Civil Rights

The Student Right to Counsel

By KC Johnson & Mike S. Adams

Note from the Editor:

This article argues that a student right to counsel in quasi-criminal campus disciplinary proceedings is good for both accused students and universities. It highlights how some states are addressing this issue through legislation, addresses opposing arguments, and surveys the status quo on campuses.

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"He who represents himself has a fool for a client." The advice implicit in this lawyerly adage cannot be heeded by college students involved in campus disciplinary matters addressing conduct that also could be subject to criminal penalty. Many colleges deny the right to counsel by prohibiting students' lawyers, and sometimes the students themselves, from exercising the fundamental functions of an attorney, such as presenting evidence, cross-examining witnesses, or speaking to anyone but the client during a hearing. Such restrictions, moreover, exist at a time of unprecedented pressure—from the federal government, the media, and social activists—on colleges to adjudicate quasi-criminal behavior, especially sexual misconduct, outside the due process protections of the criminal justice system. In short, campuses have created disciplinary tribunals for quasi-criminal matters with the expectation that the accused must represent himself.

Restricting the traditional activities of legal professionals in such cases has the effect of reducing the reliability of the proceedings, which inhibits a college's search for both justice and truth in these matters. An attorney who represents the accused can expertly interpret campus policies and hold colleges to their own stated processes throughout the proceedings. Attorneys know how to evaluate evidence and cross-examine witnesses in order to demonstrate to decisionmakers whether the evidence and the witnesses are credible. But universities do not want accused students to have robust legal representation. In 2013, defending Brown University's policy of denying the accused student access to a lawyer in the hearing, former Brown vice president Margaret Klawunn said, "We don't want attorneys to start running the University process."[1]

Colleges have long sought to run such proceedings under their own rules. Twenty years ago, Harvey Silverglate and Alan Charles Kors published *The Shadow University: The Betrayal of Liberty on America's Campuses*, exposing the injustices that result from covert campus judicial systems that do not provide minimal safeguards of due process. In 2011, the federal government mandated further erosion of due process protections—for instance, by mandating double jeopardy should an accuser choose to appeal any case where the accused also has a right to appeal.[2] The new requirements codified at a national level what some colleges were already doing and what activists were seeking. Former University of Wisconsin police chief Susan Riseling, for example, suggested that administrators could use the lack of procedural protections on campus to help build criminal cases

- NASPA: Student Affairs Administrators in Higher Education, *An Open Letter to Elected Leaders of the 50 United States*, NASPA.org (last visited Apr. 17, 2018), https://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf.
- Anna North, *Betsy DeVos just rolled back protections for sexual assault survivors. Here's what that means.*, Vox (Sept. 22, 2017), https://www.vox.com/policy-and-politics/2017/9/7/16266548/betsy-devos-title-ix-college-sexual-assault.
- *Fair Process in Campus Discipline*, Know Your IX, https://www.knowyourix.org/issues/fair-process-campus-discipline/.
- Alexandra Brodsky, *Fair Process, Not Criminal Process, Is the Right Way to Address Campus Sexual Assault*, The American Prospect (Jan. 21, 2015), http://prospect.org/article/fair-process-not-criminal-process-right-way-address-campus-sexual-assault.

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1 Katherine Cusumano and Tonya Riley, *Sexual Misconduct Disciplinary Process Alienates Accused*, Brown Daily Herald (Apr. 24, 2013), http://www.browndailyherald.com/2013/04/24/sexual-misconduct-disciplinary-process-alienates-accused/.

2 Letter from Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Colleague (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

against accused students, saying "It's Title IX, not Miranda. . . . Use what you can."[3]

The 2011 federal guidelines used an equity rationale based on analogy to a civil trial to require that accuser and accused be treated equally; but a disciplinary case is between the college and the accused student, more analogous to a criminal case. And while most colleges have teams of attorneys, accused students all too often are banned from having the meaningful services of an attorney during a hearing. The equity argument has not been extended—by colleges or the federal government—to a right to counsel for the accused. Although the 2011 mandates were rescinded in 2017, few colleges today voluntarily offer the right to an attorney and, in fact, many college administrators actively oppose it.[4]

The minimal role that lawyers for accused students play in Title IX tribunals has generated concern from judges at both the federal and state levels. In 2017, U.S. District Judge Philip Simon expressed puzzlement about the restrictions that Notre Dame placed on lawyers for accused students:

> They can't talk with the accused; they can't ask questions; they can't even pass notes to the accused. They are only permitted to consult with the students during breaks, given at the Hearing Panel's discretion. If, for example, a witness says something very inculpatory about the accused, and there is no break, the student can't talk with his advisor or lawyer about what he should ask the witness. And by the time the accused finally has a chance to talk with his advisor on a break, the witness could be long gone.[5]

Similarly, in July 2018, Justice Steven Perren in California's Second Appellate Division commented in a case against the University of California, Santa Barbara, "I read this record, and I was stunned at a university procedure which purports to be fair and equitable puts a kid [the accused student was a freshman] who's attempting to get a college education in the position of, essentially, a lawyer in a major sexual assault case"—especially since, he noted, a representative of the university's general counsel office participated in the hearing.[6] This article examines the disadvantages of denying meaningful legal representation to the accused in campus misconduct cases and examines the role of state legislation in addressing these concerns.

I. The Problems with Denying Meaningful Legal Representation to Accused Students: Three Case Studies

Much has been written arguing that the post-2011 Title IX disciplinary process treats accused students unfairly.[7] Students in many well-documented cases have been wrongly accused and found guilty in part because they lacked meaningful legal representation[8]—or *any* legal representation—in the adjudication process.[9]

Our purpose in this article is not to review this well-traveled ground, but to demonstrate how ensuring that the accused student has access to legal representation benefits both that student and the university itself—first, by making it more likely that the outcome of a disciplinary proceeding is correct, and, second, by helping to preempt expensive litigation at a later stage. As the Sixth Circuit observed:

> [T]he opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. "A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not." . . . "The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause."[10]

3 Jake New, *Making Title IX Work*, Inside Higher Ed (July 6, 2015), https://www.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective.

4 Stephanie Francis Ward, *Despite Title IX Guidance Repeal, Many Schools Don't Plan to Change Handling of Sex Abuse Complaints*, ABA Journal (July 23, 2018), http://www.abajournal.com/news/article/despite_repeal_on_department_of_ed_title_ix_guidance_many_schools_dont_plan/ (discussing survey results indicating that only eight percent of surveyed administrators had a positive reaction to Education Secretary Betsy DeVos' 2017 guidance, which invited schools to create fairer Title IX adjudication procedures).

5 Doe v. Univ. of Notre Dame, 2017 U.S. Dist. LEXIS 69645 (N.D. Ind. May 8, 2017).

6 Doe v. Regents of the University of California et al., No. B283229, oral argument audio available at https://kcjohnson.files.wordpress.com/2018/07/ucsb-unfairness-of-denying-accd-a-lawyer-perren.mp3.

7 *See, e.g.*, KC. Johnson and Stuart Taylor, Campus Rape Frenzy: The Attack on Due Process at America's Universities (2017); Evan Gerstmann, Campus Sexual Assault: Constitutional Rights and Fundamental Fairness (2018).

8 A 2017 survey from University of Miami Law Professor Tamara Rice Lave found that only 3 percent of the institutions she examined allowed "robust" legal representation for the accused. All other institutions that permitted an accused student to have a lawyer present during the hearing required the lawyer to remain silent. Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault* 71 U. Miami L. Rev. 376 (2017), *available at* https://ssrn.com/abstract=2931134.

9 *See, e.g.*, Doe v. Amherst College, 238 F. Supp. 3d 195 (2017) (college procedures denied accused student any lawyer during hearing, at which accuser admitted, without pushback from panel, to having sent texts on the night of the incident, despite having previously told the investigator otherwise); Tanyi v. Appalachian State University, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015) (university assigned a lawyer to counsel the accuser during the hearing, but insisted that accused student be represented by a graduate student without any legal training); Emily Yoffe, *The College Rape Overcorrection,* Slate (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (describing a University of Michigan case in which the accused student was presented with one opportunity to tell his side of the story, without legal representation and without ever appearing before a university hearing); Richard Dorment, *Occidental Justice*, Esquire (Mar. 25, 2015), https://www.esquire.com/news-politics/a33751/occidental-justice-case/ (March 25, 2015) (describing an Occidental College case in which the accused student had to represent himself despite the police and local prosecutor having previously investigated the case and finding charges unwarranted).

