and faculty (Hurtado, 2021) experience these procedures.

We must also caution the reader that schools may have modified their adjudication processes since we coded the policies to comply with the 2020 regulations. Our objective here is not to describe the current state of the field, but to evaluate how a nationally representative sample of schools responded to pressures to both simultaneously promote gender equity and safeguard the due process rights of accused students. We provide an analytical framework for evaluating adjudication models as schools refine their procedures in this contested space.

## Results

Schools deployed a remarkably heterogeneous array of approaches to campus sexual assault adjudication, with relatively few using Civil Rights Investigative models. As Figure 2 indicates, only 20.5% (n = 78) used Civil Rights Investigative models, meaning that a single university official—or set of officials—investigated the case and determined whether a policy violation occurred. This refutes the claim that schools widely adopted this model in response to the DCL. Fewer schools—10.8% (n = 41)—relied on Adversarial Hearing models. The majority (62.2%, n = 237) described hybrid approaches, incorporating at least one handoff during the investigation and determination of the finding. Not all schools provided procedures with adequate detail to determine how they would adjudicate a case. We classified 5.8% (n = 22) school processes as Incomplete. Three schools (0.8%) described full versions of both investigatory and adversarial hearing procedures, with no handoffs to connect them and no explanation of which procedures would be deployed under what circumstances, and were coded as Dual Process.

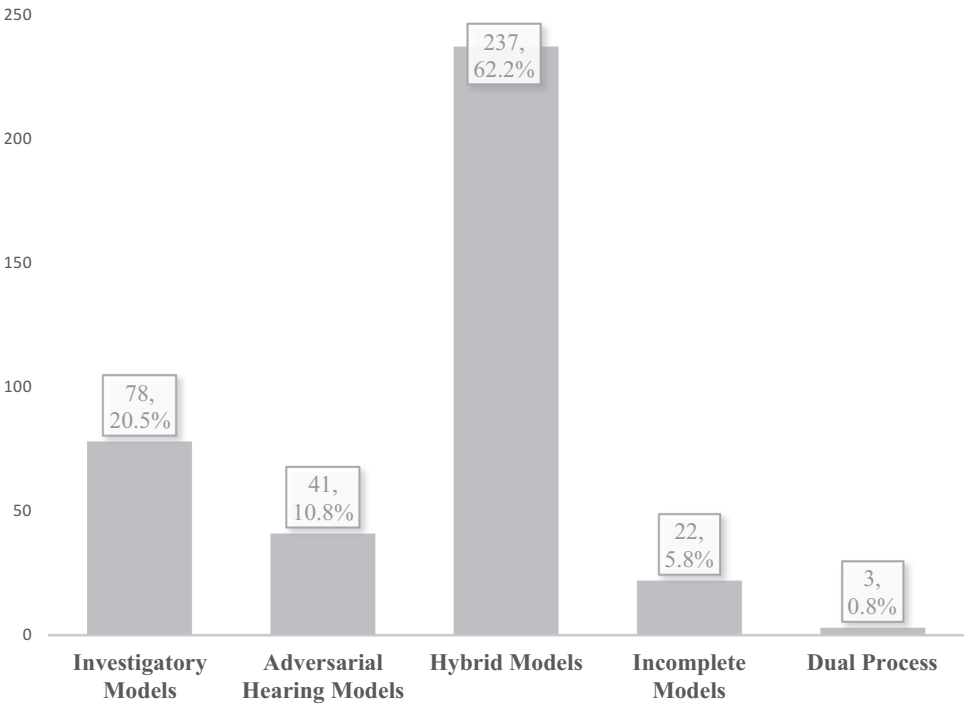



**Figure 2.** 2016 University Sexual Misconduct Adjudication Models. n = 381

### Civil rights investigatory models

Civil Rights Investigatory models, adopted by 20.5% (n = 78) of the schools, relied on a trained professional to conduct the investigation and decide responsibility. One of the most common criticisms of investigatory models was that they disregard the due process rights of accused students by permitting a single individual to both investigate and adjudicate complaints of sexual misconduct. Some instantiations of this model did concentrate authority in a single individual to a problematic extent. For example, Marygrove College (n.d.)[3] directed complaints to its Title IX director, who notified the accused student in writing, collected statements from the involved parties and witnesses, coordinated with campus security and law enforcement, and reviewed information concerning "the credibility of the alleged victim and the alleged harasser." After preparing a comprehensive report of findings, the Title IX director made the determination of responsibility and informed the parties. However, few schools employing investigatory models concentrated authority to that extent. To assess the due process protections of investigatory models, we considered whether schools relied on multiple investigators, incorporated student feedback during the investigation,[4] and/or offered students the right to appeal.

