

# PROCEEDING ACCORDINGLY

What Students Think  
about Due Process on Campus





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## What Students Think about Due Process on Campus

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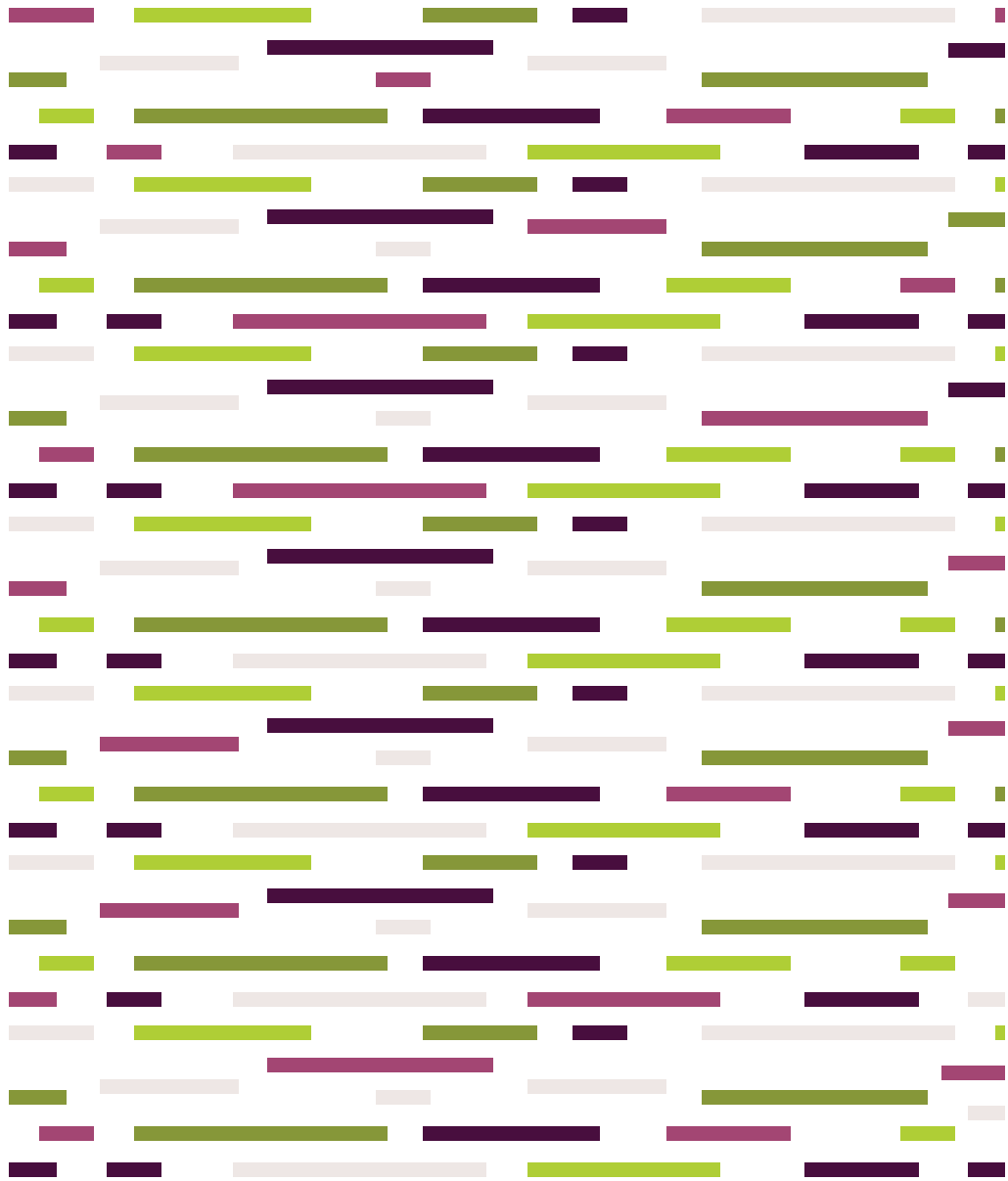
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The toplines and tabulations delivered to FIRE from YouGov (California) can be accessed at <https://www.thefire.org/publications/student-surveys/student-attitudes-due-process-survey>.



## TABLE OF CONTENTS

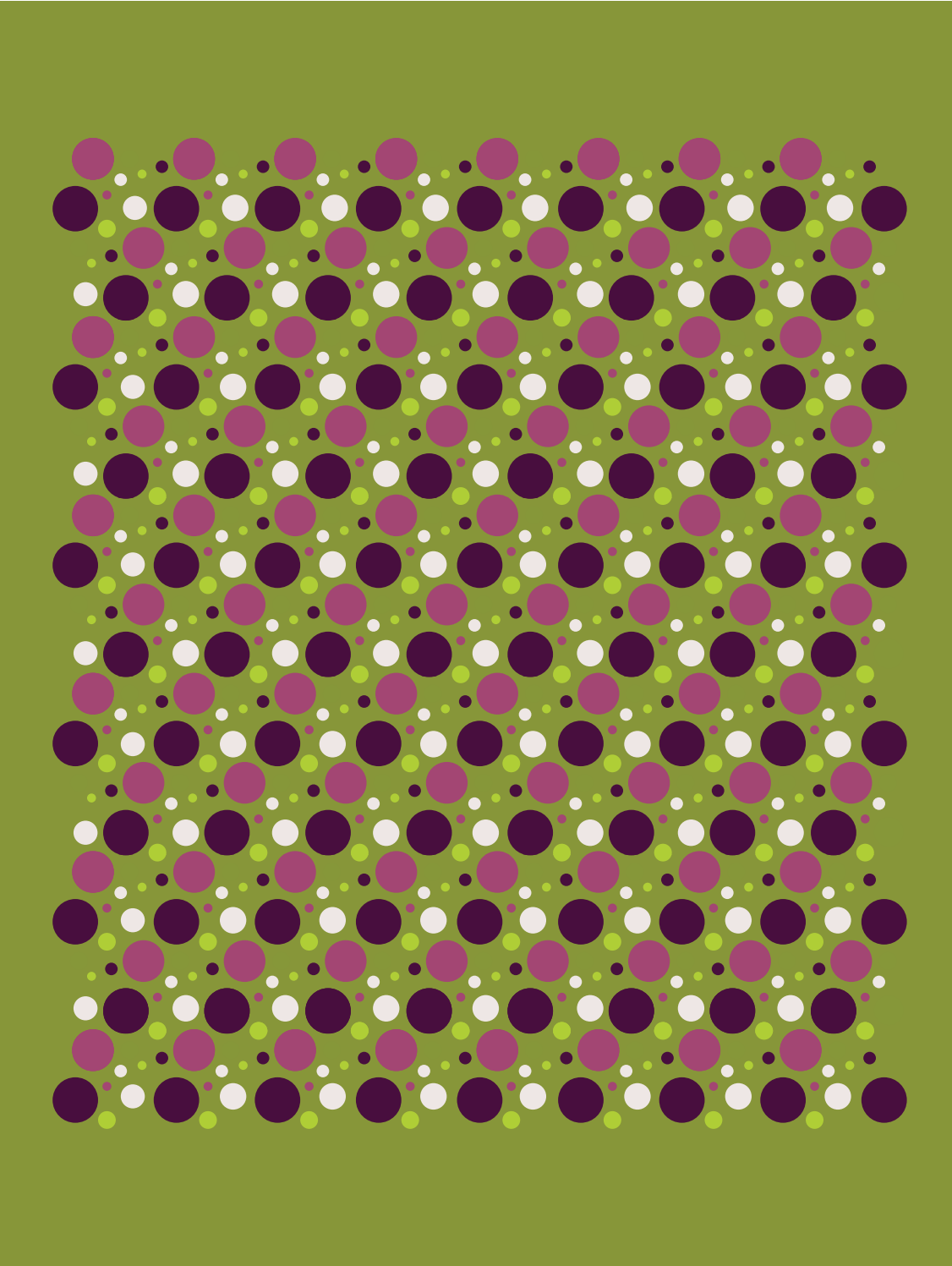
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<b>2</b>	<b>EXECUTIVE SUMMARY</b>
<b>6</b>	<b>DETAILED RESULTS</b>
7	Presumption of Innocence
8	Adequate Notice
9	Access to Evidence
12	Cross-Examination
13	Student Advisors and Lawyers
15	Single-Investigator Model
15	Impartial Decision-Maker
16	Appeals
16	Unanimous Decision to Expel
<b>20</b>	<b>DEMOGRAPHICS</b>
<b>24</b>	<b>METHODOLOGY</b>
<b>26</b>	<b>SURVEY QUESTIONNAIRE</b>
<b>32</b>	<b>APPENDIX: Procedural Safeguards from FIRE's 2017 Spotlight on Due Process Report</b>

# EXECUTIVE SUMMARY

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FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION



In the fall of 2017, FIRE released its first *Spotlight on Due Process* Report (the “2017 Report”), highlighting the startling lack of procedural protections for accused students in campus disciplinary proceedings. The authors of the 2017 Report found that nearly three-quarters of America’s top 53 universities do not presume accused students to be innocent until proven guilty, and that no school ensures that its students are protected by all ten of the fundamental elements of due process that FIRE outlined in the 2017 Report.<sup>1</sup>

This report builds on the 2017 Report. As discussed in the Methodology section, FIRE contracted with YouGov, a nonpartisan polling and research firm, to conduct a national online survey of 2,225 undergraduate students who currently attend a two- or four-year educational institution in the United States between January 29, 2018, and February 12, 2018. This report examines the findings of that survey.

The survey reveals that many college and university policies do not reflect student attitudes toward due process on campus. American students think their classmates deserve many of the procedural protections outlined by FIRE in the 2017 Report. In fact, in all but one situation described in the survey, a majority of student respondents supported the ten fundamental elements of due process highlighted in the 2017 Report (Table 1). Not only do the vast majority of students think their classmates should have due process rights, but they also feel that these rights are important: 98 percent of students think that it is very important or important that students have due process protections in college.

We drafted the survey to gauge students’ attitudes toward due process protections, and specifically used the procedural elements from the 2017 Report as a guide.<sup>2</sup> To keep our question wording

simple and precise, we broke the concepts apart and asked student respondents sixteen questions about these ten fundamental elements of due process.

Additionally, we used a natural experiment to better understand how students think about due process in different situations. We treated one-third of our 2,225-student sample as a control group and asked them questions about their attitudes toward due process protections in a situation in which a college student allegedly “broke a rule.” We asked another third of our sample the same questions about an underage student who allegedly “drank alcohol.” We asked the final third of our sample the same questions, but this time about a student who allegedly engaged in “sexual misconduct.” This unique methodology allows us to show, throughout this report, that support for due process is strong, but that it is stronger for students who have allegedly broken a rule or engaged in underage drinking than it is for students who have allegedly engaged in sexual misconduct. We invite you to read the full methodology and questionnaire at the end of this report.

We at FIRE are encouraged that student support for due process protections is high overall, and we are excited to present the results from this groundbreaking survey of college students’ attitudes toward due process on campus. We hope this report will be used by students, faculty members, and college and university administrators to advocate for meaningful institutional change to campus disciplinary policies that are legally questionable and are not supported by student populations.

**Some important findings from FIRE’s survey—the first survey to ever ask college students about due process protections on campus—include:**

<sup>1</sup>FIRE, *Spotlight on Due Process 2017*, September 2017, <https://www.thefire.org/due-process-report-2017>.

<sup>2</sup>The procedural safeguards outlined in the 2017 Report are also listed in the Appendix of this report.

Ninety-eight percent of students think it is very important or important that students have campus due process protections in college.

Only 16 percent of students think that the primary purpose of a campus disciplinary hearing is to provide an educational experience for those involved, while 84 percent of students think that the primary purpose of a campus disciplinary hearing is to provide justice and protection to students on campus. This is in stark contrast to the argument made by many school administrators who assert that campus disciplinary hearings serve primarily as an educational opportunity for those involved.<sup>3</sup>

As shown in Figure 1, students have mixed attitudes toward whether the jurisdiction of a college or university should extend to off-campus conduct: 18 percent of students think a college or university should be able to punish students for off-campus misconduct; 27 percent of students do not think a college or university should be able to

punish students for off-campus misconduct; and 54 percent of students think it depends on the circumstances.

