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Editor's note: [Please click here](#) for the April 29, 2014 OCR guidance *Questions and Answers on Title IX and Sexual Violence*

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KEY QUOTATION (from D. Matthew Gregory and Laura Bennett):

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effective ways to allow students to share their perspectives and feel that they have been respected and heard."

14.27 ENCORE COMMENTARY: The risks of "automatic expulsion" in sexual assault cases

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"The subliminal purpose of automatic sanctioning is to preclude thinking. This strategy is incompatible with the aims of a college education"

ENDNOTE: "I'd give the devil benefit of law"

14.26 Courts or Campuses? Different Questions and Different Answers

Invited commentary

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and

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Introduction

In recent years, the United States Department of Education's Office for Civil Rights (OCR) has shown an increasing interest in guiding how colleges and universities address sexual violence on campus. For example, in the Dear Colleague Letter dated April 4, 2011 and in the Resolution Agreement with the University of Montana from May 8, 2013, OCR provided recommended roadmaps for campuses to follow toward the appropriate resolution of cases involving sexual discrimination, including sexual violence. Some of the guidance is very clear – such as the burden of proof of preponderance (or more likely than not), that must be used to evaluate such cases. Other guidance is not so clear – such as how to best proceed if a survivor doesn't want to pursue formal action from a college or how to provide effective prevention programs. Recently, conversations occurred through the Negotiated Rule-Making Committee process concerning the Violence Against Women Act (VAWA) and the Campus Sexual Violence Elimination (SaVE) Act, which will result in additional guidance for campuses. The most recent guidance is the April 29, 2014 OCR guidance [Questions and Answers on Title IX and Sexual Violence](#), which was released along with the debut of the governmental website [Not Alone](#) - a resource for both students and campuses towards preventing and responding to sexual assault on college campuses. From written policies to preventative education to recordkeeping and investigations, institutions are being required to review and revise their policies and procedures in order to be compliant. At the heart of these discussions are the campus student conduct processes, as these are the avenues by which all forms of student misbehavior affecting the institution and its community members are evaluated and addressed.

Why Not Be Just Like the Courts?

The recent guidance from OCR is certainly not the first time that campus conduct proceedings have been impacted by the Federal government. Indeed, the field of student conduct has been highly influenced not only by legislation but also by case law at the judicial circuit and federal court levels. Students' due process rights were established in 1961 when the landmark case *Dixon v Alabama State Board of Education* ruled that students were entitled to basic procedural protections prior to being suspended or expelled. Today, college administrators and hearing boards all over the country uphold students' rights by providing campus processes based on fundamentally fair procedures, including informing students of the rules that their behavior may have violated and providing them the opportunity to respond to the allegations by presenting their side of the story.

For those not involved in campus conduct administration, there is often a perception that the campus conduct process is or should be like a court of law. Yet, even the courts themselves have offered that campus conduct processes **should** be distinctly different than the criminal or legal proceedings. The most recent April 29 guidance from OCR validates the courts' opinions, stating "a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required." (p. 27) Common goals in a court proceeding are to prosecute, to negotiate the best deal, or to avoid being found guilty through any available means that an experienced attorney or prosecutor might be able to pursue. While campuses may have formal hearings as a part of their case resolution process, these should still feel very different than a court proceeding. At a minimum, they should be conversational, rather than adversarial, in nature.

There is a reason most campuses have moved away from using phrases like "disciplinary" or "judicial". The campus conduct processes are about a student's relationship to the institution and its behavioral standards or policies. While there may be overlap with some criminal statutes (such as with theft, drugs, or rape), campus policies and processes are intentionally and appropriately different. For example, it would be unusual to find "murder" as a specific violation in a campus code of conduct. Whether possession of a certain amount of drugs constitutes a felony or a misdemeanor is not a question that a campus conduct panel should seek to answer. Rather, whether someone's behavior causes physical harm or constitutes a threat; or whether the use of drugs causes harm or disruption to a residence hall floor or a campus community – these are the questions that are considered when analyzing student behavior and policy violations. The focus is on assessing the negative impacts of an individual's behavior on the learning environment of others. In addition, unlike a court of law, the worst consequence of a college or university campus proceeding is not incarceration but simply that a student would no longer be able to attend that institution.

