

Report Regarding Investigation of
Discrimination/Bias in the WSU Student
Conduct Process

Lyons O'Dowd, PLLC
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SCOPE OF ASSIGNMENT

Washington State University (WSU) appointed Lyons O'Dowd, PLLC to conduct an independent investigation into whether there is ethnic or racial bias/discrimination within the student conduct process, particularly with those cases heard by the Student Conduct Board (the "Conduct Board") and/or the Student Conduct Appeals Board (the "Appeals Board").

SUMMARY OF FINDINGS

Based on the investigation conducted by this law firm, it is our opinion that there is no evidence of illegal discrimination or bias within the student conduct process regarding any ethnic or racial group, nor is there sufficient evidence to support a claim of adverse impact on such groups. The investigation did reveal that a number of witnesses had a perception of unfairness involving the treatment of football players in the process,¹ which was amplified in the fall of 2016 when several well-recognized minority football players were involved in [REDACTED] decisions.² While some of these perceptions of inequity are related to the brief adjudicatory process adopted in the Washington Administrative Code, others arise from the manner in which some board hearings were conducted. For example, in one hearing comments were reportedly made that suggested a finding of responsibility prior to deliberation or receipt of all the evidence. It was also reported that there was a comment made during a hearing suggesting a respondent had previously been involved in violent misconduct (which would be prohibited information until a finding of responsibility had been made). There were also reports that a Board Chair made negative statements about the football team and its apparent tolerance for violence against other males. It is the opinion of the investigators that while such statements would be troubling and could certainly add to the perception of inequity, there remains no evidence of racial or ethnic bias in the student conduct process. The investigators have made several recommendations to potentially ameliorate some of the perceived inequities of the student conduct process.

WITNESS SUMMARY/EVIDENCE

There is no complainant or respondent in this investigation. The interviews conducted focused on those individuals directly involved in the student conduct process, as well as those that have been critical of the process. The investigators interviewed the following individuals: Adam Jussel (Director, Office of Student Conduct); Lisa McIntyre (Associate Professor & Department Chair, Department of Sociology; Board Chair, Student Conduct Board); Melynda Huskey (Vice

¹ There were also perceptions of bias against members of the Greek system which were unaffiliated with any particular race or gender.

² A related student misconduct case involving a minority student, [REDACTED] v. *WSU*, was also decided in the midst of this investigation. This decision is expected to impact the current administrative rules governing these student conduct proceedings and is discussed in further detail below.

President-Student Affairs and Dean of Students); Elizabeth Hindman (Associate Professor, College of Communication; Chair, Communication and Society; Assistant Dean for Graduate Studies; Board Chair, Student Conduct Board); Craig Hemmens (Professor and Chair, Department of Criminal Justice and Criminology; former Student Conduct Board member); Karen Fischer (Associate Dean of Students; Student Advisor for Student Conduct Hearings); Antonio Huffman (Assistant Athletic Director, Football Operations; Student Representative for football players in the student conduct process); Bill Gardner (WSU Chief of Police); Brandon Bang (Instructor, Texas A&M; former Student Conduct Board member); JJ Oliver (Director, Leadership and Annual Gifts; Student Conduct Appeals Board member); Edwin Hamada (Director, Residence Life; Board Chair, Student Conduct Appeals Board); [REDACTED] (Student member of Student Conduct Board); Lieutenant Colonel Chris Heatherly (Chair, Department of Military Science; Student Conduct Board member); Tariq Akmal (Department Chair, Teaching & Learning; Student Conduct Board member); Tammy Crawford (Professor, Eastern Washington University; former Student Conduct Board member); Jack Thompson (WSU Alumni, WSU Foundation Trustee); Aaron Oforlea (Associate Professor, English; former Student Conduct Board member); Bill Moos (Director of Athletics) and Stephen Bischoff (Associate Director, Multicultural Student Services).

Written communications were also received and/or exchanged with numerous individuals, some of whom were students who had personal experience with the student conduct process and who will not be individually named herein, others served as student advisors/representatives, such as Tim Esser (Licensed Attorney, Washington); Roger Sandberg (Licensed Attorney, Washington); Jenna Brozich (Licensed Attorney, Washington) and Steve Martonick (Licensed Attorney, Washington).

In addition to the witness interviews and written communications, the investigators have reviewed numerous student conduct files, training materials, statistical data, and applicable laws and rules, including case law relevant to WSU's student conduct process.

BACKGROUND

WSU Campus/Framework

The WSU Pullman campus serves approximately 20,000 students.³ The diversity of the Pullman campus is reported to be 29% multicultural, with 81% of students being Washington residents, 12% out-of-state residents, and 7% international students. *Id.* As of fall 2016, WSU's undergraduate population was approximately 61.5% White, 14.4% Hispanic, 7.2% Two or More

³ See *WSU at a glance*, Quick Facts, available at <https://wsu.edu/about/facts/> (last visited January 13, 2017). In total, WSU serves approximately 29,000 students. *Id.* Almost all freshmen and approximately one-third of the undergraduate community live on campus. *Id.*

Races, 5.9% Asian, 4.8% International, 3.3% Black or African American, 0.8% American Indian or Alaska Native and 0.4% Native Hawaiian or Other Pacific Islander.⁴

There are approximately 600 WSU Student Athletes competing in university sports (nine PAC-12 conference sports for women, and six for men). *Id.* As of 2011, 31% of the student-athlete population were athletes of color, “the majority African-American, predominately in football and basketball.”⁵ There is also an active Greek community on campus with over 60 national fraternity and sorority chapters and approximately 25% of the WSU campus being affiliated with a Greek organization.⁶

WSU Student Conduct Process

All WSU students are held accountable to WSU’s Standards of Conduct, both on and off campus. These standards apply throughout the students’ duration at WSU and are outlined in detail in the Washington Administrative Code (WAC). *See* WAC 504-26-001. Enforcement of the standards is administered by the office of the Vice President of Student Services and the Office of Student Conduct (the “OSC”). *See* WAC 504-26-202 through 230.

