7-31-2014

The Due Process Failings of Student Disciplinary Board Hearings

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CHICAGOLAWBULLETIN.COM

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THURSDAY, JULY 31, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 150

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If you want to understand why the "technicalities" of a criminal trial are important — things like hearsay rules, an elevated burden of proof and the right to counsel — try sitting in on a university disciplinary hearing, where students face penalties as severe as expulsion but where such protections don't apply.

I've been a member of my university's Student Conduct Board for seven years, which means I've served as something like a juror on innumerable hearings where students were accused of violating the school's conduct code.

I also teach criminal law and procedure, so I'm probably more attuned than most to the ways in which the rules governing a disciplinary hearing depart from those you would find at any criminal trial. This chasm is far too wide, and the accused students suffer for it.

To be sure, student conduct hearings are decidedly not criminal trials. Although the students are often charged with conduct that could be prosecuted criminally — like hazing, drug possession or sexual assault — these are administrative proceedings in which the harshest sanction is dismissal from the university, not incarceration.

So neither I nor anyone else could plausibly claim that students must receive the full panoply of protections to which criminal defendants are constitutionally entitled.

Still, at least at public universities, students have a constitutional right to the rudiments of due process before they can be dismissed from school. This means they need written notice of the charges against them, an opportunity to challenge the school's evidence and present their own and a neutral decision-maker.

But just because a school is not constitutionally compelled to provide all the protections of a criminal trial doesn't mean that it should provide only the minimum process required by law.

My chief concern with the way student conduct boards actually function is the assumption that a streamlined administrative process, unburdened by hearsay objections and the like, actually leads to fairer results. They do not.

Let's take hearsay as an example.

There is, of course, a reason that the baseline rule in criminal trials is that hearsay — statements made by a witness reporting what someone else said out of court to establish the truth of the matter being asserted — is not admissible into evidence. Such statements, except in exceptional circumstances, are understood to be unreliable and cannot be subjected to the crucible of cross-examination.

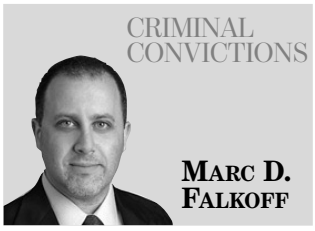
In a criminal trial — say for hazing — the prosecution could call the complainant as a witness and have her describe her version of events at a sorority during the evening in question. The prosecution could not, however, substitute that witness' testimony with a police report, taken on the night in question, in which the complainant gave her statement to an officer.

When the witness testifies in court, she can be cross-examined about her recollection and possible motives for testifying in the manner she did. That's not possible with hearsay. This is Criminal Procedure 101.

Rather than disparage hearsay rules ... we should consider how to create as fair a system as possible for all of our students, even those accused of code violations.

Anyone involved with the criminal justice system understands that hearsay rules lead to fairer trials and to more justice, not less. But in student conduct hearings, witnesses frequently don't attend, and hearsay is allowed.

Moreover, board members are told — early and often — that administrative hearings without encumbrances like a hearsay rule are superior to criminal proceedings because the truth can emerge free from lawyerly technicalities.



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However, the assumption that streamlined procedures elicit more justice than the rules we've amassed in our courts over two centuries is unsupported by empirical evidence.

Take as another example the absence of lawyers from the typical student conduct board system. The belief is that lawyers simply gum up the works.

Yet students who are called before the conduct board are typically naive about the process, even after having it explained to them by administrators. They might understand that they have done something wrong and simply assume that if the university charges them with a code violation, they must be guilty of the offense.

But what students don't understand is that a finding of guilt (or "responsibility") for an offense requires that all the elements of the offense be proved by the university.

It's not unusual for a student to "plead responsible" to the offense of disruptive behavior, for example, even though its definition requires disruption or obstruction of a university activity such as teaching, research, administration, athletic competitions and so forth.

Advice from a lawyer — perhaps retained by the university to advise all-comers to the system — would better ensure these defined elements were demonstrably impacted and help prevent unwarranted assumptions of responsibility by the accused.

I suspect that some of the resistance to fundamental criminal law protections stems from the recent nationwide trend across universities to conceptualize student discipline as educational in nature rather than punitive. We are a school, it is said, and not in the business of meting out punishment. We teach, and alleged infractions of the student code provide us with teachable moments.

To the contrary, students are brought before student conduct boards not to teach them life lessons, but rather, to be judged. And they will be punished if they are found guilty — even if we replace the word "guilty" in our guidelines with the word "responsible."

What the comparison of administrative and criminal proceedings misses is that even though a student is not risking a jail sentence when he or she is haled in front of a student conduct board, he or she is still facing severe punishment.

Expulsion from college will, to note just a few consequences, impede his her chances of admission to another school, preclude security clearance for any number of government jobs and likely prevent admission to the bar if his or her dream was to become a lawyer.

To be clear, I'm not picking on my own school's procedures. There's no reason to believe that our system is any better or worse than those of other universities, which are quite similar in most particulars. And I know from experience that everyone involved in the process — from administrators to students to faculty to staff who serve on the boards — acts with the best of intentions and in good faith.

But even with the best of intentions, a system without robust procedural rules cannot adequately protect against injustices. Rather than disparage hearsay rules and look for more efficient ways of processing student disciplinary cases, we should consider how to create as fair a system as possible for all of our students, even those accused of code violations.