"The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process."

Philosophically, those who administer campus conduct processes seek the outcomes of demonstrated learning, changes in behavior, and protection for the campus community. Legally, there is precedent to support this educational approach in lieu of a process that mirrors the criminal justice system. This important point is addressed specifically in the one of the most well-known documents providing legal guidance to higher education, *The General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax Supported Institutions of Higher Education* (Western District of Missouri, 1968). The General Order, written *en banc*, was informed by numerous amicus briefs and information from relevant national organizations and has been cited by multiple federal courts in various

districts across the U.S. In support of the philosophical approach to addressing student misconduct, it states:

The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound. (p.5)

The court's holding permits colleges and universities to conduct fundamentally "fair" (not adversarial) proceedings that focus on developmental discussions in which a student reflects on the standards of the community, his/her own behavioral decisions within that community, and the impacts of his/her actions on others. In *Wasson v. Trowbridge* (1967), the United States Court of Appeals for the Second Circuit specifically held that campus conduct processes did *not* require active legal representation, even in an expulsion proceeding. The court wrote:

Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events [at issue] should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel. It is significant that in the *Dixon* case where the balancing of government and private interests favored the individual far more than here, the court did not suggest that a student must be represented by counsel in an expulsion proceeding.

Aside from all of the judicial precedent described above, there is also a basic humane answer to this question. According to [*Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*](#), there is a wide gap between the number of students who are sexually assaulted on college campuses each year and the number who report this to campus or local law enforcement. Creating mock courtrooms on our campuses would only further this gap - we owe it to our students to provide them with the best investigation and resolution processes we can, in order to fulfill our piece of addressing the overall sexual violence problem in our country. Mirroring the criminal process and courtrooms is not the answer our students are looking for - campus proceedings should not re-victimize, nor should they persecute.

Do Campuses Still Have Procedural Obligations?

There is, of course, value in having some designated procedures. Students (both complainants and respondents) should know what to expect from a meeting with an administrator, during a campus investigation, or a hearing before a panel of campus community members. In *Goss v. Lopez* (1975), Justice White calls for more formal proceedings on campus. Justice White was not asking for a process composed of jurors, lawyers, witnesses, defendants, prosecutors, cross-examination, stringent rules of evidence, or a judge. What Justice White was advocating for is a process where students can actively engage in discussions about their behavior, and not one where it appears that a College official makes decisions without ever having heard the student's side of things or makes decisions without student inclusion.

In *Nzuve v. Castleton State College* (1975), the court recommended that educational institutions have both a need and a right to have their own campus standards. The *Nzuve* court cites the earlier *Goldberg v. Regents of University of California* (1967) opinion that squarely held that discipline imposed by an academic

community should not be required to wait for the outcome of any criminal or civil processes before determining an outcome in accordance with established institutional standards. Additionally, the *Nzuve* court offered that it would not be unusual for a temporary relief to be sought to enable the plaintiff to complete his education, thus effectively completing an “end run” around the disciplinary rules and procedures of the college (p. 325). These decisions are consistent with the current guidance coming from OCR regarding both standards for behavior as well as the procedures for addressing alleged misconduct.

The most recent Negotiated Rule-Making process has yielded public conversations suggesting that campus conduct processes should mirror judicial court procedures when the behavior in question may also constitute a crime such as sexual assault. This topic was addressed in *Gorman v. University of Rhode Island* (1988), where the court offered that a fair campus process should not have to follow the traditional common law adversarial method. The procedural question is whether the individual has had an opportunity to answer, explain, and defend, and not whether a campus hearing mirrored a common law criminal trial. The court goes on to say, that other than the right to be informed of the possible allegations and have the opportunity to be heard, procedural protections to ensure fairness are uncertain and must be determined by a careful weighing or balancing of the competing interests surrounding the case (p. 14). The same Justice White mentioned previously said, “the Due Process Clause requires, not an ‘elaborate hearing’ before a neutral party, but simply ‘an informal give-and-take between student and disciplinarian’ which gives the student ‘an opportunity to explain his version of the facts.’” See *Ingraham v. Wright* (1977) (White, J., dissenting) (p. 16).

