

Approaching Student Conduct Issues

Presented by

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Today's Agenda

- Code of Conduct Do's and Don'ts to Avoid Litigation
 - Preventing the Creation of a Contractual Relationship
 - Satisfying Due Process Obligations
 - Avoiding the Perception of Bias
- Mental Health vs. Conduct Issues
 - Mental Health Protections
 - The Duty to Protect from Foreseeable Violence
 - Conducting a Direct Threat Analysis
 - Accommodations in the Conduct Process



The Purpose of the Code of Conduct

- Your Code of Conduct Should:
 1. Define what the learning environment will look like;
 2. Recognize the importance of student and community safety;
 3. Set forth conditions governing a student's eligibility to remain part of the college community; and
 4. Describe a process for resolving alleged code of conduct violations.

The Contractual Relationship Between Students and Colleges

- Courts are *generally* deferential to college disciplinary processes and are reluctant to intervene in academic affairs
 - This means they are reluctant to apply contract law to general promises or expectations
- However, this deference can go out the door if:
 - The College fails to implement effective policy disclaimers; or
 - The College fails to substantially adhere to its published disciplinary procedures (particularly those relating to suspension and expulsion procedures)



Hypothetical Scenario 1: The Interim Policy

- AB College is in the process of overhauling its sexual misconduct policy. As it undertakes this time intensive process, ABC publishes an interim sexual misconduct policy that incorporates key changes. Unlike ABC's usual published policies, the interim policy does not contain a disclaimer of any kind.
- In the spring of 2019—while the interim policy is in place—ABC receives an allegation of sexual misconduct against Student Sam. ABC investigates and ultimately expels Sam upon reaching a finding that a policy violation occurred.
- Sam sues ABC, alleging breach of contract. In support of the claim, Sam identifies minor deviations from ABC's investigatory procedures identified in the interim sexual misconduct policy. For instance, ABC did not complete its investigation within 60 days and failed to provide him with written notice of the right to have an advisor present.
- The college moves to dismiss, arguing that a policy cannot be deemed a contract and that it substantially complied with the identified procedures. Who prevails?

The Importance of Policy Disclaimers

- *Doe v. DiStefano* (D. Colo., March 19, 2019)
 - Under facts similar to our hypothetical, the court concluded Doe could maintain a contract claim as it related to the interim version of the sexual misconduct policy, which contained no disclaimer and therefore could plausibly be viewed as a contract.
- To avoid creating an express contract each time a new policy is issued, employ a disclaimer which is:
 - Conspicuous; and
 - Unambiguous
- "The provisions of the student handbook do not constitute a contract, expressed or implied, between enrolled or prospective students and ABC. ABC reserves the right to change any of the provisions, programs, rules or regulations articulated in the handbook whenever authorized administrators deem it is expedient to do so."



Claims for Breach of an Implied Contract

- Even with an effective disclaimer, courts have concluded that a college may breach an "implied" contract if it substantially deviates from the disciplinary policies it publishes.
- "The terms of the implied contract are contained in the [college's] bulletins, circulars, and regulations made available to the student. Implicit in the contract is the requirement that the institution act in good faith in its dealing with its students. At the same time, the student must fulfill his end of the bargain by satisfying the [college's] academic requirements and complying with its procedures."
 - *Routh v. University of Rochester* (W.D.N.Y. 2013).

