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Donald D. Gehring
Bowling Green State University, dgehrin@bgsu.edu

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The Objectives of Student Discipline and The Process That's Due: Are They Compatible?

Donald D. Gehring



The disciplinary process on campuses has been too procedural and mirrors an adversarial proceeding that precludes student development. Suggestions for a paired-down process allowing for student learning are provided.

In what is probably the definitive work on higher education law, Kaplin and Lee (1995) warn that:

The law has arrived on campus. Sometimes it has been a beacon, other times a blanket of ground fog. But even in its murkiness, the law has not come “on little cat feet” like Carl Sandburg’s “Fog;” nor has it sat silently on its haunches; nor will it soon move on. It has come noisily and sometimes has stumbled. And even in its imperfection, the law has spoken forcefully and meaningfully to the higher education community and will continue to do so. (p. xx)

The forcefulness with which the law has spoken in student discipline has sometimes led to what Dannells (1997) has referred to as “creeping legalism” or proceduralism (p. 69). In his 10-year longitudinal study, Dannells (1990) reported a majority of institutions were providing a written notice of the hearing, with the accused being allowed

Donald D. Gehring is professor emeritus of Higher Education Administration at Bowling Green State University. He resides in St. Simons Island, Georgia.

to confront and cross-examine witnesses and appeal the decision. Almost 40% of the institutions he surveyed allowed the student accused of violating campus conduct regulations to have an attorney. A more recent study by the Association for Student Judicial Affairs shows that almost two-thirds of the institutions surveyed allowed attorneys to participate in campus hearings (Waryold & Peck, 1997). These are criminal law adversarial procedures. Adversarial procedures assume there are adversaries. The term adversary is defined as “a person or group opposing or hostile to another person or group; enemy; antagonist” (Barnhart & Barnhart, 1976). This type of relationship is difficult to imagine if we are to develop the kind of college and university community Boyer (1990) envisioned. In his book *Campus Life: In Search of Community*, Boyer pointed out that social bonds, which form, “the connections students feel” to the institution and to other students, are tenuous. By purposefully creating a situation in which students are set up as antagonists of each other or of the institution not only reinforces the tenuousness of social bonding, but actually eliminates the opportunity for it to take place. Where there are enemies, antagonists, or people opposed to each other, there is usually a winner and a loser. One need only look to our criminal justice system to learn to what little extent moral and ethical teaching and learning takes place in an adversarial environment. Pavela (1985) has suggested that this overemphasis on proceduralism may be due to institutional attorneys who never explained that “‘due process’ requirements at public institutions never mandated the full-blown adversarial hearings now found at many colleges and universities” (p. 41).

Many authorities in the field of campus discipline have agreed that the primary purpose of student discipline should be teaching in furtherance of the lawful missions of higher education. The Association for Student Judicial Affairs, the international organization for those who administer discipline, clearly states in the preamble to its constitution that “The development and enforcement of standards of conduct for students is an educational endeavor which fosters students’ personal and social development” (Association for Student Judicial Affairs, 1998). Boots (1987) has suggested that judicial affairs officers need to understand developmental theory in order to assist violators of campus rules to grow and develop so that they may reflect on their behavior and behave differently in the future. Where sanctions are imposed, the objective is teaching and learning, not merely punishment. As

Pavela (1985) has said, “effective discipline requires just punishment, “ (p. 47) but the purpose of that punishment is to enable the student to “...be most receptive to ethical instruction” (p. 47). Even the courts have stated that “The discipline of students in the educational community is in all but the case of irrevocable expulsion, a part of the teaching process” (*General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education*, 1968, p. 142). The same court said, “...the lawful aim of discipline may be teaching in performance of a lawful mission of the institution” (p. 142). Dannells (1997) also speaks of the “primacy of the educational value in the disciplinary/judicial function” (p. 79) and advises that “Student discipline is and always has been an excellent opportunity for developmental efforts” (p. 79). While many agree that the purpose of discipline is teaching and learning, Gehring (1998) has warned “Too often we attend to the legal to the exclusion of the learning” (p. 266).

Three of the leading organizations in higher education collaborated on a report setting forth conditions under which learning is enhanced (Potter, 1998). The report noted that “Learning is enhanced by taking place in the context of a compelling situation that balances challenge and opportunity...” (p. 7) and “Learning is strongly affected by the educational climate in which it takes place” (p. 13). Certainly, a disciplinary hearing is a compelling situation, but it is not one in which there is a balance between challenge and opportunity. The types of formal, criminal trial procedures Dannells (1990) found to be used by a majority of colleges and universities, in which students are pitted as adversaries or enemies of their institutions or other students, negate an educational climate and the positive educational benefits of discipline (Travelstead, 1987). The “creeping legalism” and “full blown adversarial hearings” simply do not create environments conducive to deeper teaching or learning in which both sides win—the students by enhancing their ethical development, and the institution by accomplishing its developmental mission.

