TOPIC:

STUDENT CONDUCT ISSUES DURING STUDY ABROAD PROGRAMMING

INTRODUCTION:

As universities continue to expand their programmatic offerings far past the gates of campus and across oceans, the concept of “campus” is becoming harder to define. With international programs and centers becoming a readily accessible option at most universities, students are almost as likely to be found trekking through Central America as they are trekking across the quad to class.

But what happens when a student in a university sponsored and controlled study abroad program engages in behavior that is against the institution’s code of conduct? What if this is not the first time the student has engaged in this behavior and the faculty member leading the trip would now like to send the student home? The traditional judicial affairs process contemplates an on-campus appearance for such a conduct violation, but what is the faculty member to do when the judicial affairs officer is 2,000 miles away?

Administering the disciplinary process in the context of an international program raises a host of questions for college and university counsel and administrators. From determining what laws, regulations and policies apply abroad, to the logistics of providing due process in remote locations with limited staff, the institution must consider many factors to ensure it preserves the due process rights guaranteed to the student while adapting to the unique context of a study abroad program.

This NACUANOTE will examine the most important of these factors, including the extraterritorial application of domestic laws, regulations and campus policies; how to ensure due process to students; and how best to adapt the student disciplinary process to provide a flexible model for issues occurring in programs abroad. An appendix to the Note provides a sample student conduct policy for international programs.

DISCUSSION:

What Laws, Regulations, and Policies Apply to Study Abroad Programs?

For a disciplinary process to be fair, a preliminary question institutions must address is: What behavior is subject to discipline? Specifically, what laws, regulations and policies apply to students who are studying abroad? One key consideration is whether U.S. federal and state laws – which may impose certain disciplinary or remedial obligations upon an institution – apply in the study abroad context. While the law is not entirely settled on the issue, prudent administrators and counsel should assume that all federal laws and regulations that apply to college and university programs in the U.S. will continue to apply abroad.
One reason for this is that many statutes affecting colleges and universities specify that they apply to “any program or activity receiving Federal financial assistance” – a point that courts have used to interpret the application of federal laws and regulations to study abroad programs. [1] Many students use federal financial aid funds to engage in study abroad programs, thus bringing to bear various prohibitions and requirements that apply under Title IV of the Educational Amendments of 1972. Indeed, courts have held that Title IX applies abroad. In King v. Board of Control of Eastern Michigan University, [2] a sexual discrimination case related to a program operating in South Africa, the court denied the university’s motion for summary judgment and used the “broad language” of Title IX to determine that the law “sweeps within its scope every single university education program,” and that study abroad programs are no exception. [3] Accordingly, study abroad programs are subject to the same obligations as the home campus with respect to Title IX, and institutions should ensure that their grievance and disciplinary processes abroad comply with the Title IX implementing regulations and guidance documents such as the April 4, 2011 “Dear Colleague Letter,” discussing procedures for addressing sexual harassment or sexual violence. [4] Similarly, the most recent edition of the Clery Act handbook released by the Department of Education last year confirms yet another extension of a federal law to overseas programming. [5]

Another issue that undoubtedly arises in the study abroad context is the extraterritorial application of laws and institutional policies regarding drugs and alcohol. Because drug and alcohol restrictions vary significantly by jurisdiction, administrators should draft clear policies so that students know what laws and rules apply. With respect to alcohol, the legal drinking age in many countries is 18, so a policy in the university’s student handbook stating, “[s]tudents under 21 years of age may not possess or consume alcohol on University-sponsored activities” has a very different effect than a policy stating “Students under the legal drinking age may not possess or consume alcohol on University-sponsored activities.” Accordingly, institutions should be clear as to how various policies apply abroad.

