DO WE REALLY NEED ALL THIS PROCESS?

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The essence of this presentation can be found in the statement which appeared in your Conference Registration materials -- "The presenters will examine whether the objectives of student discipline would be better served by a 'simpler' process, without exposing the college or university to liability for due process violations." In order to do this it seems necessary to examine both the objectives of student discipline as well as the institution's duty under the due process provision of the 14th Amendment.

The objectives of student discipline are many but I find them best encapsulated by the statement of the United States District Court for the Western District of Missouri in its en banc opinion on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education (45 F.R.D. 133). The court said:

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. (p. 142)

The court also provided a litany of lawful missions of tax supported institutions most of which can be found in the mission statements of almost all colleges and universities. These lawful missions define the areas in which we teach. So, for example, the court includes

*To train students...for leadership and superior service in public service, science, agriculture, commerce and industry.

*To develop students to well rounded maturity physically, socially, emotionally, spiritually, intellectually and vocationally.
*To develop, refine and teach ethical and cultural values.
*To teach principles of patriotism, civil obligation and respect for the law.
*To teach the practice of excellence in thought, behavior and performance.
*To develop and teach lawful methods of change and improvement in the existing political and social order. (p. 137)

If the objective of disciplining students is to teach -- leadership, social and emotional maturity, ethical and cultural values, civil obligation, respect for the law, excellence in behavior and lawful methods of change, and I believe it is, then how can it best be taught? It has been said that the best teaching is Mark Hopkins on one end of a log and a student on the other. While it may be difficult to get Mark back, I think the expression is designed to characterize good teaching as a personal relationship. The Supreme Court recognized this when it observed that,

The educational process is not by nature adversarial; instead it centers around a continuing relationship between faculty and students, 'one in which the teacher must occupy many roles -- educator, advisor, friend and at times, parent-substitute' ..." (Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), p. 90)

While teaching is the objective of student discipline the Supreme Court also tells us that "when a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential" [Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)]. This right to be heard "...before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction..." [Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1950)] has come to be known as due process. Thus, in
Goss [419 U.S. 565 (1975)] where the Court held that the suspended children not only had a protected property right in the state law guaranteeing them an education, but they also had a liberty interest since, if suspended for misconduct, it could "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment" (p. 575).

Without further arguing the property or liberty rights of students who are suspended or expelled let us agree that it is axiomatic that those actions at a public institution would invoke due process protections. I believe this has become axiomatic ever since the Fifth Circuit Court of Appeals rendered its decision in Dixon v. Alabama State Board of Education [294. F. 2d 150 (5th Cir.1961)] stating that "We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct" (p. 158). The Supreme Court denied certiorari [386 U.S. 930 (1961)] and while that normally would not tell us if the Court agreed or disagreed with the decision their subsequent reference to Dixon as "the landmark case" [Goss v. Lopez, 419 U.S. 565, note 8, 576 (1975)] in the realm of due process in student discipline leads me to believe the Court agreed with the Fifth Circuit. In addition, Dixon has been referred to by the Second Circuit as "the path-breaking decision recognizing the due process rights of students at state universities" [Blanton v. State Univ. N.Y., 489 F. 2d 377, 385 (2nd Cir. 1973)] while a later Fifth Circuit court characterized the case as "The classic starting point for an inquiry into the rights of students at state educational institutions [Jenkins v. Louisiana State Board of Education, 506 F 2d 992, 999 (5th Cir. 1975)].

However, "Once it is determined that due process applies, the question remains what process is due" [Morrissey v. Brewer, 408 U.S. 471, 481 (1972)]. Before examining that question allow me to digress for a moment to consider two significant issues.
Since the guarantee of due process is found in the 14th Amendment to the United States Constitution it would only apply to tax supported higher education institutions or private institutions found to be engaged in state action. In almost every instance private colleges and universities have not been found to be engaged in state action (Gehring, 1993). Thus since the Constitution "erects no shield against purely private conduct" (Shelley v. Kraemer, 334 U.S. 1, 13 (1947)) private institutions need not conform to the requirements of due process -- whatever they may be. This is not to say, however, that private institutions are free to be arbitrary in their administration of discipline [Alum v. Administrators of Tulane Educ. Fund, 617 So. 2d 96 (La. App. 1993)]. The decision of private institutions to discipline students, at least in New York and probably elsewhere, must be "...predicated on procedures which are fair and reasonable and which lend themselves to a reasonable determination" [Kwiatkowski v. Ithaca College, 368 N.Y.S. 2d 973, (S. Ct. Tompkins Cty. 1975)]. Furthermore, New York's highest court has held that:

Whether by analogy to the law of associations on the basis of a supposed contract between university and student or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed. [Tedeschi v. Wagner College, 427 N.Y.S. 2d 760 (1980)].

