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# Use of Preponderance of Evidence in Campus Adjudication of Sexual Misconduct

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USE OF PREPONDERANCE OF EVIDENCE IN CAMPUS ADJUDICATION OF  
SEXUAL MISCONDUCT

By

Elizabeth Sommer

THESIS

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Northern Michigan University  
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USE OF PREPONDERANCE OF EVIDENCE IN CAMPUS ADJUDICATION OF  
SEXUAL MISCONDUCT

This thesis by Elizabeth Sommer is recommended for approval by the student's thesis committee in the Department of Education and the Assistant Provost of Graduate Education and Research.

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## ABSTRACT

### USE OF PREPONDERANCE OF EVIDENCE IN CAMPUS ADJUDICATION OF SEXUAL MISCONDUCT

By

Elizabeth Sommer

How higher education institutions (HEI) handled sexual misconduct cases matters. It matters for survivors, accused, administrators, parents, HEI leaders, regulatory bodies (such as the Office for Civil Rights), and the general public. The 2011 Dear Colleague Letter published by the Department of Education's Office for Civil Rights mandated the use of preponderance of evidence in all sexual misconduct cases (Ali, 2011). The change to utilize a low burden of proof, preponderance of evidence, was and is controversial. Despite a large literature base of legal opinions on the use of preponderance of evidence in the campus adjudication process, there are few practitioner voices commenting on the preponderance of evidence. Using a phenomenological approach, student affairs practitioner perceptions of the use of preponderance of evidence in sexual misconduct will become clear. While it is too early to conclude that the preponderance of evidence is best practice everywhere, the majority of participants at this institution felt it was in support of it as a best practice.

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## CHAPTER 1: INTRODUCTION

During the 2014-2015 academic year, a Columbia University student carried her mattress to classes, across campus, and to commencement in protest of the college's handling of a sexual misconduct case. Her artistic protest titled *Carrying that Weight* received national media attention and public outcry, which placed the issues of sexual misconduct adjudication in the national spotlight (Tianni, 2014). Lipka (2015) writing for the Chronicle of Higher Education summarized the intensity of discussion surrounding sexual misconduct. She writes:

Longtime leaders can't recall another issue that so consumed colleges. The attention has prompted two White House campaigns, two documentaries, numerous conferences, constant protests, heightened scrutiny, and countless headlines, among them a Time Cover with a pennant lettered in collegiate type: RAPE. The number of college's under federal investigation now tops 100. (Lipka, 2015, p.1)

The Association of America Universities (AAU) found that 26.1% of female Higher Education Institution (HEI) seniors experienced "nonconsensual sexual contact involving force or incapacitation" (AAU, 2015, p. xiv). Krebs, Lindquist, Warner, Fisher, and Martin (2007) concluded one in five female (19.8%) students, and one in sixteen male students are victims of a completed or attempted sexual assault (6.25%). Historically, sexual assault reporting rates are low (Krebs et al., 2007). Around 50% of survivors do not report "because they do not consider it 'serious enough'" (AAU, 2015, p. iv). Other

students cited embarrassment, shame, and emotional difficulty or “did not think anything would be done about it” as reasons for not reporting sexual misconduct (AAU, 2015, p. iv). From a sample size of 779,170 representing twenty-seven HEIs, “49.2% of surveyed students believe it is very or extremely likely that a fair investigation would occur” (AAU, 2015, p. xxii). AAU (2015) concluded that 63.3 % of surveyed students thought campus officials would take the report of sexual misconduct very or extremely seriously. Whereas 44.3% of surveyed students believed “it was very or extremely likely that campus officials would take action against the offender” (AAU, 2015, p. xxii). Moreover, Krebs et al. (2007) concluded that how postsecondary institutions handle sexual misconduct complaints and cases is significant for students impacted by sexual misconduct.

Sexual misconduct has the potential to derail a student’s education, causing “widespread psychological and sociological effects on the victim irrespective of their gender” and increases “feelings of helplessness and powerlessness” which negatively impacts self-esteem (Kalra & Bhugra, 2013, p. 244). Additionally, survivors revealing an occurrence of sexual misconduct can experience serious trauma if blamed for the assault (Kalra & Bhugra, 2013). Not only does sexual misconduct impact the victim physically and psychologically, it also impacts a student’s ability to complete academic pursuits (United States Department of Education, 2011). Gertner (2015) explains how sexual misconduct is a violent form of discrimination for women. Gertner (2015) states, “sexual misconduct impairs a woman’s ability to function as an equal in an academic environment and by extension menaces all women. Unless a woman is safe, all the other guarantees of equal treatment are irrelevant” (p. 1). Women on campuses experience a

higher reported rate of sexual misconduct than the general public (AAU, 2015; Krebs et al., 2007).

Legally expected to keep students safe and free from sexual discrimination, HEIs can often foster an ideal atmosphere for sexual misconduct with alcohol fueled parties, a hook-up culture, and casual sex (Revised Sexual Harassment Guidance, 2001; Gebser v. Largo Vista Independent School District (1998); Title IX of the Education Amendments of 1972). The cultural characteristics, both broadly and at individual HEIs, directly impact the conversation and perception surrounding sexual misconduct (Kalra & Bhugra, 2013).

In April 2011, Vice President Joseph Biden and Secretary of Education Arne Duncan unveiled the Department of Education's (DOE) 2011 *Dear Colleague Letter* (2011 DCL) addressing postsecondary institutions' sexual misconduct procedures. Specifically, the 2011 DCL addressed sexual harassment and violence (Carroll et al., 2014; Baumgardner, 2014; Ali, 2011). Among several policy shifts, the 2011 DCL mandated that HEIs use preponderance of evidence to adjudicate all sexual misconduct. Preponderance of evidence is a low standard of proof. A standard of proof is the level of evidence needed for a person to be found responsible for the student code charge. By using preponderance of evidence a person is found responsible if it is more likely than not (50.01%) they violated a HEI sexual misconduct policy (Ali, 2011). Amar, Strout, Simpson, Cardiello, Beckford (2014), surveyed a nationally representative sample of 1,607 administrators and found 61% utilized preponderance of evidence. Whereas, 39% of surveyed administrators openly admitted their institutions were not compliant with the 2011 DCL.

Shifting the burden of proof for adjudicating sexual misconduct cases created implications for policy enforcement, adjudication, and the lives of sexual misconduct survivors and accused. Survivor and victim advocates heralded the change as a needed shift to improve the postsecondary institution adjudication process for victims (Wilson, 2015). Many accused students and due process advocates feel the shift removes due process and creates a one-sided system (Wilson, 2014) in favor of victims or students who regretted having sex. The scope of this research is concentrated on the 2011 DCL's mandated lower burden of proof, preponderance of evidence.

### **Statement of the Problem**

Survivors, accused, administrators, parents, university leaders, regulatory bodies (such as the Office for Civil Rights), and the general public are impacted by HEI's sexual misconduct adjudication practices. The 2011 Dear Colleague Letter published by the Department of Education's Office for Civil Rights mandated the use of preponderance of evidence in all sexual misconduct cases (Ali, 2011). Preponderance of evidence, or more likely than not, is a burden of proof used in campus adjudication processes for sexual misconduct.

The change to utilize a low burden of proof, preponderance of evidence, was and is controversial. Supporters of the mandated use of preponderance of evidence standard of proof conclude the shift creates a fair and impartial campus adjudication process (Ali, 2011; Tripplett, 2012; Weizel, 2012). The use of preponderance of evidence allows for sufficient due process, gives complainants a means to justice, and is best considering the mandated 60 day timeframe for an investigation and adjudication (Ali, 2011). However, others interpret the use of preponderance of evidence in campus adjudication processes as

a violation of due process, a process that favors the complainant, and is finding innocent students responsible for sexual misconduct (Andersen, 2014; Cohn, 2012; Henrick, 2013; Johnson, 2012; Johnson, 2015). Despite a large literature base of legal opinions on the use of preponderance of evidence in the campus adjudication process, there are few practitioner voices commenting on the preponderance of evidence. Practitioner literature focuses on understanding and compliance with the 2011 DCL. The lack of practitioner literature supporting or opposing the shift to mandated preponderance of evidence creates questions about best practice. Is the use of preponderance of evidence best practice? The lack of involvement from student affairs practitioners, administrators, Title IX coordinators, faculty, and students in deciding to use the preponderance of evidence further generates questions about best practice. Overall, do professionals support the use of preponderance of evidence as the best standard to adjudicate sexual misconduct cases?