It is also important to remember that attendance at tax supported higher education institutions is optional, not compulsory. In *The General Order*, the judges addressed this point specifically, reminding us that attendance at college is voluntary, that obligations imposed by the institution may be higher than those imposed on citizens through laws, and that the institution can “discipline students to secure compliance with these higher obligations as a teaching method or to sever the student from the academic community.” (p.4) When comparing the nature of higher education student conduct proceedings to that of the criminal court the judges wrote,

In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution. It is not a lawful mission, process, or function of an institution to prohibit the exercise of a right guaranteed by the Constitution or a law of the United States to a member of the academic community in the circumstances. Therefore, such prohibitions are not reasonably relevant to any lawful mission, process or function of an institution...Standards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes and functions of the institution...Standards so established may require scholastic attainments higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal laws. (p. 7)

What are the Roles of Advisors and Attorneys?

Case law clearly indicates that the judicial branch does not intend for campuses to duplicate their procedures in the courts. However, it is also acknowledged that students do not shed their constitutional rights when they set foot on college campuses. If a student is facing criminal charges for alleged involvement in an incident that is also subject to the campus conduct process, he/she may wish to consult with an attorney prior to discussing the incident during campus conduct process. However, the campus must also still proceed with its own resolution process to protect the safety and rights of the campus and its community members. This is especially critical in cases involving sexual coercion or other forms of violence, which can inhibit another student’s ability to pursue his/her education. The Negotiated Rule-Making committee recently came to consensus on the opportunity for students (both those accused and those bringing a complaint) to include an advisor of their choosing as they participate in a campus conduct

process. This advisor may be a parent, another student, an attorney, a faculty member, etc. What institutions must be aware of is that they can impose limits on the level of participation that such an advisor has in the campus conduct process. In *Osteen v. Henley* (1993) the court wrote,

Even if a student has a constitutional right to consult counsel--an issue not foreclosed by Baxter, as we shall see--we don't think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. To recognize such a right would force student conduct proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in--from *the law faculty or elsewhere--to serve as judges*. *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985).

One can only imagine the costs associated with a scenario involving so many attorneys being paid to debate whether or not a student violated the rules set forth by a college. Such a model would also create inequities that already exist in the courtroom – the student or the college who can afford the best attorney might face very different outcomes than those who cannot. Arguments may be made that colleges should allow students to have the same protections that they are permitted in court to ensure that colleges are not issuing the most severe sanction of expulsion in haste; however this opinion is not supported in theory nor by the legal system itself. In *Osteen v Henley* (1993), the court went on to say:

The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation, public universities will engage in an orgy of expulsions is slight. The relation of students to universities is, after all, essentially that of customer to seller. That is true even in the case of public universities, though they are much less dependent upon the academic marketplace than private universities... (pp. 225-226).

Campuses continue to face challenges with balancing prompt and fair procedural protections (as required by legislation, case law, and to further the spirit of an educational campus conduct process) for those accused of violations, while ensuring that the process is also accessible and equitable for those who have been victimized, especially survivors of the most intimate acts of sexual and other personal violence. The legal and legislative guidance demonstrates that best practices are not to create a mock courtroom, but instead to ensure a fundamentally fair administrative process that offers the most effective ways to allow students to share their perspectives and feel that they have been respected and heard.

