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Campus Sexual Misconduct Due Process Protections

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Abstract

This paper explores the present state of institutional discipline regarding sexual assaults on campus and the impact of the April 4, 2011 “Dear Colleague Letter” (DCL) issued by the Office for Civil Rights of the Department of Education on this problem. The paper then discusses the applicable Title IX standards and the procedural due process rights for the accused in campus sexual assault cases. The paper explores colleges’ responses to the DCL and means for redress for the accused under Title IX. The author argues that the DCL improperly incentivizes colleges to convict the accused, and suggests that cases of sexual assault on university campuses should be referred to courts to secure proper due process rights for both the accused and the accuser.

Keywords

Title IX, due process, campus sexual misconduct

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Campus Sexual Misconduct Due Process Protections

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Introduction

On August 7, 2014, a male freshman (under the pseudonym John Doe) who had previously been expelled from the University of Massachusetts-Amherst for sexual misconduct filed a civil complaint alleging that the university had deprived him of his rights to due process and equal protection on the basis on his sex.¹ Among other things, he claimed that the university failed to allow him to hire a lawyer, cross examine his accuser, or gather evidence in his defense. He contended that the university hurriedly found him guilty of sexual misconduct, following their pattern of discriminating against males in sexual assault cases. His case serves as a typical example of the routine murkiness involved when universities determine what constitutes consensual sex and impose sanctions on those whom they deem guilty.

According to John Doe's complaint, he was at a party (where alcohol was present) on September 13, 2013 during which a female (under the pseudonym Jane Doe) approached him and gave him her phone number. Jane Doe spoke in a coherent and intelligible manner, even demonstrating correct spelling, grammar, and punctuation in her later texts. She texted her roommate to reserve her bedroom to bring back John Doe, and (according to John Doe) she gave him verbal consent to proceed sexually. The next day, however, Jane Doe told friends she could not remember what had happened the previous night. After her friends' urging, she filed a written complaint with the university, which produced a typical 'he-said, she-said' situation for the administrators. The university found John Doe guilty of sexual misconduct, sexual harassment, and community living standards violations and expelled him from the university. He was effectively thwarted from transferring to another university even though no police report was ever filed by Jane Doe.

During the proceedings, the university ordered that John Doe have no contact with Jane Doe and banned him from campus for all purposes other than attending class. He had less than eight hours to pack his belongings and was then forced to live at his family's home two hours away while commuting to class each day. Several different university officials then gathered evidence, none of whom had the proper training to deal with sexual misconduct or the effects of alcohol consumption. The university did not provide him with all relevant documents related to the case, nor did it allow him to ask questions of his accuser. He alleged that during the hearing on November 5, 2013, the chairperson was rude to him throughout, constantly interrupting him and belittling his answers. In contrast, he alleged

¹ *Doe v. University of Massachusetts-Amherst*, No. 14-30143 (D. Mass. 2014)

the chairperson questioned Jane Doe in a calm and supportive manner. John Doe was not allowed to obtain legal counsel. He was expelled from the university two days after the hearing.²

In many ways, this trial and others like it showcase how men and women are judged differently in situations involving sex and alcohol consumption together. While both the male and female parties are violating the law and possibly weakening their ability to communicate or read intentions when under the influence of alcohol, it is rarely considered that the female students bear a level of responsibility as well. Even though most of these cases involve the voluntary consumption of alcohol, the accused male may not use it as a defense whereas the female complainant can escape scrutiny from it. It is imperative that a university both empower victims of sexual violence to seek justice and preserve a safe educational environment for them, but the accused students in campus disciplinary processes for sexual misconduct must still be afforded adequate due process rights. To adequately provide the accused due process rights while still fulfilling their Title IX obligations, universities must cease holding their own sexual assault hearings. Instead, they need to direct all complainants to the local police who will handle these criminal matters fairly.

