

Best Practices for Addressing the Confluence of Campus Complaints with Criminal Trials

By: Brett A. Sokolow, JD

The conventional wisdom of the student conduct field is that colleges should not delay campus hearings until criminal proceedings have concluded. There is truth in the assertion that college proceedings are as important as criminal trials. They serve different purposes, and each system has a legitimate interest in providing a response. Colleges owe no deference to the criminal justice process. Yet, the conventional wisdom is an over-simplification of a complex issue. Conventional wisdom also serves to over-generalize how much consensus there really is around delaying campus hearings. In fact, while many colleges do not delay campus hearings, many colleges do. And many have no rigid approach—they are flexible, depending on the circumstances. This flexibility is important. It allows institutions to recognize that there are competing interests and practical limitations. Sometimes a delay is the best solution. Sometimes a delay is inappropriate.

I think there are at least three valid reasons why a college would want to delay its conduct proceedings:

- 1) To avoid jeopardizing the criminal investigation;
- 2) To allow the respondent to preserve his/her defense for trial, rather than showing all their cards in a prior campus hearing;
- 3) Court order (or threat of prosecution for obstructing justice).

I think there are at least three valid reasons why a college would refuse to delay its conduct proceedings:

- 1) The welfare of the alleged victim (if a sexual misconduct complaint, the alleged victim is entitled to a prompt and equitable response BY the college);
- 2) The college needs to protect its community from someone who may be dangerous;
- 3) The criminal proceedings may take so long that a subsequent campus hearing will be impacted detrimentally by stale recollections, evidence already muddied by lawyers and experts, and a criminal verdict which may influence the campus proceeding.

If the conventional wisdom gives us comfort that the default is to move forward on our procedurally determined schedule, the decision not to move forward should only be occasioned for a good reason. I don't think we should ever volunteer to hold off. I think we need to have a request, preferably in writing, from the alleged victim, parents, the accused student, attorneys involved in the case, an advocate and/or a judge. There are several types of delay, including a delay of the campus investigation, a delay of the campus hearing beyond the normal timeline, and an extraordinary delay of the hearing until after the criminal trial.

Delaying an Investigation

Generally, delaying an investigation is not a viable option for the college/university because of the harm delays can cause to the evidence collection and gathering process. Additionally, the legal obligation of a college to investigate hate crimes and sexual misconduct is not satisfied by an investigation by outside law enforcement or deferring to a criminal justice response rather than providing a remedy institutionally. The only good reasons for delaying an investigation are because a current police investigation or grand jury inquiry is underway, and outside authorities believe that a concurrent campus investigation would either interfere or be unnecessary. In fact, pursuing a campus-based investigation when outside authorities claim primary jurisdiction could result in obstruction of justice charges against college administrators and/or law enforcement personnel.

Delaying a Hearing

Delaying a hearing as the wheels of the criminal justice process turn can be frustrating for college administrators, but it can also be a relief. In my experience, delays in the campus hearing process are most often requested by the accused students and their representatives. This is changing, and more and more often, delays are being requested by the complaining party as well. For the complaining party, the criminal prosecution may be of greater importance than the campus hearing. Any foregoing campus hearing could jeopardize the success of the prosecution, and a prosecutor may suggest that an alleged victim request a delay by the college/university and/or refuse to participate in the campus hearing. While such a result creates a hurdle, it will not--in itself--foreclose conducting a hearing in the absence of the complainant. Depending on how much independent evidence is available, a hearing may be conducted and a finding obtained.

When an outside law enforcement investigation causes the campus investigation to be delayed or prevented, this will likely cause a delay in the campus hearing timeline. Once outside law enforcement authorities give clearance, the campus investigation can take place and the hearing can be scheduled. Or, the results of the police investigation may be shared with the college/university, and it may be that no other (or only minor) investigation remains to be done. Different jurisdictions operate differently. Some police departments will share investigation results with colleges/universities when their investigation is complete. Others will await clearance from the prosecutor; still others refuse to share results, ever. Most often, investigation records will be available at the latest when the discovery phase of the criminal trial is underway. This can delay the hearing, but does not mean that the delay will place the campus hearing after the criminal trial, so all of the issues about a prior hearing may still be in play.

The Issues of a Prior Hearing for the Accused Student

The defense of a criminal trial is a matter of strategy. That strategy may not be fully revealed until the trial. By holding a campus hearing prior to the trial, the defense may

be forced to some extent to reveal its hand at the hearing, thereby losing a strategic advantage at the trial. Or the defense may be forced to refuse to participate in the campus hearing, or refuse to answer questions at the hearing (if your procedures permit students to refuse to answer questions).

