No. 18-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES HAIDAK,

Plaintiff-Appellant

v.

UNIVERSITY OF MASSACHUSETTS - AMHERST, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

STATEMENT OF FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), counsel for *amicus* states that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amicus curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICUS CURIAE

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student due process rights at campuses nationwide, and has filed numerous *amicus* briefs in cases concerning the due process rights of accused students in campus misconduct proceedings. FIRE believes that our perspective will assist the Court in delineating the scope of due process rights in the context of on-campus adjudications.

The parties have provided their consent to the filing of this amicus brief, which satisfies Federal Rule of Appellate Procedure 29(a)(2). This brief has been filed in a timely manner within seven days of the date Plaintiff-Appellant's principal brief was deemed filed on October 1, 2018.

ARGUMENT

I. Introduction

This case concerns whether the University of Massachusetts afforded a student a fair process before finding him responsible for a violent assault on a fellow student and expelling him.

The alleged assault for which appellant James Haidak was expelled took place while the appellant and his accuser, then his girlfriend, were studying abroad in Barcelona. According to his accuser, Haidak grabbed her wrists, punched himself in the face with her hands, and pinned her to the bed. Haidak, by contrast, alleges that his accuser was the initial aggressor—hitting and slapping him in the face and kicking him in the groin—and that he pinned her down only in self-defense. There were no other witnesses to the incident.

Certain aspects of this case appear to be uncontested. Appellant and his accuser remained in contact despite the university's issuance of a no-contact order. Even if those contacts were consensual, as appellant claims, they still happened in violation of the order.

On the charge of physical assault, however, the facts are very much contested, and appellant alleges that the university deprived him of his due process rights by not allowing him or his adviser to question his accuser about the incident. Rather, appellant had to pre-submit his questions to the university's hearing board,

"of which they posed only a few." *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 266 (D. Mass. 2018).

The lower court rejected appellant's cross-examination claim, citing a 1988 ruling from this Court that "the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases." *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988). As an initial matter, appellant is not seeking *unlimited* cross-examination. More importantly, however, the nature of campus disciplinary proceedings has changed a great deal in the years since this court decided *Gorman*. Campus tribunals are increasingly being asked to adjudicate cases with potentially criminal implications. As the severity of offenses routinely addressed by campus tribunals has grown, courts have begun to reconsider whether more process may be necessary in such cases. A number of more recent decisions suggest that cross-examination may, in fact, be an essential element of due process in campus adjudications turning entirely on the parties' credibility.

By reversing the district court's finding that the severe limitation on appellant's ability to cross-examine his accuser did not violate his due process rights, this court would reaffirm the importance of a meaningful right to cross-examination in cases such as this one, which turn entirely on the credibility of the parties. As universities around the country do away not only with cross-

examination but often with hearings altogether in their conduct processes, such a ruling from this court could not be more timely and necessary.

II. Due Process Is of Critical Importance in Campus Conduct Proceedings

A. A Finding of Responsibility for Assault, Even by a Campus Tribunal, Carries Life-Altering Consequences

Supporters of the status quo for campus non-academic misconduct adjudication often argue that due process protections in campus procedures need not be nearly as robust as those used in courts of law, because the process is merely "academic" or "educational."[1] But as one federal court recently observed, campuses are now routinely adjudicating claims "that constitute serious felonies under virtually every state's laws." *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 184 (D.R.I. 2016). Insisting that additional procedures are not needed ignores the reality of the tremendous (and well-deserved, when someone is found responsible

[1] *See, e.g., University of Massachusetts Code of Student Conduct*, at p.3 ("The resolution of conflict involving students is an educational endeavor."), *available at* https://www.umass.edu/dean_students/sites/default/files/documents/2017-2018%20Code%20of%20Student%20Conduct.pdf. *See also* ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, ASCA 2014 WHITE PAPER: STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES (2014), http://www.theasca.org/Files/Publications.ASCA%202014%20White%20Paper.pdf ("While television shows such as Law and Order might be the only frame of reference that parents, students, and others may have, we must teach them that campus proceedings are educational and focus on students' relationships to the institution.").