Purpose

How can campus judicial officers teach while ensuring enforcement of campus rules? Are the two tasks compatible? What does the law have

to say about what public institutions need to do in order to discipline students? The purpose of this article is to burn off the blanket of legal ground fog by exposing it to the light of judicial opinion, which not only finds the teaching function compatible with the law, but also actually encourages it. It is the intention of this article to use the actual words of the courts to dispel the need for formalism and to illustrate how a simpler process can rise to the level of what is constitutionally due while meeting our objective of enhancing development.

The Process That's Due

The best place to begin is with the opinion of the Fifth Circuit Court of Appeals in *Dixon v. Alabama State Board of Education* (1961). The court was considering the expulsion of students who had been denied both a notice of the reason they were being *expelled* and an opportunity to speak in their own defense. While the court said the students were entitled under the Constitution to "...notice and some opportunity for hearing before...[being] expelled for misconduct" (p. 158, emphasis added) it also made it clear that "This does not imply that a full-dress judicial hearing with the right to cross-examine witnesses is required" (p. 159). The Supreme Court denied certiorari (i.e., refused to review the case) (*Dixon*, 386 U.S. 930 1961). Normally the denial of certiorari does not tell us whether the Court agreed or disagreed with the opinion. However, in a subsequent case considering the 10-day suspension of school children, the Supreme Court referred to *Dixon* as the "landmark case" in the area of student discipline (*Goss v. Lopez*, 1975). *Dixon* has since been cited by two U.S. Courts of Appeals as "the path-breaking decision recognizing the due process rights of students at state universities" (*Blanton v. State University of New York*, 1973, p. 385) and "The classic starting point for an inquiry into the rights of students at state educational institutions" (*Jenkins v. Louisiana State Board of Education*, 1975, p. 999). Thus, it seems that *Dixon* is good law and a standard to be followed.

To say that due process is required in student disciplinary cases is only the beginning of the inquiry. The Supreme Court put it most concisely when it said, "Once it is determined that due process applies, the question remains what process is due" (*Morrissey v. Brewer*, 481, 1972). However, due process is not well defined, but is a flexible concept.

Justice Holmes referred to the process as "...the rudiments of fair play..." (*Chicago, Milwaukee & St. Paul R.R. Co. v. Polt*, 1914, p. 168) while a later Court referred to the process as "reasonableness" (*West Coast Hotel Co. v. Parrish*, 1936).

The Supreme Court has further noted that due process is "...not a mechanical instrument" or a "yardstick" (*Joint Anti-Fascist Committee v. McGrath*, 1950, p. 162), but defined by "...the gradual process of judicial inclusion and exclusion..." (*Davidson v. New Orleans*, 1877, p. 104). The Supreme Court has provided further guidance when it told us that:

Considerations of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action. (*Cafeteria & Restaurant Worker's Union v. McElroy*, 1961, p. 895)

The Nature of the Government Function in Student Discipline

What is the "precise nature of the government function involved" in student discipline? There are those, most notably the Clerys, the Society of Professional Journalists, and more recently the federal Congress, who would analogize the "nature of the government function involved" in student disciplinary situations to the prosecution of crimes.

Jennifer Merkiewicz (1996) writing for the Clery's organization, Security on Campus, stated that the Miami University campus judicial board deals with crimes. She said "The private university courts, funded by state money, handle everything from academic dishonesty to *violent* crime such as rape and arson. The proceedings and results, however, are the school's dirty secrets" (p. 13, emphasis added).

At their meeting in Washington, D.C., in 1996, the Society of Professional Journalists listed as a key concern "The lack of access to

campus crime records...,” meaning campus disciplinary records (Campus Crime Stats., 1996, p. 5).

More recently, the federal Congress passed the Higher Education Amendments of 1998 (HR6) mandating that institutions keep statistics on students “referred for campus disciplinary action for liquor *law violations...*” (emphasis added). Other federal legislation equally confuses violations of law (criminal behavior) with violations of campus community standards. Those who confuse crimes and campus rule violations fail to understand that to be considered a violation of law, specific elements must be proven beyond a reasonable doubt whereas a violation of a community standard only requires that it be shown the person more likely than not engaged in the prohibited behavior. While a crime may be a violation of campus rules, a violation of campus rules is not necessarily a crime. It is often the case that students found responsible for violating campus rules are not prosecuted and are never convicted of a violation of law, thus, they are not guilty of a crime.