10 Doe v. University of Cincinnati, 872 F.3d 393, 401 (2017) (quoting Bd. of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78, 95 (1978)) (discussing the importance of cross-examination—to both the

The purpose of the right to assistance of counsel, like that of the right to cross-examination, is to discover the truth. Due process protections are designed to ensure, not only fair procedures, but accurate and just outcomes, which is what the university ultimately wants. Moreover, allowing accused students meaningful legal representation serves the university's interests by providing legal input to help avoid lengthy and costly litigation down the line.

Consider, for example, a case from James Madison University. After a university disciplinary panel found an accused student not guilty in 2014, his accuser appealed to a three-person board whose members, not involved in the original hearing, reviewed the case de novo. The accused student and his legal representative had only limited rights to see the new evidence the accuser offered. The appeals board found the accused student guilty on the basis of that new evidence, and JMU suspended him for five and a half years. If university procedures had allowed a lawyer for the accused student to present evidence before the appeals board, the university's decisionmakers would have learned that a voicemail submitted only during the appeal by the accuser, in which she sounded heavily intoxicated, actually came from a different date and thus could not have shown her intoxication on the night of the incident. Instead, it was not until her deposition in later federal litigation that one of the JMU appeals board members learned this critical piece of information.[11] The procedural unfairness was costly: the court ultimately ordered the university to pay $849,231.25 in attorneys' fees.[12]

Not allowing the accused meaningful legal representation also harmed the university's interests in a 2014 case at DePauw University. A female student claimed that she had been too intoxicated to consent to sex with a male student, Ben King, several weeks earlier. Under then-existing university policy, King could not have a lawyer accompany him even to look at the school's investigative file, much less to speak for him at the hearing. He was found guilty. The university's investigator focused her inquiry on determining the accuser's level of intoxication. But DePauw defined sexual assault not as having sex with an intoxicated party, but as "engag[ing] in sexual activity with a person one knows or should know is incapacitated." In other words, the relevant question was not whether the accuser was intoxicated, but whether King knew or should have known that she was. In an order granting King's request for a preliminary injunction, U.S. District Judge William Lawrence found "very little evidence" that King knew or should have known that the accuser—whom he had only encountered a couple of times before the incident—was incapacitated; apart from the intoxication ratings, the only evidence DePauw cited (that she was acting "giggly" and "chatty," out of character for her) would have been meaningless to the accused student.[13] It is possible, of course, that a student like King might detect a university misapplying its own definition of sexual assault and raise this matter during a hearing. But realistically, such attorney-like behavior is beyond the ability of most college students. If King actually had been represented by counsel, it seems likely that the lawyer would have pointed out DePauw's errors at the beginning of the process and thus spared all parties a protracted litigation process.

A 2017 case at St. Mary's College, a public institution in Maryland, similarly shows how allowing the accused meaningful legal representation can benefit the college as well as the accused student. Under school procedures, an investigative team produces a report into all complaints of sexual assault, which serves as the evidentiary base for an eventual decision from an outside adjudicator. When a state judge found the school's initial adjudication violated the accused student's due process rights, he remanded the case to St. Mary's for another try. St. Mary's asked its investigators to produce a new report, which went before a new adjudicator. It appeared from the adjudicator's initial draft report as if the accused student would be found not guilty, but the adjudicator then sent a request "for any guidance you can give" to a St. Mary's administrator, who in turn passed it on to a Maryland assistant attorney general. The resulting changes ballooned the report from four to nineteen pages, deemed two exculpatory witnesses not credible, and reversed the tentative finding of not guilty to a final finding of guilt.[14] Under St. Mary's procedures, the accused student's lawyer (since the case was already in litigation, the student had hired a lawyer) could not see the adjudicator's draft findings. If he had, he surely would have pointed out that 1) the information used to attack the exculpatory witnesses' credibility came exclusively from the first investigation, and thus was not properly before the adjudicator, and 2) under university policies, the adjudicator was supposed to deliberate alone, rather than have assistance from a college administrator. Those facts helped ensure the accused student's victory in court, but the lawsuit could have been avoided altogether if the student had been afforded a full right to counsel from the beginning.

It is easy to understand why universities would structure procedures to deny meaningful legal representation to accused students; doing otherwise would threaten campus administrators' control over the adjudicatory process. But as the James Madison, DePauw, and St. Mary's examples show, shutting out lawyers can invite litigation and frustrate the search for the truth.

