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Due Process and Public University Disciplinary Procedures

While colleges and universities have [broad discretion](#) to establish codes of conduct for their employees and students, and may impose penalties for disciplinary violations, they are also subject to legal constraints regarding the procedures they use to address student and employee misconduct. Some requirements stem from federal statutory and regulatory sources. One prominent example is [Title IX](#) of the Education Amendments of 1972 (Title IX). Department of Education (ED) Title IX [regulations](#) impose various requirements on universities that receive federal funding in responding to allegations of sexual harassment. As explained in other CRS [products](#), ED's expectations for schools under Title IX have shifted across presidential administrations.

On top of these statutory and regulatory obligations, *public* universities face additional constitutional requirements unique to government actors. The Due Process Clause of the Fourteenth Amendment [requires](#) states to observe certain procedures when they deprive persons of life, liberty, or property. Federal courts have [recognized](#) that when a public university imposes disciplinary sanctions like firing an employee or expelling or suspending a [student](#), this action can constitute a deprivation of liberty or property by the state. Thus, when a state actor like a public university imposes such a deprivation on someone, the procedures it uses to do so must comport with due process.

One [recurring](#) area of litigation concerns due process challenges to the procedures public universities use when determining responsibility for sexual misconduct in education programs. Public universities that receive federal funding must follow the constitution as well as applicable Title IX requirements on how to respond to sexual harassment allegations. Public universities have responsibilities [both](#) to alleged victims of misconduct and alleged perpetrators of misconduct. Courts have [recognized](#) that satisfying both sets of [responsibilities](#) can prove challenging. This In Focus provides an overview of how federal courts have approached challenges to public university disciplinary procedures and examines the background constitutional standards that public institutions must meet as they enforce their codes of conduct.

Due Process Clause

The Due Process Clause of the Fourteenth Amendment [prohibits](#) states from depriving people of life, liberty, or property without “due process of law.” The property interests protected by the Due Process Clause are not themselves created by the Constitution; instead, they are entitlements that [stem](#) from an independent source, such as state law. For example, a state employee might have, under state law, a [property right](#) to continued employment absent cause for termination. A person's liberty interests might

feature in a government action that harms a person's reputation and changes that person's legal status, such as [labeling](#) someone a sexually violent predator and imposing legal restrictions as a consequence.

Exactly what kind of process is constitutionally required before [depriving](#) people of a protected interest depends on the context. When deciding what process is due, courts consider three [factors](#) laid out by the Supreme Court: (1) “the private interest that will be affected by the official action”; (2) the risk of an erroneous deprivation and the probable value of additional procedures; and (3) the interest of the government. In general, people with a protected interest are [entitled](#) to notice and a “meaningful opportunity to be heard” before the government may deprive them of that interest. The severity of the deprivation is a key issue in determining what procedures are constitutionally required. In general, the stronger the private interest at risk of deprivation, the more [formal and exacting procedures](#) courts will require.

In student disciplinary cases in particular, courts often look to the Supreme Court's decision in *Goss v. Lopez* to determine what process is due. The Court ruled in that case that public high school students have a property interest in their education, which is deprived by suspension from school. As such, the Court indicated that a state “may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.” According to the Court, in cases of suspension for 10 days or fewer, a student [must](#) “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” However, the Court explained, cases of more [stringent sanctions](#), such as suspensions beyond 10 days or expulsions, “may require more formal procedures.”

Due Process Rights at Public Universities

Because public universities are [state actors](#), they must comply with the Constitution's requirements, including the Due Process Clause. Private universities, on the other hand, [are generally not](#) required to comply with the Constitution; however, state laws might [impose](#) specific obligations on private colleges, and federally funded private schools must comply with Title IX's requirements.

Deprivations of Liberty and Property

The Supreme Court has ruled that public employees who can only be fired for cause have a constitutionally protected property [interest](#) in their tenure. The Court has also [assumed](#) without deciding that students of public universities enjoy a “constitutionally protectible property

right” in their continued enrollment in an educational institution.

A number of [federal courts of appeals](#) have ruled that university disciplinary decisions that result in expulsion or suspensions can constitute a deprivation of student property and/or liberty interests. Some courts [recognize](#) a general property interest for students enrolled in public higher education, while others conduct a state-specific [inquiry](#) to determine whether one exists. Courts have also found that university disciplinary decisions can implicate liberty interests. For instance, the U.S. Court of Appeals for the Fourth Circuit [ruled](#) that a student properly alleged a deprivation of a liberty interest when a university found him guilty of sexual misconduct and permanently expelled him from a state university system.