Private institutions, while not being required to conform to the due process requirements of the 14th Amendment, nonetheless will probably be held to a standard of fairness and reasonableness and be required to conform to their own rules [Fellheimer v. Middlebury College, 869 F. Supp. 238 (D. Vt. 1994); Ben-Yonaton v. Concordia College, 863 F. Supp. 983 (D. Minn. 1994)]. This latter admonition to follow your own rules also applies to public institutions.
The only case I know of where the court actually ordered the assignment of a grade involved a law school which failed to follow its own grade appeal procedures. The court observed that the student "...was entitled to a review of her final [exam] that complied with school rules about grade disputes. She did not receive that review. TSU has persisted in its inability to obey the Constitution, to follow its rules, to speak candidly or to act responsibly" [Sylvester v. Texas Southern University, 957 F. Supp. 944, 947 (S.D. Tx. 997)]. And with that statement the court ordered the University to award the student a "Pass" on her exam.

Most courts have recognized this contractual relationship finding "The terms and conditions are contained in the brochures, course offering bulletins, and other official statements, policies and publications of the institution" [Merrow v. Goldberg, 672 F. Supp. 766, 774 (D.Vt. 1986)]. However, the courts have cautioned "...to be wary of the wholesale application of commercial contract principles in the academic context" (Fellheimer, supra, 243). Thus, we all need to be careful of what we say in our official documents and publications. I know of private colleges where the term due process is actually used to describe their disciplinary procedures.

My second digression delves into the area of academic dishonesty. Many of my faculty colleagues believe that because they have academic freedom -- whatever that means -- they can make a determination that students have cheated and expel them from class without some type of process. Nothing could be further from the truth and faculty who do this risk a Section 1983 suit for damages. Recall the Supreme Court’s language in defining liberty interests protected by due process -- "...where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimum requirements of due process must be satisfied." (Wisconsin, supra, 437). Probably no other offense more significantly calls into question "a person's good name, reputation, honor or integrity" than a charge of academic dishonesty. Faculty need to understand that charges of academic dishonesty are questions of fact rather than subjective
faculty evaluations and a "...dismissal for academic dishonesty unquestionably is a
disciplinary action for misconduct" [University of Texas Medical Center v. Than, 901
S.W. 2d 926 (Tx. 1995)]. But the court also said "the minimum requirements of due
process must be satisfied" so, students should at least be confronted with the charge of
academic dishonesty, and have an impartial third party such as a department chair or other
hear the facts supporting the charge and provide students an opportunity to explain their
conduct. This need not be overly formalistic.

To return now to the question of what process is due, I think Justice Holmes said it
most concisely and articulately when he referred to the due process clause of the 14th
Amendment as "...the rudiments of fair play..." [Chicago, Milwaukee & St. Paul R.R. Co.
v. Polt, 232 U.S. 165, 168 (1914)]. The Court has also said the essential of due process
is "reasonableness" [West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936)] and that it is
"...not a mechanical instrument" or a "yardstick" "unrelated to time, place and
circumstances" (Joint Anti-Fascist Committee, supra, 162) but "The very nature of due
process negates any concept of inflexible procedures universally applicable to every
imaginable situation" [Cafeteria and Restaurant Workers Union v. McElroy, 376 U.S. 886,
895 (1961)]. Finally, the Court has told us due process is defined by "...the gradual
process of judicial inclusion and exclusion as the cases presented for decision shall
require..." [Davidson v. New Orleans, 96 U.S. 97, 104 (1877)].