One way that schools can avoid bias is to involve more than one individual in the investigation (American Law Institute, 2018). In these cases, the "single investigator" label was a misnomer. For 36% of schools using investigatory procedures, the policy indicated that more than one official participated in the investigation. Princeton University's policy (n.d.), for example, stated that the Title IX coordinator appointed a three-person investigative panel to conduct the investigation. The panelists deliberated and determined the outcome based on majority decision.

A second way schools could provide due process protections was by allowing student feedback before a finding was determined. Among schools using the investigatory model, 30% stated that parties could access each other's statements. Twenty-three percent granted both parties the opportunity to review and/or respond to evidence, and 32% allowed students to review the preliminary investigation report. Only six (1.5%) schools (CSU-Stanislaus, Bates College, College of the Ozarks, Bellevue University, Princeton University, and CSU-Monterey Bay) included all three measures. At Bates College, for example, the complainant and respondent received each other's statements, documentation of evidence, and witness statements "for comment and rebuttal" (Bates College, 2015). Nearly 45% of schools with investigatory models offered no opportunity for student feedback during investigation and determination of the finding.

Finally, the opportunity to appeal provided another important due process safeguard. Most schools relying on investigatory procedures—fully 96%—offered students the opportunity to appeal. The University of Idaho adopted an investigatory model in which the Dean of Students both conducted the

investigation and rendered the decision. However, the respondent had three opportunities to appeal the decision and sanctions, including to the Student Disciplinary Review Board, the Faculty Senate and President, and the Idaho State Board of Regents (University of Idaho, 2014).

Only one school (Louisiana State University-Alexandria) relying on an investigatory model incorporated no due process safeguards—that is, they relied on a solo investigator and did not include the opportunity for students to review evidence prior to the finding or to appeal.

### *Adversarial hearing models*

Adversarial Hearing models, adopted by 10.8% (n = 41) of the schools, relied exclusively on a hearing process to conduct fact finding and decide responsibility. These schools did not investigate complaints, but rather relied on the parties to gather and present evidence. For example, according to the University of Minnesota-Twin Cities policy, hearings were conducted by a five-person panel constituted by students and faculty members. The parties presented their cases verbally and could supplement with "written documents, objects, films, or other materials as exhibits" (University of Minnesota, Twin Cities, 2014). The complainant and respondent were each responsible for bringing their own witnesses and providing enough copies of written materials for the entire panel and opposing party. At the conclusion of the presentation of the evidence, the panel deliberated and decided the finding by majority vote. If the respondent was found responsible, the panel decided on appropriate sanctions and notified the parties of the outcome. By 2016 experts recommended that schools conduct an investigation, not only to avoid placing the investigatory burden on students, but also to minimize institutional risk (Griffin, 2018; Wilson, 2015). These schools were substantially behind the direction of the field.

The DCL strongly encouraged schools to avoid cross-examination to prevent the re-traumatization of survivors. Most schools with Adversarial Hearing models either explicitly stated there would be no direct cross-examination between the parties (32%, n = 13) or allowed the parties to submit questions to the hearing board to ask the other party (36%, n = 15). Four schools (1%) allowed cross-examination during the hearing, whether directly between students or through an advisor. Another nine did not state whether cross-examination was permitted.

### *Hybrid models*

Most schools (62.2%, n = 237) used a hybrid model for adjudicating complaints, meaning that the procedure incorporated a handoff between the investigation and determination of responsibility. We analyzed the handoffs schools described, seeking to distinguish those that provided safeguards for the

rights of both parties from those that introduced unequal burdens. We identified three types of hybrids: Investigation-and-Deliberative-Panel-Hybrids, which incorporate multiple sets of decision makers into the Civil Rights Investigatory approach; Investigation-and-Hearing-Hybrids, which incorporate trained expertise into the investigation stage before a hearing, and Reject-and-Restart-Hybrids, which permit parties to reject the findings of an investigatory process and request that the process begin again with a hearing. Table 1 shows the distribution of these three hybrid models in our sample.

