LEGAL ISSUES INVOLVED IN THE PROCESSING OF STUDENT GRIEVANCES AND THE REVISION OF STUDENT CONDUCT CODES OR POLICIES

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In the five years since the publication of "Harnessing the 'Spirit of Insubordination': A Model Student Disciplinary Code" (a copy of which is reproduced following this outline), there have been no wholesale changes or substantial shifts in the law as it relates to student disciplinary codes. There have, however, been a number of interesting court decisions concerning issues which are very important to consider when drafting and revising your Student Disciplinary Code. Among these issues are the due process requirements for colleges and universities (how much process is due students?), and the amount of lawyer participation which is advisable in the disciplinary process and that which is required by law. What follows is a discussion of

* My thanks to Steven I. Farbman, B.A., Kent State University, 1987, J.D., University of Pittsburgh, 1995, an associate with Reed Smith Shaw & McClay in Pittsburgh, who did all of the real work for this outline.
recent cases that addressed these issues, along with a few cases which, while not addressing these "hot" topics, are both interesting and noteworthy in their own right.

**DUE PROCESS**

One principle stressed in the 1990 article was that in creating their own student disciplinary codes, college or university counsel and administrators should try to follow the general dictates of due process. In the broadest sense, this means fairness to the accused student throughout the disciplinary process.

The specific minimum requirements of due process vary depending upon whether the college or university is state-owned or private. In the public university setting, due process requires notice and some opportunity to be heard before a student is disciplined.¹ In the private school setting, however, students generally are only entitled to those procedural safeguards which the school specifically provides in their student disciplinary codes. This principle is limited only by the requirement that the disciplinary procedures must be "fundamentally fair." Some courts have further defined "fundamentally fair" to mean that which is not "arbitrary and capricious."

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Several recent cases have addressed the issue of just what process is due a student in the course of disciplinary proceedings.  

**Fellheimer v. Middlebury College**

This case provides a clear statement of the due process obligations of a private college and some very good student code language on that subject. Middlebury College, a private college in Vermont, included the following language in the "Hearing Procedures" section of its Student Handbook:

... [D]ue process, insofar as the procedures of the College will permit, will be afforded the party charged. ... [A] student's due process rights cannot be coextensive with or identical to the rights afforded the accused in a civil or criminal legal proceeding. The procedures outlined below are designed, however, to assure fundamental fairness, and

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2 In addition to the cases discussed in the text, see **Held v. State Univ. of New York, College at Fredonia**, 630 N.Y.S.2d 196 (1995) (school suspended student without hearing based on fact that he had been arrested and charged with narcotics offenses; the court held that student was entitled to advance notice of the charges against him and a hearing before an impartial body before he may be suspended); **Smith v. Denton**, 320 Ark. 253, 895 S.W.2d 550 (1995) (University of Central Arkansas failed to follow its own prescribed disciplinary standards in the suspension of a student for violation of firearms policy; therefore, the university failed to afford procedural due process to the student); **Henderson State University v. Spadoni**, 41 Ark.App. 33, 848 S.W.2d 951 (1993) (a "full dress" judicial hearing is not required in order to satisfy due process requirement; fact that student's witnesses were required to testify in response to questions instead of being permitted to say whatever they wanted did not violate due process).

to protect students from arbitrary or capricious disciplinary action. 4

Ethan Fellheimer, a Middlebury student, was accused of raping a female student. Fellheimer was given notice that college judicial procedures, including a hearing, would be commenced concerning this rape charge, and he defended successfully against it. But he was not given notice that he also would be charged under the Student Handbook’s "Disrespect for Persons" provision, and that even if his conduct fell short of rape, it could be sufficient to constitute "Disrespect for Persons." Nor was he told with particularity what conduct, if proven at the hearing, would constitute that offense. Therefore, he argued, it was impossible for him to defend against it.

The Court held that a private college is contractually bound to provide students with the procedural safeguards that it has promised. It further held that by failing to give proper and sufficient notice to Fellheimer regarding the "Disrespect for Persons" charge, Middlebury College violated its obligation to be fundamentally fair in its disciplinary proceedings. The Court’s opinion concluded, however, by stating that the College’s failure to give notice did not preclude a rehearing of Fellheimer’s case after proper notice was given.

4 Id. at 240.
Coleman v. Monroe

Luiet Jamal Coleman, a varsity basketball star at the University of Missouri (a public university), stole $688.07 from the University Bookstore in an elaborate scheme, assisted by his girlfriend, an employee of the bookstore. The University Student Code of Conduct prohibits "theft of...property of the University...," so university disciplinary proceedings were commenced against Coleman. At the same time, a criminal prosecution was begun, to which Coleman pleaded guilty to misdemeanor stealing.

Notice was given to Coleman and a hearing was held by the Student Conduct Committee. Coleman had the assistance of counsel at the hearing, and he was permitted to testify. The Conduct Committee gave Coleman a one-semester suspension, which on appeal was upheld by the Chancellor of the University.

Coleman then sued several University staff members in the district court, alleging violations of his constitutional right to due process. The district court held in favor of Coleman and enjoined the University from suspending him because, as the judge said, the suspension was a "damned outrage" that "sticks in my craw."

On appeal, the Court of Appeals for the Eighth Circuit reversed, finding that due process was given. Coleman received

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5 977 F.2d 442 (8th Cir. 1992).
notice of the hearing and an opportunity to be heard. This satisfied the due process requirements for public universities. Furthermore, there was no evidence that the discipline imposed on Coleman resulted in "arbitrary and capricious" treatment.

**Herbert v. Reinstein, et. al.**

Lincoln Herbert, a student at Temple University School of Law, was accused of using a weapon, pepper gas, inside the law school in violation of the law school code of student conduct. Robert Reinstein, Dean of the Law School, sent a letter to Herbert, referring to the incident and indicating that he was considering suspending Herbert. The letter invited Herbert to meet with the Dean that day to present his version of the incident.

After this meeting, Dean Reinstein concluded that Herbert "presented a real threat to the people who worked and studied [at the law school]," and he suspended Herbert, pending a full investigation by the Disciplinary Counsel. The Disciplinary Counsel, after a hearing, upheld the suspension.

Herbert filed suit against Dean Reinstein, the law school, and the University, seeking damages and reinstatement. Herbert alleged, among other things, violation of his right to due

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6 In a humorously sarcastic poke at the District Court, the Court of Appeals wrote: "Finding no 'sticks in my craw' test in the Constitution, we reverse." 977 F.2d at 443.

process of law. The District Court held that the defendants provided sufficient due process, and Herbert appealed. The Court of Appeals reversed in part, finding fault with the informal meeting between Herbert and the Dean. Noting that the right to a hearing is of little value without prior notice of the charges presented, the Court found that Herbert was not given notice of all the reasons on which his suspension was based. In his pre-hearing letter to Herbert, Dean Reinstein did not express to him that the suspension could be based partially on incidents other than the law school pepper gas incident. Herbert therefore had no notice that he had to justify himself with respect to the other incidents in order to avoid suspension.

However, the Court concluded by noting that because Herbert's ultimate suspension is attributable to the Disciplinary Counsel, and because Herbert did receive adequate due process in connection with that hearing, he was not entitled to be reinstated. The Court remanded the case to the District Court for determination of damages, if any.

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8 Dean Reinstein admittedly based his decision at least partly on his existing knowledge of several other incidents which demonstrated Herbert's aggressive nature. For example, Herbert had a heated argument with the owner of a food truck outside the law school; several law school employees had complained of Herbert's hostile behavior towards them; and there was another pepper gas incident at a local restaurant, in which Herbert sprayed pepper gas at a man who had wielded a knife in the restaurant, even after the man was in police custody.
LAWYER PARTICIPATION IN THE PROCESS

Another important issue today is that of the participation of attorneys in student disciplinary hearings. The 1990 article comments that in most such hearings, a student need not be permitted to be represented by counsel. Furthermore, even in those cases where such representation is required, the student's lawyer may be restricted to a purely advisory role. This remains the prevailing view today and student discipline codes should utilize language to that effect.

