

# VIRGINIA Lawyers Weekly

## Student can sue over lack of due process

By: Nick Hurston September 5, 2022



A doctoral student who claims he was dismissed from a public university after being accused of sexual assault and given only 24 hours to prepare for a hearing can refile claims that his due process rights were violated.

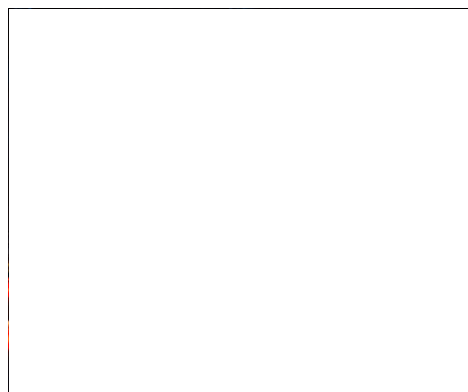
Judge Michael F. Urbanski of the Western District of Virginia said the student “has alleged that he had an insufficient amount of time to prepare for a hearing that carried the very serious consequence of being expelled from the

university. Accordingly, the court finds that ... Doe has stated a claim that Virginia Tech did not employ constitutionally adequate procedures when it gave Doe one day's notice of the hearing."

The July 28 opinion is *Doe v. Virginia Polytechnic Institute & State University*, (VLW 022-3-315).

## The hearing

John Doe, a male Iranian citizen, was a doctoral student at Virginia Polytechnic Institute & State University.



In late 2019, a female student accused him of making unwanted sexual advances towards her.

Doe said he met the student on a dating app and they had a consensual relationship.

The female student met with a Title IX investigator and requested that Doe be ordered not to contact her, but didn't pursue the matter until late January 2020.

In mid-February 2020, Virginia Tech informed Doe he was under investigation for sexual assault and suspended him pending a hearing. Doe admitted himself for mental health counseling and remained there until the end of February.

Doe met with a Title IX investigator on Feb. 28 to go over the student conduct process. That same day, Virginia Tech sent Doe a letter formally charging him with sexual assault and instructing him to meet with the director of student conduct.

At their meeting on March 3, the director said Doe had been accused of violating six Virginia Tech policies on intimate partner conduct. Two days later, the director told Doe his hearing would take place the next day, March 6.

Doe requested an extension, but the director said 24 hours was enough time to prepare.

The hearing proceeded, and Doe was found responsible of sexual assault and dismissed. The dean of student affairs denied Doe's appeal.

Doe filed suit against Virginia Tech and three university employees, alleging a 14<sup>th</sup> Amendment due process claim against all defendants, as well as Title IX and defamation claims. The defendants moved to dismiss.

## Due process

To establish a due process violation, Urbanski said Doe had to show the procedures followed by Virginia Tech in its disciplinary process were constitutionally inadequate.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," Urbanski wrote. "Once it has been determined that some process is due, the flexibility of the requirement is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."

The 4th U.S. Circuit Court of Appeals concluded that "disciplinary proceedings require more stringent procedural protection than academic evaluations, even though the effects of an adverse decision on the student may be the same."

Urbanski said the Fourth Circuit follows the standards set forth in a 1961 Fifth Circuit decision, *Dixon v. Ala. State Bd. Of Educ.*

The *Dixon* court held that a student should receive notice of the specific charges and grounds for possible expulsion, as well as a hearing with "the rudiments of an adversary proceeding" in which the student can present evidence in his or her defense.

In the instant case, Doe said he was unable to arrange for a witness to appear on his behalf, review the university's investigative report, meet with an advisor or obtain counsel before the hearing. Virginia Tech, however, claimed Doe knew he was under investigation for sexual assault two weeks before the hearing, which gave him enough time to prepare.

Urbanski disagreed, finding that Doe didn't know about the specific charges against him until three days before the hearing,

"While he was told on February 17, 2020, that he had been accused of sexual assault and learned on February 18, 2020, that he would be suspended pending an investigation and hearing, he spent part of the following week

receiving in-patient mental health care,” the judge pointed out. “Doe did not find out the specific charges being made against him until March 3, 2020, and learned on March 5, 2020, that a hearing would be held on March 6, 2020.”

Under those circumstances, Urbanski said, “Doe has stated a claim that Virginia Tech did not employ constitutionally adequate procedures.”

## Other claims

Doe also asserted that Virginia Tech was liable under 42 U.S.C. §1983 because the director of student conduct’s denial of a hearing extension was pursuant to a university policy.

Urbanski rejected that claim.

The plaintiff “has pled no facts alleging that the denial of a continuance of his hearing was the result of an express policy of Virginia Tech, that [the director] had ‘final policymaking authority,’ that there was an omission that ‘manifest[ed] indifference to the rights of citizens,’ or that this decision was part of a practice so ‘persistent and widespread’ as to be a ‘custom or usage with the force of law,’” he wrote.

The plaintiff also alleged that Virginia Tech deprived him of his property interest in continued enrollment at the university. But the judge said it was “undisputed that the Commonwealth of Virginia has not created a property interest in a continued university education.”

Although a property interest may arise by contract, a clearly implied promise, or a policy or custom, Urbanski found that Doe didn’t “describe the ‘policies and customs’ upon which he is relying.”

However, the judge gave Doe the opportunity to plead both of these claims.

On Aug. 26, Doe filed a second amended complaint with more specific allegations regarding the policies and customs of Virginia Tech.

## Unusual circumstances

R. Douglas Taylor Jr., a shareholder with Bean, Kinney & Korman in Arlington, is general counsel to a private university in Virginia and advises colleges and universities on all aspects of higher education law.

“Courts in the Fourth Circuit don’t require a great deal of procedural due process, but there were unusual circumstances in this case, and those are the concerns people have with the existing Title IX regulations,” he told

Virginia Lawyers Weekly. "How much due process is enough?"

He added that "the goal is to produce an impartial result in Title IX cases, but that can be difficult with fact-specific cases when memories may not be clear, especially where consent is the issue."

He noted that the Trump administration amended Title IX to require more due process, "but those formalities can become burdensome for smaller schools with fewer resources." Taylor predicted that the Biden administration's amendments will give schools more flexibility with hearings and evidentiary standards.

Issue: SEPT. 5 2022

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