### *Investigation-and-deliberative-panel-hybrids*

In the Investigation-and-Deliberative-Panel-Hybrid model (used by 22.8% of the sample), the investigator(s) summarized their findings in a comprehensive report, but instead of making the determination, they handed off the report to another, usually more senior official or entity to determine responsibility and recommend a sanction. At Wellesley College (n.d.), for example, the Title IX office received the complaint and initiated an investigation, usually with two trained investigators. The investigation followed the usual civil rights procedure: interviewing parties and witnesses, collecting written documents, photos, and other relevant materials, and compiling a report. After allowing the student parties to review and comment on the report, the investigators submitted their findings to the Dean of Students and the administrator of the Wellesley Honor Code Council. These administrators together determined whether the respondent violated the policy.

Investigation-and-Deliberative-Panel-Hybrids protect the Title IX rights of complainants by utilizing the expertise of a trained, trauma-informed investigator and avoiding the risk of trauma involved in a live hearing. But by involving multiple investigators and assigning a different set of people the responsibility of making the determination, such procedures increased impartiality and provided a check against biases—protecting the due process rights of accused students (American Law Institute, 2018).

### *Investigation-and-hearing-hybrid*

Adversarial Hearing models rely on a traditional hearing, where the students collect and present evidence to a hearing board. By contrast, in Investigation-and-Hearing-Hybrids (27.6%, n = 105), the school conducts an initial investigation, typically using a trained investigator who prepares a report and then turns the report over to a hearing board to further deliberate with the

**Table 1.** Distribution of hybrid adjudication models. n = 237.

| Hybrid Type | *n* | % of hybrids | % of sample |
|---|---|---|---|
| Investigation-and-Deliberative-Panel | 87 | 36.7% | 22.8% |
| Investigation-and-Hearing | 105 | 44.3% | 27.6% |
| Reject-and-Restart | 45 | 19.0% | 11.8% |
| Total | 237 | 100% | 62.2% |

participation of the parties and make a determination. Hampden Sydney College (2015) employed this model. After receiving a complaint, the Title IX coordinator assigned an investigator to interview the complainant, respondent, and witnesses. The investigator prepared a "factual report of evidence collected" without conclusions on whether the policy was violated. After receiving the report, the Title IX coordinator convened a hearing board comprised of faculty and staff. The complainant and respondent presented their cases to the board, called witnesses, and submitted questions for the board to ask participants. The hearing board deliberated and made a determination of responsibility by majority vote. Investigation-and-Hearing-Hybrids made use of both approaches, alleviating the burden on the students to collect evidence prior to the adversarial hearing.

### *Reject-and-restart-hybrids*

In 11.8% (n = 45) of schools, processes involved handoffs that re-started the adjudication process, meaning that the parties could reject the findings of the investigation and request a full hearing process to redo the case. These Reject-and-Restart-Hybrids differed from Investigation-and-Hearing-Hybrids in that they did not involve a structured handoff between an investigation and hearing, but rather a full version of an investigatory process followed by a full adversarial hearing prior to an appeal process. The University of Alabama (2015) offered an illustrative example. Together the Office of Student Conduct and Title IX office conducted the investigation and issued a letter detailing their findings and determination of responsibility. The complainant/respondent could either accept the finding or reject it and request a hearing process to re-adjudicate the case. If rejected, a new set of actors began a hearing, essentially starting the process over. This second adjudication of the case occurred *before* the appeals process. After the hearing, the University of Alabama then allowed students to appeal the finding and the sanctions to the Vice President of Student Affairs. Reject-and-Restart-Hybrids allowed students to dispute findings produced during an investigatory process, incorporating an even more robust check on potential bias. However, these processes placed additional burdens on complainants, requiring them to repeat their story multiple times, facing questioning by investigators *and* a hearing board, and engaging with the respondent, whether directly or indirectly, in a lengthy process.