Process That Is Due

Even when a person has established a deprivation of a protected interest, the specific process due can depend on the basis of a school’s action. Universities have much more flexibility in administering their academic standards than when they enforce a code of conduct through disciplinary decisions. The Supreme Court has [observed](#) that “far less stringent procedural requirements [apply] in the case of an academic dismissal” than in disciplinary suspensions or expulsions.

In cases challenging university disciplinary decisions that deprive people of protected liberty or property interests, federal courts have [generally](#) ruled that due process requires state universities to [provide](#) people with adequate notice of the charges against them, the [evidence](#) used to make a determination of guilt or culpability, and the ability to present their side of the story to an unbiased decisionmaker. People subject to university disciplinary decisions have challenged the procedures used to find them culpable of misconduct on a number of different grounds, including the [standard of evidence](#) used; the alleged [bias](#) of decisionmakers; lack of access to the [evidence](#) used against them; and failure to question witnesses and [assess](#) credibility.

Standard of Evidence. A number of plaintiffs have challenged the standard of evidence universities used in disciplinary proceedings against them. As background, in 2011, ED issued a [Dear Colleague Letter](#) on Title IX [explaining](#) that a federally funded school’s grievance procedures for responding to allegations of sexual harassment “must” utilize the preponderance of the evidence standard (i.e., more likely than not). The letter indicated that the more [demanding](#) “clear and convincing” standard used by some schools was “not equitable under Title IX.” ED’s current Title IX regulations [allow](#) schools to apply either standard, but they must apply the same standard to formal complaints against students and employees, including faculty.

Some plaintiffs have argued that the preponderance of the evidence standard violates due process in disciplinary proceedings given the significant consequences of a finding of guilt. In general, it appears that most courts have ultimately [rejected](#) these arguments. For instance, the U.S.

Court of Appeals for the Eighth Circuit [ruled](#) that a university’s use of that standard did not violate due process, observing that it is commonly used in other civil proceedings—including for very important matters such as civil suits for sexual battery. In addition, according to that court, a higher burden of proof could impede the government’s important [interest](#) in maintaining a safe campus free of a sexual predator.

Decisionmaker Bias. In general, courts [presume](#) that [decisionmakers](#) are [impartial](#). That said, due process can be violated if a person challenging a disciplinary decision establishes evidence of bias against them. For example, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) [ruled](#) that a student found responsible for sexual assault sufficiently pleaded a due process claim where he alleged that a member of a university disciplinary hearing panel was biased against him. In that case, one of the hearing panel members acted as investigator, prosecutor, and judge. The court [observed](#) that that fact alone did not give rise to a due process violation. However, the court held that other evidence showed the student had plausibly alleged that the hearing panel member was not impartial and had pre-judged his case: the individual also allegedly dominated the panel with remarks intended to reduce the defendant’s credibility, and reportedly said during the [hearing](#), “I’ll bet you do this [i.e., commit sexual assault] all the time.”

Access to Evidence. Courts have [ruled](#) that a university can [violate](#) due process when it [withholds](#) the evidence used to determine that someone is [responsible](#) for misconduct. In a decision from the U.S. Court of Appeals for the Seventh Circuit written by then-judge Amy Coney Barrett, the court examined the procedures a university used to find a student guilty of sexual misconduct. The panel [observed](#) that the university did provide notice to the student of the allegations against him but failed to disclose the evidence it used to adjudicate his guilt. The court ruled that withholding evidence the university relied on to [determine](#) responsibility “was itself sufficient to render the process fundamentally unfair.”

Credibility Assessment. A number of courts have also ruled that due process can sometimes require questioning parties and witnesses, particularly in cases where a charge turns on a credibility determination, though courts have taken different views on who must be allowed to conduct the questioning. For instance, the Sixth Circuit [ruled](#) that when resolution of guilt turns on a credibility decision, due process requires the university to “give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

By contrast, the U.S. Court of Appeals for the First Circuit [concluded](#) that while due process does require public universities to conduct “real-time cross examination” of a complaining witness, this requirement can be satisfied through an inquisitorial system, such as questioning by a hearing panel, rather than a party or party’s representative. The U.S. Courts of Appeals for the [Fourth](#), [Fifth](#), and [Eighth](#) Circuits have agreed with the First Circuit’s reasoning.

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