after a fair process) stigma of being found to have committed an act of violence or other potentially criminal conduct. As the U.S. Court of Appeals for the Sixth Circuit recently put it, "Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life." *Doe v. Baum*, 2018 U.S. App. LEXIS 25404, *11 (6th Cir. Sept. 7, 2018). This court's holding in *Gorman*—which was decided long before universities were routinely adjudicating claims of serious sexual misconduct, and long before technological developments allowed allegations of on-campus misconduct to be very widely and publicly disseminated—does not take these lifelong consequences into sufficient account.

Yale University alumnus Patrick Witt wrote about these consequences in a *Boston Globe* editorial protesting Harvard University's adoption of a broad sexual harassment policy.[2] According to Witt, a fellow student accused him of sexual misconduct via an "informal complaint" mechanism available at Yale. Because the complaint was made informally, Witt was not entitled to the details of the accusations against him. The university undertook no formal investigation, despite Witt's request that the university do so in order to allow him to clear his name. As a result of the accusation, Witt wrote, he lost his Rhodes scholarship and an offer of employment, as well as the opportunity to play in the National Football League:

[2] Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, BOSTON GLOBE, Nov. 13, 2014, https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html.

> The complaint lodged against me caused me and my family immense grief, and as a simple Google search of my name reveals, its malignant effects have not abated. It cost me my reputation and credibility, the opportunity to become a Rhodes scholar, the full-time job offer I had worked so hard to attain, and the opportunity to achieve my childhood dream of playing in the NFL. I have had to address it with every prospective employer whom I've contacted, with every girl that I've dated since, and even with Harvard Law School during my admissions interview. It is a specter whose lingering presence is rooted in its inexplicability.

If Witt committed sexual misconduct, it could be argued that these consequences were appropriate, even insufficient. But the impact of the allegation alone demonstrates the critical importance of ensuring a reliable process within campus conduct proceedings.

Witt is far from alone in having experienced serious consequences from an allegation of serious misconduct on campus. Indeed, many of the legal complaints brought in recent years by accused students for alleged due process violations further illustrate the impact of a finding of responsibility for violent misconduct, even "just" by a campus judiciary.

For example, in a recent complaint against Vanderbilt University, plaintiff Z.J.—who was attending Vanderbilt on an ROTC scholarship—explained how he was expelled for sexual misconduct three days before graduation, was not commissioned as an army officer, and retroactively lost his ROTC scholarship such that he now owes Vanderbilt $218,000 in tuition. Complaint, *Z.J. v. Vanderbilt Univ.*, No. 3:17-cv-00936 (M.D. Tenn. June 12, 2017).

After the University of Findlay found students Alphonso Baity and Justin Browning responsible for sexual assault—through a process in which Baity and Browning allege the university held no hearing and did not even interview the complainant[3]—the university released their names to the media, stating that they had been expelled for sexual assault.[4] A Google search of either student's name prominently reveals the sexual assault finding against them, despite the fact that neither student was ever arrested for or charged with any crime. It is not difficult to imagine the impact that information will have on these students' future academic and career prospects. Indeed, their complaint against the university alleges:

> As a mere example of the damage done by Defendants, Browning has thus far been denied entrance to at least two universities – University of Mount Union in Alliance, Ohio, and Ohio Northern University in Ada, Ohio – as a direct and proximate result of the Defendants' misconduct. Baity, who was being recruited by a prominent Division I basketball program, was denied entrance to school as a direct and proximate result of the Defendants' misconduct.[5]

Similarly, in a federal complaint against Butler College in Indiana, a student found responsible for sexual misconduct alleges that in the aftermath, "he applied

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[3] Compl. at 23, *Browning v. Univ. of Findlay*, No. 3:15-02687 (N.D. Ohio Dec. 23, 2015).

