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PERSPECTIVE

Boermeester v. Carry and Title IX: No hearings, no problem? Not quite

By Nia Wahl

On July 31, the Supreme Court of California held that private universities are not required to provide accused students an opportunity to cross-examine their accuser or witnesses during a live hearing. *Boermeester v. Carry*, 532 P.3d 1084, 1097 (2023). The Court has ultimately left the decision solely in the hands of private universities on how they comply with the common law doctrine of fair procedure, which requires providing (1) adequate notice, and (2) a meaningful opportunity to be heard. *Boermeester* puts an extraordinary amount of discretion in the hands of private universities to evade an objectively fair process and predetermine guilt of the accused.

The problematic impact

Universities have always had and will continue to have the power to hold alleged wrong-doers and policy violators accountable for their actions. The issue that arises from the *Boermeester* decision is how private universities will use their discretion in ensuring there are procedural safeguards sufficient to meet a “meaningful opportunity to be heard.”

The importance of the right to confront witnesses against the accused is empowered within the Sixth Amendment. Title IX investigations may not carry the same penalties and procedural requirements as a criminal proceeding, but that is not to say it is not as serious. Much like a criminal proceeding, a student is being accused of gross misconduct and will essentially be “tried” on the matter. As a result, there are devastating and long-lasting consequences for the accused. It’s not a prison sentence, but it can lead to one as well

as drastically change a student’s future. From the significantly reduced likelihood of transferring schools or gaining admission into graduate schools to the loss of a degree and potential job opportunities, the impact is critical. The Court in *Boermeester* even recognized the importance of a post-secondary education and the destructive effects of expulsion. *Boermeester* at p. 1094.

There is also a lower standard of proof in these proceedings, leaving a student’s future hanging on the balance of maybe it did happen, maybe it did not. To be clear, students who engage in serious misconduct, if found in violation after a full and fair investigation and hearing, should be held accountable for their actions. However, a presumption of innocence is supposed to exist during these investigations and Respondents (the accused), should not be treated as if they are guilty from the onset of a complaint.

There are valid arguments for eradicating the requirement for a live hearing and cross-examination (e.g., alleged victims should not be forced to relive their trauma, college students should not have to participate in a court-like setting, and the fact that universities do not have the resources or power of a court to compel witnesses to testify). But in most cases where expulsion is on the line, having a live hearing is a crucial component for the accused to fully defend themselves, especially in cases involving false or exaggerated sexual assault and harassment allegations. It’s unfortunate and takes away from true victims who are hesitant to share their stories. However, it would be a disservice to believe that false accusations do not happen. In most of these cases, the decision can come down to the credibility of the parties.

These types of cases are hardly ever black and white; there are gray

areas that require the need for further investigation. Whether based on revenge, a mistaken identity, or guilt – these situations all require credibility to be assessed, which is arguably most effectively done through cross-examination. A denial of the ability for a witness to be cross-examined raises the concern of potential lies and exaggerations to support a party’s story. If a witness can be cross-examined but not during a live hearing, there is nothing that prevents an investigator or hearing officer from rephrasing/misstating a party’s submitted question, and it denies a party to ask follow-up questions based on given testimony. How can the accused party truly be meaningfully heard if they are restricted from putting on a full defense?

The problem with depriving an accused party the right to a live hearing and ability to cross-examine their accuser (and witnesses) means that credibility cannot be effectively assessed, and the presumption of innocence is effectively null. The student loses out on the opportunity to properly defend themselves against the accusations and an investigator/hearing officer is denied all facts necessary to make a sound decision.

The present and future of Title IX

The 2020 regulations, which are still in effect, require universities that receive federal funding to provide a live hearing following an investigation, which includes the right to cross-examine the parties and witnesses. The proposed amendments to the 2020 regulations, if implemented, would eliminate that requirement, thereby aligning with the *Boermeester* decision.

Title IX is a constantly evolving law, and there is no doubt that a lot of work still needs to be done. It’s not a perfect system, but it will con-

tinue to be far from it if we fail to recognize the prejudice and harm that can result by neglecting procedures that have been declared as a right in our justice system.

Conclusion

The expansion of hearings with cross-examination has allowed an opportunity for the accused to have a full and fair hearing. The decision and its ultimate consequences have the power to destroy a young student’s life. This is not something that society, especially universities that hold the power to shape their minds and future, should take lightly. Again, it may not be a prison sentence, but it certainly has the power to imprison a young person from any future academic or professional opportunities. In the interests of justice, we must protect Complainants, but not at the cost of depriving the Respondents of a fair chance to put on a meaningful defense when they are presumed to be innocent. Live hearings help uncover the truth, which helps both the Complainants and Respondents.

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