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Constitutional Law—Third Party Cross-Examination During Campus Misconduct Hearings Satisfies Due Process Requirement Under Fourteenth Amendment—Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1st Cir. 2019)

Kori Dean
Suffolk University Law School

CONSTITUTIONAL LAW—THIRD PARTY CROSS-EXAMINATION DURING CAMPUS MISCONDUCT HEARINGS SATISFIES DUE PROCESS REQUIREMENT UNDER FOURTEENTH AMENDMENT—*HAIDAK V. UNIV. OF MASS.-AMHERST, 933 F.3D 56 (1ST CIR. 2019)*

A student enrolled in a public educational institution has a legally recognized property interest in her education, and thus is entitled to due process when that interest is threatened.[1] Due process requirements for administrative proceedings, such as school misconduct hearings, differ substantially from their criminal counterparts.[2] Despite this distinction, both utilize cross-examination to discern questions of fact and vet witness reliability.[3] In *Haidak v. Univ. of Mass.-Amherst*,[4] the First Circuit Court of Appeals considered whether cross-examination by a neutral third party during school misconduct hearings satisfies the Fourteenth Amendment's due process requirements.[5] The court ultimately held that cross-examination conducted by a third party satisfies due process as long as the testifying witness' testimony is properly probed.[6] The First Circuit also explicitly refused to follow the Sixth Circuit's holding in *Doe v. Baum* by ruling that public institutions were not required to allow student-lead cross-examination.[7]

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[1] *See* U.S. CONST. amend. XIV, § 1 (requiring due process before deprivation of life, liberty, or property); Goss v. Lopez, 419 U.S. 565, 574 (1975) (noting students' property interest in public education); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) (citing *Goss*, 419 U.S. at 574-75) (reiterating students' interest in public education falls under purview of Fourteenth Amendment).

[2] *See* J. Brad Reich, *When is Due Process Due?: Title IX, "The State," and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1, 5 (2017) (discussing differences in due process for criminal prosecutions and school disciplinary hearings).

[3] *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (noting importance of cross-examination when there are undetermined questions of fact). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*

[4] 933 F.3d 56 (1st Cir. 2019).

[5] *See id.* at 68 (outlining issue before court).

[6] *See id.* at 69 (summarizing court's holding). "[W]e agree . . . that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" *Id.*

[7] *See Haidak*, 933 F.3d at 69 (refusing to rule as extensively as *Baum* court); *see also Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (summarizing Sixth Circuit's holding).

James Haidak and Lauren Gibney were engaged in a romantic relationship while they were students attending the University of Massachusetts, Amherst ("University").[8] While studying abroad in Barcelona, the couple got into an argument that turned physical and Gibney's mother reported Haidak's alleged assault against Gibney to the University.[9] The University issued a charge against Haidak for violating two provisions of the University's Code of Student Conduct ("Code") as well as a no-contact order prohibiting him from having further contact with Gibney.[10]

Despite the no-contact order, Haidak and Gibney continued consensual communication.[11] As a result, Haidak was issued second and third notices charging him with violations of the Code.[12] At the same time the third notice was issued, the University suspended Haidak pending a disciplinary hearing.[13] Nearly five months later, the University held a hearing on the charges issued against Haidak.[14] Prior to this hearing, Haidak submitted a list of thirty-six proposed questions for the Hearing Board ("Board") to consider when questioning Gibney.[15] The Board ultimately reduced this list to sixteen, with no question worded identically to any on Haidak's initial list.[16]

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[8] *See Haidak*, 933 F.3d at 61 (describing Haidak and Gibney's relationship).

[9] *See id.* (outlining facts regarding Barcelona incident). After a spending a night at a club, Haidak and Gibney returned home and got into an argument. *Id.* According to Gibney, Haidak put his hands around her neck, pushed her onto a bed, grabbed her wrists, and punched himself in the face with her fists. *Id.* According to Haidak, Gibney hit him first and he only restrained her to prevent her from continuing to assault him. *Id.*

[10] *See id.* at 62 (noting charges issued on first notice). The Dean of Students issued Haidak a Notice of Charge for violating two provisions of the Code: (1) Physical Assault and (2) Endangering Behavior to Persons or Property. *Id.*

[11] *See id.* (stating Haidak and Gibney resumed contact over phone and in person almost immediately).

[12] *See id.* (noting charges issued on second and third notices). The second and third Notice of Charge were for violating two additional provisions of the Code: (1) Harassment and (2) Failure to Comply with the Direction of University Officials. *Id.* The charge of "Failure to Comply with the Direction of University Officials" referred to Haidak's violation of the no-contact order. *Id.*

[13] *See Haidak*, 933 F.3d at 62-63 (describing Haidak's suspension).