### **Theoretical Framework**

Self-Determination Theory surmises that there are different types of motivation. Specifically, Self-Determination Theory asserts the basic difference in motivation is between intrinsic and extrinsic forms (Ryan & Deci, 2000). Deci, Spiegel, Ryan, Koestner, and Kauffmans' (1992) Self-Determination Theory research further asserts that teachers who experience mandates experience a decline in intrinsic motivation and thusly are generally more controlling of their students. Moreover, the Self-Determination Theory researchers explain:

Pressure from administrators to make sure students perform up to standards is just one kind of pressure that teachers experience.

Government agencies, parent groups, and other forces outside the school

system bring pressure to bear on school administrators and teachers alike, and all of these intrusions on the teachers' sense of self-determination are likely to lead them to be more controlling with their students. That, in turn, will have negative effects on the students' self-determination, conceptual learning, and personal adjustment (Deci, Vallerand, Pelletier, & Ryan, 1991, p. 340).

The pressure from outside systems can impact an educator's motivation, which in turn can impact student outcomes. Self-Determination Theory could be applied to student affairs practitioners and HEI administrations who work closely with students. Federal rulemaking and laws are requiring certain process be used, such as preponderance of evidence. Although, they are not educators in a traditional classroom setting, student affairs practitioners are educators who face similar issues.

In addition to Self-Determination Theory, Astin's Theory of Involvement, purports that people support what they are involved with (Astin, 1999). Conveying, fostering, and creating opportunities for practitioners to examine and be involved in policy and procedure, especially an important policy such as sexual misconduct, could enhance support of HEI policy. Specifically, Astin's Theory of Involvement fifth postulate states: "The effectiveness of any educational policy or practice is directly related to the capacity of that policy or practice to increase student involvement" (Astin, 1999, pp. 528-529). Astin (1999) describes student involvement as the quantity and quality of the physical and psychological energy that students invest in the college experience. According to the theory, the greater the student's involvement in college, the greater will be the amount of student learning and personal development.

The same ideals can be applied to student affairs professionals. This research seeks to understand practitioners' and administrators' perceptions of preponderance of evidence being used as the standard of proof in sexual misconduct cases. How students and student affairs practitioners are involved in higher education decisions and policies impact the effectiveness and learning of students.

### **Research Question**

As a student affairs practitioner, I am constantly seeking to apply the best practice. Sexual misconduct policies have been an important topic in the field. HEIs across the nation are reviewing and revising their sexual misconduct policies. My current institution shifted to the preponderance of evidence after the 2011 DCL. Generally, I hear a lot of support for the preponderance of evidence burden of proof followed by a lot of unsure and frustrated whispers.

### Research Question:

- How do student affairs practitioners perceive the shift to preponderance of evidence in sexual misconduct cases?

### Sub questions:

- Have there been any notable changes/trends since shifting the burden of proof to preponderance of evidence?
- How has the shift to preponderance of evidence impacted or not impacted students? Why or why not?
- What are the experiences of practitioners with using the preponderance of evidence standard for adjudicating sexual misconduct cases?

- Do practitioners believe preponderance of evidence is best practice for adjudicating sexual misconduct cases?

### **Definition of Terms**

2011 Dear Colleague Letter (2011 DCL): The 2011 DCL defines and discusses educational institution policies concerning sexual misconduct. Specifically, the 2011 DCL illustrates expectations for federal funded educational institutions to foster a safe environment. The Department of Education has deemed the 2011 DCL as a significant guidance document (Ali, 2011).

Accused: Individual accused of committing sexual harassment or violence. The term accused can be used during the campus adjudication process (Ali, 2011).

Beyond a Reasonable Doubt: A high burden of proof. The criminal-justice system uses beyond a reasonable doubt in criminal cases (Cornell University Law School, n.d.).

Burden of Proof: Burden of proof is a level of proof a complainant must prove to result in a responsible or guilty verdict for the accused individual (Cornell University Law School, n.d.).

Campus Adjudication System: Campuses maintain their own adjudicatory systems separate from the legal system. Campus adjudicatory systems vary across institutions (Triplett, 2012). Students found guilty of a violation can receive a sanction of varying severity (warning to expulsion).



Clear and Convincing Standard: High standard of proof where “it is highly probable or reasonably certain that the sexual harassment or violence (misconduct) occurred” or 75% more likely than not (Ali, 2011, p.11).

Complainant: Individual pressing charges or complaint in the campus adjudicatory system or an individual filing a discrimination complaint with the Office for Civil Rights (Ali, 2011).

Consent: Act of agreeing to a sexual act between legal adults. Consent cannot be given if a person is using substances or has a disability (Ali, 2011).

Dear Colleague Letters (DCL): Office for Civil Rights issues DCLs to institutions receiving federal funding to guide and create policies as well as inform the public (Ali, 2011). DCLs also describe methods and examples to enforce proactive and preventive policies and situations. Lastly, DCLs define and clarify the role of other federal mandates and laws such as Title IX, FERPA, and the Clery Act (Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts, 2011). The DOE has issued DCLs in 1997, 1999, 2001, 2011, and 2013 about various subjects, including sexual misconduct (U.S. Department of Education, 2015).

Due Process: A fair adjudicatory procedure. The United States Constitution provides due process protection under the Fifth and Fourteenth Amendment in federal and state courts

(Cornell University Law School, n.d.). *St. John Dixon et al. v. The Alabama State Board of Education* ensured students have due process rights and prompted HEIs to be “fundamentally fair” in conduct situations (Boyd & Lowery, 2014, p. 3).

**Higher Education Institution (HEI):** Including but not limited to universities, technical, colleges, community colleges, public and private universities and all post-secondary institutions accepting federal funding.

**Office for Civil Rights (OCR):** The OCR seeks to enforce Title IX policies. The OCR investigates and issues compliance reviews for institutions utilizing federal funds. The OCR fines institutions for non-compliance. The OCR may refer cases to the Department of Justice for prosecution. The OCR receives the authority to investigate from the Department of Education (U.S. Department of Education, 2015).

**Preponderance of Evidence:** Standard of proof where “it is more likely than not that sexual harassment or violence occurred” (Ali, 2011, p. 11). The 2011 Dear Colleague Letter requires schools to adopt preponderance of evidence as standard of proof.

**Sexual Harassment:** Unwanted sexual physical contact and conduct both non-verbal and verbal. Sexual harassment includes forms of sexual violence and assault. Title IX defines sexual harassment as a form of sex based discrimination (Ali, 2011).

Sexual Assault: A form of sexual violence where consent is not given. Sexual assaults are “a form of sexual harassment prohibited by Title IX” (Ali, 2011, p. 3).

Sexual Violence:

...refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion. (Ali, 2011, p. 1)

Survivor: An “empowering” term for a person who experienced a form of sexual violence (Carroll, 2013, p. 48). The 2011 DCL refers to survivors as victims (Ali, 2011).

Title IX of the Education Amendment of 1972: A federal law which defends against sex based discrimination in education. Title IX states “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (Title IX of the Education Amendments of 1972). Primarily known for requiring nondiscrimination practices in athletics, Title IX applies to and influences sexual harassment cases and policies (Baumgardner, 2014).

## CHAPTER 2: LITERATURE REVIEW

In the United States, Black et al. (2011) concluded that one in five women and one in seventy-one men are raped in their life time. One in two women and one in five men experience some form of sexual violence. Black et al. (2011) further concluded the majority of survivors know their perpetrator.

One in five female and one in sixteen male college students experience an attempted or completed sexual assault (Krebs et al., 2007). A more recent study, conducted by the Association of America Universities (AAU), found that 26.1% of female HEI seniors experienced “nonconsensual sexual contact involving force or incapacitation” (AAU, 2015, p. xiv).

A postsecondary institution’s handling of sexual misconduct is extremely important for all involved parties. Much of the guidance and direction for tackling the issue of sexual misconduct on campus comes from Title IX of the Education Amendments of 1972 (Title IX). Title IX applies to all educational situations including, but not limited to, classrooms, extracurricular, and athletics (Ali, 2011). At the core, Title IX protects against sex discrimination and strives to provide equal access to education (Title IX of the Education Amendments of 1972).

Originally generated to address commonplace gender discrimination in education, Title IX was and is difficult to “enforce” (Guy & Fenley, 2014, p. 46). From its conception, understanding and complying with Title IX requirements was difficult. In 1979, the Department of Health, Education, and Welfare clarified Title IX by articulating three athletic related expectations for higher education institutions (Guy & Fenley, 2014).

To this day, common knowledge about Title IX revolves around athletics; however, it covers a significantly larger scope (Baumgardner, 2014). Although not originally intended to regulate campus sexual misconduct, recent Title IX rulemaking expanded higher education institutions' responsibility to adjudicate sexual misconduct (Wilson, 2014).

