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Valparaiso University

THE RIGHT OF COUNSEL IN STUDENT DISCIPLINARY HEARINGS

MARTIN A. FREY*

INTRODUCTION

Among the recommendations of the President's Commission on Campus Unrest was that colleges and universities must respond more effectively to violent disorder.

> Perpetrators of violence must be identified, removed from the university as swiftly as possible and prosecuted vigorously by the appropriate agencies of law enforcement. Universities have not adequately prepared themselves to respond to disruption. They have been without suitable plans, rules or sanctions. Some administrators and faculty members have responded irresolutely.[1]

Fortunately, most disciplinary hearings are not the result of violent confrontations between students and law enforcement authorities. Nevertheless, the Commission underlines the importance of well constructed and fairly administered disciplinary hearings.

Control and regulation of the conduct and behavior of students begins with the formation of university rules, regulations, codes and policies. Responsibility for developing these means of control and regulation is usually given to the dean of students and his staff or to a campus committee. Singly or collectively they gather bits of information on the desirability of a specific rule. Occasionally, the rule making group finds it beneficial to invite students, faculty and other members of the campus family to share their experiences and state their preferences. Once the rule has been formulated, an apparatus is established to deal with offenders. The report of a breach triggers investigation.[2] If an infraction is revealed, the university may lodge a formal disciplinary charge against the student. When the student is faced with the disciplinary hearing his right to counsel becomes an issue.[3]

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1. Chicago Sun-Times, Sept. 27, 1970, at 30, col. 2.

2. The Supreme Court in *In re Groban*, 352 U.S. 330 (1957), has held that due process does not require a right to counsel during the investigation stage of the administrative process.

3. The public educational institution, however, must be distinguished from the private institution because the former involves state action while the latter does not.

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The right to counsel cannot be determined by whether the hearing was administrative in nature. Rather, the issue will depend upon the scope of inquiry of the panel, the nature of allegations and the possible consequences of the proceedings.[4] This article seeks to explore the factors which could be said to create a right to counsel and to present tangential problems once a right has been recognized.

HEARINGS TO DETERMINE EVIDENTIARY FACTS

In some instances, a hearing may be held to determine exactly what acts the student committed. Such hearings are essentially trials with the administrative agency acting as the jury. For the purpose of this article, hearings to determine what the student did, where and when the incident took place and with what motive or intent the act was committed are referred to as evidentiary hearings.[5]

Without state action, the due process clause of the fourteenth amendment and all that goes with it has no application to the educational institution. While several attempts have been made to extend the concept of state action to the private institution, they have proved unsuccessful. *E.g.*, Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 546-49 (S.D.N.Y. 1968). *See also* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

4. *Cosme v. Board of Educ.*, 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1967), presents an example considering the crucial question as one of characterization of the whole proceeding instead of considering the issues in dispute, the type of hearing which should be used to resolve these issues and the counsel question within the requisite type of hearing. In *Cosme* the child's mother sought to have her attorney present at a hearing scheduled to discuss her son's temporary suspension from public school because of misconduct. The court upheld the denial of this request:

> These hearings are simply interviews or conferences which include school officials and the child's parents. Further, they are purely administrative in nature, and are never punitive. The parents are fully appraised of all of the facts and are furnished with copies of all information in respondent's possession.
>
> Respondent is not statutorily mandated to grant a parent a hearing. Moreover, because the hearing or conference is administrative in nature, the petitioner is not entitled to be represented by counsel. In fact, the very purpose of the interview would be frustrated or impeded by presence of counsel, who might be tempted to turn the conference into a quasi-judicial hearing.

Id., 270 N.Y.S.2d at 232.

Cosme was subsequently distinguished in *Goldwyn v. Allen*, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), a case involving the deprivation of state high school examination privileges, on the ground that *Goldwyn* involved punitive sanctions.

5. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01, at 407-11 (1958) [hereinafter referred to as DAVIS]. Professor Davis defines a hearing as an oral proceeding before a tribunal. *Id.* § 7.01, at 407. He prefers the term "trial" and "trial type of hearing" when referring to hearings to determine evidentiary facts. *Id.* § 7.01 at 408 n.4.

The choice of terminology may be crucial in the determination of the substantive issue of a particular case. In *Koblitz v. Western Reserve Univ.*, 11 Ohio C. Dec. 515, 21 Ohio C.C.R. 144 (1901), the court held that a student had a right of confrontation but not to a trial. There is also fear of the word "adversary." In *Barker v. Hardway*, 283 F. Supp. 228, (S.D. W. Va. 1968), the court relied on *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), stating that *Dixon* expressly limited the hearing procedure to non-adversary proceedings when, in

Rights to an Evidentiary Hearing

Clearly, facts which pertain to the actual conduct of an individual should not be determined without giving the individual an opportunity to present the facts as he knows them and to cross-examine those who contradict him.[6] The question of whether a student is deprived of due process if expelled from a state university without an evidentiary hearing was settled in *Dixon v. Alabama State Board of Education.*[7] That decision, however, does not require an evidentiary hearing for all acts of misconduct. The court balanced the interests of the state board with the interests of the student faced with expulsion.[8]

> The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us [expulsion] requires something more than an informal interview with an administrative authority of the college. . . . [A] charge of misconduct . . . depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . . [A full dress hearing] might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college.[9]

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fact, *Dixon* stressed that "the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college." 294 F.2d at 159. *Davis v. Firment,* 269 F. Supp. 524 (E.D. La. 1967), refers to the hearing as "quasi-judicial." *Id.* at 526. In *Wasson v. Trowbridge,* 382 F.2d 807 (2d Cir. 1967), procedural informality equated with non-adversity. *Id.* at 812.

6. *See* 1 DAVIS § 7.02, at 412-15.

7. 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

8. The balance changes radically when termination of the educational pursuit is no longer involved. For example, when the government's power is reprimand and the private interest is the right not to be scolded, the governmental power would be almost absolute and the private interest so slight that no evidentiary hearing would be required.

