

Final Report
Panel Review of Penn State University
Policies and Practices Related to Sexual Assault and Harassment

I. Summary of Relevant Facts

In August of 1999, an undergraduate female student was sexually assaulted by another student at an off campus location. Two months later, in October of 1999, the university's Judicial Affairs office was made aware of the assault when the office received a criminal complaint from the State College Police Department. Between October 21, 1999 and December 6, 2001, there were a series of discussions/actions to address the sexual assault allegation through internal procedures and, at the same time, criminal proceedings. The student also sought assistance for post-assault harassment. In March of 2002, the complainant initiated litigation, which was resolved in November of 2002 with an agreement that Penn State convene a panel to review its processes related to the handling of sexual assault/harassment matters. The panel has reviewed the university's processes as of the date of its visit in April 2003 and has provided recommendations related to the university's policies and procedures. The recommendations take into account the feedback provided by John Snyder in his December 2, 2003 correspondence to the panel and the feedback from Terry Fromson, Carol Tracy and David Cohen in their December 3, 2003 correspondence to the panel.

II. Sexual Harassment/Assault Procedure Benchmarking

In preparation for this panel review, the sexual harassment/assault policies and procedures of twelve schools, including insight from the April 2003 report from the Committee to Address Sexual Assault at Harvard University, were reviewed by the panel.

Based on this review, the panel suggests that Penn State address matters of sexual assault/harassment through its internal processes, even if criminal charges are not pursued by the alleged victim. The determination as to how to proceed should take into account the

university's best interests, the interests of the alleged victim, and the alleged perpetrator's interests.

The panel also recommends that Penn State establish a separate special hearing panel, consisting of students and non-students (university administrators and other relevant individuals) to hear sexual assault/harassment/domestic violence matters.

III. Recommendations Relevant to University Procedures

Having reviewed Penn State's processes for addressing sexual harassment/assault, the panel makes the following specific recommendations.

A. Revise Language of Policy AD41 Sexual Harassment

Policy AD41, Sexual Harassment adopts the U.S. Equal Employment Opportunity Commission's definition of sexual harassment, but does not elaborate on what specific behaviors constitute sexual harassment. The panel recommends that Penn State include examples of behaviors that can be considered sexual harassment, including sexual assault. In addition to the current clause prohibiting retaliation against anyone who files a complaint involving sexual harassment, the panel recommends that Penn State modify the clause to state that retaliation against any individual who has brought forward allegations of sexual harassment, is a violation of policy and will be addressed appropriately. As with the definition of sexual harassment, examples of conduct that constitutes retaliation should be included, such as threats, talking to others about the allegations when those individuals do not have a need to know, and similar behaviors. Furthermore, the policy should clearly state that "sexual harassment" includes non-sexualizing behavior, such as derogatory name calling, following an individual around campus, sending harassing e-mails, and making harassing phone calls, and that such action is prohibited by Penn State policy. Examples of such behavior should be included in the policy with a notation that the list does not include ALL behaviors that could

be considered sexual harassment but is meant as illustration of the scope of the policy.

B. Consolidate AD 42 Statement on Nondiscrimination and Harassment, AD 12 Sexual Assault, Relationship and Domestic Violence and Stalking, and AD41 Sexual Harassment

At the time of the panel's review, Penn State had three separate policies for actions that were either relevant to each other or subsets of each other, with somewhat different processes and outcomes. According to information provided in John Snyder's December 2, 2003 letter to the panel, there are "processes already in place for approving new Penn State policies and modifying existing ones... include[ing] a review of related and cross-referenced policies...." Without knowing the current status of this review, the panel reiterates its recommendation to consolidate these policies into one or re-write them to cross reference each other so that they are consistent with each other. The panel further recommends that the consolidated policy include a description of the procedure for addressing these matters (including the handling of criminal matters); a list of the names, phone numbers and e-mail addresses of the individuals designated to respond to these matters; and a description of the university offices responsible for handling these matters.

C. Develop a Protocol for Addressing Sexual Assault, Sexual Harassment, and Relationship/Domestic Violence/Stalking Matters

Penn State currently provides a considerable amount of information defining sexual assault/harassment and stalking and relationship violence. In addition, information is available about university resources available to respond to these issues. The challenge is that an individual who has experienced assault, harassment, or relationship/domestic violence may not be in a position to accurately define what he/she has experienced and to determine which procedure is appropriate. As a result, the panel recommends that Penn State develop and communicate to the

Penn State community a formal protocol establishing the responsibilities of each individual who is in a position to receive an incident report of sexual assault, sexual harassment, relationship/domestic violence, or stalking. In addition, it is recommended that each of the offices that currently handle these matters (i.e., Affirmative Action Office, Judicial Affairs, Center for Women Students) designate an individual who is responsible for handling any of these matters and that this individual immediately advise the other offices of receipt of the report. This determination of responsibility should consistently address the needs of all victims, whether faculty, staff or student. This will alleviate the need for the alleged victim to assume responsibility for appropriately defining what he/she has experienced and then to determine the appropriate office to contact.