II. State Laws Guaranteeing a Student Right to Counsel: Three So Far

A. North Carolina: The Students & Administration Equality Act

In fall 2012, student members of the Sigma Alpha Epsilon (SAE) Fraternity at the University of North Carolina at Wilmington (UNCW) were accused of violating campus anti-hazing regulations. UNCW also charged the fraternity with providing alcohol to minors in violation of the North Carolina criminal code. Later that semester, student leaders of the fraternity were called to answer to the charges in a formal expulsion hearing to determine whether the fraternity would be derecognized

accused and the trier of fact—in a case in which a university denied that right to the accused student).

11 Doe v. Alger, 228 F. Supp. 3d 713 (W.D. Va. December 23, 2016).

12 Doe v. Alger, 2018 U.S. Dist. LEXIS 15365 (W.D. Va. January 31, 2018).

13 King v. DePauw Univ., 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. August 22, 2014).

14 Doe v. St. Mary's College of Maryland, Civil Action No. 18-C-16-1197 (Circuit Court of St. Mary's County, Oct. 3, 2017).

and barred from operating on campus. Although the penalty was severe, the students faced a university attorney while being denied a reciprocal right to legal counsel. Twice they requested but were denied legal representation, each time in response to questions from the administration about the alleged alcohol-related violations. Since what they said on campus could lead to misdemeanor convictions in the criminal justice system, they essentially would have to give up their due process rights to an attorney and to remain silent in order to follow UNCW's rules.

The fraternity was suspended. Soon afterward, on February 16, 2013, fraternity chapter president Ian Gove described UNCW's disciplinary process in a letter to all members of the North Carolina General Assembly. Gove wrote:

> The administrators would not allow our student organization to be represented by a lawyer at their hearing and limited our ability to ask questions or present opposing material. Students were not allowed to have legal counsel present when university personnel brought them in for one-on-one interviews. The coercive investigative tactics used by an administrator to seek confessions caused distrust among the students and only corrupted the process. Several of the students interviewed felt intimidated or interrogated by the administrators who would repeatedly ask leading and harassing questions, some of which were considered to be inappropriate.
>
> The standard by which UNCW administrators take disciplinary action against a student or student organization begins with a belief that you are guilty until proven innocent and requires much less evidence than "[proof] beyond a reasonable doubt."[15]

At the time of Gove's letter, the UNCW Code of Student Life permitted an accused student to have an advisor from within the university who would "advise the respondent concerning the preparation and presentation of his/her case," but "the advisor may not speak for the respondent." The advisor could "accompany the respondent to all conduct proceedings." The advisor would be permitted "access to all materials relating to the case" if the university provided the advisor, but if the student chose the advisor, the student was responsible for providing materials to the advisor.[16] Most importantly, the advisor "may not be an attorney unless there are also criminal charges pending."[17] Yet since the alcohol-related charges, so far, had only been issued by the university, they were not considered to be pending criminal charges. As a result, the students were not allowed to have an attorney accompany them to disciplinary meetings or the hearing, even though the evidence produced could have been used against them in a criminal court. Gove concluded with a request that the North Carolina General Assembly pass a "Student Administrative Equality Act" that would "allow students and their organizations the right to have legal counsel present if they so choose when interacting with a university administrator [and] the right to have legal counsel represent them in any matter involving the university."

Within weeks of receiving Gove's letter, the state house responded. On April 10, 2013, Representatives John Bell, Rick Glazier, Nathan Baskerville, and Jonathan Jordan—two Republicans and two Democrats—filed House Bill 843. The bill was called the Students & Administration Equality Act (SAE Act). The text of the SAE Act as passed reads, in pertinent part:

> § 116-40.11. Disciplinary proceedings; right to counsel for students and organizations.
>
> (a) Any student enrolled at a constituent institution who is accused of a violation of the disciplinary or conduct rules of the constituent institution shall have the right to be represented, at the student's expense, by a licensed attorney or nonattorney advocate who may fully participate during any disciplinary procedure or other procedure adopted and used by the constituent institution regarding the alleged violation. However, a student shall not have the right to be represented by a licensed attorney or nonattorney advocate in either of the following circumstances:
>
> (1) If the constituent institution has implemented a "Student Honor Court" which is fully staffed by students to address such violations.
>
> (2) For any allegation of "academic dishonesty" as defined by the constituent institution.[18]

The law gives an officially recognized student organization the same right to have an attorney or advocate who may "fully participate" during "any . . . procedure . . . regarding the alleged violation," with the same exception of institutions that use Student Honor Court proceedings.[19]

The bill passed by a 112-1 margin in the North Carolina House. On August 23, 2013, Republican Governor Pat McCrory signed the SAE Act into law.