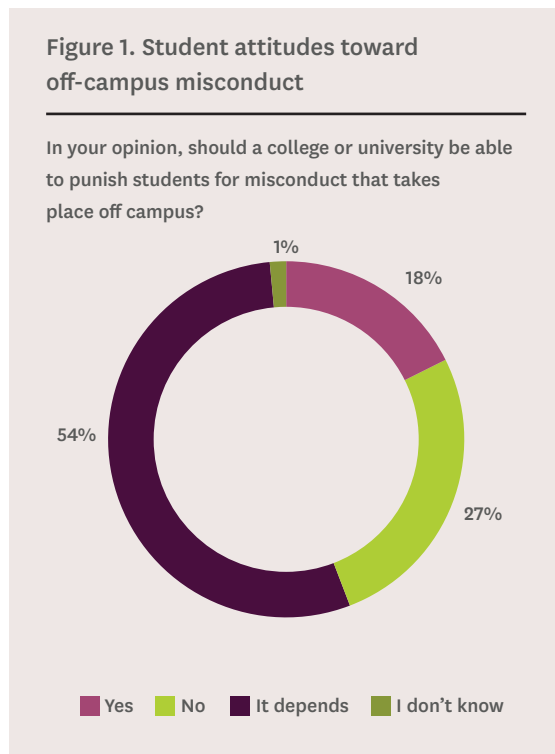
Sixty-three percent of student respondents in the sexual misconduct treatment group think that if a student is found not guilty of sexual misconduct, the complainant should be allowed to appeal the not-guilty decision to a higher campus decision-maker, allowing for a situation akin to double jeopardy.

Eighteen percent of the overall sample responded that they have participated in a campus disciplinary hearing or process (Table 5).

A majority of students who have participated in a campus disciplinary hearing or process (71 percent) think the campus disciplinary hearing or process was fair to everyone involved.

A majority of student respondents support nine of the ten fundamental elements of due process highlighted in the 2017 Report. As shown in Table 1, student support for an accused student being allowed to provide additional information or evidence at a disciplinary hearing received the highest proportion of support of any due process protection. Student support for making copies of all of the available evidence before a disciplinary hearing received the lowest proportion of support.

The one situation that did not receive a majority of support—when students in the sexual misconduct treatment group were asked about an accused student making copies of evidence—received 48 percent of student support.



<sup>3</sup>For example: (1) Emory University's Undergraduate Code of Conduct asserts, "Because the university is an institution of learning, the Code has education as its foremost aim; it is not intended to be a solely punitive process nor a substitute for the law" ([http://conduct.emory.edu/policies/code\\_of\\_conduct/index.html](http://conduct.emory.edu/policies/code_of_conduct/index.html)); (2) Massachusetts Institute of Technology's Committee on Discipline states, "With this context, the Committee on Discipline (COD) was created to resolve complaints of alleged violations of policies and/or community standards by a student, former student, or student organization in a way that is objective and educational, not legalistic or adversarial" (<https://cod.mit.edu/>); (3) Rensselaer Polytechnic Institute's Student Rights, Responsibilities, and Judicial Affairs provides, "Rensselaer's approach to the judicial process is one that is intended to be educational rather than punitive" (<https://info.rpi.edu/dean-students/student-rights-responsibilities-and-judicial-affairs>).



Table 1. Student support for due process protections

Due process protection*	Overall sample	Breaking a rule	Underage drinking	Sexual misconduct
<i>Clearly stated presumption of innocence</i>				
Presumption of innocence	85%	86%	87%	80%
<i>Adequate written notice of allegations</i>				
Written notice	89%	90%	89%	86%
<i>Right to challenge fact-finders' impartiality</i>				
Mechanism to object to bias	75%	80%	77%	69%
<i>Prohibition on conflicts of interest</i>				
Single-investigator model**	27%	26%	28%	26%
<i>Access to and right to present all evidence at hearing</i>				
Look through evidence	71%	74%	76%	61%
Make copies of evidence	60%	64%	64%	48%
Provide additional evidence	91%	93%	91%	88%
<i>Ability to pose relevant questions to witnesses</i>				
Cross-examination	75%	79%	77%	68%
<i>Active participation of an advisor of choice</i>				
Allow an advisor	83%	88%	84%	77%
Allow advisor to speak	71%	77%	72%	64%
Allow a lawyer	72%	72%	70%	72%
Allow a lawyer if law has allegedly been broken***	80%			
<i>Right of the accused to appeal a finding or sanction</i>				
Accused appeal of guilty decision	67%	68%	69%	64%
Accuser appeal of not-guilty decision****				63%
<i>Unanimity of disciplinary panel required for expulsion</i>				
Unanimity required for expulsion	78%	84%	79%	72%

\*Italicized subheadings correlate to one of the procedural safeguards outlined in the 2017 Report.

\*\*The single-investigator model is an adjudicative model that FIRE argues does not offer sufficient procedural protections to accused students. The listed percentages indicate support for the single-investigator model.

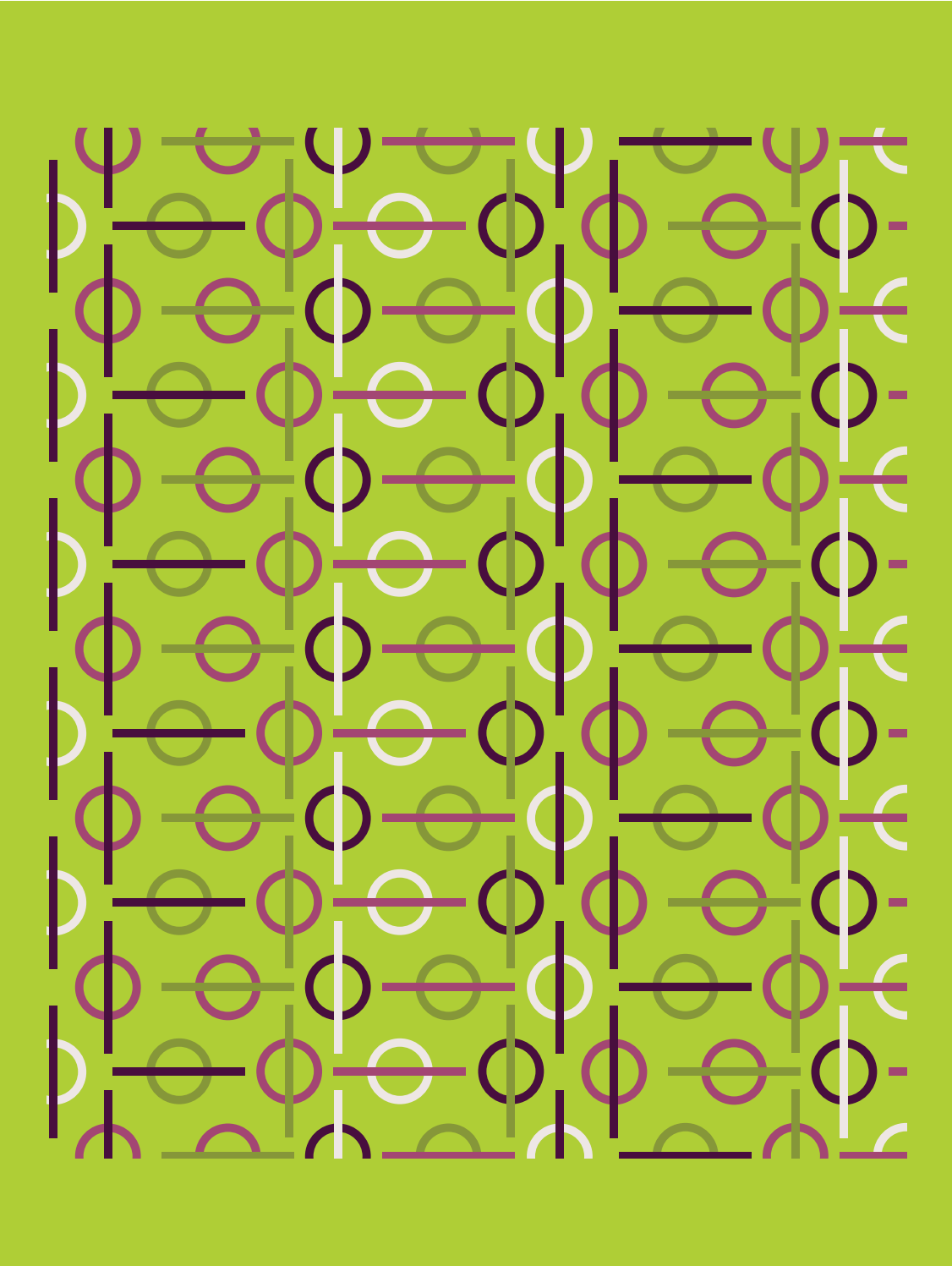
\*\*\*Asked only of the overall sample.

\*\*\*\*Asked only of the sexual misconduct treatment group.

Note: Student attitudes toward nine out of the ten procedural safeguards outlined in the 2017 Report are represented in this table. Attitudes toward the tenth safeguard, timing of written notice, are presented in Table 2.

DETAILED RESULTS

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## PRESUMPTION OF INNOCENCE

The principle that a person is innocent until proven guilty is a fundamental aspect of constitutional due process,<sup>4</sup> including in on-campus disciplinary hearings at public colleges and universities.<sup>5</sup> Consistent with this, a majority of student respondents think that a student who is accused of breaking a campus rule (86 percent), engaging in underage drinking (87 percent), or engaging in sexual misconduct (80 percent) should be considered innocent by the school’s administration until the student is proven guilty (Figure 2).

When a student has allegedly broken a rule, student respondents who self-identified as very liberal are 9 percentage points more likely than their very conservative peers<sup>6</sup> to think the student should be considered innocent by the school’s administration until the student is proven guilty. However, when a student has allegedly engaged in sexual misconduct, the opposite is true: very liberal students are a full 19 percentage points less likely than their very conservative peers to think the student should be considered innocent by the school’s administration until proven guilty (Figure 3).

Figure 2. Student attitudes toward presumption of innocence

Should the student accused of [breaking a campus rule | sexual misconduct | underage drinking] be considered innocent by the school’s administration until he/she is proven guilty?

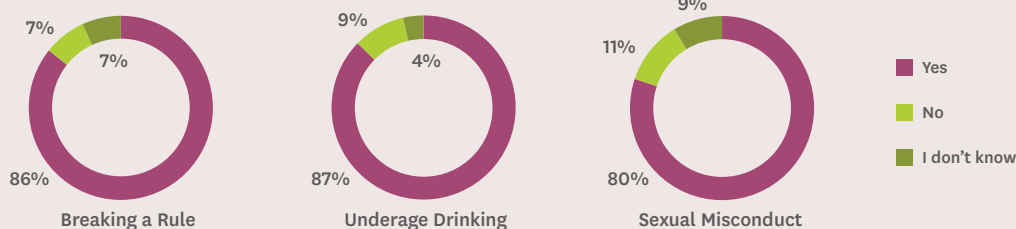


Figure 3. Ideology and support for presumption of innocence

Should the student accused of [breaking a campus rule | sexual misconduct | underage drinking] be considered innocent by the school’s administration until he/she is proven guilty?



Note: Students who were “not sure” of their ideology are not represented in this graph. Bars indicate “yes” responses.

<sup>4</sup> *Cool v. United States*, 409 U.S. 100, 104 (1972) (finding that the presumption of innocence is “constitutionally rooted”); *In re Winship*, 397 U.S. 358, 361 (1970) (holding that the prosecution must prove every element of the crime for the court to find guilt); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (“[P]laintiffs bear the risk of failing to prove their claims”).

<sup>5</sup> See *State v. Lynch*, 178 Wash. 2d 487, 499, 309 P.3d 482 (2013) (finding that the overwhelming majority of courts have held that due process is violated when the defendant is required to prove any fact which negates an element of the offense charged); *Mock v. Univ. of Tennessee at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015), available at <http://www.chronicle.com/items/biz/pdf/memorandum-mock.pdf> (holding that the university violated an accused student’s due process rights by improperly shifting the burden of the proof to him in a sexual misconduct proceeding).

<sup>6</sup> This report uses two scales in analyzing student answers based on political or ideological differences: one scale for partisan identification and one scale for ideological identification. Each scale is based on self-identification, was provided by YouGov, and allowed respondents to choose a “not sure” option. The five-point ideological scale includes the following identifiers: very liberal, liberal, moderate, conservative, and very conservative. The three-point partisan scale includes the following identifiers: Democrat, Republican, and Independent.

When a student has allegedly broken a rule, 85 percent of female students think the student should be considered innocent by the school’s administration until the student is proven guilty. Fewer (77 percent) female students think a student who has allegedly engaged in sexual misconduct should be considered innocent until proven guilty.