9. *Id.* at 158-59. The court in *Dixon* indicated that "a full-dress judicial hearing, with a right to cross-examine witnesses . . ." is not required because it might be "detrimental to the college's educational atmosphere . . . ." *Id.* at 159. Many institutions, however, do not find the right of cross-examination detrimental since they provide that right. *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 752 (W.D. La. 1968); Buttny v. Smiley, 281 F. Supp. 280, 288 (D. Colo. 1968); Jones v. State Bd. of Educ., 279 F. Supp. 199 (M.D. Tenn. 1968). *Contra,* Hammond v. South Carolina State College, 272 F. Supp. 947, 949 (D.S.C. 1967). The court in *Marzette v. McPhee,* 294 F. Supp. 562, 567 (W.D. Wis. 1968), included the right of cross-examination as a required procedural safeguard.

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Pre-*Dixon* decisions denied student rights on the grounds that attendance at the university was a privilege that could be terminated by the university.[10] It is clear now that the right versus privilege argument is no longer viable to determine whether there is a deprivation of liberty or property without due process.[11] Instead, injury to the individual is now considered; if sufficient injury may result, the Constitution requires that the university's conduct be consonant with due process. The loss of one's opportunity to receive an education is clearly a substantial injury.[12]

Right to Counsel at Evidentiary Hearings

The question remains whether the student has a right to be represented at the evidentiary hearing by counsel. The civil nature of the disciplinary proceedings renders the sixth amendment's guarantee of right to counsel inapplicable.[13] Where there is no administrative rule or state or federal law to provide for counsel, the right to counsel will not exist unless the right can be read into the due process clause of the fourteenth amendment. There has been no decision declaring that legal representation is essential for procedural due process in student disciplinary hearings.[14] The most that has been said is that under "rare and

10. *See* Hamilton v. Regents of Univ. of California, 293 U.S. 245 (1934).

11. This is especially true in the area of public employment. *See* Slochower v. Board of Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). In *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), the Court commented that "[o]ne may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Id.* at 894. *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

12. Chief Justice Warren, speaking for a unanimous Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1955), emphasized the importance of education.

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

13. French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969).

14. *See* French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969); Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W. Va. 1968). In *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968), a group of students were expelled without notification of the disciplinary charges against them or a chance to present their individual defenses to the disciplinary committee. In granting a temporary restraining order immediately reinstating them in good standing with the college, the order preserved the right of the college to take further disciplinary action after the students had been given notice of the charges and the *opportunity to be represented by counsel.*

> One case clearly has recognized the right to counsel as an integral part to a fair hearing between guidance counselor and student when such is requested by the student, and the action against the student results from reports of juvenile authorities.

exceptional circumstances" legal counsel may be required in a particular case to guarantee the fundamental concept of fairness.[15] The most important criteria with which to judge the fairness of a particular hearing are: 1) whether the student is subject to severe injury, 2) whether the university will proceed through counsel and 3) whether the student has the ability to defend himself.

Id. at 760. The case referred to was *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y. 1967). Unknown to the *Zanders* court, the *Madera* case had just been reversed on the counsel issue. Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

15. *Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning*, 45 F.R.D. 133, 148-49 (1968). *See also* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969); Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W. Va. 1968).

Some decisions, while not decided on the counsel issue, have indicated that if there be another disciplinary hearing, the student was entitled to counsel. Brown v. Greer, 296 F. Supp. 595, 599 (S.D. Miss. 1969); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 752 (W.D. La. 1968); Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899, 905 (Sup. Ct. 1967).

Other cases evidence the fact that some institutions recognize a right to counsel. Jones v. State Bd. of Educ., 407 F.2d 834, 835 (6th Cir. 1969); Powe v. Miles, 407 F.2d 73, 79 (2d Cir. 1968); Scoggin v. Lincoln Univ., 291 F. Supp. 161, 164 (W.D. Mo. 1968); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 615 (M.D. Ala. 1967); Woody v. Burns, 188 So. 2d 56, 57-58 (Fla. Ct. App. 1966).

The first case after *Dixon* to discuss counsel was *Due v. Florida A & M Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963):

> A fair reading of the *Dixon* case shows that it is not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law.

Id. at 403. It was unfortunate that this statement linked the counsel issue with that of a full-dress judicial hearing. Since *Dixon* held that it did not intend to imply that a full-dress judicial hearing was required but only that the rudiments of an adversary proceeding could be preserved without encroaching upon the interests of the institution, any issue connected with the requirement of a full-dress judicial hearing would be tainted. Therefore, the *Due* court, in fact, did not reach the counsel in the type of adversary proceeding envisioned by *Dixon*. However, from its facts and holding, *Due* could be used to support the contention that the student has no right to counsel in an evidentiary hearing although the possible injury is expulsion or indefinite suspension.

In the following cases, the counsel issue was raised but not decided by the court: Segal v. Jacobson, 295 F. Supp. 1121, 1122 (S.D.N.Y. 1969) (student did not present fact issues necessary for decision before the constitutional claims could be reached); Hammond v. South Carolina State College, 272 F. Supp. 947, 949 (D.S.C. 1967) (decided on the ground that the rule under which the students were suspended violated free speech).

In the following cases, the counsel issue was raised and rejected by the court: Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968); Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231, 232 (Sup. Ct. 1966). For additional discussion see Comment, *The Fourteenth Amendment and University Disciplinary Procedures*, 34 Mo. L. Rev. 236, 249-51 (1969).

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Specific Standards of Fairness

The student's peril may include expulsion, indefinite suspension, short suspension, removal of diploma privileges, long probation, short probation, change of environment and reprimand. The result of the action by the administrator in an expulsion case would be the drastic and complete termination of the educational experience in that particular institution.[16] This action would effectively deny an education that is vital and, indeed, basic to civilized society. Without sufficient education the student would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of a good citizen.[17] Indefinite suspension has been deemed to be the equivalent of an expulsion.[18] Although the student's peril in the short suspension has not been discussed by the courts, it would appear to decrease from the expulsion and indefinite suspension situations although the educational experience at that institution is temporarily terminated. One reason for lack of discussion on this subject is the fact that hearings which result in short suspension begin by putting the student in peril of indefinite suspension. The possible removal of diploma privileges has been considered by one court to be more than a minor sanction.[19]

The student's peril in the short suspension, long probation and short probation situations should decrease respectively. Suspension should definitely be distinguished from probation because in the former there is a termination of the educational experience in that particular university while in the latter there is no termination.

