

**CAMPUS STUDENT JUDICIAL PROCESS:
PUBLIC VS. PRIVATE**

**PROVIDING TAX FREE LODGING FOR COLLEGE
EMPLOYEES**

**CRISIS COMMUNICATIONS PLAN:
BACKGROUND INFORMATION**

**LEGAL ISSUES CONFRONTING THE
CAMPUS AT LARGE**

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CAMPUS STUDENT JUDICIAL PROCESS: PUBLIC vs. PRIVATE

INTRODUCTION

The campus judicial process differs both in purpose and function from the criminal process. The campus process is generally thought of as instructional in nature, whereas the criminal process is primarily designed as punitive, although some legal scholars believe it to be rehabilitative.

The procedural functioning of the criminal court system is weighted heavily in favor of protection of the accused's rights. Their rights are guaranteed by statutes, such as The Penal Code and Criminal Procedure Law and by The Federal, as well as State, Constitutions.

Campus judicial systems are philosophically premised upon protection of the academic community. While the judicial system differs depending on whether the institution is public or private the protections afforded the accused party are far less comprehensive than those of the criminal system. Likewise, the range of sanctions is much less severe.

THE PUBLIC SECTOR

The due process clause of the Fourteenth Amendment mandates that before students at a public institution are sanctioned for misconduct they are entitled to notice of the charges against them and a hearing opportunity. At such hearing the student is entitled to present a defense, produce explanatory testimony, and examine the hearing report. Dixon v. Alabama State Board of Ed., 294 F.2d 150 (1961). This case has become the basic case for beginning the discussion of due process in the public campus disciplinary system.

Proceeding from there, some additional concepts have been discussed by the courts. Some of these are:

- 1) Right to limit the scope of regulations so as not to impinge upon free speech. Code must demonstrate a material and substantial connection with discipline (dress codes; demonstrations; hate speech).
- 2) Right to substantial evidence as basis of decision.
- 3) Right to refuse to testify if testimony might incriminate the student in a criminal proceeding (even a subsequent criminal proceeding - remember, there is no double jeopardy).

- 4) Limited right to confront and cross examine witnesses (appears to be implicit in the concept of a hearing but was specifically not guaranteed in DIXON).
- 5) Limited right to have counsel present only if case is presented on behalf of the College by counsel (or experienced law student) or if the student is facing related criminal charges in a municipal court. Counsel does not have the right to cross examine witnesses or even participate in the process of the hearing.
- 6) Limited right to appeal.
- 7) No right to a transcript; but if there is an appeal process, the process becomes tainted, if not unworkable, without a transcript.
- 8) No right to explanation of board's decision.
- 9) No right to a public hearing (FERPA)?

The due process protections granted to students during hearings based solely upon academic infractions are less stringent than those granted during misconduct hearings. Students are currently entitled only to notice, from school authorities that they are deficient in meeting minimum academic performance. The Courts reason that they are less qualified to make academic evaluations than are school officials. Gaspar v. Bruton, 513 F.2d 843 (1975).

THE PRIVATE SECTOR

Students and employees of private institutions still have little procedural protections in disciplinary proceedings. They are not entitled to the hearings or administrative reviews that are guaranteed in the public sector. The protections afforded are contractual in nature arising from the institution's policies and the agreements to attend or work at the institution and abide by its published policies.

The courts have traditionally protected students from actions which are clearly arbitrary although still within the private institution's stated policy. Individuals are held only to a standard of conduct which reasonably sets forth the expectations of the institution. Cloud v. Trustees of Boston University, 720 F.2d 721 (1983). In addressing construction of the contract between the students and university, the court in Cloud stated that the applicable standard was that of "reasonable expectations - what meaning that party making the manifestation, the university, should reasonably expect the other party to give it". Private universities are required to act in the exercise of honest discretion based on facts within the school's knowledge. Carr v.

St. John's University, 17 A.D. 2d 632 (1962).

Students at a private university also do not enjoy Constitutional search and seizure protections. As long as government law enforcement officials are not directly or indirectly involved in the search or seizure, and university security officers have not been given public arrest or search powers, the private university is constrained only by its (contract) policy statement. U.S. v. Clegg, 509 F. 2d 605 (5th Cir. 1975); People v. Zelinski, 24 Cal 3d 357 (1979).

Private college students also are not ensured of any First Amendment freedoms except as are agreed upon in the contract (hate speech constraints; publication of campus newspapers, etc.).

PROCEDURAL DIFFERENCES

A. Evidence:

Criminal courts must adhere to a set of formal rules of evidence, which are codified in statute and quite burdensome to the prosecutor.

The state or federal rules of evidence need not be followed in a campus judicial proceeding. It should be noted, however, that serious sanctions cannot be supported by hearsay alone. Hearsay is an out of court statement offered to the court for its truth.