**ADEQUATE NOTICE**

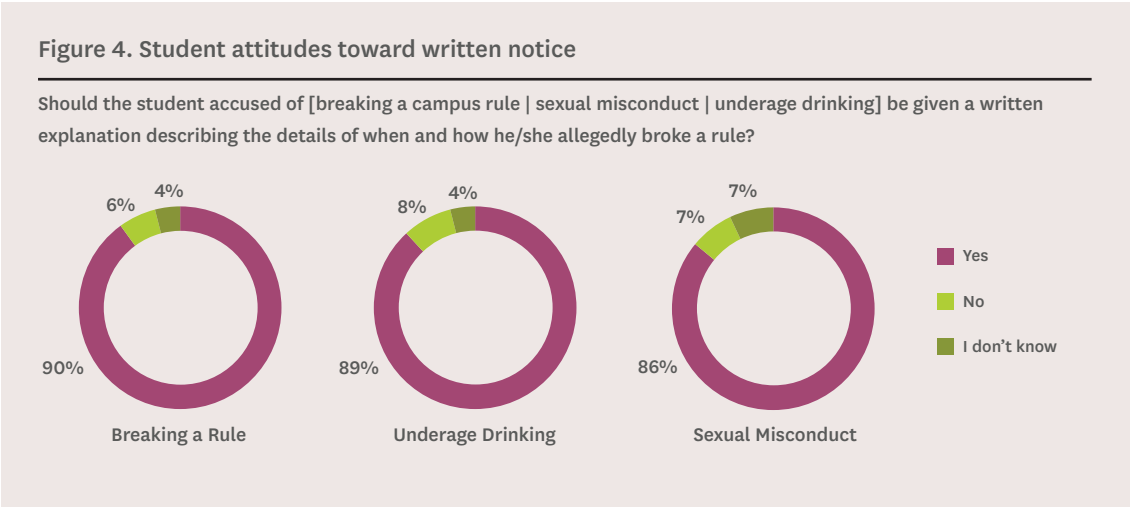
Another core due process protection is providing the accused student with adequate notice of alleged misconduct.<sup>7</sup> Adequate notice is constitutionally required for public university students facing serious disciplinary action.<sup>8</sup> The 2017 Report emphasizes that adequate notice must be in writing and must include: “the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.”

Just as a student must be told the details of how he or she allegedly engaged in misconduct, the student must also be given adequate time to prepare for a campus disciplinary hearing. If a student is informed of the details of his or her alleged misconduct at the time of the hearing,

that student has no time to prepare a meaningful defense. As stated in the 2017 Report, adequate time to prepare for the disciplinary process includes “notice of the hearing date at least seven business days in advance”; moreover, “if the accused student is required to respond to the allegations before the hearing, he or she must receive notice at least five business days in advance.”<sup>9</sup>

A majority of student respondents think a student who is accused of breaking a campus rule (90 percent), engaging in underage drinking (89 percent), or engaging in sexual misconduct (86 percent) should be given a written explanation of when and how the student allegedly broke the campus rule, engaged in underage drinking, or engaged in sexual misconduct, respectively (Figure 4).

Those respondents who stated that a student should receive a written explanation of when and how he or she allegedly broke a campus rule were then asked when the accused student should be given the written explanation. As shown in Table 2, a majority of those student respondents think that a student should receive a written explanation of alleged misconduct at least one week before a campus disciplinary hearing. Most of those students think that a student who is accused of



<sup>7</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding that notice is “[a]n elementary and fundamental requirement of due process”).

<sup>8</sup> *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (stating that oral or written notice is required for students facing suspension).

<sup>9</sup> FIRE, *Spotlight on Due Process 2017*, September 2017, <https://www.thefire.org/due-process-report-2017>.

**Table 2. Student attitudes toward timing of written notice**

When should the student be given the written explanation?	Overall sample	Breaking a rule	Underage drinking	Sexual misconduct
At least one week before the hearing	69%	75%	71%	65%
Any time before the hearing	20%	18%	21%	22%
During the hearing	5%	3%	6%	7%
It doesn't matter when	2%	2%	2%	3%
I don't know	2%	3%	1%	3%
<i>Number of observations</i>	1,966	670	662	634

Note: Respondents who stated that a student should receive a written explanation of when and how he or she allegedly broke a campus rule were then asked when the accused student should be given the written explanation, and so this table reflects the responses of 1,966 student respondents.

breaking a campus rule (75 percent), engaging in underage drinking (71 percent), or engaging in sexual misconduct (65 percent) should be given a written explanation of when and how the student allegedly engaged in misconduct at least one week before the campus disciplinary hearing.

**ACCESS TO EVIDENCE**

To maximize the truth-finding ability of disciplinary proceedings, the parties must have the right to access evidence prior to the hearing and to present relevant evidence during the hearing. The Supreme Court of the United States has held that the right to be heard is a “fundamental requirement of due process.”<sup>10</sup> As a critical safeguard against the wrongful punishment of innocent students, American courts have protected this right for public university students facing suspension or expulsion.<sup>11</sup>

A majority of students think that, before a disciplinary hearing, a student who is accused of breaking a campus rule (74 percent), engaging in underage drinking (76 percent), or engaging in sexual misconduct (61 percent) should be allowed to look through all of the evidence that might be

used to show that the student broke a campus rule, drank alcohol, or engaged in sexual misconduct, respectively (Figure 5).

Fewer students, though still a majority, think that, before a disciplinary hearing, a student who is accused of breaking a campus rule (64 percent) or engaging in underage drinking (64 percent) should be allowed to make copies of all of the evidence that might be used to show that the student broke a campus rule or drank alcohol, respectively (Figure 6). However, less than half of students (48 percent) think that, before a disciplinary hearing, a student who is accused of engaging in sexual misconduct should be allowed to make copies of all of the evidence that might be used to show that the student engaged in sexual misconduct (Figure 6).

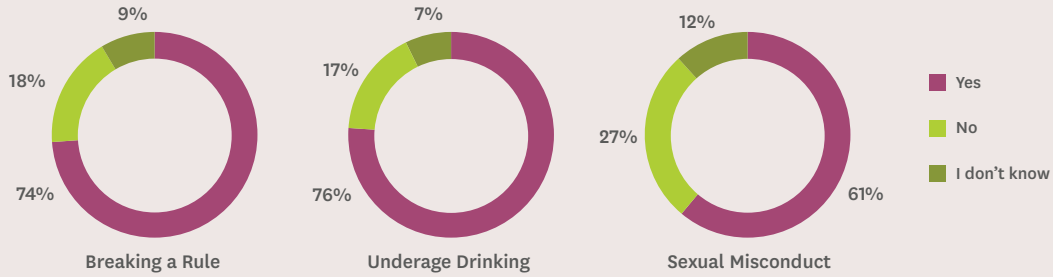
Of the ten due process protections that students were asked about in this survey, students expressed the least amount of support for allowing a student accused of misconduct to make copies of all of the evidence (Table 1).

There is no consistent ideological pattern to the responses to questions regarding access to

<sup>10</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society”) (internal quotations omitted).  
<sup>11</sup> *Goss*, 419 U.S. at 581 (noting that a student facing suspension must be given “an opportunity to present his side of the story”); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (stating that students have a right to present oral testimony or written affidavits of witnesses when facing expulsion).

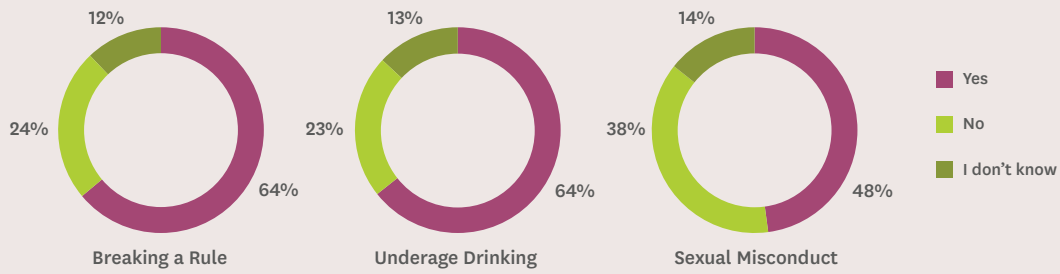
**Figure 5. Student attitudes toward looking through evidence**

Before the disciplinary hearing, should the student be allowed to look through all of the evidence that might be used to show that the student [broke a campus rule | engaged in sexual misconduct | drank alcohol]?



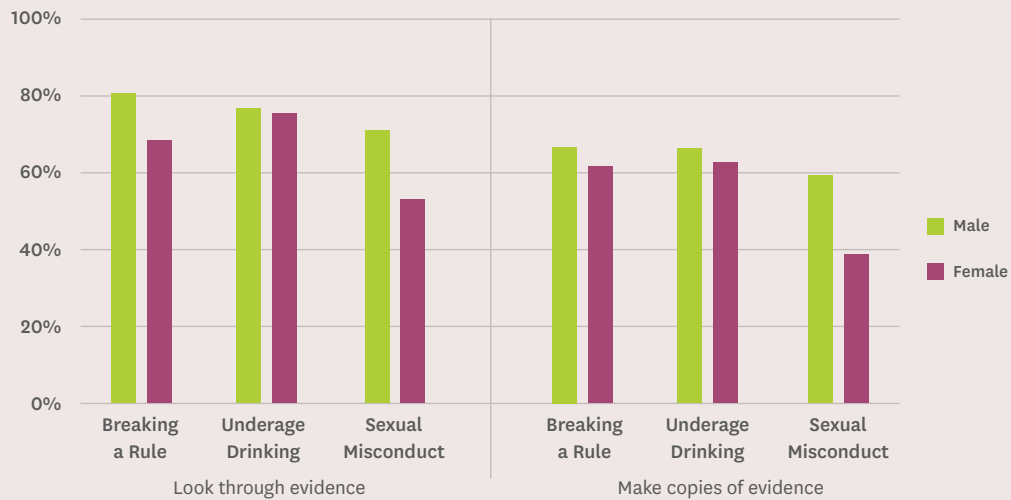
**Figure 6. Student attitudes toward making copies of evidence**

Before the disciplinary hearing, should the student be allowed to make copies of all of the evidence that might be used to show that the student [broke a campus rule | engaged in sexual misconduct | drank alcohol]?



**Figure 7. Gender and access to evidence**

Before the disciplinary hearing, should the student be allowed to look through/make copies of all of the evidence that might be used to show that the student [broke a campus rule | engaged in sexual misconduct | drank alcohol]?



Note: Bars indicate "yes" responses.

Table 3. Student ideology and attitudes toward accessing evidence

Breakdown of questions asked		Very liberal	Liberal	Moderate	Conservative	Very conservative
Before the disciplinary hearing, should the student be allowed to <b>look through all of the evidence</b> that might be used to show that the student ...	... broke a campus rule?	84%	77%	71%	69%	71%
	... drank alcohol?	87%	71%	80%	72%	71%
	... engaged in sexual misconduct?	68%	54%	60%	67%	71%
Before the disciplinary hearing, should the student be allowed to <b>make copies of all of the evidence</b> that might be used to show that the student ...	... broke a campus rule?	71%	62%	63%	63%	60%
	... drank alcohol?	77%	55%	69%	63%	62%
	... engaged in sexual misconduct?	41%	42%	49%	60%	59%

Note: Percentages indicate “yes” responses. Students who were “not sure” of their ideology are not represented in this table.

evidence (Table 3). However, there is a strong ideological divide between liberal students and their conservative peers in regard to attitudes toward allowing an accused student to make copies of all of the evidence that might be used to show that the student engaged in sexual misconduct: fewer very liberal (41 percent) and liberal (42 percent) students think that a student accused of sexual misconduct should be able to make copies of all of the evidence that might be used to show that the student engaged in sexual misconduct than their conservative (60 percent) and very conservative (59 percent) peers.

As shown in Figure 7, fewer female students than male students think an accused student should be allowed to look through or make copies of all of the evidence that might be used to show that the student broke a rule, engaged in underage drinking, or engaged in sexual misconduct. If a student has been accused of sexual misconduct,

female students are 20 percentage points less likely than male students to think the student should be allowed to make copies of all of the evidence. Similarly, in cases of alleged sexual misconduct, female students are 18 percentage points less likely than male students to think an accused student should be able to look through all of the evidence.

As shown in Table 1, of the ten fundamental due process protections that students were asked about in this survey, student support for an accused student being allowed to provide additional information or evidence regarding alleged misconduct received a higher proportion of support than any other protection. An overwhelming majority of students think that, before a disciplinary hearing, a student who is accused of breaking a campus rule (93 percent), engaging in underage drinking (91 percent), or engaging in sexual misconduct (88 percent) should

be allowed to provide additional information or evidence at the hearing about whether the student broke a campus rule, drank alcohol, or engaged in sexual misconduct, respectively (Figure 8).