B. Arkansas[20]

A bill similar to North Carolina's died in the Virginia legislature in 2014. Arkansas then became the second state to legislate the student right to counsel in April 2015 when HB 1892, originally sponsored by Representatives Grant Hodges

15 *Letter from UNCW Campus*, SAEAct.com (Apr. 17, 2018, 8:33 PM), http://www.saeact.com/how-it-began.html.

16 *UNCW Code of Student Life (2012-13)*, Archive.org (Apr. 17, 2018, 8:33 PM), https://archive.org/stream/UncwCodeOfStudentLifevolume2012-20132012/UncwCodeOfStudentLifevolume2012-20132012_djvu.txt.

17 *Id.*

18 N.C. Code § 116-40.11 (disciplinary proceedings; right to counsel for students and organizations).

19 The Student Honor Court exception is arguably inappropriate, if not self-defeating. A student who acts as an agent of the university for disciplinary purposes is no longer acting as a student but as an administrator. Furthermore, if the Student Honor Court makes a disciplinary recommendation to the university, the process is no longer "fully staffed by students to address such violations."

20 *States That Passed Laws Allowing Students the Right to Counsel*, SAEAct.com (Apr. 17, 2018, 8:40 PM), http://www.saeact.com/around-the-nation.html.

and Warwick Sabin—a Republican and a Democrat—passed with bipartisan support.

The Arkansas law provides that, except for "any allegation of academic dishonesty," a student:

> who has received a suspension of ten (10) or more days or expulsion may request a disciplinary appeal proceeding and choose to be represented at the student's expense by a licensed attorney or, if the student prefers, a non-attorney advocate who, in either case, may fully participate during the disciplinary appeal proceeding.[21]

In addition, if the appeal arises from a student-on-student complaint, the complaining student also may be represented in the same way.[22]

There are a few notable features of the Arkansas act. First, the right to an attorney only exists where the student appeals a long suspension or an expulsion, after the hearing and all witnesses and evidence have been before the adjudicator and an initial finding has been made. Second, plagiarism and other such charges of "academic dishonesty" do not produce a right to an attorney even if the penalty is expulsion. Third, the attorney may "fully participate" in the appeal, avoiding some of the problems with partial rights discussed in the case studies above. Finally, a complaining student has a right to an attorney once the accused student appeals, whether or not the accused student exercises the right to an attorney.

C. North Dakota

Within days, North Dakota became the third state to pass such a law. The bill, originally sponsored by Senators Ray Holmberg, Kelly M. Armstrong, and Jonathan Casper (as SB 2150) and by Representatives Lois Delmore, Mary C. Johnson, and Diane Larson, passed the House of Representatives 92–0 and the Senate 44–1. Governor Jack Dalrymple signed it into law on April 22, 2015. As a result, section 15-10-56 of the North Dakota Century Code now reads, in pertinent part:

> Any student enrolled at an institution under the control of the state board of higher education has the right to be represented, at the student's expense, by the student's choice of either an attorney or a nonattorney advocate, who may fully participate during any disciplinary proceeding or during any other procedure adopted and used by that institution to address an alleged violation of the institution's rules or policies. This right applies to both the student who has been accused of the alleged violation and to the student who is the accuser or victim. This right only applies if the disciplinary proceeding involves a violation that could result in a suspension or expulsion from the institution. This right does not apply to matters involving academic misconduct. Before the disciplinary proceeding is scheduled, the institution shall inform the students in writing of the students' rights under this section.[23]

The same applies to an officially recognized student organization, and it applies to appeals under the following circumstances:

> Any student who is suspended or expelled . . . and any student organization that is found to be in violation of the rules or policies of that institution must be afforded an opportunity to appeal the institution's initial decision to an institutional administrator or body that did not make the initial decision for a period of one year after receiving final notice of the institution's decision. The right to appeal the result of the institution's disciplinary proceeding also applies to the student who is the accuser or victim. . . .
>
> The issues that may be raised on appeal include new evidence, contradictory evidence, and evidence that the student or student organization was not afforded due process. The institutional body considering the appeal may consider police reports, transcripts, and the outcome of any civil or criminal proceeding directly related to the appeal.