Additionally, regardless of local laws, institutions should be mindful of the requirements established in the Higher Education Act of 1965, as amended, that require universities and colleges to provide for a program to prevent student use and abuse of drugs and alcohol. [6] A perceived lapse in the program’s adherence to the university’s drug and alcohol program and failure to uphold its own code of conduct for these related areas could be used by the Department of Education as evidence of a violation of the Act. [7] This is another reason why universities may find it desirable to establish a formal conduct code and adjudicatory procedures that explicitly apply to programs outside the United States as a clear and separate statement. While many aspects may be similar, a code governing international programs might take into account an issue such as the “legal drinking age” in the country in which the student is present.

Taking into account the applicability of various laws, a key component of a student’s enrollment in a university study abroad program is his or her duty to follow the university’s student code of conduct and other relevant policies. The conduct code provided for programs is often similar to the university’s general student conduct code provided for by official policy or in the university catalog. While this code of conduct would inherently apply to the student regardless of the location of his or her program, it should be standard practice to reaffirm the student’s understanding of these “obligations” during the pre-departure or orientation period of the study abroad program. Where the program will provide for further rules or consequences than provided by the code (such as an additional understanding that any severe disruption may result in the student’s immediate expulsion and return to the states), the university may wish to request a signed affirmation from the participating student that they understand that while abroad they will be subject to the same rules and regulations of the university as if present on the home campus, but which also provides students with certain country-specific rules that are unique to the location of study – the violation of which by the student could result in legal or disciplinary action by the local officials.

Situations may also arise where the student engages in conduct that is a violation of local laws but does not inherently run afoul of university policy. For example, if a student is in a country that
prohibits the open display of criticism against government officials and gets arrested by the local police for such violation, is the student liable for a violation of the university code of conduct as well? The expectation that a student will adhere to local laws is an area which must be addressed in policy and ideally discussed with the student in a pre-departure orientation for additional reinforcement and explanation.

With clear policies in place, institutions then must develop a process for dealing with students who violate those policies.

Applying a Disciplinary Process to International Programs

As a preliminary matter, courts have long since confirmed that institutions may discipline students for conduct code violations even when they occur away from the main campus. As stated by one court:

An educational institution’s authority to discipline its students does not necessarily stop at the physical boundaries of the institution’s premises. The institution has the prerogative to decide that certain types of off-campus conduct are detrimental to the institution and to discipline a student who engaged in that conduct. [8]

The focus of the courts is on the operation of the actual program, rather than its location, in considering whether the university retains authority over conduct. Because some university policies – especially older ones – may only provide for the on-campus adjudication of disciplinary actions, universities should revisit these policies and consider providing an alternative process useful for study abroad situations.

What Should the Disciplinary Process Include?

While student conduct codes and disciplinary processes undoubtedly vary from institution to institution, Edward N. Stoner II and John Wesley Lowery have written influentially on creating student conduct codes and disciplinary processes. [9] Their article in the Journal of College and University Law is cornerstone reading for its discussion of how the student disciplinary process operates on a college campus, and several of the principles that it addresses provide the essential building blocks for applying student conduct policies abroad.

General Due Process Considerations

Perhaps the most critical aspect of a disciplinary process, whether on the home campus or abroad, is that it have some element of due process. Depending on the severity of the possible sanctions to be levied against the student, public colleges and universities are required by the U.S. Constitution to provide students accused of misconduct with some level of procedural due process. Private institutions, though not required to, often incorporate such due process principles in their student conduct codes as a matter of good administration. [10]

Several court decisions surrounding student disciplinary hearings cite the United States Supreme Court’s decision in Goss v. Lopez [11] as providing the basis for the minimum due process required for a student who will be subject to discipline by the university. According to Goss, at a minimum, the university must give sufficient notice to the student of the charges against him/her and provide an opportunity to be heard. It is important to note that these standards of due process are only required at disciplinary hearings, and not for academic actions (i.e., expulsion from a program) undertaken by the university against the student; in those situations, the court will usually defer to the university's academic judgments. [12] While the procedure provided in Goss only entitles the student to “some kind of notice” and “some kind of hearing,” such notice must be meaningful enough to give the
student a chance to respond to the charges. Notice may be oral and need not be “served” through formal procedures such as hand-delivery or by registered or certified mail. Email is now commonly used for serving students with notice of disciplinary actions, easing the issue of providing notice abroad (but not always eliminating it).