### CROSS-EXAMINATION

The Supreme Court has called cross-examination the “greatest legal engine ever invented for the discovery of truth.”<sup>12</sup> It is crucial to ensuring fairness in college disciplinary proceedings, where evidence is often scarce and findings may turn entirely on the parties’ credibility.<sup>13</sup>

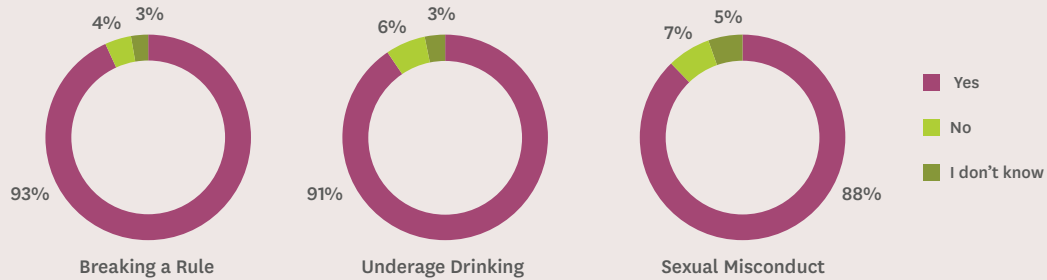
A majority of students think that a student who is accused of breaking a campus rule (79 percent), engaging in underage drinking (77 percent),

or engaging in sexual misconduct (68 percent) should be allowed to ask questions of witnesses at a campus disciplinary hearing, either directly or indirectly through another person (Figure 9).

When respondents were asked about a student breaking a rule or engaging in underage drinking, support for cross-examination was relatively consistent, regardless of the students’ ideology. The lowest proportion of support for cross-examination is among very liberal students (74 percent) when asked about a student who was accused of drinking alcohol, and the highest proportion of support for it is among conservative students (83 percent) when asked about a student who was accused of drinking alcohol—a difference of 9 percentage points.

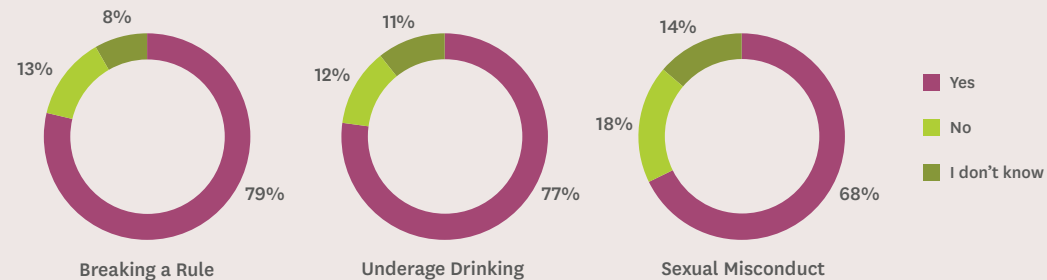
**Figure 8. Student attitudes toward providing additional evidence**

Should the student be allowed to provide additional information or evidence at the hearing about whether he/she [broke a campus rule | engaged in sexual misconduct | drank alcohol], in order to defend himself/herself?



**Figure 9. Student attitudes toward cross-examination**

Should the student be allowed to ask questions of witnesses at the hearing (either directly or indirectly through another person)?

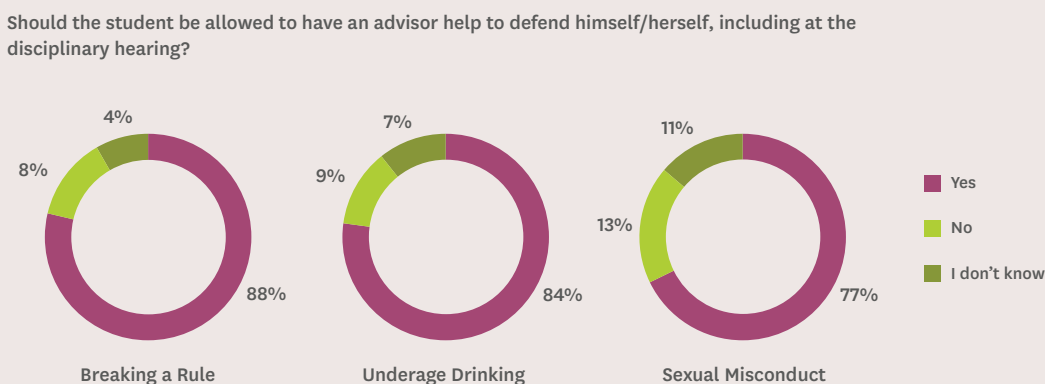


<sup>12</sup> *Lilly v. Virginia*, 527 U.S. 116, 124 (1999).speech can often be made to these teams anonymously.” (FIRE, *Bias Response Team Report 2017*, accessed September 12, 2017, <https://www.thefire.org/fire-guides/bias-response-team-report-2017/>)

<sup>13</sup> *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (“[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person.”); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested”).



Figure 10. Student attitudes toward being allowed an advisor



Again, however, a strong ideological divide emerges between liberal students and their conservative peers when the question involves a student accused of sexual misconduct. Fifty-eight percent of very liberal students and 83 percent of very conservative students think that a student who was accused of sexual misconduct should be allowed to cross-examine witnesses at a campus disciplinary hearing, either directly or indirectly through another person—a difference of 25 percentage points.

Support for cross-examination is relatively consistent among respondents in the three different treatment groups and respondents of different genders. The lowest proportion of support is among female students (64 percent) when asked about a student who allegedly engaged in sexual misconduct, and the highest proportion of support is among male students (81 percent) when asked about a student who allegedly broke a rule.

**STUDENT ADVISORS AND LAWYERS**

Another important procedural protection, as discussed in the 2017 Report, is “the active participation of [a student’s] advisor of choice, including an attorney ... during the investigation

and at all proceedings, formal or informal.”

Due to the adversarial nature and often severe consequences of campus disciplinary hearings,<sup>14</sup> FIRE argues that students should be allowed an advisor or advocate of their choice, including an attorney, to actively represent them. American jurisprudence recognizes that advocacy plays a critical role in establishing innocence or guilt.<sup>15</sup> To determine what degree of advocate participation the students would support, we asked them a series of four questions on this topic.

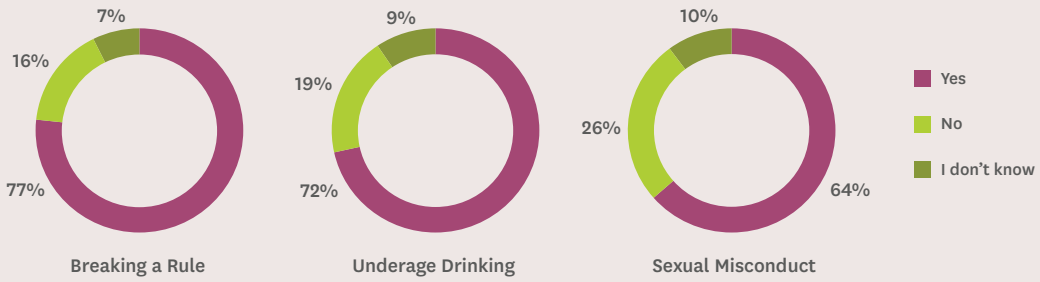
A majority of students think that a student who is accused of breaking a campus rule (88 percent), engaging in underage drinking (84 percent), or engaging in sexual misconduct (77 percent) should be allowed to have an advisor help to defend the student at the campus disciplinary hearing (Figure 10).

Student respondents who thought that an accused student should be allowed to have an advisor were then asked if they thought the advisor should be able to speak on behalf of the student during the campus disciplinary hearing.<sup>16</sup> A majority of students think that a student who is accused of breaking a campus rule (77 percent), engaging in underage drinking (72 percent), or engaging in

<sup>14</sup> *Donohue v. Baker*, 976 F. Supp. 136, 145 (N.D.N.Y. 1997) (“It is well settled that an expulsion from college is a stigmatizing event which implicates a student’s protected liberty interest”).  
<sup>15</sup> *Herring v. New York*, 422 U.S. 853, 862 (1975) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”).  
<sup>16</sup> Out of the total sample of 2,225 student respondents, 1,835 respondents were asked the following question: “Should the student’s advisor be allowed to speak for the student during the hearing?”

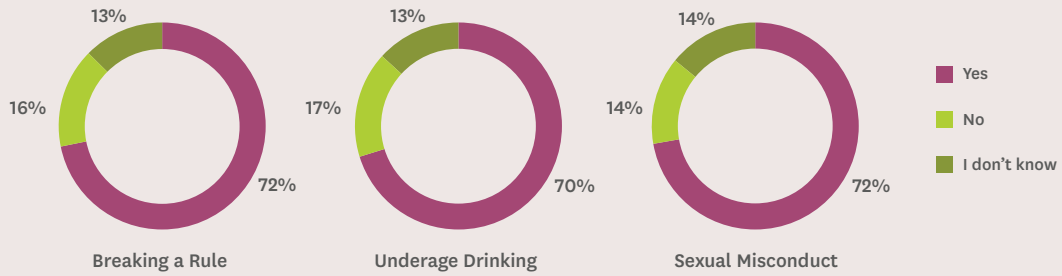
**Figure 11. Student attitudes toward allowing the advisor to speak on behalf of the student**

Should the student's advisor be allowed to speak for the student during the hearing?



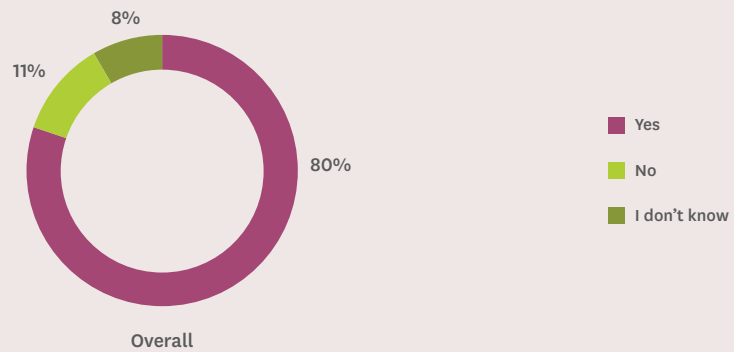
**Figure 12. Student attitudes toward being allowed a lawyer**

If an advisor may help the student, should a lawyer be allowed to serve as the student's advisor?



**Figure 13. Student attitudes toward being allowed a lawyer if a law has been broken**

Should a student accused of breaking a law be allowed to have a lawyer help to defend himself/herself at a campus disciplinary hearing?



sexual misconduct (64 percent) should be allowed to have an advisor who is allowed to speak for the student during the campus disciplinary hearing (Figure 11).

A majority of students also think that a student who is accused of breaking a campus rule (72 percent), engaging in underage drinking (70 percent), or engaging in sexual misconduct (72 percent) should be allowed to have a lawyer serve as the student’s advisor (Figure 12).

Finally, all of the student respondents were asked if they thought a student accused of breaking a law should be allowed to have the assistance of a lawyer at a campus disciplinary hearing. We asked this question to ensure that our student respondents—particularly those who were considering the scenario of breaking a campus rule—understood that such conduct might have legal implications outside of the campus disciplinary system.

A large majority of students (80 percent) think that a student who is accused of breaking a law should be allowed to have a lawyer help defend the student at the campus disciplinary hearing (Figure 13).

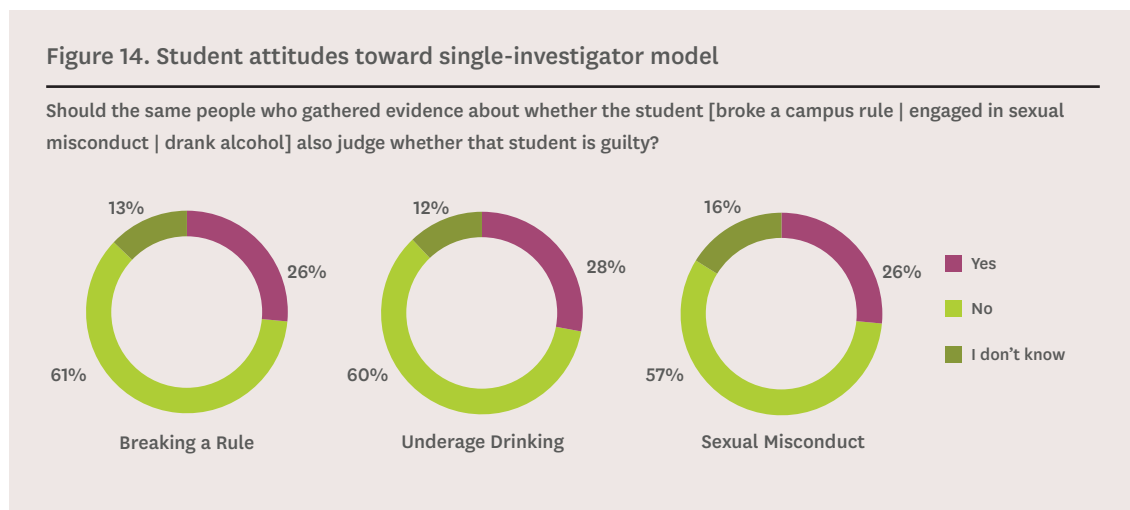
### SINGLE-INVESTIGATOR MODEL

The single-investigator model is an investigatory model in which a college empowers a sole individual to collect evidence, conduct separate interviews with the parties and witnesses, and determine whether the accused student is responsible for the alleged wrongdoing.<sup>17</sup> The single-investigator model violates students’ due process rights by creating a conflict of interest detrimental to accused students as well as by denying students the opportunity to confront their accuser and the witnesses against them.<sup>18</sup>

A majority of students do not think that the same people who gathered evidence about whether a student broke a campus rule (61 percent), engaged in underage drinking (60 percent), or engaged in sexual misconduct (57 percent) should also judge whether that student is guilty of the alleged misconduct (Figure 14).

