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STATEMENT OF FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), counsel for
amicus brief in whole or in part; no

submitting this brief; and no person other than *amicus curiae* or their counsel
contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICUS CURIAE

nonpartisan, nonprofit organization dedicated to promoting and protecting civil worked to protect student due process rights at campuses nationwide, and has filed numerous *amicus* briefs in cases concerning the due process rights of accused students in campus misconduct proceedings. FIRE believes that our perspective will assist the Court in delineating the scope of due process rights in the context of on-campus adjudications.

The parties have provided their consent to the filing of this amicus brief, which satisfies Federal Rule of Appellate Procedure 29(a)(2). This brief has been filed in a timely manner within seven days of the date Plaintiff-principal brief was deemed filed on October 1, 2018.

ARGUMENT

I. Introduction

This case concerns whether the University of Massachusetts afforded a student a fair process before finding him responsible for a violent assault on a fellow student and expelling him.

The alleged assault for which appellant James Haidak was expelled took place while the appellant and his accuser, then his girlfriend, were studying abroad in Barcelona. According to his accuser, Haidak grabbe

Haidak v. Univ. of Mass. at Amherst, 299 F.

Supp. 3d 242, 266 (D. Mass. 2018).

-examination claim, citing a 1988

ruling from this Circuit that the right to unlimited cross-examination has not been

Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988). As an initial matter, appellant is not seeking *unlimited* cross-examination. More importantly, however, the nature of campus disciplinary proceedings has changed a great deal in the years since this court decided *Gorman*.

examination but often with hearings altogether in their conduct processes, such a ruling from this court could not be more timely and necessary.

II. Due Process Is of Critical Importance in Campus Conduct Proceedings

A. A Finding of Responsibility for Assault, Even by a Campus Tribunal, Carries Life-Altering Consequences

Supporters of the status quo for campus non-academic misconduct adjudication often argue that due process protections in campus procedures need not be nearly as robust as those used in courts of law, because the process is merely

after a fair process) stigma of being found to have committed an act of violence or other potentially criminal conduct. As the U.S. Court of Appeals for the Sixth Circuit recently put it, Being labeled a sex offender by a university has both an immediate and last

Doe v. Baum, 2018 U.S. App.

LEXIS 25404, *11 (6th Cir. Sept. 7, 2018).

Gorman

which was decided long before universities were routinely adjudicating claims of serious sexual misconduct, and long before technological developments allowed allegations of on-campus misconduct to be very widely and publicly disseminated does not take these lifelong consequences into sufficient account.

Yale University alumnus Patrick Witt wrote about these consequences in a *Boston Globe* editorial protesting Harvard University

After the University of Findlay found students Alphonso Baity and Justin Browning responsible for sexual assault through a process in which Baity and Browning allege the university held no hearing and did not even interview the complainant³ the university released their names to the media, stating that they had been expelled for sexual assault.⁴

prominently reveals the sexual assault finding against them, despite the fact that neither student was ever arrested for or charged with any crime. It is not difficult to imagine the i

and career prospects. Indeed, their complaint against the university alleges:

As a mere example of the damage done by Defendants, Browning has thus far been denied entrance to at least two universities University of Mount Union in Alliance, Ohio, and Ohio Northern University in Ada, Ohio

to seven (7) colleges, and [has] been rejected by all seven and in each and every case, the reason he was not accepted was the evidence of his expulsion from BUTLER, and the reason therefor. ⁶

The stakes are high for students accused of violent misconduct and tried before campus tribunals. A

motion to dismiss a lawsuit alleging denial of fundamental fairness in an on-campus sexual misconduct proceeding:

[A] Brandeis student who is found responsible for sexual misconduct will likely face substantial social and personal repercussions. It is true that the consequences of a university sanction are not as severe as the consequences of a criminal conviction. Nevertheless, they bear some similarities, particularly in terms of reputational injury. Certainly stigmatization as a sex offender can be a harsh consequence for an individual who has not been convicted of any crime, and who was not afforded the procedural protections of criminal proceedings.

Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 602 (D. Mass. 2016).

The life-altering consequences illustrated by the foregoing examples are

New York, for example, already has such a law. Article 129-B of the New York State Education Law provides:

For crimes of violence, including, but not limited to sexual violence . . . institutions shall make a notation on the transcript of students found responsible after

withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a

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Similar legislation has also been proposed in several other states. And in June 2017, the American Association of Collegiate Registrars and Admissions Officers (AACRAO), whose membership includes representatives from more than 2,500 colleges and universities,⁹ issued guidance stating its belief that institutions

other means, such as a disciplinary transcript.¹⁰ This is a reversal of the

⁸ N.Y. STATE EDUC. LAW §6444.6 (2018).

⁹ Hillary Pettegrew, *New Guidance on Student Discipline Transcript Notations for Higher Education*, EDURISK (June 2017), <https://www.edurisksolutions.org/blogs/?Id=3334>.

¹⁰ American Association of Collegiate Registrars and Admissions Officers, TRANSCRIPT DISCIPLINARY NOTATIONS: GUIDANCE TO AACRAO MEMBERS (June 2017), *available at* <https://www.aacrao.org/docs/default-source/signature-initiative-docs/disciplinary-notations/notations-guidance.pdf>.