Intersection of Title IX and Due Process

Most known for promoting women's sports, Title IX of the Civil Rights Act (hereinafter *Title IX*) in fact bans all forms of gender-based discrimination on campus. Title IX states that "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".³ While Title IX was not originally designed to resolve claims of sexual violence on college campuses, arguments began to form in the late 1990s that sexual harassment is actually a type of sexual discrimination. The Supreme Court then expanded Title IX's right of action to allow suits for monetary damages in sexual harassment cases.⁴ Title IX defines sexual harassment as "unwelcome conduct of a sexual nature" as long as the behavior is serious enough to impact the victim's access to educational opportunities by creating a hostile environment.⁵ Under Title IX, schools are required to conduct a "prompt, thorough, and impartial" investigation into any allegation of sexual assault reported on campus.⁶ If an institution fails to adhere, it is evidence of sexual discrimination, and the institution is subject to both federal and civil penalties. When schools find that someone has committed sexual harassment, then under Title IX

² *Id.*, see 12 ("he was denied the advice of a trained lawyer or a competent advisor, and he was not counseled on how to, or in any way in a position to, completely defend himself")

³ 20 U.S.C. § 1681 (2012)

⁴ *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (holding a damages remedy is now available for actions brought to enforce Title IX)

⁵ U.S. Department of Education Office for Civil Rights, Revised sexual harassment guidance: harassment of students by school employees, other students, or third parties 2 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

⁶ *Id.*

administrators must end the behavior, prevent its recurrence, and remedy the effects on the victim.⁷

The idea of due process is rooted in the United States Constitution. The phrase means “fairness” and is found in both the Fifth and Fourteenth Amendments to the Constitution. The clause requires that the federal and state governments provide citizens with substantive fairness and certain procedures before depriving them of life, liberty, or property interests. In higher education, a property right may encompass the right to pursue an education. According to *Goss v. Lopez*, before revoking such property rights, institutional administrators in higher education must afford such students adequate due process.⁸ These procedures would in theory help to ensure student rights are not violated during the judicial process. *Dixon v. Alabama State Board of Education* found that students possess certain liberty rights in their education protected by the Fourteenth Amendment. Students could therefore only be expelled from state colleges after receiving some due process.⁹

The Office of Civil Rights (OCR) is the federal agency charged with enforcing federal anti-discrimination statutes such as Title IX. The OCR has jurisdiction to ensure that every university accepting federal funding complies with these statutes. In 2011, the OCR issued a Dear Colleague Letter (DCL) regarding campus rape, which laid out the minimum grievance procedures by which schools must comply for cases involving sexual violence.¹⁰ The DCL mandated that schools provide notice to students of the procedures and outcomes, perform adequate and impartial investigation into complaints, develop an equitable process in which parties have an equal opportunity to speak and present evidence, and ensure that the proceedings are facilitated by individuals who receive annual training on sexual violence issues. Other than these broad guidelines, the OCR fails to specify how schools should carry out these mandates. As a result, some schools are conducting such disciplinary hearings differently than others. Out of the nineteen-page document, a mere two sentences address due process rights for the accused. The document even urges that steps to afford due process rights to the accused should not restrict or delay protections for the complainant. The document strongly discourages institutions from allowing the accused to cross-examine the complainant, once again escalating the complainant’s rights. In addition, this letter clearly pressures universities to crack down on sexual assault punishments by threatening to take away the universities’ federal funding if they fail to comply with the regulations. Overall, the document incentivizes universities to immediately find the accused guilty and utterly disregard the accused’s due process rights.

⁷ *Id.*

⁸ *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process as defined by some kind of notice and hearing to be determined by appropriate accommodation for the competing interests involved)

⁹ *Dixon v. Alabama State Board of Education*, 294 F. 2d 150, 159 (5th Cir. 1961) (“a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved”)