### *Incomplete and dual process models*

Nearly six percent of schools (n = 22) included no information on how investigations were conducted, or decisions made. Coders sometimes found language that mentioned an investigation, but found no description of how the finding of responsibility was decided. In some cases, the policy lacked information about both the investigation and determination processes. The

University of Wisconsin—Green Bay (n.d.) policy, for example, offered few details in their two-page policy. The policy indicated that students could report to the Dean of Students and that an un-identified investigator would interview the accused student and witnesses. The policy concluded: "Once the investigation is complete, the investor [sic] will meet again with the student to explain the next steps of either a final outcome, or going forward with a hearing."

Similarly, we classified three schools as having Dual Processes. Documents described both investigatory and adversarial hearing processes but did not indicate whether the processes intersected or how a case entered a particular process. Troy University's (n.d.) policy, for example, prohibited sexual harassment defined as "unwelcome sexual advances . . . and any other verbal, graphic, or physical conduct." It then described an investigatory procedure handled by Human Resources. Sexual misconduct is mentioned again in the student conduct section, which detailed a hearing procedure. Depending on where a student looked in the document or reported to first, the complaint could be handled in two completely different ways. It was unclear whether the school had failed to update their manuals or if they were simply incomplete. The lack of clarity of Incomplete and Dual Process models arguably violates the rights of both parties.

## Discussion

The Obama Administration's Office for Civil Rights issued the 2011 Dear Colleague Letter in hopes of improving school responses to sexual assault. Critics claimed that schools "overcorrected" by installing adjudication models that stripped accused students of their due process rights. Our systematic analysis of adjudication policies enabled us to assess the extent to which policies protected the due process rights of students accused of sexual assault and the rights of students alleging harm.

With regard to our first research question, we did not find an empirical basis for the claim that schools seeking to comply with the DCL rushed to adopt single investigator models. Only 20.5% of schools adopted Civil Rights Investigatory models, and even these models included elements that protected due process rights (e.g., using multiple investigators (36%), providing opportunities for student feedback (55%), and allowing appeals (96%)). Investigation-and-Deliberative-Panel-Hybrids (22.8%) incorporated due process protections by separating the investigation from the determination of responsibility through a handoff. Half (50.2%) of schools provided accused students the opportunity to examine and contest evidence in a live hearing, through Adversarial Hearing models (10.8%), Investigation-and-Hearing-Hybrids (27.6%) or Reject-and-Restart-Hybrids (11.8%). Thus, contrary to

critics' assertions, efforts to comply with gender equity mandates did not lead to widespread elimination of due process protections already instantiated in student disciplinary procedures.

With respect to our second question, we found many schools' adjudication models continued to fall short on gender equity protections. A striking 10.8% of schools continued using Adversarial Hearing models, ignoring the DCL's recommendation that schools investigate misconduct. These models offer few victim protections and require complainants to investigate their own cases. A full 50.2% of schools incorporated live hearings, despite concerns that live hearings increase victim trauma (American Bar Association Commission on Domestic & Sexual Violence, 2019; Cantalupo, 2020). Reject-and-Restart-Hybrids (11.8%), in particular, placed burdens on complainants through long processes involving multiple re-hearings prior to appeal. More positively, few schools, even those incorporating live hearings, allowed cross-examination. Investigation-and-Deliberative-Panel-Hybrids (22.8%) offered particularly strong Title IX protections for complainants by using a trained, trauma informed investigator, and a deliberative panel, rather than a live hearing, to make the determination of responsibility (Cantalupo, 2020).

Even at the written policy level, some schools were unable to successfully integrate approaches. Schools with Incomplete Procedures (5.8%) failed to provide even minimal procedural detail. Dual Process (0.8%) schools described two complete procedures, without explaining how or under what conditions they intersected. These procedures, with their muddled policy language and lack of procedural clarity, did not serve students or meet legal obligations.

