Defining Substantial Evidence of Affirmative Consent in the Developing Legal World of College Disciplinary Proceedings

By Scott W. Iseman

Last year New York passed the "Enough is Enough" law requiring all private and public colleges in New York to adopt a uniform definition of affirmative consent with respect to sexual activity by college students.[1] This spring the Appellate Division, Third Department, decided two Article 78 petitions which challenged a college's determination of student conduct hearings where affirmative consent, or the lack thereof, was the primary issue. These separate Article 78 petitions provided the Appellate Division its first opportunities to evaluate whether there was substantial evidence of a lack of affirmative consent. In *Michael Weber v. SUNY Cortland, et al*, 2017 NY App. Div. Lexis 3747 (May 11, 2017), the Third Department upheld SUNY Cortland's determination that there was no affirmative consent but in *Haug v. SUNY Potsdam,* 149 A.D.3d 1200 (3d Dept. 2017), it overturned SUNY Potsdam's decision and held there was not substantial evidence of a lack of affirmative consent.

This article reviews these decisions, attempts to reconcile their holdings and provides practice points for attorneys representing both survivors and accused students during college disciplinary proceedings and in subsequent litigation challenging a college's determination in a court of law.

In both *Weber* and *Haug* the Appellate Division confronted fact patterns that are all too common throughout New York and, indeed, the United States. Petitioners (both accused male college students) socialized with female college classmates (the Complainants) and there was some level of mutual flirtation and consensual physical and sexual contact. Petitioners and Complainants eventually retire to a private room where there is intercourse. Both Complainants reported that they "froze" when confronted with the prospect of intercourse, and during intercourse, but both promptly reported that the intercourse was not consensual. After the Complainants' prompt reports, Title IX investigations and student disciplinary hearings began. Petitioners testified in their own defense and each was found responsible for some form of sexual assault offense. In *Weber*, the determination (which had been annulled by a previous Article 78 proceeding) was upheld, but in *Haug*, the determination was annulled. Obviously, the details matter, so let's dig in.

In *Weber*, the Complainant testified at the hearing and presented evidence that (1) she did not want to return to Petitioner's room; (2) she sent text messages to her friends stating that she thought she was about to be raped by Petitioner; (3) Petitioner did not ask her if she wanted to have sex, but only if she wanted him to wear a condom (intercourse appeared unavoidable to her at this point); (4) Petitioner knocked her cell phone out of her hand when a friend called Complainant and Complainant told Petitioner that she needed to leave; (5) Petitioner removed her clothes; and (6) she froze and closed her eyes during intercourse. In his defense, Petitioner stated he thought, based on (a) Complainant previously and consensually dancing with him at a bar; (b) consensually performing oral sex on him earlier in the evening; (c) returning to his apartment; and (d) telling him to use a condom, that he assumed she wanted to have intercourse. In weighing their testimony, the Court determined there was substantial evidence supporting SUNY Cortland's determination that there was no affirmative consent and Petitioner had committed rape and sexual assault as defined by SUNY Cortland's student regulations.

In *Haug*, Complaint and Petitioner, who had a pre-existing friendship, encountered one another on campus and Complainant invited Petitioner back to her room. Petitioner locked the door and the two began "making out" on Complainant's bed. When Petitioner suggested they have sex, Complainant said nothing but took off her shirt. Petitioner then removed her pants and they had intercourse during which the Complainant says she "froze up" and "did not respond to Petitioner's advances." *Haug*, 149 A.D.3d at 1201-02. Complainant promptly reported the incident but refused to name her assailant. Petitioner was later identified through an anonymous report.

Significantly, Complainant did not testify at the subsequent hearing. All evidence regarding the alleged assault was hearsay evidence presented through investigative reports and college administration witnesses.