¹⁰ “Dear Colleague” Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

One of the most significant components of the DCL is the federal mandate to use a preponderance of the evidence standard (50.01% certainty) to resolve sexual assault accusations. Prior to this DCL, OCR had not specified a particular standard of proof in disciplinary proceedings regarding sexual assault. However, according to the letter, in order for a school's disciplinary procedures to comply with Title IX, they must apply the preponderance of the evidence standard in hearings for sexual assault.¹¹ If a school were to use a higher burden of proof, such as a clear and convincing evidence standard, the school would be in violation of Title IX. To justify its insistence on this standard, the Department of Education drew an analogy to civil actions in court, which use this same standard; both parties have important but nonetheless equal interests in the outcome. This is a bad analogy, however, because a college expelling a student for sexual assault has much graver consequences for the student than the university. Such an expulsion would haunt the student for likely the rest his or her life and destroy many career prospects. This mandate alone constitutes a noteworthy erosion of the due process protections afforded students accused of serious misconduct.

While it seems intuitive that Title IX would give equivalent rights to both the complainants and the accused students if they were mistreated (wrongful acquittals and wrongful convictions can *both* be indicative of some form of sexual discrimination), universities do not have equivalent liability concerns from both the accused and the complainant. They are therefore not motivated to treat them equally. Although a school's deliberate indifference to a sexual harassment complaint is immediately considered sex discrimination and actionable under Title IX, an equivalent indifference to the accused's innocence is not immediately actionable. In a 1996 ruling, the Fifth Circuit held that accused student rights under Title IX fall under a nearly impossible-to-meet threshold: the accused must prove the school made the wrongful accusation as part of a broader pattern of systematic bias.¹² This standard forces the accused to now analyze each disciplinary case a school has adjudicated in order to prove that his or her result was part of a broader pattern of bias.

Typical Hearing Process

On most campuses, the hearing process for claims of sexual assault follows the same procedures as for any other claim of misconduct. The same system that governs alleged violations of university codes of conduct, such as the plagiarism of a term paper or the theft of a roommate's belongings, also governs claims of sexual misconduct. Many of these systems operate like courts, using a panel of decision makers who hear and weigh evidence, determine the facts, and decide sanctions. A notice and the opportunity to be heard are the basic requirements that are mandated by courts reviewing the procedural due process rights of students in such hearings.¹³

¹¹ *Id.*, 10-11.

¹² *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996) (*Rowinsky's* standard also states that a school that is equally indifferent to rights of male and female complainants cannot be said to be violating Title IX)

¹³ *Gorman v. University of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) (the court went on to state that whether or not a specific hearing is ideal, as long as it affords these two due process rights then it is fair)

Federal courts have produced mixed results regarding these basic procedural safeguards. Some courts have extended *Dixon* to include that college systems need to inform students of charges against them, advise students of the nature of the evidence supporting charges, afford students the opportunity to be heard in their defense, and sanction students based only on substantial evidence.¹⁴ Some courts have held that due process requires the accused to be allowed representation by counsel, whereas other courts have found that this right is not absolute because it could lead to burdensome costs for the university.¹⁵ Courts are also split on whether or not the accused should have a guaranteed right to discovery of evidence or whether or not he or she should be able to cross-examine witnesses.¹⁶ Courts even differ as to whether or not hearing committee members need to recuse themselves if they are familiar with the accused or complainant and have a conflict of interest.¹⁷ The only sure procedural due process rights include a notice and a hearing for the accused.

In a typical sexual assault hearing, the university will first send notice of the charge to the accused and ask him or her to respond. The accused and complainant will then appear before a panel akin to a jury, which is typically comprised of students, faculty, and staff. In numerous examples of campus hearings, defendants did not get access to discovery, relevant evidence, or attorney representation. Often, they are even prohibited from cross-examine their accuser. According to the DCL, the accused cannot introduce evidence to which he or she was not granted access.¹⁸ Only the complainant is informed of his or her legal rights. The hearing process is skewed unfairly towards the complainant.

On March 1, 2016, a 21-year-old male turned to the courts after the University of Texas-Austin punished him for the unproven accusation that he sexually assaulted a woman in a drunken off-campus encounter.¹⁹ He claimed that the school violated his Constitutional right to due process, primarily because the university's policy barred the accused from having legal representation, cross examining his accuser, or even calling testimony from corroborating witnesses. To make matters worse, the victim never filed a police report or even complained directly to the school about the incident; instead, the school decided to take action based on her father's complaint. The male is now facing a disciplinary hearing that could result in his expulsion.

