

**DUE PROCESS IN STUDENT DISCIPLINE
REVISITED: 1995-2000**

An ASJA White Paper

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by **Nona L. Wood and Robert A. Wood, February 2001**
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INTRODUCTION

To the student judicial affairs professional, there can be no topic more important than due process. As professionals, we must constantly be aware of the fundamental fairness that is due our students, and scrutinize our policies and procedures to ensure that they accomplish that goal. In addition, judicial affairs personnel often provide consultation to faculty, staff, and administrators concerning their interactions with students; therefore, recognition of the principles of due process, and the correct applications of those tenets, can benefit students, both directly and indirectly.

Preceding this article is a due process primer written by the authors and published in a 1996 issue of *The Journal of College and University Student Housing* (Vol. 26, No. 1, pp. 11-18). For those readers unfamiliar with due process, we recommend that piece be read first to help set the stage for this effort focusing on the years 1995-2000, as well as on a limited number of cases prior to 1995 that were not discussed in our previous manuscript.

We began our current research by conducting a computer search that would identify all cases reported since 1995 that included three key terms: student, college or university, and due process. As a result, the inquiry identified over six hundred cases. To narrow the outcome, we then asked for all those cases that included these three terms found in a single paragraph. This action trimmed the list to 281 cases. The results demonstrate that many individuals are litigating in an attempt to receive that due

process which they believe is owed to them. What follows is a discussion of what we believe to be some of the most important court cases concerning due process in student discipline that have been decided over the past six years. The judicial decisions presented here are not exhaustive, and as always, individuals should consult legal counsel in their local jurisdictions who are experienced in higher education law for advice concerning their own specific sets of circumstances.

John Friedl (2000) has expressed the opinion that general safety concerns, increased worry over racial tensions, and anxiety over high risk behaviors associated with college binge drinking are all reasons why colleges and universities are focusing on student behaviors both on- and off-campus that previously may or may not have been addressed by university judicial officers. In addition, as is known by any practicing student judicial affairs officer, the growth in federal legislation related to campus crime and misconduct has increased markedly since 1990. Today it is not unusual for campus crime to be the topic of newspaper articles, television magazine shows, radio programs, and other forms of media, including the Internet.

FROM WHERE ARE DUE PROCESS RIGHTS DERIVED?

“[A] student’s interest in pursuing an education is included within the Fourteenth Amendment’s protection of liberty and property” (Reilly v. Daly, 1996, p. 440). As a result, students who have at stake suspension or expulsion from public colleges and universities, must be afforded protection of their due process rights. Interestingly, the U. S. Supreme Court has never directly decided that students have liberty or property rights in continuing their college educations (Hennessy v. City of Melrose, 1999; Nickerson v. University of Alaska Anchorage, 1999; Robinson, 1999; Rosenthal, 1997). Many lower courts, however, have assumed or stated that these rights exist (Gagne v. Trustees of Indiana University,

1998; Donahue v. Baker, 1997; Jaska v. Regents of the University of Michigan, 1986). As mentioned above, and as will be observed through reading this manuscript, students are readily willing to litigate to ensure that they receive these rights.

When students are faced with discipline at private colleges and universities, constitutional protections do not exist (Berger & Berger, 1999). Those rights pertaining to students in private institutions are found in institutional documents; “brochures, policy manuals and other advertisements may form the basis of a legally cognizable contractual relationship between the institution and its students” (Bittle v. Oklahoma City University, 2000, citing Guckenberger v. Boston University, 957 F.Supp. 306, 318 [D.Mass.1997].)

Berger & Berger (1999) found in a review of private and public institutions that most private institutions who participated in their study afforded their students procedural safeguards that are not required by law. In a number of categories, these researchers concluded that the private institutions provided protections that were, as a whole, similar to those found in public colleges and universities. In terms of best practice for student judicial affairs officers in private institutions, the more similar students’ rights are to those found in public institutions, the less vulnerable private institutions might be to litigation over perceived deprivations of student due process rights.

Other sources of due process rights include state and federal statutes, for example, federal legislation pertaining to campus sexual assault and other forms of campus crime and misconduct. The 7th Circuit Court of Appeals (Waller v. Southern Illinois University, 1997) also held in a case involving a public law school that accreditation standards might constitute another source of due process rights.

Void for Vagueness Doctrine. One of the obligations of student judicial affairs officers is to help ensure that codes of student behavior are clear enough so that average students can understand what the institution asks of them, may moderate their behavior accordingly, comprehend what they have to lose if they breach those rules, and understand the processes that will be used to resolve complaints that allege they have violated those regulations. Failure to comply with these expectations may result in litigation based on the “void for vagueness doctrine” found in the Fifth and Fourteenth Amendments (Woodis v. Westark Community College, 1998); however, Bienstock (1999) has found that “void for vagueness challenges usually fail, and many courts give institutions broad leeway” (p. 9) in interpreting their own rules.

