CONTRACT LAW — UNIVERSITY DISCIPLINARY PROCEEDINGS — THIRD CIRCUIT HOLDS PENNSYLVANIA LAW GUARANTEES A "REAL, LIVE, AND ADVERSARIAL HEARING." — *Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020).

For decades, there have been legal and political fights over the proper balance between victim protection and the rights of the accused in university[1] sexual misconduct disciplinary proceedings.[2] These debates have taken place in academia,[3] the Senate,[4] administrative agencies,[5] and the courtroom.[6] As one academic put it, the issue presents a "classic civil rights enforcement dynamic."[7] Universities were whipsawed as they sought to adapt to the changing Title IX[8] enforcement approaches of the Obama and Trump Administrations;[9] they may be in for yet another round of revisions as President Joe Biden has promised to reverse course once again.[10] Yet while the political battle rages, so too do court battles — adding another wrinkle to university compliance. Recently, in *Doe v. University of the Sciences*,[11] the Third Circuit held that where a private university contractually obliges itself to provide a "fair" process to students accused of sexual misconduct, Pennsylvania law defines the contractual term "fair" to require a hearing with the opportunity for cross-examination,[12] paralleling one of the most

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[1] The term "university" is used here to refer to all colleges and universities.

[2] *See* Bryce Freeman, Comment, *The Title IX Contract Quagmire*, 118 MICH. L. REV. 909, 912 (2020). *See generally* Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653 (2001) (surveying range of approaches taken by courts reviewing private school disciplinary proceedings).

[3] *See* Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html [https://perma.cc/9BB4-ZDN2].

[4] *See* Andrew Kreighbaum, *Title IX a Sticking Point in Talks over New Higher Ed Law*, INSIDE HIGHER ED (Aug. 6, 2019), https://www.insidehighered.com/news/2019/08/06/title-ix-emerges-top-obstacle-higher-ed-law-deal [https://perma.cc/WY4Y-QGLC].

[5] *See* Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/U78Y-ZRSU].

[6] *See* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 65 (2019).

[7] Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 631 (2018).

[8] Title IX of Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

[9] *Compare* Dear Colleague Letter: Sexual Violence from Russlynn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/DG8J-3A8S] [hereinafter Dear Colleague Letter], *with* 34 C.F.R. §§ 106.3, 106.6, 106.8, 106.12, 106.30, 106.44–.45 (2020).

[10] Madeleine Ngo, *Biden Plans to Roll Back Trump-Era Education Policies*, WALL ST. J. (Nov. 29, 2020, 8:00 AM), https://www.wsj.com/articles/biden-plans-to-roll-back-trump-era-education-policies-11606654802 [https://perma.cc/MR4H-GM89].

[11] 961 F.3d 203 (3d Cir. 2020).

[12] *Id.* at 214.

controversial provisions of the Trump-era regulations.[13] While the court's holding is supported by Pennsylvania case law, in declining to adopt the quasi-contract approach available under state law, the panel missed an opportunity to bring some stability to an otherwise volatile area of law.

In August 2018, the University of the Sciences' (USciences or the University) Title IX Coordinator informed defendant John Doe of two sexual misconduct reports that two separate complainants had made against him.[14] An outside investigator interviewed Doe, the two complainants — Jane Roes 1 and 2 — and ten other witnesses, yet the process to determine "responsibility"[15] involved no hearing or cross-examination.[16] In November 2018, the investigator submitted a report finding, by a preponderance of the evidence, Doe violated the University's sexual misconduct policy.[17] Based on the report, a University administrative panel expelled Doe and issued "a notation on his academic transcript, a campus restriction, and [a] no contact order" with respect to the victims; Doe's subsequent appeal was denied.[18]

In January 2019, Doe filed a complaint and motion for a temporary restraining order and preliminary injunction against the University in the District Court for the Eastern District of Pennsylvania.[19] The district court first denied Doe's motion for a temporary restraining order and preliminary injunction,[20] then granted the University's motion to dismiss the amended complaint.[21] The court found Doe had not sufficiently pled a Title IX claim under an erroneous outcome, selective enforcement, or deliberate indifference theory.[22] The court then dismissed

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[13] *See* Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2020), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations [https://perma.cc/6CHF-NA2D].