Until 1998, Title IX purview was strictly dedicated to educational equal access. Title IX's role, however, in sexual harassment and violence policy expanded when the Federal Supreme Court set precedent with *Gebser v. Largo Vista Independent School District* (1998). *Gebser v. Largo Vista Independent School District* (1998) defined sexual harassment as a form of sex-based discrimination under Title IX. This case stated schools must protect students from sexual harassment. The decision also asserted educational institutions must provide a safe learning environment free from sexual harassment. Additionally, *Gebser v. Largo Vista Independent School District* (1998) legally gave the DOE the right and responsibility to enforce and disseminate Title IX policy (Baumgardner, 2014).

The 2003 Supreme Court case, *Desert Palace, Inc. v. Costa* (2003) established the use of preponderance of evidence in civil cases under Title IV. The 2011 DCL cited *Desert Palace, Inc. v. Costa* (2003), a civil case, as justification to utilize preponderance of evidence (Ali, 2011).

The DOE has issued several DCLs in order to shape and clarify Title IX. In April 2011, the 2011 DCL addressed postsecondary institutions' sexual misconduct procedures and described standards for educational institutions to address the issues of sexual harassment and violence (Carroll et al., 2014; Baumgardner, 2014; Ali, 2011). The 2011

DCL articulated that “sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX” and is thus under the Office for Civil Rights (OCR) jurisdiction (Ali, 2011, p. 2).

Among several policy shifts, the 2011 DCL advocated that universities change their burden of proof from “beyond a reasonable doubt” to “preponderance of evidence” (Ali, 2011, p. 10). The 2011 DCL declared the higher burden of proof standard, a clear and convincing standard, was unfair and inconsistent with civil rights laws (Ali, 2011).

Furthermore, the 2011 DCL asserted institutions must use preponderance of evidence to be compliant with Title IX. Postsecondary institutions that receive federal funding are required to follow federal mandates and laws. Before the 2011 DCL, higher education institutions could choose their standard of proof. Postsecondary institutions adhere to the Department of Education’s 2011 DCL upon real fear of “litigation” and “liability” (Triplett, 2012, p. 497). Also, institutions fear having critical federal funding restricted or withheld (Pell grants, Stafford loans, research grants, etc.). Despite non-compliance with federal mandates such as Title IX, a postsecondary institution’s federal funding has never been pulled (Baumgardner, 2014; Wilson, 2015).

In 2014, the White House issued *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*. The DOE on April 29, 2014 also issued a *Question and Answers on Title IX and Sexual Violence* to clarify the questions from the 2011 DCL (Lhamon, 2014). Both documents contained extensive explanations, details, and clarification on how to comply with the 2011 DCL.

The DOE delegates Title IX enforcement to the OCR. The OCR offers guidance to understand policy, provides education, manages a complaint system, and investigates

non-compliance. The OCR initiates investigations of HEIs with or without a complaint (Ali, 2011). Findings of the OCR can result in significant fines as well as potential criminal or a civil charges prosecuted by the Department of Justice (DOJ).

The volume of cases prompted the OCR to request funds to hire 200 investigators (Wilson, 2015). One in ten OCR sexual violence case investigations results in a school being found non-compliant (Newman & Sander, 2014). Only a handful of private HEIs refuse to receive federal funding and choose not to comply with Title IX. Not using preponderance of evidence standard of proof can result in OCR investigation and heavy fines. However, using preponderance of evidence can also result in lawsuits.

According to the activist group, *Boys and Men in Education*, a total of 103 lawsuits have been filed against HEIs alleging due process and other violations in adjudicating sexual assault (Boys and Men in Education, 2015). Cases vary; however, all are suing postsecondary institutions for alleged mishandling of sexual misconduct cases. HEIs' role in sexual misconduct adjudication is being challenged in the legal system. Wilson (2015) asserted that the preponderance of evidence legality will probably be defined when federal court decisions outline the HEI's role in sexual misconduct cases. New (2015), writing for Inside Higher Ed, surmised that at least three school have OCR investigations due to "overzealous attempts to stay off the OCR's list" (p. 3). In other words, accused students are making claims of sex discrimination due to an unfair process.

As of October 2015, there was proposed federal legislation titled the Safe Campus Act. The Safe Campus Act would allow HEIs to choose the burden of

proof used as well as requiring the incident must be reported to the police for a HEI to act on the report (New, 2015). Supporters of the Safe Campus Act illustrate the potential law as reforming the campus adjudication system. Opposed lawmakers say the act would limit reporting and a safe campus (New, 2015). HEIs' conduct processes vary depending on the institution. Born out of the Civil Rights movement to replace in loco parentis, campus adjudication systems and student conduct offices address student behaviors which violate an institution's culture, community, and policies (Boyd & Lowery, 2014). *St. John Dixon et al. v. The Alabama State Board of Education* ensured students have due process rights and prompted HEIs to be "fundamentally fair" in conduct situations (Boyd & Lowery, 2014, p. 3). Some institutions require sexual misconduct cases to be heard by conduct boards consisting of individuals representing student, staff, and faculty whereas others defer all sexual misconduct incidents to administrative review by a Title IX Coordinator or an investigative process. The goals, responsibilities, and outcomes of the campus adjudication system are different from a criminal justice system, as described in the table below.



**Table 1.1 Critical Differences between the Criminal Justice System and the Campus Adjudication Process**

<b>Criminal Justice System</b>	<b>Campus Adjudication Process</b>
Uses beyond a reasonable doubt, a high standard of proof, in sexual misconduct cases (Rape Abuse and Incest National Network, 2009).	Uses preponderance of evidence, a lower standard of proof (Ali, 2011).
The goal is “preventing and controlling crime, and achieving justice” (Wellford, 1997).	Goal is to educate students and correct behavior. HEIs want to retain students (ASCA, 2014).
Prosecutor can choose not to pursue a case if lacking evidence. In fact, “Out of every 100 instances of rape, only 7 lead to an arrest and only 3 are referred to prosecutors” (Rape Abuse and Incest National Network, 2009).	Required to look into all reports of sexual misconduct (Ali, 2011; Lhamon, 2014)
If found guilty of sexual misconduct, sentence can equal years of imprisonment and/or placement on the sex offender’s list.	If found responsible, highest sanction is permanent expulsion and a tarnished conduct record (ASCA, 2014).
Discovery, investigation, and adjudication process can take weeks, months, or even longer (Gertner, 2015).	Must complete investigation and adjudication process within 60 days of a reported complaint (Ali, 2011).
Criminal law applies to all citizens in the community.	Student conduct code applies only to students (ASCA, 2014).
Process is public. Names of accused and survivor can be released to the public (Rape Abuse and Incest National Network, 2009).	Process is typically confidential. Names of accused and survivor as well as the incident typically not made public (Ali, 2011).

Table 1.1: The key differences between the Criminal Justice System and the Campus Adjudication Process.

The above table clarifies the differences in goals, responsibilities, jurisdictions, and processes of the criminal justice system and the campus adjudication process. The 2011 DCL directive to shift the burden of proof to preponderance of evidence generated a

significant amount of literature concerning the accused students' due process rights. Arguments against the shift to preponderance of evidence unsympathetically criticized the 2011 DCL and the OCR enforcement of Title IX (Henrick, 2013; Johnson, 2012). Dissenters claim the lowering of the burden of proof to preponderance of evidence slants the limited campus judicial system towards the survivor (Henrick, 2013; Johnson, 2015). They claim the use of preponderance of evidence limits scope of inquiry and the standard unfairly limits due process rights of accused students (Henrick, 2013; Johnson 2012; Johnson, 2015).

On October 15, 2014, twenty-eight Harvard professors published a public letter in the *Boston Globe* decrying the shift to preponderance of evidence as rejecting due process (Andersen, 2014). Additionally, sixteen University of Pennsylvania law professors in a public letter articulated due process concerns for students with the use of preponderance of evidence. The University of Pennsylvania law professors' letter also suggested that the OCR did not have the legal authority to define policy on such a large scale (Shire, 2015; Wilson, 2015).

One of the twenty-eight Harvard professors to sign the letter that publically admonished preponderance of evidence was Nancy Gertner, a Harvard Law School professor, retired federal judge, and self-proclaimed feminist (Gertner, 2015). Gertner (2015) surmised that civil lawsuits do utilize the preponderance of evidence. However, civil court cases using the lower standard often take years to investigate, conduct a discovery, and includes lawyers. Further Gertner (2015) shares a concern over the lack of transparency. Gertner (2015) cited how at Harvard, the Title IX office handles every step of a sexual misconduct adjudication, including ensuring the HEI is not subject to an OCR

investigation. The tension between adjudicating and protecting the HEI creates a conflict of interest for any departments handling sexual misconduct. Although HEIs may vary from Harvard's organizational structure, conflict of interest is a reasonable concern plaguing the fairness of many adjudication processes.

