REFRAMING CAMPUS CONFLICT

Student Conduct Practice Through a Social Justice Lens

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2

WHEN STUDENT LEARNING AND LAW MERGE TO CREATE EDUCATIONAL STUDENT CONFLICT RESOLUTION AND EFFECTIVE CONDUCT MANAGEMENT PROGRAMS

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> Learning is a complex, holistic, multi-centric activity that occurs throughout and across the college experience. Student development and the adaptation of learning to students' lives and needs, are fundamental parts of engaged learning and liberal education. . . . Learning, development and identity formation can no longer be considered as separate from each other; they are interactive and shape each other as they evolve.
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> *National Association of Student Personnel Administrators (NASPA) & American College Personnel Administrators /College Student Educators International (ACPA) 2004, p. 8.*

In this comprehensive chapter, we explore how a commitment to legal compliance is not at odds with but rather aligns well with an educationally driven approach to the work of student conflict resolution and student conduct management. This approach advances students' holistic learning and is a recurring theme throughout this book. In the area of student conflict resolution and conduct management, higher education institutions are constantly managing their responsibilities to safeguard the

community's well-being and to develop and educate the individual student. Ideally, we are able to meet the individual student's needs without compromising the health and safety of the community or the institution's overall fiduciary responsibilities. Similarly, the institution's commitment to educating the whole student requires an intentional focus on the student's academic/professional development as well as the student's psychosocial development. We are constantly and intentionally engaged in student development and learning in the ever-expanding extended classroom. The disequilibrium created from student conflicts and student conduct issues, therefore, becomes a natural experiential stage from which educators can direct a student's personal growth and influence the community's definition of a just society.

Historically, the response to student conflict and misconduct is rooted in legal theories designed to determine a student's guilt or innocence through a traditional hearing model. While current Model Student Conduct Code (Stoner & Lowery, 2004) advocates move away from legalistic language modeled after the courts (e.g., guilt vs. innocence), the code's fundamental purpose remains to provide a standard corrective or disciplinary response to guilty behavior. This rubric ensures that students are not deprived of fundamental rights without due process, students are treated similarly for similar misconduct, the institution's compelling interest in maintaining a safe and healthy community is satisfied by prompt corrective action, and scarce resources are efficiently managed through the use of a standard disciplinary process.

What is lacking in this risk-reduction model is the conscious decision to support individual growth in the areas of moral and ethical decision making, social identity development, cultural competency, and other components of psychosocial development theory. In many cases, student learning is an unintended consequence rather than an intentional outcome. In our one-dimensional effort to protect people from disparate treatment, arbitrariness, and capriciousness, there is insufficient latitude to grapple with the complexity of the individual student that an institutional commitment to student learning, diversity, and inclusiveness demands. Similarly, in our isolated effort to minimize liability and risk (e.g., legal exposure, bad publicity, stakeholder backlash), we may simply postpone or even escalate the emergence of more serious problems by placing narrow policy standards over the individual needs and experiences of people. Harwood (2008) describes this dynamic in an article promoting the use of campus threat assessment teams:

> There are times when an assessment team finds that the subject is simply enraged about being charged administratively with a minor violation of a

> university rule. The situation then escalates because a campus bureaucrat holds strong and says he or she can't overlook the subject's infraction. "Sometimes," says Martin, "we have to say 'Break the rule. Make the exception . . . if that's what it takes to defuse a volatile situation.'" Of course, students also have to know that threats and violence are not the way to resolve such problems. So at the same time that the team may help to address the issue, it also has to address the student's behavior." (p. 76)

Infusing an educationally grounded approach with an institutional risk-reduction model creates the opportunity to break out of the false dichotomy of doing the right thing versus doing the thing right. Drawing on theories of moral and ethical development as well as psychosocial development, we offer in this chapter a conceptual framework for accomplishing the essential intra- and interpersonal development work implicit in student conflict and conduct management. This chapter makes the case for how an informed approach grounded in clarity about educational purpose can result in meaningful student interventions that become the rule, not the exception. These interventions encourage individual ethical development and teach/practice the fundamentals of good citizenship in a diverse society, and at the same time responsibly manage the legal and risk management concerns of the university. We argue that intentionally engaging in student development and learning through conflict resolution pathways, such as negotiation, restorative justice circles, mediation, or facilitated dialogue, actually complements the institution's legal compliance and risk management programs.

Principles for Grounding Conflict Resolution Work in Student Learning

As educators, wise practice will be informed by our understanding of

- ***what*** students are learning (intra- and interpersonal competency and character)
- ***where*** they are learning it (every "where" physically and virtually)
- ***how*** they are learning (concretely, experientially, abstractly)
- and ***with whom*** (educators, intimate and virtual peers, themselves)

With this grounding, we may be more likely to conceive of educational interventions and environments that meet today's students where they are and stretch them toward their best "possible selves," a borrowed term suggesting that it is only when individuals have awareness of what options are available

for their lives, can they aspire to these futures (Markus & Nurius, 1986). The purpose of this section is to provide the foundations for educators who manage conflict to ground their work in the principles, theory, and research of student learning.

What Is Student Learning?

The constructs of student *learning* and student *development* were at one time regarded as separate. A more sophisticated understanding of learning exists today that accounts for the "complex, holistic, multi-centric activity that occurs throughout and across the college experience" (NASPA & ACPA, 2004, p. 8).

