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Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities

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INTRODUCTION

Recently, the federal government has been pressing universities and colleges to strengthen the processes used for the investigation, discipline, and appeal of sexual harassment and assault cases arising under Title IX of the Education Act Amendments.[1] Public sector universities and colleges are also obligated to provide to employees and students disciplined for sexual harassment or assault procedural protections under the Due Process Clause of the U.S. Constitution. These disparate legal obligations have led to lawsuits alleging that universities have failed to comply with the Due Process Clause when discipline has been instituted as a result of Title IX investigations. This article will provide an overview of Constitutional Due Process rights and their application to public sector universities and colleges and will review recent judicial decisions addressing these rights in cases arising from investigations, discipline and appeals under Title IX. The article will conclude with recommendations for balancing need to address sexual misconduct on campus with the due process rights of students and employees.

OVERVIEW OF CONSTITUTIONAL DUE PROCESS RIGHTS

Employees and students at public sector colleges and universities are entitled to certain protections under the United States Constitution. In particular, the Due Process Clause states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[2]

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1. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).
2. U.S. CONST. amend. XIV, § 1.

There are two forms of constitutional due process protection: procedural due process and substantive due process. To establish a substantive due process claim, a plaintiff must show that the state has violated a fundamental right. To establish a procedural due process violation, a plaintiff must establish a constitutionally protected property or liberty interest and show that the state deprived the plaintiff of such interest without appropriate procedures.

Both substantive and procedural due process require that an individual have a property interest or liberty interest that is entitled to protection. "However, not all [liberty and] property interests worthy of procedural due process protection are protected by the concept of substantive due process."[3] Rather, to state a substantive due process claim, "a plaintiff must have been deprived of a particular quality of property interest," namely a fundamental property or liberty interest.[4] Courts have rarely found that students or employees of colleges or universities have a property or liberty interest sufficient to warrant substantive due process protection.[5] Therefore the focus herein will be on procedural due process protection.

To establish a procedural due process violation, a plaintiff must establish a constitutionally protected property or liberty interest and show that the state deprived the plaintiff of such interest without appropriate procedures.[6] Analysis of the adequacy of procedural due process is governed by a three-factor balancing test set forth in *Mathews v. Eldridge*. The three relevant factors are (i) the private interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (iii) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[7]

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3. Nicholas v. Pa. State Univ., 227 F.3d 133, 140 (3d Cir. 2000).
4. DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 599–600 (3d Cir. 1995).
5. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected"); *Black v. Sullivan*, 561 F. Supp. 1050, 1058 (D. Me. 1991) ("A state-subsidized, post-secondary education is not a fundamental constitutional right"); *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117, 125 (D. Me. 2004); *Rogers v. Tennessee Bd. of Regents, 273 F. App'x 458, 462-463 (6th Cir. 2008)* (affirming grant of summary judgment on a university student's claim that her academic expulsion for performance problems and inappropriate clinical behavior violated her substantive due process rights).
6. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
7. *See id.*

As the Supreme Court explained in *Mathews*, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances."[8] In this respect, due process is "flexible" and context sensitive.[9] A school's "primary purpose is to educate students; '[a] school is an academic institution, not a courtroom or administrative hearing room.'"[10] Thus, the nature of a due process hearing will vary depending on the circumstances. Significantly, "courts staunchly resist the suggestion that school disciplinary hearings should emulate criminal trials[,]" and this view is basic.[11] The essence of the due process requirement is that a person should receive notice and an adequate opportunity to be heard in light of the circumstances at issue.[12]

These factors generally yield several practical due process requirements. Most importantly, (1) notice of the charges against an individual, (2) the right to be heard regarding the charges, (3) a hearing before an impartial decision maker, and (4) notice of the findings and ultimate decision.[13]

PROCEDURAL DUE PROCESS RIGHTS OF STUDENTS AND EMPLOYEES AT COLLEGES AND UNIVERSITIES

The courts have repeatedly analyzed the constitutional due process rights of students and of faculty and other employees in the university setting. Most federal courts have either found that students have a liberty or property interest in continuing education sufficient to give rise to procedural due process rights[14] or have assumed that such a property right

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8. *Id.* at 348.