D. Describe Public Law Enforcement and Criminal Justice Procedures

Although Penn State's Judicial Affairs process is explained in written materials, these materials do not explain how criminal procedures operate, particularly in comparison with the university's internal processes. To address this matter, the panel recommends that Judicial Affairs revise its written materials to provide information on how the criminal process operates and what impact, if any, these processes have on the university's internal processes. This explanation should include what the criminal proceedings consist of, the role of the district attorney, the respondent's due process rights, involvement of witnesses, information on how Penn State's internal process will address the alleged victim's interests in proceeding in the criminal system, and information on retaliation. This information should also be incorporated on Penn State's web site and, if available, a link should be made to the State College Police Department's web site.

E. Increased Awareness of Penn State's Expectations of Respectful Behavior

Although students are provided with the *Student Guide to General University Policies and Procedures* and the *Penn State*

Principles and the Framework to Foster Diversity, it is unlikely that they read this information cover to cover, particularly since students are more technology-oriented and therefore tend to access information from the web. As a result, the panel recommends that Penn State take more assertive steps to share its expectations regarding respectful interactions and to provide more accessible information to individuals who have experienced sexual assault/harassment/domestic violence/stalking in ways that students can readily access the information.

This can first be accomplished by providing the information on the web. The button “Current Students” has nine drop down options: undergraduate information, graduate information, adult learners, activities, student life resources, information technology, eLion, portal, and a category for “more.” A button should be added on this page that provides information on how to handle sexual assault and related issues. Focus groups of students should be convened to determine what terminology would be best for this purpose and the best methods for disseminating the information. The panel further recommends that the “Current Students” section include a button linking to the university police’s web site.

In addition to a change in the web site, to increase awareness of Penn State’s expectations of respectful behavior, the panel recommends that: 1) orientation week¹ for first year students should include a required sexual assault education using both professional educators and upper class students; 2) all student leaders (including athletes) should be required to participate in a workshop on sexual harassment prevention; 3) there should be annual campus-wide events that focus on respectful interactions and that highlight the university’s approach to addressing sexual assault/harassment; and 4) faculty and relevant staff should be provided with guidance on appropriately responding to/handling reports of sexual harassment/assault brought to their attention.

¹ John Snyder’s December 2, 2003 letter states that additional steps have already been taken to share Penn State’s expectations regarding respectful interactions.

F. Increase Education on Policies and Procedures Relevant to Sexual Assault, Sexual Harassment, and Relationship/Domestic Violence/Stalking

Review of current Penn State policies and preventative education initiatives related to the topics identified above should be centralized through the establishment of an institutional council that addresses sexual assault and relationship violence. This council should be comprised of representatives from the university and local police, the Center for Women Students, the Centre County Women's Resource Center, Judicial Affairs, Housing, University Health Services, residence life, Counseling, and Academic Advising. The Council should review data from anonymous reports, crime statistics and case conferences on a quarterly basis (or other set schedule) to determine if changes are needed in the development and/or implementation of policies in these areas. In addition, the council should serve the purpose of identifying gaps in services for individual victims as well as for the university's response to such matters. To ensure that the council is aware of the latest methods for effectively responding to allegations of sexual assault and harassment, the panel recommends that one or more members of the council annually attend the International Conference on Sexual Assault and Harassment on campus sponsored by the Safe Schools Coalition, Inc. Information can be found at www.thesafeschools.org. In addition, to ensure consistency with basic standards of due process, all or designated members of the council should be educated on the presumption of innocence in criminal and/or administrative proceedings.

G. Increase Victim Escort Options for Individuals Who Have Experienced Sexual Assault/Harassment/Domestic Violence/Stalking

Penn State has an escort service that is "designed to enhance ...safety and piece of mind if [someone] must walk after dark." (Information found at <http://www.psu.edu/dept/police/EscortService.htm>). These escorts are students who have been selected and employed by University Police and who have

undergone interpersonal communication and sensitivity training. Although these escorts are appropriate for most routine requests for escort, they are not appropriate for individuals who have experienced sexual assault, sexual harassment, domestic/relationship violence, or stalking. Therefore, individuals who have experienced any of these actions should be offered a non-student escort if requested or the Escort Service student employees should be extensively trained in issues related to sexual harassment and sexual assault.