Appropriate language for inclusion in a Student Code might be: "The advisors, and the attorneys when applicable, have no standing in the proceedings, but may provide advice to the respective students in a quiet manner that is not disruptive to the proceedings."

Osteen v. Henley

Thomas Osteen, a student at Northern Illinois University, was accused of assaulting two other students outside a bar. Larry Bolles, a university judicial official, began disciplinary proceedings against Osteen by mailing him a notice of the charges against him, along with a copy of the university's student judicial code. Osteen pleaded guilty to the charges, but requested a hearing on the proposed sanction, a two-year expulsion from the university.

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9 13 F.3d 221 (7th Cir. 1993).
A hearing was held, at which Osteen was represented by a student advocate, but not by a real attorney. At the conclusion of the hearing, Osteen's expulsion was upheld. Osteen then filed suit against various university officials, alleging, among other things, that those officials violated his constitutional right to counsel by denying him the participation of his lawyer at the hearing.

The Northern Illinois University Student Judicial Code provided that "the alleged offender may be accompanied by an advocate or an attorney during all phases of the University judicial proceedings." However, an attorney would "not be allowed to address the University Judicial Board or Officers, but will be allowed to serve in an advisory capacity."

The Court of Appeals for the Seventh Circuit skirted the question whether a college student has a constitutional right to counsel in a disciplinary proceeding. But it firmly declared that in any case, "we do not think [a student] is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer."10 To allow such participation, the Court continued, would greatly increase the cost and complexity of student disciplinary proceedings, as the university would have to hire its own lawyers, and other lawyers

10 13 F.3d at 225.
would have to be hired to act as judges. The Court was "reluctant to encourage further bureaucratization [of education] by judicializing university disciplinary proceedings, mindful . . . that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference."\textsuperscript{11}

In short, the Court of Appeals upheld the language of the University's Student Judicial Code, which provided a narrow definition of "participation" by lawyers, encompassing only participation as an advisor, not as a litigator. It would be wise to include similar language in any code currently under development.

\textbf{OTHER ISSUES}

One Court Suggests Specific Procedural Protections for Students:

\textbf{A. and B. v. C. College and D.}\textsuperscript{12}

In this case, the United States District Court for the Southern District of New York expressed concern about judicial involvement in student disciplinary matters, and particularly the

\textsuperscript{11} Id. at 225-26.

\textsuperscript{12} 863 F.Supp. 156 (S.D.N.Y. 1994). Due to the sensitive nature of this case, which involved alcohol abuse and sexual misconduct, the file of the case was sealed and its caption was changed to conceal the identity of the individuals and entities involved.
possibility of lawsuits by students seeking damages from colleges or universities for improper expulsion or suspension. The Court wrote that if lawsuits with monetary objectives are encouraged, they might “disrupt the functioning of academic institutions and intimidate academic decision makers seeking to perform their duties.”

To that end, the Court proposed six procedures which may be considered in situations where investigation or adjudication of behavior is required, and where the potential sanctions may lead to an entry on the student’s permanent record, or to suspension or dismissal from the university. These procedures are:

1. Use of an impartial decision maker chosen by the institution (who may be an employee of the institution who was not involved in investigating the matter);

2. Provision of notice as to the substance of the allegations against a student, including a description of what the student is said to have done to the extent such information is available, together with an explanation of the disciplinary action which might be imposed;

3. Affording to a person subject to possible discipline the opportunity to appear in person and to provide . . . any statements, documents, affidavits or other materials the student intends to offer in defense;

4. Permitting a person subject to possible discipline to suggest persons who might be interviewed by the decision maker, and to suggest questions which might be put to these or other potential interviewees;

13 Id. at 158.
5. Avoiding imposition of sanctions against anyone requested to answer questions merely because a decision maker disbelieves the witness or finds inconsistencies in statements, since such discipline may make it hazardous to give unpopular if truthful responses; and

6. Permitting a person subject to possible discipline the opportunity to accept discipline voluntarily or to request a ruling by a decision maker . . . after having had a reasonable time to obtain any desired advice. 14

The court stressed that not all of these procedures may be appropriate in all circumstances, and did not recommend that any or all of them be required of a college or university. Rather, it stated that the adoption of such procedures might make courts more willing to accept the disciplinary decisions of the college or university should they ever be subject to legal challenge. For this reason, it may be worthwhile when creating or updating your Student Code to incorporate some form or combination of the above protections.

Student Honor Code Held To Provide Conditional Privilege For Allegedly Defamatory Speech:

Vargo v. Hunt 15

At issue in this case was the Defendant’s (Hunt) report to the Allegheny College Honor Committee that she observed the

14 Id. at 159.
Plaintiff (Vargo) cheating on an academic examination. Vargo sued Hunt for defamation in the lower court, lost and appealed to the Pennsylvania Superior Court. Hunt maintained that she was privileged to report the allegedly defamatory remarks under the Allegheny College Honor Code.

The pertinent portions of the Honor Code are as follows:

ARTICLE I

... A primary responsibility of each student of the College is the maintenance of honesty in one's own academic work. In addition, it is the moral obligation of each student to help maintain the integrity of the entire college community.

ARTICLE II

By virtue of matriculation in the College, each student acknowledges the following: I hereby recognize and pledge to fulfill my responsibilities, as defined in the Honor code, and to maintain the integrity of both myself and the College community as a whole.

ARTICLE III

If one student observes another committing what appears to be an act of dishonesty in academic work it is the observer's responsibility to take the appropriate action. Students are encouraged to inform either the instructor or a member of the Honor Committee. ... Failure to do so ... constitutes an infraction of the honor code.

The lower court held Hunt's statements to be conditionally privileged because the disclosure was necessary to preserve the integrity of the academic process under the Honor Code, and that such an interest far outweighed the possible risk of damage to the Plaintiff's reputation.16 The Superior Court

16 Id. at 602-03.
agreed, and added that Hunt's report to the Honor Committee was "merely a fulfillment of her 'obligation' under the same honor code the Plaintiff agreed to uphold upon admission to Allegheny College." 17 Since only interested parties were informed of Hunt's observations, and since no evidence of Hunt's abuse of her conditional privilege was presented, the Superior Court affirmed the ruling in favor of the Defendant.

The significance of this case to the drafter of a student disciplinary code is that it represents legal authority to support the inclusion of language which requires students to report misbehavior by others in the college or university community, and which makes failure to do so a violation of the code.

**Discipline for Incidents Occurring Off-Campus**

**Ray v. Wilmington College** 18

In this very recent case, a male student (the Plaintiff, Ray) was accused of physically and sexually assaulting a female student at his off-campus apartment. The victim reported the incident to campus authorities, who began disciplinary proceedings against Ray. The complaint alleged that Ray violated provisions of both the Student Code of Conduct (prohibiting physical abuse)

17 Id. at 605-06.

and the Student Life Policies Handbook (which included a "Sexual Assault Policy").

Ray asserted that the College violated its contractual obligation to provide him with a fundamentally fair disciplinary hearing. This due process argument was quickly dismissed by the Court. The College had followed its own judicial policies and procedures, and in any event had afforded Ray notice of the charges against him, and a hearing before the Judicial Board.

The Court then turned to Ray's argument that the College could not discipline him for an incident that occurred off campus. The Court emphatically disagreed. It stated that "[a]n educational institution's authority to discipline its students does not necessarily stop at the physical boundaries of the institution's premises. The institution has the prerogative to decide that certain types of off-campus conduct is detrimental to the institution and to discipline a student who engages in that conduct."19

The Court held that in light of the broad discretion private schools such as Wilmington have in making rules (including rules permitting discipline for off-campus behavior) and setting up procedures to enforce those rules, Wilmington College did not abuse its discretion in disciplining Ray for the off-campus sexual assault. Nevertheless, it is a good idea to define the geographic scope of a student code within the code itself.