The OSC receives complaints from a number of channels: residence life incident reports, walk-ins/telephone reports, online submissions, Office for Equal Opportunity reports, police interagency meetings/reports, and faculty reports. When concerns of potential misconduct are received, they are processed to determine if the concerns have merit. Of the thousands of student interactions with the OSC each year, approximately 1,500 were actually processed as cases by the OSC in the 2015/2016 academic year.

The more serious allegations, and those which are addressed in this report, are the complaints of misconduct that *could* possibly result in suspension or expulsion. All such complaints must be referred to the Conduct Board for a hearing and follow the processes outlined in the WAC. *See* WAC 504-26-401(3)(b). Approximately 4-5% of the total misconduct cases go before the Conduct Board. The Conduct Board heard 51 cases in 2013, 74 cases in 2014 (28 resulted in suspension and 22 resulted in expulsion) and 76 cases in the 2015/2016 academic year (36 resulted in suspensions, 21 resulted in expulsions and 2 were found not responsible).

⁴ *See WSU Enrollment by Level and Ethnicity Fall 2009-2016*, Institutional Research available at <https://ir.wsu.edu/enrollment/> (last visited February 15, 2017).

⁵ *See Institution Self Study Report, Gender Diversity Issues, Part 11, page 165, available at* <http://www.athletics.wsu.edu/ncaacertification/documents/2010-2011%20Self-Study%20Report.pdf> (last visited January 19, 2017).

⁶ *See Facts & Figures, Center for Fraternity and Sorority Life, available at* <https://gogreek.wsu.edu/our-community/facts-and-figures/> (last visited January 13, 2017).

Membership on the Conduct Board is voluntary and is comprised of five members (consisting of WSU students, faculty and staff). *See* WAC 504-26-100. One WSU employee must serve in the position of the Board Chair, which requires additional training. Consistent with the WAC, the Board Chair is afforded the discretion to determine what questions may be asked of witnesses, as well as what evidence may be introduced. *See* WAC 504-26-401(8). Other than a general relevancy standard, there is no written protocol on what questions can or cannot be asked. *See* WAC 504-26-403(4)(v). The Board Chair is also responsible for facilitating the hearing and writing the final report.

Conduct Board members provide their scheduling availability to the OSC at the beginning of the year and some are provided special training to serve on sexual assault cases. When a case is referred to the Conduct Board the OSC schedules board members based on their availability, appropriate training prerequisites and experience. Conduct Board members are advised to opt out if they have a conflict of interest. When a case is referred to the Conduct Board, the OSC notifies the student of the charges and the date and time for the hearing. *See* WAC 504-26-403(2).

All WSU staff, faculty and students can apply to be a member of both the Conduct Board and the Appeals Board. Applications are received through nominations and voluntary submissions. All applicants are interviewed by the OSC and the Office of the Vice President of Student Services (the “VP”). The VP makes all final decisions on appointments. *See* WAC 504-26-100. The OSC reports that there are more positions available to serve on the Conduct Board and the Appeals Board than there are applicants. Applications are encouraged from every sector of the WSU community.

Conduct Board hearings are conducted in private, with the purpose of having an educational tone and an intent to avoid unduly adversarial environments. *See* WAC 504-26-403(4); *see also* WAC 504-26-001 (“[T]he purpose of these standards and processes is to educate students and protect the welfare of the university community.” (emphasis added)). The complainant, the accused student and the student advisor are permitted to attend the entire Conduct Board hearing, except deliberations. *See* WAC 504-26-403(4). Student advisors are not allowed to speak for a student or otherwise directly address the Conduct Board or witnesses. Upon request, WSU will make a university advisor available to the student to assist the student “in understanding the student conduct process.” WAC 504-26-401(6) (emphasis added). The advisor made available by WSU does not provide advice on substantive matters,⁷ such as what line of questioning might be appropriate for witnesses or the type of statements that should be made by a respondent to the Conduct Board.

⁷ Currently, the Associate Dean of Students serves as the default student advisor for students facing potential disciplinary action before the Conduct Board.

After reviewing a case and determining that there is merit to the allegation(s), the Director must refer the case to the Conduct Board if the misconduct at issue *could* result in potential suspension/probation. Witnesses may be provided by both parties, accompanied by advance written statements. *See* WAC 504-26-403(4). Questions for witnesses are put in writing and forwarded to the Board Chair, who has the discretion to determine their relevancy. WAC 504-26-403(4). After closing the information section of the hearing, the Conduct Board determines, by majority vote, whether the student is responsible for each alleged charge. *See* WAC 504-26-403(4). If the student is found responsible, the Conduct Board may consider prior misconduct of the student to assist in determining appropriate sanctions. *See* WAC 504-26-403(4). The WAC outlines a wide array of potential sanctions but there are no rules in place to govern what sanctions are appropriate for particular misconduct. Final decisions of the Conduct Board must be in writing and provided to the student within 10 days of the hearing. *See* WAC 504-26-403(4).

