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Due Process in Public University Discipline Cases

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I. INTRODUCTION

The stakes are high for university students accused of misconduct. When expulsion is a possible sanction, an accused student faces a financial loss and a stigma that may preclude admission to another university or access to a career that requires a clean conduct record.[1] For universities, the stakes are also high. Universities use student disciplinary processes to maintain a safe environment for learning and to convey and promote university and civic values.[2] Discipline procedures are matters of public interest and criticism, particularly where the alleged misconduct is sexual.[3] When student discipline processes are fair and perceived as such, these processes reinforce a culture of responsible and ethical behavior that will benefit students, faculty, and staff into the future. When discipline processes are perceived as unfair, irrelevant, or overly bureaucratic, the negative impact on the university is similarly profound and long-lasting.

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1. *E.g.*, Furey v. Temple Univ., 884 F. Supp. 2d 223, 247–48 (E.D. Pa. 2012); Doe v. Rector & Visitors of George Mason Univ., No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847, at *17–18 (E.D. Va. Feb. 25, 2016). *See also* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961) ("Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.").

2. *E.g.*, *Furey*, 884 F. Supp. 2d at 248 (noting that Temple University has an interest in maintaining safety and in using its resources "to best achieve its educational mission and the educational component of its disciplinary process"). *See also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Ed]ucation is perhaps the most important function of state and local governments. . ..[and] the very foundation of good citizenship.").

3. As of March 2015, the U.S. Dep't. of Educ. Office of Civil Rights had open investigations into 104 universities regarding their protocol for responding to a student complaint of sexual assault by another student, nearly twice the number of open investigations in 2014. See Press Release, U.S. Dep't of Educ., U.S. Department of Educ. Releases List of Higher Education Institutions with Open Title IX sexual Violence Investigations (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

As state actors, public universities' student discipline processes implicate a student's liberty and property interest in an education.[4] Public universities must provide each accused student with due process of law under the Fourteenth Amendment.[5] Students subject to discipline by private universities are not entitled to constitutional protection under the Fourteenth Amendment because private universities are not state actors.[6] However, both private and public university discipline cases are subject to judicial review under state law as a breach of contract between the student and the university or under the law of associations.[7] Both private and public universities must follow their internal rules of procedure, but whether departures are a breach of contract is an issue of state law and not necessarily a deprivation of due process under the Fourteenth Amendment.[8]

4. *See, e.g.*, Woodis v. Westark Cmty. Coll., 160 F.3d 435, 440 (8th Cir. 1998) (stating nursing student at a community college was entitled to due process); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) (stating "a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property"); Hart v. Ferris State Coll., 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) (noting that "threat of . . . expulsion implicates [a college student's] property and liberty interests in . . . education and reputation"). *But see*, McGee v. Schoolcraft Cmty. Coll., 167 F. App'x 429, 437 (6th Cir. 2006) (noting that whether a college student's interest in continued enrollment is protected by procedural due process "has not been resolved."). See also, Lee v. Univ. of Mich.- Dearborn, No. 5:06-CV-66, 2007 U.S. Dist. LEXIS 72236, at *24–25 (W.D. Mich. Sept. 27, 2007) (extending qualified immunity to former university provost on grounds that the existence and scope of a college student's due process rights "appear to be an issue of judicial debate.").

5. The Supreme Court has assumed without deciding that public university students have property and liberty interests in their education. *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985). *See also* Tigrett v. Rector & Visitors of Univ. of Va., 290 F.3d 620, 627 (4th Cir. 2002). Lower courts have recognized public university students' property and liberty interests in continued enrollment. *See. e.g.*, *Woodis*, 160 F.3d at 440; Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991) (noting that public university students have an implied contract which requires university to act in good faith, and which provides a property interest entitled to due process protection); *Gorman*, 837 F.2d at 12 (finding that public post-secondary students have a constitutionally-protected liberty and property interest in their education); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (finding that public university student has a property interest in education). *But see* Galdikas v. Fagan, 342 F.3d 684, 689 (7th Cir. 2003) (noting that whether a college student has a property right for purposes of substantive due process protection in continued enrollment is an open question in the circuit).

6. *E.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) (finding that a private university is not a state actor).

7. *See, e.g.*, Yu v. Vassar Coll., 97 F. Supp. 3d 448, 452 (S.D. N.Y. 2015); Bleiler v. Coll. of the Holy Cross, No. 11-11541-DJC, 2013 U.S. Dist. LEXIS 127775, at *1 (D. Mass. Aug. 26, 2013). *See generally An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795 (1970); *Note, Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974).

8. *E.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U. S. 532, 541 (1985); Heyne v. Metro. Nashville Pub. Schs., 655 F.3d 556, 569 (6th Cir. 2011); Levitt v. Univ. of Tex., 759 F.2d 1224, 1230 (5th Cir. 1985); Doe v. Hazard, No. 5:15-CV-300-JMH, 2016 U.S.

In *Goss v. Lopez*,[9] the Supreme Court held that a public high school student subject to a ten-day suspension had a property and liberty interest in education protected by the Fourteenth Amendment and was entitled to notice and an opportunity to be heard before imposition of the sanction.[10] A school must provide "effective notice and [an] informal hearing" as a "meaningful hedge against erroneous action."[11] A year later, in *Mathews v. Eldridge*,[12] the Court explained that whether state administrative procedures provide sufficient due process requires a balance among three factors: 1) the nature of the private interest that the state action will affect; 2) the risk of erroneous deprivation of private interests through the procedure at issue, and value of additional or substitute procedural safeguards in reducing that risk; and 3) the cost that additional or substitute procedural safeguards would impose on the state actor.[13]

In 1961, fourteen years before the Supreme Court decided *Goss*, the Fifth Circuit set out its due process standards for public university student discipline cases. In *Dixon v. Alabama State Board of Education*,[14] the University of Alabama had expelled several students for protesting racial segregation without notice of the charges or an opportunity to be heard.[15] The Fifth Circuit held that a student facing expulsion is entitled to notice of the charges against him and a description of the evidence that if proven would justify the sanction.[16] Additionally, the student is entitled to a hearing at which he can present a defense and a report of the findings against him.[17] Although courts uniformly follow the mandate in *Goss* that due process in student discipline cases requires at a minimum notice of the charges and an opportunity to be heard, several circuit courts have adopted the standard set forth in *Dixon* as guidance for determining what process a university must provide.[18]

Dist. LEXIS 5478, at *16 (E.D. Ky. Jan. 15, 2016); Sterrett v. Cowan, 85 F. Supp. 3d 916, 926 (E.D. Mich. 2015).

9. Goss v. Lopez, 419 U.S. 565 (1975).

10. *Id.* at 572–75, 577.

11. *Id.* at 583.

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

13. *Id.* at 335. *See e.g.*, Furey v. Temple Univ., 884 F. Supp. 2d 223, 247 (E.D. Pa. 2012) (applying *Mathews v. Eldridge* factors in a university student discipline case); Palmer v. Merluzzi, 868 F.2d 90, 95 (3d Cir. 1989) (same).

14. Dixon v. Ala. State. Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961).

15. *Id.* at 151–52.

16. *Id.* at 158.

17. *Id.* at 159.