B. Burden of Proof:

In a criminal court the charges against a defendant must be proven "beyond a reasonable doubt." If any reasonable doubt as to whether the defendant committed the crime or not exists, the defendant must be found to be not guilty of the offense charged.

In campus judicial proceedings the charges against a student need only be proven by "substantial evidence." Slaughter v. Brigham Young University, 514 F.2d 622 cert. denied, 423 U.S. 898 (1975). Substantial evidence is defined as, such evidence that a reasonable mind might accept as adequate to support a conclusion. Black's Law Dictionary, West Publishing Co. 1983. Some commentations like to suggest the campus should go up a step: from a "preponderance of the evidence" to "clear and convincing evidence".

C. Right to Counsel:

The defendant in a criminal proceeding is unequivocally entitled to be represented by an attorney.

A student, in a campus judicial proceeding has no right to be represented by an attorney. In some instances, the student does, at least at a public university, have the right to have an attorney present to render advice, but not to present a defense or to conduct cross-examinations. Gabrilowitz v. Newman, 582 F.2d 100 (1978).

There is NO right to appointed counsel for an indigent student.

D. Right Against Self Incrimination:

The 5th Amendment right against self incrimination dictates that no person shall be compelled in any criminal case to be a witness against herself or himself.

The student's testimony is considered compelled and is not admissible in a later criminal proceeding and thus the 5th Amendment protection applies in a campus judicial proceeding if students are required to testify or if their silence will be held against them. Furutani v. Ewigleben, 297 F.Supp. 1163 (1963).

E. Double jeopardy

F. Indictment process

G. Pre-hearing discovery of evidence

H. Pre-hearing status of student

I. Adjournments

-change of venue

-subsequent criminal trial

J. Jury Trial

K. Open v. closed hearing

L. Change from standing board to special board

M. Separation of judge and jury functions

N. Absolute impartiality of trier of fact or presiding judge

-voir dire

-recusation

- O. Subpeona power
- P. Confrontation and cross-examination of adverse witnesses
- Q. Confrontation of accuser
- R. Free transcript of the hearing
- S. Appeals
- T. Mediation
- U. Privacy of records

RESOURCES

- 1) Bickel, Robert, The College Administrator and the Courts. (Published by College Administration Publications, Inc.).
- 2) Young, D. Parker and Gehring, Donald D., The College Student and the Courts. (Published by College Administration Publications, Inc.).
- 3) Pavela, Gary, The Dismissal of Students with Mental Disorders: Legal Issues, Policy Considerations and Alternative Responses. (Available from College Administration Publications, Inc.).
- 4) Pavela, Gary, SYNTHESIS. Law and Policy in Higher Education (College Administration Publications, Inc.).
- 5) Weeks, Kent M. Student Affairs Decisions and the Law. College Legal Information, Inc. Publishers: Nashville, Tennessee, 1994.

FOOTNOTES

1. For a comprehensive discussion of the legal implications of the public-private issue see: KAPLIN, William A. The Law of Higher Education. A Comprehensive Guide to Legal Implications of Administrative Decision Making. Second Edition, Jossey-Bass Publishers: San Francisco, California, 1985.

2. The best discussion I've seen on the subject of the rights of the private college and its students regarding discipline is in: Stoner, Edward N. II and Cerminara, Kathy L. Harnessing the "Spirit

Stetson 1995 - Legal Issues Affecting Private Colleges and Universities - Charles F. Carletta, Esq.

of Insubordination": A model Student Disciplinary Code. The Journal of College and University Law, Fall 1990, Volume 17, No. 2 pages 89-121. National Association of College and University Attorneys and the Notre Dame Law School, 1990.

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PROVIDING TAX FREE LODGING FOR COLLEGE EMPLOYEES

I. LODGING FURNISHED TO EMPLOYEES

A. INTERNAL REVENUE CODE SECTION 119(a)

1. Exclusion From Employee's Gross Income (Not Subject To Employment Taxes)¹

- a. Convenience of the Employer
- b. Employer's Business Premises
- c. Condition of the Employment
- d. Additional Factors
 - (1) Lodging Furnished In Kind
 - (2) No "In Lieu Of" Option
 - (3) Charge for Lodging Irrelevant

B. INTERNAL REVENUE CODE SECTION 119(d)

1. Tax Reform Act of 1986:² Safe Harbor Valuation

- a. Educational Institution³ Employees
 - (1) Corporate Officers and Executives Of College Qualify as Employees
- b. Gross Income Exclusion for Qualified Campus Lodging
 - (1) On Or In Proximity Of the Campus
 - (2) Furnished by the Institution as a Residence To the

¹ IRC Regs. Section 1.119-1(a)(1)(b); IRC Regs. Section 1.61-2(d)(3)

² Tax Reform Act of 1986, Section 1164(a)
Prior to the Tax Reform Act of 1986, the exclusion for employer provided lodging did not apply to employees of an educational institution. Bob Jones Univ. v. United States, 670 F.2d 167 (Ct. Cl. 1978)

