



Sexual misconduct and due process

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The current federal investigations of over 80 colleges and universities for their handling of student sexual misconduct allegations - and the criticisms that triggered them - have shone a spotlight on universities' alleged failures to adequately protect the complainants or punish the perpetrators of sexual misconduct. Recent criticism, however, has focused instead on the lack of due process afforded to the accused. The fire from both sides illustrates the difficulty universities face in navigating between two sets of legal obligations - on one side, obligations to complainants, imposed by Title IX of the Education Amendments of 1972,

and on the other, obligations to the accused, imposed on public universities by the 14th Amendment's due process guarantee (and on private universities by the common law requirement that student disciplinary procedures be fair and free from bias and prejudice).

Criticisms of university procedures for failing to provide due process to the accused

Twenty-eight members of the Harvard Law School faculty recently signed an open letter in the Boston Globe criticizing Harvard's newly adopted policy for dealing with sexual misconduct. The strongly worded critique centers on the Harvard policy's purported inconsistency with "due process of law ... and the rule of law generally." Noting that "the law that the Supreme Court and lower federal courts have developed under Title IX and Title VII attempts to balance ... important interests," including the goal of "fully address[ing] sexual harassment while at the same time protecting students against unfair and inappropriate discipline," the HLS faculty's open letter blasted Harvard's new sexual misconduct policy as one that "departs dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials."

These criticisms were echoed a few days later in Judith Shulevitz's article in the New Republic, "Accused College Rapists Have Rights Too," which decried student sexual misconduct policies as having "strayed from any commonsense understanding of justice." Among the disciplinary procedures criticized by Shulevitz were the lack of free counsel for the accused, proof by only a preponderance of the evidence instead of beyond a reasonable doubt, and the inability to directly cross-examine witnesses.

SPECIAL REPORT

Asia

Once considered a distant land, Asia has become an important market for American businesses and California law firms.



Tuesday, October 28, 2014

Corporate

Valeant increases bid for Allergan on eve of insider trading hearing

Allergan has sued Valeant in Santa Ana federal court for violating insider-trading laws after partnering with hedge fund Pershing Square Capital Management LP to move ahead with a hostile bid, which now stands at \$200 per share.

Litigation

San Francisco-based real estate group sues Zillow for trade secrets theft

A network of the country's top real estate agents sued online real estate company Zillow Inc. Monday, alleging the company feigned interest as an investor in the members-only group, only to steal its trade secrets.

Antitrust & Trade Reg.

It's time to revisit antitrust penalties

Does antitrust crime pay? Despite escalating corporate fines and longer jail sentences, it is widely acknowledged that cartel activity is still being under-deterred. By **Kellie Lerner and Jill Casselman**

Government

AG nets \$750,000 in funding for recidivism reduction efforts

California Attorney General Kamala D. Harris announced Monday that her office has been awarded nearly \$750,000 in federal grant funds for recidivism reduction efforts.

Entertainment & Sports

Injunction on Aereo may not doom Dish's commercial-skipping service

A federal judge last week barred Aereo Inc. from transmitting broadcast TV programs to its subscribers, but the action does not necessarily hurt Dish's defense of its innovative DVR system.

Shulevitz and the HLS faculty opinion blamed these issues, in part, on the U.S. Department of Education's Office of Civil Rights' 2011 Dear Colleague letter and the OCR investigations of numerous universities that followed in its wake. The letter interpreted Title IX as requiring schools receiving federal funding to establish robust measures for handling sexual misconduct allegations promptly and equitably. To avoid disqualification from receiving federal funds, a university must take *immediate* action when it knows of sexual misconduct that creates a hostile environment. It must conduct its own investigation irrespective of any law enforcement investigation, and must afford both the complainant and the accused "similar and timely" access to information to be used at a disciplinary hearing, as well as an equal opportunity to present witnesses and other evidence.

What due process must universities provide

Much of the recent outrage appears to be based on the view that student disciplinary proceedings should provide students accused of sexual misconduct with the due process afforded to defendants in criminal trials. But courts have rejected that notion. Due process jurisprudence sets forth only minimal requirements regarding accused students at public universities, and most private universities must comply only with an even looser standard of basic fairness. As the Office of Civil Rights explained in its April 2014 Questions and Answers on Title IX and Sexual Violence, while criminal defendants face the risk of incarceration, students facing a Title IX university disciplinary proceeding do not - "and, therefore, the same procedural protections and legal standards are not required."

