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VICTIMS ON TRIAL:

THE TREATMENT OF SEX ABUSE VICTIMS AND
VICTIMS OF OTHER SERIOUS CRIMES IN BOARD OF
EDUCATION STUDENT SUSPENSION HEARINGS

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Introduction

This investigation began by focusing on a single issue at student suspension hearings: the failure of Board of Education (“BOE”) procedures to protect victims of sexual abuse from improper cross-examination about their prior sexual experience. Remarkably, there is no BOE regulation, state regulation or state law to prevent a victim of sexual misconduct from being victimized again by being compelled to answer embarrassing and irrelevant questions about her sexual history. This sharply contrasts with “rape shield” or “victim shield” laws and rules first enacted more than a generation ago for victims in criminal trials. We did extensive research demonstrating that similar protections have been developed for civil trials, administrative hearings, college disciplinary proceedings and, in at least one state, public school student suspension hearings. It is our contention that victims in BOE proceedings should receive the same protections.

Our investigation also pointed to broader problems. Students suspended for misconduct for more than five days are entitled by state law and BOE regulations to specified rights and the due process of law. Witnesses testify and evidence is presented to a neutral hearing officer, who determines the merit of the charges and recommends findings to the Superintendent. We found that BOE disciplinary procedures focus almost

exclusively on the rights of the accused.¹ Victims and witnesses are given little or no consideration in the BOE policies. They receive little advance notice of the disciplinary hearings at which they are to testify. They are not allowed to have an attorney attend the hearings. There are no counselors to assist victims who are often traumatized when compelled to confront their attackers in the hearing room. Foreign language interpreters are not provided for witnesses whose command of English may be limited.² Where the subject of the hearing is also charged with a crime as a result of his conduct, the disciplinary process itself undermines the prospects of a successful criminal prosecution. In reaching these conclusions, we relied on other student victims we have interviewed, SCI case reports, testimony from BOE officials involved in suspension hearings, training materials for hearing officers, hearing transcripts and relevant regulations. We recommend a sweeping overhaul of these procedures to properly recognize the rights of victims and their families, and to promote the public's interest in the efficient functioning of the criminal justice system.

The Office of the Special Commissioner of Investigation ("SCI") does not, as a matter of policy, identify names of students in its public reports. This report describes in graphic detail a disciplinary hearing in which a student's privacy was seriously and, we believe, wrongly invaded. The student's mother, who was very cooperative with our

¹ We have previously reported cases supporting this view. See Special Commissioner of Investigation for the New York City School District ("SCI"), *Dangerous Consequences: Officials at Brooklyn Technical High School Fail to Report Armed Robberies to the Police* (Nov. 2000), at <http://www.specialcommissioner.org/reports/11-20%20BrooklynTech%20Rpt.pdf>; *Opportunities Lost: How Personnel at August Martin High School Mishandled a Breach of Security and the Rape of a Student in Classroom 324* (Sept. 1997), at <http://www.specialcommissioner.org/reports/9-97%20August%20Martin%20Rpt.pdf>; *Treating the Victim as the Accused: Interim Acting Principal Jewel Moolenaar's Serious Mishandling of the Complaint of a Sexually Abused Child at CS 129X* (Sept. 1992), at <http://www.specialcommissioner.org/reports/09-92%20Moolenaar%20Rpt.pdf>.

² There is also little reference to victim support in the BOE's proposed Code of Conduct. New York City Board of Education, *Safe and Orderly Environment Initiative* (Apr. 2001), at <http://www.nycenet.edu/chancellor-corner/conduct.pdf>.

inquiry, was troubled by the prospect of her daughter's being traumatized by publicity. For this reason we have also omitted other identifying information from this report, including the name of her school, teachers and school officials.³ We also believe that the harm to the victim in this case was principally the result of a systemic failure, not individual misconduct. Accordingly, our recommendations at the conclusion of the report call for prompt improvements in BOE disciplinary procedures.

Development of “Shield” Statutes for Sex Abuse Victims

Twenty-six years ago, the New York State Legislature enacted a “rape shield” or “victim shield” statute.⁴ Its purpose was to bar harassment of victims in criminal trials; it prevents attorneys from raising matters relating to the victims’ sexual conduct that have no bearing on the guilt or innocence of defendants. “[T]he shield serves an important public interest by removing one of the impediments that caused many victims of sex offenses not to report them.”⁵ Similar laws designed to protect victims “from degrading and embarrassing disclosure of intimate details about their private lives, to encourage reporting of sexual assaults, and to prevent wasting time on distracting and collateral and irrelevant matters” are now in effect in virtually all other states, and federal law generally prohibits such evidence in both civil and criminal trials.⁶ However, there is no

³ The name of the school and BOE employees referenced herein will be confidentially submitted to the BOE with a copy of this report.

⁴ N.Y. Crim. Proc. Law § 60.42 (McKinney 1992). New York later enacted a similar statute for juvenile delinquency proceedings in the Family Court. N.Y. Jud. Ct. Acts § 344.4 (McKinney 1999). While “rape shield” is the common term used to describe such statutes, they are applicable to prosecutions of all sex crimes. Therefore, we will refer to such protections as “sex abuse victim shields” or simply “victim shields.”

⁵ *Practice Commentaries* to N.Y. Crim. Proc. Law § 60.42, p. 9 (McKinney 1992).

⁶ *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991), cited in *McCormick on Evidence*, § 193, p. 682 (5th ed. 1999); Fed. R. Evid. 412 (West Supp. 2001); See generally Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 Colum. U. L. Rev. 1, 32 (1977); Leigh Bienen, *Rape III – National Developments in Rape Reform Legislation*, 6 Women’s Rts. L. Rep. 170, 197 (1980).

comparable protection for victims contained in the New York State Education Law and related state regulations, the BOE by-laws, the Chancellor's Regulations, or in the BOE's manual for hearing officers governing student suspension hearings.

Female Student Sexually Violated in High School Stairwell

On an afternoon in the Spring of 2000, a 14-year-old female freshman at a New York City high school ("Student A") left her math class to use the bathroom and encountered in the hall a 19-year-old male senior ("Student B"), whom she knew. Student A agreed to accompany Student B to an empty stairwell. Once there, Student B took Student A's hand and placed it on his penis. Student B had been "pestering" her and asking her to have sex for months; she had refused these requests. Student B then unzipped his pants and exposed his penis. He repeatedly requested that Student A perform oral sex and she told him that she would not. He persisted in his demands, saying that if she did so he would "leave [her] alone."⁷ Student B, who weighs 200 pounds, told Student A that he would not let her leave. Frightened, she complied with his

⁷ Superintendent's Suspension Hearing Case No. 4249 ("SSH") Record 6/26/00 at 121 -122. SCI has discovered several discrepancies between the tape recording of the hearing and the official transcript. Where such differences occur, quotations herein are taken from the tape recording.

demand, later testifying that she believed it “was a lot safer” to do so.⁸ Student A then returned to her class, where she confided to a friend what had occurred and told her that she was scared that Student B “would come back and hurt [her].”⁹ She did not, however, inform school officials or her parents of this incident, fearing that she would “get into trouble.”¹⁰ In the ensuing weeks, rumors about the incident circulated through the school. Students, including Student B, teased and harassed Student A. One boy, Student C, asked Student A to perform oral sex on him. Student A reported Student C to school officials, and during their investigation, Student A revealed Student B’s attack of nearly two months earlier.

Once Student A told her parents and school officials about the attack, they summoned police, who arrested Student B at school. Student B was arraigned in Criminal Court the following day. (The District Attorney ultimately charged Student B with Sexual Misconduct and Endangering Welfare of a Child.¹¹ Ten months later, Student B pleaded guilty to Harassment in the Second Degree,¹² a violation, was sentenced to a conditional discharge and was ordered by the court to stay away from

⁸ SSH Record 6/26/00 at 126. The difference in age between attacker and victim is noteworthy. Student B, aware of Student A’s age, referred to her as “jail bait,” indicating that he was aware of the possible criminal consequences of his conduct. SSH Record 6/27/00 at 200. Indeed, had Student A been three months younger – or Student B 16 months older – at the time of the incident, New York criminal law would deem Student A to be incapable of consent, and Student B’s conduct would automatically constitute the felony of Sodomy in the First Degree or Sodomy in the Third Degree. N.Y. Pen. Law §§ 130.40(2), 130.45 (McKinney 1998).

⁹ SSH Record 6/26/00 at 128.

¹⁰ Student A’s decision to not inform the authorities is not unusual. Seventy-five percent of victims of sexual assault and rape do not report these crimes to the police. Younger victims (aged 12 to 19) are least likely to report these crimes. Of the victims declining to report sexual assault or rape by someone known to them, 44.6% claim that it is a private or personal matter and 10.4% cite fear of reprisal. U.S. Dep’t of Justice, *Criminal Victimization in United States, 1999 Statistical Tables*, Tables 91, 96, 104, NCJ 184938 (Jan. 2001), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus99.pdf>. See also, *People v. Benjamin R.*, 103 A.D.2d 663, 669, 481 N.Y.S.2d 827, 831 (4th Dep’t. 1984) (In trial of defendant charged with sexual abuse of 14-year-old victim, expert testimony regarding why victims of sexual abuse are often reluctant to reveal the crime deemed admissible.).

¹¹ N.Y. Penal Law §§ 130.20(2), 260.10(1) (McKinney 1998, 2000).

¹² N.Y. Penal Law § 240.26(1) (McKinney 2000).

Student A and her school.). At the time of Student B's arraignment, the judge issued a temporary order of protection directing that Student B stay away from Student A. The order, however, allowed Student B to return to school, and he did so.

The Suspension Hearing

The week after Student B's arraignment, with the criminal case pending, the high school principal suspended Student B from school as a result of his criminal conduct. In the interim, Student A's parents, concerned for her safety, would not permit her to attend school with Student B, and she missed five days of classes pending his suspension. The principal's suspension notice directed Student B to report to the BOE Office of Student Suspension Hearings on East 28th Street in Manhattan. New York State Education Law and BOE Chancellor's Regulations entitle public school students suspended for more than five days to a hearing on the charges, regardless of whether the student is accused of cutting classes or committing a serious criminal offense.¹³

BOE suspension hearings are conducted in a manner somewhat similar to a criminal trial. The hearing officer takes sworn testimony from witnesses in the presence of the accused (called the respondent) and receives documents into evidence. Witnesses may be cross-examined by a representative of the respondent, and the proceeding is tape-recorded and transcribed for use in any subsequent appeal. The respondent may be accompanied by his or her parents or another adult, and may be represented by a lawyer, who is often a criminal defense attorney.

¹³ N.Y. Educ. Law § 3214(3)(c)(1) (McKinney 2001), Chancellor's Reg. A-441(II)(B) (Sept. 5, 2000). BOE procedures for suspending elementary, intermediate and junior high school students are essentially similar to those for high school students. Chancellor's Reg. A-440 (Sept. 5, 2000).

In other respects, the disciplinary process and hearing facilities differ dramatically from their criminal counterparts. The BOE high school hearing office is on the eighth floor of a commercial building marked by a graffiti-scarred entrance at the street level. While 65 schools in the city deploy metal detectors full-time to screen for weapons, no such device is used at the hearing office, the very place where students are tried for carrying weapons in school.¹⁴ Only one School Safety Agent is assigned to the high school hearing office; when he is ill or otherwise absent the office has gone unguarded for much of the day.¹⁵ Respondents, witnesses and officials from high schools throughout the city are directed to report to the office at 9:30 a.m. on the scheduled date of the hearing. Witnesses must then wait as hearing officers conduct preliminary conferences with the respondent to determine whether a hearing will actually take place, or if the respondent will instead opt to plead no contest. The number of cases handled by the hearing officers has increased by 239 percent, from 1900 in the 1991 – 92 school year, to 4539 in 1999 – 2000, while the number of hearing officers – eight – has remained the same during that period.¹⁶ The rooms in which hearings are conducted do not resemble courtrooms in any way. They are, rather, the private offices of the hearing officers. All parties to Student B's hearing – the respondent, his attorney, his parents, the victim, her mother and other witnesses, and a tape recorder operator – sat on opposite sides of a 30 inch by 60 inch table adjacent to the hearing officer's desk. The room in

¹⁴The Director of the Office of Student Suspension Affairs informed SCI that over the past several years she has asked the BOE to install metal detectors at the hearing office; the Board has taken no action in response.

¹⁵ Another School Safety Agent is assigned to the street entrance, eight floors below the hearing office.

¹⁶ All but one of the hearing officers – the officer who presided in Student B's case – are attorneys.

which the hearing took place measures 12 feet by 11 feet and is among the larger offices.¹⁷ A scale illustration of the room appears on the following page.

The difference between suspension hearings and criminal proceedings is most pronounced in the treatment of victims and witnesses. There is no practical analog to a criminal prosecutor in a disciplinary hearing, nor do witnesses testifying against the respondent generally (as in this case) have an advocate present during their testimony. The school official presenting the case – typically a dean from the respondent’s school – is usually a witness at the hearing, testifying as to information he discovered in his investigation of the incident. As a witness, he is barred from the room when the victim and other witnesses against the respondent are examined and cross-examined, and therefore cannot know whether the hearing officer learns all essential facts. In lieu of direct examination, the hearing officer asks general questions of the school’s witnesses, but is obligated to remain neutral toward the parties. “The Hearing Officer must allow both the parent and the school latitude to question the opposing witnesses. Hearing Officers cannot side with the school or the student. Hearing Officers cannot testify. Hearing Officers cannot make objections.”¹⁸ Thus, as happened in this case, there is often no one to protect the victim from harsh cross-examination and inadmissible

¹⁷ The Director also informed SCI that she has requested that “panic alarms” be installed in the hearing rooms – as they were in the previous Suspension Affairs office in Brooklyn; the BOE has also ignored this request.

¹⁸ New York City Board of Education, *Manual for High School Hearing Officer* at 5, (Aug. 26, 1992) (on file with SCI). The manual further states: “During the presentation of the school’s case, the Hearing Officer may feel he/she is in the role of presenting the school’s case. The Hearing Officer must be careful to avoid any such role.” *Id.* at 10.

evidence.¹⁹ In stark contrast to the respondent, the complaining witness is allowed little support. Even if a victim's family undertook the expense of hiring a private attorney to assist their child, the attorney would not be permitted to attend the hearing. Most egregiously, in suspension hearings involving sex offenses there is no rule barring intrusive questioning of victims concerning any sexual conduct in which they may have engaged prior to the charged offense.

Student B appeared at his suspension hearing represented by an experienced criminal lawyer (who was previously appointed to represent him on the criminal charges) and a law student intern; his parents also accompanied him.²⁰ Student B's attorney and law intern were well-prepared for the hearing. A dean from the high school was in charge of preparing the case against Student B. She telephoned Student A and her parents on a Friday afternoon and, for the first time, advised them that Student A was needed to testify at the hearing on the following Monday morning.²¹ In contrast with

¹⁹ Where an attorney appears for a respondent at a suspension hearing, the subject school may, but is not required to, assign a "Staff Advisor" – a faculty member or school official – to present the case and to represent the interests of the witnesses and the school during the hearing. Chancellor's Reg. A-441(II)(B)(13)(l), A-441(II)(B)(16)(c) (Sept. 5, 1995) (current version at A-441(II)(B)(18)(f) (Sept. 5, 2000)). Staff Advisors are not attorneys, and they receive minimal training. This, of course, makes for a very unbalanced adversarial proceeding. Inexplicably, Student A's school did not provide her with even the limited support allowed by the Chancellor's Regulations; although the school had at least three Staff Advisors and was notified 17 days before the hearing that Student B would be represented by an attorney, it did not send a Staff Advisor to assist.

²⁰ On the first day of the hearing, a third legal representative attended on behalf of Student B; this attorney indicated that he was present to supervise Student B's attorney.

²¹ The dean telephoned from the Suspension Hearing Office on the first scheduled day of the hearing. Apparently, she previously believed that the school's case against Student B could be made with the presentation of reports and hearsay testimony. However, regulations required that a finding against a respondent may not be based exclusively on hearsay evidence and, moreover, required the testimony of the complaining witness. Chancellor's Reg. A-441(II)(B)(16)(f), (i) (Sept. 5, 1995). The revised regulation allows for a complaining witness other than the victim, but still prohibits findings based exclusively on hearsay. Chancellor's Reg. A-441(II)(B)(17)(a), (e) (Sept. 5, 2000). SCI asked to interview the dean. Her attorney advised us that she transmitted our request to her client, but the dean did not respond to it or to several letters and telephone messages from the attorney.

Student B, Student A had no preparation for what she was about to experience. Until they arrived at the BOE Suspension Office, no one informed Student A and her parents that Student B would be present during Student A's testimony, or that she would be cross-examined by Student B's attorney. When called to the hearing room, Student A was directed to sit across the narrow table facing her attacker, his parent, his attorney and the attorney's law assistant. Student A's mother (but not her father) was allowed in the cramped room over the vehement protest of Student B's attorney, and only on the condition that she sit behind her daughter and out of her view, and that she not speak during the proceedings.²²

If Student A's violation by Student B in the school stairway was not traumatizing enough, there was further indignity for her to face. Without the equivalent of a prosecutor, there was no one to object to the defense attorney's deceptive and humiliating line of cross-examination:

Attorney: Okay. And have you gotten into trouble before for having sex with other boys?

Student A: Who said – who said I had sex with somebody?

Attorney: Okay.

Hearing Officer: I can't hear you.

Student A: I said, who said I had sex with somebody? Why are you assuming? Why are you assuming?

Hearing Officer: I'm going to ask you again to answer the question. Counselor, after the question I want you to move on.

Student A: I have answered it.

²² SSH Record 6/26/00 at 108 – 112. Arguing to exclude Student A's mother from the hearing, Student B's attorney sarcastically said of the victim, "She doesn't need to have her hand held." *Id* at 112.

Hearing Officer: No you're not. You're asking a question to a questioner. You're not here to ask questions.

Student A: I'm just saying, why does she assume?

Hearing Officer: You're not here to ask questions. If you have any questions you want to direct to me in terms of procedure I will be happy to answer them.

If you want the attorney to repeat a question if you don't understand it, you can make that request.

Proceed.

Attorney: Are your parents worried about you having sex with boys?

Student A: No.

Attorney: Okay. Do you ever talk about having sex with boys with your parents?

Student A: Not really.²³

A short time later, the 14-year-old victim was again humiliated with irrelevant questions, while her mother looked on:

Attorney: Okay. Now, before you supposedly licked [Student B's] penis have you ever licked any other boy's penis?

Student A: No.

Attorney: Okay. And have you ever had sex with a boy?

Student A: No.²⁴

²³ SSH Record 6/27/00 at 54 - 55.

²⁴ SSH Record 6/27/00 at 57.

The attorney later asked whether the victim had sex with Student B prior to the charged conduct:

Attorney: And you never had oral sex with [Student B] prior to [date of the charged incident]?

Student A: No.

Attorney: And you never had sex with [Student B]?

Student A: No.²⁵

The objective of this cross-examination, and its effect on Student A, while predictable, is best described in her own words. At the end of her testimony, Student B's attorney and Student A engaged in the following dialogue:

Attorney: Do you have a problem sometimes remembering what really happened versus what maybe was a story and not real?

Student A: I have a problem remembering, but not remembering what's real and what's not. Because I know that this – what happened – was real. The reason why I don't remember - -

Hearing Officer: You have answered the question.
Proceed.

Student A: Can I please just say something?

Hearing Officer: Yes. Go ahead.

Student A: The reason why I don't remember everything is because when he traumatizes me – to have to come here every day and tell somebody else something different. Because somebody else might - -

Hearing Officer: I can't hear you.

²⁵ SSH Record 6/27/00 at 73 - 74.

Student A: - - the story what happened.

Hearing Officer: I can't hear you.

Student A: I said it is really traumatizing to have to tell everybody and like – what happened. Because it happened, yes. But, nobody wants to believe me, okay.

Hearing Officer: Well, no one has said that they don't believe you or they do believe you. That's the purpose of the hearing.

Student A: I know it is.

Hearing Officer: It's a fact finding process. So, this is your opportunity to tell your side of the story.

Proceed.

Without anyone to oppose her, the attorney continued to twist the girl's words:

Attorney: You were actually saying that it is hard for you to tell what happened because every time you talk to somebody about this it comes out a little differently every time.

Student A: I didn't say it comes out different; I said it's like hard to keep telling everybody because it was really traumatizing, and I never went through anything like that in my life before.²⁶

Moments later, undeterred, Student B's attorney again asked:

Attorney: When we were talking earlier this morning I asked you if [Student B] was your boyfriend and you said, no; right? And you said you never kissed [Student B]. You said you never had sex with [Student B]. You never had oral sex with [Student B]; right?

Student A: Yes.²⁷

²⁶ SSH Record 6/27/00 at 174 - 76.

²⁷ SSH Record 6/27/00 at 179 - 180.

Student A was subjected to further irrelevant harassment throughout the hearing. Alluding to the rumors that circulated through the school, Student B's attorney named two other male students, and asked Student A whether she had "discussed" sex with them, and whether they had asked her to perform oral sex. She replied in the negative.²⁸ The attorney also asked Student A: "Well, you just said you saw [Student B's penis]. So, I want you to explain what it looked like. How big was it?" Finally, the hearing officer found these questions inappropriate and directed Student B's attorney to proceed to another area of inquiry.²⁹

Student A testified over the course of two days. When she completed her testimony, the hearing officer directed her to appear for a third day in case he needed clarification of her testimony (he did not). Thus, Student A missed three days of school in addition to the days missed when her parents refused to allow her to be in school with the respondent. Her mother missed three days of work in order to provide her with much-needed support at the hearing. Student A's father, a night-shift worker, missed three days of sleep in order to accompany his daughter to the hearing.

At the conclusion of Student B's suspension hearing, the presiding hearing officer found Student A to be a credible witness, and that her testimony was detailed and forthright. He determined that the weight of the credible evidence presented at the hearing established that Student B had engaged in sexual misconduct as charged. Based on these findings, the borough High School Superintendent extended Student B's

²⁸ SSH Record 6/27/00 at 108 - 110.

²⁹ SSH Record 6/27/00 at 29.

suspension to one full year and assigned him to a BOE alternative instruction site.³⁰ The consequences were harsher for Student A, since she too was virtually, although not literally, placed on trial at Student B's suspension hearing.

By no means does this result imply that the attorney's cross-examination was ineffective. The attorney's prime concern was, of course, the criminal case. BOE disciplinary hearings are required to be commenced no later than five days after the charges are filed.³¹ By contrast, a criminal case may not be tried for as much as a year after a defendant is charged. The disciplinary hearing allowed Student B's attorney access to the victim and her testimony that would not be permitted by law in a criminal case until trial.³² Moreover, a practiced cross-examiner can mold an unprepared witness's testimony to the defendant's advantage. A transcript of such a disciplinary hearing is a valuable tool for a criminal defense lawyer. The attorney will exploit even minor discrepancies in the victim's testimony at the hearing when cross-examining her for a second time at the subsequent trial. The BOE did not notify the assistant district attorney assigned to the criminal case about the disciplinary hearing; the prosecutor's only information came from Student A's mother who telephoned her in the middle of the hearing. Thus, there was no possibility of preparing the victim in order to limit the damage that Student B's attorney sought to inflict on the criminal case.

³⁰ Student B, now 20, is currently enrolled in a high school equivalency diploma program administered by the BOE Auxiliary Services for High Schools. The instant case is Student B's second superintendent's suspension from high school; he was previously suspended for 30 days for sexually harassing a teacher and was then, at his own request, transferred to Student A's school.

³¹ The instant case was postponed twice at the respondent's request.

³² N.Y. Crim. Proc. Law § 240.20 (McKinney 1993); *People v. Spencer*, 79 Misc.2d 72, 73, 361 N.Y.S.2d 240, 242 (N.Y. Sup. Ct. Erie Co. 1974).

In addition, the cross-examination and other harsh circumstances suffered by victims and other witnesses at BOE disciplinary hearings effectively weaken their resolve to subject themselves to similar treatment at the criminal trial. Indeed, soon after Student B's disciplinary hearing, Student A's mother contacted the assistant district attorney assigned to prosecute Student B and requested that she try to arrange a plea bargain so that her daughter would not have to testify again.

The burden on victims and witnesses is exacerbated in cases in which there are multiple respondents accused by the BOE of criminal misconduct. Each respondent is given a separate hearing; a victim attacked by three students must testify at three disciplinary hearings. If a victim remains willing to testify at a criminal trial after such an ordeal, the defense attorneys will have three transcripts to use in their cross-examination. SCI has been informed of a BOE disciplinary case in which three male high school students were charged with sexually abusing a 14-year-old female in school. The three respondents were also arrested and charged with Sodomy in the First Degree, a felony.³³ The victim, accompanied by her father, appeared and testified at the first of three scheduled suspension hearings. The victim, an immigrant to the United States, had a limited understanding of English, but the BOE did not provide an interpreter. The victim wept during parts of her testimony. Her father attempted to place a comforting hand on the girl's shoulder but was admonished not to do so by the hearing officer. The

³³ N.Y. Penal Law §§ 130.50(1) (McKinney 2000). The three males eventually pleaded guilty in Criminal Court to Sexual Abuse in the First Degree, a felony. N.Y. Penal Law §§ 130.65(1) (McKinney 2000).

victim and her father were so upset by the experience that he refused to allow his daughter to testify at the hearings of the remaining two respondents.³⁴

Student A's treatment in the hearing presents several terrible ironies. If, instead of pleading guilty, Student B had chosen to contest the accompanying criminal charges at a trial in the Criminal Court, questions about any prior unrelated sexual conduct would be unlawful. Any lawyer daring to ask them of a victim in these circumstances would be immediately stopped and admonished by the judge. Further, if the case was heard by a jury, the attorney would risk alienating the jurors. Even though punishment upon conviction at a criminal trial may include imprisonment (as compared to expulsion from school), the law – with very limited exceptions – prohibits subjecting a victim to such irrelevant, intrusive and embarrassing questions.

Victim Shield in Non-Criminal Forums

If Student B's conduct had been the subject of a civil lawsuit in any United States District Court in the country, questions about any prior sexual experience of Student A – including with Student B – would, except in very specific circumstances, be prohibited. This is because Congress has enacted victim shield protection into the Federal Rules of Evidence. Exceptions to the rule are rare: all parties must be notified two weeks before the trial, and the judge must conduct a private hearing outside the presence of the defendant. An exception may then be granted only if the court determines that the

³⁴ SCI has been informed of another case in which a victim had to testify on separate occasions at BOE disciplinary hearings against three boys who were also criminally charged with Sexual Abuse in the First Degree. The prior multiple testimony of the victim proved so problematic to the prosecution of the criminal case, that it was dismissed without prejudice in the Criminal Court.

probative value of the evidence outweighs the danger of harm to any victim and of unfair prejudice to any party.³⁵

Had Student A and Student B been college students, and the same incident occurred on campus, Student A may well have been shielded from the questions she was compelled to answer as a 14-year-old high school freshman. The State University of New York campuses at Binghamton, Buffalo and Stony Brook, and Cornell and Syracuse Universities generally bar evidence of past sexual conduct of a victim in disciplinary hearings. Some of these student conduct codes also restrict evidence of sexual conduct with the accused.³⁶ Florida and Oregon also grant victims of sexual misconduct the right to have unrelated past behavior excluded from disciplinary hearings at state universities.³⁷

If Student A had been sexually violated by a licensed physician, questions that she was forced to endure at the suspension hearing would not likely be allowed at a professional disciplinary hearing against the offending doctor in New York and in other

³⁵ Fed. R. Evid. 412(b)(2) (West Supp. 2001).

³⁶State University of New York at Binghamton, *Student Handbook 2000*, Procedures for Review of Student Conduct § III (E) (6), at <http://www.binghamton.edu/home/student/shandbk2000/conduct.html#judicial> (last visited May 11, 2001) (“[Q]uestions must be relevant to the case. Information presented must have been obtained in a manner consistent with local, state and federal law”); State University of New York at Buffalo, *Student Conduct Rules, University Standards and Administrative Regulations*, Article 2 (4), at <http://www.ub-judiciary.buffalo.edu/rulereg.shtml> (last visited May 16, 2001) (Victim has “[t]he right, as established in state criminal codes, not to have his or her irrelevant past sexual history discussed during the hearing.”); Cornell University, *The Campus Judicial System*, at http://www.cornell.edu/Admin/CampGov/judicial_system.html#ja5 (last visited May 11, 2001) (Complainant has “the right to keep evidence of sexual conduct out of hearings unless fairness to the defendant requires such evidence”); The State University of New York at Stony Brook, *University Student Conduct Code and Campus Polices* § II(A)(1)(c), at <http://ws.cc.sunysb.edu/stuaff/judiciary/code.htm#generalcampusreg> (last visited May 11, 2001) (“The prior sexual experiences of the alleged victim of sexual abuse and/or assault will not be considered in the determination of guilt to a charge of sexual abuse and/or assault.”); *Syracuse University Judicial System Procedures* §§ II(7.6), (9.8), at <http://students.syr.edu/depts/judicial/JudicialSystemProcedures.htm> (last visited May 14, 2001) (“[E]vidence of the complainant’s prior sexual conduct will not be admissible unless it proves or tends to prove specific instances of the complainant’s prior sexual conduct with the accused student.” The admissibility of such evidence must be resolved prior to the hearing).

³⁷ 6C2-3.004(8)(a)(3), F.A.C. (WESTLAW 2001) (Florida State U.); 6C9-3.381(6)(d)(1), F.A.C. (WESTLAW 2001) (U. of North Florida); 6C4-6.0021(7)(a), F.A.C. (WESTLAW 2001) (U. of So. Florida); 6-C7-5.0044(4)(b), F.A.C. (WESTLAW 2001) (U. of Central Florida); 6C10-4.001(1)(j)(3) F.A.C. (WESTLAW 2001) (Florida Gulf Coast U.); Or. Admin. r. 574-032-0150(4) (WESTLAW 2001).

states.³⁸ Minnesota and Tennessee prevent evidence of previous sexual conduct in disciplinary proceedings against licensed social workers and therapists.³⁹ Vermont and Florida have, in recent years, enacted statutes to protect victims in professional licensing hearings.⁴⁰

California's experience in student disciplinary hearings is instructive. In 1995, a 12-year-old Los Angeles girl was raped at her middle school by another pupil. As in Student A's case, the girl's family received little advance notice of the disciplinary hearing to determine whether her alleged attacker should be suspended or expelled. When the victim arrived for the hearing with her parents, she was told that she would have to face the accused, his parents and his attorney alone. The young girl's ordeal prompted the state legislature to act.⁴¹ The following year, it enacted a statute giving sexual assault victims the same protections at school disciplinary hearings that are guaranteed in criminal court proceedings. Instances of the complainant's prior sexual conduct are presumed inadmissible, and should not be heard absent a determination of

³⁸ See *Gross v. De Buono*, 636 N.Y.S.2d 789 (3d Dep't 1996) (Hearing officer presiding over a disciplinary proceeding of a physician charged with sexual misconduct toward his patients acted "well within his discretion" in limiting cross-examination with regard to irrelevant matters such as the witnesses' ... sexual history"); *Morris v. Board of Registration in Medicine*, 405 Mass. 103, 539 N.E.2d 50, cert. den., 493 U.S. 977, 110 S.Ct. 503 (1989) (although Massachusetts' rape shield statute was limited by its terms to criminal prosecutions, it, along with the common law, required that an administrative magistrate reject evidence of a patient's prior sexual conduct in a disciplinary hearing against a physician); Ohio Admin. Code § 4731-13-27 (WESTLAW through Apr. 30, 2001) (Imposes shield in sexual misconduct cases before the state medical board unless it involves evidence of the origin of semen, pregnancy or disease or the victim's sexual activity with the offender, if material and not prejudicial; examiner must resolve in advance of hearing; victim entitled to counsel at hearing).

³⁹ Minn. Stat. § 148B.14 (WESTLAW through end of 2000 Legis. Sess.); Tenn. Code Ann. § 29-26-207 (WESTLAW through end of 2000 Legis. Sess.).

⁴⁰ V.S.A. § 1646 (WESTLAW through end of 2000 Legis. Sess.) (bars evidence of prior sexual conduct of witnesses in professional licensing board administrative hearings (and civil actions) unless it bears on the credibility of the complaining witness, or is material to a fact in issue and its probative value outweighs its private character); Fla. Stat. § 120.81(4) (2000) (similar protections in proceedings for professional licensure that involve allegations of sexual misconduct).

⁴¹ See, Amy Pyle, *New Rights for Campus Victims*, Los Angeles Times, Oct. 2, 1996 at B1; *Victims Too Need Protection; Education Code Provisions on Campus Rape Require Reform*, id., Aug. 20, 1996 (Editorial) at B6.

extraordinary circumstances. Before the hearing officer makes such a determination, the complainant is entitled to advance notice and representation by counsel. Victims must be given five days' notice before testifying, and may be accompanied by two adult support persons (e.g., parent, guardian or attorney) during their testimony.⁴²

Conclusion

Student A and her mother were subjected to a frightening and humiliating experience at the disciplinary hearing of the student's attacker. They had little notice of the proceedings and no warning of what to expect. When they arrived, they found themselves face-to-face with the attacker, fearful for their own security. The attacker's criminal defense attorney pursued a "scorched earth" cross-examination with Student A, replete with embarrassing and graphic questions about the extent of her sexual experience. The hearing officer, with little in the way of real training and without access to protective measures available for the victim in criminal cases, allowed most of the highly personal and intimate questioning without interruption. In the end, though her attacker was found guilty and suspended, Student A was victimized all over again, this time by a system that owed her much more.

The ordeal of Student A is not an isolated event. Increasingly, the student disciplinary system handles serious criminal allegations. Rapes, robberies, and assaults are being litigated in a forum better suited to roughhouse behavior on the playground or disruptive antics in the classroom. Principals, assistant principals and deans investigate

⁴² Cal. Educ. Law § 48918(h) (West 2001).

these crimes as a prerequisite to the suspension hearings. We have repeatedly criticized the practice of investigations of serious crimes by school officials.⁴³ Such allegations should be promptly reported to the police for thorough and professional investigation.

Accused students are afforded rights similar to criminal defendants, with legal representation, cross-examination, and discovery. While “victims’ rights” have greatly expanded in criminal court cases, victims testifying in school disciplinary hearings are often treated shabbily.⁴⁴ They are forced to confront their assailants a few feet away with little in the way of protection. Unlike the accused, they usually have no one to represent their interests. BOE rules frequently require the school representative to leave the hearing room while the victim testifies. Victims feel alone and helpless before the accused.

Disciplinary hearings undermine criminal cases as well. For the accused, it is a golden opportunity to obtain discovery from an unprepared and unprotected witness. School investigations, amateurish even if well meaning, are riddled with errors.⁴⁵

⁴³ See *Dangerous Consequences: Officials at Brooklyn Technical High School Fail to Report Armed Robberies*, *supra* (Dean informed victim’s parent that police are not allowed to investigate in school; school officials did not inform police or district attorney of witnesses to crime, or of the suspension hearing; dean conducted “show up” identification of suspects.); *Treating the Victim as the Accused*, *supra* (School official delayed reporting rape to police, accused victim (third grader) of lying, conducted “lineup” identification of suspects.); *Opportunities Lost*, *supra* (School officials fail to report rape to police for one month resulting in unsecured crime scene and evidence.); SCI, *The Death of John Morale: An Investigation Into Midwood High School’s Handling an Assault on a School Aide* (Apr. 1998), at <http://www.specialcommissioner.org/reports/4-98%20Midwood%20Rpt.pdf>; Letter from Edward F. Stancik to Hon. Harold O. Levy, Chancellor, New York City Board of Education, June 27, 2001 (Two fifth-grade female students sexually accosted by two sixth-grade male students; assistant principal told not to call police by school district’s assistant director of pupil personnel.), at <http://www.specialcommissioner.org/reports/06-01%20CS66%20letter.pdf>; Letter from Stancik to Levy, Sept. 21, 2000 (Sexual abuse of female middle school students; school officials fail to call police or to allow victims’ parents to use school telephone to call police.), at <http://www.specialcommissioner.org/reports/9-00%20IS278k%20Rpt.PDF>.

⁴⁴ See SCI, *Dangerous Consequences*, *supra*; *Treating the Victim as the Accused*, *supra*.

⁴⁵ *Id.*

Victims and other witnesses can be intimidated from testifying in later court proceedings. Typically, police and prosecutors have no idea their case is being undermined, because school officials do not notify them about the disciplinary process.⁴⁶ From a law enforcement standpoint, there is little to gain and much to lose at these hearings.

⁴⁶ See, SCI, *Dangerous Consequences*, *supra*.

Recommendations

No victim or parent should have to endure what Student A and her mother went through in the disciplinary process. We recommend that the Board of Education take sensible steps to address the failings in the current system. In doing so, we urge the BOE to embrace “victims’ rights” advances made in the criminal justice system in the past 20 years. Furthermore, the BOE should do more to facilitate fair and just criminal prosecutions stemming from school incidents. Accordingly, we recommend that the BOE:

- ?? Enact victim shield protections that have long been a staple of criminal proceedings for witnesses in school disciplinary hearings.
- ?? Provide victims, witnesses and their families with reasonable notice of the dates and purposes of upcoming proceedings.
- ?? Instruct victims and their families of *their* rights in disciplinary actions. A simple, straightforward pamphlet can take much of the mystery and surprise out of the process.
- ?? Ensure that victims and their families have someone to protect their interests in disciplinary hearings. At minimum, the BOE should assign an advocate for the victim when the respondent is represented by an attorney; currently, only the accused is entitled to representation.
- ?? Consolidate hearings of multiple respondents charged with misconduct arising out of the same incident so as to limit the need for repeated testimony by witnesses.

- ?? Provide foreign language interpreters for witnesses as necessary.
- ?? Study the feasibility of permitting witnesses to testify from their school via closed circuit television.
- ?? Train hearing officers regarding the rights of victims and their families and to recognize those rights in disciplinary proceedings.
- ?? Deploy adequate security measures as found in any courthouse or airport: metal detectors, alarms and sufficient numbers of School Safety Agents.
- ?? Prohibit the practice of conducting full disciplinary investigations *before* police are notified.
- ?? Require school officials to notify law enforcement officials of upcoming disciplinary proceedings.

We also encourage a broader debate on the purpose and functioning of the disciplinary process where serious criminal charges are involved. Current law requires schools to conduct a full disciplinary hearing, amounting to a trial, before suspending a student.⁴⁷ An argument can be made that since criminal charges are sufficient to bring the accused to trial for serious crimes like rape, robbery, or felony assault, they should suffice to require him to attend a different school while the case is pending. Were the law to recognize this principle, at least in the case of the most serious and violent felonies, victims like Student A would be spared the intimidation and humiliation that often goes hand-in-hand with these proceedings. It is time to recognize that disciplinary hearings now routinely involve criminal allegations. Having recognized that school officials cannot effectively investigate criminal cases, it seems obvious that they should not

⁴⁷ N.Y. Educ. Law § 3214(3)(c)(1) (McKinney 2001); Chancellor's Reg. A-441(II)(B) (Sept. 5, 2000).

adjudicate them. It is important to note that suspended students still receive an education, but at a school other than the one where the alleged offense occurred. Thus, the rights of the accused to an education could be protected without endangering the integrity of the criminal justice proceedings.

Therefore, we are also referring our findings to the Governor, the New York State Senate and Assembly, the New York City Council, and the New York State Department of Education.

Finally, we are referring the record of the disciplinary proceedings in this matter to the Director of the BOE Office of Student Suspension Affairs for her review of the conduct of the hearing officer. While he should have prevented the extensive cross-examination regarding the victim's alleged prior sexual history, in reviewing the tape recording of the proceeding as a whole, we found that the hearing officer was balanced and fair. He should be instructed regarding means available under current rules to properly protect the rights of crime victims.

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Scale illustration of Room 802, BOE Office of Student Suspension Affairs.

Student A sat on the left side of the conference table, next to the tape recorder operator, during her testimony at Student B's suspension hearing. Student B, his attorney, the attorney's legal assistant and Student B's parent sat in the four chairs on the right side of the 30-inch-wide table, facing Student A. The hearing officer sat behind the desk adjoining the conference table. Student A's mother was permitted to attend the hearing on the condition that she sit in the folding chair on the left, out of her daughter's view.