19 Id. at *2.
Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code

Edward N. Stoner II
and Kathy L. Carminara

The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the great obstacle to science with us and a principle cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather.

Thomas Jefferson
Letter to Thomas Cooper, Nov. 2, 1822
VII The Works of Thomas Jefferson 288 (1884)

Since the days Thomas Jefferson wrote to Mr. Cooper, institutions of higher education have struggled with the responsibility of disciplining students. This task has been made more difficult because the legal relationship between a college or a university and its students

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1. Thomas Cooper was the second President (1826-1835) of South Carolina College, later renamed the University of South Carolina. Mr. Jefferson was the founder of the University of Virginia.
has never fit neatly within one legal doctrine. During the first part of the twentieth century, the concept of in loco parents predominated. Under this doctrine, courts viewed institutions as standing in the shoes of the students’ parents. Courts tended to give colleges and universities a great deal of discretion when they viewed the institutions as standing in loco parents to the students.

During the 1960s, however, courts began to move away from the concept of in loco parents. Instead, courts viewed the relationship between student and institution as contractual. Under this view, institutions enter into contracts with their students to provide them with educational services in exchange for students paying certain fees and obeying certain rules. In addition, beginning with the landmark case of Dixon v. Alabama Board of Education, in 1961, courts have required public institutions of higher learning to afford students due process before taking disciplinary action.


8. Although Dixon has been referred to as a “landmark” decision, see Gosa v. Lopez, 410 U.S. 365, 578 n.8, 93 S. Ct. 729, 737 n.8 (1973). A court as early as 1897 spoke in terms of a college student having certain rights to notice and a hearing before being dismissed from school. Commonwealth ex rel. Hill v. McCAuley, 3 Pa. County Ct. 77 (1887).

Only public schools, or private schools which have the requisite amount of interaction with the state to constitute “state action,” have been required to provide due process for their students. See Dartmouth Review, slip op. at 12; VanLoo v. Curran, 490 So.2d 525, 529 (Ala. 1986). See generally Siles, Of Students’ Rights and Honor: The Application of the Fourteenth Amendment’s Due Process Clause to Honor Code Proceedings at Private Colleges and Universities, 64 Den. U.L. Rev. 47 (1987); Thibig, The Application of Fourteenth Amendment Norms to Private Colleges and Universities, 11 J. L. & Educ.

1989] MODEL STUDENT DISCIPLINARY CODE 91

Although courts no longer merely rubber-stamp college or university decisions, as they once may have done under the doctrine of in loco parents, principles from all three views appear in student disciplinary cases. Courts afford institutions of higher education a great deal of discretion. At the same time, however, they require colleges and universities to honor the contracts they make and to provide fair procedures.

Colleges and universities thus operate within a volatile environment. In order to ensure smooth administration, yet still to fulfill their responsibility of maintaining discipline within an educational environment, colleges and universities are well-advised to establish written student disciplinary codes. For a public college or university, such a written code provides constitutionally-required notice to students, faculty and administrators concerning the institution’s policies and procedures. It may also ensure against charges of unconstitutional arbitrary action, for example, allegations that the school singled out one student for particularly unfair treatment. The private institution too may avoid charges of arbitrary or unfair treatment by implementing a written student disciplinary code. A written student code can benefit both public and private institutions, as well as students, by

171 (1982); Annotation, Action of Private Institution of Higher Education as Constituting State Action or Action Under Color of Law for Purposes of the Fourteenth Amendment and 42 U.S.C.S. § 1983, 37 A.L.R. 4th 601 (1976). Students at private colleges and universities, however, have attempted to bring due process and other constitutional cases against private institutions. See, e.g., Albert v. Carpenza, 651 F.2d 581 (2d Cir. 1981); Cummings v. Virginia School of Cosmetology, 147 F. Supp. 270 (E.D. Va. 1987); Miller v. Long Island Univ., 85 Misc. 2d 393, 398 N.Y.S.2d 917 (N.Y. Sup. Ct. 1976). In addition, it should be noted that Dickinson College, the institution at issue in McCauley, is a private school, and the court still imposed “notice and hearing” requirements, 3 Pa. County Ct. 77.

For a comprehensive recent discussion of the state of the law with regard to whether due process applies to private college and university disciplinary proceedings, see Boehm, University of Pa. School of Veterinary Medicine, 292 Pa. Super. 92 (1990).


10. Indeed, some courts have required a written disciplinary code. In Sagola v. Kauflman, 418 F.2d 153 (7th Cir. 1969), for example, the court ruled that the University of Wisconsin had acted unconstitutionally in sanctioning students for “misconduct” when no rules specifically defined what the University viewed as “misconduct.” The court ruled that while a University had the power to punish misconduct, it had to promulgate rules describing such misconduct to avoid punishing students on the basis of unconstitutionally vague, overbroad criteria. 418 F.2d at 106-07. "Purporting to appropriate rule or regulation, the University has the power to maintain order by suspension or expulsion of disruptive students. Requiring that such sanctions be administrated in accordance with preexisting rules does not place an unwarranted burden upon university administrations." Id. at 105.

11. Wise policy may sometimes involve granting students more rights than the Constitution requires. Wright, supra note 6 at 1025. See also W. KAZIN, THE LAW OF HIGHER EDUCATION at 294, 312-14 (2d ed. 1985).
clearly setting forth the terms of the "contract" between the student and the school with respect to disciplinary matters. 12

What follows is a model student code which college or university counsel and administrators may use in creating their own written student disciplinary code. Of course, decisions with regard to certain topics will depend upon the preference of each individual college or university. Such topics include choosing a person at the institution to administer student-code policies and procedures; establishing a minimum amount of notice of the alleged violation; setting a maximum period between the time students are notified of charges against them, and the day on which those charges are heard; and deciding who will determine sanctions. Nevertheless, the following model is a sound beginning upon which to build a student disciplinary code.

College or university counsel and administrators should keep a few principles in mind when drafting their own student disciplinary codes. First, the institution, whether public or private, should try to follow the general dictates of due process. Due process, roughly translated, means ensuring that procedures are fair to the accused student. 13 If an institution is public, it is required to grant due process. 14 If the institution is private, constitutional due process may not be required, 15 but the institution’s actions may appear fairer and more reasonable to a court if it gives students as much procedural protection as would a public institution.

Second, although college discipline is sometimes seen as the "criminal law of university government," 16 student disciplinary codes need not be drafted with the specificity of criminal statutes. 17 In fact, to avoid indicating that it expects its student code to be treated like a criminal statute, a college or university should avoid language implying

12. There is one negative aspect to the promulgation of a written student code. "Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better-conceived and administered system, written rules also provide a specific target to aim at in a lawsuit." W. Kaplin, supra note 11, at 322.

13. For this reason, the institution should be aware that if it chooses to have a written student disciplinary code, it must follow the dictates of that code. Tedeschi v. Wagner College, 49 N.Y.2d 652, 658-60, 464 N.E.2d 1302, 1306-09 (1984); VanLoock v. Curtiss, 429 So.2d at 528; W. Kaplin, supra note 11, at 322. See Warren v. Drake Univ., 486 F.2d 200, 202 (8th Cir. 1973).


15. Miles, The Due Process Rights of Students in Public School or College Disciplinary Hearings, 46 Ala. L. 144, 146 (1987) ["It is a good idea for a school or college to grant as much due process as it thinks is allowable, given a balance between the circumstances, the educational mission of the school and the rights of the student."] W. Kaplin, supra note 11, at 392-07.

