What are students' due process rights in school disciplinary proceedings?

BY ADAM J. SHEPPARD

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Sexual assaults involving college students are an all too common occurrence. However, based on the prejudicial nature of the allegations, there is often a tragic rush to judgment.

Witness the case of the Duke lacrosse players falsely accused of rape. The players were cleared of wrongdoing when lawyers presented discrepancies in the complainant's various accounts, raised issues regarding her credibility, challenged DNA evidence and presented alibi evidence.

Lawyers and investigators only received such evidence after the players were indicted and the discovery process commenced, however. In the immediate aftermath of the allegations, the university suspended the players from games, canceled the remainder of the season and forced the coach to resign.

School disciplinary proceedings do not accord students the same due process rights as criminal defendants. See *Board of Curators v. Horowitz*, 435 U.S. 78, 88, 98 S.Ct. 948, 954, 55 L.Ed.2d 124 (1978); ("A school is an academic institution, not a courtroom or administrative hearing room."); *Jaksa v. Regents of Univ. of Michigan*, 597 F.Supp. 1245, 1250 (E.D.Mich.1984) (though "a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms." (citing, *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992, 1000 (5th Cir.1975))).

Many school codes do not accord students the right to legal representation at school disciplinary proceedings. Nor do students have a right to cross-examine their accusers in person. See e.g., *Cloud v. Trustees of Boston University*, 720 F.2d 721, 14 Ed. Law Rep. 450 (1st Cir. 1983).

The standard of proof used in such hearings is also lower than the "proof beyond a reasonable doubt" used in criminal cases. Traditionally, schools have used a "clear and convincing evidence" standard to adjudicate allegations of sexual assault. *Ruane v. Shippensburg University*, 871 A.2d 859, 863 (Pa.Cmwlth., 2005.).

The "clear and convincing evidence" standard is "more than preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense.' [Citation.]" *Judgment Services Corp. v. Sullivan*, 321 Ill.App.3d 151, 156 (1st Dist. 2001).

Two years ago, the Obama administration dealt a further blow to students' due process rights in sexual misconduct cases. In April 2011, the Department of Education and its Office of Civil Rights issued a "Dear Colleague" letter to colleges and universities receiving federal funding (see whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf).

The "Dear Colleague" letter was a "significant guidance document" on how to adjudicate allegations of sexual misconduct. Id. at 1, fn 1. The letter stated that "in order for a school's grievance procedures to be consistent with Title IX (the federal law which prohibits discrimination based on sex), the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual violence or harassment occurred)." Id. at 11.

Grievance procedures which use the "clear and convincing evidence" standard are "not equitable under Title IX." Id. According to the letter, the preponderance standard is the "appropriate" standard for investigating allegations of sexual harassment or violence. Id.

Using the preponderance standard in sexual assault cases is particularly troublesome. For one thing, alcohol is often a factor in sexual assault cases — see collegedrinkingprevention.gov/media/journal/118-abbey.pdf, "Alcohol-Related Sexual Assault: A Common Problem Among College Students," Antonia Abbey, Ph.D., Department of Community Medicine, Wayne State University, which cites a collection of studies reporting that at least half of college students' sexual assaults are associated with alcohol use. Also see wral.com/news/local/story/1092027, showing police notes in the Duke lacrosse case indicate that the accuser was inebriated, she admitted drinking and taking a muscle relaxant.

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Moreover, sexual assault cases are frequently "he-said, she-said" cases — see *Hammer v. State*, 296 S.W.3d 555, 561-62 (Tex.Crim.App. 2009) (footnotes omitted).

In such cases, the trier of fact hears two diametrically different versions of an event, unaided by other corroborative evidence. Id. Coupling these factors with a lower standard of proof will greatly increase the risk of wrongful decisions.

Combating sexual violence on college campuses is obviously a laudable goal, but students' due process rights must not fall by the wayside.

As Justice Louis Brandeis stated, "[t]he greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning, but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 573 (1928) (Brandeis, J., dissenting).

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