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FEBRUARY 8, 2018

# New York's Third Department rules a university is not required to provide a right to cross-examine an accuser in a sexual assault administrative proceeding

**By Tina Sciocchetti, Kevin Saunders and Zachary Osinski**

A recent 3–2 decision from the Appellate Division, Third Department held that Article 129-B of the Education Law (the "Enough is Enough Law") does not require that educational institutions provide a student the right to cross-examine an individual who accused that student of a sexual assault.

In *Matter of Jacobson v. Blaise*, No. 524159, 2018 WL 356658 (3d Dep't Jan. 11, 2018), the petitioner was expelled from the State University of Plattsburg ("University") after being found responsible for violating two provisions of the University's Student Conduct Manual for "initiat[ing] sexual intercourse with another student three different times without establishing affirmative consent." The complainant in the case reported the incident to a nurse at the University's health center, and she referred the matter to the University's Title IX Coordinator, who then met with both the complainant and the petitioner and obtained statements detailing their recollections of the incident. Based on these statements, the petitioner was later charged with violating two provisions of the University's Student Conduct Manual. At the eventual disciplinary hearing before the Student Conduct Board ("Board"), the complainant listened to the proceedings by Skype, but did not actually participate. Instead, the Title IX Coordinator read the complainant's statement into the record and the petitioner was allowed to cross-examine the Coordinator, but not the complainant herself. After an appeal of the Board's decision, the petitioner was ultimately dismissed from school as a result of the hearing. He then commenced an Article 78 proceeding seeking to have the University's decision overturned.

The Third Department first addressed whether or not the University had provided him adequate due process despite not allowing him to question his complainant. The majority rejected that argument, and explained that there is only a limited right to cross-examine an adverse witness in an administrative proceeding, and the Enough is Enough law "does not require such cross-examination." Furthermore, the majority found that under the Enough is Enough law, "a reporting individual is not obligated to participate in the hearing" and has the right to make a decision about whether or not to participate in the process "free from pressure by the institution." According to the court, this includes the right to decide whether or not to participate in the hearing and also the right to remain anonymous. Finally, the court found that since it was the University that had to

demonstrate the facts supported the charge, the petitioner was afforded adequate due process by allowing him to question the Title IX Coordinator about her basis for bringing the charges.

The majority also noted that in other cases, institutions had provided a mechanism for students accused of sexual assault to ask for additional information from a complainant. However, the court stated that while such a process was not necessary where the two parties provided "relatively consistent accounts[,]" it should be made available "where a material factual conflict exists between the statements of a reporting person and an accused student[.]" Ultimately, the court vacated the University's determinations because it found that the Title IX Coordinator had improperly defined the definition of "affirmative consent" and what it meant to obtain such consent. Interestingly, the court found, and the parties did not dispute, that the definition of "affirmative consent" given in the Enough is Enough law applied to this case, even though it was not in the student handbook at the time of the incident, and despite the fact that it had not yet been enacted prior to the incident.

The dissent strongly objected to the court's ruling on the due process issue, and would have found that there is "nothing in the law that prevents the reporting individual from participating in a disciplinary hearing." While the dissent agreed that there is only a limited right to cross-examination in administrative hearings, they found that such a right should apply here, as the outcome of the proceeding could have a "lasting impact" on the petitioner's personal life, including his "educational and employment opportunities" as a finding of responsibility for a sexual offense can and did result in his permanent dismissal from the University.

Given the importance of the issues decided, and the strongly worded dissent, we will be monitoring whether or not the Court of Appeals ultimately takes up this issue. Additionally, it will be interesting to see what effect the Trump Administration's new guidance letter from the Office for Civil Rights (issued September 2017) would have on future rulings. In that letter, it was specifically noted that under Title IX, "[a]ny process made available to one party in the adjudication procedure should be made equally available to the other," including "the right to cross-exam[ination]." At this time, a notice of appeal has not been filed for this case.

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