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Reconciling Student Due Process Rights in Sexual Misconduct Adjudications: What Educational Institutions and Policymakers can Learn from Haidak

Lauren McNamara

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I. Introduction

In November 2018, the United States Department of Education ("DOE") released a set of Title IX regulations aimed at reforming how public universities conduct Title IX procedures.[1] The proposed regulations ("2018 regulations") endeavored to improve how universities address allegations of sexual assault and sexual harassment by requiring procedural due process protections, such as live hearings and cross-examination procedures.[2] The 2018 regulations mirrored the Sixth Circuit's 2018 holding in *Doe v. Baum*.[3] In *Baum*, the court held that public universities must provide an accused student or the accused student's representative with the opportunity to cross-examine the complainant and adverse witnesses.[4] This procedural shift incited significant controversy, as critics argued that universities would now resemble a "quasi-legal system" that would burden universities and ultimately, harm students.[5]

Amidst this controversy, in *Haidak v. University of Massachusetts-Amherst* the First Circuit departed from the Sixth Circuit's categorical rule in *Baum*, holding that the cross-examination of a complainant and adverse witnesses by a neutral third party satisfies student due

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[1] Press Release, U.S. Dep't of Educ., Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018) (on file with U.S. Dep't of Educ.) (hereinafter 2018 Press Release).

[2] *Id*.

[3] Doe v. Baum, 903 F.3d 575 (6th Cir. 2018).

[4] *Id*.

[5] *See* Andrew Kreighbaum, *College Groups Blast DeVos Title IX Proposal*, INSIDE HIGHER ED (Jan. 31, 2019), https://www.insidehighered.com/news/2019/01/31/higher-ed-groups-call-major-changes-devos-title-ix-rule.

process rights in Title IX matters relating to sexual misconduct.[6] *Baum* and *Haidak*'s conflicting holdings present a new lens for analyzing student due process rights in Title IX grievance procedures, particularly in sexual misconduct matters. Further, in reconciling the two cases the First Circuit's holding presents a workable solution that should inform how universities and policymakers address student due process rights in Title IX sexual misconduct matters. The 2018 regulations are still being finalized and it is unknown when they will be released.[7] Regardless of the DOE's finalized Title IX regulations, litigation in this area will continue to be a subject of intense scrutiny and university policies will need to continually adapt. The *Haidak* holding offers important guidance as universities and policymakers determine how to fairly balance a student's right to be heard and a student's right to an education free from sexual assault and harassment.

This Comment is intended to assist universities, legal advisors, educational institutions, and policymakers in navigating current confusion surrounding due process rights in Title IX sexual misconduct matters, specifically procedural due process requirements for university proceedings or hearings. Part II of this Comment will provide a brief history of Title IX regulations and how Title IX regulations have evolved to address sexual misconduct at public universities. Part II will further explain student due process rights through an explanation of key case law and conclude by describing the current tension between Title IX regulations and student due process rights. Part III will analyze the conflicting holdings in *Baum* and *Haidak*. Part IV will argue that the First Circuit's holding in *Haidak*, through its analysis of a university's cross-examination procedures in

[6] Haidak v. Univ. of Massachusetts-Amherst, No. 18-1248, 2019 U.S. App. LEXIS 23482 (1st Cir. Aug. 6, 2019).
[7] *See* Sarah Brown and Katherine Mangan, *What You Need to Know about the Proposed Title IX Regulations*, THE CHRON. OF HIGHER ED. (Nov. 16, 2018), https://www.chronicle.com/article/What-You-Need-to-Know-About/245118; Christopher Carusone and Kate Emert Gleason, *Correspondence Encourages the DOE Not to Release New Title IX Regulations Amidst the COVID-19 Pandemic*, JD SUPRA (Apr. 9, 2020), https://www.jdsupra.com/legalnews/correspondence-encourages-the-doe-not-18201/.

a sexual misconduct matter, presents a workable solution to current concerns regarding student due process rights in Title IX sexual misconduct matters. Part V will briefly conclude.

II. The Evolution of Title IX Regulations and Student Due Process Rights in Sexual Misconduct Matters

This Section will first provide background on Title IX regulations and how the regulations address sexual misconduct. Second, this Section will explain key case law regarding student due process rights. Finally, this Section will conclude by addressing the relationship between Title IX regulations and student due process rights.

A. Background on Title IX Regulations Regarding Matters of Sexual Assault and Sexual Harassment

The U.S. Congress passed Title IX of the Education Amendments of 1972 on June 23, 1972.[8] Congress passed Title IX in response to the educational inequality experienced by women prior to the 1970s.[9] Title IX prohibits discrimination "on the basis of sex in education programs and activities operated by recipients of federal financial assistance."[10] Schools are responsible for "taking steps to prevent sex-based discrimination, including sexual harassment, and for responding quickly and effectively to harassment when it occurs."[11]

Focusing on Title IX's regulations pertaining to sexual assault and harassment, the United States Office for Civil Rights ("OCR") issued further guidance in 1997.[12] The guidance, titled "Sexual Harassment Guidance: Harassment of Students by School Employees, Others Students,

[8] U.S. DEP'T OF EDUCATION, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX (2012).
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] U.S. DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997).

or Third Parties," emphasized legal authority which established the sexual harassment of students as a form of sex discrimination covered by Title IX.[13] Under this guidance, teachers and administrators must recognize instances of sexual harassment, take prompt action to end the harassment, and prevent it from reoccurring.[14] The OCR's guidance underscored that schools retained flexibility in designing procedures for responding to sexual misconduct as long as those procedures were reasonable and similar to how the school would respond to other types of serious misconduct.[15]

Subsequent Supreme Court cases confirmed the duty of schools to effectively address sexual harassment and sexual misconduct by both students and teachers in order to create a safe school environment.[16] Following these Supreme Court cases, in 2001 the OCR published revised guidance for schools that provided information and examples to assist schools in determining if sexual harassment occurred.[17] Further, the OCR attempted to clarify how a school's response to sexual misconduct allegations would be evaluated under Title IX regulations.[18] Specifically, the OCR emphasized that a school's response to allegations of sexual misconduct would be measured by a "reasonableness" standard in which "[s]chools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps."[19] The OCR also recognized the due process rights of individuals by stating that schools must recognize due process rights "consistent

[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).
[17] U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) (hereinafter 2001 Revised Sexual Harassment Guidance).
[18] *Id*.
[19] *Id*.

with any federally guaranteed due process rights involved in a complaint proceeding" but that schools "should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant."[20]

Schools were also required to adopt and publish a policy outlining grievance procedures for sex discrimination and sexual misconduct.[21] These grievance procedures had to be "prompt and equitable" and provide an "effective measure for preventing and responding to sexual harassment."[22] In evaluating whether a school's response to sexual harassment was "prompt and equitable" the OCR would consider:

> (1) notice to students, parties, and employees of the grievance procedure; (2) application of the procedure to complaints alleging harassment; (3) adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (4) clear timelines for the major stages of the complaint process; (5) notice to parties of the outcome of the complaint; and (6) an assurance that the school will take steps to prevent a reoccurrence of the harassment.[23]

Later, in 2011, the OCR issued a "Dear Colleague Letter" ("DCL") that supplemented its 2001 guidance.[24] The OCR emphasized that the DCL was intended to provide further guidance regarding how the DOE would evaluate a school's compliance with its legal obligations under Title IX.[25] Importantly, the DCL required schools to use a preponderance of evidence standard (it is more likely than not that sexual harassment or violence occurred) when responding to allegations of sexual misconduct.[26] At the time, some schools followed a "clear and convincing" evidence standard (highly probable or reasonably certain that the sexual harassment or violence occurred).[27]

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[20] *See* 2001 Revised Sexual Harassment Guidance, *supra* note 17.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] Department of Education Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (hereinafter Dear College Letter).
[25] *Id*.
[26] *Id*.
[27] *Id*.

The DCL stated that the "clear and convincing" standard was inconsistent and not equitable under Title IX.[28]

The DCL also outlined how schools should facilitate sexual misconduct proceedings, in particular, hearings.[29] The guidance explained that parties must be provided an equal opportunity to present relevant witnesses and evidence through a hearing or another mechanism.[30] The DCL opposed allowing parties to personally question or cross-examine each other because such procedures "may be traumatic…possibly escalating or perpetuating a hostile environment" that the hearing sought to remedy.[31] Additionally, schools were encouraged to establish an appeals process.[32]

On September 22, 2017, the DOE withdrew the 2011 DCL, as well as a 2014 OCR document titled "Questions and Answers on Title XI and Sexual Violence," because the guidance "led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints."[33] Specifically, the DOE claimed that the 2011 and 2014 guidance did not adhere to fundamental standards of fairness because both adopted a minimal standard of proof (the preponderance of the evidence standard), discouraged cross-examination by the parties, and prioritized the efficient resolution of Title IX complaints over affording parties due process protections.[34] Instead, the DOE directed schools to follow its 2001 guidance until final regulations were released under Secretary of Education, Betsy Devos.[35]

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[28] *See* Dear College Letter, *supra* note 24.
[29] *Id*.
[30] *Id*.
[31] Department of Education Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.

The DOE's 2001 guidance required "prompt and equitable" grievance procedures that included adequate notice to students as well as the opportunity to present witnesses and other evidence.[36]

B. Student Due Process Rights

Public institutions must adhere to Title IX requirements in order to receive federal funding, but also must consider due process rights guaranteed under the U.S. Constitution.[37] Importantly, due process requirements only apply at public universities, while Title IX and DOE regulations apply to all universities.[38] When courts analyze a question of due process rights, the analysis typically proceeds in a two-step manner.[39] First, the court evaluates whether due process applies (whether a person's life, liberty, or property is being put at risk because of something the government is doing).[40] Second, if the person is entitled to due process, the court determines what process is due under the specific circumstances.[41] In *Mathews v. Eldridge*, the Supreme Court held that the process that is due depends largely on context and three factors: (1) what is at stake for the person; (2) how risky it is under the current procedures for the person to be wrongly punished and how likely is it that safeguards would reduce that risk; and (3) how costly and time consuming the new protections would be for the government.[42]

The Supreme Court followed the *Mathews* framework in its first major holding on students' due process rights in *Goss v. Lopez*.[43] In *Goss*, students who faced short suspensions brought a class action against school officials, contending that due process required hearings prior to the

[36] *See* 2001 Revised Sexual Harassment Guidance, *supra* note 17.
[37] *FIRE's Guide to Due Process and Campus Justice*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 13, 2013), https://www.thefire.org/research/publications/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/ [bereinafter *FIRE's Guide*].
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] Mathews v. Eldridge, 424 U.S. 319 (1976).
[43] Goss v. Lopez, 419 U.S. 565 (1975).

enactment of a suspension.[44] The Court reasoned that public education was a property interest protected by the Due Process Clause[45] and that a student's liberty is at stake when the student's good name, reputation, honor, or integrity is being questioned.[46] Further, the Court articulated that the "fundamental requisite of due process is the opportunity to be heard," and students were entitled to "some kind of notice" and "some kind of hearing."[47]

The Court considered the costs schools would face if student disciplinary procedures followed common law trials and required that "there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension."[48] Therefore, in the context of a short suspension, under *Goss*, schools are not required to facilitate the production of evidence, the opportunity for cross-examination, legal representation for the parties, or an appeal procedure.[49] The Court did note that due process "may require more formal procedures" in more serious cases.[50]

Since *Goss*, lower federal courts and various state courts have grappled on a case-by-case basis with the issue of when more "formal procedures" may apply to school disciplinary proceedings.[51] There have been no higher court decisions to clarify the types of procedures necessary.[52] According to the Foundation for Individual Rights in Education, the "principle firmly established by these federal and state courts is that the amount of due process required in campus disciplinary cases must be based on the particular nature and gravity of the charges and circumstances."[53] Case law suggests that courts are hesitant to second-guess the disciplinary

[44] *Id.* at 568.
[45] *Goss*, 419 U.S. at 574.
[46] *Id.*
[47] *Id.* at 579.
[48] *Id.* at 584.
[49] *Id.* at 583.
[50] *Goss*, 419 U.S. at 584.
[51] *FIRE's Guide*, *supra* note 37.
[52] *Id.*
[53] *Id.*

decisions made by education institutions.[54] Further, due process is intended to be flexible and the "establishment of a one-size-fits-all rules would be contrary to the constitutional premise that one has a right only to the process that is 'due.'"[55]

C. The Relationship Between Title IX Regulations and Student Due Process Rights

The relationship between Title IX regulations and student due process rights is complicated and controversial, especially in sexual misconduct matters.[56] Despite the relative flexibility schools have in developing procedural protections for student due process rights, many criticized and continue to criticize the 2011 DCL as a serious threat to student due process rights.[57] For example, in 2016, the American Association of University Professors ("AAUP") wrote a report that raised significant concerns about the implications of the 2011 DCL.[58] The AAUP's concerns included: (1) whether education institutions are the right forum to hear sexual assault cases; (2) whether altering the evidence standard to a "preponderance of evidence" deprives the accused of a fair hearing; and (3) whether a mandated procedure that negates the right to cross-examine one's accuser violates due process.[59]

The controversy surrounding the 2011 DCL letter prompted the DOE to withdraw the 2011 DCL in 2017 and in 2018, propose a revised set of Title IX regulations.[60] The DOE stated that its 2018 regulations would improve university responses to sexual assault and harassment by