As for the actual opportunity to be heard, a hearing is not necessarily required (unless such hearing is guaranteed by university policy, in which case the action becomes more of an issue of contract). For instance, in *Parker v. Duffey*, students set up two different meetings with university administrators to discuss the charges against them. The court determined that these meetings alone were sufficient to meet the due process requirement. Likewise, the same circuit upheld a university’s decision to move forward with a scheduled hearing even after being notified by the student that he could not be present and attempting to reschedule the meeting several times. Since the student had been given the opportunity to discuss the charges with administrators previously, the court found no violation of the student’s due process rights. Moreover, if a hearing is scheduled and the student declines to appear, the student cannot then invoke a claim against the university for a violation of due process. Likewise, the university is not required to entertain a request to reopen a case once it is decided (outside any appeals processes provided through policy). Finally, unless otherwise provided for in policy, the minimal rights of due process do not provide the student the right to be represented by counsel at the hearing. However, the bias of an administrator charged with determining the outcome of the disciplinary process can be the basis of a due process claim.

These previous cases provide helpful parameters within which a useful policy on the international application of a university’s disciplinary process can operate. However, it is also important to remember that institutions have flexibility to take interim measures without providing full due process in extreme or dangerous situations. Study abroad environments may be subject to heightened institutional interests and concerns in this regard. Furthermore, a university has the right to remove a student from the study abroad experience if the university believes there is a medical necessity and danger to the student’s well being.

**Special Considerations in the Study Abroad Context**

The purpose of a separate procedure to be applied in study abroad situations is not meant to undermine the university’s current student disciplinary procedure – it is meant to complement that procedure while providing for flexible application in a number of different situations in a foreign location. The policy must be flexible enough to alert the faculty or program director to the essential components of the appropriate disciplinary procedures while also giving notice to the student of the procedures used in enforcing student discipline abroad. The institution should distribute the policy prior to departure, and provide an opportunity for students to ask questions in order to understand it.

Because of the unique nature of the study abroad environment and the fact that in certain instances the sanction imposed may call for the immediate removal of the student from the program, the policy should clearly state that expulsion at the student’s expense is an option. Furthermore, consistent with the university’s policy on its home campus, the policy should provide for an appeal process that can ensure an expedient and efficient review of the case. In cases of immediate removal and when possible, the program leader may want to involve other stakeholders in considering the decision. In certain instances, a more formal hearing with the student conduct officer via conferencing technology might be appropriate.

Other key considerations in implementing a study abroad disciplinary policy include:
• **Is there a need for a policy?** Most programs already operate by the “rip cord” emergency measure that sends the student packing in the event of a major incident. However, few programs have a process in place for dealing with minor incidents. How will the university deal with the minor discipline of a student?

• **Who are the stakeholders?** Stakeholders can include university counsel, office of student conduct, an education abroad coordinator, and program leaders. All of these parties should develop open lines of communication and work together to develop the aforementioned policies. Keep in mind that a university with two study abroad programs may have a very different looking team of stakeholders than a university with 50 programs.

• **What is the baseline framework for handling student conduct issues abroad?** In the absence of a formal policy, the university should at least be prepared to guide the program leader through the disciplinary process (investigation, determination, adjudication). Establish who is to be notified (partners? local authorities?) and what initial actions program leaders will be expected to take once an incident is reported. University counsel can review the framework once created to reexamine any possible areas of exposure.

• **How will your institution handle emergencies?** In the event of an emergency, the notification of multiple parties or a full-blown investigation may not be feasible. In situations where a student's actions have made him a danger to himself or others, the program leader should be given the authority to send the student home immediately. One exception is if criminal charges are pending against the student in the foreign location. In this case, the program leader should immediately consult with university counsel (who should in turn then generally contact the local consulate or embassy). Normally, a university would not represent the student but the university can direct the student or parent to the consulate who often can then offer a list of attorneys who speak English (which is invaluable and something not be taken for granted in a non-English speaking location).