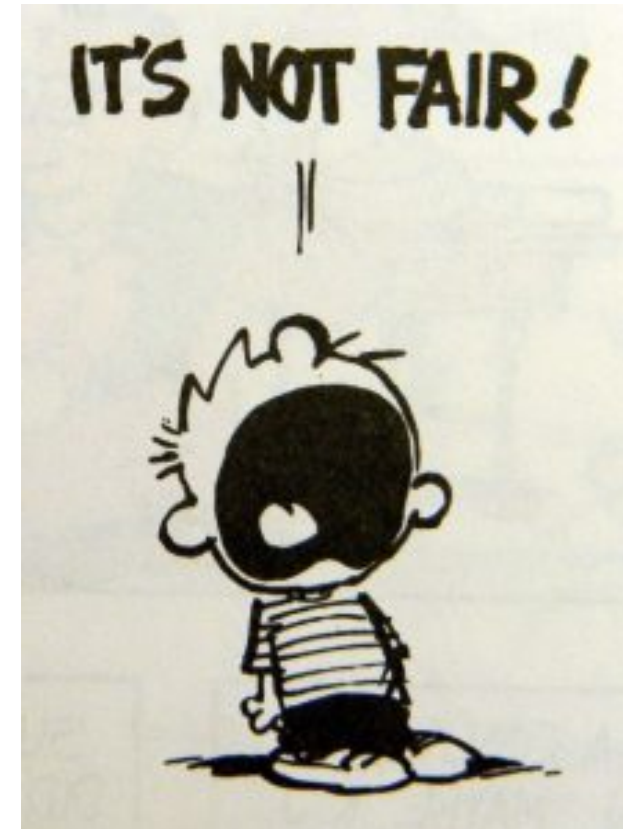


Hypothetical 2: Suspended Scott

- ABC receives a report that Student Scott, a member of Kappa Sigma, engaged in hazing of prospective fraternity members during rush week. Shortly after receiving the report ABC sent a letter to Scott notifying him of the date and time of his conduct meeting. In the letter, ABC identifies the provisions of the Code of Conduct that Scott is charged with violating, but provides no information regarding the specific nature or basis of the charges. ABC further instructs Scott not to have contact with any individual who participated in Kappa Sigma's rush week in advance of the conduct meeting.
- Scott attends the conduct meeting, but as he is unaware of the nature of the charges against him and unable to speak to the rushes, he presents no witness statements.
- During the meeting, ABC's investigators indicate that a text message Scott allegedly sent supports a particular allegation that he blackmailed recruits in an effort to force them into a binge drinking competition. ABC rejects Scott's request to see a copy of the text message.
- At the conclusion of the meeting, ABC places Scott on suspension, preventing him from taking courses or visiting campus during the spring and summer semesters.

Hypothetical 2: Suspended Scott

- Following his suspension, Scott sues ABC alleging breach of implied contract. Scott alleges that ABC failed to adhere to significant procedural rules contained in the student handbook, including by:
 - Failing to provide "fundamental fairness;"
 - Failing to inform him of the nature of the allegations against him prior to the conduct meeting; and
 - Denying him a meaningful opportunity to prepare for the conduct meeting.
- The College files a motion to dismiss. Who prevails?



The Importance of Substantial Compliance with Suspension and Dismissal Procedures

- *Demoulas v. Quinnipiac University* (Conn. Super. Ct. 2015)
 - Under facts similar to ours, the court concluded that an implied contract may exist, and allowed the student to proceed with his claims.
 - Since the University relied on the handbook and code of conduct to justify the suspension, the University could not deny the plaintiff's claims based upon the same policies.
- So, what's the take away?
 - If your handbook identifies procedures for conduct proceedings, then—particularly when the potential sanctions are severe—substantially comply with those procedures.

Best Practices to Avoid and Defend Against Contract Claims

1. Develop a code of conduct that:
 - Describes prohibited behavior
 - Describes a (flexible)process for investigating and resolving code of conduct violations
 - Contains an effective disclaimer
2. Adhere to the procedures described in the code of conduct
 - Investigators and decision makers should review the code of conduct before each investigation
 - Investigators and decision makers should receive regular training regarding the code of conduct



Best Practices to Avoid and Defend Against Contract Claims

3. Identify "problem" cases early and loop in counsel as necessary
 - Complex allegations
 - Time-consuming investigations
 - Litigious parties
4. Offer opportunities to debrief
 - Is the prescribed procedure working?
 - Update your code of conduct regularly to ensure it is consistent with your actual practice



A College's Procedural Due Process Obligations

- Public colleges must afford a measure of due process to students facing conduct proceedings
 - "A [college] is not a court of law, and it is neither practical nor desirable it be one. Yet, a public [college] student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing."
 - *Gomes v. Univ. of Maine Sys.* (D. Me. 2005).