Further guidance has been given us by the Court when it said:

Considerations of what procedures due process may require under
any given set of circumstances must begin with a determination of
the precise nature of the government function involved as well as the
private interest that has been affected by governmental action.
(Cafeteria and Restaurant Workers Union, supra, 895)

Although the Cleary's, the Society of Professional Journalists and the Federal
Congress have attempted to analogize the circumstances and private interests involved in
student discipline to criminal procedures and crimes, and this really concerns me, the courts have consistently said "We do not believe there is a good analogy between student discipline and criminal procedure" [Norton v. Discipline Committee, East Tenn. St. Univ., 419 F. 2d 195, 200 (6th Cir. 1969)]. This sentiment of the 6th Circuit Court of Appeals has been echoed by the 1st [Gorman v. Univ. Rhode Island, 837 F. 2d 7 (1st Cir. 1988)], 5th [Wright v. Texas Southern Univ., 392 F. 2d 728 (5th Cir. 1968)], 8th [Esteban v. Central Mo. St. College, 415 F. 2d 1077 (8th Cir. 1969); cert. den. 398 U.S. 965 (1970)], and 11th [Nash v. Auburn Univ., 812 F. 2d 655 (11th Cir. 1987)] Circuits, the federal district court for the Eastern District of Michigan [Jaska v. Regents of Univ. Michigan, 597 F. Supp. 1245 (E.D. Mich. 1984)] and the Supreme Court of Vermont (Nzuve v. Castleton St. Col. 335 A. 2d 321 (VT. 1975)].

The U.S. District Court for the Western District of Missouri in its en banc opinion (Judicial Standards of Procedure and Substance, supra) zeroed in on this question when it observed that:

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. ...The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.

In the lesser disciplinary procedures, including, but not limited to guidance, counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of the lawful mission of the institution.
The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. (p. 142)

The difference between campus discipline and criminal law was also illustrated by an interesting case in the 8th Circuit. A basketball player at the University of Missouri was suspended for one semester for stealing almost $700 from the campus bookstore. The federal district court judge imposed a permanent injunction prohibiting the suspension saying it was "a damned outrage" and "sticks in my craw." On appeal the 8th Circuit speculated that the district court seemed to seek to impose criminal procedures in a university disciplinary context, and that was inappropriate. The court also said it could find no "sticks in my craw" test in the Constitution and reversed the lower court. I think the district judge must have been a season ticket holder [Coleman v. Monroe, 977 F. 2d 442 (8th Cir. 1992)].

If the process that's due depends on the circumstances and the private interest affected and if it need not conform to the procedures and processes of criminal law nor comply with a "sticks in my craw" test, then what is required? You may need to comply with specific mandates of your state's Administrative Practices Act, but Melinda will address that issue. The requirements for student discipline have been eloquently stated by the 5th Circuit in Dixon which the Supreme Court referred to as the "landmark case." As an aside, you might be interested to know that Professor M.M. Chambers (1972), who was writing about college law well before many of us were out of knickers, found that seventy four years before Dixon a county court in Pennsylvania required that due process rights to notice and hearing be afforded a student facing disciplinary charges [Commonwealth ex rel. Hill v. McCauley, 3 Pa. Co. Ct. 77 (1887)].

In Dixon the court gave us some direction when it said:
For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university ... The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations. ...a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail. This does not imply that a full-dress judicial hearing, with the right to cross examine witnesses, is required. ...the names of witnesses against him and an oral or written report on the facts to which each witness testifies. He should be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. (p. 159)

When I first began my career I served as the Director of Housing at West Georgia College. In those days there was no interhall visitation and a male student hid in the room of a female student and awoke her in the middle of the night looking for his girlfriend. The female student talked him into leaving and reported him the next morning. My Dean sent him a note (handwritten as I recall) telling him to be in his office that afternoon to talk about the incident in the women's hall last night. When the student appeared the Dean said "Was that you in the women's hall last night?" The student said "yes." The Dean said "How long will it take you to pack?" The student said "About 20 minutes." The Dean then said "Good, see that you are gone in 30!" Notice and an opportunity for hearing, but not much teaching.

You might have noted that Dixon involved an expulsion and the court specifically directed its remarks and requirements to this circumstance and the private interest affected
by expulsions or long term suspensions. Even in cases of expulsions or long term suspensions, the courts have not required a "full dress judicial hearing" (Dixon, supra, 159). The First Circuit Court of Appeals overruled a finding by the district court that a student, subjected to a one-year suspension, was denied due process when he was not allowed, at his own expense, to tape record his hearing and the Director of Student Life served as the advisor to the Judicial Board [Gorman v. University of Rhode Island, 837 F. 2d 7 (1988)]. The court placed a campus disciplinary hearing in perspective when it said:

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

For disciplinary actions less than expulsions or long term suspensions even less process is required. Recall the Supreme Court’s words that "the private interest that has been affected by governmental action" (Cafeteria & Restaurant Workers Union, supra, 895) would be considered in determining what process is due. I might add that most of the disciplinary hearings that take place on our campuses do not involve expulsions or long term suspensions. It is also interesting to note that judicial challenges to institutional imposed suspensions only constituted 7 percent of all substantive cases appearing in the National Reporter System from 1970 to 1993 or 68 out of 973 cases (Gehring, 1998).

