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LETTER TO THE EDITOR

Universities cannot shortcut the due process rights of those accused of sexual misconduct

In the June 12 edition of the Daily Journal, David Urban wrote an article regarding *Austin v. University of Oregon*, 2019 DJDAR 4815 (9th Cir. June 4, 2019), arguing that the case's "reasoning will be relevant in California because it expressly interprets federal standards for due process in the student discipline context." Mr. Urban goes on to conclude that "a public institution in California may only need to argue that *Austin*'s very general discussion of due process rights needs to be satisfied for a university to prevail." Respectfully, Mr. Urban's analysis of *Austin* goes too far, and his elevation of its importance to California-based litigation is misplaced.

The case involved multiple male student athletes who purportedly forced a female student to have non-consensual sex. The matter became public through the local news and "the campus erupted in protest." The university initiated disciplinary proceedings pursuant to its Student Conduct Code, which actually provided an option to the students to select two very different types of processes. The first process would be a panel hearing in front of a panel of students, faculty and staff, which included the right of appeal and presumably allowed presentation of evidence. The opinion is silent on whether a right of cross-examination of the complaining party was included in such a hearing, so that whether this right was available to the accused student athletes is unclear and not discussed. In any event, the accused students opted not to have such a hearing but rather chose a "Special Administrative Conference," which allowed them only to access the case file and to review and respond to the investigative report before an allegedly neutral administrator. However, this streamlined conference process had a very significant benefit: By choosing this option, the most serious disciplinary sanctions were eliminated. Specifically, the possibility of expulsion was removed. Moreover, the students also eliminated potential "negative notation" on their academic record, such as that they raped another student. Instead, the only thing that could go on the students' record was a "notation of finding of Code violation - unspecified."

The students chose to limit their downside and opt for the more streamlined procedure. After losing in front of the administrator who suspended the students, they sued claiming sex discrimination and due process violations under Title IX. But their case was dismissed due primarily to pleading failures — they simply could not plead any facts to show that they were discriminated against by the university because they were male. As the court noted: "Just saying so is not enough." Federal pleading standards required them to allege facts showing that they were mistreated because of their sex, and after three attempts they simply could not do so. Not surprisingly in this factual scenario, the court rejected the argument that males are more often the subjects of sexual misconduct violations than females as sufficient to show that the university was somehow biased against men. The court also differentiated the 9th Circuit pleading requirements for Title IX cases from those in the 2nd Circuit. As for due process, without much discussion, the court pointed out that the students had a choice and with the help of counsel opted for an Administrative Conference instead of a full hearing — and they achieved tangible benefits through this choice and avoided both expulsion and a very negative notation on their record. As a result, the court held that "[o]n these facts, the student athletes were not denied due process." (Emphasis added.)

Critically, this case is limited to its unique facts. There is no discussion of, for example, the right of cross-examination so thoroughly discussed in the California cases because these students opted not to have a full hearing. The court does not even discuss the issue because of the peculiar circumstances of this case. And the court explicitly limits its determination to these particular facts. Thus, Mr. Urban's conclusions that this case represents anything inconsistent with the developing California authority which he references is not persuasive. *Austin*, by its own description, is primarily about federal pleading standards, and any attempt to construe it as something more is wishful thinking on the part of universities.

In fact, unlike *Austin*, a series of recent California Court of Appeal decisions clarified the fair hearing and due process requirements in a California university setting. In *Doe v. Claremont McKenna College*, 25 Cal. App. 5th 1055 (2018), the court held that when the complainant's credibility is at issue, it must be assessed by some form of cross-examination, whether traditional or over videoconference. Similarly, in *Doe v. Allee*, 30 Cal. App. 5th 1036 (2019), the court again held that when witness credibility is at issue, the accused must be allowed to cross-examine witnesses and that the adjudicator must be neutral. In *Doe v. University of Southern California*, 29 Cal. App. 5th 1212 (2018), the court held that the Title IX investigator should have personally interviewed witnesses rather than having relied on second-hand summaries, and that the university did not comply with its own procedures. Finally, in *Doe v. Regents of University of California*, 28 Cal. App. 5th 44 (2018), the court held that the accused was denied a fair hearing because he was denied access to critical evidence, was not allowed to cross-examine witnesses, and was denied the opportunity to present evidence in his defense.

This area of the law has developed because of the need for universities to properly address the issue when unsettling sexual misconduct allegations are made — whether against students, faculty or other staff members. Such allegations are explosive and frequently exploited by the media or even prospecting plaintiff's lawyers. Understandably, universities would like to put such challenging and divisive public controversies behind them quickly. But sometimes the allegations are significantly overstated or just plain false, so there must be procedural protections for accused members of the university's community, whose lives can be ruined by inaccurate or meritless allegations of this type. Thus, to avoid a rush to judgment without due process, the courts have made clear that discovery, cross-examination and other procedural safeguards must be instituted, and *Austin* does not change that requirement. The details of the recent cases differ, but the trend is clear: Universities must provide the accused with at least a truly neutral adjudicator, the opportunity to cross-examine witnesses, including the accusing party, and discovery of evidence, and the university must comply with its own procedures. ■


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