WHAT IS DUE PROCESS?

The leading case in defining due process in student disciplinary hearings is Dixon v. Alabama (1961, p. 151) in which the 5th Circuit Court of Appeals stated that, “Due process requires notice and some opportunity for hearing before a student at a tax-supported college can be expelled for misconduct.” From this modest beginning, courts have continued to refine and expand the scope of what due process requires. Rosenthal (1997) concluded that the most comprehensive cataloging of procedural requirements can be found in Esteban v. Missouri State College” (1969). That listing included:

. . . a written statement of the charges to be furnished the student on at last 10 days’ notice; a hearing before the college’s president, as the one person possessing authority to expel or suspend; advance inspection by the student of any affidavits or exhibits which the College intended to submit at the hearing; the student’s right to have counsel present with him at the hearing; the right to present his version as to the charge and to make such showing by way of affidavits, exhibits, and witnesses as he desired; the right to hear the evidence against him and to question any witnesses giving adverse evidence;

the president's determination of the facts solely on the evidence presented at the hearing and a statement by him in writing of his findings as to guilt or innocence of the conduct charged and the disposition, if any, to be made by way of disciplinary action; and permission to each side at its own expense to make a record of the events at the hearing. (p. 1081)

Substantive versus Procedural Process. Colleges and universities must provide due process to students by having regulations and processes that furnish students their full procedural due process rights. Substantive due process requires that decisions regarding the fate of students be made free from malice, bad faith, or ill will, with the substance of a decision bearing a rational relationship to the information provided in a hearing. Furthermore, it should be clear that professional judgment was exercised in such a manner that it would be consistent with that of like professionals similarly situated.

In examining due process allegations made by a medical student, the U. S. District Court in Lewin v. Medical College of Hampton Roads stated that, "the court 'may not override [the decision] . . . unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment'" (1996, p. 1167, citing Regents of the University of Michigan v. Ewing, 1985). Although the Lewin court determined that they were examining an academic dismissal, not a conduct suspension, the same principle applies to behavior conflicts. It is important to note that decisions must be based on all data derived from a particular proceeding and not rely on information unavailable for the student to examine within the setting of the hearing.

Academic versus Behavioral or Disciplinary Due Process. Gary Pavela (1997) found there are three factors to help determine when a case is disciplinary rather than academic: 1) when a factual dispute must be resolved, 2) when there is a resulting moral stigma, such as in the case of fraud,

dishonesty, or misrepresentation (see Jaska, 1986; Siblerud v. Colorado State Board of Agriculture, 1995), and 3) when isolated past actions are the primary focus of attention, rather than present academic competency (see Roach v. University of Utah, 1997). The leading decisions in academic due process are Regents of the University of Michigan v. Ewing (1985) and Board of Curators, University of Missouri v. Horowitz (1978), which both found that academic disputes require far less due process procedures than do disciplinary due process matters. In situations requiring academic due process, no hearing is mandatory, although prior notice must still be provided, preferably in time for the student to correct the perceived academic deficiencies. A court must only determine whether the decision was “arbitrary, unreasonable, or an abuse of discretion” (Szejner v. University of Alaska, 1997, footnote 2), or was “careful and deliberate” (Horowitz, 1978, p. 85).

In some instances, courts have declined to decide whether the behavior was academic or nonacademic, ruling instead that due process had been met at the higher standard required for a disciplinary dismissal. This was the case in Roach v. University of Utah (1997), in which an individual was dismissed from a clinical psychology training program for engaging in a sexual relationship with a patient. Subsequently, this student was ejected from a second graduate program for providing misleading and inaccurate information on his admission forms. The court found in this second dismissal that it was disciplinary in nature and Roach’s due process rights had been denied because he was suspended without prior notice and had no opportunity to appear to discuss those charges before being issued a letter suspending him from the program immediately. When the line between whether the dismissal is academic or behavioral is blurred, best practice recommends that the institution use the guidelines for disciplinary dismissals (Nickerson, 1999; Pavela, 1997).

Presumption of Innocence. Under constitutional due process, public institutions must begin from the premise that the student is not in violation of university rules or regulations until it is demonstrated that the student did, in fact, violate specific policies. Because private institutions are not bound by the U. S. Constitution, they may elect to start from the opposite perspective, although adopting such a stance may be very difficult to defend to the institutions' constituencies. Berger and Berger (1999) found in their survey that approximately 20% of private institutions presumed responsibility on the part of the accused students prior to their hearings.