[4] Vanessa McCray, *2 student-athletes expelled from University of Findlay after sexual assault investigation*, BLADE, Oct. 6, 2014, http://www.toledoblade.com/local/2014/10/06/2-student-athletes-expelled-from-University-of-Findlay-after-sexual-assault-investigation.html.

[5] Compl. at 31, ¶ 144, *Browning v. Univ. of Findlay*, No. 3:15-02687 (N.D. Ohio Dec. 23, 2015)).

to seven (7) colleges, and [has] been rejected by all seven—and in each and every case, the reason he was not accepted was the evidence of his expulsion from BUTLER, and the reason therefor."[6]

The stakes are high for students accused of violent misconduct and tried before campus tribunals. As a judge noted in denying Brandeis University's motion to dismiss a lawsuit alleging denial of fundamental fairness in an on-campus sexual misconduct proceeding:

> [A] Brandeis student who is found responsible for sexual misconduct will likely face substantial social and personal repercussions. It is true that the consequences of a university sanction are not as severe as the consequences of a criminal conviction. Nevertheless, they bear some similarities, particularly in terms of reputational injury. Certainly stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings.

Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 602 (D. Mass. 2016).

The life-altering consequences illustrated by the foregoing examples are likely to become even more severe due to growing support, among various states and associations, for special notations on the transcripts of students suspended or expelled for serious misconduct.[7]

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[6] Compl. at 5, *Doe v. Butler Univ.*, No. 1:16-cv-01266 (S.D. Ind. May 23, 2016).
[7] Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (Jul. 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts.

New York, for example, already has such a law. Article 129-B of the New York State Education Law provides:

> For crimes of violence, including, but not limited to sexual violence . . . institutions shall make a notation on the transcript of students found responsible after a conduct process that they were "suspended after a finding of responsibility for a code of conduct violation" or "expelled after a finding of responsibility for a code of conduct violation." For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they "withdrew with conduct charges pending."[8]

Similar legislation has also been proposed in several other states. And in June 2017, the American Association of Collegiate Registrars and Admissions Officers (AACRAO), whose membership includes representatives from more than 2,500 colleges and universities,[9] issued guidance stating its belief that institutions "have a responsibility to notify other institutions of potential threats to their communities from students they have suspended/expelled for serious misconduct," and recommending notation either on a student's academic transcript or by some other means, such as a disciplinary transcript.[10] This is a reversal of the

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[8] N.Y. STATE EDUC. LAW §6444.6 (2018).

[9] Hillary Pettegrew, *New Guidance on Student Discipline Transcript Notations for Higher Education*, EDURISK (June 2017), https://www.edurisksolutions.org/blogs/?Id=3334.

[10] American Association of Collegiate Registrars and Admissions Officers, TRANSCRIPT DISCIPLINARY NOTATIONS: GUIDANCE TO AACRAO MEMBERS (June 2017), *available at* https://www.aacrao.org/docs/default-source/signature-initiative-docs/disciplinary-notations/notations-guidance.pdf.

organization's previous recommendation that recording disciplinary actions on a student's transcript was not "a recommended best practice."[11]

Amicus FIRE takes no position on the wisdom of disciplinary notations on transcripts *per se*. But the increasing use of such notations underscores how important it is that meaningful procedural protections be in place to ensure trustworthy results. Any student who has actually committed violent misconduct should, without a doubt, face severe consequences. But those consequences underscore the crucial importance to all parties of a fair and reliable process for determining guilt or innocence.

B. Due Process Is of Great Importance for Victims as Well as the Accused

Though procedural protections are generally described as inuring to the benefit of the accused, they are in fact vital for victims and the entire campus community. Without the fairness and reliability that the procedural protections of due process safeguard, public confidence and trust in the adjudicatory system

[11] American Association of Collegiate Registrars and Admissions Officers, *Disciplinary Notations*, https://web.archive.org/web/20180424142449/http://www.aacrao.org/resources/trending-topics/disciplinary-notations.

erode, leaving all students less likely to participate in it or respect its outcomes, among other ill effects.[12]

When procedurally flawed processes are used to adjudicate allegations of serious misconduct, students found responsible can and will avail themselves of legal remedies to set aside those findings. In cases where those students are in fact responsible, victims are betrayed and re-victimized, and a potential criminal is left free to roam campus.

