"ENOUGH IS ENOUGH"*: EXAMINING DUE PROCESS IN CAMPUS SEXUAL ASSAULT DISCIPLINARY PROCEEDINGS UNDER NEW YORK EDUCATION LAW ARTICLE 129-B

Laura Garcia†

TABLE OF CONTENTS

I. INTRODUCTION

On July 7, 2015, New York codified disciplinary procedures for sexual assault allegations on all college campuses in an amendment to the New York education law.[1] This "Enough is Enough" law, Article

---

* *See Enough is Enough: Combating Sexual Assault on College Campuses*, N.Y. ST., https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses (last visited June 1, 2017).

† J.D. Candidate, Rutgers Law School, May 2017; Executive Editor, *Rutgers University Law Review*. I want to thank my family, for their unwavering support through the years, and Ray, for the countless weekends spent at the library with me while I wrote this Note.

1. N.Y. EDUC. LAW §§ 6439–6449 (McKinney 2015) (codified as Article 129-B of Title VII of the New York Education Law).

129-B, became effective on October 5, 2015 (hereinafter "Article 129-B").[2] Article 129-B of the New York Education code details several procedural protections that must be afforded to both alleged perpetrators and their alleged victims.[3] It began as a bill proposed by New York Governor Andrew Cuomo in January 2015.[4] Prior to this proposal however, Cuomo had already begun pushing New York undergraduate schools to reform their sexual assault policies.[5] In particular, Cuomo pushed for schools that had not yet adopted an affirmative consent policy to do so.[6] According to the Governor's website, House Democratic Leader Nancy Pelosi stated that sexual assault on campus is an "all-hands-on-deck epidemic in America."[7]

Article 129-B has the following aims: to treat sexual violence as a crime and to assure students that "they have a right to have it investigated and prosecuted as one"; to protect victims; to create a uniform definition of affirmative consent; to promote communication between campus assault victims and local police; and to ensure that colleges and students alike are informed and prepared to handle sexual assault claims.[8] It was intended as "the most aggressive [sexual assault on college campuses] policy in the nation."[9] This Note describes the current Title IX landscape and examines whether Article 129-B is truly an "aggressive" policy by closely examining its provisions and their potential due process concerns for all parties. Before examining Article 129-B's various provisions, it is important to first discuss how Title IX jurisprudence and notions of judicial deference helped create this problem.

Title IX is a federal education amendment passed in 1972, which forbids sex-based discrimination in all United States educational

---

2. *Id.*

3. *Id.*

4. *Enough is Enough: Combating Sexual Assault on College Campuses*, N.Y. ST., https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses (last visited June 1, 2017) [hereinafter *Enough is Enough*].

5. *See* David Klepper, *SUNY System OKs Affirmative Sexual Consent Policy*, THE BOS. GLOBE (Dec. 3, 2014), https://www.bostonglobe.com/news/nation/2014/12/03/suny-system-oks-affirmative-sexual-consent-policy/0Ll1RifAOswFTOdirWEF3O/story.html.

6. *See id.*

7. *Governor Cuomo Signs "Enough is Enough" Legislation to Combat Sexual Assault on College and University Campuses,* N.Y. ST. (July 7, 2015), https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university [hereinafter *Governor Cuomo Signs "Enough is Enough" Legislation*].

8. *Enough is Enough*, *supra* note 4.

9. *Governor Cuomo Signs "Enough is Enough" Legislation*, *supra* note 7.

institutions that receive federal funding.[10] Any school (including a college or university) risks losing federal funding if it violates Title IX.[11] While Title IX does not specifically address sexual assault, the United States Supreme Court has held that a school may be liable for discrimination under Title IX if it mishandles a student's sexual assault claim.[12] Thus, an institution can face both administrative penalties from the Department of Education Office for Civil Rights ("OCR") in the form of loss of funding as well as civil penalties in a court of law in the form of monetary damages.[13] In 2011, the OCR issued its "Dear Colleague Letter," establishing some procedural protections that must be afforded to both accused students and alleged victims.[14] One of its most controversial requirements was the requirement that all sexual assault disciplinary hearings be held to the "preponderance of the evidence" standard.[15] As of September 2017, the Dear Colleague Letter has been withdrawn,[16] in favor of "either a preponderance of the evidence standard or a clear and convincing evidence standard."[17]

As a whole, however, Title IX and its subsequent interpretations have been ineffective in establishing procedures which ensure that schools give the accused fair treatment in the adjudicatory process. While the Dear Colleague Letter outlined the victim's protections as required under Title IX, it fell short of defining the actual parameters of due process as they relate to sexual assault on campus.[18] Article 129-B

10. *See* 20 U.S.C. §§ 1681–1688 (2012). These statutory sections were enacted by Title IX of the United States Education Amendments of 1972, Pub L. 92-318, 86 Stat. 235, 373-75 (1972).

11. *See id.*

12. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that a school may be liable for civil money damages where it "acts with deliberate indifference to known acts of harassment in its programs or activities").

13. *Id.* at 647–48.

14. "Dear Colleague Letter" from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) [hereinafter "Dear Colleague Letter"], https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html (requiring, for instance: "an adequate, reliable, and impartial investigation of the complaints," "the opportunity for both parties to present witnesses and other evidence," and use of a preponderance of the evidence standard).

15. *Id.*

16. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Sept. 22, 2017) [hereinafter Withdrawal Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf; Press Release, U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

17. Dep't of Educ., Q&A on Campus Sexual Misconduct (Sept. 2017) [hereinafter Q&A], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

18. *See* "Dear Colleague Letter," *supra* note 14.

establishes those procedures for New York state colleges and universities, and acknowledges that fairness to the accused must also be preserved, an issue that has certainly received more attention in recent years.[19]

Furthermore, scholars have noted that judicial deference has played a large role in the courts' failure to hold schools accountable for protecting the due process rights of students.[20] Indeed, this Note will further describe how the judiciary has addressed the issue of sexual assault on campus and several scholars' positions on judicial deference. The failure of both state and federal courts to scrutinize sexual assault policies at universities across the country requires legislative action because courts have not only been unwilling to analyze school policies themselves, but also, in the case of private universities, have declined to grant students constitutional due process protections altogether.[21]

Until the development of laws like Article 129-B in New York, the only avenues for private university students to prevail in civil claims against their respective schools for their failure to adhere to impartial disciplinary procedures were through Title IX or breach of contract claims.[22] Public university students, on the other hand, were able to assert due process violations as well.[23] As a result, private universities

---

19. *See* Stephen Henrick, *Reform College Sexual Assault Policies to Protect Accused Students, Too*, HUFFINGTON POST (Mar. 15, 2013, 4:34 PM), http://www.huffingtonpost.com/stephen-henrick/reform-college-sexual-assault-policy_b_2885773.html (noting that fairness to the accused is just as important as fairness to the victim, and posing a few possible remedies to explore).

20. *See* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 90–91 (2013) [hereinafter *A Hostile Environment for Student Defendants*] ("In light of the change that Title IX has wrought, the judiciary's quixotic unwillingness to get more involved in university discipline only fosters an imbalance of power that leads to false convictions.").

21. *See, e.g.*, Yu v. Vassar Coll., 97 F. Supp. 3d. 448, 463–75 (S.D.N.Y. 2015); Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *12 (W.D. Va. Aug. 5, 2015).

22. *See A Hostile Environment for Student Defendants*, *supra* note 20, at 90–91; Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—as Compared with Public—Institutions of Higher Learning: A Glaring Gap?*, 83 MISS. L.J. 863, 863–64 (2014) ("When faced with sanctions, including but not limited to dismissals, students at public institutions of higher education (IHEs) may obtain judicial review under Fourteenth Amendment due process and other constitutional bases, whereas their counterparts at private IHEs lack this protection.").

23. *See* Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U. N.H. L. REV. 443, 447–48 (2011) (arguing that although students at private universities are not afforded the same Constitutional due process rights, the "contractual" requirement for a private university to provide a fair hearing is analogous to Constitutional due process). Although Smith's argument is valid in stating that "fundamental fairness" bears some similarity to procedural due process, Smith's article fails to note that a fundamental fairness analysis avoids a deeper due process analysis.

were not bound by the United States Constitution when establishing disciplinary procedures.[24] Article 129-B holds all New York schools, both public and private, accountable for adhering to its procedural requirements.[25] If all states were to enact similar legislation, it would thus eliminate the private-public dichotomy in the courts.

While the amendment answers many questions about the procedural due process protections that must be afforded to both victims and alleged violators, it leaves New York with numerous unanswered questions. For instance, this legislation does not sufficiently address the burden of proof required at sexual assault disciplinary hearings, whether a school is obligated to report out to local police, and the proper procedures for choosing and training members of the adjudicatory or appeals panels.[26] If New York decides to further improve this amendment by doing away with peer-controlled appellate hearings, establishing a definite burden of proof, and further outlining the intersection between local police and University administration, the amendment would certainly set the stage for all states to enact similar legislation.

