

The Victim's Rights Paradigm for Campus Hearings

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In addition to the substantive and procedural fairness requirements to which our hearings are subject, victim's rights have asserted themselves firmly as an expression that in a balanced process, we must attend to the rights of all student parties. While the following list is not exhaustive, it gives examples of many substantive and procedural victim's rights that may be accorded in the process, and explanations of each. Some or all of these may be desirable within your campus hearing process. You can consider this article a "how-to" for those of you wishing to enhance the victim's rights emphasis of your processes. Please assume that any reference to victims in this article does not assume a violation by the person they are accusing, and is just a convention by me to keep from writing "alleged victim" every time.

- *Notice and Explanation of Process*

Just like many of us would sit down with a respondent and explain the process by which their alleged violation will be determined, it is both possible and beneficial to create the same opportunity for victims. They need to understand the parameters of the policy, and what it does and does not cover. They need to know how the conduct process plays out, and giving them a chance to ask questions will help to make what is to come more predictable and comfortable for them. It may clear up misunderstandings in advance, and help conduct administrators to set reasonable expectations with victims for what the process can and cannot accomplish.

- *Notice of When Complaint Delivered to Respondent*

Some respondents are not aware in advance that a complaint is headed their way. Victims are rightfully apprehensive that a respondent who receives a complaint may respond with shock, anger and potentially even violence. Keeping the victim in the loop as to exactly when notice will be given may help them to make protective decisions, and expect possible contact from the respondent soon after.

- *Victim Receives Copy of Respondent's Response to the Complaint*

I encourage you to shed light through your process, rather than to cloak it in secrecy and an information vacuum. When a victim makes a complaint, you share that complaint with the respondent. If the respondent writes a formal response to the complaint (and s/he should), it is balanced to share a copy of that response with the victim. Appropriate FERPA consents should be obtained, and you may need to redact certain information, but that is better than keeping the victim in the dark about the respondent's specific responses to the allegations of the complaint.

- *No-Contact Order/Interim Suspension*

Imposing a no-contact order between the parties to a complaint is becoming a more common practice, and as long as you take meaningful steps toward assuring that the no-contact order is enforceable, this type of protection can create a level of reassurance and conflict de-escalation for the victim. Many victims are subsequently harassed by the person they accuse and their friends, and are subject to retaliation. A no-contact order is one of the mechanisms for us to proactively curtail potential harassment and retaliation provoked by the filing of the complaint. Similarly, an interim suspension can be an important way to protect the rights of a victim from a respondent who may pose a continuing threat of harm or acute potential for dangerous retaliation. Many administrators are hesitant to use interim suspension authority, but I encourage it when the circumstances warrant a temporary separation.

- *Option for a Three-Member Administrative Panel*

This is an option I have been encouraging colleges and universities to consider for years. In repeated surveys, victims indicate a distinct preference for a panel versus a single hearing officer. They also indicate a preference for a three-member panel of mixed genders, rather than panels of 5, 7 or 9 people. Finally, they indicate that the presence of faculty and students on a panel is often a disincentive to reporting and pursuing a complaint, because of concerns for confidentiality. Try offering victims the option of electing for a three-member administrative panel of mixed genders, and see if your reporting increases.

- *Right to Unbiased Decision-Makers Who Have Been Trained*

Making sure that victims are aware that you have a separate process for critical issues, or that your regular conduct decision-makers are specifically trained at handling relationship violence, stalking, discrimination and sexual misconduct can send a clear message that your process is attentive to their needs, sensitive to their concerns, and respectful of their experiences.

- *Right to a Closed Hearing*

Why some campuses persist in noting that a hearing can be open to the public under certain circumstances continues to baffle me. It can scare victims from reporting. In order to open a hearing to the public, you would need permission from all parties to the complaint, every student witness and any students who are participating as panelists on your conduct board. This is almost impossible, and even if you got such consensus, it would still not be a good idea. We can already publicize the results anonymously, and victims can in many circumstances discuss the results publicly (and so can the institution), so there really is no distinct additional benefit to an open hearing.

- *Right to the “More Likely Than Not” Standard of Proof*

According to the US Department of Education, the appropriate standard of proof for discrimination claims is the preponderance of the evidence. Use a different standard at your own peril.

- *Right to a Prompt Process and Hearing*

Victims have a right to prompt and equitable resolution, depending on the nature of the complaint. While there is no clear rule for what is prompt, you should establish a reasonable timeline and adhere to it unless you have a good reason to delay. For complaints involving discrimination or violence, I strongly encourage my clients to fast-track these complaints on a 30-day timeline, or 60-days at most.