[14] *See id.* at 64 (recounting events leading up to disciplinary hearing).

[15] *See id.* (detailing University policy regarding hearing procedures). University policy did not allow a student respondent to question other students directly but permitted the respondent's submission of proposed questions for the Board to consider posing to witnesses. *See id.*

[16] *See id.* (describing Haidak's questions and photographs of abuse); *see also* Haidak v. Univ. of Mass. at Amherst, 299 F. Supp. 3d 242, 257 (D. Mass. 2018) *aff'd in part*, *vacated in part*, *remanded sub nom*. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1st Cir. 2019) (noting questions omitted by Board). Of the sixteen questions the Board accepted, none addressed whether Gibney had ever hit or bitten Haidak, or whether Gibney had tried to conceal her consensual relationship with Haidak from her parents. *See Haidak*, 299 F. Supp. 3d at 257.

The Board ultimately found Haidak responsible for physical assault and failure to comply with the direction of University officials, resulting in his expulsion.[17] He subsequently filed suit against the University alleging that the manner in which his hearing was conducted violated his right to due process under the Fourteenth Amendment.[18] The district court granted summary judgement in the University's favor.[19] On appeal, Haidak argued that due process requires that a student respondent be allowed to question an adverse witness directly when a disciplinary proceeding turns on that witness's credibility.[20] The First Circuit rejected this argument, ruling that the procedures of a common law trial need not govern a university disciplinary hearing and that due process was satisfied when the Board conducted its own cross-examination.[21]

The Fourteenth Amendment prohibits states from depriving citizens of life, liberty, or property without due process of law.[22] There are two types of due process under the Fourteenth Amendment: substantive

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[17] *See Haidak*, 933 F.3d at 64-65 (stating Board's ruling); *see also Haidak*, 299 F. Supp. 3d. at 258-59 (outlining Board's rationale for its decision). The Student Conduct Hearing Board report provided the following:

> The board finds [Plaintiff] not responsible for [endangering behavior to persons or property], because his actions did not rise to a level violating this policy. However, his behavior was disproportionate to the actions he attributed to Gibney, and the board believes [Plaintiff] did cause physical harm to [Gibney's] wrists and arms based on the narratives and pictures presented in the hearing. As such, we find [Plaintiff] responsible for [physical assault]. Regarding the second and third incidents, the board finds [Plaintiff] not responsible for [harassment] in both cases, as the contact after the April incident was mutual and non-threatening according to both parties. However, we find [Plaintiff] responsible for [failure to comply] in both cases because he still knowingly violated the directives of the university, and failed to address any reservations he might have had with the appropriate official.

Haidak, 299 F. Supp. 3d. at 258 (alterations in original).

[18] *See Haidak*, 933 F.3d at 65 (outlining Haidak's complaint). Haidak claimed that his hearing was constitutionally flawed because: "(1) some of his proffered evidence was excluded; and (2) he was not allowed to cross-examine Gibney." *Id.* at 66.

[19] *See Haidak*, 299 F. Supp. 3d at 271 (granting summary judgment for University).

[20] *See Haidak*, 933 F.3d at 68 (describing Haidak's argument that his constitutional rights were violated). While Haidak acknowledged that the right to unlimited cross-examination is not an essential requirement in school disciplinary hearings, he maintained he should have the right to cross-examine Gibney since the outcome his hearing depended on her credibility. *Id.*

[21] *See id.* at 69 (outlining court's ruling). "[Haidak's] position would seem to be that the accused student must be allowed to question opposing witnesses himself. As a general rule, we disagree . . . ." *Id.*

[22] *See* U.S. CONST. amend. XIV, § 1 (stating due process is required before deprivation of life, liberty, or property).

and procedural.[23] Substantive due process protects citizens from the arbitrary and wrongful deprivation of a fundamental constitutional right, while procedural due process affords citizens the right to appropriate procedures before they are stripped of a property or liberty interest.[24] Whether procedural protections are due to a citizen under certain circumstances depends primarily on "the extent to which the individual will be 'condemned to suffer a grievous loss.'"[25] This question of extent creates a sort of spectrum for procedural due process requirements, with civil due process located on one end and criminal due process located on the other.[26] Since defendants in criminal proceedings are more likely to suffer the loss of life or liberty, due process requirements in criminal cases are far more expansive than those in civil or administrative matters, where life and liberty are usually not at stake.[27]

When determining whether a specific procedure violates a citizen's due process rights, a court must first address the nature of the property or liberty interest at stake and then evaluate the adequacy of the proceedings afforded to the citizen.[28] The Supreme Court in *Mathews v. Eldridge* listed three factors for a court to consider when determining the sufficiency of procedural due process in administrative proceedings: (1) the private interest implicated by government action; (2) the risk of erroneous deprivation

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[23] *See* Aaron Nisenson, *Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities*, 120 PENN. ST. L. REV. 963, 963-64 (2016) (distinguishing between substantive and procedural due process).