[14] Doe v. Univ. of the Scis., No. 19-358, 2019 U.S. Dist. LEXIS 125592, at *3 (E.D. Pa. July 29, 2019).

[15] *Id.* at *10.

[16] *See id.* at *3–5.

[17] *Id.* at *3–4.

[18] *Id.* at *5.

[19] *Id.* The amended complaint alleged claims of sex discrimination under Title IX, breach of contract, and both intentional and negligent infliction of emotional distress. *Id.* at *5–6.

[20] The district court found Doe unlikely to succeed on either his Title IX or breach of contract claim. Doe v. Univ. of the Scis., No. 19-358, 2019 U.S. Dist. LEXIS 24073, at *26 (E.D. Pa. Feb. 14, 2019).

[21] *Univ. of the Scis.*, 2019 U.S. Dist. LEXIS 125592, at *36.

[22] *Id.* at *18. On the erroneous outcome theory, the court ruled Doe had neither alleged facts that sufficiently "cast some articulable doubt on the accuracy of" Doe's discipline nor proved that gender bias motivated such an erroneous outcome. *Id.* at *8 (quoting Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)). Next, the court rejected Doe's selective enforcement argument based on the University's failure to punish Roe 2 for having sex with Doe without obtaining his affirmative consent when both had been drinking, as Doe never accused Roe 2 of sexual misconduct. *Id.* at *14–15. Finally, the court found Doe's claims amounted to an allegation that he "advanced arguments of gender bias and other procedural flaws in the adversarial disciplinary proceeding and [the University] rejected them" — which cannot rise to the level of deliberate indifference. *Id.* at *17 (quoting Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 826 (E.D. Pa. 2017)).

Doe's breach of contract claim, noting that the contract itself provided for the use of a single-investigator model, in which a single entity serves as both investigator and adjudicator.[23] It concluded that such a model was not in conflict with the contractual provision guaranteeing "fundamental fairness,"[24] as Pennsylvania law "only requires a university to provide 'notice of the charges and some opportunity for hearing,'" and the single-investigator model satisfied those requirements.[25]

The Third Circuit reversed and remanded. Writing for the panel, Judge Porter[26] aligned the Third Circuit's Title IX pleading standard with the Seventh Circuit's, refusing to require a specific theory of liability in challenges to university disciplinary proceedings.[27] Then, the panel found Doe's complaint plausibly asserted USciences "discriminated against him on account of his sex," citing Doe's claims that the University gave in to "external pressure" in enforcing and implementing its sexual misconduct policy and that "sex was a motivating factor" in the University's "investigation and decision to impose discipline."[28] In deciding the proper standard to account for external pressure, the panel agreed with the Sixth and Seventh Circuits that allegations of "external pressure" — in this case arising from the 2011 Dear Colleague letter issued by the Obama Administration's Department of Education (DOE)[29] — could not "support a plausible claim of . . . sex discrimination" on their own.[30] But here, the panel noted, Doe also plausibly alleged "USciences was improperly motivated by sex"[31] when it chose to investigate Doe but not the two Roes and one of the witnesses, all females, despite the University "having notice" of various alleged

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[23] *Id.* at *22.

[24] *Id.*

[25] *Id.* (quoting *Trs. of the Univ. of Pa.*, 270 F. Supp. 3d at 812). The court also found that the University had provided Doe with sufficient notice of the allegations against him, *id.* at *20–21, that it did not impermissibly limit his access to evidence, *id.* at *25–26, and that it did not misapply the preponderance of the evidence standard, *id.* at *26–27. Finally, the court dismissed Doe's claims for intentional and negligent infliction of emotional distress. *Id.* at *29–35.

[26] Judge Porter was joined by Judges Restrepo and Matey.