[54] *See* Fern L. Kletter, *Schools Violation of Student's Substantive Due Process Rights by Suspension or Expelling Student*, 90 A.L.R. 235 (2013).
[55] *FIRE's Guide*, *supra* note 37.
[56] *See* Audrey Wolfson Latourette, *Title IX Office of Civil Rights Directives: An Assault Against Due Process and First Amendment Rights*, 23 J. OF LAW, BUS. & ETHICS 1 (2017).
[57] *Id*.
[58] *The History, Uses, and Abuses of Title IX*, AM. ASSOC. OF UNIV. PROFESSORS (June 2016), https://www.aaup.org/report/history-uses-and-abuses-title-ix.
[59] *Id*.
[60] *See* Proposed Amendments to Title IX Education Amendments of 1972, 34 C.F.R. Part 106 (proposed Nov. 29, 2018).

ensuring transparency and consistency in Title IX grievance proceedings.[61] The DOE explained that one means of increasing transparency and consistency in Title IX grievance proceedings would be through due process protections for students in the form of live hearings and new cross-examination procedures that would be conducted by the complainant's and respondent's advisor of choice.[62]

The 2018 regulations were highly scrutinized.[63] Between the release of the regulations in November 2018, and the DOE's public comment period ending in February 2019, over 100,000 comments were filed.[64] Some were concerned that the 2018 regulations relied too heavily on formal legal procedures and concepts not appropriate or feasible in an educational setting.[65] Others argued that the 2018 regulations were too concerned with protecting the accused.[66] In contrast, advocates for individual rights in education and other organizations, such as the American Civil Liberties Union ("ACLU"), ultimately praised the DOE's focus on student due process rights and shift to live hearings with cross-examination procedures.[67]

While universities, key advocacy groups, and policymakers grappled (and continue to grapple) with the relationship between student due process rights and Title IX protections in light of the

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[61] 2018 Press Release, *supra* note 1.
[62] *Id*.
[63] *See* Hallie Busta, *Ed. Dept.'s Title IX Proposal Gets 100k Public Comments*, EDUCATIONDIVE (Feb. 1, 2019), https://www.educationdive.com/news/ed-depts-title-ix-proposal-gets-100k-public-comments/547414/.
[64] *Id*. (stating that the proposed Title IX "rewrite" is "the most controversial regulatory undertaking" in the DOE's history).
[65] Letter from the American Council on Education, to Betsy DeVos, Secretary of the Department of Education (Jan. 30, 2019) (on file with author) (stating that "[c]olleges and universities are not law enforcement agencies or courts," and that the proposed regulations rely "on formal legal procedures and concepts" that are "wildly inappropriate and infeasible in an educational setting") [hereinafter American Council on Education Letter].
[66] *See* Laura Meckler, *Devos Set to Bolster Rights of Accused in Title IX Cases*, WASH. POST (Nov. 14, 2018), https://beta.washingtonpost.com/local/education/betsy-devos-set-to-bolster-rights-of-accused-in-rewrite-of-sexual-assault-rules/2018/11/14/828ebd9c-e7d1-11e8-a939-9469f1166f9d_story.html; Erica L. Green, *Sex Assault Rules Under DeVos Bolster Defandants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018) https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html.
[67] *See* American Council on Education Letter, *supra* note 65 ("While the ACLU supports live hearings and cross-examination in the university context, it believes the cross-examination right would be substantially improved if…modified in several respects to further ensure equity and to prevent abuse.").

DOE's 2018 changes, two circuits delivered important and conflicting opinions that offer key insight into the debate.

III. The Conflicting Holdings of *Baum* and *Haidak*

This Section will analyze the conflicting holdings of *Baum* and *Haidak*. It will provide factual background on both cases, highlight the key reasoning of both opinions, and explain how each decision was received.

A. Factual Background on the *Baum* Decision

In *Baum*, John Doe and Jane Roe were students at the University of Michigan attending a fraternity party.[68] At the party, Doe and Roe drank alcohol, danced, and had sexual intercourse.[69] Two days later, Roe filed a sexual misconduct complaint claiming that she was too intoxicated to consent to sexual intercourse.[70] Having sexual intercourse with an incapacitated person violated the university's policies, and consequently, the university launched an investigation.[71] The school's investigator collected evidence and interviewed Doe and Roe, as well as twenty-three other witnesses.[72]

The investigator concluded that the relevant question, whether Roe was too intoxicated to consent during the encounter, could not be addressed based on the evidence and recommended that the administration rule in Doe's favor.[73] Roe appealed the decision and a three-member panel reviewed the investigator's report.[74] After two closed sessions (no new evidence was introduced

[68] *Baum*, 903 F.3d at 578.
[69] *Id.*
[70] *Id.* at 579.
[71] *Id.* at 578.
[72] *Id.*
[73] *Baum*, 903 F.3d at 580.
[74] *Id.*

nor were students interviewed), the panel reversed the decision.[75] The panel found Roe's description of events "more credible" and Roe's witnesses "more persuasive."[76] Facing the possibility of expulsion, Doe agreed to withdraw from the university.[77]

Doe subsequently filed a lawsuit claiming that the university's disciplinary proceedings violated the Due Process Clause and Title IX.[78] Doe argued that because the university's decision turned on a credibility finding, the school was required to give him a hearing with an opportunity to cross-examine Roe and adverse witnesses.[79] The university filed a motion to dismiss, which the district court granted and Doe appealed.[80]

B. The Sixth Circuit's Opinion and Reasoning

In evaluating Doe's appeal, the court first emphasized that the "opportunity to be heard" is the "Constitutional minimum."[81] The court noted that determining what "being heard" looks like requires a balancing of the parties' competing interests, citing the *Mathews* and *Goss* opinions.[82] The court turned to its own decisions, outlining that in the context of universities, if a student is accused of misconduct, the university must hold some sort of hearing before imposing a serious sanction like expulsion or suspension.[83] Similarly, when the university's determination turns on the credibility of the accuser, the accused, or witnesses, the hearing must include an opportunity for cross-examination.[84] The court described cross-examination as the "greatest legal engine" for

[75] *Id.*
[76] *Id.*
[77] *Id.* at 578.
[78] *Baum*, 903 F.3d at 578.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 581.
[82] *Id.*
[83] *Id.*
[84] *Baum*, 903 F.3d at 581.