The decision of the Conduct Board may be appealed to the Appeals Board. *See* WAC 504-26-403(4); WAC 504-26-407(1). An appeal must be based on one of four grounds: (1) whether the Conduct Board hearing was fair and in conformity with the process; (2) whether the decision reached was based on substantial evidence; (3) whether the sanctions imposed were appropriate; and (4) whether new information exists that was not known at the time of the Conduct Board hearing. WAC 504-26-407. In the case of expulsion, the student may appeal to the President after review by the Appeals Board. The President, in turn, will limit the review to the foregoing grounds and make a final decision. WAC 504-26-407.

In August of 2014, Adam Jussel was appointed as the Director of the OSC. There were many changes implemented after Mr. Jussel's appointment.⁸ In-depth trainings were developed for the benefit of the Conduct Board and the Appeals Board, as well as members of the WSU community. Current training materials cover the conduct process and due process, sexual misconduct and discrimination, alcohol and drugs, trends and data, gender-based violence, and sexual assault trauma. The OSC also hosts presentations offered by the WSU Police, the Center for Civic Engagement ("CCE"), International Programs, the Office for Equal Opportunity ("OEO"), and Alcohol and Drug Counseling, Assessment, and Prevention Services ("ADCAPS").

The Conduct Board and Appeals Board are provided more in-depth training on sanctioning. The training, titled *Self-Determination Theory & the Art of Sanctioning*, describes a theoretical basis for sanctions and outlines the OSC's goals in regard to the same, including: (1) education and development, (2) deterrence, and (3) assistance. Minimum sanction standards are outlined for

⁸ Before Mr. Jussel's appointment, it was reported that the OSC was not always following appropriate channels and processes, including issuing suspension/expulsion decisions without involving the Conduct Board in violation of the WAC. The investigators have not looked into the merit of these allegations and find them outside the scope of this appointment. However, assuming these allegations are true, this does assist in explaining some of the increase in cases heard by the Conduct Board over the last few years.

minor misconduct (such as a variety of alcohol-related offenses). However, there are no written guidelines for what forms of misconduct will result in the most serious sanctions: suspension or expulsion.

Currently, there are 42 individuals trained to serve as members of the Conduct Board,⁹ three of which currently serve as Board Chairs (Lisa McIntyre, Elizabeth Hindman and Consetta Helmick). Lisa McIntyre has been a member of the Conduct Board for 19 years. Lisa served as the exclusive Board Chair for over a decade, with Elizabeth Hindman and Consetta Helmick joining as Board Chairs within the last two to three years.

Witness Interviews

The investigators interviewed both current and former Conduct Board members and Appeals Board members, as well as others involved in the process, including students, student advisors/student representatives and other observers to the process. The statements provided herein refer to evidence gathered during the witness interviews.

Those serving (or having served) on the Conduct Board and the Appeals Board all recognize that the student conduct process is a critical component of the WSU community and requires the utmost respect and attention. Recent efforts by the OSC to provide greater clarity on processes and training were applauded.¹⁰ A number of witnesses emphasized the “educational” purpose of the process, both in terms of the student’s obligation under the WAC to represent himself/herself without the assistance of legal counsel, as well as in regard to the ultimate sanction imposed. This educational focus is consistent with goals outlined in the WAC. Others expressed concern that some students were disadvantaged due to less experience and/or an inability to adequately represent themselves.

⁹ Of the 42 members eligible to sit on the Conduct Board, 12 are faculty, 14 are staff and 16 are students. Each Conduct Board must be comprised of at least three faculty/staff members, including the Board Chair, and at least 1 student. Twenty-two members are female and twenty are male.

¹⁰ The majority of witnesses reported that the training provided by the OSC was consistent, up-to-date and covered the topics that would be appropriate for a Conduct Board member in this setting. Some witnesses suggested that additional training should be offered on multicultural issues, particularly as it applies to the decision of sanctions. It was also reported that there is no specific training provided to Conduct Board members regarding one’s obligation to consider and potentially recuse oneself due to a conflict of interest or perception of bias.

The current Board Chairs (Lisa McIntyre, Elizabeth Hindman, and Consetta Helmick) were recognized as having different stylistic approaches to conducting the hearing but all essentially following the same process as outlined by the OSC.¹¹

Critiques of the Process

Overly punitive/inadequate due process

There were several reports that the process was overly punitive and failed to afford students adequate due process.¹² Several witnesses recommended that a student's legal counsel/advisor be able to speak directly to the Conduct Board, ask questions of witnesses and otherwise engage directly in the hearing. Many witnesses suggested that the WSU student advisor is unduly limited to provide only procedural advice to students. There were also concerns expressed that there is no training for individuals serving in the role of student advisor, which requires an in-depth understanding of the conduct process and likely some familiarity with legal norms. Others suggested that students should be better advised on the substantive aspects of the student conduct hearing and that this advice should be afforded to students by an individual independent of the OSC, with specialized training in student conduct hearings and the due process rights of students. The vast majority of witnesses agreed that individuals serving in the role of student advisor should be properly equipped to assist a student in advising on both the procedural and substantive aspects of their case. The investigators concurred with a number of these critiques.