Such a premise seemed likely in regard to Peter Trzop (Trzop v. Centre College, No. 1999-CA-000582-MR, Crt.App.Ken., August 11, 2000), a student at Centre College and a member of the National Guard, who was dismissed from the college for possessing a knife in violation of their weapons' policy. Trzop's room was searched by college personnel without his knowledge or permission, and three pocket knives and a military issue knife were seized. Allegedly he had used one or more of these to threaten a fellow student.

Trzop was then taken out of class under campus security escort and was required to meet with college personnel concerning the knives. At this meeting he was evaluated, again without his knowledge or permission, by a mental health professional. In addition, Trzop claimed that campus security officers kept him from leaving the office, that he was provided no opportunity to respond to the unwritten charges made by unknown individuals, and that he was handed a pre-prepared letter of dismissal at this meeting. A trial court found for Centre College and Trzop appealed to the Kentucky Court of Appeals using state statutes to assert that even private colleges must provide due process for their students. The Court of Appeals agreed and his case was remanded for further proceedings before a trier of fact to

determine whether he did or did not receive what the state law required, given that there were factual disputes between information provided by the College and Trzop.

SPECIFIC PROCEDURAL PROTECTIONS

Bostic and Gonzalez (1999) identified nine student rights perceived by over 80% of student judicial officers in their sample to be required in disciplinary proceedings in public higher education: “hearing with explicit charges, written notice of hearing, aware of opposing testimony, opportunity to present defense, opportunity to present witnesses, opportunity to have counsel (not attorney), choice to testify or not, written notice of decision, and opportunity to appeal.” (p. 168). These procedures have a great deal in common with those previously outlined by the 8th Circuit Court of Appeals in Esteban, although today few, if any, college presidents are actively involved in student judicial determinations. Least important in the view of the respondents in the Bostic and Gonzalez survey were the opportunity to be judged by a jury and the opportunity for a public hearing.

Noticeably absent from Bostic and Gonzalez’s list are the cross-examination of witnesses, the right to an attorney, and the right to a written transcript of the hearing. Bienstock (1999) found in his review of due process case law that these three aspects are often litigated. The discussion that follows will examine a number of specific due process protections and related case law.

Notice. The provision of notice is an essential element of due process (Trzop, Tigrett v. Rector & Visitors of the University of Virginia, U.S. District Court, Charlottesville, 2000; In re Trahms v. Trustees of Columbia University in the City of New York, 1997); however, “. . . [t]here are no hard and fast rules by which to measure meaningful notice” (Nash v. Auburn University, 1987, p. 661). To allow students to prepare adequately for hearings, the notice should clarify for students the specific code

provisions of which they are accused of violating, and should include a summary of basic facts such as who, what, when, and where.

Berger and Berger (1999) found that more than 90% of the colleges contacted in their survey furnished students with written notice of charges, and that most of their respondents (80%) reported providing notice of ten days or less prior to the hearing. Their results suggest that there is a strong consensus that students deserve to know of what they are accused and that those charges should be placed in writing. Notices must include the date, time, and place of the hearing, and before whom the accusations will be heard. These authors recommended that five working days notice should be provided for informal adjudications, while students facing formal disciplinary hearings should have ten working days notice.

Pavela (2000) has stated that it is important to understand the educational value of timeliness. As any experienced judicial officer knows, he pointed out that the longer between the incident and the hearing, the more likely students will engage in self-rationalization and self-justification, decreasing the educational nature of the hearing and increasing the adversarial nature of the proceeding (Cobb v. Rector, 2000).

Janosik and Riehl (2000) found that “. . . students, parents, and faculty expect due process protections provided in campus disciplinary hearings to increase as the severity of the potential sanction increases in each phase of the hearing process” (p. 452). Their finding tends to agree with Berger and Berger (1999) in that there may be a range of time allowed between notice and hearings, depending on the severity of the potential sanctions risked by students. In Nickerson (1999) the court said “we hold that notice must precede the academic dismissal by a reasonable time so that the student has a

reasonable opportunity to cure his or her deficient performance” (p. 5). Similarly, students accused of other forms of misconduct must be allowed a prudent time between the notice and the hearing in which to prepare to answer the stated charges.

At the same time, courts have not found that students must know the full and exact content of statements to be made by others and used in the hearing prior to that event (Robinson, 1999, citing Nash, 1987). In Nash, the 11th Circuit Court of Appeals found it sufficient that veterinary students being accused of academic dishonesty regarding a particular test knew that they were being accused of that charge, and that certain individuals would be speaking as witnesses. The court said: “There is no constitutional requirement that, to provide them an opportunity to respond, appellants must have received any more in the way of notice than a statement of the charge against them” (p. 663).