### *Implications for theory*

Our analysis of campus adjudication policies is consistent with the expectation derived from Edelman's theory of legal endogeneity and provides insight into the relationship between law and organizations, especially with respect to university policies related to equity, diversity, and inclusion. Edelman's theory suggested it was unlikely that the DCL would lead schools to abandon approaches to student conduct developed in response to constitutional due process requirements. And indeed, schools did not. The DCL did not enter an empty space. Administrators were faced with the task of reconciling new expectations for protecting Title IX gender equity rights with longstanding approaches to safeguarding the due process rights of students accused of misconduct. Claims by critics that universities dramatically changed their procedures in response to the DCL demonstrates naivete—or disingenuousness—about university policy making. The messy and sometimes contradictory policies we found offer traces of administrators' struggles to interpret ambiguous legal mandates in the context of existing policies, practices,

routines, and organizational arrangements. New legal requirements are mediated by organizational commitments to previous policies, as well as to other legal mandates.

### Directions for future research

The backlash described at the outset of this paper continued to gain traction after we completed data collection. Critics reshaped the discourse to center men accused of assault (Behre, 2019). Secretary of Education DeVos rescinded the DCL and issued new regulations. On August 14, 2020, when the new regulations went into effect, Secretary DeVos called the regulations a "historic" break from the "kangaroo courts" of the past (Green, 2018). These regulations prioritized the due process rights of the accused at the expense of the Title IX rights of victims (Green, 2018). The live hearing requirement ruled out Investigation-and-Deliberative-Panel-Hybrids—models that, in our estimation, best advance the goal of gender equity. The regulations required Investigation-and-Hearing-Hybrid models *with cross-examination*. This disregards evidence that adversarial cross-examination is harmful to victims of sexual violence (Campbell, 2008; Cantalupo, 2020; Konradi, 2017; Parsons & Bergin, 2010).

This shift in the legal environment generates further questions for research. For example, (how) have university administrators acted to protect gender equity in the face of a legal environment newly hostile to these efforts? Did universities implement the 2020 regulations, try to work around them, or find other ways to protect gender equity? Garces et al. (2021) offer disheartening hypotheses. In a study of how university administrators balanced protecting free speech and protecting students of color from hate speech, they found that fear of being viewed by powerful constituencies as insufficiently protective of free speech made it "nearly impossible" for university administrators to engage in "inclusion-focused responses such as condemning hate speech, acknowledging the harm it causes students of color, or educating the campus community about its effects" (p. 1059). They refer to these dynamics as *repressive legalism*. And, indeed, emerging evidence of university administrators' handling of cases, even before the 2020 regulations, suggests these dynamics were in play. Cruz (2021) found Title IX administrators were fearful of litigation and media attention, leading to cautious decision making and concerns about neutrality that increased empathy for accused students and tempered empathy for those experiencing the harm. Further research should also explore how students, particularly those marginalized by race, gender, and class, experienced campus sexual assault adjudication processes before and after the 2020 regulations to understand how, and to what extent, gender equity efforts have been curtailed.

### *Implications for policy*

Irrespective of the political party in office or the specifics of the Title IX regulations in effect, administrators interested in advancing gender equity in higher education through effective response to sexual assault face challenges. The formal adjudication of sexual assault on campus is unlikely to become less legalized and adversarial. It is possible that student participation in adversarial processes—whether as complainant, respondent, or witness—may extend and exacerbate the harms of the incident, even in the unlikely event that we arrive at processes that all constituencies view as fair. Universities must, of course, strive for fair processes and to reduce the harms to students drawn into them. But formal adjudication of complaints will never fully realize the gender equity intent of Title IX. Universities should envision gender equity expansively—through more visionary approaches to prevention, more services for victims (especially supportive measures to enable survivors to finish their degrees), more opportunities for students to invest in designing safer social worlds, and more investment in restorative or other less adversarial approaches to resolution.

## Notes

1. Dozens of law review articles were published after the DCL that argued schools had "gone too far" in changing campus adjudication procedures (e.g., Ellis, 2013; Fries, 2013; Hendrix, 2012).
2. While courts have declined to extend constitutional due process protections to students in private schools, most due process cases emerging from private institutions are based on contract law as it relates to student misconduct policies and other agreements between students and the university.
3. As policy documents were often undated, the in-text citation sometimes list n.d. or a year prior to 2016. All documents analyzed here were retrieved from school websites in 2016.
4. We coded for whether policies permitted students an opportunity to examine and respond to statements, evidence, and/or the preliminary findings prior to the determination of responsibility.

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