Petitioner, testifying in his own defense, offered additional facts that Complainant told him "not to worry" about not using a condom; that Complainant put herself on top of Petitioner during intercourse and, at the conclusion, asked Petitioner if he had fun. SUNY Potsdam determined that the Complainant had not provided affirmative consent and found Petitioner responsible for sexual assault. The Appellate Division, in a 3-2 decision, annulled

Scott W. Iseman is an associate O'Connell and Aronowitz in the firm's Albany office. Scott joined the firm after completing his service with the United States Marine Corps. Since joining O'Connell and Aronowitz, Scott has used his experience to help defend college students against criminal charges and also in student disciplinary proceedings throughout New York State.

that determination and found that there was not substantial evidence of a lack of affirmative consent.

How do we reconcile these two decisions and what are the takeaways?

First, in *Haug*, the Complainant did not testify and the Court clearly discounted the hearsay evidence presented by SUNY Cortland, when compared to the in-person testimony provided by Petitioner. The Court determined that it was not clear that "a reasonable person could find from these hearsay accounts an absence of behavior that indicated[d], without doubt to either party, a mutual agreement to participate in sexual intercourse." *Haug*, 149 A.D.3d at 1202-03 (internal quotations and citations omitted). The Court went on to find that Petitioner's testimony "seriously controverted" the hearsay evidence and as a result, "common sense and elemental fairness suggest that [seriously controverted hearsay evidence] may not constitute the substantial evidence necessary to support the [challenged] determination." *Haug*, 149 A.D.3d at 1203 citing *McGillicuddy's Tap House, Ltd. v. NYS Liq. Auth.*, 57 A.D.3d 1052, 1053 (2015). The Petitioner in *Haug* clearly benefited from the Complainant's decision not to testify and his decision to testify in his defense.

Second, the Appellate Division had serious reservations about the manner in which SUNY Cortland conducted the hearing. While the Court provided little detail, it commented that many of the procedures employed by the hearing board gave it "pause"—intimating that they would have critiqued the process had Petitioner asserted a timely objection to those issues. *Id*. at 1201. Similarly, the Court also went out of its way to criticize SUNY Potsdam for enhancing Petitioner's punishment after he appealed the Board's decision. *Id*. 1203.

In *Weber*, the Petitioner obviously did not, and perhaps could not, offer any evidence that Complainant consented except for her conduct (the "preceding events") that were temporally attenuated to the intercourse. In short, Petitioner offered nothing to challenge Complainant's account that she froze and did not consent. Indeed, the Court found that basic facts were "uncontested." *Weber*, 2017 NY App. Div. Lexis 3747 at *3. Moreover, the Complainant testified during the hearing, which, no doubt, improved the credibility of her testimony.

With these considerations in mind, there are a number of practice points for those who represent accused students at disciplinary proceedings. First, the prompt and thorough preservation of errors and objections is critical in these matters. The Court in *Haug* refused to reach multiple arguments (that may have been meritorious) because the issues were not properly preserved. Common issues that require preservation in student disciplinary investigations and hearings include: (1) notice of the allegations; (2) right to counsel and/or advisor; (3) fair treatment under the school's procedures and the proper adherence to said procedures; (4) right to confront witnesses and challenge the reliability of evidence presented; (5) right to present a complete and meaningful defense; (6) the use of credibility assessments by the school's investigators; and (7) composition and right to challenge/*voir dire* the hearing board. When these and other issues arise, the attorney should make a written record of their objections at every stage of the proceeding (investigation, hearing, and appeal) to the Title IX coordinator, the liaison for the disciplinary board and the school's official who handles any internal review/appeal process.

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While these issues need to be preserved, *Weber* provides a cautionary tale about how difficult it is to prevail on these issues even if they are preserved. For example, in denying Petitioner's request to annul the college's determination for various Due Process and Constitutional deprivations, the Appellate Division emphasized that there is no general constitutional right to discovery in administrative proceedings and that there is only a "limited right" to cross examine adverse witnesses. *Weber*, 2017 NY App. Div. Lexis 3747 at *4.

Counsel for students need to remember that student disciplinary proceedings, despite their dramatic consequences, are administrative, not criminal or even civil. Students are not afforded the same level of rights and remedies as a criminal proceeding or the scope of discovery and opportunity to challenge a matter as in a civil proceeding. As a result, when challenging a college's determination even casual adherence to Due Process and other critically important rights can survive judicial review because colleges are afforded considerable discretion to draft and implement their procedures.

Next, whether the accused student testifies at a disciplinary hearing should be carefully considered rather than immediately dismissed as the prudent attorney might initially be inclined to do. In *Haug*, Petitioner obviously added facts that controverted the allegations and his testimony was critical to overturning the college's de-

termination. Without his testimony, the hearsay evidence alone may have been sufficient. After all, two dissenting Justices thought so despite his testimony.

Generally, the prudent attorney never exposes a client to speaking when the statements could later be used against the client in a criminal matter, as is possible with student disciplinary proceedings involving allegations of sexual assault, drug use and other prohibited conduct. *Haug*, however, gives a good reason for accused students to testify and participate in investigative interviews provided the testimony seriously controverts the facts underlying the allegation. When *Haug* is compared to *Weber* we see that testimony and evidence must focus on the Complainant's specific actions (i.e., conduct and statements) and be accompanied with an explanation of why those actions led the accused to reasonably believe there was consent for that specific sexual encounter.

Critically, testimony that one *assumed* or merely "thought" there was consent is, in fact, evidence that there was *not* affirmative consent. While caution is still required, the student's testimony may be the best and perhaps the only evidence to controvert the allegations.

For those providing counsel and advice to survivors of sexual violence or other misconduct, *Haug* and *Weber* also provide valuable lessons. No survivor wants to see their assailant exonerated or for the matter to drag on while attorneys and courts scrutinize the intimate details of a traumatic experience. Survivors respond differently and understanding what their goals are is essential to effective representation. Some survivors will want to speak in person as often as possible and others will want nothing to do with the process. Counsel's job in these matters is more than providing strict legal advice. Rather, counsel need to ensure that colleges take the allegations seriously; that there is a thorough and proper investigation and hearing; and that the survivors are provided with the accommodations and resources they are entitled to on campus generally and particularly throughout the investigation and hearing process.

These accommodations include changing of room assignments, class schedules, access to health care and mental health services and the opportunity to report to law enforcement. During disciplinary proceedings survivors also have the right to be separated from their assailant, have an advocate with them, and myriad other accommodations to ensure their comfort and ability to fully participate. Such accommodations and rights should be aggressively pursued and a college's failure to provide them may result in a private right of action for the survivor against the college.

Whether the survivor or the accused, students need experienced legal representation immediately and throughout these investigations and proceedings because the consequences are extraordinary: expulsion; permanent disciplinary marks on transcripts; forfeiture of scholarships and financial aid; loss of tuition and credits; and irreparable harm to one's reputation and job prospects for the accused. For survivors, the consequences are no less significant as they can be re-traumatized throughout the process and suffer irreparable emotional, psychological and reputational harm on top of the trauma they already experienced. While some colleges provide faculty/administrative advisors to survivors and the accused, these advisors, however well intentioned, rarely know how to develop evidence, how to properly preserve issues for challenge in a court of law or to prepare an accused student or a survivor for an adversarial hearing. Many times, students attempt to initially defend and prepare themselves, sometimes with the assistance of their parents or a college advisor, and often only compound their problems. Such early missteps are extremely difficult to reverse or correct.

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Finally, student disciplinary proceedings are being litigated with increased frequency in state and federal courts by accused and survivors alike. In federal courts aggrieved students are successfully bringing claims under breach of contract theories and under gender discrimination claims under Titles VII and IX. [2] Due to the increasing frequency of this litigation and the Appellate Division's decision in *Haug*, it is fair to say that student disciplinary outcomes are on the courts' radar and will continue to be a ripe target for law making as more students challenge the process and the decisions they are subjected to.

Endnotes

1. A detailed summary is available here: https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses.
2. Student Handbooks or Codes of Conduct are interpreted as a contract binding the school and student. When the school fails to live up to the terms of the agreement (fair proceedings, certain processes, etc), students can have a colorable claim. *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 481 (S.D.N.Y. 2015). Students also may have equal protection/sexual discrimination claims under Titles VII and IX. *See, e.g., Doe v. Columbia Univ.*, 831 F.3d 46 (S.D.N.Y. 2016).