



Education ADVISORY ■

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California Supreme Court Says Cross-Examination Is Not Necessary for Campus Disciplinary Proceedings

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While institutions of higher education would prefer to focus on educating their students and not investigating allegations of wrongdoing, issues inevitably arise. Generally, how institutions adjudicate allegations is not specifically prescribed. Depending on the severity of the conduct or the subject of the conflict, the sanctions that may be imposed can be of significant consequence to the accused student. The more severe the accusations and potential sanctions, the tougher it can be for an institution to balance competing interests in a way that withstands the inevitable scrutiny. For example, must an institution allow an accused student to cross-examine witnesses during Title IX investigations? The California Supreme Court says no.

Cross-examination is considered a cornerstone of our system of justice. As recently noted by the Connecticut Supreme Court, “[i]t has been said many times that cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth.” Challenging memories, testing credibility, and probing narratives are hallmarks of getting to the truth that is facilitated by cross-examination.

In higher education, the topic of cross-examination is debated in connection with Title IX investigations weighing the rights of the accuser and the accused. Indeed, on July 31, 2023, the California Supreme Court in *Boermeester v. Carry, et al.* recently admonished “[w]hen crafting the precise procedures necessary to provide a meaningful opportunity to respond, however, a private university must balance competing interests, including the accused student’s interests in a fair procedure and completing a postsecondary education, the accuser’s interest in not being retraumatized by the disciplinary process, and the private university’s interests in maintaining a safe campus and encouraging victims to report instances of sexual misconduct or intimate partner violence without having to divert too many resources from its main purpose of education.”

Similarly, the Connecticut Supreme Court in *Khan v. Yale University* (June 27, 2023) summarized the tensions that arise in investigations involving sexual assault:

[W]e consider it foundational that all students must be able to attend school, move about campus, and enjoy the manifold privileges and benefits of their academic pursuits without fear of sexual harassment or assault by members of their own community.

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At the same time, however, we must recognize a competing public policy that those accused of crimes, especially as serious a crime as sexual assault, are entitled to fundamental fairness before being labeled a sexual predator. . . . Those accused of sexual assault in the higher education context often face life altering and stigmatizing consequences, including suspension or expulsion In the face of these consequences, we must acknowledge that the accused's right to fundamental fairness is no less important than the right of the accuser or the larger community to achieve justice.

Given these tensions, institutions must consider whether live cross-examination is necessary to ensure the adjudicatory process is fair. The proposed amendments to Title IX regulations – to be released in October 2023 – suggest live cross-examination will not be required. In the context of Title IX, the U.S. Department of Education under the Biden Administration has indicated sufficient protections can exist without live cross-examination, provided the accuser and the accused are treated equitably in the process and all sides are given an equal opportunity to present relevant evidence and respond to relevant evidence offered by other parties. Similarly, California's Senate Bill 493, which became effective January 1, 2021, does not require institutions to conduct live hearings with cross-examination of witnesses.

In *Boermeester*, the California Supreme Court also concluded cross-examination was not necessary when it considered whether California's common-law doctrine of fair procedure was violated when a student accused of intimate partner violence was not provided the opportunity to cross-examine his accuser. In *Boermeester*, the institution expelled the accused from the private university "after conducting a two-month investigation and determining that he violated [the institution's] policy against engaging in intimate partner violence."

At the time, the institution's student conduct code "prohibited students from engaging in intimate partner violence, which it defined as 'violence committed against a person . . . with whom [the accused student has] had a previous or current dating, romantic, intimate, or sexual relationship.'" Following the institution's procedures in effect, the institution's Title IX office would conduct an intake interview of the alleged victim, and if a formal investigation was opened, notify the accuser and the accused of the investigation and alleged policy violations. Both the accuser and accused would have "individual and separate" opportunities to review the evidence gathered in the investigation and "respond to the evidence through an 'evidence hearing' held at the Title IX office and conducted by [the institution's] Title IX coordinator."

The coordinator also facilitated questions submitted by each to pose to the other at the separate hearings. The Title IX investigator would prepare a summary that, if a violation of the conduct policy were found, would be sent to a misconduct sanctioning panel composed of three appointed individuals (one undergraduate student and two staff) to impose sanctions, which was subject to appeal. "Throughout the process – from investigation to final adjudication – both the accuser and accused student were allowed to receive support and assistance from an advisor of their choice, who could be an attorney."