Section II of this Note discusses Title IX and its long-established due process weaknesses in the context of recent Title IX cases, and how Article 129-B expands on Title IX procedural protections. Section III discusses the issue of judicial deference and its detrimental effect on campus sexual assault reform. Section IV analyzes select provisions of Article 129-B and proposes changes which would maximize procedural due process protections for the accused. Section V explores the addition of several provisions to the statute. Finally, Section VI explores the policy implications of having a statute that so closely mirrors a criminal trial, and how such a rigorous disciplinary hearing may affect future litigation if the alleged victim were to bring suit in civil court or press criminal charges.

II. BACKGROUND: TITLE IX AND ITS DUE PROCESS PITFALLS

With the development of laws such as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act")[27] and Title IX of the United States Education Amendments ("Title

Courts should not be allowed to essentially skim the surface of a student's due process rights simply because they attend a private institution.

24. *Id.* at 455–56.

25. *See* N.Y. EDUC. LAW §§ 6439–6449 (2015).

26. *See id.*

27. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2000).

IX"), it is clear that sexual assault is recognized as a national issue.[28] Unlike Article 129-B, Title IX itself does not outline specific disciplinary steps schools should undertake in sexual assault cases, but instead provides broad guidance as to what procedures schools should consider when adjudicating such claims. Schools must look to Title IX clarification documents for guidance. For instance, from 2011 through 2017, the "Dear Colleague Letter" required a preponderance of the evidence standard of proof, the ability to present witnesses, and a "prompt, thorough, and impartial" investigation, but did not specifically outline the procedures all schools must follow.[29] As of September 2017, the "Q&A on Campus Sexual Misconduct" provides interim guidance, which suggests that "findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard."[30] Under Title IX, schools are given a greater amount of disciplinary discretion than they would have under legislation similar to Article 129-B.[31] While Article 129-B still needs some reform, given the judicial response to Title IX causes of action with underlying due process claims, it is certainly a step in the right direction.

Several universities have already created policies that not only conform to Title IX, but ensure the victim's safety as well as the accused's due process rights[32]; other universities, however, have either blatantly failed to follow Title IX and the Clery Act, or have done the bare minimum to comply with such regulations.[33]

---

28. *See* 20 U.S.C. § 1681 (2012).

29. "Dear Colleague Letter," *supra* note 14, at 5.

30. Q&A, *supra* note 17, at 5; *see also* Claire Hansen, *New Title IX Guidance Gives Schools Choice in Sexual Misconduct Cases*, U.S. NEWS (Sept. 26, 2017, 10:58 AM), https://www.usnews.com/news/education-news/articles/2017-09-26/new-title-ix-guidance-gives-schools-choice-in-sexual-misconduct-cases.

31. *See* "Dear Colleague Letter," *supra* note 14, at 4–5. While Title IX only requires a fair and impartial hearing with review based on the preponderance of the evidence, Article 129-B details every step of the adjudicatory process.

32. *See* Beth Howard, *How Colleges Are Battling Sexual Violence*, U.S. NEWS (Aug. 28, 2015, 2:58 PM), http://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence (noting that Dartmouth College, Elon University in North Carolina, and Denison University in Ohio have all implemented policies that focus on education and awareness in conjunction with their respective Title IX coordinators).

33. *See* Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015, 2:06 PM), https://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_us_55b19b43e4b0074ba5a40b77; Tyler Kingkade, *Yale Faces $165,000 Clery Act Fine For Failing to Report Sex Offenses on Campus*, HUFFINGTON POST (May 15, 2013, 6:59 PM), https://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html.

Students from colleges all over the country, both those adjudicated guilty of committing sexual assault and those allegedly victimized, have sued their schools under Title IX alleging that the schools' disciplinary policies violated the statute.[34] While the basis of a Title IX suit is gender discrimination, many Title IX complaints involving sexual assault on campus allege that the disciplinary procedure used was inherently unfair, biased toward the victim, or biased toward the accused.[35] Courts are reluctant, however, to examine the fundamental fairness of schools' procedures themselves.[36] Rather, unless the student proves gender discrimination, the court will dismiss the case and the underlying procedure will not warrant further judicial examination.[37] As author Stephen Henrick noted:

> While a school's deliberate indifference to a sexual harassment grievance is now automatically sex discrimination, and thus actionable under Title IX, a school's deliberate indifference to an accused student's *innocence* is not. As a paradoxical consequence . . . a plaintiff must prove that the school made its wrongful accusation as part of a broader pattern of systematic bias.[38]

If other states do not enact legislation similar to Article 129-B, students subjected to inherently unfair disciplinary procedures will be left with little recourse beyond the minimum Title IX requirements.[39]

In *Sahm v. Miami University*, for example, a student accused of sexual assault sued Miami University for implementing unfair

---

34. *See, e.g.*, Doe v. Columbia Univ., 101 F. Supp. 3d 356, 369–70 (S.D.N.Y. 2015); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 461–63 (S.D.N.Y. 2015); Wells v. Xavier Univ., 7 F. Supp. 3d 746, 748 (S.D. Ohio 2014); Manalov v. Borough of Manhattan Cmty. Coll., 952 F. Supp. 2d 522, 532–34 (S.D.N.Y. 2013); Doe v. Blackburn Coll., No. 06-3205, 2012 WL 640046, at *7–8 (C.D. Ill. Feb. 27, 2012); Doe v. Univ. of the South, 687 F. Supp. 2d 744, 756–58 (E.D. Tenn. 2009).

35. *See, e.g.*, *Wells*, 7 F. Supp. 3d at 747–48; *Manalov*, 952 F. Supp. 2d at 526; *Columbia Univ.*, 101 F. Supp. 3d at 369–70.

36. *See, e.g.*, Sahm v. Miami Univ., No. 1:14-cv-698, 2015 WL 93631, at *4 (S.D. Ohio Jan. 7, 2015) (granting in-part and denying in-part defendant's motion to dismiss).

37. *See, e.g.*, *id.* at *5 ("Sahm asserts that he was not afforded due process at his hearing and makes the unsubstantiated leap that he was discriminated against on the basis of his gender [in violation of Title IX].").

38. *A Hostile Environment for Student Defendants*, *supra* note 20, at 75 (emphasis added) (footnote omitted).

39. *Id.* at 54 ("[A]lleging breach of contract or a due process violation, rarely if ever succeed and are subject to minimal damage awards. As a result, schools providing the bare minimum processes without sufficient procedural safeguards have little to fear from students who are subject to biased or erroneous proceedings.").

disciplinary procedures and violating several Title IX provisions.[40] In response to the defendant's motion to dismiss, the court dismissed the bulk of the claims, but gave the plaintiff leave to amend the complaint to reassert his Title IX claims, contending that he did not have a sufficient factual basis for his claim, even though there were facts that indicated that his institution may not have been handling sexual assault cases properly.[41] The amended complaint alleged that the Title IX coordinator conducted an improper investigation, and that the university had a history of mishandling and underreporting sexual assaults on campus, but the court ultimately found that these claims also failed to sufficiently allege gender bias.[42]

In New York, Columbia University and Vassar College were among the schools sued under Title IX for not only implementing campus procedures that violated the accused's due process rights, but for violating Title IX.[43] When it comes to sexual assault disciplinary practices, at the core of many existing Title IX cases is a due process question that Title IX simply does not answer.[44] Title IX and its subsequent administrative correspondence are mostly victim-centered, and speak very little about the procedural safeguards afforded to students accused of sexual assault.[45] Nonetheless, New York courts have declined to comment on whether the schools' policies themselves violated due process, and instead focused on whether the plaintiffs' allegations gave rise to a plausible inference that they were mistreated because of their gender.[46] One recent New York case, however, did

40. *Sahm*, 2015 WL 93631, at *1.

41. *Id.* at *6–7 ("If Sahm fails to file an amended complaint within one month of the date of this Order, the Court shall dismiss the Title IX claims as well for failing to allege that Miami University acted against him on the basis of his gender.").

42. Sahm v. Miami Univ., 110 F. Supp. 3d 774, 775–76, 780 (S.D. Ohio 2015) (dismissing Title IX claims after filing of amended complaint).

43. Yu v. Vassar Coll., 97 F. Supp. 3d 448, 461 (S.D.N.Y. 2015); Doe v. Columbia Univ., 101 F. Supp. 3d 356, 360 (S.D.N.Y. 2015), *vacated*, 831 F.3d 46 (2d Cir. 2016).

44. *See, e.g.*, 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, 277 (2009) ("The due process doctrine . . . and Title IX . . . are not in conflict. Rather . . . the due process doctrine and Title IX complement one another."); *A Hostile Environment for Student Defendants*, *supra* note 20, at 54 ("Quite simply, the process of resolving sexual misconduct allegations under Title IX is fundamentally unfair to the accused and unduly prone to false convictions.").

45. *A Hostile Environment for Student Defendants*, *supra* note 20, at 83–84 ("Cases involving wrongfully accused students do not carry the same media or reputational concerns for institutions . . . .").

