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The legal aspects of disciplinary suspension and expulsion practice and policy at major tax-supported colleges and universities in South Carolina

Brague, Kirk Alan, Ed.D.

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THE LEGAL ASPECTS OF DISCIPLINARY SUSPENSION AND EXPULSION PRACTICE AND POLICY AT MAJOR TAX-SUPPORTED COLLEGES AND UNIVERSITIES IN SOUTH CAROLINA

by

Kirk A. Brague

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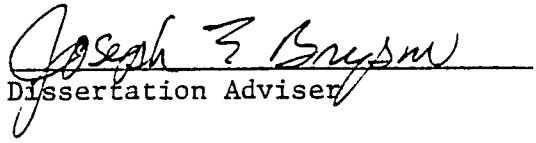

Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Advisor: Joseph E. Bryson

Committee Members: Clyde B. Inscoe

Mark L. Hunsaker

Terry W. Mullins

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The administration of discipline at tax-supported colleges and universities has seen great change and evolution during the past thirty years, with significant case law and authoritative literature emerging from the landmark Dixon case of 1961. The major purpose of this study was the assessment of disciplinary procedures and policies used by the 11 major tax-supported colleges and universities in South Carolina, and an analysis of those procedures and policies in light of prevailing case law and authoritative opinion.

The study was developed through descriptive and historical analyses of case law, legal trends, and authoritative legal and educational opinion regarding disciplinary due process and related issues at tax-supported institutions. Descriptive data and information concerning disciplinary practices at the eleven colleges and universities were collected and analyzed in terms of consensus findings resulting from the analysis of case law and expert opinion. The resulting analysis provides institutional disciplinary administrators with an assessment of their institutions' disciplinary policies and procedures, and guidelines for the retention, modification, and addition to their practices.

The study results showed that all eleven institutions, with a few procedural exceptions, observed minimally mandated due process procedures when conducting disciplinary suspension/expulsion proceedings. Most institutions expanded certain procedures beyond minimal due process mandates, although none met all prevailing judicial and educational standards. Two schools offered procedures consistent with espoused judicial and educational opinion.

Issues involving interim suspension, overlapping jurisdiction and mandatory psychiatric withdrawals were inadequately covered or ignored by a number of institutions, both in written policy and established practice. A lack of experience with some of these issues appeared to be a major cause for corresponding inadequate policies and procedures. The institutions generally treated academic dishonesty in a manner similar to disciplinary misconduct, a practice consistent with prevailing thought. The individual nature of each institution's campus climate was reflected in the distinct, varied nature of its disciplinary practices.

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CHAPTER I

INTRODUCTION

Discipline in higher education is a concept which has seen great change and development since the founding of higher education institutions in America. Major changes in philosophy and role of discipline have often reflected gradual changes in the nature of the relationship between an institution and students. However, the thirty years which followed the landmark 1954 Brown v. Board of Education of Topeka[1] decision have encompassed many judicial decisions directly addressing the administration of discipline on college campuses. These judicial decisions and subsequent scholarly attention have significantly affected disciplinary policies and procedures, requiring awareness of their implications among college and university disciplinarians and tribunals.

Higher education has witnessed a major shift from the initial rigid behavioral control of the Colonial period to the current stance of less behavioral control and greater reliance on students' self-discipline. The evolution has developed from an external control, which denotes punishments, restrictions, and institutional control over violations of laws and mores, to internal control, emphasizing self-discipline and personal responsibility.[2]

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[1]Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

[2]William T. Packwood, ed., College Student Personnel Services (Springfield, Illinois: Charles C. Thomas, 1977), p. 235.

Court decisions at the state and federal level have had a significant impact on the evolution of campus discipline. Prior to the Fifth Circuit Court's acceptance of federal jurisdiction over college disciplinary appeals in the celebrated case of Dixon v. Alabama State Board of Education,[3] the few challenges to college disciplinary action were heard primarily in state courts. These decisions helped define the legal relationship between the student and higher education institution, which in turn has had important implications for the administration of campus discipline. The relationship theories utilized by various courts in settling disciplinary litigation have usually influenced courts' decisions regarding proper and improper disciplinary policy and procedure.

One significant question which has underscored the development of legal relationship theories has been that of higher education opportunity and enrollment as a right versus a privilege. Early case law reflected a societal perspective which suggested that education, especially higher education, was not a necessity, or right of the aspiring student.[4] The distinction between right and privilege eroded slowly during the first half of the twentieth century due to several factors including the mass public education movement, the civil rights movements, and continuing judicial decisions.

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[3]Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

[4]Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec.537 (1844).; Turner v. Gaither, 83 N.C. 357, 35 Am. Rep. 547 (1880).;Cory v. Cook, 24 R.I. 421, 53 Atl. 315 (1902).

The 1961 Dixon case is prominently cited for the court's specification of minimal due process procedural rights to be observed in disciplinary proceedings involving separation from the institution. However, the significance of the case also rests upon the Fifth Circuit Court's implicit rejection of the privilege theory. Judge Rives, writing the majority opinion, insisted " the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right of due process."[5] Justice Rives did invoke the property right in judica by declaring that the right to remain at the public institution was a private interest.[6]

The landmark Dixon decision established precedence for federal courts in maintaining jurisdiction over litigation involving due process rights of students threatened with dismissal from tax-supported institutions of higher education. Some writers have suggested that the right/privilege distinction is one no longer worthy of significant discussion.[7] Mills contends that "the courts are trying to avoid the argument of contractual versus constitutional rights and that no clear definition has yet been drawn on the right-privilege dichotomy."[8] He further suggests that "if a college education is a right, the due

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[5]Dixon, p. 156.

[6]Ibid, p. 157.

[7]see William Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harvard Law Review 1439 (1968).; Richard E. O'Leary, "The College Student and Due Process in Disciplinary Proceedings," University of Illinois Law Forum 438, 462 (1962).

[8]Joseph L. Mills, The Legal Rights of College Students and Administrators (Washington: Lerner Law Book, 1971), p. 33.

process clause serves to protect the rights of college students."[9] Federal court jurisdiction over higher education disciplinary cases since Dixon has established a constitutional rights connection between student and institution. The result of this judicial evolution has been the replacement of the in loco parentis doctrine with contractual theory and the constitutional rights concept.

The authority of federal courts to adjudicate issues related to disciplinary suspensions and dismissals at tax-supported colleges and universities clearly rests upon a constitutional rights basis guaranteed by both the Fifth and Fourteenth Amendments. The many federal cases which have followed Dixon have generally dealt with questions regarding the specification of appropriate procedural due process requirements. In addition, many of the decisions rendered in these cases have suggested that fundamentals of fairness and reasonableness are solid foundations upon which to rest broad, flexible procedures of due process.[10] In the 1963 Due v. Florida A & M University[11] case the court maintained that:

> More specific routines of notice and advisement may be indicated in this regard, but a foisted system of rigid procedure can become ritualistic, dogmatic, and impractical as to itself be a denial of due process. The touchstones in this area are fairness and reasonableness.[12]

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[9] Ibid., p. 34.

[10] For a comprehensive discussion, see Frank P. Ardiaolo, "What Process is Due?," in Student Affairs and the Law, ed. Margaret J. Barr, New Directions for Student Affairs series, no. 22 (San Francisco: Jossey-Bass, 1983), pp. 13-25.

[11] Due v. Florida A & M University, 233 F. Supp. 396 (1963).

Ardaiolo suggests that a review of significant federal court cases will illustrate the federal Constitution's legal mandate that fundamental fairness govern all student disciplinary procedures.[13]

The Dixon case and subsequent decisions have defined procedural due process. Entities such as the United States District Court for the Western District of Missouri, the American Association of University Professors (AAUP) and the American Civil Liberties Union (ACLU) have authored statements which have had an impact on the definition of acceptable procedural due process.[14] Educators such as Ardaiolo, Pavela, and Young have proposed codes of conduct and disciplinary policies and procedures to govern campus disciplinary activities.[15] Despite these efforts and continued judicial refinement, definitive procedures have yet to be agreed upon by all educators, legal scholars, and jurists. The United States Supreme Court has not yet issued a landmark decision which would set precedent regarding constitutional due

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[12]Ibid.,

[13]Ardaiolo, p. 18.

[14]United States District Court for Western District of Missouri, "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education," en banc, 1968; American Association of University Professors, " Joint Statement on Rights and Freedoms of Students," AAUP Bulletin 54 (2), (Summer, 1968).; American Civil Liberties Union, Academic Freedom and Civil Liberties of Students in Colleges and Universities (New York: American Civil Liberties Union, 1965).

[15]Ardaiolo, pp. 22-24.; Gary Pavela, " Limiting the 'Pursuit of Perfect Justice' on Campus: A Proposed Code of Student Conduct," Journal of College and University Law 6, pp. 139-151 (1979-80).; D. Parker Young, The Legal Aspects of Student Discipline in Higher Education (Athens, Ga.: Institute of Higher Education, 1969), pp. 24-25.

process procedures applicable to college and university disciplinary proceedings, yet the Court has rendered decisions which have had substantial impact on these issues.[16]

Now is an appropriate time to assess the evolution of procedural due process on the college and university campus. The surge of litigation following Dixon that delineated minimally acceptable due process procedures has given way to decisions which have more sharply defined procedural points. The judicial warning has been sounded that administrators should not develop conduct policies and due process procedures analogous to criminal law proceedings and judiciaries.[17] Rather, procedures and codes of conduct should satisfy both judicially mandated constitutional guarantees and the educational needs to which the disciplinary process serves.

The purpose of this study is the review and analysis of major court cases and administrative disciplinary policies and procedures which have an effect on disciplinary proceedings at the eleven major tax-supported, four-year institutions (excluding the Medical University) in South Carolina. Those institutions are:

The Citadel
Clemson University
College of Charleston
Francis Marion College
Lander College
South Carolina State College
University of South Carolina at Aiken (USC-Aiken)
University of South Carolina at Columbia (USC-Columbia)
University of South Carolina at Conway (USC-Coastal)

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[16]see Goss v. Lopez, 419 U.S. 565 (1975), Board of Curators of the University of Missouri v. Horowitz, 98 U.S. 948 (1978).

[17]Ardaiolo, p. 18; Pavela, p. 137; Young, p. 1.

University of South Carolina at Spartanburg (USC-Spartanburg)
Winthrop College

Cases are reported which address the issues of: (a) concepts of due process; (b) specifications of procedural due process; (c) suspension and dismissal of students; (d) the relationship between the institution and its students regarding the exercise of discipline; and (e) the dichotomy of academic versus disciplinary suspension and dismissal.

There is a need for current analysis of both judicial decisions and administrative practice regarding these issues. The results of such an analysis will assist college and university administrators in designing policy, modifying disciplinary processes and rendering decisions which comply with current and precedential court rulings and contemporary educational standards.

Overall, the purpose of this study is to provide college and university administrators with appropriate information and recommendations so that they can arrive at decisions which lead to the implementation and utilization of fair and reasonable disciplinary procedures which will meet critical judicial and educational examination.

Statement of the Problem

College and university administrators need administrative guidelines which will ensure fairness in disciplinary proceedings while simultaneously meeting judicial standards of procedural due process. Judicial decisions, authoritative opinion, and existing guidelines must be reviewed to derive practices and legal precedents which have standing. This is the focus of the study which is described in the following pages.

Questions to be Answered

This is a historical study of the legal aspects of administrative disciplinary policies, procedures and practices at the eleven major, four-year, tax-supported higher education institutions in South Carolina. The research describes the extent to which administrative practices have addressed due process, suspension, and dismissal of students; exercise of the discipline decision; and the dichotomy of the academic versus disciplinary suspension and dismissal.

One of the major purposes of this study is the development of practical, legal guidelines for college and university decision makers to have at their disposal when faced with rendering decisions concerning due process and suspension and dismissal of students in South Carolina higher educational institutions. Answers are needed for the following questions in order to develop and establish guidelines for college and university administrators.

1. What educational and legal opinion has been expressed to define the status and future direction of the legal relationship between students and tax-supported institutions of higher education?

2. What decisions have been held by both federal and state courts which speak to the legal relationship between students and institutions, particularly in reference to disciplinary procedures?

3. What procedural due process guidelines have been held by these same courts and legal and educational scholars to be required for disciplinary suspension and dismissal?

4. What legal, educational, and judicial distinctions have been drawn between the issue of suspension and dismissal for academic misconduct versus disciplinary misconduct?

5. What policies and administrative practices dictate established, acceptable due process procedures for disciplinary

activities at each of the major, senior tax-supported colleges and universities in South Carolina?

6. What conclusions and recommendations may be given in response to a comparison between due process procedures utilized at these institutions and educational opinion and legal decisions specifying acceptable procedural due process guidelines?

Scope of the Study

This is an examination and analysis of court decisions and opinion given by jurists, educators and legal scholars to define reasonable, acceptable procedural due process guidelines applicable to higher educational disciplinary proceedings at tax-supported institutions. The research describes reasons for litigation, the results of such litigation, and the implications these cases have for administrators, particularly those at the major, senior tax-supported institutions in South Carolina.

The primary focus of this research is the reporting and examination of relevant cases and authoritative opinion dealing with:(1) the legal relationship between the student and the higher education institution; (2) minimal, acceptable procedural due process requirements for disciplinary proceedings; and (3) the dichotomy of due process distinctions and requirements for academic versus disciplinary suspensions and dismissals.

Legal precedents and trends were identified, as were disciplinary guidelines and procedures utilized by administrators and tribunals at the major, four-year, tax-supported colleges and universities in South Carolina. A qualitative comparison between legal precedents and trends, and authoritative opinion and these institutional guidelines and procedures was made. Recommendations for the maintenance, revision, or

elimination of guidelines and procedures currently utilized at these institutions are provided as dictated by the comparative analysis.

Methods, Procedures and Sources of Information

Two basic research techniques are appropriate for this study. The first technique requires a historical research study to examine and analyze available references pertaining to legal aspects of procedural due process in higher education disciplinary proceedings. The second technique involves an analysis and assessment of current disciplinary procedures and practices at the major tax-supported colleges and universities in South Carolina.

A search was made of Dissertation Abstracts to determine whether a need existed for this research, as indicated by related topics. Related journal articles were located by using sources such as the Index to Legal Periodicals, Education Index, College Student Personnel Abstracts, and the Reader's Guide to Periodical Literature.

The Encyclopedia of Educational Research provided general research summaries. A number of books pertaining to legal issues in higher education were reviewed. A review of related material was generated by a computer search of the Educational Resources Information Center (ERIC) system.

Court decisions related to the topic were located through use of the Corpus Juris Secundum, American Jurisprudence, the American Digest System and the National Reporter System. Recent court cases were found by examining case summaries in The College Student and the Courts and The College Administrator and the Courts.

A survey was sent to the chief student affairs officer at each institution requesting information concerning disciplinary policies and procedures in use. The responses to the survey were analyzed in light of findings from the review of literature and review of applicable court decisions. Supplemental documents such as disciplinary policy statements and judicial codes were solicited along with the completed survey.

Definition of Terms

Selected judicial terms and other vocabulary which are interspersed throughout the study are defined below. Terms which are used only in isolated instances or in specific sections of the study are defined within the text. All definitions, unless otherwise noted, are given in the fifth edition of Black's Law Dictionary.

Adjudicate: To settle in the exercise of judicial authority.

Affirmance: The confirmation and ratification by an appellate of a judgement, order, or decree of a lower court brought before it for review.

Appeal: The complaint to a superior court of an injustice done or error committed by an inferior one, whose judgement or decision the court above is called upon to correct or reverse.

Appellant: The party who takes an appeal from one court or jurisdiction to another.

Appellate court: A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, or error; a reviewing court, and, except in special cases where original jurisdiction is conferred, not a "trial court" or court of first instance.

Circuit courts: Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts in which their jurisdiction extends.

Defendant: The person defending or denying; the party against whom relief or recovery is sought in an action or suit.

Dicta: Opinions of a judge which do not embody the resolution or determination of the court.

Dismissal: An order or judgement finally disposing of an action, suit, motion, etc., by sending it out of court, though without a trial of the issues involved.

Error: A mistaken judgement or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law.

Expulsion: The act of depriving a member of a corporation, legislative body, assembly, society, commercial organization, etc., of his membership in the same by a legal vote of the body itself, for breach of duty, improper conduct, or other sufficient cause.

Finding: The result of the deliberations of a jury or a court.

In loco parentis: In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities.

Infra: Below, under, beneath, underneath. The opposite of supra above.

Injunction: A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act,or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such an act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law.

Judgement: The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.

Jurisdiction: The authority by which courts and judicial officers take cognizance of and decide cases.

Opinion: The statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgement is based.

Plaintiff: A person who brings action; the party who complains or sues in a personal action and is so named on the record.

Procedural due process: Those safeguards to one's liberty and property mandated by the 14th Amendment, U.S. Constitution, such as the right to counsel appointed for one who is indigent, the right to a copy of a transcript, the right of confrontation; all of which are specifically provided for in the 6th Amendment and made applicable to the states' procedure by the 14th Amendment.

Substantive due process: Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty, or property; the essence of substantive due process is protection from arbitrary and unreasonable action.

Supra: Above, upon.

Suspension: Suspension of a right: The act by which a party is deprived of the exercise of his right for a time.

Writ of Certiorari: An order by the appellate court which is used when the court has discretion on whether to hear an appeal. If the writ is denied, the court refuses to hear the appeal and, in effect, the judgement below stands unchanged. If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it up to the higher court which has used its discretion to hear the appeal.

Significance of Study

College and university administrators are frequently required to adjudicate or process actions involving violations of student codes of conduct. These disciplinary cases may involve violations which carry applicable sanctions of suspension and/or expulsion. When such violations occur it is incumbent upon the disciplinary officer or tribunal to act in a manner which affords the defendant a fair, reasonable disciplinary proceeding. Judicial decisions also dictate the adequacy of procedural due process to be observed in these proceedings. This study will assist administrators and tribunals in understanding legal decisions as they relate to the design, modification, and implementation of procedural due process guidelines and practices.

Disciplinary officials at the major tax-supported institutions in

South Carolina should find this study useful in examining the adequacy of their own campuses' disciplinary procedures and practices. The study is designed to provide these administrators with useful comparative data which will reveal an overall perspective of the administration of discipline at these institutions as a whole. The focus is upon current legal and educational issues and court decisions, with older cases discussed where they have precedential value.

This study makes recommendations which will benefit the administrator of campus discipline. A greater understanding of legal decisions and authoritative opinion should result in higher quality decisions system of campus discipline.

Design of the Study

The remainder of this study is divided into five parts. Chapter II consists of a review of literature describing the evolution of the concerning disciplinary procedures, guidelines, and systems. The significance of this study is that it analyzes and elaborates on court decisions and authoritative opinion which will be beneficial to the administrator who desires to oversee a fundamentally fair, legally sound student/institutional relationship theories, and the corresponding evolution of the concept and practice of disciplinary due process in higher education. A brief review of literature regarding related issues of academic misconduct and mandatory withdrawal for students with mental disorders is also included.

Chapter III contains a general listing and discussion of significant cases which have had precedential value to the issues of procedural due process, student suspension and expulsion and the legal relationship

between student and higher education institution.

Chapter IV includes a description and analysis of due process procedures and practices currently in place at each of the major, four-year, tax-supported colleges and universities in South Carolina.

The concluding chapter of the study reviews and summarizes the literature and litigation research, as well as the analysis imposed upon institutional procedures and practices. Research questions asked in the introduction are reviewed and answered in this chapter. Recommendations are made to assist college and university administrators in the evaluation and modification of existing due process procedures and practices. Recommendations for future research related to this study are also made.

In general, the review of literature and the review of judicial decisions are treated chronologically under each subheading in order to show the judicial evolution of due process concepts and relationship theories.

CHAPTER II

REVIEW OF RELATED LITERATURE

Overview

The policies and practices which govern the administration of discipline at tax-supported colleges and universities in the United States today bear scant resemblance to the administration of discipline practiced from the founding of Harvard until the middle of this century. Underlying this fundamental evolution of disciplinary practice is the evolution of the relationship between the student and his college or university. That relationship, influenced greatly by the social and economic conditions of the time, has also been subjected to scholarly and judicial scrutiny.

The history of higher education in America started with the founding of church-affiliated schools such as Harvard, Yale, William and Mary College, Princeton and others. These schools looked upon discipline as integral to the moral and ethical training of their students, many who were preparing for the ministry.[1] Faculty members were required to assume both teaching and proctoring roles, a dichotomy which placed faculty in the guise of students' enemies.[2] The Colonial period in higher education, dominated by religious influences, saw

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[1]William T. Packwood, ed., College Student Personnel Services (Springfield, Il.: Charles C. Thomas, 1977), p. 232.

[2]John S. Brubacher and Willis Rudy, Higher Education in Transition, 3d ed., rev. and eln. (New York: Harper & Row, 1976), p. 42.

colleges take a strict, rigid stance regarding the disciplining of students. Strict discipline provided "a controlled environment for the production of the morally and religiously upright."[3]

The time between the colonial period and the Civil War found colleges and universities continuing to exercise discipline within the traditional authoritarian model supported by religious concepts.[4] Few schools tolerated student self-governance, the most notable exception being the University of Virginia, under the direction of Thomas Jefferson. There a university court made up of student representatives and a proctor to administer discipline were proposed. The plan did not succeed for a variety of reasons including legislative unwillingness to approve the proposed court and proctor.[5]

This period was also characterized by open rebellion against the rigid systems of rules of conduct operating at most colleges and universities. Brubacher and Rudy have noted that open and violent rebellions occurred at almost every institution, regardless of geographical location or state or private status. Student rebellion reflected the social fabric of a young nation in conflict between overly repressive morality and a violent, exuberant frontier attitude.[6]

The post-Civil War period in higher education marked important changes which altered the authoritarian role institutions assumed

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[3]Ibid., p. 51.

[4]Ibid., p. 52.

[5]Ibid.

[6]Ibid., p. 55.

regarding student discipline. Curriculum changes, the dissolving of rigid discipline systems, coeducation, and the diminished role of faculty in the administration of discipline all created a greater emphasis on self-discipline by students.[7]

The first part of the Twentieth Century ushered in the widespread designation of deans of men and women to relieve presidents and faculty of their disciplinary duties.[8] The dean was charged with the conduct of students and chosen for his or her personal qualities and rapport with students.[9] Many of the early deans espoused ideals of personal development and self-discipline coupled with more individualized, personalized attention to the "whole" student.[10]

The end of World War II and other societal forces created a mass consumer movement for higher education in the 1950's that has continued through the present. Ratliff has identified six social pressures affecting the student-institution relationship and discipline which increased during the early and middle parts of the century: 1) the civil rights movement; 2) the increasing value and importance of the college degree and student status in good standing; 3) the rapid growth of enrollments; 4) the court-enforced expansion of civil liberties across the board; 5) the increased maturity of college students; and 6) the pressures of the military draft and the subsequent value of student

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[7]Ibid.

[8]Packwood, p. 233.

[9]George P. Smith and Henry P. Kirk, "Student Discipline in Transition," NASPA Journal 9 (April 1971): 277.

[10]Packwood, p. 234.

exemptions.[11] The lowering of the age of legal majority, a societal shift toward attitudes and mores more permissive than in the past, and an increased awareness of student power arising from student activism are also developments affecting the student-institution relationship and the administration of discipline.[12]

The purpose of this review of the literature is to examine the development of thought pertaining to the student-institution relationship, the administration of discipline at tax-supported colleges and universities, and procedural due process in disciplinary proceedings. The chapter will be developed under the following topic headings:

1. The Student-Institution Relationship Prior to Dixon
2. The Constitutional Right to Due Process: Dixon Mandate
3. After Dixon: Defining Disciplinary Due Process
4. Other Due Process Considerations: Academic Misconduct and Withdrawal for Mental Disorders.

The Student-Institution Relationship Prior to Dixon

Numerous writers and scholars have examined the subject of college and university discipline by focusing attention on the underlying relationship which exists between the student and the institution. Relationship "theories" have been advanced to classify and explain the relationship. Some of these theories have been given judicial standing by courts examining the disciplinary relationship, as well as other relationships which exist between students and colleges. Generally, those theories advanced to explain the disciplinary relationship have some foundation in constitutional, civil, or common law.

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[11]Richard C. Ratliff, Constitutional Rights of College Students (Metuchen, N. J.: Scarecrow Press, 1972), p. 23.

[12]Packwood, p. 234.

Several theories of the student-institution relationship have been discussed enough to warrant examination. They are:

1. In Loco Parentis theory
2. Contractual theory
3. Fiduciary theory
4. Privilege theory
5. Status theory
6. Constitutional Rights theory (examined in next section)

In Loco Parentis theory was given judicial standing in the 1913 case, Gott v. Berea College, and the subsequent 1924 case, John B. Stetson University v. Hunt.[13] The college under in loco parentis was presumed to stand "in place of the parents."[14] Mills noted that courts developed this theory during the nineteenth century when college students were considerably younger than the majority of today's students.[15] This theory allowed colleges to exercise virtually the same control over their students that parents exerted over their children.

Changing societal influences and certain court decisions led to the decline of in loco parentis as a suitable theory for use to explain the student-institutional relationship. William Van Alstyne, Associate Professor of Law at Ohio State University, found in loco parentis wanting as a legitimate basis for explaining the disciplinary relationship between students and their colleges.[16] Specifically, he

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[13]Gott v. Berea College, 161 S. W. 204 (Ky. 1913), John B. Stetson University v. Hunt, 102 So. 637 (Fla. 1924).

[14]Joseph L. Mills, The Legal Rights of College Students and Administrators (Washington, D.C.: Lerner Law Book Publishing, 1971), p. 39.

[15]Ibid.

[16]William W. Van Alstyne, "Procedural Due Process and State University Students," UCLA Law Review 10 (January 1963): 375-377.

observed that parental power is often more restricted than a university's power to suspend or expel, with the probable consequence of denial of future admission to both education and a profession, as well as stigmatization.[17] Van Alstyne also noted that parental demands or expectations that universities closely supervise their children were difficult to imagine, and parents would be expected to fully support due process in the event their children were threatened with suspension or expulsion.[18]

Limitations on the applicability of in loco parentis to the college campus have been noted by others. The family context of in loco parentis is strained by the fact that legal adult college students attend a modern, impersonal university incapable of acting in the personal fashion of a parent.[19] It has been observed that expulsion is an act foreign to the parental function.[20]

Alvin Goldman, Assistant Professor of Law at the University of Kentucky, addressed relationship theories in a 1966 article widely cited in later writings. He wrote:

> The loco parentis characterization of the studentuniversity affiliation is very questionable and has fallen into disuse. It does not explain the school's power to regulate student conduct when the student acts with his parent's consent, nor does it explain the basis of authority over an emancipated pupil or one who has reached majority. Finally, it has been noted that a parent may not lawfully do the very act which the university frequently

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[17]Ibid., p. 375.

[18]Ibid., p. 376.

[19]Notes and Comments, "Private Government on the Campus-Judicial Review of University Expulsions," Yale Law Journal 72 (1963): 1380.

[20]Ibid.

tries to accomplish in asserting its purported loco parentis authority - sever all ties.[21]

Beaney, in an article contained in the special edition of the 1968 Denver Law Journal, observed that "this legal relic [in loco parentis] of an earlier and simpler era provides an inadequate foundation for describing the rights and duties of participants in increasingly complex university affairs."[22] He noted the caution used by courts in redefining the status of students, but asserted that reliance on in loco parentis as a doctrine was no longer defensible.[23]

Two years later Lucas took in loco parentis theory to task, pointing out that in loco parentis powers exercised by colleges were often unnecessarily authoritarian and not conducive to students' development.[24] He noted both societal and individual need for higher education as a powerful force working against the arbitrariness of in loco parentis as a base for disciplinary action.[25]

In loco parentis accorded students second-class citizenship rights, according to Kenneth Gordon, and in tandem with contract theory, were primary ideas used to justify disciplinary action without due

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[21]Alvin L. Goldman, "The University and the Liberty of Its Students - A Fiduciary Theory," Kentucky Law Journal 54 (Summer 1966): 650.

[22]William M. Beaney, "Students, Higher Education, and the Law," Denver Law Journal 45 (Special Issue): 515.

[23]Ibid., p. 524.

[24]Roy Lucas, "The Right to Higher Education," Journal of Higher Education 41 (January 1970): 57.

[25]Ibid., p. 59.

process.[26] He noted that in loco parentis placed the burden of proof of innocence on the student in disciplinary action that lent support to the view of the student as a second-class citizen of the college community.[27] He ended his article by observing that "the pendulum has finally begun to swing and that the student as a first-class citizen is fast becoming the trend."[28]

Ratliff, examining the different relationship theories, observed the incongruity of courts finding value in both in loco parentis and contract theories, with their respective presumption of the student as both a legal infant and a party entering into a legally binding agreement through enrollment.[29] He went on to write:

> In loco parentis would at least have something to be said for it if it were consistently applied. The fact that it has not been consistently applied is well known. In such instances as it has been applied it has scarcely reflected the degree of familial attachment which might be expected of a parent. Like the contract theory it would seem to have been utilized in a unilateral application scarcely characteristic of filial relationships. The "parent" has been more stern than loving, more vindictive than understanding.[30]

It has been noted that in loco parentis was a "convenient fiction" used to support sometimes questionable authoritarian control by the institution.[31] The demands of students to participate in all aspects of

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[26]Kenneth W. Gordon, "Due Process: A Swing Toward Student Rights," Journal of College Student Personnel 12 (March 1971): 95.

[27]Ibid., p. 96.

[28]Ibid., pp. 99-100.

[29]Ratliff, pp. 37-38.

[30]Ibid., p. 44.

[31]Robert Laudicina and Joseph L. Tramutola, A Legal Perspective for Student Personnel Administrators (Springfield, Il.: Charles C. Thomas, 1974): 7.

community decision-making, both campus and civic, was a force which diminished the role of in loco parentis.[32]

Most writers and scholars have dismissed in loco parentis as a viable theory to explain the disciplinary relationship between the modern college student and his or her college or university. At the same time, many are unwilling to proclaim any other theory as providing comprehensive protection to student rights.[33] However, contract theory has been advocated by many as a better doctrine to replace in loco parentis.

Contract theory places the student-institution relationship within the framework of a contract, express or implicit, which is entered into upon enrollment by the student. The act of enrollment, with the signing of admission and registration forms, binds the student to abide by institutional rules and regulations. Some institutions explicitly state that enrollment constitutes a contract obligating the student to observe all college rules and regulations.[34]

Contract theory has been cited in a number of cases to accurately describe the legal relationship between the student and the college, although the preponderance of such cases involve private institutions.

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[32]Ibid.

[33]Laura Krugman Ray, "Toward Contractual Rights for College Students," Journal of Law and Education 10 (April 1981): 166., Gerald A. Fowler, "The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal," Journal of Law and Education 13 (July 1984): 416., Richard L. Morrill and Eric C. Mount, Jr., "In Loco Parentis Revisited?", Change 18 (Jan./Feb. 1986): 36.

[34]Mills, p. 43.

Scholarly opinion concerning contract theory is divided, with some writers viewing it as the most logical basis for describing the private school relationship. Others see critical flaws in it, regardless of its application setting.

Warren Seavey, Professor of Law Emeritus, Harvard Law School, addressed one of the key criticisms of contract theory in his 1957 indictment of lack of due process in college disciplinary dismissal proceedings. He noted that courts depart from the usual rules of contracts, which require justification for terminating a contract for breach, when allowing colleges to dismiss students without showing cause for breach.[35]

In 1966 the Yale Law Journal observed that "once the court has seized upon the contract analogy, it acts as if it were driven to finding for the college."[36] The authors, noting the disparate nature of the power between the two parties in the contract, wrote:

> The university's reservation of power to discipline and the student's waiver give the university power to terminate the school-student relationship despite partial performance by the student. This power may be characterized as power to perform or not at its own will, as power to determine finally whether breach occurred, or as an ouster of the jurisdiction of the courts to review claims arising out of expulsion. The clauses are standardized terms of a complex printed document. They are proposed in a manner which brooks no negotiation and by a party which, by virtue of its experience and its strong seller's posi- tion, is clearly able to impose conditions. The student is in an unusually weak bargaining position. Most often he is of an age such that only limited competency to contract is imputed to him; his promises are

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[35]Warren A. Seavey, "Dismissal of Students: 'Due Process'," Harvard Law Review 70 (1957): 1409.

[36]Notes and Comments, p. 1377.

> ordinarilycompetency to contract is imputed to him; his promises are ordinarily unenforceable against him.[37]

Admission and registration forms, catalogs, and student handbooks are documents which have been cited as sources for terms of the student-school contract. One of the terms frequently contained in these documents was a statement allowing the school to dismiss a student without showing cause. These statements have been criticized because they have been used by colleges to arbitrarily expel students without due process.[38]

The application of contract theory in higher education has been viewed by some as inappropriate because the university is "far removed from the marketplace, and it is unwise, therefore, to judge student-university conflicts by the law of the market."[39] In a similar vein, the scope of the contract for an entire academic degree pursuit is not analogous to the narrow, specific focus of most contracts.[40] However, contracts might be suitable means for defining certain aspects of the relationship, such as business and academic-administrative functions and support services.[41]

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[37]Ibid., p. 1378.

[38]Alvin L. Goldman, "The University and the Liberty of Its StudentsA Fiduciary Theory," Kentucky Law Journal 54 (Summer 1966): 652.; Moneypenny, p. 652.

[39]Goldman, p. 653.

[40]Thomas C. Fischer, "Challenge from the Courts," in Substantial Justice on Campus, William R. Bracewell, ed. (Athens, Ga.: University of Georgia Center for Continuing Education, 1973), p. 8.

[41]Ibid.; Virginia Davis Nordin, "The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship," Journal of College and University Law 8 (1981-82): 150.

Contract theory has been repeatedly challenged because of its unilateral nature, with the institution as sole designer of the contract terms. As such, the contract is presented to students as non-negotiable and offered on a take-it-or-leave-it basis.[42] Such a basis is far removed from the negotiability and give-and-take basis which characterizes most contractual actions and is recognized by contract law.

Some writers have observed that contract theory can be interpreted to protect student interests, although courts have been reluctant to challenge university action as a breach of the student-institution contract.[43] However, despite changes which have created more specific, fairer rules and regulations, contract theory has still been considered an inappropriate analogy for the student-institution relationship.[44]

Two of the more recent aspects of contract theory which have been examined by scholars include the increasing attitude of consumerism found among college students in the 1980's, and the relative lack of judicial decisions applying state action to the private college in disciplinary cases. The student, as a consumer of educational services, may be positioned to seek redress for failure of the school to provide numerous services implied in the educational contract between the two.[45]

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[42]Mills, p. 43, Packwood, p. 243.

[43]David M. Rabban, Notes: "Judicial Review of the University-Student Relationship: Expulsion and Governance," Stanford Law Review 26 (November 1973): 104-105.

[44]Ibid., p. 105.

[45]Fowler, p. 413; Jon Charles Rogers, "The Evolution of a Contractual Right for the American College Student" (Ph. D. dissertation, Florida State University, 1986): 196.

Contract theory is still touted as a viable avenue by which the private college student can be guaranteed fair and reasonable due process. Scholars have observed that court cases finding "state action" sufficient to apply constitutional due process protections to the private college student are almost non-existent. Ray, noting the unlikelihood that future courts will endorse the public function theory of private education, contends that state courts can apply basic contract principles to the student-institution relationship to protect student rights in private colleges.[46] She writes:

> Under contract doctrine, sympathetic courts can offer students some measure of protection for their rights without holding colleges to a level of performance beyond the scope of their original agreement to educate and graduate their matriculants. There is an additional challenge for the courts in the vigilance and analytic skill needed to distinguish among the disparate elements that compose such an agreement; some areas of academic life are admittedly and properly beyond judicial reach. For many student claims, however, courts are well equipped to determine if a college has in fact breached its contract in dismissing or otherwise disadvantaging a student. Far from intruding on academic freedom by reading such contracts carefully, courts would do no more than hold institutions of higher education to their voluntary promises, a practice as appropriate to the courts as it is fair to students and colleges alike.[47]

Contract theory has proponents who find it to be a reasonable and adequate basis to explain and govern the student-private institution relationship. They point to numerous cases that characterize various aspects of the relationship in contractual terms. Others, while unable to fully embrace contract theory as a comprehensive foundation for the relationship, nonetheless support its application for specific services.

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[46]Ray, p. 189.

[47]Ibid.

The critics of contract theory point out the inequality of the parties and the coercive nature of the enrollment contract as fundamental flaws of the theory. They point to court cases that have seemingly upheld the right of the institution to define breach of the contract while placing the burden of proof of innocence on the student. They also note the lack of judicial application of contract theory to court cases challenging disciplinary suspensions and expulsions at tax-supported schools. The point that analogies between commercial contracts and the student-university contract are distorted is a major criticism lodged against contract theory. Finally, most critics believe that other theories have greater, sounder applicability to the student at tax-supported colleges and universities.

Warren Seavey broke new conceptual ground in his seminal Harvard Law Review article of 1957, by advancing the concept of a fiduciary relationship between a student and his or her college.[48] He proposed that faculty and administrators had a duty to act for the benefit of students concerning matters relevant to their mutual relationship, thus creating a fiduciary relationship. He also suggested that such a relationship placed a duty on the fiduciaries to "afford their students every protection."[49] The fiduciary was required to disclose all facts involving transactions between parties, with dismissal to be applicable to such disclosure.[50]

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[48]Seavey, p. 1407.

[49]Ibid.

[50]Ibid.

Nine years later Goldman gave support to and expanded the concept of fiduciary theory as a basis for the disciplinary student-institution relationship. Goldman, noting the student-institution relationship to be a status relationship with unique characteristics, pointed out that a fiduciary relationship exists where one party dominates another.[51] After surmising that all elements of a fiduciary relationship are present in the student-institution relationship,[52] Goldman placed the burden on schools to show that disciplinary action "was imposed in a manner consistent with scholarly integrity and fair process."[53]

Moneypenny, while not denying the obligations that fiduciary theory places on the institution, noted that no court as of 1968 had yet affirmed the theory as a relationship basis.[54] However, it has been suggested that fiduciary theory offers courts substantial reason for intervening in matters between students and colleges.[55]

Fischer, Administrative Dean of the Antioch School of Law, found fiduciary theory to have limited applicability to the student-institution relationship. Among the legal limitations he identified were the problems of identification of the fiduciary principal, the definition of the "property" held by the fiduciary, and the manner in

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[51]Goldman, pp. 667-669.

[52]Ibid., p. 671.

[53]Ibid., p. 674.

[54]Moneypenny, p. 650.

[55]Donald J. Mash, "Student Discipline in Higher Education: A Collision Course with the Courts?", NASPA Journal 8 (January 1971): 151.

which the beneficiary (student) receives the benefits.[56]

Mills, characterizing fiduciary theory as a "benevolent in loco parentis," drew analogies between student-institution relationships and those of the lawyer-client, doctor-patient, and minister-confessor.[57] He suggested a weakness of fiduciary theory is it bestows many rights on the student with few responsibilities, placing most of the responsibility for breaking the fiduciary bond on the institution.[58]

Beach, in a 1974 article, suggested that claims could be made that colleges are not only trustees to students under fiduciary theory, but also trustees to the public, and maybe even alumni.[59] He further suggested that each party had conflicting claims of the fiduciary that often were the substance of disciplinary cases, thus minimizing the usefulness of the fiduciary concept.[60]

Fiduciary theory has been compared to constitutional rights theory in extending greater procedural rights for students in disciplinary hearings than those offered by other theories. Ratliff wrote:

> Since the constitutional and fiduciary concepts of student rights in disciplinary proceedings seemingly are aimed at the same general objective, it would seem that the basic pragmatic difference would be that the fiduciary concept could seemingly be made applicable to private schools sooner than the constitutional theory is likely to be stretched to that extent.[61]

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[56]Fischer, p. 9.