Selection of Conduct Board for particular cases

The OSC confirmed that there is no random selection of Conduct Board members to a particular case. Selection to serve on a particular board is guided by a Conduct Board member's availability and training (as in the case of sexual misconduct cases), not the perception of a Conduct Board member's tendency toward a particular outcome. Some witnesses expressed concern that the OSC sits in a conflicted role because it determines which cases should be prosecuted, selects the Conduct Board members for cases, answers students' questions in regard to certain aspects of the case and advises the Conduct Board in the hearing and deliberation.

¹¹ The OSC provides a step-by-step checklist for all Board Chairs to follow when conducting a hearing.

¹² Some of those witnesses who described the sanctioning process as overly punitive expressed concerns about the impacts that an expulsion would have on a student, particularly a minority student, who would have to return to his or her home and potentially never finish obtaining a degree or achieve his or her long-term education goals.

Cultural Differences

Some witnesses expressed perceptions of unfairness in the system when the respondent has unique cultural differences, particularly where the student is not a native English speaker. With respect to some of the football players, it was described that young people from Pacific Island cultures are extremely deferential to any person of authority and have a tendency to agree with any question asked, regardless of its accuracy. One student adviser found this difference problematic (recognizing that it created a potential disadvantage for the student), and expressed frustration about not being able to assist the student directly in speaking to the Conduct Board members or asking questions of witnesses. The limitations for representatives not being allowed to speak directly to the Conduct Board or witnesses is consistent with the rules currently imposed by the WAC.

Perceptions of bias against football players

It was reported that there is bias, or a perception of bias, in the student conduct process particularly as applied to male student athletes and members of the Greek system.¹³ Part of this perceived bias appears related to the small-town environment that students live in while attending WSU. Pullman has an active law enforcement presence both on and off campus.¹⁴ This can be a challenging adjustment for some students coming from more populated locations where law enforcement presence is less frequent. This can also be a challenge for some student athletes who are more noticeable due to stature. When an issue of misconduct arises, some student athletes are more likely to have their case subjected to public scrutiny. Aside from a few discrete (and unsubstantiated) allegations of racial or ethnic bias,¹⁵ the perceptions of inequity explained to the investigators appeared to be unrelated to race and ethnicity.

¹³ Most witnesses recognized that violent misconduct issues predominantly involved males rather than females. The data provided to investigators reports that of the 20 total physical abuse of others charges since 2014, 19 cases involved male respondents and only one case involved a female respondent. Many witnesses also suggested that the presence of Greek students in the conduct office generally involved the presence/use of alcohol. The investigators have no independent data regarding this allegation.

¹⁴ Statistical data provided by the Office of Institutional Research (OIR) reports that of a sampling of 200 student misconduct cases provided by the OSC from the spring of 2014 to November of 2016, only 40 cases involved police arrests or citations, of which 2.5% are identified as American Indian/Alaskan, 2.5% Asian, 5% Black/African American, 15% Hispanic/Latino, 7.5% International, 0% Native Hawaiian/Pacific Islander, 2.5% Unspecified, 15% Two or More Races, 50% White.

¹⁵ Of those concerns, several referenced statistical information that black males are more likely to face criminal charges than white males of the same age. Others identified that there is a higher percentage of minorities in the student athlete population at WSU.

The perceptions of some of the critics of the Conduct Board related to some comments, statements and stylistic approaches by Board Chairs responsible for conducting the hearings. In terms of style, some witnesses believe that the approach to hearings was too informal. Some witnesses characterized the questioning of respondents as sometimes “leading” (meaning assuming the truth of the assertion in the question, regardless of whether that assertion was established) and sometimes too casual in situations where a serious sanction, such as expulsion, was a real possibility. Some witnesses also believed that questions of male respondents were more aggressive and harsh, and that such questioning was potentially unfair when the respondent was a non-native English speaker coming from a different culture (such as the Pacific Islander respondents). It was also reported that a board member made comments that led some former board members to believe that a bias exists against football players and members of the Greek system (or at least recognized that such comments could add to that perception of bias).¹⁶ Some witnesses reported a concern that a Board Chair could attempt to sway other board members, particularly the more junior members, to reach a particular outcome. There was no evidence that these concerns were tied to racial or ethnic grounds.

Many current and former board members reported that, despite stylistic differences, the hearing process was consistent and objective regardless of who was serving as Board Chair. Generally, the witnesses commended all Board Chairs for their service and recognized the time, energy and stress involved in the position. Witnesses that were current or former board members also reiterated that the Conduct Board consists of five people, and that most board members are unlikely to be swayed with an outcome that they do not agree with in principle.

Some witnesses involved with the Conduct Board suggested that the recent cases involving WSU football players were no different than other student conduct cases, except that these cases involved high-profile student athletes. There was some concern expressed that the athletic department could do a better job stressing to football players what is and what is not acceptable behavior.¹⁷ It was also suggested that international students are not given adequate training on the WAC standards and the conduct that will be expected of students while attending WSU, despite any cultural differences. Several board members indicated that the harshest sanctions (suspension and expulsion) would be appropriate in cases resulting in severe physical harm to another

¹⁶ For example, one former board member had a recollection that a Board Chair said during deliberation something to the effect that “oh yeah, another student from [particular Greek] house” and “another from [athletic team].” Another witness reported that during deliberation a Board Chair stated that there were problems with the football team and the Conduct Board should send a message.