46. *See Columbia Univ.*, 101 F. Supp. 3d at 365–67. The court limited its analysis to a *Twombly* and *Iqbal* "plausibility" analysis when establishing whether the plaintiff had a claim to which relief could be granted. *Id.* at 365 (citing Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2008)).

explore the complexities of a school's disciplinary procedure outside of the limited gender discrimination context of Title IX, as well as the court's role in addressing its fairness.[47]

In *Doe v. Columbia University*, the plaintiff alleged that Columbia University's Title IX coordinator was gender-biased and that the university's disciplinary hearings were inadequate.[48] The plaintiff alleged that the investigation was inadequate, that the Title IX coordinator failed to advise him of his rights, and that the interviews were not impartial.[49] The court concluded that its "'role, of course, is [not] to advocate for best practices or policies' with respect to the treatment of sexual assault complaints on college and university campuses" and dismissed the complaint.[50] Thus, by limiting plaintiff's Title IX claims to its purest form (gender discrimination), the court ensured that students who were subjected to fundamentally unfair disciplinary hearings could not bring any Title IX claims against their schools unless they made the broader showing that the schools' policies themselves were gender-biased.[51]

III. BACKGROUND: THE PROBLEM OF JUDICIAL DEFERENCE

Scholars agree that aside from the court's reluctance to extend Title IX suits past a finding of gender discrimination, at the root of schools' failure to rectify due process shortfalls is the state courts' refusal to make policy judgments regarding university disciplinary policies.[52] This refusal to examine schools' policies is arguably due, in part, to the overarching principle of judicial deference.[53] Although it is not the appellate court's responsibility to rewrite school policies,[54] courts should not avoid engaging in this type of inquiry.

---

47. *See Yu*, 97 F. Supp. 3d at 462–65 (S.D.N.Y. 2015).

48. 101 F. Supp. 3d at 360.

49. *Id.* at 369.

50. *Id.* at 376 (alteration in original) (quoting *Yu*, 97 F. Supp. 3d at 461).

51. *Id.* at 376.

52. *See A Hostile Environment for Student Defendants*, *supra* note 20, at 90–91, 90 n.183 (citing Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 222–28 (1985)). Courts normally exercise judicial deference in academic contexts. However, these cases are not accusations that are merely academic in nature, but criminal.

53. *See* Smith, *supra* note 23, at 456–57 (separating "judicial discretion" in disciplinary proceedings into four, distinct classes: when the court refuses to analyze beyond determining that a matter is purely academic; when the court conducts an analysis based on contract and fundamental fairness; when the court conducts a full factual review; and when the court reviews the entire disciplinary procedure *de novo*).

54. *See id.* at 456–58.

Courts have frequently relied on judicial deference in order to avoid making policy decisions regarding college sexual assault disciplinary procedures.[55] In this instance, judicial deference refers to a court's refusal to make policy judgments regarding sensitive social issues, and instead defer to the judgment of rule-drafters (or, in this case, the judgments of university policy-makers).[56] While the New York legislature was able to take steps to rectify potential due process violations in college adjudicatory proceedings, state court jurisprudence in recent years exemplifies an overwhelming need for such legislation on a national scale.[57] Several other states have failed to pass similar legislation, leaving a perpetual cycle of judicial deference and, ultimately, judicial inaction. Sexual assault on campus is a particularly sensitive issue, and it is understandable why it would fall under one of the circumstances where courts will defer to the schools or even the state legislature to implement their own policies.

Despite the fact that there are numerous cases where courts have declined to examine the fundamental fairness of disciplinary procedures and instead have focused on whether Title IX was violated, some courts have defined the parameters of due process in college disciplinary hearings.[58] These cases are worth noting, not only because they were decided in states with a need for codification, but also because they provide the legislature with the necessary guidance as to what due process really requires in a college setting.[59]

In *Salau v. Denton*, a University of Missouri student sued his University's former Chancellor, Director of the Office of Student Life,

---

55. *See supra* Section II; Doe v. Columbia Univ., 101 F. Supp. 3d 356, 376 (S.D.N.Y. 2015); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 461 (S.D.N.Y. 2015).

56. *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 6–8 (2009) (noting the inconsistencies in the courts' decisions to apply judicial deference in several contexts).

57. *See, e.g.*, *Columbia Univ.*, 101 F. Supp. 3d at 376; *Yu*, 97 F. Supp. 3d at 484–85.

58. *See, e.g.*, Salau v. Denton, 139 F. Supp. 3d 989, 1002–05 (W.D. Mo. 2015); Tanyi v. Appalachian State Univ., No. 5:14-CV-170RLV, 2015 WL 4478853, at *7–8 (W.D.N.C July 22, 2015).

59. DAVID CANTOR ET AL., THE UNIVERSITY OF MISSOURI, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 15 (2015) (reporting that approximately one in every three female University of Missouri students have experienced some form of sexual assault). Since then, the University of Missouri has changed its policies. *See* Scott Canon, *Mizzou Report Details Sex Discrimination Numbers on Campus, from Rape to Dating Violence*, KANSAS CITY STAR (Sept. 17, 2015), http://www.kansascity.com/news/local/article35607225.html#storylink=cpy. However, these changes, such as hiring a full-time Title IX coordinator and investigator, are victim-centric. As an institution with the highest instances of sexual assault, it should also impose due process protections and procedural safeguards. There is still much work to be done.

Senior Coordinator for the Office of Student Life, and two other school officials, for various Title IX and Constitutional violations.[60] These included, but were not limited to: Title IX Sex Discrimination, Title IX Hostile Education Environment, and Fourteenth Amendment violation of Due Process.[61] The district court, after conducting an extensive review of the disciplinary process, ultimately dismissed the student's claims.[62]

The court in *Salau* examined whether the plaintiff's substantive and procedural due process rights were violated.[63] Rather than analyzing University of Missouri policies regarding how disciplinary hearings should be carried out and establishing whether those polices were constitutionally sound, the court noted the minimal procedural due process standards required as a matter of law.[64] Thus, although the plaintiff's request for a continuance in order to obtain an attorney prior to the disciplinary hearing was denied and he was unable to obtain a list of the witnesses against him, all due process required was "adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures."[65]

Furthermore, in *Tanyi v. Appalachian State University*, the district court's opinion provided a detailed analysis of each step of the plaintiff's disciplinary hearing.[66] While the court refused to establish whether Appalachian State University's disciplinary policies for sexual assault allegations were valid, the court nevertheless determined that Appalachian State acted appropriately in that particular proceeding.[67] This case discussed several due process issues that would benefit from uniform codification.[68] For example, the plaintiff in *Tanyi* was not allowed to present character witnesses on his behalf, yet the court nonetheless held this was not a violation of his due process rights.[69] Appalachian State also did not notify the plaintiff of his right to find his own representation, but rather, assigned him a philosophy graduate

60. 139 F. Supp. 3d 989, 996–97 (W.D. Mo. 2015).
61. *Id.* at 997.
62. *Id.* at 1013.
63. *Id.* at 1002–05.
64. *Id.*
65. *Id.* at 1003 (quoting Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970)).
66. Tanyi v. Appalachian State Univ., No. 5:14-CV-170RLV, 2015 WL 4478853, at *3–5 (W.D.N.C July 22, 2015) (analyzing the school's refusal to allow character witnesses or appoint an attorney, failure to advise the accused of a separate hearing, and failure to inform plaintiff of two exculpatory witnesses, among other due process issues).
67. *Id.* at *3.
68. *Id.* at *3–5. See also *infra* Section IV for further discussion of Article 129-B.
69. *Tanyi*, 2015 WL 4478853, at *3.

student as his counsel (while assigning a licensed attorney as the victim's counsel).[70] Appalachian State also failed to provide the plaintiff with the identities of two exculpatory witnesses.[71] Finally, Appalachian State appointed a hearing panel member who had already participated in the plaintiff's co-defendant's adjudication.[72] If the court had analyzed the school's procedures and agreed to establish whether the school's procedures were valid or whether the school improperly deviated from its policies, perhaps the plaintiff's rights would have been preserved.[73]

IV. ARTICLE 129-B AND PROPOSED CHANGES

Article 129-B addresses two key issues in campus sexual assault cases: due process for the accused and protecting the alleged victim.[74] Article 129-B contains several provisions that adequately protect the victim, not unlike the victim-centered safeguards that Title IX already has in place.[75] In terms of due process protections, Article 129-B extends those protections whereas Title IX and the courts have not. However, several of Article 129-B's critical provisions require some changes, and adding provisions that provide for further procedural safeguards would make this legislation a great example for other states to follow.

A. Student Bill of Rights

Section 6443 of Article 129-B requires that all New York schools include a "Students' Bill of Rights" in their codes of conduct.[76] The code

---

70. *Id.* at *4.
71. *Id.* at *5.
72. *Id.* at *4–5.
73. *See id.* at *4 (recognizing the possibility that the defendant school may have deviated from its set policies and that if it had done so, this may constitute a due process violation, yet ignoring this question and off-handedly comparing this deviation to a criminal trial). Also note that the Eighth Circuit in *Jones v. Snead* made it clear that comparing these proceedings to criminal proceedings is very problematic and inappropriate. 431 F.2d 1115, 1117 (8th Cir. 1970).
74. *See, e.g.*, Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 776 (2014) ("[T]he adversarial revolution also exacts severe costs on a crucial third player—victim-witnesses, especially in cases of traumatic crimes of sexual assault and violent crime generally. The courts are in disarray about what—if anything—should be done to protect at-risk victims."); *A Hostile Environment for Student Defendants*, *supra* note 20, at 53 ("Over the years, OCR has issued a series of publications that escalate complainant rights and mandate new procedures for resolving complaints in a way that does not sufficiently protect the due process rights of falsely accused students.").
75. *See generally* 20 U.S.C. §§ 1681–1688 (2012).
76. N.Y. EDUC. LAW § 6443 (McKinney 2015).

of conduct must be distributed annually to all students, posted on the school's website, and posted in all campus residences or campus centers.[77] The first proposed change to this provision is the method of circulating this Bill of Rights. Having a Students' Bill of Rights is one of the critical provisions of this law, and hiding it within a student code of conduct seems to go against the inherent purpose of the provision. Student codes of conduct are often lengthy and hidden within student handbooks, and the rules within them range from ethical and academic requirements to various forms of disciplinary sanctions.[78] Since one of the purposes of Article 129-B is to promote reporting and protect alleged victims,[79] it would be more beneficial to students if they receive the Students' Bill of Rights separately from the code of conduct. Additionally, schools should require that all students sign an acknowledgment indicating that they have read and understood those rights. Doing so will ensure that all students are on notice of their protections.