In December 2017, the Santa Barbara County Superior Court ordered the University of California, Santa Barbara (UCSB) to reinstate and reconsider the appeal of a student who had been found responsible for stalking his ex-girlfriend. *Doe v. Regents of the Univ. of Cal.*, No. 17-cv-03053 (Cal. Super. Ct. Dec. 22, 2017).

[12] *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 105 OHIO ST. J. CRIM. L. 105, 108 (2005) ("The public is much more likely to support and participate in the criminal justice process and support those officials who run it when the public believes that the process is run fairly. If the American public does not perceive its criminal justice system to be fair, negative consequences can result. Diminished public support for the criminal justice system, taken to the extreme, can lead to diminished respect for the law and, thereby, less compliance with the law."); Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT. INST. JUST. J. 23, 30 (2001) ("[D]ata suggest that fairness builds trust in the criminal justice system and that trust builds compliance with the law. Thus, what is more fair is more effective, and to be effective it is necessary to be fair.").

UCSB rendered its initial decision without granting the student a hearing or an opportunity to confront his accuser, relying instead on a single investigator who interviewed the parties and a number of witnesses separately before finding the student responsible. On appeal, the student was given a hearing at which he and other witnesses testified and evidence was presented. However, in upholding the investigator's decision, the appeals board considered "only the evidence in the Title IX investigator report," and did *not* consider the evidence presented at the appeal hearing, as required by UCSB policy. *Id.* at 8.

Finding this problematic, the superior court ordered UCSB to reconsider the student's appeal. UCSB's second decision, however, was "identical in every respect" to the original appeal decision, so the court held UCSB in contempt and ordered it to vacate the finding of responsibility entirely and to re-admit the student. This was an unjust result for the alleged victim, since the alleged perpetrator was allowed to remain on campus not because of any shortcomings in the victim's complaint, but because of UCSB's repeated failure to offer the accused student a fair process. *Doe v. Regents of the Univ. of Cal.*, No. 17-cv-03053 (Cal. Super. Ct. Aug. 10, 2018).

In 2015, a female student proceeding under the pseudonym Jane Doe filed a federal lawsuit against the University of Kentucky. Jane first reported a rape to the university and to police as a freshman in the fall of 2014. According to Jane, she

was violently raped by a fellow student, a football player who held his hand over her mouth and forcibly removed her clothing. The university held a hearing, but the accused student could not attend because of a criminal court date arising from the same conduct. The university found him responsible in absentia.[13]

A university appeals board overturned that decision. The accused student's due process rights had been violated, it concluded, because he was not able to attend the hearing. A second hearing was scheduled. This time, Jane did not attend, on advice from staff at the university's counseling center. The accused student was found responsible for a second time. And for a second time, the appeals board overturned the decision on due process grounds—this time because Jane's absence had denied the accused student the right to confront his accuser.[14]

The university scheduled a third hearing. Jane reported that the notice of the third hearing "caused [her] mental health to deteriorate" and that she had withdrawn from classes. At his third hearing, the accused student was found responsible again, but the appeals board again overturned the decision on due process grounds.[15]

In denying the university's motion to dismiss Jane Doe's complaint, the U.S. District Court for the Eastern District of Kentucky wrote:

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[13] Compl., *Doe v. Univ. of Ky.*, No. 5:15-cv-00296 (E.D. Ky. Oct. 1, 2015).
[14] *Id.* at ¶¶ 24–28.
[15] *Id.* at ¶¶ 32–37.