• **How can your system be both flexible and consistent?** Whereas most student conduct hearings held on campus follow a similar script with a consistent process, the fact is that no policy will fit every situation considering the unique aspects of each study abroad program. What fits for a semester long program in Florence does not necessary work for a weekend trip scaling Machu Picchu. University counsel must be aware of how discipline is being administered abroad to determine if revisions to the current procedures are necessary to remain consistent with the fundamentals of due process. Counsel should also embrace creativity and flexibility.

Based upon the considerations above, some specific policy measures that should be considered include:

• Providing trip leaders with clear authority to make decisions on behalf of the institution when necessary for the health and safety of the students or others (and the training to exercise such authority appropriately);

• Using technology like videoconferencing when appropriate and available for affording due process and involving both on-campus judicial officers and on-site trip
leaders;

● Incorporating specific actions/conduct in the student code based upon past and reasonably-anticipated violations from study-abroad scenarios (violation of foreign laws or the rules of foreign partners, prolonged unexcused absences, etc.);

● Clearly stating in policy/notices that students are responsible for the financial cost of unanticipated travel (i.e., the ticket home) that results from disciplinary action;

● Require behavioral contracts of students with a history of conduct issues.

CONCLUSION:

Due to the unique nature of the study abroad experience, there exists an opportunity for the misapplication of student disciplinary procedure and thus a need for a uniform policy that faculty and program directors can use in order to maintain order in the program while also ensuring that the student is provided the appropriate due process. The policy proposed in the Appendix seeks to fill that void. As adopted, the policy represents an example of the duty of the university to reexamine existing processes to provide the tools necessary for the successful and orderly operation of its study abroad programs.

FOOTNOTES:

FN1. See Bird v. Lewis & Clark College, 104 F. Supp. 2d 1271 (D. Or. 2000), aff’d 303 F.3d 1015 (9th Cir. 2002) (considering the application of the Americans with Disabilities Act to a study abroad program). For a more detailed treatment of the ADA’s application abroad, see Allison Charney & Josh Whitlock, Federal Disability Laws: Do They Translate to Study Abroad Programs?, NACUANOTES Vol. 10, No. 7 (April 26, 2012).

FN2. 221 F. Supp. 2d 783 (E.D. Michigan 2002). But see also Phillips v. St. George’s University, 2007 WL 3407728 (E.D.N.Y. 2007), which raises the possibility of a court not applying Title IX when study abroad programs are under the control of a foreign educational facility. Some OCR officials have used this distinction in determining whether the ADA applies in a study abroad program. Arizona State University (OCR Region VIII, November 29, 2001).

FN3. Id. at 788. The court even went so far as to review the congressional statements made in the floor debate during the original passage of Title IX to strengthen their position. See also Mattingly v. University of Louisville, 2006 WL 2178032 (W.D.Ky. 2006).


FN6. See Josh Dermott, Federal Enforcement of Drug-Free Schools Regulations Likely to
FN7. For more information about this amendment, go to www.higheredcenter.org. Although there are no materials that specifically provide technical assistance with adhering to the program while engaged in international programs, the center is a clearing house for current news and academic materials on alcohol use in several university study abroad contexts.


FN11. 419 U.S. 565 (1975). While the initial case originated from an Ohio public high school, several cases continue to follow the principles established by Goss for justifying the basis for the several variations at the university level. Flaim v. Medical College of Ohio, 418 F.3d 629 (6th Cir. 2005); Barnes v. Zaccari, 669 F.3d 1295 (11th Cir. 2012); Willis v. Texas Tech University Health Sciences Center, 394 Fed. Appx. 86 (5th Cir. 2010); Esfeller v. O’Keefe, 391 Fed. Appx. 337 (5th Cir. 2010); Lucey v. State of Nevada, ex rel. Board of Regents of the Nevada System of Higher Education, et al., 380 Fed. Appx. 608 (9th Cir. 2010); Furey v. Temple University, et al., 730 F.Supp. 2d 380 (E.D. Pennsylvania, 2010); Holmes v. Poskanzer, et al., 342 Fed. Appx. 651 (2nd Cir. 2009).

