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Campus Judiciaries on Trial: An Update from the Courts

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Abstract

Colleges and universities have adjudicated countless allegations of sexual assault among their students despite their lack of both the tools available to law enforcement to ensure a thorough investigation and the ability to conduct a trial in a fair and orderly manner. Unfair proceedings that lead to unreliable outcomes benefit no one. Both victims and the accused suffer when allegations of serious felonies are adjudicated in campus judiciaries that are underprepared and ill-equipped to handle such grave matters. Many recent court decisions and ongoing legislative efforts are pushing the pendulum back in the other direction toward fairer processes on campus, but there is still a long way to go, and getting there is going to require the active participation of everyone who cares about students' fundamental rights.

Students accused of misconduct on college campuses have long suffered from a lack of due process in university adjudications. From its founding in 1999, for example, the Foundation for Individual Rights in Education (FIRE) has received complaints from students alleging that they were treated unfairly in campus proceedings.

Over the past five years, however, a particularly dire situation has emerged for the increasing number of students who find themselves accused of sexual misconduct on campus. Under tremendous pressure from the federal government, colleges and universities routinely use their internal disciplinary processes to adjudicate claims of sexual assault, often with shockingly little regard for the due process rights of students who stand accused of one of society's most heinous offenses. The result is students whose lives are dramatically altered by patently unfair proceedings.

Key Points

- The U.S. Department of Education's Office for Civil Rights has mandated that universities use a "preponderance of the evidence" standard when adjudicating claims of sexual harassment and sexual violence. This constitutes a remarkable erosion of the due process protections afforded students who are accused of serious misconduct.
- Under the increasingly popular "single investigator" model, one person essentially fulfills the roles of detective, prosecutor, judge, and jury.
- Students found "responsible" in campus proceedings are often expelled and face serious challenges when seeking to enroll at other schools.
- OCR's unprecedented intrusion into university student conduct administration has taken the problem to a new level. Besieged college administrators find themselves struggling to comply with a breathtaking array of new regulations and requirements while under the federal microscope.

This paper, in its entirety, can be found at **http://report.heritage.org/lm165**

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Increasingly, these students are seeking redress in federal and state courts, alleging that their universities violated their due process rights, breached contractual obligations, and even discriminated against them on the basis of their sex. So far, the results have been mixed. It is clear that in many cases, these students do have cognizable legal claims against their universities. However, it is also clear that many judges—particularly federal judges—are extremely reluctant to interfere in the internal workings of university judicial systems absent a showing of the most egregious disregard for basic fairness.

This paper will take a closer look at recent rulings and analyze what they suggest for campus due process protections. First, however, it is useful to discuss how we arrived at where we are today.

Development of Federal Standards in Campus Sexual Assault Cases

The major law governing campus sexual assault is Title IX of the Education Amendments of 1972, and the text itself is brief: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Many people associate Title IX primarily with rules requiring parity between men's and women's athletic teams, but Title IX actually prohibits all types of sex discrimination in educational programs receiving federal funds, and a federal court ruled in 1977 that universities could be liable under Title IX not just for overt sex discrimination, but also for failing to respond to allegations of sexual harassment by professors.[1]

By the mid-1990s, federal courts, in tandem with the U.S. Department of Education (ED), had interpreted institutional responsibilities under Title IX to include not only responding to allegations of harassment by professors, but also responding to claims that harassment by fellow students created an educational environment so hostile as to amount to discrimination on the basis of sex. In 1997, for example, the Education Department's Office for Civil Rights (OCR), which oversees enforcement of Title IX, released official guidance affirming that schools must respond to student-on-student harassment that creates a "hostile environment" because a failure to do so "permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX."[2]

After many years of gradual expansion, things changed sharply in the fall of 2010 when the Obama Administration began to take a much more aggressive stance toward the enforcement of Title IX. On April 4, 2011, OCR sent a groundbreaking "Dear Colleague" letter to every college and university receiving federal funding—all but a handful nationwide—on the subject of their obligation under Title IX to respond to claims of sexual harassment and sexual violence.[3] The 19-page "significant guidance document" contained numerous directives on how schools must address claims of sexual assault in order to be compliant with ED's view of Title IX. Two of those directives in particular had profound implications for due process on campus.