> [D]isciplinary proceedings which do not involve expulsion or suspension, but which only deal with lesser penalties such as the loss of certain social privileges, do not have to be protected by the same procedural safeguards which are necessary in expulsion or suspension proceedings.[20]

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16. *See* Madera v. Board of Educ., 386 F.2d 778, 784 (2d Cir. 1967).

17. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961). *See also* Brown v. Board of Educ., 347 U.S. 483 (1955).

18. *See* Madera v. Board of Educ., 386 F.2d 778, 784 n.6 (2d Cir. 1967); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

19. In *Goldwyn v. Allen,* 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), a public high school student was prohibited from taking regent's examinations. The debarring of the student from the examinations would result in her not obtaining a state diploma. Any future employer of this student, who may require a high school education, and any institution of higher learning to which she may seek admission will not accept her affirmation of her educational attainments without a high school diploma as evidence. The court appropriately felt that these possible sanctions were not minor.

20. French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969).

The hearing to determine whether to change the student's environment, as distinguished from the expulsion or suspension situation, would put the student in a lesser degree of peril because the change would not necessarily result in terminating the student's education.[21] However, the change could have a detrimental effect on the student's educational experience. Transferring a student from an accelerated program to a regular program or moving him from a regular public school to a special school for students with behavioral problems could mean that he would be denied the opportunity of receiving an education commensurate with his ability.[22] Reprimand would appear to place the student at the lowest level of peril since there would be neither a disruption of his education nor a change in the program he is pursuing.

Whether the university is represented by counsel is another criteria to judge the fairness of the proceeding. Legal representation for the university may exist in many forms. At the evidentiary hearing, the most apparent form occurs when counsel acts in a prosecutorial role and presents the case against the student.[23] It is quite possible for legal representation to be more subtle. A lawyer could instruct an administrator on presenting the case against the student. He could also be present at the hearing, either as an advisor[24] or as a member of the administrative board.[25]

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21. For example, in *Madera v. Board of Educ.*, 386 F.2d 778, 782 (2d Cir. 1967), there were only three things that could have happened to the seventh grade student involved as a direct result of the hearing. He could have been 1) reinstated in the same school in the same or a different class, 2) transferred to another school of the same level or 3) transferred to a special school for socially maladjusted children (but only with the parents' consent). Therefore, the student was placed at the beginning of the disciplinary procedure at a very low level of peril.

22. *Compare* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967) *with* Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967) *and* Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y. 1967). In the latter two decisions the court was more informed of the potential of injury to the student.

23. *See* French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 766, 768 (W.D. La. 1968); Jones v. State Bd. of Educ., 279 F. Supp. 190, 194 (M.D. Tenn. 1968).

24. *See* Buttny v. Smiley, 281 F. Supp. 280, 289 (D. Colo. 1968).

25. *See* Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 418 (W.D. Wis. 1969) (former member of the state supreme court); Marzette v. McPhee, 294 F. Supp. 562, 566 (W.D. Wis. 1968) (former member of the state supreme court); Due v. Florida A & M Univ., 233 F. Supp. 396, 399 (N.D. Fla. 1963) (law professor). The court in *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161 (W.D. Mo. 1968), made the following observation on the subject of legal advice to an evidentiary board:

> The entire record reflects that all members of the committee served with dedication under extremely trying circumstances. It is unfortunate that the committee did not have assistance of legal counsel to guide it in regard to the not uncomplicated problems which arise in cases where speech is mixed with conduct because the record demonstrates beyond question that the deficiencies that require the disciplinary action to be set aside did not result from any intention on the part of any member of the committee or the part of anyone

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A third specific criteria for judging the fairness of the proceeding is the ability of the student to defend himself. In the evidentiary hearing the question reduces to whether he has the ability to make skilled inquiry into the facts to ascertain whether he has a factual defense and to prepare and submit it.[26]

Whether other aspects of the hearing taken as a whole are fair may include everything from the attitude of the hearing officers to the safeguards built into the procedure. The hearing as a whole would become tainted if the hearing officer had predetermined the facts before the student had an opportunity to present his side or if the procedure did not permit the student to present or review the evidence.

Balancing Criteria to Achieve Fairness

Courts have indicated that, in order to determine in a given case whether the requirement of counsel is an ingredient of fairness required by procedural due process, the student's interests must be balanced against the university's interests. The theoretical polar positions on the balance would be as follows. At one end would be the case where the maximum possible penalty could be reprimand handled solely by a non-legally trained administrator and where the student knew and understood the charge against him and his available defenses. At the other end would be the case where the maximum possible penalty could be expulsion, the university proceeded through counsel, the issues were beyond the comprehension of the student untrained in law and there existed evidence that the university would not make available to the student in order for him to prepare his case.

Barker v. Hardway,[27] *Madera v. Board of Education*[28] and *French*

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else not to deal fairly with the students at Lincoln University.
Id. at 173.

26. In *In re Gault,* 387 U.S. 1 (1967), a much broader spectrum of questions was presented because the juvenile court hearing was not limited to an evidentiary hearing:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.

Id. at 36.

27. 283 F. Supp. 228 (S.D. W. Va.), *aff'd,* 399 F.2d 638 (4th Cir. 1968), *cert. denied,* 394 U.S. 905 (1969).

28. 267 F. Supp. 356 (S.D.N.Y.), *rev'd,* 386 F.2d 778, (2d Cir. 1967), *cert. denied,* 390 U.S. 1028 (1968). For a case comment on the district court decision, see 42 N.Y.U.L. REV. 961 (1967). For a note on the reversal at the Court of Appeals, see Note, *Constitutional Law—Due Process Does Not Require That a Student Be Afforded the Right to Counsel at a Public School Suspension Hearing,* 22 RUTGERS L. REV. 342 (1968).

v. Bashful[29] illustrate the weighing process. In *Barker,* ten students were refused their request to be represented by legal counsel at the college's disciplinary hearing. The court viewed three factors as not justifying the need for counsel: the college did not have a lawyer present; each student had the ability to defend himself since he was mature, educated and well acquainted with the facts; and the other aspects of the hearing taken as a whole appeared fair since each student was permitted to bring a faculty member, a fellow student or his parents as an advisor, to face his accuser, to produce witnesses and to be heard before a board of six faculty members.[30] A fourth factor supported the students' request for counsel since they were subject to severe injury by suspension. In upholding the college's refusal, the district court's decision implied that the severity of the injury by itself would not off-set the other three factors.[31]

In *Madera,*[32] a fourteen year old seventh grade public school student was suspended from school by the principal for behavioral difficulties. The principal notified the district superintendent of the suspension, who in turn notified the student's parents, requesting their presence at a guidance conference to be held in her office. After receiving the notice, the parents sought the aid of legal counsel. The attorney wrote the district superintendent asking to appear on behalf of the parents and their son at the conference. He was advised that under existing rules he could not attend the conference. The student and his parents brought

29. 303 F. Supp. 1333 (E.D. La. 1969).