[24] *See, e.g.*, *id.* (defining substantive and procedural due process); Goss v. Lopez, 419 U.S. 565, 574 (1975) (describing "student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (describing substantive due process right of privacy); Reich, *supra* note 2, at 17-18 (discussing non-criminal situations analogous to campus sexual assault investigations where due process protections exist).

[25] *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (describing how Court determines whether procedural due process protections are due). The Court will first determine the weight of the individual's interest and then consider whether the nature of the interest "is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Id.* Once the Court determines that due process applies, it must then decide what process is due. *Id.*

[26] *See id.* (stating due process is flexible and "calls for such procedural protections as the particular situation demands"). The *Morrissey* Court recognized that a parolee has a legitimate liberty interest in his parole and ruled that due process requires fair and informal hearing procedures when the state seeks to revoke parole. *Id.* at 484.

[27] *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 56 (2006) (noting difference between criminal proceedings and civil proceedings).

[28] *See* Nisenson, *supra* note 23, at 964 (describing procedural due process analysis). To establish a procedural due process violation, a citizen must show that the state deprived him or her of a constitutionally protected property or liberty interest without appropriate procedures. *Id.*

of said interest through the procedures used and the value of additional or substitute procedural safeguards; and (3) the government's interest and the financial and administrative burdens that additional procedural requirements would entail.[29] Courts approach criminal procedural due process differently, however.[30] In the absence of a *Mathews*-like test, courts must rely on a wide variety of precedent to ensure that the due process rights of defendants in criminal trials are adequately protected.[31] Among the various criminal due process rights protected under the Constitution is the right to confront witnesses through cross-examination.[32] The Supreme Court declared that it is "one of the safeguards essential to a fair trial" and the most effective means of ascertaining the truth.[33]

Legal scholars have defined cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[34] While cross-examination may be invaluable to a defendant who seeks to refute evidence presented against him, it also has its shortcomings.[35] In

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[29] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining three-factor test).

[30] *See* Kuckes, *supra* note 27, at 14 (distinguishing criminal due process analysis from civil due process analysis). Courts tend to approach civil and administrative procedural due process challenges in a straightforward fashion by using the *Mathews* test. *Id.* In criminal cases, however, there is no uniform doctrinal approach. *See id.* at 14-15. Courts must use a historical approach in determining what procedural due process rights should be afforded to criminal defendants. *See id.*

[31] *See id.* at 18 (acknowledging criminal due process precedent is highly protective of criminal defendants). While many of the rights afforded to a criminal defendant are specifically enumerated in the Bill of Rights, the Supreme Court has found that criminal defendants are entitled to several additional freestanding rights, implied by the constitutional guarantee of due process of law. *See*, *e.g.*, Medina v. California, 505 U.S. 437, 453 (1992) (acknowledging "longstanding recognition that the criminal trial of an incompetent defendant violates due process"); Estelle v. Williams, 425 U.S. 501, 503 (1976) (emphasizing presumption of innocence for criminal defendants); In re Winship, 397 U.S. 358, 364 (1970) (stating Due Process Clause protects accused against conviction except upon proof beyond a reasonable doubt); Brady v. Maryland, 373 U.S. 83, 87 (1963) (forbidding suppression of material evidence favorable to defendant).

[32] *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); Reich, *supra* note 2 at 15-16 (outlining due process protections afforded to criminal defendants); *see also* Pointer v. Texas, 380 U.S. 400, 404 (1965) (affirming "fundamental right" to cross-examine witnesses); Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (affirming right to counsel).

[33] *See Pointer*, 380 U.S. at 404-05 (acknowledging importance of cross-examination in criminal proceedings). The Court emphasized the critical role cross-examination plays in exposing falsehood and protecting criminal defendants. *Id.* The Court also noted that this right appears in the Sixth Amendment, reflecting the Framers' belief that confrontation is a fundamental aspect of a fair criminal trial. *Id.*

[34] *See* JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, 32 (Chadbourn, rev. 1974).