Even in the case of a 10 day suspension the Supreme Court has said that due process only required that students be provided with "some kind of notice and afforded some kind of hearing" (Goss, supra, 579). The Court also offered additional guidance when it said the student should "...be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an
opportunity to present his side of the story" (p. 581). The Court characterized this as an "...informal give-and-take between student and disciplinarian ..." (p. 584). The Court did state that more formal procedures would be required for longer suspensions, but as we have noted most of our campus discipline involves even less than 10 day suspensions.

Some private interests affected by governmental action could be so de minimus, they would not trigger due process. Consider the situation in which a student at East Stroudsburg University was found to have drugs in his room and was placed on suspended suspension -- I suppose that's like double secret probation. He complained, among other things, that his due process rights were violated. The Commonwealth Court of Pennsylvania said "In the present case ... the punishment meted out under this rule simply does not deprive the petitioner of a right which would in turn give rise to a constitutional claim" [Beaver v. Ortenzi, 524 A. 2d 1022 (Cmwlth. Ct. Pa. 1987)].

Thus, I believe that for offenses that would result in sanctions less than long term suspension or expulsion or other significant deprivation such as the loss of financial aid or campus living, a straightforward notice should be provided (and I think it should be written to ensure both parties are on the same page so to speak) informing the student of the rules he or she is alleged to have violated and when and where to appear for a hearing. I also believe the hearing can be conducted by an administrative official of the institution although one or two students may also serve on this panel in furtherance of their education. At the hearing the student should have an opportunity to admit or deny the violation and if there is a denial be confronted with the evidence which could constitute a police officers' or R.A.s testimony and an incident report. I don't believe a recording is necessary or that an appeal is required. If the hearing is kept to this minimum there is a much better opportunity for the kind of give-and-take exchange which the Supreme Court envisioned and which facilitates the teaching process. In this kind of a situation students might actually learn something about their own emotional maturity, obligations as a citizen, respect for the law, ethical and cultural values and behavioral expectations. Discipline, even with punishment, is teaching.
As Pavela (1985) pointed out a just punishment drives students to behold themselves and "not surprisingly, it is when we 'behold ourselves' in the context of a just punishment that we may be most receptive to ethical instruction" (p. 47).

But even beyond discipline for lesser offenses, our procedures for those violations which might result in long term suspensions or expulsions have become much too cumbersome and tend to mirror criminal trials. I don't know if this is the result of what Pavela (1985) has referred to as "college and university attorney's, who apparently failed to explain to campus officials that court cases setting forth the 'due process' requirements at public institutions never mandated the full-blown adversarial hearings now found at many colleges and universities" (p. 41), or whether institutions are simply going to the extreme to cover themselves. If the latter is true, institutions need to know that from 1970 to 1993 at every level of court from lower state courts through U.S. Courts of Appeals colleges and universities have won 70 percent of the cases in which they were sued by or sued a student. Only at the U.S. Supreme Court have institutions lost more cases than they have won -- students have won 10 cases while institutions have prevailed seven times (D. Gehring, 1998).

Even in the case of long term suspension or expulsion there is no general right to representation by counsel, although if the student is being charged with a crime arising from the same facts counsel should be allowed to advise the student at the disciplinary hearing [Donohue v. Baker, 976 F. Supp. 136 (N.D. N.Y. 1997); Osteen v. Henley, 13 F. 3d 221 (7th Cir. 1993); General Order, supra; Dixon, supra; Gabriilowitz v. Newman, 582 F. 2d 100 (1st Cir. 1978)]. Disciplining students whose conduct is also subjecting them to criminal prosecution does not constitute double jeopardy for while the conduct was the same and the non-criminal and criminal sanctions were imposed in separate proceedings, the third leg of the test for double jeopardy fails since the non-criminal sanction is not punishment but "a means to protect the integrity of the institution" [State v. Sterling, 65 A. 2d 432 (Me. 1996)]. Furthermore there is no legal mandate for the
institution to wait until the criminal charge is resolved. As the Supreme Court of Vermont has observed in a case where a student was charged with attempted rape both on campus and by the local prosecutor:

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. To hold otherwise would, in our view, lead logically to the conclusion that civil remedies must, as a matter of law, wait for determination until related criminal charges are disposed of. By parallel, the owner of stolen property could not obtain damages or its recovery until criminal prosecution has been completed. Similarly, in the instant case, the complaining witness could not have redress for the assault on her, if proven, until the pending criminal charges had run their long course of trial and appeal. Nor would it be at all unusual for the temporary relief here sought to enable the plaintiff to complete his education, thus effectively completing an "end run" around the disciplinary rules and procedures of the college. [Nzuve v. Castleton State College, 335 A. 2d 321 (Vt. 1975)].