First, the 2011 Dear Colleague letter mandated that universities use a "preponderance of the evidence" (50.01 percent certainty) standard when adjudicating claims of sexual harassment and sexual violence. While some schools were already using the preponderance standard, many were not. FIRE surveyed the standards of evidence in use at the top 100 colleges and universities nationwide and found, among other things, that prior to the Dear Colleague letter, nine out of the top 10 institutions were using standards of evidence higher than preponderance.[4]

This mandate alone constitutes a remarkable erosion of the due process protections afforded students who are accused of serious misconduct. While supporters of the preponderance standard argue that it is the same standard used in civil proceedings, the reality is that litigants in civil courts have many procedural protections that are unavailable to students in campus disciplinary proceedings: legal representation, the right to discovery of evidence, the right to cross-examine opposing witnesses, rules of evidence guaranteeing the exclusion of hearsay and other irrelevant or unreliable evidence, and sworn witnesses who testify under penalty of perjury, to name just a few.[5]

Moreover, although universities cannot impose criminal penalties on students who are found responsible for sexual assault in campus proceedings, such hearings do have a quasi-judicial nature, addressing society's most heinous crimes, including rape and sexual misconduct. Students found "responsible" in campus proceedings are often expelled and face serious challenges when seeking to enroll at other schools.

Second, the 2011 Dear Colleague letter also mandated that "[i]f a school provides for appeal of the findings or remedy, it must do so for both parties." This provision is offensive to basic notions of fairness, given its resemblance to constitutionally impermissible double jeopardy.

The letter also "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing." While some universities allow parties to cross-examine one another through a third party, such as the hearing officer, the result is often the effective denial of what has been called the "greatest legal engine ever invented for the discovery of the truth."[6] In a proceeding at the University of California, San Diego, for example, the hearing officer through whom the accused student was allowed to question his accuser asked only nine of the 32 questions submitted by the accused student.[7]

Since the 2011 Dear Colleague letter's issuance, the number of colleges and universities under OCR investigation for alleged Title IX violations has been increasing rapidly. In May 2014, when OCR first made public the list of schools under investigation, the number stood at 55. By August 2015, 128 schools were under investigation.[8]

Even the White House has gotten involved. In January 2014, President Barack Obama established the White House Task Force to Protect Students from Sexual Assault. In April 2014, the task force issued its first report, which did nothing to allay concerns over the erosion of students' due process rights.

Perhaps most worryingly, the task force report appeared to be enthusiastic about the increasing popularity on college campuses of the "single investigator" model, in which "a trained investigator or investigators interview the complainant and alleged perpetrator, gather any physical evidence, interview available witnesses—and then either render a finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender."[9] Under this model, one person essentially fulfills the roles of detective, prosecutor, judge, and jury.

Impact on Accused Students

Regrettably, the pressure on universities to comply with the ever-moving target of OCR's expectations has had disastrous consequences for accused students' due process rights.

Shortly after the Dear Colleague letter was issued in April 2011, for example, Stanford University lowered its standard of evidence from "beyond a reasonable doubt" to "a preponderance of the evidence" *in the middle of an accused student's disciplinary proceedings*—proceedings that, even with a higher evidentiary standard in place, already raised due process concerns.[10] For one thing, Stanford's sexual assault policy at the time provided that an individual could not consent to sexual activity "if intoxicated by drugs and/or alcohol."[11] In other words, sex with anyone who was drunk, whether or not that person was actually incapacitated, constituted sexual assault at Stanford.

Moreover, members of Stanford's campus tribunals were trained with materials aimed at women in abusive relationships and the counselors and social workers who work with them—materials wholly inappropriate for people who are supposed to be neutral fact-finders. Key points used to train panel members included "When people take a neutral stand between you and your abusive partner, they are in effect supporting him and abandoning you" and "Everyone should be very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence. The great majority of allegations of abuse—though not all—are substantially accurate."[12]

On May 4, 2011, the hearing panel found, by a preponderance of the evidence, that the student was responsible for sexual assault because "the impacted party was intoxicated by alcohol."[13]

Similarly, at Occidental College, a male student was found responsible for sexual assault in 2013 because the adjudicator found that his accuser had been incapacitated at the time of the sexual encounter—despite the accused student's own intoxication and despite text messages from the accuser asking "do you have a condom?" and enthusiastically telling a friend she was about to have sex. After he was expelled from Occidental, the student filed a lawsuit against the college, asking a California state court to order Occidental to set aside its finding of responsibility.[14] A hearing in the Occidental student's case is scheduled for October 2015.