[57]Mills, p. 46.

[58]Ibid.

[59]John A. Beach, "Fundamental Fairness in Search of a Legal Rationale in Private College Student Discipline and Expulsions," Journal of College and University Law 2 (Fall 1974): 67.

[60]Ibid.

[61]Ratliff, p. 54.

Fowler, supporting the similarity of protection offered by both, suggested that equal applicability of the theory to both public and private institutions would help clarify the ambiguous nature imposed on the student-institution relationship by the various theories.[62]

In summary, advocates suggest fiduciary theory focuses attention to procedures related to actions taken by the institution on behalf of the student beneficiary, and it offers fairness and procedural rights to private institution students not adequately protected by constitutional rights concepts. Critics have noted the lack of court decisions deferring to fiduciary theory to explain the student-institution relationship. It has been suggested that legal application of the theory is impractical, and puts the burden of responsibility on the college or university.

Another student-institution relationship theory defines matriculation and enrollment as a privilege, not a right, extended by the institution and subject to institutional withdrawal.[63] Court until 1961 followed the lead of the 1928 case, Anthony v. Syracuse University, in which the state court clearly recognized the distinction, writing:

> Attendance at the University is a privilege and not a right. In order to safeguard its scholarship and its moral atmosphere, the University reserves the right to request the withdrawal of any student whose presence is deemed detrimental. Specific charges may or may not accompany a request for withdrawal.[64]

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[62]Fowler, p. 416.

[63]Van Alstyne, p. 370.

[64]Anthony v. Syracuse University, 231 N. Y. S. 435, 438 (1928).

The argument for this view is that even if attendance at a college or university is viewed as a privilege rather than a right, it remains a valuable privilege.[65] As such, the privilege has almost the status of a property right, and is subject to reasonable, not arbitrary decisions.[66]

The 1961 case, Dixon v. Alabama State Board of Education,[67] has been cited as the case which changed the judicial attitude that enrollment at tax-supported institutions was a privilege, not a right.[68] Most scholars following the deterioration of the privilege distinction in post-Dixon court decisions have concluded that regardless of the privilege or "right" label placed on enrollment at the tax-supported institution, courts have guaranteed that enrollment is protected by due process in disciplinary proceedings.[69]

One other theory which has received some attention by those examining the student-institution relationship is status theory. Status theory proposes that students and institutions have rights and duties inherent in their respective statuses, developed through custom, tradition, and usage.[70]

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[65]Moneypenny, p. 651.

[66]Ibid.

[67]Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied, 368 U. S. 930 (1961).

[68]John P. Holloway, "The Student in Court," in Student Protest and the Law, Grace W. Holmes, ec. (Ann Arbor: The Institute of Continuing Legal Education, 1969), p. 89.

[69]see pp. 2-3; Lucas, p. 57; Mash, p. 151; Kern Alexander and Erwin Solomon, College and University Law (Charlottesville: Michie Co., 1972), pp. 411-12; Mills, pp. 32-34.

[70]Ratliff, p. 48.

Status theory has been linked to both contract theory and common law regarding private associations. Knapp noted that both status and contract theory generate the same conclusion, but status theory "seems to do so more comfortably, because it does not have to recognize express provisions which attempt to modify the requirement of reasonableness."[71] Ray has suggested that since student status has both economic and social value to the student, it is analogous to private association membership. Therefore, the common law extension of judicial protection to members of private associations should also extend to students.[72]

Status theory, like the fiduciary theory, has a few proponents who support it philosophically, but who are forced to conclude that judicial deference has been paid primarily to contract and constitutional rights theories regarding the disciplinary relationship between schools and students. Status and fiduciary theories offer interesting, insightful philosophical views of the relationship, but are not supported by case law as a legal basis for viewing relationships. While it has been suggested that student-institution relationships defy legal classification,[73] the proposal has been put forth that "the realities of student-institutional relations worked out within the academic community will greatly influence the attitude of the judges."[74] It appears that

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[71]S. R. Knapp, "The Nature of 'Procedural Due Process' as Between the University and the Student," College Counsel 3 (1968): 27.

[72]Ray, p. 168.

[73]William M. Beaney and Jonathan C. S. Cox, "Fairness in University Disciplinary Proceedings," Case Western Reserve Law Review 22 (April 1971): 397.

[74]Beaney, p. 517.

both judiciaries and educators have found a common theory to explain and understand the disciplinary relationship between the student and the tax-supported college and university. That theory or concept is the constitutional rights concept.

The Constitutional Right to Due Process: Dixon and Beyond

The 1961 Dixon case marked a water shed for the development of constitutionally guaranteed rights to procedural due process for students at tax-supported colleges and universities. This landmark decision, while representing a one hundred eighty degree change in judicial philosophy,[75] was rendered during a period when the United States was under both judicial and social pressure to enlarge and protect the civil rights and liberties of its citizens. The Fifth Circuit Court of Appeals followed that trend in thrusting constitutional protections upon the public university campus.

The Dixon decision was widely analyzed during the early years which followed it, both for its findings as well as its implications for the future development of the constitutional rights theory of the student-institution disciplinary relationship. It is difficult, even today, to find any article of substance dealing with disciplinary due process and student-institutional relationship theories which does not pay homage to the Dixon decision. Van Alstyne, writing two years after Dixon was handed down, said "there is every indication that it will not only

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[75]Charles Alan Wright, "The Constitution on the Campus," Vanderbilt Law Review 22 (October 1969): 1031.

endure, but that it will be substantially expanded."[76] Binder devoted a 1973 article, "Dixon After a Decade: Ramifications and Interpretations," to an examination of the Dixon legacy on due process and student-institution relationship.[77] The numerous articles examining various specific aspects of procedural due process invariably cite Dixon as the major starting point. The absence of a Supreme Court case to reverse, repudiate, or substantially modify Dixon has also contributed to its continued interest as the most significant constitutional framework for student due process.[78]

The Dixon decision has been noted for the specific ground which it broke in addressing disciplinary dismissals from tax-supported institutions. It has been cited as the first case to substantially limit discretionary discipline authority.[79] The Dixon decision did not clearly distinguish college attendance as a right or privilege, but it suggested that it was a necessity, a point maintained by both educators and a higher education-conscious society.[80] Dixon has been lauded for changing the concept of discipline from inquisitorial to adversarial.[81]

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[76]Van Alstyne, p. 380.

[77]John J. Binder, "Dixon After a Decade: Ramifications and Interpretations," NOLPE School Law Journal 3 (Spring 1973): 49-60.

[78]Robert M. Echols, Jr. and Steven F. Casey, Comments -"The Right to Counsel in Disciplinary Proceedings in Public and Private Educational Institutions," Cumberland Law Review 9 (Winter 1979): 751; Rabban, p. 99.

[79]JeRoyd W. Greene, Jr., "University Discipline and Student Rights: A Suggested Hearing Model," Howard Law Journal 15 (Summer 1969): 497.

[80]William R. Bracewell and O. Suthern Sims, Jr., "The Dean, the Constitution, and the Courts," NASPA Journal 11 (July 1973): 23.

[81]Holloway, p. 90.

Millington noted, "But by far the most important consequence was the fact that Dixon was the first case in which constitutional rights were expressly extended to students in public colleges and universities."[82] Ratliff reinforced these points in indicating Dixon was most noted for declaring a property right to students in their status at tax-supported colleges and extending Fourteenth Amendment protections to these students.[83]

The Dixon case has not been without its detractors, most who have criticized its inapplicability, its narrow focus, and its lack of resolution regarding a number of due process issues. Many of the criticisms have acknowledged the rudimentary values of Dixon while critiquing it on extended grounds. Dixon drew sharp distinctions between its application to public, rather than private institutions, and to disciplinary, not academic, dismissals.[84] As a result, it is suggested that:

> The two distinctions between public and private colleges, between discipline and academic matters raise two different sets of issues which should be treated separately. They have in common, however, a tendency to categorize neatly where developments in higher education have been working to blur some traditional lines of division. They also have in common the effect of an all-or-nothing jurisprudence: the student who falls on the wrong side of the line has no judicial recourse.[85]

Dixon has been charged with generating more due process questions than it answered in its decision. Among those issues left unresolved were: the right to cross-examination, the right to counsel, the right to

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[82]William G. Millington, The Law and the College Student (St. Paul: West Publishing, 1979), p. 19.

[83]Ratliff, p. 2.

[84]Ray, p. 163.

[85]Ibid., p. 164.

appellate review with provision of a transcript to expedite the review, and the right to require an open hearing.[86] Dixon was also cited as failing to address other procedural issues, and more important, interim suspension and the severity of the sanction required to trigger Dixon's due process notice and hearing mandate.[87] Millington noted that Dixon also avoided issuing guidelines concerning substantive due process questions raised in the case. This criticism has been repeated by others looking for a broader due process mandate from the case.[88]

Despite its limitations, Dixon has been lauded as an agent of change.[89] The influential cases which followed Dixon in the early and middle 1960's have invariably been linked to Dixon by both courts and the legal and educational scholars of the time. Twelve years after Dixon was rendered it was hailed as having "an impact on student discipline of the same dimension as the Brown decision on school desegregation."[90]

In summary, Dixon represented a decision commensurate with social and legal movements of the day, most notably, the civil rights movement and greater judicial recognition of the rights of citizenship. What

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[86]Project - "Procedural Due Process and Campus Disorder: A Comparison of Law and Practice," Duke Law Journal 1970 (1970): 766.

[87]Ibid.; Earl D. Osborne, "The State University, Due Process and Summary Exclusions," Hastings Law Journal 26 (September 1974): 255-256.

[88]Millington, pp. 20-21.

[89]Binder, p. 50.

[90]Stanford Cazier, Student Discipline Systems in Higher Education, ERIC/Higher Education Research Report No. 7 (Washington, D.C.: American Association for Higher Education, 1973), p. 3.

distinguished Dixon from its predecessors was a federal court claim of constitutional jurisdiction over the expulsion proceedings of a student at a tax-supported institution where an allegation of denial of due process was raised. What further gave Dixon its lofty judicial stature was its assertion that enrollment at a tax-supported college was not a privilege subject to arbitrary withdrawal, but an interest protected by minimal due process notice and hearing where the interest was threatened by dismissal.

After Dixon: Defining Disciplinary Due Process

An examination of Chapter III of this study will reveal that Dixon unleashed a torrent of litigation centered on disciplinary suspensions and dismissals from colleges and universities. Issues which Dixon ignored or casually addressed were significant points of contention in many of the post-Dixon cases. Like other landmark cases, Dixon served as the catalyst for a movement shaped by its successors.

Educators and legal scholars also increased their attention and writings to the issues generated by Dixon and those cases which followed. Ratliff suggested that legal journals published as many articles featuring student rights issues in the seven years following Dixon as they published in the preceding four decades.[91]

Dixon and its early successor cases established and reinforced the right to minimal due process procedures in suspension and dismissal cases at tax-supported institution. Later case decisions gave greater definition to the increasingly litigated question to how much process

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[91]Ratliff, p. 2.

was due in suspension and dismissal proceedings. Simultaneously, educators and legal scholars attempted to interpret the flow of judicial decisions, writing about the definition and philosophy of expanded disciplinary due process.

This section will categorize scholarly attention in terms of particular due process features. Those features are:

1. Specific hearing procedures and rights
2. The right to counsel
3. Overlapping jurisdiction and double jeopardy
4. Appeals procedures
5. Interim suspension

It did not take long for the scholarly examination of Dixon and those disciplinary cases following it to start regarding the definition of due process procedures. Just two years after Dixon, Professor Van Alstyne offered his view on the specifics of procedural due process in the state university context. He prefaced his observations by noting "the measure of required due process is closely connected with the measure of harm to the student involved in the infraction of which he is accused."[92] This thought has been embraced by others as justification for a wide range of due process procedural rights for students facing suspension or expulsion.

Specifically, Van Alstyne proposed that a faculty Hearing Board should be utilized to hear appeals of sanctions imposing suspension or expulsion, with strict separation of Hearing Board members from other aspects of the case. Further, the hearing process should allow the student opportunity to testify, present evidence and witnesses, and

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[92]Van Alstyne, p. 383.

receive a transcript of the proceedings. Cross-examination was to be offered whenever possible.[93]

The same year the Yale Law Journal suggested minimal due process procedures including a decision by an impartial tribunal, the ability of the student to summon students and staff as witnesses, and the right to cross-examination by the student.[94] In addition, the student was allowed the right to request a private hearing.[95] These were procedures that had not yet been embraced by courts, let alone stated as minimally required in disciplinary proceedings.

In 1964 the Texas Law Review published an article which reviewed procedural due process rights, with reference to the University of Texas Disciplinary Code.[96] The article suggested that it was desirable to separate adjudicative roles from those of the investigator and prosecutor, although not mandated by the courts.[97] While noting that Dixon did not mandate cross-examination, the author asserted that there was no reason to deny this right to the accused student.[98] The author noted the Texas Code provided for indefinite suspension for failure to testify, a rule which could be used to compel self-incriminating evidence.

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[93]Ibid., p. 386.

[94]Notes and Comments, p. 1408.

[95]Ibid.

[96]Michael T. Johnson, Comments - "The Constitutional Rights of College Students," Texas Law Review 42 (February 1964): 344-363.

[97]Ibid., p. 352.

[98]Ibid., p. 353.

The author continued to point out that protection against self-incrimination, while not directly applied to the states under the Fourteenth Amendment, was a powerful protection, particularly in those disciplinary cases where criminal charges were also possible.[99]

During this same period of time in which due process procedures and rights were being defined, some writers were reminding college and university authorities that due process required more than informal processes and guidelines. Arthur Sherry, Professor of Law at the University of California, wrote:

> In short, procedural fairness must not be left to chance or to ad hoc extemporization but must be considered as a fundamental part of the exercise of the university's disciplinary authority and receive the same careful consideration that is required in the enactment of substantive rules and regulations.[100]

Professor Beaney also urged careful use of procedures, writing:

> Obviously, the spirit with which these procedures used are of vital importance; a mere formal observance is insufficient. An institution, large or small, which insists on using highly truncated and informal methods in dealing with serious disciplinary problems is inviting judicial intervention. The obvious thrust of legal developments in recent decades has been toward increased judicial scrutiny of procedures used in reaching decisions that adversely affect vital interests of individuals and groups. Government and its instrumentalities, and, in ever greater degree, private associations as well, are compelled to observe the rules of reasonableness and fairness in the procedures they employ.[101]

Ira Heyman, writing in the same issue of the California Law Review as his colleague Professor Sherry, specified a number of procedural

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[99]Ibid., p. 356-357.

[100]Arthur H. Sherry, "Governance of the University: Rules, Rights, and Responsibilities," California Law Review 54 (March 1966): 38.

[101]Beaney, p. 521.

points required in formal proceedings. He wrote that hearings should be public unless the student requests a closed hearing, in order to establish a perception of impartiality.[102] He strongly stated that determination of guilt should not be made based on evidence unavailable to the accused student.[103] Additional points recommended were the student's right against forced self-incrimination and the maintenance of a written or taped copy of the hearing proceedings.[104]

Van Alstyne, in a contribution to the 1968 special issue of the Denver Law Journal, reinforced his 1963 contention that suspension and dismissal proceedings deserved broad procedural considerations. Reviewing necessary due process procedures similar to those already noted, he wrote:

> These procedural safeguards roughly parallel some of the standards required by criminal courts in their disposition of offenses punishable by fine or short term imprisonment. The comparison is not fortuitous because it is now evident that expulsion or exclusion from college may, in the long run, disadvantage an individual at least as much as a single infraction of a criminal statute. There should be no surprise, therefore, that students are entitled at least to a similar degree of due process as a suspected pickpocket.[105]

Several scholars writing about due process mandates remarked about fears of educators that court decisions had removed administrative decision-making from disciplinary dismissal proceedings. One writer,

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[102]Ira Michael Heyman, "Some Thoughts on University Disciplinary Proceedings," California Law Review 54 (March 1966): 79.

[103]Ibid., p. 81.

[104]Ibid., pp. 82-85.

[105]William W. Van Alstyne, "The Student As University Resident," Denver Law Journal 45 (Special 1968): 595.

noting a lack of uniformity among institutions regarding disciplinary procedures, suggested a hearing model based on a format used by the National Labor Relations Board.[106] After spelling out the procedural components of the model he suggested methods of implementation, including: 1) incorporation in state statutory law, 2) a binding Supreme Court ruling requiring all colleges and universities to adopt the hearing model, 3) federal legislation to implement the model in tax-supported institutions, and 4) extension of the model through application of the Fourteenth Amendment to private institutions.[107] Although this proposal got no serious attention, it points out the degree to which some scholars were intent upon mandating due process procedures in the college environment.

The year 1968 saw a remarkable document emerge from the United States District Court for the Western District of Missouri, en banc.[108] The venue for several major cases reviewing discipline at tax-supported institutions, this court issued an unusual order and accompanying memorandum describing judicial standards applicable to the disciplinary actions of tax-supported colleges and universities litigated in the court.[109] The memorandum noted: "A court should never intervene in the processes of education without understanding the nature of

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[106]Greene, p. 506.

[107]Ibid.

[108]General Order and Memorandum on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. en banc, 1968).

[109]Ibid., p. 134.

education."[110] This theme of cautious judicial intervention was further expanded, the court writing, "Only where the erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational process."[111]

The court's memorandum went on to address the comparison between student discipline and criminal law. The court wrote:

> The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educations, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.[112]

The memorandum specifically addressed due process procedural issues after recognizing the right to notice, hearing, and the necessity for action to be taken only on grounds supported by substantial evidence.[113] The court wrote:

> There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of

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[110] Ibid., p. 136.

[111] Ibid.

[112] Ibid., p. 142.

[113] Ibid., p. 147.

> witnesses, or any of the remaining features of federal criminal jurisprudence. Rare exceptional circumstances, however, may require one or more of these features in a particular case to guarantee the fundamental concepts of fair play.[114]

This document was widely hailed and assailed by legal scholars and cited by most as an extraordinary document which would carry great weight in discussions on disciplinary due process procedures. Ratliff noted that the document had been cited at least twice in federal courts as of 1972, with one of the courts citing it disapprovingly.[115]

Another well-publicized, widely cited document dealing with disciplinary issues was issued in 1968. A joint committee representing five professional associations drafted the "Joint Statement on Rights and Freedoms of Students," which was subsequently endorsed by numerous other professional associations.[116] The preamble of the document spoke of its purpose:

> The responsibility to secure and to respect general conditions conducive to the freedom to learn is shared by all members of the academic community. Each college and university has a duty to develop policies and procedures which provide and safeguard this freedom.[117]

The statement went on to address due process in disciplinary proceedings. Under the heading, "Procedural Standards in Disciplinary

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[114]Ibid.

[115]Ratliff, p. 132.

[116]American Association of University Professors, U. S. National Student Association, Association of American Colleges, National Association of Student Personnel Administrators, and National Association of Women Deans and Counselors, "Joint Statement on Rights and Freedoms of Students," AAUP Bulletin 54 (Summer 1968): 258.

[117]Ibid., p. 258.

Proceedings," the authors stated:

> In developing responsible student conduct, disciplinary proceedings play a role substantially secondary to example, counseling, guidance, and admonition. At the same time, educational institutions have a duty and the corollary disciplinary powers to protect their educational purpose through the settling of standards of scholarship and conduct for the students who attend them and through the regulation of the use of institutional facilities. In the exceptional circumstances when the preferred means fail to resolve problems of student conduct, proper procedural safeguards should be observed to protect the student from the unfair imposition of serious penalties.[118]

The authors of the statement then outlined hearing committee procedures including: 1) impartial committee membership; 2) the student's opportunity to testify and present evidence and witnesses, and cross-examine adverse witnesses; 3) the denial of improperly introduced evidence, and a decision based only on evidence properly introduced in the hearing; 4) a digest and verbatim record made available in the absence of a transcript; and 5) the right to appeal to the president or ultimately to the governing board of the institution.[119]

This powerful statement was supported by many influential educational associations, and recognized by scholars and jurists, including the authors of the General Order. Like the General Order, it placed the administration of discipline in the hands of educators, but recognized that dismissal issues were subject to greater procedural care. In that regard, the "Joint Statement" went a great deal farther in specifying necessary due process procedures.

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[118]Ibid., pp. 260-61.

[119]Ibid., p. 261.

Wright's 1969 review of procedural due process reviewed the most prominent procedural due process issues emanating from the Dixon and post-Dixon decisions. Among the issues he wrote about were open hearings and the right to an impartial tribunal. He concluded that "fairness and reasonableness do not require that a disciplinary proceeding be open, and the cases so hold."[120] While claiming the student's right to an impartial tribunal, he noted the impracticality of requiring a complete lack of knowledge or prior involvement with a case as a requisite of participation on the tribunal. He noted that criminal case juries are not held to an absolute standard, and suggested that universities need not be as well.[121] Wright went on to propose future due process issues to be resolved including right to discovery, the right to be tried jointly with or apart from others accused of the same incident, and the ability of authorities to increase sanctions assessed by the hearing tribunal.[122] He concluded that courts were capable of deciding these issues, writing:

> I have no doubt that the courts will reach right results if they do not allow themselves to be distracted by analogies from criminal law or administrative law or elsewhere and keep their gaze fastened on the twin requirements of fairness and reasonableness as these apply in that unique institution, and academic community.[123]

The 1970's were marked by a great deal of scholarly inquiry devoted to procedural due process issues affecting colleges and universities.

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[120] Wright, p. 1080.

[121] Ibid.

[122] Ibid., p. 1082.

[123] Ibid.

This abundance of research and writing mirrored the proliferation of court challenges to disciplinary proceedings. One of the developing trends in scholarly writings was attention given to a single significant aspect of due process, as opposed to the panalopy of due process procedures. Another trend, often intertwined with the first, was research focused on a single court decision. These two approaches produced an intense look at part of the procedural due process picture.

The Cornell Law Review contained an article which focused on the admissibility of coerced testimony in a criminal trial subsequent to the disciplinary proceeding, citing Furutani v. Ewigleben.[124] The article concluded that admission of any coerced statement obtained in a disciplinary hearing, if admitted into a criminal court proceeding, denied the accused his right to a fair trial.[125]

Another 1970 article focused specifically on exclusionary rules of evidence used in disciplinary hearings in tax-supported institutions.[126] The exclusionary rules examined included: 1) hearsay rule; 2) opinion rule; 3) best evidence rule; and 4) rules of privilege.[127] The author concluded the trend of both case and administrative law was to replace exclusionary rules of evidence with discretion.[128]

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[124]Douglas Meiklejohn, Notes -- "Admissibility of Testimony Coerced by a University," Cornell Law Review 55 (February 1970): 435.

[125]Ibid., p. 447.

[126]Richard Maxwell, "Rules of Evidence in Disciplinary Hearings in State-Supported Universities," Texas Tech Law Review 1 (1970): 357.

[127]Ibid., pp. 358-361.

[128]Ibid., p. 364.

1970 was also a year in which D. Parker Young, a noted educational law authority, reviewed the status of procedural due process. He pointed out that court decisions revealed students had no absolute right to confront and cross-examine adverse witnesses and no right against self-incrimination.[129] Young said schools were free to determine their one rules of evidence, but rules applicable in criminal action, such as hearsay, were not applicable to disciplinary proceedings.[130] He also stated that there was no requirement that a disciplinary hearing be made public.[131]

In 1971, Beaney and Cox pointed out that courts had not considered all the aspects of a disciplinary hearing.[132] Specifically, they noted undefined issues such as the composition, number, and neutrality of the hearing tribunal; the student's right to discovery of facts against him prior to the hearing; and the fairness and consistency of an institution's decision to initiate a hearing.[133]

An important research project in the field of student discipline was conducted and the results published in 1971 by the Duke Law Journal.[134] The project surveyed the disciplinary procedures at over

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[129]D. Parker Young, The Legal Aspects of Student Dissent and Discipline in Higher Education (Athens, Ga.: Institute of Higher Education, 1970), pp. 27-29.

[130]Ibid., p. 29.

[131]Ibid., p. 26.

[132]Beaney and Cox, p. 390.

[133]Ibid., p. 394.

[134]Project, "Procedural Due Process and Campus Disorder, A Comparison of Law and Practice," Duke Law Journal 1970 (1970): 763.

500 American colleges and universities. Their results revealed a great deal about the status of due process on college campuses nationwide. Among their results were:

1. Seventy-nine percent of respondents provided written notice of charges; only twenty-four percent gave seven days notice, but fifty-five percent gave at least two days notice. Fifty-two percent gave names of adverse witnesses and fifty-seven percent permitted examination of supporting documents prior to hearing.

2. Only seventy percent indicated having a formal hearing procedure.

3. Forty-nine percent of schools responding either required closed hearings or left the decision to the accused student.

4. Forty-seven percent of respondents allowed joint proceedings, twenty percent rejected them.

5. Many schools had cross-sectional representation on hearing boards, with eighty-four percent including at least one student. Only seventeen percent were totally homogenous among administrative, faculty, or student makeup.

6. A majority of schools prohibited both a testifying school official and a prosecutorial witness to participate at hearing board members.

7. Eighty-one percent of respondents allowed students to hear adverse witnesses. Only eight percent did not allow either the student or his counsel the right to cross-examine witnesses. Only twenty-four percent compelled witnesses to appear at hearings.

8. Eighty-one percent of respondents recognized the student's right to testify and call witnesses on his behalf.

9. Seventy-one percent of respondent schools recognized the privilege against self-incrimination.

10. Only seventeen percent followed no rules of evidence during the hearing. Ten percent followed evidentiary rules such as hearsay, relevancy, and materiality. Seventy-three percent reported only using evidence presented at the hearing in order to determine guilt or innocence.

11. Fifty-three percent of the schools allowed the student to make a transcript; twenty percent denied that activity. Forty-nine percent provided the transcript on a financial basis.

12. Thirty-six percent of schools wrote and made available to the student the findings of the proceeding. Only fifty-eight percent prepared specific findings; nineteen percent did not.[135]

The study concluded:

> Though many schools have kept pace with legal developments in the student disorder area or even advanced ahead of such developments, results of the questionnaire reveal that many existing procedures fail to satisfy even the minimal current requirements of due process. The survey justifies the initial evaluation that most schools desire to treat students fairly within the law and to protect life and property through the application of reasonable judicial procedures.[136]

While the definition of due process continued to receive substantial review,[137] some writers in 1971 were again expressing caution about the development of an overly legalistic system of discipline. It was observed that court decisions which raised issues of due process in disciplinary proceedings resulted in a more formal and legalistic system with hearings resembling quasi trials.[138] The "escalation of legalism in the university discipline area" was found to be a continuing, but not totally positive result of the evolution of discipline.[139] Universities

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[135]Ibid., pp. 768-792.

[136]Ibid., p. 793.

[137]Harry W. Pettigrew, "Due Process Comes to the Tax-Supported Campus," Cleveland State Law Review 20 (January 1971): 119-120; D. Parker Young, "Due Process Standards and Guidelines for Student Discipline in Higher Education," Journal of College Student Personnel 12 (March 1971): 103-106; Gordon, p. 98.

[138]Jan M. Carlson and Robert N. Hubbell, "One More Time: The Future of College Student Discipline," NASPA Journal 9 (October 1971): 127.

[139]David J. Hanson, "Student Rights and the Institutional Response," Journal of NAWDC 35 (Fall 1971): 44.

were admonished not to be "so intimidated by advocates of strict adherence to the concept of due process as to debilitate university efforts to provide adequate safeguards for the protection of student rights to participate in the educational process."[140]

Alexander and Solomon, noting the prevailing judicial view that broad procedural requirements sufficiently protected constitutional interests, presented a list of recommended procedural steps that no one court had entirely required or proposed.[141] Among their non-mandated recommendations included the need for student representation on hearing panels, the student's choice of open or private hearing, and the right of the accused to remain silent.[142]

Two years later, an article compared the recommendations of Alexander and Solomon with those proposed in the "Joint Statement" of 1968.[143] The authors noted differences between the two statements on some questions of procedural refinement. Using the Alexander and Solomon recommendations as an outline, the authors surveyed ninety-eight public and private universities regarding campus procedural rights afforded students in disciplinary proceedings. Their results indicated a majority of public and private institutions provided basic elements of

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[140]George D. Taylor, "Colleges Move Toward Due Process Through Trial and Error Attempts," College and University Business 51 (October 1971): 24.

[141]Alexander and Solomon, p. 434.

[142]Ibid., pp. 434-436.

[143]David W. Leslie and Ronald P. Satryb, "Due Process on Due Process? Some Observations," Journal of College Student Personnel 15 (September 1974): 341.

fairness in their procedures, with private institutions offering similar protections to public schools, but slightly below them in degree of application.[144] The authors also noted that greater attention was paid to the finer details of due process than was the case a decade before when a similar survey was conducted.[145]

A survey conducted in 1972 addressed a specific question: the subpoena power in university disciplinary proceedings.[146] The author noted that administrative procedure acts being enacted in various states, with their potential applicability to disciplinary proceedings at tax-supported universities, authorized the power of subpoena to state agencies.[147] The author concluded that survey responses indicated a greater likelihood that more institutions would utilize subpoena power in tandem with other disciplinary procedures.[148] Another aspect of the study revealed little institutional use of witness' oath, and limiting sanction for perjury as part of the formal disciplinary process.[149]

Five years later, in 1977, an article was published which also related institutional disciplinary proceedings with proceedings governed

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[144]Ibid., p. 345.

[145]Ibid.

[146]Steven B. Yarbrough, "The Power of Subpoena, Witness' Oath, and Sanction for Perjury in the University Disciplinary Proceeding," NASPA Journal 10 (July 1972): 33-40.

[147]Ibid., p. 37.

[148]Ibid., p. 38.

[149]Ibid., p. 39.

by administrative procedures acts.[150] Specifically, the study compared the Tennessee Uniform Administrative Procedures Act, with its provisions binding upon state agencies, to case law regarding due process in public school disciplinary proceedings. The author concluded the act's provisions, "which necessitate formalistic, trial-type adversary proceedings, are ill-suited to the great majority of public college and university disciplinary proceedings..."[151] The author noted that other states excluded public universities from the "state agency" application of their administrative procedures acts.[152]

The same year another writer, reviewing applicable disciplinary cases involving public institutions, wrote that cross-examination, if not considered essential to due process, is inevitably a factor considered by the court in determining overall fairness of a proceeding.[153] The author also suggested that wholesale application of rules of evidence to the disciplinary process were unnecessarily burdensome and expensive.[154]

A substantial monograph was published in 1978 by the American College Personnel Association entitled, The Legal Foundations of Student

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[150]David C. Porteous, "College and University Disciplinary Proceedings Under the Tennessee Uniform Administrative Procedures Act: Undue Process?" Memphis University Law Review 7 (Spring 1977): 345-365.

[151]Ibid., p. 364.

[152]Ibid.

[153]M. Michele Fournet, Notes -- "Due Process and the University Student: The Academic/Disciplinary Dichotomy," Louisiana Law Review 37 (Spring 1977): 944.

[154]Ibid., p. 945.

Personnel Services in Higher Education.[155] This work, edited by Edward Hammond and Robert Shaffer, two noted educators and scholars, was written for the student personnel professional, the campus lay person in the field of law.[156] Chapter VII of the monograph was a review of procedural due process requirements in colleges and universities, by E. T. Buchanan, a dean of students, noted educator, and lawyer.[157]

Buchanan devoted most of the chapter to the definition of due process procedural requirements. He stated that notice should include a cover letter, notice of charges, notice of hearing, and witness statements.[158] The right of the student to examine certain evidence prior to the hearing, including witness statements, photographs, or video or audio tapes, was upheld.[159] He also noted that students had no right to decide on either joint or separate hearings, or open or closed hearings.[160] Protection against self-incrimination was not offered as a due process right, and the right to confront and cross-examine adverse

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[155]Edward H. Hammond and Robert H. Shaffer, eds., The Legal Foundations of Student Personnel Services in Higher Education (Washington, D.C.: American College Personnel Association, 1978).

[156]Ibid., p. III.

[157]E. T. "Joe" Buchanan, Chapter VII - "Student Disciplinary Proceedings in Collegiate Institutions--Substantive and Procedural Due Process Requirements," in The Legal Foundations of Student Personnel Services in Higher Education, pp. 94-115.

[158]Ibid., p. 103.

[159]Ibid., p. 107.

[160]Ibid.

witnesses was recommended, but not found established by case law.[161] The student could present witnesses and testimony or affidavits during the hearing, and institutions were recommended to adopt a process to compel attendance of students, faculty, or staff as witnesses.[162] He also recommended that a combination of investigative, prosecutorial, and adjudicatory roles be avoided in order to prevent the potential for bias in the proceeding.[163]

The publishing of Legal Foundations marked a new trend in educational scholarship which devoted attention to legal issues for the benefit of the educational practitioners who were dealing with disciplinary and other issues on their respective campuses. Other publications which followed were directed at student personnel services professionals, faculty, and lawyers in higher education.[164] These publications

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[161]Ibid., pp. 108-109.

[162]Ibid., p. 108.

[163]Ibid., p. 107.

[164]D. Parker Young and Donald D. Gehring, The College Student and the Courts, rev. ed. (Asheville, N.C.: College Administration Publications, 1977); Robert D. Bickel and Judith A. Brechner, The College Administrator and the Courts (Asheville, N.C.: College Administration Publications, 1978); Margaret J. Barr, ec., Student Affairs and the Law, New Directions for Student Services, no. 22 (San Francisco: Jossey-Bass, 1983); Donald D. Gehring, ed., Administering College and University Housing: A Legal Perspective (Asheville, N.C.: College Administration Publications, 1983); Hilda F. Owens, ed., Risk Management and the Student Affairs Professional with a Foreward by E. T. Buchanan, III, vol 2, NSAPA Monograph Series (Columbus, Ohio: National Association of Student Personnel Administrators, 1984); Patricia A. Hollander, D. Parker Young, and Donald D. Gehring, A Practical Guide to Legal Issues Affecting College Teachers, Higher Education Administration Series (Asheville, N.C.: College Administration Publications, 1985); Gary Pavela, The Dismissal of Students with Mental Disorders: Legal Issues, Policy Considerations and Alternative Responses, Higher Education Administration Series (Asheville, N.C.: College Administration Publications, 1985).

usually gave readers prescriptions and reviews of past and current thinking regarding due process procedures.

William Buss, Professor of Law at the University of Iowa College of Law, wrote a thought-provoking article in 1979 which suggested that cost considerations had been used by courts and scholars in balancing the consideration of traditional due process procedures of governmental agencies.[165] He suggested that jurists had viewed the expensive administrative costs of elements such as right to counsel and cross-examination as necessary only where the interest was substantial enough to justify the expense. He went on to write:

> There is very little doubt that the costs of providing extensive procedural protection are very real, and it is likely that these costs were not sufficiently counted when the heady breezes of due process revolution were blowing freshly. This heightened cost consciousness has led to a healthy skepticism about the actual value of particular procedures in specific contexts.[166]

Buss's article echoed the writings of others who considered the cost and burden of institutional provision of extensive due process procedures.

The results of a study involving a survey of disciplinary and academic dismissal procedures at public universities were published in 1982.[167] A total of sixty-two schools provided responses to a number of due process questions including the right to twenty-four different hearing procedures.[168] The study concluded that, among other findings,

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[165]William G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," Iowa Law Review 65 (October 1979): 42.

[166]Ibid., p. 43.

[167]Ibid., pp. 47-48.

[168]Edward D. Golden, "Procedural Due Process for Students at Public Colleges and Universities," Journal of Law and Education 11 (July 1982): 337.

most institutions provided written notice with specific accusations, and time, place, and date of hearing, but not necessarily the violated regulations or specification of time for preparation of defense.[169] Over ninety percent published some type of formal disciplinary procedures, with some variation in hearing procedures offered. Few institutions took a legalistic approach to evidence or level of proof.[170] In all procedures the level of use in academic proceedings was significantly lower than use in disciplinary proceedings.[171]

Gary Pavela, recognized educational law authority, defined the state of procedural due process in disciplinary hearings in a 1983 publication.[172] Among the points he made were:

1. Students do not have to be appointed to disciplinary hearing panels, but many schools do so as a matter of policy.
2. Superficial knowledge of the case background does not require disqualification, but hearing panelists should not participate in the investigation and prosecution of the case.
3. The "beyond a reasonable doubt" standard of proof used in criminal cases may be supplanted by guilt established by "clear and convincing evidence."
4. Circumstantial evidence may be used, and hearsay is not excluded, but should not be grounds for dismissal. Technical rules of evidence are inapplicable.
5. Students who choose to invoke Fifth Amendment privilege against self-incrimination should be advised that the panel could draw negative inferences from such silence. However, subsequent responses would not be admissible in a concurrent or future criminal proceeding.

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[169]Ibid., pp. 348-351.

[170]Ibid., p. 359.

[171]Ibid.

[172]Gary Pavela, "Constitutional Issues in the Residence Halls," in Administering College and University Housing: A Legal Perspective (Asheville, N.C.: College Administration Publications, 1983), p. 11.

6. Confrontation and cross-examination of adverse witnesses should be allowed if the case is to be decided on questions of credibility.
7. Hearing proceedings should be tape recorded or transcribed. Students found guilty should receive a written statement of findings.
8. Institutions are expected to follow their own regulations. The burden will be on institutions to show that deviations did not deny students a fair hearing.[173]

The same year another review of due process procedures was published as part of a volume written to highlight legal issues in higher education for reading by student affairs professionals.[174] The author, upon conclusion of his review of significant federal court cases, stated that "what the federal Constitution legally requires in student discipline cases is a policy of fundamental fairness that governs all procedures."[175] He went on to propose legal and policy guidelines for a fundamentally fair discipline process which included: 1) the right of the student to choose between an administrative or board hearing; 2) the opportunity to hear all information presented and to question all who present information; and 3) the right to challenge the objectivity of judges.[176] In summary, the author wrote:

> In dealing with student, the constitutional parameters of due process have been defined so that administrators faced with a disciplinary encounter who ask, "What process is due?" can answer

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[173]Ibid., pp. 29-31.

[174]Margaret J. Barr, ed., Student Affairs and the Law, New Directions for Student Services, no. 22 (San Francisco: Jossey-Bass, 1983).

[175]Frank P. Ardaiolo, "What Process is Due?" in Student Affairs and the Law, New Directions for Student Services, no. 22 (San Francisco: Jossey-Bass, 1983).

[176]Ibid., p. 23.