16. See supra note 8.


18. See Tinker v. Des Moines Indep. Schol Dist., 393 U.S. 503, 509-10, 90 S. Ct. 732 (1960) (first amendment applies in public high school context); because of cases such as Tinker, public institutions must ensure that their students are guaranteed, inter alia, first-amendment rights.

19. Stating that students are guaranteed such rights, however, will not always ensure that the school will not be attacked. In Dye v. University of Mich., 721 F. Supp. 352 (E.D. Mich. 1989), the University was careful to provide in the preamble to its Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment that it promulgated: "a strong commitment to the principle of freedom of speech guaranteed by the
The following model student code is organized so that all concerned—students, administrators and faculty members—can understand the concepts embodied therein. It progresses from a general definition section to a section outlining the authority of the institution's judicial bodies, a description of misconduct covered by the code, an outline of the procedures for bringing charges of misconduct, holding hearings and deciding appeals and, finally, a section on interpretation and revision of the code. The commentary following each section sets forth not only the practical reason for including each section within the code, but also the legal support for each provision, and, in some cases, suggestions on how the college or university attorney could approach certain situations.

In the final analysis, even the adoption of a sound student code, coupled with enlightened administration, will not eliminate the "spirit of insubordination" which Thomas Jefferson saw as such a significant problem for higher education nearly a century-and-three-quarters ago. Indeed, as Mr. Jefferson recognized, such insubordination results, in part, from the "ideas of independence" which are the backbone of our liberties, not only in higher education, but also in the world at large.

To the captains of our ships of higher education, therefore, the calm waters of consistently proper student behavior are unlikely ever to be reached. Instead, as Mr. Jefferson feared, the challenges of student discipline are likely always to loom as breakers ahead. Nevertheless, a sound student code following this model, like a sound ship under a sailing captain of old, will enable college and university administrators to navigate confidently past the dangers of insubordination, even when those dangers are accompanied, as they often are, by storm clouds of public concern and campus unrest.

First Amendment to the United States Constitution.... The University is dedicated to allowing students vigorous and open academic discourse and intellectual inquiry, including speech that espouses controversial or even offensive ideas.

Such pronouncements did not protect the University from a ruling holding invalid its policy which prohibited, inter alia, "threats or verbal slurs, invective or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of intimating the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy." The court found that the policy was both overbroad in that it prohibited some speech protected by the first amendment and so vague that it deprived students of due process.

Of course, private universities are not required to ensure that their students receive first-amendment freedoms. See, e.g., Doe v. University of Mich., 721 F. Supp. 852, 867. Nevertheless, the private college or university should endeavor to ensure such protections.

Confusion often arises over whether the first amendment applies in cases involving private institutions. Assuming that it does for purposes of assuring students of the institution's good intentions will make the institution's actions appear more reasonable in the face of a challenge.

1. The term [College] [University] means [name of institution].
2. The term "student" includes all persons taking courses at the [College] [University], both full-time and part-time, pursuing undergraduate, graduate, or professional studies and those who attend post-secondary educational institutions other than [name of institution] and who reside in [College] [University] residence halls. Persons who are not officially enrolled for a particular term but who have a continuing relationship with the [College] [University] are considered "students."

Commentary. This definition is intended to include persons not enrolled for a particular term but who enroll for courses from time to time, perhaps toward a degree. Such persons would be expected to honor the Student Code even between periods of their actual enrollment.

3. The term "faculty member" means any person hired by the [College] [University] to conduct classroom activities.
4. The term "[College] [University] official" includes any person employed by the [College] [University], performing assigned administrative or professional responsibilities.
5. The term "member of the [College] [University] community" includes any person who is a student, faculty member, [College] [University] official or any other person employed by the [College] [University]. A person's status in a particular situation shall be determined by [title of appropriate college or university administrator].
6. The term "[College] [University] premises" includes all land, buildings, facilities, and other property in the possession of or owned, used, or controlled by the [College] [University] (including adjacent streets and sidewalks).
7. The term "organization" means any number of persons who have complied with the formal requirements for [College] [University] [registration/registration].

26. The authors recommend that, as in every good legal document, a student code should contain a section in which the code's drafter's defines all the terms of art that will appear throughout the code. Following is a partial list of definitions recommended for use with a college or university's student code. Definitions of some terms will, of course, vary with the type of disciplinary system established, and with the institution's traditional definitions of certain concepts [plagiarism or cheating, for example].
27. The college or university must designate a person within its administration to oversee the operation of the student code and to be responsible for its administration. See infra Article I, Section 12. The person designated should be the same person assigned under Article V, Section A, to resolve other questions of interpretation.
8. The term "judicial body" means any person or persons authorized by the [title of administrator identified in Article I, number 13]28 to determine whether a student has violated the Student Code and to recommend imposition of sanctions.

Commentary. A "judicial body," sometimes called a "hearing board," need not be comprised of any particular number of persons. Concerns recur about the composition of such bodies. An impartial decisionmaker is essential to due process.29 Courts have recognized, however, that in the college or university context it is often impossible to assemble a group of people who have not in some way heard of the charges at issue or who do not know the person(s) involved.29 Frequently, "judicial bodies" which determine whether the Student Code has been violated include both students and faculty members or administrators. In this model, the code administrator defines the composition of hearing boards, but if the history or social system on campus dictates otherwise, the composition may be defined in more detail in the Student Code.

9. The term "Judicial Advisor" means a [College] [University] official authorized on a case-by-case basis by the [title of administrator identified in Article I, number 13] to impose sanctions upon students found to have violated the Student Code. The [title of administrator identified in Article I, number 13] may authorize a judicial advisor to serve simultaneously as a judicial advisor and the sole member or one of the members of a judicial body. Nothing shall prevent the [title of administrator identified in Article I, number 13] from authorizing the same judicial advisor to impose sanctions in all cases.

Commentary. Just as courts have recognized that persons comprising a judicial body may have prior knowledge of the events at issue or the person(s) involved, they have recognized that it

28. The person who authorizes the judicial body should be the same one designated to be responsible for the administration of the student code. See infra Article I, number 13.
30. "Members of the college community, including students, usually comprise the hearing board. Given the nature of the academic community, members of the hearing board may know the student outside the context of the disciplinary proceedings." Note, supra note 17, at 371. See Naris v. Auburn Univ., 812 F.2d 855, 856 (11th Cir. 1987) (participation of a student justice with prior knowledge of the charge did not indicate bias); Gorman v. University of R.I., 837 F.2d 7, 15 (1st Cir. 1988). But see Note, supra note 17, at 372 ("while a board member has no constitutional obligation of recusal, fundamental fairness may suggest this action as in the best interest of both parties").
Commentary. Listed here is a sampling of the types of other sources of rules and regulations governing colleges or universities.

15. The term "cheating" includes, but is not limited to: (1) use of any unauthorized assistance in taking quizzes, tests, or examinations; (2) dependence upon the aid of sources beyond those authorized by the instructor in writing papers, preparing reports, solving problems, or carrying out other assignments; or (3) the acquisition, without permission, of tests or other academic material belonging to a member of the [College] [University] faculty or staff.

16. The term "plagiarism" includes, but is not limited to, the use, by paraphrase or direct quotation, of the published or unpublished work of another person without full and clear acknowledgment. It also includes the unacknowledged use of materials prepared by another person or agency engaged in the selling of term papers or other academic materials.

Commentary. Cheating and plagiarism are the two most common types of academic misconduct. The courts' views about institutional decisions regarding such academic misconduct will be discussed in greater detail hereinafter.

ARTICLE II: JUDICIAL AUTHORITY

1. The Judicial Advisor shall determine the composition of judicial bodies and Appellate Boards and determine which judicial body, Judicial Advisor and Appellate Board shall be authorized to hear each case.

