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Court Gives Respondents Greater Process Protection In Sexual Assault Cases Turning On Credibility

PUBLIC UNIVERSITY MUST ALLOW CROSS-EXAMINATION IN CERTAIN SEXUAL ASSAULT CASES.

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The court held that when the outcome of a sexual-misconduct case hinges on the credibility of competing narratives, and suspension or expulsion is a likely sanction, public universities must allow the accused student or his representative to engage in live cross-examination of the accuser and adverse witnesses before a neutral fact finder.

In *Doe v. Baum*, John Doe, who withdrew from the university pending imminent dismissal for sexual misconduct violations, sued the school for violating his constitutional right to procedural due process and for violating Title IX, which prohibits sex discrimination in the education programs and activities of institutions that receive federal financial aid. A female student, Jane Roe, had reported to the university that Doe had sex with her in his bedroom without her consent and when she was incapacitated. Conversely, Doe contended that Roe consented to sex and was not incapacitated. There were no witnesses to the alleged assault, and witnesses offered starkly different testimony regarding how intoxicated Roe appeared to be at a party taking place downstairs immediately before the alleged assault. Despite an investigator's initial finding that the evidence did not support the existence of a sexual assault, a university appeals panel found Roe and her supporting witnesses to be more credible and determined that Doe committed sexual assault.

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In reaching its decision against Doe, the university appeals panel reviewed the "cold record" prepared by the investigator, which consisted of written accounts of testimony by the parties and witnesses. Doe was not allowed to cross-examine Roe before the panel, despite an earlier decision from the Sixth Circuit in *Doe v. Cincinnati*, 872 F.3d 393 (6th Cir. 2017), holding that students accused of a serious charge like sexual assault must be allowed to engage in some form of cross-examination.

In the claim against the University of Michigan, the court held that the Constitution's guarantee of procedural due process required the university to permit Doe, or Doe's representative, to cross-examine Roe regarding her account of the evening. The court was not persuaded by the university's arguments that cross-examination would be superfluous and burdensome, and could cause further harm to Roe. Describing cross-examination as "the greatest legal engine ever invented for uncovering the truth," the court explained that cross-examination would have provided a critical opportunity for Doe to test Roe's credibility before the panel. It held that the burden on the university to allow cross-examination was modest and that the impact on Roe could be minimized by the use of a witness screen or other physical separation of the parties.

On his Title IX claim, Doe argued that the university's process produced an erroneous outcome that resulted from an investigation and hearing process biased against male students. Specifically, Doe claimed that the absence of cross-examination, and the panel's wholesale crediting of the testimony from female witnesses and discounting of testimony of male witnesses, could be explained only by anti-male bias. The court held that such a claim was plausible, especially given that, at the time of Doe's hearing, the university was attempting to address widespread criticism that it had mishandled prior reports of sexual misconduct directed at female students. The court determined that Doe should be allowed an opportunity to try and prove his gender-bias theory through discovery.

What This Means to You

Doe will have an immediate effect on public colleges and universities in the Sixth Circuit's jurisdiction—Michigan, Ohio, Kentucky and Tennessee. While private schools are not bound by the Constitution's due process clause, the court's analysis of Doe's Title IX claim suggests private institutions could face liability under Title IX for failing to provide cross-examination to the extent there is evidence the failure to provide cross-examination is due to gender bias.

Public colleges and universities in the Sixth Circuit should review their sexual-misconduct policies and consider revising them, as necessary, to provide the right of cross-examination in the circumstances specified in Doe. Private colleges and universities in the Sixth Circuit should review their sexual misconduct policies to determine whether any aspects of their policies, including the absence of cross-examination, pose the risk of a gender-bias Title IX claim and consider appropriate revisions, as necessary.

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For more information about the implications of this ruling for your institution, please contact your Husch Blackwell attorney, Derek T. Teeter or Michael T. Raupp.

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