Advisors in Student Disciplinary Hearings. There is a general consensus among judicial officers that it is appropriate for students to have an advisor present to provide counsel to them during student conduct hearings; however, there is also substantial agreement that these individuals need not be attorneys, and if they are, their roles may be limited to an advisory capacity only. Bostic and Gonzalez found in their 1999 survey that, when compared to a previous study by Dannells (1990), an increasing number of hearing officers believe it is important to allow students to have someone advising them. There was an increase from 70 to 80% concerning the right to have an advisor present at hearings and an increase from 43.2% to 55% in regard to the right to have an attorney present; however, Bienstock (1999) concluded that most court cases have held that there is no right for students to have legal counsel attend a disciplinary hearing. For discussions that advocate for the presence, and even the active

participation by legal counsel, see the work of Friedl (2000), Berger and Berger (1999), Rosenthal (1997), and Picozzi (1987).

Various sources have found that allowing students to have attorneys present might be advisable in certain circumstances, even though that counsel is generally not permitted to exercise the typical role of full representation, as when the accused is charged with criminal conduct, or when the institution proceeds through counsel (Berger & Berger, 1999; Osteen, 1993; Gorman v. University of Rhode Island, 1988; Jaska, 1986; Wasson v. Trowbridge, 1967). For example, an attorney was considered appropriate in a case in which the student risked losing an advanced academic degree (Crook v. Baker, 1984), and in another in which free speech rights were also implicated (French v. Bashful, 1969).

Berger & Berger (1999) noted that having legal advisors present may not work to students' advantage in that attorneys often escalate the temperature of the proceedings, may antagonize the hearing panel, and frequently transform the intended educational nature of a student disciplinary hearing into a full blown adversarial hearing. In addition, students may claim that having attorneys present is intended to protect their Fifth Amendment rights when parallel criminal proceedings are pending, when in fact the true object of the attorneys' presence may be to help clients better present their case in on-campus disciplinary hearings so that they may result in more favorable outcomes (Donohue v. Baker, 1997), thus severing the educational link between students and their institutions.

Confrontation and Cross-Examination of Witnesses. Federal and state courts are divided concerning the rights of students to confront and cross-examine witnesses during disciplinary hearings. The 11th Circuit Court of Appeals rejected a due process claim because the student was present when witnesses were questioned by the panel, the student had the opportunity to present statements and

witnesses, and it was held that there was no constitutional right to cross in student disciplinary hearings (Nash, 1987). In Jaska (1986), the 6th Circuit Court of Appeals found that a student accused of cheating did not have the right to the names of anonymous fellow student accusers, noting that revealing the witnesses' identities would possibly subject them to reprisals for coming forward, and that faculty were present to cross-examine in place of the initial witnesses. In Reilly (1996) an Indiana Appellate Court ruled that the student had no right to formal cross-examination because the student had the opportunity for previous contact with faculty witnesses, had representation of counsel, and was permitted to present her case to the hearing body. Even though the court never decided whether the action was academic or disciplinary, they held that the student was afforded due process consistent with a disciplinary proceeding. In general, courts will determine whether the student had the opportunity "to respond, explain, and defend" themselves (Gorman, 1988, p. 8).

Courts have determined, however, that if the outcome of an adjudication depends on a single witness and that individual's credibility, then cross-examination may be essential (Donahue, 1997; Winnick, 1972). Donahue was accused of raping a fellow student and was denied the opportunity to have his attorney question the complainant. A U. S. District Court in New York ruled that Donahue's counsel did not have the right to perform a cross-examination, but that the student himself should have been given the right to address questions through the hearing panel. The court reached this conclusion because the result of the proceedings depended on his truthfulness versus her credibility, and, because there was no record of the judicial hearing, it was not clear that he had been provided the opportunity to ask questions of his accuser through the board.

Impartial Arbiter. Courts have permitted administrators who have had prior contact with the accused student, or the matter at issue, to serve in a decision-making capacity at a student disciplinary hearing. Just because an administrator had prior knowledge of a set of circumstances does not disqualify that person from serving in a decision-making capacity (Gorman, 1988, Nash, 1987, Winnick, 1972, Wasson, 1967). In Nash the 11th Circuit Court of Appeals noted that the allegation of prejudice on the part of the board must be evident from the record and not based in speculation or inference, thus placing the burden on the accused student to prove that such bias actually existed. A certain degree of commingling of responsibilities is permitted due to what some courts have described as the intimate setting of a college or university (Gorman, 1988). This is good news, particularly for small campuses at which a limited number of individuals may be available and trained to conduct disciplinary hearings.