2. The Judicial Advisor shall develop policies for the administration of the judicial program and procedural rules for the conduct of hearings which are not inconsistent with provisions of the Student Code.

3. Decisions made by a judicial body and/or Judicial Advisor shall be final, pending the normal appeal process.

4. A judicial body may be designated as arbiter of disputes within the student community in cases which do not involve a violation of the Student Code. All parties must agree to arbitration, and to be bound by the decision with no right of appeal.

34. Seeinfra text accompanying notes 40-43.

ARTICLE III: PROSCRIBED CONDUCT

A. Jurisdiction of the [College] [University]

Generally, [College] [University] jurisdiction and discipline shall be limited to conduct which occurs on [College] [University] premises or which adversely affects the [College] [University] Community and/or the pursuit of its objectives.

Commentary. The college or university should state in general terms the conduct which the institution intends to reach. A college or university has jurisdiction to punish a student for activities which take place off-campus when those activities adversely affect the interests of the college or university community. School officials have wide latitude in determining whether an activity adversely affects the interests of the university community.

Under this Model Student Code, when an activity occurs off-campus, it would be the responsibility of the administrator designated in Article I, number 13, to determine whether college or university jurisdiction should be asserted.

Utilizing this procedure on a case-by-case basis allows the institution to consider the unique facts of each situation without the impossible problem of drafting language to cover every possible situation.

B. Conduct—Rules and Regulations

Any student found to have committed the following misconduct is subject to the disciplinary sanctions outlined in Article IV:

1. Acts of dishonesty, including but not limited to the following:
    a. Cheating, plagiarism, or other forms of academic dishonesty.
    b. Furnishing false information to any [College] [University] official, faculty member or office.

36. See infra text accompanying notes 40-43.
c. Forgery, alteration, or misuse of any [College] [University] document, record, or instrument of identification.

3. Physical abuse, verbal abuse, threats, intimidation, harassment, coercion and/or other conduct which threatens or endangers the health or safety of any person. 37

4. Attempted or actual theft of and/or damage to property of the [College] [University] or property of a member of the [College] [University] community or other personal or public property.

5. Hazing, defined as an act which endangers the mental or physical health or safety of a student, or which destroys or removes public or private property, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in a group or organization. 38

37 A provision such as this one would bring within the Student Code incidents of alleged date rape. Despite the sensitive nature of this subject, institutions may wish to consider incidents of alleged date rape to be within the provisions of their Student Codes because doing so may afford an avenue of redress to complainants who feel uncomfortable with existing crimes in court. See Wing, Student Court to Judge Campus Date Rape Cases, U. N. Nov. 1989, at 2, col. 1.

While this language is appropriate for a private university or college which need not worry unduly about due-process requirements under federal or state law, prominent drafting a code at a public institution may wish to review with their institutional counsel whether more specific language is required in their situation. For example, the University of Michigan’s Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment was found to be unconstitutionally vague when it prohibited “[p]hysical acts or threats or verbal slurs, invective or epithets referring to an individual’s race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy.” See Doe v. University of Mich., 721 F. Supp. 652 (E.D. Mich. 1989). That language is considerably more broad than the language proposed in this Model Student Code. See generally, Hodulik, Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests, 18 J.C.U.L. 573 (1986).

38 See Pa. Stat. Ann. tit. 24, § 5352 (Purdon 1980 Supp.), Pennsylvania, the legislature has promulgated an Anti-Hazing Law. Pa. Stat. Ann. tit. 24, §§ 5351-5354 (Purdon 1980 Supp.), which requires that all public or private institutions of higher education adopt a written anti-hazing policy and establish rules for enforcement of the policy and punishment of offenders. As part of this law, the legislature has defined what it considers to be hazing. See also 24 Pa. Cons. Stat. §§ 19-1-23 (1978) [defining hazing and classifying it as a Class C misdemeanor]; Ill. Rev. Stat. ch. 144, para. 222 (1986) [defining hazing]; Ohio Rev. Code Ann. § 2903.31 (Baldwin 1986) [making hazing a fourth-degree misdemeanor]. Student code drafters would be well-advised to determine whether applicable state law provides a definition of hazing and, if so, to incorporate such definition into their code in order to make the provision self-executing, i.e., to provide that, whenever a student is charged with hazing under state law, such actions would also constitute hazing under the student code.
d. Use of computing facilities to interfere with the work of another student, faculty member or [College] [University] Official.

e. Use of computing facilities to send obscene or abusive messages.

f. Use of computing facilities to interfere with normal operation of the [College] [University] computing system.

17. Abuse of the Judicial System, including but not limited to:

a. Failure to obey the summons of a judicial body or [College] [University] official.

b. Falsification, distortion, or misrepresentation of information before a judicial body.

c. Disruption or interference with the orderly conduct of a judicial proceeding.

d. Institution of a judicial proceeding knowingly without cause.

e. Attempting to discourage an individual’s proper participation in, or use of, the judicial system.

f. Attempting to influence the impartiality of a member of a judicial body prior to, and/or during the course of, the judicial proceeding.

g. Harassment (verbal or physical) and/or intimidation of a member of a judicial body prior to, during, and/or after a judicial proceeding.

h. Failure to comply with the sanction(s) imposed under the Student Code.

I. Influencing or attempting to influence another person to commit an abuse of the judicial system.

Commentary. Colleges or universities are, of course, free to include in their lists of misconduct as many types of acts as they choose, within certain limitations. The list of acts of misconduct which constitute violations of the Student Code should give students fair notice of the types of conduct which may result in sanctions. The college or university should, however, be careful to emphasize that the list is not all-inclusive. Otherwise, the college or university may be held to a contract, inadvertently created, to punish only misconduct listed, and none other.95

Courts tend to give college and university officials much greater freedom concerning purely academic decisions than they do concerning purely disciplinary decisions.96 Academic-misconduct cases

involving cheating or plagiarism, for example, present a unique hybrid of academic and disciplinary decisions.97 Because several courts have categorized cases of academic misconduct as disciplinary, rather than academic,98 the authors suggest that institutions classify such "academic misconduct," as requiring the same procedures as cases involving purely disciplinary matters.99 Academic misconduct may also be grounds for academic sanctions, such as the imposition of a lower grade. This system must be dovetailed with the institutional process for student review of academic sanctions. Even if a faculty member imposes an academic sanction for an academic offense, the authors recommend that the student have the right to have the conduct reviewed under the Student Code. If these procedures produce a conclusion that the misconduct occurred, the Student Code procedures can upheld, increase, or reduce the sanction. If no violation is found, the sanction imposed by the faculty member must be lifted.

Concerning items number three, thirteen, fifteen and seventeen, the college or university must ensure that regulations which may infringe upon the right of free speech do not violate the first amendment because of overbreadth or vagueness.100 They must

so that bennings are useful and appropriate in this context. However, academic determinations are quite different because they are more subjective and evaluative.101 Levin, Constitutional Law—Due Process of Law, 47 U. Chi. L. Rev. 514, 517 (1979); see Horowitz, 435 U.S. at 87-91, 98 S. Ct. at 563-566. See generally Wilhelm, Academic or Disciplinary Decisions: When Is Due Process Required?, 8 U. B scheme L. Rev. 291 (1965); Fournier, Due Process and the University Student: The Academic/Disciplinary Dictionary, 37 La. L. Rev. 929 (1977); W. Kaplin, supra note 11, at 307-12.


98. Incidents of cheating and plagiarism generally involve some degree of fact-finding, "if the academic dishonesty matter includes facsimile disputes, university officials should grant the student the same procedural safeguards as those in a disciplinary matter." Note, supra note 16, at 364. See also Roberts, supra note 42, at 384 ("[e]ven if a public university classifies the punishment of cheating as an academic matter, the courts may not hold the same view").