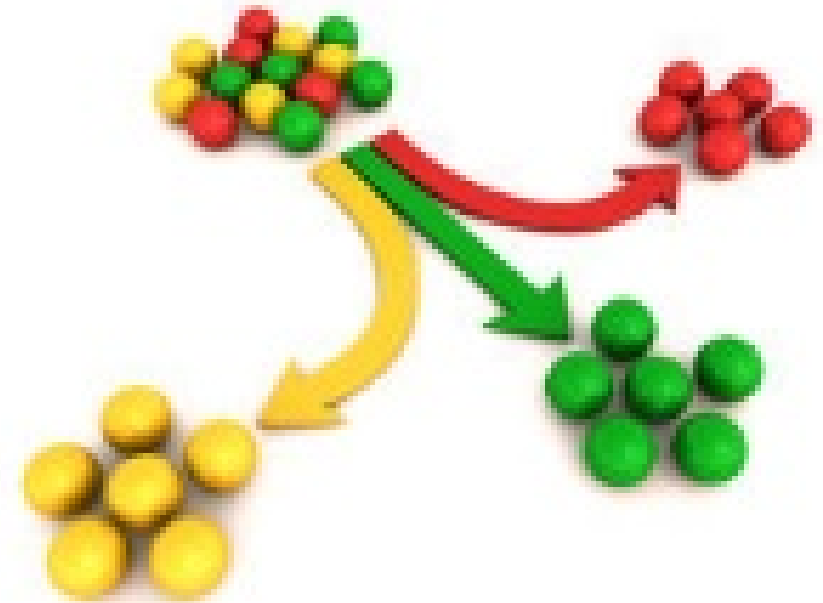


Procedural Due Process Obligations

- At a minimum, students involved in conduct proceedings are entitled to:
 1. Notice of the charges against them
 2. An opportunity to be heard
 3. Unbiased decision makers
- Student conduct proceedings with more serious potential outcomes or sanctions require a higher degree of procedural protections for students
 - "If a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process." *Doe v. Baum* (6th Cir. 2018).

Avoiding Bias Before the Investigation Begins

- Your Code of Conduct process should spread out authority and decision making power
 - It is "well established that school-disciplinary committees are entitled to a presumption of impartiality, absent a showing of actual bias." While a "school administrator's dual roles do not per se disqualify him or her from being an impartial arbiter," the plaintiff asserted sufficient facts that a school administrator acting as investigator, prosecutor, and judge was not impartial, and that the process had been "manifestly compromised."
 - *Doe v. Miami U.*, 882 F.3d 579 (6th Cir. 2018)



Minimizing the Appearance of Bias During the Investigation

1. Identify objective investigation criteria
 - What are the elements of the alleged policy or legal violation?
 - What evidence will be sufficient to prove a violation?
 - What evidentiary standard will be used?
2. Avoid early hypotheses and be open to all possible outcomes
3. Find commonality with witnesses
4. Ask open-ended questions

Minimizing Bias During the Investigation (Cont.)

5. Obtain and consider all relevant evidence
 - Electronic communications
 - Conduct follow-up interviews, when necessary, to fill in gaps
6. Consider preparing a chronology of information and evidence
7. Cite to evidence in the report and acknowledge credibility determinations



The Duty Not to Discriminate Based on Disability

- The Law:
 - Section 504 of the Rehabilitation Act of 1973
 - "No otherwise qualified individual with a disability...shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
 - The Americans with Disabilities Act
 - Prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by state and local governments, including public colleges.



The Duty to Protect Students from Foreseeable Violence

- While colleges have a duty not to discriminate, they increasingly also have an obligation to provide students with a safe educational environment.
 - A schizophrenic student attacked another student during chemistry lab, stabbing her with a knife while having auditory hallucinations. Prior to the attack, UCLA officials were aware that the student suffered from hallucinations, was in counseling, and had admitted that he thought about harming others. The stabbing victim sued UCLA and the court held that the college owed its students a duty to protect them from foreseeable violence in certain settings.
 - *Regents of Univ. of California v. Superior Court* (Cal. S. Ct. 2018)



Balancing These Competing Obligations

- Notwithstanding Section 504 and the ADA, Colleges may:
 - Hold students with disabilities accountable for code of conduct violations
 - Take reasonable steps to address situations where students pose a direct threat to others
 - E.g., interim suspension, involuntary leave of absence, dismissal

Conducting The Direct Threat Analysis

- In 2011, the ADA regulations were revised to remove any reference to "threat to self," and instead only refer to "threat to others"
- Determining whether a student poses a threat to others requires an individualized assessment, that relies on the best objective evidence and reasonable judgment, to ascertain:
 - The nature, duration, and severity of the risk;
 - The probability that the potential injury will actually occur; and
 - Whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk



Hypothetical Scenario 3: Assessing Threat

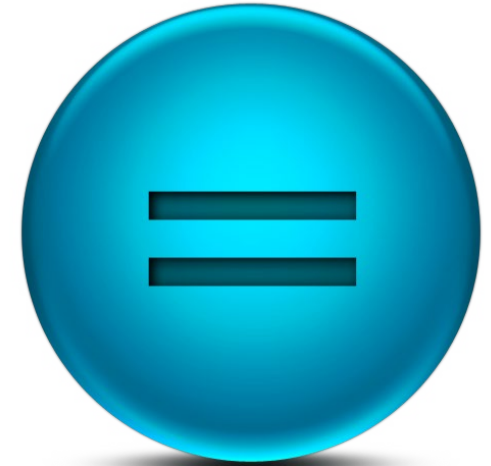
- Instructor Ian reports concerning information about a student in his class, Sandra, who is in her second year of study at ABC. Recent emails from Sandra to Ian express increasing hostility toward the instructor over a poor grade on her midterm.
- Ian asked Sandra to stop by his office yesterday to discuss the emails and Sandra's declining grades. Ian reports that the conversation was largely one-sided, with Ian doing most of the talking, and Sandra simply listening. As Sandra stood up to leave the office, she made a comment under her breath that "It's not going to matter soon anyway."
- Ian reports that in class Sandra has been withdrawn, her appearance is unkempt, and she frequently misses class or shows up late.

Hypothetical Scenario 3: Assessing Threat (Cont.)

- ABC's threat assessment team—which you are a part of—gathers the following additional information:
 - Conduct History:
 - Semester 1: Sandra was found responsible for a substance use violation
 - Semester 2: While intoxicated at an ABC event, Sandra slammed another student against the wall. Sandra received discipline as a result.
 - Medical History:
 - Sandra self-disclosed anxiety and depression conditions to Disability Services and requested permission to bring her emotional support hamster to class. The request was denied pursuant to ABC's emotional support animal policy.
 - Information from ABC Police:
 - No history with the police.
 - A quick check of social media sites shows Sandra with drug paraphernalia and several references to violent song lyrics.
- Does Sandra's conduct warrant further action?

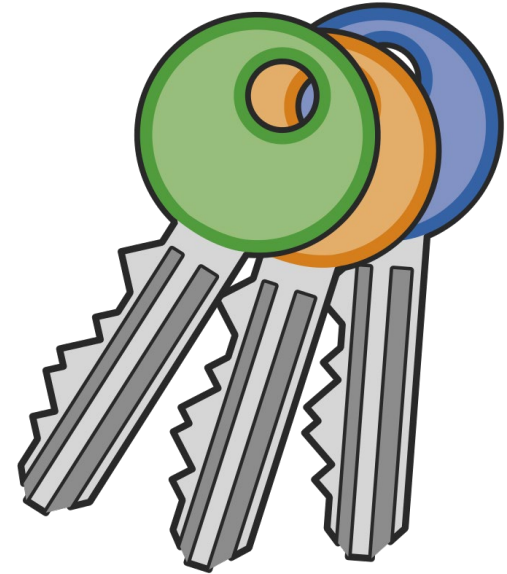
Addressing Troubling Behavior

- Colleges may not:
 - Sanction a student with a disability for behavior that does not result in sanction when undertaken by a non-disabled student
 - *Spring Arbor University*, OCR Letter of Finding (2010)
 - Charge a student with a code of conduct breach merely to force the student to reveal his or her medical condition



Addressing Troubling Behavior, Cont.

- Key Takeaways:
 1. Conduct an individualized assessment
 2. Focus on actual conduct, not real or perceived disability
 3. Avoid stereotypes or assumptions
 4. Follow your policies and procedures
 - Generally, like conduct should be treated in a like manner, regardless of disability



Accommodations During Conduct Proceedings

- Colleges have a duty to provide reasonable accommodations during conduct proceedings, upon request
 - *Rossley v. Drake Univ.* (S.D. Iowa 2018)
 - The student alleged that Drake violated the ADA by failing to provide him with reasonable accommodations during its conduct investigation, disciplinary hearing, and appeals hearing.
 - Although the investigators and administrators knew of the student's dyslexia and ADHD, because neither the student nor his attorney made any accommodation request during the proceedings, the court found in favor of the college.

Accommodations During Conduct Proceedings (Cont.)

- Examples of Accommodations Within the Conduct Process:
 - Additional time to review the investigation report
 - Providing the investigation report in an accessible format
 - Allowing additional break times during interviews
 - Making available interpreters/assistive technology
 - Including disability services in the process
- To ensure no perception of bias, consider:
 - Informing the other party of the accommodation provided and/or
 - Provide the option of the same/similar accommodations to other involved parties

Questions?

Best Practices to Approaching Student Conduct Issues

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