- *Right to Have Substantiated Claims Forwarded to a Hearing*

If you want a process that appropriately incorporates victim's rights into its balance, you cannot take the approach Harvard tried a few years ago, of requiring independent corroborating evidence before you will proceed with a hearing. All claims should be investigated, and where a reasonable belief exists that policy may have been violated, you should refer the complaint for a hearing. Corroboration or substantiation should exist at some level before you proceed, but it can be provided by any source, including a credible victim. It would be unfair to the respondent to refer a completely unsubstantiated complaint to a hearing.

- *Right Not to Have Complaints of Sexual Violence Mediated as the Sole Resolution*

Many have argued to me that allowing for mediation of sexual violence is a way of accommodating victims who desire that approach. I agree, but mediation is not an acceptable approach to violent situations where there is a likelihood of continuing conflict and violence. So, we can compromise, and offer victims mediation--or even better--restorative justice opportunities subsequent to and in addition to the normal hearing process to which the complaint should be subjected.

- *Advisor/Advocate*

Most processes today offer victim's an advisor or advocate. I would suggest that we train a cadre of advocates who are familiar with the campus process, so that the victim can choose a knowledgeable supporter, if desired. However, if the victim wants so other person as an advisor or advocate, I think we should find a way to make that possible. Some campuses limit advisors to members of the community (in an effort to respect FERPA, I think), but in doing so might limit a victim from bringing a trusted friend, sister, local rape crisis center advocate, mom or other vital support resource.

- *List of Witnesses*

Victims can often be upset by surprise witnesses who are called by the respondent or institution. I recommend that all parties to a complaint submit and exchange a written list

of witnesses at least 48 hours in advance of the hearing, to avoid the potential for surprise, and to allow all parties the utmost opportunity to prepare their arguments.

- *Copies of Documentary Evidence*

I recommend that all documentary evidence that will be introduced in the hearing be shared between the parties at least 48 hours in advance of the hearing, to avoid the potential for surprise, and allow the parties the opportunity to prepare their arguments.

- *Right to Advance Notice of Board Composition and Right to Challenge*

Victims can be unnerved by the presence of certain people on a conduct board, including faculty advisors, student friends or foes. All parties should be informed in advance of the hearing of who the hearing officers will be, and should be given an opportunity to object to any member of the board for cause.

- *Sexual History/Character*

This is one of the most widely respected victim's rights provisions, but a clear policy on how it works is important. Can students introduce their own history and/or character? Is there an absolute bar on this type of evidence, or would you prefer to say that normally it is not permitted, unless it meets a high relevance threshold (that is would be "manifestly unfair" not to consider the information)? Does it bar evidence of behavior between the victim and respondent, or just between the victim and uninvolved third-parties?

- *Separate Testimony Options*

Gomes was bound to approve allowing a victim to testify from behind a screen. Courts have used such protections for victims for years, and it does not prejudice the fairness of those proceedings. Create a procedural rule, and make it clear to victims that you can use separate meetings, screens or partitions, or live closed-circuit technology to allow the victim to testify outside the direct physical presence or sightline of the respondent. While it would be unfair to force the respondent to be removed, if the victim wants to be in a separate room or behind a screen, we should be willing to accommodate that reasonable request, and even offer it without being asked.

- *Right to be Present for Entire Proceeding*

If you treat the victim as a mere witness, they are not entitled to be present for the entire proceeding (excluding the deliberation, of course). The victim is the reason for the hearing, and I recommend that allow the victim to be present for all portions of the proceedings at which the respondent has the right to be present.

- *Right to Present Own Complaint or Use Proxy*

I have written before that it is disempowering to refuse to allow a victim to present his/her own complaint, if s/he wants to. "Making the case" can be cathartic, and an important step on the road to healing. It is also less educational to impose a proxy-based hearing process, where someone speaks for the parties. If a victim wants or needs a proxy, we should allow it. But, why should our procedures require it?

- *Right to Know Outcome and Sanctions*

Every victim should be given the right, under your policies, to know the outcome and sanctions of any hearing involving discrimination or violence. No laws bar us from sharing this information and some require us to do so. We should provide this information in writing (just ask Miami University), and should place no conditions on our willingness to share it.

- *Right to be Informed of Respondent's Review (Appeal) Status*

If the respondent appeals, keep the victim informed of the status of the appeals request, processing and outcome. FERPA does not bar this, as some people believe.

- *Right to Petition for Review (Appeal)*

Give the victim the same status to request an appeal as you give to the respondent. If victim's rights are balanced with the respondent's rights in the process, appeal rights should be equivalent.

- *Right to Title IX Based-Remedies*

If you find the respondent to be in violation for an offense governed by Title IX, assure that you accord the victim the remedies required by federal law:

- 1) Bring the discriminatory conduct to an end;
- 2) Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct;
- 3) Restore the victim to his or her pre-deprivation status, to the extent practical and possible.

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.

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