99. Regulation of speech is an intricate area of the law. See generally Hodulik, supra note 50. In Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989), the United States District Court for the Eastern District of Michigan, Southern Division, invalidated a portion of the University of Michigan’s policy on discrimination and disciplinary conduct because the sweeping provisions of that policy could be, and in fact had been, used to punish students for activity protected by the first amendment. See supra note
also ensure that it is not an abuse of the judicial system (i.e., a

37. But see Students Against Apartheid Coalition v. O'Neill, 938 F.2d 735 (4th Cir. 1991) (University of Virginia's regulation prohibiting temporary structures on the south side of rotunda in order to preserve integrity of upper lawn, a historical architectural area, did not violate the First Amendment because it was content-neutral, narrowly tailored to meet a significant government interest and left open other avenues of communication).

After extensive study and debate, the University of Wisconsin System recently adopted administration aimed at prohibiting discriminatory harassment. See Hodulik, supra note 32, at 574-75. The rules (in part) provide as follows:

UWS 17.06 Offenses defined. The university may discipline a student in nonacademic matters in the following situations:

1. (a) For met or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
   1. Denounce the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
   2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.

(c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

1. A student would be in violation if:
   a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or jokes; and
   b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:
   a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and
   b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.

3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems to be no evidence that the student's purpose was to create a hostile environment.

Compare University of California Student Conduct, Policies Applying in Campus Activities, Organizations and Students (April 1991) § 51.01 (pertinent portion available from NACUA).

The Wisconsin rule has been challenged in federal district court. See UW-Platteville v. Board, No. 95-C-0328, slip op. (E.D. Wis. 1996). The plaintiffs contend that Rule 17.06 violates the First and Fourteenth amendments to the United States Constitution and article I, sections 1 and 3, of the Wisconsin Constitution. Hodulik, supra note 37, at 573. This

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violation (item number sixteen) for persons to attend the hearing but to refuse to testify by asserting their fifth-amendment right not to incriminate themselves. A person may assert the privilege against self-incrimination as to possible criminal exposure during a civil proceeding. In the college disciplinary setting, the student may remain silent, and such silence should not be used against the student, but a violation of the Student Code may nevertheless be found based upon the other evidence presented.

C. Violation of Law and [College] [University] Discipline

1. If a student is charged only with an off-campus violation of federal, state, or local laws, but not with any other violation of this Code, disciplinary action may be taken and sanctions imposed for grave misconduct which demonstrates flagrant disregard for the [College] [University] community. In such cases, no sanction may be imposed unless the student has been found guilty in a court of law or has declined to contest such charges, although not actually admitting guilt (e.g., "no contest" or "nolo contendere").

Commentary. The college or university may punish off-campus violations of the law if such misconduct affects the college or university community.

2. [Alternative A]

[College] [University] disciplinary proceedings may be instituted against a student charged with violation of a law which is also a violation of this Student Code, for example, if both violations result from the same factual situation, without regard to the pendency of civil litigation in court or criminal arrest and prosecution. Proceedings under this Student Code may be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus.

[Alternative B]

If a violation of law which also would be a violation of this Student Code is alleged, proceedings under this Student Code
may go forward against an offender who has been subjected to civil prosecution only if the [College] [University] determines that its interest is clearly distinct from that of the community outside the [College] [University]. Ordinarily, the [College] [University] should not impose sanctions if public prosecution of a student is anticipated, or until law enforcement officials have disposed of the case. 49

Commentary. A college or university may take student disciplinary action before criminal charges arising out of the same facts are resolved. 50 There are two basic approaches to the recurring dilemma of how a college or university should proceed when a student is accused not only of violating school regulations, but also of breaking the law. Alternative A is the pro-active approach, in which the institution has reserved the authority to take action under the Student Code in all such situations. A college or university may choose this approach because it does not wish to trivialize its code. To postpone the use of its disciplinary code and system of hearings and appeals in those cases involving criminal conduct would lead, in the words of one court, to an “absurd situation” 51 A student who violated a rule or regulation short of committing a crime receives immediate discipline, while a student who committed a more serious offense is entitled to attend school without immediate disciplinary action. 52 Alternative B illustrates the other approach. Although such an approach is not often admitted explicitly, it is not uncommon. It does, however, lead to a Student Code which deals only with minor offenses. The authors recommend Alternative A.

3. When a student is charged by federal, state or local authorities with a violation of law, the [College] [University] will not request or agree to special consideration for that individual because of his or her status as a student. If the alleged offense is also the subject of a proceeding before a judicial body under the Student Code, however, the [College] [University] may advise off-campus authorities of the existence of the Student Code and of how such matters will be handled internally within the [College] [University] community. The [College] [University] will cooperate fully with

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ARTICLE IV: JUDICIAL POLICIES

A. Charges and Hearings

1. Any member of the [College] [University] community may file charges against any student for misconduct. Charges shall be prepared in writing and directed to the Judicial Advisor responsible for the administration of the [College] [University] judicial system. Any charge should be submitted as soon as possible after the event takes place, preferably within [specify amount of time].

Commentary. This section not only describes who may file charges, but also requires that such charges be in writing and that they all be submitted to the same person. Such measures are desirable because: (1) they ensure that college or university officials can immediately assess the gravity of each complaint; and (2) they serve to provide notice in an orderly fashion. The use of a standard form for charges will ensure the receipt of all the necessary information.

Practice varies widely concerning the length of limitations periods. For example, at Westminster College complainants are asked to file charges within forty-eight (48) hours. At Pratt Institute, charges of discriminatory treatment must be submitted within twenty-eight (28) days of the date the complainant first attempted to resolve the matter, which must be done within ninety (90) days of the incident. Finally, at Northwestern University, complainants have one year during which to file charges.

2. The Judicial Advisor may conduct an investigation to determine if the charges have merit and/or if they can be disposed of administratively by mutual consent of the parties involved on a basis acceptable to the Judicial Advisor. Such disposition shall be final and there shall be no subsequent proceedings. If the charges cannot be disposed of by mutual consent, the Judicial Advisor may later serve in the same manner as the judicial body or a member thereof.

54. Id.
55. Pratt Institute Non-Discrimination Grievance Procedures at 1-2 (available from NACUA).
56. Northwestern University Offenses and Hearing Procedures at 24 (available from NACUA).

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Commentary. As noted previously, courts have recognized that it is not possible in the college or university setting to ensure that the participants in the disciplinary process have not had prior contact with the student(s) involved or prior knowledge of the events which are the subject of the proceeding. Where staffing permits, it is preferable to separate the administrative and judicial functions.

3. All charges shall be presented to the accused student in written form. A time shall be set for a hearing, not less than five nor more than fifteen calendar days after the student has been notified. Maximum time limits for scheduling of hearings may be extended at the discretion of the Judicial Advisor.

Commentary. Notice and an opportunity to be heard are essential to all student disciplinary proceedings, at least in the public college and university settings.

Requiring that the accused student receive written notice of the charge ensures that the accused student receives adequate notice of the alleged violations. Such notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Further, there is no bright-line rule governing how far in advance of a hearing notice should be given. Indeed, some courts have

57. See supra notes 20-32 and accompanying text. In Nash v. Auburn Univ., 812 F.2d 555 (11th Cir. 1987) the court required evidence of actual bias on the part of a student justice, refusing to hold that the accused students had been denied a bias-free tribunal merely because one student justice knew of suspicions about the student and had had prior contact with potential witnesses. Id. See also, Cordman v. University of R.I., 537 F.2d 7, 15 (1st Cir. 1988), where the court rejected the accused student's contention that a university administrator's function both as advisor to the disciplinary board and as a non-voting member of the Board evidenced bias. Because there was no actual evidence of bias, the court noted that this argument "assumes too much." ["If the intimation setting of a college or university, prior contact between the participants is likely, and does not per se indicate bias or partiality"]; Dartmouth Review v. Dartmouth College, 524 F.2d 311 at 16-20 (N.H. Cir. Jan. 3, 1980).
60. See Nash, 512 F.2d at 601.
indicated that notice of charges may be given at the same time the student has an opportunity to defend against those charges. Nevertheless, it seems fairer to give some reasonable amount of time to allow accused students to prepare their defenses. Proper notice may benefit the institution if a student challenges its actions. The institution must, however, be sure to follow its own rules once it establishes an amount of time which is to pass between notice and the hearing.