### IMPARTIAL DECISION-MAKER

Decision-makers need to be impartial—an impartial disciplinary body is a core component of due process.<sup>19</sup> In order to ensure fundamental fairness, parties must be able to challenge the neutrality of the disciplinary body.<sup>20</sup> A majority of student respondents think that if a student



<sup>17</sup> Will Creeley, ‘Single Investigator’ at UCLA Means Hearings Available Only on Appeal, FIRE (Jan. 13, 2016), <https://www.thefire.org/single-investigator-at-ucla-means-hearings-available-only-on-appeal/> (describing the single-investigator model).

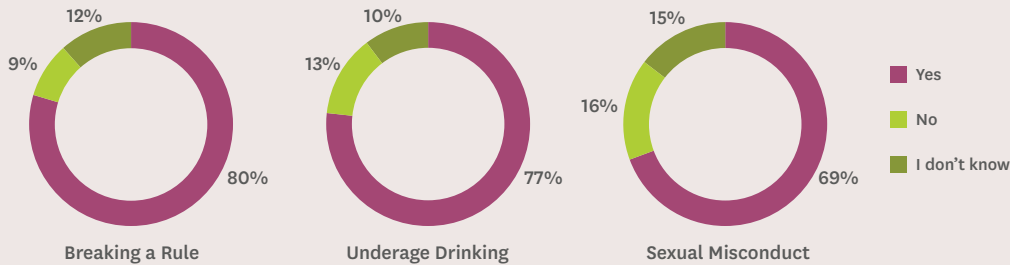
<sup>18</sup> *Smith v. Denton*, 320 Ark. 253, 261 (1995) (finding due process concerns when one college administrator served as the investigator, prosecutor, witness, and judge); *Doe v. Brandeis Univ.*, Supp. 3d 561 (D. Mass. 2016) (“The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions”) (footnote omitted).

<sup>19</sup> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“This requirement of neutrality in adjudicative proceedings . . . helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law”); *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (“An impartial decision-maker is an essential guarantee of due process”).

<sup>20</sup> See *Marshall*, 446 U.S. at 242 (impartiality “preserves both the appearance and reality of fairness . . . by ensuring that [each party] . . . may present his case with assurance that the arbiter is not predisposed to find against him”) (internal citations omitted).

Figure 15. Student attitudes toward objecting to bias

If the student accused of [breaking a campus rule | sexual misconduct | underage drinking] feels that a member of the hearing panel is unfairly biased against him/her, should that student be allowed to object to the participation of the hearing panel member?



accused of breaking a campus rule (80 percent), engaging in underage drinking (77 percent), or engaging in sexual misconduct (69 percent) feels that a member of the campus hearing panel is unfairly biased against the student, the student should be able to object to the participation of the hearing panel member (Figure 15).

## APPEALS

A majority of student respondents think that if a student is found guilty of breaking a campus rule (68 percent), engaging in underage drinking (69 percent), or engaging in sexual misconduct (64 percent), the student should be allowed to appeal the guilty decision to a higher campus decision-maker (Figure 16). FIRE argues that an accused student's right to appeal a finding or sanction is a core component of any fair system of adjudication.<sup>21</sup>

Forcing an exonerated student to face discipline or expulsion a second time constitutes a threat to fundamental fairness akin to that prohibited in criminal hearings by the Fifth Amendment's bar against "double jeopardy."<sup>22</sup> Nonetheless, a majority of student respondents think that if a student is found not guilty of sexual misconduct (63 percent), the person who made the sexual misconduct complaint should be allowed to

appeal the not-guilty decision to a higher campus decision-maker (Figure 17).

More very liberal (75 percent) and liberal (74 percent) students think that if a student is found not guilty of sexual misconduct, the person who made the sexual misconduct complaint should be allowed to appeal the not-guilty decision to a higher campus decision-maker than do their conservative (61 percent) and very conservative (53 percent) peers.

## UNANIMOUS DECISION TO EXPEL

Finally, FIRE argues that a decision to expel a student should be unanimous due to the severity of the penalty of expulsion and its effect on a student's educational career.<sup>23</sup> A majority of students think that the decision to expel should be unanimous if a student broke a rule (84 percent), engaged in underage drinking (79 percent), or engaged in sexual misconduct (72 percent) (Figure 18).

Just as with cross-examination, when respondents were asked about a student breaking a rule or engaging in underage drinking, support for unanimous expulsion is relatively consistent regardless of the students' ideology. The lowest proportion of support is among conservative

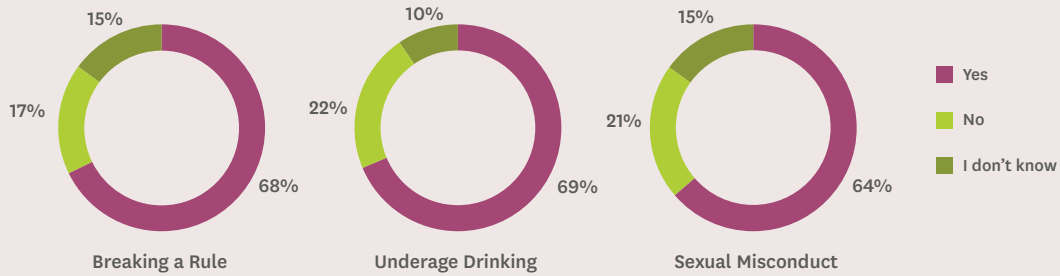
<sup>21</sup> Silverglate, Harvey A. and Josh Gewolb, *FIRE's Guide to Due Process and Campus Justice* (Philadelphia: Foundation for Individual Rights in Education, 2014), 141–42.<sup>22</sup> One hundred seventy-one students recognized that hate speech is protected by the First Amendment, but think it should not be protected.

<sup>22</sup> See *Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) ("For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time") (internal citations omitted).

<sup>23</sup> See *Donohue*, 976 F. Supp. 136 at 145. See also *Gonzales v. McEuen*, 435 F. Supp. 460, 471 (C.D. Cal. 1977) ("There is no question that a high school student who is punished by expulsion might well suffer more injury than one convicted of a criminal offense").

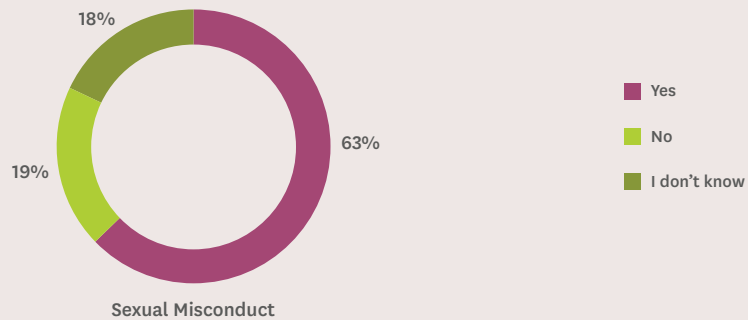
**Figure 16. Student attitudes toward appealing a guilty decision**

If the student is found guilty of [breaking a campus rule | sexual misconduct | underage drinking], should that student be allowed to appeal the guilty decision to a higher campus decision-maker?



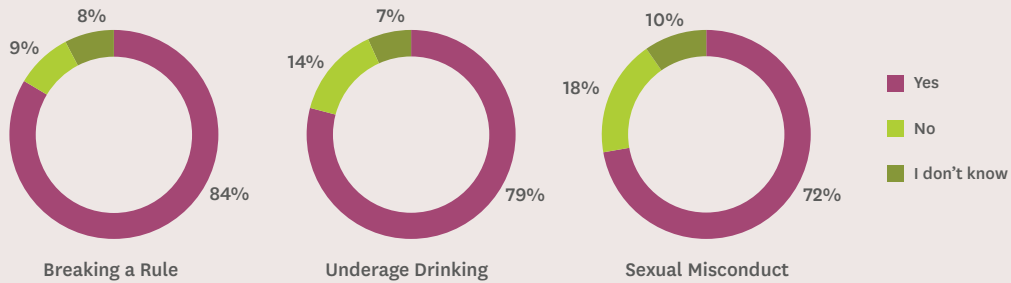
**Figure 17. Student attitudes toward appealing a not-guilty decision**

If the student is found not guilty of sexual misconduct, should the person who made the sexual misconduct complaint be allowed to appeal the not-guilty decision to a higher campus decision-maker?



**Figure 18. Student attitudes toward unanimity for expulsion**

The student is found guilty of [breaking a campus rule | sexual misconduct | underage drinking], and may be expelled from school. Before the student is expelled because of the guilty finding, should all of the decision-makers have to agree that expulsion is the correct punishment?



students (76 percent) when asked about an underage student who allegedly drank alcohol, and the highest proportion of support is among moderate students (86 percent) when asked about a student who allegedly broke a campus rule—a 10 percentage point difference.

But, once again, when a student has been accused of sexual misconduct, there is a strong ideological divide between liberal students and their conservative peers with regard to attitudes toward requiring unanimity for expulsion. Fifty-seven percent of very liberal students and 79 percent of very conservative students think all of the decision-makers should have to agree that expulsion is the correct punishment if a student is found to be responsible for engaging in sexual misconduct—a difference of 22 percentage points.

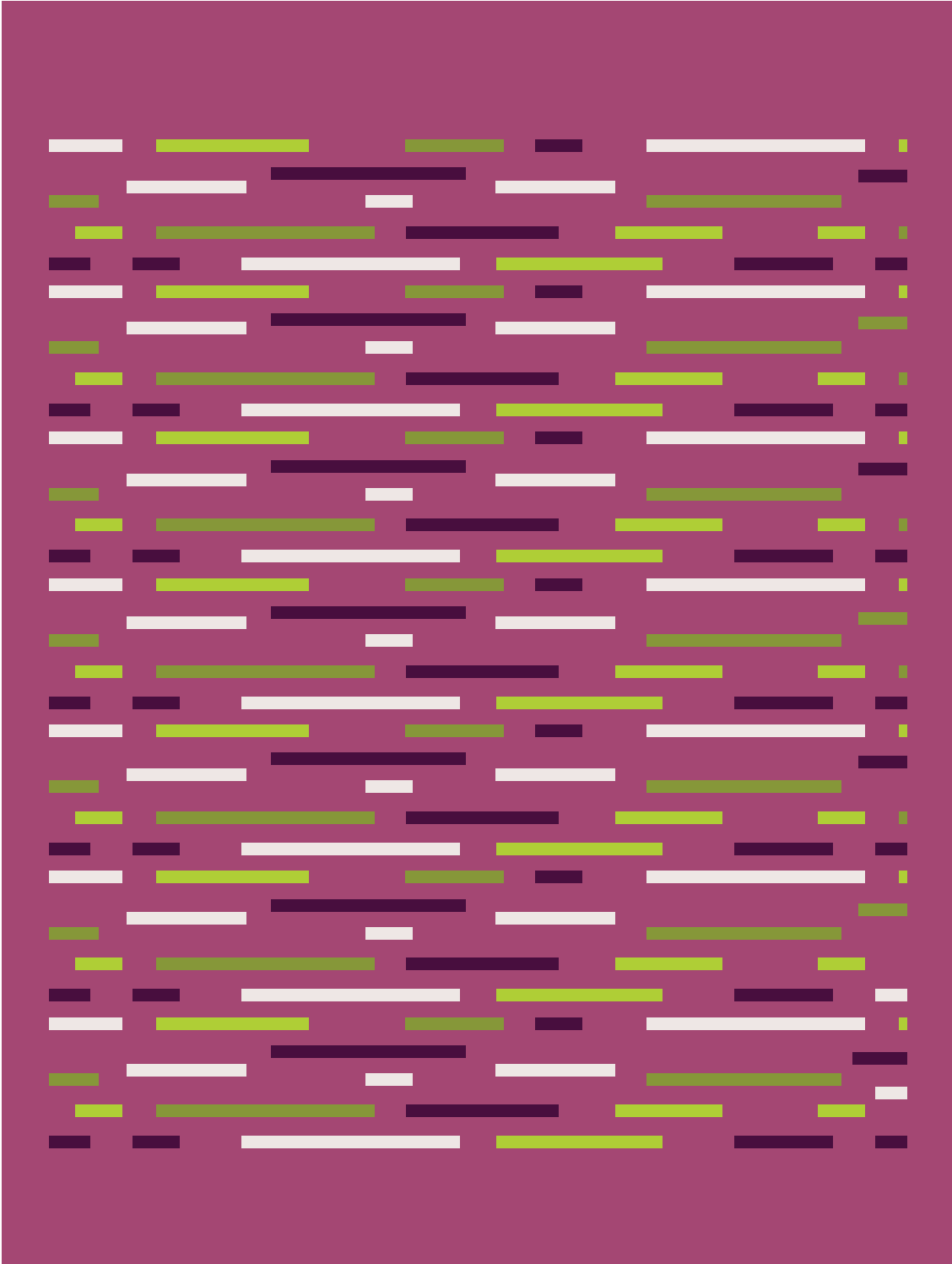
Figure 19. Ideology and support for unanimity required for expulsion

Before the student is expelled because of the guilty finding, should all of the decision-makers have to agree that expulsion is the correct punishment?