> [T]he University bungled the disciplinary hearings so badly, so inexcusably, that it necessitated three appeals and reversals in an attempt to remedy the due process deficiencies. The disciplinary hearings were plagued with clear errors, such as conducting a hearing without [the accused] Student B's presence, and refusing to allow Student B to whisper to an advisor during the proceeding (as only two examples of several obvious errors), that resulted in multiple appeals spanning months, [and] profoundly affected Plaintiff's ability to obtain an education at the University of Kentucky (the Court suspects this lengthy process profoundly affected Student B as well).[16]

In 2012, the University of Michigan found a student responsible for sexual assault through four separate university processes and removed him from campus for four years. Yet, after procedural defects at each stage of these processes, the accused student filed a lawsuit against the university alleging that he had not been provided with constitutionally mandated due process. As a result of its settlement with the accused student, the university threw out its findings of responsibility. Reacting to the settlement, the alleged victim's attorney expressed dismay that the university agreed to reverse its findings because of its own procedural errors:

> Today, the university has surrendered and turned its back on our client, apparently because of its own technical mistakes. Blindsided and betrayed, our client is more damaged from having reported the assault to the university than if she had not come forward at all.[17]

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[16] *Doe v. Univ. of Ky*., 2016 U.S. Dist. LEXIS 117606, *8 (E.D. Ky. Aug. 31, 2016).

[17] David Jesse, *U-M drops nonconsensual sex finding to settle suit*, DETROIT FREE PRESS (Sept. 12, 2015, 11:13 AM), http://www.freep.com/story/news/local/michigan/2015/09/12/u-m-drops-nonconsensual-sex-finding-settle-suit/72145304.

Properly conceived, due process protects all interests at stake: the accused's interest in not being wrongly found responsible for an act he or she did not commit, the complainant's interest in a reliable adjudication that holds the correct person responsible and is not subject to reversal on procedural grounds, and the community's interest in ensuring trustworthy decisions that can be relied upon to protect the wellbeing of its citizens. The allegations of serious, often violent misconduct adjudicated within our nation's colleges and universities leave no room for faulty procedures, such as the ones used in the instant case, that taint the entire system's reliability and integrity.

III. Due Process in Campus Misconduct Adjudications Requires a Meaningful Right of Confrontation

A. Schools Are Increasingly Adopting Procedures That Deny Students the Right of Confrontation

Appellant Haidak alleges that although "credibility was the central issue" for the university's hearing board to decide with regard to the claim of physical assault, the board failed to ask Haidak's accuser most of the questions that he had pre-submitted (Second Amended Compl. ¶¶ 189, 193).

Despite the fact that universities are increasingly adjudicating complaints that turn entirely on the credibility of the parties, opportunities for meaningful cross-examination are troublingly rare, including at this circuit's public universities.

Last year, FIRE surveyed the conduct policies at 53 of the country's leading universities to determine the extent to which those policies provided students with fundamental procedural protections. We surveyed procedures for those offenses that could result in suspension or expulsion, whether sexual or non-sexual offenses. One of the protections we looked for was the right to meaningful cross-examination, which we defined as "[t]he ability to pose relevant questions to witnesses, including the complainant, in real time, and respond to another party's version of events." This included cross-examination through a third party, such as a hearing panel, so long as there are "clear guidelines setting forth when questions will be rejected."[18]

The ability to pose questions in real time, even through a third party, is critical. If a party is limited to only pre-submitted questions, he or she has no opportunity to challenge false or misleading statements made by a witness during the course of testimony—a challenge that might bear significantly on the witness' credibility. Similarly, if the hearing panel (or other administrators) have an unfettered right to screen out questions at their discretion, they may—as in the instant case—screen out questions that bear directly on the credibility of parties and witnesses.

[18] FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON DUE PROCESS 2018, *available at* https://www.thefire.org/due-process-report-2017.

Despite the increasing consensus among courts that some form of cross-examination is essential to due process where credibility is the primary issue, 20 of the 53 surveyed institutions provided no opportunity for cross-examination whatsoever, and 13 provided a troublingly limited opportunity. In sexual misconduct adjudications, the numbers were even lower: the majority of institutions—32—made no provision for cross-examination at all, and only three institutions guaranteed a robust right of cross-examination.[19]

In this circuit and around the country, students are facing severe, lifelong consequences without ever being given an opportunity to meaningfully defend themselves. This court has an opportunity to address this serious problem in the instant case.

