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Date rape case gives Brandeis SJC challenge

By Sacha Pfeiffer, Globe Staff, 4/30/2000

In a case that could influence the way private colleges and universities handle allegations of date rape, the state's highest court will hear arguments tomorrow in a legal challenge involving a Brandeis University student who was suspended after being accused of engaging in "unwanted sexual conduct" with a fellow student.

The accused student sued the school and seven administrators, arguing that he had been denied a fair hearing, and that his reputation and educational career had been damaged as a result.

The case has generated wide interest among the state's nearly 100 colleges and universities because it raises an increasingly controversial legal question: What right do courts have to review disciplinary decisions made by private institutions of higher learning?

The Brandeis case is one of many highly politicized, emotionally charged cases involving allegations of student sexual misconduct that have surfaced on college campuses nationwide in recent years - and that have sparked controversy over how and where those allegations should be handled.

Universities argue that they have fair, effective guidelines in place to deal with serious allegations of wrongdoing, and that it would be wrong to involve the courts in cases that are already tangled.

But critics say schools are sometimes unequipped to deal with serious disciplinary issues, the outcomes of which can have lasting effects on students' lives.

They also charge that the process is often warped by an incendiary atmosphere on

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some campuses, most of which do not use trained investigators.

"The disciplinary procedures of most private colleges in Massachusetts would not hold up in any other civilized segment of society," said Boston defense attorney Harvey A. Silverglate, co-author of "The Shadow University: The Betrayal of Liberty on America's Campuses."

"They violate fundamental notions that we have developed over 250 years in this country of what decent and rational procedures are for treating members of private associations."

Under state law, the disciplinary procedures of private colleges and universities are subject to court review only if they are found to be unfair, or if they are applied in an "arbitrary or capricious" manner. Were that not the case, lawyers for Brandeis and other private colleges argue, disgruntled students would view the judicial system as a "super dean's office" and clog the courts with their complaints. Indeed, courts nationwide historically have granted private colleges and universities wide freedom to create - and enforce - their own standards of conduct.

"For decades and centuries, the court has held - not just in Massachusetts, but throughout the country - that the courts should really not be involved in the internal judicial proceedings of the university," said Brandeis spokeswoman Michal Regunberg.

"Universities have well-established judicial proceedings of their own, and you just don't want the court beginning to stick its nose where it hasn't seen a need to do that in the past."

Echoing that argument, attorneys representing 10 private area colleges have weighed in with a friend-of-the-court brief.

But critics of the closed-door disciplinary decisions made at many private colleges argue that the proceedings often deny students their basic rights, and allow schools to function as private judiciaries lacking outside oversight.

"If schools would treat their students in a minimally civilized matter," said Silverglate, "these cases wouldn't end up in court."

An organization Silverglate helped found, the Foundation for Individual Rights in Education, filed an amicus brief on behalf of the accused student, David A. Schaer, jointly with the Massachusetts chapter of the American Civil Liberties Union.

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Schaer was a junior when a female student with whom he previously had had a sexual relationship accused him of raping her in her dorm room in February 1996. The woman complained to school officials and Schaer was brought before a disciplinary board of four students and two faculty members. At a hearing, Schaer claimed the sex was consensual, and that the woman had asked him to come to her room to "fool around" and provided him with a condom.

The woman, who had been drinking, claimed she told Schaer she did not want to have sex, but that she woke to find him having intercourse with her.

The disciplinary board ultimately charged Schaer with engaging in "unwanted sexual conduct" and suspended him from school for 31/2 months. He was also placed on disciplinary probation for the remainder of his Brandeis career and required to undergo professional counseling.

After losing an internal appeal, Schaer sued.

A Superior Court judge dismissed the case, but the state Appeals Court reversed that decision in part last fall, ruling that Schaer had grounds to file suit. Attorneys for Brandeis appealed to the Supreme Judicial Court, which agreed to hear the case.

In his suit, Schaer alleges that the school failed to grant him a fair hearing and violated its own procedure.

"It was an absurd proceeding having very little relationship to the kind of serious deliberations we accept in courts and administrative agencies," said Schaer's lawyer, David M. Lipton, who called the hearing "a charade."

Lawyers for Brandeis maintain that the school met all its obligations to Schaer, granting him a six-hour hearing that included testimony from 13 witnesses, and allowing him to cross-examine all witnesses.

"Every private organization, in a sense, has a right to define its culture, and if it's going to have a right to create its own culture it's going to, in effect, create its own judicial system," said Robert E. Sullivan, an attorney representing Brandeis.

"There is a tendency today to believe one has not received justice unless he's had full ... review in judicial court," Sullivan added. "That's where the rub is: private universities are saying, 'No, we don't believe students are entitled to detailed ... review in the procedure of every single case.'"

"Colleges have to look at their own rules and ask themselves two questions: do

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our rules pass muster, and do we follow our rules?" countered Silverglate.

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"But colleges do not view themselves as being bound by the rules of civilization, and that's their problem."

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