18. *See* Gorman v. Univ. of R.I., 837 F.2d 7, 13 (1st Cir. 1988) (citing *Dixon* with approval as a "valuable discussion of the procedural due process rights of students"); Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 74 (4th Cir. 1983) (stating that the summary of requirements in *Dixon* remains valid); Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970) (stating that notice and opportunity to be heard are essential factors); Doe v. Rector & Visitors of George Mason Univ., No. 1:15-cv-209, 2016 U.S. Dist. LEXIS

When the alleged student misconduct is sexual, a public university must simultaneously ensure that it handles the case in compliance with the mandate of Title IX that no student "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."[19] Title IX regulations specifically require universities to adopt "grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any [action prohibited by title IX]."[20]

In April 2011, the U.S. Department of Education's Office of Civil Rights (OCR) issued a "Dear Colleague" letter (the 2011 Letter) to colleges and universities under its jurisdiction which set out specific procedures that universities must follow in investigating and resolving claims of student-on-student sexual misconduct.[21] The OCR has explained that the procedures for charges of sexual misconduct set forth in the 2011 Letter do not have the force of law. Rather, they "simply serve[] to advise the public of the construction of the regulation [the OCR] administers and enforces."[22]

In June 2016, a University of Virginia student filed a complaint challenging the OCR's legal authority to enforce the procedural requirements set out in the 2011 Letter, and Oklahoma Wesleyan University was the first university to join the suit in August 2016.[23] Universities under OCR investigation have settled OCR enforcement actions by accepting wide ranging OCR oversight and supervision, likely reflecting university deference to the OCR's power to investigate universities it suspects of non-compliance with Title IX and to terminate a non-compliant institution's access to federal financial aid programs.[24] The

24847, at *45 (E.D. Va. Feb. 26, 2016) (listing the due process requirements); Jacksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1249 (E.D. Mich. 1984) (stating that "due process requires a state university to give its students notice and the opportunity to be heard"); Edwards v. Bd. of Regents, 397 F. Supp. 822, 827 (W. D. Mo. 1975) (outlining the due process requirements).

19. 20 U.S.C. § 1681(a) (2012).

20. 34 C.F.R. § 106.8(b) (2016); *accord* 20 U.S.C. §§ 1681–1688 (2012).

21. Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Dear Colleague, at 6–18 (Apr. 4, 2011), www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter 2011 Dear Colleague Letter].

22. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, to Hon. James Lankford, U.S. Dep't of Educ., at 3 (Feb. 17, 2016), http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf.

23. Amended Complaint, Doe v. Lhamon, No. 1:16-cv-01158-KBJ (D. D.C., August 15, 2016).

24. *See, e.g.*, University of Virginia Resolution Agreement 19 (September 17, 2015), http://www2.ed.gov/documents/press-releases/university-virginia-agreement.pdf ("Further, the University understands that during the monitoring of this Agreement, OCR

OCR's guidance to universities on how to provide "prompt and equitable" grievance procedures for complaints alleging a Title IX violation focus almost exclusively on universities' obligations to the complainant.[25] The OCR has not offered guidance on what process is due to the accused student, other than to caution that due process protections for the accused student should "not restrict or unnecessarily delay vindication of a complainant's Title IX rights."[26]

A university is subject to a student's private right of action under Title IX for failure to provide a response to a complaint of harassment.[27] In a suit against a university for damages, the plaintiff must show that the university exercised substantial control over the perpetrator of the discriminatory conduct, had actual knowledge and was deliberately indifferent to the conduct, and that the university's failure to respond deprived him or her of educational benefits.[28] The 2011 Letter states that

may visit the University, interview staff and students, and request additional reports or data as are necessary for OCR to determine whether the University has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Title IX . . . ."); Voluntary Resolution Agreement: Southern Methodist University 15 (Nov. 16, 2014), http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf (same); Resolution Agreement: Princeton University Case No. 02-11-2025, at 13 (Oct. 12, 2014), http://www2.ed.gov/documents/press-releases/princeton-agreement.pdf (same).

25. 2011 Dear Colleague Letter, *supra* note 21, at 18.

26. *Id.* at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."); *accord* U.S. DEP'T. OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 22 (2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. ("The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. . . . [S]chools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.").

27. *See* 20 U.S.C. § 1681 (2012); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (recognizing private cause of action under Title IX for student-on-student sexual harassment); Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 66 (1992) (recognizing full range of remedies for private action under Title IX); Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979) (recognizing a private right of action under Title IX).

28. *Davis*, 526 U.S. at 644–45; *see* S.K. v. N. Allegheny Sch. Dist., No. 2:14cv1156, 2016 U.S. Dist. LEXIS 25975, at *17 (W.D. Pa. 2016) (citing *Davis*). To establish that a university was deliberately indifferent, the plaintiff must show that the school's decision not to provide a remedy for a Title IX violation was an official act and clearly unreasonable. *See* Doe v. Willits Unified Sch. Dist., 473 F. App'x 775, 775–76 (9th Cir. 2012); Doe v. Sch. Bd., 604 F.3d 1248, 1259 (11th Cir. 2010); Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2016 U.S. Dist. LEXIS 22573, at *32 (M.D. Pa. 2016). In *Samuelson v. Or. State Univ.*, No. 6:15-cv-01648-MC, 2016 U.S. Dist. LEXIS 20991, at *1 (D. Or. 2016), the court found no university Title IX-based liability for a sexual assault of a female student perpetrated by a non-student at an off campus private party. The court held that the student's claim that the university was deliberately indifferent to her report of the rape was

"[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[29] In a footnote, the OCR explains that this is the standard for its enforcement of Title IX and also applies to private suits for injunctive relief. The OCR's view is that the standard that applies in private cases against universities for monetary damages is "actual knowledge and deliberate indifference."[30]

Because the stakes in university discipline cases for both students and universities are so high, and the due process constitutionally required in any particular situation is unclear, the prospect of a subsequent challenge in court looms in nearly every case. This article considers how and why courts have upheld or overturned public university student conduct outcomes with focus on recent decisions. Given the unique facts of each case and the variety of conduct codes and processes implemented by universities, the cases confirm the Supreme Court's observation in *Goss*, that what process is due in a public school discipline case depends on the circumstances.[31] However, common themes appear which may provide some practical guidance for universities and for courts.

barred by the statute of limitations. *See id.* at *25–26. *But see* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184–85 (10th Cir. 2007) (stating that the Univ. of Colorado acted intentionally in violation of Title IX by official policy showing a deliberate indifference to an obvious need for training or guidance in connection with its program of providing female student "ambassadors" to host football program recruits).

29. 2011 Dear Colleague Letter, *supra* note 21, at 4. The OCR takes the position that a single act of student-on-student sexual violence can create a hostile environment. "The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical." Dep't of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, at 1 (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter Questions and Answers]. The OCR defined "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent . . . ." *Id.* at 1. Notwithstanding the requirement of a *physical act* in its definition of sexual violence, OCR notes "sexual coercion" as an example of sexual violence, a term which OCR does not define. *Id.*

30. *Id.* at 1("A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program, *i.e.* creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.").

31. *See* Goss v. Lopez, 419 U.S. 565, 578 ("[The] very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 419 U.S. at 565, *citing* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

II. WHAT PROCESS IS DUE?

A. Notice of the Charges

Meaningful notice is an essential element of due process. To provide due process, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[32] The Supreme Court in *Goss* held that a public high school student subject to suspension is entitled to "oral or written notice of the charges against him . . . ."[33] It observed that the more serious the stakes are for the accused student, the more formal and detailed the notice must be.[34] In *Dixon*, the court held that a university student accused of misconduct is entitled to "a statement of the specific charges" against him.[35] The content and timing of the notice necessary to satisfy the requirements of due process has been the subject of challenges with a variety of outcomes.