[27] *See Univ. of the Scis.*, 961 F.3d at 209 (citing Doe v. Purdue Univ., 928 F.3d 652, 667–68 (7th Cir. 2019)). Instead, a plaintiff need only allege facts supporting "a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex." *Id.* In so holding, the court parted ways with the Second and Sixth Circuits. *See Yusuf*, 35 F.3d at 715 (requiring the facts alleged to support a causal nexus between an erroneous outcome or selective enforcement and sex discrimination); Doe v. Mia. Univ., 882 F.3d 579, 589 (6th Cir. 2018) (adding two additional theories, deliberate indifference and archaic assumptions, to the Second Circuit's framework).

[28] *Univ. of the Scis.*, 961 F.3d at 209.

[29] This controversial letter provided guidance on the Obama Administration's view on proper handling of university sexual misconduct disciplinary proceedings. Dear Colleague Letter, *supra* note 9; *see* Freeman, *supra* note 2, at 914.

[30] *Univ. of the Scis.*, 961 F.3d at 210 (citing *Purdue Univ.*, 928 F.3d at 669; Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018)).

[31] *Id.*

violations the three committed.[32] Based on the combined force of these allegations, the court found Doe alleged a plausible claim of sex discrimination.[33]

The panel then considered USciences' contractual promise of fairness. Among other things, the student handbook promises that USciences will "[e]ngag[e] in investigative inquiry and resolution of reports that are adequate, reliable, impartial, prompt, fair and equitable."[34] In interpreting all of the relevant provisions, the panel rejected the University's argument that the fairness promised was limited to the explicit provisions in the student handbook and sexual misconduct policy.[35] Instead, the panel found that the contract did not define "fairness" at all, leaving the matter of contractual interpretation to the court.[36] To reach this conclusion, the panel turned first to the dictionary definitions of "fair" ("just, unbiased, equitable, legitimate, in accordance with rules")[37] and "fair hearing" ("a term of art used to describe a 'judicial or administrative hearing conducted in accordance with due process'").[38] While noting that sometimes courts are "chary about reviewing too closely the manner in which a private university chooses to investigate and discipline its students,"[39] the panel reasoned that such hesitations are more appropriate in cases involving university disciplinary actions directly related to the nature of a university's mandate, "such as academic integrity or faculty development,"[40] rather than matters of alleged criminal activity, which can have much more serious implications.[41] Further, Judge Porter considered the context of the 2011 Dear Colleague letter, wherein universities allegedly "overreact[ed]"[42] to the DOE and related public pressure by improperly reducing protections for accused students, relevant to USciences' contractual promise of "fairness."[43]

The panel next held that Doe sufficiently pled his contract claim. Turning to Pennsylvania case law to define the contractual term "fair," the panel concluded Pennsylvania law defines fairness requirements rather broadly. It specifically concluded that "USciences's contractual promises of 'fair' and 'equitable' treatment to those accused of sexual

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[32] *Id.* at 211. The alleged violations involved breaches of the sexual misconduct policy and confidentiality policy. *Id.* at 210–11.

[33] *Id.* at 211.

[34] Joint Appendix, Volume II at 120, *Univ. of the Scis.*, 961 F.3d 203 (3d Cir. 2020) (No. 19-2966).

[35] *Univ. of the Scis.*, 961 F.3d at 212.

[36] *Id.*

[37] *Id.* (quoting THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 347 (J.B. Sykes ed., 7th ed. 1982) (defining "fair")).

[38] *Id.* (quoting Wojchowski v. Daines, 498 F.3d 99, 102 n.5 (2d Cir. 2007)).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 212–13.

[42] *Id.* at 210.