Meanwhile, numerous other lawsuits by students accused of sexual misconduct ("accused-student lawsuits") are working their way through state and federal courts. In fact, since the 2011 Dear Colleague letter was issued, more than 50 students have filed lawsuits alleging that they were denied basic

fairness in university sexual misconduct proceedings. In general, these lawsuits allege one or more of the following:

- Discrimination on the basis of sex, in violation of Title IX;
- Violation of constitutional due process rights; and/or
- Breach of contract.

Traditionally, courts have been very reluctant to interfere with the inner workings of university judicial systems, granting significant deference to campus disciplinary decision-making. However, recent decisions suggest that this may be starting to shift and that courts, particularly state courts, may be increasingly willing to step in when unjust university proceedings threaten a student's educational and career prospects. Nevertheless, these lawsuits remain an uphill battle for plaintiffs, and a look at the three major claim types and how they have played out in court so far will help to shed light on why that is so.

Title IX

In several of the early accused-student lawsuits, plaintiffs brought Title IX sex discrimination claims that survived a university's motion to dismiss. One such complaint was filed by Dez Wells, a former student-athlete at Xavier University who claimed he was falsely accused of sexual assault by his resident adviser. Among other things, Wells alleged that the university had created a discriminatory environment in which he, as a male student accused of sexual assault, "was fundamentally denied due process as to be virtually assured of a finding of guilt."[15] This, Wells alleged, constituted sex discrimination in violation of Title IX.

A federal district court denied the university's motion to dismiss Wells's complaint, holding that Wells had sufficiently alleged "a pattern of decision-making"—based on his gender—"that has ultimately resulted in an alleged false outcome that he was guilty of rape."[16] Following his success on the motion to dismiss, Wells ultimately settled his claims with the university.[17]

While this early success was encouraging to accused-student plaintiffs, the *Wells* case has proven to be something of an outlier. In the past eight months alone, judges have dismissed six accused-student plaintiffs' Title IX claims,[18] holding in each case that the student had not shown evidence pointing to gender discrimination as the motive for the university's wrongful actions. Although the judge in *Wells* did not require such specific facts, the consensus among later decisions is that *Wells* was inconsistent with legal standards requiring a plaintiff to provide factual support in order for a sex discrimination claim to survive a motion to dismiss.

- In *Tanyi v. Appalachian State University*, for example, the court dismissed plaintiff's Title IX claim for failing to offer more than his "subjective belief" that the university's actions against him were due to his gender, explicitly stating that it "declines to follow the *Wells* ruling."[19]
- Similarly, in *Doe v. Columbia University*, the judge, in dismissing the plaintiff's Title IX claim, also specifically "decline[d] to follow the *Wells* decision," stating that the *Wells* court appears to have applied a "more lenient pleading standard" than that required by the Supreme Court.[20]

Notably, courts generally do not treat evidence that a university's procedures are biased against accused students as evidence of gender bias, even though such students are overwhelmingly male. This is because, as the *Columbia* court put it, such evidence could just as easily be "prompted by lawful, independent goals, such as a desire (enhanced, perhaps, by the fear of negative publicity or Title IX liability to the victims of sexual assault) to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity."[21]

Rather than alleging bias against accused students generally, therefore, plaintiffs alleging Title IX violations must be able to show facts such as "statements touching upon gender made by members of the disciplinary panel or the university at large, or perhaps cite patterns—not a single instance—of decision-making that would also demonstrate the influence of entrenched gender discrimination."[22]

- In *Harris v. St. Joseph's University*, for example, the plaintiff's Title IX claim survived the university's motion to dismiss because, according to the complaint, "the head of SJU's ethics department and a member of the Community Standards