"uncovering the truth," and consequently, if a university's decision turns on credibility, the hearing must include an opportunity for cross-examination in order to satisfy due process.[85]

Because Doe never received an opportunity to cross-examine Roe or adverse witnesses, the court reasoned that there was a serious risk that the university "erroneously deprived Doe of his protected interests."[86] The court continued to emphasize the importance of cross-examination in credibility determinations and noted that it would be feasible for the university to facilitate cross-examination procedures.[87] The court stated that Doe's interests were also significant, as being labeled a sex offender carries severe consequences, and therefore, Doe was entitled to respond to his accuser's allegations.[88]

The court was not persuaded by the university's argument that Doe was "heard" because he was permitted to review Roe's statement and submit a response identifying inconsistencies and therefore, there would have been "no added benefit to cross-examination."[89] The court explained, "[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness's demeanor under that questioning."[90] The court did, however, explain that the accused may not always have a right to personally confront his or her accuser.[91] The court articulated that universities have a legitimate interest in avoiding procedures that subject an alleged victim to further harm or harassment, and allowing the accused to cross-examine his or her accuser could

[85] *Id.*
[86] *Id.* at 582.
[87] *Baum*, 903 F.3d at 582.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 583.

cause such harm.[92] The court proposed that instead of denying cross-examination, universities could allow the accused's agent to conduct cross-examination.[93]

C. Responses to the *Baum* Decision

The *Baum* decision was significant because it was the second decision in which the Sixth Circuit ruled that students facing sexual misconduct charges at university disciplinary hearings were entitled to cross-examine their accusers.[94] Previously, in *Doe v. University of Cincinnati*, the Sixth Circuit held that a university student facing allegations of sexual assault is permitted to confront his or her accuser at a disciplinary hearing.[95] Therefore, within the Sixth Circuit, college administrators who deny students the right of cross-examination in future disciplinary proceedings can be held personally liable for violating a "well-established constitutional right."[96]

Critics highlighted that the decision left "open" who would conduct such cross-examinations and how they would be conducted.[97] Further, critics noted that the decision failed to define the scope of the required hearing or adversarial proceeding, as prior case law demonstrates that a "full-scale" adversarial hearing for school disciplinary proceedings is not

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[92] *Baum*, 903 F.3d at 583.
[93] *Id.*
[94] Richard Fossey and Todd A. DeMitchell, *Doe v. Baum: The Sixth Circuit Reiterates that Students Accused of Sexual Assault Are Constitutionally Entitled to Confront their Accusers at University Title IX Disciplinary Hearings*, SCHOOL LAW REP. (Dec. 2018), https://www.researchgate.net/publication/329512251_Doe_v_Baum_The_Sixth_Circuit_Reiterates_that_Students_Accused_of_Sexual_Assault_are_Constitutionally_Entitled_to_Confront_Their_Accusers_at_University_Title_IX_Disciplinary_Hearings.
[95] Richard Fossey and Todd A. DeMitchell, *Doe v. Baum: The Sixth Circuit Reiterates that Students Accused of Sexual Assault Are Constitutionally Entitled to Confront their Accusers at University Title IX Disciplinary Hearings*, SCHOOL LAW REP. (Dec. 2018), https://www.researchgate.net/publication/329512251_Doe_v_Baum_The_Sixth_Circuit_Reiterates_that_Students_Accused_of_Sexual_Assault_are_Constitutionally_Entitled_to_Confront_Their_Accusers_at_University_Title_IX_Disciplinary_Hearings.
[96] *Id. See* Jeremy Bauer-Wolf, *A Potential Title IX Supreme Court Case?*, INSIDE HIGHER ED (Aug. 8, 2019), https://www.insidehighered.com/news/2019/08/08/ruling-umass-amherst-title-ix-lawsuit-may-lead-supreme-court-case-experts-say ("Experts in Title IX of the Education Amendments of 1972…heralded the opinion as a reformation of due process in such cases, at least among the collection of Midwestern states the Sixth Circuit encompasses. The Sixth Circuit is becoming known for producing more radical opinions in Title IX cases that have made waves among lawyers and college administrators.").
[97] *Id.*

required to satisfy due process.[98] After the *Baum* decision, legal advisors warned that education institutions that did not provide hearings or cross-examination for sexual misconduct matters faced a "heightened risk of adverse findings in due process and Title IX erroneous outcome claims."[99]

Interestingly, the Sixth Circuit's ruling appeared consistent with the DOE's increased focus on due process protections in its 2018 regulations.[100] Because of this, legal advisors warned that universities should not consider the *Baum* decision an "outlier, but rather as consistent with the national trend toward requiring additional due process in Title IX proceedings."[101] Further, legal experts noted that the *Baum* decision affects Title IX practices at more than forty state colleges and universities in Michigan, Ohio, Tennessee, and Kentucky, and the decision would likely influence other courts considering similar cases.[102]

Additionally, many policymakers argued that the opinion was overly concerned with the rights of accused students.[103] Critics emphasized that adversarial questioning might discourage victims of sexual assault and sexual harassment from coming forward and would also discourage witnesses from testifying on behalf of accusers.[104] Essentially, the decision was "framed as a victory for the accused in cases of sexual assault."[105]

D. Factual Background on the *Haidak* Decision

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[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*. *See* Editorial Board, *Due Process for Sexual Assault Cases; The Sixth Circuit Says the Accused have a Right to Cross-Examination*, WALL STREET J. (Sept. 13, 2018), https://search.proquest.com/docview/2103234858/citation/2D68495DA2A4382PQ/1?accountid=13793 ("The ruling also adds legal credence to Education Secretary Besty DeVos's effort to restore due process in Title IX proceedings. Michigan hasn't said if it will appeal, but the Supreme Court is overdue for a case on how universities adjudicate sexual assault.").
[102] Editorial Board, *Due Process for Sexual Assault Cases; The Sixth Circuit Says the Accused have a Right to Cross-Examination*, WALL STREET J. (Sept. 13, 2018). https://search.proquest.com/docview/2103234858/citation/2D68495DA2A4382PQ/1?accountid=13793.
[103] Michigan Daily Editorial Board, *From the Daily: The Problems of Cross-Examination*, MICHIGAN DAILY (Sept. 16, 2018), https://www.michigandaily.com/section/editorials/daily-problems-cross-examination.
[104] *Id*.
[105] *Id*.