³ Definition: see IRC Section 170(b)(1)(a)(ii)

Employee

- (3) Inclusion In Gross Income To The Extent That A Safe Harbor Amount Exceeds the Lesser of
 - (a) 5% of the Appraised of the Qualified Campus Lodging
 - i) Appraisal by Qualified Independent Appraiser
 - ii) Appraisal Reviewed Annually
 - (b) Average of the Rentals Paid By Individuals For Comparable Lodging Provided at the Institution, Over the Rent Paid By the Employee
 - (c) Safe Harbor Amount Subject To Employment Taxes

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LEGAL ISSUES CONFRONTING THE CAMPUS AT LARGE

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A) Governance

- Charter, By-Laws, etc. (Can the College operate a day care center without amending its charter?; grant graduate degrees?; establish an evening division?; implement home study programs via pay TV?; establish satellite campus facilities?)

B) Environmental Law

- disposal of waste from labs
- incineration
- hazardous waste materials
- nuclear waste materials

C) Human Resources

- developing manuals (faculty handbook, staff manuals)
- tenure
- letters of recommendation
- employment at will
- drug testing
- dismissal for cause
- promotion
- retirement (pension planning consistent with Canadian or United States tax laws)
- immigration

D) Affirmative Action

- developing an affirmative action policy for:
faculty/staff
students
- nondiscrimination: age, sex, race, religion, national origin, handicap (Veteran?)
- collective bargaining: including organization issues
- records: retention, sharing

- audit of actions initiated by the Department of Education Office for Civil Rights and/or the Province or State Human Rights Commission
- educating the campus community on multiculturalism (as demanded by large Canadian or United States (or Mexican?) corporations looking to colleges for placement)

E) OSHA

- developing chemical hygiene plan
- plan for confined work spaces
- how to conduct OSHA sensitivity among faculty (particularly in the laboratory)
- defending an OSHA investigation

F) Student Affairs

- student records
- student disciplinary systems
- emergency suspension techniques for students suffering from emotional disabilities or acting out hostilities
- Greek issues: drafting relationship statements
alcohol
- Medical Clinic/Counselling Center/licensing/records/medical ethics/malpractice/AIDS/Family Planning (religious affiliated institutions)
- student government
- foreign students
- student press
- Enrollment Management concepts/Financial Aid/Admissions (prison programs)
- Athletics/Drug Testing/Recruiting/Affiliations

G) Contracts with Government and Other Sponsors

- research issues
- intellectual property issues
- patent issues
- research agreements with the U.S. national laboratories (CRADA)
- real estate issues in government contracts (can the funds be used to improve college property)
- termination clauses (can college recoup what it has spent)
- hold harmless/indemnity clauses
- indemnifying and holding harmless the Government of Canada
- bidding/affirmative action/lobbying/conflict of interest
- confidentiality/non-disclosure agreements

H) General Business

- insurance: all aspects including officers and directors liability
- risk management: all aspects including worker's comp.
- use of school buses, qualifications of drivers, types of buses to be purchased for different uses
- liability issues generally; sensitize faculty, students and staff about them
- third party subpoena (to quash or not to quash)

I) Development

- various vehicles for giving including pooled income funds and charitable remainder trusts consistent with the tax codes of Canada or the United States
- college publications

J) Public Safety

- student records
- training of public safety personnel
- equipment (armed?)
- uniforms
- radio communications
- peace officer status: arrest, etc.

K) Litigation Generally

- civil
- criminal (as it relates to student affairs particularly)

L) Physical Facilities

- architectural agreements; construction management
- handicap access
- real estate title issues; easements for utilities
- bidding the contracts

M) Unrelated Business Income

- the "bookstore"
- the new guidelines regarding examinations of colleges and universities by the United States IRS
- scholarship and fellowship grants
- lobbying
- affinity cards

N) Local Connections within the Host Municipal Government

- Municipal/County/City
- Dept. of Education (Province or State)
- Dept. of Education (Federal) Office of Civil Rights

O) Finance

- Financing new construction:
 - tax exempt or taxable (HUD, UDC, IDA, Sallie Mae vs. banks, pension funds, insurance companies)
- Budget balancing (refinance of debt):
 - minimize interest costs
 - maximize savings benefits
- Budget development
 - international trends in tuition dependence
 - structuring crossovers between faculty and staff
 - layoffs: avoiding claims of discrimination

P) Church Law

Q) The Perspective from Without

- Information Management
- RICO; mail fraud
- Open records/open meetings

For an additional perspective on the issue of how the law and lawyers affect the campus generally and specifically how to implement lawyers as a resource, see: BICKEL, Robert D., The Role of College and University Legal Counsel, A Revisiting of My Comments of Twenty Years Ago. Bowling Green State University in conjunction with The Association for Student Judicial Affairs: Presented at the Campus Judicial Affairs Training Institute, Bowling Green, Ohio 1993.