FN12. Jackson v. Cleveland State University, 802 F.2d 458 (6th Cir. 1986) (citing Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978)).

FN13. Flaim at 634 (quoting Goss at 579).

FN14. Lucey at 610.

FN15. 251 Fed. Appx. 879 (5th Cir. 2007).


FN20. Furey at 397.

FN21. Ju v. University of Washington, 156 Wash. App. 1017 (Div. 1 2010). For an in-depth treatment of the difficult issues surrounding self-harming students and compliance with the Americans with Disabilities Act regulations, see Paul Lannon & Elizabeth Sanghavi, New Title II Regulations Regarding Direct Threat: Do They Change How Colleges and Universities Should Treat...

FN22. The Forum on Education Abroad is the Standards Development Organization recognized by the Department of Justice and the Federal Trade Commission, and as such as developed standards for organizations and institutions involved in sending students on education abroad programs.

AUTHOR:

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RESOURCES:

- NACUA Resource Page on International Programs
- Higher Education Compliance Alliance Resource Page on International Activities and Programs
- Forum on Education Abroad: Standards of Good Practice for Education Abroad (see specifically Standard 5.b. related to Student Codes of Conduct).

APPENDIX:

An Example of a Student Conduct Policy and Disciplinary Process for International Programming

Using Kent State University’s student disciplinary procedures provided for in the University Policy Register (www.kent.edu/policyreg) as a template (policies 3342-4-02, 3342-4-02.1, and 3342-4-02.101), the following policy is an adaptation providing for a draft student disciplinary policy for use in the study abroad environment:

(A) Purpose. Students enrolled at the university who are engaged in educational opportunities outside of the United States (i.e. study abroad, student exchange, semester immersion, etc.) shall be responsible for engaging in conduct consistent with the standards provided in the university student conduct policy, as well as compliant with any additional conditions agreed to relevant to the
education opportunity.

This policy provides for the disciplinary process available for complaints of misconduct or violations of the student code of conduct that occur when a university student is enrolled in an educational opportunity abroad. The purpose of this policy is to provide procedures for the immediate address of conduct issues due to the unique circumstances involved in disciplinary problems while engaged in an international educational opportunity. This policy does not replace the student code of conduct and its administration as already provided for by policy.

(B) Eligibility.

(1) All students enrolled in university programming or those students enrolled in a study abroad, exchange, or other educational opportunity abroad approved by the university are eligible under this policy.

(C) Definitions.

(1) Student. For the purposes of this policy, a “student” is a person formally enrolled in a university or a student participant in a university-sponsored educational opportunity.

(2) International educational opportunity. For the purposes of this policy, an “educational opportunity” is a program, course, or experience that is conducted by the university or sponsored through a relationship with the university that involves international travel outside of the United States.

(D) Procedures.

(1) Pre-departure form. Prior to the start of any international educational opportunity under this rule, each student must read and sign the “Student Code of Conduct for International Programs.” A copy of the signed form must be kept on file for the duration of the international educational opportunity in the office of global education, or in the departmental office responsible for the faculty member leading the opportunity whichever is appropriate.

(2) Applicability and notice. While engaged in the international educational opportunity, the student will be responsible for following all other university rules regarding student conduct, as amended by the “Student Code of Conduct for International Programs.” By signing the form provided for in paragraph (D)(1) of this rule, the student expressly agrees and consents to be subject to any additional provisions provided within such form even if such may be stricter than the student conduct code as found within this Administrative Code.

(a) The student code of conduct applies to all aspects of the international educational opportunity occurring on university premises or premises secured by the university for hosting the educational opportunity, during university-sponsored activities such as field trips or day trips, and to conduct committed generally by the student that adversely affects the university community and/or the pursuit of its objectives.

