

YOUR RESULTS MAY VARY

Advice for Student Conduct Officials by Linda Rowe, Ed.D.

In this feature Linda Rowe endeavors to shine a little light on everyday and not-so-everyday issues in student conduct. Linda's main qualification for giving advice is her willingness to do so. Aside from that, her credentials include a doctorate in higher education leadership, over 30 years experience in student affairs at public universities, including 7 years as a judicial officer, a decade of active involvement with the Association for Student Judicial Affairs, avid interest in higher education legal issues, and, most importantly, being the mother of three (two college grads and one high school senior). Linda promises to base all advice on her best understanding of current law, policy and theory but will aim to express it in a practical and, on occasion, lighthearted way. This is a complex, demanding field and none of these answers will ever fully address the uniqueness of your situation, your campus, or your students. Think for yourself, consult your supervisor, run it by counsel, and remember ... *your results may vary!*

Dear Linda:

"Marge," a student on our campus, has been a vocal critic of campus programs and initiatives that she perceives as biased and liberal. She created provocative posters that bordered on slander. She also has the habit of recording conversations and posting them to her website. Two other students, "Bart" and "Lisa," began to post messages on a website unaffiliated with the University expressing their distaste for Marge and her tactics. The postings continued and eventually, Marge's face was pasted on pornographic pictures on Bart and Lisa's website. Marge filed a complaint saying her educational rights were being infringed on and demanded that we respond. What cause do we have to respond? What response is appropriate? What kind of information would we provide to the student about the outcome knowing that this outcome will be posted on her popular website and that Marge will not protect other students' confidentiality?

Signed,

MUDDLED IN MUNCIE.

Dear Muddled:

Oh what a tangled web we weave when first we practice to speak free! Marge seems neither to have considered that her speech would draw a response nor to have anticipated that the response would be just as provocative as her own speech. Her audience is talking back to her and she doesn't like it. Apparently none of Marge's targets felt moved to formally complain about *her* slanderous posters or her recordings, but now she is appealing to a higher authority to end the debate.

From your question, I surmise that you have looked at the facts of the situation and have not (yet) identified any clear and obvious violation of your campus rules. Therefore, you are probably motivated, as I would be, to treat this as an educational, developmental, and interpersonal problem.

I would respond by talking to Marge and investigating her complaint as I might any other complaint. Ask her to explain how her rights are being infringed upon. Ask her to tell you what campus rules she thinks are being violated. Is she claiming a Title IX gender discrimination/harassment violation? If so, your institution does have a responsibility to look into the complaint to discover whether the alleged offending behaviors are so severe and pervasive as to interfere with Marge's ability to get an education. I have to tell you that the case law in this area is not very sympathetic to Marge's plight. As a college student, no longer of "tender years," Marge might well be expected to be able to take what she dishes out.

I might ask Marge, what outcome does she seek by filing this complaint? This can be a difficult question to ask because we often have to tell students that their desired outcomes ("make them truly sorry") are not always within our power to compel. Finally, you will at some point have to break the news to Marge that the other students haven't broken any rules. But, you can perhaps help her explore alternative routes to dealing with what is probably a very embarrassing situation. If you do not, she is likely to take the situation and her frustration back to the public forum in an unproductive manner. Remember that Marge has no responsibility to maintain confidentiality about what she has experienced first-hand with other students or in her meeting with you. Consider this when you send her a written summary of your meeting. And, for goodness sakes don't let her record your meeting with her – or, *do* let; it might actually be good PR for you because you will no doubt come across as well reasoned and fair!

My opinion is that in most cases a student has a right to know that a complaint has been filed about him or her. Therefore, with Marge's full understanding that I planned to do so, I would next talk to Bart and Lisa. Ask them, what had they hoped to accomplish with their website? Was this really the best way to do it? What other, more grown-up strategies could they use to they make their views known? Help them understand how speech can drift into harassment. If they did not violate any rules, repeatedly make it clear that they did not and emphasize that you are seeking their help to maintain civil discourse in the campus community.