[43] *Id.* at 213–14.

misconduct require[d] at least a real, live, and adversarial hearing and the opportunity . . . to cross-examine witnesses — including his or her accusers."[44] However, the panel declined to dictate any particular form of procedure for such a hearing.[45] Nonetheless, because Doe had not been afforded this kind of "real, live, and adversarial hearing" or the ability to conduct cross-examination, Doe had plausibly alleged the single-investigator model, as applied, constituted a breach of contract.[46]

Presented with an opportunity to pave a path toward stability on a long-unsettled question of law — the requisite process in private university sexual misconduct proceedings — the Third Circuit instead employed a strained approach to contract interpretation that may only layer on further uncertainty. By defining "fairness" as a contractual term — not otherwise contractually defined — by reference to Pennsylvania contract law's definition of "fundamental fairness," the panel forewent a more straightforward application of the state's quasi-contract approach, potentially leaving universities the chance to contract out of the panel's holding. Despite being characterized as "pathbreaking"[47] and "profound,"[48] the decision itself provided no added protections beyond the current Title IX regulations, nor did it provide a more stable baseline for universities to fall back on in the likely event federal regulations change yet again. In the end, the panel's decision will likely leave private universities and their students subject to whiplash from the sharp pendulum swings generated by the political branches.

While public university disciplinary proceedings are subject to the strictures of federal and state due process, private university proceedings are not.[49] Instead, courts have applied contract law to the

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[44] *Id.* at 215; *see also id.* at 214 (citing Psi Upsilon v. Univ. of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991); Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 582 (Pa. Super. Ct. 1990); Reardon v. Allegheny Coll., 926 A.2d 477, 482 (Pa. Super. Ct. 2007)).

[45] *Id.* at 215.

[46] *Id.* at 216.

[47] *See* KC Johnson & Samantha Harris, *New Title IX Regulations in Sexual-Assault Cases Are Vindicated in Court*, NAT'L REV. (June 1, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/title-ix-regulations-sexual-assault-cases-court-upholds-due-process/ [https://perma.cc/DY2U-VFM7].

[48] *See* Greta Anderson, *Federal Appeals Court Defines "Fairness" in Title IX Policies*, INSIDE HIGHER ED (June 2, 2020) (quoting Peter Lake, Director of the Stetson Center for Excellence in Higher Education Law and Policy), https://www.insidehighered.com/quicktakes/2020/06/02/federal-appeals-court-defines-fairness-title-ix-policies [https://perma.cc/N444-BTBT].

[49] Under the state action doctrine — which holds that constitutional protections are guaranteed only when the state, rather than a private entity, acts — public universities, as state actors, are bound to guarantee due process protections, but private universities, which are not state actors, are not. *See* Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J. COLL. & U.L. 511, 519 (2013). *But see* Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975); Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 16–17 (2017). This distinction has often meant different processes for students involved in disciplinary hearings at public schools versus those involved in such hearings at private schools. *See* Rubenfeld, *supra*, at 23–24, 57–58.

relationship between private universities — like USciences — and their students.[50] Under the contract approach, the precise contours of which vary from state to state, courts generally "employ the theory that the 'relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook.'"[51] The courts in some states, like Pennsylvania, go further, taking a "quasi-contract approach" to determine what process is due. Recognizing that a contractual relationship does not quite capture the university-student relationship, these courts find that "private schools should incorporate a requirement of 'fundamental' or 'basic' fairness in disciplinary proceedings."[52]

This contract approach is complicated by Title IX — a federal sex discrimination statute empowering the federal government to regulate sexual misconduct disciplinary proceedings at all schools receiving federal funding.[53] The current Title IX implementing regulations impose live hearing and cross-examination requirements, rendering the panel's prescription of these procedures superfluous for the moment. But enforcement in this area has been uneven, as the Obama Administration took a very different stance on the proper balance between the rights of victims and the accused, imposing neither requirement prescribed by the panel.[54] With the Biden Administration now pledging to roll back

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[50] *See* Tenerowicz, *supra* note 2, at 657–58, 684–85. For decades, lawyers and legal academics have attempted to bridge what some consider to be an arbitrary gap between public and private school procedures, *see id.* at 684–85, with contract theory emerging as the most viable option, *see id.* at 657–58. It is worth noting that, while private universities are not subject to due process claims, public universities can be subject to both contract and Due Process Clause claims. *See, e.g.*, Doe v. N. Mich. Univ., 393 F. Supp. 3d 683, 693, 699–700 (W.D. Mich. 2019).