In *Nash v. Auburn University*,[36] the Eleventh Circuit held that the university's notice of charges against two veterinary students accused of cheating on an exam was constitutionally sufficient although it did not provide a detailed description of the facts underlying the charges or the nature of the evidence to be offered.[37] The court held that *advance* notice of the expected testimony of witnesses was not required because the students were present at the hearing and able to confront adverse witnesses.[38] In response to the plaintiff's challenge to the timing of notice of the charges, the court held that a four-day advance notice of a hearing on charges of academic dishonesty was sufficient.[39]

In *Flaim v. Medical College of Ohio*,[40] the college expelled a medical student who pled guilty to a criminal charge of possession of a controlled substance. The school notified the student of the specific conduct rules he

32. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

33. *Goss*, 419 U.S. at 581.

34. *See Goss*, 419 U.S. at 584 ("Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.").

35. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961).

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

37. *Id.* at 663. The plaintiffs asserted that the notice did not summarize the testimony expected from the professor who prepared and graded the exam. *Id.* at 662.

38. *Id.* at 662–63.

39. *Id.* at 661–62*; see also Goss*, 419 U.S. at 582–83 (finding that where student was subject to a ten day suspension, the school need not provide for a delay between giving notice of the charges and the hearing, however, notice and hearing should precede removal of the student from school unless the student's presence presents a "danger to persons or property" or disrupts the academic process, in which case the "hearing should follow as soon as practicable").

40. Flaim v. Medical College of Ohio, 418 F. 3d 629 (6th Cir. 2005).

was charged with violating and informed him of his procedural rights.[41] Because there were no underlying facts in dispute—the student had already been convicted of a drug felony—the court held that the notice was sufficient because it provided a meaningful opportunity to prepare for the hearing.[42] Requiring more information in the notice "would be nothing more than an additional and unnecessary expense and administrative burden . . . without any corresponding benefit [to the student]."[43]

In *Sterrett v. Cowan*,[44] a student accused of sexual misconduct received notice of the charges against him but not until after an equal opportunity specialist interviewed him.[45] The specialist incorporated findings based on the interview in a report in which she concluded that the plaintiff was responsible for sexual misconduct that due to its severity created a hostile environment, triggering the university's obligations under Title IX.[46] The plaintiff learned during the initial interview the nature of the charges against him. The university later provided him with the specialist's summary of the interview and an activity log of her interviews with four unnamed witnesses.[47] The court denied the university's motion to dismiss in part because it failed to provide the plaintiff with notice of the charges *before* the interview with the equal opportunity specialist.[48]

In *Doe v. Rector & Visitors of George Mason University*,[49] the court held that the notice the university provided to the student was deficient because the university expelled the student for conduct other than the conduct identified in the notice it provided.[50] The notice specified charges relating to a single incident of sexual misconduct on a particular day. The hearing panel heard ten hours of evidence and found the student not

41. *Id.* at 632–33.
42. *Id.* at 639.
43. *Id.*
44. Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. 2015).
45. *Id.* at 927. The student received notice of an "undefined" student complaint against him. *Id.* He alleged that he was not provided with notice of the specific allegations made against him during the interview, but "eventually gleaned that it involved unspecified sexual misconduct allegations by [a classmate] and friend . . . ." *Id.*
46. *Id.* at 923.
47. *Id.* at 927.
48. *Id. But see*, Howe v. Pa. State Univ. Harrisburg, No. 1:16–0102, 2016 U.S. Dist. LEXIS 11981, at *15–16 (M.D. Pa. Feb. 2, 2016) (finding that due process does not require that the plaintiff receive notice of the charges before an informal disciplinary conference).
49. Doe v. Rector & Visitors of George Mason Univ., No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847 (E.D. Va. Feb. 25, 2016).
50. *Id.* at *28–32.

responsible for that incident.[51] The complainant appealed.[52] The administrator who heard the appeal conducted a *de novo* review, and conducted *ex parte* and off the record conversations with the members of the hearing panel, the complainant, and the plaintiff.[53] The administrator overruled the hearing panel and expelled the plaintiff for sexual assault without providing the plaintiff with a factual basis for his decision or procedural grounds for reversing the decision of the panel.[54] The plaintiff learned only as a result of discovery in his federal court case that the administrator's decision to expel him was based on alleged conduct other than that specified in the notice to him and other than the conduct that the hearing panel had considered.[55]

The court viewed the university's failure to provide notice of the charges on which the plaintiff was ultimately disciplined as denial of the plaintiff's opportunity to be heard.[56] Applying the balance of factors in *Mathews v. Eldridge*, the burden to the university of informing the plaintiff that his *entire relationship* with the accusing student was at issue in the disciplinary proceedings against him was "incredibly low," while prejudice to the plaintiff's ability to mount an effective defense absent that notice was significant.[57] The court noted that due process does not require a particular form of notice, specific means of communication of notice, or even notice before the first level hearing.[58] In this case, however, the university provided the student *no* notice of the conduct for which he was ultimately disciplined. "Failure to provide clear and specific notice that might allow for a meaningful defense is constitutionally insufficient to provide due process."[59]

51. *Id.* at *9–13; *see* GEORGE MASON UNIVERSITY CODE OF STUDENT CONDUCT 2015–2016: SPECIAL PROCEDURES FOR ALLEGED VIOLATION OF SEXUAL MISCONDUCT, § XVI, at 13–25 (updated Aug. 27, 2015), https://studentconduct.gmu.edu/wp-content/uploads/2011/09/2015-2016-Code-of-Student-Conduct.pdf.

52. The 2011 Dear Colleague Letter states that if a school's discipline process provides for an appeal, it must provide the right to appeal to both the accused student and the complainant. *See* Questions and Answers, *supra* note 29, at 26.

53. *Rector & Visitors of George Mason Univ*., 2016 U.S. Dist. LEXIS 24847, at *13–14.

54. *Id*. at *15.

55. *Id*. at *16.

56. *Id*. at *28 (citing Flaim v. Med. College of Ohio, 418 F. 3d 629, 638 (6th Cir. 2005)). The *Flaim* Court noted that constitutionally adequate notice must afford "a meaningful opportunity to prepare for the hearing." *Flaim*, 418 F. 3d at 638.

57. *Rector & Visitors of George Mason Univ.*, 2016 U.S. Dist. LEXIS 24847, at *30–31.

58. *Id*. at *31.

59. *Id*. at *32. (Emphasis added).

B. Discovery Rights and Meaningful Opportunity to Present a Defense

It is clear that due process does not require universities to provide accused students with the full range of litigation-style discovery rights in a disciplinary proceeding.[60] However, accused students have, without much success, challenged university decisions to withhold information from them relevant to the charges against them on grounds that the nondisclosure deprived them a meaningful opportunity to be heard.

In *Gomes v. University of Maine System*,[61] the court considered whether the accused students were entitled to a list of witnesses and a summary of their testimony before the hearing. Following *Nash*, the court concluded that where the witnesses testify in the presence of the accused student, due process does not require advance disclosure of their identities or a summary of their testimony.[62] The court also considered the due process implications of one-sided disclosure of evidence before the hearing. The hearing officer provided a statement from a police report of the incident to the complainant. Her attorney obtained a copy of the full report from the police a few days later. On advice of university counsel, the hearing officer did not provide the police report to the accused student based on concern about the application of a Maine statute that prohibited recipients of police reports from further distribution. The court noted that the university's one-sided disclosure of police report information raised a question regarding the fairness of the hearing.[63] However, considering the chronology of events, the short time between the initiation of the discipline process and the hearing, the court concluded that the non-disclosure of the police report to the plaintiff did not deprive him of due process.[64]

60. *See, e.g.*, Furey v. Temple Univ., 884 F. Supp. 2d 223, 250 (E.D. Pa. 2012) (stating that university was not required to provide plaintiff with statements of adverse witnesses before the hearing where the plaintiff had the names of the witnesses, and the university had no statements from them); Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 18 (D. Me. 2005) (stating that no due process requirement exists to provide the accused student with exculpatory or impeachment evidence).

61. Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 17 (D. Me. 2005).

62. *Id*. at 23 (citing Nash v. Auburn Univ., 812 F. 2d 655, 662–63 (11th Cir. 1987)). The accused students attempted to distinguish *Nash* based on the relatively lower gravity of the charge in that case (academic dishonesty) compared to their case (sexual assault). *Gomes*, 365 F. Supp. 2d at 23. The court held that for purposes of ascertaining due process, distinctions based on the nature of the charge is not appropriate. *Id*. at 24. The court noted, however, the due process importance of a distinction between proceedings for failure to meet academic standards and those for violation of conduct rules. *Id*. at 24 n.24. Citing *Board of Curators of the University of Missouri v. Horowitz*, the court noted that academic dismissal cases call for "less stringent procedural requirements" than misconduct cases. *Id.* (quoting *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978)). The court also noted that although the charges were different in *Nash*, the sanction (expulsion) was identical to the sanction in the plaintiffs' case. *Id*. at 24.

63. *Id*. at 20.

64. *Id*. at 22.

In *Furey v. Temple University*,[65] the court found no due process violation in the university's failure to provide the plaintiff in advance of the hearing contact information for the student eyewitnesses that the university expected to testify at the hearing. [66] The hearing administrator contacted all student witnesses to request but not compel their presence at the hearing. Two witnesses did not attend. The court noted that although the university knew the students would not attend in advance, the plaintiff did not, and could not address the issue of whether the hearing could proceed fairly without them. Although the university's failure to disclose to the plaintiff before the hearing that eye-witnesses would not be present viewed in isolation was not a due process deficiency, the court concluded that the missing witness testimony "affected the fundamental reliability and fairness in the [h]earing and appeal."[67]

In *Doe v. Ohio State University*,[68] a plaintiff expelled for sexual misconduct argued that the university violated his right to due process by failing to turn over to him information in its possession that he could have used to challenge the complainant's credibility.[69] The court characterized the plaintiff's argument as denial of an opportunity for meaningful cross-examination.[70] Citing *Gomes*, the court concluded that the plaintiff was independently aware of most of the information he claimed the university failed to provide and found him unlikely to succeed on that issue for purposes of his request for a preliminary injunction.[71]

C. Confrontation Rights (Right to Cross-Examine Witnesses, Right to Counsel)

In several recent cases, students have asserted denial of due process because the university denied them the right to full or even limited representation by an attorney in the course of the disciplinary process, limited their rights to cross-examine witnesses, considered hearsay testimony over their objection, or improperly permitted or denied admission of certain types of evidence. Courts have been generally unsympathetic to these challenges, noting that the rights of students facing discipline are not the same as those afforded defendants in criminal

65. Furey v. Temple Univ., 884 F. Supp. 2d 223, 254 (E.D. Pa. 2012).

66. *Id*.

67. *Id*. at 255. *See* discussion of the court's decision in *Furey* infra at text accompanying notes 157–166.

68. Doe v. Ohio State Univ., No. 2:15-CV-2830, 2016 U.S. Dist. LEXIS 21064 (S.D. Ohio Feb. 22, 2016).

69. *Id.* at *22.

70. *Id.* at *22–23.

71. *Id.* at *24–26 (citing Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 22 (D. Me. 2005)).

proceedings.[72] However, courts have recognized the importance of providing the accused student with an opportunity to challenge the credibility of witnesses, particularly in cases where witnesses testify before hearing panel about critical and disputed facts.[73]

For example, in *Marshall v. Indiana University*,[74] the student argued that because the university had a staff member who was a licensed attorney present the case against him and participate as a representative of the university's interests during the hearing panel's deliberations, he was entitled to representation by counsel.[75] The court noted that although the student's argument was compelling, neither Seventh Circuit nor Indiana law required that a university permit an accused student to be represented by counsel.[76] Similarly, in *Furey v. Temple University*,[77] the court held that applying the *Mathews v. Eldridge* balancing factors, any additional safeguard against an erroneous outcome by allowing active representation of counsel was outweighed by the "adversarial element and legal expertise required on the part of the school to implement this procedure."[78]

About a decade before the decisions in these cases, in *Flaim v. Medical College of Ohio*,[79] the Sixth Circuit considered a due process objection on grounds that the plaintiff's counsel was permitted to attend the hearing, but not consult with the plaintiff or to speak during the hearing.[80] The medical school did not present its case through an attorney and the hearing was not conducted under formal rules of evidence.[81] The court found in favor of the university. "Flaim's complaint really boils down to the assertion that he was denied the opportunity to present his case as effectively as he would have wished—he could not reasonably claim that he was denied the opportunity to present his case at all due to the lack of legal counsel."[82]

72. *E.g.*, Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) (finding that a student simultaneously subject to criminal charges for the misconduct is entitled to consult with legal counsel during a disciplinary proceeding but is not entitled to active representation by counsel in the proceeding); Gabrilowitz v. Newman, 582 F.2d 100, 103–04 (1st Cir. 1978) (same).

73. See discussion *infra* at text accompanying notes108–111.

74. Marshall v. Ind. Univ., No. 1:15-CV-00726-TWP-DKL, 2016 U.S. Dist. LEXIS 32999 (S.D. Ind. Mar. 15, 2016).

75. *Id.* at *5, 9, 13.

76. *Id.* at *13–14.

77. Furey v. Temple Univ., 884 F. Supp. 2d 223 (E.D. Pa. 2012).

78. *Id.* at 253.

79. Flaim v. Med. College of Ohio, 418 F.3d 629 (6th Cir. 2005).

80. *Id.* at 640.

81. *Id.*

82. *Id. See also* Gorman v. Univ. of R.I., 837 F. 2d 7, 16 (1st Cir. 1988); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961).

In *Doe v. University of Cincinnati*,[83] the plaintiff argued that he was denied an opportunity to cross-examine witnesses because under the university's rules the plaintiff was required to submit questions to the panel chair in written form with no opportunity to ask follow up questions or confront adverse witnesses directly.[84] The court concluded that because the Due Process Clause does not require any right to cross-examine witnesses in a student discipline proceeding, the university's process for indirect questioning through the hearing chair was adequate.[85]

In *Newsome v. Batavia Local School District*,[86] a case involving high school student misconduct, the Sixth Circuit noted that although cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested"[87] the value of cross examination must be balanced against the burden allowing it would impose on school administration.[88] The plaintiff was disciplined for possession of marijuana on school property.[89] The court held that, in a high school discipline proceeding, the benefit of requiring cross-examination rights as a tool to reduce the risk of an erroneous outcome would be small because the school administrator generally knows or can easily obtain through school records information to help him evaluate the credibility of students' accounts of the alleged misconduct.[90] In contrast, the burden on high school administrators would be significant. Exposing student witnesses to cross-examination would likely deter students from coming forward with information of serious misconduct.[91] Also, requiring administrators to oversee disciplinary proceedings with cross- examination rights would require legal skills they do not have.[92] After balancing the *Mathews v. Eldridge* factors, the court concluded that due process did not require cross-examination rights in high school student discipline cases.[93]

Courts have been sensitive to the administrative costs of permitting cross-examination in university discipline cases. In *Osteen v. Henley*,[94] the Seventh Circuit considered a due process challenge on grounds that the hearing officer cut off a statement by the student's advocate during the