H. Participation of University Officials in Civil or Criminal Processes

The University's conflict of interest statement should be revised to advise university officials that they are prohibited from providing opinions, in their official capacity, related to ongoing civil or criminal matters unless authorized by the university's senior administration and that they are prohibited from providing public support, in their official capacity, for Penn State individuals involved in ongoing civil or criminal matters. They should also be strongly encouraged to refrain from engaging in such behavior in their personal capacity. An annual statement should be signed by each university official acknowledging this agreement. In addition, training, whether through workshops or on line, should be provided to university officials upon hire and on an annual basis.

IV. Recommendations Relevant to Victim of Sexual Harassment /Assault

It became clear to the panel during the meetings held in April of 2003 that individuals who experience sexual assault or harassment have a number of resources available to them; however, the information is not in a "user friendly" format. As a result, the panel makes the following recommendations to better address the needs of the individual who has been victimized by sexual assault or harassment.

A. Develop Brochure with Sexual Assault/Harassment Protocol

Although Penn State offers numerous resources to alleged victims, including court accompaniment, housing, and academic support, the information about the resources does not inform an alleged victim about how to obtain these services and does not include information on the full process for addressing sexual assault/harassment matters.

Penn State should develop a simple brochure in a checklist format that outlines the steps involved in addressing sexual assault/harassment and related allegations and that lists all offices/individuals available to someone who has experienced sexual assault/harassment. This information should also be available on the web.

B. Establish Case Management System for Sexual Assault/Harassment and Related Matters

Penn State's Coalition to Address Relationship and Sexual Violence has developed a system of anonymous and confidential reporting of sexual assault. This should be expanded to include sexual harassment, stalking and relationship violence.

According to information obtained from Penn State's police web page; information "is collected to estimate the frequency of sexual assaults...the general nature of these offenses and the services provided to victims." In these cases, unless reported to the police, no investigation takes place.

The information on the website from the Penn State police indicates that in the year 2002, there were 91 anonymous reports of sexual assault but only 11 sex offenses reported to the police. Clearly, most cases do not get reported to the police.

We recommend that a case management system be set up to follow up on these reports. Each report should be assigned a number to protect the confidentiality of the victim. The report should then be shared with an appropriate subset of the university-wide council recommended in the prior section. A

representative from the Center for Women Students or other appropriate office should be charged with following-up with the victim over a period of time. Many victims of violence have a delayed reaction to it. Initially they may not want or need services. However, as time passes, issues associated with the assault emerge for many victims. A case management system that follows up can assist in this issue. This service, of course, must also be available for victim survivors who are going through the internal judicial or legal processes. This does not and should not replace the role of the Police Victim/Victim Advocate. This system will not only better serve victims who might not be able to reach out for services, but it also will enable Penn State to develop a tracking system to find out what happens to victims.

C. Broader Options Than “Trauma Drop”

Allowing a student faced with a traumatic sexual assault and its aftermath to withdraw from school for a semester or more should only be one option available to a student. Penn State’s goal throughout the process should be encouraging the student to remain in school, even if this is done with a reduced class load. Penn State should have a coordinated effort by which it works with professors, academic support staff, and the student to creatively address the student’s concerns with completing course work during the aftermath of the assault and the fear resulting from continuing harassment. Such efforts could include informing professors of the need to accommodate a student, individual tutors at confidential locations, online classes and coursework, extensions of academic deadlines, rescheduling or relocating exams, and assisting the student with identifying secure housing, including off-campus housing, if necessary.

V. Recommendations Relevant to the Alleged Respondent of Sexual Harassment/Assault

The panel recommends that Penn State consider implementing a policy that mandates withdrawal of students accused with sexual assault while felony charges are pending.

One of the most troubling aspects of this case was the protracted delay in the resolution of this matter, leading to unnecessary stress and anxiety to the victim and an unintentional message to the larger community that sexual assault charges are not taken seriously.

In analogous situations in the public employment context, it appears to be common practice for public employees accused of sexual assault (or other crimes) to be suspended without pay if there is an underlying felony charge, issued after a grand jury indictment or a preliminary hearing before a judge. The suspension without pay may remain in place until the criminal charges are resolved.

Although this analogy is not perfect, this does provide support for Penn State implementing a mandatory "withdrawal while felony charges pending" provision. The implementation of such a withdrawal would be preceded by a rudimentary hearing, designed to challenge any obvious errors (e.g. the criminal charge in question was a misdemeanor, not a felony); to show that some transparent miscarriage of justice has occurred; or that the alleged crime, if proven, has no bearing on any legitimate university interest.