Board [ ] stated to Plaintiff's father that SJU had 'adopted a policy favoring female accusers as SJU was concerned about Title IX charges by female students.'" The court allowed the plaintiff's Title IX claim to proceed, holding that "[a]llegations such as statements by members of the disciplinary tribunal or pertinent university officials are sufficient at this stage of the proceedings to support a Title IX claim."[23] Harris settled his claim against the university.[24]

- Similarly, the plaintiff's Title IX claim in *Doe v. Washington and Lee University* was allowed to proceed because his complaint alleged that the university's Title IX officer had spoken favorably about an article titled "Is It Possible That There Is Something in Between Consensual Sex and Rape...And That It Happens to Almost Every Girl Out There?" According to plaintiff's complaint, that article "posits that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express"—a situation that the court noted parallels "the circumstances under which Plaintiff was found responsible for sexual misconduct."[25]

As of this writing, a substantial number of accused-student Title IX claims are in the earliest stages of litigation, including cases pending against Brandeis University, Brown University, Yale University, Amherst College, and many others. The large number of such claims dismissed in recent months suggests that accused-student plaintiffs continue to face an uphill battle in alleging gender discrimination, but plaintiffs who are able to offer concrete facts suggesting gender bias may see their claims survive a motion to dismiss, at which point universities often seem eager to settle rather than proceed with litigation.

Due Process

A number of accused students have also alleged that their universities' actions violated their due process rights protected in the Fifth and Fourteenth Amendments to the Constitution. Although state governmental entities themselves are generally immune from federal lawsuits (with some notable exceptions, including Title IX claims),[26] federal law allows public university students to sue individual people—such as university administrators—for depriving them of their constitutional rights while acting pursuant to their official duties.[27]

For students at public universities, Section 1983 claims seem like a natural option for obtaining redress from the courts. However, decisions to date suggest that for a federal court to intervene in a state university's internal proceedings, the alleged violations of due process must be particularly severe.

In its July 2015 decision in *Tanyi v. Appalachian State University*, for example, a federal district court in North Carolina dismissed most of the plaintiff's due process claims, allowing just two to proceed. *Tanyi* stems from a September 2011 group sexual encounter involving former Appalachian State University football player Lanston Tanyi, his roommate, and a female student identified in the pleadings only as "Student A." Tanyi and his roommate claim the encounter was consensual; Student A claims it was not. Shortly after that encounter, another female student—"Student B"—came forward to allege that Tanyi was one of several student athletes who had raped her in April 2011. According to Tanyi's complaint, he "had no idea who [Student B] was."

Shortly after the encounter with Student A, Tanyi learned that the university was charging him with various forms of sexual misconduct against both Student A and Student B. At his first hearing, on Student A's allegations, Tanyi and his roommate were tried together. The university assigned them a philosophy graduate student as their adviser; Student A was assigned a licensed attorney. Tanyi and his roommate were found responsible, and Tanyi was suspended.

Tanyi appealed, arguing that he was entitled to a hearing separate from the hearing for his roommate, who—unlike Tanyi—already had a disciplinary record at the university. The university granted his request for a separate hearing, at which he was found not responsible and allowed to return to campus.

The university held a hearing on Student B's allegations at which Tanyi was also exonerated. However, after a Facebook post by Student A alleging that the university was attempting to protect its football players from rape allegations garnered significant media attention, Student B appealed the university's ruling, and the university granted her a new hearing. The night before the second hearing, Tanyi learned that Student B was adding an allegation that he had harassed her in the weeks leading up to her appeal.

At the second hearing, Tanyi was again exonerated of the sexual assault charges, but he was found responsible on the new harassment charge. On the basis of that finding, he was banned from playing football for Appalachian State.

In addition to bringing a discrimination claim under Title IX, Tanyi's complaint alleged that a number of actions by university administrators had deprived him of his constitutionally protected due process rights. On the positive side, the judge in *Tanyi* held in no uncertain terms not only that "students at public universities maintain protected property interests in their continued enrollment," but also that "[s]tudents facing school discipline also possess a liberty interest in their reputations."[28] However, in ruling on Tanyi's seven individual due process claims, the court set a very high bar for what actually constitutes a due process violation in the university setting. In particular, the court dismissed a number of Tanyi's specific due process claims, holding that:

- The fact that Tanyi's adviser was a philosophy graduate student while Student A had a licensed attorney did not violate Tanyi's due process rights, since no "intricate knowledge of the law or extensive legal training" was necessary to represent him in a campus proceeding.