83. Doe v. Univ. Cincinnati, No. 1:15-CV-681, 2016 U.S. Dist. LEXIS 37924 (S.D. Ohio, Mar. 23, 2016).
84. *Id.* at *34–35.
85. *Id.* at *35.
86. Newsome v. Batavia Local Sch. Dist., 842 F. 2d 920 (6th Cir. 1988).
87. *Id.* at 924 (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)).
88. *Id.* at 925.
89. *Id.* at 921.
90. *Id.* at 925.
91. *Id.* ("[I]t is critically important that we protect the anonymity of students who 'blow the whistle' on their classmates . . . .").
92. *See Id.* at 925–26.
93. *Id.* at 926.
94. Osteen v. Henley, 13 F.3d 221 (7th Cir. 1973).

hearing.[95] The court held that the Due Process Clause patrols the "outer bounds" of administrators' discretionary authority and the hearing officer was within the bounds of that authority.[96] The court held that the Due Process Clause did not create a right to full representation by counsel for a student in a university disciplinary proceeding.[97] "We are reluctant to encourage further bureaucratization [of education] by judicializing university disciplinary proceedings, mindful also that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference."[98] Recognizing that the relationship of universities to students is analogous to that between merchant and customer, the court concluded the danger was *de minimus* that rules prohibiting full attorney representation for accused students will incite universities to an "orgy of expulsions."[99]

On the other hand, courts appear to recognize that denial of *any* opportunity to challenge the credibility of adverse witnesses may deprive an accused university student of due process if the witness's credibility is in issue and the witness is testifying on facts critical to the case. In *Flaim*, the Sixth Circuit noted that Flaim's case did not require the fact-finder to make a choice between believing an accuser or an accused based on their different accounts of the events.[100] The court noted that the Second Circuit in *Winnick v. Manning*[101] similarly held that the right to cross-examine adverse witnesses is not essential to due process in school disciplinary

95. *Id.* at 225.

96. *Id.*

97. *Id. See also* Furey v. Temple Univ., 884 F. Supp. 2d 223, 249 (E.D. Pa. 2012) (noting that university counsel was brought into the disciplinary proceeding because the accused student was represented by counsel and that university counsel's attendance at the hearing "served to increase the legal and adversarial tone of the disciplinary process, and contributed to the confrontational dynamic"); Flaim v. Med. College of Ohio, 418 F. 3d 629, 641 (6th Cir. 2005); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987); Winnick v. Manning, 460 F. 2d 545, 549 (2d Cir. 1972) (citing Dixon v. Ala. State Bd. of Educ., 294 F. 2d 150, 159 (5th Cir. 1961)); Holmes v. Poskanzer, 2007 U.S. Dist. LEXIS 3216, at *16–17 (N.D. N.Y. 2007) (finding no deprivation of due process where students were permitted to pose questions to adverse witnesses through the hearing panel).

98. *Henley*, 13 F.3d at 225–26 (citing Piarowski v. Ill. Cmty. Coll. Dist. 515, 759 F.2d 625, 629 (7th Cir. 1985)).

99. *Id.* at 226 (noting that Northern Illinois University "can't have been happy to lose a student [to expulsion] whom it had wanted so much that it had given him a football scholarship"). Johnson v. Temple Univ., No. 12-515, 2013 U.S. Dist. LEXIS 134640 at *27 (E.D. Pa. 2013) (recognizing a limited right to counsel when a student faces criminal charges for the same conduct).

100. *Flaim*, 418 F.3d at 641 (stating that Flaim was given adequate opportunity to address discrepancies in the adverse witness's testimony during the hearing and that "[w]e assume that any discrepancies, to the extent they might have existed, would not have been sufficient to convince the Committee that Flaim had not been convicted of a felony").

101. Winnick v. Manning, 460 F. 2d 545 (2d Cir. 1972).

proceedings.[102] However, in both *Flaim* and *Winnick*, the accused students admitted the facts to which the adverse witnesses testified so that the witnesses' credibility on key issues of fact was not in dispute.[103] In *Winnick*, the Second Circuit noted in dicta that "if [the] case had resolved itself into a problem of credibility, cross[-]examination of witnesses might have been essential to a fair hearing."[104]

In *Furey v. Temple Univ*ersity,[105] the court held that due process required that the plaintiff be permitted to cross-examine witnesses, but not necessarily by counsel. The court asserted that the purpose of cross-examination is to permit the accused to challenge the credibility and truthfulness of witnesses, and particularly where facts are in dispute and witness credibility is important, cross-examination of witnesses is "an important safeguard."[106] The court concluded that the university provided due process because it afforded the plaintiff the right to challenge witnesses' credibility by posing questions through the hearing panel chair.[107]

In contrast, in *Doe v. Regents of the University of California San Diego*,[108] university conduct rules permitted the plaintiff to question the complainant only by submitting questions in advance to the hearing officer who had discretion to decide whether to pose them to the complainant.[109] The court held that in a sexual assault case where witness credibility was critical, the university denied the plaintiff due process when the hearing officer asked the complainant nine of thirty-two questions the plaintiff submitted for her.[110] "While the Court understands the need to prevent additional trauma to potential victims of sexual abuse . . . . [t]he limiting of questions in this case curtailed the right of confrontation crucial to any definition of a fair hearing."[111] The court also criticized the hearing

102. *Flaim*, 418 F. 3d at 641.

103. *Id.* at 641; *Winnick*, 460 F. 2d at 550.

104. *Winnick*, 460 F. 2d at 550.

105. Furey v. Temple University, 884 F. Supp. 2d 223 (E.D. Pa. 2012).

106. *Furey*, 884 F. Supp. 2d at 252. The court cites *Winnick* for the proposition that due process does not require cross-examination where the witness does not testify to a fact essential to the case against the accused, but may require it where the case turns on credibility of fact witnesses. *Id.* at 251–52.

107. *Id.* at 252.

108. Minute Order, Doe v. Regents of the Univ. of Cal.-San Diego, No: 37-2015-00010549-CU-WM-CTL (Sup. Ct. Cal. July 10, 2015), http://freepdfhosting.com/80f5b8c6c8.pdf. *See generally* Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (October 15, 2015), http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights.

109. Minute Order at 2, *Regents of the Univ. of Cal.-San Diego*, No. 37-2015-00010549-CU-WM-CTL.

110. *Id.* at 2–4.

111. *Id.* at 2.

panel's reliance on facts stated in the report of the investigator, a staff member in the university's Office for the Prevention of Harassment and Discrimination, who did not testify at the hearing and was not subject to cross-examination.[112] It noted that although due process does not require the hearing panel to exclude hearsay testimony, it does require that the accused student have an opportunity to challenge the investigator's findings and conclusions if they are presented as part of the evidence against him.[113] "[I]t was the panel's responsibility to determine whether it was more likely than not that petitioner violated the policy[,] and not defer to an investigator who was not even present to testify at the hearing."[114]

In *Doe v. Rector and Visitors of George Mason University*,[115] the court held that *ex parte*, off the record conversations with the complainant conducted by the administrators in a sexual misconduct case created a "glaring procedural deficienc[y]."[116] The constitutional problem was not that the conversations took place but that the administrators did not provide the plaintiff with a report of them.[117] The court held that the plaintiff was entitled to a report of the evidence against him taken outside his presence so that he could offer a meaningful defense.[118] Balancing the *Mathews v. Eldridge* factors, the court concluded that administrative burden of making a record of the interviews and providing them to plaintiff was low.[119] The benefit in terms of reduced risk of an erroneous outcome was high.[120] Providing the content of the interviews to plaintiff was essential to fulfill the due process requirement notice of the "full context of the accusations and evidence against him" and an opportunity to respond in his defense.[121]

112. The investigator's report concluded "I find it more likely than not that . . . [plaintiff] ignored [the complainant's] objections to sexual activity in violation of the Student Sex Offense Policy." *Id.* at 3.

