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## Divided Fifth Circuit ruling offers contrasting analysis of due process in sexual misconduct disciplinary proceedings

By Tina Sciocchetti and Steven M. Richard

By a split 2–1 decision, the United States Court of Appeals for the Fifth Circuit recently held that the University of Houston (the University) did not violate the due process rights of two students who were expelled for sexual misconduct. *Plummer v. University of Houston, et al.*, No. 15-20350 (5th Cir. June 26, 2017). A strongly worded dissent criticized the Office for Civil Rights’ Dear Colleague Letter (2011) and faulted the University’s disciplinary procedures. This ruling shows the stark contrast in judicial views applied by courts in evaluating the fairness of sexual misconduct disciplinary proceedings.

### Background

*Plummer* involved lewd behavior by a male student (McConnell) and a female student (Plummer), who were dating. McConnell met another University student (Female Student) at a bar. They became intoxicated, went to McConnell’s dorm room and engaged in sexual activity that neither could remember afterwards. Plummer found her boyfriend and Female Student naked and unconscious in his dorm room. Plummer took a photo of the two, which she posted on social media, and also made two videos, which she later showed to her friends and shared electronically along with the photo. One video depicted the Female Student’s intimate parts, and included footage of McConnell appearing to fondle the unresponsive Female Student. The second video showed the naked Female Student lying on the dorm’s communal hallway floor and being led into an elevator that was sent to the lobby. A medical examination of the Female Student determined injuries consistent with sexual assault.

The police investigated the incident but declined charges. Three months later, the Female Student filed a sexual assault complaint with Richard Baker (Baker), the University’s Vice President of Equal Opportunity Services (EOS), who conducted an investigation. The University initially declined disciplinary action, but it acted over a year and a half later when it learned Plummer had failed to disclose one of the videos. At some point, the Female Student decided not to pursue her complaint, and the University became the “complainant” in disciplinary proceedings against McConnell and Plummer. Baker wrote investigative reports concluding that (1) McConnell had violated school

policies by engaging in sexual activity without consent and (2) Plummer had facilitated and encouraged the sexual assault and had violated policies with her recordings.

Each student appealed Baker's findings to a four-person appellate panel as allowed by the University's procedures. The panels held separate appeal hearings, reviewing whether to uphold or reject the findings based upon a preponderance of the evidence standard. Baker testified about his investigation and provided his investigative materials. The students were represented by counsel who, under the University rules, acted as "advisers." Yet, the attorneys were allowed to participate more fully in the hearings, including at times examining and cross-examining witnesses and making statements to the panels. The Female Student was not deposed and did not appear at either hearing. The panels upheld Baker's findings, and each student's final appeal to a University vice president was unsuccessful. McConnell and Plummer were expelled, but the University removed the disciplinary notations from their official transcripts.

McConnell and Plummer sued the University, Baker and another University official alleging constitutional due process and Title IX violations. The federal district court granted summary judgment in the defendants' favor on due process claims. The Title IX claims were dismissed for failure to state a claim. The students appealed to the Fifth Circuit, resulting in the split ruling addressed below.

### **The majority's opinion**

As a public institution, the University is subject to constitutional due process requirements. In a due process challenge, courts must focus on "ensuring the presence of 'fundamentally fair procedures to determine whether the misconduct has occurred.'" The majority applied the due process standard articulated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), that the amount of process due in university proceedings "is based on a sliding scale that considers three factors: (a) the student's interests that will be affected; (b) the risk of an erroneous deprivation of such interests though the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (c) the university's interests, including the burden that additional procedures would entail." The majority stressed that it is not the judiciary's role to second guess university disciplinary adjudications.

Under the first and third due process factors, the majority ruled McConnell and Plummer had a constitutionally protected liberty interest in their higher education, and the University had a strong interest in maintaining a safe educational environment while preserving its administrative resources. Focusing on the second factor, the majority stated that "the amount of process constitutionally required in state university disciplinary proceedings will vary in accordance with the particular facts of each case."

McConnell and Plummer argued that they were denied confrontation of the victim and effective cross-examination. The majority stated that the appeal did not require it to determine whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings. The unique facts of the case with its graphic visual evidence led the majority to conclude that "further procedural safeguards would not have lessened the risk of an erroneous deprivation of the [students'] interests or otherwise altered the outcome." The University did not rely on testimonial evidence from the Female Student, who remembered little about the incident. Rather, the conduct depicted in the videos and photo—combined with their subsequent distribution and publication—was sufficient to sustain the findings and sanctions.

McConnell and Plummer argued that Baker performed dual roles, acting as both a victim advocate and an investigator, which tainted the disciplinary process. The majority found no due process violation. Noting that Baker relied primarily on the videos and photo to support his findings, the students failed to show that a different investigator would have uncovered any additional information diminishing the significance of that graphic evidence. Further, the students complained of a conflict of interest arising from the participation of an attorney from the University's Office of Equal Opportunity Services (EOS) serving as an adviser to the hearing panels because Baker also served as vice president of that office. Dispatching this argument, the majority noted that the separate EOS attorney advisor explicitly instructed the panelists they were free to disagree with the interpretations of the evidence offered by the parties, including Baker.

Finally, the majority found no error in the dismissal of the Title IX claims. McConnell and Plumber argued selective enforcement because both McConnell and the Female Student were culpable for their intoxication and the ensuing events, yet the Female Student was not charged. The majority focused again on the videos and photos, concluding that "[t]he University's discipline was predicated on what [McConnell and Plumber] did." Also, the students failed to show that the University was deliberately indifferent to "the constitutional sufficiency of the procedures it employed in sexual misconduct disciplinary cases." The University acted upon actual notice of the incident and conducted a thorough investigation.