30. 303 F. Supp. at 236-37.

31. The court based its decision on two grounds: 1) its "reluctance to grant adversary judicial status to student disciplinary hearings" and thus set new precedent and 2) the fact that the hearing was investigative only and not adjudicative. *Id.* Although the court may have reached the proper conclusion, neither ground satisfactorily supported the conclusion.

The court declared that a balance should be made between the private interest affected and the public interest involved. It then concluded "that in the circumstances of this case" the denial of the request for counsel did not deny the students due process. The circumstances which the court referred to were not discussed.

The second ground illustrated the confusion which could result when there has been a failure to keep the investigation stage separate from the accusatory stage. Although *In re Groban,* 352 U.S. 330 (1957), held that due process did not require counsel during the investigation stage of the administrative process, it had no application to the accusatory stage. The court failed to consider that the hearing was being held after the students already had been charged with the offense. Although the hearing would gather evidence, it was long past the investigation stage. This error went undiscussed by the court of appeals because it considered that since the district court gave a trial de novo, any previous error on the college level was erased. Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968), *cert. denied,* 394 U.S. 905 (1969). A similar misconception was displayed in *Wasson v. Trowbridge,* 382 F.2d 807, 812 (2d Cir. 1967). For a case comment on *Barker,* see 71 W. VA. L. REV. 187 (1969).

32. Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.), *rev'd,* 386 F.2d 778 (2d Cir. 1967), *cert. denied,* 390 U.S. 1028 (1968).

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an action to restrain the board of education from conducting the hearing without permitting legal counsel. Two factors warranted a conclusion of no counsel: the school did not have a lawyer present and there seemed to be no issue taken with the fairness of the hearing as a whole other than with the counsel issue. The other two factors favored counsel: the student did not have the ability to defend himself because he was only fourteen and his parents did not have the ability to defend him because they did not speak English and the student was subject to severe injury since the guidance conference could ultimately result in the loss of personal liberty to a child, a suspension which would be the functional equivalent of his expulsion from the public schools or a withdrawal of his right to attend public schools. The district court granted the injunction,[33] thus indicating that the severity of the injury coupled with an inability to defend oneself could off-set an otherwise fair hearing where the institution did not proceed through counsel.

The board of education appealed the issuance of the injunction and the court of appeals held that the student was not entitled to counsel.[34] In so doing, the court found all four factors to support a no-counsel decision. In addition to the two accepted by the trial court, the appellate court found that the presence of a lawyer was not necessary to provide the student with the ability to defend himself:

> Appellees here argue that the presence of a lawyer is necessary because it is he "who has the communicative skill to express the position of the student's parents when—because of lack of education, inarticulateness, or simply awe of the array of highly educated and articulate professionals in whose presence they find themselves—they may themselves be unable to do so . . . ." However, it does not appear that a lawyer could solve this communication problem. Actually the trial record supports the view, despite some testimony to the contrary . . . that the social worker, who is allowed to attend the Guidance Conference, would provide more adequate counsel to the child or the parents than would a lawyer.[35]

The court also viewed the student as not being subject to severe injury. The guidance conference was a meeting to determine the student's future educational welfare. It did not put his liberty in peril. The fact that the child's education had been terminated without a hearing on the facts

33. *Id.*
34. Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967).
35. *Id.* at 788.

appeared inconsequential to the court.[36]

In the third case, *French v. Bashful*,[37] the balance was in favor of retained counsel.

> Although the right to counsel was not among the rights specifically enumerated by the court in *Dixon*, it cannot be denied that the assistance of an attorney in a trial-type proceeding is of considerable value. An attorney is experienced in legal and quasi-legal proceedings. Counsel is best qualified to prepare a defense to the charges, examine the evidence against the defendant, cross-examine witnesses if such a right is permitted, and to otherwise plead the defending student's cause.
>
> In spite of the invaluable assistance to a defendant in a university disciplinary proceeding, it may well be that in many cases the student will not be at such a disadvantage so as to require the assistance of counsel. But here there is more reason for counsel than in most cases. The prosecution of the case was conducted by Overton Thierry, a senior law school student, who is now a member of Louisiana State Bar Association. A member of the Discipline Committee testified that Thierry was chosen to prosecute these cases because of his familiarity with legal proceedings. . . .
>
> . . . .
>
> Of course, Thierry was not a lawyer at the time of the hearings. But he had nearly completed his studies and was to be admitted to the Louisiana State Bar Association in a very few months. Surely, it cannot be doubted that his ability to conduct himself in a proceeding of this sort was likely to be far superior to that of the defendants who, as far as can be ascertained from the record, had no legal education or experience whatsoever.
>
> In view of the particular and special circumstances of this case, we therefore hold that procedural due process requires that these students be permitted to be represented by their retained legal counsel at the hearings.[38]

It is also of importance in *French* to note that the maximum possible penalty was expulsion, an extreme peril disposition. Furthermore, there was an additional infirmity in the proceedings; the discipline committee did not put its findings into a report open to the student's inspection.

36. *Id.* at 784, 786, 788.
37. 303 F. Supp. 1333 (E.D. La. 1969).
38. *Id.* at 1337-38.

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Thus it would appear that the court could satisfy all four factors to favor a right to counsel.

Right of an Indigent Student to Assigned Counsel

If due process requires that a student in a particular hearing has a right to counsel, the question arises whether he is entitled to have the university assign counsel to him if he is unable to employ his own counsel. Although neither criminal cases nor juvenile court cases are the guide to due process in administrative proceedings,[39] they do supply a background against which administrative law questions can be considered. *Gideon v. Wainwright*[40] required the state to offer appointed counsel for a defendant in a criminal proceeding when he is financially unable to obtain one. *In re Gault*[41] extended this right to juveniles in delinquency hearings. It may be contended that the student in a disciplinary hearing also lacks the skills essential to defend himself and therefore requires appointed counsel when he is financially unable to obtain one.[42]

French v. Bashful,[43] the first student discipline case to address itself to the issue of appointed counsel, chose not to follow *Gideon* and *Gault.* Instead, after finding that the university's refusal to permit the students to have the assistance of their retained legal counsel at the hearing was a denial of due process, the court, in dictum, opposed appointed counsel.