Henrick (2013) asserted false sexual assault cases "...will increase substantially due to the desire of colleges and universities to placate OCR and avoid potential liability from dissatisfied complainants at the expense of just and fair adjudication of student cases" (p. 91). The legal standing of due process was not the only facet of the 2011 DCL that was questioned. Baumgartner (2014) declared that the OCR's rulemaking could be legally challenged under the Administrative Procedure Act (APA) due to not following proper APA protocol. The Foundation for Individual Rights in Education (F.I.R.E.) Legislative and Policy Director, Joseph Cohn stated a higher standard of proof would be perfectly legal:

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court of the United States held that an institution may only be found liable for damages under Title IX if it is deliberately indifferent to claims of sexual misconduct. Writing for the majority, Justice Sandra Day O'Connor explained that a college 'may not be liable for damages unless its deliberate indifference subjects its students to harassment. That is, the deliberate indifference must, at a minimum, cause [students] to undergo harassment or make them liable or vulnerable to it' (Cohn, 2012, p. 1).

Cohn interpreted the "clear and convincing" or "beyond a reasonable doubt" standard would suffice and would not be construed as deliberate indifference.

Overall, preponderance of evidence opponents illustrated that the shift created unfair campus adjudication procedures and thus limits the accused due process rights (Cohn, 2012; Gertner, 2015; Henrick, 2013; Johnson, 2012; & Johnson, 2015)

Other legal reviews found the preponderance proof standard constitutionally aligned with due process since it is utilized in civil law cases (Weizel, 2012; Triplett, 2012). Legal reviews supporting the shift argued that preponderance of evidence is fair and appropriate for campus adjudication systems (Weizel, 2012; Triplett, 2012). Weizel (2012) and Triplett (2012) determined preponderance of evidence was fair and appropriate for campus adjudication systems by using the “Supreme Court’s *Mathews v. Eldridge* procedural due process balancing test” (Triplett, 2012, p. 1613). *Mathews v. Eldridge* procedural due process balancing test asks to weigh the impact to private interests against public interest and cost for implementing a new or different procedure (Weizel, 2012).

Weizel (2012) cited the shift to uniform campus adjudication systems will ensure all sexual misconduct cases, no matter the postsecondary institution, are treated similarly. Weizel (2012) also surmised preponderance of evidence is the most effective process due to HEI’s low levels of evidence and a limited discovery. In many cases, physical evidence is not present or scarce and there are few to no witnesses. Additionally, a significant percent of sexual misconduct cases involve alcohol or other drugs (AAU, 2015). Higher education institutions need to complete adjudication of sexual misconduct cases within 60 days after a HEI becomes aware of an incident (Ali, 2011). During the 60 days, a HEI must conduct a fair and impartial investigation, collect evidence, and

adjudicate the sexual misconduct case. The limited timeframe may hinder HEIs from finding enough evidence to find a student responsible for sexual misconduct with a high standard of proof (Gertner, 2015).

The lack of concrete evidence often caused cases to be dismissed in the criminal justice system (Rape Abuse and Incest National Network, 2009). The lower burden of proof, preponderance of evidence, gives the complainant a chance at being successful in a sexual misconduct adjudication case (Weizel, 2012). However, most importantly, higher education institutions use of preponderance of evidence ensures victims an outlet to achieve justice (Ali, 2011; Weizel, 2012).

Sexual misconduct adjudication literature concerning practitioners and students focuses on best practice and compliance with the 2011 DCL. Carroll et al. (2013) created a 2011 DCL compliance instrument and measured adherence to the 2011 DCL at a case study institution. The 2011 DCL compliance instrument constructed a “snapshot” of compliance, but not program effectiveness (Carroll et al., 2013, p. 54). Others focus on specific universities’ compliance to the 2011 DCL (Poole, 2014; Raheem, 2014). Compliance means acceptable application of the law in accordance to OCR and DOE standards. Koss, Wilgus, and Williamse (2014) discussed the application of restorative justice while maintaining compliance with Title IX standards. Cantalupo (2014) surmised an increase in surveys examining sexual violence would directly help students, parents, future students, faculty research, and the university.

Amar et al. (2014) surveyed administrators and found campus adjudication, response, and education concerning sexual assault, were key indicators to providing an understanding of campus and areas for improvement. Their work focused on

administrator perceptions and understanding of HEI response to sexual misconduct. The impact of preponderance of evidence was not thoroughly discussed in Amar et al. (2014). However, Amar et al. (2014) summarized a macro overview of “protocols, response, and student prevention effort for sexual assault” (p. 1).

The professional organization, Association for Student Conduct Administration (ASCA), summarized the frustration with the standard of proof, beyond a reasonable doubt, and support for preponderance of evidence by concluding:

These cases sometimes come down to believing one party as more credible than the other. If we start from the premise of clear and convincing or beyond a reasonable doubt, we are essentially saying to the victim, ‘Even if I believe you over the accused, if I don’t believe you by this higher standard, I have to find in the accused student’s favor.’ This devalues the victim’s sense of personal value to the institution. Use of the ‘more likely than not’ or 50% model is the only truly equitable standard for campus conduct cases (2014, p. 13).

Authors included commentary on the 2011 DCL impact and lack of clarity (Cantalupo, 2014; Carroll et al., 2013; Koss et al., 2014). Complaints about the unclear guidance dominated the majority of complaints (Triplett, 2012; Koss et al., 2014). The 2011 DCL recognized the “limitations of a one-size fits-all approach with sexual harassment,” but failed to explain alternative resolution approaches in sexual assault cases (Koss et al., 2014, p. 254). The unclear guidance of the DCL caused many universities to not utilize restorative justice (Koss et al., 2014). Furthermore, promoting

more clarity would ensure safety and fairness for accused, survivors, and universities (Triplett, 2012).

There still remains a large hole in the literature regarding the 2011 DCL guidance to shift the burden of proof. Much of the dialogue omits the opinions, voices and impact on the survivor. Accused voices surface in the literature as activists for change (Boys and Men in Education, 2015). In fact, the voices of students were limited to predominately quantitative reports (AAU, 2015). Legal reviews focused on the legality of preponderance of evidence standard in administrative hearings. Legal opinions focused on if preponderance of evidence allows for sufficient due process. Practitioners, although concerned with the impact on the student, focus on the practices and compliance of preponderance of evidence. The ASCA directly supports the use of preponderance of evidence as best practice. However, most journal articles penned by practitioners focus on compliance of Title IX policy.

## CHAPTER 3: METHODOLOGY

The purpose of this qualitative research study was to explore how student affairs practitioners perceived the shift to the preponderance of evidence standard of proof. As I learned more about the sexual misconduct policy, I listened to practitioners who were pleased and yet sometimes confused with the federal requirements. I wondered whether or not practitioners supported the federally mandated shift to preponderance of evidence and what their reasoning was behind their position. Since it was federally mandated for post-secondary institutions to use preponderance of evidence, I wondered if student affairs professionals believed it was the best evidence standard for all students (victim/survivor, accused).

This chapter describes the phenomenological methods utilized to understand the practitioner's perceptions of the shift to preponderance of evidence. Phenomenological methods have historical roots in "philosophy and psychology" to describe a "phenomenon" (Creswell, 2014, p. 14). More specifically in this research, a phenomenological approach allowed multiple practitioners' experiences with preponderance of evidence to be studied and explored (Creswell, 2014).

Due to the confidential nature of sexual misconduct cases, few practitioners on campus actively adjudicate and/or handle cases. This confidentiality limited the number of practitioners who have knowledge of preponderance of evidence or experiences with it. By exploring specific practitioner's involvement, experiences, and opinions about the use of preponderance of evidence in sexual misconduct cases, a clearer illustration of



practitioners' beliefs and understanding developed. In-depth interviews allowed for a rich discourse and understanding to unfold.

Research was conducted at a rural public HEI with enrollment under 10,000 students. Ten participants were identified as potential participants with seven participants being "purposefully selected" because of their experience handling, managing, adjudicating, and investigating sexual misconduct cases (Creswell, 2014, p. 189). "Purposefully selected" means participants were chosen based on their experiences (Creswell, 2014, p. 189). All participants handled aspects of sexual misconduct conduct cases. Participants are employed by the HEI in various capacities, including housing and residence life, dean of student's office, sexual misconduct investigators, and administration. The seven participants were asked to participate in an in-depth, face-to-face interview (Creswell, 2014; Marshall & Rossman, 2006).