A false accusation can devastate the life of the student, often preventing them from transferring to another school or attending graduate school, damaging their reputation, and limiting their job opportunities. These life-altering consequences stem from an adverse

¹⁴ See *Dixon*, 294

¹⁵ *Osteen v. Henley*, 13 F. 3d 221 (7th Cir. 1993)

¹⁶ *Winnick v. Manning*, 460 R. 2d 545, 549 (2nd Cir. 1972) (a college student's right to cross examine witnesses is not an essential due process requirement), *Dillon v. Pulaski County Special School District*, 468 F Supp. 54 (8th Cir. 2009) (due process "demanded" the opportunity for cross-examination where witness testimony was essential to the committee's findings)

¹⁷ See *Gorman*, 837

¹⁸ See "Dear Colleague", 11 (including information regarding the complainant's sexual history)

¹⁹ DeMarche, E. (2016). Texas college student sues over possible expulsion for alleged sex assault. *Fox News*. Retrieved from <http://www.foxnews.com/us/2016/03/01/texas-college-student-sues-over-possible-expulsion-for-alleged-sex-assault.html>

decision by their school. For example, in one case at the University of North Dakota, a student adjudicated under the preponderance standard was suspended for three years from the institution for sexual assault despite the fact that the local police force refused to charge him with a crime and instead charged his accused for making a false claim.²⁰ After significant public pressure, the university eventually reversed its ruling. Georgia Tech was also recently ordered to reinstate a student expelled for alleged sexual assault. The Georgia Board of Regents is now working on a system-wide due process policy, which will allow accused students to have access to legal counsel during hearings and an appeal process. Only three other states have passed laws to that effect.²¹

College tribunals act as miniature justice systems, regardless of the fact that the hearings do not actually occur in courts of law. Although universities cannot impose criminal penalties on students they find responsible for sexual assault in campus proceedings, these hearings do have a quasi-criminal nature, mainly because of the nature of the crimes they address and the penalties they impose. Generally speaking, these hearings involve an allegation, an investigation, a hearing, the presentation of evidence, a sentencing, and an appeals process. When the allegations concern sexual assault, the hearings decide whether someone committed conduct constituting a felony crime. Students found responsible in such hearings are often expelled and face serious challenges when they seek to enroll at other universities. In fact, this past January, a federal court in Kentucky ruled that such campus hearings are quasi-criminal in nature.²² As such, students deserve the same due process rights that their counterparts in the criminal courts are afforded.

Why This is a Problem

The idea of due process holds that a disciplinary system must work fairly, consistently, and impartially to arrive at just results. The idea is not confined solely to the courtroom; at least it should not be if the society truly cares about fundamental fairness and justice. Some opponents argue that if a college simply follows its own policy, then it is innocent of violating any due process rights. However, if the policy is fundamentally unfair to begin with, then it follows that the finding or ruling will be as well. Policies need to provide fundamental fairness to both genders and to both the accused and the victim to avoid due process violations. All students must be treated fairly with equal access to any campus resources.

The constitutional guarantee of fair proceedings is located in the Fifth and Fourteenth Amendments to the Constitution, applying not only to court proceedings but to the public

²⁰ Victory for due process: student punished for alleged sexual assault cleared by University of North Dakota; accuser still wanted for lying to police. (2011, October 18). *Foundation for Individual Rights in Education*. Retrieved from <https://www.thefire.org/victory-for-due-process-student-punished-for-alleged-sexual-assault-cleared-by-university-of-north-dakota-accuser-still-wanted-for-lying-to-police-2/>

²¹ Hagen, L. (2016, January 26). Ga. lawmakers stress due process in campus assault cases. *Public Broadcasting Atlanta*. Retrieved from <http://news.wabe.org/post/ga-lawmakers-stress-due-process-campus-assault-cases> (Arkansas, North Carolina and North Dakota have passed similar laws)