¹⁷ Some witnesses referred to what they had heard were the football coach’s three rules. These were reported to be: 1) Don’t cheat, 2) Don’t do drugs, and 3) Don’t hit a woman.

individual, regardless of race, ethnicity or gender,¹⁸ and that the Conduct Board tends to be more lenient when an individual takes responsibility for his or her actions.

Although some witnesses expressed concerns about racial and ethnic bias in the student conduct process, the investigators found no evidence to substantiate those concerns.

Recent Cases of Concern

During the summer of 2016, there were three separate incidents involving five WSU football players. [REDACTED] The first event occurred in June, [REDACTED] In late July, [REDACTED]

[REDACTED] In August, [REDACTED] In the resulting student conduct cases, [REDACTED]

[REDACTED] The investigators reviewed all of the foregoing conduct files and interviewed some of the witnesses who were involved in those matters.

[REDACTED] *v. WSU*; [REDACTED] *v. WSU*

[REDACTED], the Court in [REDACTED] *v. WSU* granted Petitioner [REDACTED] and found that there were procedural irregularities in the hearing. Following this ruling, WSU temporarily lifted the decisions rendered in [REDACTED] and [REDACTED] cases.

On December 1, the Washington Court of Appeals ruled in [REDACTED] *v. Washington State University* that “the statutory brief adjudication procedure is inadequate where a college or graduate student faces expulsion or is charged with sexual misconduct that would amount to a felony under criminal law.” 385 P.3d 251, 253 (Wn. Ct. App. 2016). Given the severe hardships [REDACTED] faced—expulsion, loss of his financial and personal investment in his doctoral degree, damage to his reputation due to criminal charges, loss of his visa and ability to remain in the United States—the Court of Appeals determined that that the brief adjudication process was improper and that a full adjudication was required in order to adequately address the issues and interests at stake. *Id.* As a result of this ruling, WSU is in the process of rewriting its rules governing student conduct proceedings.

¹⁸ The investigators reviewed a decision by the Conduct Board in the fall of 2014 where a female student was expelled from the University following a charge of violence toward another student. The Board Chair of that hearing also presided over a misconduct matter that resulted in the expulsion of a male football player.

LAW

Illegal Discrimination

WSU Executive Policy #15 provides that discrimination in all forms “destroys mutual respect and a trusting environment, [and] can bring substantial personal harm to individuals, and violates individual rights.” Prohibited discrimination applies to all conduct on the basis of race, sex/gender, color, and national or ethnic origin, among others. This policy applies to the conduct of all WSU students, faculty, staff, and others associated with the University.

The Revised Code of Washington also prohibits discrimination because of race, color and national origin. *See* RCW 49.60.030(1)(b). In order to prove discrimination “the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) that the defendant’s establishment is a place of public accommodation [which includes public universities such as WSU]; (3) the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and (4) the protected class status was a substantial factor causing the discrimination.” *Spry v. Peninsula School Dist.*, 193 Wn. App. 1015, at *6 (2016).

In addition to claims of direct discrimination, discrimination claims can be based on disparate impact, though caused by facially neutral processes. The U.S. Supreme Court has held that conduct is not unconstitutional merely because it produces a disproportionately adverse effect. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). “The decisions of the Supreme Court in many contexts reiterate the basic equal protection principle that the uneven consequences of governmental action claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” *Tasby v. Estes*, 643 F.2d 1103, 1107 (5th Cir. 1981) (emphasis added). “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an individual racial discrimination forbidden by the Constitution.” *Washington*, 466 U.S. at 242.

Bias/Impartial Tribunal

Although the exact scope of what may be required in suspension/expulsion hearings at WSU is currently unclear, basic due process requirements include the right to an unbiased and impartial tribunal. *Harris v. Hornbaker*, 98 Wn.2d 650, 656-57, 658 P.2d 1219, 1221 (1983) (en banc) (“In an adjudicatory setting, impartiality and lack of bias are required of decision makers.”). Washington courts apply the “appearance of fairness doctrine” to quasi-judicial proceedings in two situations: “(1) when an agency has employed procedures that create the appearance of unfairness and (2) when one or more acting members of the decision-making bodies have apparent conflicts of interest creating an appearance of unfairness or partiality.” *In re Disciplinary Proceeding Against Peterson*, 180 Wn.2d 768, 785, 319 P.3d 853, 861 (2014) (en banc) (citations omitted). “Hearing officers are not judges, but we trust and empower them to preside over proceedings, take evidence, make findings of fact, and do other duties analogous to the role of a judge. The presumption of fairness for judges likewise applies to hearing officers” *Id.* at 862.