After *Baum*, the First Circuit issued an opinion considering the same issue.[106] In *Haidak*, James Haidak and Lauren Gibney were students at the University of Massachusetts at Amherst who had been in a tumultuous relationship since 2012.[107] When studying abroad in Barcelona, Haidak and Gibney engaged in an argument that turned physical.[108] According to Gibney, Haidak put his hand around her neck, pushed her onto the bed, hurt her by squeezing various pressure points, and grabbed her wrists and punched himself in the face with her fists.[109] Later that day, Gibney's mother called the university to report that Haidak had physically assaulted Gibney.[110] Gibney followed up three days later by submitting a written report of the incident.[111] The university initiated an investigation.[112]

The university gave Haidak notice of Gibney's allegations and issued a no-contact order. Haidak denied the allegations, and both parties resumed contact with each other.[113] Later, Haidak and Gibney had an argument when Haidak arrived a bar where Gibney worked and positioned himself uncomfortably close to Gibney until security removed him.[114] Subsequently, Gibney obtained a restraining order against Haidak.[115] The university offered Haidak a date for a hearing and sent a handout describing hearing procedures.[116] The procedures allowed for Haidak to submit questions for the Board to consider when questioning the complainant and witnesses.[117] Haidak submitted thirty-six questions, which the Assistant Dean of Students, Patricia Cardoso, pared down

[106] Haidak v. Univ. of Massachusetts-Amherst, No. 18-1248, 2019 U.S. App. LEXIS 23482 (1st Cir. Aug. 6, 2019).
[107] *Id.* at *5.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Haidak*, 2019 U.S. App. LEXIS 23482, at *5.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Haidak*, 2019 U.S. App. LEXIS 23482, at *13.

to sixteen.[118] Haidak and Cardoso discussed the evidence that Haidak wished to present to the hearing board.[119]

During the hearing, four students and one staff member considered Haidak's charges.[120] Gibney attended in person, while Haidak phoned in and Haidak's attorney observed.[121] Two university advisors were also appointed to both Haidak and Gibney, and both were present at the hearing.[122] The hearing board asked questions to both Haidak and Gibney, examining each student three times.[123] Of the questions the board asked Gibney, none were worded identically to those proposed by Haidak, but were designed to elicit the same information.[124] Ultimately, the board found that Haidak's behavior was "disproportionate to the actions he attributed to Gibney" and that Haidak caused physical harm to Gibney based on the "narratives and pictures presented in the hearing."[125]

After reviewing the board's finding and Haidak's disciplinary history (which included two prior violations of the university's student code of conduct), the Associate Dean of Students, David Vaillancourt, decided expulsion was necessary.[126] Haidak appealed and the university's appeals board recommended that Vaillancourt's sanction be upheld.[127] Haidak then filed a two-count complaint against the university and the officials involved, alleging due process, equal protection,

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[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] *Haidak*, 2019 U.S. App. LEXIS 23482, at *13.
[124] *Id*.
[125] *Haidak*, 2019 U.S. App. LEXIS 23482, at *13.
[126] *Id*.
[127] *Id*.

and Title IX violations.[128] The district court dismissed Haidak's procedural due process challenges.[129]

E. The First Circuit's Opinion and Reasoning

The First Circuit articulated that it was not evaluating whether Haidak's hearing mirrored a common law trial, but whether Haidak had an "opportunity to answer, explain, and defend."[130] Haidak argued that due process requires the accused or the accused's representative to question opposing witnesses directly whenever a disciplinary proceeding turns on the witnesses' credibility.[131] The court noted that the university did not implement an adversarial model in its truth-seeking, but rather, an inquisitorial model.[132] The court explained, contrary to Haidak's argument, that the inquisitorial model is not considered inadequate in all settings, noting that the inquisitorial model of truth-seeking is often used in critical administrative decisions, such as whether to award or terminate disability benefits.[133]

Further, the court emphasized that students do not have a right to legal counsel in school disciplinary hearings, which Haidak did not allege, and therefore, the court explained Haidak's position "would seem to be that the accused student must be allowed to question opposing witnesses himself."[134] Here, the court noted that "schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse."[135] The court referenced guidance from the Foundation for Individual Rights in Education, which recommends that in

[128] *Id.*
[129] *Id.*
[130] *Id.* at *12.
[131] *Haidak*, 2019 U.S. App. LEXIS 23482, at *21.
[132] *Id.* at *22.
[133] *Id.*
[134] *Haidak*, 2019 U.S. App. LEXIS 23482, at *23.
[135] *Id.* at *25.

sexual misconduct matters, or any matter that turns on credibility, there is some opportunity for "real-time" cross-examination and that a "hearing panel is sufficient."[136]

In considering the holding in *Baum*, the court agreed with the Sixth Circuit and found the "complete absence of any examination before the factfinder is procedurally deficient."[137] However, the court emphasized that the Sixth Circuit 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. . . ."[138] The court found that questioning a complaining witness by a neutral party is not so ". . . fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation" and that "student disciplinary proceedings need not mirror common law trials."[139] Further, the First Circuit noted the possibility for a "slippery slope" of universities holding jury trials in implementing the *Baum* holding.[140]

After determining that the questioning model utilized by the university, where a panel conducted multiple rounds of questioning of parties and witnesses, was constitutionally sufficient, the court evaluated whether the school conducted "reasonably adequate questioning."[141] The court found that in Haidak's case, this was a "close question."[142] After reviewing the school's manual and directions for its hearing board and evaluating Haidak's actual hearing,[143] the court found that both Haidak and Gibney were questioned in real-time, and both parties, particularly Gibney, were asked three times to further clarify and restate responses to ensure consistency.[144] As part of its

[136] *Id*.
[137] *Id*.
[138] *Id*.
[139] *Haidak*, 2019 U.S. App. LEXIS 23482, at *25.
[140] *Id.* at *26.
[141] *Haidak*, 2019 U.S. App. LEXIS 23482, at *26.
[142] *Id*.
[143] *Id.* at *27.
[144] *Id*.

analysis, the court also looked to the "probative value" of the hearing board's questions and held that the board conducted a hearing that was reasonably calculated to get to the truth by allowing Haidak to be heard after Gibney testified and examining Gibney in a "manner reasonably calculated to expose any relevant flaws in her claims."[145]

F. Responses to the *Haidak* Decision

The decision generated mixed responses regarding its departure from the *Baum* holding.[146] Some responses have highlighted that the First Circuit agreed with the Sixth Circuit that cross-examination should be mandated in some form in sexual misconduct hearings at universities, and thus, the split may be one of degree.[147] Other sources noted that the circuit spilt will create confusion and complexity for universities as case law differs and regulations are in "flux."[148] Consequently, litigation will inevitably arise.[149] Finally, experts explained that while the split is "dramatic," until other cases work through court systems across the country, universities will not know whether the Sixth Circuit opinion is more of an outlier or the standard.[150] Colleges and universities have largely followed a model similar to the one the First Circuit endorsed in *Haidak*, as under current DOE regulations there is ambiguity over how a hearing or proceeding should be structured (an ambiguity the 2018 proposed regulations seek to clarify by requiring live hearings and cross-examination).[151]

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[144] *Id*.
[145] *Id*.
[146] Bauer-Wolf, *supra* note 96.
[147] *Id*.
[148] *Id*. ("College court is essentially subject to appeal in federal court more routinely than ever. And instead of uniform national standards created as such, it now matters which jurisdiction you are in. Due process in higher education is becoming a ball of confusion—a mix of conflicting cases and regulations in flux. Is it fundamentally fair to colleges to create college court this way?").
[149] *Id*.
[150] Samantha Harris, *In Flawed, but Ultimately Helpful Ruling, First Circuit Recognizes Limited Right to Cross-Examination in Campus Disciplinary Proceedings*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Aug. 8, 2019), https://www.thefire.org/in-flawed-but-ultimately-helpful-ruling-first-circuit-recognizes-limited-right-to-cross-examination-in-campus-disciplinary-proceedings/.
[151] *Id*.