As recited in the opinion, Boermeester claimed his behavior "was playful or sexual in nature and amounted to mere 'roughhousing.'" The investigator concluded that the institution's conduct code had been violated. The misconduct sanctioning panel recommended expulsion; even though an appellate panel recommended reducing the sanction (because it was uncertain the accused intended to harm Roe). The institution concluded expulsion was appropriate.

Boermeester appealed the determination by filing a petition for writ of administrative mandate under California's statute. The trial court denied the writ, but was reversed by the appellate court, which concluded that the institution's "disciplinary procedures were unfair because Boermeester was unable to directly or indirectly question Roe and the

third party witnesses in real time at a live hearing.” The California Supreme Court granted review to answer whether the institution “should have held a live hearing featuring real-time direct or indirect cross-examination of all parties and witnesses ... with an opportunity for Boermeester to ask the witnesses follow-up questions.”

First, the supreme court concluded that the institution’s disciplinary hearing was “quasi-judicial” and that the subsequent review is limited to “whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.”

The court concluded that the review “applies not only to the decisions of governmental agencies but also to the decisions of private organizations, so long as the private organization was legally required to hold a hearing, take evidence, and make factual determinations in coming to its decision” and applied the standard to the private university even though it had never previously applied the standard to a private university’s disciplinary decision.

Second, the court discussed the regulatory guidance and legislative backdrop of its opinion. The court noted that California’s “statute does not require universities to conduct live hearings featuring cross-examination of the accuser and other witnesses.” It also recounted the changing posture of the U.S. Department of Education’s Office for Civil Rights (OCR) as administrations change and noted that Title IX regulations “may be trending towards providing private universities with more flexibility in determining whether to conduct a live hearing.”

While neither was applicable or dispositive, the court noted it was significant that Senate Bill 493 and the OCR’s most recent proposed regulations give institutions wide latitude in determining the precise nature of their disciplinary proceedings.

Finally, the court applied the common-law doctrine of fair procedure. That doctrine was “originally developed to prevent the arbitrary expulsion of individuals from memberships in certain private organizations – such as mutual aid societies, fraternities, or unions – where the expulsion ‘adversely affected property rights in specified funds held for the association’s members.’” The courts expanded the doctrine “to prevent the arbitrary expulsion or exclusion of individuals from private organizations that ‘possess substantial power either to thwart an individual’s pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced.’”

It is sufficient to show that exclusion from membership deprives them of substantial educational, financial, or professional advantages for the doctrine to apply. Since “a private university provides an important, quasi-public service – a postsecondary education – affecting the public interest,” “a student’s interest in completing a postsecondary education at a private university is analogous to an individual’s interest in continuing membership in a private organization that impacts the individual’s ability to practice his or her chosen profession.” Therefore, California’s common-law doctrine of fair procedure applied.

That doctrine only requires that private organizations “provide adequate notice of the charges and a meaningful opportunity to be heard.” The court noted that “[w]e have never held ... that any specific or baseline procedures must be followed to satisfy these requirements.”

“Requiring live hearings featuring real-time cross-examination of witnesses in the accused student’s presence would be contrary to our prior conclusion that ‘fair procedure does not compel formal proceedings with all the embellishments of a court trial.’” The court also recognized “the practical limitations on the ability of private institutions to provide for the full airing of disputed factual issues” because they “are ill-equipped to function as courts because they lack subpoena power to force key witnesses to attend a hearing and be subject to cross-examination.”

Having concluded the institution was not obligated by either its own procedures or the fair procedure doctrine to allow Boermeester to directly or indirectly cross-examine Roe or other witnesses at a live hearing, it ruled the institution's disciplinary procedures were fair.

Despite the proposed amendments to Title IX's regulations and California Senate Bill 493, *Boermeester* remains a notable opinion. The fair procedure doctrine continues to apply to actions that do not involve sexual discrimination or violence. For example, because the consequences for academic dishonesty may have a material effect on a student's reputation, the same considerations are warranted for those disciplinary proceedings.

In sum, the accused in a disciplinary hearing must have an opportunity to be informed of the charges and a meaningful opportunity to be heard. That opportunity to be heard generally should include a chance to review and challenge evidence, with assistance if desired. The proceeding must have indicia of reliability, such as consequences for false statements.

But it does not necessarily require all the trappings of a trial, such as live cross-examination. Institutions must be thoughtful about how they balance all the competing demands on the adjudicative process, being sure to consider the rights of the accused, the interests of the accuser, and the institution at large.

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