“A proceeding appears to be fair if it would so appear to a reasonably prudent and disinterested person.” *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 904, 232 P.3d 1095, 1102 (2010) (en banc) (citations omitted). The courts have declared that there is “no inherent unfairness in the mere combination of investigative and adjudicative functions, without more, that would prompt invocation of the appearance of fairness doctrine.” *Peterson*, 180 Wn.2d at 785, 319 P.3d at 861 (emphasis added). In *Peterson*, a certified professional guardian facing disciplinary charges alleged that one of the commissioners involved in the disciplinary process was biased against her and his involvement in the case violated the appearance of fairness doctrine. *Id.* Peterson argued that Commissioner Valente engaged in an “unprecedented crusading” that is a “result of his personal vendetta and bias against her.” *Id.* Peterson introduced evidence that she had previously served on the board with Valente and that the two had a falling out during that time. Peterson also alleged that Valente used this prior experience in initiating an investigative proceeding against her and recommending that she face disciplinary charges. The Court took note that the transcripts and opinion letters issued by Valente were fair and that there was no “material evidence suggesting impropriety” or error to the hearing officer’s findings. *Id.* Without such specific evidence, there is not the “something more” that would violate the appearance of fairness doctrine.

Similarly, if there is simply a “general predilection” toward a certain outcome, but no indication that the members are not able to decide the case fairly, courts will not find a due process violation. *Matter of Johnston*, 99 Wn.2d, 466 475, 663 P.2d 457, 462 (2009) (en banc).¹⁹ In *Johnston*, a physician alleged that hearing officers had predetermined his disciplinary action by making public statements regarding their thoughts on the case before the hearing, in deprivation of his right to due process. *Id.* at 461-62. The Washington Supreme Court held that such statements, while perhaps supporting a general predilection towards a particular outcome, could otherwise be explained by the board’s duty to enact a summary suspension for the protection of the public. *Id.* at 475-76. The Court also held that the appearance of fairness was not undermined by these statements and that reviewing courts “must presume that board members acted properly and legally performed their duties *until the contrary is shown*.” *Id.* at 464-65 (emphasis added). In other words, the standard for demonstrating bias in violation of one’s due process rights is a high threshold that requires a showing of material evidence of unfairness and/or lack of objectivity.

¹⁹ Other jurisdictions having addressed bias in student conduct proceedings have held that the interest in avoiding expulsion is great compared with the cost of administration to provide an impartial tribunal. See *Furey v. Temple University*, 730 F.Supp.2d 380, 396 (E.D. Pa. 2010) (finding a panel member biased due to his friendship with a testifying police officer and his statements regarding the credibility of the officer’s statements and the type of cross-examination used by the panel member). Cf. *Gorman v. University of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988) (finding no evidence of bias where panel members had allegedly expressed a dislike for people that went against the system (such as the respondent in that matter)). See also *Pham v. University of Louisiana at Monroe*, 2016 WL 3843591 at *5 (W.D. La. 2016) (requiring *actual* bias to be proven in order to succeed on a claim of bias in a student conduct hearing).

Student Conduct Framework-RCW/WAC

The Revised Code of Washington includes an administrative procedure act (“APA”), which is applicable to all agencies of the State of Washington. *See* RCW 34.05.413-479. WSU, as an agency of the State, is subject to the APA and empowered to adopt rules governing its formal and informal procedures. *See* RCW 34.05.010(2), (7) (defining “agency” to include any institution of higher education and defining “institutions of higher education” to include WSU); RCW 34.05.220 (providing agencies with rulemaking authority). The APA outlines two types of administrative proceedings: the full administrative hearing and the brief adjudicatory proceeding.

WSU had adopted the brief adjudicatory proceeding, with some modification, set forth in the Washington Administrative Code (“WAC”). The brief adjudication process has minimal requirements: the agency must inform the party of the agency’s view regarding the matter, the party must have an opportunity to explain his/her view, and the agency must give the party a statement of reasons for the agency’s decision. *See* [REDACTED] v. *Washington State University*, 196 Wn. App. 878, 905 (2016). The rules governing the student conduct process are summarized above and set forth in the WAC 504-26-001 *et seq.* The preamble to these rules reiterates that all WSU students are expected to meet the standards of conduct outlined and that they will be held accountable for their conduct “both on and off campus.” WAC 504-26-001 (emphasis added). “[T]he purpose of these standards and processes is to educate students and protect the welfare of the university community.” WAC 504-26-001 (emphasis added).

ANALYSIS

The analysis and recommendations set forth herein are based on the rules and procedures in existence at the time of the investigation and do not take into consideration changes to the student conduct process that have been made, or will be made, subsequent to the investigation.

No Evidence of Illegal Racial or Ethnic Discrimination

The investigators’ review of the recent student cases does not reveal evidence to support a prima facie claim of racial or ethnic discrimination in WSU’s student conduct process. As outlined in *Spry, supra*, a plaintiff must (1) be a member of a protected class, (2) be subjected to conduct by WSU through its student conduct process, (3) be treated differently than individuals not a member of the class, and (4) show that the different treatment was substantially a result of the student’s protected status. [REDACTED]

[REDACTED] and were involved in student conduct cases before the Conduct Board; thus meeting elements one and two. However, there is insufficient evidence to survive the third and fourth elements of a discrimination claim as to these individuals. As to [REDACTED]

[REDACTED] This finding of no responsibility militates in favor of a conclusion that [REDACTED] was not discriminated against by the Conduct Board due to his race, gender or otherwise.