Granting the Judicial Advisor discretion to extend the maximum time limits permits the institution flexibility in cases in which examination periods, breaks and holidays disrupt the time at which hearings would otherwise be scheduled. Some institutions may wish to deal with break and/or holiday issues more explicitly by providing in their codes for dates certain to be used in such situations. For example, a college or university may wish to provide that, in cases in which an examination period or break intervenes between the time of notice and the hearing date, hearings always will be held on the first day on which classes are again in session.

4. Hearings shall be conducted by a judicial body according to the following guidelines:
   a. Hearings normally shall be conducted in private. At the request of the accused student, and subject to the discretion of the chairperson, a representative of the student press may be admitted, but shall not have the privilege of participating in the hearing.
   b. Admission of any person to the hearing shall be at the discretion of the judicial body and/or its Judicial Advisor.
   c. In hearings involving more than one accused student, the chairperson of the judicial body, in his or her discretion, may permit the hearings concerning each student to be conducted separately.
   d. The complainant and the accused have the right to be assisted by any advisor they choose, at their own expense. The advisor may be an attorney. The complainant and/or the accused is responsible for presenting his or her own case and, therefore, advisors are not permitted to speak or to participate directly in any hearing before a judicial body.
   e. The complainant, the accused and the judicial body shall have the privilege of presenting witnesses, subject to the right of cross examination by the judicial body.

51. Gese, 419 U.S. at 585-86, 95 S. Ct. at 740-41; Dixon, 294 F.2d at 158-60.
institution’s disciplinary board may be considered a state agency in some situations. Being deemed a state agency may bring into play certain state administrative agency laws, which may require representation by an attorney. Second, if criminal charges are either pending or potential, the college or university must permit the student to have counsel. Even in these cases, however, counsel may be restricted to an advisory role. It is not required that either students or counsel be given the opportunity to cross-examine witnesses. Cross-examination by the disciplinary hearing board is sufficient.

A smaller school may wish to institute either an arbitration or a mediation requirement prior to reaching the hearing stage. Such an option is acceptable because the concept of due process is flexible, requiring no more than is necessary to provide fair notice and an opportunity to be heard. In other words, in some cases a hearing is not required; a meeting between the students involved and college administrators suffices, as long as accused students are informed of the charges and given an opportunity to tell their side of the story.

By contrast, larger schools may not want to require such an initial meeting because such meetings could consume all of the administrator’s time with little benefit. Local experience will dictate whether it is effective to attempt to resolve alleged Student Code violations through such a meeting.

This Model Student Code advocates using a “more likely than not” or “preponderance of the evidence” standard for disciplinary decisionmaking. This is because the “beyond a reasonable doubt” standard applied in criminal cases is too demanding for college disciplinary proceedings. Courts review disciplinary decisions of colleges or universities under a “substantial evidence” standard. In doing so, courts generally examine whether there was enough evidence at the hearing to demonstrate that it was “more likely than not” that the accused student violated the Student Code, or whether a “preponderance of the evidence” demonstrated such violation—the same standard applied in most civil cases. Some codes use a “clear and convincing” standard, but such a standard is not common.

5. There shall be a single verbatim record, such as a tape recording, of all hearings before a judicial body. The record shall be the property of the [College] [University].

Commentary. The purpose of this provision is twofold. First, it assures all parties that a record will be made of the hearing. Second, it establishes that such record is the property of the institution. In some cases, a student may request permission to make a record of the proceedings. An institution may not wish to permit a student to do so because, for example, it may not wish its students replaying tapes of college disciplinary proceedings as a form of entertainment. The college or university may grant student requests to make a record of the proceedings if it wishes, perhaps by the condition that the tape nevertheless become the school’s property and not be removed from its control. In any event, a provision requiring that a record be kept can shield the institution from liability should it refuse the student’s request.

70. Gehlbruch v. Newman, 382 F.2d 100, 103 (1st Cir. 1967).
71. Id.
72. See Nash v. Auburn Univ., 812 F.2d 835, 839 [11th Cir. 1987] [accused students’ ability to submit questions to the disciplinary board, to be asked of the witnesses, held sufficient]; Wimmer v. Lehman, 705 F.2d 1402, 1405 (4th Cir. 1983); University of Houston v. Sebest, 386 S.W.2d 685, 689 (Tex. Cl. App. 1964); Hart v. Ferris State College, 557 F. Supp. 1379, 1386-87 [W.D. Mich. 1983] [probable value of cross-examination by student’s counsel is minimal compared to significant burden it would impose]; Gorman v. University of R.I., 837 F.2d 7, 18 (1st Cir. 1988) [right to unlimited cross-examination not an essential requirement of due process]. But see Speake v. Grantham, 317 F. Supp. 1253, 1259 (S.D. Miss.), aff’d per curiam, 490 F.2d 1351 (5th Cir. 1973); Dillon v. Pulaski County Special School Dist., 469 F. Supp. 54, 58 (E.D. Ark.), aff’d, 594 F.2d 999 (8th Cir. 1979); Kemna v. Rodgers, 310 F. Supp. 217, 221 (D. Me. 1970) (student has right to confront and cross-examine witnesses against him or her).
73. See, e.g., Office of Student Affairs, Westminster College, Student Handbook Bulletin 1989-90 at 15 (detailing a required pre-hearing conference, at which a student may request an administrative hearing rather than a hearing before the College Judicial Board).
75. See, e.g., Gorman v. University of R.I., 837 F.2d 7 (1st Cir. 1988).
76. See, e.g., Gorman v. University of R.I., 837 F.2d 7 (1st Cir. 1988).
77. See supra note 75.
78. At least one court has required that a transcript be made of student disciplinary hearings. See Drake v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1973).
Except in the case of a student charged with failing to obey the summons of a judicial body or [College] [University] official, no student may be found to have violated the Student Code solely because the student failed to appear before a judicial body. In all cases, the evidence in support of the charges shall be presented and considered.

Commentary. "Judgment by default" is a rather harsh penalty to impose upon a student accused of violating the disciplinary code. It is also a good way to ask for a lawsuit.

B. Sanctions

1. The following sanctions may be imposed upon any student found to have violated the Student Code:
   a. Warning—A notice in writing to the student that the student is violating or has violated institutional regulations.
   b. Probation—A written reprimand for violation of specified regulations. Probation is for a designated period of time and includes the probability of more severe disciplinary sanctions if the student is found to be violating any institutional regulation(s) during the probationary period.
   c. Loss of Privileges—Denial of specified privileges for a designated period of time.
   d. Fines—Previously established and published fines may be imposed.
   e. Restitution—Compensation for loss, damage or injury. This may take the form of appropriate service and/or monetary or material replacement.
   f. Discretionary Sanctions—Work assignments, service to the [College] [University] or other related discretionary assignments (such assignments must have the prior approval of the Judicial Advisor).
   g. Residence Hall Suspension—Separation of the student from the residence halls for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
   h. Residence Hall Expulsion—Permanent separation of the student from the residence halls.
   i. [College] [University] Suspension—Separation of the student from the [College] [University] for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
   j. [College] [University] Expulsion—Permanent separation of the student from the [College] [University].