> In holding as we do, we want to make it clear that we are limiting this holding to *retained* legal counsel as opposed to

39. Esteban v. Central Missouri State College, 290 F. Supp. 622, 628 (W.D. Mo. 1968); 1 DAVIS § 8.10, at 556.

40. 372 U.S. 335 (1963).

41. 387 U.S. 1 (1967).

42. *See* 42 N.Y.U.L. REV. 961, 965 (1967); *cf.* Note, *The College Student and Due Process in Disciplinary Proceedings,* 13 S.D.L. REV. 87, 104-09 (1968). For a discussion of the problems and solutions on the question of appointed counsel for disciplinary hearings in the public schools, see Note, *Constitutional Law—Due Process Does Not Require That a Student Be Afforded the Right to Counsel at a Public School Suspension Hearing,* 22 RUTGERS L. REV. 342, 356-60 (1968). Heyman, *Some Thoughts on University Disciplinary Proceedings,* 54 CAL. L. REV. 73 (1966), suggests:

> Students should seek their own counsel; if the student is indigent, normally voluntary representation will be possible, at least on a large campus. This is especially true in cases involving political matters where organizations like the American Civil Liberties Union are available. In other cases, should an indigent student's efforts be unsuccessful, the university should help him obtain representation. The problem is eased on campuses with law schools. If the case burden is not severe, law teachers working with law students (or in many instances, law students alone) can service the demand.

Id. at 80.

43. 303 F. Supp. 1333 (E.D. La. 1969).

> appointed counsel. In cases of this kind it is necessary to weigh the interests of the two sides to the controversy. . . . When the right to retained counsel is involved, we feel that any burden which such a right places on the university is inconsequential compared to the vital interest of the student in being represented by counsel. But a similar holding as to appointed counsel would have a far greater effect on the university. If a college administration were forced to provide counsel for defendant students at every disciplinary proceeding, the cost to the school would be considerable. It is no secret that the universities are not unlimited in their funds. It is therefore this Court's opinion that this would be too high a price for a college to pay for the privilege of enforcing discipline among its students.[44]

Authority, however, exists which requires counsel in certain circumstances.[45] A panel of judges[46] noted that

> [t]here is no general requirement that procedural due process in student disciplinary cases provide for legal representation . . . . Rare and exceptional circumstances however, may require provision of one or more . . . [procedural safeguards] in a particular case to guarantee the fundamental concepts of fair play.[47]

The "rare and exceptional circumstances" rule bears a striking resemblance to the "special circumstances" rule established for the right to appointed counsel in criminal cases by *Powell v. Alabama*.[48] *Powell* held that "special circumstances" in capital cases required appointed counsel to meet due process standards. *Betts v. Brady*[49] admitted the possible existence of "special circumstances" in noncapital cases as well.

The "special circumstances" rule was abandoned in *Gideon v. Wainwright*.[50] Justice Harlan, concurring in the *Gideon* decision made the following observation:

> The principles declared in *Powell* and in *Betts*, however, had a

44. *Id.* at 1338.
45. *See* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969); Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W. Va. 1968).
46. *Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (1968).
47. *Id.* at 148-49.
48. 287 U.S. 45 (1932).
49. 316 U.S. 455 (1942).
50. 372 U.S. 335 (1963).

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> troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the *Betts* decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. Such dicta continued to appear in subsequent decisions, and any lingering doubts were finally eliminated by the holding of *Hamilton v. Alabama* . . . .
>
> In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts,* there were cases in which the Court found special circumstances to be lacking, but usually by a sharply divided vote. However, no such decision has been cited to us, and I have found none, after . . . 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.[51]

Assuming that there is an analogy between "rare and special circumstances" in student discipline cases and the "special circumstances" rule that was used prior to *Gideon* in the criminal trial area, the student rights decisions appear to be at the *Betts v. Brady* stage of development. If history repeats itself, the "rare and special circumstances" rule will erode to the point that the mere existence of the possibility that the student would be subject to severe injury would in itself constitute the circumstances requiring the services of counsel at the evidentiary hearing.[52]

Other Tangential Issues

In those cases where a right to counsel exists, the question then arises whether the university has a duty to inform the student that he has a right to retain his own counsel. Although there is no clear authority

51. *Id.* at 350-51 (Harlan, J. concurring).

52. The erosion may have begun as evidenced by *French v. Bashful,* 303 F. Supp. 1333 (E.D. La. 1969). The court concentrated on the fact that the college was represented by counsel and the student was not. This imbalance lead the court to conclude that the student's ability to defend himself was jeopardized.

on this point,[53] the answer may rest on whether the student's failure to have counsel was based on an intentional relinquishment or abandonment of a fully known right. Even if a student has the right to have counsel assigned, there is no authority that requires university officials to advise him of this right to be provided with counsel.[54]

In considering the role of counsel at the evidentiary hearing, many questions may be raised. The basic question is whether counsel should be permitted to participate actively in the hearing or whether he should be restricted to merely advising his client. Although Columbia University and Central Missouri State College are on record as permitting only the student to present evidence,[55] others, *e.g.*, the University of California at Berkeley, the University of Florida, Tennessee A & I State University, Wisconsin State University at Oshkosh and the Louisiana State Board of Education have permitted counsel to present evidence and cross-examine witnesses testifying against the student.[56]

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53. In *Due v. Florida A & M Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963), there was no request by the student nor comment by the disciplinary committee with respect to securing counsel. In contending that the hearing denied the student due process, it is unclear whether the thrust was the right to counsel or the right to be informed of this right to counsel. The court's response does not clarify the issue:

> A fair reading of the *Dixon* case shows that is it not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law.

Id. at 403.

Cases do exist in which the students have been informed prior to the hearing that they had the right to be represented by counsel of their choice at the hearing. *See* Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

54. Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968).

55. Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 541 (S.D.N.Y. 1968); Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967). In *Goldwyn v. Allen*, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967), the attempt was made to permit counsel to attend the hearing before the assistant superintendent of schools "as an observer only." Despite counsel's objections, the assistant superintendent refused to permit counsel to actively participate in the conference in behalf of his clients. Instead of discussing the role of counsel the court resolves the case on the basis that the assistant superintendent had no authority to conduct the hearing and therefore the student was denied a hearing.

56. Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 753 (W.D. La. 1968) (counsel even permitted additional time to sum up each individual case); Jones v. State Bd. of Educ., 279 F. Supp. 190, 194, 199 (M.D. Tenn. 1968); Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); Woody v. Burns, 188 So. 2d 56, 58 (Fla. Ct. App. 1966).

Heyman, *Some Thought on University Disciplinary Proceedings*, 54 CAL. L. REV. 73 (1966), suggests that the student be given a choice between an informal hearing and a formal hearing.

> Students will be represented by lawyers only rarely if the informal hearing is chosen. Counsel, if any, will be a layman who will help the student by speaking with him, directing an occasional question to witnesses, and, perhaps, addressing the committee in support of the student. A lawyer will want

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In certain situations counsel has been allowed to appear instead of the student.[57] There may be a difference in the role of counsel depending on whether he is constitutionally required or whether he is not required but is permitted to be present by the institution. It would appear that the gratuitous nature of counsel's presence should give the university some discretion in determining counsel's role.

HEARINGS TO DETERMINE QUESTIONS OF LAW

The hearings to determine questions of law do not involve a dispute over the facts which gave rise to the hearing. Instead, the parties agree upon the facts but differ on the issue of whether the university's rule deprives the student of a constitutional or statutory right such as freedom of speech or assembly. In such a dispute, oral arguments are the most convenient procedure.[58] For the purposes of this article, such hearings will be referred to as legal argument hearings.

The *Dixon* decision applies only to evidentiary hearings.[59] There are no student discipline cases establishing a right to a legal argument hearing although many universities provide such hearings.[60] Thus, only

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to participate more fully. He may wish to cross-examine witnesses in detail, put his client on the stand, and make motions concerning the admissibility of evidence. That kind of participation may suggest to the university that its case should also be presented by counsel, and what began as an informal proceeding will tend to become adversary, and similar to the formal proceeding. If informality is desired, the participation of lawyer-counsel should be limited to advising the student, seeking to ask questions of witnesses through the committee (unless under the circumstances the committee determines that direct questioning would be helpful to it), and summarizing the case for the student. This restriction on the role of lawyer-counsel for the student is reasonable, furthermore, since the student may, by choosing the more formal process, get the full participation of counsel.

The university should not be represented by counsel in an informal proceeding.

Id. at 80.

57. In *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968), counsel appeared instead of the students at an evidentiary hearing. The initial hearing, held on the college's campus with apparently all the 29 students present, was defective since the students were expelled without the college presenting any evidence. *Id.* at 752, 761. The students appealed to the State Board of Education which conducted a hearing de novo. Only 14 of the 29 students made the trip to Baton Rouge for the full evidentiary hearing. Counsel represented the other 15 students without them being present. *Id.* at 753. In *Goldberg v. Regents of Univ. of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967), counsel was permitted to appear and fully participate at the prehearing conference without the personal appearance of his clients.

In *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 543 (S.D.N.Y. 1968), a *private* university would not permit the appearance of lawyers instead of the students.

58. By analogy, a typical hearing before an appellate court is an argument, not a trial. *See* 1 DAVIS § 7.07, at 432.

59. *See* notes 7-13 *supra* and accompanying text.

60. *See* Moore v. Student Affairs Comm. of Troy State Univ., 204 F. Supp. 725,

when the university, in its discretion, chooses to use the hearing to entertain oral arguments does the student's right to counsel become an issue. It would appear, because of its gratuitous nature, that the granting of a legal argument hearing would not require the university to grant a right to counsel. Yet, if the university did allow participation of retained counsel, an equal protection issue would be raised if the institution did not appoint counsel for those who could not afford to retain an attorney.[61] As in evidentiary hearings there is no authority to support the right of the student to be informed of the university's policy of allowing counsel.[62]

Because the structure of the legal argument hearing differs from the evidentiary hearing, the role of counsel will also differ. In evidentiary hearings the mere presence of an attorney may be of valuable assistance since he can still advise the student of proper tactics, procedural rights and advantageous cross-examination. Since the legal argument hearing is essentially speech-making, the attorney must deliver the speech to be of any substantial benefit to the client.[63] Thus, it would be inconsistent to allow the attorney to be present but deny him an opportunity to participate.

THE HEARING TO DETERMINE POLICY

A third type of hearing seeks to determine questions of policy and

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731 (M.D. Ala. 1968) (dispute over whether due process requires presence of newspaper reporter at hearing). The institution may be unaware that they are providing a legal argument hearing for a non-factual issue. For example, in *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W. Va. 1968),

> [s]ix of the suspended students appeared before the Committee and upon having their requests to be represented by legal counsel refused, read a prepared statement and refused to go on with the hearing.

Id. at 234. The question on right to legal counsel was the non-factual issue in dispute. The hearing consisted of reading a prepared statement—the speech-making type of hearing and not the presentation of evidence. *Accord,* Hammond v. South Carolina State College, 272 F. Supp. 947, 949 (D.S.C. 1967) (right to counsel, confrontation and cross-examination). *Davis v. Firment,* 269 F. Supp. 524, 526 (E.D. La. 1967), appears to be a case where a dispute over a non-fact issue (whether a public high school grooming regulation violated freedom of expression) was aired at the hearing. The student's attorney made an oral speech on this issue so as to make this part of the hearing the argument type of hearing. The hearing also shaded into a trial type of hearing when counsel was permitted to produce any information and evidence, including the inspection of the student's hair.

61. Withholding the right to counsel from indigent students would be constitutionally vulnerable on two grounds. Assuming that in a particular circumstance it would be a denial of due process to not allow counsel, the decision to bar counsel would deny due process to the student whether or not he could afford counsel. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). In addition, criteria which classifies individuals on the basis of whether or not they can afford to exercise a certain right has met increasing scrutiny by the Supreme Court. *See, e.g.,* Williams v. Illinois, 90 S. Ct. 2018 (1970).