Friedl (2000), however, described a case in which a court denied the university's motion to dismiss a student's claim that his procedural due process rights were violated when an administrator served as the adjudicator at the initial hearing and presented the case against the student during the appeal (citing Osteen v. Board of Regents of Regency Universities, No. 91 CV 20247, 1992 WL 74995 [N.D.Ill. April 8, 1992]). Also, a U. S. District Court in New York recommended in A. and B. v. C. College and D. (1994) that the institution should use an impartial arbiter chosen and employed by the college, who was not involved in the investigation of the case at hand, which involved allegations of alcohol abuse and sexual misconduct that resulted in dismissal. Saurack (1995) argued a similar point of view in his work, stating that he believes that students, "... should be entitled, at a minimum, to an impartial adjudicator and to notice, and to a hearing with an actively participating attorney who is able to

cross-examine witnesses” (p. 816). In light of these differing viewpoints, where possible, universities should endeavor to maintain a pool of trained adjudicators so that such conflicts, real or perceived, might be avoided.

Interestingly, in two cases students claimed that the emotionally charged atmosphere of their campuses prevented them from receiving a fair hearing. In Nash (1987) students accused of cheating claimed that a “contemporaneous undergraduate honor code controversy” caused the issue of academic dishonesty to linger in the minds of many Auburn students and faculty members (p. 661), thus resulting in an unfair hearing. The 11th Circuit Court of Appeals found that the accused students had not offered any evidence, nor did any evidence appear in the record, to demonstrate that the impartiality of the hearing board was compromised. Once raising this issue, the burden of proof was on the students to make their case to the court in this regard and they failed to do so.

In Schaer v. Brandeis University (2000), a student found in violation of campus policies relating to unwanted sexual activity and creating a hostile environment sued alleging that his due process rights under contract law were violated by Brandeis University in several ways. He claimed that the hearing was conducted in an atmosphere of hysteria and misinformation, citing articles in the campus newspaper which included what the student called “hysterically published” inaccurate information. Twice at court Schaer failed to convince judges that his allegations were substantiated in any way by the record. Even if the allegations were true, Schaer offered no proof that the purported negative atmosphere affected the outcome of his hearing.

Self-Incrimination. The right to avoid self-incrimination is found in the Fifth Amendment of the U. S. Constitution and is applicable only in criminal courts (Furutani, 1969). Most campuses generally

do not advise students concerning their Fifth Amendment right against self-incrimination, because campus proceedings are not criminal in nature. Some sources argued that such admonishments are essential (Rosenthal, 1997; Picozzi, 1987). Rosenthal (1997) concluded at the end of an exhaustive article on this issue that accused individuals should have the right not to incriminate themselves, and if students do not have the right against self-incrimination in disciplinary hearings, then hearing boards should be cautioned not to draw any negative inferences. He stated that silence is not necessarily indicative of guilt and may merely reflect an individual's desire not to admit to behavior that also would be unfavorable to his character. For example, Rosenthal uses the instance of a student accused of sexual assault, who would prefer not admit to a drunken one-night stand out of concern that this behavior might also be hard to defend and might negatively persuade the board that he could also have engaged in unwanted sexual activity. Interestingly, two courts, a U. S. District Court and a State Supreme Court, found that testimony compelled in a college hearing would be excluded from subsequent criminal trials (Hart v. Ferris State College, 1983; Nzuve v. Castleton State College, 1975).

Standard of Proof--Evidence. Most student disciplinary hearings use the standard of proof based on a preponderance of the evidence, that is, is it more likely than not that a student did violate a particular college regulation. Recent state court decisions, however, have ruled that universities need to base suspensions and expulsions on substantial evidence (Gagne, 1998; Szejner, 1997; Reilly, 1996). Bienstock (1999) has observed that: "This is clearly a lower standard than 'clear and convincing' and arguably, at least in some states, a lower standard than 'preponderance of the evidence' in that it may not require a balancing of evidence contrary to the final decision, but only a certain minimum quantum of evidence in favor of that decision." Stated differently, substantial evidence is:

“ . . . [s]uch evidence that a reasonable mind might accept as adequate to support a conclusion. It is that quality of evidence necessary for a court to affirm a decision of an administrative board. Under the ‘substantial evidence rule,’ reviewing courts will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision” (Black, 1991, p. 996).