The in-depth, face-to-face interview allowed participants to explain their experiences and opinions about preponderance of evidence. During the in-depth interviews, an emic or participant's perspective created the discourse on the phenomenon. The researcher's opinions, or the etic perspective, do not illustrate the findings (Marshall & Rossman, 2006). Before interviewing participants, a face-to-face interview protocol was developed and utilized to ensure standardization and completion of research goals (Creswell, 2014). The interviews were audiotaped and transcribed. Interviews took place in a realistic site which included the individual participant's office or private location of their choosing. A realistic site allowed the researcher "to build trusting relationships with the participants in the study" (Marshall & Rossman, 2006, p. 62).

Further, providing the opportunity for the participant to choose the space for the interview allowed the participant to feel comfortable.

Sexual misconduct adjudication processes at post-secondary institutions are under extreme pressure to correctly and effectively resolve cases. Due to the political pressure and intense public pressure to successfully handle sexual misconduct cases, it is critical that participant responses remain confidential to the extent allowed by law. A comment revealing doubt or unquestioning support for HEI policy could result in one's professionalism or abilities to investigate or adjudicate sexual misconduct currently or in the future to be questioned.

After conducting face to face interviews, the interviews were transcribed and hand coded. Coding was completed using Creswell's (2014) eight steps as a systematic process of analyzing textual data. First, each transcript was read multiple times. Second, the researcher jotted down the big picture of each interview. Thirdly, a list of topics were created from the notes. Fourth, the researcher created a code for each topic and found the "appropriate segments of the text" relating to the list of topics (Creswell, 2014, p. 198). The fifth step consisted of the researcher organizing, connecting, and reducing topic categories. Sixth, the researcher made final decisions on topics. The seventh step consisted of the organized data being moved to one word document. The eighth step was to recode and reorganize any data if needed (Creswell, 2014). The researcher then created codes for each theme. The steps allowed the researcher to organize the information from the interviews into meaningful categories in which common themes from across the interviews began to emerge.

## CHAPTER 4: FINDINGS

The purpose of this qualitative research was to learn if student affairs practitioners perceive preponderance of evidence as best practice in sexual misconduct cases. By examining seven interviews focusing on the use of preponderance of evidence a clearer understanding of practitioners' and administrators' opinion on the federally mandated switch to preponderance of evidence was revealed. This chapter illustrates the patterns and themes that emerged from the analysis of collected data.

### **Patterns that Emerged**

After transcribing and coding the interviews, three themes emerged. Themes were created by multiple participants speaking at length about each topic. Those three themes are best practice, concerns for the accused, and federal involvement.

The most common theme was support of preponderance of evidence as best practice. Participants advocated that preponderance of evidence was best practice for the campus adjudication system. In the theme of best practice participants explained preponderance of evidence fit the campus adjudication system.

Two sub-themes emerged, which supported the theme of "best practice": HEI system and justice. The sub-theme of HEI system discussed how the limitations and structure of the campus adjudication process works best with preponderance of evidence. The sub-theme of justice focuses on how the preponderance of evidence allows victims a pathway to achieve a desired outcome.

However, despite a theme and supporting sub-themes illustrating preponderance of evidence as best practice, six out of seven participants expressed concern for the

accused student. Thus, a theme illustrating concern for the accused in sexual misconduct cases emerged. Participants explained that although preponderance of evidence is best, many accused students dislike the standard. Lastly, a theme detailing that the preponderance of evidence is federally mandated appeared. Although never the focal point of comments, many participants spoke about how the use of preponderance of evidence is federally mandated by the OCR. The following sections of this chapter, will articulate and clarify each theme.

### **Best Practice**

Administrators and practitioners agree that the use of preponderance of evidence is best practice. Six out of seven participants supported the use of preponderance of evidence. Participant 2 concluded that they really did not know. Responses were generally supportive of the preponderance of evidence. Participants supported their belief that preponderance of evidence was best practice by describing it as the best option for the campus adjudication process.

Participant 3 cited the lack of witnesses in sexual misconduct cases creates an atmosphere where preponderance of evidence is needed. Two participants described how HEIs must respond to sexual misconduct and that preponderance of evidence is the best way a HEIs can respond. Participant 1 defended the preponderance of evidence standard as the best practice because it allows the victim to achieve justice. They further hypothesized that any higher standard in a HEI system would result in victims not reporting or the accused never getting convicted. Participant 3 and 4 described preponderance of evidence as a fair form of adjudication. Another participant concluded

that they never really disagreed with the usage of preponderance of evidence and had more specific examples of problems when it was not used.

Support for preponderance of evidence by the participants was often expressed in emotional or feeling statements. *I feel* statements were common in describing support of preponderance of evidence. In fact, one interview claimed to love the standard. A few more described their comfort with using the standard of proof. Participant 7 described how they were able to sleep better at night with using preponderance of evidence. Many expressed comfort or the ability to feel fair with using the preponderance of evidence. Statements indicated the preponderance of evidence felt right or was a reasonable burden of proof for a HEI setting.

### **HEI System**

Many justified the usage of preponderance of evidence due to the limitations and goals of the campus adjudication system. Participants openly discussed the differences in the court and campus system. Participant 1 and 5 explained that HEI systems are not set-up for the use of a higher burden of proof. Participant 1 further stated that HEIs are not trained to act as a criminal court. Participant 7 concluded that attending a HEI is a privilege, not a right. Due to HEI being a privilege, HEIs could use the preponderance of evidence. Participant 5 concluded a higher burden would be harder to adjudicate without the resources of a jury or courtroom and further questioned who would supply the doubt if beyond a reasonable doubt was used by a HEI adjudication process. Participant 1 and 4 both described the worst sanction a HEI can take against someone is removing them from campus. In fact, Participant 1 and 4 further described how very few sexual misconduct victims achieve justice in the criminal justice system. Statements highlighted the

differences in responsibilities and abilities of HEI compared to the criminal justice system. Those differences in set-up and abilities justify the use of preponderance of evidence in the campus adjudication process.

## **Justice**

Six out of the seven participants expressed how preponderance of evidence provided the ability for a victim to achieve justice. Specially, participants described how the preponderance of evidence allowed victims to achieve justice by creating a fair process. Three participants concluded the process allowed more victims to come forward, since they feel they have a chance at achieving a favorable outcome. Four participants described how the process relieves victims of the burden of proof; meaning that victims of sexual misconduct did not have to fight for someone to believe their side or produce evidence in an often evidence-less crime. Participant statements indicated that victims could achieve a favorable outcome in campus adjudication cases, whereas higher burdens of proof rarely allowed for a favorable outcome. Participant 2 explained how many victims are afraid people will think they are lying or that they will need to prove they were victimized. Participant 3 explained that cases rarely have concrete proof for any side of the case and the preponderance of evidence allow HEIs to take action against those responsible for sexual misconduct.

In conclusion, preponderance of evidence allows victims to achieve justice. A higher burden of proof would result in a system not supportive of the victim. The preponderance of evidence standard encourages more victims to report in the hope something will be done. Furthermore, preponderance of evidence removes the burden

from the victim. It allows victims a method to seek justice, in situations with often limited physical evidence.

### **Concern for Accused**

Despite six participants concluding that the preponderance of evidence standard is the best standard for adjudicating sexual misconduct cases, six out of seven participants expressed some kind of concern for the accused. Concerns included fairness, respect, dislike of process, impact or bias. Although, participants overwhelmingly concluded preponderance of evidence as best practice, there was an understanding that the process can be hard for the accused.

Participant 1 described potential bias by calling students “the accused.” They questioned if even being accused of sexual misconduct automatically created a bias in the adjudication process. Participant 7 concluded that theoretically, the accused shoulders more of a burden. Three of the participants expressed knowledge of accused disliking the preponderance of evidence. One participant described an experience with two students who were accused, but did not feel responsible. Participant 6 vaguely suggested that accused are dissatisfied with the preponderance of evidence, but quickly stated that it was too soon to tell. Participant 3 openly expressed that accused disliked the preponderance of evidence standard and often felt it is too low. Participants continued to highlight the need for accused to be treated with respect. Although, participants overwhelmingly supported preponderance of evidence as best practice, there was an understanding that the process can be hard for accused.