Unlike the other states, North Dakota also defines "fully participate":

> "fully participate" includes the opportunity to make opening and closing statements, to examine and cross-examine witnesses, and to provide the accuser or accused with support, guidance, and advice. This section does not require an institution to use formal rules of evidence in institutional disciplinary proceedings. The institution, however, shall make good faith efforts to include relevant evidence and exclude evidence which is neither relevant or probative.[24]

Finally:

> This section does not affect the obligation of an institution to provide equivalent rights to a student who is the accuser or victim in the disciplinary proceeding under this section, including equivalent opportunities to have others present during any institutional disciplinary proceeding, to not limit the choice of attorney or nonattorney advocate in any meeting or institutional disciplinary proceeding, and to provide simultaneous notification of the institution's procedures for the accused and the accuser or victim to appeal the result of the institutional disciplinary proceeding.

The North Dakota law also has some distinctive features that are worthy of note. First, the right to an attorney only applies to suspensions and expulsions (including of student organizations), except where those penalties are given for "academic misconduct." Second, the right to an attorney applies both before and during appeals, unlike the Arkansas right which only applies in appeals. Third, the attorney may "fully participate . . . during any . . . procedure . . . to address an alleged violation"; "fully participate" is defined to make clear that an attorney is explicitly allowed to make opening and closing statements, examine and cross-examine witnesses, and provide other services. Also, the university must notify the accused student of the right to an attorney in writing. Finally, an accuser or victim has equivalent rights to an attorney.

21 Ark. Code § 6-60-109 (right to counsel).

22 *Id.*

23 N.D. Cent. Code § 15-10.

24 *Id.*

III. Administrative Opposition to the SAE Act: Three Bad Arguments

In February 2015, shortly before Arkansas and North Dakota adopted their versions of the SAE Act, a coalition led by the university administrator organization NASPA: Student Affairs Administrators in Higher Education (NASPA) published an undated letter attacking the student due process movement.[25] The opening of the letter acknowledged that the group's opposition largely focused on the effects of allowing meaningful legal representation to students accused of sexual misconduct. The coalition included organizations "working to combat sexual violence in communities throughout the country, and national women's and victims' rights organizations," such as advocacy organizations Know Your IX and the Victim Rights Law Center.

NASPA's letter includes some troubling statements that show why laws like the SAE Act are important countermeasures needed to combat the systemic unfairness against the accused in campus judicial procedures. Consider, for example, NASPA's argument that due process legislation would "make it more difficult for campuses to end [sexual] violence and its devastating effects on victims' lives." Here, the letter betrays a desire for "sending clear messages to the campus community"—a formulation from another part of the letter—through punishment. Of course, it has always been true that recognizing due process for the accused makes it harder to obtain guilty findings, while ignoring due process makes it easier to obtain findings of guilt, especially false findings. By ignoring the problem of false convictions altogether, NASPA trivializes the experiences of innocent victims of false accusations.

NASPA also argues that due process legislation "creating rights only for accused students and not student victims will enable outside interference at an unprecedented level into internal IHE [institution of higher education] administrative proceedings." But such laws have been proposed because so many colleges have failed to provide fair proceedings, despite what the signatories call "15 years of higher education best practices." Indeed, courts nationwide have found that colleges have violated the due process rights of accused students.[26] Besides, the U.S. Department of Education's interference in 2011, and then the Violence Against Women Act's update with new interference from Congress in 2013 and subsequent negotiated rulemaking from the Department of Education, in addition to the Clery Act's outside interference decades earlier,[27] were approved warmly by the signatories because the substance of such "interference" was consistent with NASPA's policy preferences. Nor did NASPA indicate any discomfort with the hundreds of investigations of individual schools launched by the Obama-era Office for Civil Rights (OCR), despite the immediate, on-the-ground interference of OCR investigators.