[35] *See* Hannah Walsh, Note, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1800 (2020) (noting detrimental effects of cross-examination on victims' testimony). Walsh acknowledges that cross-examination is an imperfect method of discerning truth in that it "incentivizes respond-

cases that involve sexual assault and domestic violence, for example, the adversarial nature of such questioning often retraumatizes victims who testify against their abusers.[36] Despite this, it is universally acknowledged that cross-examination remains a fundamental procedural due process right afforded to criminal defendants.[37] Though the utility of cross-examination is almost unanimously accepted, some courts hesitate to extend this right to students accused of misconduct, primarily due to the difference in interests at stake and the resulting burden that schools would bear.[38] As a result, school misconduct hearings tend to resemble criminal trials through their fact-finding procedures, but markedly differ in other procedural aspects.[39]

In school misconduct hearings, courts agree that schools must provide, at minimum, notice to students of specific charges laid against them and an opportunity to be heard.[40] While it is widely accepted that these hearings should not adopt all procedural formalities of a criminal trial, courts vary in their interpretations of which additional procedural safeguards schools must afford respondents.[41] Specifically, federal circuit

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ents to undermine a witness' credibility in the eyes of the trier of fact, regardless of the truth of the testimony." *Id.* As a result, cross-examination may weaken witness testimony and interfere with the accuracy of the testimony provided. *Id.*

[36] *See id.* at 1801 (explaining that sexual abuse victims are retraumatized when confronted with triggers). "Retraumatization is the 'reliving [of] stress reactions experienced as a result of a traumatic event when faced with a new similar incident . . . [in which] a current experience is subconsciously associated with the original trauma.'" *Id.* (quoting Substance Abuse & Mental Health Servs. V. Admin., *Tips for Survivors of a Disaster or Other Traumatic Event: Coping with Retraumatization* 1 (2017), https://store.samhsa.gov/sites/default/files/d7/priv/sma17-5047.pdf). Testifying victims are retraumatized when confronting their attacker in court, as they often must relive the assault through invasive questioning. *Id.* at 1802. Cross-examination further harms victims by attacking their character and undermining their creditability on the stand. *Id.*

[37] *See* Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection***,** 55 B.C. L. REV. 775, 776-78 (2014) (arguing courts and legislatures refuse to protect victims at expense of defendants' due process rights).

[38] *See* Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1627-28 (2012) (noting circuit splits regarding accused's right to cross-examine witnesses); *see also* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (concluding school hearings need not exactly mirror judicial hearings). The Fifth Circuit reasoned that it would be impractical and "detrimental to the college's education atmosphere" if it were to force schools to adhere to trial-type procedures. *Dixon*, 294 F.2d at 159.

[39] *See* Nisenson, *supra* note 23, at 965-66 (outlining factors that may limit due process protections required). Due process requires that a person receive "an adequate opportunity to be heard *in light of the circumstances at issue*." *Id.* (emphasis added).

[40] *See* Weizel, *supra* note 38, at 1627 (explaining fundamental procedural safeguards required in school misconduct hearings). The consensus among federal courts is that notice of charges and opportunity to be heard are required when a student's interest in education is threatened. *Id.*

[41] *See id.* (presenting differing opinions on due process requirements in school misconduct hearings). While courts vary in their interpretation of additional safeguards required under the

courts are split on whether students should have the opportunity to cross-examine adverse witnesses during these hearings.[42]

The Sixth Circuit recently addressed this issue in *Doe v. Baum* and held schools must afford a student respondent the right to cross-examine witnesses when the outcome of a hearing depends on certain findings of fact.[43] While the Sixth Circuit was not the first to deem cross-examination a due process requirement for accused students, other courts have refused to adopt such a ruling, referencing the administrative and financial burdens of facilitating trial-type procedures.[44]

School misconduct cases highlight the pervasiveness of intimate partner violence on college campuses.[45] While statistics quantifying sexual assaults and intimate partner violence on college campuses vary, they highlight how women enrolled at postsecondary educational institutions experience rape, sexual assault, and intimate partner violence at incredibly high rates.[46] One report from the U.S. Department of Justice found that from 1995-2013, women ages 18 to 24 had the highest rate of rape and sexual

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Fourteenth Amendment, they usually seek to prevent the "judicializing" of school disciplinary hearings. *Id.*

[42] *See id.* (outlining different opinions regarding cross-examination).

