NINE QUESTIONS LIKELY TO ARISE IN YOUR SEXUAL ASSAULT POLICY REVIEW

Colleges are reevaluating sexual assault policies after release of the April 4, 2011 U.S. Department of Education Office of Civil Rights (OCR) " Dear Colleague Letter" (DCL) on sexual violence. In this issue (expanded from an earlier formulation in *The Pavela Report*) we focus on nine questions likely to arise in your sexual assault policy review. Please consider them in consultation with legal counsel.

[1] If due process is designed to "protect the accused," aren't our due process procedures — by definition — failing to protect *accusers*?

The answer is *no*, for reasons stated in the 2001 OCR Revised Sexual Harassment Guidance (cited with approval in the DCL):

> "Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions."

Most of us use shorthand expressions like "due process protects the accused." What we mean to say, of course, is that due process protects the *rights* of the accused. Those "rights" aren't carved in stone, but federal courts show no indication of backtracking from basic formulations in *Dixon v. Alabama* (1961) *and Goss v. Lopez* (1975). OCR understands judges and juries — not administrative agencies — have final say on due process requirements. Consequently, OCR regulations promote "prompt and equitable resolution of … sex discrimination complaints," not wholesale repudiation of fifty years of due process jurisprudence.

Where do due process "rights" come from? Initially, of course, they have to be traced to state or federal constitutions, or contractual obligations at private institutions. However, in discussing the nature and scope of due process, modern court decisions examine the public policy aim of promoting sound decision-making.

In *Dixon*, the U.S. Court of Appeals for the Fifth Circuit wrote:

> "The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well-nigh inevitable when the Board hears only one side of the issue …"

In *Goss*, The Supreme Court wrote:

> The concern [about due process] would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately,

> that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process …

The staying power of decisions like *Dixon* and *Goss* is echoed in OCR's observation that due process promotes "sound and supportable decisions." In this sense, the reasonable due process rights we give to accused students are grounded less on cultural fashions of the 1960s and 1970s and more on evolving mechanisms to enhance disciplined thinking and fact-finding. These due process mechanisms are deeply ingrained in our educational mission. They're implicit in the scientific method itself. Modeling and practicing them advances the interests of *everyone* in our communities.

[2] What general due process standards apply?

Please see our suggestions in LPR#343: "Understanding due process: A 2010 overview for college administrators."

Also, hearing board members at both public and private institutions of higher education might be alerted to the Joint Statement on the Rights and Freedoms of Students, endorsed by a broad array of higher education associations, including the National Association of Student Personnel Administrators, the Association of American Colleges and Universities, and the American Association of University Professors. This document continues to provide useful guidance on standards of fundamental fairness in student disciplinary proceedings nationwide.

See also a related list of OCR due process expectations in our article: The "OCR Due Process Mandate" (June 23, 2011).

[3] How do we explain the "preponderance of evidence" standard of proof?

The DCL states on p. 11 that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard." This requirement means that disciplinary charges against accused students must be proven by "the weight of the evidence" or "more likely than not."

The preponderance standard does *not* shift the burden of proof. If a hearing panel concludes that the evidence — considered overall — weighs equally on both sides, the "preponderance" standard has not been met and the charges have not been proven.

We suggest incorporating the following language in your hearing panel instructions:

> The accused student must not be presumed "guilty" (or "responsible"). Instead, guilt or responsibility must be established by a "preponderance of the evidence" (e.g. "more likely than not") standard. Your decision in this regard requires "a conscientious and rational judgment on the whole record."*

> "Preponderance" means more than half. If, for example, the hearing panel concludes that the evidence — considered overall — weighs equally on both sides, the preponderance standard has not been met and the charges have not been proven.
>
> *United States Supreme Court decision in *v. SEC* 450 U.S. 91, 101 (1981) (citing a House of Representatives Report).

The OCR "preponderance standard" has been questioned by the AAUP. It may be prudent to follow the standard now, but we predict debate over this mandate is far from over.

[4] Should the accuser be subject to questioning by the accused?

The DCL states: "Allowing an alleged perpetrator to question an alleged victim *directly* may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment" (p. 12) [italics added]. Colleges should not misinterpret this language to mean that accused students must be barred from asking questions altogether. We recommend relaying questions from the accused to the accuser through the hearing panel presiding officer. Irrelevant or prejudicial questions can be stopped at this point. The presiding officer needs to take care, however, not bar relevant and probative questions about the "specific sexual conduct at issue." In *Jane Doe v. University of the Pacific* (E.D. California, December 2010) the court observed:

> "That the [hearing] Board questioned plaintiff about the specific sexual conduct at issue, including whether she consented to the conduct and how she expressed that consent or lack thereof, is not evidence that the University 'blamed' plaintiff for the assault."

[5] Should the accuser be visible to the accused when he or she is testifying?

Courts haven't provided definitive guidance on this topic. In *Cloud v. Trustees of Boston University* 720 F.2d 721, 725 (1983) the U.S. Court of Appeals for the First Circuit allowed witness screening in a context where [1] the accused student was allowed to question the witness and [2] the accused student's attorney was able to view the witness during her testimony:

> Cloud asserts that testimony by a witness shielded from Cloud's view violated the PSC's [Provisional Student Code's] guarantee of "the right to confront and cross examine any witness." The Supreme Court, however, has stated that "an adequate opportunity for cross-examination may satisfy the [sixth amendment confrontation] clause even in the absence of physical confrontation." Douglas v. Alabama, 380 U.S. 415, 418 (1965). Cloud was given an opportunity to cross-examine the witness, and his attorney and the Judicial Committee were permitted to view the witness. We believe the Hearing Examiner had discretion to make the protective ruling in question.