9. *Id.* at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

10. Murakowski v. Univ. of Del., 575 F. Supp. 2d 571, 585–86 (D. Del. 2008) (quoting Bd. Of Curators v. Horowitz, 435 U.S. 78, 88, 98 (1978)) ("Contrary to [the student's] assertion, neither a full-scale adversarial proceeding similar to those afforded criminal defendants, nor an investigation, which would withstand such a proceeding, is required to meet due process.").

11. Hammock ex rel. Hammock v. Keys, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000); Flaim v. Medical College of Ohio, 418 F.3d 629, 635 (6th Cir. 2005) (describing as an "unhelpful observation that disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities").

12. *Mathews*, 424 U.S. at 348–9.

13. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).

14. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961) ("[T]he right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value."); Woodis v. Westark Cmty Coll., 160 F.3d 435, 437, 440 (8th Cir. 1999) (finding that procedural due process applied to nursing student in disciplinary action by community college); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("[A] student facing expulsion or suspension from a public educational institution is entitled to the protections of due process"); Stoller v. Coll. of Med., 562 F. Supp. 403, 412 (M.D. Pa. 1983) ("[A] graduate student has a 'property' interest in continuing his studies."); Hart v. Ferris State Coll., 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) ("[T]he threat of suspension or expulsion implicates . . . property and liberty interests in public

exists.[15] (As noted previously, courts have generally found that pursuit of an education is not a fundamental right or liberty for purposes of substantive due process.)[16]

In cases involving student discipline, there are several factors that may lessen the specific procedural protections required to satisfy due process. First, if the level of discipline is significantly less than expulsion, fewer procedural protections may be required. Second, when students are disciplined for academic misconduct, such as plagiarism or cheating, courts typically require due process protections that are less elaborate than ones that apply when students are disciplined for non-academic misconduct.[17] However, neither of these factors is likely to apply in disciplinary proceedings arising from Title IX investigations involving allegations of sexual misconduct: as one court recently noted, "the same due process standards applicable to 'grade school food-fights' should not also apply to disciplinary proceedings in higher education, where adult students face expulsion for allegations of sexual assault."[18]

The seminal case involving constitutional due process rights of students subject to serious discipline is *Dixon v. Alabama State Board of*

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education and reputation, and that such interests are within the purview of the due process clause of the Fourteenth Amendment."); Hall v. Univ. of Minn., 530 F. Supp. 104, 107 (D. Minn. 1982) ("A student's interest in attending a university is a property right protected by due process"). Other courts have found no protected property interest. *See* Osteen v. Henley, 13 F.3d 221, 223 (7th Cir. 1993) ("[I]t is an open question in this circuit whether a college student as distinct from an elementary or high school student has a property right in continued attendance . . . ."); Lee v. Univ. of Mich.-Dearborn, No. 5:06-CV-66, 2007 U.S. Dist. LEXIS 72236, at *28–29 (W.D. Mich. Sept. 27, 2007) (finding the question unresolved)

15. Tigrett v. Rector & Visitors of Univ. of Va., 290 F.3d 620, 627 (4th Cir. 2002) (assuming a property interest without deciding whether one exists). In *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Supreme Court held that the existence of a property right was unnecessary to determine, as the Court simply assumed the existence of a right for the purposes of dismissing the defendant's due process claim. *Id.* at 223. In the other major case on this issue, *Board of Curators of University of Missouri. v. Horowitz*, 435 U.S. 78, 98 (1978), the Supreme Court similarly assumed both a liberty and a property interest for the purpose of dismissing the defendant's due process claim. *Id.* at 91–92. The Sixth Circuit has issued contradictory rulings on this point. *Compare* McGee v. Schoolcraft Cmty. Coll., 167 F. App'x 429, 437 (6th Cir. 2006) ("The issue of whether a student's interest in continued enrollment at a post-secondary institution is protected by procedural due process has not been resolved."), *with* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 633 (6th Cir. 2005) ("In this Circuit, we have held that the Due Process Clause is implicated by higher education disciplinary decisions.").

16. *See* p. 102 *supra*.

17. *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 634 (6th Cir. 2005) (noting that in a case involving a disciplinary, rather than an academic, expulsion, the court is to "conduct a more searching inquiry.") *see generally* Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J. COLL. & UNIV. L. 511 (2013).