[43] *See* Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) (outlining holding). "[W]hen the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination." *Id.* (citing Doe v. Univ. of Cincinnati, 872 F.3d 393, 399-402 (6th Cir. 2017) and Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005)); *see also* Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivor's Interests and the Mathews Analysis*, 43 HARV. J.L. & GENDER 319, 355-56 (2020) (summarizing court's justification in *Baum*). The *Baum* court focused heavily on the second prong of the *Mathews* test: the nature of the accused students' interest and the risk of its erroneous deprivation. Carson & Nesbitt, *supra* note 43, at 355-56.

[44] *See* Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972) (holding students do not have right to cross-examine witnesses); Dillon v. Pulaski Cty. Special Sch. Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978) (holding students have right to cross-examine witnesses when testimony essential to committee findings); *see also* Hunter Davis, Comment, *Symbolism over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX*, 27 MICHIGAN J. GENDER & L. 213, 226 (2020) (noting courts have not reached consensus on *Baum* approach).

[45] *See* Ilana Frier, Supreme Court Commentary, *Campus Sexual Assault and Due Process*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 117, 117 (2020) (noting high rates of sexual assault and rape on college campuses). Frier notes a popular statistic stating one-in-five women experience sexual assault while attending college and argues that these statistics are relevant in analyzing what process is due to students accused of sexual misconduct and intimate partner violence. *Id.*

[46] *See* David DeMatteo et. al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y. AND L. 227, 228 (2015) (noting variances in survey outcomes studying prevalence of campus sexual assaults).

assault victimizations compared to women in all other age groups.[47] Among those women who identified as college students, only 20% reported their rapes or sexual assaults to police.[48] The statistics on domestic and intimate partner violence are similarly concerning, with women ages 18 to 24 experiencing higher rates of intimate partner violence than women in all other age groups.[49] Schools have a legitimate interest in maintaining safe educational environments for students, and the prevalence of campus sexual assaults and domestic violence undoubtedly implicate this interest.[50]

In *Haidak v. Univ. of Mass.-Amherst*, the First Circuit acknowledged the conflicting interests between educational institutions and the students attending those institutions.[51] Students have a recognized property interest in their postsecondary education; at the same time, educational institutions have an interest in creating and enforcing codes of conduct to maintain order and ensure student safety.[52] Here, both interests were implicated: the University had reason to believe that Haidak had used physical force against another student and subsequently harassed her, and Haidak faced potential expulsion as a result.[53] Because Haidak faced the possible divestiture of his interest in his education, the court ruled that the University was obligated to abide by certain procedural due process requirements, including notice and opportunity to be heard.[54]

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[47] *See* Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T OF JUSTICE (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf (describing occurrence of rape and sexual assault victimizations among college-aged women).

[48] *See id.* (identifying reporting rate of students enrolled in postsecondary education institutions). This percentage can be compared with the reporting rate of nonstudent victims ages 18 to 24, of which 32% report their rapes and sexual assaults to police. *Id*.

[49] *See* Shannan Catalano, *Intimate Partner Violence, 1993-2010*, U.S. DEP'T OF JUSTICE (Nov. 2012), https://www.bjs.gov/content/pub/pdf/ipv9310.pdf (describing occurrence of intimate partner violence among college-aged women).

[50] *See* Frier, *supra* note 45, at 125 (acknowledging schools' interest in creating safe learning environment).Frier also acknowledges that, just as accused students have a legitimate interest in continuing their education, victims have a similarly legitimate interest in avoiding revictimization while pursuing their own education. *Id.*

[51] *See* Haidak v. Univ. of Mass.-Amherst*,* 933 F.3d 56, 66 (1st Cir. 2019) (acknowledging competing interests between students and state universities).

[52] *See id.* (describing student interest in education and state interest in enforcing codes of conduct). "Students have paramount interests in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment . . . The state university, in turn, has an important interest in protecting itself and other students from those whose behavior violates the values of the school." *Id.* (citation omitted).

[53] *See id.* (acknowledging specific interests of University and Haidak).

[54] *See id.* (stating Haidak entitled to procedural due process). In determining whether Haidak's due process rights were violated, the court noted that it would only consider whether Haidak "had an opportunity to answer, explain, and defend." *Id*. at 66-67 (quoting Gorman v.