113. *Id.* at 3.

114. *Id.* (emphasis removed). See also, Doe v. Columbia, 2016 U.S. App. LEXIS 13773 (2d Cir. July 29, 2016) (finding that a university is not shielded from liability for sex discrimination by Title IX investigator who, although not the decision maker in a student discipline case, is "endowed by the institution with supervisory authority or institutional influence"over an otherwise non-biased decision maker. Id. at * 32.

115. Doe v. Rector & Visitors of George Manson Univ., No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847 (E.D. Va. Feb. 25, 2016).

116. *Id.* at *33.

117. *Id.*

118. *Id.* (citing Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (The accused student should be "given. . . [sic] an oral or written report on the facts to which each witness testifies.").

119. *Id.* at *33–34.

120. *See id.* at *47.

121. *Id.* at *33–34.

D. Impartiality of Tribunal

The university must provide an impartial tribunal to decide whether an accused student is responsible, and if so, the appropriate sanction. Members of the tribunal are entitled to a presumption of impartiality that may be overcome only by a showing of actual bias.[122] The plaintiff bears the burden of overcoming the presumption of impartiality.[123] Proof of prejudice must be based on more than speculation and inference.[124]

Fifteen years ago, in *Gomes v. University of Maine System*,[125] the plaintiff who the university had expelled for sexual misconduct argued that the hearing board chair was biased because she had participated in sexual assault victim advocacy programs.[126] The court found this evidence insufficient to overcome the presumption of impartiality: "There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it."[127]

In the 2016 decision *Doe v. University of Cincinnati*,[128] the court considered and rejected an argument that a hearing board was not impartial because: 1) the university provided board members with training on sexual assault; and 2) the OCR had exerted pressure on the university to expel students accused of student-on-student sexual misconduct.[129] The court observed: "Plaintiffs do not cite any authority for the repeated implication . . . that a university must balance its sexual assault training with training on the due process rights of the accused . . . ."[130] Nor is it reasonable to infer that the university "has a practice of railroading students accused of sexual misconduct simply to appease the Department of Education and preserve its federal funding."[131] In any event, these

122. *See* Gorman v. Univ. of R.I., 837 F.2d 7, 15 (1st Cir. 1988); Nash v. Auburn Univ., 812 F.2d 655, 665 (11th Cir. 1987); Duke v. N. Texas State Univ. 469 F. 2d 829, 834 (5th Cir. 1972); Furey v. Temple Univ., 884 F. Supp. 2d 223, 255 (E.D. Pa. 2012). *See also* Doe v. Univ. of Cincinnati, No. 1:15-CV-681, 2016 U.S. Dist. LEXIS 37924, at *29 (S.D. Ohio, Mar. 23, 2016); Doe v. Ohio State Univ., No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 21064, at *30 (S.D. Ohio Feb. 22, 2016). 2011 Dear Colleague Letter, *supra* note 21, at 12; Questions and Answers, *supra* note 29, at 32.

123. *Gorman*, 837 F.2d at 15.

124. *Furey*, 884 F. Supp. 2d at 255 (citing *Gorman*, 837 F.2d at 15); *Duke*, 469 F. 2d at 834. *See also Ohio State Univ.*, 2016 U.S. Dist. LEXIS 21064, at *30.

125. Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6 (D. Me. 2005).

126. *Id.* at 29.

127. *Id.* at 31.

128. Doe v. Univ. of Cincinnati, No. No. 1:15-CV-681, 2016 U.S. Dist. LEXIS 37924 (S.D. Ohio Mar. 23, 2016).

129. *Id.* at*14–15, 28.

130. *Id.* at *30.

131. *Id.* at *31.

assertions of bias were insufficient to overcome the presumption of impartiality.[132]

Similarly in In *Doe v. Ohio State University*,[133] the plaintiff sought a preliminary injunction against the University to stay his expulsion at the conclusion of a disciplinary proceeding against him for sexual misconduct. The student alleged that training materials provided to members of the hearing panel biased the panel members against males accused of sexual misconduct.[134] In the course of discovery in federal court, the plaintiff learned that the training materials provided to members of his hearing panel stated that "a [v]ictim centered approach can lead to safer campus communities;" "[s]ex offenders are overwhelmingly white males;" "[i]n a large study of college men, 8.8% admitted rape or attempted rape;" "[s]ex offenders are experts in rationalizing their behavior;" and "22-57% of college men report perpetrating a form of sexually aggressive behavior."[135] The magistrate judge concluded that there was "undeniably some evidence. . .from which it could be inferred that the training materials. . .[were] biased against males who are accused of sexual misconduct."[136] However, the judge concluded that because the training materials were the only evidence of hearing panel bias that the plaintiff presented, he was not likely to prevail on the merits of his due process challenge.[137]

The OCR has clearly made training for persons involved in the investigation and adjudication of student sexual misconduct complaints a centerpiece of its guidance and a focus of Title IX enforcement activity against universities.[138] The 2011 Letter requires that all persons involved

132. *Id.*

133. Doe v. Ohio State Univ., No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 21064 (S.D. Ohio Feb. 22, 2016).

134. *Id.* at *31.

135. *Id.* at * 8–9 (alteration in original).

136. *Id.* at * 30–31.

137. *Id.* at * 32. *See also* Marshall v. Ind. Univ., No. 1:15-cv-00726-TWP-DKL, 2016 U.S. Dist. LEXIS 32999, at *12–14 (S.D. Ind. Mar. 15, 2016). The plaintiff argued that the hearing panel was biased because at the time of the hearing Indiana-University Bloomington was under OCR investigation for Title IX non-compliance for its handling of complaints of sexual assault with considerable media attention, putting pressure on the university to prosecute all sexual misconduct complaints aggressively. The court held that under Seventh Circuit precedent, the plaintiff received all the process he was due. The university would have been justified in providing even less process than he received, particularly because the allegations against him included on-campus criminal activity. *Id.* at *12–14 (citing Medlock v. Trs. of Ind. Univ., 738 F.3d 867, 871 (7th Cir. 2013)) (stating that expulsion prior to any hearing complied with due process where student was accused of possession of a six foot tall marijuana plant in his college dorm room and other criminal activity with no facts in dispute).

138. For example, as part of an agreement with OCR resolving an investigation ("proactive compliance review") for violation of Title IX, Ohio State University agreed to retain a Title IX Coordinator who would oversee training of any persons who have a role

in implementing the grievance procedure, including members of a hearing panel, must be trained to "handl[e] complaints of sexual harassment and sexual violence."[139] The Letter specifies that the training should include:

> [I]nformation on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence. . . ; the proper standard of review [sic, standard of proof?] for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.[140]

Given the OCR's insistence that all university faculty, staff and student investigators, and adjudicators of student sexual misconduct cases receive subject specific training, it is no surprise that since 2011, an industry has emerged to provide it.[141]

Apart from the possible effect of the training on the impartiality of hearing board members, the mandated informational content may call into question the accused student's opportunity to be heard and offer a

in investigating or adjudicating student conduct issues involving sex discrimination under Title IX. Resolution Agreement: Ohio State University OCR Docket # 15-10-6002, at 9 (2014), http://www2.ed.gov/documents/press-releases/ohio-state-agreement.pdf. The university agreed that the OCR will review and approve the training materials. *Id.*

139. 2011 Dear Colleague Letter, *supra* note 21 at 12; Questions and Answers, *supra* note 29, at 25.