Moreover, the rights enumerated within the Students' Bill of Rights provision are unduly victim-centered. Indeed, six out of the eleven rights provided by the statute only benefit the alleged victim.[80] Additionally, the procedural rights regarding a single opportunity for appeal and the right to a fair, impartial hearing are already enumerated in Title IX policies and do not provide students with notice of the additional rights afforded to them by the provisions in Article 129-B.[81] Thus, the Students' Bill of Rights, on its face, does not adequately disclose to accused students their procedural rights in the

---

77. *Id.*

78. *See, e.g.*, VASSAR COLL., *Vassar College Regulations*, *in* VASSAR COLLEGE STUDENT HANDBOOK 4 (2016), http://deanofthecollege.vassar.edu/documents/student-handbook/VassarStudentHandbook.pdf.

79. *Enough is Enough*, *supra* note 4.

80. Specifically, the following provisions granting the right to:

> 1. Make a report to local law enforcement and/or state police; 2. Have disclosures of domestic violence, dating violence, stalking, and sexual assault treated seriously; 3. Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure by the institution; . . . 5. Be treated with dignity and to receive from the institution courteous, fair, and respectful health care and counseling services, where available; 6. Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations; . . . 8. Be protected from retaliation by the institution, any student, the accused and/or the respondent, and/or their friends, family and acquaintances within the jurisdiction of the institution.

EDUC. § 6443.

81. 20 U.S.C. § 1681 (2012).

event of the initiation of a disciplinary hearing. If the Students' Bill of Rights is printed in student codes of conduct, it should, at the very least, outline all the procedural rights afforded to students. Nevertheless, the rights outlined in the Bill of Rights provision address key issues in Title IX cases that have been brought in several states, including New York, and each will be examined in turn.[82]

First, the Bill of Rights must explicitly state that "[a]ll students have the right to . . . [m]ake a report to local law enforcement and/or state police."[83] This is particularly important for victims who feel afraid to report sexual assault to the police or who have a misconception that the ongoing disciplinary investigation replaces any criminal investigation.[84] By making it clear to victims that the choice to report the incident to the police is their decision, this provision of the Bill of Rights promotes external reporting to the police.[85]

Second, the Students' Bill of Rights provides that students have the right to "[p]articipate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard."[86] Schools must also allow a party one level of appeal and the opportunity to be advised "by an advisor of choice who may assist and advise" any party throughout the process.[87] These provisions seem to be in direct response to various Title IX cases alleging due process violations.[88] Specifically,

---

82. *See, e.g.*, Doe v. Columbia Univ., 101 F. Supp. 3d 356, 369–70 (S.D.N.Y. 2015); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 461–63 (S.D.N.Y. 2015); Manalov v. Borough of Manhattan Cmty. Coll., 952 F. Supp. 2d 522, 532 (S.D.N.Y. 2013).

83. EDUC. § 6443.

84. *See* Robin Wilson, *Why Colleges Are on the Hook for Sexual Assault*, CHRON. OF HIGHER EDUC. (June 6, 2014), http://chronicle.com/article/Why-Colleges-Are-on-the-Hook/146943 ("[M]any question why colleges—not the police or courts—seem to have the primary responsibility for dealing with a crime as serious as rape."); Kimberly Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 153–54 (2012).

85. Some commentators, however, believe that local police are ill-equipped to handle sexual assault cases, particularly those involving young college students. *See, e.g.*, Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294#.VISyCWTF90I ("[C]ampus rape is not just a crime but also an impediment to a continued education . . . Title IX's protections are necessary for an individual student's learning opportunities and for gender equality . . . ."); Dana Bolger & Alexandra Brodsky, *Victim's Choice, Not Police Involvement, Should Be Lawmakers' Priority*, MSNBC (Feb. 12, 2015, 6:49 AM), http://www.msnbc.com/msnbc/campus-rape-victims-choice-should-be-lawmakers-priority.

86. EDUC. § 6443.

87. *Id.*

88. *See, e.g.*, Doe v. Columbia Univ., 101 F. Supp. 3d 359, 369–70 (S.D.N.Y. 2015); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 461–62 (S.D.N.Y. 2015); Wells v. Xavier Univ., 7 F. Supp. 3d 746, 748 (S.D. Ohio 2014); Manalov v. Borough of Manhattan Cmty. Coll., 952 F.

allowing students to enlist an advisor who may participate and assist directly in the procedure is critical to the accused's rights. Many victims and alleged perpetrators have never previously been involved in such situations and are thus in need of guidance throughout the adjudicatory process.[89]

Additionally, while Article 129-B outlines the specific procedures schools must follow upon receiving an allegation of sexual assault, it does not indicate that schools must disclose these procedural protections to all students.[90] Thus, while victims are explicitly required to be on notice of their rights through the Students' Bill of Rights, students who may be accused of sexual assault will not become aware of the extent of their specific *procedural* rights until the process is already initiated.[91] Schools should be required to disclose these details prior to the commencement of an adjudicatory procedure to avoid having accused students suggest that they were not on notice of the procedure. These procedural protections, although not fully highlighted in the Students' Bill of Rights, are detailed further in later sections of the statute and are discussed in the next section.

B. Due Process and Uniform Codification of the Adjudicatory Process

Section 6444 of Article 129-B sets out, in some detail, how schools should respond to sexual assault allegations.[92] This ensures that all students are afforded due process in disciplinary investigations as well as in the subsequent hearings.[93] While courts have generally declined to afford the same due process protections to private schools as they have to public institutions, Article 129-B eliminates this procedural dichotomy.[94] The requirements in this section closely mirror the

---

Supp. 2d 522, 526 (S.D.N.Y. 2013); Doe v. Univ. of the South, 687 F. Supp. 2d 744, 756–58 (E.D. Tenn. 2009).

89. *See, e.g.*, Michael E. Miller, *All-American Swimmer Found Guilty of Sexually Assaulting Unconscious Woman on Stanford Campus*, WASH. POST (Mar. 31, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/all-american-swimmer-found-guilty-of-sexually-assaulting-unconscious-woman-on-stanford-campus/?utm_term=.2f7b77b0d069 ("It was a stunning fall from grace for Turner. Once a record-setting swimming prodigy, he is now a convicted sex offender at age [twenty].").

90. EDUC. § 6444.

91. *See id.*

92. *Id.*

93. *Id.*

94. *See* Yu v. Vassar Coll., 97 F. Supp. 3d 448, 462–63 (S.D.N.Y. 2015) (noting that private universities are not afforded the same Constitutional due process protections as public universities). Scholars have also commented on this disparity. *See, e.g.*, Zirkel, *supra* note 22, at 864 ("[T]he public university student enters the arena of disciplinary hearings brandishing the sharp sword of constitutional safeguards. At the same time, the

procedures in a criminal trial, reflecting Governor Cuomo's desire to treat sexual assault on campus as a crime.[95] The provisions in Section 6444 seem to respond to the national concerns regarding sexual assault disciplinary procedures as well as the various due process violations seen not just in New York, but in cases nationwide.[96] It is clear that as the second state to codify sexual assault disciplinary practices, Governor Cuomo intended New York's Article 129-B to address the issues that have arisen on a national level rather than those limited to New York jurisdictions.[97] Section 6444 provides "protections and accommodations" that are victim-centered as well as specific procedural rights that must be afforded to both parties throughout all disciplinary hearings.[98]

The first "protection and accommodation" provision requires that schools issue a no contact order.[99] This prevents victims from having to face their alleged assailants on campus or in class and risk future harm.[100] The other "protections and accommodations" set out by Section 6444 are victim-specific and do not necessarily risk infringing on the accused's due process rights.[101] As such, the no contact order is the only "protection and accommodation" that will be discussed in this section. By making clear that schools are required to do everything they can to

---

private university student, for whom these constitutional safeguards do not exist, carries only the equivalent of a dull stick." (quoting Marc H. Shook, *The Time is Now: Arguments for the Expansion of Rights for Private University Students in Academic Disciplinary Hearings*, 24 LAW & PSYCHOL. REV. 77, 77 (2000))).

95. *Enough is Enough*, *supra* note 4. See generally *A Hostile Environment for Student Defendants*, *supra* note 20, and *infra* Section VII, for an explanation of the implications of having disciplinary hearings that mirror criminal trials.