Haidak took issue with how his misconduct hearing was conducted and alleged several due process violations in his complaint.[55] Among these, he argued that the University violated his procedural due process rights by refusing to allow him to cross-examine Gibney during his hearing.[56] He cited the First Circuit's prior ruling in *Gorman v. Univ. of R.I*—which held that the right to unlimited cross-examination was not a due process requirement in school misconduct cases—but urged the court to allow such cross-examination when the outcome of a disciplinary proceeding depends on a witness' credibility.[57] Haidak referenced the Sixth Circuit's decision in *Baum* to support his argument and urged the First Circuit to adopt a similar ruling.[58] The court dismissed this argument, stating that it had "no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation."[59] It noted that the University's inquisitorial model of adjudication has long been considered fair for administrative decisions and that, as long as complaining witnesses are adequately questioned by a neutral factfinder, due process is satisfied.[60]

The First Circuit raised two justifications that contributed to its ruling.[61] First, student respondents generally do not have the right to legal

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Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988)). The court explicitly stated that it would not ask whether Haidak's hearing procedurally mirrored a common law trial. *Id.*

[55] *See id*. at 67-68, 73 (outlining due process violations alleged by Haidak). Haidak argued that the University violated his due process rights in the following ways: (1) the University excluded certain evidence from the proceedings; (2) the University did not allow him to cross-examine Gibney; and (3) the University unduly delayed his expulsion hearing. *Id.*

[56] *See Haidak*, 933 F.3d at 68 (outlining Haidak's argument regarding cross-examination).

[57] *See* Gorman v. Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988) (noting full cross-examination of witness is not required); *Haidak*, 933 F.3d at 68 (describing Haidak's argument for distinguishing case from *Gorman*).

[58] *See Haidak*, 933 F.3d at 69 (outlining Haidak's argument to adopt *Baum*); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (discussing court rationale). The Sixth Circuit in *Baum* ruled that a university violated an accused student's due process rights by not allowing him to question the female student who had accused him of rape. *Baum*, 903 F.3d at 586. The *Baum* court then announced a categorical rule that a state school must allow cross-examination by an accused student or his representative in all cases turning on credibility determinations. *Baum*, 903 F.3d at 586.

[59] *See Haidak*, 933 F.3d at 68 (stating reasons for refusing to adopt *Baum*).

[60] *See id.* (noting appropriateness of inquisitorial model for administrative hearings). The First Circuit defined an inquisitorial system as a system whereby a neutral factfinder conducts the hearing, determines what questions to ask and defines the extent of the inquiry. *Id*. (quoting *Inquisitorial System*, BLACK'S LAW DICTIONARY (11th ed. 2019)). The court acknowledged that there is no data proving which model (inquisitorial or adversarial) is more accurate in a school disciplinary setting but noted the inquisitorial model is appropriate for administrative hearings such as Social Security proceedings. *Id*.

[61] *See Haidak*, 933 F.3d at 69 (outlining court's hesitancy to adopt *Baum* ruling).

counsel in school disciplinary hearings.[62] Accordingly, if courts were to compel schools to allow cross-examination by the respondent, the student himself would conduct the questioning rather than through a representative.[63] The court expressed doubt as to the effectiveness of such an outcome, stating that student-conducted cross-examination would not substantially decrease the risk of erroneous deprivation.[64] Rather, such cross-examination could be founded on personal animus and negatively impact the probative value of disciplinary hearings, particularly when the questioner and witness are the respondent and complainant, respectively.[65]

The First Circuit further justified its ruling by noting that disciplinary hearings should not mirror common law trials.[66] The Supreme Court previously held that imposing trial-type procedures onto administrative hearings would overwhelm administrative facilities and divert educational resources.[67] The First Circuit stated that, if it were to insist on a right to party-conducted cross-examination, school disciplinary hearings would begin to replicate jury-waived trials and invite further concessions, such as the right to legal counsel.[68] These concessions would ultimately make school misconduct hearings virtually indistinguishable from common law trials—a result the Supreme Court warned against in *Goss*.[69]

The Sixth Circuit's decision in *Doe v. Baum* stands in stark contrast to the First Circuit's ruling in *Haidak*.[70] While both courts explicitly

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[62] *See id.* (noting courts generally do not require schools to allow students legal counsel).

[63] *See id*. (explaining consequence of allowing cross-examination in school misconduct hearings).

[64] *See id*. (expressing doubt over effectiveness of student-led cross-examination). "As a general rule, we disagree, primarily because we doubt student-conducted cross-examination would so increase the probative value of hearings and decrease the 'risk of erroneous deprivation,' that it is constitutionally required in this setting." *Id*. (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[65] *See id.* (noting downsides of student-conducted cross-examination). The court suggests that "in the hands of a relative tyro, cross-examination can devolve into more of a debate." *Id.*

[66] *See Haidak*, 933 F.3d at 69 (noting hesitancy to make misconduct hearings like common law trials). "We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials." *Id*. (citing Goss v. Lopez, 419 U.S. 565, 583 (1975)).