PRACTICE TIP: Exercising the right to refuse to answer incriminating questions should be an all-or-nothing proposition. Accused students cannot selectively decide to answer some questions but not others. Put up or shut up.

Colleges have no obligation to an accused student to help them make their best defense in a criminal prosecution. If we decide to delay our hearing, we do so because we want to, not because we must. If lawyers for the accused student or the prosecutor ask us to delay our hearings, we should consider their reasons, but be guided most strongly by our own policies and best practices for us and for upholding our code of conduct. If any of the lawyers feel so strongly that a campus hearing will jeopardize the trial, they should try to convince a judge of that. If the judge orders a TRO, I'll be happy to respect it.

The records of campus hearings can be subpoenaed and are admissible in criminal trials. Accused students are often fearful that if they admit to wrongdoing in a campus hearing, they will be admitting to a crime as well. Such an admission could be used against them at the trial. This is not always true. Sometimes, admitting to violation of a campus policy is not equivalent to admitting to a crime. Date rape is a good example. Conduct may violate the campus rule but not reach to the level of a statutory violation. If an accused student is fearful that an admission could be used against them at the trial, they are permitted to confer with an attorney with respect to any campus hearing. They may even be permitted to have advice of counsel at the hearing on many college campuses. This may help them to determine how best to answer questions and handle admissions. Administrators should also keep in mind that many courts will not admit into evidence admissions by accused students in campus hearings at public colleges/universities on the basis that such a statement is a compelled admission.

Sometimes, we hit the Trifecta. It is in everyone's best interest to delay the campus hearing. The alleged victim wants us to hold off. The accused student wants us to hold off. And, we want to wait until the evidence is released or the criminal trial is concluded. When such circumstances exist, a written agreement between all three parties can help to assure a smooth process down the road and leave the students free to concentrate on the prosecution. The hitch can come when the accused student is involved in a violent felony and you believe the accused student may be a danger to the community, or you don't want to take the chance that s/he may be. Your hearing is the only way to separate him/her from the college, and protect your community unless you have a voluntary withdrawal policy what can help you to finesse this situation. If the accused is willing to withdraw (without penalty) pending the outcome of the trial, and the alleged victim is comfortable with such an approach, and we are too, we have a potential win-win. An outline for just such an approach is included in the model policy below.

VIOLATIONS OF LAW--A MODEL POLICY

Violations of federal, state and local laws are incorporated as offenses under the Student Code of Conduct. When an offense occurs over which the college has jurisdiction, the college conduct process will usually go forward notwithstanding any criminal charges that may arise from the same incident. Should a student withdraw from the college when criminal charges are made, it is the typical practice of the college to pursue investigation and resolution of campus conduct matters, regardless of the fact that the student has withdrawn.

When a student is accused, arrested, charged or indicted for a violent or drug-related off-campus crime, the college may elect to take action against that student for violation of the code of conduct, which incorporates violation of local, state and federal laws as code infractions.

When it has reasonable cause to separate a student from the community, the college may suspend a student for a reasonable time pending the scheduling of a campus hearing for violation of the code of conduct. The college reserves the right to exercise its authority of interim suspension upon notification that a student is facing criminal investigation and/or charges. The college will permit a student who receives an interim suspension to request a meeting with the Dean of Students to show cause why an interim suspension is not merited. Regardless of the outcome of this meeting, the college may still proceed with the scheduling of a campus hearing.

When criminal charges are pending, the college may be delayed or prevented from conducting its own investigation, and moving forward with a campus hearing. In such cases, the college will delay its hearing until such time as it can conduct an internal investigation, or obtain from law enforcement sufficient information upon which to proceed.

It may be in the best interests of students accused of crimes to withdraw from the college, without penalty, until the criminal charges are resolved. The college has a procedure for voluntary withdrawals, under the following conditions. If the alleged victim of the crime is a student, the alleged victim must approve of the withdrawal and delay of the hearing. The accused student may not be present on campus or at college-sponsored events without special permission. The accused student must comply with any and all campus efforts at investigation that will not prejudice their defense in the criminal trial, and the accused student must agree that in order to be reinstated to active student status, they must first be subject to and fully cooperative with a campus hearing, and must comply with any sanctions that are administered.

Any use of the foregoing model policy must be accompanied by the following credit:

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