When care is not taken to separate legalistic language from campus codes confusion arises, and there is misunderstanding on the part of students, attorneys and others. While it is true that one infraction, such as a rape, may be a violation of law (a crime), and also a violation of campus regulations, only the local prosecutor has the authority to prosecute the crime. The campus judicial system has no authority to, nor should it ever prosecute crimes such as rape. Rape and other crimes are legal terms with specific criteria, which must be proven. For this very reason several authorities have recommended that legalistic language be removed from campus codes (Pavela, 1999; Stoner & Cerminara, 1990). The institution, however, may well discipline students for violating the campus rule prohibiting sexual touching without permission. Where colleges use legalistic language, the courts will hold them to a standard of proving the elements of the crime (*Hardison v. Florida A&M University*, 1998). Colleges and universities do not prosecute crimes, but simply discipline students who violate their rules. Any analogy of criminal prosecution and crimes to campus proceedings and violations of campus rules is simply not valid (*General Order on Judicial Standards of Procedure and Substance*, 1968).

The courts too have consistently reiterated that they "...do not believe there is a good analogy between student discipline and criminal procedure" (*Norton v. Discipline Committee, East Tennessee St. University*, 1969, p. 200). Four other United States Courts of Appeals have echoed this sentiment (*Gorman v. University Rhode Island*, 1988; *Wright v. Texas Southern University*, 1968; *Esteban v. Central Missouri State College*, 1969; and *Nash v. Auburn University*, 1987) as well as the Supreme Court of Vermont (*Nzuve v. Castleton State College*, 1975). The United States District Court for the Western District of Missouri has also said that even in cases of irrevocable expulsion "...the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law...The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound" (*General Order on Judicial Standards of Procedure and Substance*, 1968, p. 142).

Essential Elements of Due Process

If criminal procedures are not the model to follow in student disciplinary actions where the individual could be suspended or expelled ("the private interest affected..."), then what standards of process are due? Again, the 1961 "landmark case" of Dixon provides counsel and it is instructive to revisit the court's words.

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university...The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations...a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail. ...the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should be given an opportunity to present to the Board or the administrative official of the college his own defense against the charges and to produce either oral testimony or written affidavits in his behalf (p. 159, emphasis added).

In this case when the court referred to the “Board,” it meant the Board of Education and not a campus judicial board. It is interesting to note that the *Dixon* (1961) court said that if these procedures were followed, “...the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college” (p. 159). Note first that the court spoke of the “rudiments of an adversary proceeding” not an adversarial environment like a criminal trial which is confrontational and contentious (*Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, 1988). Thus, a hearing before an administrative official would preserve the elements of an adversary proceeding (one against the other) but would not necessarily create an adversarial environment (permeated with confrontation and contentiousness) in which the educational value of the experience might be lost. It is also of consequence to observe that the court specifically pointed to the college’s interests and said those could be preserved. In other words the court is saying that even in an expulsion hearing, following the procedures it has outlined would allow the institution to take advantage of an opportunity to teach valuable lessons.

As noted in the facts of the case and the court’s language, these procedures were confined to expulsions and allowed for an administrative official of the college to hear the student’s defense. The First Circuit Court of Appeals held that a student was not denied due process because the Director of Student Life advised the judicial board (*Gorman v. University of Rhode Island*, 1988). The court placed the hearing and the court’s involvement in perspective when it said:

...courts should not extol form over substance and impose on educational institutions all the procedural requirements of a criminal trial. The question presented is not whether the hearing was ideal or whether its procedures could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair and accorded the individual the essential elements of due process. (p. 16)

While allowing an administrator to hear the student’s defense is legally defensible, including students on a hearing panel has certain educational benefits. However excluding the maturity and wisdom

administrative officials or faculty bring to the hearing can preclude taking advantage of a “teachable moment” for the student accused of violating community standards.

The Process That’s Not Due

These “essential elements of due process” are those noted in Dixon, and do not include a right to be represented by counsel, to cross-examine witnesses, or even, in some cases, to confront them physically, nor to appeal the decision. Although there is no general right to counsel (*Donohue v. Baker*, 1997; *Osteen v. Henley*, 1993; *Dixon v. Alabama State Board of Education*, 1961; *Gabrilowitz v. Newman*, 1978; *General Order on Judicial Standards of Procedure and Substance*, 1968), when the college or university is represented by counsel it is only “fair” to allow the student the same right (*French v. Bashful*, 1969). But, there is no legal or other reason for the institution to use counsel, thereby complicating the procedures and moving to an adversarial rather than a teaching mode, and thus giving up the opportunity for a positive learning experience to take place. However, students who are also charged with criminal conduct arising from the same set of facts should be allowed to have counsel advise, but not represent them at the hearing (*Gabrilowitz v. Newman*, 1978). This would not necessarily create an adversarial environment since counsel would have a limited role “... only to safeguard appellee’s rights at the criminal proceeding, not to affect the outcome of the disciplinary hearing” (*Gabrilowitz v. Newman*, 1978, p. 106).