96. *See, e.g.*, *Columbia*, 101 F. Supp. 3d at 369–70; *Yu*, 97 F. Supp. 3d. at 461–62; *Wells*, 7 F. Supp. 3d at 748; *Manalov*, 952 F. Supp. 2d at 526; *Univ. of the South*, 687 F. Supp. 2d at 756–58.

97. *Enough is Enough*, *supra* note 4 (asserting that New York's Article 129-B is one of the first to address the issue of sexual assault on college campuses and that the issue is of national concern).

98. EDUC. § 6444(4).

99. *Id.*

100. *See, e.g.*, Regents of the Univ. of Cal. v. Sup. Ct. of L.A., 193 Cal. Rptr. 3d 447, 484 (Cal. Ct. App. 2015) (holding that whether the plaintiff's school breached its duty of care to protect her after receiving notice of her assailant's dangerousness is an issue for the trier of fact). A student at Columbia University recently carried around a mattress with her to class in protest against Columbia University allowing her assailant to remain in school. Jessica Durando, *Columbia University Student Carries Rape Protest Mattress to Graduation*, USA TODAY (May 19, 2015, 3:38 PM), http://www.usatoday.com/story/news/nation-now/2015/05/19/columbia-college-student-mattress-emma-sulkowicz/27595223/.

101. *See* EDUC. § 6444(4)(b)–(h) (highlighting the victim's right to obtain a restraining order, file a police report, and request other "interim measures . . . to help ensure safety, prevent retaliation and avoid an ongoing hostile environment").

distance the accused from their alleged victims, this no contact order requirement seems to be in response to cases in which victims have sued their schools for failing to protect them from future attacks during ongoing sexual assault investigations under theories of negligence or Title IX gender discrimination.[102] Nevertheless, the cases examining whether schools should have distanced the alleged victim from the accused did not examine the negative effects this may have on the accused.

In *S.S. v. Alexander*, a female undergraduate student alleged that she was raped in her dorm room by a fellow male student.[103] She alleged that the University of Washington acted with indifference to her claims of rape by encouraging her to hold off on filing a police report, failing to suspend her alleged rapist, and failing to initiate a proper disciplinary hearing.[104] Instead, the assistant athletic director and the school's ombudsman decided to conduct mediation where both parties were merely allowed to present statements.[105] After the alleged rapist admitted to his actions, cried, and apologized for his behavior, the school officials' only imposed sanctions requiring the accused to undergo counseling and conduct community service.[106] The officials did not require the accused to stay away from his alleged victim neither before nor after the mediation.[107]

Since S.S. also worked for the football team, she was faced with the impossible choice of either losing her employment or having to face her rapist almost on a daily basis.[108] Her alleged rapist was not faced with the choice of leaving the football team.[109] S.S. alleged that the school acted in this way because the perpetrator was a football player, and argued that the school should have not only conducted a more thorough

102. *See, e.g.*, Doe v. Blackburn Coll., No. 06-3205, 2012 WL 640046, at *2, *14 (C.D. Ill. Feb. 27, 2012) (granting the defendant college's motion for summary judgment and stating that the school's failure to modify its disciplinary practices following the plaintiff's sexual assault was an unfounded Title IX claim); *Regents of the Univ. of Cal.*, 193 Cal. Rptr. 3d at 458 (rejecting plaintiff's contention that the university owed her a duty to protect her from third-party conduct); S.S. v. Alexander, 177 P.3d 724, 745 (Ct. App. Wash. 2008) (holding that the plaintiff presented sufficient evidence that the University of Virginia's mishandling of the procedures following the plaintiff's rape interfered with her studies in a way that violated Title IX to warrant reversal of summary judgment to defendant).

103. *Alexander*, 177 P.3d at 729.

104. *Id.* at 729, 738–40.

105. *Id.* at 729–30.

106. *Id.* at 730–31.

107. *See id.* at 730–31.

108. *Id.* at 745.

109. *See id.*

disciplinary proceeding, but suspended the accused.[110] S.S. indicated that she "experienced feelings of hopelessness and helplessness, found it difficult to concentrate on her studies, and felt angry and upset whenever she had contact with the accused throughout the course of her sophomore year."[111] Ultimately the court held that the victim presented sufficient evidence to submit her Title IX claim to a jury.[112]

If the University of Washington had conducted a more thorough disciplinary hearing, a no contact order would have been necessary to protect the victim from the psychological effects of having to face her abuser. However, section 6444 does not refer to a no contact order in the limited circumstances where the respondent or accused had already admitted to engaging in the sexual activity.[113] Instead, it seems to refer to the ability of a school to prohibit the accused from accessing institutional buildings pending the accused's request to review or modify such an order in cases where the accused has not yet been found to have engaged in sexual assault.[114]

Moreover, in *Doe v. Blackburn College*, a victim of sexual assault by an unknown individual sued Blackburn College under Title IX, alleging that the school's breach of its duty to protect sexual assault victims amounted to Title IX "deliberate indifference" to acts of harassment.[115] In its analysis, the court identified several prior incidents of sexual assault where the victims knew their assailants.[116] The court indicated that Title IX requires actual knowledge of the sexual assault and "deliberate indifference" after the fact, not preemptive measures to protect potential victims.[117] Thus, the implementation of a no contact order, as a preemptive measure, may alleviate potential institutional liability both under Title IX and under theories of negligence.

Under the no contact order provision of Article 129-B, schools "may establish an appropriate schedule for the accused and respondents to access applicable institution buildings and property at a time when such buildings and property are not being accessed by the reporting individual."[118] While cases such as *S.S. v. Alexander* and *Doe v. Blackburn College* focus on the victims' allegations that their schools

110. *Id.* at 730–31.
111. *Id.* at 731–32.
112. *Id.* at 745.
113. N.Y. EDUC. LAW § 6444(4) (McKinney 2015).
114. *See id.* § 6444(4)(a).
115. Doe v. Blackburn Coll., No. 06-3205, 2012 WL 640046, at *1, *7 (C.D. Ill. Feb. 27, 2012).
116. *See id.* at *2–3.
117. *Id.* at *8.
118. EDUC. § 6444(4)(a).

failed to adequately protect them from their alleged abusers, section 6444 does not seem to anticipate the negative effects a no contact order may have on the accused, especially since they have not yet been found to have engaged in sexual abuse.[119] Indeed, it is very important to ensure that alleged victims feel safe and that their education is not compromised. However, interfering with the accused's education can be just as detrimental.[120]

The language of the no contact order provision implies that schools have the discretion to prohibit the accused from attending classes with the alleged victim or from even being in the same buildings as their alleged victims.[121] Section 6444 appears to put the onus on the accused to leave any building or space where the victim is present.[122] This directly conflicts with the provision that provides that all accused students carry a presumption of not being responsible,[123] similar to a presumption of innocence in a criminal trial. Allowing schools to utilize "interim suspensions" or prohibit accused students from attending classes or extracurricular activities where the victim is present directly affects the accused's ability to receive a proper education.

Instead of providing that the school "may establish an appropriate schedule for the accused and respondents to access applicable institution buildings," section 6444 should provide that any absences before and during the disciplinary hearing must be excused.[124] This will prevent the accused from facing additional institutional penalties for missing an excessive number of classes to conform to the requirements of the no contact order. This section should also require that professors provide accommodations such as make-up classes or exams as well as the opportunity for the accused to learn the material from home. This will ensure not only that the accused's educational opportunities are not infringed upon, but also that the institution is less likely to be liable for civil penalties, especially if the student is found to have not been responsible for sexual assault at the conclusion of the disciplinary investigation.

---

119. *See* S.S. v. Alexander, 117 P.3d 724, 728 (Wash. Ct. App. 2008); *Blackburn*, 2012 WL 640046, at *13.

120. *See A Hostile Environment for Student Defendants*, *supra* note 20, at 62 (criticizing the "Dear Colleague Letter" as effectively suggesting that "[A]lleged perpetrators should automatically suffer life-upending punishments like expulsion from their residences upon accusation because they are likely guilty.").

121. EDUC. § 6444(4)(a).

122. *See id.*

123. *Id.* § 6444(5)(c)(ii) (providing that the respondent has a right to a presumption that he or she is not responsible "until a finding of responsibility is made").

124. *Id.* § 6444(4)(a).

The first procedural requirement set out in this section is the requirement to give the accused adequate notice of the date, time, and location of any hearings or meetings as well as notice of the factual allegations against the accused and specific codes of conduct that were allegedly broken.[125] This provision of Article 129-B does not add much to existing Title IX case law and guidance. Indeed, notice to the accused is an issue that was highlighted in the Dear Colleague Letter, and is also addressed in Title IX cases that have explored college disciplinary procedures.[126] In *Bleiler*, in examining the College of the Holy Cross's disciplinary procedures, the district court held that adequate notice to the accused is indeed required under Title IX.[127]

It is well established that the "essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[128] Here, accused students are faced with suspension, expulsion, civil liability, or even criminal liability as a result of a finding that they engaged in sexual assault of any kind. Instead of re-codifying the notice requirements already protected by Title IX,[129] this provision should further indicate how far in advance students must receive such notice before the hearing. Title IX requires "promptness," but the OCR has not established proper guidance as to how much time both the accused and the complainant must have to prepare for a hearing.[130]

Since section 6444 allows for "trial-like" procedures, such as the review of evidence, findings of fact, and for both parties to bring "advisors," it should also provide for a particular time-frame in which parties may prepare, similar to the "speedy trial" protections of the Sixth Amendment to the United States Constitution.[131] If schools can simply provide notice as short as twenty-four hours, such procedural due process protections are rendered ineffective, because students

125. *Id.* § 6444(5)(b).