> that the institution must provide procedures governing students that are fundamentally fair.[177]

One year later, in another publication directed toward student affairs professional, D. Parker Young reviewed the development or procedural due process.[178] He addressed the nature of the disciplinary hearing, writing:

> Student disciplinary proceedings have been held to be civil and not criminal proceedings and therefore do not necessarily require all of the judicial safeguards and rights accorded to criminal proceedings. The hearing itself should provide the student an opportunity to present his defense and present witnesses in support of his case. There is no general absolute requirement at this time that the student be warned against self-incrimination or be permitted to cross-examine witnesses. Also, rules of evidence that apply in criminal proceedings, such as the hearsay rule, are not applicable. There is also no requirement that the hearing be open to the public or members of the college community. In fact, an open hearing would violate the Buckley Amendment unless the student approved that the hearing be made public. The student is entitled to appeal the decision. The hearing is not intended to be a full-blown proceeding, but simply a fair and ample opportunity for both sides to present the facts.[179]

D. Parker Young's observations provide a reasonable summary of the state of due process disciplinary hearing procedures and issues presently recognized by most courts and educators. The expansion of the minimal hearing procedures dictated by Dixon has not led to the full-blown criminal-like proceedings that scholars and educators since the early 1960's feared might result. Yet, most writers feel that rights which have been expanded and recognized have been generally consistent

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[177] Ibid., p. 24.

[178] D. Parker Young, "The Student/Institutional Relationship: A Legal Update," in Risk Management and the Student Affairs Professional, p. 15.

[179] Ibid., pp. 22-23.

with dictates of fairness and reasonableness and the educational philosophy inherent in discipline in higher education.

The Right to Counsel

The right of an accused student to receive either advice or representation by counsel, particularly legal counsel, in disciplinary hearings, was one of the procedural issues which received considerable attention. Several court cases examined this right as a crucial contention of due process denial cases. Similarly, educational and legal experts closely scrutinized this procedural issue, particularly as an element of the evolution of formal due process in disciplinary hearings.

Although the Dixon decision did not address this issue, it did not stop others from suggesting that minimal due process required a right to counsel. Only two years after Dixon, the Yale Law Journal defined the right to counsel-parent, friend, lawyer, or faculty member of choice, as a minimal right necessary because of the unequal position in which the student stands to the institution.[180]

Two years later, in a 1965 publication, the authors contended that the student's right to counsel was inappropriately advanced by those who "confuse the disciplinary approach with law enforcement..."[181] This contention was consistent with their views that legalism presented a significant threat to the educational process.[182]

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[180] Notes and Comments, p. 1408.

[181] Thomas A. Brady and L. F. Snoxell, Student Discipline in Higher Education, Student Personnel Series No. 5 (Washington, D.C.: American College Personnel Association, 1965), p. 17.

[182] Ibid., p. 18.

This view was generally not supported by others who viewed the right to counsel as another fundamental due process right worthy of consideration in the disciplinary context. Sherry supported the accused student's right to counsel, and expected schools to give a request for right to legal assistance "ungrudging recognition."[183] The right to counsel of choice was declared a mandatory procedure which the university was required to provide at its expense if the student could not afford counsel.[184] While others have not held the university responsible for providing counsel for the student at institutional expense, Professor Wright did offer some support for the right to assistance by counsel, saying it was "a matter of grace rather than compulsion."[185] The authors of the "Joint Statement" supported the student's right to be assisted in his defense by an advisor of choice.[186]

In a 1970 publication, D. Parker Young cited the 1969 case, French v. Bashful[187] as setting a precedent for students to receive assistance of counsel where the school used counsel in its disciplinary proceeding.[188] The Duke Law Journal, also citing French v. Bashful and other cases, suggested that right to counsel was a procedure which

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[183]Sherry, p. 37.

[184]Greene, p. 507.

[185]Ibid., p. 1075.

[186]"Joint Statement of Rights and Freedoms of Students," p. 261.

[187]French v. Bashful, 303 F. Supp. 1333 (E. D. La., 1969).

[188]D. Parker Young, The Legal Aspects of Student Dissent and Discipline in Higher Education, p. 28.

helped assure fair treatment of students.[189] Their article reported that fifty-seven percent of schools which responded to its survey extended the right to assistance of counsel at hearings, with only three percent providing funds for an attorney upon request. Further, the study showed fifty-four percent of respondent schools asserting a right to be represented by counsel.[190] They noted that a substantial number of institutions preferred an absence of counsel by both parties, possibly reflecting lack of legal training and a fear of the complexity for such adversial proceedings.[191]

Martin Frey, Associate Professor of Law at Texas Tech University, wrote an insightful article concerning the right to counsel in disciplinary hearing in 1970.[192] He proposed that right to counsel was dependent upon the scope of inquiry of the panel, the nature of the allegations, and possible consequences of the proceedings.[193] Noting the inapplicability of the Sixth Amendment's guarantee of right to counsel because of the civil nature of disciplinary proceedings, Frey pointed out that right to counsel was dependent upon state law, administrative rule, or the due process clause of the Fourteenth Amendment.[194] He went on to write:

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[189]Project --"Procedural Due Process and Campus Disorder," p. 784.

[190]Ibid., pp. 784-785.

[191]Ibid., p. 785.

[192]Martin A. Frey, "The Right of Counsel in Student Disciplinary Hearings," Valparaiso University Law Review 5 (February 1970): 48.

[193]Ibid., p. 49.

[194]Ibid., p. 51.

> 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.[195]

Frey also noted that criminal and juvenile case law, while not guides to administrative due process, did support provision of counsel by the institution where the student was financially unable to obtain assistance.[196] He pointed out other tangential issues concerning counsel, including the lack of authority requiring university officials to advise the student of his right to have counsel assigned to him where permitted.[197]

Leslie and Satryb's 1974 study of due process procedures at public and private institutions indicated thirty-five percent of the public schools surveyed documented a student's right to representation by an attorney, but sixty-seven percent accorded the student the right to advisor representation. Nearly seventy-five percent of the public schools allowed the student assistance by either an attorney or

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[195]Ibid., p. 55.

[196]Ibid., p. 59.

[197]Ibid., p. 62.

advisor.[198] They concluded students were at an unfair disadvantage when prosecuted within an unfamiliar setting without competent assistance. They suggested the requirement of essential fairness was that "the student should not be placed under the double handicap of having to prepare a substantive defense while having to learn the procedural system under which he is to be prosecuted."[199]

Porteous's 1977 comparison of administrative procedures act provisions and disciplinary proceedings addressed the issue of right to counsel in both situations. He observed that restrictions on the right to counsel in disciplinary proceedings were inconsistent with the Tennessee Uniform Administrative Procedures Act, which could require representation and advisement by counsel in all proceedings at state colleges and universities.[200] As a practical matter, he offered the opinion that no student could effectively take advantage of the Act's hearing provisions without being represented by counsel.[201]

The 1978 case, Gabrilowitz v. Newman[202] revolved around the due process claim of right to counsel at a university disciplinary hearing. An examination of that case and other pertinent case law concluded that Gabrilowitz would have a substantial effect on the right to counsel

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[198]Leslie and Satryb, p. 342.

[199]Ibid., p. 344.

[200]Porteous, pp. 360-361.

[201]Ibid., p. 361.

[202]Gabrilowitz v. Newman, 582 F. 2d 100 (First Cir. 1978).

issue in college disciplinary hearings.[203] The author wrote:

> In Gabrilowitz, the First Circuit utilized the due process balancing test to conclude that a student has the right to have counsel present at a university disciplinary proceeding where the conduct subject to the disciplinary hearing is also the object of a pending criminal proceeding. It is questionable, however, whether the court fully realized the possible impact its decision could have on the broader question of whether an accused in a criminal proceeding has the right to have his attorney present at a parallel civil proceeding.[204]

In this regard, the author had hopes that a university due process case might further expand due process considerations in a non-university judicial proceeding.

The Gabrilowitz case was prominently cited in other discussions of right to counsel in 1979. One writer dismissed an assertion by a dissenting judge in Gabrilowitz, who feared the decision would extend the right of counsel to all disciplinary proceedings because of the mere possibility of concurrent criminal charges.[205] The writer suggested courts would not expand the decision to offer right to counsel in disciplinary proceedings not involving pending criminal charges.[206] Other areas indicated for future expansion of right to counsel included the right of indigent student to have counsel appointed and the extent of counsel participation in disciplinary proceedings.[207]

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[203]Rodney Jay Vessels, Case Notes --"Constitutional Law--Procedural Due Process," Brigham Young University Law Review (1978): 740.

[204]Ibid., p. 741.

[205]Patrick D. Lane, "Constitutional Law--Due Process of Law--Right to Counsel," University of Cincinnati Law Review 48 (1979): 131.

[206]Ibid.

[207]Ibid.

A review of decisions involving college disciplinary issues led two writers to report the pros and cons of the right to counsel debate. Among the arguments cited against inclusion of counsel:

1. Most attorneys are ill-equipped to enhance the education and counseling functions of college discipline.
2. A purely legal defense presents the student from experiencing the healthy introspection of preparing his/her own account for the hearing.
3. The cost of retaining legal counsel, or the unequal ability of students to afford private representation was onerous.
4. There is no need for this right; campus proceedings are fundamentally fair without it.

The points which were given to support counsel included:

1. The right to counsel is the one element which would allow campus disciplinary proceedings to offer all the procedural protections of a criminal proceeding; a denial thus becomes an arbitrary restriction.
2. The appearance of fairness requires the right to counsel. No other extended rights can substitute for this denied right.
3. Where the institution proceeds with legal assistance, the student's right to counsel representation maintains the hearing as balanced and fundamentally fair.[208]

The start of the decade of the 1980's found writers viewing the right to counsel as a procedural right still in the process of early evolution, moving away from past prohibitions against any role for counsel.[209] Weisinger, updating his 1979 review of right to counsel, observed areas of expansion for due process right to counsel in a 1981 article.[210] Among the areas he explored was the preparation needed by

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[208]Ron Weisinger and Rod Crafts, "Right to Counsel: Legal and Educational Considerations," NASPA Journal 17 (Autumn 1979): 30-31.

[209]Robert M. Echols, Jr., and Steven F. Casey, Comments--"The Right to Counsel in Disciplinary Proceedings in Public and Private Institutions," Cumberland Law Review 9 (Winter 1979): 755-756.

[210]Ron Weisinger, "Right to Counsel Revisited," NASPA Journal 18 (Spring 1981): 51.

both the institution and the student's legal counsel when counsel was permitted to be present at a disciplinary hearing. He noted that students who planned to bring counsel to the hearing should notify the at least two days in advance to allow the school to inform the student of the permissible role of counsel and to review hearing ground rules.[211] He also advised institutions to prepare their hearing boards for the unusual circumstances surrounding inclusion of legal counsel to remove anxiety which might interfere with the board's role as an adjudicatory body.[212] Finally, he stated that a prepared board, with a knowledgeable advisor, would not require inclusion of an institution's attorney.[213]

Little has been written since the mid 1980's which has expanded educational thought concerning the right to counsel. In part, this parallels the limited number of cases brought in court involving substantial claims of denial of due process right to counsel. A recent article cited several college and university judicial administrators and authorities on their handling of lawyer involvement in disciplinary proceedings.[214] They all indicated that, although lawyers' involvement in disciplinary proceedings were the exception, they were comfortable with inclusion of legal counsel. In effect, the presence of lawyers in

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[211]Ibid., p. 52.

[212]Ibid., p. 54.

[213]Ibid., p. 55.

[214]Cheryl M. Fields, "Lawyers Are Sometimes Involved in Hearings for Disciplinary Cases," The Chronicle of Higher Education 33 (March 18, 1987): 45.

disciplinary hearings is no longer considered problematic or out-of-the-ordinary.

Overlapping Jurisdiction and Double Jeopardy

Another significant due process procedural issue which has generated significant legal and scholarly attention is that of overlapping jurisdiction between civil authorities and university officials in matters where student behavior constitutes both a violation of civil law and university regulation. One reason for special attention to this issue is fact that several of the early due process cases, including Dixon, involved students disciplined for actions which came under civil jurisdiction. Arrests associated with involvement in the civil rights protest movement were central to significant cases of the Dixon era, including Knight v. State Board of Education and Due v. Florida Agricultural and Mechanical University.[215]

The issue of overlapping jurisdiction resulted from decisions college and university officials faced when contemplating disciplinary action against a student facing criminal action for the same incident. Questions arose concerning the timing of the disciplinary proceedings relative to criminal action. The student's right to counsel issue was further heightened by the prospect of hearing proceedings affecting the criminal case disposition. The right to protection against self-incrimination took on new significance when applied to the student defending himself against both civil campus proceedings and a criminal

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[215]Knight v. State Board of Education, 200 F. Supp. 174 (M. D. Tenn. 1969), Due v. Florida Agricultural and Mechanical University, 233 F. Supp. 396 (N. D. Fla. 1963).

court trial. There was added pressure upon institutions to respond forcefully to students arrested for violating laws of society as well as institutional regulations. The legal concept of double jeopardy was often invoked when students were tried in both a college hearing and the criminal court. Courts addressed these issues involving overlapping jurisdiction early on after Dixon, and so did the educators and legal scholars.

Brady and Snoxell, consistent with their forceful distinction between disciplinary and judicial procedures, stated that institutional proceedings were not parallel to criminal or civil proceedings.[216] They pointed out that educational disciplinary processes often considered facts in a different light than courts.[217]

Sherry's article of 1966 recognized the problems inherent in jurisdictional overlap between civil and university authorities. Addressing that difficulty, he wrote:

> When on-campus behavior of this sort is of such a degree, however, that it constitutes a violation of the criminal law, a jurisdictional choice may present itself in which the guidelines of decision may be most unclear. As a matter of law, since the conduct is an offense against university regulation as well as an offense against the state, both have jurisdiction to impose appropriate penalties. As a matter of prudence and discretion, however, wisdom may well dictate that in some cases, action by one jurisdiction is enough.[218]

While cautioning against institutional suppression of constitutionally protected behavior both on and off the campus, Sherry noted that student

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[216]Brady and Snoxell, p. 17.

[217]Ibid.

[218]Sherry, p. 29.

conduct of a reckless and unjustifiable nature was not immune or subject to special consideration when disciplined by university proceedings.[219]

The 1968 "Joint Statement" addressed pertinent jurisdictional issues under the heading "Off-Campus Freedom of Students."[220] Echoing the cautions raised by Sherry, the document stated:

> Students who violate the law may incur penalties prescribed by civil authorities, but institutional authority should never be used merely to duplicate the functions of general law. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted. Institutional action should be independent of community pressure.[221]

Robert B. McKay, Dean of the New York University of Law, contributed an article to the 1968 special issue of the Denver Law Journal which expounded on issues of double jeopardy and jurisdictional overlap.[222] He was quick to dismiss the question of constitutional double jeopardy as inapplicable to the college disciplinary proceeding.[223] While noting that violations of laws were also violations of university regulations, express or implicit, he stated that imposition of university discipline should be restricted to violations that threatened identifiable institutional interests.[224]

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[219] Ibid., p. 38.

[220] "Joint Statement on Rights and Freedoms of Students," p. 260.

[221] Ibid.

[222] Robert B. McKay, "The Student As Private Citizen," Denver Law Journal 45 (Special 1968): 558.

[223] Ibid., p. 564.

[224] Ibid., p. 566.

Van Alstyne, writing in the same special issue, suggested that universities exercise caution in prosecuting incidents where students faced concurrent court action.[225] He outlined several of the overlapping jurisdictional issues and situations which institutions needed to address.

Wright's comprehensive due process review of 1969 addressed the procedural issues inherent in overlapping jurisdiction. He dismissed claims of double jeopardy as invalid, and noted that postponement of a disciplinary proceeding pending the conclusion of criminal charges was not required.[226]

In 1970, the Duke Law Journal observed that self-incrimination resulting from university disciplinary proceedings was "too speculative" an argument to require a stay on the proceedings pending completion of criminal action.[227] Their survey results found universities divided on questions related to exercising disciplinary action concurrent with criminal action.[228]

As with other due process rights and issues, the question of overlapping jurisdiction was prominently cited in publications in the early and middle 1970's. The notion of universities only prosecuting actions which interfere with the school's primary educational functions

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[225]Van Alstyne, "Student As University Resident," pp. 598-603.

[226]Wright, p. 1078.

[227]Project --"Procedural Due Process and Campus Disorder," p. 772.

[228]Ibid., p. 773.

regardless of civil or criminal action, was noted as the "furthest departure to date from the once-popular idea that the school stands in loco parentis to the student..."[229] Another writer restricted concurrent university action to situations where off-campus conduct threatened or harmed members of the university community or posed a threat to university property or operations.[230] Decisions faced by university officials in deciding whether to bring certain violations of law to the attention of civil authorities instead of processing through campus disciplinary proceedings were discussed in another article.[231] One other article addressed the role of sanctions in the overlapping jurisdiction issue, stating:

> Once the university has decided to bring a case either internally or externally, they should defer bringing the case concurrently until after the case is resolved in the original tribunal. Once a decision is made, the university should carefully weigh that decision with the question of whether the sanction is sufficient or whether there is need for some additional sanction. If the answer is that the sanction is sufficient, the university should not pursue the matter further. If, however, they feel that some additional sanction is necessary then it is quite appropriate for additional charges to be brought... However, the second tribunal should consider the original sanction so that their efforts do not merely duplicate what has already been done.[232]

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[229]J. Clinton Eudy, "Colleges and Universities--Constitutional Law--Legality of Broad Rules Governing Behavior," North Carolina Law Review 48 (June 1970): 949.

[230]Hanson, pp. 46-47.

[231]Joseph J. Karlesky and D. Grier Stephenson, Jr., "Student Disciplinary Proceedings: Some Preliminary Questions," Journal of Higher Education 42 (November 1971): 654-655.

[232]Ronald H. Stein, "Discipline: On Campus, Downtown, or Both, A Need for a Standard," NASPA Journal 10 (July 1972): 46.

The 1968 case, Zander v. Louisiana State Board of Education[233] was cited in 1972 as recognizing the university's "right and responsibility to take disciplinary action concurrently with civil action in those instances where student behavior represents a threat to the purpose, function, and facilities of the institution.[234] Two bases were observed to offer judicial support of the rejection of double jeopardy issues: 1) the noncriminal nature of disciplinary proceedings; and 2) the non-punitive nature of disciplinary proceedings and sanctions.[235]

Packwood cited several publications addressing jurisdictional and double jeopardy issues, including a 1969 survey which included responses from five hundred fifty-eight institutions.[236] The study reported that: 1) two thirds of respondents did not act on violations of law unless the college was involved; 2) two thirds delayed disciplinary proceedings until court actions were resolved; 3) nearly seventy-five percent kept on-campus violations and misdemeanors within institutional processes; and 4) only twelve percent left all violations of law for civil prosecution.[237]

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[233]Zander v. Louisiana State Board of Education, 281 F. Supp. 747 (W. D. La. 1968).

[234]Edward H. Hammond, "Institutional Justification for the Existence of a Campus Judicial System," in Proceedings--Substantial Justice on Campus, p. 42.

[235]Thomas E. Kelly, Jr., "Double Prosecution of the State University Student," Journal of College and University Law 1 (Spring 1974): 275-277.

[236]Packwood, p. 247, citing T. B. Dutton, F. W. Smith, and T. Zarle, Institutional Approaches to the Adjudication of Student Misconduct (Buffalo: National Association of Student Personnel Administrators, 1969).

[237]Ibid.

In his 1981 article, Weisinger noted that a student's defense against concurrent criminal and university charges presented the student with a "strategic dilemma": "If appellee chooses not to risk self-incrimination and possible imprisonment... he throws his college degree into the balance against a possible loss of liberty."[238] He went on to point out that campus police reports, if included in the student's disciplinary file, might be reviewable by the student under the provisions of the Family Educational Rights and Privacy Act, sometimes over the resistance of officials who don't want student access to such records prior to a court action.[239]

A 1987 article highlighted a dilemma confronting increasing numbers of colleges: The proper response for a university to take when its students face serious criminal charges.[240] The article included the following conditions under which a student's Fifth Amendment rights against self-incrimination could be protected in a hearing held before the resolution of criminal charges:

1. If the student is required to appear at the hearing, but not compelled to testify.
2. If the student's failure to testify is not considered substantial evidence of guilt or even a piece of evidence suggesting guilt.[241]

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[238]Weisinger, p. 53, citing Gabrilowitz v. Newman, 582 F. 2d 100, 105 (First Cir. 1978).

[239]Ibid., p. 54.

[240]Cheryl M. Fields, "When Students Face Serious Criminal Charges, Some Colleges Await Court Action, Others Mete Out Quick Discipline," The Chronicle of Higher Education 33 (March 18, 1987): 41.

[241]Ibid.

The article further noted that schools had the right to conduct a disciplinary action even after acquittal of criminal charges because the "beyond a reasonable doubt" burden of proof in criminal proceedings is higher than that of the "preponderance of the evidence" standard acceptable in disciplinary proceedings.[242]

Appeals Procedures

The Dixon decision, as noted earlier, was cited as much for its absence of opinion as it was for what is specified regarding procedural due process. One of the key elements which Dixon omitted was the right of a student to an internal appeal subsequent to a due process hearing. What Dixon did say was that a student could appeal an unconstitutional denial of due process in the federal court system.

The issue of denial of appeal or inadequacy of appeal was not central to most denial of due process claims raised in disciplinary court challenges. As early as 1963, Van Alstyne's survey of seventy-two state universities indicated an appeals process offered by ninety percent of the respondent schools. He called this one of the brighter aspects of the survey results.[243] Most scholars examining due process procedures noted the presence of an appellate review in most disciplinary systems, even though other procedural rights were lacking.

An article written in 1962 noted that statutory remedies were sometimes available for appeals of unjust expulsion from state

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[242]Ibid., p. 45.

[243]Van Alstyne, "Procedural Due Process and State University Students," p. 369.

universities.[244] Citing the 1958 case, Steier v. New York State Education Commissioner, it was observed that, where the plaintiff student failed to exhaust his internal appeal to the state commissioner of education as provided by statute, his complaint was dismissed by the federal district court.[245]

A 1964 review of procedural due process stated that an internal appellate review system would most easily alleviate the need for the judiciary to review original hearing decisions.[246] It was further stated that administrative systems were not required by the Fourteenth Amendment to provide a system of appeals, although it would be desirable.[247]

Brady and Snoxell observed that most institutions had an internal appeals process, with the president of the school usually serving as the appellate authority.[248] They suggested restrictions against reopening the determination of facts and the presence of any counsel within the appeal.[249]

Sherry, couching his recommendations for due process in terms of guarantees of procedural fairness, recommended a full review of serious

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[244]Eugene L. Kramer, Notes --"Expulsion of College and Professional Students--Rights and Remedies," Notre Dame Lawyer 38 (December 1962): 182.

[245]Steier v. New York State Education Commissioner, 161 F. Supp. 549 (E. D. N. Y. 1958), affirmed, 271 F. 2d 13 (Second Cir. 1959), cert. denied 361 U. S. 966 (1960).

[246]Johnson, pp. 361-362.

[247]Ibid., p. 362.

[248]Brady and Snoxell, p. 20.

[249]Ibid.

disciplinary action by a high administrator as a routine matter, and at least upon request of the accused student.[250] This reasoning was reiterated by Beaney two years later when he recommended an opportunity for appeal.[251] The "Joint Statement" gave a simple affirmation to the right to appeal to the president or ultimately the institutional governing board.[252] One writer in a 1969 publication suggested the possibility of schools using an appeals body which would include one or members of the broader community.[253] It was further suggested that a "distinguished judge or educator with no involvement in the particular conflict might contribute to a more enlightened judgement."[254] The same year D. Parker Young reiterated the need for an appeal procedure before the ultimate administrative authority of the institution.[255]

The 1970 survey project of the Duke Law Journal reported that fifty-seven percent of respondent schools provided some type of appellate review, with only three percent reporting no appeals process.[256]

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[250]Sherry, p. 38.

[251]Beaney, pp. 520-521.

[252]"Joint Statement on Student Rights and Freedoms," p. 261.

[253]Tom J. Farer, "The Array of Sanctions," in Student Protest and the Law, p. 80.

[254]Ibid.

[255]D. Parker Young, The Legal Aspects of Student Discipline in Higher Education, p. 25.

[256]Project --"Procedural Due Process and Campus Disorder," p. 793.

The president of the institution was the most popular choice of appellate officer, with error in hearing procedures being the most reviewable grounds.[257] The authors stated the contemporary status of appeals procedures, writing:

> No case has held that a college must provide for institutional review of the hearing panel's decision, but procedures embodying such an appellate framework have been impliedly endorsed by courts which state that the student has a right to make a transcript of the proceedings before the hearing panel. It would appear that some appellate procedure would be desirable from both the student's and the administration's point of view. Appellate review would benefit the student by serving as a safeguard against individual arbitrariness of the hearing panel and aid the university by correcting procedural errors which, if left unanswered, might result in judicial intervention and reversal on petition of the students involve. To accomplish these ends, a procedure of automatic review by the President or other higher university official would be adequate and desirable.[258]

A 1972 publication referred to Van Alstyne's 1962 findings of appeals procedures in place at ninety percent of the respondent institutions in advocating the student's right to an institutional appeal.[259] Cazier, reviewing procedural due process rights and procedures, noted that "while only a bare majority of institutions specifically provide for appellate review, such a review would seem a proper extension of the requirements of fundamental fairness."[260]

An interesting point regarding appellate review was raised in a 1973 journal article which suggested that state universities needed to

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[257] Ibid.

[258] Ibid., pp. 792-793.

[259] Alexander and Solomon, p. 436.

[260] Cazier, p. 38.

require administrative review of decisions rendered by student-controlled judicial processes.[261] The author wrote:

> But, as a state instrumentality, a public university cannot enforce any denial of due process; it seems well within the bounds of its legitimate interests to insist on the right to review (on appeal) any case which might entangle them in such a denial... Giving students autonomous control over discipline... allows operation of some classical conflict of interest forces. Interest groups do not have particularly good records when it comes to self-regulation. Broadening the constituencies of review mechanisms, either by providing new sources of review at succeeding levels of the process or by including a pluralist membership on any review panel, would serve to introduce varying points of view on issues at hand and to enrich debates and compromises before decisions are made.[262]

The author concluded that institutional officials must review decisions by student groups "in the interest of ensuring adherence to constitutional requirements."[263]

Leslie and Satryb's 1974 survey of due process procedures at ninety-eight institutions indicated that the vast majority of public universities included the right to appeal in their procedures.[264] They proposed that identification of the final appellate authority be open and specific, suggesting that boards of trustees were often that authority.[265]

A 1977 article referred to the decision in Zanders v. Louisiana State Board of Education as providing judicial recommendation for an

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[261]David W. Leslie, "Some Implied Legal Restraints on Student Power," NASPA Journal 11 (October 1973): 63.

[262]Ibid.

[263]Ibid., p. 64.

[264]Leslie and Satryb, p. 344.

[265]Ibid., pp. 344-345.

appeals process.[266] The author indicated that appeal procedures did not need to be lengthy or expensive, with the value of such a procedure to enhancing the university's image greatly outweighing the minor inconvenience to some administrators.[267] Further, the appeals procedure would probably reduce challenge suits, and in fact, might become an important factor in determining the fairness of the disciplinary proceedings.[268]

The legal challenge reduction value of an internal appeals process was noted in a publication one year later, as well as other factors. Specifically, the author reiterated the lack of judicial requirement for an appeals procedure. He noted that both the student and the institution can appeal a decision, a point not generally recognized by the writings of others.[269] He also indicated that penalties can be increased on appeal, another point not addressed in other writings.[270]

More recent writings in the 1980's continue to support the need for an appeals process, if not the legal mandate for it. It appears that appellate reviews will remain an accepted practice of most institutions in the absence of future judicial decisions having any significant impact on the appeals issue.

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[266]Fournet, p. 945.

[267]Ibid.

[268]Ibid.

[269]E. T. "Joe" Buchanan, "Student Disciplinary Proceedings in Collegiate Institutions--Substantive and Procedural Due Process Requirements," p. 109.

[270]See Gary Pavela, "Constitutional Issues in the Residence Hall," p. 30; Frank P. Ardaiolo, "What Process is Due?", p. 23.

Interim Suspension

Interim, or summary suspension, is the last major disciplinary procedural issue to be reviewed in this chapter. Interim suspension involves a separation of a student from the institution on a basis other than permanent dismissal. It is usually invoked immediately after the commission of some behavior, often with a specified time period noted for the duration of the suspension. The act can affect both academic student status and the student's status as a welcome member of the university or college community and campus.

Van Alstyne, addressing alternatives to summary dismissal of students without a fair hearing, wrote that an "interim measure in the extreme case" would be suspension of the student for the balance of the semester to remove any immediate danger posed against other students.[271] He contended that such an interim suspension should not prejudice the final determination of a case processed in a regular disciplinary hearing.[272]

The authors of the "Joint Statement" were cognizant of the volatile nature of many college campuses at the time their document and its standards were being developed. It was a time when civil and student rights actions presented perceived and real threats to the facilities, members, and orderly processes of the campus environment. It was also a time when court cases had been and continued to involve disciplinary

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[271]Van Alstyne, "Procedural Due Process and State University Students," p. 385.

[272]Ibid.

action taken by student protesters. They realized that a statement concerning interim suspension would be particularly applicable to the campus environment of the day. The authors wrote:

> Pending action on the charges, the status of a student should not be altered, or his right to be present on the campus and to attend classes be suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property.[273]

Professor Wright referred to the "Joint Statement's" allowance for imposition of interim suspension in addressing the issue, and noted that three cases had permitted interim suspension consistent with the "Joint Statement."[274] He observed the difficulty of acting forcefully under conditions of violence and rioting on campus, while trying to hold a hearing under less than ideal conditions on a campus in uproar. This situation was suited for the imposition of a summary suspension pending a later hearing which would offer the student all ordinary procedural protections.[275]

Holloway, writing in the 1969 book, Student Protest and the Law, summarized options open to campus officials dealing with student disorders as: 1) institutional discipline leading to probation, suspension, or expulsion; 2) injunctive relief granted by courts; and 3) prosecution

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[273]"Joint Statement on Rights and Freedoms of Students," p. 261.

[274]Wright, p. 1075, citing Stricklin v. Regents of University of Wisconsin, 279 F. Supp. 416, 420 (W. D. Wis. 1969); Marzette v. McPhee, 294 F. Supp. 562, 568-570 (W. D. Wis. 1968); Scoggin v. Lincoln University, 291 F. Supp. 161, 172 (W. D. Mo. 1968).

[275]Ibid., p. 1074.

under criminal trespass or special criminal laws.[276] He concluded that all three remedies were appropriate for serious campus disruptions, with institutional discipline being the first and most effective remedy.[277]

The Duke Law Journal survey of 1970, within its inclusive scope, spoke about interim suspensions. The authors cited Stricklin v. Regents of University of Wisconsin, a 1969 case where the District Court upheld an interim suspension challenge where there was no clear reason for imposing the interim suspension pending a preliminary hearing.[278] The article went on to sketch the form of the preliminary hearing:

> ... the requirement is satisfied by providing a student an early opportunity to appear before a single officer or an agency of the university to be informed of the nature of the offense. The student should also be allowed to make a statement before any decision on preliminary suspension is reached. Admission of guilt would justify no further steps before suspension, but a detailed denial supported by names of witnesses would probably require further investigation. A plausible explanation constituting an excuse or justification for continued presence on the campus might require a broader revelation by the university authorities of the source and nature of adverse information and possibly even necessitate confrontation with accusers.[279]

Sixty-two percent of respondent schools maintained the right to impose an interim suspension after the bringing of charges and prior to a formal hearing, while twenty-one percent would not. About forty-five percent of grounds given for imposing interim suspension were considered legal grounds while numerous other grounds were not legally sound.

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[276]Holloway, pp. 100-101.

[277]Ibid., p. 103.

[278]Project --"Procedural Due Process and Campus Disorders," pp. 774-775, citing Stricklin v. Regents of University of Wisconsin, at 420.

[279]Ibid., p. 776.

Fifty-two percent of respondents had at least an informal appeals or review procedure for the interim suspension while eleven percent had none.[280]

Young, writing in 1970, pointed out that "guilt" was not an acceptable rationale for imposition of interim suspension. He stated that a quick hearing, probably within three days, was required before the suspension was enacted.[281] One writer found interim suspension to be the issue of most public (political) interest surrounding due process disciplinary procedures.[282]

An insightful analysis of interim suspension written in 1971 found such action analogous to the concept of bail in a criminal action, with bail serving to restore the status of the accused because of presumption of innocence. It was also suggested that the accused student had the same right to presumption of innocence, with interim suspension imposed only under conditions of immediate danger.[283] The writer suggested that suspension without hearing, becoming final if the student did not request a hearing, would be violative of due process and "contrary to fundamental fairness to reverse the presumption of innocence and force the student to prove his right to be readmitted."[284]

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[280]Ibid., pp. 776-777.

[281]D. Parker Young, The Legal Aspects of Student Dissent and Discipline in Higher Education, p. 44.

[282]Pettigrew, p. 120.

[283]Marwin B. Brakebill, "Suspension of Student Pending Disciplinary Hearing," Texas Tech Law Review 2 (1971): 272.

[284]Ibid., pp. 277-278.

Stein wrote a thought-provoking article regarding temporary suspension in 1974.[285] Noting the development of thought on interim suspension, both judicially and scholarly, he nonetheless pointed out problems regarding the appropriateness and potential "irreparable harm" of interim suspension.[286] Finally, Stein suggested intermediary steps to interim suspension, including warnings and partial temporary suspension, where the student is separated from a specific class or campus facility.[287] Another writer one year later also mentioned less drastic steps before interim suspension, including cooling down, containment, and persuasion.[288]

In his 1983 review of procedural due process, Buchanan specified procedures for interim suspension. He observed that notice of a preliminary hearing should include: 1) facts uncovered by investigation; 2) facts constituting possible violations of regulations, with appropriate citation; 3) the opportunity for the student to present further evidence at a preliminary hearing; and 4) that a preliminary hearing will be held in the student's absence if he or she doesn't respond to the notice.[289]

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[285]Ronald H. Stein, "The Nature of Temporary Suspension," NASPA Journal 11 (Winter 1974): 16.

[286]Ibid., pp. 21-22.

[287]Ibid., pp. 22-23.

[288]Terrence N. Tice, Student Rights, Decisionmaking, and the Law, ERIC/Higher Education Research Report No. 10 (Washington, D.C.: American Association for Higher Education, 1976), p. 35.

[289]Buchanan, p. 100.

Suspension and Expulsion for Academic Misconduct

Dixon and those cases which followed in the 1960's dealt with a wide range of disciplinary conduct on campus. As such, they were often very specific in defining procedural due process for the adjudication for disciplinary misconduct. One of the areas of which they usually stayed clear was a definition of due process for other dismissal matters, particularly those involving academic performance.

The distinction between academic and disciplinary suspensions and expulsions has been given a great deal of attention by both the courts and the scholars. While due process in disciplinary dismissals has been greatly refined since Dixon, issues involving dismissals for academic reasons have been less than settled. Even intervention into the issue by the United States Supreme Court in the 1978 case, Board of Curators of University of Missouri v. Horowitz,[290] did not prevent writers and courts from reexamining the nature of academic dismissals.

One of the most significant aspects of that case was the Court's distinction between academic and disciplinary dismissals. From that distinction arose a defined separation between dismissal based on disciplinary misconduct and academic misconduct. Subsequently, the focus has been on due process procedures applicable to the academic misconduct dismissal proceeding.

As early as 1963 a major review of current judicial thought observed that academic misconduct in the form of cheating was a

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[290]Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

non-academic matter subject to review by courts in dismissal actions. The article, differentiating between academic performance and misconduct, stated:

> But where an allegation of crime - even one related to academic performance - is dependent on non-academic facts, as cheating on examinations may be, or is established by the school in a manner not involving academic judgment, the court is competent to review the appropriateness of the school's decision. The school has, it must be admitted, greater concern with academic than with other forms of student misbehavior. But unless the decisions it makes require academic expertise, this concern ought not to preclude a court from judging for itself. Evaluation of fact-finding to determine the occurrence of crime is standard business for the courts.[291]

This thought, that factual determinations could be reviewed by courts, was consistent with developing judicial views concerning reviews of disciplinary actions.

Wright, in his 1969 article, wrote that he could perceive "no basis on which a student can claim a constitutional right to a D rather than an F," but later suggested that cases of cheating demanded constitutionally required due process procedures.[292] Noting the costs of time and money required for such cases, he nevertheless contended that schools would gladly incur "any cost to be sure that it is not committing a serious injustice, likely to damage the student for life, by finding him guilty of an offense he did not in fact commit."[293]

Two authors of a 1975 article provided an insightful view of development of judicial review of academic dismissal cases since

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[291]Notes and Comments, p. 1394.

[292]Wright, pp. 1069, 1083.

[293]Ibid., p. 1084.

Dixon.[294] The authors noted that several federal court cases had distinguished between academic performance and misconduct of an academic nature in determining the appropriateness of institutional dismissal proceedings.[295] The authors, contending situations such as cheating and plagiarism involved an inseparable mix of academic infractions and misconduct, considered these offenses to be misconduct "warranting dismissal on disciplinary grounds and requiring a due process hearing."[296]

Articles which followed the Horowitz decision analyzed and sometimes criticized the Court's distinction between academic and disciplinary dismissal due process requirements and the definition of academic versus misconduct evaluations. One writer found elements of Horowitz to be a hybrid of academic and disciplinary concerns (i.e., personal hygiene, lack of regular attendance), entitling the student to a due process hearing before dismissal.[297] Another writing observed the distinction between purely academic decisions and misconduct, and noted that problems arise when conduct falls in between (such as attendance, personal hygiene, and patient rapport).[298] Disagreeing with the Supreme

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[294]William Toombs and Elaine DiBiase, "College Rules and Court Decisions: Notes on Student Dismissal," Journal of College and University Law 35 (1975): 355.

[295]Ibid., pp. 361-364.

[296]Ibid., p. 364.

[297]John S. Bricker, "Administrative Law--Due Process," University of Detroit Journal of Urban Law 56 (Fall 1978): 240-241.

[298]Debbe A. Levin, "Constitutional Law--Due Process of Law," University of Cincinnati Law Review 47 (1978): 522.

Court's contention in Horowitz that such conduct was part of academic performance, the article suggested it was analogous to misconduct, and further suggested that "labeling conduct academic does not address whether its verification if susceptible to a fact-finding process or to a subjective evaluation..."[299] Echoing the same thoughts about Horowitz, Pavela wrote, "Specifically, administrators may be tempted to avoid a time-consuming and potentially embarrassing hearing by disguising disciplinary action as 'academic evaluation.'"[300] He felt that cases of academic dishonesty presented the greatest potential for confusion and abuse after Horowitz, but urged educators to incorporate hearings into the resolution of charges of plagiarism or cheating. He cautioned educators to reject arguments for purely academic judgments since contested cases of academic dishonesty invariably involve factual disputes and may leave students with the most burdensome stigma an educational institution can impose."[301] He suggested that institutions develop clear statements defining policies and procedures regarding academic dishonesty in order to protect student rights and limit subjective resolution by faculty.[302]

Buss's comprehensive review of the Horowitz decision and other academic dismissal cases suggested that Horowitz was an unsatisfactory due process decision on several counts. Among the weaknesses cited was

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[299] Ibid.

