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PERSPECTIVE

Sexual misconduct and due process

By Hailyn J. Chen and Emily R.D. Murphy

The current federal investigations of over 80 colleges and universities for their handling of student sexual misconduct allegations — and the criticisms that triggered them — have shone a spotlight on universities' alleged failures to adequately protect the complainants or punish the perpetrators of sexual misconduct. Recent criticism, however, has focused instead on the lack of due process afforded to the accused. The fire from both sides illustrates the difficulty universities face in navigating between two sets of legal obligations — on one side, obligations to complainants, imposed by Title IX of the Education Amendments of 1972, and on the other, obligations to the accused, imposed on public universities by the 14th Amendment's due process guarantee (and on private universities by the common law requirement that student disciplinary procedures be fair and free from bias and prejudice).

Criticisms of university procedures for failing to provide due process to the accused

Twenty-eight members of the Harvard Law School faculty recently signed an open letter in the Boston Globe criticizing Harvard's newly adopted policy for dealing with sexual misconduct. The strongly worded critique centers on the Harvard policy's purported inconsistency with "due process of law ... and the rule of law generally." Noting that "the law that the Supreme Court and lower federal courts have developed under Title IX and Title VII attempts to balance ... important interests," including the goal of "fully address[ing] sexual harassment while at the same time protecting students against unfair and inappropriate discipline," the HLS faculty's open letter blasted Harvard's new sexual misconduct policy as one that "departs dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials."

These criticisms were echoed a few days later in Judith Shulevitz's article in the New Republic, "Accused College Rapists Have Rights Too," which decried student sexual misconduct policies as having "strayed from any commonsense understanding of justice." Among the disciplinary procedures criticized by Shulevitz were the lack of free counsel for the accused, proof by only a preponderance of the evidence instead of beyond a reasonable doubt, and the inability to directly cross-examine witnesses.

Shulevitz and the HLS faculty opinion blamed these issues, in part, on the U.S. Department of Education's Office of Civil Rights' 2011 Dear Colleague letter and the OCR investigations of numerous universities that followed in its wake. The letter interpreted Title IX as requiring schools receiving federal funding to establish robust measures for handling sexual misconduct allegations promptly and equitably. To avoid disqualification from receiving federal funds, a university must take *immediate* action when it knows of sexual misconduct that creates a hostile environment. It must conduct its own investigation irrespective of any law enforcement investigation, and must afford both the complainant and the accused "similar and timely" access to information to be used at a disciplinary hearing, as well as an equal opportunity to present witnesses and other evidence.

What due process must universities provide?

Much of the recent outrage appears to be based on the view that student disciplinary proceedings should provide students accused of sexual misconduct with the due process afforded to defendants in criminal trials. But courts have rejected that notion. Due process jurisprudence sets forth only minimal requirements regarding accused students at public universities, and most private universities must comply only with an even looser standard of basic fairness. As the Office of Civil Rights explained in its April 2014 Questions and Answers on Title IX and Sexual Violence, while criminal defendants face the risk of incarceration, students facing a Title IX university disciplinary proceeding do not — "and, therefore, the same procedural protections and legal standards are not required."

The Supreme Court and lower courts have set a low bar for the due process universities must provide in disciplinary proceedings: Before a short suspension, a university need only provide "notice and a hearing." *Goss v. Lopez*, 419 U.S. 565, 582 (1975). And when more serious sanctions are imposed, courts have used the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test to determine what procedures are required. What constitutes minimally sufficient process depends on the balance of the student's interest and the risk of erroneous deprivation thereof, weighed against the institution's interest and burdens of alternate procedural requirements. Potential punishments may also be an animating consideration. Depending on the circumstances, courts have recognized certain due process protections — none of which rise to the level of those afforded to criminal defendants. For example:

• Accused students must be provided written notice of the grounds for discipline, the nature of the evidence upon which the university intends to rely, the witnesses, and the potential sanctions.

• Accused students must be given a fair opportunity to explain his or her position, present evidence, including witness testimony, and respond to the evidence against him or her — but not necessarily through or with the assistance of counsel.

• Accused students have rights to cross-examine their accusers and witnesses, though not necessarily directly and not necessarily through counsel.

• Assistance of counsel is not required at disciplinary hearings unless the student is also facing criminal charges. Even then, counsel's participation may be subject to reasonable limits.

• Evidentiary standards are relaxed at disciplinary hearings, permitting hearsay and character evidence.

• Decision-makers should be impartial and independent, but courts have placed the burden on the accused student to prove bias.

• The decision must be made in good faith, based on the evidence, and most courts have held that a burden of proof based on a preponderance of the evidence or "more likely than not" satisfies due process.

• Courts have held that accused students do not have a constitutional right to an appeal.

The path between a university's Title IX obligations and due process or fairness obligations is complicated. Neither OCR nor the courts have provided clear guidance on whether measures implemented by universities to satisfy their Title IX obligations violate due process or notions of fairness. Given the muddled state of the law, heightened attention to unsatisfactory outcomes, and the sensitive nature of sexual misconduct allegations, the debate over how best to handle these matters is not likely to go away soon.

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