²² *Doe v. Hazard*, No. 5:15-cv-00300, 4 (E.D. Ky. 2016)

campus as well. The Supreme Court has ruled that students do not “shed their constitutional rights” at the “schoolhouse gate”²³; rather, students are afforded due process rights before they are suspended or expelled. In *Mathews v. Eldridge*, the Supreme Court instructed lower courts to weigh three factors when determining the proper scope of due-process rights in a particular situation.²⁴ First, accused students have liberty interests to protect their good names against false accusations. Some of the more extreme cases, such as the Duke lacrosse scandal, highlight how college sexual-assault proceedings can be picked up by the media and have far-reaching publicity.²⁵ Second, hearings must provide as much evidentiary process as possible so that the deciding panel avoids the risk of making erroneous decisions. When such cases fall into the area of disputed facts, oral evidence and cross-examination are extremely important to avoid the risk of erroneously depriving liberty. Finally, the courts must weigh the cost that increased processes impose on the system. While a full trial-like process would obviously impose tangible costs on an institution, there are mitigating factors. The courts’ application of the *Mathews* balancing test was meant to ensure that schools use fundamentally fair procedures that allow students the opportunity to respond to charges against them but without imposing highly technical or costly procedures on schools.²⁶

Others Speak Out

In response to the 2011 ORC letter, colleges across the United States have strengthened their commitment to investigate alleged sexual assaults and have even changed the standard of proof required for sanctions. Universities are now scrambling to replace their sexual misconduct policies to further crack down on sexual assault cases. They also are hiring new administrative staff to address the legislation. In May of 2014, the OCR published a list of colleges under investigation for their handling of sexual violence cases.²⁷ Harvard Law School was one of the universities named, and the administration rushed to change their standards and procedures. In October of 2014, twenty-eight current and retired Harvard Law professors asked the university to abandon its new sexual misconduct policy and instead craft different guidelines for investigating allegations. They voiced their concerns in an open letter published in the *Boston Globe*, which condemned these new

²³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)

²⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976)

²⁵ Block, J. (2016, March 11). 10 years later, the duke lacrosse rape case still stings. *The Huffington Post*. Retrieved from http://www.huffingtonpost.com/entry/duke-lacrosse-rape-espn-30-for-30-us_56e07e33e4b065e2e3d486f7 (a case where three Duke lacrosse players were accused of raping a female they had hired for entertainment in 2006 inflamed race, gender, and class divisions nationally- the men were eventually exonerated and ESPN Films’ 30-for-30 series revisited the entire story in March of 2016)

²⁶ See Gorman, 837 (applying the *Mathews* test to a public university’s disciplinary proceedings to determine the procedures required to satisfy the accused student’s due process rights)

²⁷ Press Release, U.S. DEP’T OF EDUC., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014). Retrieved from <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-educationinstitutions-open-title-ix-sexual-violence-investigations>

procedures for going far beyond what Title IX required.²⁸ The professors primarily complained that the policy exceeded the scope of the Title IX legislation with which Harvard sought to comply and that the policy was instead drafted and implemented largely without consulting the faculty. The group wrote that the policy had reasonable aims but that the punitive elements unfairly disfavored the accused. Harvard's policy provided the accused with no opportunity to see the facts against him, face the accusing party, or even have counsel available. The panel wrote that these procedures lacked the most basic elements of fairness and due process, were stacked overwhelmingly against the accused, and were in no way required by Title IX law. Harvard's policy noticeably stated that any instance of sexual conduct that occurred when a person was so incapacitated as to be incapable of inviting the conduct would be deemed unwelcome. The professors lamented how one-sided the policy was and criticized the university for failing to adequately address the complexity involved in these situations.

A growing number of lawmakers are speaking out that campus sex cases must be referred to criminal justice authorities in order to restore due process to the campuses. Senators from both sides of the aisle have said this problem is serious. For example, Republican Senator Chuck Grassley from Idaho stated that the crime of rape both off campus or on campus should be treated the same way.²⁹ Democratic Senator Sheldon Whitehouse from Rhode Island voiced his concern that law enforcement is being marginalized when it comes to the crime of sexual assault on college campuses.³⁰ Organizations such as the People for the Enforcement of Rape Laws (PERL) oppose this expansion of Title IX that grants schools judicial powers to decide sexual assault cases.

