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Client Alert: Sixth Circuit Reaffirms Due Process Right to Cross-Examine Title IX Accuser

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Last year, in *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017), the Sixth Circuit held that, when credibility is at issue, the Due Process Clause requires a public university to provide an accused student a hearing with an opportunity to conduct cross-examination.

In September 2018, the Sixth Circuit reiterated and clarified its holding in *University of Cincinnati*. Specifically, the court concluded 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.” *Doe v. Baum*, Case No. 17-2213, 2018 U.S. App. LEXIS 25404 (6th Cir. Sept. 7, 2018).

Baum involved a sexual misconduct complaint to the University of Michigan filed by Jane Roe, a female student, against John Doe, a male student. While Doe alleged that their sexual encounter was consensual, Roe alleged that she was too intoxicated to consent. The university investigated and interviewed Doe, Roe, and twenty-three other witnesses. The investigator concluded that the evidence supporting Roe’s complaint was not more convincing than the evidence offered in opposition to it because of conflicting witness statements. Roe appealed. After reviewing only the investigator’s report, the Appeals Board reversed, reasoning that, even though the investigation was fair and thorough, Roe’s description of the events was “more credible” and Roe’s witnesses were more persuasive. The university set aside the investigator’s recommendation. Doe withdrew from the university and filed suit claiming that the university’s disciplinary process violated the Due Process Clause and Title IX. With regard to due process, Doe argued that, because the university’s decision was based on credibility, the university was required to allow him a hearing and an opportunity to cross-examine Roe and adverse witnesses.

The district court dismissed Doe’s claim and concluded that, even if credibility was at issue, the university’s failure to allow cross-examination was immaterial. The Sixth Circuit reversed and concluded that Doe raised a plausible due process claim to defeat a motion to

dismiss. Specifically, the court rejected the university's argument that cross-examination was not necessary because Doe was permitted to review Roe's statement and submit a response identifying inconsistencies for the investigator. The court reiterated that written statements cannot substitute for cross-examination and that the university must allow for some form of live questioning in front of the fact-finder. The court clarified, however, that the accused does not necessarily have the right to personally cross-examine his accuser or other witnesses—the university could allow an agent to cross-examine where confrontation may subject the accuser to emotional trauma. The court also clarified that *University of Cincinnati* did not stand for the proposition that cross-examination is required only if the university's decision depends solely on the credibility of the accused versus the accuser. Rather, cross-examination is no less important where the finding rests on the credibility of several witnesses. Cross-examination is, however, unnecessary when the university's decision does not rely on any testimonial evidence.

Impact: Public Institutions

Baum reaffirmed and clarified the due process requirement that public institutions within the Sixth Circuit—Michigan, Ohio, Kentucky and Tennessee—must allow the accused student, or his or her agent, the opportunity to cross-examine the accuser and adverse witnesses before a neutral fact-finder when credibility of witnesses is in dispute. This right to cross-examine, however, does not include the right to “personally” cross-examine the accuser, given a recognition of the trauma to the accuser this may cause.

Note, however, that previous Sixth Circuit precedent has limited a student's constitutional right to counsel to proceedings where the hearing is procedurally complex or where the university utilizes counsel. Therefore, this raises the question of what process a school may follow when confrontation by the accused may subject the accuser to emotional trauma, but the accused has no agent or has an agent who may also subject the accuser to emotional trauma, such as a friend or parent. This question is especially important as *Baum* confirmed that written questions are not sufficient to protect the due process rights of the accused.

Impact: Private Institutions

Private institutions are not subject to the due process requirements of their public counterparts and, therefore, are not required to provide the accused student with an opportunity to cross-examine through live questioning. Nevertheless, in light of *Baum* and to attempt to protect the private institution from other civil liability, when credibility is at issue, private institutions should provide a meaningful opportunity through their Title IX process for students to identify inconsistencies and suggest inquiries for follow-up on a case-by-case basis.