B. Although Due Process Requirements Are More Flexible in the Campus Judicial Setting, a Meaningful Right of Confrontation Is Necessary in the Context of Sexual Misconduct Cases

i. Due Process Standards Must Account for the Circumstances and Stakes of the Case

Courts have recognized that due process standards depend upon the circumstances and stakes of the particular case. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural

[19] *Id.*

protections as the particular situation demands."); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation."). Because of the life-altering consequences of campus adjudications of violent misconduct discussed above, care must be taken to ensure that decisions offer sufficient due process protections so as to be fair and reliable.

With respect to non-academic student disciplinary proceedings, courts have been particularly sensitive to those cases in which students stand accused of behavior that would amount to a crime. *See Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) ("A university is not a court of law and it is neither practical nor desirable it be one. Yet a public university student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing. In weighing this tension, the law seeks the middle ground."). In *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975), a case involving students accused of marijuana possession—certainly a crime less severe than physical assault—the court noted:

> This case is among the most serious ever likely to arise in a college context. In the interest of order and discipline, the College is claiming the power to shatter career goals, and to make advancement in our highly competitive society much more difficult for an individual than it already is.

Id. at 797. Accordingly, the court stated, "It is in light of the high stakes involved that the Court must determine" whether the due process afforded the accused students met constitutional standards. *Id*.

Cases of violent misconduct, as explained above, involve the highest stakes possible in the college disciplinary context. Students who are victims of violence suffer trauma that should be fairly and thoroughly investigated, and students found responsible for such assaults will be subjected to tangible and extensive repercussions that extend far beyond campus. It is these stakes that this court must consider in determining the degree of procedural protection in campus Title IX proceedings.

ii. Cross-Examination Is Critical in the Context of Campus Sexual Misconduct Adjudications

In the years since this court decided *Gorman*, the nature and scope of campus judicial proceedings has changed dramatically. Universities now routinely adjudicate claims of serious, violent misconduct, leaving many students permanently labeled as violent offenders without having had a meaningful opportunity to confront their accusers. Schools are increasingly disregarding hearings altogether, relying solely on investigative reports, and allowing decision makers to make fact and credibility determinations without having even met the parties in person. These models undermine the truth-seeking purpose of these

investigations. The parties are the witnesses who have the most information and the most incentive to ensure the opposing party is thoroughly questioned about the facts and credibility issues.

These circumstances have led to a flood of litigation: In the past seven years alone, more than 300 students have brought suit against their universities alleging that they were denied fundamental fairness in university judicial proceedings.[20]

As these cases proceed, more and more courts are revisiting the question of cross-examination and holding that, at least where a case turns primarily on the credibility of the parties, cross-examination—which the Supreme Court of the United States has called "the greatest legal engine ever invented for the discovery of truth," *Lilly v. Virginia*, 527 U.S. 116, 124 (1999)—is an essential element of a fair proceeding.

Recently, in *Doe v. Baum*, 2018 U.S. Dist. LEXIS 25404 (6th Cir. Sept. 7, 2018), the U.S. Court of Appeals for the Sixth Circuit held that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *See also Doe v. Univ. of Mich.*, 2018 U.S. Dist. LEXIS 112438 (W.D. Mich. July

[20] Samantha Harris & KC Johnson, Lawsuits Filed by Students Accused of Sexual Misconduct (Oct. 3, 2018), *available at* http://bit.ly/2OCSigG.

6, 2018) (enjoining the University of Michigan from deciding the plaintiff's case through a process that did not afford him a live hearing at which he could indirectly question his accuser); *Doe v. Bd. of Trs. of the Univ. of Ill.*, No. 17-CV-2180 (C.D. Ill. Dec. 18, 2017) (denying university's motion to dismiss and noting that "when the outcome of a disciplinary decision is dependent on credibility-based determinations, the accused's right to some form of cross examination is enhanced"); *Doe v. White*, No. BS168476, at 5 (Cal. Super. Ct. July 12, 2018) ("Fair procedure in a student discipline matter requires a process by which the accused student may question the complaining student, particularly if the findings are likely to turn on the credibility of the complainant.").