It could be argued by [REDACTED] that they were treated differently than [REDACTED] who is [REDACTED] and was only [REDACTED] yet involved in [REDACTED].²⁰ Such an allegation would likely satisfy the third element of a discrimination claim. However, based on extensive interviews and a review of the case files at issue, the investigators find no evidence that the different treatment afforded to [REDACTED] was because of their race or ethnicity. The investigators' review of the files suggests that the differing treatment stems from the individual circumstances of each student's involvement in the [REDACTED]. For example, both [REDACTED] and [REDACTED] were [REDACTED]. Although [REDACTED] was [REDACTED], whereas [REDACTED]'s involvement [REDACTED]. Also, this sanctioning decision is consistent with the sanctioning parameters followed by several members of the Conduct Board, which is that physical altercations resulting in serious bodily harm to another are more likely to result in expulsion. Similarly, [REDACTED] was reported to have [REDACTED]. There are other concerns regarding this decision discussed below, but there is no evidence of racial or ethnic discrimination.

As to [REDACTED], [REDACTED] there is insufficient evidence to support an allegation that he was treated differently than others involved in the same incident. The OSC reported that it investigated the incident to discover whether other WSU students were involved, but [REDACTED] was unable to identify who he was with during the incident and suggested that they were [REDACTED]. Even if this third element were met, the investigators do not find evidence that the [REDACTED] decision was substantially a result of [REDACTED] race or ethnicity. This was [REDACTED] with the Conduct Office. [REDACTED]. The Conduct Board noted that [REDACTED]. The [REDACTED] decision is again consistent with the sanctioning parameters outlined above regarding misconduct resulting in serious harm to another.

Insufficient Evidence Regarding Disparate Impact

The investigators have reviewed statistical data provided by both the OSC, as well as WSU's Office of Institutional Research in order to address potential claims of disparate impact. That data considers severe conduct cases referred to the Conduct Board from the spring of 2014 through November of 2015. There were 201 total incidents used in the data sampling, which is

²⁰ An argument that males are being targeted is unlikely to pass even the second element given the lesser sanction for [REDACTED] as compared to the other males involved in the incident.

broken down by race/ethnicity as follows: 48% White, 4% Native Hawaiian/Other Pacific Island, 5.5% Asian, 1% American Indian, 8.5% International, 8% Black/African American, 2% Unspecified and 9% Two or More Races. Of the 201 cases, 62 cases resulted in expulsions--41% (25 students) of which involved White respondents, and approximately 4% [REDACTED] involved Native Hawaiian/Pacific Islanders. This data is slightly higher than the University's ethnicity data reporting that only 0.4% of the student population reports to be Native Hawaiian or Other Pacific Islander, while 61.5% of the community reports to be White.

However, the data sampling provided is far too small to support a claim of disparate impact. There have been only [REDACTED] cases of [REDACTED] involving Native Hawaiian/Pacific Islander students since 2014, [REDACTED]. Furthermore, as set forth in *Washington v. Davis, supra*, even if the data was sufficient to show a disproportionately adverse impact on minorities, the differing treatment must still be "traced to a racially discriminatory purpose." Based on the evidence reviewed by the investigators, there is no evidence to support the presence of a racially discriminatory purpose.

Perceptions of Unfairness

The investigators found that a number of witnesses perceived unfairness in the student conduct process, particularly when the conduct at issue involves football players and violence against others. Several witnesses expressed concern about comments made in connection with the Conduct Board about the football team and one board member was reported to have expressed an interest in teaching the team a lesson. When interviewed, this board member recognized that acts of violence resulting in the most severe harm should result in suspension/expulsion. This board member also expressed concern that the football program had not adequately trained its players on the inappropriateness of violence against other males.

With this framework in mind, the investigators recognize how comments made during student conduct hearings, particularly those involving football players, can, even without illegal bias, lead to the perception of unfairness. For example, during the hearing for [REDACTED], the Board Chair reportedly commented that it was unlikely that the [REDACTED]. The statements were made as follows:

[REDACTED]

[REDACTED]

This comment was made during the board hearing and was perceived by some as suggesting [REDACTED], as well as a potential connection between violent behavior and playing football. This comment followed testimony by [REDACTED] wherein [REDACTED] characterized football players as being known for being more aggressive generally, and described [REDACTED].

The Board Chair also made a statement during the board hearing that some perceived as a factual finding that [REDACTED]. The statements were made as follows:

[REDACTED]

Some witnesses perceived this comment as a predetermination of responsibility for [REDACTED] involvement in the [REDACTED].

Finally, the investigators take note of the decision letter for ██████████ which identified in bold type (the bold type was not typical of the other cases reviewed by the investigators) that it was the Conduct Board's specific intent that ██████████. Such language, and its emphasis, was perceived by some witnesses as unnecessarily and unfairly punitive.

Washington has adopted the "appearance of fairness doctrine" and assumes that all hearing officers have acted fairly, even if they demonstrate a predilection toward a particular outcome, unless there is "material evidence suggesting impropriety." In this case, the statement by the Board Chair suggesting that ██████████ was not ██████████ could be interpreted as an indication of a predetermined outcome. However, like the decision in *Johnston* wherein hearing officers made public statements in advance of the hearing suggesting they had predetermined the outcome of the case, statements of a potential predilection toward a particular outcome are not sufficient to undermine the appearance of fairness of the proceeding. Also, the Board Chair's statement suggesting that ██████████ ██████████ and its potential connection to playing football is akin to the allegation of bias in *Peterson* wherein it was alleged that one of the adjudicators involved in the disciplinary proceeding seemed to be acting pursuant to a personal vendetta against the respondent. However, the Washington Supreme Court has made clear that all board members must be presumed to have acted fairly and unless there is material evidence indicating otherwise, the appearance of fairness has not been violated. While these statements, in isolation, may not be entirely appropriate, they must be read in context within the framework of the student conduct process. The Board Chair is tasked with facilitating the entire hearing process, and maintaining its "educational" premise. Also, the framework of student conduct hearings, at that time, was within the brief adjudicatory process which is likely to give way to informal, almost conversational testimony, that would be unusual for a courtroom. The ultimate finding ██████████ was made by the Conduct Board as a whole (consisting of five people) and is supported by substantial evidence in the record. ██████████ was afforded the opportunity to participate in the manner mandated by the WAC at that time. Although the investigators believe these comments may not be entirely appropriate, and likely added to the perceptions of unfairness against football players, without more, they are insufficient to support a claim of unfairness as proscribed by the State of Washington. The investigators reiterate that they did not find bias related to a person's race or ethnicity.

