

# Circuit Split on Student's Due Process Right to Cross-Examination in Title IX Matters

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Constitutional due process does not mean a student accused of assault has the right to directly cross-examine his accuser in adjudications under Title IX of the Education Amendments of 1972 at state institutions of higher education, the federal appeals court in Boston has held. [\*Haidak v. University of Massachusetts-Amherst\*](#) No. 18-1248 (1st Cir. Aug. 6, 2019).

This puts the U.S. Court of Appeals for the First Circuit at odds with the U.S. Court of Appeals for the Sixth Circuit (in Cincinnati) and the Department of Education's proposed Title IX regulations.

The First Circuit has jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

### Sixth Circuit Decision

In *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit held that the University of Michigan's process for adjudicating sexual misconduct allegations did not meet minimum standards of due process. The Sixth Circuit reasoned that, as an arm of the State of Michigan, the school must provide constitutional due process to students accused of sexual misconduct. In so holding, the Sixth Circuit made a blanket finding that a student at a state institution accused of sexual misconduct is entitled to cross-examine his or her accuser, either directly or through an agent or representative. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

*Baum* had many state universities throughout the country revising their sexual misconduct policies to reflect the ruling.

Reflecting the Sixth Circuit's holding in *Baum*, the Department of Education's proposed Title IX regulations would guarantee accused students the right to cross-examine their accusers in these proceedings. (See our article, [Department of Education Unveils Proposed Title IX Regulations](#).)

### Background

The First Circuit case involves two students at the University of Massachusetts-Amherst who were in a romantic relationship that began in 2012. In 2013, the University received a complaint that the boyfriend, the Respondent, had assaulted the complainant. The University issued both parties a no-contact order.

The Respondent allegedly violated the no-contact order. The University issued him a warning, then an interim suspension prior to conducting a hearing. The University found the Respondent was not responsible for sexual misconduct, but it found him responsible for assault and for violating the no-contact order. The University ultimately expelled the Respondent.

The Respondent sued the University, alleging that his due process rights were violated and that the adjudicatory process was in violation of Title IX. After the federal district court dismissed his claims in their entirety, he appealed to the First Circuit.

### First Circuit Decision

The First Circuit agreed with the district court's dismissal on all counts, except as to the Respondent's challenge of due process on the interim suspension.

The Court said the five-month interim suspension violated the Respondent's due process rights because the University did not demonstrate his conduct was severe enough to merit an immediate suspension. It ruled the University should have provided him some level of process pre-suspension.

However, the Court was clear it was *not* holding that the Respondent's due process rights were violated simply because he was not afforded the opportunity to interrogate his accuser directly. Relying on *Baum*, the Respondent had argued he was entitled to more than an assurance that his accuser would be questioned by an independent fact-finder. He contended he was entitled to cross-examine the accuser himself. The First Circuit disagreed. It said the Sixth Circuit took "the conclusion one step further than [the First Circuit] care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases to determine credibility."

The First Circuit held that an interrogation of the accuser by an independent fact-finder may be enough to satisfy the guarantee of due process. The Court drew a distinction between administrative hearings at colleges and universities and common law trials, cautioning against mixing them up. In holding that a blanket rule requiring direct cross-examination went too far, the Court reasoned that a university choosing to use an independent examiner still had to ensure adequate questioning of the accuser. The Court said, "A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student." If the school chooses to question the accuser in place of the accused, the Court holds, it must sufficiently probe the credibility of the accuser and the accusations.

The Court concluded that this case was a close call. It noted that many of the questions provided by the Respondent to the fact-finder were stricken, and that there was a discernible difference in tone and manner in which the parties were questioned. Accordingly, the Court vacated dismissal of the Respondent's claims challenging the constitutionality of the manner in which the University suspended him for five months without prior notice or an adequate hearing and remanded that portion of the case to the lower court.

### Takeaways

The circuit split on cross-examination under Title IX takes on additional significance in light of the Department of Education's proposed regulations, which adopted the Sixth Circuit rule. It remains to be seen whether the Department will consider *Haidak* in re-evaluating the proposed regulations, which would have a broader impact than either of these decisions, and applicable to all public schools and private schools accepting federal funds.

The immediate impact for public higher education institutions outside of the First Circuit is more confusion. *Haidak* represents a different standard than *Baum* and apparently

approves the procedures that most public institutions utilized prior to *Baum*. While the circuit split could set the table for U.S. Supreme Court review, many commentators are skeptical that the high court would grant *certiorari*.

As the law continues to change and evolve, university counsel should regularly review their policies and procedures for handling allegations of misconduct. Please contact a Jackson Lewis attorney if you have any questions about this case or other developments.

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