140. Questions and Answers, supra note 29, at 40. Training the university must provide to all employees likely to witness or receive reports of sexual violence "should include practical information about how to prevent and identify sexual violence . . . ; the behaviors that may lead to and result in sexual violence; the attitudes of bystanders that may allow conduct to continue; the potential for revictimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual violence, including the use of nonjudgmental language; the impact of trauma on victims; . . ." *Id.* at 38.

141. *See About ATIXA and Title IX*, ASS'N OF TITLE IX ADM'RS (ATIXA), https://atixa.org/about/ (last visited Apr. 13, 2016) ("OCR may not have realized that with its April 4th, 2011 Dear Colleague Letter, it has created it [sic] [a] new profession and a new field."). *See generally* Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html?_r=0 (stating that Brett Sokolow, Executive Director of ATIXA, described university investment in compliance with the April 2011 letter as a "cottage industry").

meaningful defense. Although some topics provide panel members with otherwise publicly available information about the university's student conduct rules and hearing process, many topics require presentation of information that is fairly the subject of scientific disagreement, or specifically designed to affect hearing panel members' interpretation of the evidence presented unfavorably to theaccused student. For example, OCR explains that required training about the neurobiological "effects of trauma" should inform trainees that the human brain responds to trauma by releasing chemicals into the nervous system which affect the person's perception at the time of the trauma and may corrupt the person's recall of the event, and may explain inconsistencies or gaps in complainants' reports of events.[142] Because the chemical response to trauma negatively affects memory function, investigators and adjudicators should "anticipate non-linear accounts, with jumping around and fragmented memories." Moreover, an investigator should refrain from pressing complainants for facts about the event that is the subject of the complaint because doing so may cause "additional stress."[143]

Unlike expert testimony presented during the course of a hearing, the mandatory training of investigators and panel members occurs outside the hearing process. A student accused of sexual misconduct has no opportunity to know of the scope or content of this information. Arguably, without this information, he lacks a meaningful opportunity to challenge its accuracy or its relevance to the fair and unbiased resolution of the facts in dispute in the case against him.

Training which the university provides to investigators and members of student conduct tribunals could be considered a form of *ex parte* contact. *Ex parte* communications raise due process concerns when they call into question the appearance of impartiality of a proceeding.[144] However, the standard is high for establishing a connection between *ex parte* communications and the impartiality of the tribunal. The plaintiff must show that the communications "irrevocably taint[]" the integrity of the process and the fairness of the result."[145] Although the plaintiffs in

142. MICHAEL HENRY ET AL., ATIXA, THE SEVEN DEADLY SINS OF TITLE IX INVESTIGATIONS 3 (2016), https://atixa.org/wordpress/wp-content/uploads/2012/01/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf.

143. *Id.* at 4. "Asking individuals what happened may be less effective than asking them how it made them feel, as the feelings may help to decode memories of what caused the emotions." *Id.*

144. Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 35 (D. Me. 2005) (quoting Grieco v. Meachum, 533 F.2d 713, 719 (1st Cir. 1976), *cert. denied* 429 U.S. 858 (1976), *overruled on other grounds by* Maine v. Moulton, 474 U.S. 159 (1985)).

145. *Id.* (quoting Springfield Terminal Ry. Co. v. United Transp. Union, 767 F. Supp. 333, 349 (D. Me. 1991)). *See, e.g.*, *Gomes*, 365 F. Supp. 2d at 37 ("The Appeal Committee was perfectly capable of drawing its own inferences from the record before it, and there is no evidence it was unduly influenced by [the ex parte communication.").

Doe v. University of Cincinnati, and *Doe v. Ohio State* did not prevail, the courts' reaction to the complainant-centered content of the training the hearing members received reveals a dangerous thicket for universities who must simultaneously comply with OCR's content-specific training requirements and fulfill their obligation to provide an unbiased hearing process.

In *Doe v. Rector & Visitors of George Mason University*,[146] the plaintiff successfully asserted a denial of due process based on the bias of the decision-maker in his discipline case.[147] The administrator hearing the complainant's appeal of a finding of no misconduct conceded that when he met with the plaintiff he had already decided to reverse the finding of the hearing board and find the plaintiff responsible for sexual assault.[148] The administrator "never truly afforded plaintiff a meaningful opportunity to be heard in the appeal process."[149] The court recognized Fourth Circuit precedent holding that an administrator can be an impartial decision maker even though he has made a conditional decision about a case pending further developments.[150] But the administrator hearing the plaintiff's appeal admitted that he had made up his mind conclusively as to the plaintiff's responsibility for sexual assault without first hearing the plaintiff's defense.[151] The court stopped short of finding that the administrator was biased, but it held that because of the administrator's prejudgment, the plaintiff's opportunity to be heard was not meaningful.[152]

E. Right to Appeal; Right to Record of Hearing

The opportunity to be heard includes the ability to present a meaningful defense. Courts have generally responded to challenges to the adequacy of appeals procedures under due process grounds by noting that an accused student has no constitutional right to appeal if the university has provided a hearing that provides due process.[153] In *Boyd v. State*

146. Doe v. Rector & Visitors of George Mason Univ., No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847 (E.D. Va. Feb. 25, 2016).

147. *Id.* at *46.

148. *Id.* at *14–16.

149. *Id.* at *34.

150. *Id.* at *35.

151. *Id.*

152. *Id.* at *36–37. The Dean of Students heard the plaintiff's appeal following the administrator's decision to expel him. *See id.* at *37–38. The court held that the procedure afforded the plaintiff in this subsequent appeal did not overcome the earlier lack of due process. *See id.* at *38. The Dean of Students also met with the accusing student *ex parte* and off the record and again provided the plaintiff no opportunity to respond or defend himself. *Id.*

153. *E.g.*, Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 33 (D. Me. 2005); Winnick v. Manning, 460 F. 2d, 545, 549 n.5 (2d Cir. 1972). In *Doe v. Univ. of Cincinnati*, No. 1:15-CV-681, 2016 U.S. Dist. LEXIS 37924, at *27–28 (S.D. Ohio Mar. 23, 2016),

University of New York at Cortland,[154] the New York Supreme Court found that the university's failure to provide the plaintiff with a detailed statement of the hearing panel's factual findings deprived the plaintiff of due process.[155] "[S]uch a statement is necessary to permit the student to effectively challenge the determination in administrative appeals and in the courts and to ensure that the decision was based on evidence in the record."[156] Although the case does not explain at what stage of a disciplinary process detailed findings of fact must be produced and provided to the accused student, under New York law, public institutions must justify disciplinary decisions with findings of fact sufficient to support the charges.

F. Accumulation of Procedural Problems

In *Furey v. Temple University*,[157] the plaintiff was charged with assaulting an off-duty police officer and was expelled.[158] The student raised several aspects of the disciplinary process as due process violations.[159] The trial court, after a bench trial, concluded that, although the procedural issues that the plaintiff raised, taken individually, did not necessarily deprive the plaintiff of due process, "the accumulation of mistakes at each step of the process and failures to comply with the Temple Code resulted in a violation of procedural due process."[160]

The plaintiff alleged that he was denied due process because he was not permitted to cross-examine adverse witnesses directly.[161] Under the

the court held that any due process deficiencies in the initial hearings on the charges against the plaintiffs were cured on appeal. The plaintiffs' appeals were sustained and they were granted new hearings at which the alleged procedural defects were not repeated. *Id.*

154. Boyd v. State Univ. of N.Y. at Cortland, 973 N.Y.S.2d 413 (N.Y. App. Div. 2013).

155. *Id.* at 415. The university charged the student with violation of its rules, which define as misconduct failure to comply with state laws. *Id.* at 414. The university charged the student with violation of Delaware law based on alleged harassment of a University of Delaware student which resulted in a Delaware warrant for his arrest. *Id.* The court held that the statement of the hearing panel that the student "harassed and threatened [the victim]" failed to set forth the specific conduct that supported the charges that he violated Delaware law. *Id.* at 415.

156. *Id.* at 415 (quoting Matter of Kalinsky v. State Univ. of N.Y. at Binghamton, 557 N.Y.S.2d 557, 578 (N.Y. App. Div. 1990)). *See also* Matter of Lambraia v. State Univ. of N.Y. at Binghamton, 23 N.Y.S.3d 679, 681 (N.Y. App. Div. 2016) (finding that the "Conduct Board sufficiently detailed its factual findings"); Matter of Budd v. State Univ. of N.Y. at Geneseo, 19 N.Y.S.3d 825, 827 (2015) (finding that the university's written determination sufficiently "set forth detailed factual findings").

157. Furey v. Temple Univ., 884 F. Supp. 2d 223 (E.D. Pa. 2012).

158. *Id.* at 227, 230.

159. *Id.* at 248.

160. *Id.* at 259.

161. *Id.* at 251–52.

university's conduct process rules, the plaintiff was permitted to submit questions for adverse witnesses through the hearing panel chair.[162] The court held that the university's process for indirect cross-examination provided due process, but that the manner in which the witnesses were questioned raised fairness issues that, considered together with other aspects of the hearing, deprived the plaintiff of his right to due process.[163] "[W]hen a hearing on serious charges turns on issues of credibility, as this Hearing did, the importance of a fair tribunal, where the testimony of all of the witnesses is examined for truthfulness, is heightened."[164]

The court identified as the most serious issues that the administrator hearing the plaintiff's appeal failed to give presumptive weight to the initial hearing board's recommendation, his deference to the police officer's version of the events, ex parte conversations with a witness who did not appear to testify at the hearing, and the absence of eye witness testimony at the hearing other than the police officer.[165] The court also noted as due process issues the tone of the hearing itself (which the court described as "hostile)," and the deferential questioning of the police officer relative to the questioning of the plaintiff.[166]

III. CONCLUSIONS

The trial court's decision in *Furey*, could be read as creating a new "omnibus" standard for due process. Courts have considered university discipline due process as a sum of the individual parts of the process provided. A university provides due process if no one part of the discipline process falls below the minimum standard of due process. The trial court in *Furey* may have broken new ground by holding that a university fails to provide due process through an accumulation of procedural mistakes, none of which taken individually deprived the plaintiff of due process. The prospect of a challenge to the "overall fairness" of a disciplinary process on grounds that as a whole it deviated in several relatively minor respects from *ideal* process raises the likelihood of success on appeal and the likelihood that students will continue the disciplinary process in federal court after it concludes on campus.

The new role of universities in investigating and adjudicating complaints of student-on-student sexual misconduct under the guidelines set forth in the 2011 Letter puts universities in a difficult position as they try to fulfill both their obligation under Title IX and their obligation to

162. *Id.* at 229
163. *Id.* at 252.
164. *Id.* at 254.
165. *Id.* at 259.
166. *Id.* at 259–60.

provide due process of law to accused students. The OCR may intend that the mandatory training for all persons involved in the handling of sexual misconduct cases will correct misconceptions and irrational biases against victims of sexual misconduct. However, to the extent that the training is designed to influence investigators and adjudicators outside the hearing process regarding critical issues (e.g., the credibility of witnesses on the issue of consent) within the hearing process, it calls into question the accused student's opportunity to be heard and present a meaningful defense. Moreover, a female "victim-centered" response to a claim of sexual misconduct against a male student may amount to anti-male bias and may violate the accused student's rights under Title IX. In *Doe v. Columbia University*,[167] a male student who had been suspended for an act of sexual coercion against a female student claimed that the university Title IX investigator responsible for his case was affected by anti-male bias and that the investigator and other university decision makers were motivated to discipline him to protect the university from public criticism from female students and the public regarding its prior responses to female students' claims of sexual assault. [168] The Second Circuit held that the plaintiff pled facts that raised a "plausible minimal inference of bias" sufficient to survive a motion to dismiss.[169]

To respond to the new Title IX requirements, universities must add staff, provide OCR-approved training and in many cases fundamentally redesign their discipline procedures to fulfill their role as investigator and adjudicator of their students' sexual conduct. The new *capacity* of universities to administer an elaborate investigative and adjudicative procedure to comply with Title IX may change judicial perception of the administrative burden associated with additional due process protection for accused students. If courts perceive universities as protectors of the rights of sexual misconduct complainants and *adversaries* of accused students, judicial perception of the *Mathews v. Eldridge* factors may tip in favor of requiring universities to provide litigation-style due process protections for accused students.

In 2015, two bills were introduced in Congress that would require universities to provide specific procedural rights to students accused of sexual misconduct including notice of the charges two weeks before the

167. Doe v. Columbia Univ., Nos. 15-1536, 15-1661, 2016 U.S. App. LEXIS 13773 (2d Cir. July 29, 2016).

168. Id. at *4. "Against this factual background, it is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault." Id. at * 25.

169. Id. at *2.

hearing, the right to all inculpatory and exculpatory evidence before the hearing, the right to confront witnesses by direct questioning, and representation by an attorney at all stages of the process, including the investigation.[170] Notably, both bills include a definition of sexual violence that does not include "sexual coercion,"[171] which would likely reduce the volume of sexual misconduct cases for universities.[172]

Procedural safeguards such as a right to discovery, active representation by counsel, and attorney examination of witnesses will impose significant costs on universities. The Seventh Circuit in *Osteen* warned that the involvement of attorneys in a discipline proceeding would judicialize the process, and undesirably shift the tone of discipline cases from educational to adversarial. Beyond tone, the involvement of attorneys for both sides will no doubt expand the duration of the process, potentially outliving the time to degree for the students involved.

The effectiveness of university discipline process as a tool to ensure safety on campus and to inculcate norms of ethical and civil behavior among students depends on how students perceive it. Because students' time at their university is relatively short, a university must provide swift process to ensure that students can see justice served among their cohort while they are still students. If the addition of litigation-style procedural safeguards means that universities cannot resolve discipline cases swiftly, the value of the process to the community is substantially diminished. Instead of reinforcing community ethical and civil values, protracted student discipline processes may erode them.

The stakes for both universities and students in the discipline proceedings are indeed high. This survey of recent cases reveals the legal challenges for universities who must anticipate what due process requires and ensure in practice that each student accused of misconduct receives a fair hearing. It also reveals the challenge for courts as they apply due process precedents to new student discipline processes designed to ensure university compliance with the OCR's interpretation of Title IX. What process is due has always reflected a balance between public and private interests. A new challenge for courts is to strike the balance between the constitutional requirement of due process of law and the antidiscrimination mandate of Title IX.

170. Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015). Two states have enacted legislation that require colleges or universities in the state higher education system to provide a student accused of certain misconduct a right to be represented by an attorney. N.C. GEN. STAT. § 116-40.11 (2013); N.D. CENT. CODE. § 15-10-56 (2015).

171. *See supra* note 29.

172. *Id.*