[300] Gary Pavela, "Judicial Review of Academic Decisionmaking After Horowitz," NOLPE School Law Journal 8 (1978): 67.

[301] Ibid., p. 68.

[302] Ibid., p. 70.

the Court's rejection of procedural fact-finding as appropriate to "academic decisions."[303] He noted that standard misconduct cases were often clear cut factual determinations, but that other misconduct cases, where factual issues were not the controlling factors, still required the right of the accused to present a version of the circumstances of a particular incident.[304] Like others, he cautioned about "the relative ease with which 'academic' judgments can be enlarged to include the very types of personal behavior that, by someone else's jargon, might be regarded as disciplinary conduct."[305]

The Horowitz decision, while widely questioned by scholars, established the academic/disciplinary dichotomy with enough judicial power to force writers to recognize, if not totally accept, the distinction. One writer observed that "drawing the line between behavior matters... can be tricky," but suggested cheating and plagiarism were behavioral problems requiring due process in dismissal proceedings.[306] Another writer concluded that an emphasis on the academic versus disciplinary distinction ignored the determinative issue of whether facts in dispute were open to adjudication.[307] Two authors of a 1981 article concerning academic misconduct wrote:

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[303]Buss, p. 9.

[304]Ibid.

[305]Ibid.

[306]Millington, pp. 93-94.

[307]Gretchen Harris, Notes --"Civil Rights: Inconsistent Due Process Standards Applied to Cases of Exclusion from Educational Institutions," Oklahoma Law Review 34 (Spring 1981): 307-308.

> While educators continue to be split in their opinion about the proper characterization of cheating and plagiarism as academic or disciplinary misconduct and the way such misconduct should be institutionally addressed, the courts have been consistent in their characterization of such violations as academic dishonesty; thus requiring the same due process protections be afforded students as in other misconduct situations of a disciplinary nature. These requirements are considerably more stringent than those which need to be followed in cases of scholastic failure.[308]

They suggested that incidents of cheating and plagiarism be incorporated into existing due process disciplinary procedures.[309]

A comprehensive brochure concerning issues of academic integrity was published in 1985 by the National Association of Student Personnel Administrators.[310] The publication cited several cases suggesting most academic dishonesty cases involved disciplinary decisions rather than academic judgments. A policy of processing academic dishonesty for disciplinary action would have significant educational value.[311] Among the due process procedures suggested for academic dishonesty cases were: 1) the right to a hearing, which could be informal and nonadversarial; 2) no active participation by legal counsel for any party; 3) the review of suspensions or expulsions by a senior administrator; and 4) recession of any penalties imposed by a faculty member if the student was found innocent.[312] The article observed that some faculty had an erroneous

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[308]Denney G. Rutherford and Steven G. Olswang, "Academic Misconduct: The Due Process Rights of Students," NASPA Journal 19 (Autumn 1981): 10-11.

[309]Ibid., p. 16.

[310]"Issues and Perspectives on Academic Integrity," NASPA brochure (1985).

[311]Ibid., p. 10.

[312]Ibid., pp. 12-13.

perception of due process requiring full-blown, complex adversarial procedures, and as a result, either ignored academic dishonesty or lowered grades after assuming cheating or plagiarism occurred.[313]

The author of a 1985 article wrote that expulsions for academic dishonesty triggered procedural rights including notice of specific charges, a fair and impartial hearing, an opportunity to defend against the charges, and a record of the proceedings.[314] One year later a writer proposed that six different due process procedures might be applicable to academic dishonesty proceedings: notice; right to counsel; cross-examination; right to a hearing; reasons for a decision; and appellate review.[315] The writer went on to qualify each of these rights in terms of different court findings and situational contexts.[316] The same year, another writer concurred with the need for notice and hearing in academic dishonesty cases, observing "the Constitution, according to the courts, does not require a public university to provide students an opportunity to cross-examine their accusers and witnesses, to appeal a suspension or expulsion decision, or to have a lawyer represent the student at the disciplinary hearing."[317]

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[313]Ibid., p. 12.

[314]Martha M. McCarthy, "Legal Challenges to Academic Decisions in Higher Education," College and University 60 (Winter 1975): 111.

[315]Ralph D. Mawdsley, "Plagiarism Problems in Higher Education," Journal of College and University Law 13 (Summer 1986): 77.

[316]Ibid., pp. 77-86.

[317]Robert N. Roberts, "Public University Responses to Academic Dishonesty: Disciplinary or Academic," Journal of Law and Education 15 (Fall 1986): 377.

Mandatory Withdrawals for Mental Disorders

The issue of mandatory withdrawal from a college or university on grounds of a mental disorder is the most recent major area of investigation having a direct relationship with disciplinary due process in dismissal proceedings. Also referred to as psychiatric withdrawals, these institutional policies and procedures are designed to separate students with threatening, disruptive, self-destructive behaviors from the institution, where such behavior has a diagnosed basis in some mental disorder. Withdrawal actions are taken to prevent the affected student from posing a danger to self, others, institutional property, or the orderly educational process. This action is also taken consistent with institutional recognition that many mental disorders are beyond both the scope and ability of campus health officials to properly treat. In such cases, where the student may not be willing or mentally capable of recognizing the need to leave the campus environment, the institution may resort to a mandatory withdrawal process.

A contributor to the 1978 book, The Legal Foundations of Student Personnel Services in Higher Education, projecting future legal issues in higher education, listed issues pertaining to mental health among those issues to receive greater educational and judicial attention.[318] It was predicted that court actions would be initiated by students contesting summary removals due to medical or psychological reasons.[319]

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[318]Barrie Wright, "Projections of Future Legal Issues and Developments in Higher Education," in The Legal Foundations of Student Personnel Services in Higher Education, p. 149.

[319]Ibid.

Two years later a journal article noted psychiatric separation of students from colleges as an open and unsettled area of the law not yet charted.[320] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, which prohibits discrimination against handicapped students in institutions receiving federal aid, did not present obstacles to separating a disruptive student. Also, a lack of any applicable case law was cited.[321] Recommendations for handling determinable cases of emotional or mental disturbance included combinations of disciplinary action and preventive health measures such as psychiatric separation and civil commitment for treatment. Disciplinary procedures covering disturbed behavior needed to incorporate due process while separation procedures needed policy authorization specifying conditions and methods for both voluntary and involuntary separation.[322]

Gary Pavela wrote a significant article in the early 1980's reviewing some of the court decisions and legal/educational issues surrounding misuse of mandatory psychiatric withdrawals.[323] He noted that schools often drafted psychiatric withdrawal policies that violated provisions of Section 504 of the Rehabilitation Act and often gave students little or no procedural protection against both the stigma associated with a finding of a mental disorder and misuse of such

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[320]Perry A. Zirkel and Charles T. Bargerstock, "Two Current Legal Concerns in College Student Affairs: Alcohol Consumption and Psychiatric Separation," Journal of College Student Personnel 21 (May 1980): 254.

[321]Ibid., p. 255.

[322]Ibid.

[323]Gary Pavela, "Therapeutic Paternalism and the Misuse of Mandatory Psychiatric Withdrawals on Campus," College and University Law 9 (1982-83): 101.

procedures for removal of "troublesome" or "eccentric" students.[324] He further noted that interpretations of Section 504 supported exclusion based on behavior resulting from mental disorders, but not solely because of the student's past mental health history, any assumption of disturbed behavior, or a paternalistic concern to force the seeking of treatment.[325]

Around the same time Gehring focused on several issues related to dismissal of students with mental disorders.[326] He supported the use of disciplinary procedures in treating disruptive emotional behavior, writing:

> Another response which is normally advanced is that individuals with emotional problems "disrupt" the educational process. Again, there are many students who did this but we refer to them as discipline problems and there are established procedures for dealing with them. Administrators are familiar with due process procedures for disciplinary situations. This option is certainly available for "disruptive" students if campus regulations prohibit disruptive behavior.[327]

One year later, in 1984, an article dealing with discipline of physically and emotionally handicapped students reiterated Gehring's suggestion that "no overriding reason exists to avoid use of normal disciplinary procedures, regardless of... a physical or emotional disability."[328]

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[324]Ibid., p. 103.

[325]Ibid., pp. 110-111.

[326]Donald D. Gehring, "The Dismissal of Student with Serious Emotional Problems: An Administrative Decision Model," NASPA Journal 20 (Winter 1983): 9.

[327]Ibid., p. 10.

[328]Ron Weisinger, Jane Thierfeld, and Rod Crafts, "Campus Discipline and the Handicapped Student: Accountibility with Accomodation," NASPA Journal 22 (Fall 1984): 46.

Another 1984 article considered the limitations of psychiatric withdrawal and the appropriate uses of such procedures.[329] The authors noted that a pattern of disruptive behavior needed to exist before a predictive diagnoses could be made which would warrant a psychiatric withdrawal. Also, they reiterated the need to prevent such a policy from becoming an "easy alternative to an effective disciplinary code."[330]

Pavela followed his earlier article on misuse of psychiatric withdrawal with a 1985 book which is the most comprehensive treatment of students dismissals based on mental disorders.[331] After reviewing pertinent court cases dealing with due process issues and mental disorders, Pavela suggested due process procedures which would serve both legal and educational purposes in involuntary dismissal proceedings. He included the following procedural guidelines:

1. A substantive showing that the student engaged, or threatened to engage in behavior indicating the posing of a threat to self, others, property, or lawful activities of others. Allegations of disciplinary violations should be resolved through disciplinary channels absent the student's incapacity to respond to the charges, or inability to discern the wrongfulness of the behavior in question.
2. The giving of adequate notice is required to convey the possibility of involuntary withdrawal. Emergency situations are an exception, but notice should follow as soon as possible.

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[329]Bob E. Leach and James D. Sewell, "Responding to Students with Mental Disorders; A Framework for Action," NASPA Journal 22 (Fall 1984): 37.

[330]Ibid., p. 39.

[331]Gary Pavela, The Dismissal of Students With Mental Disorders: Legal Issues, Policy Considerations and Alternative Responses, The Higher Education Administration Series (Asheville, N.C.: College Administration Publications, 1985).

3. The student should be given an opportunity to examine relevant evaluations, and discuss with campus officials in an informal proceeding. The student should be allowed assistance by family or friends and mental health professional of choice.
4. A tenured faculty member, rather than legal counsel, should appear at the proceeding to challenge and question the withdrawal recommendation, in the role of a "devil's advocate."
5. A statement of reasons should be given for any withdrawal decision.[332]

A 1986 article addressed the issue of psychiatric withdrawals from the perspective of college health professionals.[333] The author noted that misconduct, even if directly related to a physical or mental handicap, could be subject to disciplinary action, but that such action was strictly limited to the behavior, not the "mental illness" etiology.[334] The article also denounced the use of mandatory psychotherapy as a form of discipline and a condition of continued enrollment or reenrollment on a variety of grounds.[335]

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[332]Ibid., pp. 25-26.

[333]Gerald A. Amada, "Dealing with the Disruptive College Student: Some Theoretical and Practical Considerations," Journal of American College Health 34 (April 1986): 221.

[334]Ibid., p. 222.

[335]Ibid., p. 224.

Conclusion

The development of the student-institution relationship moved from the strict, Puritanical authoritarian relationship of the Colonial period, with heavy emphasis on external disciplinary control to relationships governed by contractual terms, constitutionally protected rights, and an emphasis on internal control. The advent of numerous societal forces, coupled with the Dixon decision and its successors, established a constitutional rights disciplinary relationship between the student at a tax-supported college or university and his or her institution that is all but taken for granted at present.

The Dixon decision established the applicability of the Fourteenth Amendment protection of due process when students are threatened with disciplinary suspension or dismissal from their tax-supported institutions. The decision also diminished the privilege-right distinction regarding enrollment at public colleges and universities. Dixon was the first federal court case to define minimal due process procedures in a disciplinary dismissal to include notice and hearing. Dixon was also noted, and sometimes criticized, for the limitations of its holding, including its inapplicability to private institutions issues.

The Dixon decision created great judicial and scholarly interest in a developing field of educational law. A large number of writers interpreted and defined Dixon and the court decisions which followed, both for the developers and practitioners of student discipline in

higher education. Much of the scholarly attention was devoted to further defining the due process mandate of Dixon and the Fourteenth Amendment, as well as defining those issues which were not protected or covered by the Dixon constitutional rights umbrella.

Much of the scholarly writing generated by educators has lauded the Dixon mandate for due process, while frequently cautioning against the conversion of campus disciplinary proceedings into full-blown, adversarial trials similar to criminal proceedings. The majority opinion among educational commentators favors institutions erring on the side of "reasonableness and fairness" when deciding the extent of due process procedures and rights to offer in disciplinary proceedings involving suspension or expulsion. At the same time, these authorities have consistently pointed out the differences between criminal court processes and aims, and those of colleges and universities. Few writings have suggested disciplinary proceedings are analogous to criminal courts. Basic, minimal due process has been consistently defined to include written notice of charges, some form of a hearing for the purpose of refuting the charges, the keeping of a record of the hearing, and a written report of the hearing findings. Generally accepted procedural rights for the accused student include some advisory assistance during the hearing, the right to present witnesses and testimony, the right to refute adverse testimony and evidence, and the right to speak on one's own behalf.

Other due process rights and procedures have generated significant debate, substantial support, but not universal acceptance. Part of the reason for this is a perceived lack of full judicial deference to these

issues. Points such as the right to appellate review, limited right to legal counsel, and limited right to cross-examination have strong support from legal and educational authorities, but do not have an absolute legal mandate supporting them. Other points which also have mixed support and opinions include the right to an open or closed hearing, the right to be tried separately or jointly, the right to representation by counsel, the overall composition of hearing panels, and applicable rules of evidence.

The issues involved with overlapping jurisdiction for a particular student misconduct incident have received considerable attention in disciplinary writings. Generally, the institution has been found to have the right to proceed against the student irregardless of concurrent or pending criminal action. The emphasis behind this contention is the noncriminal nature of the disciplinary proceeding. Other related issues such as the double jeopardy argument against dual proceedings, and the need to keep the two proceedings separate, have raised additional points addressed by the experts. In general, it is accepted that double jeopardy is not involved when the student is tried for the same offense by both institutional proceedings and civil or criminal court. However, the student's right against self-incrimination and the right to legal counsel have been stretched in the student's favor by some educators when concurrent charges are present.

Interim or summary suspension is a special due process situation which has received considerable attention in disciplinary writings. While most writers support an institution's right to impose interim suspension under limited circumstances involving threat to persons,

property, or the orderly, educational process, they also emphasize the limited nature of such an imposition. Many note the due process procedures attendant upon interim suspension, including a preliminary hearing where possible.

Two issues which have been linked by some with the adjudication of disciplinary misconduct are dismissals based on academic misconduct and mandatory, or psychiatric, withdrawals of students with mental disorders. Numerous writers have noted judicial acceptance that issues of academic misconduct are more amenable to judicial due process review than those of academic performance. Accordingly, the courts and the scholars have consistently supported due process protections to students facing dismissals for academic misconduct. Where the courts and the scholars have differed is in the interpretation of acts and behavior which constitute "academic misconduct." The legal and educational opinion is consistently more encompassing of such things as appearance, class attendance, and personal habits within the due process protection of academic misconduct than judicial opinion. There is general agreement between both parties that issues of academic dishonesty, which are amenable to factual determinations, are protected by due process procedures comparable with disciplinary proceedings.

The mandatory withdrawal of students with mental disorders is among the most recent significant expansions of judicial and scholarly review of due process issues in higher education. The consensus authoritative opinion that such withdrawals may be sought, but only after offering the student some procedural due process, represents an opinion supported by the few applicable court cases. Limitations have been placed on such

withdrawals to protect students from the impreciseness of mental health diagnoses and the paternalism of institutional officials.[336] General opinion suggests that students should be treated under disciplinary procedures where their actions represent violations of disciplinary rules and regulations. Limitations which may preclude such a process include the student's incapacity to respond to charges, or his or her inability to understand the wrongness of the action.

This represents the summary of the pertinent literature addressing legal and educational concerns central to the study of disciplinary procedures at tax-supported colleges and universities. The next section will examine applicable court decisions addressing these same issues and others.

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[336]Leach and Sewell, pp. 38-39.

CHAPTER III

LEGAL ASPECTS OF DISCIPLINARY DUE PROCESS PERTAINING TO SUSPENSION AND DISMISSAL

Overview

The authority for the administration of discipline was once the the exclusive domain of college and university faculty and administrators. The proliferation of court cases in the past twenty-five years clearly illuminates the judicial influence now exerted on disciplinary philosophy, procedures, and systems. The purpose of this chapter is the identification and analysis of selected court cases which involve substantial legal issues pertaining to disciplinary due process and disciplinary suspension and expulsion. The primary focus will involve the seminal Dixon case and those cases which follow Dixon.

The first cases examined are those which describe the relationship between the individual student and the institution of higher education, particularly with regard to the imposition of discipline.

The next cases examined define components of disciplinary due process related to suspension and expulsion. These component headings are:

1) Sufficiency of notice
2) Right to a hearing; adequacy of hearing and procedures
3) Composition and jurisdiction of hearing agency
4) Right to counsel
5) Failure to follow specified procedures
6) Procedures used where jurisdiction overlaps
7) Imposition of interim suspension
8) Appeals procedures

The chapter also discusses cases pertaining to two related topics. One topic is due process involving suspension and expulsion based on academic misconduct. The second topic is the mandatory (psychiatric) withdrawal of students with mental disorders.

Most cases examined were litigated in United States District Courts and Circuit Courts of Appeal. The basis for this federal jurisdiction lies largely with United States constitutional and statutory claims invoked by the litigants. A lesser number of decisions rendered by the higher state courts have been examined. Many of those decisions involve state constitutional and statutory issues.

Decisions issued by the United States Supreme Court establish legal precedence, thereby influencing judicial decisions of inferior courts. Circuit Courts of Appeal issue decisions which generally carry greater precedence than those of District Courts. State court decisions generally have precedence only within the state of their location. The limited number of applicable Supreme Court decisions focuses attention on the Circuit Court and District Court decisions which address disciplinary due process in higher education.

Despite the significance of legal precedence, cases are decided on their individual merits. Cases with several similarities may result in different decisions because of many diverse factors; therefore, caution should be exercised when drawing generalizable conclusions from an analysis of judicial findings.

Judicial Decisions Which Address the Student-Institution Relationship

The legal relationship between an institution of higher education and its students is one of flux and evolution. That relationship is

defined by educational philosophy, legal theories, and judicial decisions. D. Parker Young, speaking with regard to the student-institution relationship, noted:

> There is an unending progression of court decisions that continue to define the rights and responsibilities of both the student and the institution.[1]

A number of cases which have addressed the student-institution relationship have been linked with legal theories regarding that relationship. These cases examine the administration of and authority for student discipline within the context of the student-institution relationship. This review will examine cases within the context of significant underlying legal theories and concepts.

The few cases which upheld the standing of in loco parentis doctrine were primarily adjudicated in state courts during the last half of the nineteenth century and the first half of the twentieth century. Landers v. Seaver[2] and State ex rel. Burpee v. Burton[3] are two early cases which established the right of the teacher to stand in loco parentis in exercising discipline, according to Mills[4].

Gott v. Berea College interjected the legal concept of in loco parentis into case law defining the student-institution relationship in

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[1]D. Parker Young, The Law and the Student in Higher Education, N.O.L.P.E. Monograph Series (Athens, Ga.: Institute of Higher Education, 1976), p. 2.

[2]Landers v. Seaver, 32 Vt. 114 (1859).

[3]State ex rel. Burpee v. Burton, 45 Wisc. 150 (1878).

[4]Joseph L. Mills, The Legal Rights of College Students and Administrators, (Washington, D. C.: Lerner Law Book Publishing, 1971), p. 40.

American higher education.[5] At issue in this 1913 case was the right of a college to proscribe and enforce a rule limiting students' conduct off-campus. The court clearly upheld the college's authority to dismiss the students for violation of the regulation, stating:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.[6]

The 1924 case of John B. Stetson University v. Hunt gave further standing to the judicial concept of in loco parentis, the court noting:

> As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose...[7]

Although the 1927 case of Anthony v. Syracuse University cited the doctrine of in loco parentis[8], the key 1967 case of Goldberg v. Regents of the University of California began the judicial denial of in loco parentis as a basis for institutional power over student conduct.[9] The California Court of Appeals held that "the better approach ...recognizes that state universities should no longer stand in loco parentis in relation to their students."[10] The following year a District Court

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[5]Gott v. Berea College, 161 S.W. 204 (Ky. 1913).

[6]Ibid., p. 206.

[7]John B. Stetson University v. Hunt, 102 So. 637 (Fla. 1924).

[8]Anthony v. Syracuse University, 231 N.Y.S. 435 (1928), 223 N.Y.S. 796 (1927).

[9]Goldberg v. Regents of the University of California, 57 Cal. Rptr. 463 (1967).

[10]Ibid., p. 470.

further diminished the standing of in loco parentis in Buttney v. Smiley.[11] The court agreed with the students that "the doctrine of 'In Loco Parentis' is no longer tenable in a university community."[12]

Three other cases in 1968 also contributed to the demise of in loco parentis as a viable doctrine for institutional regulation of student conduct.[13] Noting the dawning of a new era in student-institution relationships, the District Court in Zanders v. Louisana State Board of Education observed that "the doctrine [in loco parentis] is of little use in dealing with our modern 'student rights' problems."[14] In Moore v. Student Affairs Committee of Troy State University, the court stated that "the college does not stand strictly speaking, in loco parentis to its students," thereby denying the university grounds for search and seizure based upon this doctrine.[15]

The trust theory was introduced in two cases to explain the relationship between an institution and its students. The 1901 case of Koblitz v. Western Reserve University implied a university assumed the role of a trustee to the student upon enrollment.[16] In Anthony v.

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[11]Buttney v. Smiley, 281 F. Supp. 280 (D. Colo., 1968).

[12]Ibid., p. 286.

[13]Zanders v. Louisiana State Board of Education, 281 F. Supp. 747 (W. D. La. 1968); Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M. D. Ala. 1968); Jones v. Tennessee State Board of Education, 279 F. Supp. 190 (M. D. Tenn. 1968).

[14]Zanders v. Louisiana State Board of Education, p. 756.

[15]Moore v. Student Affairs Committee of Troy State University, p. 729.

[16]Koblitz v. Western Reserve University, 21 Ohio Cir. C. R. 144, 11 Ohio C. Dec. 515 (1901).

Syracuse a dismissed student was described by the trial court as the beneficiary of a trust, according to Ratliff.[17] He noted that in both cases a trust theory was advanced only to be rejected by the court.[18]

The status theory hypothesizes that students and their colleges and universities have rights and duties inherent in the status of each, and through development by custom, tradition, and usage. Knapp has noted that status theory "gave to the university or college the power to take action, in its discretion, for disciplinary purposes, subject only to the requirement that such action not be arbitrary, or unreasonable, or an abuse of discretion."[19] In Koblitz v. Western Reserve University the court ruled for the university against a student seeking reenrollment following criminal prosecution, stating:

> Custom again, has established the rule. That rule is so uniform that it has become a rule of law; and if the plaintiff had a contract with the university, he agreed to abide by that rule of law . . .[20]

Ratliff has noted that two other cases, Anthony v. Syracuse and Tanton v. McKenney,[21] have couched the status theory in terms of "inherent" powers which belong to the institution.[22]

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[17]Richard C. Ratliff, Constitutional Rights of College Students, Metuchen, New Jersey: Scarecrow Press, Inc., 1972), p. 50.

[18]Ibid.

[19]S. R. Knapp, "The Nature of 'Procedural Due Process' as Between the University and the Student", College Counsel 3 (1968): 27.

[20]Koblitz v. Western Reserve University, p. 523.

[21]Tanton v. McKenney, 226 Mich. 245, 197 N. W. 510 (Mich. 1924).

[22]Ratliff, p. 49.

Judicial Decisions Invoking Contract Theory

Contract theory was the primary legal theory advanced in cases litigated prior to Dixon involving the imposition of discipline as a function of the student-institution relationship. In Koblitz v. Western Reserve University the court ruled that the enrollment constituted entrance into a contract which obligated the student to yield to reasonable discipline. The court stated:

> The University agrees with him that it will impart to him instructions; that it will aid him in the ordinary ways of his duties; that it will treat him fairly; that it will give him every oppotunity to improve himself; and that it will not impose upon him penalties which he in no wise merits, and that it will deal with him impartially.[23]

The 1909 case, Booker v. Grand Rapids Medical College found the court suggesting an implied contract to continued enrollment subject to the student's maintenance of good standing.[24] The court said:

> The institution in advertising, seeks students, and in extending admission makes an offer to the student, and the student by registration accepts. The student agrees to pay tuition and fees and the college agrees to provide instruction as described, and the appropriately earned degree, if the student remains in good standing academically and abides by the institution's reasonable rules and regulations.[25]

In Anthony v. Syracuse University, the court ruled that the signed registration card constituted a contract between the student and the

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[23]Koblitz v. Western Reserve University, p. 522.

[24]Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589 (Mich. 1909).

[25]Ibid., p. 591.

institution. Anthony was dismissed from the university for the apparent reason that she was not a "typical Syracuse girl."[26] The University contended that the contractual relationship allowed it to dismiss without stating cause, and the appellate court agreed, noting:

> I can discover no reason why a student may not agree to grant to the institution an option right to terminate the relation between them. The contract between an institution and a student does not differ in this respect from contracts of employment.[27]

Very few cases in the thirty-five years after Anthony involved an alleged breach of contract by either the institution or its students.[28] In the 1962 case, Carr v. St. John's University, the notion of an implied contract was advanced by the court in upholding the dismissal of students participating in a civil marriage ceremony.[29] The court held:

> When a student is duly admitted to a private university, secular or religious, there is an implied contract between the student and the university that if he complies with the terms prescribed by the university, he will obtain the degree which he sought . . .There is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit to be continued, as a member therof.[30]

Five years later, in Green v. Howard University, a District Court cited catalog provisions as the basis for a contractual arrangement between the university and its students.[31] The court upheld the

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[26]Anthony v. Syracuse University, p. 437.

[27]Ibid., p. 439.

[28]Eileen K. Jennings, " Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?", Journal of College and University Law 7 (1980-81): 194.

[29]Carr v. St. John's University, 231 N. Y. S. 2d 410, 187 N. E. 2d 18 (1962).

[30]Ibid., p. 413.

[31]Green v. Howard University, 271 F. Supp. 609 (D. D.C. 1967).

dismissal of students who participated in campus disorders, citing a catalog provision allowing the institution to "require the withdrawal of any student at any time for any reason deemed sufficient to the University."[32]

A District Court in the 1969 case, Krawez v. Stans, ruled that authorized agents of the institution could enter into a binding contract between the institution and its students.[33] Midshipmen at the United States Merchant Marine Academy were suspended after admitting to the use of marijuana on campus. Their admittance was prompted by questioners who assured them that their discussion would not be used against them. The court denied the institution the right to use the admissions as evidence in disciplinary proceedings, saying:

> As agents, the questioners were authorized to make promises to the students concerning the use of their statements. They told plaintiffs that if they spoke freely nothing they said would be used against them. Plaintiffs, by speaking freely, accepted this offer, and a contract was made. The Academy is bound by this agreement. It cannot use as evidence in disciplinary proceedings admissions made by the plaintiffs to the agents.[34]

The issue of a contractual relationship was explored and dismissed by a state court in Ryan v. Hofstra University.[35] In this case the court ordered a student reinstated after his expulsion for violation of student regulations. Although the court that "no contract was proven or

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[32]Ibid., p. 613.

[33]Krawez v. Stans, 306 F. Supp. 1230 (E. D. New York 1969).

[34]Ibid., p. 1235.

[35]Ryan v. Hofstra University, 324 N. Y. S. 2d 964 (1971).

argued by either side,"[36] it held that Hofstra was entwined with the state of New York to the degree requiring due process within its disciplinary system.

One year later a California appeals court also established a contractual relationship between a public university and its students in Andersen v. Regents of University of California.[37] A student dismissed for misconduct filed suit claiming breach of contract and a denial of due process. The court held that enrollment did constitue a contract, saying:

> While constitutional principles of due process apply to disciplinary action taken by the university, this in itself does not mean that enrollment in the university does not create a contract between student and university . . . A contract is created by the state which, by its very nature, incorporates constitutional principles of due process.[38]

In Slaughter v. Brigham Young University, the Tenth Circuit Court of Appeals reversed the trial court's decision that a rigid application of commercial contract doctrine was applicable in finding for the student's action for breach of contract arising out of his expulsion on the ground of academic dishonesty.[39]

The court noted that "some elements of the law of contracts . . . should be used in the analysis of the relationship between plaintiff

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[36]Ibid., p. 973.

[37]Andersen v. Regents of University of California, 99 Cal. Rptr. 531 (1972).

[38]Ibid., p. 535.

[39]Slaughter v. Brigham Young University, 514 F. 2d 622 (Tenth Cir.1975).

and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons." The court then stated, "The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category."[40]

Breach of contract was the basis for another suit challenging imposition of suspension on the ground of academic dishonesty in Pride v. Howard University.[41] The District of Columbia Court of Appeals ruled that Howard University's Code of Conduct did constitute part of a contract between the student and the school.

In Swanson v. Wesley College, the plaintiff brought suit charging his due process rights were violated and the institution breached its contract to provide an education when it permanently suspended him for violations of three disciplinary rules involving weapons and threats made against officials.[42] The Superior Court of Delaware held that both the college bulletin and student handbook constituted the terms of the contract and found him in breach of the contract to educate.[43]

The 1980 case, Tedeschi v. Wagner College, involved a student who was suspended from Wagner College because of disruptive social behavior.[44] The plaintiff alleged she was deprived of her due process

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[40]Ibid., p. 626.

[41]Pride v. Howard University, 384 A. 2d 31 (D. C. 1978).

[42]Swanson v. Wesley College, 402 A. 2d 401 (Del. 1979).

[43]Ibid., p. 404.

[44]Tedeschi v. Wagner College, 427 N. Y. S. 2d 760, 404 N. E. 2d 1302 (1980).

rights. The Court of Appeals of New York ordered reinstatement based on the school's failure to follow its own procedures for suspension. However, the court noted the contractual relationship between student and institution was not satisfactory in resolving this dispute.[45]

In 1981 a state court upheld the dismissal of a student based on the terms of a contract as stated in the college catalog in Aronson v. North Park College.[46] The court cited Eisele v. Ayers[47] to establish a contract was present based on the following catalog provision:

> The institution reserves the right to dismiss at any time a student who in its judgment is undesirable and whose continuation in the school is detrimental to him self or his fellow students. Such dismissal may be made without specific charge.[48]

In Napolitano v. Trustees of Princeton University, the Superior Court of New Jersey upheld Princeton University's decision to withhold a degree for a year based on a finding of plagiarism.[49] The student cited a breach of contract by the institution as grounds for reduction of the penalty, and the court observed the relationship between student and institution:

> Cannot be described either in pure contractual or associational terms. In those instances where courts have dealt with the rela-

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[45]Ibid., p. 1305.

[46]Aronson v. North Park College, 418 N. E. 2d 776 (Ill. 1981).

[47]Eisele v. Ayers, 381 N. E. 2d 21 (Ill. 1978).

[48]Aronson v. North Park College, p. 781.

[49]Napolitano v. Trustees of Princeton University, 453 A. 2d 263 N. J. 1982).

tionship of a private university to its students in contractual terms, they have warned against a rigid application of the law of contracts to students' disciplinary proceedings.[50]

The First Circuit Court of Appeals upheld the expulsion of a law student based on four incidents of misconduct in Cloud v. Trustees of Boston University.[51] The student contended that an improper disciplinary hearing was conducted constituting a violation of contractual rights.[52]

In another 1983 case, Coveney v. President & Trustees of Holy Cross College, the Supreme Court of Massachusetts upheld the dismissal of a student charged with violating student regulations.[53] The student contended that the expulsion was arbitrary and capricious, but the court rejected this assertion. The court said the plaintiff "did not have a contractual right to a hearing."[54]

The Eighth Circuit Court of Appeals upheld the expulsion of a medical student based on a charge of cheating in Corso v. Creighton University.[55] The court noted the contractual nature of the relationship between student and institution with the Student Handbook being the

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[50]Ibid., p. 272.

[51]Cloud v. Trustees of Boston University, 720 F. 2d 721 (First Cir. 1983).

[52]Ibid., p. 724.

[53]Coveney v. President and Trustees of Holy Cross College, 445 N. E. 2d 136 (Mass. 1983).

[54]Ibid., p. 140.

[55]Corso v. Creighton University, 731 F. 2d 529 (Eighth Cir. 1984).

primary source of terms governing the relationship. The court held the student "must be afforded his contractual right to such a hearing before the Committee on Student Discipline] prior to being expelled from the medical school."[56]

In Fussell v. Louisiana Business College of Monroe, Inc., the Louisiana Court of Appeals heard a breach of contract suit brought against the school by a student suspended due to her involvement in a student petition campaign.[57] The court ruled for the plaintiff and remanded the case to the trial court. The court established the student's probable claim to a breach of contract, saying:

> The only probable cause for the breach of the educational contract in this case is the requirement that 'the school may require withdrawal of any student whose attitude or conduct is not in accordance with school standards'. . . The school standards are not defined, nor was any evidence presented as to what those standards might be in the context of this litigation.[58]

A different circuit of the Court of Appeals of Louisiana heard another 1985 case involving a breach of contract suit in Simmons v. Sowela Technical Institute.[59] The student, who was suspended from a practical nursing program for violating school rules and nursing ethics, sued alleging breach of an implied contract. The court ruled that because the student paid no fees and could leave voluntarily from the

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[56]Ibid., p. 533.

[57]Fussell v. Louisiana Business College of Monroe, Inc., 478 So. 2d 652 (La. 1985).

[58]Ibid., p. 655.

[59]Simmons v. Sowela Technical Institute, 470 So. 2d 913 (La. 1985).

program, there existed no bilateral contract and no cause for action.[60]

A student who was dismissed for falsifying grade change forms filed suit alleging breach of contract in Life Chiropractic College v. Fuchs.[61] The court ruled the college did not breach its contract with the student by denying the student the right to confront and cross-examine witnesses at a hearing, stating:

> Being a private institution, the college was not, of course, constitutionally required to provide the appellee with the full panoply of due process protections which would be applicable at a state sponsored educational institution.[62]

In the 1986 case, Johnson v. Lincoln Christian College, the plaintiff brought suit against the institution charging it with a breach of its implied contract with him.[63] The school dismissed the plaintiff based on an allegation of homosexuality although he had completed all requirements for a degree. The court affirmed a number of contentions raised by the plaintiff including the existence of an implied contract. The court noted:

> The elements of a traditional contract are present in the implied contract between a college and a student attending that college, and are readily discernible. The student's tender of an application constitutes an offer to apply to the college. By 'accepting' an application to be a student at the college, the college accepts the applicant's offer. . . and upon satisfactory completion of the school's academic requirements (which constitutes performance), the school becomes obligated to isse the student a diploma.[64]

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[60]Ibid., p. 917.

[61]Life Chiropractic College v. Fuchs, 337 S. E. 2d 45 (Ga. 1985).

[62]Ibid., p. 48.

[63]Johnson v. Lincoln Christian College, 501 N. E. 1380 (Ill. 1986).

[64]Ibid., p. 1384.

Judicial Decisions Establishing A Constitutional Rights Doctrine

Dixon v. Alabama State Board of Education, decided by the Fifth Circuit Court of Appeals in 1961, represents a firm federal judicial commitment to students' right to constitutionally guaranteed due process in disciplinary proceedings involving suspension or expulsion from tax-supported colleges and universities. The preponderance of future cases involving disciplinary procedures at tax-supported colleges and universities have been built on the due process foundation set in Dixon and subsequent cases.

The six plaintiffs, former students at Alabama State College, appealed their dismissal from the college, which was based on alleged misconduct. The U. S. District Court, Middle District of Alabama, upheld the dismissal and denied a requested injunction against obstructing the plaintiffs' right to attend college.[65]

The plaintiffs, members of a group of Negro students, joined a group in a prearranged sit-in at a publically owned lunch grill. After being refused service the facility was closed and the students were asked to leave. They refused to leave, police were summoned, and the students were ordered outside the facility.

During the next two days several of the plaintiffs were involved participants of mass demonstrations. The president of the college, Dr. Trenholm, warned students, including the plaintiffs, to cease disruptive activities. The Governor of Alabama, John Patterson, asked President

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[65]Dixon v. Alabama State Board of Education, 186 F. Supp. 945 (M. D. Ala. 1960).

Trenholm and the investigative staff of the Attorney General of Alabama to investigate the students' conduct.[66]

The State Board of Education received the Governor's report and a report from President Trenholm. The Board subsequently voted unanimously to expel nine students, including the six plaintiffs. Each of the plaintiffs was officially notified of his expulsion. No formal charges were made against the students and no hearing was offered to any of them prior to their expulsion.[67]

Judge Rives, writing for the Circuit Court, held the plaintiffs were entitled to adequate notice and an opportunity for a hearing prior to expulsion for misconduct, stating:

> In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense.[68]

Having upheld the fundamental constitutional principle that due process requires both notice and hearing, the court further defined the nature of both elements required prior to dismissing a student from a tax-supported college or university. The court identified the following standards:

1) The notice should state the specific charges and the grounds which would justify expulsion.
2) The nature of the hearing should vary depending on the particular circumstances of the case.
3) A charge of misconduct is best processed in a hearing which gives the hearing authority an opportunity to hear both sides in considerable detail.

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[66]Dixon v. Alabama State Board of Education, 294 F. 2d 150, 154.

[67]Ibid.

[68]Ibid., p. 157.

4) A full-dress judicial hearing, including the right of cross-examination, is not required, but an adversarial proceeding is acceptable.
5) The accused should be given the names of adversarial witnesses and an oral or written report on the facts addressed by the witnesses.
6) The accused should be allowed to present his own defense, and to produce oral or written testimony or affidavits of witnesses on his behalf.
7) The results and findings of the hearing authority should be presented in a report open to the accused's inspection.[69]

The judgement of the District Court was reversed and the case remanded for further proceedings consistent with the Court's opinion.

One important issue addressed by the court was that of the "privilege versus right" distinction applicable to enrollment in a tax-supported university. The court noted that although the District Court said, " The right to attend a public college or university is not in and of itself a constitutional right,"[70] that distinction was not a justification for denial of due process. The court stated, "It nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process."[71] This part of the decision further built the foundation for a constitutional right to due process in disciplinary proceedings at tax-supported colleges. The court observed the right to continued enrollment was a valuable private right not easily waived by administrative regulations and provisions.[72]

This case set the precedent for the right of students at tax-

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[69]Ibid., p. 158.

[70]Dixon v. Alabama State Board of Education, 186 F. Supp. 945, 950.

[71]Dixon v. Alabama State Board of Education, 294 F. 2d 150, 156.

[72]Ibid., p. 157.

supported colleges and universities to receive fundamental due process notice and hearing prior to expulsion for misconduct. Important cases which followed addressed the constitutional rights doctrine and further defined the nature of due process required within this doctrine.