See also *Gomes v. University of Maine System* 365 F.Supp.2d 6, 27 (2005) (the court concluded that the university disciplinary process "was not ideal and could have been better," but affirmed the penalty imposed on two students in a sexual assault case):

> The Hearing Committee required all witnesses to be visible to the Plaintiffs while testifying. The Plaintiffs admit they could see the Complainant's profile during her

> testimony and were given an opportunity to cross-examine the Complainant and her witnesses. Under these circumstances, there is no due process violation.

In the context of a lower ("preponderance") standard of proof, the limited role of legal counsel at most schools, and potentially severe, long term consequences for accused students, we suggest adopting the following policy:

> "Generally, even if screened or testifying from a separate location, witnesses — including the accuser — should be visible to the hearing panel and to the accused while testifying."

See our related article: "Cross-examination in sexual misconduct cases." See also the recently approved University of Virginia "Policy and Procedures for Student Sexual Misconduct Complaints" and the option for "testimony by closed circuit technology" provided therein (p.14).

[6] What kind of training should be provided to hearing panels?

The DCL states that a "school's investigation and hearing processes cannot be equitable unless they are impartial" (p.12). The substance and spirit of impartiality should be reflected in relevant training materials. Those materials will likely be one focus of "discovery" by plaintiffs in any subsequent litigation.

The DCL itself and published studies linked therein (DCL p. 2) provide useful training resources regarding sexual violence. Hearing panel members should also be instructed on potential conflicts of interest (see DCL p. 12:" serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest"), confidentiality requirements, and the standard of proof. More specialized training may be required in complex cases. For example, in footnote 30 (p. 12), the DCL states "if an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner."

John Lowery (Indiana University of Pennsylvania) and I developed an online sexual assault case study that may also be useful for hearing panel training.

A recurring postscript in the ASCA *Law and Policy Report* states: "Hear the case before you decide it." That phrase is a due process thinking and training exercise. Board members should be encouraged to discuss what it means and why it is a critical component of the "equitable" and "impartial" adjudicatory process expected by OCR and the courts.

[7] What role should be given to lawyers in our proceedings?

The DCL states: "While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties" (p. 12).

State and federal courts — not OCR — have the final say in determining relevant due process requirements. Courts are likely to give accused students a right to legal assistance (not active

representation) in sexual assault cases if related criminal charges are pending. See *Gabrilowitz v. Newman* 582 F.2d 100, 107 (1st Cir. 1978):

> "We hold that, because of the pending criminal case, the denial to appellee of the right to have a lawyer of his own choice consult with and advise him during the disciplinary hearing without participating further in such proceeding would deprive appellee of due process of law."

Again, as stated in the DCL, If an accused student is allowed to have an attorney/adviser at the hearing the same option must be granted to the accuser.

[8] What appeal process should be provided?

The DCL states (p. 12): "OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties."

This OCR "recommendation" is not a requirement (see our "Editor's note" below). Courts have held there is no due process right to an appeal in college disciplinary proceedings. See *Gomes v. University of Maine System* (*supra*, at p. 33): "[A] student has no constitutional right to review or appeal after a disciplinary hearing which satisfied the essential requirements of due process." College appellate committees struggle with the temptation to start anew and substitute their judgment. The idea of deferring to fact finding by a hearing panel (whose members saw the witnesses and assessed credibility) has limited cachet on campus. Student affairs colleagues have seen cases remanded and reheard and re-remanded for a year or longer.

One desirable option used at some schools is to mandate review of hearing panel recommendations by a senior administrator. The administrator should allow both sides to comment in writing on hearing panel findings and recommendations before acting on them.

[9] Does the OCR ban against mediation prevent all informal settlements?

The DCL states on page 8 that "mediation is not appropriate even on a voluntary basis" in sexual assault cases. This does not mean, however, that every case must be resolved in a full-blown hearing, contrary to the wishes of the parties.

OCR appears to be using the word "mediation" as a term of art, meaning an effort by an "impartial" or "neutral" facilitator to help disputants reach an agreement. Colleges, however, can't be neutral bystanders in Title IX enforcement; they bear ultimate responsibility for providing "all students with an educational environment free from discrimination" (DCL, p. 1).

Likewise, criminal courts aren't a neutral dispute resolution system. They're designed to apply the law, do justice, and protect the public. Cases are pursued by a prosecutor — not a facilitator. However, even for the most serious allegations, judges, prosecutors and defense attorneys routinely participate in discussions leading to plea agreements. Once reviewed and accepted by a judge, such agreements serve the public safety interests of the state.

Colleges can follow a similar process in sexual assault cases — preferably with greater deference to the accuser. For example, if an accused student admits responsibility and wishes to forgo a formal hearing, the college can propose a sanction. If the proposed sanction is approved by both parties it can be implemented without further proceedings. This is a timely administrative process designed to punish unlawful discrimination and bring the closure desired by everyone; it isn't "mediation."

We recommend the recently approved University of Virginia "Policy and Procedures for Student Sexual Misconduct Complaints." The UVA policy was adopted after the DCL and benefited from extensive public comment. Part V (p. 16) provides a national model for "informal resolution" of sexual assault cases.

Editor's note: Interpreting and applying OCR guidance

Colleges retain reasonable latitude to apply OCR "recommendations" or interpret ambiguities in OCR publications. It's important to remember that the OCR enforcement process is geared toward voluntary compliance and remediation, even if Title IX violations are found. The 2001 OCR Revised Sexual Harassment Guidance states: "[T]he process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms" [italics added].