The accused can file a Title IX lawsuit against his or her institution alleging that gender was the motivating factor in the discipline. Male students are increasingly turning to Title IX gender discrimination and bias lawsuits to fight for liberation from campus hearing sanctions. In addition, students are arguing negligence and breach of contract on behalf of the university, including allegations that campus officials are leading superficial investigations and awarding the accuser special treatment at hearings, and administrators are ignoring exculpatory evidence from the accused.

In many instances, courts have held that private universities are contractually bound by promises made in their student handbooks and other such policies. In the same way, many accused-student lawsuits have included claims that universities breached their contractual obligations by failing to follow their own procedures in campus adjudications. These claims have not proven successful for the accused student plaintiffs. But they do imply that if the school does not comply with reasonable expectations in their handbook, then they will be held liable to the accused. In most cases, the issue at hand is that a university's procedures

²⁸ Bartholet, E. (2014, October 15). Rethink Harvard's sexual harassment policy. *The Boston Globe*. Retrieved from <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexualharassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>

²⁹ Lawmakers speak out. (2015). *SAVE*. Retrieved from <http://www.saveservices.org/sexual-assault/lawmakers/>

³⁰ *Id.*

were unfair, not that they were ignored. And unfairness will not create a breach of contract claim if the college has followed its own procedures. For example, in *Bleiler v. College of the Holy Cross*, the plaintiff claimed that the college violated its procedures by allowing two students to continue as members on the hearing panel even though they were friends with the complainant in the case.³¹ The college procedures did allow students to request that panel members be disqualified if there were conflicts of interest but then only guaranteed a substitution if the college deemed that there was enough information to suggest such conflicts. Because of this, the court ruled that no breach of contract occurred because the college still followed the procedures set forth. This highlights why it is important to amend the policies at the core and place inherent safeguards of fairness to force the universities to comply.

Options for Reform

As of December 30, 2015, the OCR had 194 Title IX investigations open at 159 colleges and universities examining allegations that the schools mishandled their sexual assault cases. This number grew from 55 in May of 2014 to 85 in October of 2014 to 159 in December of 2015.³² In one of the first of its kind, the US District Court in Rhode Island ruled in March of 2016 to allow a former student's lawsuit to proceed against Brown University, alleging that the school violated his due process rights and discriminated against him based on gender during a wrongful sexual misconduct investigation. The opinion drafted by Justice Smith states:

Taking the facts in Doe's complaint as true and drawing all reasonable inferences in his favor, Brown ignored exculpatory evidence, including the victim's own testimony in the October 18th complaint that she had in fact articulated consent. Doe has created a reasonable expectation that if the case is allowed to proceed to trial that discovery may yield evidence that Brown showed a bias towards female students in alleged sexual misconduct cases.³³

Colleges simply are not equipped to do these kinds of weighty allegations justice; accusations of sexual violence should be taken just as seriously as other crimes. While one would not expect a campus panel to investigate a school-related murder (rather, outside detectives would be brought in immediately), the same expectations should not be put on universities to have the proper credentials to arbitrate other felonies. If colleges want to take sexual assault seriously, they should refer complainants immediately to law enforcement. Instead, they supplant a criminal investigation with their own capricious

³¹ *Bleiler v. College of the Holy Cross*, Civ. No. 11-11541-DJC (D. Mass 2013) (the school asked the two panel members who knew the complainant if this relationship produced a conflict that would put fairness into question; both responded that no such conflict of fairness existed)

³² Kingkade, T. (2015, January 1). Federal campus rape investigations near 200, and finally get more funding. *The Huffington Post*. Retrieved from http://www.huffingtonpost.com/entry/federal-funding-campus-rape-investigations_us_568af080e4b014efe0db5f76

³³ *Doe. v. Brown University*, Civ. No. 1:15-cv-00144 (D.R.I. 2016)

systems where they have little to no oversight, or they conduct their own investigation while the criminal justice system does independent work.