In his hearing at the University of Massachusetts, appellant Haidak was afforded only a very limited opportunity to cross-examine his accuser. His questions had to be submitted in advance, denying him the opportunity to ask questions responding to or informed by his accuser's testimony at the hearing. For cross-examination to fulfill its truth-seeking function, a party must be able to respond to the actual testimony of the witnesses against him, not just submit questions in advance based on what he thinks the testimony will be. A procedure that does not offer some opportunity for real-time cross-examination, even if only through a hearing panel, is fundamentally unfair to a person whose future depends upon the decisionmaker's credibility assessment.

What's more, Haidak's pre-submitted questions were filtered twice—first, through Dean Patricia Cardoso, who pared his list of 36 questions down to 16, and then again through the hearing panel, which further pared down his list of questions. (Pl.'s Response to Def.'s Statement of Undisputed Facts, ECF No. 129, at ¶ 110). Among the questions excluded were questions about whether Haidak's accuser had ever hit or bitten him prior to the incident in Barcelona; whether Haidak had ever hit his accuser; and whether his accuser had been truthful in her testimony at a restraining order proceeding. (*Id.*) These are questions that bear directly on the credibility of one of just two parties to an incident to which there were no other witnesses.

While real-time cross-examination through a hearing panel might satisfy the requirements of due process, the university's ability to reject proposed questions must be subject to reasonable limitations if cross-examination is to be meaningful. In *Doe v. Pennsylvania State University*, 276 F. Supp. 3d 300 (M.D. Pa. 2017), for example, the district court noted the "precarious balance hearing panel members must strike in their review of submitted questions." *Id.* at 310. Finding that "inconsistent application of a university's procedures governing a disciplinary hearing may offend due process," the court ruled that "Penn State's failure to ask the questions submitted by Doe may contribute to a violation of Doe's right to due process as a 'significant and unfair deviation' from its procedures." *Id.* at 309.

Imposing all of the rigors of our criminal justice and civil legal systems on campus tribunals might be, as many courts have noted, impractical and cumbersome. Indeed, for this reason, sexual and other violent assault allegations—among the most serious claims our society recognizes—may be better resolved by the judiciary, which has the process, expertise, and authority to ensure fair and reliable outcomes. But to the extent that campus administrators must undertake the resolution of these types of allegations, great care must be taken to ensure a proper balance between the rights of the accused and the administrative or logistical interests of the university.

CONCLUSION

This is a rapidly emerging area of law. Since 2011, more than 300 students have filed lawsuits alleging they were denied a fair process in campus sexual misconduct proceedings. Many of these lawsuits are still pending, with new suits being filed frequently; FIRE is aware of 17 new suits filed in just the past three months alone.

More guidance from the courts regarding the necessity of fundamentally fair procedures is desperately needed. Nowhere is this truer than on the question of an accused student's right to meaningfully confront his accuser and the witnesses against him. To help ensure fair, reliable hearings and just outcomes for all students, including those involved in the instant case, FIRE urges this court to

reverse the lower court's grant of summary judgment on appellant's due process claims.

Respectfully submitted,

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October 5, 2018

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(7)(B)

Pursuant to Fed. R. App. P. 32 (a)(5), I hereby certify that this brief uses 14-Point Times New Roman, a proportionally-spaced font. Pursuant to Fed. R. App. P. 32 (a)(7)(B), I certify that the brief was prepared using Microsoft Word, and contains 5343 words, including all citations but exclusive of all certificates of counsel, Table of Contents, Table of Authorities, Corporate Disclosure Statement, and Funding Statement, and according to that system's word count function.

Date: October 5, 2018 /s/ Monica R. Shah
Monica R. Shah

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2018, I have electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by the CM/ECF system, which will then send notification of such filing to all counsel of record.

Date: October 5, 2018 /s/ Monica R. Shah
Monica R. Shah