Beginning with Dixon the courts have agreed that even in expulsions or long term suspensions there is no right to confront and cross-examine witnesses. Recall that the court in Dixon said that "This is not to imply that a full dress judicial hearing with the right to cross-examine witnesses is required" (p. 159). The 11th Circuit has echoed this standard (Nash, supra, 664) and the federal district court in the Eastern District of Michigan has put it most succinctly saying "The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding" (Jaska, supra, 1250). However, if the case involves the credibility of witnesses then cross-examination might be
essential to a fair hearing [Winnick v. Manning, 460 F. 2d 545 (2nd Cir. 1972)], but even then confrontation of witnesses is not an absolute right. The Supreme Court also tells us that "an adequate opportunity for cross-examination may satisfy the [sixth amendment confrontation] clause even in the absence of physical confrontation" [Douglas v. Alabama, 380 U.S. 415, 418 (1965)]. In two cases, one dealing with an act of academic dishonesty and the other, a date rape, the courts have found that only allowing cross-examination by directing questions to the witness through the disciplinary panel did not violate due process. The 11th Circuit said it found "...no denial of appellant's constitutional rights to due process by their inability to question the adverse witness in the usual adversarial manner" (Nash, supra, 664). There may be times when even if cross-examination is permitted, the witness may testify anonymously. The Supreme Court, applying due process to a parole revocation, said "...if the hearing officer determines that the informant would be subject to risk of harm if his identity were disclosed, he need not be subject to confrontation and cross-examination" (Morrissey, supra, 487). It could be argued that in dealing with parole violations and informants, the criminal element differentiates this from campus discipline since an informant might be subject to violent retribution. However, one need only read Carolyn Palmer's (1993) research on violence and victimization in residence halls to quickly dispel that thought. The 1st Circuit followed the Supreme Court's advice in a case in which a third year law student was crawling under library tables peeping up women's skirts. He was found to have violated university regulations and expelled. The court allowed a woman to testify out of the student's sight because of "her frightened and nervous state [and that] did not render the hearing unfair" [Cloud v. Trustees of Boston University, 720 F. 2d 721, 725 (1st Cir. 1983)]. The anonymous testimony of a witness in a cheating case was also upheld by a federal district court (Jaska, supra, 1253).

Finally, an aspect of campus disciplinary procedures which I find very cumbersome is the appeal process. Some institutional procedures I have reviewed have allowed appeals from the original hearing panel to a review committee, to the President and finally to the
Board of Trustees. Most of these institutions do not even specify what the grounds are for an appeal. While it may be reasonable to have a panel's decision reviewed if one can show that there is new information clearly unavailable at the time of the hearing or some type of procedural violation, there is no right to an appeal. The Supreme Court has made it clear that "Due process does not comprehend the right of appeal" [District of Columbia v. Clawans, 300 U.S. 617, 627 (1936)]. The Court explained its logic by saying, "If a single hearing is not due process doubling it will not make it so" [Reetz v. Michigan, 188 U.S. 505, 508 (1903)].

The fact that we incorporate all these trappings of what is thought to constitute due process such as representation by counsel, confrontation and cross-examination of witnesses and multiple appeals for every offense from minor violations to major incidents that may also constitute crimes confuses student rather than serving the objective of discipline — teaching in furtherance of the lawful mission of the university. It also creates an adversarial environment in which teaching is precluded. Dixon said the procedures it outlined would preserve the "rudiments of an adversary proceeding ...without encroaching upon the interests of the college" (p. 150). Note that the court never said there had to be an adversarial environment, but only the "rudiments of an adversarial proceeding"—notice and hearing—had to be maintained. I suggest that we streamline our process and go back to Dixon or the County Court in Pennsylvania and take our guidance from them in providing notice and a hearing which is, in the words of the Supreme Court, "fair" and "reasonable" in light of the circumstances and the private interest affected and use these procedures to teach leadership, social and emotional maturity, ethical and cultural values, civil obligation, respect for the law, excellence in behavior, and lawful methods of change.
References