What learning are we trying to inspire in students, and to what end? Over at least the past two decades, numerous reports have emerged from national associations and governmental agencies articulating desired college outcomes. While the language associated with the aims of higher education might shift over time and across reports, the fundamental purpose that guides educators has remained steady and is captured broadly within the following, not necessarily mutually exclusive, constructs:[1]

- Knowledge acquisition
- Intrapersonal competence
- Interpersonal competence
- Cognitive and moral/ethical complexity
- Practical competence/skill development
- Global civic engagement and social responsibility
- Life-long integrative learning/self-authorship

Taken together, these outcomes might be aggregated to describe what Gardner, Csikszentmihalyi, and Damon (2001) call developing *competence and character*. That is, "Individuals exhibit a sense of autonomy and maturity, while at the same time maintaining a connection to the wider community, to vital traditions of earlier times, and to people and institutions yet to come" (p. 243). Yet, in their study of individuals identified as rating highly in competence and character, Gardner et al. revealed an even greater intercultural development outcome reaching beyond individualistic virtues—that of differentiation and integration.

> Optimal development of a person involves fulfilling two potentials that we all have: *differentiation* and *integration*. A differentiated person is competent, has character, and has achieved a fully autonomous individuality.

> This is the highest goal of Western cultures. An integrated person is someone whose goals, values, thoughts, and actions are in harmony; someone who belongs to a network of relationships; someone who accepts a place within a system of mutual responsibilities and shared meanings. In many Eastern cultures, it is integration that is held to be the highest goal of human development. A future worth striving for, in our opinion, is one where a person can develop both differentiation and integration to their fullest extent. (p. 243)

According to the authors, differentiation and integration are the foundation for engaging in *good work*. Gardner et al. describe good work as "work of expert quality that benefits the broader society" (p. ix). Within the context of learning outcomes being grounded in optimal individual development and contribution to the greater good, we argue that student conflict resolution work has the capacity, if done with intentionality, to guide competence and character, differentiation and integration. Choosing to approach student conflict work with these learning outcomes at the forefront is a commitment by student affairs professionals to serve as educators in the higher-learning enterprise.

What Fundamental Theories Ground Student Conflict and Conduct Work?

> "Thin" theor[ies] . . . leave out the unwieldy bulk of human personality and the untidy commingling of real lives filled with dread and aspirations. Philosophers of thin theories treat similar cases similarly, without much regard for moral psychology or the particularity of individual persons. Thin theories are clean and neat. . . . Thick theories require qualifications about the nature of societies and differences among the human animals who live in them. They involve a more complex moral psychology that views human beings as motivated by more—and less—than reason. (Laney, 1990, p. 49)

A theoretical orientation informs how educators influence development along an array of learning outcomes. Being theory grounded informs practice and, employed wisely, elevates perfunctory activities to educationally purposeful interactions. For example, when can community service or a reflective paper transform from a standard sanction into a vehicle for integrative learning for students to better understand themselves and their role in a just society? As educators, intentionality of action informed by knowledge must be the measure for effective work with students. This framing offers an important reference point for the theory-to-practice model and pathways presented in subsequent chapters. The theories, the model, and the pathways

are neither clean nor neat and yet must be considered as we strive to increase our effectiveness with students.

Current research in the physiology of brain development suggests that the prefrontal cortex, that region that controls judgment and impulse, is one of the last areas to develop and may not reach maturity until one's mid-20s (Giedd, 2004; Reyna & Farley, 2006; Winters, 2008). This suggests a greater degree of influence for higher education in terms of affecting moral and ethical development in students. Developmental theories inform us about what students learn and how they make meaning. A substantial cognitive psychology literature base demonstrates the relationship between intellectual and moral development. Cognitive, moral, and ethical development and learning theory help explain *how* students make meaning and approach experiences. It also explains how making meaning may be influenced and mediated by their own unique selves including social identities and learning styles. While much of the research literature is based on 18- to 22-year-old college students, the use of the term *student* here is intended to include students of all social identities and of all class levels, from entering to PhD (Astin, 1993; Chickering & Reisser, 1993; Erikson, 1968; Feldman & Newcomb, 1969; King & Kitchener, 1994; Sanford, 1962; Terenzini, Pascarella, & Blimling, 1996; Upcraft, 1994).

Most cognitive development theories assert that as students gain cognitive complexity, they develop the capacity to shift from an externally driven to an internally driven sense of self and evolve in their moral reasoning and reflective judgment. They more fully integrate from an authority-defined right from wrong to a more nuanced sense of who they are, who they desire to be, and the extent to which there is congruence between their thoughts and their behaviors (Baxter Magolda, 1998; Gardner, 2006; Gardner et al., 2001; King & Kitchener, 1994; Kohlberg, 1976; Kolb, 1981; National Research Council, 2000; Pascarella & Terenzini, 2005; Perry, 1970). Understanding the relationship between moral development and conduct and conflict work creates a bridge for the work to be used as the vehicle for practicing the individual skills associated with developing what Gardner et al. coined as competence and character.

Psychosocial development literature also informs conflict resolution work as it concerns itself with the *what* of higher learning. Closely aligned with the learning outcomes discussed earlier, these developmental tasks include mastering knowledge, developing competence, managing emotions, and establishing a sense of self, purpose, and integrity (Chickering & Reisser, 1993). When students abuse substances, argue with their roommates, or inappropriately assert themselves with others, they reveal the personal work

required to better understand the alignment between who they are and who they aspire to be.

Psychosocial tasks cross as students gain the knowledge, awareness, and skills to understand the complexities of their diverse social identities and their relationship to others in a society that bestows different power and privilege to these different identities. This includes but is not limited to social diversity of race, ethnicity, nationality, class, sexual orientation, gender and gender orientation, disability, religion, age, and intellectual diversity of ideas, and their intersectionality. The grasp of the complex intersectionality across multiple identities leads to intercultural understanding, and, per Gardner et al. (2001), to gaining the tools to engage meaningfully in good work. Gaining that grasp requires taking risks to understand oneself more fully and to learn from interactions with others. One can see the clear vision line between these tasks, the conflict this may create, and the role conflict resolution educators can play. In this respect, conflict resolution work is in the service of a greater goal for individuals and society (Hardiman & Jackson, 1992; Jones & McEwen, 2000; McIntosh, 1992; Pope, 2000; Robinson, 1993; Schlossberg, 1989; Tatum, 1997; Zuniga, Ratnesh, Nagda, Chesler, & Cytron-Walker, 2007).

Current conceptualizations of the student experience advance *thick theories*, bringing together the wealth of knowledge garnered across multiple theory bases. In her study on the relationship of moral development to enhancing tolerance for diversity, Taylor (1998) introduced a model that was a confluence of cognitive and psychosocial development, interactionist theory, sociological theory, and college impact. *Self-authorship*, a concept first introduced by Kegan (1982) and expanded by Baxter Magolda and King (2004), brings together epistemological, intrapersonal, and interpersonal foundations for the development of cognitive maturity, integrated identity, and mature relationships that converge to create effective citizenship (Baxter Magolda, 1998; Baxter Magolda & King; Kegan).

Taylor (2008) has introduced a comprehensive model that is a synthesis of multiple theories and models, which themselves derive from multiple perspectives that integrate key constructs from decades of research about college students, including Baxter Magolda and King's (2004) self-authorship model. From her synthesis, she draws a conceptual map to describe the student journey from Following External Formulas to Standing at the Crossroads, Becoming Self-Authored, and Building an Internal Foundation (Figure 2.1). Such an integrated approach allows researchers and practitioners alike to live into the holistic concept of learning by reinforcing the inextricable links between cognitive and psychosocial growth and the role played by environmental/social influences to foster and/or impede this growth.

A well-documented component for fostering growth is the presence of disequilibrium or "crisis" that causes students to challenge (with support) previous assumptions about themselves, their external influences, and their micro and meta relationships in society (Erikson, 1968; Light, 2001; Sanford, 1962). Adapted from Taylor (2008), Figure 2.1 aligns some of the types of questions prompted at each stage of development. Student conflict resolution educators can perhaps easily imagine how using this integrated map could inform how one would engage meaningfully with a student presenting with a disequilibrium opportunity, whether addressing drinking behavior or allegations of harassment. The student, and the conduct and conflict resolution educator, are offered a teachable moment. Consistently, that teachable moment is in service of encouraging individual competence and character and in building these qualities to enhance one's contribution to the greater good.

Where Do Students Learn?

Students are learning to negotiate complex relationships, including the one they have with themselves. Moreover, they are learning to be good citizens

FIGURE 2.1
Mapping Intricacies of Young Adults' Developmental Journey

	 Following external formulas	 Standing at the crossroads	 Becoming self-authored	 Building an internal foundation
Cognitive	What authorities say about what I should know	How do I know?	I know because...	I know because...but I also accept ambiguity
Intrapersonal	What authorities say about what I should be	Who am I?	I am..	I am...even when environmental forces pressure me to change
Interpersonal	What authorities say about kinds of relationships I should have	What type of relationships do I want to have?	I want relationships that...	I want relationships that...but negotiate to meet both my needs and others' needs

Note. Adapted from "Mapping Intricacies of Young Adults' Developmental Journey" (K. Taylor). *The Journal of College Student Development*; May/June 2008, *49*(3); p. 226.

and leaders in a global community. In total, students have a 24-hour-a-day job mastering content, learning sophisticated critical thinking skills, establishing a moral compass, and developing the knowledge, skills, and awareness associated with becoming a global citizen. Those 24 hours are spent in the classroom, in cocurricular activities, at work and at study, and in their living environments. These are 24 hours of potential time to "become habituated to a vision of the good society by inhabiting a good community of scholars" (Laney, 1990, p. 59); 24 hours making wise decisions and at times employing poor judgment, sometimes simultaneously.

In keeping with Taylor's (2008) model, we can imagine students negotiating an array of internal and external conflicts as they journey from socially prescribed to internally driven modes of being. Representative conflicts are illustrated in Table 2.1 and Table 2.2.

How Can Students Be at the Center of Their Own Learning? With Whom Are They learning?

How best might students learn to negotiate these untested and uncertain territories? Advocates of active student learning propose placing students at the center of their own learning. Astin (1993) refers to this as *engagement*, the notion of the required physical and psychological energy directed at a learning task. When learning occurs at the cognitive and affective levels and as a result of *active learning* through experience, it is more likely to become truly integrated. Kolb's (1981) experiential learning model provides an iterative learning cycle for active learning. This model describes types of learning

TABLE 2.1
Examples of Negotiating Internal Conflicts

Presenting Concern	*Internal Conflict*
Choosing major and career	Will I choose what my parents have selected for me or follow my passion?
Determining one's value system in a competitive environment	Will I (or to what degree will I) compromise my value system to ensure I advance well? To what extent can I "do well" if/when I "do good?"
Reconciling multiple social identities and related privilege and subjugation	Will I acknowledge and live into my life as a White, gay male?
Determining one's personal identity	Who am I? Why do I believe what I believe?

TABLE 2.2
Examples of Negotiating External Conflicts

Presenting Concern	*External Conflict*
Roommate conflict	How can I reconcile differences with someone so different from myself?
Romantic and/or sexual relationship	How can I understand what are the appropriate boundaries with a potential partner?
Adhering to rules, regulations, and laws set by society and the institution	How can I decide when I can assert my own will and when I need to follow external principles and directives?
Hazing	How do I reconcile my desire to engage in traditional bonding activities with my peers with my responsibility not to harm myself or others?

from concrete to abstract and proposes that a student may enter at any access point in the cycle, depending on his or her learning style, and engage in learning. This engagement occurs within and throughout the extended classroom. Kegan (1982) places an emphasis on the learners themselves and advances three principles critical for effective learning, which he says occurs when students

- bring their own life experiences to their learning
- are validated as knowers
- work with educators to mutually construct meaning

The idea of mutually constructing meaning supports Freire's (1997) concept of educators and students together engaging as "simultaneous teachers *and* students" (p. 53) in the enterprise of creating knowledge together. It is an empowerment model that represents a recurring motif in the literature for promoting active student learning. Another recurring motif in the college impact literature concerns itself with the influence of role models and, in particular, peers (Alwin, Cohen, & Newcomb, 1991; Astin, 1993; Pascarella & Terenzini, 1991, 2005). In their qualitative study regarding good workers, Fischman, Solomon, Greenspan, and Gardner (2004) identified six factors influencing good work, that is, work derived from competency and character. These factors align substantially with college impact research conducted over time and include

- Long-standing belief and value system (often derived from family, religion, philosophy, and organized groups and then internalized)
- Role models, mentors (learning positive lessons from those admired and also lessons from negative antimentors)
- Peers (the ethical standards of peers can reinforce or undercut tendencies)
- Pivotal experiences (experiential tipping points can influence a more or less ethical course)
- Institutional milieu (includes norms, observed behaviors, organizational histories)
- Periodic inoculations (this reinforces pivotal experiences to strengthen resolve) (adapted from Fischman et al., pp. 167–183)

According to Fischman et al. (2004), "when [these factors] all point in a positive direction, one is likely to encounter a good worker. When the signals are weak or decidedly mixed, or when they point collectively in a negative direction, one is likely to encounter a worker of indifferent or poor quality" (p. 173).

Taken together, educators are led to the conclusion that students learn best what they discover for themselves cognitively, affectively, and experientially (Blimling, Whitt, & Associates, 1999). This is a compelling case for structuring conduct and conflict work to empower community members to engage educationally and intentionally with students across the expanse of the formal and extended classroom. It is a particularly compelling case for students themselves, whether directly involved or affected by a conflict or incident of misconduct or part of the educational community at large, to play an active role in constructing their own learning and making their own meaning (Astin, 1993; Baxter Magolda, 1999; Freire, 1970/1997; Kegan, 1982; Kolb, 1981; Kuh, Schuh, & Whitt, 1991, 2005; Light, 2001; Pascarella & Terenzini, 1991, 2005).

Because we are reminded that "learning is a complex, holistic, multicentric activity" and that learning and development are not separate entities (NASPA & ACPA 2004, p. 5), the sight line between learning, conflict, and conduct work is made. Yet, to gain a fuller understanding of conflict resolution and conduct management, legal principles must also be fully integrated into the conflict equation. Together with an educational orientation, the balance of individual growth and community accountability may be aligned and actualized. We now turn to legal considerations.

The Role of Law in Student Conflict and Conduct Management

Understanding the legal principles that the traditional judicial approach to student conflict and conduct management are based on is necessary to challenge the either/or view that legal compliance is at odds with conflict resolution methods premised in student learning theories. The legal cornerstones of student conduct management are the concepts of due process and nondiscrimination. We are legally compelled through constitutional requirements or contractual obligations to provide students with fundamental fairness before imposing sanctions affecting their continued enrollment. We are also required to respond to similar misconduct in similar ways, suggesting that fairness requires sameness. As a result, the primary focus from a legal compliance perspective in developing student conflict and conduct management policies is the establishment of clear behavioral standards and resolution procedures that can be applied uniformly to all students. Consistent with this legal framing, all students who set off the fire alarm/sprinkler system in a residence hall are generally subjected to the same disciplinary procedures and set of sanctions regardless of whether subsequent damage or community disruption resulted from the careless use of a microwave, intentional attempted arson, or the burning of paper shoes as an expression of a traditional Chinese death ritual. The impact of the student's misconduct supersedes the student's intent.

An educationally grounded approach to student conflict and conduct management suggests that student learning theories should inform the *institutional process* for managing misconduct as well as the *institutional response* to the misconduct through sanctioning. In this case, the student's intent supersedes the result of the student's misconduct. The careless student, the deliberate arsonist, and the culturally conscious student may be at different points in their cognitive, intrapersonal, and interpersonal development. Likewise, each student poses a different risk to the health and safety of the overall community.

How then do we meet the individual student at his or her unique developmental stage without engaging in disparate treatment? How do we move beyond the comfort and ease of a uniform response to student conflict and conduct issues to create a space for individualized intervention and growth for all participants in the conflict? How do we appropriately balance the individual student's needs and the institution's interests and fiduciary responsibilities to maintain a healthy and safe community?

To answer these questions, we must first challenge the premise that fairness requires sameness. Fairness is not about everyone being treated the same, but rather it is about everyone getting what they need. This is a foundational principle of social justice.

> [Thick theories] do not lend themselves to severing values from facts and making moral decisions on the basis of general empirical induction. They frequently begin . . . with a vision of what is good rather than a vision of what is right, and they speak more about virtue and character and tradition than they do about law and obedience and duty. (Laney, 1990, p. 50)

When we rely on established student learning and development theories to tailor an appropriate institutional response to student conflict and conduct issues, we are able to advance the overall academic mission. Similarly, when we invest in a spectrum of conflict resolution methods that are able to meet the variety of student conflict and conduct issues that arise, we are then able to be truly fair.

Due Process

The concept of due process stems from federal and state constitutional law. At the core of the Fourteenth Amendment to the U.S. Constitution (Section 1) is the belief that before the government can take away or burden a citizen's fundamental life, liberty, and property interests, the citizen must be given due process (*Goss v. Lopez*, 1975). The due process clause of the Fourteenth Amendment of the Constitution encompasses the idea that an individual's liberty and property interests are protected by substantive and procedural due process rights (*Goss v. Lopez*). Over many decades of American jurisprudence, the Supreme Court has determined that *substantive due process rights* are rooted in the Constitution and represent those individual freedoms that are so necessary to the foundation of the American judicial and political systems that neither liberty nor justice would exist if these rights were abolished. Examples include the right to marry, to have children, to determine the education and raising of one's children, the right to marital privacy, the use of contraception, bodily integrity and abortion, and refusal of unwanted lifesaving medical treatment (*Palko v. State of Connecticut,* 1937; *Washington v. Glucksberg*, 1997).

The U.S. Supreme Court has yet to conclude that continued enrollment in a public college or university is a constitutionally protected interest entitled to substantive due process protections. On two notable occasions, the Supreme Court has considered whether public universities violated the Fourteenth Amendment when dismissing students for unsatisfactory academic

performance (*Soong v. University of Hawaii at Hilo*, 1992). In the *Board of Curators of the University of Missouri v. Horowitz* (1978) case, the Supreme Court assumed for the sake of argument that the student was entitled to substantive due process protection and then quickly determined that because there was evidence that the university was careful and deliberate in its decision making that the university did not act arbitrarily or capriciously in reaching its conclusion, that the student failed to meet the academic standards of the program. In doing so, the court recognized that

> the educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles—educator, adviser, friend, and at times, parent-substitute." . . . This is especially true as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized. (p. 90)

In the other case, *Regents of the University of Michigan v. Ewing* (1985), the Supreme Court assumed that the student had an implied contractual right to continued enrollment but decided there was no evidence the university acted arbitrarily when the record showed that the university's process was fair, that the university acted in good faith, and the university offered good reasons for its dismissal decision. In fact, Justice Lewis F. Powell opined in a concurring opinion that a student's interest in continued enrollment at a public institution "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution" (pp. 229–230).

The duty to make reasoned and rational decisions regarding student conflict and conduct issues is usually viewed as a contractual duty that is created by the educational institution's conduct policies, handbooks, and codes of conduct (*Dixon v. Alabama State Board of Education*, 1961).[2] The existence of an implied contract is a matter of state law (*Bishop v. Woods*, 1976; *Regents of the University of Michigan v. Ewing*, 1985). Private institutions may also obligate themselves, through their student handbooks and policies, to be fundamentally fair in the administration of student conduct policies by avoiding arbitrary and capricious actions (Tenerowicz, 2001).

While it remains uncertain whether continued enrollment at a public institution is a property interest protected by substantive due process, it has been clearly established that public institutions must comply with the procedural due process requirements of the Fourteenth Amendment before suspending or expelling a student for nonacademic misconduct (*Dixon v.*

Alabama State Board of Education, 1961).[3] The Supreme Court held in *Goss v. Lopez* (1975) that "at the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing" (p. 579). The required notice consists of specific information regarding the charges of misconduct and the policies that are alleged to have been violated, so the student can adequately respond to the charges (*Goss v. Lopez,* 1975). In terms of a hearing, all that is required is that the student be provided with a meaningful opportunity to be heard and tell his or her version of events (*Goss v. Lopez,* 1975).[4] In fact, the notice and hearing can occur simultaneously (*Goss v. Lopez,* 1975).[5] As such, an informal interview is sufficient in most situations (*Dixon v. Alabama State Board of Education,* 1961). In short, procedural due process simply requires fundamental fairness (*Dixon v. Alabama State Board of Education,* 1961).[6]

The Supreme Court has recognized that procedural due process is not a technical rule that should be mechanically applied in all cases (*Cafeteria & Restaurant Workers v. McElroy,* 1961). On the contrary, the court has consistently held that "due process is flexible and calls for such procedural protections as the particular situation demands" (*Morrisey v. Brewer,* 1972). In fact, in certain emergent circumstances where it is necessary for the state to act quickly, due process may be provided after a temporary suspension has been ordered (*Gilbert v. Homar,* 1997).[7] Similarly, the idea that schools must provide a formal, adversarial hearing model to satisfy the constitutional requirements of procedural due process has been completely and consistently rejected by federal courts beginning with the case of *Goss v. Lopez* (1975), in which the Supreme Court held that "formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process" (p. 583).

Having a spectrum of conflict resolution pathways available to resolve student conflicts or to manage student behaviors in a manner that is consistent with student learning and social justice theories is aligned with the constitutional concepts of substantive and procedural due process. Pathways selected and applied in a responsible manner are inherently thoughtful, deliberate, and reasoned (as opposed to being arbitrary or capricious). Similarly, no matter which pathway is most appropriate, the student is still guaranteed notice and an opportunity to be heard. Pathways such as facilitated dialogue, mediation, and restorative justice circles actually provide a greater opportunity for the student to be heard than the more formal adjudication pathways. Moreover, these forums are intentionally tailored to provide the

affected students with a safer and more egalitarian space to share their personal narrative than what can be provided in a traditional arbitration/hearing process.

Conflict resolution educators can determine the desired learning outcomes that students should master as a result of their participation in campus conflict resolution procedures and then infuse student learning theories into the establishment of conflict resolution programs/policies without compromising the institution's due process obligations. If the goal is to teach students to understand themselves as part of a community and to appreciate how their actions affect others, this can be achieved through a traditional judicial hearing by holding the student strictly accountable for violation of community rules and regulations. But this goal may also be achieved through pathways offered as a diversion from the judicial hearing process, such as restorative justice practices or mediation. If the goal is for students to become aware of their internally driven selves and evolve their moral and ethical decision making based on an appreciation of the source of their motives and intent, then a facilitated dialogue between parties coupled with a reflective writing exercise may be appropriate. The range of possibilities to support student learning is endless within the legal framework of fundamental fairness (i.e., notice and opportunity to be heard).

Nondiscrimination

Civil rights laws enacted by federal, state, and local governments in addition to institutional nondiscrimination policies prohibit disparate treatment of students based on their protected status, and protect people against rules and practices that disparately have an impact on a group of students based on their membership in a protected classification.[8] Key to a disparate treatment claim is evidence of an intentional discriminatory motive that is proven by either direct or indirect evidence. Also key to a disparate impact claim is evidence that an otherwise neutral policy or practice disproportionally negatively affects certain protected groups. Therefore, it is understandable that educational institutions prefer a uniform disciplinary process to protect students from the possibility of unbridled discretion, discriminatory animus, bias, or poor judgment of educators who administer conduct and conflict resolution programs. The effectiveness of the student conflict or conduct management program can suffer if there is no consistency in the institutional response or outcome. Uniform disciplinary processes help to neutralize the impacts of structural privileges and disadvantages that exist within an institution.

In addition, uniform disciplinary processes help to ensure that over time and across decentralized institutions, students are treated similarly for similar misconduct. Complying with a standard disciplinary protocol limits the ability of others to influence the institutional response to student misconduct because of the identity of the accused student, the identity of the other involved student(s), or the negative consequences for the institution. The more options that are available in a student conflict and conduct management program and the less obvious the desired learning outcomes are, the greater the opportunity for intentional or unintentional discriminatory treatment exists.

Yet, treating everyone the same, without regard to the interplay of intent versus consequence, or individual versus community, or thin theories versus thick theories can also result in unfair and discriminatory outcomes for individual students. This is because of structural biases inherent in institutions and the primacy of the dominant narratives on each campus.

Consider the case of undergraduate student "Sarah" labeled a threat by a professor who desires her immediate removal from future classes. The professor describes Sarah's classroom behavior as intimidating, confrontational, and disruptive. According to the professor, Sarah takes over classroom discussions without allowing other students' voices to be heard and inappropriately challenges authority. This conflict has resulted in a verbal altercation between Sarah and the professor. As a result some students no longer want to attend class. The professor refuses to teach the class if Sarah remains in it.

Before initiating the disciplinary hearing process, the associate dean interviews Sarah and learns that Sarah is an adult in her mid-50s who is returning to school to finish her undergraduate degree. She is an African American woman who appears to be thoughtful and confident. Sarah acknowledges the tension between her and the professor, a White male in his 40s, and explains that she is frustrated at being ignored and marginalized by the professor whom she feels never wants to acknowledge her and who disrespects her regularly. Sarah doesn't see her actions as threatening or disruptive but merely an appropriate effort to engage fully in classroom discussions and to be heard. According to Sarah, the younger students never have anything to say or contribute to the discussion.

The principle of nondiscrimination does not require the institution to ignore any of these relevant facts in determining an appropriate resolution between the professor and student if the learning outcomes of the institution's conflict and conduct management programs are clearly established and demand consideration of those factors. Establishing desired learning outcomes leads to the creation of conflict resolution and conduct management

tools that are informed by congruent student learning theories. Inconsistent pursuit of the desired learning outcomes then becomes a test for whether disparate treatment is occurring.

Using a spectrum of conflict resolution options does not forego any of the procedural safeguards provided to students through the formal pathway of adjudication, as long as the pathways are managed by educated, well-developed, and highly skilled professionals capable of tailoring a forum that effectively meets the desired learning outcomes for the individual student and protects him or her against discriminatory conduct. The conflict resolution and conduct management program that is educationally grounded can comply with the institution's nondiscrimination obligations under two conditions.

First, all the participants must choose to participate in the selected alternative conflict resolution pathway and must do so in good faith. Pathways that empower participants to engage in their own conflict resolution methods only work if the individuals are developmentally capable of meaningful participation and learning. If students benefit from the effective resolution of their conflict or conduct issue from the chosen alternative pathway, then they have received what they need from the process and will have been treated fairly. If students choose not to participate in an alternative conflict resolution pathway, then the traditional hearing model should be the default process. By maintaining the traditional hearing model as part of the overall program, the students have the same protections against nondiscrimination that have always existed at that institution.

Second, student affairs educators must build trust in the administration of the conflict resolution and conduct management program. There must be clarity and transparency in the purpose and process of the spectrum of pathways in order to avoid a perception of disparate treatment that may result when the community experiences differing processes and outcomes. Students must be confident that regardless of the chosen pathway, they will be provided with a full and fair opportunity to be heard and respected, that they will be safe in the process and not further harmed, that a resolution will be reached in a timely manner, and that the resolution will be effective. The conflict resolution educator or conduct administrator must be sophisticated in understanding student learning theories in general, and ethical development specifically, to appropriately identify the student's readiness for a transformative experience. The professional also must command a full understanding of his or her own ethical development and social identities to avoid engaging in stereotyping and other biased decision making. That is, the effective educator requires a strongly developed internal foundation.

Returning to the case of Sarah, having the option of a facilitated dialogue or mediation allows the institution to appropriately address the conflict in a forum that views her as an equal participant rather than an alleged wrongdoer. The less-formal pathways for conflict resolution where the desired outcome is win-win provide Sarah and the professor space to engage in thoughtful reflection about their interaction. More traditional interventions such as hearings encourage participants to justify their behaviors while positioned for a win-lose outcome. To implement a conflict resolution and conduct management program without engaging in discriminatory conduct, the student participant must choose to participate in good faith. The traditional hearing process should be available for students who are incapable of participating in alternative conflict resolution methods in good faith. The conflict resolution educators must be skilled, seasoned, and knowledgeable practitioners committed to the institution's stated approach to instill trust and confidence in the community.

It is important to recognize the limits of alternative conflict resolution methods rooted in student learning theories when issues of violence and power inequality are present and undermine the shared interest in safety. Clearly, disruptive student behaviors that negatively affect the ability of the community to function and that jeopardize the safety of the student or other community members require swift and effective institutional response. While alternative conflict resolution methods should not necessarily be relied on to manage students in crisis, it is always advisable to rely on student learning concepts to shape an institutional response that creates an opportunity for making meaning, albeit at a later time or away from the institution.

Practical Application

In this chapter we have attempted to present a collaborative conversation between student affairs professionals and in-house higher education attorneys about how to partner to create a robust conduct management program fully infused with conflict resolution pathways that meets the institution's individual needs and is educationally based. Creating learning opportunities for students in the midst of a conflict or in response to student misconduct is difficult and messy work. The urge to bring quick order to the mess through strict adherence to rules and process should be resisted. Operating in a socially just framework of thick theory is not tidy, yet we challenge colleagues to rely on the well-developed theories of moral, ethical, and psychosocial development to be comfortable in the mess long enough to lay the

foundation for the development of young adults who are learning to internalize the values of integrity, judgment, compassion, personal responsibility, accountability, and respect.

This chapter reviews the conditions students learn best under and emphasizes the value of active student learning, the power of students to create their own meaning cognitively and affectively, and the role of institutions, educators, and peers to influence that learning. Conflict incidents offer a presenting issue that often represents the crisis or disequilibrium required to affect change (Erikson, 1968; Light, 2001; Sanford, 1962). These contexts for incident resolution and conduct management go well beyond simply addressing the presenting conflict. Instead, it prepares educators to leverage conflict as a tool that can enable students to integrate and differentiate in a way that helps them to form the internal foundation and function as global citizens with competence and character. While this may present a compelling case for framing all student conflict work to align with these purposes, serious consideration must first be given to readiness at the personnel, unit, divisional, and institutional levels.

While the law is flexible enough to support the institution's vision for managing student conflict and conduct issues, student affairs professionals and lawyers must undertake a realistic evaluation of their institution's, division's, conduct and conflict office's, and personnel's readiness to embrace a sophisticated and complex approach to student learning in the context of student conflict and conduct management. To determine readiness requires individuals and organizations to behave as reflective practitioners, carefully considering on a regular basis what they know, how they know it, and how they may leverage this understanding in future situations (Schön, 1983). For example, student affairs educators must be honest about their ability and capacity to explore and deliver a spectrum of conflict resolution practices. In-house counsel must be willing to challenge the traditional legal view that fairness equals sameness and sameness equals amnesty from legal action. The institution should be clear and transparent about its desired learning outcomes for the student conflict and conduct management program.

We conclude with the following assessment questions to help explore readiness and fit for each community and practitioner as they approach conflict work.

Professional Staff Level

What is the current capacity of your campus's conflict resolution and conduct management educators to engage in an educationally based approach

that is sophisticated enough to protect the students and the institution from harm? Are staff members

- educated in current theory and research regarding student learning processes and outcomes, as well as moral and ethical development?
- advanced in their own development of internal foundation to instill reasoned, ethical, and principled decision making in their work?
- at a level of professional maturity to deal with the ambiguity and messiness inherent in nontraditional, alternative models?
- supported by bench strength, motivation, creativity, and diversity to employ a range of resolution strategies and work meaningfully with students?
- competent in assessment to measure impact?
- ready with a demonstrated track record of making sound judgments?

Unit Level

What is the current capacity of your functional unit to engage in an educationally based approach that is sophisticated enough to protect the students and the institution from harm? Does the unit

- employ best practices in its current work?
- have a mission, vision, strategic plan, and evaluation methods that can support this broadened approach to the work?
- have educated and experienced staff to carry out this approach?
- have sufficiently strong relationships with key campus partners (such as general counsel, intergroup relations, and public safety) to build partnerships for this work?
- demonstrate functioning in a status quo or change management phase, assuming the current work is being done well within its established framework?
- have resources at a level that can accommodate approaches that may bring greater effectiveness but perhaps not greater efficiency?

Student Affairs Divisional Level

What is the current capacity of your division to engage in an educationally based approach that is sophisticated enough to protect the students and the institution from harm? Is divisional work

- informed by the most current theory, research, and best practices?
- conceptually and tangibly supportive of a student learning approach to its work or is it more activities/services oriented?

- articulated and measured as learning outcomes?
- grounded in valuing active student learning interventions?
- in a status quo or change management phase?

Institutional Level

What is the current capacity of your institution to engage in an educationally based approach that is sophisticated enough to protect the students and the institution from harm?

- What is the institution's culture and approach to student conflict and conduct management?
- What is the scope of conflict resolution and conduct management services currently offered on your campus?
- How broad or narrow is conflict resolution work currently defined?
- Is the current campus approach perceived as effective in achieving the desired student learning outcomes? If yes, how so? If not, why?
- Where are potential partners, colleagues, competitors, and naysayers?
- What is the institution's risk tolerance level for potential litigation, actual litigation, public attention, and critical analysis from key constituencies and stakeholders that may result from moving beyond the comfort of your current practice?
- Is the institution in a status quo or change management phase?
- Does the institution have the capacity to withstand scrutiny and support its educational aims?
- Do the current policies and practices of key partners (e.g., general counsel, intergroup relations, public safety) support or undermine active student learning interventions?
- What is the current scope and capacity of the institution's student support services to sustain a broad range of conflict resolution offerings (i.e., counseling and psychological services, services for students with disabilities, sexual assault prevention and awareness centers, health services)?
- How can student conflict resolution educators use knowledge about the power of active, engaged learning to shape interventions? In other words, how can student conflict resolution educators leverage this assessment tool to operationalize their work?

Conclusion

This chapter challenges the false dichotomy that pits educational intentionality against legal compliance. We put forward the *compatible to competing*

continuum and recognize that one does not have to sacrifice the individual good for the community good but may invest meaningfully in both. Leveraging conflict situations for the greater good of student learning can also serve to protect the interests of the community. It is only from an informed, studied perspective about the aims of student learning that a different lens may be applied to conflict issues and the developmental role they offer.

Institutions will need to determine for themselves if they are positioned to frame their work within this broader learning perspective. The most vital element to engaging in any student-related work is authenticity. Rather than place a value judgment on preferred models and approaches, the decision about direction will need to be based on an assessment of how any organization can live into its best self. And this best self may be fluid over time depending on organizational and staff readiness. In the end, clarity about the purpose of the work and intentionality around its delivery will allow conflict resolution educators to engage in their own good work with competence and character.

As we weigh how educators may facilitate opportunities for learning offered in these transitional moments and years, we are reminded of John Dewey's notion that the mind is a verb not a noun, a process not a structure (Dworkin, 1959). How might we prompt the processes for students' full engagement in their own learning? And as educators, how might we treat our own minds like verbs to remain open to the array of approaches for encouraging the development of competence and character through the vehicles of behavioral incidents and conflict situations? If we have the capacity to remain cognizant of the ultimate purpose of our work, form will follow function. Ernest Boyer (1987), as head of the Carnegie Foundation for the Advancement of Teaching, said this of higher education:

> The aim of the undergraduate experience is not only to prepare the young for productive careers, but also to enable them to live lives of dignity and purpose; not only to generate new knowledge, but to channel that knowledge to humane ends; not merely to study government, but to help shape a citizenry that can promote the public good. (p. 297)

Envisioning student conflict resolution and management not as an end in itself (managing behavior) but as a tool for affecting student growth and development to prepare students as productive, purposeful, knowledge-generating, humane citizens of the world is a worthy purpose for student affairs educators. It creates the avenue for developing good workers to do good work. Various conflict resolution methods can be designed to provide

participants with the opportunity to learn how to be good citizens in a just community. This, in the end, transforms the *what* of conflict work to the *so what* of student learning.

Notes

1. Some key reports include but are not limited to Association of American Colleges and Universities (AAC&U, 2002, 2007), ACPA (1996), NASPA and ACPA (2004), ACPA et al. (2006), American Association for Higher Education (AAHE), ACPA, and NASPA (1998), Leskes and Miller (2006), U.S. Department of Education (2006), and the Spellings Commission Report (2006).

2. Recognizing that it is a "well settled rule that the relations between a student and a private university are a matter of contract" (p. 157).

3. Holding that "we are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct" (p. 158)

4. Holding that "in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is" (p. 582).

5. Holding that "there need be no delay between the time 'notice' is given and the time of the hearing" (p. 583).

6. Holding that in addressing student misconduct, public universities should exercise "at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense" (p. 157) when there are no issues of immediate threat to others.

7. Holding that "where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause [of the Fourteenth Amendment]" (p. 1812).

8. Colleges and universities receiving federal funds are prohibited from discriminating against beneficiaries of those federally funded programs based on an individual's race, color, or national origin (Title XI of the Civil Rights Act of 1964), sex (Title IX of the Civil Rights Act of 1964), age (Age Discrimination Act, 42 U.S.C. § 6104), disability (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and the Americans with Disabilities Act, 42 U.S.C. § 12101). In addition, Title IV of the Civil Rights Act of 1964 prohibits public colleges from religious discrimination in the admissions process. In addition, state laws and municipal ordinances prohibit discrimination in the provision of educational services on additional classifications such as religion, veteran's status, sexual orientation, height, or weight.

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