As for the *Haidak* decision, many questioned what the court meant by "reasonably calculated" questioning and criticized the ruling as unclear.[152] One expert explained that because the "reasonably calculated" standard is ambiguous, it is likely that the decision will lead to "a lot of litigation over whether the school-conducted questioning in any given case was sufficient."[153] Essentially, as universities wait for the 2018 regulations to be finalized, the contentious opinions in *Baum* and *Haidak* have created additional complexity and confusion for Title IX administrators.

IV. The *Haidak* Opinion: A Fair Process for Sexual Misconduct Adjudications

This Section will first argue that the *Haidak* decision meets procedural due process standards because the Constitution does not require university disciplinary proceedings to be modeled after common law trials and include procedural due process protections such as live cross-examination. Next, it will outline the ways in which the *Haidak* decision mitigates current tension around facilitating fair sexual misconduct proceedings as well as recognizes a university's interest in maintaining consistent, feasible procedures and most importantly, protecting victims of sexual assault and harassment.

A. The *Haidak* Decision Meets Procedural Due Process Standards Under the Constitution

In evaluating the due process procedures required in a non-criminal matter, such as university disciplinary proceedings, courts follow the Supreme Court's decision in *Mathews v. Eldridge*. In *Mathews*, the Supreme Court held that the process that is due depends largely on context and three factors: (1) what is at stake for the person; (2) how risky it is under the current procedures for the person to be wrongly punished and how likely is it that safeguards would reduce

[152] *Id.*
[153] *Id.*

that risk; and (3) how costly and time consuming the new protections would be for the government.[154]

The *Mathews* framework is recognized as the "universal analysis federal courts use when determining the extent and the type of notice, and what additional procedural requirements apply in different situations."[155] Courts have applied the *Mathews* framework in a variety of contexts to determine what kind of due process is required.[156] For example, in *Cleveland Board of Education v. Loudermill*, the Supreme Court found that due process required a school board to provide a "limited pre-termination hearing" before the discharge of an employee followed by a "post-termination" hearing in which an employee could challenge the discharge.[157] Further, the Court has applied the *Mathews* framework in claims regarding government benefits and services,[158] family rights matters,[159] children's rights matters,[160] prisoners' rights matters,[161] creditors' claims,[162] and forfeiture proceedings.[163] Essentially, the *Mathews* framework recognizes that notice and the opportunity to be heard can be satisfied "with less detailed and less formal proceedings than in the criminal context" and there is not a categorical rule that governs every situation.[164] This is particularly true in the school discipline context.

In school discipline matters, following the *Mathews* analysis, the Supreme Court has found that schools are not "a courtroom"[165] and like other non-criminal matters, procedural due process

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[154] *Mathews*, 424 U.S. at 319.
[155] Penny Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling "Due Process" Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN'S RTS. L. REP. 126 (2018).
[156] *Id.*
[157] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
[158] *See generally* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985).
[159] *See generally* Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Dep't of Soc. Servs., 452 U.S. 19 (1981).
[160] *See generally* Schall v. Martin, 467 U.S. 253 (1984).
[161] *See* Morrissey v. Brewer, 408 U.S. 471, 486-87 (1972).
[162] *See generally* Conn. v. Doehr, 501 U.S. 1 (1991); N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).
[163] *See generally* U.S. v. Bajakajian, 524 U.S. 321 (1998); U.S. v. James Daniel Good Real Prop., 510 U.S. 43 (1993).
[164] Venetis, *supra* note 155.
[165] Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 98 (1978).

may involve less detailed and formal procedures. The Supreme Court followed the *Mathews* framework in its first major holding on students' due process rights in *Goss v. Lopez*.[166] The Court's holding in *Goss* emphasized that a school is not required to model its disciplinary proceedings after common law trials.[167] For example, students do not have a right to legal counsel and due process procedures are subject to university discretion.[168] The *Goss* opinion does, however, require that schools provide accused students with notice and "some kind of hearing."[169] The Court noted that more "formal" procedures might be required for more serious disciplinary cases, but did not clarify what more "formal" procedures would be required, or the types of "serious" cases that would warrant them.[170] Despite the serious nature of sexual misconduct allegations, Title IX regulations have historically recognized the *Goss* holding as granting universities flexibility in designing and executing sexual misconduct proceedings.[171]

However, the 2018 regulations seek to restrict much of the flexibility given to universities in designing their disciplinary proceedings, specifically, by requiring live cross-examination by parties or their representatives.[172] However, the requirement of live cross-examination conflicts with federal law and in particular, the Court's decision in *Goss*.[173] In order to further understand why live cross-examination by parties or their representatives is not constitutionally necessary in university disciplinary proceedings, it is helpful to explore post-*Goss* jurisprudence related to student procedural due process rights. A month after the *Goss* decision, the Court focused on

[166] *Goss*, 419 U.S. at 565.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] Harris, *supra* note 150.
[172] 2018 Press Release, *supra* note 1.
[173] Venetis, *supra* note 155 ("The Department of Education cites to one Sixth Circuit case to support this regulation, which is an outlier, and has not been adopted by any other court, and ignores the Supreme Court's *Goss* decision.").

substantive due process in the context of a student's civil rights claim.[174] The Court held that school officials are "entitled to qualified good faith immunity from liability for money damages…unless they knew or reasonably should have known that their actions would violate the constitutional rights of the affected student."[175] The Court articulated that it was not the role of the federal government to set aside decisions of school administrators, even if the court viewed those decisions as "lacking a basis in wisdom or compassion."[176] The Court clarified that students (in this case public high school students) do have procedural and substantive rights while at school, but these rights are limited.[177] The Court's decision in *Goss* and *Woods* demonstrate the Court's deference to school officials in creating fair policies and procedures for disciplinary matters.

In *Haidak*, the court held that university sexual misconduct proceedings must include a hearing where witnesses are cross-examined, but that such cross-examination could be executed by a panel or hearing board.[178] These procedural requirements are constitutionally sufficient, aligned with *Goss* and post-*Goss* jurisprudence, and provide the opportunity for a "back and forth" demanded by advocates of student due process rights. Both the court in *Baum* and the 2018 regulations require cross-examination to be conducted by parties or their representatives,[179] and many advocates of student due process rights reason that such a categorical rule is necessary because anything less is unconstitutional.[180] However, this assertion is false and distracts from decades of constitutional precedent. In her article, "Misrepresenting Well-Settled Jurisprudence:

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[174] Lisa Swem, Lecture at 2017 School Law Seminar Council of School Attorneys (Mar. 23 2000). *See* Wood v. Strickland, 420 U.S. 308 (1975).
[175] *Wood*, 420 U.S. at 326.
[176] *Id*.
[177] *Id*.
[178] *Haidak*, 2019 U.S. App. LEXIS 23482, at *26.
[179] *Baum*, 903 F.3d at 578; 2018 Press Release, *supra* note 1.
[180] Editorial Board, *Due Process for Sexual Assault Cases; The Sixth Circuit Says the Accused have a Right to Cross-Examination*, WALL STREET J. (Sept. 13, 2018).
https://search.proquest.com/docview/2103234858/citation/2D68495DA2A4382PQ/1?accountid=13793.