Cross-examination of witnesses by accused students can turn disciplinary hearings into invective proceedings that are ill suited to teaching or even to civility. Often students accused of violating campus rules who appear before judicial boards to claim their innocence are angry and are certainly not trained to cross-examine witnesses who may be reluctant to testify in the first place. In most student disciplinary actions there is generally no legal or other reason for accused students to engage in cross-examination of witnesses since the judicial board can ask questions of anyone giving testimony in order to get at the truth. Even where the consequence of the hearing may be expulsion, the courts, beginning with *Dixon* (1961) have said there is no right to cross-examine witnesses. A federal district court put it more succinct-

ly when it said “The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding” (*Jaska v. Regents of Univ. of Michigan*, 1984, p. 1250). However, where the credibility of a witness is at issue cross-examination may be essential to a “fair” hearing (*Winnick v. Manning*, 1972) but even then the physical confrontation of witnesses is not a right. The Supreme Court has said that “an adequate opportunity for cross-examination may satisfy the [sixth amendment confrontation] clause even in the absence of physical confrontation” (*Douglas v. Alabama*, 1965, p. 418). Two disciplinary hearings contested in court because of the failure to allow the accused student to directly cross-examine adverse witnesses were resolved in favor of the institution. One case dealt with an act of academic dishonesty (*Nash v. Auburn University*, 1987) and the other a date rape (*Donohue v. Baker*, 1997). The Eleventh Circuit Court of Appeals said in the academic dishonesty case that there was “...no denial of applicant’s constitutional rights to due process by their inability to question the adverse witnesses in the usual adversarial manner” (*Nash v. Auburn*, 1987, p. 664). In the situation involving a date rape where credibility was an issue and the facts were disputed, the federal district court said due process was satisfied if the student was allowed to question his accuser through the disciplinary panel (*Donohue v. Baker*, 1997).

There may also be times when, because of issues of credibility, cross-examination is permitted, but the witness testifies anonymously. This situation often occurs in campus sexual misconduct cases. The Supreme Court applied due process standards to the revocation of a parole—a much more significant private interest than a disciplinary panel or administrator could ever impose—and said “...if the hearing officer determines that the informant would be subject to risk of harm if his identity were disclosed he need not be subject to confrontation and cross-examination” (*Morrissey v. Brewer*, 1972, p. 487). The Supreme Court’s advice was applied in a campus judicial proceeding involving the suspension of a third-year law student who was contesting his expulsion before the First Circuit Court of Appeals on the grounds that allowing an adverse witness to testify out of his sight violated due process. The court noted that the circumstances of the case involved the accused student crawling on his knees under a library table looking up women’s skirts and said that while the disciplinary panel allowed the female student to testify out of sight of the accused

because of “...her frightened and nervous state [that] did not render the hearing unfair” (*Cloud v. Trustees of Boston University*, 1983, p. 725).

There are also institutions that permit multiple levels of appeals beyond the original decision. While it may be reasonable to have an expulsion or long-term suspension reviewed by an administrative official to ensure that the institution followed its own procedures and the violation merited the sanction, there is no legal basis for an appeal. The Supreme Court has made it clear that “Due process does not comprehend the right of appeal” (*District of Columbia v. Clawans*, 1936, p. 627). The Court’s logic in stating that due process does not include the right of appeal was explained in one of its earlier cases when it said “If a single hearing is not due process doubling it will not make it so” (*Reetz v. Michigan*, 1903, p. 508).

The Process That’s Due for Lesser Offenses

Research data show the disciplinary sanctions of suspension and expulsion are not often imposed, but “... milder forms are clearly the most commonly used” (Dannells, 1991, p. 168). In instances where students are not in jeopardy of being expelled or suspended for a long period of time, “the private interest that has been affected by government action” (*Cafeteria & Restaurant Workers’ Union v. McElroy*, 1961, p. 895) is minimal and thus the requirements of due process are lower. The Supreme Court has said that even in the case of a student suspended for 10 days there was only required “some kind of notice and ...some kind of hearing” (*Goss v. Lopez*, 1975, p. 579, emphasis added). The Court characterized this as an “...informal give-and-take between student and disciplinarian...” (*Goss v. Lopez*, 1975, p. 584).