The Supreme Court and lower courts have set a low bar for the due process universities must provide in disciplinary proceedings: Before a short suspension, a university need only provide "notice and a hearing." *Goss v. Lopez*, 419 U.S. 565, 582 (1975). And when more serious sanctions are imposed, courts have used the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test to determine what procedures are required. What constitutes minimally sufficient process depends on the balance of the student's interest and the risk of erroneous deprivation thereof, weighed against the institution's interest and burdens of alternate procedural requirements. Potential punishments may also be an animating consideration. Depending on the circumstances, courts have recognized certain due process protections - none of which rise to the level of those afforded to criminal defendants. For example:

Accused students must be provided written notice of the grounds for discipline, the nature of the evidence upon which the university intends to rely, the witnesses, and the potential sanctions.

Accused students must be given a fair opportunity to explain his or her position, present evidence, including witness testimony, and respond to the evidence against him or her - but not necessarily through or with the assistance of counsel.

Accused students have rights to cross-examine their accusers and witnesses, though not necessarily directly and not necessarily through counsel.

Assistance of counsel is not required at disciplinary hearings unless the student is also facing criminal charges. Even then, counsel's participation may be subject to reasonable limits.

Evidentiary standards are relaxed at disciplinary hearings, permitting hearsay and character evidence.

Decision-makers should be impartial and independent, but courts have placed the burden on the accused student to prove bias.

The decision must be made in good faith, based on the evidence, and most courts have held that a burden of proof based on a preponderance of the evidence or "more likely than not" satisfies due process.

Courts have held that accused students do not have a constitutional right to an appeal.

The path between a universities' Title IX obligations and due process or fairness obligations is complicated. Neither OCR nor the courts have provided clear guidance on whether measures implemented by universities to satisfy their Title IX obligations violate due process or notions of fairness. Given the muddled state of the law,

Litigants protest 'broken' family court system at Judicial Council meeting

The group that organized the speakers, Marin County-based "Center for Judicial Excellence," is a longtime gadfly that has pushed for reforms to the state's family court system.

Mergers & Acquisitions Dealmakers

A roundup of weekly mergers and acquisitions, financing activity and the lawyers involved.

Corporate

Newly public companies adopting contentious governance practices

Taking advantage of historically lighter scrutiny, newly public companies are embracing defensive corporate governance structures known to attract shareholder criticism, according to a new report from Paul Hastings LLP.

Criminal

Lawyers for defendant in wide-ranging corruption case seek Supreme Court review

Attorneys for the developer in a San Bernardino County public corruption case are asking the California Supreme Court to review allegations of due process rights violations, saying the charges are time barred, among other things.

Solo and Small Firms

Jury awards \$26.3 million in personal injury case

Maryam Hedayati was crossing the street in Laguna Hills in 2012 when a driver under the influence of drugs ran into her. She woke up weeks later to a new reality - one of her legs had been amputated and she had gaps in her memory.

Public Interest

New Bet Tzedek president and CEO has new vision for the organization

At 32, Jessica Kornberg is about half the age of her predecessor and is the first woman to occupy the top job, but her promotion marks a return to selecting young and dynamic attorneys to shepherd the organization.

Communications

Doubtful FCC would, could sack Washington's NFL team

The Federal Communications Commission is being asked to step into the controversy over the Washington NFL team's use of the name "Redskins." By **John F. Stephens and Jason M. Joyal**

Labor/Employment

Separating Ebola fact from hysteria

For the past several weeks the country has been fascinated with the continuing stories involving the spread of Ebola from Africa to other countries

heightened attention to unsatisfactory outcomes, and the sensitive nature of sexual misconduct allegations, the debate over how best to handle these matters is not likely to go away soon.

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including the U.S. By **Edwin G. Foulke, Jr.**

Intellectual Property

Deputizing the whole wide countryside

This term, the U.S. Supreme Court will decide *Ohio v. Clark*, embedded in which is a fundamental and far-reaching question about when the federal Constitution applies to the actions of private citizens. By **Brian M. Hoffstadt**

Constitutional Law

Holding parents liable for kids' online speech: a bad idea

Although born out of a desire to protect minors from online bullying, A recent Georgia Court of Appeals decision raises several troubling concerns. By **Jamie Williams**

Education

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Judicial Profile

Margaret L. Oldendorf

Superior Court Judge Los Angeles County (Glendale)

Education

'Yes means yes' a focal point for campus general counsel

Of more than a dozen California college general counsel interviewed, most agreed that, though "not a sea change," SB 967 is an important law. But what it looks like on the ground can differ widely from school to school.