# DEMOGRAPHICS

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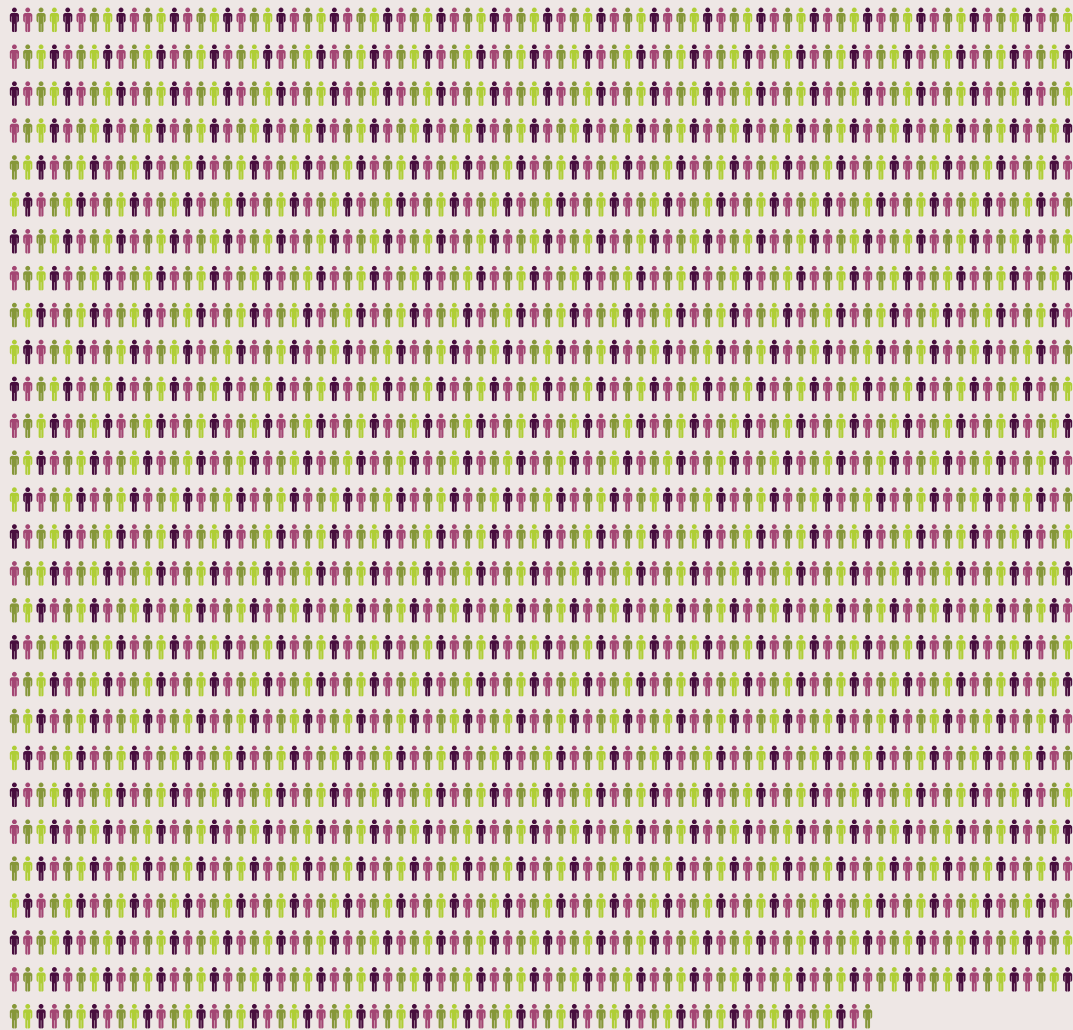




The statistics in this report were taken from an overall sample of 2,225 college students who were enrolled in two- or four-year educational institutions at the time they took the survey.

Residents of all 50 states and the District of Columbia were represented in survey responses.

### Our sample includes 2,225 college students.



*Data from the overall sample represents the following breakdown of students:*

Table 4. Demographic characteristics of the overall sample

	Weighted percentage	Number of observations
Male	45%	919
Female	55%	1,306
<b>Race</b>		
White	57%	1,298
Black	15%	333
Latino	17%	350
Other	10%	244
<b>College Attendance</b>		
Two-year college attendee	36%	773
Four-year college attendee	64%	1,452
<b>School Type</b>		
Public school student	82%	1,805
Private school student	16%	369
<b>Living Arrangements</b>		
Lives on campus	23%	546
Lives off campus	77%	1,665
<b>Financial Aid</b>		
Received a Pell Grant	48%	1,056
<b>Class Year</b>		
Freshman	24%	546
Sophomore	30%	697
Junior	23%	501
Senior	16%	336

Table 4 (Cont.). Demographic characteristics of the overall sample

	Weighted percentage	Number of observations
Democrat	32%	906
Independent	41%	633
Republican	20%	425
<b>Liberalism</b>		
Very liberal	13%	328
Liberal	20%	475
Moderate	36%	741
Conservative	14%	300
Very Conservative	7%	146

Note: Percentages are weighted.

Table 5. Student roles in campus disciplinary hearings or processes

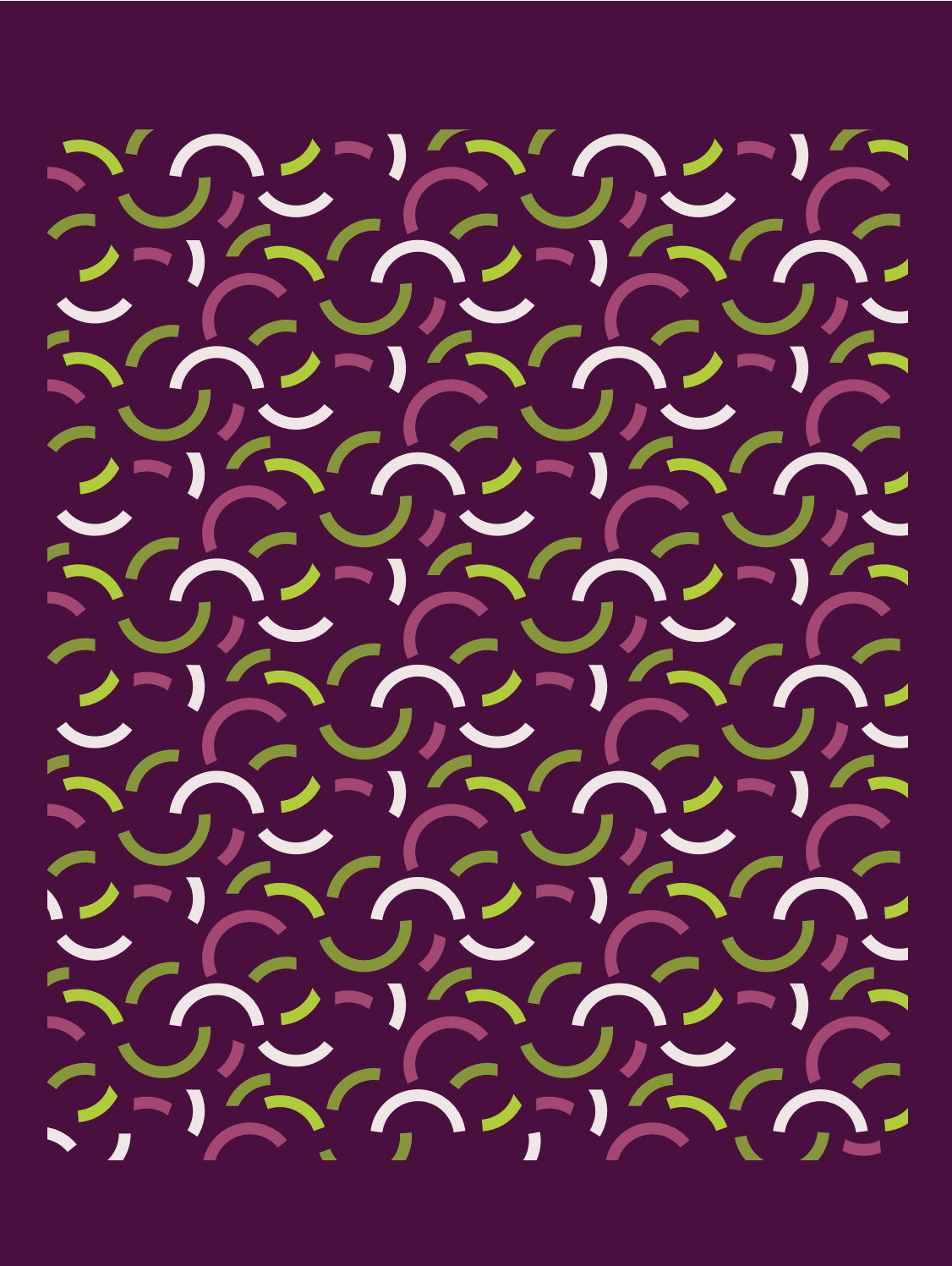
Role that the respondent played while participating in the campus disciplinary hearing or process	Weighted percentage	Number of observations
Student accused of a conduct violation	27%	109
Student advisor, defender, or advocate	17%	70
Student accusing another student of a conduct violation	10%	40
Student fact-finder or jury member	12%	46
Student witness	32%	122
Other [please specify]	1%	5
<b>Number of observations</b>		<b>392</b>

Note: Eighteen percent of the overall sample, or 392 respondents, answered this question. These percentages may not be representative of and do not necessarily reflect the proportion of students who participate in campus disciplinary hearings or processes while at American colleges or universities.

METHODOLOGY

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FIRE contracted with YouGov, a nonpartisan polling and research firm, to conduct a national online survey of 2,225 undergraduate students who currently attend a two- or four-year educational institution in the United States. Survey respondents were participants in YouGov's online, opt-in research panel, consisting of about 1.8 million individuals.

YouGov used an online survey to interview 2,457 undergraduate students between January 29, 2018 and February 12, 2018. Respondents were offered incentives from YouGov in exchange for completing the survey. The final dataset was created by matching responses down to a sample of 2,225 observations based on a sampling frame constructed using the 2013 American Community Survey.

The survey included a natural experiment with three treatments:

- Treatment One asked students about their attitudes toward due process protections in a situation in which a college student allegedly “broke a rule.”
- Treatment Two asked students about their attitudes toward due process protections in a situation in which a college student allegedly “engaged in sexual misconduct.”
- Treatment Three asked students about their attitudes toward due process protections in a situation in which an underage college student allegedly “drank alcohol.”

The questions for each treatment group are in the Survey Questionnaire section of this report.

The final dataset is an overall sample consisting of three treatment groups of the following sizes: 742 observations in the Treatment One group; 742 observations in the Treatment Two group; and 741 observations in the Treatment Three group. Each treatment group was created by matching responses based on a sampling frame constructed using the 2013 American Community Survey.<sup>24</sup>

After the matching process, YouGov calculated weights for each response based on the respondent's gender, race, and age. After weights were calculated for each treatment group, a weight was calculated for the overall sample using the same method. All of the reported tabulations are weighted and may not total 100 percent due to rounding.