Another 1961 case emanating out of the civil rights protest movement was Knight v. State Board of Education.[73] This case featured thirteen students of Tennessee A & I University arrested in Mississippi for participation in a sit-in protest. The university discipline committee subsequently suspended them without notice or hearing. The students brought action alleging a violation of their constitutional right to due process. The District Court, in deference to the Fifth Circuit's finding in Dixon, observed:

> With respect to the type of notice and hearing to be provided, consideration should be given to the observations made by the Court of Appeals for the Fifth Circuit in the Dixon case.[74]

Two years later another District Court cited Dixon as the judicial precedent for adjudicating due process rights claims brought by students suspended or expelled from tax-supported institutions. The case Due v. Florida Agricultural and Mechanical University, like Dixon and Knight, involved students suspended for participation in civil rights demonstrations.[75] The court relied heavily on the Dixon decision in upholding the constitutional right of the students to due process, but it denied the students' claims to certain due process rights, stating:

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[73]Knight v. State Board of Education, 200 F. Supp. 174 (M. D. Tenn. 1961).

[74]Ibid., p.

[75]Due v. Florida Agricultural and Mechanical University, 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 the university disciplinary committee. . ."[76]

These cases were among the first to reiterate the federal judiciary's acceptance of Dixon's mandate for minimal constitutionally guaranteed due process rights in cases involving disciplinary suspension and expulsion from tax-supported institutions. Many of the cases which followed the early post-Dixon decisions not only embraced the constitutional rights doctrine, but further expanded and defined the procedural points of due process. Some cases, such as Esteban v. Central Missouri State College, examined and redefined a number of specific points of procedural due process.[77] Many other cases focused judicial scrutiny on a limited number of due process issues, with one point of procedure often the grounds for either the suit or the court's decision. An examination of court decisions from Dixon to the present still shows courts examining, reaffirming, and redefining legal and educational concepts of disciplinary due process.

The next section of this chapter is devoted to a review of several cases which have helped define specific components of disciplinary due process procedures. These cases are grouped into the following component headings:

1) Sufficiency of notice
2) Right to, and adequacy of disciplinary hearing
3) Composition and jurisdiction of the hearing agency
4) The right to advisement/representation by counsel

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[76]Ibid., p. 403.

[77]Esteban v. Central Missouri State College, 277 F. Supp. 649 (W. D. Mo. 1967).

5) Failure of the institution to follow specified disciplinary procedures
6) Procedures used where jurisdiction overlaps
7) Imposition of interim suspension
8) Disciplinary appeals procedures.

Sufficiency of Notice

A key procedural due process issue addressed by courts following Dixon was that of the giving of notice of charges and hearing. Early cases reaffirmed the constitutional necessity for notice to be given, and in some cases, the validity of the form of notice. Later cases involved fewer challenges to the necessity of notice, although the form of notice was still challenged.

The District Court in Knight v. State Board of Education clearly supported the need for adequate notice as required by the due process clause of the Fourteenth Amendment.[78] The court observed that without such due process, "the school authorities are not in position to exercise their discretion and judgment in a fair and reasonable manner."[79] This court was not the last to couch judicial due process doctrine in terms of "fairness and reasonableness."

In Due v. Florida Agricultural and Mechanical University, the court allowed suspensions to stand despite the students' assertion that notice was not received. The charges were read to the students when they were brought before a disciplinary committee. Judge Harrold Carswell, in upholding the notice given, wrote:

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[78]Knight v. State Board of Education, p. 180.

[79]Ibid.

> Procedures are subject to refinement and improvement in the never-ending effort to assure, not only fairness, but every semblance of fairness. More specific routines of notice and advisement may be indicated in this regard, but a foisted system of rigid procedure can become so ritualistic, dogmatic, and impractical as to itself be a denial of due process. The touchstones in this area are fairness and reasonableness.[80]

The 1967 case, Esteban v. Central Missouri State College, sometimes referred to as Esteban I, found the District Court for the Western District of Missouri considering several due process issues connected with the suspension of two students involved with demonstrations. This case preceeded the court's release of its extraordinary document on the subject of student discipline, General Order on Judicial Standards of Procedures and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education.[81]

The court examined the students' contention that inadequate notice of charges was given because the Dean of Men orally advised them concerning the disciplinary action, rather than give them written notice. The court upheld the plaintiffs' argument, and suggested that written notice of the precise charge would remedy the appearance of "uncertainty in the minds of the students as to the ground or grounds upon which the college proposed to take action."[82] The court also specified that written notice should be provided at least ten days prior to the disciplinary hearing.[83]

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[80]Due v. Florida Agricultural and Mechanical University, p. 403.

[81]45 F. R. D. 133, U. S. District Court for the Western District of Missouri (en banc), 1968.

[82]Esteban v. Central Missouri State College, p. 651.

[83]Ibid.

A District Court in Jones v. State Board of Education Of & For State of Tennessee followed or exceeded some of the Esteban provisions with the exception of ten days notice.[84] The court allowed the school's giving of notice two days in advance of the hearing, and upheld the expulsion of the students. The Sixth Circuit Court of Appeals affirmed the trial court's findings.[85]

The same court which issued the Dixon decision considered sufficiency of notice in the 1968 case, Wright v. Texas Southern University.[86] Several students at the institution were refused reentry after being charged with violations of student regulations. The disciplinary administrator was unable to give written notice because of the students' failure to notify the university of changes of address as specified by regulation, which led to the return of the notices. Other methods of giving notice were also tried without success. The Fifth Circuit Court of Appeals denied the appellants' due process claims, writing:

> It would be unreasonable to hold that a university could not take disciplinary action against students who could not be contacted although diligent attempts were made, particularly where their whereabouts were not disclosed to the University in violation of a valid regulation.[87]

The California Court of Appeal reviewed claims of denial of due

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[84]Jones v. State Board of Education Of & For State of Tennessee, 279 F. Supp. 190 (M. D. Tenn. 1968).

[85]Jones v. State Board of Education Of & For State of Tennessee, 407 F. 2d 834 (Sixth Cir. 1969).

[86]Wright v. Texas Southern University, 392 F. 2d 728 (Fifth Cir. 1968).

[87]Ibid., p. 730.

process made by a student dismissed for misconduct in Andersen v. Regents of University of California.[88] The court upheld the adequacy of the disciplinary procedures including lack of notice of charges prior to the hearing.[89]

Two students suspended by the University of Puerto Rico challenged their suspensions on several grounds in the 1974 case, Marin v. University of Puerto Rico.[90] The District Court, in upholding the plaintiffs' claims of denial of due process, noted that due process required "adequate advance notice to the student of (a) charges, (b) the specific, previously promulgated regulations under which the charges are brought, and (c) the evidence against the student."[91]

One year later the Fifth Circuit Court of Appeals again heard another case involving adequacy of notice in Jenkins v. Louisiana State Board of Education.[92] The students alleged that notice was not given regarding the specific charge of conspiracy for which they were suspended. The notice specified charges of inciting to riot, disturbing the peace and criminal damage to public property. The students' claimed that lack of specification of a "conspiracy" charge led them to be

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[88]Andersen v. Regents of University of California, 99 Cal Rptr. 531 (1972).

[89]Ibid., p. 536.

[90]Marin v. University of Puerto Rico, 377 F. Supp. 613 (D. Puerto Rico 1974).

[91]Ibid., p. 623.

[92]Jenkins v. Louisiana State Board of Education, 506 F. 2d 992 (Fifth Cir. 1975).

"tried and disciplined upon charges were not even made against them."[93] The court upheld the suspensions and found the notice given to be sufficient, stating:

> Due process in the context of this case is not to be equated with that essential to a criminal trial and the notice of charges need not be drawn with the precision of a criminal indictment. . . There is no doubt in our minds that the notice given the appellants was in sufficient detail to fairly enable them to present a defense at the Disciplinary Board hearing.[94]

The District Court for the Southern District of Texas examined several claims of denial of the due process in the 1978 case, Adibi-Sedeh v. Bee County College.[95] The plaintiffs, all Iranian students, were charged with several violations of student regulations. Notice of their hearing was given by certified letter, by copies of the letter handdelivered to many of the students, and by notices posted directing the students to seek messages at specific locations. The court found that these steps were procedurally sufficient, noting:

> Taking into account the size of the college, the several reasonable ways notice to the offenders had been given, and the reasonable assumption that the Iranian community at the school is closely knit, the Court finds all of the members of the class had fair and adequate notice of the hearing.[96]

Right to, and Adequacy of Disciplinary Hearing

The right to a disciplinary hearing, like the right to receive notice, was a procedural due process issue which was reinforced by most

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[93]Ibid., p. 999.

[94]Ibid., p. 1000.

[95]Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S. D. Texas 1978).

[96]Ibid., p. 556.

of the early decisions following the Dixon decision. Later decisions focused on specific aspects of the hearing which did or did not meet due process. Issues such as introduction of evidence, the right to cross-examine witnesses, the public or private nature of the hearing, and the record of the hearing are among the issues which were raised in suits and decided by the courts.

In Wasson v. Trowbridge, the Second Circuit of Appeals heard the case of a cadet of the Merchant Marine Academy who was dismissed for disciplinary reasons.[97] The student argued about a number of due process points in claiming a deprivation of due process. The court remanded the case to the District Court after upholding Wasson's right to challenge the hearing because of allegations of concealed evidence and the denial of a continuance requested by Wasson to obtain favorable witnesses.[98]

Esteban v. Central Missouri State College (Esteban I) was the first case to significantly expand the concept of the disciplinary hearing put forth by the Dixon court. Judge Elmo Hunter, writing for the court, set forth essential elements of due process including: 1) a hearing before the college's president; 2) the student's right to confront and cross-examine adverse witnesses; 3) the student's right to present his version as to the charge, and to offer exhibits, affidavits, and witnesses; and 4) written findings and disposition, with permission by either party to make a record of the hearing at its own expense.[99]

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[97]Wasson v. Trowbridge, 382 F. 2d 807 (Second Cir. 1967).

[98]Ibid., p. 813 .

[99]Esteban v. Central Missouri State College, 277 F. Supp. 649, p. 651.

This court expanded Dixon's mandate by allowing for cross-examination, the right to a record of the hearing, and the right to counsel.

One year later, in Buttney v. Smiley, the District Court for the District of Colorado heard a First Amendment case concerning students who were suspended for blocking access to the Placement Center of the University of Colorado to protest recruiting by the Central Intelligence Agency.[100] The court decided that university officials were not required to advise students involved in disciplinary proceedings of their right to remain silent and to be provided with counsel.[101]

The first of two 1971 cases involving the University of South Carolina, Bistrick v. University of South Carolina, was initiated by a student suspended for his involvement in the take-over of a campus building.[102] The student filed suit claiming the university denied him due process. The court cited the four requirements of fundamental fairness put forth by Professor Charles Wright in assessing the adequacy of Bistrick's disciplinary action.[103] The court noted that the university went beyond Wright's requirement for the accused to be given the names of adverse witnesses and a summary of their testimony. Adverse witnesses testified in Bistrick's presence and were subject to cross-examination by his counsel.[104] In addition, Bistrick's counsel was

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[100]Buttney v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).

[101]Ibid., p. 287.

[102]Bistrick v. University of South Carolina, 324 F. Supp. 942 (D. S. C. 1971).

[103]Wright, Charles Alan. "The Constitution on the Campus." Vanderbilt Law Review 22 (October 1969): 1072.

[104]Bistrick v. University of South Carolina, p. 951.

furnished with a full transcript of the hearing.[105] The court decided that Bistrick was given a proper due process hearing.

The same District Court heard Herman v. University of South Carolina later in 1971.[106] The court quickly noted that the facts of this case were "practically identical to those in Bistrick v. University of South Carolina."[107] The student, who was suspended for occupying the university union building, raised many of the same due process claims that were raised in Bistrick. The court, again citing Professor Wright's four safeguards, concluded that the plaintiff was not denied due process.

A California appeals court upheld the adequacy of several hearing due process issues challenged by a dismissed student one year later in Andersen v. Regents of the University of California.[108] Among those issues, the court found that "Plaintiff has cited no authority and we have found none holding that college disciplinary proceedings must be public, at least in the absence of a request by the student that the hearing be made public."[109] The court also decided the student was not injured because he wasn't told that he had the right not to testify.[110]

Another 1972 case, Paine v. Board of Regents of University of Texas System, concerned a suit brought by a student against the Board of

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[105]Ibid., p. 952.

[106]Herman v. University of South Carolina, 341 F. Supp. 226 (D. S. C. 1971).

[107]Ibid., p. 227.

[108]Andersen v. Regents of University of California, 99 Cal. Rptr. 531 (1972).

[109]Ibid., p. 537

[110]Ibid.

Regents of the University of Texas System because of his suspension, based on a rule created by the Board which mandated an automatic suspension for drug offenses.[111] The rule, which affected those who were placed on probation or convicted of the use, possession, or sale of drugs, did not allow the student to have a disciplinary hearing. The court, in finding the rule violated constitutional guarantees to due process, stated:

> The Board of Regents may not lawfully provide for the suspension or expulsion of a student in good standing upon the bare fact of his final conviction or probation for a drug or narcotic offense absent a hearing affording him the opportunity to show that despite this fact he poses not substantial threat of influencing other students to use, possess or sell other drugs or narcotics.[112]

The court pointed out that a student found guilty of murder would be accorded greater due process rights than the drug violator under this rule.[113]

The Second Circuit Court of Appeals heard suspended students claim denial of due process as a result of suspension for participating in "sleep-ins" in the 1973 case, Blanton v. State University of New York.[114] Among other claims raised was the due process right to cross-examine and confront adverse witnesses. The court noted Dixon's indication that cross-examination is not necessary, but cited Winnick v.

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[111]Paine v. Board of Regents of University of Texas System, 355 F. Supp. 199 (W. D. Texas 1972).

[112]Ibid., p. 205.

[113]Ibid., p. 206

[114]Blanton v. State University of New York, 489 F. 2d 377 (Second Cir. 1973).

Manning in observing "if a case of a substantial suspension of a state university student has resolved itself into a problem of credibility, 'cross-examination of witnesses might be essential to a fair hearing.'"[115] The court concluded that the cross-examination was not necessary in this case.

The Supreme Court of Colorado handed down a decision which further expanded the right to a hearing in the 1973 case, Watson v. Board of Regents of University of Colorado.[116] A non-student brought action against the Board of Regents of the University of Colorado because the plaintiff was denied admission to the university, after which he was denied access to the campus because he had a prior criminal record and had made threatening gestures to university personnel. He claimed that he had been denied due process because a hearing was not held prior to being denied access. The court, drawing comparisons between this case and that of a disciplinary suspension or expelsion, stated: "The same protections must be afforded non-students who may be permanently denied access to University functions and facilities.[117] A United States Military Academy cadet brought suit against his disciplinary dismissal in Brown v. Knowlton.[118] The cadet raised a number of due process claims including claims concerning his hearing.

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[115]Ibid. p. 385 citing Winnick v. Manning, 460 F. 2d 545 (Second Cir. 1972), p. 550.

[116]Watson v. Board of Regents of University of Colorado, 512 P. 2d 11162 (Colo. 1973).

[117]Ibid., p. 1165.

[118]Brown v. Knowlton, 370 F. Supp. 1119 (S. D. N. Y. 1974).

The court dismissed the cadet's argument that his hearing was not timely because of a time lapse between the offense and his hearing. The court concluded that timeliness was not an issue because the hearing was held in the same semester as the infractions.[119] The student also claimed that a failure of the Academy to produce several witnesses who were no longer present at the Academy was a due process violation. The court dismissed that claim as well as others in upholding the dismissal.[120]

The 1974 case, Marin v. University of Puerto Rico, was decided in favor of the plaintiff students on a number of grounds. The District Court offered its view of proper due process to include "A full, expedited evidentiary hearing (a) presided over by an impartial, previously uninvolved official, (b) the proceedings of which are transcribed, at which the student (c) can present evidence and (d) cross-examine opposing witnesses, (e) with the assistance of retained counsel..."[121]

The year 1975 saw the United States Supreme Court hand down a decision in Goss v. Lopez which, although not about a college or university action, did have significant standing in future disciplinary due process cases in higher education.[122]

The Court, with four Justices dissenting, affirmed the decision of the District Court for the Southern District of Ohio, upholding the

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[119]Ibid., p. 1122.

[120]Ibid.

[121]Marin v. University of Puerto Rico, p. 623.

[122]Goss v. Lopez, 95 S. Ct. 729 (1975).

denial of due process claims of public school students suspended without notice and an opportunity to be heard by school authorities. The Court stated:

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[123]

The Court spoke to the need for a process which would allow the student to avoid being subjected to unfair deprivation of his right to an education. The decision noted that "requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action."[124] The Court qualified its holding to short suspensions, not exceeding ten days, and suggested that longer suspensions or expulsions might require more formal procedures.[125]

In Nzuve v. Castleton State College, a Kenyan student dismissed because of criminal activities occuring on campus brought suit alleging several claims of denial of due process.[126] The Supreme Court of Vermont dismissed the student's claims, including the absence of "random selection" of College Court members, and noted "laudable, if not

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[123]Ibid., p. 736

[124]Ibid., p. 741.

[125]Ibid.

[126]Nzuve v. Castleton State College, 335 A 2d 321 (Vt. 1975).

mandated, provisions in the Castleton College Court procedures," including the right to a closed or open hearing, the right to remain silent, and the right to present evidence and examine witnesses.[127]

A student at a two-year community college brought suit challenging his disciplinary probation in DePrima v. Columbia-Greene Community College.[128] The student, who was charged with violations of college rules, was given a requested hearing, although his attorney was not allowed to cross-examine witnesses and the student was not allowed to confront and cross-examine witnesses and to call his own witnesses. The court remanded the matter back to the disciplinary panel to allow for cross-examination and presentation of witnesses on behalf of the student.[129]

The 1978 case, Adibi-Sadeh v. Bee County College, was the result of a suit by several plaintiffs, Iranian students, who challenged disciplinary action brought against them for disruption operations of the college.[130] One due process claim raised was that of the college's denial of the plaintiffs' attorney's request to allow cross-examination at a later separate hearing for each student. The court decided that such a request would have placed an unreasonable burden on each of the college's witnesses.[131]

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[127]Ibid., p. 324.

[128]DePrima v. Columbia-Greene Community College, 392 N. Y. S. 2d 348 (1977).

[129]Ibid., p. 350.

[130]Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S. D. Texas 1978).

[131]Ibid., p. 556.

A student suspended for one year because of charges of several disciplinary offenses alleged a violation of due process rights in Turoff v. Kibbee.[132] In this 1981 case, the District Court for the Eastern District of New York ruled on a number of contentions offered by the student. The student did not receive notice of a pre-hearing informal conference because of a mistaken mailing. He contended the absence of the pre-hearing conference constituted a due process violation. The court, disagreeing, wrote:

> The hearing procedure provides greater protection than the informal conference and is designed to lessen the change of an unjustified suspension or other disciplinary measure. This does not imply that the informal conference is a meaningless exercise. It is clearly a more expeditious and simpler means of resolving less complex cases.[133]

A student of the University of Maryland School of Pharmacy was dismissed due to disciplinary charges resulting from observed drug-induced impairment and a later guilty plea to possession of cocaine. He brought suit in District Court in Sohmer v. Kinnard, alleging several due process violations.[134] The court addressed the student's contention that certain evidence concerning his cocaine possession was inadmissable in the hearing, stating:

> Plaintiff contends that it was not proper for the Grievance Committee to admit into evidence the agreed statement of facts which he entered into the court proceedings concerning his cocaine possession... It was not improper for the Committee to rely on this agreed statement of facts as evidence of plaintiff's guilt.[135]

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[132]Turof v. Kibbee, 527 F. Supp. 880 (E. D. N. Y. 1981).

[133]Ibid., p. 885.

[134]Sohmer v. Kinnard, 535 F. Supp. 50 (D. Maryland 1982).

[135]Ibid., p. 54.

The 1986 case, Gorman v. University of Rhode Island, resulted from a suit brought by a student who claimed several violations of procedural due process arising from three separate disciplinary hearings resulting in suspension.[136] The court decided that the plaintiff was not denied due process right to cross-examination because he was not allowed to cross-examine adverse witnesses about potential sources of bias.[137] The court recognized that the courts were far from unanimous about the right of cross-examination. The court upheld the student's right to make a tape-recorded copy of the hearing at his own expense, stating:

> In sum, the interests at stake are substantial, the risk of errors in significant, and the corrective value of a verbatim record is similarly significant. Furthermore, allowing a student to tape-record the hearings imposes no burden upon the university. I therefore hold, based on this balancing test, that where no other verbatim record of the proceeding will be made available, a student threatened with a year-long disciplinary suspension from a public university has the right to tape-record the disciplinary hearings at his or own expense.[138]

The court used this finding and others in dismissing the disciplinary sanctions, and ordered the university to afford the plaintiff a de novo hearing complying with due process points decided by the court.

Composition and Jurisdiction of Hearing Agency

Several court decisions involving claims of due process violations by tax-supported colleges and universities have addressed issues concerning the composition and jurisdiction of the hearing agency which

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[136]Gorman v. University of Rhode Island, 646 F. Supp. 799 (D. R. I. 1986).

[137]Ibid., p. 807.

[138]Ibid., p. 808.

adjudicated the campus disciplinary process. Courts have issued opinions on matters such as bias among hearing board members, the proper judicial venue for a disciplinary action, and the appointment of special disciplinary panels.

The Fifth Circuit Court of Appeals in Dixon indicated that the appellees "should be given the opportunity to present to the Board, or at least to an administrative official of the college..."[139]

The composition of a hearing panel was a significant due process point examined by the Second Circuit Court of Appeals in Wasson v. Trowbridge. The student, dismissed based on an accumulation of excessive demerits, claimed that members of a panel which awarded him demerits had participated in the investigation against him, resulting in a biased panel. The court decided that "Wasson was entitled to show that members of the panel had had such prior contact with his case that they could be presumed to have been biased."[140] The case was remanded to the District Court for a hearing on due process issues addressed by the Circuit Court.

The District Court in Esteban I noted that the issue of the hearing agency was a key point favoring the plaintiff's denial of due process claim. The court, addressing the point, wrote:

> ...As the Court views the matter, the critical defect in the hearing procedure used by the college was the fact that the person to whom the students were permitted to make their explanation or showing... was only one of a number of persons on the board which made the recommendation of suspension. It is imperative that the students charged be given an opportunity to present their version

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[139]Dixon v. Alabama State Board of Education, p. 159.

[140]Wasson v. Trowbridge, p. 813.

of the case and to make such showing as they desire to the person or group of persons who have the authorized responsibility of determining the facts of the case and the nature of action, if any, to be taken.[141]

The court directed the president of the college to conduct the hearing granted the plaintiffs by the court.[142]

The District Court for the District of South Carolina denied the assertion of the suspended student that he was denied fair and impartial hearing in the 1971 case, Herman v. University of South Carolina. The plaintiff's claim rested on the fact that Special Committee (hearing committee) members were also members of the Board of Trustees, the appeals authority which later heard his appeal. The court cited three appellate decisions which held that a "combination of investigative and judicial functions within an agency does not violate due process..."[143] The court also decided against Herman by declaring the Special Committee established by the Board was a permissable hearing body, even though normal disciplinary procedures required a hearing before a disciplinary committee.[144]

One year later the Third Circuit Court of Appeals heard a procedural due process claim raised by the appellees regarding the hearing body in Sill v. Pennsylvania State University.[145] The university's board of trustees appointed a group of private citizens to serve as

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[141]Esteban v. Central Missouri State College, p. 651.

[142]Ibid.

[143]Herman v. University of South Carolina, p. 233.

[144]Ibid.

[145]Sill v. Pennsylvania State University, 462 F. 2d 463 (Third Cir. 1972).

a fact-finding panel, and to hear charges and make recommendations to the president concerning students subject to disciplinary action. The students claimed that failure to assign their case to the established faculty-administrator-student judicial board constituted a denial of due process. The court pointed out the fluid nature of due process, and sided with the university, stating:

> The appointment of the special disciplinary panel for the purpose of making factual findings and disciplinary recommendations to the president was a reasonable exercise of the power vested in the board of trustees and did not offend the appellants' constitutional rights to procedural due process.[146]

Winnick v. Manning, decided in 1972 by the Second Circuit Court of Appeals, revolved around the appellee's claim of denial of due process based on the assigned hearing official.[147] The student was suspended for disrupting class activities. Because the Student Conduct Committee had disolved at the end of the academic period, a hearing was conducted by the Associate Dean of Students. The student alleged bias because the Associate Dean's department initiated the formal disciplinary proceedings. The court denied the student's allegation, writing:

> It may well be that having an administrator as the sole judge in student disciplinary proceedings is undesirable. In fact, the University's regulations recognize that a tribunal composed of students and faculty is preferable. Nevertheless, the mere fact that the decisionmaker in a disciplinary hearing is also an administrative officer of the University does not in itself violate the dictates of due process.[148]

In Blanton v. State University of New York, students who participated in "sleep-ins" were suspended after disciplinary proceedings.

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[146]Ibid., p. 470.

[147]Winnick v. Manning, 460 F. 2d 545 (Second Cir. 1972).

[148]Ibid., p. 549.

The students claimed that the inclusion of the Dean of Student Life in their hearing as a "non-voting coordinator" created impartiality because the Dean had participated in the "sleep-in" confrontation. The court upheld the university's procedure, pointing out that "in any event, the students were given a full opportunity to present their case to a decision maker with no previous involvement in the incident, President MacVittie."[149]

Prior involvement of a disciplinary board's members with a disciplinary matter was a due process issue in the 1974 case, Brown v. Knowlton. The members of the initial disciplinary board were also members of a second board which again heard the case. The plaintiff claimed that membership on both boards constituted bias. The court, rejecting plaintiff's argument, wrote:

> The only prior contact which members of the panel have been shown to have had with the plaintiff's case is the previous hearing. There is not even an allegation that any member of the panel initiated or investigated any charges against the plaintiff. Thus there can be no presumption of bias.[150]

Students suspended because of disciplinary charges while attending Grambling University, brought suit in the Fifth Circuit Court of Appeals, alleging a number of due process violations in Jenkins v. Louisiana State Board of Education. Among other grounds, the students claimed the Hearing Board appointed by the president was not an impartial tribunal. The Court noted that "mere speculation and tenuous inferences" were not enough upon which to allege prejudice in a hearing

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[149]Blanton v. State University of New York, p. 368.

[150]Brown v. Knowlton, p. 1121.

body, and dismissed the appellants' claim.[151]

Marshall v. Maguire, a 1980 case, was brought into court by a student expelled from The State University of New York at Old Westbury.[152] The student, who had his hearing before the Judicial Council and his appeal before the Judicial Review Committee, claimed a violation of due process because the Associate Dean of the College served on both councils, in violation of the student code of conduct. The court found "the presence of the Associate Dean on the Judicial Council... so taints the proceedings of the Council as to require that they be undertaken anew."[153]

In Sohmer v. Kinnard, the District Court for the District of Maryland heard a student of the University of Maryland School of Pharmacy claim the due process right to be given a hearing before the ultimate disciplinary authority. He was given a hearing before the Student Grievance and Disciplinary Committee, which recommended suspension to the Faculty Assembly. The Faculty Assembly voted to dismiss the student instead. The court denied the student's right to have his hearing before the Faculty Assembly, noting that other cases had not established such a right.[154]

In Gorman v. University of Rhode Island, a student bought suit alleging several violations of due process concerning his suspension

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[151]Jenkins v. Louisiana State Board of Education, p. 1003.

[152]Marshall v. Maguire, 424 N. Y. S. 2d 89 (1980).

[153]Ibid., p. 92.

[154]Sohmer v. Kinnard, p. 54.

from the University of Rhode Island. The student, who was heard by three different hearing boards, claimed that the Acting Director of Student Life, in his capacity as advisor to the University Board of Conduct, was not an impartial member of each hearing proceeding. The court, in an extensive review, agreed with the plaintiff, writing:

> ...The evidence offered by the plaintiff on the issue of impartiality necessitates two findings, either of which alone rises to the level of a due process violation: first, that the defendant Ronald Weisinger[advisor]as an agent of the defendant University, exerted such influence over the various hearing boards as to compromise their necessary independence; and second, that the cumulative likelihood of bias on the part of hearing board members rendered the proceedings insufficiently impartial.[155]

The court instructed the University to "take all necessary steps to structure the hearing procedures in a way that preserves the independence and impartiality of the hearing boards."[156]

Right to Advisement/Representation by Counsel

The Fifth Circuit Court of Appeals did not address the due process right to receive, advise, or be represented by counsel during disciplinary proceedings in its Dixon decision. The absence of such a decision opened the door for a number of different courts to ponder the right to and limitations of participation of legal counsel in disciplinary proceedings in higher education. The findings of these courts do not reveal the strong consensus that follows the right to notice and hearing.

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[155]Gorman v. University of Rhode Island, p. 813.

[156]Ibid., p. 816.

Wasson v. Trowbridge was among the earliest of cases brought before the Second Circuit Court of Appeals concerning disciplinary due process at military service academies. In this 1967 case the court addressed a number of due process questions, and remanded the case to the District Court. One issue addressed by the court was Wasson's right to representation to counsel at his hearings. The court observed, "The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing."[157] The court cited the non-criminal, non-adversarial nature of the hearing and the school's lack of counsel among other aspects mitigating the need for counsel.[158]

In Esteban v. Central Missouri State College, the District Court accorded the plaintiffs the right to have counsel present at the hearing to advise them.[159] The court then limited questioning of adverse witnesses to the plaintiffs, not their attorney.[160]

The 1968 case, Barker v. Hardway, resulted from the suspension of students who participated in racial demonstrations at Bluefield State College.[161] Six of the suspended students refused to participate in an appeal hearing because the college denied them representation by legal counsel. They brought suit contending a denial of due process rights. The court disagreed, Judge Christie stating: "I have been cited to no decision by the Supreme Court or any other court expressly extending the

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[157]Wasson v. Trowbridge, p. 812.

[158]Ibid.

[159]Esteban v. Central Missouri State College, p. 651.

[160]Ibid.

[161]Barker v. Hardway, 283 F. Supp. 228 (S. D. W. V. 1968).

right of counsel to a student at a school disciplinary hearing."[162]

Students disciplined for occupying administration offices and buildings at Southern University brought suit in the District Court for the Easter District of Louisiana claiming a right to counsel, in the 1969 case, French v. Bashful.[163] The school allowed the case to be prosecuted by a senior law student who later practiced law. The students were denied representation by their attorneys. The court decided the special circumstances of the case required the permitting of representation of the students by their retained counsel.[164] The court went on to state that the holding was limited to retained counsel (as in this case), not appointed counsel. The school did not have to pay for counsel for the students.[165]

In Andersen v. Regents of University of California, the state Appeals Court upheld the adequacy of several due process procedures instituted by the university during a disciplinary dismissal action. The student claimed denial of due process because he was not informed of his right to counsel prior to his hearing. The court dismissed his argument, noting:

> Plaintiff at the beginning of the hearing was advised of his right to counsel and between hearings was urged to get counsel. He was not injured because he was not so instructed prior to the hearing.[166]

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[162]Ibid., p. 237.

[163]French v. Bashful, 303 F. Supp. 1333 (E. E. La. 1969).

[164]Ibid., p. 1338.

[165]Ibid.

[166]Andersen v. Regents of University of California, p. 537.

The 1972 case, Hagopian v. Knowlton, found the Second Circuit Court of Appeals considering the due process claims of a cadet dismissed from the United States Military Academy.[167] The cadet, dismissed because of excessive demerits, claimed several due process rights were denied him. The court upheld his right to a hearing, but denied his claim to a right to representation by counsel, noting "the importance of informality in the proceeding militates against a requirement that the cadet be accorded the right to representation by counsel..."[168]

Two students suspended for disruptive behavior at El Centro Junior College in Texas brought action in District Court in Haynes v. Dallas County Junior College District.[169] The students, whose request for representation by counsel at their hearing was denied, claimed such denial violated their due process rights. The court cited Dixon's findings in refusing to extend basic due process rights including representation by counsel.[170]

The District Court for the District of Puerto Rico indicated a number of necessary due process procedures applicable to disciplinary hearings in its decision in the 1974 case, Marin v. University of Puerto Rico. One distinctive point rendered by the court was its requirement that counsel retained by the students be allowed to assist with presen-

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[167]Hagopian v. Knowlton, 470 F. 2d 201 (Second Cir. 1972).

[168]Ibid., p. 211.

[169]Haynes v. Dallas County Junior College District, 386 F. Supp 208 (N. D. Tex. 1974).

[170]Ibid., p. 212.

tation of evidence and cross-examination "if his or her attendance does not unduly delay the hearing."[171]

In Nzuve v. Castleton State College, the Supreme Court of Vermont considered the appellee's claim of deprivation of due process concerning his disciplinary hearing. Among the points raised was deprivation of counsel. The court noted the student's right to have an advisor, who could be legal counsel, present at the hearing.[172] The court dismissed this claim and lauded the College for its procedures.

The First Circuit Court of Appeals heard a claim of violation of due process involving a disciplinary procedure at the University of Rhode Island in the 1978 case, Gabrilowitz v. Newman.[173] The court upheld the District Court's decision in finding an unconstitutional deprivation of due process. The student was forced to decide whether to testify or not at a campus hearing pending criminal action for the same incident, without benefit of counsel. The court supported the student's need for legal counsel, stating, "Only a lawyer is competent to cope with the demands of an adversary proceeding held against the backdrop of a pending criminal case involving the same set of facts."[174] The court went on to define a limited role for counsel:

> Counsel would be present only to safeguard appellee's rights at the criminal proceeding, not to affect the outcome of the disciplinary hearing. Counsel's principal functions would be to advise appellee whether he should answer questions and what he should not say so as

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[171]Marin v. University of Puerto Rico, p. 624.

[172]Nzuve v. Castleton State College, p. 324.

[173]Gabrilowitz v. Newman, 582 F. 2d 100 (First Cir. 1978).

[174]Ibid., p. 106.

> to safeguard appellee from self-incrimination; and to observe the proceeding first-hand so as to be better prepared to deal with attempts to introduce evidence from the hearing at a later criminal proceeding. To fulfill these functions, counsel need speak to no one but appellee. Counsel should, however, be available to consult with appellee at all stages of the hearing, especially while appellee is being questioned.[175]

In Turoff v. Kibbee, the District Court upheld the due process procedures used by Brooklyn College in its suspension of a student for disciplinary reasons. The court dismissed the student's claim of deprivation of due process based on the college's denial of representation of the student by his attorney. The court noted that the attorney was allowed to be present and to advise the student during the hearing, and that such involvement was adequate.[176]

The 1982 case, Kolesa v. Lehman, was brought by a scholarship student in the Naval Reserve Officers Training Corps (NROTC) at the University of Rochester.[177] The student alleged a denial of due process in the disciplinary proceedings which led to his disenrollment from the NROTC program. Specifically, he claimed the right to representation by legal counsel at his hearing. The court cited Wasson v. Trowbridge and Hagopian v. Knowlton, two decisions rendered by the Second Circuit Court of Appeals concerning due process procedures at military academies. It held that the non-criminal, essentially investigative nature of the hearing, coupled with the absence of counsel on the part of the government and the individual's ability to "develop the facts adequately," did

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[175]Ibid.

[176]Turof v. Kibbee, p. 886.

[177]Kolesa v. Lehman, 534 F. Supp. 590 (N. D. N. Y. 1982).

not necessitate the student's representation by counsel.[178]

A statutory claim to right to representation by legal counsel in a disciplinary proceeding was upheld by a state court in the 1982 case, Kusnir v. Leach.[179] The court, reviewing the Pennsylvania Administrative Agency Law, declared Clarion State College to be an agency of the Commonwealth. As such, the provision of the law allowing the student to be represented by counsel before the agency, was applicable.[180] Although this case was not decided on constitutional grounds, it points out the need for institutions to review applicable state administrative laws which may affect disciplinary procedures.

In Sohmer v. Kinnard, the District Court dismissed the plaintiff's claim to right of representation by counsel in a disciplinary dismissal proceeding. The court observed that some cases found representation by counsel to be an element of due process, but it chose to side with Dixon and Herman v. University of South Carolina in ommitting representation by counsel as a due process right.[181]

A student brought suit against Ferris State College alleging a number of due process violations incurred during disciplinary proceedings, in Hart v. Ferris State College.[182] The plaintiff, who was allowed to consult with counsel, claimed that denial of counsel's right

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[178]Ibid., p. 593.

[179]Kusnir v. Leach, 439 A. 2d 223 (Penn. 1982).

[180]Ibid., p. 227.

[181]Sohmer v. Kinnard, p. 54.

[182]Hart v. Ferris State College, 557 F. Supp. 1379 (W. D. Mich. 1983).

to cross-examine was a due process violation. The court, in an extensive discussion, spoke of the conflicting decisions on the matter. However, the court dismissed the student's claim, noting "the probable value of the additional procedural safeguard of allowing plaintiff's counsel to conduct cross-examination is rather minimal where plaintiff is allowed to question witnesses herself and to consult with counsel.[183]

The District Court for the District of Massachusetts agreed with the plaintiff's claim to a right to consult with counsel in a disciplinary proceeding, in McLaughlin v. Massachusetts Maritime Academy.[184] The student, charged with a criminal offense both on and off the campus, alleged a violation of due process since he was denied civilian counsel at a second hearing. The court, citing similarities between this case and the circumstances of Gabrilowitz v. Newman, found for the plaintiff, declaring, "The plaintiff will probably succeed in his claim that the disciplinary proceeding, as it has been held to date, without plaintiff having the right to a lawyer of his own choice with whom to consult and advise, deprived plaintiff of due process of law."[185]

The 1983 case, Henson v. Honor Committee of University of Virginia, was brought before the Fourth Circuit Court of Appeals by a student alleging denial of due process because experienced legal counsel was not allowed to represent him at a disciplinary hearing.[186] The student was

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[183]Ibid., p. 183.

[184]McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983).

[185]Ibid., p. 812.

[186]Henson v. Honor Committee of University of Virginia, 719 F. 2d 69 (Fourth Cir. 1983).

allowed to have two student-lawyers represent him at no cost as well as a practicing attorney to assist, although the attorney could not take an active role in the proceeding. The court found these procedures to be "constitutionally valid."[187]

The right to assistance by counsel in a disciplinary proceeding was a point raised by the plaintiff in Gorman v. University of Rhode Island. The plaintiff's request for assistance by a personally retained attorney was denied by the university. The court upheld this denial, citing several federal court decisions which denied a right to counsel. The court noted that judicial acceptance of the right to counsel required a determination of overlapping criminal charges, not an issue in this case.[188]

Failure to Follow Specified Procedures

A few legal challenges to the disciplinary procedures of colleges and universities have focused on the institution's failure to follow its own specified procedures. Some courts have found this failure to be a serious flaw in the proceeding, while other courts have allowed some deviation from standard disciplinary procedures, noting the United States Supreme Court's finding of flexibility in due process.[189]

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[187] Ibid., p. 74

[188] Gorman v. University of Rhode Island, p. 806.