## **Federal**

Six participants described preponderance of evidence as best practice for the HEI environment, but four cited it being federally mandated. When asked if they ever disagreed with the usage of preponderance of evidence, Participant 5 concluded that they did not, because it was the standard mandated. Participant 1 described frustration with multiple federal laws, such as VAWA (Violence against Women Act), Clery Act, and Title IX mandating different and conflicting policies. Another participant expressed thankfulness that the OCR is supporting preponderance of evidence. Participant 6 illustrated an understanding of why preponderance of evidence is used and seemed to respect the federal mandate. Although never a focus of the participants' comments, a majority of participants mentioned the legal requirement to use the preponderance of evidence. This theme created more questions which included: did practitioners agree preponderance of evidence is best practice because they recognized it is a federally mandated standard?

## **Other Noteworthy Themes**

Process matters to the success of any sexual misconduct adjudication. The HEI used in this research recently shifted to an investigator model for adjudicating sexual misconduct. Previously a board consisting of staff, faculty, and students adjudicated all sexual misconduct cases. Now, the university used in the research has two assigned investigators collect data and create a report. A three person panel votes on responsibility of the accused based on the investigators' report. Three participants expressed how the process of adjudicating or communicating about a case impacted how a victim and the accused feels about the process. Participant 3 and 4 mention how an investigator model



allows for a more personal conversation to take place compared to a faculty, staff, student conduct board hearing. The presentation of preponderance of evidence impacts students, practitioners, and administrator's perceptions of the process. Moreover the process impacts victim and accused opinions towards the preponderance of evidence.

### **Summary**

The findings illustrate preponderance of evidence is recognized as best practice for adjudicating sexual misconduct cases at a HEI level. Administrators and practitioners supported the use of preponderance of evidence by explaining the limitations and the goals of HEI system. Specially, participants concluded HEIs have limited power in sanctioning responsible accused. Participants also cited the limitation in evidence collected as reason to use the preponderance of evidence standard. The sub-theme of justice further supported preponderance of evidence as best practice. Participants illustrated how preponderance of evidence helps victims achieve justice. They further described how the HEI system is limited, specifically in the amount of physical evidence available as well as limited sanctioning powers. Furthermore, data suggests that any high evidentiary standard would result in students not coming forward and reporting, similar to the criminal justice system. Preponderance of evidence allows students a way of achieving justice, since many incidents happen without a witness. Practitioners strongly felt the process was fair to the victim and allowed them a chance to find justice. Despite strong support for preponderance of evidence, there was a concern for ensuring an unbiased and clear process for the accused in a sexual misconduct case. Most practitioners recognized the role of the federal government in mandating sexual misconduct policy.

## CHAPTER 5: DISCUSSION AND SUMMARY

As a young professional in higher education, sexual misconduct has been a focal issue. How practitioners and administrations handle sexual misconduct policy matters. It matters for all students involved. The preponderance of evidence is a key point of contention in legal circles and among accused student activists. The literature examines how HEIs can remain compliant, but rarely tackles if the policy is best practice. Understandably, no policy is without its fault, nor is a policy tackling a heated issue like sexual misconduct simply dualistic. However, understanding why and if preponderance of evidence was the best method of adjudication became the main research question. The findings clearly illustrate that administrators and practitioners handling sexual misconduct issues “feel” that preponderance of evidence is best practice.

### **Limitations**

The findings represent one small public rural HEI involving seven practitioners and administrators. The small sample size inhibits the ability to make larger generalizations. Additionally, the researcher was associated with all participants in both a personal and professional setting. At times, the pre-established relationship with accused allowed for more in-depth conversations. However, at times the relationship with researcher could have limited or stunted the conversation or willingness to discuss previous experiences. Due to the sensitive subject matter, confidentiality for participants was a priority. Hence, the researcher did not share specific quotes, which can impact the perception of the research.

## **Summary**

According to this limited sample of student affairs practitioners and administrators, preponderance of evidence is the best practice for HEI to adjudicate sexual misconduct cases. Justification for the preponderance of evidence was described in feeling statements. Participants described the limitations of the HEI system as reasoning for the usage of preponderance of evidence. Participants compared and contrasted HEI with the criminal justice system. Moreover, HEIs can give victims a chance for justice using a lower burden of proof as the criminal system often does not prosecute cases due to the high burden of proof. Justice was a central theme and practitioners cited the use of preponderance of evidence as a means to give victims justice. It allows victims to accuse their perpetrators in a safe environment where they are not forced to publically share and prove their traumatic experiences. Administrators and practitioners also demonstrated concern for the accused students. Yet, the majority of participants firmly agreed preponderance of evidence is best practice. There is fear that accused feel or perceive the burden of proof is tilted towards the victim. Despite a main focus on the students with the preponderance of evidence, the federal mandated aspect of the preponderance of evidence emerged in multiple interviews.

## **In Practice**

The findings inform the field of student affairs and campus officials who adjudicate sexual misconduct. Understanding the role the burden of proof has in the campus adjudication process is important for all parties involved: practitioners, faculty, administrators, staff, and most importantly students. Although the findings stem from a small sample size, it encourages further investigation and reflection on current

adjudication practices for sexual misconduct. In this study practitioners and administrators concluded preponderance of evidence is the best standard of proof for sexual misconduct cases. However, is that true at multiple universities? This research opens multiple avenues for future research and exploration.

As HEIs are federally required to handle situations of sexual misconduct, finding the best method to adjudicate is important. Finding the best practice for HEIs to adjudicate sexual misconduct impacts victims, accused, staff, faculty, administration, and the university as a whole. Sub-standard adjudication practices can lead to victims being re-victimized, innocent yet accused students being held responsible, and a creation of an unsafe environment not free from sex discrimination. Understanding if preponderance of evidence is the best burden of proof matters for all parties involved in the sexual misconduct campus adjudication process.

### **Future Research**

It is clear that more research is needed to support preponderance of evidence as best practice. Further exploration concerning the use of preponderance of evidence are diverse. Not only do the voices of administrators and practitioners need more examination, the voices of students going through the campus adjudication process using preponderance of evidence need to be evaluated and heard. Both the voices of the victims and accused students need to be evaluated and explored. Understanding student's opinions is needed before establishing preponderance of evidence as best practice.

Another avenue for further research exploring diverse institutions. Investigation of larger, private, historically Black, urban, outside of the mid-west, for profit, and religious HEI perceptions of preponderance of evidence would enrich the discourse. A

sampling of diverse institutions both in location, size, mission, and student population should be examined.

Another avenue for exploration is understanding the impact of the federal government. Several participants mentioned that preponderance of evidence was federally required. To what end does the federal requirement influence administrators and practitioners voices and opinions? Did knowledge of the federal mandate limit practitioners and administrators from speaking out or dissenting from the use of preponderance of evidence? Further research would be critical to understanding the role of the federal mandate in perceptions of the preponderance of evidence.

One of the most promising areas of future research is understanding the best process for adjudicating sexual misconduct in the campus adjudication system. A few participants talked at length about the process of adjudication. The standard of proof, preponderance of evidence, is required. However, the process or method of adjudication differs in HEIs. Which process is best? How do HEIs decide which adjudication process to use in sexual misconduct? The role of the process used in sexual misconduct adjudication needs more research.

## **Conclusion**

The 2014-2015 senior art thesis titled *Carry that Weight* at Columbia University is just one national incident that highlighted the importance of campus adjudication of sexual misconduct. How a HEI handles sexual misconduct directly impacts the students the HEI serves. One piece of understanding the HEI's adjudication of sexual misconduct cases is the role of the preponderance of evidence. The type of burden of proof has direct implications for victims, accused students as well as practitioners and administrators.

Sexual misconduct is a societal problem. One in two women are the victims of sexual violence in their lifetime (Black et al., 2011). One in four female students experience some form of sexual misconduct by their senior year (AAU, 2015). Sexual misconduct is a problem on and off campus. It is a crime that often occurs without a witness or physical evidence. According to Rape, Abuse, and Incest National Network (2009), “Out of every 100 instances of rape, only 7 lead to an arrest and only 3 are referred to prosecutors” (p.1). The criminal justice system has a low rate of successfully punishing predators of sexual misconduct. HEIs are expected to adjudicate and handle all reported incidents of sexual misconduct. However, a larger question lingers: Why are HEIs held federally responsible to effectively adjudicate sexual misconduct, when only three out of one hundred reported cases in the criminal justice system lead to prosecution? These are larger scope questions, which should be reconciled, since sexual misconduct is a problem not only facing HEIs, but also the public. Despite the questions concerning the dissonance between expectations of the HEI and the criminal justice system, HEIs are expected to handle sexual misconduct.