62. *See* notes 54-55 *supra* and accompanying text.

63. *See* notes 56-57 *supra* and accompanying text.

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discretion and usually does not concern facts about the immediate parties.[64] In such hearings, herein referred to as legislative hearings, the tribunal might consider the need for a certain rule or decide what facts constitute a violation of the rule.[65]

> [A] tribunal cannot think about issues of law or policy without drawing upon such of its background of factual understanding as it deems relevant. What we call "judgment" is usually a mixture of many ingredients—ideas, imagination, memory of experience, memory of facts, and other mental processes. The tribunal draws upon the experience of its members, and it is free to do research beyond the record . . . .[66]

Legislative hearings may be structured as a trial or as an oral agrument. If evidentiary facts are in dispute, the trial structure may be more conducive in the ascertainment of truth. However, most legislative hearings employ oral argument similar to legal argument hearings.[67] "The question of whether to use the method of trial for legislative facts is one of convenience, not one of legal right."[68]

In student disciplinary hearings the dean of students and his staff or a university committee may have all the testimony to present at a legislative hearing. Often, the student will have little or nothing to contribute. The right of a student to participate at such a hearing is not found in the *Dixon* decision.[69] More specifically, there is no student discipline case which states that due process requires such a hearing,

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64. *See generally* 1 DAVIS § 7.06, at 429-32.

65. *Mollere v. Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969), posed the question whether state college girls under the age of twenty-one could constitutionally be required to pay more than other students to support the college's housing system. In resolving the issue, the court considered the following legislative facts:

> It is undisputed that the College's sole reason for requiring that women under 21 and freshmen men live in college residence halls was to meet the financial obligations which arose out of the construction of those dormitories. When the Court specifically asked Mrs. Parker, the Dean of Women, the reason for the requirement, she testified that the sole and only reason was to increase the revenue of the housing system. Indeed, when she was asked why this particular category of students was chosen she replied that the girls in this group together with the freshman boys comprised the precise number needed to fill the dormitory vacancies. This was confirmed by the Auditor of the University, and their testimony was not contradicted by any other College official.

Id. at 827.

66. 1 DAVIS § 7.06, at 429.

67. *Id.* at 431.

68. *Id.*

69. *See* notes 7-13 *supra* and accompanying text. *See also* 1 DAVIS § 7.06, at 429-32.

although many institutions provide one. Consider the problem at the University of Colorado in *Buttny v. Smiley*[70] which arose from a protest demonstration at the university placement service on campus. At the disciplinary hearing

> [e]ach plaintiff was given the right to testify in his own behalf, not only to testify *factually* but to give his reasons for his action and even to expound his political philosophy, including his criticisms of American foreign policy and the C.I.A. Each respective student was allowed to testify as he desired whether or not the testimony had any relevance to the facts. Even persons who had no knowledge of the facts were allowed to testify on behalf of the plaintiffs. A Dr. Richard Maskowitz, not a member of the University community as such, testified and read into the record part of a paper excoriating the C.I.A. and attempting to justify the students' action here. The document itself appears in the record as an exhibit. None of these things would ordinarily be done in any court of law. The University administration went far beyond what was required of them in receiving evidence submitted by the students.[71]

The evidence beyond the facts pertaining to these students could be considered legislative facts and the method of presentation, speechmaking, could be considered an oral argument type of hearing.

If the university decides not to provide a legislative hearing, there is no counsel problem. However, if the university decides to provide a hearing on the dispute over legislative fact, it has the option of either providing a trial type or an argument type of hearing. The existence of the choice complicates the counsel issues. The right to counsel in either case would depend upon the fact that the granting of either type of hearing would be gratuitous. If counsel were permitted, then the right to appointed counsel would be a pertinent issue for either form of hearing.[72] A distinction would occur in counsel's role at the hearing. In the trial type of hearing where witnesses are presented, the lawyer's role would be quite different from that in the argument type of hearing where merely a persuasive argument is made.

Students' Right to Counsel in Practice

There exists at present a void in understanding between laymen

70. 281 F. Supp. (D. Colo. 1968).
71. *Id.* at 288.
72. *See* notes 54-55 *supra* and accompanying text.

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(student and administrator alike) and lawyers. Even where the right to counsel exists, the normal student who has been involved in an individual offense ranging in seriousness from possession of marijuana to violation of dormitory hours, as opposed to a mass demonstration violation, shuns counsel.

The student's reluctance to retain counsel may stem from his fear of offending the institution. If he is represented by counsel at the hearing, the hearing board may be more prone to mete out discipline.[73] He may feel that his problem with the institution is personal and therefore he dislikes involving others, especially strangers. He may feel a sense of martyrdom when he receives discipline or he may not wish to give up the spotlight to a lawyer and thereby lose the attention which he is getting. The student may resist counsel because he identifies counsel with his parents and the establishment. The thought of expense of retention and the inability to identify a lawyer who would be available also may dissuade a student from obtaining counsel. The student may not be fully aware of the seriousness of the offense. Often it is difficult for a freshman to realize just how injurious suspension or expulsion will be. This is illustrated when he retains counsel for the criminal charge but not for the institutional charge resulting from the same acts. The student also may feel that counsel cannot help him in institutional discipline since lawyers are useful only in court.

Not all student reaction is unfavorable to counsel. Some feel that the lawyer is necessary because he has the communicative skill to express the student's position better. He is more educated, more articulate, more respected and more in command of the situation than the student. He is now in awe of the array of highly educated and lucid professionals in whose presence the hearing is held.[74] The student may feel that without the assistance of counsel he might incriminate himself.[75] In addition, he may fear that statements made by him during the hearing might be admitted into evidence against him in subsequent court proceedings.[76]

The administrator's aversion to counsel is based on his feeling that counsel signifies his loss of control over discipline. The lawyer represents an encroachment into the domain which once belonged solely to the administrator. His honest exercise of discretion is challenged. He may no longer retain the *in loco parentis* attitude that he has held for so

73. *See* Jones v. State Bd. of Educ., 279 F. Supp. 190, 202-03 (M.D. Tenn. 1968).
74. *Accord*, Madera v. Board of Educ., 368 F.2d 778, 788 (2d Cir. 1967).
75. *See* Hammond v. South Carolina State College, 272 F. Supp. 947, 949 (D.S.C. 1967).
76. Madera v. Board of Educ., 267 F. Supp. 355, 360, 372 (S.D.N.Y. 1967).