NASPA further argues that right to counsel legislation "could perpetuate inequality between students based on who can afford an attorney," and that "giving accused students a right to an attorney who 'fully participates'" would upend "equality and fairness." This statement—along with its underlying assumption that letting an accused student have a lawyer harms the accusing student—misapprehends the nature of the campus disciplinary process, where the real accuser is the college, not the student complainant (just as criminal cases are prosecuted by the government, not by victims). And the college often has a team of attorneys as well as vast resources and disciplinary experience, while the accused student is usually entering the process for the first time.

IV. The Status Quo: Three Levels of Restrictions Colleges Place on the Right to Counsel

It is true that, under federal law, the accused and accuser each may be accompanied "by an advisor of their choice" at all disciplinary proceedings and related meetings and proceedings, in cases of alleged domestic violence, dating violence, sexual assault, or stalking.[28] But the implementing regulation from the U.S. Department of Education, following a negotiated rulemaking process, expressly permits institutions to "establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties."[29] Colleges and universities restrict the participation of attorneys so as to render their presence ineffective, as demonstrated by the cases and policies described here.

The status quo at colleges across the country limits students' right to counsel in various ways. Some schools like the University of California, Davis flatly prohibit (or reserve the right to prohibit) the presence of legal counsel in student conduct hearings. These schools maintain secrecy with respect to outsiders with rules such as, "Hearings are closed except to the hearing panel or hearing officer, the accused student, the reporting party, and the witnesses . . . unless otherwise approved."[30] At other institutions, including the University of California, Irvine, counsel may be present at a hearing but "may be excluded from participating."[31]

Other colleges, such as the College of William and Mary, only allow counsel to serve as a "silent supporter," and then only upon two days' prior notice. However, W&M acknowledges

25 NASPA: Student Affairs Administrators in Higher Education, *An Open Letter to Elected Leaders of the 50 United States*, NASPA.org (last visited Apr. 17, 2018), https://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf.

26 KC Johnson, Post Dear-Colleague Letter, College/University Setbacks, https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/edit#gid=0.

27 *See* Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. 113-4, which amended the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).

28 20 U.S.C. § 1092(f)(8)(B)(iv)(II), from VAWA.

29 34 C.F.R. § 668.46(k)(2)(iv).

30 UC Davis Office of Student Support & Judicial Affairs, *The Conduct System: A Brief Overview* (last visited Apr. 17, 2018), http://sja.ucdavis.edu/disciplinary-process.html.

31 UC Irvine Office of Academic Integrity & Student Conduct, *Policy on Student Conduct and Discipline* (last visited Apr. 17, 2018), https://aisc.uci.edu/policies/pacaos/discipline-procedures.php.

that the stakes are higher in a quasi-criminal case and permits participation of counsel if:

> the hearing exposes him/her [the student] to potential criminal action outside the College's conduct process. The determination regarding the participation of legal counsel is final, and legal counsel will participate only to the extent authorized. Under no circumstances will the attorney be permitted to question witnesses or other parties to the proceedings, or to serve as a witness. The College may have its own legal counsel or advisor present if a student opts to have legal counsel present.[32]

Others, while allowing counsel to be present, bar them from participating directly in the hearing. In other words, only indirect input is permissible. For example, Pennsylvania State University and North Carolina Central University (NCCU) state that "The attorney may advise the student but may not disrupt proceedings and can be asked to leave at the discretion of the case manager [or, at NCCU, the conduct officer]."[33] In student disciplinary cases at the University of California, San Diego, an attorney "will be limited to communicating with their advisee and will not interrupt, disrupt, or directly participate in the Administrative Resolution meeting or Student Conduct Review," and UCSD must be given two days' notice (three days' notice for appeals) if an attorney will be present.[34] In cases where a student is grieving a university action, "The grievant may be assisted by anyone, including a student advocate, but only the student advocate may speak on behalf of the grievant," and if the student brings an attorney (five days' notice is required), "the administrative unit may be assisted by Campus Counsel or other representative it selects provided no attorney or non-student advocate shall participate directly in the proceedings."[35] At the University of California, Santa Barbara, "Students are to represent themselves. The role of the attorney or advisor is therefore limited to assistance and support of the student in making his/her own case."[36] In the California State University System, the attorney or advisor's role "is limited to observing and consulting with, and providing support to, the Complainant or Student charged; an advisor may not speak on a Student's or Complainant's behalf."[37] The University of Florida provides that an attorney or any advisor "may not speak for the student, or address any hearing participants."[38] At the University of Michigan, "Each party may be accompanied at the hearing by a personal advisor, who may be an attorney; however, the advisor may not participate directly in the proceedings, but may only advise the party. For example, the advisor may not question witnesses or make presentations."[39] And at Bucknell University, while the accused student "may be accompanied by an Adviser" of his choice, only:

> the Investigator will call and question all witnesses, including the Parties. The Parties may ask the Investigator to pose additional questions or inquire further into specific matters by submitting these requests in writing or orally, at the discretion of the Chair. The Chair is empowered to reframe or disallow any questions that are irrelevant, redundant, or otherwise inappropriate.[40]

These restrictions ensure that the only lawyer allowed to speak in Bucknell's hearings is the Title IX coordinator, an attorney who also serves as the university's investigator.

These types of limitations are far from uncommon; indeed, they are the norm. The Foundation for Individual Rights in Education (FIRE) published a report last year on the state of due process on campus, analyzing the policies of the 53 top-ranked institutions (according to *U.S. News and World Report*).[41] Of those 53 institutions, only three allow legal counsel to be present and directly participate in all non-academic disciplinary cases.[42] With so few exceptions to the rule, it is no wonder that associations of student conduct administrators would oppose legislation to change this status quo.

V. Conclusion

By denying effective legal representation to accused students facing campus hearings for what would be criminal charges outside of campus, universities have created policies that not only are unfair to the accused, but that also—in the long run—can work against the university's own interests in truth and justice in such cases. In quasi-criminal cases and other cases where significant consequences are possible (such as expulsion or

32 College of William and Mary, *Student Conduct Procedures* (last visited Apr. 17, 2018), https://www.wm.edu/offices/deanofstudents/services/studentconduct/studenthandbook/administration_code_of_conduct/vi_student_conduct_procedures/index.php.

33 Penn State University Office of Student Conduct Advisers (last visited Apr. 16, 2018), https://studentaffairs.psu.edu/conduct/FAQforAttorneys.shtml; North Carolina Central University, 2017–18 Student Code of Conduct (last visited Apr. 17, 2018), http://www.nccu.edu/news/index.cfm?ID=0113404D-15C5-F8D8-3A19B38DB686D84F.

34 UC San Diego Student Conduct Code 2017–2018 § 22 (last visited July 25, 2018), https://students.ucsd.edu/sponsor/student-conduct/regulations/22.00.html.

35 UC San Diego Student Conduct Code 2017–2018 § 23 (last visited July 25, 2018), https://students.ucsd.edu/sponsor/student-conduct/regulations/23.00.html.

36 UC Santa Barbara Student Conduct Code (last visited July 25, 2018), http://judicialaffairs.sa.ucsb.edu/CMSMedia/Documents/CodeofConduct2012.pdf.

37 Timothy P. White, Executive Order 1098 (student conduct procedures), California State University (last visited July 25, 2018), https://www.calstate.edu/eo/EO-1098.html.

38 University of Florida Dean of Students Office, *Advisors* (last visited Apr. 17, 2018), https://sccr.dso.ufl.edu/process/advisors.

39 University of Michigan–Ann Arbor, *Statement of Student Rights & Responsibilities* (last visited Apr. 17, 2018), https://oscr.umich.edu/sites/oscr.umich.edu/files/ssrr_july_2016_-_v_2017.pdf.

40 *Bucknell University Sex Discrimination, Sexual Misconduct, Relationship Violence and Stalking Policy & Procedures for Resolving Complaints Against Students 2017-18* (last visited Apr. 17, 2018), https://www.bucknell.edu/Documents/SexualMisconduct/BucknellPolicy.pdf.

41 Spotlight on Due Process 2017, FIRE, https://www.thefire.org/due-process-report-2017/.

42 Those three are Cornell University, the University of Southern California, and the University of Wisconsin-Madison.

a long suspension), both accused and accuser should be allowed an attorney at all meetings, hearings, and relevant proceedings where the party is present. Full participation of attorneys—including examination and cross-examination of the parties and witnesses—will lessen the risks and costs of litigation and increase the likelihood of a process and a finding that will be accepted by all parties. If colleges do not increase due process protections for their students, it is likely that more states will follow North Carolina's example and do so on their behalf.