Amicus FIRE takes no position on the wisdom of disciplinary notations on transcripts *per se*. But the increasing use of such notations underscores how important it is that meaningful procedural protections be in place to ensure trustworthy results. Any student who has actually committed violent misconduct should, without a doubt, face severe consequences. But those consequences underscore the crucial importance to all parties of a fair and reliable process for determining guilt or innocence.

B. Due Process Is of Great Importance for Victims as Well as the Accused

Though procedural protections are generally described as inuring to the benefit of the accused, they are in fact vital for victims and the entire campus community. Without the fairness and reliability that the procedural protections of due process safeguard, public confidence and trust in the adjudicatory system

¹¹ American Association of Collegiate Registrars and Admissions Officers, *Disciplinary Notations*, <https://web.archive.org/web/20180424142449/http://www.aacrao.org/resources/trending-topics/disciplinary-notations>.

erode, leaving all students less likely to participate in it or respect its outcomes, among other ill effects.¹²

When procedurally flawed processes are used to adjudicate

UCSB rendered its initial decision without granting the student a hearing or an opportunity to confront his accuser, relying instead on a single investigator who interviewed the parties and a number of witnesses separately before finding the student responsible. On appeal, the student was given a hearing at which he and

Properly conceived, due process protects all interests at stake: interest in not being wrongly found responsible for an act he or she did not commit, the interest in a reliable adjudication that holds the correct person responsible and is not subject to reversal on procedural grounds, and the interest in the school's ability to protect the wellbeing of its citizens. The allegations of serious, often violent misconduct adjudicated within the school's disciplinary process are often the result of faulty procedures, such as the ones used in the instant case, that taint the entire

III. Due Process in Campus Misconduct Adjudications Requires a Meaningful Right of Confrontation

A. Schools Are Increasingly Adopting Procedures That Deny Students the Right of Confrontation

Appellant Haidak alleges that

assault, the board of trustees, and the student body. Haidak had pre-submitted (Second Amended Compl. ¶¶ 189, 193).

Despite the fact that universities are increasingly adjudicating complaints that turn entirely on the credibility of the parties, opportunities for meaningful cross-examination

Despite the increasing consensus among courts that some form of cross-examination is essential to due process where credibility is the primary issue, 20 of the 53 surveyed institutions provided no opportunity for cross-examination whatsoever, and 13 provided a troublingly limited opportunity. In sexual misconduct adjudications, the numbers were even lower: the majority of institutions 32 made no provision for cross-examination at all, and only three institutions guaranteed a robust right of cross-examination.¹⁹

In this circuit and around the country, students are facing severe, lifelong consequences without ever being given an opportunity to meaningfully defend themselves. This court has an opportunity to address this serious problem in the instant case.

B. Although Due Process Requirements Are More Flexible in the Campus Judicial Setting, a Meaningful Right of Confrontation Is Necessary in the Context of Sexual Misconduct Cases

i. Due Process Standards Must Account for the Circumstances and Stakes of the Case

Courts have recognized that due process standards depend upon the circumstances and stakes of the particular case. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)

¹⁹ *Id.*

F.2d 7, 12 (1st Cir. 1988)

procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of
-altering consequences of campus

adjudications of violent misconduct discussed above, care must be taken to ensure that decisions offer sufficient due process protections so as to be fair and reliable.

With respect to non-academic student disciplinary proceedings, courts have been particularly sensitive to those cases in which students stand accused of behavior that would amount to a crime. *See Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005)

practical nor desirable it be one. Yet a public university student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing. In weighing this tension, the law seeks the

Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975), a case involving students accused of marijuana possession certainly a crime less severe than physical assault the court noted:

This case is among the most serious ever likely to arise in a college context. In the interest of order and discipline, the College is claiming the power to shatter career goals, and to make advancement in our highly competitive society much more difficult for an individual than it already is.

Id. at 797. Accordingly, the court stated, I

investigations. The parties are the witnesses who have the most information and the most incentive to ensure the opposing party is thoroughly questioned about the facts and credibility issues.

These circumstances have led to a flood of litigation: In the past seven years alone, more than 300

Imposing all of the rigors of our criminal justice and civil legal systems on campus tribunals might be, as many courts have noted, impractical and cumbersome. Indeed, for this reason, sexual and other violent assault allegations among the most serious claims our society recognizes may be better resolved by the judiciary, which has the process, expertise, and authority to ensure fair and reliable outcomes. But to the extent that campus administrators must undertake the resolution of these types of allegations, great care must be taken to ensure a proper balance between the rights of the accused and the administrative or logistical interests of the university.

CONCLUSION

This is a rapidly emerging area of law. Since 2011, more than 300 students have filed lawsuits alleging they were denied a fair process in campus sexual misconduct proceedings. Many of these lawsuits are still pending, with new suits being filed frequently; FIRE is aware of 17 new suits filed in just the past three months alone.

More guidance from the courts regarding the necessity of fundamentally fair procedures is desperately needed. Nowhere is this truer than on the question of an

against him.

claims.