(3) Oversight. The office of student conduct will be responsible for ensuring the implementation of this policy in coordination with the office of education abroad. The office of student conduct is responsible for the periodic review of this policy to ensure consistency with current university procedures and the minimum requirements of due process.

(4) Administrative process for violations.

(a) Venue. If the violation occurs outside the borders of the United States, the on-
site faculty and/or staff member will be responsible for determining the appropriate venue to hold any necessary disciplinary process.

(b) Offenses. The student will be deemed to be in violation of the student code of conduct while engaged in an international educational opportunity in the following situations:

(i) Behavior in violation of university policies or procedures;

(ii) Behavior in violation of the terms of sanctions imposed under this policy;

(iii) Behavior deemed detrimental or disruptive to the university community, the international educational opportunity, and/or prohibited by local, state, federal, or international law.

(c) Procedural standards. In the event that the on-site faculty and/or staff member receives a complaint of an alleged violation or determines for him/herself that such alleged violation has occurred, the on-site faculty and/or staff member shall ensure that the certain minimum requirements are met before rendering a final determination:

(i) The student shall have notice of the alleged violation prior to any action; and

(ii) The student shall have the opportunity to respond, explain and defend against the alleged violation prior to any action.

(d) Standard of review. The on-site faculty and/or staff member shall evaluate the points of view presented by the parties in conflict and shall determine by the preponderance of the evidence if it is more likely than not that the accused student engaged in behavior that is in violation of this rule. However, during the course of this process, the technical rules of evidence applicable to civil and criminal U.S. cases shall not apply.

(e) Impartial hearing. The student will be provided with an impartial hearing. If the student questions the impartiality of the hearing prior to the rendering of a decision, the student must contact the director of the office of student conduct at the home university campus. In extreme cases, the office of student conduct at the campus may preside over the process through remote technology.

(E) Sanctions. Upon review of the materials and facts as presented, if the on-site faculty and/or staff member (or other party as provided for in paragraph (D)(4)(e) of this rule) determines that the student engaged in the behavior at issue, the on-site faculty and/or staff member has the sole discretion to apply sanctions to the student as appropriate. Sanctions include but are not limited to:

(1) Written warning/probation. Unless applicable to paragraph (D)(4)(b)(iii) of this rule, a student will generally be placed on formal probation and given a written warning for their first offense. The on-site faculty and/or staff member has sole discretion in determining the appropriateness of this sanction and terms of the probationary period.

(2) Additional sanctions as determined at the discretion of the on-site faculty and/or staff member including but not limited to suspension of field trip privileges, access restrictions, and remuneration in the event of damages to property.

(3) Immediate removal. For behavior deemed detrimental, disruptive and/or dangerous to
the student, other students, or the international educational opportunity, the student may be immediately dismissed and removed from the program and subject to the terms contained in the "Student Code of Conduct for International Programs." Immediate removal is also appropriate in situations when a student violates the probationary terms provided for in paragraph (D)(4)(b)(iii) of this rule.

(F) Appeals.

(1) Students may appeal the decisions in section (E) of this rule to the vice president for student affairs. No additional appeal will be heard.

(2) Appeals are limited to the following reasons:

   (a) The decision is not in accordance with the facts presented;
   (b) The decision was reached through a procedure not in accordance with this rule;
   (c) New information is available which may suggest modification of the decision; or
   (d) To determine whether the sanction(s) imposed were appropriate for the conduct violation that the student was found to have committed.

(3) An appeal must be in writing (email is acceptable), must state clearly the rationale for the appeal and must be submitted within seven calendar days of the date of the decision.

(G) Reports and records.

(1) All reports and records created pursuant to this policy will be administered in accordance with university policies.

While the above provides a sample policy based upon one institution's current student conduct policy, any college or university would be well served by also considering the Forum on Education Abroad's Standards of Good Practice for Education Abroad when drafting their policies, notably Standard 5.b. which applies to student conduct codes. [22]

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