Tabulations from the overall sample have an estimated margin of error of  $\pm 2.2$  at the 95% confidence level. Tabulations from treatment groups have an estimated margin of error of  $\pm 3.8$  at the 95% confidence level. Tabulations taken from subgroups of the overall sample and treatment groups have a greater margin of error. The median amount of time it took a respondent to complete the survey was 8 minutes.

The aim at each stage of this survey project was to objectively understand the opinions and attitudes of college students.

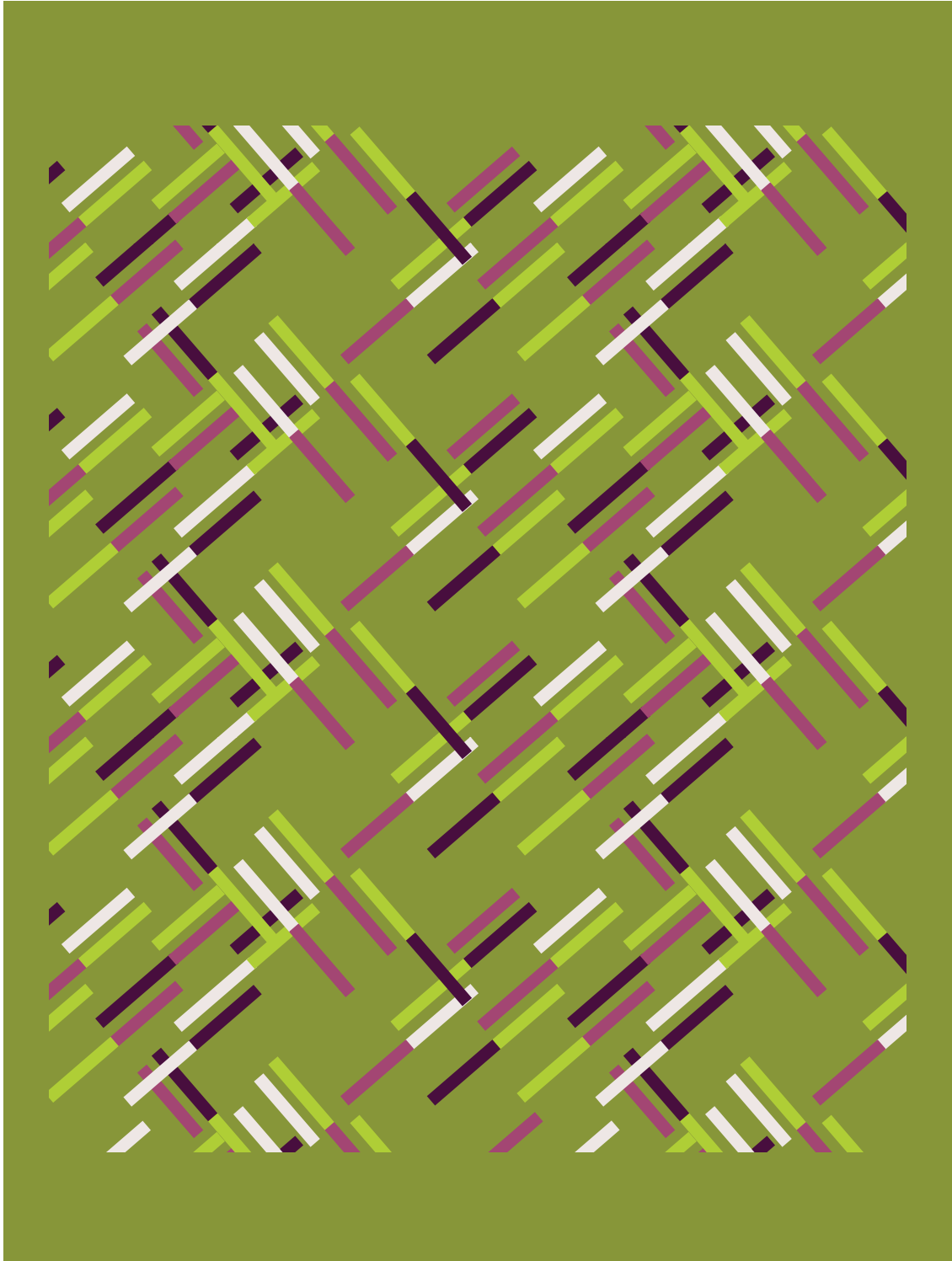
Before publication, this report was externally reviewed by Angela C. Erickson to verify that the results are presented in a fair and honest way. Every effort has been taken to ensure the interpretations are accurate.

<sup>24</sup> United States Census Bureau, American Community Survey (ACS), <http://www.census.gov/programs-surveys/acs/data/summary-file.2013.html>.

# SURVEY QUESTIONNAIRE

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***In this survey we are going to ask you a variety of questions about campus disciplinary hearings, and the process that students accused of misconduct go through at their college or university. There are no correct or incorrect answers to the following questions, and we thank you for your participation.***

**Q1** Have you ever participated in a campus disciplinary hearing or process, in any way?

- Yes
- No
- I don't know

**Q2** Which role did you take when you participated in the campus disciplinary hearing or process? I was a... [Asked only of respondents who answered "yes" to Q1.]

- Student accused of a conduct violation
- Student advisor, defender, or advocate
- Student accusing another student of a conduct violation
- Student fact-finder or jury member
- Student witness
- Other [please specify]

**Q3** In your opinion, was the campus disciplinary hearing or process fair to everyone involved? [Asked only of respondents who answered "yes" to Q1.]

- Yes [please specify]
- No [please specify]
- I don't know [please specify]

**Q4** In your opinion, if a student is accused of breaking a campus rule, how should that student be allowed to defend himself/herself? [check all that apply] [The first three answer options were randomized.]

- At a disciplinary hearing
- At a meeting with administrators
- Through a written statement
- I don't think there should be disciplinary hearings at colleges or universities [please specify]
- Other [please specify]

**Q5** In your opinion, should a college or university be able to punish students for misconduct that takes place off campus?

- Yes
- No
- It depends
- I don't know

*[One-third of the respondents were shown no additional instructions and answered questions about breaking a campus rule.]*

*[One-third of the respondents were shown the following instructions and answered questions about sexual misconduct:]*

Next, we are going to ask you about a situation of **sexual misconduct** that might result in a disciplinary hearing on a college campus. Again, there are no correct or incorrect answers to the following questions, and we thank you for your participation.

Take a moment to read and think about the following situation: A college student has been accused of **sexual misconduct** by a classmate. The college's administration informs the accused student that he/she needs to attend a campus hearing. If the student is found guilty of sexual misconduct at the hearing, he/she may be suspended or expelled from school. Please think about this situation while answering the following questions.

*[One-third of the respondents were shown the following instructions and answered questions about underage drinking:]*

Next, we are going to ask you about a situation of **underage drinking** that might result in a disciplinary hearing on a college campus. Again, there are no correct or incorrect answers to the following questions, and we thank you for your participation.

Take a moment to read and think about the following situation: A resident hall assistant at a college or university finds a group of students drinking beer in a dorm room and accuses one of the students of underage drinking. The college's administration informs the accused student that he/she needs to attend a campus hearing. If the student is found guilty of underage drinking at the hearing, he/she may be suspended or expelled from school. Please think about this situation while answering the following questions.

*[Respondents in the three different treatment groups were given questions corresponding to their group's specific treatment scenario; each group's questions contained the text of only one of the three options indicated in brackets.]*

**Q6** Should the student accused of [breaking a campus rule] [sexual misconduct] [underage drinking] be considered innocent by the school's administration until he/she is proven guilty?

- Yes
- No
- I don't know

**Q7** Should the student accused of [breaking a campus rule] [sexual misconduct] [underage drinking] be given a written explanation describing the details of when and how he/she allegedly broke a rule?

- Yes
- No
- I don't know

**Q8** When should the student be given the written explanation? [Asked only of respondents who answered "yes" to Q7.]

- At least one week before the hearing
- Any time before the hearing
- During the hearing
- It doesn't matter when
- I don't know

*[The order of Q9 and Q10 were randomized.]*

**Q9** Before the disciplinary hearing, should the student be allowed to look through all of the evidence that might be used to show that the student [engaged in sexual misconduct] [drank alcohol] [broke a campus rule]?

- Yes
- No
- I don't know

**Q10** Before the disciplinary hearing, should the student be allowed to make copies of all of the evidence that might be used to show that the student [engaged in sexual misconduct] [drank alcohol] [broke a campus rule]?

- Yes
- No
- I don't know

**Q11** Should the student be allowed to provide additional information or evidence at the hearing about whether he/she [engaged in sexual misconduct] [drank alcohol] [broke a campus rule], in order to defend himself/herself?

- Yes
- No
- I don't know

**Q12** Should the student be allowed to have an advisor help to defend himself/herself, including at the disciplinary hearing?

- Yes
- No
- I don't know

**Q13** Should the student's advisor be allowed to speak for the student during the hearing? [asked only of respondents who answered "yes" to Q12]

- Yes
- No
- I don't know

**Q14** If an advisor may help the student, should a lawyer be allowed to serve as the student's advisor?

- Yes
- No
- I don't know



**Q15** Should the student be allowed to ask questions of witnesses at the hearing (either directly or indirectly through another person)?

- Yes
- No
- I don't know

**Q16** Should the same people who gathered evidence about whether the student [engaged in sexual misconduct] [drank alcohol] [broke a campus rule] also judge whether that student is guilty?

- Yes
- No
- I don't know

**Q17** If the student accused of [breaking a campus rule] [sexual misconduct] [underage drinking] feels that a member of the hearing panel is unfairly biased against him/her, should that student be allowed to object to the participation of the hearing panel member?

- Yes
- No
- I don't know

If the student is found *not guilty* of sexual misconduct, should the person who made the sexual misconduct complaint be allowed to appeal the not-guilty decision to a higher campus decision-maker? [asked only of respondents who answered sexual misconduct questions]

- Yes
- No
- I don't know

**Q18** If the student is found *guilty* of [breaking a campus rule] [sexual misconduct] [underage drinking], should that student be allowed to appeal the guilty decision to a higher campus decision-maker?

- Yes
- No
- I don't know

**Q19** The student is found *guilty* of [breaking a campus rule] [sexual misconduct] [underage drinking], and may be expelled from school. Before the student is expelled because of the guilty finding,

should all of the decision-makers have to agree that expulsion is the correct punishment?

- Yes
- No
- I don't know

**Q20** Should a student accused of *breaking a law* be allowed to have a lawyer help to defend himself/herself at a campus disciplinary hearing?

- Yes
- No
- I don't know

**Q21** In your opinion, which of the following is the primary purpose of a campus disciplinary hearing? [Answer options were randomized.]

- To provide an educational experience for those involved
- To provide justice and protection to students on campus

**Q22** The questions you just answered were about due process protections available to students involved in disciplinary processes at colleges and universities across America. In your opinion, how important is it that students have these types of due process protections in college?

- Very important
- Important
- Unimportant
- Very unimportant

*[Respondents who answered questions about breaking a campus rule were shown no follow-up materials.]*

*[Respondents who answered questions about sexual misconduct were shown this follow-up material:]*

Thank you for finishing the previous section of the survey. We have a few more questions for you, but if you or someone you care about has been affected by sexual misconduct, RAINN is an organization that can offer you help. RAINN is available on the web (<https://www.rainn.org/>) or by phone (1-800-656-4673).

The Rape, Abuse, and Incest National Network (RAINN) is the nation’s largest anti-sexual violence organization. RAINN carries out programs to prevent sexual violence, help survivors, and ensure that perpetrators are brought to justice.

*[Respondents who answered questions about underage drinking were shown this follow-up material:]*

Thank you for finishing the previous section of the survey. We have a few more questions for you, but if you or someone you care about has been affected by substance abuse, SAMHSA is an organization that can offer you help. SAMHSA is available on the web (<https://www.samhsa.gov/find-help/national-helpline>) or by phone (1-800-662-4357).

The Substance Abuse and Mental Health Services Administration (SAMHSA) is the agency within the U.S. Department of Health and Human Services that leads public health efforts to advance the behavioral health of the nation. SAMHSA’s mission is to reduce the impact of substance abuse and mental illness on America’s communities.

We’re almost done—the following questions will help us to get to know you better and make sure that our survey is representative and inclusive. Thanks so much for taking our survey!

