



## Constitutional Due Process at Private Institutions?

A new federal court order may have significant implications for adjudicating campus rape cases.

By [Jeremy Bauer-Wolf](#)

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**In a ruling** that could have national implications for campus sexual assault proceedings, a federal judge has suggested that a private institution in an alleged rape case may not have followed due process standards -- a constitutional concept that generally applies only to public universities.

This is a significant development, commentators and legal observers say. This is the first time a judge, in a case involving a private college, directly linked due process to Title IX of the Education Amendments of 1972, the federal law that bars sex discrimination, including sexual violence, at educational institutions. (Students have also sued when they feel a private institution has violated its own sexual assault policies.)

The actual text of Title IX, which is only a sentence, makes no mention of due process.

"If applied more broadly, this would represent a fundamental shift in the safeguards that private schools owe to accused students to more closely align with those required of public schools," said S. Daniel Carter, president of Safety Advisors for Educational Campuses, which consults with colleges and universities on Title IX.

Federal rules around Title IX have been in flux for more than a year. Education Secretary Betsy DeVos withdrew guidelines from the Obama administration that many rape-prevention activists credit with providing more protections for sexual assault survivors. DeVos has since introduced new Title IX regulations -- unpopular with those same advocates -- that have not yet been approved. Multiple Title IX cases out of the Sixth Circuit, where this ruling originates, **have been considered unprecedented** and challenged college and university procedures.

The ruling, which emerged from a lawsuit against **Rhodes College**, in Tennessee, grants a temporary restraining order to a student, a former football player and fraternity member, accused of raping a female student at a party in February. After investigating, the college determined that the student, who is anonymous in court filings, was responsible for alleged assault and kicked him out.

The order, written by U.S. District Judge John T. Fowlkes Jr., prevents the college from enforcing that expulsion. The student, a senior, had also asked that he be allowed to graduate, but Fowlkes denied his request. If the student is unsuccessful in his lawsuit, he would once again be removed from the college.

The 22-year-old student, John Doe, allegedly took the anonymous female student as his date to the fraternity party. The lawsuit states she drank heavily and used marijuana and cocaine and by the end of the night was violently ill. After she was taken out of the party, the student told her friends (while she was "incoherent and incapacitated") that she had been raped. The next morning, after she decided to go to the hospital, the staff there reported the alleged incident to the Memphis Police Department. The university also emailed a campuswide notice about the reported rape.

Because of the email, the police presence on campus, and local news reports, the sexual assault allegation was widely known. Doe alleges that the media coverage and public pressure from the student sexual assault awareness group, Culture of Consent, influenced the college to expel him and other men accused of sexual assault.

Rhodes College spokesman Matt Gerien said in a statement that "Rhodes College remains committed to providing a safe campus and learning environment for its students" and "the college's legal team will vigorously defend the Title IX process."

Doe states in the lawsuit that the college discriminates against men. The student allegedly named another female student who instigated and participated in her rape, but during the Title IX hearing on the accusations, a panel of adjudicators did not ask that female student questions about her role in the alleged attack.

The student did not attend that hearing. The lawsuit states the accused students were unable to ask her or the lawyer representing her any questions. [A previous decision](#) from the U.S. Court of Appeals for the Sixth Circuit ruled that accused students must be allowed to cross-examine their

accusers. This was an opinion that theoretically applied only to public universities, but was one that Fowlkes referenced heavily in his recent order.

"To adequately assess credibility, which concerns both the accused and the accuser, there must be some form of live questioning of the accuser in front of the fact-finder; written statements of the accuser will not suffice," the judge wrote, referencing the appeals court case.

Brett Sokolow, president of the Association of Title IX Administrators, said that the judge is inferring that due process is inherent within Title IX. Many practitioners and lawyers believe the conventional wisdom: that due process is guaranteed by the 14th Amendment, he said.

"It's a heck of a shot across the bow," Sokolow said.

While the order isn't setting any precedents -- it's not a final decision in the student's case -- it is a big deal, said Peter Lake, director of the Center for Excellence in Higher Education Law and Policy at Stetson University.

"I think the message from the Rhodes case is 'private schools in the 6th circuit, brace for impact. Public due process could be coming to your neighborhood,' " Lake said.

But colleges are likely to fight such a ruling, Carter said.

Carter said that while all colleges and universities ought to afford accused students with a fundamentally fair process, the implications of "due process" being applied to private colleges would extend far beyond sexual misconduct cases and significantly expand the legal obligations of those institutions.

The U.S. Supreme Court has also never expressly established that college students accused of non-academic misconduct that could lead to suspension or expulsion are entitled to due process protections under the 14th Amendment, Carter said.

Read more by *Jeremy Bauer-Wolf*

[https://www.insidehighered.com/news/2019/06/25/rhodes-college-ruling-opens-door-due-process-private-universities?utm\\_source=Inside+Higher+Ed&utm\\_campaign=7fe6efd772-DNU\\_2019\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_1fcbc04421-7fe6efd772-200040001&mc\\_cid=7fe6efd772&mc\\_eid=20a6b0e480](https://www.insidehighered.com/news/2019/06/25/rhodes-college-ruling-opens-door-due-process-private-universities?utm_source=Inside+Higher+Ed&utm_campaign=7fe6efd772-DNU_2019_COPY_01&utm_medium=email&utm_term=0_1fcbc04421-7fe6efd772-200040001&mc_cid=7fe6efd772&mc_eid=20a6b0e480)