- The joint hearing with his roommate, who had a prior disciplinary record, was not prejudicial enough to violate his due process rights.

- The fact that one of the members of Tanyi's hearing panel had found against his roommate in a prior proceeding was not prejudicial enough to violate his due process rights.

- Disclosure of exculpatory witnesses is not required in student proceedings.

The court did find, however, that several of the university's actions were egregious enough for Tanyi's due process claims to survive the university's motion to dismiss. First, the court held that the university had "failed to articulate a legitimate reason for re-hearing Student B's rape allegations," and this was "fundamentally unfair to Tanyi."[29] The court also found that Tanyi had received inadequate notice of Student B's new harassment claim against him, holding that "[t]he essence of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[30]

A Michigan district court reached a similar result in *Sterrett v. Cowan*, acknowledging students' due process rights in campus proceedings but setting an extremely high bar for what actually violates those rights.[31] Among other things, the court held that "[t]here need be no delay between the time notice is given and the time of the hearing" and that "[n]otice as to the identity of an accuser or the opportunity to cross-examine an accuser is not part of the due process requirement."[32]

Nonetheless, the court did find two potential due process violations. First, a university administrator interviewed the plaintiff over Skype about an unspecified complaint against him without ever giving him any details—verbal or written—about the allegations. This, the court held, may have violated the plaintiff's due process right to adequate notice. The court also found that in denying the plaintiff a hearing after he had specifically requested one, administrators may have violated his due process rights.

Interestingly, several recent state court decisions have taken a far more expansive view of students' due process rights and have overturned university decisions on grounds of procedural unfairness. In *Doe v. University of California, San Diego*, a California Superior Court judge ordered UCSD to set aside its finding of responsibility and sanctions against a student after holding that the university's hearing against him was unfair.[33] The court was particularly concerned that the plaintiff was not given an adequate opportunity to cross-examine his accuser: The hearing officer through whom the plaintiff was allowed to question his accuser asked only nine of the 32 questions submitted by the plaintiff. Moreover, the court found that the fact that the accuser was placed behind a barrier during the proceedings unfairly limited the plaintiff's ability to confront her, noting "the importance of demeanor and nonverbal communication in order to properly evaluate credibility."

The court also found that the university improperly delegated the hearing panel's duty to render a decision to a single investigator: "It 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. 'Due process requires that a hearing...be a real one, not a sham or pretense.'"[34] This is a particularly noteworthy finding in light of the increasing popularity of the "single investigator" model praised by the Obama administration's Task Force to Protect Students from Sexual Assault.[35]

Several weeks later, another California Superior Court judge ordered the University of Southern California to stay its expulsion of a sophomore football player, also citing due process concerns.[36]

Meanwhile, a Tennessee Chancery Court judge recently reversed, on due process grounds, the University of Tennessee at Chattanooga's (UTC's) expulsion of a student for sexual assault.[37] This decision is of particular note because the accused student explicitly challenged UTC's interpretation of its "affirmative consent" standard, alleging that UTC had required him to prove himself innocent by offering evidence that he had received consent. Increasingly common on university campuses, "affirmative consent" standards generally define consent not as the absence of a "no," but rather as the presence of a "yes" or other clear verbal or non-verbal assent. California and New York have passed laws requiring state colleges and universities to adopt an affirmative consent standard, and other states are considering similar legislation.

The judge in the UTC case found that, as implemented by the university, UTC's affirmative consent policy was "flawed and untenable":

> [The accused] must come forward with proof of an affirmative verbal response that is credible in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts. Absent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party's consent strains credulity and is illusory.[38]

While this area of the law is evolving rapidly, the decisions to date suggest that when it comes to due process claims, accused students may be better off in state courts than in federal courts. In federal courts, students seeking relief must demonstrate that they were deprived of their constitutional rights to due process, whereas at least some state courts (such as in California and Tennessee) are able to overturn university decisions if they are demonstrably unfair, regardless of their constitutionality.