The Record of the Hearing–Hearing Transcripts. What kind of record should a college create concerning the content of the hearing? Berger and Berger (1999) found that less than 50% of public colleges and about 64% of private colleges provide for a verbatim record or let students create one on their own. Overall, fewer than one-half of all institutions provide for a transcript of the proceedings. Generally verbatim records of student disciplinary hearings are unnecessary, unless the case is particularly complex or the facts of the situation are known to be disputed. In Schaer v. Brandeis University (2000), the student alleged that his due process rights had been breached by the extreme brevity of the written summary of the hearing which had lasted for several hours. Although the Massachusetts Supreme Judicial Court found that the written summary could easily have been more lengthy, the court refused to find that the briefness of the record failed to provide the student an adequate account under due process on which to base his appeal.

Case law is mixed concerning whether students have a right to a transcript of the proceedings. In Marin v. University of Puerto Rico (1974) and Esteban (1969), a district court and the 8th Circuit Court of Appeals found that students do have a right to a copy of the record under normal circumstances; however, the 6th Circuit Court of Appeals in Jaska held that there was no right to a transcript. The Superior Court of Pennsylvania made a similar ruling (Flynn v. University of Scranton, 1999), while in Gorman (1988) a Rhode Island court held that:

Written accounts of university student's disciplinary hearings, comprised of summary of testimony and evidence presented and of decision rendered, constituted sufficient record of proceedings, and student's right to tape record disciplinary hearings was not so essential that its denial rendered hearing unfair and violated due process. (p. 8)

Berger and Berger (1999) found that only 70% of private colleges require a written decision, while 85% of public institutions require a written, reasoned rationale for the findings of the hearing individual or board. Best practice would suggest that written decisions with rationales should be available for all decisions, particularly those resulting in a student disciplinary probation, suspension, or expulsion.

The Sanction. In their survey of student judicial officers, Bostic and Gonzalez (1999) discovered "clear support and consensus for the following sanctions: oral warning, written reprimand, disciplinary probation with and without restriction, temporary dismissal, and permanent dismissal" (p.174). The authors also found a decline in the support of the use of penalty fines which are more often used by private, rather than public institutions. A U. S. District Court in Massachusetts decided that withholding of a degree was an acceptable sanction in a case in which all of the requirements had been met, but the actual degree had not yet been awarded (Dinu v. President and Fellows of Harvard College, 1999). Two Harvard University students completed their courses of study and were found in violation of university policies for stealing money from a student organization. They claimed that this violated their due process rights because the sanction was disproportionate to their violations. The hearing board required them to withdraw for one year, at the end of which they would be eligible to receive their degrees. The court upheld this decision because of a specific code stipulation that stated

that a student may not receive a degree until she or he has been relieved of their probationary status by the Administrative Board.

An Alaskan state court ruled that probation is a mild disciplinary sanction, consisting merely of a 'written reprimand' and the possibility that more severe disciplinary actions would be imposed for additional violations (Szejner, 1997). In a Pennsylvania case, a student questioned in U. S. District Court his institution's right to assign him to 100 hours of psychological therapy as part of his conduct sanctions (Herbert v. Reinstein, 1997). The court upheld this as part of a package of consequences administered by the Temple Law School for having sprayed a homeless man with pepper gas that also injured an employee of the Law School. The student also had a previous history of physical and verbal altercations, and lied to the hearing board in denying his actions, despite the testimony of other witnesses.

“Double Jeopardy.” In State v. Kauble (1997), a student committed a misdemeanor, the false reporting of a crime (a carjacking), and subsequently pled guilty to that offense. In his student disciplinary hearing, the student was found in violation of student code policies on the University of Oklahoma Norman campus and was sanctioned to one year of probation and 100 hours of community service. The student sought to avoid criminal penalties, claiming that he had already been punished for the same factual situation.

The Oklahoma Court of Criminal Appeals agreed with the University that community service was not punishment, but was instead remedial. From both the court's and the University's perspectives, the purpose of community service was to assist the student to avoid suspension, to maintain institutional order, and to assure safety in college facilities. The court found that because the student was not facing

a second prosecution following acquittal or conviction, and that he was not facing multiple criminal prosecutions for the same offense, that the sanctions assigned by the University did not constitute double jeopardy. It was the court's opinion that, "Although Oklahoma courts have not directly addressed this issue, other courts have and not one court has found sanctions imposed in a school disciplinary proceeding constitute punishment under the Double Jeopardy Clause," (citing Ohio v. Wood, 112 Ohio App.3d 621, 679 N.E.2d 735 [1996], p. 679). The court acknowledged that community service is not obligatory, and that the student had a choice; he could accept the community service and remain enrolled, or he could choose to leave the institution. The university's purposes to protect the public from harm, to protect the University's resources, to protect other students, and to help the student toward rehabilitation were all found to be rationally related to the University's remedial goals. It is possible that this same rationale might be useful to justify the imposition of other educational sanctions frequently imposed as a result of student disciplinary hearings, although the Oklahoma court did not address this particular point.