Peddling 'Due Process' Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women," Penny Venetis notes that the 2018 regulations give the *Baum* decision "great authority" and in doing so, the DOE has "abdicated its duties...towards students who have been sexually assaulted and harassed, in favor of students who have been accused of sexual abuse."[181] Venetis explains that providing the accused with cross-examination tools that courts have "summarily rejected for decades" irresponsibly departs from "well-settled case law."[182]

The procedural requirements for cross-examination outlined in *Haidak* better balance the constitutional flexibility universities have historically held in structuring sexual misconduct hearings and the need for some type of cross-examination in such hearings. Therefore, the court in *Haidak* presents a useful model for universities as they facilitate questioning procedures in sexual misconduct proceedings.

B. The *Haidak* Decision Offers a Solution to the Administrative Burden of Modeling University Adjudication Procedures after Common Law Trials

Under various revisions of Title IX regulations, in cases of sexual misconduct, universities were required to provide students with notice and "some type of" hearing, but such procedures did not need to follow the procedural due process requirements of common law trials.[183] However, as accused students increasingly brought suits alleging violations of their due process rights, courts were forced to evaluate whether Title IX regulations adequately ensured that university sexual misconduct proceedings protected student due process rights.[184] The 2018 regulations and the

[181] Venetis, *supra* note 150.
[182] *Id*.
[183] 2018 Press Release, *supra* note 1.
[184] The College Fix Staff, *Civil Liberties Group Launches New Searchable Database of Campus Due Process Litigation*, COLLEGEFIX (Oct. 16, 2019), https://www.thecollegefix.com/civil-liberties-group-launches-new-searchable-database-of-campus-due-process-litigation/ (explaining that the 2011 Dear Colleague letter spurred colleges to "abandon critical due process protections for accused students" and that the rulings on the subsequent wave of litigation – more than 500 lawsuits since 2011 and 70 this year alone – "contain a wealth of useful information for lawyers").

Sixth Circuit's decision in *Baum* have reinvigorated this controversy, forcing courts and universities to grapple with whether university disciplinary proceedings must offer the same due process rights granted in common law trials, specifically, live cross-examination by a party or a party's representative—a change that would require many universities to overhaul their disciplinary proceedings. Here, the First Circuit's decision in *Haidak* offers a workable solution that acknowledges a student's right to be heard, but also considers the administrative burden many universities would face if following the 2018 regulations and the *Baum* decision.

First, modeling university due process procedures, specifically cross-examination procedures, after common law trials could lead to a host of issues, from administrative efficiency to student safety.[185] If a university proceeding were to be modeled after a criminal or civil model, the university would face obstacles in its primary goal of ensuring that students' education is prioritized by effectively and efficiently responding to student sexual misconduct allegations.[186] Mandatory adversarial processes "superimpose a high conflict procedure onto a non-adversarial community and system."[187]

In the *Goss* decision, the Court recognized the administrative burden schools might face if required to implement formal due process procedures, such as live cross-examination.[188] The Court articulated that "even truncated trial-type procedures might well overwhelm administrative facilities."[189] The Court explained that facilitating procedures such as live cross-examination with counsel would inevitably lead schools to divert resources and increase expenses without

[185] Teresa Watanabe and Suhauna Hussain, *Ruling Affirming the Rights of Students Accused of Sexual Misconduct Roils California Colleges*, L.A. TIMES (Feb. 14, 2019), https://www.latimes.com/local/education/la-me-california-universities-title-ix-20190215-story.html.
[186] *See* Naomi M. Mann, *Taming Title IX Tensions*, 203 UPENN J. OF CONST. L. 631 (2017).
[187] *Id.* at 655.
[188] *Goss*, 419 U.S. at 565.
[189] *Goss*, 419 U.S. at 565.

necessarily improving the effectiveness of the disciplinary proceeding.[190] While permitting a party or a party's representative to engage in cross-examination might appear to relieve a university or school of its responsibility to adjudicate a disciplinary matter, such changes would "fundamentally change the system and render it less accessible to students."[191] First, adding counsel to represent a student and facilitate cross-examination would complicate proceedings by "importing outside legal rules based on adversarial systems."[192] Students (as under the 2018 regulations students may facilitate cross-examination) and educational institutions would need to learn these "outside legal rules," which would require significant training and consultation.[193] In addition, cross-examination often prolongs hearings and consequently, adds administrative costs.[194] Further, cross-examination frequently "devolves into a mini-trail of extrinsic evidence and character witnesses because of the impeachment threat that accompanies cross-examination."[195]

Thus, in the university setting, it is the university's responsibility rather than the parties' to investigate the facts.[196] This system of adjudication and cross-examination is labeled "inquisitorial" and does not involve the administrative demands of an adversarial model.[197] Under the First Circuit's holding in *Haidak*, an inquisitorial model would require universities to facilitate a "back and forth" form of questioning that is "reasonably calculated" to uncover the truth.[198] Additionally, neither students nor student representatives would be permitted to engage in questioning or cross-examination, reducing the likelihood of contentious and potentially damaging

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[190] *Id*.
[191] Mann, *supra* note 186.
[192] *Id*.
[193] *Id*.
[194] H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented*", 27 CORNELL J.L. & PUB. POL'Y 145 (2017).
[195] *Id*.
[196] *Haidak*, 2019 U.S. App. LEXIS 23482, at *27.
[197] *Id*.
[198] *Id*.

hearings. [199] The First Circuit's articulation of an inquisitorial model, when designed and executed effectively, is more conducive to the university setting than cross-examination procedures modeled after common law trials.

As evidenced by many student lawsuits and general concern about student due process rights, however, the inquisitorial model used by many universities should be adapted to ensure that both the accused and accuser in sexual misconduct cases have a chance to present their case and respond to allegations.[200] The First Circuit's holding in *Haidak* offers important insight into this issue. The First Circuit's decision, through its holding regarding cross-examination procedures, seems to fairly balance the right of an accused student to be heard, but also the university's interest in regulating itself and ensuring that sexual misconduct is handled effectively.