Breach of Contract Claims

In many states, courts have held that private universities are contractually bound by promises made in their student handbooks and other policies.[39] Accordingly, many accused-student lawsuits have included claims that universities breached their contractual obligations by failing to follow their own procedures in campus adjudications. So far, however, these claims have not proven successful for accused-student plaintiffs. In most cases, the issue is that a university's procedures were unfair, not that they were ignored—and unfairness itself does not generally create a breach of contract claim where the college has followed its own procedures.

In *Bleiler v. College of the Holy Cross*, for example, the plaintiff claimed (among other things) that the college violated its procedures by allowing two students to continue as hearing panel members despite the fact that they were Facebook friends with the complainant in the case. College procedures allowed students to request that panel members be disqualified for conflicts of interest but only promised that a substitution would be made if the college "deems there is information to suggest a potential conflict." Therefore, the court ruled that the mere fact that the plaintiff and the college disagreed about whether a conflict existed did not put the college in breach of contract:

> Irish communicated with the panel members who believed that they did not have a conflict of interest and determined that neither of the student panel members knew C.M. well. These actions by Irish on behalf of the College do not breach the reasonable expectations conveyed by the Handbook where the College complied with the procedures laid out in the Handbook for situations involving potential conflicts.[40]

Similarly, in *Yu v. Vassar College*, the court acknowledged that "a College is contractually bound to provide students with the procedural safeguards that it has promised" but dismissed the plaintiff's breach-of-contract claim because it found that "Vassar did not violate any of its own procedures."[41]

OCR: "Misinformed Interlopers"

Title IX is an important piece of legislation that serves a vital function, but over the years, it has been stretched beyond recognition to cover aspects of campus life not originally intended by Congress. The Department of Education's Office for Civil Rights bears the primary responsibility for ensuring compliance with Title IX, and in recent years, it has become clear that OCR must be reined in.

Although complaints of injustice in campus judiciaries are nothing new, OCR's unprecedented intrusion into university student conduct administration has taken the problem to a new level. Besieged college administrators find themselves struggling to comply with a breathtaking array of new regulations and requirements, all while under the microscope of the federal government.

In writing about how she "didn't sign on for this," a former student conduct administrator recently detailed the dramatic change in her profession following OCR's issuance of the April 4, 2011, Dear Colleague letter:

> It felt like a group of well-intended but misinformed interlopers had shown up to tell me how to do a job I had done for years. Absent any input from people in jobs like mine, this group of lawyers and policy specialists created a blueprint for an already existing structure, disregarding the years of effort undertaken to build it. We needed some renovation. They were requiring a gut rehab.[42]

Another administrator, writing anonymously in *Inside Higher Ed*, had yet sharper words for OCR, calling the Dear Colleague letter "a 19-page document that at best complicates my work, at worst undermines my judgment and my ability to make good decisions for my institution and my students."[43] Between the complicated new guidance and the skyrocketing number of Title IX investigations, OCR has put intense pressure on universities—which fear a loss of federal funding—in a way that has severely undermined the rights of accused students on campus. This must change.

Obviously, one possibility is simply that a change of Administrations in 2017 could result in OCR stepping back from its aggressive enforcement of Title IX on campus. Another possibility is that OCR's actions could be challenged under the Administrative Procedure Act (APA),[44] because the April 2011 Dear Colleague letter likely violated the APA by creating new substantive rules without providing for notice and comment as the act requires.

There are also various types of legislation at the state and federal levels that would help to protect accused students' due process rights. North Carolina and North Dakota, for example, have laws that guarantee public university students the right to counsel in campus disciplinary hearings (many universities' regulations prohibit the participation of attorneys in such proceedings).[45]

Recently introduced federal legislation would also require universities to take concrete steps to protect students' due process rights. The Safe Campus Act of 2015 (H.R. 3403), sponsored by Representative Matt Salmon (R–AZ), and a similar bill, the Fair Campus Act of 2015 (H.R. 3408), sponsored by Representative Pete Sessions (R–TX), would require universities nationwide to allow attorney participation in university judicial hearings. They would also require that universities disclose exculpatory evidence to accused students and would forbid universities from having individuals play multiple roles in the investigatory and adjudicatory process—a common practice under the popular "single investigator" model.