Similarly, the University of Maine (State of Maine v. Sterling, 1996) suspended a student athlete and revoked part of his athletic scholarship for assaulting another student. The Supreme Court of Maine held that these sanctions were remedial and served the purpose of "safeguarding the integrity of the University" (p. 434).

The Review or Appeal. There is no constitutional right to a formal review (Pavela, 2000), or an appeal of a decision in a student disciplinary proceeding, unless such rights are awarded contractually, as long as the decisions made are reasonable based on the whole record and have been made in good faith (Lewin, 1997; Szejner, 1997; Nash, 1987; Gaspar v. Bruton, 1975, Winnick,

1972). In Gagne (1998) an Indiana Appellate Court ruled that contractual right existed under the code for the student to appear before a review board. Berger and Berger (1999) found in their survey that about 92% of their respondents afforded a right of appeal; however, as noted in the New York case of In re Trahms (1997), a meaningful review becomes possible only if the evidence is preserved, highlighting the need for a solid record of the hearing's proceedings.

SUMMARY

Berger and Berger concluded in their study of due process procedures offered by private and public institutions that many institutions provide a surprisingly high level of protections for their students, and that courts have “been hostile to claims challenging disciplinary procedures in institutions of higher education” (p. 301). Bostic and Gonzalez (1999) discovered that judicial affairs officers in their study were satisfied with the current conditions in student judicial systems on American campuses. Given the ever increasing pace of litigation in this area, however, it behooves institutions to examine their policies and procedures carefully for fundamental fairness, and to adopt any necessary new policies and procedures to offer not only the promise or appearance of fairness, but actual due process. It is the hope of the authors that this manuscript, and the one previously published (Wood & Wood, 1996), will assist student judicial affairs officers in this endeavor.

References

- A. and B. v. C. College and D., 863 F.Supp. 156 (S.D.N.Y. 1994).
- Berger, C. J., and Berger, V. (1999). Academic discipline: A guide to fair process for the university student. Columbia Law Review, 99, 289-364.
- Bienstock, R. E. (1999, June 20-23). Student discipline primer. NACUA Conference Proceeding, Nashville, TN, pp. 1-13.
- Bittle v. Oklahoma City University, No. 93684, Court of Civil Appeals of Oklahoma, June 2, 2000.
- Black, H.C. (1991). Black's law dictionary, abridged 6th edition. St. Paul, MN: West Publishing Co.
- Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78, 55 L Ed. 2d 124, 98 S.Ct. 948 (1978).
- Bostic, D., & Gonzalez, G. (1999, Spring). Practices, opinions, knowledge, and recommendations from judicial officers in public higher education. NASPA Journal, 36(3), 166-183.
- Cobb v. Rector and Visitors of University of Virginia, 69 F.Supp.2d 815 (W.D.Va. 1999), 84 F.Supp.2d 740 (W.D.Va. 2000).
- Crook v. Baker, 584 F.Supp. 1531 (E.D.Mich. 1984).
- Dannells, M. (1990). Changes in disciplinary policies and practices over ten years. Journal of College Student Development, 31, 408-414.
- Dinu v. President and Fellows of Harvard College, 56 F.Supp.2d 129 (D.Mass. 1999).
- Dixon v. Alabama State Board of Education, 294 F.2d 150 (1961).
- Donahue v. Baker, 976 F.Supp. 136 (N.D.N.Y. 1997).
- Esteban v. Central Missouri State College, 277 F.Supp. 649 (W.D.Mo. 1967), 415 F.2d 1077 (1969).
- Flynn v. University of Scranton, No. 96-CV-2838 (Sup.Crt.Pa. 1999).
- French v. Bashful, 303 F.Supp. 1333 (E.D.La. 1969).
- Friedl, J. (2000). Punishing students for non-academic misconduct. Journal of College and University Law, 26(4), 701-726.
- Furutani v. Ewigleben, 297 F.Supp. 1163 (N.D.Cal. 1969).
- Gagne v. Trustees of Indiana University, 692 N.E.2d 489 (Ind.App. 1998).
- Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975).
- Golden, E. J. (1982). Procedural due process standards for students at public colleges and universities. Journal of Law and Education, 11(3), 337-359.
- Gorman v. University of Rhode Island, 646 F.Supp. 799 (D.R.I. 1986), 837 F.2d 7 (1st Cir. 1988).
- Guckenberger v. Boston University, 957 F.Supp. 306, 318 (D.Mass.1997).
- Hart v. Ferris State College, 557 F.Supp. 1379 (1983).
- Hennessy v. City of Melrose, No. 98-2011 (1st Cir. 1999).
- Herbert v. Reinstein, 976 F.Supp. 331, 121 Ed.LawRep. 727 (E.D.Pa. 1997).