many years. The presence of counsel invites formality.[77] He is required to make written records which are subject to review and scrutiny by others. His position as the center of attraction will no longer exist because the lawyer will speak in terms that the administrator will not understand and he will introduce technicalities which will confuse the administrator and delay discipline.[78] Some administrators do realize that the institution may receive benefits by having the student represented by counsel. For example, counsel's presence may help to ameliorate any possible prejudice in the case created by procedural irregularities that may have occurred during the hearing.[79]

Although law writers favor counsel for the disciplinary processes when the student is subject to severe disciplinary penalties,[80] a practitioner may be less receptive to the idea. The fee which he could charge

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77. *Id.* at 373. ("the presence of an attorney would change a 'therapeutic' conference into an adversary proceeding, to the great detriment of any children involved"); Cosme v. Board of Educ. 50 Misc. 2d 344, 270 N.Y.S.2d 231, 232 (Sup. Ct. 1966) ("the very purpose of the interview would be frustrated or impeded by presence of counsel, who might be tempted to turn the conference into a quasi-judicial hearing"). On appeal, the *Madera* court stated that

> [t]he mere attendance of counsel at the conference would do little to aid in finding the truth without also granting the other rights accorded in adversary proceedings—calling of witnesses, cross-examinations, etc. This would be destructive to the original purpose of the conference—to provide for the future education of the child.

Madera v. Board of Educ., 386 F.2d 778, 788 (2d Cir. 1967).

78. Counsel can cause unnecessary distractions. For example in *Goldberg v. Regents of Univ. of California,* 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967), counsel staged a walk-out. Hearings may have to be set or postponed to accommodate counsel when he is unavailable. Wasson v. Trowbridge, 285 F. Supp. 936, 941, 944 (E.D.N.Y. 1968); Hammond v. South Carolina State College, 272 F. Supp. 947, 949 (D.S.C. 1967); Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). Social workers may be more able to solve the communication problem. Madera v. Board of Educ., 386 F.2d 778, 788 (2d Cir. 1967). In addition, if it is required that the indigent be provided with counsel, the possible introduction of legal maneuvering and delaying tactics into the system may cause the hearing to proceed more slowly, the slower proceedings will create a backlog of cases before the hearing board, and there may not be a sufficient number of lawyers trained to handle the specialized problems which arise in institutional discipline. 42 N.Y.U.L. REV. 961, 965 (1967).

79. Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968) (presence of counsel helped to disperse any possible prejudice caused by a closed hearing).

80. Heyman, *Some Thoughts on University Disciplinary Proceedings,* 54 CAL. L. REV. 73, 79 (1966); Kutner, *Habeas Scholastica: An Ombudsman for Academic Due Process—A Proposal,* 23 U. MIAMI L. REV. 107, 147 (1968); Sherry, *Governance of the University: Rules, Rights and Responsibilities,* 54 CAL. L. REV. 23, 37 (1966); Van Alstyne, *The Student as University Resident,* 45 DENVER L.J. 582, 593 (1968); Wright, *The Constitution on the Campus,* 22 VAND. L. REV. 1027, 1075-76 (1969); Note, *Constitutional Law—Due Process Does Not Require That a Student Be Afforded the Right to Counsel at a Public School Suspension Hearing,* 22 RUTGERS L. REV. 342 (1968); Note, *The College Student and Due Process in Disciplinary Proceedings,* 13 S.D.L. REV. 87, 104-11 (1968).

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might constitute a financial loss. The injury to be suffered by the student may not be of such magnitude as to justify a larger fee. The practitioner may feel that "his client can take care of himself" since the institution will treat him fairly. Therefore, he sees no need to represent his client at the institutional hearing but only at the criminal court hearing which is being held on the same facts. The attorney also may be wary of offending the institution or of creating a conflict of interests since he may directly or indirectly receive other business from the institution. In addition, the attorney may desire to avoid the administrative hearings because he is inexperienced in this forum. If he does take the case, he would rather rely on judicial relief than seek administrative remedies.

CONCLUSION

If pre-hearing procedures have been used to limit and focus the issues to be presented at the disciplinary hearing, the analysis of this article will be useful. The analysis may also be beneficial in hindsight when the transcript of the hearing can be reviewed and the issues isolated and labeled evidentiary, legislative or legal. Analysis is more complicated at the beginning of the hearing when no pre-hearing procedures have been used to screen the issues. When, as in *Barker v. Hardway*,[81] the students demanded counsel at the opening of the hearing and the board had no idea of what issues would eventually be presented, the board must determine whether evidentiary fact issues will be raised. If so, the case is governed by *Dixon* and the students are entitled to a trial type of hearing on such issues. The hearing board must then determine whether circumstances exist which require an attorney's presence.[82] Once counsel has been admitted to the hearing, he will be present when other types of issues arise. There would no longer be a question of right to counsel. Instead the question would be first whether a hearing should be permitted for the issue being raised and second what type of hearing. If the issue were one of legislative fact, the board could refuse to hear any evidence on it since the university would not be required to grant a hearing on this issue. If the board, however, decided to air the issue, they could choose between the trial type and the argument type of hearing. The question to be evaluated then would be the role of counsel in this hearing.

The problem of defining in what situations the right to counsel should be extended to disciplinary hearings may admit of no simple solution. As the law presently stands, it can only be said that there may

81. 283 F. Supp. 228 (S.D. W. Va. 1968).
82. *See* notes 14-39 *supra* and accompanying text.

be factors which warrant a right to counsel. No doubt, as students become more aware of the seriousness of the various disciplinary hearings and of their rights in such hearings, the factors supportive of the right will be more fully articulated by the courts. It is now clear, however, that students, administrators and attorneys are reluctant to extend the right to counsel.[83] Such attitudes reflect a gap in understanding between lawyers and laymen. The result is that even where a right to counsel exists, it is seldom used or, if used, rarely protects the student's interests or improves the quality of administrative discipline. Today, in an era of dynamic student activism, the gaps of understanding must be filled to insure that due process is given proper consideration in establishing and conducting the disciplinary hearing.

83. *See* notes 74-81 *supra* and accompanying text.

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