[189] see Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U. S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961)., Mathews v. Eldridge, 424 U. S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

The 1971 case, Bistrick v. University of South Carolina, allowed the District Court for the District of South Carolina to hear a number of due process complaints lodged by the plaintiff following a suspension proceeding. Plaintiff argued that the establishment of a special committee by the board of trustees was contrary to standard disciplinary policy, a violation of due process. The court disagreed, finding the plaintiff was afforded due process by the special committee hearing and a later appeal to the entire board.[190]

In Sill v. Pennsylvania State University, the Third Circuit Court of Appeals heard the appellees object to the appointment of a special disciplinary panel which heard their disciplinary case instead of the established campus judicial board. They claimed this deviation constituted a violation of due process. The court disagreed, stating, "...nor is the procedure required to afford due process of law of a fixed and invariable character; the requirements of due process frequently vary with the type of proceeding involved."[191]

The appellee in Winnick v. Manning, a 1972 case, claimed several violations of due process concerning his suspension from the University of Connecticut. He claimed the university failed to follow its own procedure in allowing the Associate Dean of Students to conduct the hearing rather than the Student Conduct Committee, which had disbanded at the end of the academic year. The court quickly dismissed this claim, writing:

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[190]Bistrick v. University of South Carolina, p. 952.

[191]Sill v. Pennsylvania State University, p. 469.

> Winnick contends that the University's failure to follow its own procedural guidelines deprived him of his right to due process. However, we are not inclined to hold that every deviation from a university's regulations constitutes a deprivation of due process. Here the alleged deprivations did not rise to constitutional proportions and did not constitute in themselves a denial of due process. Furthermore, the alleged deviations were minor ones and did not affect the fundamental fairness of the hearing.[192]

A student suspended from Northwest Missouri State University for disciplinary reasons alleged a violation of due process in the 1975 case, Edwards v. Board of Regents of Northwest Missouri State University.[193] Specifically, the plaintiff charged that a second hearing, conducted by the Board of Regents after a formal hearing was held by the Student-Faculty Discipline Committee, was a deviation of institutional regulations, and constituted a due process violation. The first hearing resulted in a unanimous vote for all charges to be dropped. The second hearing considered charges of the first hearing along with new charges.

The District Court for the Western District of Missouri decided against the student and upheld the suspension. The decision stated, "several courts have upheld dismissal or suspension of students where the educational institution followed a procedure which, while contrary to its regulations, comported with the requirements of due process."[194] The court went on to point out the need to change inadequate or ineffective rules, and the need for administrators and students to follow those that stand.[195]

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[192]Winnick v. Manning, p. 550.

[193]Edwards v. Board of Regents of Northwest Missouri State University, 397 F. Supp. 882 (W. D. Mo. 1975).

[194]Ibid., p. 830.

[195]Ibid., p. 831.

A student suspended by the president of the university brought action in District Court alleging a denial of due process in Escobar v. State University of New York/College at Old Westbury.[196] The student was given a disciplinary hearing before a judicial committee which recommended several sanctions, but did not suspend the student. The president reviewed the proceedings of the hearing and independently suspended the student. The student claimed the president's independent action was contrary to established procedures and constituted a violation of due process. The District Court agreed, stating:

> But where, as here, an offending student has been formally charged under the college's disciplinary code, has been subjected to a hearing, has been officially sentenced, and has commenced compliance with that sentence, it is a denial of due process of law for the chief administrative officer to step in, conduct his own in camera review of the student's record, and impose a different punishment without complying with any of the procedures which have been formally established for the college.[197]

The State University of New York at Old Westbury was involved with a 1980 case, Marshall v. Maguire, where a student expelled after a disciplinary proceeding charged a violation of due process. Specifically, the student charged that failure to comply with the code of conduct led the Associate Dean to serve on both the fact finding committee and the review council (appeal body), a due process violation. The state court agreed with the student, noting that, although "not every deviation from the university's regulations necessarily constitutes a deprivation of due process," in this case, it did.[198]

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[196]Escobar v. State University of New York/College at Old Westbury, 427 F. Supp. 850 (E. D. N. Y. 1977).

[197]Ibid., p. 858.

[198]Marshall v. Maguire, 424 N. Y. S. 2d 89 (1980).

Suspension was vacated and a new hearing was ordered according to code. The District Court for the Eastern District of New York considered a denial of due process claim involving a deviation from disciplinary procedures in the 1981 case, Turof v. Kibbee. The student, who was suspended for physical assaults, inadvertently did not receive a pre-hearing conference as specified in the trustees' bylaws. He was given a hearing which the court found to be satisfactory. The student claimed the lack of a mandated pre-hearing conference constituted a violation of due process. The court noted that any defects resulting from the lack of a conference were "cured by the full disciplinary hearing."[199]

Procedures Used Where Jurisdiction Overlaps

College and university disciplinary proceedings have often arisen over incidents, both on and off the campus, which have also led to criminal and civil proceedings. Students have brought action in court over issues such as the timing of one proceeding with regard to the other, and the question of "double jeopardy" where two different proceedings adjudicate the same incident. The courts have been relatively consistent in determining that educational institutions' disciplinary proceedings do not constitute an unconstitutional "double jeopardy" action where court action is also comtemplated or occuring simultaneously. Likewise, the courts have been hesitant to link disciplinary and criminal proceedings to a degree that limits most actions taken by the college or university.

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[199]Turoff v. Kibbee, p. 885.

Students at San Mateo College suspended for acts during campus demonstrations were later charged with criminal violations. They asked the District Court to postpone college expulsion hearings until after completion of the criminal trials, in the 1969 case, Furutani v. Ewigleben.[200] The students claimed their testimony in the expulsion proceedings might jeopardize their rights against self-incrimination in the criminal trials if such testimony were used in the trials. The court decided against the students, stating: "College authorities should be free to enforce fair and reasonable disciplinary regulations necessary to the orderly functioning of the educational institution."[201]

In the 1975 case, Nzuve v. Castleton State College, a student charged with criminal burglary, attempted rape, and simple assault argued that testimony from a campus disciplinary hearing held prior to the criminal trial would "prematurely disclose his defenses" in the trial. The court disagreed and separated the two proceedings, writing:

> Educational institutions have both a need and a right to formulate their own standards and to enforce them; such enforcement is only coincidentally related to criminal charges and the defense against them[202]

The court noted that offering the injunction sought by plaintiff would allow him to complete his education and effectively complete an "end run" subverting the disciplinary proceeding.[203]

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[200]Furutani v. Ewigleben, 297 F. Supp. 1163 (N. D. Cal. 1969).

[201]Ibid., p. 1165.

[202]Nzuve v. Castleton State College, p. 325.

[203]Ibid.

The First Circuit Court of Appeals, in Gabrilowitz v. Newman, decided that criminal and disciplinary proceedings arising from the same incident were not unrelated.[204] As a result, the court ruled that criminal proceedings against the student necessitated his due process right to be represented by retained counsel during the disciplinary hearing. The court clearly linked the two proceedings in upholding the student's request for representation by counsel.

In the 1983 case, Hart v. Ferris State College, a District Court heard the plaintiff claim the college's failure to delay disciplinary proceedings until the resolution fo criminal proceedings regarding a drug arrest constituted a violation of due process. The court, citing Furutani v. Ewigleben, Nzuve v. Castleton State College, and Gabrilowitz v. Newman as leading cases on the subject, ruled against the plaintiff and denied the request for an injunction against the disciplinary proceeding.[205]

The District Court in McLaughlin v. Massachusetts Maritime Academy heard a case similar in fact to Gabrilowitz v. Newman. The student, charged with both disciplinary and criminal violations, requested the right to have counsel advise him at his disciplinary hearing. The school refused, conducted the hearing, and dismissed the student. The student claimed a denial of due process, and the court agreed, granting an injunction against dismissal. The court declared "the necessity that expulsion proceedings, at least in those instances in which they arise

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[204]Gabrilowitz v. Newman, p. 102.

[205]Hart v. Ferris State College, p. 1385.

out of the same facts involved in criminal proceedings...comport with the requirements of the Due Process Clause."[206]

Imposition of Interim Suspension

The imposition of an interim suspension has been at the center of some due process court challenges to disciplinary actions at colleges and universities. Often the legal challenge focuses on the lack of opportunity for the student to present arguments against an interim suspension. Courts have been most tolerant of the imposition of interim suspension when there is evident need to remove the student from campus, and where possible, the student is offered a preliminary hearing prior to imposition of the suspension.

In the 1968 case, Marzette v. McPhee, students at Wisconsin State University-Oshkosh suspended for damaging university facilities brought suit challenging their interim suspension.[207] The students, upon suspension, were given ten days to request a disciplinary hearing. Those who did not request a hearing waived that right and were to be expelled automatically. The students claimed that due process required a hearing prior to the imposition of the suspension. The court agreed, with Judge Doyle writing:

> I find that the plaintiffs and the members of their class (that is, the suspended students) will be irreperably harmed by any significant extension of their present suspension... I find that this suspension has been imposed, and has been continued to the present, without due process of law.[208]

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[206] McLaughlin v. Massachusetts Maritime Academy, p. 813.

[207] Marzette v. McPhee, 294 F. Supp. 562 (W. D. Wisc. 1968).

[208] Ibid., p. 569.

One year later, the same court again grappled with a due process claim involving interim suspension imposed by the University of Wisconsin in Stricklin v. Regents of University of Wisconsin.[209] The District Court for the Western District of Wisconsin heard the denial of due process allegations of students suspended by the Board of Regents without notice or hearing after being identified as participants in violent campus disorders. The students claimed that lack of a hearing was unreasonable and violative of their due process rights. The court agreed, noting that "unless the element of danger to persons or property is present, suspension should not occur without specification of charges, notice of hearing, and hearing."[210] The court spoke to the importance of procedural due process in interim suspensions, stating:

> The right of a student in a public university to procedural due process with respect to interim suspensions is by its very nature shortlived. But the significance of the right is not diminished by its inherent brevity. It must be vindicated when, as here, the case demands it.[211]

The same District Court for the Western District of Wisconsin heard another challenge to an interim suspension in the 1970 case, Buck v. Carter.[212] The plaintiffs, suspended temporarily for allegedly invading a fraternity house and physically assaulting occupants and destroying furnishing, alleged a number of due process violations regarding the imposition of the interim suspension. The court noted that the school offered a preliminary hearing for the plaintiffs, at which they did not

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[209] Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 (W. D. Wisc. 1969).

[210] Ibid., p. 420.

[211] Ibid., p. 422.

[212] Buck v. Carter, 308 F. Supp. 1246 (W. D. Wis. 1970).

deny being present during the incident or offer any explanation for their presence.[213] Upon these circumstances the court declined to find the school in violation of procedural due process. A student suspended without hearing for allegedly carrying a firearm on campus, in violation of campus regulations, brought suit against the University of Kansas in Gardenhire v. Chalmers.[214] The court upheld the university's right to impose the immediate suspension, but held that notice and hearing should be commenced within five to fifteen days of the initiation of suspension.[215] Such a hearing would allow the student opportunity to show cause to lift the suspension or not make it permanent.

In Braxton v. Municipal Court, a 1973 case, individuals brought action as a result of their involvement in campus demonstrations at San Francisco State College.[216] Specifically, they challenged a state statute authorizing the temporary removal of students or non-students from campus prior to notice and hearing in order to "...provide a swift remedy, by means of exclusion from the campus, of those students who commit overt acts of violence or otherwise engage in illegal conduct which disrupts 'the orderly operation of such camus.'"[217] The court upheld the statute, but pointed out that issuance of an exclusion order without a hearing necessitated a post-exclusion hearing no later than

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[213]Ibid., p. 1250.

[214]Gardenhire v. Chalmers, 326 F. Supp. 1200 (D. Kansas 1971).

[215]Ibid., p. 1205.

[216]Braxton v. Municipal Court, 109 Cal. Rptr. 897 (1973).

[217]Ibid., p. 900.

seven days following a request by the excluded party.[218]

Marin v. University of Puerto Rico was instituted by plaintiffs challenging numerous procedural actions of the University during disciplinary action taken against them. The students, who were summarily suspended, challenged this action. The court, while noting the permissibility of temporary suspension in advance of a full hearing, found no factors justifying the imposition of summary suspension in this case.[219] The court spelled out essentials of the preliminary hearing, including the provision of charges, specific regulations underlying the charges, the issue for decision (the summary suspension), and the right to a prompt, full hearing.[220]

The United States Supreme Court's decision in Goss v. Lopez gave future courts direction in judging the due process nature of interim suspensions. This 1975 case, involving public high school students suspended temporarily without hearing due to charges of misconduct, was cited often by courts deciding similar issues involving colleges and universities.

The court determined that plaintiffs were denied due process resulting from a lack of a hearing prior to or shortly after the imposition of the suspension. The decision stated requirements of due process in connection with suspensions of 10 days or less, including oral or written notice of charges, an explanation of evidence and an

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[218]Ibid.

[219]Marin v. University of Puerto Rico, p. 624.

[220]Ibid.

opportunity for the student to present his or her side.[221] The court also addressed the timliness of the hearing, writing:

> There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred...Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from the school...Students whose presence poses a continuing danger to persons or property or an ongoing threat of disruption of the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practival...[222]

In Wallace v. Florida A & M University, a pharmacy student summarily expelled after adjudication of guilt for possession of cocaine, challenged his summary expulsion.[223] The student, dismissed in accordance with a state administrative rule allowing for summary dismissal based on certain types of convictions, challenged the action because it was initiated prior to the date that a court order set aside for the adjudication of guilt. The student claimed that expulsion prior to this date was unjustified. The court disagreed, pointing out that he was summarily suspended prior to the time that his conviction was set aside. This occurence made the administration rule applicable. Beyond that, the court found Florida A & M "warranted in taking this summary action and removing Wallace from the premises of the institution."[224] Since the administrative rule provided for suspension, not expulsion, the university's action was so modified.

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[221]Goss v. Lopez, p. 740.

[222]Ibid.

[223]Wallace v. Florida A & M University, 433 So. 2d 600 (Fla. 1983).

[224]Ibid., p. 602.

Appeals Procedures

Due process claims involving institutional appeals procedures have been raised by students in a number of cases. Some cases already examined regarding a failure to follow specified procedures involved student appeals of disciplinary proceedings. A few cases have examined the adequacy of the appeal process.

The 1973 case, Becker v. Oswald, was brought in District Court by a student dismissed from Pennsylvania State University due to a drug arrest.[225] The student was given a hearing, but he chose not to appeal the hearing decision through disciplinary procedures. Instead, he filed suit in federal court claiming a denial of due process. The court dismissed the action, finding a lack of proof that the university's appeal procedures were inadequate.[226]

In Blanton v. State University of New York, the Second Circuit Court of Appeals heard allegations of denial of due process from students suspended for disciplinary reasons. The students, given a disciplinary hearing, failed to take the opportunity to appeal the hearing decision to the university president. The university raised the argument that appellees should be barred from raising due process claims because of failure to exhause administrative procedures. The court, while unwilling to prohibit such action, noted, "At minimum, such failure to appeal can be taken as one of the factors to be weighed in

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[225]Becker v. Oswald, 360 F. Supp. 1131 (M. D. Pa. 1973).

[226]Ibid., p. 1134.

determining whether these plaintiffs were deprived of any of their constitutional rights."[227]

The State University of New York at Old Westbury's disciplinary appeals process was contested in the 1980 case, Marshall v. Maguire. The student, expelled after a disciplinary hearing for an alleged rape, unsuccessfully appealed the decision. He brought action in state court challenging the dual membership of an administrator on both the hearing and appeals bodies, a violation of campus rules. The university claimed that because the student didn't raise the issue during his final appeal to the university president he waived the right to challenge the issue in court. The court found for the student on both points and ordered a new hearing.[228]

The 1986 case, Gorman v. University of Rhode Island, was decided in favor of the plaintiff on a number of grounds. One issue raised was the adequacy of the appeals process. The court declared the process flawed, noting the lack of a record of the hearing denied plaintiff adequate protection before the Appeals Board.[229] The only record of the disciplinary proceedings presented to the Appeals Board consisted of notes prepared by an administrator who appeared before the Board as an advocate for the hearing decisions. The court found this partisan role to be at odds with the right to an impartial hearing.[230]

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[227]Blanton v. State University of New York, p. 384.

[228]Marshall v. Maguire, p. 91.

[229]Gorman v. University of Rhode Island, p. 809.

[230]Ibid., p. 810.

Cases Involving Academic Misconduct

State and federal courts have decided numerous cases brought by college and university students challenging suspension and dismissal from their institutions because of academic reasons. A significant number of cases were brought to court challenging suspensions or dismissals based on unsatisfactory academic performance. The Supreme Court issued a landmark decision regarding such suspension and dismissal actions in the 1978 case, Board of Curators of University of Missouri v. Horowitz.[231]

Other cases involving suspensions and expulsions based on charges of academic misconduct such as cheating and plagiarism have been litigated in the same courts. These courts have often differentiated between suspensions and dismissals based on deficient academic performance and alleged academic misconduct. Courts have sometimes been asked to define indicators which constitute academic performance as opposed to non-performance factors in academic suspension and dismissal proceedings.

A review of pertinent court cases reveals judicial deference to the Supreme Court's decision in Board of Curators of University of Missouri v. Horowitz regarding academic deficiency dismissals rendered. The case review also shows judicial delineation between issues of academic performance and academic misconduct. Much of the case law has drawn similarities between dismissals and suspensions based on disciplinary violations and charges of academic misconduct. Accordingly, courts have suggested proceedings involving suspension or expulsion based on

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[231]Board of Curators of University of Missouri v. Horowitz, 435 U. S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

academic misconduct should draw upon some due process procedures mandated in disciplinary actions.

A 1966 case, Woody v. Burns, was brought by a student challenging his denial of reenrollment in the College of Architecture and Fine Arts at the University of Florida.[232] The student, whose application for late registration was denied by both a faculty committee and the university without notice or hearing, challenged the action. The court, finding this action tantamount to expulsion, considered it a decision based solely on misconduct, and thus subject to due process considerations comparable to those set forth in Due v. Florida Agricultural and Mechanical University.[233] The court found for the student.

In Brookins v. Bonnell, a nursing student challenged his mandatory withdrawal from the nursing program at a Pennsylvania community college.[234] The student claimed a due process right to a hearing to answer charges that he did not submit a medical exam or transcript of previous work, and that he did not attend classes regularly. The institution claimed the withdrawal was based on academic requirements which did not necessitate a due process hearing. The court disagreed with the school, observing that "final determination of the disputed, or at least unclear facts, cries out for a fair and impartial hearing."[235]

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[232]Woody v. Burns, 188 So. 2d 56 (Fla. 1966).

[233]Ibid., p. 58.

[234]Brookins v. Bonnell, 362 F. Supp. 379 (E. D. Pa. 1973).

[235]Ibid., p. 383.

In the 1974 case, McDonald v. Board of Trustees of University of Illinois, the District Court heard action brought by students expelled from the University of Illinois College of Medicine on charges of cheating.[236] The students were given notice and hearing before the College of Medicine Committee on Student Discipline, where they were represented by counsel. They challenged the finding claiming denial of due process because the finding was not based on substantial evidence. The court disagreed, and noted that presence of an adequate due process proceeding led to findings that were supported by the evidence.[237]

In Garshman v. The Pennsylvania State University, a District Court heard the suit of a first year medical student facing possible dismissal based on alleged academic dishonesty.[238] The university procedures included a hearing at which the plaintiff could be assisted by an advisor from the university faculty, staff, or student body. The advisor was allowed to assist in the hearing proceedings and preparation of appeals.

The student challenged the university judicial process claiming a denial of due process right to be represented by legal counsel. The court dismissed the student's claim and found the university's procedures satisfactory, writing:

> In the face of the extensive procedural safeguards afforded to Garshman by the University with respect to the charges against him,

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[236]McDonald v. Board of Trustees of University of Illinois, 375 F. Supp. 95 (N. D. Ill. 1974).

[237]Ibid., p. 104.

[238]Garshman v. The Pennsylvania State University, 395 F. Supp. 912 (M. D. Pa. 1975).

> the Court cannot accept the proposition that the one factor - exclusion of counsel at the hearing - renders the University's procedure susceptible to unreasonable, arbitrary, or capricious termination decisions.[239]

The Seventh Circuit Court of Appeals decided a case involving university action based on alleged plagiarism in the 1976 case, Hill v. Trustees of Indiana University.[240] A graduate student receiving failing grades from a professor based on alleged plagiarism challenged the action. The institutional action was postponed pending a Code of Conduct proceeding. Subsequently, the student decided not to reenroll before the proceeding was initiated. He filed suit claiming the receipt of failing grades absent a prior hearing violated procedural due process. The court disagreed, observing that efforts on the university's part to stay any consequences of the charges pending a proceeding set forth in the Code of Conduct constituted adequate due process protection.[241]

A medical student dismissed from the University of MissouriKansas City Medical School for academic deficiencies brought suit challenging the dismissal in Horowitz v. Board of Curators of University of Missouri.[242] The Eighth Circuit Court of Appeals reversed the District Court's upholding of the dismissal, finding the dismissal "effected without the hearing required by the fourteenth amendment."[243]

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[239]Ibid., p. 921.

[240]Hill v. Trustees of Indiana University, 537 F. 2d 248 (Seventh Cir. 1976).

[241]Ibid., p. 252.

[242]Horowitz v. Board of Curators of University of Missouri, 538 F. 2d 1317 (Eighth Cir. 1976).

[243]Ibid., p. 1321.

The United States Supreme Court, in Board of Curators of University of Missouri v. Horowitz, granted certiorari to consider "what procedures must be accorded to a student at a state educational institution whose dismissal may constitute a deprivation of 'liberty' or 'property' within the meaning of the Fourteenth Amendment." The Court sidestepped the claim raised by Horowitz that dismissal deprived her of a "liberty" interest in continued enrollment protected by Fourteenth Amendment due process.[244] Rather, the Court responded that, assuming a liberty or property interest, Horowitz was offered "at least as much due process as the Fourteenth Amendment requires."[245] The Court cited several cases which held that academic dismissals did not require formal hearings to be conducted.[246]

The Court also differentiated between disciplinary proceedings and the procedures suited for academic evaluations, writing:

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement... Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing.[247]

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[244]Board of Curators of University of Missouri v. Horowitz, p. 952.

[245]Ibid.

[246]Ibid., p. 954.

[247]Ibid., p. 955.

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[244]Board of Curators of University of Missouri v. Horowitz, p. 952.

[245]Ibid.

[246]Ibid., p. 954.

[247]Ibid., p. 955.

What the court did not undertake was a definition of the specified dismissal issues which are better suited to be adjudicated in disciplinary procedural processes.

A former veterinary student challenged her dismissal from the Ohio State University College of Veterinary Medicine on grounds of alleged honor code violations in the 1980 case, Bleicker v. Board of Trustees of Ohio State University, Etc..[248] The student, accused of deliberately altering an examination, was dismissed after two hearings. The student challenged the action claiming a denial of due process because she did not receive written notice of the hearing dates, was not told that she could request written records of either hearing and the findings, and was not told she could inspect physical evidence prior to the hearings.

The court, while advising the school to "adopt the additional procedures as a matter of routine," decided these procedures "would have contributed little toward reducing the risk of error in plaintiff's case."[249] The court noted the plaintiff's opportunity to twice confront and question accusers, examine the physical evidence, and offer her version of the incident.[250] The court found this process to offer acceptable procedural protections.

In the 1983 case, Lightsey v. King, the District Court for the Eastern District of New York heard the case of a student challenging a cheating charge which resulted in a course failure and ineligibility for

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[248]Bleicker v. Board of Trustees of Ohio State University, Etc., 485 F. Supp. 1381 (S. D. Ohio 1980).

[249]Ibid., p. 1388.

[250]Ibid.

a Coast Guard licensing exam.[251] The student, who was found to be not guilty after an honor board hearing, was refused a change in the failing grade by both his instructor and the Merchant Marine Academy administration. The student alleged a due process violation resulting from the institution's refusal to change the failing grade.

The court found the Academy's failure to honor its own judicial procedures to be a violation of the plaintiff's due process rights. The court noted, "The procedural requirements of due process presuppose that the results of those required procedures will be respected... There is no difference between failing to provide a due process hearing and providing one but ignoring the outcome."[252] The court also criticized the Academy for claiming the issue was one of discretionary grading rather than one of student discipline.[253]

The Fourth Circuit Court of Appeals addressed alleged due process violations pertaining to sanctions imposed resulting from a cheating charge in Jones v. Board of Governors of University of North Carolina.[254] The student was not given formal notice of the disciplinary hearing until the hearing date, and the notice contained no information concerning the specifics of the charge, the nature of adverse evidence, and the identity of her accusers. In addition, the Dean of the Nursing School appeared at the hearing and took an active prosecutorial role. No record of the hearing was made.

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[251]Lightsey v. King, 567 F. Supp. 645 (E. D. N. Y. 1983).

[252]Ibid., p. 649.

[253]Ibid., p. 648.

[254]Jones v. Board of Governors of University of North Carolina, 704 F. 2d 713 (Fourth Cir. 1983).

The Student Court found her guilty and imposed a failing grade and disciplinary probation. The student appealed to the Chancellor for a new hearing before the Chancellor's Hearing Panel, which exonerated her. Subsequently, the College of Nursing urged the Chancellor to find the student guilty. After reviewing the matter at the request of the Chancellor, the Vice-Chancellor for Academic Affairs found her guilty and restored the sanctions.

The student brought action stating a due process claim based on the university's arbitrary disregard for the Hearing Panel's findings. The student's claim was also based on the school's violation of rules which allowed only the accused to appeal a decision. The Circuit Court upheld the District Court's finding for the student. The court observed that "to the extent a state's procedures directly embody fundamental guarantees grounded in the due process clause, a significant departure from those procedures would as well violate the underlying constitutionally based guarantees."[255] The court ordered the student reinstated until a formal hearing was held to hear the merits of the case.

Another academic dishonesty case brought into Circuit Court, Hall v. Medical College of Ohio at Toledo, required the Sixth Circuit Court of Appeals to determine the due process right to counsel in a hearing.[256] The student was given notice and hearing, in which he was allowed to present witnesses, cross-examine adverse witnesses, and present testimony. He was offered a transcript of the hearing, given a

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[255]Ibid., p. 717.

[256]Hall v. Medical College of Ohio at Toledo, 742 F. 2d 299 (Sixth Cir. 1984).

copy of the hearing report, and allowed to appeal the decision. He was found guilty and dismissed. He brought suit alleging a due process violation occurred when the school denied the right to have his attorney present at the hearing. The court disagreed, writing:

> However, just because his expulsion from a state medical school on grounds of academic dishonesty may implicate a liberty interest protected by constitutional due process guarantees, this does not mean that Hall was necessarily entitled to all the incidents of a full-blown judicial trial. We can find no case authority to "clearly establish" that he had the right to counsel in such a hearing..."[257]

Another 1984 case, Jaska v. Regents of University of Michigan, was brought by a student suspended for alleged cheating.[258] The student was given a hearing after which he was found guilty. He admitted to cheating in correspondence to an appeal board, which reduced his penalty. He then brought action claiming denial of due process based on several points such as the right to a transcript of the hearing, the right to confront an anonymous accuser, and the right to be accompanied by a representative at the hearing. The court dismissed his claim, noting that "a school disciplinary hearing is not a criminal trial and that a student accused of cheating is not entitled to all of the procedural safeguards afforded criminal defendants."[259]

In the 1984 case, University of Houston v. Sabeti, the Court of Appeals of Texas heard a student bring action challenging an expulsion

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[257]Ibid., p. 1250.

[258]Jaska v. Regents of University of Michigan, 597 F. Supp. 1245 (E. D. Mich. 1984).

[259]Ibid., p. 1250.

for alleged plagiarism.[260] The student challenged the denial of his counsel's right to address the hearing proceedings. The university was not represented by counsel. The lower court found for the student and the university appealed.

The appeals court reversed the decision, finding the student had no constitutional right to representation by counsel at the hearing. The court, citing Wasson v. Trowbridge,[261] did not find factors present in the case which supported the right to representation by counsel: the case was non-criminal in nature; the university was not represented by counsel; the student had the maturity and ability to develop a defense; and other aspects of the hearing were fair.[262]

In the case, Patterson v. Hunt, three dental students at the University of Tennessee Center for Health Sciences who were suspended for alleged cheating brought suit charging violations of due process.[263] Specifically, they alleged they were improperly denied the right to present witnesses because they were separated during the proceedings. They also claimed the school failed to notify them of their right to counsel. These and other claims were rejected by the court, which wrote:

> The plaintiffs complain of the secret proceedings of the honor council, the inability to confront witnesses, the lack of the administrative board hearing, and in sum, the miscarriage of justice in denial by UT to grant them a trial. We have carefully

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[260]University of Houston v. Sabeti, 676 S. W. 2d 685 (Tex. 1984).

[261]Wasson v. Trowbridge, p. 812.

[262]University of Houston v. Sabeti, p. 689.

[263]Patterson v. Hunt, 682 S. W. 2d 508 (Tenn. 1984).

> reviewed the record and find that plaintiffs have not attempted in any way to refute the clear facts of the situation, i.e., they violated the Honor Code.[264]

Two students suspended from the Auburn University College of Veterinary Medicine due to alleged academic dishonesty challenged several of the university's due process procedures in Nash v. Auburn University.[265] Specifically, they argued that notice was given only thirty hours before the hearing, allowing inadequate time to prepare. The court, noting the plaintiff's agreement with the schedule at an earlier conference, quickly dismissed the argument.[266] The court denied the students' claim to right to pre-hearing notice of the evidence as well as the right to cross-examine.[267] The court also dismissed claims of denial of a meaningful appeal, noting the right to an appeal was a "non-existent right."[268] The court denied the claim of right to representation by legal counsel at the hearing as well.[269]

Mandatory (Psychiatric) Withdrawal of Students with Mental Disorders

One of the recent significant developments in the study of due process procedures applicable to suspension/dismissal proceedings is that of mandatory withdrawal of students diagnosed as having mental disorders who have committed disruptive actions. The literature focusing

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[264] Ibid., p. 516.

[265] Nash v. Auburn University, 621 F. Supp. 948 (M. D. Ala. 1985).

[266] Ibid., p. 954.

[267] Ibid., p. 955.

[268] Ibid., p. 957.

[269] Ibid., p. 958.

on this issue, while primarily written in the 1980's, is more extensive than applicable court decisions. This area of educational law is limited, but in a state of development which should be manifested in increased litigation.

The basis for judicial review of psychiatric withdrawal cases are varied. The Rehabilitation Act of 1973, state laws, and Fourteenth Amendment protections have been cited as applicable to specific psychiatric withdrawal situations. Section 504 of the Rehabilitation Act of 1973 has been applied to at least one related case in finding that a candidate rejected for admission to a psychiatric residency program had been discriminated against because of his multiple sclerosis and presumed "emotionally instability" resulting from the handicap.[270] In this case, Pushkin v. Regents of the University of Colorado, the Tenth Circuit Court of Appeals found university interview process which denied Pushkin admission to the program did so based upon "a mistaken, restrictive belief as to the limitations of handicapped persons."[271] Pavela has noted that this case supports the need for institutions to carefully review the behavior of a student suffering from a mental disorder before initiating a mandatory psychiatric withdrawal.[272]

The 1980 case, Evans v. West Virginia Board of Regents, resulted from a medical student's suit challenging a failure to be reinstated as

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[270]Pushkin v. Regents of the University of Colorado, 658 F. 2d 1372 (Tenth Cir. 1981).

[271]Ibid., p. 1385.

[272]Gary Pavela, The Dismissal of Students With Mental Disorders: Legal Issues, Policy Considerations and Alternative Responses (Asheville, N.C.: College Administration Publications, 1985), p. 9.

a student at the West Virginia School of Osteopathic Medicine.[273] The student, who had taken an approved medical leave based on a physical condition and resulting mental anguish, was denied reinstatement without a hearing. The court, finding a Fourteenth Amendment right to due process, ordered the school to reinstate the student immediately, with any subsequent termination action to afford due process including: notice of reasons for program termination; time to prepare a defense against the charges, the opportunity to have retained counsel at a hearing; the right to confront accusers and present evidence on his own behalf; an unbiased hearing panel; and an adequate record of the proceedings.[274] Underscoring this case was the school's perception that the student's physical and mental condition impaired his academic ability, even though he was otherwise qualified as a student in good standing. The court noted that nothing in the record of the student indicated "unfitness or inability to complete the remainder of his education."[275]

The 1982 case, Patton v. State Board of Higher Education, was brought to court by a medical student challenging his placement on mandatory medical leave by the University of Oregon.[276] This leave was instituted after reports of disruptive behavior were reported to the

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[273]Evans v. West Virginia Board of Regents, 271 S. E. 2d 778 (W. V. 1980).

[274]Ibid., p. 781.

[275]Ibid., p. 780.

[276]Patton v. State Board of Higher Education, 651 P. 2d 169 (Ore. 1982).

university. The student challenged the mandatory leave claiming the right to a contested hearing, which had been denied repeatedly by the university. The court found for the student under Oregon Administrative Regulations, which require a contested hearing to be held. The court examined those procedures offered the student, and concluded that "although the procedure followed afforded petitioner some protections of a contested case hearing, significant statuatory requirements were not met" including failure of the notice to state charges and cite specific rules involved.[277] The court remanded the case to the university for comtemplation of a contested case hearing.

Conclusions

The review of pertinent federal and state cases reveals numerous issues litigated regarding the proceedings by which tax-supported colleges and universities suspend or expel students for disciplinary reasons. Underlying these procedural decisions are other judicial decisions which have defined the disciplinary relationship between the student and institution. The great majority of the reviewed cases reveal consistency regarding many procedural due process issues, although numerous expansions of basic due process rights have resulted in a variety of judicial opinions about such expansions.

Federal courts since the 1961 Dixon decisions have consistently applied the Fourteenth Amendment right to due process in disciplinary suspension and expulsion proceedings at tax-supported institutions. These decisions have created a recognized student-institution discipline

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[277] Ibid., p. 171.

relationship that rests on constitutional rights. Other legal theories of the disciplinary relationship, except contract theory, have been given minimal or no judicial attention.

Contract theory has been widely applied by federal and state courts as the governing doctrine for the disciplinary relationship between the student and the private college or university. Courts have been reluctant to apply constitutional due process guidelines in private school disciplinary actions because of a lack of finding of necessary "state action" in such proceedings. Contract theory has been applied to other aspects of the student-institution relationship at tax-supported institutions.

The Dixon court and most of its successors found notice and hearing to be an integral component of minimal due process in discipline actions. Written notice is a standard due process procedure defined by the courts, as is the right to a hearing before an impartial hearing body. The right of the accused student to present witnesses, testimony, and evidence at the hearing has been well established. The right of the student to be present and to receive or make some record of the proceeding is also a due process right with firm judicial standing. The right to cross-examine adverse witnesses, while not upheld in several cases, also has substantial backing in a number of other cases, particularly where issues of credibility are raised.

The right to be assisted by counsel of choice has been established by courts in most cases. Less clear is an absolute right to representation by counsel in the disciplinary hearing. As one standard for this right, courts have occasionally linked the right to

representation where the student faces concurrent or pending criminal action. Where schools have chosen to be represented by counsel, courts have balanced that action with the student's right to similar representation.

Courts have fluctuated in their decisions concerning dual involvement by institutional authorities in both the enforcement and adjudication of the disciplinary case. Likewise, there is judicial uncertainty over the appropriateness of due involvement with both the initial hearing and any subsequent appeals. In general, courts have ruled against schools where such overlapping involvement by school officials results in bias to the proceeding.

An institution's failure to follow its own established disciplinary procedures is one due process claim that courts have often upheld in favor of the student. Courts most often find for the school in cases where the deviation was minimal, or where an appeals process rectified the error. Otherwise, the courts have found significant departures from normal disciplinary procedures to be a due process violation.

Courts have consistently held that college and university disciplinary actions are independent of concurrent or pending civil or criminal action for the same incident. Courts do not require institutions to await the outcome of judicial proceedings before taking disciplinary action. Because disciplinary actions are not criminal in nature, but rather educational processes, the concurrent execution of both disciplinary and legal charges does not impose unconstitutional double jeopardy. Courts have extended, in some cases, the right to counsel in disciplinary proceedings where the student also faces serious charges for the same incident.

Courts have consistently given educational authorities judicial permission to impose interim suspensions based on the nature of the incident and its affect on the health and safety of individuals (including the accused), institutional property, and the orderly educational process. With equal consistency the courts have required schools to offer suspended students the right to a preliminary hearing to challenge the imposition of interim suspension. The courts have repeatedly admonished school officials to offer both preliminary and later formal hearings within a reasonable period of time. These decisions follow the mandate of several cases, including Goss v. Lopez, a leading Supreme Court statement on student discipline and interim suspension.

Courts adjudicating disciplinary proceedings have generally upheld a student's right to an impartial appeals process, if such a process is prescribed. The issue of a constitutional right to an internal appeal has not been conclusively decided. Where an appeal process is offered, courts have been reluctant to step in and enjoin the institution from imposing its disciplinary sanctions where the accused student has not availed himself or herself of the institutional appellate review process. Courts have reviewed the composition of appeals bodies to determine if overlapping involvement by members in other phases of the proceedings have rendered them biased or partial to the guilt of the accused. A finding of bias generally has resulted in a finding for the student.

Issues involving academic suspensions and dismissals have been the subject of numerous court decisions, particularly in more recent years.

The distinction between academic and disciplinary dismissals and contingent procedures has been observed by most courts since the 1978 Horowitz decision of the Supreme Court. Courts which have found challenged dismissal decisions resulting from academic misconduct, specifically academic dishonesty, have consistently applied due process procedures in reviewing these cases. Cases involving academic dishonesty have been considered to be amenable to factual determinations consistent with disciplinary proceedings.

The limited case law involving mandatory withdrawals of students with mental disorders suggests that certain procedures are applicable to such proceedings, consistent with federal law, state statutes, and constitutional due process protections. Minimal due process procedures addressed include notice, hearing, and some right to advisory assistance.

CHAPTER IV

AN ANALYSIS OF DISCIPLINARY PROCEDURES AND POLICIES AT MAJOR TAX-SUPPORTED COLLEGES AND UNIVERSITIES IN SOUTH CAROLINA

Overview

Colleges and universities derive their authority from acts of legislation, institutional charters, bylaws, and other sources. The authority to regulate student conduct and administer discipline is generally a function delegated to administrators and disciplinary agencies by individual institutional boards of trustees. The result of individual institutional governance and delegation of this authority are disciplinary policies and procedures which have common foundations in legal and educational thought, but which vary according to the philosophy, experiences, and perceived needs of the school

This stage of the study is designed to report and analyze specific disciplinary procedures and policies at each of the eleven four-year, tax-supported colleges and universities in South Carolina. In addition, institutional practices regarding related issues of the adjudication of academic misconduct and mandatory withdrawal of students with mental disorders are also reported and reviewed.

Methodology

Information concerning disciplinary procedures and policies for each institution was collected through distribution and collection of a survey instrument. The survey and a cover letter were sent to each institution's chief student affairs officer. That person was asked to

direct the survey to the appropriate primary administrator of campus discipline. Five of the surveys were completed by chief student affairs administrators and six were completed by other members of the student affairs staffs. Self-addressed, stamped envelopes were included to facilitate return of completed surveys. The survey form also requested additional support materials (i.e. student handbooks, disciplinary documents) to be returned with the completed surveys.