Finally, the national conversation around this issue must change. While most people have long understood the importance of due process and the rights of the accused generally, many people seem to have developed a blind spot when it comes to the issue of sexual assault. Advocates for the due process rights of those who are accused of sexual assault are often subject to crude accusations or called apologists for rape.[46]

As blogger Fredrik DeBoer recently wrote, too many people now treat "any reference to due process or rights of the accused, when it comes to sex crimes, as inherently evil, conservative, and misogynist." Their belief, he says, is that "if you suggest that we shouldn't operate under a blanket presumption of guilt when accusations of sex crimes are made, you deserved to be accused in similar terms."[47]

As a result, too many people are reluctant to speak out on this important issue. Victims' rights advocates are omnipresent, but too often there is a lack of vocal support for accused-students' rights, particularly within university administrations that are considering how best to address the issue of sexual assault on campus.

Conclusion

Colleges must enforce Title IX claims fairly and evenly to ensure that all students have equal access to an education. Colleges and universities all have disciplinary tribunals on campus to deal with cheating, stealing, violations of honor codes, and the like. But as the Rape, Abuse, & Incest National Network wrote in a letter to President Obama's sexual assault task force:

> It would never occur to anyone to leave the adjudication of a murder in the hands of a school's internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault? We need to get to a point where it seems just as inappropriate to treat rape so lightly.
>
> While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.[48]

Campus tribunals clearly are not designed or organized to handle complex crimes like rape or murder. Yet colleges and universities have adjudicated countless allegations of sexual assault among their students despite the fact that they lack both the tools available to law enforcement to ensure a thorough investigation and the ability to conduct a trial in a fair and orderly manner.

Unfair proceedings that lead to unreliable outcomes benefit no one. Both victims and the accused suffer when allegations of serious felonies are adjudicated in campus judiciaries that are underprepared and ill-equipped to handle such grave matters. Many of the recent court decisions discussed here, along with ongoing legislative efforts, are pushing the pendulum back in the other direction toward fairer processes on campus, but there is still a long way to go, and getting there is going to require the active participation of everyone who cares about students' fundamental rights.

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Endnotes

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14. Complaint, Doe v. Occidental College, No. BS147275 (Cal. Super. Ct. filed Feb. 19, 2014).
15. Amended Complaint at 18, Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014), ECF No. 7.
16. Wells v. Xavier Univ., 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014).
17. Alex Prewitt, *Terps Guard Dez Wells, Xavier Settle Lawsuit Over Expulsion*, Wash. Post (Apr. 24, 2014), *available at* https://www.washingtonpost.com/news/terrapins-insider/wp/2014/04/24/terps-guard-dez-wells-xavier-settle-lawsuit-over-expulsion.
18. Tanyi v. Appalachian State Univ., 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015); Doe v. Univ. of Mass. Amherst, 2015 U.S. Dist. LEXIS 91995 (D. Mass. July 14, 2015); Sahm v. Miami Univ., 2015 U.S. Dist. LEXIS 65864 (S.D. Ohio May 20, 2015); Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370 (S.D.N.Y. Apr. 21, 2015); Yu v. Vassar Coll., 2015 U.S. Dist. LEXIS 43253 (S.D.N.Y. Mar. 31, 2015); Blank v. Knox Coll., 2015 U.S. Dist. LEXIS 8205 (C.D. Ill. Jan. 28, 2015).
19. Tanyi v. Appalachian State Univ., 2015 U.S. Dist. LEXIS 95577, *25–26 (W.D.N.C. July 22, 2015).
20. Doe v. Columbia Univ., 2015 U.S. Dist. LEXIS 52370, *40–41 (S.D.N.Y. Apr. 21, 2015).
21. *Id.* at 34 (internal citations omitted). *See also* Sahm v. Miami Univ., 2015 U.S. Dist. LEXIS 65864, *12 (S.D. Ohio May 20, 2015) ("Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.").
22. Blank v. Knox Coll., 2015 U.S. Dist. LEXIS 8205, *11 (C.D. Ill. Jan. 26, 2015) (granting college's motion to dismiss plaintiff's Title IX claim.)
23. Harris v. St. Joseph's Univ., No. 13-3937 (E.D. Pa. Nov. 26, 2014).
24. Susan Kruth, *Saint Joseph's Settles Title IX Lawsuit Brought by Expelled Student*, The Torch (Jan. 8, 2015), *available at* https://www.thefire.org/saint-josephs-settles-title-ix-lawsuit-brought-expelled-student.
25. Doe v. Washington & Lee Univ., 2015 U.S. Dist. LEXIS 102426, *28–29 (W.D. Va. Aug. 5, 2015).
26. The Eleventh Amendment to the U.S. Constitution provides that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."
27. 42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." Claims brought under this statute are commonly referred to as "section 1983 claims."