126. *See* Bleiler v. Coll. of the Holy Cross, No. 11-CV-11541-DJC, 2013 WL 4714340, at *8 (D. Mass. Aug. 26, 2013) (acknowledging that Title IX requires that "[s]tudents have the right to be informed of any charges of misconduct [and] the right to adequate time to prepare a response to the charges . . . ."); "Dear Colleague Letter," *supra* note 14, at 8–9.

127. *Bleiler*, 2013 WL 4714340, at *8.

128. Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (alteration in original)).

129. *See* "Dear Colleague Letter," *supra* note 14, at 8–9 (stating that there must be notice of the grievance procedures, and such procedures must be prompt).

130. *See id.* at 9.

131. *See* N.Y. EDUC. LAW § 6444(5) (McKinney 2015); Hogan, *supra* note 44, at 286 (citing footnote omitted) (asserting that receiving notice of the hearing the night before may be insufficient notice)); U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

would simply not have enough time to present an adequate presentation or even find an advisor to aid them through the process. Granting respondents and alleged victims several weeks to prepare will ensure that the hearing is conducted fairly and that respondents are less likely to sue their schools later for violating their due process rights.

Section 6444 provides both the accused and the victim the right to offer evidence and testimony and to be provided with a fair and full record of the hearing.[132] As seen in cases like *Yu* and *Tanyi*, witness testimony is crucial in allowing both parties to present their respective sides of the story, particularly if those witnesses were present during the incident or are used as character witnesses.[133] Providing a fair and full record of the hearing is also crucial, specifically if the results of the disciplinary hearing are disclosed in subsequent litigation or are addressed in the student's professional or personal life.[134] This is especially important in cases where the alleged victim presses criminal charges against the alleged perpetrator, since the results of the disciplinary hearing may be entered into evidence.[135] Additionally, providing a fair and full record of the hearing can prevent future civil litigation, mainly if a school is accused of violating Title IX or Article 129-B's requirements.

Two final evidentiary provisions also require some clarification: the provision granting the right to review any evidence held by the institution, and the provision allowing an impact statement.[136] The first

132. EDUC. § 6444(5)(b)(ii).

133. Yu v. Vassar Coll., 97 F. Supp. 3d 448, 463–75 (S.D.N.Y. 2015); Tanyi v. Appalachian State Univ., No. 5:14-CV-170RLV, 2015 WL 4478853, at *5 (W.D.N.C. July 22, 2015).

134. *See, e.g.*, Justin Neidig, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16. WM. & MARY J. OF WOMEN & L. 179, 197 (2009) (noting that disciplinary records are treated as educational records and may come to light in other contexts). "Courts have recognized the greater consequences of student disciplinary action, specifically noting that the 'potential consequences reach beyond [a student's] immediate standing at the [college].'" *Id.* (citing Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005)).

135. *See* Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual-Assault Case?*, N.Y. TIMES (Jan. 21, 2016), http://nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case.html (describing a case where a student of the University of Montana was accused of rape and copies of the redacted disciplinary hearing where he was found to have committed the rape were used in his criminal trial). The student was ultimately acquitted, because the standard at the criminal trial was much greater than the standard used at his disciplinary hearing. *See* Jim Robbins, *Ex-College Quarterback is Acquitted of Rape in Montana*, N.Y. TIMES (Mar. 1, 2013), http://www.nytimes.com/2013/03/02/us/jordan-johnson-ex-montana-quarterback-is-acquitted-of-rape.html.

136. EDUC. §§ 6444(5)(c)(v), (viii).

provision needs to clarify whether the accused also has the right to see the evidence the victim plans on using at the hearing. Section 6444 also allows for the use of forensic evidence upon the complainant's request.[137] Would the accused be aware of this forensic evidence prior to the hearing? The statute is unclear. Allowing the accused to see the evidence against them promotes the notions of due process and fundamental fairness because it allows the accused to prepare for the hearing and avoids any elements of surprise.

In terms of the impact statement, it is unclear whether the victim holds the right to an impact statement, or whether it is the respondent that holds the right.[138] This is critical, because if schools interpret this statute to mean only that the impact statement refers to the victim, respondents may be left with the inability to describe how suspension or expulsion may affect them. If schools interpret this to mean that the accused also holds the right to an impact statement, then both parties will have equal opportunities to speak.[139]

Another problematic procedural provision of Section 6444 is the opportunity for at least one level of appeal.[140] At this point, after taking several steps forward in ensuring due process protections for the accused, Article 129-B takes several steps back. Granting the alleged victim the right to an appeal negates all of the due process protections required in the initial disciplinary hearing, because it allows for a second factual review in the event of a finding that the accused did not commit sexual assault.[141]

Allowing the victim to appeal subjects the defendant to a violation of due process akin to a double jeopardy violation under the Fifth Amendment.[142] Here, an appeal differs greatly from an appeal at a criminal or even civil level. Appealing a disciplinary hearing is more of a *de novo* review of the facts, and allowing more than one appeal will

---

137. *Id.* § 6444(8).

138. *Compare* § 6444(5)(b)(i) (explicitly stating that the "respondent, accused, and reporting individual" has the right to be "accompanied by an advisor of choice"), *with* § 6444(5)(b)(iii) (failing to define the impact statement as a "victim's impact statement," which is used in criminal proceedings before jury deliberations or an impact statement by both parties).

139. This recommendation would have been consistent with the 2011 Dear Colleague Letter. "Dear Colleague Letter," *supra* note 14, at 11.

140. EDUC. § 6444(5)(b)(iii).

141. *See* EDUC. § 6444(5)(b)(iii) (stating that *all students* have the right to at least one appeal, and that "a respondent and reporting individual in such cases shall receive written notice of the findings of fact, the decision and the sanction, if any, as well as the rationale for the decision and sanction").

142. U.S. CONST. AMEND. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

merely lead to a constant back-and-forth between the alleged victim and the accused.[143] Disciplinary hearings, as a whole, are civil or even administrative in nature. Disciplinary hearings regarding sexual assault, on the other hand, should be treated very differently.[144] A disciplinary panel's finding that a student did not commit sexual assault or is subject to particular disciplinary procedures is akin to an acquittal and the accused should not be subjected to a second hearing or appeal.[145] Allowing the alleged victim to start the process over not only puts undue pressure on the school to keep the pending hearing open and accommodate the parties involved, but also puts undue pressure on the accused. The greater the number of hearings, the higher the risk for lapses in memory or loss of evidence. Article 129-B should thus limit the right of appeal to the accused.

One final procedural protection worth noting is the provision allowing the accused to bring an advisor of their choice.[146] At first glance, this seems to alleviate the issues that several of the Title IX due process cases have addressed regarding allowing the accused to bring an attorney to help facilitate the hearings.[147] It does not. The provision states that "[r]ules for participation of such advisor shall be established in the code of conduct."[148] Even though the provision allows for advisors to be present, it does not change the discretion schools may have in deciding their level of involvement. For example, courts have held that advisors should only take on the role as consultants, and thus cannot engage in any cross-examination or questioning of any witnesses.[149]

143. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1812 (1987) ("[T]he root, commonsense idea underlying double jeopardy is generalizable beyond criminal cases: Government should not structure the adjudication game so that it is 'heads we win; tails let's play again until you lose; then let's quit (unless we want to play again)'"); Andrew Kloster, *The Violence Against Women Act and Double Jeopardy in Higher Education*, 65 STAN. L. REV. ONLINE 52, 54 n.8 (2012).

144. *See* Kloster, *supra* note 143, at 57 ("[C]ollege disciplinary proceedings are not perfectly analogous to criminal trials, neither are they perfectly analogous to civil suits.").

145. *See id.*

146. N.Y. EDUC. LAW § 6444 (5)(c)(i) (McKinney 2015).

147. *See* Salau v. Denton, 139 F. Supp. 3d 989, 1007 (W.D. Mo. 2015) ("[T]he presence of attorneys or the imposition of rigid rules of cross-examination at [an academic disciplinary] hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration.") (alteration in original) (quoting Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975)); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) ("[A]t most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel.") (quoting Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993)).

148. EDUC. § 6444 (5)(c)(i).

149. *Salau*, 139 F. Supp. 3d at 1007; *Yu*, 97 F. Supp. 3d at 464–65; *see also* Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/nyregion/new-factor-in-

Courts are wary to allow a higher level of involvement, particularly since doing so would mirror criminal trials too closely.[150] Indeed, it is impractical to have sexual assault disciplinary hearings mirror criminal trials so much that they are indistinguishable from one another. However, limiting an advisor's role to that of an attorney's role in a deposition, for instance, might alleviate this tension. This way, advisors may object if the hearing is being conducted in a way that infringes on the student's rights without being limited to a "consultant" role.