CONCLUSION

The investigation reveals no evidence of racial or ethnic discrimination/bias in the student conduct process. There was a perception by a number of interviewees that there is a bias against football players. Some of that perception appears to be related to the brief adjudicatory process adopted in the WAC while others relate to isolated comments made by board members during hearings, as well as stylistic (informal) approaches by board members. While the investigators conclude that illegal bias did not impact the ultimate decisions reviewed, the investigators note that the perceptions of unfairness should be addressed and have made several recommendations to potentially ameliorate some of these issues.

RECOMMENDATIONS

In order to ensure both the actual and perceived objectivity of the student conduct process, the investigators recommend that WSU consider making some of the following adjustments to its process.

To minimize the conflicting roles of the OSC and its Director, it is recommended that an attorney be made available to both the Conduct Board and the Appeals Board for questions. Ideally, this individual would be present during all hearings, as well as deliberations. Having an individual outside of the OSC advise the Conduct Board and the Appeals Board would minimize the OSC's potential to serve in conflicting roles within the proceedings.

It is also recommended that training be offered by the OSC, and approved by the Attorney General's Office ("AGO"), regarding Conduct Board members' obligations in terms of conflicts of interests and appearances of bias/impartiality. It is our recommendation that, to the extent possible, Conduct Board members not serve on multiple cases involving the same student, as this arguably violates a student's right to prevent prior misconduct from being considered before a decision of responsibility has been made.

To address concerns regarding receipt of student notifications, the investigators recommend that copies of all misconduct notices be sent to a student's athletic coach, Greek advisor, or any other advisor identified by the student in advance as authorized to receive copies of the same. Notices regarding conduct cases being referred to the Conduct Board should, in addition to a description of the charges, make clear that the alleged conduct at issue could result in the student's suspension or expulsion. Finally, the notice should identify the names of all Conduct Board members assigned to hear the case. Just as the Conduct Board members are expected to recuse themselves in the case of a conflict, a student/respondent should be afforded a similar right to exercise at least one peremptory challenge as to any Conduct Board member assigned to his/her case, and raise concerns of bias as to any others in advance of the hearing. Any allegations of potential bias should be resolved by a WSU administrator outside of OSC, in consultation with the AGO.

Although the investigators recognize that filling the membership on these boards is very challenging, it is our recommendation to increase the total membership of the Conduct Board from five members to seven members, with the additional two members being WSU faculty/staff. In doing so, there will be greater assurances that no particular individual is able to sway the outcome of the proceeding.

It is also recommended that the composition of the Conduct Board on any given matter be completely random, much like a jury selection, without any individual having control over who may ultimately serve on a particular case. To improve the depth and diversity of the Conduct Board pool, WSU may consider making representation from each department/constituent group on campus mandatory and/or consider offering a small stipend for the service. Greater efforts should

also be made to clarify the prerequisites for membership, as many individuals were not aware that *any* member of the WSU community could apply for the position.

It is also recommended that term limits be imposed for all Conduct Board and Appeals Board members, including limits for service as the Board Chair.

To ensure more consistent outcomes in sanctioning decisions, the investigators recommend that WSU develop written guidelines that identify the types of misconduct that are likely to result in a suspension or expulsion decision. Currently, there are no written procedures governing the most severe sanctioning decisions. These guidelines should only set outer limits and retain the Conduct Board's flexibility to craft sanctions that are individually tailored to the student at hand.

To prevent any single Conduct Board member from unduly influencing the Conduct Board, it is also recommended that all sanctioning decisions for suspension or expulsion be unanimous. This requirement need not apply to the finding of responsibility.

It is unclear at this time whether student advisors/attorneys will be allowed to speak directly to the Conduct Board and/or otherwise address and cross-examine witnesses. Assuming this component of the process does not change, it is recommended that all students facing potential suspension or expulsion before the Conduct Board be afforded a WSU-appointed advisor that will advise the student on both the procedural and substantive aspects of the proceedings. This individual does not need to be an attorney, but should be trained by WSU on the WAC standards, the student conduct process, and should have experience as a Conduct Board member.

Finally, to address concerns of cultural disparity, the investigators recommend including in the notice sent to students, additional resources such as the Office of Multicultural Student Services and/or the Office of Equity and Diversion. Ideally, these offices would train individuals to serve as student representatives in the student conduct process and work to ensure the student understands the charges and is equipped with the tools to adequately participate in the proceeding. Additional training on multicultural issues is also recommended for both the OSC, as well as all board members.