Recently, how HEIs handle sexual misconduct is under an intense spot light. In 2011, the OCR mandated that all HEIs use preponderance of evidence as their burden of proof for adjudicating sexual misconduct cases. Shifting the burden of proof for adjudicating sexual misconduct cases created implications for policy enforcement, adjudication, and the lives of sexual misconduct survivors and accused.

The literature surrounding the HEIs mandated shift to preponderance of evidence is mainly focused on the legal aspects or policy compliance. Many legal reviews examine if preponderance of evidence gives sufficient due process to accused students. Literature

targeting the practitioner mainly focuses on compliance. Amar et al. (2014) surveyed administrators and found only 60% of schools were utilizing the preponderance of evidence standard in sexual misconduct cases. Despite a focus surrounding the use of preponderance of evidence, very little literature articulated what practitioners and administrators actually thought about preponderance of evidence. This research sought to close the gap.

While it is too early to conclude that the preponderance of evidence is best practice everywhere, the majority of participants at this institution felt they were in support of it as a best practice. Six out of the seven participants felt that preponderance of evidence was best practice for adjudicating sexual misconduct cases. Participants supported their belief that preponderance of evidence was best practice by using *I feel* statements.

Participants talked at length about the limitations of the HEIs and the differences from the criminal justice system. HEIs can only expel or take away a student's opportunity to learn at that particular institution. Many participants also claimed that HEIs do not have the infrastructure to adjudicate with a higher burden of proof. By this they meant that sexual misconduct cases rarely carry concrete physical evidence or a witness. Thus, it is very hard to collect evidence.

Six out of seven participants described how the lower standard allows for victims to pursue and achieve justice. Many openly discussed how the lower burden of proof allow victims a chance to see some sort of favorable outcome.

Despite participants' belief that preponderance of evidence was the best practice, many described concerns for the accused students. It was clear the despite a belief that

preponderance of evidence was best practice, many knew that accused students did not agree with the use of preponderance of evidence. This is an avenue for future research to better understand different perspectives of preponderance of evidence.

Although not a focal point of the data, participants consistently mentioned the federal mandate. The quick mentioning of the federal requirement to use preponderance of evidence introduced more questions. Were participants simply saying preponderance of evidence was best practice because the standard is federally mandated?

More research is needed focusing on the campus adjudication system of sexual misconduct. The voices of students and diverse institutions are needed to fully understand the use of preponderance of evidence. This research is just a start to humanizing and creating an understanding of the HEI adjudication policy and process. More research is needed to understand the implications and impacts of federal policy on the HEI adjudication of sexual misconduct.

How HEIs handle and adjudicate sexual misconduct matters to many involved parties. While it is too early to conclude that the preponderance of evidence is best practice everywhere, the majority of participants at this institution felt it was in support of it as a best practice.



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## APPENDIX A

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**Application for Review of Research**  
**Involving Human Subjects**  
**NMU Institutional Review Board (IRB)**



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Submission of this application signifies that you have read the NMU IRB Policy Manual and agree to adhere to the procedures and policies explained therein, and that you have completed the [requisite CITI Human Subjects Research Training Modules](#). You must include your CITI Completion Report as an attachment to this IRB application.

Submission of applications to the IRB review will be conducted electronically according to the following procedure:

1. After completing this application, the principal investigator will forward the application to the Department Head for approval.
2. If the Department Head approves the project, s/he will forward the application electronically to the administrative assistant to the IRB ([awigand@nmu.edu](mailto:awigand@nmu.edu)) and the IRB chair ([dereande@nmu.edu](mailto:dereande@nmu.edu)). Please copy the principal investigator on the e-mail.

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**I. Name of Investigator:** Elizabeth Sommer

**Department:** Education, Leadership, and Public Service

**Mailing Address:** 101 Payne Hall, Marquette MI 49855



**Phone:** 920-917-2821 or 906-227-2516

**Email:** esommer@nmu.edu

**II. Faculty Advisor** Dr. Bethney Bergh  
**Advisor's Phone** 906-227-1864  
**Advisor's E-mail** bbergh@nmu.edu

**III. List the CITI Modules you have taken within the past three years:**

Elizabeth Sommer: Student Research– See attached

Bethney Bergh: Faculty and Staff – See attached

**IV. Project Title: Use of Preponderance of Evidence in Campus Adjudication of Sexual Misconduct**

**V. Funding:** Not funded

**List source of funding (if applicable):**

**VI. Proposed project dates:** October 10<sup>th</sup>- December 31<sup>st</sup>, 2015

**Note:** Do not begin your research (including recruiting potential research subjects) until you receive notification that your application has been approved by the IRB. This process will take approximately 2 weeks (excluding breaks).

**VII. Type of Review (check one)**

Administrative review	Yes <sup>1</sup>	<b>No</b>
Expedited review	<u>Yes</u> <sup>2</sup>	No
Full review	Yes	<b>No</b>

<sup>1</sup> If yes, explain why you feel your project should receive an administrative review (please relate your argument to one of the categories listed under Section I Part D in the IRB Manual).

<sup>2</sup> If yes, explain why your project should be expedited (please relate your argument to one of the categories listed under Section I Part D in the IRB Manual) and complete this application form.

This research applies for an expedited review according to the section 1.D.3.VII of the IRB manual which states, "Research on individual or group characteristics or behavior (including, but not limited to, research on perception, cognition, motivation, identity, language, communication, cultural beliefs or practices, and social behavior) or research employing survey, interview, oral history, focus group, program evaluation, human factors evaluation, or quality assurance methodologies. (Note: Some research in this category may be exempt)."

**IIIX. Project Description (Abstract)**

Please limit your response to 200 words

The manner in which higher education institutions handle sexual misconduct matters for the survivors, accused, administrators, parents, university leaders, regulatory bodies (such as the Office for Civil Rights), and the general public. The 2011 Dear Colleague Letter published by the Department of Education's Office for Civil Rights mandated the use of preponderance of evidence in all sexual misconduct cases (Ali, 2011). The change to utilize a low burden of proof, preponderance of evidence, was and is controversial. Despite a large literature base of legal opinions on the use of preponderance of evidence in the campus adjudication process, there are few practitioner voices commenting on the preponderance of evidence. Using interviews conducted through phenomenological approach, the researcher will seek to understand student affairs practitioner perceptions of the use of preponderance of evidence in sexual misconduct. By exploring specific practitioner's involvement, experiences, and opinions about the use of

preponderance of evidence in sexual misconduct cases a clearer illustration of practitioner's beliefs and understanding will develop.

**IX. Subjects in Study** (check all that apply)

- |                      |                                      |                             |
|----------------------|--------------------------------------|-----------------------------|
| NMU students         | Pregnant women, fetuses, or neonates | <b>NMU faculty or staff</b> |
| Cognitively impaired | Prisoners                            | Adult, non-student          |
| Minor                | Non-native speakers                  |                             |

**Number of subjects** 7

**Age range of subjects** 20-99

**X. Procedures**

- A.** Describe how the subject pool will be identified and recruited. If the subjects receive payment or compensation for participation, state the amount and form of payment.

Ten participants will be identified as potential interviewees with seven participants being "purposefully selected" because of their experience handling, managing, adjudicating, and investigating sexual misconduct cases (Creswell, 2014, p. 189). Of the ten identified participants, seven participants will be asked to participate in a face-to-face interview. The remaining three may be asked in the event one or more of the seven chooses not to participate. All participants handle aspects of sexual misconduct conduct cases. Participants are employed by the university in various capacities, including housing and residence life, dean of student's office, Title IV capacities, faculty, and administration. Participants will be selected from multiple departments and offices to further ensure confidentiality. Participants will not be compensated. Data collected during the interviews will be coded to categorize common themes in practitioners' experiences. Coding will further ensure participant anonymity and confidentiality.

- B.** Discuss where the study will take place and any equipment that will be involved.

Interviews will take place in the participant's office or private location of their choosing. Allowing the participant to choose the space for the interview will allow them to feel comfortable. An audiotape recording device will be used to record the interviews.

- C. Describe what the participants will be doing in the research project and how long will they be asked to participate. Attach any interview scripts, questionnaires, surveys, or other instruments that the participants will be asked to complete or respond to.

Participants will be asked for a face-to-face interview. The interview will be scheduled for one hour. A face-to-face interview allows participants to explain in-depth their experiences and opinions about preponderance of evidence.

- XIV. If there are any costs—laboratory tests, drugs, supplies, etc.—to the subjects for participating, they should be explained.

The only cost to participating subjects will be their time.

- XIV. If deception is involved or information withheld from the subjects, please justify the withholding and describe the debriefing plan.