C. Training Requirements

Troubled by the increase in sexual assault incidents and underreporting on campuses, United States Senator Claire McCaskill urged the U.S. Senate Subcommittee on Financial and Contracting Oversight to draft a report that surveyed a national sample of schools to shed light on the various shortcomings institutions have faced with regards to handling these types of cases.[151] Senator McCaskill's report found that twenty percent of the institutions in the national sample provide no sexual assault response training at all for faculty and staff.[152] Thirty percent of the schools do not provide any training for students.[153] It is illogical for these schools to not only fail to provide sensitivity training for sexual assault but to also have these untrained individuals serve on an adjudicatory panel.

All schools are required to have a Title IX coordinator on campus to ensure that federal law is enforced,[154] yet many institutions do not have one.[155] The Senate report also notes that Title IX coordinators are invaluable to schools.[156] They can be a "good resource for encouraging students to report, since [they] . . . have the knowledge and training to guide victims through their school's particular reporting and adjudication processes."[157] They are also important to "help ensure that

---

campus-sexual-assault-cases-counsel-for-the-accused.html?_r=0. When asked about his role in these proceedings, one attorney stated: "You may or may not be able to present your witnesses. You probably don't have the chance to cross-examine." *Id.*

150. *See* Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970) ("[I]t is not sound to draw any analogy between student discipline and criminal procedure . . . .").

151. *See* U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS 2 (July 9, 2014) [hereinafter SEXUAL VIOLENCE ON CAMPUS], http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.

152. *Id.* at 1.

153. *Id.*

154. 34 C.F.R. § 106.8 (2017).

155. SEXUAL VIOLENCE ON CAMPUS, *supra* note 151, at 2.

156. *See id.* at 12.

157. *Id.*

the institution's processes and procedures for responding to sexual violence comply with federal law as well as assist students in understanding their rights under federal law should institutions fail to comply."[158] Yet, "[m]ore than ten percent of institutions in the Subcommittee's national sample do not have a Title IX coordinator."[159] With this level of a lack of oversight and federal compliance, there is no wonder that so many Title IX cases have been filed against American universities. This is just one example of why schools should not only have Title IX coordinators, but should also provide thorough and adequate training to all students and faculty in the case that Title IX coordinators are unavailable.

Article 129-B addresses the training and lack of oversight issues by requiring that all schools provide emergency access to Title IX coordinators and adequate training for all students and all faculty.[160] Schools must provide education for all first-year and transfer students entering the institution on various Title IX requirements.[161] All students must also have training specific to domestic/dating violence.[162] Most importantly, all individuals involved in the adjudication process must have had annual training in conducting sexual violence investigations and handling cases involving significant trauma.[163]

Section 6444 specifically requires that any individuals responsible for handling the investigation be trained in impartiality, the effects of trauma, the rights of the respondent, and "other issues."[164] Requiring such training enables campus officials other than Title IX coordinators, such as members of the administration and campus security, to have the tools to better respond to sexual assault allegations. For example, in some extreme cases of sexual assault, campus security or police are the first to respond.[165] Failing to provide training on impartiality may contribute to due process violations at the investigatory stage. Similarly, failing to provide training on the effects of trauma may violate the civil rights of the victim under Title IX.[166]

---

158. *Id.*
159. *Id.* at 2.
160. N.Y. EDUC. LAW § 6444(1)(b), (5)(c)(ii) (McKinney 2015).
161. *Id.* § 6447(2)(a)-(h).
162. *Id.* § 6447(5).
163. *Id.* § 6444(5)(c)(ii).
164. *Id.*
165. *See* Campus Safety Staff, *UT Police Adopt New Sexual Assault Response Guidelines*, CAMPUS SAFETY MAGAZINE (Mar. 3, 2016), www.campussafetymagazine.com/article/ut_police_adopt_new_sexual_assault_response_guidelines/Sexual_Assault#.
166. *See id.* According to University of Texas System Police Director Michael Heidingsfield, "[Campus police] must publicly acknowledge our moral obligation to

The training requirements under Section 6444 are again victim-centered.[167] Schools often train campus police by focusing on victim's rights.[168] Administrators are also trained under Title IX, which arguably in itself, is victim-centric.[169] This is likely due to the fact that the media has focused on gross mishandling of investigations of sexual abuse and injury to alleged victims. If a school is known to have a prevalence of campus sexual assault and to mishandle such allegations, students may be deterred from attending that school. On the other hand, alleged perpetrators of sexual assault are often presumed guilty, and their complaints of due process violations are not met with as much sympathy.

Students and faculty other than those involved in the adjudicatory process are also required to participate in annual training.[170] Article 129-B provides that all students, student leaders, and student-athletes must be trained in issues involving sexual assault.[171] This level of campus-wide oversight certainly promotes the "all hands on deck" approach that Governor Cuomo identified in his statements regarding Article 129-B.[172] If all students were aware of their schools' requirements under Title IX, this may encourage students to push for better sexual assault procedures and Title IX compliance. Thus, promoting campus-wide training may promote more investigations and compliance with Title IX.

V. PROPOSED ADDITIONAL PROVISIONS AND CLARIFICATION

A. Burden of Proof

Article 129-B's evidentiary provisions do not identify a burden of proof.[173] This is contained in Title IX guidance, establishing that the evidentiary standard in sexual assault disciplinary hearings may be

understand sexual assault for the life-altering and destructive experience it is, and be champions of those victimized." *Id.*

167. EDUC. § 6444(5)(c)(ii).

168. *See generally* Campus Safety Staff, *supra* note 165 (announcing that campus police will be retrained according to new guidelines that are more victim-centric).

169. *See A Hostile Environment for Student Defendants*, *supra* note 20, at 52.

170. EDUC. § 6447.

171. *Id.*

172. *See Enough is Enough*, *supra* note 4.

173. Article 129-B does not clearly set forth who has the burden of proof. While it would be assumed that the accuser would hold the burden, some universities have shifted the burden to the accused. *See* Teresa Watanabe, *More College Men are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014, 6:15 PM), http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html.

"either [the] preponderance of the evidence standard or a clear and convincing evidence standard."[174] New York, despite its statutory construction enhancing the due process protections afforded to students accused of committing sexual assault, is bound by the minimum Title IX requirements. The real question is, then, whether New York is bound by the requirements detailed in the interim guidance at all, and if not, which evidentiary standard applies.

Even before the interim guidelines were in place, several commentators and courts had noted that the Dear Colleague Letter—which established that the evidentiary standard in sexual assault disciplinary hearings by a preponderance of the evidence[175]—was not binding law because it had not satisfied the "notice and comment" requirements of the Administrative Procedures Act ("APA").[176] Without Congress's official enactment of a law establishing the preponderance of the evidence standard, one could find, as the Department of Education did in September 2017, that the Dear Colleague Letter was not binding on any state (let alone New York).[177] Thus, Article 129-B could, and should, be altered to provide a higher standard of proof than preponderance of the evidence.

In determining that the preponderance of the evidence standard was the more applicable standard of proof, the Dear Colleague Letter reasoned that because the OCR uses that standard in "resolving allegations of discrimination" in administrative hearings, it should thus be utilized in cases of sexual assault on campus.[178] This line of reasoning is illogical because OCR grievance procedures are

174. Q&A, *supra* note 17, at 5.

175. "Dear Colleague Letter," *supra* note 14, at 10–11 ("In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. . . . Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.").

176. *See* 5 U.S.C. § 553 (requiring agencies to publish "[g]eneral notice of proposed rule-making" in the Federal Register and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."); Joe Cohn, *UMass Amherst Tells Court that 'Dear Colleague' Letter is Not Binding Law*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 4, 2014), https://www.thefire.org/umass-amherst-tells-court-dear-colleague-letter-binding-law/.

177. Indeed, the withdrawal letter notes that one of the main concerns with the Dear Colleague Letter warranting withdrawal was its implementation without notice and comment. *See* Withdrawal Letter, *supra* note 16. For a discussion of how the APA's notice and comment requirement could have applied to the Dear Colleague Letter prior to its withdrawal, see Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 67 (2013).

178. "Dear Colleague Letter," *supra* note 14, at 11.

administrative in nature and involve the inherent civil rights protections codified by Title IX. In the context of sexual assault disciplinary practices, however, there is an underlying criminal element that cannot be ignored. The Dear Colleague Letter stated: "Grievance procedures that use this [clear and convincing] standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX."[179] Though the preponderance of the evidence standard can still be used to establish whether a civil rights violation has occurred,[180] adjudicating allegations of rape does not involve *civil rights* violations but rather, *criminal* violations of the utmost kind.

Moreover, adopting the preponderance of the evidence standard is contrary to the inherent purpose of Article 129-B: to treat sexual violence as a crime and to assure students that "they have a right to have it investigated and prosecuted as one."[181] Preponderance of the evidence is a civil standard that only requires that the adjudicatory panel be more than fifty percent sure that the accused student committed sexual assault. The beyond a reasonable doubt standard, on the other hand, is too strict a test, particularly since the disciplinary hearing is not technically a criminal trial, and both parties' statements regarding what occurred, as well as some electronic exchanges, are commonly the only evidence presented at these disciplinary hearings.[182] Instead, New York should follow a "clear and convincing" evidentiary standard, as included in the 2017 Q&A.[183] This was the standard used in several schools prior to the Dear Colleague Letter's release, and it should remain the standard today to ensure that the evidence presented is viewed in a light that is neither unduly sympathetic to the victim nor biased toward the accused.