The survey instrument contains thirty items, twenty-three with multiple responses and seven requiring a YES or NO response. The respondents were asked to indicate all applicable responses to each multiple response item. Respondents were directed to write a N/A (Not Applicable) beside those items not applicable to their institutions' policies or procedures. Respondents were also directed to place question marks beside items with unclear meanings. Those unclear responses were clarified in follow-up telephone conversations with the respondent.

Survey items are grouped under seven topical heading suggested by the review of literature and analysis of pertinent court cases. These headings are listed in order of progression within the survey:

1. Prehearing Communications, Investigation, and Conference
2. Elements and Procedures of the Formal Disciplinary Hearing
3. Appeal Procedures
4. Interim Suspension
5. Overlapping Jurisdiction
6. Academic Misconduct
7. Mandatory (Psychiatric) Withdrawal of Student With Mental Disorders

The remaining portion of this chapter reports the survey data collected from each institution. The data is depicted in Tables 1-7, arranged by topical heading, and described in accompanying narrative. Following the narrative is an analysis of the survey findings with regard to conclusions about due process reached in earlier chapters reviewing authoritative literature and applicable court decisions. The survey and cover letter are included in the Appendix section of this study.

Prehearing Communications, Investigation and Conference

Findings

Six separate items pertaining to initial disciplinary activities following report of disciplinary misconduct are included in the instrument. Items 1-6 include: giving of notice; prehearing communications; and prehearing investigations and conference. Table 1 indicates responses given for these items.

Item 1 indicates each institution provides students with judicial polices and procedures regarding institutional discipline. Eight of eleven respondents provided copies of supporting documents with completed surveys. Some of these documents were clearly oriented toward student readers while a couple were internal administrative statements of policy and procedures.

Item 2 indicates each school provides the accused student with written notice of charges where suspension or expulsion may be imposed. The corresponding item (3) indicates the presence of various elements contained within the written notice. Six respondent schools provide

TABLE 1

PREHEARING COMMUNICATIONS, INVESTIGATION AND CONFERENCE

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
1. Institution provides printed document containing judicial policy and procedures											
Yes = Y No = N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
2. Written notice is provided to accused student when facing possible suspension or expulsion											
Yes = Y No = N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
3. Elements contained in written notice:											
a. Specific facts, evidence related to charges		a	a		a	a			a		a
b. Citation to regulation	b	b	b	b	b	b	b	b	b	b	b
c. Prehearing conference information		c			c	c	c	c	c	c	c
d. Formal hearing information (time and place)		d	d	d		d	d	d			d
e. Formal hearing information (format and procedures)		e	e			e	e	e			e
f. Copies of related documents		f									f
g. Other: _____								g*			
4. Methods for conveying notice of charges to accused student:											
a. Sent by unregistered mail		a		a					a		a
b. Sent by registered or certified mail			b		b	b	b	b	b	b	
c. Hand-delivered to residence	c			c							
d. Hand-delivered to another location			d		d		d	d			
e. Other: _____								e*			

* Comments, where appropriate, are described in narrative.

TABLE 1

PREHEARING COMMUNICATIONS, INVESTIGATION AND CONFERENCE

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
5. Information conveyed orally as well as in writing											
Yes = Y No = N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
6. Frequency of occurrence of following elements in pre-hearing conference											
A = Always G = Generally N = Seldom or Never											
a. Student allowed to plead innocent or guilty	A	A	A	A	A	A	G	A	A	A	A
b. Student pleading guilty given applicable sanctions	A	A	A	A	A	A	A	A	G	A	A
c. Accused student offered opportunity to request formal hearing	A	A	A	A	A	A	N	A	A	A	A
d. Student allowed to review all pertinent documents	A	A	A	G	G	A	A	A	A	A	A
e. Student given explanation of hearing rights/procedures	A	A	A	A	A	A	A	A	A	A	A
f. Student given explanation of possible sanctions	N	A	A	A	A	A	A	G	A	G	G
g. Student allowed to offer testimony regarding incident	A	A	A	A	A	A	A	A	A	G	A

specific facts and evidence related to charges against the student. All eleven provide a specific citation to the regulation(s) allegedly violated. Although all eleven schools offer a form of a prehearing conference (Item 6), only eight include information about the conference in the notice. Since all but one of the schools communicates orally with the student (Item 5) in addition to the written notice, it is likely that prehearing conference information is communicated orally. All schools offer the accused a formal disciplinary hearing, but only seven schools provide information about the hearing time and place in the formal notice, while six schools describe the hearing format and procedures. Two institutions, Clemson University and Winthrop College, include copies of related documents such as incident reports, witness statements, and arrest reports in the written notice.

The methods used for transmitting the written notice are indicated in Item 4 of the table. Six schools use more than one method of providing written notice. The most popular method for delivering notice, used by seven respondents, is through registered or certified mail. Four schools send written notice through unregistered mail, with Clemson and Winthrop using this means exclusively. Two schools hand-deliver notice to the student's address of residence, while three other schools deliver notice to a location other than residence. Notice is sometimes provided to the student during the prehearing conference at USC-Columbia, where oral communications precede official written notice.

Prehearing conference activities are reported in Item 6. Respondents provided information concerning the frequency of occurrence of the following conference activities: a) student allowed to plead to charges;

b) student given sanctions after admitting guilt; c) student allowed to request hearing; d) student allowed to review pertinent documents; e) student given explanation of hearing rights/procedures; f) student given explanation of possible sanctions; and g) student allowed to offer personal account of incident. All eleven respondents indicated that most of these activities always occur during the conference, with a few exceptions in which the activities generally occur. Three schools generally give the accused student an explanation of applicable sanctions but The Citadel reports it seldom or never provides this explanation. This was the only conference activity any respondent reported as seldom or never being included in the prehearing conference.

Analysis

All eleven schools provide students with descriptive documents concerning disciplinary policies and procedures as required by consensus judicial and authoritative opinion. Likewise, each school provides written notice which meets minimal due process standards recognized by courts and educators. Educational opinion suggests that written notice should include a statement of facts related to the alleged violation of of regulations and logistical information about a formal hearing. Five schools omit the statement of facts and four schools do not provide hearing information. It is likely that courts would uphold the adequacy of those schools' notices provided the omitted information was either communicated in oral notice or during the prehearing conference. Clemson and Winthrop exceed accepted judicial definitions for written notice by including copies of related documents with the notice. Some influential commentators have found inclusion of such documents to be an

appropriate, reasonable component of written notice, even if not legally required. The majority of schools provide two methods of delivery of notice, a practice compatible with judicial and scholarly opinion. Clemson and Winthrop, with their reliance only upon unregistered mail, take a small risk that notice will not be assured of reaching the student or being returned to the sender. This is probably not an adequate process given the potential consequences of such failure, and the minimal cost of other, more reliable alternatives.

Most court decisions and scholarly writings have declined to define the parameters and components of the prehearing conference or meeting. Despite that, the practice is common in the exercise of discipline, not only at these schools but also at many others. The literature does suggest that students have a right to review pertinent documents related to the incident, and each of the eleven schools provides this opportunity during the prehearing conference. Each school also uses the prehearing conference to review applicable hearing rights and procedures with the accused student. In this respect, the conference meets the needs and rights of the accused which have generally been extended by courts and informed commentators.

Elements and Procedures of the Formal Disciplinary Hearing

Findings

Table 2 charts responses to nine items (7-15) regarding aspects of the formal disciplinary hearing prescribed by disciplinary policy. Item 7 reveals that all eleven institutions offer a formal hearing, while the remaining items reveal differences concerning aspects such as the designated hearing authority, the frequency with which certain due

TABLE 2

ELEMENTS AND PROCEDURES OF THE FORMAL DISCIPLINARY HEARING

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
7. Accused allowed to request a hearing to determine guilt or innocence, or applicable sanction where faced with suspension or expulsion Yes = Y No = N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
8. Designation of hearing authority											
a. Designated Hearing Officer		a		a			a	a		a	
b. Different Hearing Officer each case											
c. Designated Hearing Board						c	c	c	c		c
d. Different Hearing Board each case	d		d		d					d	
e. Other: _____								e*			
9. Number of constituents included on Hearing Board from each of the following groups:											
a. Students			a+		2/3	3	3	a+	2	2	2
b. Administrators			b+				2	b+		1	
c. Faculty	3		c+		2/3	4	3	c+	3	3	3
d. Non-institutional members											
e. Other: _____					e*			e*			

+Number of representatives not given

TABLE 2

ELEMENTS AND PROCEDURES OF THE FORMAL DISCIPLINARY HEARING

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
10. Frequency of presence of each of the following procedures in the school's hearing: A = Always G = Generally N = Seldom or Never											
a. Student has right to be tried with or apart from others	N	A	A	N	A	A	G	N		A	N
b. Institution makes choice about separate or joint proceedings	A	A	G	A	G	G	A	G		A	A
c. Student has right to request open or closed hearing	N	A	N	N	N	A	N	G	N	N	A
d. Institution decides if hearing is open or closed	A		A	A	G		A	N	A	A	N
e. Student can be compelled to appear at hearing	A	A	A	N	N	N	A	A	N	N	N
f. Student can be compelled to testify against self	N	N	N	N	N	N	N	N*	N	N	N
g. Institution will proceed with hearing in absence without cause.	N	N	A	A	A	A	A	A	G	A	G
11. Form of record of proceedings											
a. Written			a	a	a	a	a	a	a	a	
b. Audiotaped	b				b	b		b	b	b	b
c. Stenographed											
d. Videotaped			d								
e. Records not kept		e									
f. Other: _____											

TABLE 2

ELEMENTS AND PROCEDURES OF THE FORMAL DISCIPLINARY HEARING

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
12. Frequency with which the following activities are allowed during the formal disciplinary hearing:											
A = Always G = Generally N = Seldom or Never											
a. Student may be advised by legal counsel of choice	N	A	A	N	N	A	A	A	G	A	A
b. Student may be advised by 3rd party who is not a lawyer	A	A	A	A	N	A	A	A	G	A	A
c. Student may be represented by legal counsel	N	A	N	N	N	N	N	N	G	N	N
d. Student or counsel may confront adverse witnesses	A	N	A	A	G	A	A	A	A	N	A
e. Student or counsel may present witnesses on student's behalf	A	A	A	A	G	A	A	A	A	G	A
f. Student or counsel may present evidence on student's behalf	A	A	A	A	A	A	A	A	G	A	A
g. Institution may be advised by legal counsel	N	N	A	N	N	A	A	A	G	A	N
h. Institution may be represented by legal counsel	N	N	N	N	N	N	N	A	N	A	N
13. Power of campus "subpoena" to call witnesses to appear at the hearing and testify:											
a. Student may subpoena witnesses	a		a	a		a					
b. School may subpoena witnesses	b		b	b		b		b			
c. Neither party has subpoena power		c			c		c		c	c	c

TABLE 2

ELEMENTS AND PROCEDURES OF THE FORMAL DISCIPLINARY HEARING

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
12. Frequency with which the following activities are allowed during the formal disciplinary hearing:											
A = Always G = Generally N = Seldom or Never											
a. Student may be advised by legal counsel of choice	N	A	A	N	N	A	A	A	G	A	A
b. Student may be advised by 3rd party who is not a lawyer	A	A	A	A	N	A	A	A	G	A	A
c. Student may be represented by legal counsel	N	A	N	N	N	N	N	N	G	N	N
d. Student or counsel may confront adverse witnesses	A	N	A	A	G	A	A	A	A	N	A
e. Student or counsel may present witnesses on student's behalf	A	A	A	A	G	A	A	A	A	G	A
f. Student or counsel may present evidence on student's behalf	A	A	A	A	A	A	A	A	G	A	A
g. Institution may be advised by legal counsel	N	N	A	N	N	A	A	A	G	A	N
h. Institution may be represented by legal counsel	N	N	N	N	N	N	N	A	N	A	N
13. Power of campus "subpoena" to call witnesses to appear at the hearing and testify:											
a. Student may subpoena witnesses	a		a	a		a					
b. School may subpoena witnesses	b		b	b		b		b			
c. Neither party has subpoena power		c			c		c		c	c	c

TABLE 2

ELEMENTS AND PROCEDURES OF THE FORMAL DISCIPLINARY HEARING

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
14. Who determines acceptability of evidence entered into hearing:											
a. Hearing Board or Officer	a	a	a		a	a	a	a	a	a	a
b. Third party removed from hearing				c							
c. Primary discipline administrator											
d. Other: _____											
15. Methods for communicating facts, conclusions, and applicable sanctions to the accused											
a. Oral decision rendered upon conclusion of hearing		a					a		a		
b. Written decision rendered upon conclusion of hearing											
c. Written decision rendered after conclusion of hearing		c	c	c	c	c	c	c	c	c	c
d. Other: _____	d*							d*			

process procedures are exercised, and some structural and logistical matters.

Five institutions designate a particular individual to serve as the institutional hearing officer (Item 8). In each case, a student affairs staff member is so designated. Two of the five, USC-Aiken and USC-Columbia, also offer a designated hearing board as another hearing authority. Five institutions utilize a designated hearing board, while four other respondents appoint a different board for each case.

Item 9 indicates the compositional makeup of hearing boards at institutions using that format. Only The Citadel uses a homogenous composition of three faculty members. The other eight schools include students as well as faculty on their boards. Four of those eight include administrators in a tripartite board. The item asks respondents to provide specific numbers for each constituency of the board. Seven schools gave these figures, with the largest total board size being eight members (USC-Aiken) and the smallest the The Citadel's three member board. All of the multirepresentative boards had either the same number of students or one less student than the number of faculty members. USC-Columbia indicated that member composition varies between different boards.

Respondents are asked to indicate the frequency with which specified procedures or conditions occur regarding the formal hearing in response to Item 10. Four of the response choices relate to hearing format while three others concern the accused student's participation in the hearing.

Five of the respondent schools always allow the accused student

the right to be tried either together or apart from others tried for the same incident. Four institutions seldom or never offer the student that choice, while USC-Aiken generally does. USC-Coastal does not find this element applicable to their hearing procedures. Seven respondents do not allow the student the right to request an open or closed hearing.

Five schools retain the right to compel the accused student to attend the hearing. Two of those five, The Citadel and Clemson, will seldom or never proceed with the hearing in the student's absence. Six of the eleven seldom or never force the student to appear at the hearing, but all six generally or always proceed with the hearing in the student's absence. None of the respondents requires the student to testify against himself, but USC-Columbia specifically notes the hearing official or board may draw a negative inference from the accused student's silence or failure to respond to questions, which may be self-incriminating if answered.

Eight of the respondents keep a written record of the hearing proceedings (Item 11), while five of those eight keep an audiotaped record also. Two other schools, The Citadel and Winthrop, keep only an audiotaped record. The College of Charleston, the only school to videotape its proceedings, also keeps written records. Clemson is the only school that keeps no hearing records, although it does provide a brief hearing synopsis in its written statement of findings.

Item 12 records responses to the frequency of permitted procedural activities during the formal hearing. Five of the responses deal with advisor and legal counsel issues while the other three pertain to witnesses and evidence. All eleven schools allow the accused student or

authorized advisor/counsel the right to present witnesses and evidence on behalf of the student. Nine schools allow the student or advisor to confront adverse witnesses, while Clemson and USC-Spartanburg seldom or never allow the student that right. Eight schools allow the student to be advised by legal counsel of choice, and all except Lander College allow advisement by a third party who is not a lawyer. However, only two of the eight schools (Clemson and USC-Coastal) which permit counsel advisement also allow legal counsel to represent the student as a hearing participant.

Item 13 indicates that a majority of schools do not exercise the power to compel members of the campus community to attend the hearing through "campus subpoena" power. Five schools have such a practice, with four of the five allowing both the school and the student to compel attendance, while USC-Columbia allows only the university to exercise that power.

Ten respondents allow the hearing officer or board to determine acceptability of evidence entered into the hearing (Item 14). Clemson reports no definition of acceptable evidence and Francis Marion College delegates that responsibility to the primary discipline administrator.

Ten of the eleven schools provide the student with a written decision of the hearing after the conclusion of the hearing (Item 15). Two of those schools, Clemson and USC-Aiken, also give an oral decision upon conclusion of the hearing. The president of The Citadel gives the student oral notification of the hearing results after the hearing conclusion, while USC-Columbia often offers other responses in addition to written decisions.

Analysis

Judicial decisions have not defined a model upon which to base a campus judicial structure, and educators and legal observers have not reached agreement on a particular arrangement, although some have discussed aspects of structure including the composition of hearing boards. The different hearing authorities designated by the eleven institutions are all acceptable according to prevailing judicial and educational opinion. The eight schools which have faculty and students on boards have strong educational support for heterogeneous representation. The Citadel, with is homogenous faculty board, meets judicial standards but is not a model recommended by the majority of authoritative writings.

Each institution offers a disciplinary hearing which incorporates minimal due process procedures as defined by both the courts and the scholars with a few procedural exceptions. Other issues which expand minimal due process, but without a clear mandate from courts and educators, are also addressed by institutions in various ways. Seven of the respondents do not allow the student to request an open (public) or closed (private) hearing format, although some educators support that right. None of the institutions require the student to provide potentially self-incriminating testimony, even though courts have generally not found self-incrimination to be an issue upon which a student may base a denial of due process claim. Some educational opinion has been cited as supporting USC-Columbia's practice of permitting negative inferences from the silence of the accused, with Pavela arguing that such silence is inconsistent with the ethical dialogue crucial to the

disciplinary process.[1]

All institutions except Clemson provide one or more forms of record of the hearing, an almost universally recognized due process requirement. It would appear that Clemson's synopsis of the hearing as contained in the written findings is not adequate to provide the appeal authority with needed hearing information. The lack of such a record could conceivably require Clemson to hold a de novo hearing on appeal, even though prevailing judicial decisions and expert opinion do not suggest the necessity for a rehearing at the appeal level.

The issue of advisor/counsel assistance and representation for the accused student is not clearly defined by either court decisions or educational thought in all its aspects. Ten schools allow the accused to be assisted by a third party advisor during the hearing, a practice almost always supported by courts and universally recognized in educational and legal writing. The right to similar assistance by retained counsel, observed by eight schools, also enjoys substantial judicial and authoritative support, although not at the level of nonlegal advisory assistance. Only Clemson and USC-Coastal have expanded the right of counsel to include representation during the hearing. This expansion has both support and opposition, but generally is not considered a due process requirement except in specific, limited circumstances, such as when the institution is represented by counsel Both USC-Columbia and USC-Spartanburg reserve the right to institutional counsel

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[1]Cheryl M. Fields, "When Student Face Serious Criminal Charges, Some Colleges Await Court Action, Others Mete Out Quick Discipline," The Chronicle of Higher Education 33 (March 18, 1987): 45.

representation even though they deny that right to the accused student. A number of court decisions and scholarly articles have suggested that such a practice places the student at a disadvantage, creating a proceeding which is not fundamentally fair.

All eleven schools allow students fundamental procedural rights to present supporting witnesses, testimony, and evidence during the hearing. Only Clemson does not allow the right to confront adverse witnesses, largely because such witnesses are not participants of the hearing; only their statements are used. The right to confront and cross-examine is an expansion of due process sometimes upheld by courts, and often, but not always supported by educational opinion. The primary objection to these procedural rights is that of creating a proceeding analogous to a criminal trial.

A couple of articles have suggested that schools should use a "subpoena" to require needed witnesses to appear at disciplinary hearings. No court decisions were found which required compelled attendance. However, four schools have chosen to institute this requirement, and it appears that educational sentiment is favorable toward this practice. Few articles or court decisions have defined appropriate rules of evidence although the consensus of that limited opinion is that exclusionary rules do not apply and that a "preponderance of evidence" is sufficient to find guilt. Little has been said regarding the authority for determing acceptability of hearing evidence. Nine schools authorize the hearing body to make that determination, a practice consistent with most views of hearing agency powers.

All of the schools provide the student with a written report of the hearing finding except The Citadel. The requirement for written findings, while not upheld in every case, has substantial judicial support and universal authoritative recognition. The three schools which give additional oral findings upon conclusion of the hearing provide the hearing body with additional opportunities to expound on its findings. This is a positive aspect of the educational process at work in the disciplinary hearing.

Appeals Procedures

Findings

Table 3 provides information concerning institutional appeals procedures. Item 16 indicates that all eleven schools provide the student with appellate review following the formal hearing. Nine schools have established grounds for appeal, while Clemson and USC-Coastal grant appeals regardless of the reason for the request. South Carolina State College alone also permits the school to appeal the hearing decision. None of the schools automatically generates an appellate review after suspension sanctions, unlike the automatic appeals which are often triggered by certain severe sentences given for convictions of criminal law. The designated appellate authority is reported in Item 17. The results of the survey reveal some variability with four schools delegating that authority to an appeals board. Francis Marion designates its chief student affairs officer as its appeals official. Seven of the institutions designate their president or chancellor as the ultimate appeals authority, while USC-Spartanburg

TABLE 3

APPEALS PROCEDURES

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
16. Which of the following conditions govern hearing appeals:											
a. Internal appeal is granted on request, regardless of grounds		a							a		
b. Student may request appeal based on certain specified grounds	b		b	b	b	b	b	b		b	b
c. Appeal is automatically triggered where suspension/expulsion is given											
d. Institution may request appeal based on specified grounds						d					
e. Institution does not have appeal procedure											
f. Other: _____								f*			
17. Who serves as appellate authority:											
a. There is no appeal authority											
b. An Appeals Officer											
c. An Appeals Board			c		c	c		c			
d. The chief student affairs officer (if not "a")				d							
e. The president of the institution (if not "a")		e			e		e	e	e	e	e
f. Other: _____	f*				f*					f*	
18. Method for informing student of right to appeal:											
a. Instructions in notice of charges				a	a			a	a		
b. Instructions given during hearing											b
c. Instructions given during prehearing conference								c		c	c
d. Instructions listed in school publications		d	d	d	d	d	d	d		d	d
e. Instructions given with hearing findings	e				e		e	e		e	e
f. Other: _____											

TABLE 3

APPEALS PROCEDURES

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
19. Established grounds for appeal:											
a. Procedural defects in handling of incident prior to hearing	a		a				a	a			
b. Procedural defects in hearing	b		b		b	b	b	b		b	
c. Issues of proper jurisdiction							c	c			
d. Insufficient evidence and testimony to support findings						d	d	d		d	
e. Severity of sanction imposed			e				e	e		e	e
f. Evidence that hearing was biased, not fundamentally fair	f		f			f	f	f		f	f
g. Student's desire to appeal to another authority	g	g		g			g				
h. Other: _____								h			
20. Actions which can result from appeal:											
a. Original decision is upheld	a	a	a	a	a	a	a	a	a	a	a
b. Original decision is reversed	b	b	b	b	b	b	b	b	b	b	b
c. New hearing is ordered			c	c		c	c	c		c	
d. Severity of sanction is reduced	d	d	d	d		d	d	d	d	d	d
e. Severity of sanction is increased		e	e	e		e		e	e		
f. Other: _____											

designates both its chancellor and its academic vice chancellor. Two schools, The Citadel and Lander, list their governing boards as final appellate bodies.

Item 18 reports the schools' methods for informing students of their right to appeal. The most common method for noting an appeal right is through instructions listed in institutional documents (nine schools use this). Four schools give those instructions in the original notice of charges, while six schools give appeals information with hearing findings. Three schools provide three or more sources of appeals information.

The nine schools which specify certain grounds for appellate review generally provide several such grounds (Item 19). Only two schools (Francis Marion and Lander) have a single requirement upon which to base an appeal. Four institutions allow appeals for procedural defects in both the handling of the incident and the subsequent hearing. Three other schools allow appeals based on defective hearings, but not the prehearing processing of the incident. USC-Aiken and USC-Columbia allow numerous grounds for appeals including the issue of proper jurisdiction regarding the incident. Four schools consider the insufficiency of testimony and evidence supporting the hearing findings as an appeals ground. Seven schools allow appeals based on a showing of bias in the hearing, resulting in a proceeding which was not fundamentally fair. USC-Columbia also includes the discovery of new, relevant evidence as an applicable appeals issue. USC-Aiken and USC-Columbia both provide seven different grounds for appeal, six of which are common to both schools.

The possible results which can arise from appellate review are listed in Item 20. All the schools allow the appeals authority to uphold or reverse the original decision, a standard appeals function. Only six of the schools will order a new hearing as a result of an appeal, with four of those six allowing a hearing bias claim to be reviewed. All of the schools except Lander allow a sanction to be reduced through appeal, with six schools also permitting the appeals authority to increase the severity of the sanction. Only Lander refuses to consider the severity of the sanction on appeal.

Analysis

All eleven schools, with their guarantee of a right to appeal, offer their students a procedural right which the courts have not fully mandated, but have recognized as curing some procedural defects which would otherwise be subject to litigation. Disciplinary commentators are unanimous in upholding the student's right to an appeal, and in proclaiming the educational and procedural soundness of appellate review.

The designation of the appellate authority at most institutions clearly meets the judicial requirement of impartiality arising from the appeals official or board's lack of prior involvement with the proceeding. This separation of functional involvement is inferred through responses to the survey and review of supporting documentation. Most institutions (8) provide for an appeal to the ultimate appellate authority, usually defined in the literature, court decisions, and common practice as the president (chancellor) or the board of trustees. One school, Francis Marion, has designated the chief student affairs officer as the appeals official, a practice not uncommon at other

institutions around the country.

All eleven colleges and universities provide a method for informing the student of the right to appeal, with seven schools providing written documentation and directions in more than one document. This practice is consistent with authoritative opinion, which supports fully informing students of their basic rights. Courts reviewing denial of due process claims have commented favorably upon the presence of appeals procedures.

The grounds for appeals reported by the institutions, in some cases, exclude factors which have been given judicial and authoritative support. Only seven schools consider evidence of a biased hearing as a basis for appellate review. A claim of bias has been widely embraced by courts and writers alike in reviewing a claim of violation of due process. Some decisions have upheld schools' disciplinary proceedings where the institution's appellate review cured a defective, or biased proceeding. The two schools with no established grounds for appeal (Clemson and USC-Coastal) and the three others granting appeals simply because the student requests an appeal to a higher authority, have extended the appeals right farther than many educators would require. Other grounds accepted for appeals, including procedural defects in the investigation and adjudication of the incident, are grounds which court cases have used to review due process challenges.

Appeals decisions, as reported by the schools, appear to offer a process which considers the appropriateness of the sanction given or recommended by the hearing. By not authorizing the appellate authority to modify the hearing sanction, Lander College constricts the appeals process in a manner inconsistent with opinions offered regarding

appeals. Few court decisions or scholarly writings have spoken about the right of the appeals authority to increase the hearing sanctions. Six schools allow this action, but only S.C. State permits the institution to appeal the hearing decision. The practice of permitting the appeals authority to increase the hearing sanctions, while possibly legal, appears to have little authoritative support in the literature reviewed for this study.

Interim Suspension

Findings

Responses to three items (21-23) of the survey regarding interim suspension are found in Table 4. All of the schools except Clemson reserve the right to order an immediate temporary suspension prior to holding a formal hearing (Item 21). Item 22 indicates reasons given to justify imposition of an interim suspension. The immediate danger which the student poses to self or others is an accepted standard for all ten schools. Eight of them also allow interim suspension if the presence of the student on campus is deemed likely to substantially disrupt the educational process. Three schools (Francis Marion, Lander, and USC-Aiken) temporarily suspend according to the nature of the particular alleged offense. The College of Charleston, Francis Marion, and S.C. State can suspend on an interim basis if the accused student is arrested for certain violations of law. Francis Marion is the only school using all the aforementioned reasons for imposition of interim suspension. Only one school, USC-Coastal, relies solely on a single criteria, the danger to self and others, to authorize interim suspension.

TABLE 4

INTERIM SUSPENSION

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
21. Institution reserves right to order immediate suspension prior to holding formal hearing											
Yes = Y No = N	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y
22. Reasons which may be used to justify imposition of interim suspension:											
a. Immediate danger student poses to self/others	a		a	a	a	a	a	a	a	a	a
b. Nature of offense in question				b	b		b				
c. Possibility that continued presence of student will substantially disrupt educational process	c		c	c	c		c	c		c	c
d. Arrest of student for violation of specific law			d	d		d					
e. Other: _____	e*							e*			
23. Conditions which apply when imposing interim suspension:											
a. Student is given notice that interim suspension is imposed			a	a	a		a	a	a	a	a
b. Student is offered opportunity to appeal interim suspension								b		b	
c. Student is offered opportunity for formal hearing during or after the interim suspension			c		c	c	c	c	c	c	c
d. Other: _____											

Item 23 provides responses concerning conditions which apply when interim suspension is imposed. Only The Citadel does not define certain applicable conditions. All others give notice of the suspension, with eight schools offering the student subsequent opportunity for a formal hearing either during or after the interim period. Two schools, USC-Columbia and USC-Spartanburg, allow the student to appeal the interim suspension.

Analysis

The ten schools which reserve the right to impose interim suspension do so with full support from courts and educators, subject to certain conditions. The "immediate danger to self and/or others" criteria used by all ten is a standard required by courts and scholars. The threat of potential disruption to the educational process, used by eight schools, has been upheld by several court decisions as a constitutionally valid basis for interim suspension.

The four schools which use as a criteria the nature of the offense or specific law allegedly violated do so without strong support from judicial and educational opinion. If the offense in question does not reflect upon the student's suitability to continue as a member of the campus community, the general rule is against the use of interim suspension. The same rule is applicable where the specific law allegedly violated is not relevant to the student's continued enrollment but still becomes grounds for an interim suspension.

Eight of the ten schools offer the student notice of the interim suspension, a procedure required by courts and supported by legal experts. The Citadel does not have notice, but indicates that this is

based on an absence of experience in exercising interim suspension power. South Carolina State does not provide notice of the interim suspension, an apparent violation of due process precedent. The constitutional requirement of a preliminary or appeals hearing to challenge the interim suspension is specifically cited only by USC-Columbia and USC-Spartanburg. Five other schools allow the student to have a formal hearing either during or after the interim suspension period. It is not clear whether these hearings, if held during the suspension period, permit the student to challenge the interim suspension. If not, such hearings, whether conducted during or after the interim period, are in violation of due process mandates unless an emergency situation prevents the holding of a preliminary hearing.

Francis Marion provides no formal hearing either during or after the interim suspension, an apparent violation of due process. It is not clear if their response also indicates a further due process violation caused by a lack of opportunity for a later due process hearing concerning the incident which precipitated the original disciplinary action. A lack of hearing on the original charge would compound the institution's denial of due process.

Overlapping Jurisdiction

Findings

Table 5 shows institutional disciplinary policies and practices related to concurrent or pending action for violation of civil or criminal law. Item 24 indicates that seven schools' disciplinary procedures are affected by overlapping charges resulting from the same

TABLE 5

OVERLAPPING JURISDICTION

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
24. Are institution's disciplinary proceedings affected when student is concurrently charged for violation of law for same incident											
Yes = Y No = N	Y	Y	N	N	N	Y	Y	Y	N	Y	Y
25. Frequency of occurrence of activities resulting from concurrent violations of school and civil/criminal laws											
A = Always G = Generally N = Seldom or Never											
a. Institution delays proceeding until criminal action is done		G				A	A	N		G	N
b. Institution proceeds with disciplinary action, but delays giving sanctions until criminal action is finished		G						N			G
c. Student can request school proceedings prior to court proceedings		A						N			G
d. Student can request postponement of school action until court action finishes		A						N			G
e. Institution proceeds with action regardless of circumstances	G	G						A			N
26. Does institution offer/give on request disciplinary documents and reports to civil authorities if materials are not part of civil/criminal action, or are not subpoenaed											
a. Always											
b. Generally											
c. Seldom				c			c	c		c	
d. Never	d	d	d		d	d					

incident. The Citadel's actions are seldom affected by such overlap, but the school's respondent reports an increasing trend toward considering concurrent or pending charges before proceeding with disciplinary action. Three other schools indicate that such charges do not alter their disciplinary proceedings.

Schools responding affirmatively to Item 24 also responded to Item 25 concerning the frequency of occurrence of certain conditions where jurisdiction overlaps. Four institutions generally or always delay their proceedings until concurrent judicial action is completed. USC-Columbia and Winthrop seldom or never delay proceedings where concurrent charges are present. Clemson and Winthrop generally proceed with disciplinary action, but delay giving sanctions until criminal actions are finished. Both Clemson and Winthrop extend to the student the right to request that disciplinary action proceed either before or after concurrent criminal action.

Five schools never provide, either by request or at their own discretion, institutional disciplinary documents to law enforcement or judicial officials where such documents are not already part of the civil or criminal process or have not been subpoenaed (Item 26). Three schools seldom provide these materials but reserve the right to do so on occasion.

Analysis

Judges and scholars alike have recognized the separate and independent functions of disciplinary proceedings and criminal trials for adjudication of the same incident. They have also defined fundamental fairness as requiring the disciplinary proceedings to be more protective

of the accused student where that student faces serious criminal charges for his/her behavior. Seven institutions consider concurrent or pending criminal actions, with four of them generally or always deferring to the judicial process. Since none of these four require a student to offer self-incriminating evidence or testimony at the disciplinary hearing (see Table 2, Item 10), the delay in proceeding with the hearing would not seem to be related to the due process "double jeopardy" issue. Therefore, these schools are practicing a policy which is not mandated by courts or proposed by most authoritative writings.

Two schools, Clemson and Winthrop, delay giving sanctions as a rule until criminal action is complete. Courts have not required schools to delay sanctions even when both disciplinary and criminal charges and sanctions are of a serious nature. The writings regarding this matter are mixed with some writers arguing that such delays allow the student to draw an inappropriate inference that couples the two proceedings. Conversely, some writers have suggested the appropriate- ness of linking institutional sanctions to court sentences, particularly where the sentence is deemed sufficient for educating and rehabilitating the misbehaving student.

Both Clemson and Winthrop permit the student to request a postponement or initiation of the disciplinary proceeding relative to the court proceeding. No court has suggested this as a due process right, and in fact, one court noted that a student's request for a delay pending his criminal trial for serious charges would allow him to complete his education and subvert the disciplinary process.[2] The Citadel and

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[2]Nzuve v. Castleton State College, 335 A. 2d 321 (Vt. 1975).

USC-Columbia both indicate that disciplinary proceedings are sometimes affected by concurrent adjudication, but they did not indicate what such an affect might be. Since courts and authoritative scholars have acknowledged the college or university's right to proceed irrespective of criminal or civil court action, these institutions have a great deal of flexibility with which to respond to the particular issues and conditions of each incident. This flexibility is certainly in keeping with the nature of due process procedures as defined by courts from the United States Supreme Court down and reiterated by legal and educational scholars.

It is questionable whether federal legislation allows a student's disciplinary file to be shared with authorities outside of the disciplinary process and the institution. While three schools reserve the right to do so, they would be wise to define the conditions and records which could be shared with outside agencies, seeking assistance from qualified counsel in this policy task.

Academic Misconduct

Findings

Data charted in Table 6 indicates certain aspects of institutional policies and practices concerning suspension or dismissal based on a charge of academic misconduct, defined as actions usually considered academic dishonesty. Item 27 indicates that six schools treat academic misconduct procedurally different from disciplinary misconduct. Four schools treat the two types of misconduct in a similar manner, while three other schools handle academic misconduct like failing academic performance. Winthrop indicates it has no set procedure available to

TABLE 6

ACADEMIC MISCONDUCT

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
27. Policies and procedures which apply to possible suspension/ expulsion for academic misconduct:											
a. Academic misconduct is treated differently than disciplinary procedures	a	a				a	a	a			a
b. Academic misconduct is treated like disciplinary misconduct			b		b				b	b	
c. Academic misconduct is treated like failing academic performance				c				c		c	
d. No set procedure for handling academic misconduct											d
28. If academic misconduct is treated differently from disciplinary misconduct, in which of the following ways:											
a. Not applicable--they are treated the same			a		a				a	a	
b. Formal notice given	b	b					b	b			
c. Accused given hearing with procedural rights similar to disciplinary hearing	c	c		c			c	c			
d. Accused given hearing not similar to disciplinary hearing						d		d			
e. Incidents are individually processed--no set procedure											e
f. An appeal process is present if requested	f						f	f			
g. Other: _____								g*			

process academic misconduct, although it treats it different from disciplinary misconduct. USC-Spartanburg treats academic misconduct both like disciplinary misconduct and failing academic performance. The school did not give indicators to explain how incidents were channeled into either of the two processes.

The six schools which process the two types of misconduct differently do so in a number of ways (Item 28). Four of them offer their students formal notice of charges. Those four plus one other school allow the student the right to a hearing with procedural rights similar to those offered in a disciplinary hearing. Two schools, S. C. State and USC-Columbia, offer a hearing which is not procedurally comparable to a disciplinary hearing. Three schools offer the student the right to appeal the hearing findings. USC-Columbia, which has academic misconduct hearings that are similar to disciplinary proceedings, notes that "fundamentals" are common to all, but that some variability is present depending on the colleges and/or professors involved with the process.

Analysis

Six institutions treat academic misconduct in a manner different from disciplinary misconduct, with Francis Marion treating it like failing academic performance. Both judicial and educational opinion has been generally supportive of treating academic misconduct, where defined as academic dishonesty, in a manner similar to disciplinary misconduct. Four of the six schools provide the student with notice and a hearing procedurally similar to their disciplinary hearing. These four would appear to meet judicial and authoritative expectations, which do not require that disciplinary structures be used, so long as the designated

format offers notice and a hearing conforming to fundamental procedural protections. Francis Marion, despite treating academic misconduct like failing academic performance, may still meet judicial and educational standards because the student is offered a hearing similar to a due process disciplinary hearing. However, their absence of written notice would not be viewed favorably by most courts. Winthrop has no set procedure for handling academic misconduct; incidents are processed on an individual basis. It is doubtful that many courts or educational law experts would suggest such a lack of uniformity in processing these incidents.

South Carolina State offers a hearing which is not similar to that of a disciplinary hearing. It is not evident whether their hearing meets accepted standards. Three schools offer an appeals process. While this is not judicially mandated, such appeals rights are generally recognized as consistent with the concept of fundamental fairness where separation based on academic dishonesty can have a stigmatizing effect on the student. USC-Columbia notes that procedures vary to a degree between colleges, but common fundamental elements are present in all hearings. Such variation is acceptable if the college and its faculty agree to observe fundamental procedural rights and abide by the hearing decision.

Mandatory Withdrawal of Students with Mental Disorders

Findings

Table 7 reports information concerning institutional policies and due process procedures pertaining to the mandatory (psychiatric) with-

TABLE 7

MANDATORY WITHDRAWAL OF STUDENTS WITH MENTAL DISORDERS

	The Citadel	Clemson University	College of Charleston	Francis Marion College	Lander College	S.C. State College	USC-Aiken	USC-Columbia	USC-Coastal	USC-Spartanburg	Winthrop College
29. Does school have written policy and due process procedures applicable where student is recommended for mandatory withdrawal for mental disorders											
Yes = Y No = N	N	N	Y	N	Y	Y	N	Y	N	N	Y
30. The following policies and procedures are applicable to mandatory withdrawal situations:											
a. School has clear statement concerning applicable policy					a	a		a			a
b. Institution must show cause for mandatory withdrawal	b				b	b		b			
c. Institution will use disciplinary policies and procedures in the absence of mitigating factors	c	c	c		c		c	c		c	c
d. Institution provides notice that withdrawal is considered	d					d	d	d		d	
e. Institution used independent evaluation in decision	e	e			e		e			e	
f. Institution relies on evaluations of in-house professionals	f		f								f
g. Student offered hearing or conference (formal or informal)						g		g		g	g
h. Institution allows student advisory assistance during hearing or conference						h		h		h	h
i. Legal counsel for student is allowed								i		i	i
j. Appeal process is available						j	j	j		j	
k. Other: _____											

drawal of students with mental disorders. Item 29 shows that six of the eleven schools have no written policy applicable where a student is recommended for a mandatory psychiatric withdrawal. However, four of the six report practices related to this type of withdrawal action.