Although noted on the official transcript, the "withdrawal while felony charges pending" statement would not be considered a disciplinary finding or penalty. No student, based on such a withdrawal alone, would be considered to have a disciplinary record.

We assume most courts will find a property interest in a student's continued enrollment at a public institution of higher education. Essentially, whether or not the "disciplinary" label is applied, students subject to "withdrawal while felony charges pending" are entitled to some kind of due process. The key question is how the extent and nature of that due process should be defined. The case, Goss v. Lopez, 419 U.S. 565 (1975), can be helpful to Penn State in making that determining. In Goss, the Court determined that it was the nature, and not the "weight" of interest that was a stake. Therefore, as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. In determining the extent and nature of the due process required, the Court in Goss stated "the timing and

content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."

For accused students, the main interest would relate to the uninterrupted continuation of their education at a particular location, including any related opportunities to compete in intercollegiate athletics. It cannot be said that a withdrawn student has been subjected to any additional stigma (beyond the public record of the felony charge itself), or denied educational opportunities altogether. The student might be hampered, but certainly would not be precluded from enrolling elsewhere, especially in rapidly growing accredited degree programs conducted online. Any transition might be eased if appropriate refunds and retroactive withdrawals are granted by Penn State. Scholarship athletes would suffer the greatest potential harm; however, even that impact could be reduced by holding an athletic scholarship open and exploring options for "redshirting" the athlete. The aim, of course, is to make the required withdrawal as non-punitive as possible.

For the University, a "withdrawal while felony charges pending" policy can be justified by the residential nature of the University, and the relative vulnerability of inexperienced young adults living, working, and playing in environments designed to maximize freedom and accessibility. Allowing a student accused of a serious crime to remain in such a setting (especially when complainants and pertinent witnesses are present) is bound to generate reasonable concerns about safety, security, and possible harassment, or retaliation to the point that the college's educational aims are likely to be disrupted. It is also reasonable for colleges to be concerned about their reputation among the general public, including prospective students, when a student accused of a felony is allowed to remain on campus pending a criminal trial.

At least part of the University's interest in implementing a "withdrawal while felony charges pending," procedure would relate to making "predictions" of potential harm or disruption. There are indications, at least in the context of regulating employee speech, that such predictions merit "substantial weight" in the courts (see Waters v. Churchill, 511 U.S. 661, 1994). While college students are not likely to be equated to employees, tort law decisions recognizing

a duty of care (based on a "special relationship" between students and colleges, especially on matters related to safety and security) may promote a recognition of at least "some" deference to the prediction that keeping a student accused of a felony on campus creates a substantial and unacceptable risk of harm.

It was clear in Goss that schools and colleges could create an interim suspension procedure with a post-deprivation hearing, particularly when a student's presence poses a danger to other students or where there is an ongoing threat of interruption of the academic process. It may not be "practicable" to hold a full disciplinary hearing when an underlying felony charge has yet to be resolved, especially when local authorities and potential witnesses decline to cooperate or participate.

The task of defining the nature and extent of appropriate due process protections in a "withdrawal while felony charges pending" policy should encompass the protections already accorded in preliminary hearings (or other procedures) invoked by state or federal judicial systems prior to implementing a felony charge or indictment. Those procedures, standing alone, are sufficient to deprive a person of liberty pending possible release on bail. They may also be sufficient to justify limiting an accused student's access to a college campus pending trial.

In sexual assault cases, a complicating factor in implementing a "withdrawal while felony charges pending" policy is the following language in the OCR 2001 "Revised Sexual Harassment Guidance," available at: <http://www.ed.gov/offices/OCR/shguide/>

“In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.”

A policy of withdrawing students while felony charges are pending sends a powerful message about institutional priorities (especially when prominent athletes may be involved), reduces the risk of ongoing harassment and retaliation, and eliminates incentives to accused students to try to delay criminal proceedings until graduation. In this context, it is reasonable for colleges to suggest that utilizing such a mandatory withdrawal policy constitutes in itself a "prompt and effective response" to alleged harassing behavior.

Likewise, Penn State's process should provide that "[t]he standard or presumptive penalty for sexual assault should be permanent expulsion." This language reflects the reality that there are many levels of sexual assault (from unwelcome touching to rape). Also, as several observers have seen in the context of traditional honor codes, "automatic expulsion" penalties tend to distort the fact finding process, leading to acquittals in "minor" cases. A presumptive penalty with some room for lesser sanctions will enhance enforcement.

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