- In re Trahms v. Trustees of Columbia University in the City of New York, 666 N.Y.S.2d 150 (App. Div. 1997).
- Janosik, S. M., & Riehl, J. (2000, Winter). Stakeholder support for flexible due process in campus disciplinary hearings. NASPA Journal, 37(2), 444-453.
- Jaska v. Regents of the University of Michigan, 597 F.Supp. 1245 (E.D.Mich. 1984); aff'd 787 F.2d 590 (6th Cir. 1986).
- Lekutis v. University of Osteopathic Medicine and Health Sciences, 524 N.W.2d 410 (Iowa 1994).
- Lewin v. Medical College of Hampton Rds., 910 F.Supp. 1161 (E.D.Va. 1996), aff'd, 131 F.3d 135 (4th Circ. 1997).
- Marin v. University of Puerto Rico, 377 F.Supp. 613 (D.P.R. 1974).
- Nash v. Auburn University, 621 F.Supp. 948 (D.C. Ala. 1985), 812 F.2d 655 (11th Cir. 1987).
- Nickerson v. University of Alaska Anchorage, 975 P.2d 46 (Sup.Ct.Alaska 1999).
- Nzuve v. Castleton State College, 335 A.2d 321 (Vt. 1975).
- Ohio v. Wood, 112 Ohio App.3d 621, 679 N.E.2d 735 (Crt.App.Ohio 1996).
- Osteen v. Board of Regents of Regency Universities, No. 91 CV 20247, 1992 WL 74995 (N.D.Ill. 1992).
- Osteen v. Henley, 13 F.3d 221 (7th Cir. 1993).
- Pavela, G. (1997). Disciplinary and academic decisions pertaining to students: A review of the 1995 judicial decisions, Journal of College and University Law, 23(3), 391-401.
- Pavela, G. (2000, March 20). Avoiding unnecessary delays in student conduct cases. Synfax Weekly Report, pp. 953-954.
- Picozzi v. Sandalow, 623 F.Supp.1571 (E.D.Mich. 1986), aff'd, 827 F.2d770 (6th Cir. 1987), cert.den., 484 U.S. 1044, 108 S.Ct. 777 (1988).
- Picozzi, J. M. (1987). University disciplinary process: What's fair, what's due, and what you don't get. The Yale Law Journal, 96, 2132-2161.
- Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985).
- Reilly v. Daly, 666 N.E.2d 439 (Ind.App. 1996).
- Roach v. University of Utah, 968 F.Supp. 1446 (D.Utah 1997).
- Robinson, T. (1999, Fall). Property interests and due process in public university and community college student disciplinary proceedings. School Law Bulletin, 10-20.
- Rosenthal, P. E. (1997). Speak now: The accused student's right to remain silent in public university disciplinary proceedings. Columbia Law Review, 97, 1241-1287.
- Saurack, W. (1995). Protecting the student: A critique of the procedural protection afforded to American and English students in university disciplinary hearings. Journal of College and University Law, 21(4), 785-824.
- Schaer v. Brandeis University, 716 N.E.2d 1055 (Mass.App.Crt. 1999), slip opinion, SJC-08198 (Sup.Crt.Mass. 2000).
- Siblerud v. Colorado State Board of Agriculture, 896 F.Supp. 1506 (D.Colo. 1995).

- State of Maine v. Sterling, 685 A.2d 432, (Me. 1996).
- State v. Kauble, 948 P.2d 321 (Okl.Cr. 1997).
- Szejner v. University of Alaska, 944 P.2d 481 (Sup.Crt.Alaska 1997).
- Tigrett v. Rector & Visitors of the University of Virginia, U. S. District Court, Charlottesville, 2000).
- Trzop v. Centre College, No. 1999-CA-000582-MR (Crt.App.Ken. 2000).
- Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967).
- Waller v. Southern Illinois University, 125 F.3d 541 (7th Cir.II. 1997).
- Winnick V. Manning, 460 F. 2d 565 (2nd Cir. 1972).
- Wood, N. L., & Wood, R. A. (1996). Due process in student discipline: A primer. Journal of College and University Student Housing, 26(1), 11-18.
- Woodis v. Westark Community College, 160 F.3d 435 (8th Circ. 1998).

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