No deception is involved or information withheld from the subjects.

#### XI. Risks

Describe the nature and likelihood of possible risks (physical, psychological, social, etc.) to the subjects and precautions that will be taken to minimize them. **Simply stating "none" is unacceptable; most research presents some risk to subjects.**

Sexual misconduct adjudication processes at post-secondary institutions are under extreme pressure to correctly and effectively resolve cases. Due to the political and intense public pressure to successfully handle sexual misconduct cases, it is critical that participant responses remain confidential. Participants may be uncomfortable discussing the subject matter. Confidentiality will be taken very seriously to minimize risks. All data will be password protected.

All printed data and audio recordings will be kept in a lock box in my office. Participants will only be identified as Participant A, B, C, etc.

**XII. Benefits**

Describe the benefits to the subject and/or society. The IRB must have sufficient information to make a determination that the benefits outweigh risks.

The manner in which higher education institutions handle sexual violence matters for the survivors, accused, administrators, parents, university leaders, regulatory bodies (such as the Office for Civil Rights), and the general public. By understanding how current student affairs practitioners perceive the shift to preponderance of evidence as the standard of proof in adjudicating sexual misconduct cases, we will understand how if practitioners think they are adjudicate sexual misconduct cases to the best of their ability.

**XIII. Voluntary Participation**

Describe how you will ensure subject participation is voluntary. A copy of the consent form to be signed by the subject should be attached to this proposal, (See Section IV in the IRB Manual for information about informed consent forms.) If your research is exempted from obtaining a signed informed consent release, please include a written protocol that indicates how informed consent will be obtained.

All participants will be invited and asked to take part in the study by telephone. Ten participants have been identified as potential interviewees, which the intention to interview seven. All participants interviewed, will be asked to sign a consent form. The consent form is attached to the IRB application.

**XIV. Confidentiality of Data**

Describe how you plan to protect the confidentiality of the data collected. Include a description of where the data will be stored and who will have access to it. If the data will be coded to protect subject identity, this should be explained. NOTE: ALL DATA MUST BE RETAINED FOR 7 YEARS

Confidentiality will be taken very seriously to minimize risks. Specific names and positions will not be used in any reports produced. Participants will be selected from multiple departments and offices to further ensure confidentiality. Participants will be identified only as Participant A, B, C, etc. Coding the data will further ensure participant confidentiality. During the research and thesis process, all data will be stored on a password protected computer with printed materials in a locked box. Data in reports, articles, or presentation will be coded and no individual comments will be quoted. Following the conclusion of the research all printed data and audio recordings will be kept in a locked cabinet in the office of Dr. Bethney Bergh for seven years.

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Upon approval from the IRB, you will be issued a project number. Please list this project number on all materials distributed to your participants. If your project is approved, you will have one year from the date you receive your project number to conduct your research. If you need more than one year to collect data, you must request a one-year extension by submitting a Project Renewal Form.

At any point, should you wish to make changes to your protocol, you must submit a Project Change Form before initiating the changes.

If any unanticipated problems arise involving human subjects, you must immediately notify the IRB chair ([dereande@nmu.edu](mailto:dereande@nmu.edu)) and NMU's IRB administrator ([bcherry@nmu.edu](mailto:bcherry@nmu.edu)) and must submit an Unanticipated Problem/Adverse Event form.

## APPENDIX B

101 Payne Hall  
Marquette, Michigan 49855  
Date:  
Participant's Address

Project Number:

Dear \_\_\_\_\_,

We are writing to invite you to participate in a research study. The purpose of the study is understand student affairs practitioner's perceptions of sexual misconduct processes. Specifically, the use of preponderance of evidence as the standard of proof in sexual misconduct cases.

We are inviting you to be in this study because of your experience handling, managing, adjudicating, and investigating sexual misconduct. Approximately seven of people will take part in this study at Northern Michigan University.

If you agree to participate, we would like you to partake in a face-to-face interview that will last approximately one hour. During the interview you are free to not answer any questions that you prefer not to answer.

We will keep the information you provide confidential to the extent allowable by law. Federal regulatory agencies and the Northern Michigan University Institutional Review Board (a committee that reviews and approves research studies) may inspect and copy records pertaining to this research. All interview information will be kept under in a lock box, cabinet or password protected file. If we write a report about this study we will do so in such a way that neither you, nor individuals involved in the experiences you share can be identified.

One of the risks of the study is that you may be uncomfortable discussing the subject matter. You will not benefit personally. However, we hope that others may benefit in the future from what we learn as a result of this study. By understanding how current student affairs practitioners perceive the shift to preponderance of evidence as the standard of proof in adjudicating sexual misconduct cases, we will understand if practitioners think they are adjudicate sexual misconduct cases to the best of their ability.

You will not be paid for being in this research study.

Taking part in this research study is completely voluntary. If you decide not to be in this study, or if you stop participating at any time, you won't be penalized or lose any benefits for which you otherwise qualify.

If you have any further questions regarding your rights as a participant in a research project you may contact Dr. Brian Cherry of the Human Subjects Research Review Committee of Northern Michigan University (906-227-2300) [bcherry@nmu.edu](mailto:bcherry@nmu.edu). Any questions you have regarding the nature of this research project will be answered by the principal researcher who can be contacted as follows: Elizabeth Sommer (906-227-2516) [esommer@nmu.edu](mailto:esommer@nmu.edu).

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I have read the above "Informed Consent Statement." The nature, risks, demands, and benefits of the project have been explained to me. I understand that I may ask questions and that I am free to withdraw from the project at any time without incurring ill will or negative consequences. I also understand that this informed consent document will be kept separate from the data collected in this project to maintain anonymity (confidentiality). Access to this document is restricted to the principle investigators.

-----  
Subject's Signature

-----  
Date

Thank you very much for your consideration. Please return consent form by \_\_\_\_\_ if willing to participate in study.

Respectfully,  
Elizabeth Sommer



TABLE 1.1

**Table 1.1 Critical Differences between the Criminal Justice System and the Campus Adjudication Process**

<b>Criminal Justice System</b>	<b>Campus Adjudication Process</b>
Uses beyond a reasonable doubt, a high standard of proof, in sexual misconduct cases (RAINN, 2015).	Uses preponderance of evidence, a lower standard of proof (Ali, 2011).
The goal is “preventing and controlling crime, and achieving justice” (Crime & Justice, 1997).	Goal is to educate students and correct behavior. HEIs want to retain students (ASCA, 2014).
Prosecutor can choose not to pursue a case if lacking evidence. In fact, “Out of every 100 instances of rape, only 7 lead to an arrest and only 3 are referred to prosecutors” (RAINN, 2015).	Required to look into all reports of sexual misconduct (Ali, 2011; Lhamon, 2014)
If found guilty of sexual misconduct, sentence can equal years of imprisonment and/or placement on the sex offender’s list.	If found responsible, highest sanction is permanent expulsion and a tarnished conduct record (ASCA, 2014).
Discovery, investigation, and adjudication process can take weeks, months, or even longer (Gertner, 2015).	Must complete investigation and adjudication process within 60 days of a reported complaint.
Criminal law applies to all citizens in the community.	Student conduct code applies only to students (ASCA, 2014).
Process is public. Names of accused and survivor can be released to the public (RAINN, 2015).	Process is typically confidential. Names of accused and survivor as well as the incident typically not made public (Ali, 2011).

Table 1.1: This table serves as a guide to understanding the key differences between the Criminal Justice System and the Campus Adjudication Process.

**TABLE 3.1**

**Table 3.1 Interview Protocol**

Date and Time:
Place:
Interviewer:
Participant:
Instruction:

**Ice Breaker Questions:**

How long have you been at NMU?

What is your professional background?

How long have you handled sexual misconduct issues?

**Main Questions:**

- How do student affairs practitioners perceive the shift to preponderance of evidence in sexual misconduct cases?
- What do student affairs practitioners think about the shift to preponderance of evidence?

**Sub questions:**

- Have there been any notable changes/trends since shifting the burden of proof to preponderance of evidence?

- How were student affairs practitioners involved in creating HEI's sexual misconduct policy, specifically shifting the burden of proof to preponderance of evidence?
- How has the shift to preponderance of evidence impacted or not impacted students? Why or why not?
  - Specific examples of impact or non-impact?
- Describe your (practitioner) experiences with using the preponderance of evidence standard for adjudicating sexual misconduct cases.
- Do practitioners believe preponderance of evidence is best practice for adjudicating sexual misconduct cases? Why or why not?

#### Probing questions

Acknowledgement: Thank you for your time and honesty. I really appreciate you taking time your of your busy day!