[67] *See id.* (explaining rationale behind different procedures for administrative hearings). "A major purpose of the administrative process, and the administrative hearing, is to avoid the formalistic adversary mode of procedure." *Id*. (quoting *Gorman*, 837 F.2d at 16).

[68] *See id.* at 69-70 (acknowledging consequences of requiring schools to permit student-led cross-examination). "If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete." *Id*.

[69] *See id.* at 69-70 (citing *Goss*, 419 U.S. at 583) (reiterating effects of allowing party-conducted cross-examination).

[70] *See id.* at 69 (stating cross-examination from neutral factfinder satisfies due process). However, in *Haidak*, the First Circuit outlined the reasons why they would not follow *Baum*. *Id.* When discussing the Sixth Circuit's decision, the First Circuit said:

acknowledged the importance and effectiveness of adversarial cross-examination as a factfinding tool, the First Circuit deemed it an inappropriate practice within the context of administrative misconduct hearings.[71] The Sixth Circuit in *Baum*, on the other hand, held that students facing suspension or expulsion as a result of alleged misconduct must be afforded the right to cross-examine adverse witnesses when the school's decision turns on a credibility determination.[72] Thus, the Sixth Circuit allowed elements of an adversarial system to creep into the disciplinary hearings of public education institutions.[73]

The basis of the Sixth Circuit's ruling lies primarily in its interpretation of the interests at stake for a student accused of sexual misconduct.[74] In its opinion, the court stated that a student facing sexual assault allegations could suffer numerous losses, such as personal relationships, future employment opportunities, and the property interest in their education.[75] According to the Sixth Circuit, these interests are substantial enough to require additional due process protections such as cross-examination.[76] While the First Circuit did not comment on these findings directly, it acknowledged the *Baum* ruling in its opinion and explicitly stated that it did not agree with its holding.[77] As such, it would appear that the First Cir-

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> In a holding that we could easily join, the court found the complete absence of any examination before the factfinder to be procedurally deficient. But the court took the conclusion one step further than we 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 turning on credibility determinations.

Id.; Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) (ruling accused has right to cross-examine witnesses).

[71] *See Haidak*, 933 F.3d at 68-69 (citing California v. Green, 399 U.S. 149, 258 (1970)) (noting cross-examination's effectiveness, but ruling cross-examination was unnecessary in school misconduct hearings); *Baum*, 903 F.3d at 581 (stating importance of cross-examination in credibility determinations).

[72] *See Baum*, 903 F.3d at 581 (summarizing court's holding).

[73] *See id.* (defending use of cross-examination in school disciplinary hearings); *see also* Davis, *supra* note 44, at 224-25 (noting *Baum* holding improperly relied on criminal cases). Davis noted that the school disciplinary process should be distinct from the criminal justice system because students accused of sexual assault receive relatively minor punishments, such as temporary dismissal or, in rare cases, expulsion. Davis, *supra* note 44, at 226. These students do not face prison, fines, sex offender registration, or other forms of criminal sanctions. Davis, *supra* note 44, at 226.

[74] *See Baum*, 903 F.3d at 582 (describing student interest at stake).

[75] *See id.* (noting lasting impact of "sex offender" label from university).

[76] *See id.*at 583-84 (weighing student's interest against university's interest).

[77] *See Haidak*, 933 F.3d at 69 (refusing to adopt *Baum's* ruling).

cuit considers these interests insufficient to permit the introduction of adversarial process into school misconduct hearings.[78]

The First Circuit's decision affords procedural due process to students involved in school misconduct hearings that conform to the precedent set out in *Mathews v. Eldridge*.[79] The court properly reviewed University policy to determine the risk of erroneous deprivation of Haidak's education interest and carefully considered the financial and administrative burdens that student-led cross-examination would impose upon the University.[80] Furthermore, the court afforded Haidak's property interest the proper weight and allocated the appropriate due process protections, namely an opportunity to be heard in a proceeding that vetted the facts of his case.[81] In contrast, the Sixth Circuit's ruling in *Baum* inflates the interests of the accused without properly considering the legitimate interests of the school in adjudicating cases of particularly traumatizing misconduct.[82] When confronted with the possibility of re-traumatization on cross-examination, the *Baum* court sidestepped the issue, suggesting that, in cases where victims may be subjected to further harm, the respondent's representative may conduct the cross-examination instead of the respondent himself.[83] This solution disregards the fact that victims are re-traumatized through the adversarial nature of questioning, not merely because the respondent is the one conducting the questioning.[84] The Sixth Circuit conducted an unbalanced *Mathews* test in favor of the student respondent, effectively devaluing the

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[78] *See id.* (summarizing court's holding).