14.27 ENCORE COMMENTARY: The risks of "automatic expulsion" in sexual assault cases)

Students on some campuses have been calling for automatic expulsion in sexual assault cases. We think this approach would likely result in *fewer* respondents being held accountable for sexual misconduct. Our preferred model is a policy that identifies expulsion as a presumptive (not automatic) sanction and requires hearing panels to state specific reasons for any penalty imposed. The following considerations influence our view:

[1] Mandatory sanctioning disempowers complainants. Your editor worked for many years at the University of Maryland. Some sexual assault complainants there demanded expulsion. Others felt just as strongly that alternative penalties should be imposed. Complainants have varying perspectives on sanctioning, usually based on different factual circumstances in each case. Their views should not be determinative, but neither should they be disregarded. Watch for a significant *drop* in reporting if word spreads that complainants have no voice in the sanctioning process.

[2] Mandatory sanctioning distorts fact-finding. More "acquittals" will result if automatic expulsion is required. Why? Facts keep interfering with our theories. Shades of gray can arise in sexual misconduct cases, especially on the issue of consent. Colleges typically resolve sexual misconduct allegations no prosecutor would pursue: e.g., both parties were drinking; both may have hazy recollections of events; one or both were inhibited about verbalizing sexual wishes; words or actions were ambiguous or misconstrued. When these factual patterns arise, thoughtful people on hearing panels--given no discretion in sanctioning--may refuse to find the accused student responsible. Complainants will be outraged and the benefits associated with more moderate penalties lost.

[3] Sooner or later, mandatory sanctioning will polarize the campus and discredit programs designed to reduce sexual misconduct. It's understandable when people and institutions forget lessons from the distant past. What's inexcusable is to forget lessons from the *recent* past. The 2006 [Duke lacrosse case](#) prompted articles nationwide about the dangers of overzealous prosecutors and college administrators politicizing sexual assault allegations. Now, some commentators portray colleges as centers of misogyny intent on protecting rapists. How did this dizzying transformation occur? Whatever the cause, one-size-fits-all sanctioning will guarantee more high profile cases prompting doubts about our common sense and commitment to fairness. Old ideological wounds will re-open and even the most reasonable educational programming targeted as an exercise in "political correctness."

A working suggestion

The subliminal purpose of automatic sanctioning is to preclude thinking. This strategy is incompatible with the aims of a college education. A better idea (grounded on the work of administrative law professor [Kenneth Culp Davis](#)) is to *guide* and *structure* discretion--without eliminating discretion altogether. One of the best examples we've seen among college sexual assault policies is at the University of Virginia ("[Procedures for Cases of Sexual Assault](#)"). Please note the section in italics:

Sanction: *The Panel is required to consider suspending or expelling any student found responsible for sexual misconduct; however the panel may impose any sanction that it finds to be fair and proportionate to the violation. In determining an appropriate sanction, the Panel may consider any record of past violations of the Standards of Conduct, as well as the nature and severity of such past violation[s]. The panel will also consider, as part of its deliberations, whether the sanction will [a] bring an end to the violation in question, [b] reasonably prevent a recurrence of a similar violation, and [c] remedy the effects of the violation on the complainant and the University community. The sanction decision will be made by the panel by majority vote. Any sanction imposed will be explained or supported in the written decision of the Panel.*

The UVA sexual assault policy points to, but does not mandate expulsion. It also specifies specific sanctioning considerations keyed to relevant OCR guidance. This approach is an intelligent middle ground on a challenging topic likely to be debated on your campus.

--Gary Pavela

ENDNOTE: "I'd give the devil benefit of law"

College communities need student conduct officers and hearing panels with the requisite courage and emotional intelligence to *stand fast* on the need for procedural fairness and disciplined fact-finding ("hearing cases before deciding them"). Such a commitment to "basic due process" —in the words of the 1997 OCR Sexual Harassment Guidance—will promote "sound and supportable decisions" to "*both parties*" in sexual misconduct proceedings (emphasis supplied). The wisdom behind this view was expressed years ago by Robert Bolt in the first act of his play "A Man for All Seasons (1960)." The dialogue is between Sir Thomas More and his son-in-law Roper:

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down do you really think you could stand upright in the winds that would blow then? *Yes, I'd give the Devil benefit of law, for my own safety's sake.*

[end]