College hearing panels often use the same Title IX coordinator as investigator, prosecutor, defender, jury, and judge.³⁴ In addition, the panels are made up of university employees who most likely have an innate interest in the claims. Colleges have a very strong incentive to convict the accused, as acquitting the accused student carries with it the threat of OCR costing colleges over half a billion dollars in federal funding. Unfortunately, a presumption of impartiality favors the university, and the burden relies on the accused to demonstrate such bias.³⁵ For example, past rulings have found that even if a member of the disciplinary body observed the conduct in question, it does not render this member impartial.³⁶ The level of partiality required in these hearings is not the absolute neutrality that is required in the criminal justice system.

Courts, on the other hand, do not suffer from the same problem that universities do in enacting bias. The justice systems mitigate the impact of biases by diffusing power and responsibility among a number of people, including legislators, judges, jurors, and officers. In contrast, a university administrator can frequently fill each of these roles so that the separate functions no longer check each other. The justice systems also already mitigate the risk of undeserved punishments through safeguards already in place. No individual courtroom can establish its own rules of evidence, while colleges are not even required to have rules of evidence at all. Colleges can tailor their proceedings to the facts of each case, whereas the courts have such procedures already set permanently in place. As such, courts should be the only venue for handling cases of sexual misconduct on university campuses.

To accomplish their legal and ethical obligations under Title IX, colleges should instead focus on responsibilities they are capable of meeting regarding sexual assault: leading preventive education, providing counseling for alleged victims, and offering academic and housing accommodations to keep students safe while the justice system handles the case. Colleges could speedily link student complainants to medical resources and law enforcement once aware of sexual assault claims, and they should continue to help them acquire and use the resources they need to navigate the system. These are responsibilities that colleges can effectively fulfill. The colleges could even extend these services on a temporary basis while the criminal case is being tried in court and remove them if the accusation comes back uncorroborated.

Given how weak the current system is, this reform would seem to make perfect sense. Tennessee has already implemented legislation that recognizes this same idea of a university's limited competence in handling criminal matters. This law, called "Robbie's Law," requires universities to call in local police as soon as a homicide or rape has been

³⁴ *Smith v. Denton*, 895 S.W.2d 550, 555 (Ark. 1995) ("Throughout the proceedings, Dr. Smith acted in a variety of often-conflicting capacities. He was at once investigator, prosecutor, witness, and judge")

³⁵ See Gorman, 837

³⁶ *Nash v. Auburn University*, 812 F.2d 655, 665 (11th Cir. 1987)

reported.³⁷ The step from Robbie's Law, which still allows campus police to take the lead on rape investigations, to a more objective policy, which would mandate universities simply refrain from conducting such judicial processes, is a small one. Under this proposal, students accused of rape or other criminal charges directly would be investigated directly by local police or be subject to suits by complainants directly. The university would then be discharged of the Title IX obligation to conduct its own trial and would provide a more equitable solution for both parties.

Counterarguments

One argument is that colleges must hear these sexual assault claims because they are obligated to ensure a learning environment free from sexual discrimination. While this obligation to maintain a safe and equitable learning environment is definitely valid, it does not follow logically to authorize institutions to investigate and prosecute the actual crimes. The OCR even recognized in a letter to the Buffalo State College that a school that immediately informs authorities of alleged criminal conduct and then simply cooperates in the investigation meets its obligation.³⁸ If a jury finds the accused guilty (after a fully impartial trial with procedural safeguards), the school can then take its own disciplinary action to ensure a safe learning environment. It is important to separate the obligation to avoid sexual discrimination from the requirement to adjudicate sexual assault claims. Much as with any other felony, universities simply cannot be empowered to play the roles of the police department and prosecuting attorney.