[79] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining three factor test). The factors the court must consider when conducting a due process analysis are: (1) the private interest implicated by the government action; (2) the risk of erroneous deprivation of the interest through the procedures used; and (3) the government's interest, including the burdens that may be imposed if additional procedural requirements were adhered to. *Id.*; *Haidak*, 933 F.3d at 69-70 (discussing factors from *Mathews* test).

[80] *See Haidak*, 933 F.3d at 68-70 (outlining court's weighing of competing interests).

[81] *See id.* at 65 (stating students have property interest in education); *see also* Weizel, *supra* note 38, at 1624-25 (noting lesser interest at stake in school administrative hearings). Weizel notes that, while due process is flexible, a property and even liberty interest in education is not weighty enough to justify "highly technical or wieldy procedures." Weizel, *supra* note 38, at 1625.

[82] *See Baum*, 903 F.3d at 581-82 (discussing whether cross-examination would unduly burden the school). Aside from considering the administrative and financial burden of cross-examination, the Sixth Circuit did not discuss any other interest that may be implicated by such a practice. *Id.*

[83] *See Baum*, 903 F.3d at 583 (stating accused does not always have right to personally confront accuser).

[84] *See* Walsh, *supra* note 35, at 1801 (describing re-traumatizing effects of cross-examination).

school's legitimate interest in adjudicating cases of sexual and intimate partner violence.[85]

While the First Circuit's ruling was ultimately sound, the court should have discussed the prevalence of intimate partner violence and sexual assault on college campuses when it considered the nature of the University's interest.[86]The Supreme Court in *Mathews* explicitly stated that due process requirements are flexible and depend on context, and, as such, the pervasiveness of sexual assault and domestic abuse among female students warrants special consideration.[87] Courts should take these facts and statistics into account when considering the school's interest in conducting its misconduct hearings.[88] With the prevalence of such assaults, and because of the long-lasting stigma and fears associated with coming forward, public educational institutions have a legitimate interest in crafting adjudication hearings with the student victim in mind.[89] The practice of cross-examination, while arguably an effective tool for discerning the truth, works against schools seeking to curb violence on their campuses by discouraging female victims from reporting assault.[90]

The rulings in *Haidak* and *Baum* represent a significant circuit split regarding the use of cross-examination in student misconduct hearings. While both courts utilized the balancing test set forth in *Mathews v. Eldridge*, the Sixth Circuit emphasized the interests of the student respondent at the expense of the legitimate interests of the school. The First Circuit, on the other hand, properly weighed these interests and upheld the widely

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[85] *See* Carson & Nesbitt, *supra* note 43, at 359 (stating *Baum* court focused too heavily on private interest of accused).

[86] *See Haidak*, 933 F.3d at 69 (balancing competing interests between Haidak and University); *see also* Carson & Nesbitt, *supra* note 43 at 367 (asserting court in *Haidak* should have conducted "a more reliable, accurate balancing analysis."). Carson and Nesbitt argue that, when considering the nature of the University's interest—the third prong of the *Matthews* test—the court should determine the complainant's risk of erroneous deprivation of her access to education, her reputation, and professional and financial opportunities. Carson & Nesbitt, *supra* note 43 at 367.

[87] *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (stating due process varies depending on context); *see also* Frier, *supra* note 45, at 117 (noting high rates of sexual assault and rape on college campuses necessitate adjudication).

[88] *See* Carson & Nesbitt, *supra* note 43, at 319 (noting that third prong of *Matthews* test can accommodate interests of complaining students).

[89] *See id.* at 322 (listing consequences of speaking out against sexual assault). Student survivors have been forced out of school, punished for speaking out, lost money defending themselves, committed suicide, and been killed by intimate partners after their schools refused to act. *Id.* These factors create a hostile environment for student victims of intimate partner violence and discourage reporting. *Id.*

[90] *See* Davis, *supra* note 43, at 234 (listing negative impacts of cross-examination in sexual assault adjudications on campus). Davis notes that compulsory live cross-examination will lead to a decrease in already low reporting rates for sexual assault on campus. *Id.*

accepted tenet that school misconduct hearings should not mirror common law criminal trials. While the First Circuit's ruling was ultimately sound, it should have emphasized the school's interest in providing a safe educational environment for female students, who are overwhelmingly victims of sexual assault and intimate partner violence and would be further harmed by the use of adversarial cross-examination.

Kori Dean