28. Tanyi v. Appalachian State Univ., 2015 U.S. Dist. LEXIS 95577, *6 (W.D.N.C. July 22, 2015).
29. *Id.* at *16–17.
30. *Id.* at *17.
31. Sterrett v. Cowan, 2015 U.S. Dist. LEXIS 13056 (E.D. Mich. Feb. 4, 2015).
32. *Id.* at *13.
33. Tentative Ruling on Petition for Writ of Administrative Mandate, Doe v. Univ. of Cal., San Diego (Cal. Super. Ct. July 10, 2015).
34. *Id.* at 3.
35. *See supra* note 9.
36. Gary Klein & Lindsey Thiry, *Judge Opens Door for Bryce Dixon to Return to USC Football Team*, L.A. Times (Aug. 12, 2015), *available at* http://www.latimes.com/sports/usc/uscnow/la-sp-usc-bryce-dixon-20150812-story.html.
37. Mock v. Univ. of Tenn. at Chattanooga, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015).
38. *Id.* at 12.
39. *See*, *e.g.*, Kuritzky v. Emory Univ., 669 S.E.2d 179, 181 (Ga. App. 2008) ("Georgia law permits an expelled student to bring a breach of contract action against a private educational institution for failure to abide by the hearing procedures set forth in the student handbook"); Swartley v. Hoffner, 734 A.2d 915, 919 (Pa. Super. Ct. 1999) ("The relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a student can bring a cause of action against said institution for breach of contract where the institution ignores or violates portions of the written contract."). *See also* Corso v. Creighton Univ., 731 F.2d 529, 531 (8th Cir. 1984) ("For our purposes, the Creighton University Handbook for Students…is the primary source of the terms governing the parties' contractual relationship"); Dinu v. President & Fellows of Harvard Coll., 56 F. Supp. 2d 129, 130 (D. Mass 1999) ("That the relationship between a university and its students has a strong, albeit flexible, contractual flavor is an idea pretty well accepted in modern case law. So too, is the proposition that a student handbook, like the occasional employee handbook, can be a source of the terms defining the reciprocal rights and obligations of a school and its students") (internal citations omitted).
40. Bleiler v. Coll. of the Holy Cross, 2013 U.S. Dist. LEXIS 127775, *48 (D. Mass Aug. 28, 2013).
41. Yu v. Vassar Coll., 2015 U.S. Dist. LEXIS 43253, *88 (S.D.N.Y. Mar. 31, 2015).
42. Lee Burdette Williams, *Dean of Sexual Assault*, Inside Higher Ed (Aug. 7, 2015), *available at* https://www.insidehighered.com/views/2015/08/07/how-sexual-assault-campaign-drove-one-student-affairs-administrator-her-job-essay.
43. Anonymous, *An Open Letter to OCR*, Inside Higher Ed (Oct. 28, 2011), https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students.
44. 5 U.S.C. § 553.
45. N.C. Gen. Stat. § 116-40.11; N.D. Sen. Bill No. 2150.
46. Sandy Hingston, *The New Rules of College Sex*, Philadelphia (Aug. 22, 2011), *available at* http://www.phillymag.com/articles/the-new-rules-of-college-sex/?all=1.
47. Fredrik DeBoer, *Sexual Assault Accusations and the Left* (Aug. 4, 2015), *available at* http://fredrikdeboer.com/2015/08/04/sexual-assault-accusations-and-the-left.
48. Letter from Rape, Abuse, & Incest National Network to White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), *available at* https://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf.