Florida HB233's Implications for Student Conduct Processes at Public Institutions of Higher Education

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April 30 marks the official end of the legislative session in Florida for 2021. And they have had a busy one! Florida HB233 has been getting much attention in the news for its provisions regarding "intellectual freedom and viewpoint diversity." It is now headed to Governor Desantis for his expected signature. The bill, which applies only to public higher education institutions, includes several provisions you may have heard about by now. These provisions will allow students to record essentially any classroom interaction for the purposes of complaints or civil/criminal proceedings,[1] and require institutions to conduct annual "intellectual free and viewpoint diversity" assessments.[2] They also prevent institutions from "shielding" students, faculty, and staff from "ideas and opinions that they may mind uncomfortable, unwelcome, disagreeable, or offensive."[3]

In addition to the provisions that have been the subject of more attention and controversy, HB233 as enacted has several new student conduct and due process provisions that have gotten less media attention. Below, we provide a quick summary of the bill's Section 5, which covers conduct provisions. Some of these provisions will feel like more of the same. Some will require a bit more careful thinking by institutions in deciding how best to implement the new law, which will go into effect July 1, 2021, if it is signed.[4]

Before touching on the bill's specific Code of Conduct provisions, a few notes: First, HB233 does not designate which Code violations are subject to its procedural requirements. It simply states that the Code must "at a minimum provide the following due process protections to students and students organizations" in any violation of rules or regulations. This language is consistent with current law in Florida related to student Codes of Conduct at public institutions.[5] Second, the provisions of HB233 on student conduct processes and student respondents *also* apply to student organizations as respondents.

I. Timely Written Notice

HB233 specifies that the institution's Codes of Conduct must provide timely written notice of the alleged violation – i.e., notice at least seven business days before a hearing – that provides "sufficient time to prepare" for a hearing. The notice must have "sufficient detail," including allegations, provisions of the Code of conduct at issue, the process to be used and associated rights, and the date, time, and location of the disciplinary proceeding.

Then, it requires that at least five days before a hearing, the institution provide the respondent with a list of all known witnesses against them and all known information related to the allegation. This information should include both inculpatory and exculpatory information

(meaning information that tends to show the allegation happened and information that tends to show it did not happen).

For our public institutions, specific written notice should not be new. For offenses that could require sanctions such as suspension and expulsion, public institutions are already bound by Constitutional Due Process to provide such notice. However, institutions should note the specific timeline requirements of HB233 to provide the initial notice and notice of witnesses and information related to the proceeding.

II. Hearing

Holding hearings before a determination of responsibility is not a new practice for public institutions of higher education following the requirements of Constitutional Due Process and the Title IX and V.A.W.A. Amendments to Clery. However, HB233 adds several significant requirements for these hearings. Some of the new requirements are consistent with existing best practices. HB233 specifies there is a presumption of no violation until the full proceeding concludes. It requires that hearings be held before "an impartial decisionmaker" and that determinations of responsibility be made using a *preponderance of the evidence* standard, meaning that the information presented at the hearing supports the finding that it is "more likely than not that the violation of the code of conduct was committed." And, it provides respondents the right to present "relevant" information on their own behalf (with the inclusion of "relevant" allowing institutions to set some boundaries on the information covered in the context of the hearing).

However, several of HB233's requirements extend significantly beyond common existing practices. First, the bill provides that respondents must have the right to question witnesses and have an advisor or advocate (at the respondent's expense) *who may directly participate in all aspects of the proceeding,* including "the presentation of relevant information and questioning of witnesses." This participatory advisor role is beyond even the required participation during cross-examination required by the 2020 Title IX Rules or the requirements of *any* court interpreting Constitutional Due Process or Title IX. Instead, it mirrors the requirements of North Carolina's N.C.G.S.A 116-40.11, which requires U.N.C. institutions to provide respondent students "the right to be represented, at the student's expense, by a licensed attorney or non-attorney advocate who may fully participate during any disciplinary procedure." Thus, Florida institutions should turn to their U.N.C. colleagues for best practices in this area. Institutions should also carefully consider how to best create a non-adversarial environment through setting expectations and rules for participation and decorum, as well as to create an equitable environment when one party has a sophisticated advisor and the other does not.

Second, HB233 grants respondents the right "against self-incrimination" and to remain silent and cautions that their choice to remain silent may not be used against them. This right may feel new in the student conduct space, and it is beyond the requirements of federal Constitutional Due Process, as this is not criminal court! This right is consistent with a right granted under the 2020 Title IX Rules for Title IX-covered conduct already, and so lessons learned about how to implement this provision in the Title IX space should be exported to other conduct processes.

III. Appeal

HB233 creates a specific appeal right for respondents as well. The bill does not specify which grounds should be allowed in an appeal or what the appeal scope and process must look like. Nonetheless, it may represent a departure from current practice for many institutions. It provides respondents the right to appeal the determination regarding responsibility *directly to the Vice President of Student Affairs or other designated senior administrator* (who may not have participated in previous decision-making in the case). As institutions amend their Codes of Conduct and policies to implement this requirement, they should take care to ensure there is no risk of involvement of the designated appeal officer in any other aspect of the case, as well as to clearly lay out in their Code the grounds and process for appeal and the authority the appeal officer has, so as to make this new appeal process as transparent as possible.

IV. Additional Procedural Rights

HB233 grants a few other procedural rights related to conduct charges and proceedings that institutions need to be aware of. It requires that institutions provide in their process a specific time limit (often referred to as a "statute of limitations" in legal practice) within which a student must be charged with a violation from the time of the alleged behavior, with a description of when that time limit may be extended or waived. When updating policies to incorporate this provision, institutions should clearly identify that extensions and waivers of a specific timeline may be required for certain types of conduct under federal law, and specifically, Title IX-covered conduct.

The bill also grants respondents the right to an accurate and complete record of the proceeding, available for copying upon request by the respondent.

And finally, HB233 includes a parallel procedural right for students in the student government that student conduct officers should be aware of. It requires student governments to adopt internal procedures that provide any elected or appointed officer who has been disciplined, suspended, or removed from office, the right "to directly appeal such decision to the vice president of student affairs or other senior university administrator designated to hear such appeals." The procedure may not condition the exercise of this appeal right on any other requirement, such as consideration of a student panel or judiciary.

When signed, this bill will clearly change the practice at many Florida institutions, and institutions should take a careful look, with the advice of counsel, at their policies. The SUNY SCI will update relevant Florida-specific training materials with the requirements of HB233.

[1] H.B. 233, 2021 Sess., (Fl. 2021), at § 3.
[2] *Ibid*, at §§ 1-2.

[3] *Id*.
[4] *Ibid*, at § 6 ("This act shall take effect July 1, 2021").
[5] *See* F.S.A § 1006.60.