



## CAMPUS COUNSEL

A legal blog written for administrators, HR professionals, in-house counsel, and deans at colleges and universities

### Student Discipline on Campus: Public vs. Private Institutions

BY BOWDITCH & DEWEY • FEBRUARY 5, 2020

What is the relationship between the federal constitutional due process standard applicable to public educational institutions and the “basic fairness” standard applicable to private institutions in Massachusetts? Does the “basic fairness” standard necessarily require a private institution to comply with federal due process requirements in disciplining students?

In *Doe v. Trustees of Boston College*, a private college student identified by the pseudonym John Doe was suspended after he was found to have engaged in a sexual assault against another student identified as Jane Roe. Roe had filed a disciplinary complaint against Doe under the school’s Student Sexual Misconduct Policy, and the suspension decision was the outcome of the procedures set forth in that Policy. The procedures did not provide for either Doe or Roe (or any other witnesses) to be cross-examined.

Following his suspension, Doe filed a lawsuit against the college in the U.S. District Court for the District of Massachusetts, alleging various claims, including breach of contract on grounds that he was deprived of fair process in violation of Massachusetts law. Doe alleged that the procedures set forth in the Policy deprived him of his right to disciplinary proceedings conducted with “basic fairness” because Roe was not cross-examined. Doe also asked the Court to issue a preliminary injunction and stay his suspension.

The district court granted Doe’s motion for preliminary injunction, finding a substantial likelihood that Doe would succeed on his claim that the disciplinary procedures used by the school deprived him of fair process. The district court stated that it believed the private college’s failure to provide a mechanism for cross-examination or similar real-time evaluation of credibility violated Doe’s right to fair process in light of *Haidak v. University of Massachusetts-Amherst*. The college appealed the district court’s decision.

On appeal, the First Circuit reversed the district court’s decision. The First Circuit stated that the *Haidak* decision involved a public university and the federal due process clause, and did not govern the Massachusetts state law issue presented in *Doe*. Moreover, the First Circuit stated that the Massachusetts Supreme Judicial Court has been explicit

that a private university need not comply with federal due process to meet the “basic fairness” requirement in disciplining students, and that courts applying Massachusetts “basic fairness” law have not required cross-examination or similar real-time evaluation of credibility, and have approved of school disciplinary procedures which did not involve any opportunity for the accused student to pose questions to be addressed to the accuser.

Finally, the First Circuit affirmed that Massachusetts law permits its colleges and universities flexibility to adopt diverse approaches to student discipline matters that do not meet federal due process requirements, and stated that whether Massachusetts will wish to redefine the requirements of basic fairness in college and university discipline matters at some time in the future is an issue properly left to the Supreme Judicial Court or state legislature rather than the federal district court.

## CLIENT TIP

Following *Doe*, it is clear that the limitations imposed on public institutions by constitutional due process and private institutions by the Massachusetts law concept of “basic fairness” are distinct, and that a private school’s disciplinary procedures need not *necessarily* meet federal due process requirements—including the real-time cross-examination requirement recognized by *Haidak*—to comport with “basic fairness” under Massachusetts law. However, the exact definition and bounds of the “basic fairness” standard are still not entirely clear.

Moreover, educational institutions should be aware that the disciplinary procedures required by constitutional due process and the Massachusetts law “basic fairness” concept are only baseline, minimum requirements. Other sources of law—such as state or federal statutes or regulations, or contracts (e.g., some student conduct policies)—may require educational institutions to provide additional protections to their students, beyond those required by federal due process or “basic fairness.” Indeed, the new proposed Title IX regulations, which are expected to go into effect this year, *require* (among other things) that all applicable schools provide live hearings with the opportunity for cross-examination, even though such procedures may not be required by the Massachusetts “basic fairness” concept. Stay tuned for further updates.