A major challenge in a complaint like this is to persuade students to move away from seeing the judicial officer as the arbiter of a zero sum game. In the zero sum game disputes between parties come down to winner and loser, good guy and bad guy. The phenomenon plays out when an accused student is found "not responsible" and the accuser experiences the outcome as a personal repudiation, not merely a decision based on the preponderance of evidence. If your campus has a strong mediation program, consider referring Marge along with Bart *or* Lisa (but not both unless Marge has a compatriot) to mediation to negotiate a truce.

In summary, dear Muddled, your job is simply to help these students navigate the boundaries of acceptable behavior in your community and to encourage them to express themselves freely and help them deal with the consequences of their expression. I hope they give you a raise.

Thanks to Brian Farber for his assistance with this question.

YOUR RESULTS MAY VARY PART II

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Dear Linda:

If a complainant in a sexual misconduct complaint refuses to testify at a campus hearing until after the criminal process is over, how does this impact the accused student's right to a fair and expeditious hearing? How long can she hold out?

Signed,

AWAITING TRIAL.

Dear Awaiting:

Colleges should almost always try to move ahead with their conduct processes regardless of the snail's pace of the criminal courts. As is often said, we don't prosecute crimes; we uphold our codes of conduct.

I am wondering if the complainant is simply refusing to *participate* in the campus process or is insisting that you wait until the criminal process has run its course before you proceed? I know of no law or regulation, short of a specific court order, that gives a complainant the right to force you to wait until she's ready to have a hearing. However, I do not recommend going ahead without the complainant unless you have enough other evidence to establish that a violation occurred.

A hearing without a complainant will probably seem very fair and expeditious to the accused, but then you might end up with a convicted rapist on your hands should he be found not responsible by your board, but guilty by the court. On the other hand, deferring to the complainant leaves you in quandary about what to do with the accused in the meantime: allow him to remain on campus, perhaps even complete his degree, or indefinitely suspend him until who knows when? Should you decide to wait for the courts, your best assessment of the threat the accused poses to the campus community will help determine whether to let him stay or make him go.

Some institutions have policies that compel complainants and witnesses to testify upon pain of disciplinary action -- but we can agree that this is not the compassionate stance to take with an alleged assault victim. What you need to do is to learn more about out why

the complainant wants to defer campus action and then try to persuade her to change her mind. When you engage in this discussion have present someone the complainant regards as her advocate or support person. This could be a counselor, attorney, parent, or friend. You might have to undertake your persuasive efforts through the complainant's representative.

Take the time to explain how your goals and processes are different from the court's and how waiting for the court interferes with them. Here are some points that have encouraged other complainants to rethink their stances:

- Your process allows you to let the complainant testify by closed circuit TV or other means to shield her from the accused.
- Try as you might, without a hearing you might not be able to prevent the accused from remaining in school. Say this only this if it is true. It should not be used to threaten or coerce.
- Your process employs a different definition of the violation and a different, less stringent, standard of evidence. Therefore it is likely to move more quickly and the accusations will be easier to prove.
- Detailed forensic evidence that might be withheld by police is not always crucial in a campus hearing. The officer's written statement might be enough.
- If the accused student is found "not guilty" in court, finding him responsible for a campus violation could become even more difficult. He is bound to use it as a defense in the campus hearing.
- Attempts to rely on evidence shared in campus conduct hearings to support criminal cases are usually unsuccessful, mainly because a college's rules of evidence and procedures are so much less stringent than a court's.
- The fear that an accused student's attorney will use a campus hearing to garner case-destroying evidence later to be introduced in court is generally overblown. At any rate, you should be able to allow the complainant to have her own attorney or advisor present if she feels the need for an advisor on these matters.

The bottom line is that neither the accused nor the complaint should be allowed to control the campus process. Do the best you can to make things happen the way you know they should and document your reasoning every step of the way.

Thanks to Brian Farber for his assistance with this question.

*All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.*