The Supreme Court also recognized that “the educational process is not by nature adversarial, instead it centers around a continuing relationship between faculty and students, ‘one in which the teacher must occupy many roles— educator, advisor and at times parent-substitute’” (*Board of Curators of University of Missouri v. Horowitz*, 1978, p. 955). The Court has thus even permitted school administrators to suspend students for short periods if they engage in a “give-and-take” conversation, which would allow for taking advantage of the teachable moment a disciplinary hearing presents. All the Supreme Court

requires in this type of situation is that the student "...be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story" (*Goss v. Lopez*, 1975, p. 581). The First Circuit Court of Appeals reminds us that the courts should not "...extol form over substance..." (*Gorman v. University of Rhode Island*, 1988, p. 16).

The "essential elements of due process," as the Supreme Court pointed out, are "some kind of notice and...some kind of hearing." These two essential aspects of due process need not be overly formalized in lesser disciplinary sanctions but are amenable to a simple and straightforward administrative notice and hearing in which the student and the administrator engage in a "give-and-take" discussion. It must be recognized that not all private interests of students trigger the due process clause. Where a student was found to have drugs in his room, was placed on "suspended suspension," and complained to the court that his due process rights were violated, the court said "...the punishment meted out under this rule simply does not deprive the petitioner of a right which would in turn give rise to a constitutional claim" (*Beaver v. Ortenzi*, 1987). As Pavela has noted, if the offense would not result in expulsion, suspension or other serious penalty, "...most college disciplinary cases should be resolved in nonadversarial conferences with students without formal hearings, or a 'right' to appeal." (*Synfax*, March 20, 2000, p. 954, emphasis added).

Discussion

The "creeping legalism" described by Dannells (1997) has gone far beyond what the courts have actually required in order to provide students with due process. Institutions have unnecessarily formalized their procedures to incorporate the right to counsel, confrontation and cross-examination of witnesses and multiple appeals (e.g., *Schulman v. Franklin and Marshall College*, 1988; *Rosenfeld v. Ketter*, 1987; *Beaver v. Ortenzi*, 1987; *Smith v. Denton*, 1995). These types of procedures are confusing to students, preclude the "opportunity for developmental efforts" (Dannells, 1997, p. 79), and even "...create an adversarial atmosphere likely to produce harsher, not more lenient results" (Pavela, 1999, p. 906).

Whether the relationship between a student and an institution is characterized as one of contract or association, the institution must substantially follow its own rules. Thus, the more straightforward and clear the disciplinary procedures are, the easier they will be for students to understand and for the institution to follow. Adversarial procedures that pit one antagonist against another, like criminal procedures, are complex but even worse, do not provide the support necessary for personal and social development.

Institutions would be well served by a comprehensive review of their disciplinary procedures. Legalistic language and structure should be eliminated and procedures streamlined. Hearings should be designed as fact-finding procedures and a time to raise ethical questions. Minor offenses, which could result in less than a suspension, should be dealt with at the lowest level possible and provide the student with an oral or written notice and an opportunity to present his or her side of the story. Decisions about responsibility for violating rules of conduct can be based on whether it is more likely than not that the student engaged in the behavior. There would be no need for confrontation or cross-examination of witnesses or representation or advice of counsel (unless there is a pending criminal charge). A letter to the student should state the outcome of the hearing and the basis for the findings. One level of review of the decision could be provided if requested and justified.

Major offenses where the result could be suspension or expulsion could be handled in a similar procedural manner, since the essential elements of due process are present. Of course if there is a question of credibility of a witness, cross-examination should be allowed, and even then this can be accomplished by having questions directed through the hearing officer or panel. If criminal charges are pending as a result of the same incident, the students should have counsel to advise them. Even where the outcome is expulsion, there is no need for more than one level of appeal and it should be granted only where it can be shown either that there is new evidence which clearly was not available at the time of the hearing, that there has been a substantial and prejudicial departure from the procedures, or that the student's rights were in some way violated. These added measures would be called into play only in unusual circumstances. For most cases a one-on-one dialogue can take place which allows the administrator to

hear both sides in considerable detail and make a decision of responsibility. This type of dialogue may also permit the administrator to assess the individual's level of development and ask questions that require the student to reflect on a higher level. Finally, administrators may also want to include students as members of hearing panels for the educational benefits such service provides. While this is an excellent educational opportunity, it requires a great deal of preparation and training and should not be undertaken unless appropriate resources are available to provide the support required.

If institutions review their disciplinary procedures with the objective of providing a system that both aids in the development of students and meets what the courts have defined as due process in student discipline without excessive formalism, then everyone involved will benefit.

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