---

179. *Id.*

180. *See* Q&A, *supra* note 17, at 5 (permitting the continued use of the preponderance of the evidence standard).

181. *Enough is Enough*, *supra* note 4.

182. *C.f.* Lavinia M. Weizel, Note, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1630–32 (2012).

183. Q&A, *supra* note 17, at 5; *see* AM. ASS'N OF UNIV. PROFESSORS, CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES 371 (2012), http://www.aaup.org/file/Sexual_Assault_Policies.pdf ("The AAUP advocates the continued use of 'clear and convincing evidence' in both student and faculty discipline cases as a necessary safeguard of due process and shared governance.").

B. Student Participation

Having students on an adjudicatory panel of this magnitude poses yet another due process issue: fact-finder bias.[184] There are two competing arguments regarding student disciplinary panels.[185] The first is that having a panel that consists (in part) of students more closely mirrors a "jury of your peers."[186] On the other hand, taking the right to a "jury of your peers" too literally is a cause for concern. The second argument is that students are ill-equipped to adjudicate a topic as sensitive and fact-specific as sexual assault.[187] For example, the same student disciplinary panel that hears plagiarism cases likely also hears sexual assault cases. The standards cannot possibly be the same, and the training must be substantially different. This becomes a grave issue when the panel is not specially trained in handling sexual assault cases.[188] Some universities have done away entirely with panels that consist of individuals associated with the school, whether they are students or faculty.[189]

Although Article 129-B requires that all students receive annual training on prevention and treatment of instances of sexual abuse, domestic violence, dating violence, and stalking, it does not explicitly state whether students should be involved in the adjudication proceeding at all.[190] Section 6444 does, however, indicate that the panel cannot consist of any members with a "conflict of interest."[191] In this context, a conflict of interest most likely means knowledge of the underlying incident or familiarity between the parties and panel members. This is much more likely to occur on smaller campuses. The

184. *See* Bleiler v. Coll. of the Holy Cross, No. 11-11541-DJC, 2013 WL 4714340, at *3–4 (D. Mass. Aug. 26, 2013) (declining to accept the plaintiff's assertion that his student disciplinary panel was biased).

185. *See* Adam Liptak, *Should Students Sit on Sexual Assault Panels?*, N.Y. TIMES (Apr. 10, 2015), http://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html; *Students Say Students Should Sit on Sexual Assault Panels*, EDUC. ADVISORY BD. (Apr. 16, 2015, 10:47 AM), https://www.eab.com/daily-briefing/2015/04/16/students-say-students-should-sit-on-sexual-assault-panels.

186. Liptak, *supra* note 185.

187. *Id.*

188. *See* SEXUAL VIOLENCE ON CAMPUS, *supra* note 151, at 2.

189. *See* Meredith Clark, *College Sexual Assault: A Campus-By-Campus Report Card*, MSNBC (Aug. 26, 2015, 10:52 AM), http://www.msnbc.com/ronan-farrow-daily/college-sexual-assault-campus-campus-report-card (noting that Amherst College eliminated peer and faculty panels and replaced them with officials from other schools in the area in an effort to strengthen its sexual assault policies).

190. *See* N.Y. EDUC. LAW § 6444(5)(b)(iii) (McKinney 2015) (explaining that the panel "*may* include one or more students" (emphasis added)).

191. *Id.*

Department of Education itself dissuades schools from having students participate in disciplinary hearings.[192] The responses for and against this dissuasion present the two competing arguments mentioned above.[193]

VI. FUTURE IMPLICATIONS: CRIMINAL OR CIVIL?

In examining whether the plaintiff's due process rights were violated, the Eighth Circuit, in *Jones v. Snead*, made sure to warn lower courts and other appellate courts against comparing school disciplinary hearings to criminal proceedings.[194] It is likely that the court anticipated that one of the dangers of treating a disciplinary hearing in this way is the risk that defendants will present claims of double jeopardy or *res judicata* in future proceedings. The Fifth Amendment's double jeopardy clause protects defendants against being "subject for the same offence to be twice put in jeopardy of life or limb."[195] Additionally, *res judicata* is a form of civil claim preclusion that centers on the principle that a matter adjudged is taken for its truth.[196] Thus, if the subject of a sexual assault disciplinary proceeding is treated as if he were a criminal defendant, he may have an issue with the victim later pressing criminal charges.[197] Likewise, if a disciplinary proceeding is civil in nature, a subsequent civil trial may also be problematic since it will likely review the same factual record and evidence.

The confusion as to whether college disciplinary hearings should mirror civil or criminal proceedings is exemplified in cases where the courts have been inconsistent in applying the proper civil or criminal

192. *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 30 n.30 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence.").

193. *Compare* Collin Binkley, *Ohio State Student Pushing for Students to be Heard on Disciplinary Panels*, COLUMBUS DISPATCH (Mar. 7, 2015, 2:32 AM), http://www.dispatch.com/content/stories/local/2015/03/06/campus-disciplinary-panels.html, *with* Liptak, *supra* note 185.

194. 431 F.2d 1115, 1116–17 (8th Cir. 1970) ("[W]e have cautioned 'that it is not sound to draw an analogy between student discipline and criminal procedure.'" (quoting Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1088 (8th Cir. 1969))).

195. U.S. CONST. amend. V.

196. *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 13–19 (2001).

197. *Enough is Enough*, *supra* note 4 ("By standing up and saying 'Enough is Enough,' we made a clear and bold statement that sexual violence is a crime, and students can be assured they have a right to have it investigated and prosecuted as one.").

procedure rules in reviewing sexual assault disciplinary hearings.[198] In *Tanyi*, the court applied an evidence rule applicable only to civil cases when reviewing the evidence used at the disciplinary hearing.[199] Yet, the court also applied the Federal Rules of Criminal Procedure, even though these disciplinary hearings were not criminal trials.[200] It is possible that even though Article 129-B provides clarity as to the due process rights required, having a hearing structured in this way mirrors a criminal trial too closely.

Section 6444 of Article 129-B mirrors the procedural due process rights ensured in criminal proceedings.[201] For example, granting the accused the right to a presumption of "not responsible" mirrors the presumption of innocence until proven guilty in criminal trials.[202] Additionally, aside from the procedural requirements such as allowing both parties to present witnesses and evidence, bring an advisor, and have the right to an appeal, the provisions allowing the accused's prior sexual assault accusations/adjudications but disallowing evidence of the victim's prior sexual activity closely mirror existing rape shield statutes.[203] Thus, these provisions make it clear that disciplinary hearings must mirror criminal trials, and if not, due process is not preserved.

Allowing a disciplinary hearing that so thoroughly mirrors a criminal trial (absent allowing advisors to take on an active role in the hearing) grants the accuser three bites of the apple. First, the alleged victim can have the school make a determination of guilt for purposes of suspension or expulsion. Second, the victim may sue the accused for damages in a civil action, using the same facts and similar claims. Finally, the alleged victim may bring criminal charges against the same individual using the same factual record and evidence. As such, suits involving *res judicata* or double jeopardy claims are anticipated. Thus, the arguments that perhaps sexual assault allegations should be left to the courts will not be discussed in this Note, but are worth future consideration.[204]

198. *See, e.g.*, Tanyi v. Appalachian State Univ., No. 5:14-CV-170RLV, 2015 WL 4478853, at *2–4, *10 (W.D.N.C. July 22, 2015) (applying the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure when reviewing Appalachian State's actions).

199. *Id.* at *3 (citing FED. R. EVID. 412(b)(2)).

200. *Id.* at *4 (citing FED. R. CRIM. P. 14(a)).

201. *See* N.Y. EDUC. LAW § 6444 (McKinney 2015).

202. *See id.*

203. *Compare id. with* FED. R. EVID. 412, 413.

204. For a further analysis as to whether colleges should do away with disciplinary hearings entirely, see Robert Carle, *The Trouble with Campus Rape Tribunals*, WITHERSPOON INST. (July 14, 2014), http://www.thepublicdiscourse.com/2014/07/13369/,

VII. CONCLUSION

Article 129-B is a great example of states taking the necessary initiative and expanding rights for those accused of committing sexual assault on campus. Several of its provisions provide the procedural protections that colleges nationwide have failed to provide, and address the due process issues that have been seen in Title IX cases time and time again. However, several of its provisions merely mirror the protections already required by federal legislation or are insufficient in protecting the accused. Thus, by changing these provisions and adding the protections described within this Note, Article 129-B would set the stage for other states to enact similar forms of uniform codification.

Finally, schools are left with two choices: either conduct the sexual assault disciplinary hearing in a way that mirrors a criminal trial in order to preserve the accused's rights, or not conduct hearings on this issue at all and leave such determinations to the courts. In addition, conducting hearings that mirror these trials pose double jeopardy issues that cannot be ignored. Overall, Article 129-B is a positive step toward ensuring college disciplinary proceedings are conducted in a manner that is just.

---

and *A Hostile Environment for Student Defendants*, *supra* note 20. *But see* Brodsky & Deutsch, *supra* note 85.