

# BLUEPRINT FOR REFORM

THE JAMES G.  
MARTIN  
CENTER  
FOR ACADEMIC  
RENEWAL

## Due Process on Campus

*“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

Fourteenth Amendment of the United States Constitution

### Why due process

Due Process is the right to fair and objective process in judicial matters.<sup>1</sup> This is a right recognized by the United States Constitution, which provides that no one should be “be deprived of life, liberty, or property, without due process of law.” Due process is not just about civil procedure, it is about treating people fairly, equality before the law, and giving a moral foundation for judicial procedures. Found in the 5th and 14th amendments of the United States Constitution, due process protections exist for the protection of both the accused and the accuser.

Holding institutional systems accountable to a specific process that upholds truth, pursues

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1. To read more from the Martin Center about the importance of due process, visit: <https://www.jamesmartin.center/tag/due-process>

justice, and treats all people equally is imperative.<sup>2</sup> In campus judicial proceedings, institutions should rely on policies and legal precedent to decide what order to follow and how to rule in cases with contested facts or contradicting statements. Court decisions have laid a foundation for minimum standards to provide objectivity and fairness in cases of disputed facts.

Nevertheless, there are instances where students' rights to due process is violated in various ways, from expelling students without notice or opportunity to be heard; a lack of opportunity for cross-examination in disciplinary hearings; and a biased or unqualified hearing panel acting as a judicial body. Colleges and universities across the country repeatedly fail to provide proper

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2. Robinson, J.A. (2018) “[Due Process: Restoring a Fundamental Right on Campus](#),” The James G. Martin Center for Academic Renewal.

disciplinary channels and fair proceedings, resulting in serious miscarriages of justice.<sup>3</sup> These instances are often politically motivated and the victims usually, male.<sup>4</sup>

For example, in 2019,

- Over two thirds of America's top 53 universities did not guarantee basic due process of innocence until proven guilty.
- Around 40 percent of schools did not require an impartiality clause for the fact-finders, or the institution's judicial body.
- Fewer than one third of institutions (28.3 percent) guaranteed a meaningful hearing, with proper fact-finding, and cross-examination.<sup>5</sup>

Although recent actions by the department of education under Secretary Betsy DeVos promise to ameliorate these problems, states should act to ensure that students' rights are protected regardless of federal policies.

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3. Frodeman, R. (2020) "Ordeal by Title IX," *Quillette*; Soave, R. (2017) "Here Is Every Crazy Title IX Rape Case Betsy DeVos Referenced," *Reason*; FIRE (2019) "Spotlight on Due Process," Foundation for Individual Rights in Education.

4. Leef, G. (2020) "New Title IX Regulations Restore Due Process—But There's a Battle Ahead," The James G. Martin Center for Academic Renewal; Harris, S. (2020) "The Floridian Inquisition," *Quillette*.

5. FIRE (2019) "Due process of college campuses," Foundation for Individual Rights in Education.

## Recommendations

**The Martin Center recommends** that all colleges and universities provide full due process rights that are guaranteed through the United States judicial system, in order to provide justice and fairness to both the accuser and the accused. This should primarily be done in two ways. First, delegating serious felonies like sexual assault charges to appropriate authorities that are better qualified and prepared to carry out a thorough investigation without violating the rights of the accused. Universities are simply not capable of performing this high stakes legal task.<sup>6</sup> Second, there must be a student equivalent of Miranda Rights.<sup>7</sup>

### Universities should:

- Acknowledge, in an official university policy, that the rights of the students accused of misconduct are taken seriously and that accused students are presumed innocent until proven guilty in all student disciplinary proceedings.
- Give adequate written notice to defendants of the time and place of any policy violation, or adequate, detailed, and coherent written notice of any allegation. It must have a detailed report of what the allegations are, what has been violated, who is affected by them, and the identity of the accusers.

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6. *Inside Higher Ed* (2017) "Compassion Is No Substitute for Competence."

7. Leef, G. (2018) "Why Shouldn't College Students Have the Equivalent of Miranda Rights?" The James G. Martin Center for Academic Renewal; and "The Student Right to Counsel" *Federalist Society Review*, Volume 19, Aug 20, 2018.

- Give the accused adequate time to prepare for all phases of the disciplinary process, including a notice period of seven business days in advance, and access to all evidence to be considered at the hearing five business days in advance. Every notice period must be followed by at least a week to reply.
- Eliminate conflicts of interest and ensure impartiality by barring victim advocates from serving as investigators, fact-finders, prosecutors, or adjudicators in the same disciplinary proceeding.
- Use only impartial fact-finders and give defendants the right to challenge fact-finders' impartiality.
- Give the accused access to all relevant inculpatory evidence as well as the right to present exculpatory evidence at disciplinary hearings.
- Guarantee the right of the accused to cross-examine his or her accusers, including the right to pose questions to witnesses and accusers and to respond to allegations.
- Guarantee the right of the accused to an attorney or an advisor of choice, both during the investigation and at all formal and informal proceedings.
- Guarantee the right of the accused to appeal a finding or sanction on the basis of new information, procedural errors, and findings not supported by the record. Appeals must not be decided by the investigator or original fact-finding panel.
- Mandate that the decision of a unanimous, unbiased panel must be required for any punitive action.
- Ensure that the standard of proof of responsibility for proving nonacademic misconduct shall not be less than clear and convincing evidence.

## **Policymakers should:**

- Mandate that public universities provide a transparent and impartial process for university disciplinary hearings (as outlined above).
- Give students and student organizations whose rights have been violated the right to bring an action in any state court or competent jurisdiction.

## **Model Legislation**

[North Carolina HB 777](#): An Act to Establish Due Process Safeguards for Students Facing University Disciplinary Procedures.

[SAE Act: Students and Administration Equality Act](#) (Foundation for Individual Rights in Education model legislation)

[Arkansas HB 1892](#): An Act to Provide a Right of Counsel for Students During Disciplinary Appeal Proceedings at State Supported Institutions of Higher Education and For Other Purposes

[North Dakota SB 2150](#): An act relating to student and student organization disciplinary proceedings at institutions under the control of the state board of higher education; to provide for the development of a uniform policy; and to provide for a report to the legislative management.

[Student Right to Active Council](#) (American Legislative Exchange Council model legislation)

## **Further Reading**

Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

Epidemics on Campus, Real and Imagined

Biden Vows To Destroy Campus Due Process Again If Elected

Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support

New Regulations Demand Due Process for Campus Sexual Misconduct Cases

Legal Policy Focus: Title IX, Sexual Misconduct, and Due Process on Campus

The New Title IX and its Challengers

Open Letter Regarding Inequitable Victim-Centered Practices

Blair A. Baker, *Note, When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 Cornell J.L. & Pub. Pol'y 533, 542 (2017).

## **For More Information**

For supplemental data or additional research on this topic, please contact the Martin Center by phone or email. You can reach us at 919-828-1400 or [info@jamesgmartin.center](mailto:info@jamesgmartin.center).

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## **About the Martin Center**

The James G. Martin Center for Academic Renewal is a private nonprofit institute dedicated to improving higher education policy. Our mission is to renew and fulfill the promise of higher education in North Carolina and across the country.

We advocate responsible governance, viewpoint diversity, academic quality, cost-effective education solutions, and innovative market-based reform. We do that by studying and reporting on critical issues in higher education and recommending policies that can create change—especially at the state and local level.

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