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Appellate Court upholds constitutionality of NY's campus sexual assault law

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For the second time, a New York State appellate court has reviewed a student disciplinary case arising out of the State University of New York at Plattsburgh in which the respondent was found responsible for sexual misconduct. This time, the court's decision considered the constitutionality of New York's campus sexual assault law, Education Law Article 129B, and upheld the law.

As we wrote last year,[1] a divided panel from the Appellate Division, Third Department, in *Matter of Jacobson v. Blaise*, annulled the university's disciplinary determination and expulsion of a student after finding that a school official had improperly defined "affirmative consent" for the student conduct panel. Although the matter was remanded for a new disciplinary hearing at that time, the court's decision was significant for the panel majority's holding (over a sharply-worded dissent) that a university was not required to provide a right to cross-examine an accuser in a college sexual assault administrative proceeding.

Since that time, neither the U.S. Court of Appeals for the Second Circuit nor New York's highest court, the Court of Appeals, has decided the issue of whether a complainant must appear at a public university's disciplinary hearing to allow a respondent the opportunity for cross-examination. Although this due process issue was raised before the Court of Appeals in *Haug v. SUNY Potsdam*, the court's decision in that case did not address it, finding that it had not been properly preserved at the administrative level. The *Haug* court ultimately upheld the university's sexual misconduct disciplinary determination, which had been based on hearsay evidence of the complainant's report given by a university investigator. At least one federal circuit court of appeals, the Sixth Circuit,[2] has ruled that a right to cross-examination of an accuser is required in a public university proceeding; proposed regulations issued by the U.S. Department of Education, Office for Civil Rights, also require a right to cross-examination be provided to the parties.

[1] See "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," February 07, 2018, available here.

[2] See *Doe v Baum, et al.*, available here.

By contrast, the First Circuit[3] recently declined to adopt the Sixth Circuit's approach to party cross-examination, noting that "when the questioner and witness are the accused and the accuser, schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse." The First Circuit held that due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through the hearing panel. The issue of the extent to which due process requires rights of cross-examination is an evolving issue in judicial lawsuits.

On its second review of the university's adjudication of the sexual assault matter in *Matter of Jacobson v. Blaise*, the Appellate Division upheld both the finding of responsibility and the penalty imposed. The respondent ("petitioner" on appeal) again had been charged with violating the university's student conduct manual by initiating sexual intercourse with the student complainant three different times over several hours, without affirmative consent. This time, the student conduct board found responsibility for one of the two charges and imposed a sanction of a three-year suspension. After the university's judicial board upheld the decision on appeal, the respondent challenged it under CPLR Article 78 and proceedings were again transferred to the Appellate Division, Third Department.

The Appellate Division first rejected the petitioner's due process claims, ruling that he had been "afforded adequate notice of the allegations and disciplinary charges against him and a meaningful opportunity to be heard at a fair and impartial hearing." Similarly rejecting claims that the disciplinary panel members were biased against him, the court reasoned there was no evidence of bias, and the participation of a school administrator who had participated in the prior administrative proceeding that had been the subject of the first appeal and remand did not "establish bias or otherwise violate principles of due process."

In reviewing the university's determination that the petitioner had violated the school's student conduct manual, the court became one of the first appellate courts to apply the standards set forth by the Court of Appeals in *Haug*. The court stated, pursuant to *Haug*, that its role in reviewing the university's disciplinary decision, made after a hearing, was "limited to assessing whether the determination is supported by substantial evidence."[4] The court cited testimony adduced at the hearing to find sufficient support for the university's determination that the complainant was unable to provide affirmative consent to sexual activity because she was asleep or unconscious, and therefore incapacitated during at least one of the three instances of sexual intercourse that were alleged. The court further identified sufficient evidence in the record for the university's finding that even if the complainant had not been incapacitated, she never affirmatively consented to intercourse with the petitioner.

The court concluded that the university believed the reporting individual to be more credible than the respondent and — to the extent the petitioner had provided conflicting evidence on the issue of affirmative consent at the disciplinary hearing — it was the "exclusive province" of the university to resolve these issues of credibility (not the court's). Because the complainant had testified, the issue regarding the due process right to cross-examination did not arise again on appeal.

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[3] See *Haidak v. University of Massachusetts-Amherst, et al*., available here.

[4] Another Appellate Division court recently applied the same standard from *Haug*, adding that "[s]ubstantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.'" *See Matter of Velez-Santiago v. State Univ. of N.Y. at Stony Brook*, 170 A.D.3d 1182, 1183 (2d Dep't 2019) (*quoting 300 Gramatan Ave. Assoc. v. State Div. of Human Rights,* 45 N.Y.2d 176, 180 (1978)).

Having dispensed with the petitioner's challenges to the process and outcome of the disciplinary matter, the court addressed his challenge to New York's campus sexual assault law, Education Law Article 129B (commonly known as the "Enough is Enough" law). Noting the petitioner cited no legal support for his allegations that the law was constitutionally vague on its face and as applied to him, the court held the law was not facially unconstitutional, stating, "we find that [the "Enough is Enough" law] contains sufficiently clear standards so as to afford a student of ordinary intelligence fair notice of the meaning of its provisions and to whom it applies, and further, that the provisions are sufficiently clear to prevent its arbitrary enforcement."

Finding that the petitioner "wholly fail[ed]" to identify how the statute was unconstitutional as applied, the court rejected that argument as well. The court's decision concluded with a finding that the three-year suspension was not "so disproportionate to the offense as to be shocking to one's sense of fairness." Accordingly, the court declined to modify the sanction imposed. The university's decision was confirmed and the petition dismissed.

Takeaways

The Appellate Division's decision is an indication of how lower courts interpret the guidance set forth in the Court of Appeals' decision in *Haug*. It confirms our earlier analysis that the high court's decision stood as a strong signal to lower courts that they should avoid disturbing carefully-weighed disciplinary determinations by colleges and universities that are reasonably supported by the evidence. By instructing lower courts to defer to the credibility determinations and weighing of contradictory evidence by university panels, the Court of Appeals narrowed the grounds for reversal in cases that hinge on such determinations, and the decision here is an example of the application of those standards.

In addition, the decision is noteworthy as it appears to be the first time an appellate court has ruled on the constitutionality of New York's campus sexual assault law in a published opinion. It remains to be seen whether a stronger constitutional challenge to the law would prevail, but the Appellate Division's interpretation stands as a firm defense of the law's constitutionality, at least against a future facial challenge.

Because the complainant testified in the hearing following remand, the Appellate Division did not again revisit the claim that a respondent is constitutionally entitled to cross-examine an accuser in a public university's sexual misconduct disciplinary hearing. Accordingly, the last word on that issue remains the Court of Appeals' decision in *Haug*, which upheld a sexual misconduct code of conduct violation following a hearing in which a complainant declined participation, finding that it was supported by reliable, sufficient hearsay evidence. As stated above, the due process claim had not been properly preserved for review in *Haug*. However, because the New York campus sexual assault law affords students the right to decline participation in a campus sexual misconduct proceeding, it can be expected that New York institutions will likely proceed in appropriate cases without a complainant's participation, relying on hearsay of the sexual assault report.

With the split in federal courts of appeals on this issue, and the proposed federal regulation requiring cross-examination, this issue is likely to come to a head in a future New York federal or state matter. We will continue to monitor developments in this area and will provide alerts on significant cases.

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