

“Hearing” Things Out: Adjudication of Sexual Misconduct Complaints

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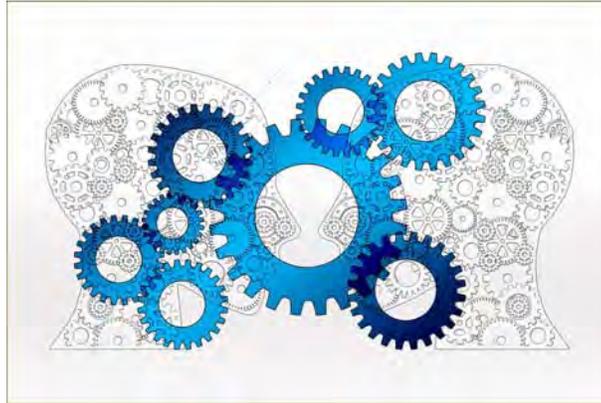
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WHY ARE WE HERE?



Background



Background: Sexual Misconduct Adjudications

- 2011 DCL
 - Institutions may process complaints through existing conduct mechanisms, as long as they meet req's of **prompt and equitable** resolution
 - “Prompt and equitable”:

*As noted in the 2001 Guidance, **procedures adopted by schools will vary** in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences.*

Background: Sexual Misconduct Adjudications

- 2011 DCL
 - Equal opportunity to present relevant witnesses and other evidence; timely access to any information to be used at a hearing
 - If allowing participation of attorneys, must allow for both sides
 - Direct cross-examination by parties ***“strongly discouraged”***

Background: Sexual Misconduct Adjudications

- 2014 Q&A
 - *“The investigation may include a hearing to determine whether the conduct occurred, but **Title IX does not necessarily require a hearing.**”*
 - *“OCR **does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties.**”*
 - Cross-examination may be conducted by ***“trained third party”***
 - Recommends that “third party” screen questions and ask only those ***“deemed appropriate and relevant to the case.”***
- 2017 Q&A
 - *“The investigator(s), or separate decision-maker(s), **with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy.**”*

Background: Sexual Misconduct Adjudications

- Common Models
 - “Single Investigator” → Appeal Officer
 - “Single Investigator” → Appeal Board (Hearing or No)
 - Conduct Board
 - External Adjudicator

Hearings and Cross Examination: The Circuits Split



The 6th Cir. Speaks: *Doe v. Baum*

- Alleged SA (incapacitation) in a fraternity house; 3 month investigation, including multiple witnesses
- “Recommended” finding of non-responsibility by investigator, including detailed rationale and credibility assessments
- Complainant appealed to three-member Board, no live hearing or questioning, found Respondent in violation

The 6th Cir. Speaks: *Doe v. Baum*

- Respondent sues, claiming violations of Due Process and Title IX
 - Due Process – Because decision turned on issue of credibility, R should have been given a hearing w/ opportunity to cross-examine
- **District Court** grants University’s motion to dismiss; **6th Cir.** reverses

The 6th Cir. Speaks: *Doe v. Baum*

- Holding/Rationale
 - “Opportunity to be heard is the constitutional minimum”
 - “If a student is accused of misconduct, the University must hold **some form of hearing** before imposing... suspension or expulsion”
 - “When the University’s determination turns on the credibility of the accuser, the accused, or witnesses, that **hearing must include an opportunity for cross-examination.**”
 - “So if a university is faced with competing narratives about potential misconduct, the administration must facilitate **some form of cross-examination** in order to satisfy due process.”

The 6th Cir. Speaks: *Doe v. Baum*

- Holding/Rationale, cont’d
 - Cross-examination req’d because it is “the greatest legal engine ever invented” for uncovering truth (identifying inconsistencies and assessing demeanor)
 - Permitting cross-examination poses “no substantial burden”

The 6th Cir. Speaks: *Doe v. Baum*

- Holding/Rationale, cont'd
 - “Some form of cross-examination”
 - University must allow for “live questioning *in front of* fact-finder”
 - Accused does not necessarily have right to personally confront – Universities have legitimate interest in avoiding procedures that subject an alleged victim to further harm/harassment
 - Could allow “accused student’s agent” to conduct cross

The 1st Cir. Splits (sort of): *Haidak v. Univ. of Mass. Amherst*

- Alleged IPV abroad; No Contact Order instituted, both parties violate;
- Respondent interim suspended (no hearing – 5 mos.), then expelled after live hearing before Board
- Board conducted ping-pong questioning during hearing
- Respondent submitted 36 questions, 20 were excluded by Administrator

The 1st Cir. Splits (sort of):
Haidak v. Univ. of Mass. Amherst

- Respondent sues, claiming violations of Due Process and Title IX because he was not afforded right to direct cross-examination or counsel during hearing, and because questions and evidence were excluded from hearing
- **District Court** grants summary judgment, holds direct cross-examination and/or right to counsel “not essential to due process...”
- **1st Cir.** overturns with respect to interim suspension, but not with respect to due process/cross-examination

The 1st Cir. Splits (sort of):
Haidak v. Univ. of Mass. Amherst

- Holding/Rationale
 - “Easily” agreed that “the complete absence of any examination before the factfinder [is] procedurally deficient.”
 - Noted due process right to “some opportunity for real-time cross-examination, even if only through a hearing panel.”
 - Striking R’s questions *could* raise due process concerns, but Board “avoided the pitfalls created by the University” through extensive questioning

The 1st Cir. Splits (sort of): *Haidak v. Univ. of Mass. Amherst*

- Holding/Rationale
 - *“When a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student.”*
 - **BUT, Baum goes too far**

Where Are We Going Now?



A “Light” at the End of the Tunnel?: SCOTUS and/or OCR Regs

- Headed for the high court?
- Proposed regulations
 - Apparently adopt *Baum* rationale re: cross-examination
 - Prohibit “single investigator” model, require live hearings
 - Mandates live cross-examination of parties and witnesses by advisors-of-choice
 - Also reflect *Haidak* re: interim measures



Reading the Tea Leaves

- **New regs likely on the way** – including uniform standards for public and private institutions
- **More process**, including re: interim measures, live hearings, and cross-examination
- **No more single investigator models**, particularly those that include appeals on the record alone

Practical Implications

- Likely nearing consensus
- Questioning *required*
- Litigation over adequacy of questioning?
- Strategic decisions re: adjudication models: internal, external, hybrid?
 - Institutional values
 - Resources
- Increased importance of identifying and training board members/adjudicators
- Peril in excluding questions from parties
- More process at interim measures phase

QUESTIONS?



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