18. Marshall v. Ind. Univ., No. 1:15-cv-00726-TWP-DKL, 2016 U.S. Dist. LEXIS 32999, at *8 (S.D. Ind. Mar. 15, 2016).

Education.[19] In *Dixon,* the Fifth Circuit articulated "the nature of the notice and hearing required by due process prior to expulsion from a state college or university."[20] As a general matter, a student threatened with expulsion is entitled to notice that "contain[s] a statement of the specific charges and grounds which, if proven, would justify expulsion."[21] And where the charge is misconduct,

> a hearing which gives 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. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required . . . Nevertheless, . . .the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to . . . an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the [administrator] directly, the results and findings of the hearing should be presented in a report open to the student's inspection.[22]

Similarly, faculty members and other university employees may have a property right or liberty interest sufficient to warrant procedural due process protection,[23] though generally not sufficient to warrant substantive due process protection[24] and therefore may be entitled to procedural due process when subject to significant discipline.[25] One federal appellate court set forth its views as to minimum legal procedural safeguards in cases involving terminations of faculty in the academy:

> These safeguards may include (1) written notice of the grounds for termination; (2) disclosure of the evidence supporting termination; (3) the right to confront and cross-examine adverse witnesses; (4) an opportunity to be heard in person and to present witnesses and

19. Dixon v. Ala. St. Bd. of Ed., 294 F.2d 150 (5th Cir. 1961).
20. *Id.* at 158.
21. *Id.*
22. *Id.* at 159.
23. Bd. of Regents v. Roth, 408 U.S. 564, 576–77 (1972)
24. Nicholas v. Pa. State Univ., 227 F.3d 133, 142 (3d Cir. 2000); Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (stating that professor's interest in position in university department "is essentially a state law contract right, not a fundamental interest embodied in the Constitution"); Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989) (finding "no clearly established constitutional right to substantive due process protection of continued public employment" in Ninth Circuit as of 1984). *But see* Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989) ("[S]chool authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status are liable for a substantive due process violation.").
25. *See generally* William Kaplin and Barbara Lee, The Law of Higher Education (5th Ed. 2013) at 288-295.

documentary evidence; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied upon.[26]

Given the long existing requirement for due process protections in student and employee discipline cases, colleges and universities have developed fairly comprehensive policies governing the investigations and appeals of such discipline. These policies were often the product of the shared governance model that is unique to colleges and universities, a model under which many campus constituencies (particularly faculty and student groups) had a significant role in drafting policies applicable to them. This involvement helped ensure that the policies provided adequate due process. For faculty, many universities' have policies based on those recommended by a joint committee representing the AAUP and the Association of American Colleges and Universities.[27] Adopting and following such policies largely insulated universities from due process liability. Courts generally deferred to universities, particularly when they followed these established hearing and appeal procedures. Therefore, until recently, constitutional due process challenges by students or faculty members disciplined for misconduct generally fared very poorly.

RECENT CASES ADDRESSING DUE PROCESS RIGHTS IN RELATION TO TITLE IX INVESTIGATIONS AND DISCIPLINE

Recently, colleges and universities have begun to change their established policies and procedures to address concerns regarding sexual misconduct on campus. One essential statute addressing sexual misconduct at colleges and universities is Title IX of the Education Amendments of 1972 ("Title IX"), which covers educational programs or activities operated by recipients of Federal financial assistance.[28] Title IX and its implementing regulations prohibit discrimination based on sex.[29] Sexual harassment, which includes acts of sexual violence, is a form of sex discrimination (referred herein as "sexual misconduct"). At the federal level, Title IX is enforced by the United States Department of Education Office for Civil Rights (OCR), which has the authority to investigate colleges and universities to ensure compliance with Title IX, with the most

26. Chung v. Park, 514 F.2d 382, 386 (3rd Cir. 1975). *See also* Levitt v. Univ. of Tex. at El Paso, 759 F.2d 1224, 1228 (5th Cir. 1985) (stating that a hearing should be before "a tribunal that possesses some academic expertise and apparent impartiality toward the charges").

27. *See* AM. ASSOC. OF UNIV. PROFESSORS, AAUP POLICY DOCUMENTS & REPORTS 91-93 (11th ed. 2015); The Law of Higher Education, at 638–639.

28. 20 U.S.C. §§ 1681–1688 (2012).

29. *See* 34 C.F.R. Part 106 (2016).

serious potential sanction being a termination of Federal financial assistance, which may include federally insured student loans.

In addition to conducting investigations, "OCR issues guidance documents—including interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice—in order to further assist schools in understanding what policies and practices will lead OCR to initiate proceedings to terminate Federal financial assistance."[30] OCR also issues responses to Frequently Asked Questions and "Dear Colleague Letters."However, guidance documents, including OCR's Dear Colleague letters, do not have the force of law or regulation. As OCR recently explained "it is Title IX and the regulation, which has the force and effect of law, . . . not OCR's 2011 (or any other)" Dear Colleague letter.[31] Therefore, attempts by universities to rely on a defense that they were legally obligated to modify their policies as a result of OCR Dear Colleague letters have been rejected by the courts.[32]

Starting largely with its 2011 Dear Colleague letter, and continuing with other guidance documents, OCR sought to pressure universities to alter their policies governing the investigation, discipline and appeals in cases involving sexual misconduct.[33] Many of the recommendations in the 2011 Dear Colleague letter impact the due process procedures applicable in investigations and discipline for allegations of sexual misconduct. Some of the significant aspects of the letter include recommending that the appropriate burden of proof is the preponderance

30. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Dep't of Educ., to James Lankford, Chairman, Subcomm. on Regulatory Affairs and Fed. Mgmt. (Feb. 17, 2016), http://chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20 RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf.

31. *Id.*

32. Yeasin v. Univ. of Kan., 360 P.3d 423 (Kan. Ct. App. 2015) (rejecting the University's argument that its Student Code needed to extend to off-campus misconduct in order to comply with Title IX requirements based on the 2011 Dear Colleague Letter.); *see* Complaint of Petitioner, Sanning v. Bd. of Trs. of Whitman Coll., No. 4:15-cv-05055-SAB (E.D. Wash. June. 22, 2015). This case arose from the termination of a Professor by Whitman College as the result of a Title IX investigation. The plaintiff alleged that in terminating him, the College violated its own policies and procedures and discriminated against him based on sex. One of the primary arguments advanced by the college was that it was required by law, in the form of the OCR's "Dear Colleague" letters, to depart from its own policies and procedures. In a short ruling, the court found that there were sufficient allegations that the College treated Sanning differently because of his sex which supposedly "led to a process which violated the Grievance Policy adopted by Whitman and ultimately lead to Sanning's employment being terminated." Sanning v. Bd. of Trs. of Whitman College, No. 4:15-cv-05055SAB (E.D. Wash. Dec. 9, 2015), https://docs.justia.com/cases/federal/district-courts/washington/waedce/4:2015 cv05055/68759/19.

33. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dept. of Educ. to Dear Colleague (Apr. 4, 2011) http://www2.ed.gov/about/offices/list/ocr/letters/ colleague-201104.html.

of the evidence and not clear and convincing evidence, recommending designated and reasonably prompt time frames for all major stages of the grievance procedures, recommending against the cross examination of the complainant, and recommending that the Title IX coordinator identify and address "any patterns or systemic problems that arise during the review of" sexual harassment complaints.[34]

In addition to issuing guidance, OCR frequently investigates universities for possible violations of Title IX. These investigations generally result in resolution agreements between the OCR and the university. Many of the agreements are very similar, which may be partially attributable to using the Department of Justice and OCR's 2013 agreements with University of Montana-Missoula as "a blueprint [for] colleges and universities across the country to take effective steps to prevent and address sexual assault and harassment on their campuses."[35] Among the provisions commonly included in OCR-university agreements are requirements that a university effectively disseminate information about Title IX; revise its policies and practices to ensure prompt and equitable resolution of sexual harassment and sexual assault allegations; report such proposed revisions to OCR; expand training and education for staff and students; conduct annual "climate assessments"; improve tracking and review of its handling of sexual harassment allegations; and assess how the university handled prior sexual harassment complaints and remedy any concerns identified.[36]

Many universities have substantially revised their policies and procedures both to address general concerns regarding sexual misconduct and in response to this pressure from OCR, whether due to OCR's guidance documents or pursuant to individual resolution agreements. These revisions to the policies have created substantial due process concerns and in turn lawsuits alleging violations of due process filed by individuals, generally students, who were subject to discipline under the new policies and procedures.

Initially, the historical tendency to defer to universities in due process cases continued in cases involving Title IX violations.[37] However, as the

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34. *Id.* at 7.

35. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana in Missoula (May 9, 2013), http://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and.

36. RISA LIEBERWITZ ET AL., AM. ASS'N OF UNIV. PROFESSORS THE HISTORY, USES, AND ABUSES OF TITLE IX 13 (2016), http://www.aaup.org/file/TitleIX-Report.pdf [hereinafter THE HISTORY, USES, AND ABUSES OF TITLE IX].

37. Doe v. Ohio State Univ., No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 21064 at *32 (S.D. Ohio Feb. 22, 2016) ("When a university provides a student facing disciplinary

cases under the revised Title XI procedures advanced, courts have demonstrated a new willingness to review, and to overturn, disciplinary decisions, particularly in cases involving claims of sexual misconduct. While some state courts found significant elements of the disciplinary process or procedures potentially unlawful on state law grounds,[38] federal courts have frequently addressed the claims using established procedural due process analysis.[39]

Several common themes emerge from the recent cases finding violations of due process rights. First, due process violations have been found where universities have substantially failed to follow their own internal procedures.[40] This is not to say that the failure to follow internal

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proceedings with a full hearing, advance notice of the charges and the evidence, and the opportunity to call witnesses and to confront the accuser, it is extremely difficult for that student to prove a due process violation. That appears to describe this case."); Doe v. Hazard, No. 5:15-CV-300-JMH, 2016 U.S. Dist. LEXIS 5478 at *16–17 (E.D. Ky. Jan. 15, 2016) ("[E]ven if Plaintiff had adequately alleged a violation of a clearly established right, Simpson's alleged due process errors are corrected by the new procedures and process that UK has put in place for Doe's third hearing."); Marshall v. Ohio Univ., No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291 at *38 (S.D. Ohio Nov. 17, 2015) (dismissing plaintiff's due process claims as plaintiff "does not allege that he did not have sufficient notice about the hearing, that he was not permitted to fully respond to and defend against A.H.'s allegations, or that he was denied an opportunity to fully participate in the hearing"); Salau v. Denton, 139 F. Supp. 3d 988, 1004 (W.D. Mo. 2015) ("Plaintiff was afforded adequate procedural rights by Defendants by way of notice of the charges, identification of the violations charged, and an opportunity to present his case even though he refused to participate.").

38. *See* Yeasin v. Univ. of Kan., 360 P.3d 423 (Kan. Ct. App. 2015) (deciding the case under the Kansas Judicial Relief Act and declining to reach the questions of Title IX or the First Amendment).

39. *Sterrett v. Cowan*, 85 F. Supp. 3d 916 (E.D. Mich. 2015)(Potential due process violation as plaintiff was allegedly denied the opportunity for a hearing prior to the issuance of the investigators final report on which the discipline was based.); *Tanyi v. Appalachian State Univ.*, No. 5:14-cv-170RLV, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015)(Plaintiff alleged a due process violation as the university "wrote that a second hearing was necessary because ASU did not adequately prove its case against him at the first hearing. Such reasoning is a plainly inadequate basis for granting a new hearing, and fundamentally unfair to Tanyi"); *Doe v. Alger,* 2016 U.S. Dist. LEXIS 43402 (W.D. Va., Mar. 31, 2016)(Plaintiff stated a viable procedural due process claim.); *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)(Discussed infra.)

40. Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 760 (D. Md. 2015) (allowing a claim by students disciplined for alleged sexual misconduct to proceed as "Plaintiffs allege that [Salisbury University] SU Defendants were negligent in their direct and personal treatment of Plaintiffs, as evidenced by their failure to adhere to SU's policies and procedures"); *compare* Yeasin, 360 P.3d at 424 (Kan. Ct. App. 2015) (ordering that a university reinstate a student as the university did not follow its Student Code and therefore had no authority to expel the student, rejecting the Universities defense that it needed to interpret the Code in the manner it did in order to comply with Title IX), *with* Howe v. Pa. State Univ.-Harrisburg, No.1:16-0102, 2016 U.S. Dist. LEXIS 11981, at *16 (M.D. Pa. Feb. 2, 2016) (finding no due process violation when the university followed its Code of Conduct).

procedures alone violates due process.[41] Instead, the existing internal procedures likely satisfied due process protections, and the deviation from these procedures removed this protection.[42] The deviation from the procedures also creates significant potential problems because it may create an ad hoc procedure with the consequential failure to ensure adequate safeguards, such as notice as to both the charges and the rules governing the proceedings, an impartial decision maker, and a clear decision. Second, potential due process violations have been recognized where there was not an adequate hearing or a hearing result in favor of the accused was not adopted. This includes cases where no in-person hearing was held,[43] where a university official involved in the investigation of the alleged misconduct has become excessively involved in the decision making or appeal of any discipline,[44] and where university officials reconsidered or reheard the case after the student was initially found not guilty.[45] One recent decision provides an example of both themes.

The case involved a student expelled by George Mason University (GMU) in Virginia.[46] The primary factual issue was whether an admitted sexual relationship between a male student at GMU (Doe) and a female student at another university (Roe) crossed the line from consensual to non-consensual.[47] In May 2014, Roe filed a complaint with the GMU police department, which reported the incident to Brent Ericson, the Director of the Office of Student Conduct at GMU.[48] From June 2014 through late August 2014, the Roe communicated frequently with Ericson.[49] GMU ultimately charged Doe with sexual misconduct,

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41. Korte v. Curators of Univ. of Missouri, 316 S.W.3d 481, 488 (Mo. Ct. App. 2010) ("Noncompliance with its own procedures does not constitute a due process violation if the hearing provided exceeds the process constitutionally required.").

42. Furey v. Temple Univ., 730 F. Supp. 2d 380, 394 (E.D. Pa. 2010); Rone v. Winston-Salem/Forsyth County Bd. Of Educ., 701 S.E.2d 284, 292 (N.C. Ct. App. 2010).

43. *See* Doe v. Pa. State Univ., No. 4:15-cv-02072 (M.D. Pa. Oct.28, 2015).

44. Doe v. Rector & Visitors of George Mason Univ., No. 1:15-cv-209, 2016 U.S. Dist. LEXIS 24847, at *33 (E.D. Va. Feb. 25, 2016).

45. Sterrett v. Cowan, 85 F. Supp. 3d 916, 924 (E.D. Mich. 2015) (recognizing a potential due process violation as plaintiff was allegedly denied the opportunity for a hearing prior to the issuance of the investigators final report on which the discipline was based); Tanyi v. Appalachian State Univ., No. 5:14-cv-170RLV, 2015 U.S. Dist. LEXIS 95577, at *16–17 (W.D. N.C. July 22, 2015) (reporting that Plaintiff alleged a due process violation as the university "wrote that a second hearing was necessary because ASU did not adequately prove its case against him at the first hearing. Such reasoning is a plainly inadequate basis for granting a new hearing, and fundamentally unfair to Tanyi"); Doe v. Hazard, No. 5:15-CV-300-JMH, 2016 U.S. Dist. LEXIS 5478, at *4 (finding due process errors with the hearing as the Office of Student Conduct, rather than the Hearing Panel, made decisions regarding the conduct of the hearing).

46. *Rector & Visitors of George Mason Univ.*, 2016 U.S. Dist. LEXIS 24847, at *1.

47. *Id.* at 42.

48. *Id.* at 8.

49. *Id.*

focusing primarily on one incident dated October 27, 2013.[50] The allegations were initially adjudicated by a three-member panel made up of GMU faculty members and staff.[51] The panel held a ten hour hearing and both Doe and Roe had the opportunity to testify, call witnesses, and submit evidence.[52] On September 12, 2014, the panel issued a decision finding Doe not responsible on all of the charges against him.[53] Roe sought to appeal.[54]

The court found that the appeal request did not meet the normal GMU appeal requirements.[55] Nonetheless, Ericson permitted Roe's appeal and assigned the appeal to himself.[56] In deciding the appeal, Ericson engaged in numerous ex parte contacts, including with Roe, Doe and each of the hearing panelists.[57] On October 10, 2014, Ericson issued a decision finding Doe guilty of the charges.[58] Ericson did not explain the factual basis for his findings or the grounds for reversing the decision of the hearing panel.[59] However, in discovery in the lawsuit, Ericson disclosed that he considered incidents other than the one on October 27, 2013, and that he had made up his mind regarding Doe's guilt prior to meeting with Doe.[60]