### **The dissent**

In a strongly worded dissent, Justice Edith H. Jones took a broad swipe at federal Title IX guidelines and their resulting impact upon sexual misconduct investigations and adjudications. The dissent stressed that due process protections must be scrutinized carefully because charges of sexual misconduct "will affect the students' future lives as surely as criminal convictions." Based upon what she perceived to be clear due process failures in the University's proceedings, Justice Jones would have reversed the judgment in the University's favor and remanded the case back to the district court for further proceedings.

At the very outset of her dissent, Justice Jones warned:

This case is the canary in the coal mine, arguing worse to come if appellate courts do not step in to protect students' procedural due process right[s] where allegations of quasi-criminal sexual misconduct arise. Yes, there is undisputed graphic evidence—the videos and a photo of what transpired among McConnell, Plummer and the Female Student . . . The panel's conclusion seems driven by the "unique facts" of graphic evidence to discount all of McConnell's and Plummer's serious arguments. Put bluntly, the panel implies that because they are guilty, they got enough due process.

The dissent conveyed strong criticism of the Office for Civil Rights' 2011 Dear Colleague Letter, which was issued without administrative rulemaking procedures, which states an "extremely broad definition of 'sexual harassment' that has no counterpart in federal civil rights case law," and prescribes procedures for sexual misconduct adjudications "heavily weighted in favor of finding guilt." The University's policies largely tracked the Dear Colleague Letter and did not "deserve deference as products of 'institutions of higher learning.'" Instead, "[t]hese policies were developed by bureaucrats in the U.S. Department of Education and thrust upon educators with a transparent threat of withholding federal funding."

The dissent found that “several features of the process” violated the students’ due process rights. Most prominently, Baker’s Title IX responsibilities in the proceedings “placed him in the multiple, and inherently conflicting, roles of *advocating* for the female student, *investigating* the events, *prosecuting* McConnell and Plummer, *testifying* as a witness at their hearings[] and *training* and *advising* the disciplinary hearing panels.” The dissent also criticized the limitations imposed upon the students’ attorneys, who were not permitted formally to represent their clients. Instead the students were forced to “play lawyer” against “the real lawyer,” Baker. Additional fundamental due process flaws arose through the disclosure of evidence less than a week before the hearings, the redaction of witness identities on privacy concerns, the inability to confront the Female Student who never appeared and was not deposed, and the use of the preponderance standard for adjudicating quasi criminal conduct (for which no actual criminal charges were brought).

Justice Jones concluded her dissent as strongly as it began:

I do not take the position that the students must be afforded the same procedural protections as criminal defendants. What drives my concerns is the close association between the charges leveled against them and actual criminal charges. Sexual assault is not plagiarism, cheating[] or vandalism of university property. Its ramifications are more long lasting and stigmatizing in today’s society. The University wants to have it both ways, degrading the integrity of its fact-finding procedures, while congratulating itself for vigorously attacking campus sexual misconduct. Over prosecution is nothing to boast about.

## **Takeaways**

The *Plummer* case presents two clearly contrasting judicial viewpoints—a majority opinion showing deference to the University’s policies and their implementation and a dissenting opinion asserting that the judiciary must intervene to correct processes that are not protecting the rights of the accused. The case remains before the Fifth Circuit, where the students have petitioned for a full en banc review. They argue that the panel’s split ruling presents issues of exceptional importance, portraying the majority’s decision as a result-oriented disposition that refused to address the critical issue of the constitutional sufficiency of the University’s procedures to adjudicate sexual misconduct charges. In their petition, the students request that the full Fifth Circuit provide “what the [majority opinion] failed to do: guidance for colleges and universities to implement Title IX in accordance with the Due Process Clause.”

As we have reported in our recent alerts, trial courts at the federal and state levels are addressing many lawsuits filed by expelled or suspended students challenging sexual misconduct disciplinary adjudications. Courts are grappling with the appropriate level of judicial review and the standards to apply in determining whether Title IX and constitutional mandates have been met. These cases can pose vexing issues. Courts must recognize the difficult challenges facing colleges and universities in protecting the rights of both complaining and accused students, while carefully analyzing compliance with Title IX and due process prerequisites. With the cases now reaching appellate courts (such as the Fifth Circuit here), the views of the judiciary in evaluating college and university adjudications of sexual misconduct allegations remain difficult to predict.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Michael J. Cooney at [mcooney@nixonpeabody.com](mailto:mcooney@nixonpeabody.com) or 202-585-8188
  - Steven M. Richard at [srichard@nixonpeabody.com](mailto:srichard@nixonpeabody.com) or 401-454-1020
  - Tina Sciocchetti at [tsciocchetti@nixonpeabody.com](mailto:tsciocchetti@nixonpeabody.com) or 518-427-2677
  - Laura B. Bacon at [lbbacon@nixonpeabody.com](mailto:lbbacon@nixonpeabody.com) or 312-977-4403
  - Eliza T. Davis at [etdavis@nixonpeabody.com](mailto:etdavis@nixonpeabody.com) or 312-977-4150
  - Julianna Malogolowkin at [jmalogolowkin@nixonpeabody.com](mailto:jmalogolowkin@nixonpeabody.com) or 617-345-1069
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