While the First Circuit provides universities with flexibility in designing questioning procedures, it does require such questioning to meet a standard of "reasonably adequate questioning."[201] Clarification is needed over what "reasonably adequate" questioning looks like so that universities can properly protect victims from re-traumatization while also ensuring an accused student is heard. The First Circuit's lack of clarity could lead to inconsistent procedures and continuing litigation and controversy. Thus, using aspects of the opinion, courts, policymakers, and universities should outline what "reasonably adequate questioning" looks like.

The First Circuit found that the university conducted "reasonably adequate questioning" because both parties were permitted to submit questions to the hearing panel and the hearing panel questioned both Gibney and Haidak multiple times.[202] Therefore, it seems that questioning procedures should provide students with input and ensure that students respond to questions

[199] *Haidak*, 2019 U.S. App. LEXIS 23482, at *27.
[200] Watanabe and Hussain, *supra* note 185.
[201] *Haidak*, 2019 U.S. App. LEXIS 23482, at *27.
[202] *Id.*

multiple times. Particularly, the First Circuit found that witnesses should be asked the same question multiple times to determine if a witness's response is consistent.[203] University administrators or factfinders should also ask follow-up questions as appropriate and provide the accused with multiple opportunities to respond to a complainant's responses.[204] Ideally, the 2018 regulations would adopt the First Circuit's holding, as it acknowledges that while students are not constitutionally entitled to a live hearing, there is a need to reform what due process looks like at the university level in sexual misconduct matters. However, the regulations should further clarify factors that contribute to "reasonably adequate questioning."

The First Circuit's holding in *Haidak* provides schools with a degree of autonomy on how hearings are structured, as well as who at the university facilitates the proceeding.[205] The Sixth Circuit's categorical rule that demands cross-examination by an accused or the accused's representative is indicative of procedural requirements that create a trial-like proceeding that may burden university administrations, especially universities with less resources.[206] The decision in *Haidak* will not eliminate university concerns around resources and training, but it will provide schools the opportunity to revamp current structures instead of overhauling them.

C. The *Haidak* Decision Considers the Re-traumatization of Victims

The First Circuit decision also accounts for the trauma that victims may experience if subjected to questioning by their attacker, or highly adversarial questioning in general. Critics of the Sixth Circuit's decision in *Baum* and the 2018 regulations argue that victims will be "re-traumatized" and less likely to report sexual misconduct if subjected to the "trial-like" procedures

[203] *Haidak*, 2019 U.S. App. LEXIS 23482, at *27.
[204] *Id*.
[205] *Id*.
[206] Erica Houskeeper, *Legal Issues: The Ripple Effect of Proposed Title IX Regulations*, UVM Outreach (May 20, 2019), https://learn.uvm.edu/blog/blog-education/new-title-ix-regulations.

outlined in *Baum* and by the DOE.[207] Therefore, the First Circuit's opinion leaves flexibility in structuring hearings so that universities can ensure victims are protected and encouraged to report sexual misconduct when it occurs.

First, the decision in *Baum* and the 2018 regulations seek to shift the focus of Title IX from ensuring victims have rights to an education free from sexual harassment to protections for accused students.[208] This departure will likely exacerbate the underreporting of sexual harassment and abuse that is already rampant within the university setting.[209] The National Sexual Violence Resource Center reports that about 90% of sexual assault victims on college campuses do not report their assaults.[210] If students fear confrontation from their harasser or their harasser's representative, they will be less likely to report, especially if they feel they will not be believed. Student victims are less likely to report sexual assaults if such reporting leads to a courtroom-like proceeding, and "some evidence suggests that fear of cross-examination may be the primary driving force behind underreporting in the criminal justice system."[211] The 2018 regulations create obstacles for students reporting sexual abuse and such obstacles are contrary to the intent of Title IX.

Essentially, adversarial cross-examination is inappropriate in the university setting. University proceedings are not criminal proceedings, and while adversarial cross-examination has benefits, it is likely to contribute to underreporting of sexual assault at universities and the re-traumatization of student victims. Cross-examination questioning does not always seek to advance truth-seeking, but rather, functions as a means to intimidate or discredit a victim.[212]

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[207] *Id*.
[208] Venetis, *supra* note 155.
[209] *Id*.
[210] *Get Statistics*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/statistics (last visiting March 10, 2020).
[211] Bruton, *supra* note 194.
[212] *Id*.

Further, strategic cross-examiners can ask questions about impermissible topics or "make the same insinuations through permissible questioning."[213] For example, in a cross-examination of a rape victim, an advocate will address questions of consent and "grill the victim about the details of her behavior, attitudes and attire on the night of the attack...The lawyer must characterize every detail vividly from the most salacious point of view attainable and present it all with maximum innuendo."[214]

Adversarial and aggressive cross-examination harms a victim. Many victims of sexual harassment and assault are severely traumatized by the crime and must undergo that trauma again in court. Moreover, many advocates seek to exculpate the accused by addressing "factfinders' preexisting beliefs and stereotypes about what 'real' assault looks like."[215] Victims may be asked questions such as, "Did you resist?" or "Why didn't you go to the police right after?" Such questions "reinforce oppressive social norms and leave many victims feeling partially responsible for the harm done to them."[216] If student victims fear trial-like procedures and fail to report instances of sexual misconduct, sexual harassment persists and universities not only fail to deter instances of sexual harassment but fail to protect student victims. The questioning procedures outlined by the First Circuit in *Haidak* provide the accused student with a chance to participate in questioning, but also ensure student complainants are protected.

The inquisitorial model articulated by the First Circuit in *Haidak* decreases the trauma a complainant experiences while testifying as a neutral panel ensures questioning is not abusive. In a courtroom setting, even the "most attentive arbiters cannot censor all abusive questions, so by

[213] Bruton, *supra* note 194.
[214] David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann,* 90 COLUM. L. REV. 1004 (1990).
[215] Bruton, *supra* note 194.
[216] *Id*.

allowing a panel to censor or change questions" the inquisitorial model ensures abusive and adversarial questioning is precluded.[217] A neutral party can also control the length of the proceeding and prevent victims from "excessively long proceedings."[218]

Universities should develop a mechanism for cross-examination, but this should not involve the accused or his or her representative because a neutral third-party is constitutionally adequate, provides universities with needed flexibility, and decreases the potential for a victim to experience additional emotional trauma.

V. Conclusion

Despite current Title IX regulations, litigation continues to arise over due process rights in sexual misconduct cases at the university level. Consequently, the First Circuit's decision in *Haidak* should be leveraged to guide policymakers and universities in developing fair processes that protect an accused's due process rights, but also do not overburden university administrations, and more importantly, do not re-traumatize victims or discourage victims from seeking redress.

Haidak should guide legal advisors and policymakers as they continue to advise universities on best practices to ensure due process is satisfied and campus sexual misconduct is handled effectively. As Title IX regulations continue to be revised, the *Haidak* opinion should maintain relevancy in conversations surrounding how sexual misconduct is handled at the university level.

[217] Bruton, *supra* note 194.
[218] *Id*.