In finding that GMU violated Doe's due process rights, the court explained,

> In sum, the undisputed record facts disclose that plaintiff was deprived of reputational liberty without due process of law. Throughout the disciplinary process, plaintiff was led to believe that he was charged with conduct violations for a single incident . . . . After his acquittal by a panel, plaintiff was subjected to an appellate process before an administrator who deviated from internal policy by using an alleged procedural irregularity to justify a *de novo* review of the facts, again without informing plaintiff of the scope of the review. More problematically, the administrator conducting the *de novo* factual review met *ex parte* and off the record with plaintiff's accuser. This administrator then found plaintiff liable and imposed sanctions upon him without providing a basis for the decision.
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50. *Id.* at 9.
51. *Id.* at 12.
52. *Id.*
53. *Id.* at 13.
54. *Id.*
55. *Id.* at 13–14.
56. *Rector & Visitors of George Mason Univ.*, 2016 U.S. Dist. LEXIS 24847, at *14.
57. *Id.* at 14–15.
58. *Id.* at 15.
59. *Id.*
60. *Id.* at 55.

> The procedural inadequacy on this record was not the failure to provide a specific form of notice or the failure to structure proceedings in a particular manner. Rather, the conclusion reached here is simply that due process is violated where a state-run university (i) fails to provide notice of the full scope of the factual allegations in issue in a disciplinary proceeding, (ii) deviates from its own procedures in permitting an appeal of a finding of no responsibility, (iii) conducts a *de novo* administrative review of the charges without affording an adequate opportunity to mount an effective defense, including by holding off-the-record and *ex parte* meetings with the accuser, and (iv) fails to provide a basis for its decision such that meaningful review can occur.[61]

PROCEDURES TO ENSURE THAT DUE PROCESS RIGHTS ARE SATISFIED

The due process challenges faced as a result of the heightened focus on sexual misconduct have received a significant amount of attention from more than just the courts. On March 24, 2016, the AAUP issued a draft report entitled The History, Uses, and Abuses of Title IX that reviewed some of the pending controversies involving recently developed Title IX procedures.[62] While the report focused heavily on the impact of current interpretations of Title IX on academic freedom, it also identified tensions between current interpretations of Title IX and the due process rights of students and faculty.[63] It found that questions of free speech and academic freedom have been ignored in recent positions taken by the Office of Civil Rights (OCR) of the Department of Education (DOE),[64] which is charged with implementing Title IX, and by university administrators who are expected to oversee compliance measures.

The report provides a number of recommendations for OCR and the Department of Education and for university administrators to strengthen the due process protections accorded in Title IX investigations. The report stressed that "OCR should increase its attention to protecting due process in all stages of Title IX investigations and proceedings, [and that] OCR should refine its compliance process to develop the potential to work with universities[65] to create policies and procedures for receiving and addressing Title IX complaints in ways that address problems of sexual discrimination[66] while also protecting academic freedom[67] and free speech

61. *Id.* at 43–45.
62. THE HISTORY, USES, AND ABUSES OF TITLE IX, *supra* note 36.
63. *Id* at 6.
64. *Id.at 16*–17.
65. *Id.* at 49–50.
66. *Id.* at 48–49.
67. *Id.*

and providing due process for all parties."[68] The report also recommends to university administrators that "in order to ensure adequate due process, shared governance must accompany the creation of any campus adjudication system and drive every stage of its operation."[69]

It is noble and necessary for universities to address and prevent sexual misconduct on campus. Universities are also under pressure from OCR to enact particular investigatory and appeal procedures. However, universities also have an obligation, both legally and morally, to provide proper due process protections to their students and employees. Universities have traditionally provided such due process protections, and such protections should not simply be dismantled in an attempt to address concerns regarding sexual misconduct. Rather, universities must balance the need to address sexual misconduct with the need for due process, while also honoring the long tradition of student and faculty involvement on campus. This can best be accomplished by careful revisions to existing policies and procedures, and adherence to traditional due process protections, such as those in AAUP's recommended academic due process standards. The process of revising these policies should follow the normal protocol for involvement of faculty, students, and other interested parties. In that way universities can address sexual misconduct while honoring the due process rights of students and employees and the tradition of shared governance.

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68. *See* Executive Summary, http://www.aaup.org/report/history-uses-and-abuses-title-ix.

69. AAUP Report at 49.

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