A variety of applicable policies and procedures are charted in Item 30. Four schools have policies which require the school to show cause for pursuing a psychiatric withdrawal. Eight schools use disciplinary procedures to process the student's misconduct unless mitigating factions are present which would not allow the student to adequately respond to the charges. Five schools provide notice that a psychiatric withdrawal is contemplated. Five institutions use independent evaluations when seeking withdrawals, while three schools rely on evaluations provided by the institutions' mental health staff. Three of the schools providing notice (S. C. State, USC-Columbia, and USC-Spartanburg), also offer an informal or formal hearing. In addition, those three and Winthrop allow the student to be assisted by an advisor. While S.C. State does not provide for assistance by legal counsel, the other three do. Four schools offer the student the opportunity to appeal the hearing or conference decision.

Analysis

This is a relatively new field of scholarly inquiry, as revealed by the review of literature. It is therefore not surprising that six institutions do not have a written policy concerning mandatory psychiatric withdrawals. Also, there is not clear judicial precedent available to guide the development of policy and corresponding procedures. Despite these limitations, five schools do have written policies while

four others observe established procedures where such withdrawals are pursued. Only one school, USC-Coastal, reports no policy or procedures in use to process psychiatric withdrawals.

Eight of the schools process disturbed behavior through disciplinary proceedings when the student is capable of adequately participating in the proceeding. Where this process is not appropriate, institutions draw upon various procedures. This reliance on disciplinary channels to address disturbed behavior is consistent with the consensus opinion of leading experts on the subject. The writings on mandatory withdrawals all stress the need to treat the disturbed behavior like other misbehavior where possible.

Five institutions provide notice of a withdrawal action, a procedure recommended by most commentators. Five schools provide for independent evaluation of the student, while three consider in-house staff evaluations. Pavela, a leading authority in this field, urges use of independent evaluations as a procedure which ensures a fundamentally fair protection of the student's constitutional rights. He requires a notice to be given where possible. Those schools which proceed without notice or independent evaluation do so contrary to significant expert recommendation.

Only four schools offer the student an informal or formal conference as suggested by most opinion on this subject. Those four seem to offer some of the protections suggested including the right to advisory assistance. The hearing, with accompanying right to advisory help, is an essential element of due process recognized by authorities and those court decisions which have upheld denial of due process claims. The

three schools expanding the right of assistance to include legal counsel do so without judicial mandate. The opportunity to appeal a withdrawal decision is also not judicially mandated, but is consistent with most writings discussing the procedural protections which have value where a separation may have a stigmatizing effect on the individual. Pavela, however, has proposed that legal counsel not be invited to actively participate in the conference or hearing, urging instead the use of a faculty member to challenge the hearing as a "devil's advocate." None of the schools reported the presence of this role. Pavela also has suggested that appeals not be considered.

The status of mandatory withdrawal policies and procedures at the eleven institutions suggests that schools with written policies and procedures generally offer minimally acceptable procedural protections against arbitrary withdrawal actions. Only four schools come close to offering the range of protections recommended by Pavela. The limited applicable court cases suggest that notice and hearing, where possible, are minimally required before such withdrawals are considered constitutionally adequate. The widespread use of disciplinary proceedings to handle emotionally disturbed behavior is a sound educational practice. Although such practice will help these schools who do not have written policies regarding psychiatric withdrawals, was well as their own established practices, the lack of formalization could be a litigious matter. There would appear to be no reason for these schools not to formalize present procedures and use this process to consider other elements which Pavela and others have recommended.

Conclusion

The data reported from this survey suggests that all eleven major tax-supported colleges and universities in South Carolina have disciplinary policies and exercise disciplinary procedures which address similar issues and offer somewhat similar disciplinary proceedings. Only a few significant fundamental procedural protections are missing from the procedures reported in the survey.

All eleven institutions appear to offer the student both oral and written communications which convey needed information to the student concerning charges for disciplinary misconduct. The majority of schools include several items within their written notice which have been recommended by most legal experts and upheld as necessary by numerous courts. Only two schools have expanded the notice to include copies of important documents not mandated by courts. Several scholars have suggested that such documents, when included in the notice, help ensure the student is allowed to adequately prepare a defense to the charges. The nine other schools offer the student the opportunity to review these documents at a prehearing conference. This process, which is also not mandated by courts, would seem to provide additional helpful interaction between the student and the institution.

Most of the formal hearing procedures described by the institutions work to ensure that constitutional rights are preserved, as outlined by applicable court decisions. The most suspect absence of procedural protections include one school's failure to keep a record of the hearing (Clemson) and another school's prohibition against assistance for the accused by a nonlegal advisor (Lander). These omissions

of procedure are not likely to be reviewed favorably by any court hearing a denial of due process claim, where these omitted procedures are challenged in a suspension or expulsion action.

Other hearing procedures, while not representative of the weight of authoritative opinion, do not appear to be procedurally deficient with regard to court mandated minimal procedures. Some writers have suggested that students should have the right to ask for an open or closed hearing, with the institution complying with the request. Only four schools offer the student this right. Three schools do not allow the student to be advised by legal counsel of choice during the hearing. The preponderance of literature regards this as a reasonable procedural right, particularly where dismissal is contemplated, or where the student faces concurrent civil or criminal charges. Court decisions usually reflect favorably upon an institution's extension of right to advisory assistance to include legal counsel.

Most of the reported hearing procedures are squarely in line with judicial and educational thinking. The schools all appear to have properly designated hearing authorities, with most schools providing for representation by both students and faculty, and four also including administrators. This heterogeneity is widely applauded by disciplinary writers. Only one school does not allow any advisory assistance, while eight schools expand this important right to include assistance by a lawyer. The schools all appear to allow the student or advisor the right to present evidence, witnesses, and testimony on behalf of the student. All but one allow for the confrontation of adverse witnesses. These procedural hearing rights have been upheld by numerous court

decisions and the vast majority of related writings.

Appellate review is an important procedural protection given almost universal support by scholars and paid great deference by judicial decisions. The unanimous offering of an appeals process, for which eight schools designate their chief executives or boards of trustees as the appeals authority, indicates statewide observance of this right. Most schools offer grounds for appeal which will meet judicial scrutiny, but those institutions which do not accept evidence of bias or defects in the hearing as appeals grounds are overlooking a significant basis upon which several court decisions have revolved. The majority of those decisions have upheld the schools' suspension or expulsion actions where the appeals process cured procedural defects or bias in the hearing. These should be appeals grounds considered by every school, not just the six who affirmed them.

It is interesting to note that five institutions allow the sanction to be increased on appeal, yet only one school reports the right to appeal its own decisions. No literature suggests that increasing sanctions is an appropriate purpose of an appeals process, although it is seldom discussed at all. Likewise, the right of the institution to appeal has drawn little scholarly comment, with courts addressing the issue primarily in cases where the institution improperly reversed a finding contrary to established policy. There appears to be no reason why an institution can't increase a sanction on appeal or reserve for itself an appeal right as long as their procedures establish that right and it is not exercised in an arbitrary or unreasonable manner.

Responses to the condition of interim suspension suggest that some institutions, while reserving the right to impose temporary suspension, seldom put that practice in use. The schools are on solid foundation in their primary criteria for imposition of an interim suspension. However, those five schools which appear to use facts such as the nature of the offense or the instance of arrest to justify interim suspension are doing so without much judicial or authoritative backing.

The two schools which offer the student an opportunity to appeal the interim suspension (USC-Columbia and USC-Spartanburg) allow for a procedural right that numerous courts have enforced for the benefit of students. The lack of such an appeal, or preliminary hearing, offers the institution too much discretion to deny an important, constitutionally protected right to continued enrollment. It is unclear if any of the eight schools which offer a formal hearing during or after the period of suspension meet the constitutional mandate to allow the student to challenge the suspension. Any hearing held after the suspension, except where postponed by emergency, would appear to be insufficient to protect against arbitrary and unwarranted imposition of interim suspension.

The consensus opinion shared by courts and scholars alike regards the disciplinary process as an educational function independent of concurrent civil or criminal action for the same offense. As such, disciplinary proceedings need not be linked with court action except in particular circumstances regarding specific procedural points. It appears that four institutions follow that opinion, while five others vary their proceedings in relation to both student requests and

institutional deliberation. Although many writers would urge schools to act independently in processing violations of institutional rules, many would suggest that concurrent actions can also serve an educational function upon which the disciplinary process can build. With that thought in mind, it would be hard to find fault with institutions which can show logical reasons for linking certain disciplinary actions with concurrent judicial action.

The four institutions which treat academic misconduct procedurally similar to disciplinary misconduct have little to fear from judicial inspection or educational scrutiny. Those seven schools which treat it differently than disciplinary misconduct have the burden of showing that certain procedural protections are offered the student when suspension or expulsion is contemplated. Of those seven, four schools offer notice and hearing with similar procedural rights. These four schools would appear to be meeting judicial and authoritative standards. The expansion of an appeal process can only be an asset for the remaining three schools in the event they are subject to judicial review. Winthrop, with its lack of established, formalized procedures, is open to potential claims of arbitrary action and denial of due process.

The lack of written psychiatric withdrawal policies by a majority (six schools) of the respondents reflects the relative newness of this issue and a probable lack of institutional experience processing such withdrawals. Certainly, few schools have been challenged in court for initiating these type of withdrawals. Those schools which do report procedures for psychiatric withdrawals, whether written or not, seem to

offer most minimally accepted due process protections. The two greatest deficiencies occur where notice is not given (4 schools) or a hearing is not offered (5 schools). On the positive side, the use of independent evaluations by five schools and the extension of advisory assistance in the hearing and appeals process by four institutions provides adequate safeguards for the student. All of the schools are also following educationally sound policy by treating disturbed behavior as disciplinary misconduct where possible. This practice is lauded by most as a proper, logical, educational approach to disturbed behavior.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

This study was designed to gather and analyze data regarding disciplinary policies and procedures for each of the eleven major, tax-supported colleges and universities in South Carolina. Related procedural issues of academic misconduct and mandatory psychiatric withdrawals were also studied as a result of this analysis. A second study purpose was a review of pertinent judicial decisions and authoritative opinion regarding the evolution of the student-institution relationship and the development of constitutionally defined due process rights in disciplinary suspension and expulsion proceedings.

The primary focus of the historical review was the period from the 1961 Dixon decision to the present. This period of time was characterized by a transition in judicial and educational philosophy regarding discipline in higher education that took on historic proportions. This adjustment mirrored changing societal concepts of civil rights and attitudes toward access to higher education. One manifestation of the changing times were court decisions which clearly established a constitutional basis for the disciplinary relationship between the student and his/her tax-supported institution. These same court decisions and other cases, reinforced by the weight of significant authoritative opinion, imposed minimal due process protections, which were subsequently redefined and sometimes expanded, in cases where students challenged disciplinary suspensions and dismissals. Coupled with an analysis of the

institutional data, this review of judicial and educational opinion provided knowledge which allowed conclusions to be drawn concerning the status of disciplinary due process at tax-supported colleges and universities in South Carolina.

Summary

The first key research question concerned the effect of educational and legal opinion on the status and future direction of the student-institution relationship. The complex nature of higher education does not allow for one particular relationship theory or doctrine to satisfactorily explain the entire range of interactions between a student and a college or university. Elements of in loco parentis, contract, status, fiduciary, and constitutional rights theories have all had proponents touting them as sufficient to define aspects of the relationship. The societal forces which have significantly shaped the development of higher education in America have also exerted great force on the evolution of the student-institution relationship. The Dixon decision would not have had the impact it did on public higher education had it occurred well before the development of the civil rights movement of the sixties. Dixon was the product of turbulent social change, and in turn, it contributed to further change in a specific context: the right to continued enrollment under an umbrella of constitutional protection.

The judicial bombshells dropped by the United States Supreme Court and the Fifth Circuit Court of Appeals in Brown v. Board of Education and Dixon marked an inevitable intrusion into government provisions for education. Those two decisions laid to rest the prevailing notion that

education was a governmentally extended privilege not subject to constitutional protections or federal judicial review. Dixon, in finding an application of the Fourteenth Amendment right to due process in suspension/expulsion proceedings at tax-supported colleges and universities, firmly established that one aspect of the student-institution relationship, the discipline function, was supported by the United States Constitution. No courts or legal and education authorities have yet mounted any serious challenge to that assertion.

The vast majority of educators and legal scholars support the applicability of a constitutional rights doctrine to the disciplinary function. Most laud the doctrine for providing fundamentally fair and reasonable dispensing of discipline. At the same time, significant educational opinion has cautioned against overdevelopping the definition and technical expansion of disciplinary due process at the expense of the underlying educational philosophy of personal development. The constitutional rights concept has been embraced by the educational community where it is modified to meet educational needs which are not analogous to society's expectations of the criminal justice system.

The second study question addressed the body of judicial decisions reflecting on the disciplinary relationship between students and their colleges and universities. The review of cases reported in Chapter III reveals that both state and federal courts have clearly supported student' rights to certain procedural protections when faced with potential suspension or expulsion based on disciplinary misconduct. The Dixon decision and its early successors (i.e. Knight, Due, and Esteban) have all been cited by numerous courts to uphold the precedent of a

constitutional right to due process in disciplinary proceedings at tax-supported institutions. Similarly, Dixon and subsequent decisions have been repeatedly cited both for specifying minimally acceptable due process procedures and expanding due process beyond minimal expectations. There are no court cases since Dixon which have repudiated the student's right to continued enrollment at tax-supported institutions under constitutional protection.

It is equally clear that students of private colleges and universities have little judicial support for a claim of constitutional protection in disciplinary suspension/expulsion proceedings. Courts have been loath to extend due process protections to private school students under a constitutional mandate. Numerous decisions have been rendered in cases where students have attempted to prove enough evidence of "state action" on the part of the private college to require a finding of applicability of constitutional due process. These decisions, with few exceptions, have repeatedly rebuffed the "state action" argument for a constitutional rights mandate in the private school setting.

Courts have upheld student challenges to private institutional disciplinary proceedings where claims of arbitrary or unfair treatment have been sustained. Contract theory has been advocated by numerous courts as governing the student-institution relationship. These courts have typically upheld institutional disciplinary decisions which are based on procedures specified in documents containing the terms of the implied contract (i.e. student handbooks, catalogs). Conversely, disciplinary actions have been overturned where institutions have been

found to violate the terms of the enrollment contract, particularly where disciplinary procedures have not been observed as specified by school policy.

The third study question focused on the definition of due process guidelines which have been established and recommended by courts and authoritative opinion. The courts and educators have used the Dixon decision as a foundation upon which to craft a set of procedures which will meet constitutional standards while serving the educational needs of a college's disciplinary process. The results of this procedural evolution have generally favored some expansions of procedural rights beyond the Dixon mandate. Thus, notice and hearing are no longer discussed by courts; rather, they define the expansion of these and other due process procedures. They have also been consistent in observing Dixon's disclaimer against a "full-dress judicial hearing" requirement, and in rendering subsequent opinions which do not require disciplinary procedures conforming to criminal court trials. At the same time, many courts and most writers have advanced disciplinary due process procedures beyond the "rudimentary elements of fair play" espoused by the Dixon court.

Two important expanded procedural rights now firmly established by authoritative opinion and most judicial decisions are the right to have advisory assistance in the preparation of a hearing defense and during the hearing, as well as the right to appeal a hearing decision. The first procedural right has been specifically identified by court decisions while the right to appeal has seldom been denied by judicial review. Both procedural protections enjoy overwhelming support by

educational commentators. Both procedures have been elevated to a level above that of a "rudimentary element" but not to the extent offered in criminal proceedings. Even the expansion of advisory assistance to include legal counsel in an advisory capacity, while enjoying consensus support, has been limited regarding representation during the hearing because such a limitation is compatible with the educational, nonadversarial nature of the disciplinary hearing.

Other due process issues which have developed under constitutional due process applications have included technical issues (i.e. rules of evidence, right to protection against self-incrimination) and philosophical issues (i.e. adjudication when jurisdiction overlaps, imposition of interim suspension). Most courts reviewing these issues have distinguished between criminal law applications and disciplinary usage. Courts generally have sided with institutions where student challenges have rested on arguments of technical deficiencies without showing how such deficiencies have resulted in an unfair or biased proceeding. Likewise, courts have allowed institutions to proceed with concurrent disciplinary action or impose interim suspension where such actions do not unfairly deprive the student of basic constitutional rights. Limitations have been imposed by courts on schools when interim suspension is contemplated, with preliminary or appeals hearings required to allow challenges to the suspension except in emergency situations. Conversely, courts have expanded the student's right to representation by legal counsel in limited settings where the student faces concurrent criminal charges of a serious nature. In each of these cases court have expanded limitations or rights only where the potential

for unfair denial of constitutional rights is likely.

Dixon and those decisions which followed created two major distinctions which were crucial to the applicability of due process procedures in suspension and expulsion proceedings. The first distinction, as noted, is that of tax-supported as opposed to privately funded colleges and universities. The other significant classification distinguishes disciplinary dismissals from academic dismissals. Much judicial and authoritative thought has been expressed concerning both sets of distinctions.

The Horowitz decision of 1978 was the Supreme Court's opportunity to clarify and define the disciplinary/academic dismissal dichotomy alluded to in earlier cases but never clearly illustrated. The Court's decision, by many accounts, "muddied the waters" as much as it served to clarify the differences between the two dismissal actions. What Horowitz did accomplish was to distinguish one aspect of the academic dismissal issue that was amenable to due process proceedings. The decision opened the door for the adjudication of academic dishonesty through proceedings similar in nature to disciplinary dismissal proceedings. Where the Court failed, in the opinion of some scholars, was in its broad definition of academic performance, subject to academic evaluations and minimal judicial review rather than due process considerations and considerable judicial review.

Legal and educational authorities have generally found academic dishonesty incidents well suited for the fact-finding, inquisitorial format used in the disciplinary hearing. They support procedural protections for the accused where the stigma of dismissal based on

academic dishonesty can have a great impact on a student's educational and occupational future. Most writers have observed that academic misconduct is more difficult to define and verify than disciplinary misconduct. Like the courts, numerous experts are cautious about the potential for academic misconduct proceedings to usurp the legitimate academic evaluation of student performance. As a corollary to that point, those who argue for due process adjudication of academic dishonesty incidents are forceful in insisting that academicians observe the findings and sanctions imposed by the recognized process.

Another research question posed by this study involves the due process policies and procedures practiced in the administration of discipline at the major tax-supported institutions in South Carolina. The research data reveals that most institutions rely on disciplinary systems which offer almost all of the required procedures, as well as significant expansions of procedural protections at some institutions. Few noticeable omissions are evident from the data reported by each school. Important procedures such as notice, hearings with certain hearing rights, records of proceedings, right to advisory assistance, and appellate review are all present at these schools with few exceptions.

Policies and procedures regarding interim suspension, overlapping jurisdiction, and the related topic of mandatory psychiatric withdrawals are less consistent with recommendations rendered by courts and knowledgeable writers. In several cases, schools reported limited or no experience with these situations, resulting in an absence of written or practiced policy and procedures. The larger institutions generally had

policies and procedures defined to handle these situations. Interim suspension, while a significant due process procedural issue in the 1960's and 1970's, has been a limited topic of court challenge and authoritative comment in more recent years. This may very well account for several schools' apparent unfamiliarity or lack of developed procedures with which to process imposition of interim suspension. The same rationale appears to hold true for some schools' lack of policies and procedures designed to handle mandatory withdrawals. Only in this case, recent scholarly review has been offered for an issue which has little case law upon which to build, and which has drawn little scholarly attention prior to the end of the 1970's. Those schools which do have policies and procedures to deal with both interim suspension and psychiatric withdrawals have some, but usually not all, of the elements suggested by the experts and required in significant court decisions.

The last research question cited in Chapter I requires a comparison to be drawn between the disciplinary policies and procedures of the eleven institutions and the collective opinions and recommendations of educational authorities, legal scholars, and applicable court decisions. Judicial decisions and significant additions to the body of related literature do not usually have an immediate impact on institutional processes. The time lag between court decisions and corresponding institutional change can be great. The institution is most likely to adapt its disciplinary process to meet changing judicial and authoritative opinion when it responds to a specific occurrence in a reactive way; usually the result of a crisis. It appears that some of the schools have not had the experiences or crises necessary to spur

development of policies and procedures related to topics such as hearing formats (i.e. requests for open or closed, joint or separate hearings), imposition of interim suspension, and/or mandatory withdrawals of students with mental disorders. This lack of developed policy and procedures suggests the potential for judicial review of these undefined or imperfectly designed practices.

Conclusions

The research supporting this study, while substantial in some respects, is not comprehensive enough to allow for the development of absolute, generalized conclusions regarding the status of procedural due process in disciplinary systems at tax-supported colleges and universities in South Carolina. However, the research findings and analyses do allow the following conclusions to be drawn concerning the legal aspects of disciplinary policies and procedures at the eleven major tax-supported schools:

1. With a few procedural exceptions, all eleven institutions observe minimally mandated due process procedures when conducting disciplinary proceedings which may result in suspension or expulsion.

2. The individual nature of each institution's campus climate is reflected in the distinct, varied nature of its disciplinary policies and procedures.

3. Most of the institutions have expanded certain procedures beyond the minimal due process mandate of prevailing judicial decisions. These expanded procedures are generally consistent with authoritative recommendations.

4. While each school varies in terms of the comprehensiveness of its own disciplinary procedures and policies, no single school appears to have addressed all due process procedural considerations to the complete satisfaction of prevailing judicial and authoritative opinion. However, USC-Columbia comes very close to offering a disciplinary process which is consistent with espoused judicial and educational standards. USC-Spartanburg also exercises sound disciplinary processes and practices consistent with authoritative recommendations.

5. Issues involving interim suspension, overlapping jurisdiction, and mandatory psychiatric withdrawals indicate the most significant absence of written and established practices for a large number of institutions.

6. Academic misconduct, specifically defined in the context of academic dishonesty, is generally processed in a manner similar to that used in adjudicating disciplinary misconduct. Such treatment is consistent with court decisions and educational recommendations.

7. A lack of practical experience dealing with certain types of misconduct situations appears to be a major cause for a corresponding lack of written or established policy and procedures regarding issues such as interim suspension and mandatory withdrawal of students with mental disorders.

Recommendations

The purpose of this study is to evaluate the status of disciplinary policies and procedures at the major tax-supported colleges and universities in South Carolina and provide institutional disciplinary administrators with current, applicable information and guidelines for

the administration of discipline on their campuses. The study results and analyses provide the basis for the following recommendations:

1. All eleven institutions should undertake a thorough review of their disciplinary processes in light of current prevailing judicial decisions and recent developments reflected in authoritative writings.

2. Those institutions observing disciplinary practices which have not been formally written and approved should undertake such formalization of these policies and procedures.

3. The few institutions which have significant omissions or erroneous practices regarding minimally mandated procedures should add needed procedures or modify the procedures in question.

4. Issues which address expansion of procedural due process, such as different hearing formats (i.e. open v. closed, joint v. separate), should be carefully considered for their applicability to the institution's disciplinary process.

5. Institutions should be proactive in developing practices to cover potential disciplinary or related dismissal actions for which the institution has no existing policies and little or no practical experience.

6. Institutional disciplinary administrators and campus judicial authorities should undertake the effort to remain informed of continuing developments in case law, authoritative research and expert commentary regarding discipline in higher education.

7. Where possible, institutions should seek to assure that all involved parties understand current thinking about academic misconduct adjudication, and to ensure that academic misconduct proceedings meet

standards offered by court decisions and knowledgeable commentary.

8. Institutions should consider providing students with one specific, comprehensive document which outlines procedures and policies covering disciplinary misconduct, academic misconduct, and other related issues.

Recommendations for Future Research

Most studies, no matter how thorough or inclusive, generate other issues worthy of further study. Among the possible research directions suggested by this study are the following:

1. A replication of this study could be initiated focusing on the status of disciplinary policies and procedures of private colleges and universities in South Carolina.

2. An examination could be conducted of the specific practices which govern academic dismissals at each of the eleven institutions, with a subsequent comparison made between policy and procedures of both academic and disciplinary dismissal proceedings.

3. Statistical data could be gathered describing the extent and content of disciplinary suspension and expulsion proceedings for the eleven institutions included in this study.

4. A replication of this study could be undertaken for tax-supported colleges and universities in any other state. Where feasible, results of that study could be compared with results from this study. Some states have system governing boards and administrative procedures acts which might significantly influence the overall status of disciplinary practices in that state, thus rendering comparisons invalid.

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APPENDIX A

SURVEY INSTRUMENT AND COVER LETTER

June 4, 1987

Dear Chief Student Affairs Officer:

My name is Kirk Brague and I am the Director of Student Development Programs in the division of Student Affairs at Clemson University. I am also a doctoral student in Education Administration at the University of North Carolina at Greensboro. I am currently preparing to gather data for my research, and I need your assistance.

The topic of my dissertation is "Suspension and Expulsion Practice and Policy at Major, Tax-Supported Colleges and Universities in South Carolina." This dissertation is being guided by my advisor, Dr. Joseph Bryson, an authority on legal issues in education. The goal of my research is to assess the status of disciplinary due process procedures and policy for each of the major tax-supported institutions of higher education in this state. This study requires me to gather information from each of these institutions, including your school.

I have enclosed my survey instrument for this research. I ask that you give this survey to the individual on your campus who is the primary administrator of disciplinary programs for that person to complete. I have enclosed a self-addressed, stamped manilla envelope in which the survey can be returned. In addition, I have enclosed a self-addressed, stamped postcard which I ask that you return to me as soon as possible.

It is my hope that this research will be both informative and beneficial to administrators of discipline at each of the schools included in the study. I intend to share significant findings with those individuals who complete the survey at the conclusion of my research effort.

Because there are so few schools (11) included in my study, it is imperative that I receive materials back from each institution. My target deadline for the receipt of completed surveys is June 26, 1987, but an earlier return will be greatly appreciated.

Please contact me if there are any further questions. Your cooperation in facilitating this research effort is greatly appreciated.

Sincerely,

Kirk A. Brague
Director of Student Development Programs

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INSTITUTIONAL DISCIPLINARY SURVEY

Dear Respondent:

Let me take this opportunity to thank you for taking your time and effort to complete this survey. The data which you provide me will be very helpful to me in my dissertation research effort. I promise to share a summary of my findings with you at the conclusion of my activities. I hope you will find both this survey and my findings informative and helpful to you as you administer discipline activities on your campus.

My deadline for receipt of completed surveys is FRIDAY, JUNE 26, 1987. I would appreciate receiving materials back as soon as possible, but the June 26th deadline is crucial to my research.

Again, thank you for your assistance.

Sincerely,

Kirk A. Brague
Director of Student Development Programs

DIRECTIONS:

Please answer all questions to the best of your ability. Circle all applicable answers to the item, unless otherwise noted. If you respond to the choice 'Other', please write short, concise answers in the blank space provided (use back of page if more space is needed).

If you are not sure about the meaning of an item, please put a question mark out to the side of the item in the margin and proceed to the next item. I will follow-up on the item in question at a later date. If the entire question is not applicable to your situation, please write a visible 'NA' out to the side of the item in the margin.

Please put the completed survey in the enclosed, self-addressed, stamped envelope. Please enclose any additional materials which will give me a greater insight into the nature of disciplinary due process procedures on your campus (e.g. statements in the Catalog or Student Handbook, disciplinary flow-chart, etc.).

A. PREHEARING COMMUNICATIONS, INVESTIGATION, AND CONFERENCE

1. Y N Does your institution provide students with any printed statement or document which outlines the judicial policy and procedures of the school? If YES, please include a copy with the completed survey.

2. Y N Is written notice provided to the accused student concerning applicable charges for violation of student conduct regulations where the sanctions of suspension or expulsion may be applied?

3. If YES is your answer in #2, please indicate which of the following elements are contained in the written notice:

   a. Specific facts and evidence related to the charge(s) brought against the student.
   b. A citation of the specific regulation(s) allegedly violated.
   c. Information concerning an administrative prehearing conference.
   d. Information concerning the time and place for a formal disciplinary hearing.
   e. Information concerning the format and procedures for a formal hearing.
   f. Copies of related documents (e.g. incident report, witness statements, arrest reports, etc.)
   g. Other:_____

4. How is the written notice of charges conveyed to the accused student?

   a. Sent by unregistered mail.
   b. Sent by registered or certified mail, receipt requested.
   c. Hand-delivered to address of residence.
   d. Hand-delivered to student at a location other than residence.
   e. Other:_____

5. Y N Is information concerning the charges conveyed to the student orally, as well as in written form?

6. Please indicate the frequency to which each of the following elements occur during a prehearing conference (please mark N/A in the column next to the number of this question if prehearing conferences are not conducted, and move to the next item). A = Always G = Generally N = Seldom or Never

A G N a. The accused student is allowed to plead innocent or guilty to the charges.
A G N b. The student who pleads guilty is then given applicable sanctions.
A G N c. The accused student is offered the opportunity to request a formal hearing in order to determine innocence or guilt, or to consider appropriate sanctions upon entering a guilty plea.
A G N d. The student is allowed to review all pertinent documents related to the charges and the alleged incident.
A G N e. The student is given an explanation of the disciplinary procedures which will be used to adjudicate the charges, and his/her rights during this process.
A G N f. The student is given an explanation of possible recommended sanctions.
A G N g. The student is allowed to offer personal testimony concerning the incident and the related charges to the person(s) conducting the conference.

B. ELEMENTS AND PROCEDURES OF THE FORMAL DISCIPLINARY HEARING

7. Y N In cases where the sanctions of suspension or expulsion are applicable to a particular incident of misconduct, is the accused student allowed to request a hearing to determine guilt or innocence, or to determine applicable sanctions?

8. Who serves as the hearing authority for the purpose of the initial hearing?

a. A designated Hearing Officer (give title: _____)
b. A different Hearing Officer designated for each case.
c. A designated Hearing Board (panel or committee) with permanent standing.
d. A different Hearing Board designated for each case.
e. Other: _____

9. How many of the following constituencies are represented on the Hearing Board? (Skip to next question if you do not have a Hearing Board) Write number in blank to represent number from each group on board.

a. ____ Students.
b. ____ Administrators.
c. ____ Faculty.
d. ____ Non-institutional members.
e. ____ Other: _____

10. Please indicate the frequency with which the following features of a hearing are evident as part of your campus's procedures:
A = Always G = Generally N = Seldom or Never

A G N a. The student has the right to be tried apart or with other students involved in the same incident.
A G N b. The institution decides whether the student will be tried apart from or with other involved parties.
A G N c. The accused student has the right to decide on an open or closed hearing.
A G N d. The institution decides whether the hearing is open or closed.
A G N e. The student can be compelled to appear at the hearing.
A G N f. The student can be compelled to testify against himself/herself.
A G N g. The institution will proceed with the hearing in the event that the accused is absent without cause.

11. In what form are records of the hearing proceedings kept?

a. Written.
b. Audiotaped.
c. Stenographed.
d. Videotaped.
e. Records of the proceedings are not kept.
f. Other: _____

12. With what frequency are the following activities allowed during the disciplinary hearing? A = Always G = Generally N = Seldom or never

A G N a. The student may be advised by legal counsel of his/her choosing.
A G N b. The student may be advised by a third party who is not an attorney.
A G N c. The student may be represented by legal counsel.
A G N d. The student (or authorized counsel) may confront adverse witnesses.
A G N e. The student (or counsel) may present witnesses on the student's behalf.
A G N f. The student (or counsel) may present evidence.
A G N g. The institution may be advised by legal counsel.
A G N h. The institution may be represented by legal counsel.

13. Is the student or the school allowed to "subpoena" witnesses from the campus community (e.g. students or employees) to appear and to testify at the hearing?

a. The student may subpoena witnesses.
b. The school may subpoena witnesses.
c. Neither party has subpoena power.

14. Who determines the acceptability of evidence entered during the hearing?

a. Hearing Board of Officer.
b. Third party removed from hearing.
c. Primary institutional disciplinary administrator.
d. Other:_____

15. How are the finding of facts, conclusions, and any applicable sanctions communicated to the accused student?

a. Oral decision rendered upon conclusion of the hearing.
b. Written decision rendered upon conclusion of the hearing.
c. Written decision rendered after the conclusion of the hearing.
d. Other:_____

C. APPEAL PROCEDURES

16. Which of the following conditions generally govern appeals of the hearing decision?

a. An internal appellate review is afforded the student upon request, regardless of grounds.
b. The student may request appellate review based on established grounds for appeal.
c. An internal appellate review is automatically initiated upon a finding of guilt where suspension or expulsion is recommended.
d. The institution may request an appellate review based on established grounds.
e. The institution does not have an appeals procedure.
f. Other:_____

17. If an appeals process exists, who serves as the appellate authority?

a. There is not an appellate authority.
b. An appeals officer.
c. An Appeals Board.
d. The chief student affairs officer (if not the appeals officer).
e. The president of the institution (if not the appeals officer).
f. Other:_____

18. How is the student informed of his/her right to appeal?

a. Instructions concerning appeals are contained within the notice of charges.
b. Instructions concerning appeals are given during the hearing.
c. Instructions concerning appeals are given during the prehearing conference.
d. Instructions are listed in institutional publications.
e. Instructions are given with the findings of the hearing.
f. Other:_____

19. If grounds have been established for an appeal at your institution, please indicate which of the following represent such grounds:

a. Procedural defects in the handling of the incident prior to the hearing.
b. Procedural defects in the hearing.
c. Issues of proper jurisdiction.
d. Insufficient evidence and testimony to support the findings.
e. Harshness or leniency of sanctions imposed on the guilty.
f. Evidence that the hearing was biased, not fundamentally fair.
g. The student's desire to appeal to another authority.
h. Other:_____

20. Which of the following actions can take place as the result of an appeal?

a. The original decision is upheld.
b. The original decision is reversed.
c. A new hearing is ordered.
d. The severity of the sanction is reduced.
e. The severity of the sanction is increased.
f. Other:_____

D. INTERIM SUSPENSION

21. Y N Does the institution reserve the right to order an immediate suspension of a student prior to the holding of any formal disciplinary hearing?

22. If YES is given for #20, which of the following reasons may be used to justify imposition of an immediate suspension pending further disciplinary action?

a. The immediate danger which the accused poses to self and/or others.
b. The nature of the alleged offense in question.
c. The possibility that the continued presence of the accused student will substantially disrupt the educational process.
d. The arrest of the student for violation of specific civil or criminal laws (e.g. arson, violent assault, etc.).
e. Other:_____

23. Which of the following conditions apply to the imposition of interim suspension?

a. The student is given notice that an interim suspension is imposed.
b. The student is afforded the opportunity to appeal the interim suspension.
c. The student is afforded the opportunity for a formal disciplinary hearing during or upon conclusion of the interim suspension.
d. Other: _____

E. ISSUES WHERE INSTITUTIONAL DISCIPLINE AND SOCIETAL LAW OVERLAP

24. Y N Are the institution's disciplinary procedures affected in any way if the accused student is also charged with a violation of civil or criminal law for the same incident(s)?

25. If YES is given for #24, with what frequency do the following activities happen as a result of the student being tried both institutionally for misconduct and civilly or criminally for violations of law?

A G N a. The institution does not process the charge(s) until all legal proceedings are completed.
A G N b. The institution processes the incident, but does not impose any sanctions until the legal proceedings are completed.
A G N c. The student has the right to request that the institutional proceedings be initiated prior to the disposition of legal proceedings.
A G N d. The student has the right to request that the institutional proceedings be postponed until after disposition of the legal proceedings.
A G N e. The institution processes the incident regardless of circumstances.

26. Does the institution offer or give upon request incident reports, witness statements, hearing records or any other related documents to law enforcement or judicial officials, when such material is not part of the legal proceedings, or is not subpoenaed?

a. Always.
b. Generally.
c. Seldom.
d. Never.

F. ACADEMIC MISCONDUCT

27. Please identify which of the following statements apply to suspension and expulsion for academic misconduct (e.g. cheating, plagiarism, inappropriate collaboration, etc.) at your institution:

a. Academic misconduct is treated procedurally different from student disciplinary misconduct.
b. Academic misconduct is procedurally treated like disciplinary misconduct.
c. Academic misconduct is treated procedurally like failing academic performance with regard to suspension or expulsion.
d. There is no set procedure for handling suspension and expulsion for academic misconduct.

28. If academic misconduct is procedurally processed in a different manner than disciplinary misconduct (e.g utilizing a different structure), please indicate which elements are present in the process for academic misconduct:

a. Not applicable; they are treated the same.
b. A formal notice is given the accused.
c. The accused is afforded a hearing with due process rights similar to those afforded the accused during a disciplinary hearing.
d. The accused is afforded a hearing which is not comparable to a disciplinary hearing.
e. Each incident is handled in an individual manner, with no set procedure.
f. An appeals process is present if requested.
g. Other: _____

G. MANDATORY WITHDRAWAL OF STUDENTS WITH MENTAL DISORDERS

29. Y N Does your institution have a written policy statement and corresponding due process procedures which are applicable to instances where a student is recommended for mandatory withdrawal for mental disorders? (Please enclose a copy of any such statement and procedures.)

30. Please indicate which of the following policy considerations and due process procedures are applied to cases of mandatory withdrawal for mental disorders:

a. The institution has a clear statement concerning the policy to be applied in such cases.
b. The institution must show reasons for pursuing a mandatory withdrawal for mental disorder.
c. The institution will require that standard disciplinary procedures be used unless there is a showing of the student's incapacity to respond to the charges, or to understand the nature and wrongfulness of the act(s) in question.
d. The institution provides the student with adequate notice (exceptions made for "emergencies") that involuntary withdrawal is contemplated.
e. The institution uses independent evaluation by non-affiliated mental health professionals as part of the process.
f. The institution relies solely on evaluations conducted by mental health professionals who are members of the institutional staff.
g. The student is offered some form of hearing or conference (formal or informal) in order to examine the evaluation and discuss the situation.
h. The institution allows the student to have advisory assistance during the hearing or conference.
i. The institution allows the student to have legal counsel present during the hearing or conference.
j. There is an appeal process available to the student.
k. Other: _____

THANK YOU FOR YOUR TIME AND EFFORT IN COMPLETING THIS SURVEY. PLEASE FILL IN THE INFORMATION AT THE BOTTOM OF THIS PAGE, AND SEND THE COMPLETED SURVEY AND ANY ADDITIONAL INFORMATION IN THE ENCLOSED ENVELOPE. I WILL SEND RESEARCH FINDINGS TO YOU AT THE CONCLUSION OF MY RESEARCH.

Name of survey respondent: _____

Title of survey respondent: _____

Mailing Address of respondent: _____

_____

Telephone Number of respondent: _____