- Q23 Do you consider yourself to be:**
- Male
  - Female
  - Non-binary
  - Prefer to self-describe [please specify]

- Q24 Do you consider yourself to be:**
- Heterosexual
  - Gay
  - Lesbian
  - Bisexual
  - Queer
  - Prefer to self-describe [please specify]

- Q25 What is the name of the college or university that you attend?**
- Open-ended [please specify]

- Q26 Is the college or university you attend a public or private school?**
- Public
  - Private
  - I don’t know

- Q27 Is the college or university you attend affiliated with any religion or faith?** [Asked only of respondents who answered “private” to Q26.]
- Yes
  - No
  - I don’t know

- Q28 What is your current class standing?**
- First year (Freshman)
  - Second year (Sophomore)
  - Third year (Junior)
  - Fourth year (Senior)
  - Fifth year (Senior or more)
  - Graduate or professional student
  - Other [please specify]

- Q29 What is your major?** [allow up to three responses]
- Accounting
  - Administrative Science/Public Administration
  - Advertising
  - Agriculture/Horticulture
  - Anthropology
  - Architecture
  - Art History
  - Aviation/Aeronautics
  - Biology
  - Biostatistics
  - Business Administration
  - Chemistry
  - Child/Human/Family Development
  - Classics
  - Communications
  - Communicative Disorders
  - Computer Science
  - Criminology/Criminal Justice
  - Dance
  - Dentistry
  - Economics

Education  
 Educational Administration  
 Electronics  
 Engineering  
 English  
 Environmental Science/Ecology  
 Ethnic Studies  
 Finance  
 Fine Arts  
 Food Science/Nutrition/Culinary Arts  
 Foreign Language  
 Forestry  
 Gender/Women's/LGBTQ Studies  
 General Studies/Interdisciplinary  
 Geography  
 Geology  
 Health  
 History  
 Human Resources  
 Human Services  
 Humanities  
 Industrial Science  
 Information Technology  
 Journalism  
 Law Enforcement  
 Liberal Arts  
 Library Science  
 Linguistics  
 Literature  
 Management  
 Marketing  
 Mathematics  
 Mechanics/Machine Trade  
 Medicine  
 Music  
 Nursing  
 Optometry  
 Parks and Recreation  
 Pharmacy  
 Philosophy  
 Physical Education  
 Physics  
 Political Science/International Relations  
 Pre-Law/Law  
 Psychology  
 Public Relations  
 Religion/Theology  
 Social Sciences  
 Social Work

Sociology  
 Special Education  
 Sports Science/Kinesiology  
 Statistics  
 Television/Film  
 Textiles  
 Theater Arts  
 Urban and Regional Planning  
 Veterinary Medicine  
 Visual Arts/Graphic Design/Design and Drafting  
 Writing  
 Undeclared  
 Other [please specify]

**Q30** Have you taken a course about any of the following subjects in high school or college? [check all that apply] [Answer options were randomized.]

United States Government  
 Political Science  
 American History  
 Civil Rights and Liberties  
 Constitutional Law  
 None of the above  
 I don't know

**Q31** Do you live on or off campus?

On  
 Off  
 I don't know

**Q32** Did either of your parents attend college?

One of my parents attended college  
 Both of my parents attended college  
 Neither parent attended college  
 I don't know

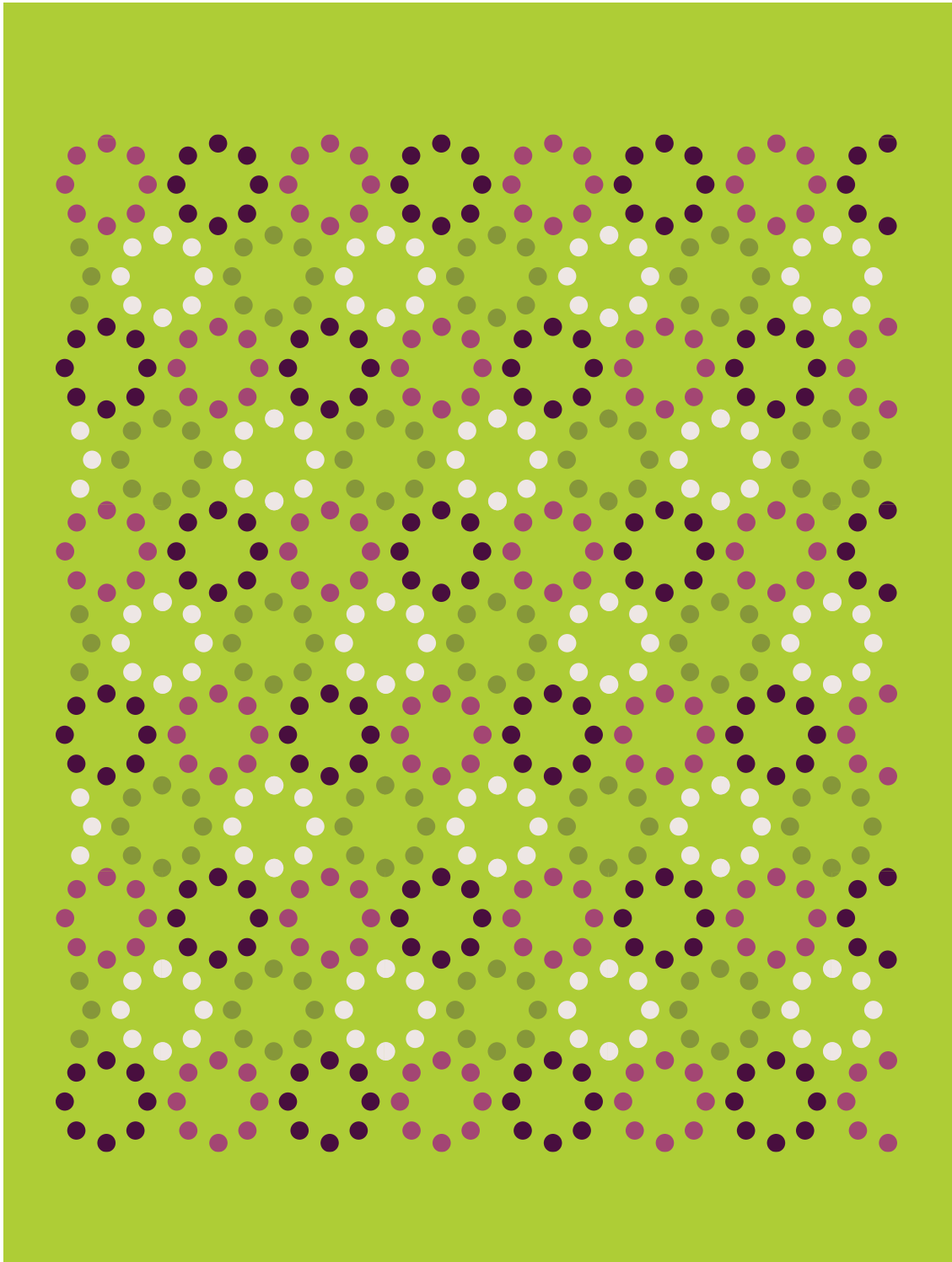
**Q33** Have you received a Pell Grant as part of your college financial aid package?

Yes  
 No  
 I don't know

# APPENDIX

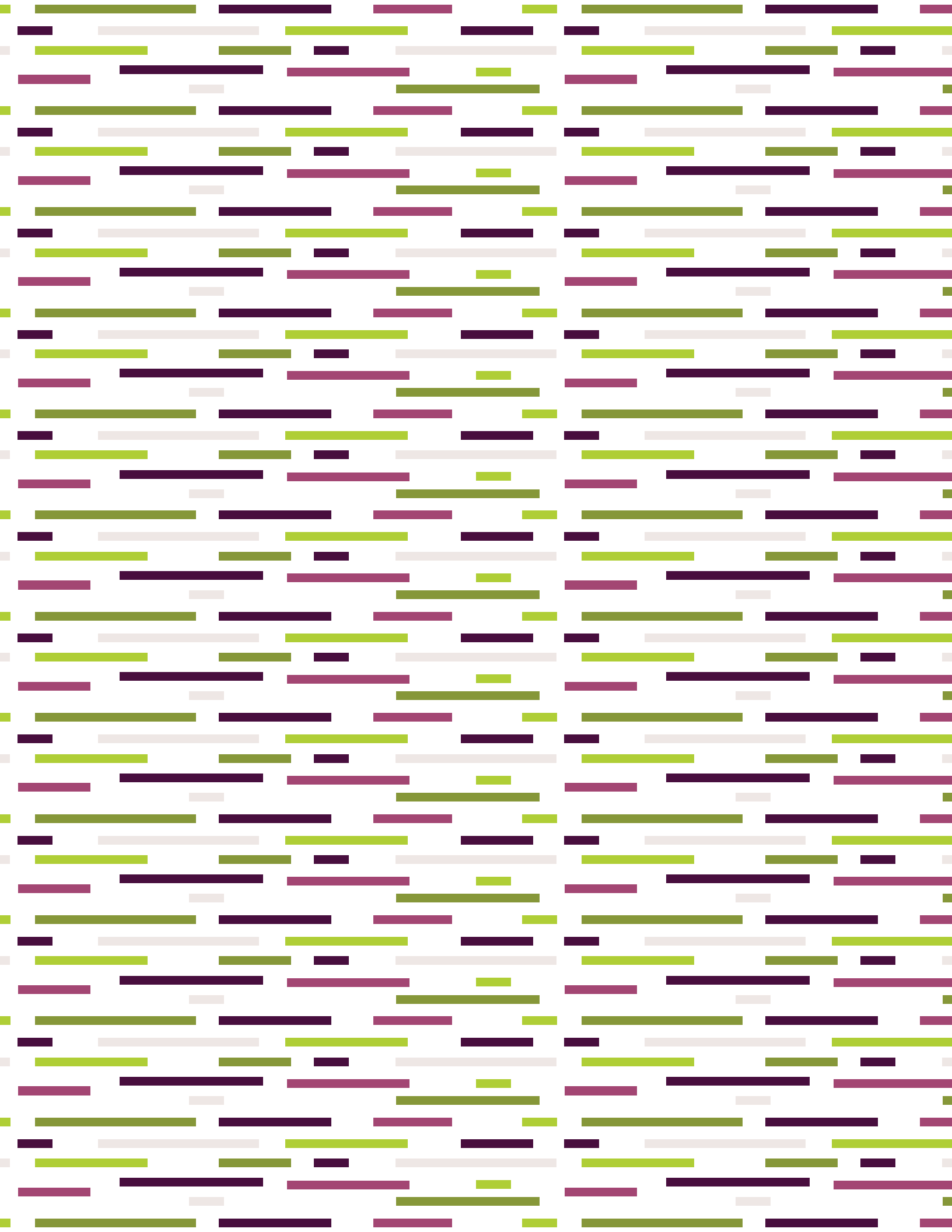
## Procedural Safeguards from FIRE's 2017 Spotlight on Due Process Report

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION



- 1 A clearly stated presumption of innocence, including a statement that a person's silence shall not be held against them.
- 2 Adequate written notice of the allegations. Adequate notice should include the time and place of alleged policy violations, a specific statement of which policies were allegedly violated and by what actions, and a list of people allegedly involved in and affected by those actions.
- 3 Adequate time to prepare for all phases of the disciplinary process, including notice of the hearing date at least seven business days in advance, and access to all evidence to be considered at the hearing five business days in advance. If the accused student is required to respond to the allegations before the hearing, he or she must receive notice at least five business days in advance.
- 4 A prohibition on conflicts of interest that could compromise the integrity of the process (i.e., advocates cannot serve as investigators or fact-finders, and fact-finders must not hear the appeal).
- 5 The right to impartial fact-finders, including the right to challenge fact-finders' impartiality.
- 6 Access to and the right to present all relevant inculpatory and exculpatory evidence at hearing.
- 7 The ability to pose relevant questions to witnesses, including the complainant, in real time, and respond to another party's version of events. If questions are relayed through a panel or chairperson, there must be clear guidelines setting forth when questions will be rejected, and the reason for refusing to pose any rejected question should be documented.
- 8 The active participation of an advisor of choice, including an attorney (at the student's sole discretion), during the investigation and at all proceedings, formal or informal.
- 9 The meaningful right of the accused to appeal a finding or sanction. Grounds for appeal must include (1) new information, (2) procedural errors, and (3) findings not supported by the record. Appeals must not be decided by the investigator or original fact-finding panel.
- 10 Unanimity of panel must be required for expulsion.





FIRE's mission is to defend and sustain the individual rights of students and faculty members at America's colleges and universities. These rights include freedom of speech, freedom of association, due process, legal equality, religious liberty, and sanctity of conscience—the essential qualities of liberty. FIRE educates students, faculty, alumni, trustees, and the public about the threats to these rights on our campuses, and provides the means to preserve them.



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