[51] Harris & Johnson, *supra* note 6, at 79 (quoting Doe v. Brown Univ., 166 F. Supp. 3d 177, 191 (D.R.I. 2016)).

[52] Tenerowicz, *supra* note 2, at 658. Although this approach is often called "implied in law," "quasi-contract" more accurately reflects the nebulous nature of the limitation — namely, that neither courts, nor practitioners, nor commentators agree this limitation is exclusively rooted in contract law. *Compare id.* at 657–58 (linking this limitation to contract law), *with* Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 580 (Pa. Super. Ct. 1990) (recognizing scholars and courts have linked fundamental fairness to constitutional protections), JAMES A. RAPP, 3 EDUCATION LAW § 9.07[5] (LexisNexis) (last visited Apr. 4, 2021) (tying fundamental fairness to "basic fairness"), Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 10 (linking fundamental fairness to basic fairness and avoiding arbitrariness and capriciousness), *and* Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 502–03 (2012) (linking fundamental fairness to constitutional protections).

[53] *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688; *see also* Freeman, *supra* note 2, at 913 (describing Title IX and its history).

[54] The 2011 Dear Colleague letter resulted in a wave of litigation surrounding an already contentious issue. *See* Harris & Johnson, *supra* note 6, at 65 ("As of August 16, 2019, no fewer than 298 of the post-Dear Colleague letter lawsuits (191 in federal court) have yielded substantive decisions, at various stages of the legal process."). Amid this litigation wave, the Trump Administration took over, rescinded the guidance, and implemented new Title IX regulations reversing the DOE's stance on several key issues. *See* Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-

the existing regulations, the procedures required by contract law represent the crucial baseline to which controlling standards would return if the regulatory environment reverted to something closer to the Obama Administration's regime.[55]

Yet, in crafting these consequential contractual requirements, the panel deviated from the standard approach dictated by Pennsylvania law. In cases where Pennsylvania courts have evaluated the "fundamental fairness" of a contract — outside of the contract's explicit provisions — they have presupposed the occurrence of a hearing and found that proceedings were fair in part *because* a student had the opportunity to participate in a live, adversarial hearing.[56] Moreover, the Third Circuit itself has already adopted this reading of Pennsylvania case law.[57] But instead of invoking this line of precedent — and finding that, even if the University abided by the procedural safeguards specifically provided by its handbook and disciplinary policy, the policies in place did not comport with "'fundamental' or 'basic' fairness" — the panel chose to read the contract provision guaranteeing "fair[ness]" as guaranteeing "fundamental fairness" by reference to Pennsylvania case law.[58]

Not only is the quasi-contract approach better supported by precedent, but it also does not require — as the panel's reasoning does — disregarding the parties' specific intent as expressed in other contractual provisions. There is a strong argument, despite the panel's claim that USciences never defined the term "fair," that the parties' contractual intent was that "fairness" require only that the University abide by the extensive explanation of its own disciplinary policy — which, in sexual misconduct cases, meant using a single-investigator model. It seems

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devos.html [https://perma.cc/Y482-87QD]. Under the Trump Administration's Title IX regulations, all schools receiving federal funding — public or private — are barred from using a single-investigator model and must allow for some type of cross-examination. *See* Anderson, *supra* note 5. Within months of this guidance taking effect and soon after the election of President Biden, advocacy groups began calling on the incoming Administration to rescind the regulations, *see* Greta Anderson, *Gender Equity Groups Urge Biden to Rescind DeVos Title IX Rules*, INSIDE HIGHER ED (Dec. 11, 2020), https://www.insidehighered.com/quicktakes/2020/12/11/gender-equity-groups-urge-biden-rescind-devos-title-ix-rules [https://perma.cc/29DX-ZX2M], resulting in promises that the Biden Administration will do exactly that, *see* Ngo, *supra* note 10. For universities, it has been, and will likely continue to be, one of their "most pressing challenges" to ensure their policies are compliant with the ever-changing landscape shaped by both the political back-and-forth and the flurry of litigation in recent years. *See* Brett A. Sokolow, *OCR Is About to Rock Our Worlds*, INSIDE HIGHER ED (Jan. 15, 2020), https://www.insidehighered.com/views/2020/01/15/how-respond-new-federal-title-ix-regulations-being-published-soon-opinion [https://perma.cc/SJJ6-BBFM].

