

TITLE IX STUDENT DISCIPLINARY CODES DEEMED CONTRACTS IN JOHN DOE V. THE GEORGE WASHINGTON UNIVERSITY

Education Law Notes

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Words are not written in a vacuum, and they can bind the party that wrote them, regardless of whether that was the author's intent. That was the lesson The George Washington University ["GW" or "University"] recently learned in John Doe v. The George Washington University, in which the United States District Court for the District of Columbia held both that GW's Code of Conduct constituted a contract between the University and its students and that GW had failed to comply with it. Doe arose from an all-to-common scenario; in September 2015, two students met at a party and moved with alacrity to what the plaintiff believed was consensual sex. Two years and a month later, however, the other student, "Jane Roe," filed a complaint with the University's Title IX enforcement office, claiming that despite having initiated the sexual encounter, she had been too intoxicated to give consent.

The University convened a hearing on December 14, 2017, at which Roe and three other students testified as to her alleged level of intoxication. In response, the plaintiff relied solely upon his own subjective opinion that the complainant had not appeared drunk, a peculiar strategy given the number of witnesses arrayed against him. Whatever Doe was thinking, it did not work, and on January 23, 2018, the University suspended him for one year for sexually assaulting Roe, thereby delaying the conferral of his degree from May 2018 until January 2019.

Doe promptly appealed, in support of which he submitted a statement from another student that Roe had "appeared 'normal' and lucid" at the party. Doe also included a professional toxicology report, concluding that if Roe had, in fact, consumed as much alcohol as she had claimed, "she likely would have been passed out and unable to stand, speak, remember anything from the entire evening, or dress herself and leave Mr. Doe's room on her own two feet." Doe's appeal, however, never made it to the review panel. Instead, it was rejected by a GW administrator, whose role was to determine the "viability" of appeals based upon new information that 1) was relevant to the case; 2) was not previously presented; and 3) could significantly alter the prior findings of fact. The administrator determined that the appeal lacked "validity" on the ground that Doe's evidence allegedly could have been obtained prior to his hearing and thus was not new.

Litigation ensued, and Doe fared better in court. The judge granted his summary judgment motion and ordered the University to entertain Doe's appeal, including not only the other student's statement and the toxicology report, but also Roe's cell phone records, which Doe had subpoenaed as part of the court

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proceeding and which contradicted the testimony of both Roe and one of her other witnesses. In reaching that decision, the court followed a two-step process, first finding that the disciplinary code “forms a contract between the University and its students.” In so holding, the court flatly rejected the school’s argument that there was no contract because the school expressly reserved to itself “a ‘unilateral right to modify the Code without notice to, or the consent of, students.” The court instead held:

The fact that a university reserves the right to modify “requirements, rules, and fees,” as does GW, does not mean that no bargain exists. GW has agreed to provide its students with an education and, upon satisfactory completion, a degree. The Code of Conduct governs student behavior while studying at the University and its sections on appeals from panel decisions . . . impose requirements on the University, to which the University expressed a clear intent to be bound.

Having determined that the disciplinary code constituted a binding contract, the court then dismissed GW’s argument that Doe could have obtained the statement and report prior to the original hearing, noting that the disciplinary code did not include that limitation. Furthermore, because the toxicology report was in response to Roe’s testimony at the hearing, Doe obviously could not have obtained it prior to then.

The court also faulted the University administrator for denying Doe’s appeal based upon his perception of its *validity* rather than upon its *viability*. In other words, the appropriate standard under GW’s disciplinary code was whether the appeal had “a reasonable chance of success,” not a *guarantee* of success, and in employing the latter test, the administrator superseded his role as gatekeeper and essentially became a fact finder. The irony, of course, is that as a private school, GW “owe[d] no strict constitutional due process to its students Nonetheless, having unilaterally issued the Code of Conduct that governed Mr. Doe and University obligations, GW was required to comply with its terms.”

What Does It Mean?

For decades, courts have recognized that without the proper disclaimers, a personnel manual can constitute a contract between an employer and its employees. Perhaps, then, it is not surprising that some courts are giving similar effect to student handbooks, including disciplinary codes. In the eyes of these courts, students pay tuition in consideration for an education, the schools’ policies and codes set forth the terms and conditions of the education that is being offered, and by enrolling, students are deemed to have accepted these terms and conditions. It is understood that words are written to be read, and as unrealistic as it may be, students are assumed to rely upon them. Thus, it is imperative that educational institutions take great care when fashioning school policies, particularly disciplinary codes, for they are increasingly being seen as enforceable contracts. It is perhaps even more important that they ensure that their administrators understand and follow them. As Doe makes clear, if a school fails to do so, it proceeds at its own peril.

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