Another argument is that because the consequences are not explicitly criminal, the procedures do not require due process protections. Some argue that these college hearings do not involve a constitutional loss of liberty as criminal trials do, so they should not be subject to due process protections. However, the substantial economic impact of losing access to a college degree because of suspension, expulsion, or negative notations on transcripts that could thwart admission into other programs is serious enough to warrant such protections. Education is vital for protecting one's future and livelihood, and as such it must be defended at all costs. If the system is not fairly resolving such claims, then it cannot be considered legitimate to take away important liberties.

A final argument is that these complainants would have little to no motivation to create untrue accusations of sexual misconduct. Critics argue that their complaints should be resolved as swiftly as possible to avoid placing additional burdens on the victims or causing them to relive any harmful experience. Sexual assault advocates argue that asking for the complainant to face the accused would be improperly traumatic for the complainant and that it would be even more harrowing for them to have to repeat and relive the experience. The problem with this argument is that it assumes the outcome (the truthfulness of the complainant's words) without even giving the accused any semblance of an opportunity to challenge it. The only meaningful way to test such accounts of sexual misconduct is to allow both sides to hold hearings, question witnesses, share evidence, have access to lawyers,

³⁷ TENN. CODE ANN. § 49-7-129 (2012)

³⁸ Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005)

and be subject to a neutral deciding authority. If colleges are not capable of ensuring these two-sided proceedings, then cases must be directed immediately to law enforcement to be handled in an unbiased fashion.

Conclusion

Because of Title IX, universities face wrongful incentives to immediately convict in cases of alleged sexual assault without proper procedures to ensure fairness to all parties involved. The OCR's authority to terminate federal funding from universities has led numerous institutions to issue erroneous sexual assault findings to avoid liability from dissatisfied complainants. As a federal judge articulated in a 2012 lawsuit, the process applied to the accused and the conduct of university officials in prosecuting such claims "offends the court's sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused."³⁹ Such unequal justice on college campuses due to Title IX must end.

The current strategy for dealing with sexual misconduct on college campuses has failed miserably. Forced by the federal government to conduct trials, incompetent colleges are branding students sexual offenders regardless of whether or not those students have committed sexual violence. These campus trials are often presided over by professors and staff incapable of proceeding without bias. Fair process is vital to ensure consistent findings of accountability. So many students claiming they have been expelled because of a lack of due process show just how much damage untrue claims of sexual assault can do--long-lasting consequences for the women making the accusations, the men wrongly accused, and all other parties involved in the injustice. While there is no debate on whether or not sexual misconduct must be confronted aggressively, it should not be handled in such a way as to strip all dignity from the accused.

The recent ruling to allow John Doe's case against Brown University to proceed is a small yet pivotal victory for the accused's due process rights. In the case, John Doe alleges Brown University violated his due process rights and discriminated against him based on gender during a sexual misconduct investigation.⁴⁰ Universities such as Brown University are placed under enormous pressure to crack down on sexual assault and expel males from the institutions without regard to their rights. As dozens of young men are going to court to seek relief from such reputational damage due to alleged sexual assaults and subsequent expulsions, the courts will hopefully begin to see that something is truly wrong in the campus systems.

Like other institutions, universities have limits; they are simply unable to impartially and effectively try cases of sexual misconduct. Due to the severity of the punishments and the stigmas ascribed to an accusation of sexual misconduct as well as how likely an erroneous finding is, a fairer system is needed to ensure the due process rights of both parties are

³⁹ *Doe v. Univ. of Mont.*, Case 9:12-cv-00077-DLC (D. Mont. 2012)

⁴⁰ See *Doe v. Brown University*

protected. Colleges are not prepared to undertake the weighty responsibility of fairness that comes with criminal allegations. As colleges cannot be expected to investigate and try cases of homicide on campus, so they should not be expected to adjudicate cases of sexual assault. Instead, colleges should encourage victims to participate in a criminal investigation regarding their claims and provide them with lawyers to help them report the crime. These actions would better ensure fair treatment for all involved. Trained investigators, people with criminal law experience, and the courts should be the sole venue for handling cases of sexual misconduct on university campuses.

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