55 *See* Ngo, *supra* note 10. There is also ongoing litigation challenging the regulations. *See* Kery Murakami, *Rethinking Title IX*, INSIDE HIGHER ED (Mar. 9, 2021), https://www.insidehighered.com/news/2021/03/09/president-biden-tells-education-department-examine-title-ix-rules [https://perma.cc/UPX7-664V].

56 *See, e.g.*, *Boehm*, 573 A.2d at 582.

57 *See* Kimberg v. Univ. of Scranton, 411 F. App'x 473, 481 (3d Cir. 2010).

58 *See Univ. of the Scis.*, 961 F.3d at 211–12, 214.

unnatural to read the contract, construing "all provisions in the agreement . . . together" and giving each effect,[59] to guarantee a hearing — directly contradicting the specific provisions providing for a single-investigator model.[60] As the University argued, "a basic canon of construction is that the 'specific governs the general.'"[61] Conversely, it seems all the more plausible that *despite* the parties' intent, the contract fails to provide "fundamental fairness," a quasi-contractual limiting principle on the parties' actual intent.

Furthermore, the panel's reasoning allows other universities to contract out of the panel's holding in ways that the quasi-contract approach does not — creating at least one perverse incentive in the process. Universities could either omit the word "fair" from their policies, which would seem to be normatively undesirable, or explicitly define the word "fair" by referencing procedures within the contract. While either workaround would require changes to university policies, each is an ostensibly easy way to nullify the panel's holding. Moreover, the panel's reasoning adds another layer of uncertainty as universities are left to wonder about the outcome of the next logical line of cases where a university provides no contractual guarantee of "fairness." Would the court then take the quasi-contract approach? The question remains open — leaving universities with an "escape hatch" that, ultimately, may not even be sound. If the panel had instead adopted the quasi-contract reasoning in the first instance, no such uncertainty would exist.

The court could have provided a clear contract law baseline, shielding private universities from the vicissitudes of the ever-changing regulatory landscape — an approach that any state adopting the quasi-contract approach could follow.[62] Under a regime where university-student contracts are limited by a quasi-contract requirement for a hearing and some form of cross-examination, there would be stability for private universities on one of the most controversial issues within the larger debate over how best to reconcile victim protection with the rights of the accused.[63] Yet the Third Circuit's reasoning leaves universities subject to the whims of the political branches and leaves advocates of more protections for accused students with a hollow win.

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[59] *See id.* at 212 (quoting LJL Transp., Inc. v. Pilot Air Freight Corp., 962 A.2d 639, 647 (Pa. 2009)).

[60] *See* Joint Appendix, Volume II, *supra* note 34, at 157–58.

[61] Responsive Brief of Appellee, University of the Sciences at 24, *Univ. of the Scis.*, 961 F.3d 203 (3d Cir. 2020) (No. 19-2966) (quoting Doe v. Nat'l Bd. of Med. Exam'rs, 199 F.3d 146, 155 (3d Cir. 1999)). This method of interpreting the contract was adopted by the Eastern District of Pennsylvania in a similar case. *See* Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 812 (E.D. Pa. 2017) (citing Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 432 (Pa. 2001)).

[62] This is all the more true for a case that, legally, has only persuasive value, given that the panel was interpreting state law. *See* Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 56 n.5 (2015).

[63] *See* Gersen, *supra* note 13. This stability would continue even if the Biden Administration were to keep its word and rescind the newest Title IX regulations, so long as it did not also affirmatively ban live hearings and cross-examinations.