81. A student who is expelled or suspended may ask a court to enjoin the discipline.

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Commentary. Colleges and universities may, within certain limitations, authorize as many types of sanctions as they wish. This section gives the institution maximum flexibility by permitting the Judicial Advisor to impose any sanction for any infraction of the Student Code. An alternative approach is to enumerate those offenses carrying the more serious sanctions (i.e., expulsion and suspension), and to allow the Judicial Advisor to choose among the remaining sanctions in punishing other offenses. 82

2. More than one of the sanctions listed above may be imposed for any single violation.

3. Other than [College] [University] suspension, disciplinary sanctions shall not be made part of the student's permanent academic record. But shall become part of the student's confidential record. Upon graduation, the student's confidential record may be expunged of disciplinary actions other than residence-hall expulsion. [College] [University] suspension or [College] [University] expulsion, upon application to the Judicial Advisor. Cases involving the imposition of sanctions other than residence-hall expulsion, [College] [University] suspension or [College] [University] expulsion shall be expunged from the student's confidential record [insert preferred number] years after final disposition of the case.

Commentary. The maintenance of student records is regulated by the Buckley Amendment. 83 The Buckley Amendment does not mandate that records of disciplinary action be treated as this section provides, but if a college or university already has a policy concerning such records, school officials may wish to incorporate that policy into the Student Code. Drafters of student codes should investigate their own state's laws to determine whether any privacy acts affect this issue. 84 When determining the institution's preferred


82. The district court in Gorman, for example, found that the University of Rhode Island's sanction of compulsory psychiatric treatment was a "shocking extreme" and would violate the student's right to privacy. 648 F. Supp. 795, 814.


course of action, student-code drafters should realize that disclosure of severe disciplinary actions could affect the student’s ability to enter other institutions. This would occur only if such news “imposed on [the student] a stigma or other disability that foreclosed his freedom to take advantage of other . . . opportunities.” Whether any sanction short of expulsion should appear on an academic transcript and, even then, whether the reason for expulsion should appear, are issues meriting careful consideration.

4. The following sanctions may be imposed upon groups or organizations:
   a. Those sanctions listed above in Section B 1, a through e.
   b. Deactivation—Loss of all privileges, including [College] University recognition, for a specified period of time.

Commentary. When a student organization engages in some act of misconduct, the college or university may take action not only against the student(s) involved, but also against the organization itself. This procedure does not violate the double jeopardy clause of the Constitution for two reasons. First, the double jeopardy clause applies only to criminal, not civil, proceedings. Proceedings under a school’s Student Code are not criminal proceedings. Furthermore, the actors (student(s) and organization) are separate offenders. Punishing each of them for the same act is not punishing the same offender twice for one act of misconduct. Similarly, it does not violate the double jeopardy clause for the same student to be subjected to both criminal and student-code (civil) sanctions for the same misconduct.

5. In each case in which a judicial body determines that a student has violated the Student Code, the sanction(s) shall be determined and imposed by the Judicial Advisor. In cases in which persons other than or in addition to the Judicial Advisor have been authorized to serve as the judicial body, the recommendation of all members of the judicial body shall be considered by the Judicial Advisor in determining and imposing sanctions. The Judicial Advisor is not limited to sanctions recommended by members of the judicial body. Following the hearing, the judicial body and the Judicial Advisor shall advise the accused in writing of its determination and of the sanction(s) imposed, if any.

Commentary. Imposition of sanctions by the Judicial Advisor ensures some consistency among the sanctions meted out over time. A college or university may choose to allow students, rather than a college or university official, to impose sanctions in each case. Such a choice is not unusual. It may be more equitable, however, to have the Judicial Advisor choose the punishment in all situations, so as to avoid putting students who sit on the judicial body in the awkward position of imposing a harsh punishment on a peer.

C. Interim Suspension

In certain circumstances, the [title of administrator identified in Article I, number 13], or a designee, may impose a [College] University or residence-hall suspension prior to the hearing before a judicial body.

1. Interim suspension may be imposed only: a) to ensure the safety and well-being of members of the [College] University community or preservation of [College] University property; b) to ensure the student’s own physical or emotional safety and well-being; or c) if the student poses a definite threat of disruption of or interference with the normal operations of the [College] University.

2. During the interim suspension, students shall be denied access to the residence halls and/or to the campus (including classes) and


90. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707 (1972).

91. The fifth amendment to the United States Constitution provides in part: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amends. V. This provision applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 1865, 2022 (1969).


95. Cf. United States v. Richmond, 705 F.2d 1183, 1195 n.7 (8th Cir. 1983) (punishment of both a corporation and its officers does not constitute double punishment).
or all other [College] [University] activities or privileges for which the student might otherwise be eligible, as the [title of administrator identified in Article I, number 13] or the Judicial Advisor may determine to be appropriate.

Commentary. It is permissible to impose an interim suspension in certain instances. The requisite notice and hearing process, however, should follow as soon as is practicable.

D. Appeals

1. A decision reached by the judicial body or a sanction imposed by the Judicial Advisor may be appealed by accused students or complainants to an Appellate Board within five (5) school days of the decision. Such appeals shall be in writing and shall be delivered to the Judicial Advisor or his or her designee.

Commentary. This is another point at which it may be wise to grant students more rights than they might otherwise have. Although there is some authority for the proposition that students need not be given the right to appeal from a decision rendered as a result of a hearing, providing an appellate process promotes an image of fairness. Further enhancing the image of fairness, this model affords not only the accused student but also the complainant a right to appeal. Particulars, such as the amount of time within which to permit appeals, may vary from school to school.

2. Except as required to explain the basis of new evidence, an appeal shall be limited to review of the verbatim record of the initial hearing and supporting documents for one or more of the following purposes:

94. This concept stems from a passage in Goss v. Lopez, 419 U.S. 585, 592-93, 95 S. Ct. 729, 740-41, which provides that "...students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and ... hearing should follow as soon as practicable." In Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985), however, the Supreme Court indicated that in most cases an interim suspension without some sort of hearing beforehand is something to be avoided if possible. Loudermill was not a school case, but it indicated that, at least in the public employment context, a pretermination hearing serves as "an initial check against mistaken decisions." Id. at 545, 105 S. Ct. at 1495.

95. Goss, 419 U.S. at 592-93, 95 S. Ct. at 740. See Picard, supra note 82, at 2158 n.81, in which the author indicates that judgments of whether the imminent danger necessary to justify an interim suspension is present should be left to the discretion of the administrator responsible for implementing the student code but that the administrator's decision should be reviewed as soon thereafter as is practicable.


1980] MODEL STUDENT DISCIPLINARY CODE 119

a. To determine whether the original hearing was conducted fairly in light of the charges and evidence presented, and in conformity with prescribed procedures giving the complaining party a reasonable opportunity to prepare and present evidence that the Student Code was violated, and giving the accused student a reasonable opportunity to prepare and to present a rebuttal of those allegations.

b. To determine whether the decision reached regarding the accused student was based on substantial evidence, that is, whether the facts in the case were sufficient to establish that a violation of the Student Code occurred.

c. To determine whether the sanction(s) imposed were appropriate for the violation of the Student Code which the student was found to have committed.

d. To consider new evidence, sufficient to alter a decision, or other relevant facts not brought out in the original hearing, because such evidence and/or facts were not known to the person appealing at the time of the original hearing.

Commentary. The appellate body should review the hearing board's decision in order to determine whether it was supported by substantial evidence. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making such a determination, the Appellate Board should not substitute its judgment for the judgment of the judicial body. Instead, it should review the judicial body's determination only to see whether there was evidence before the judicial body which supported the result reached below.

3. If an appeal is upheld by the Appellate Board, the matter shall be remanded to the original judicial body and Judicial Advisor for re-opening of the hearing to allow reconsideration of the original determination and/or sanction(s).


Commentary. A smaller institution may wish to permit yet another step in the appeal process by providing that a person disagreeing with the decision of the Appellate Board may appeal to the president or other top-ranking official. In such cases, the institution may want to provide that the decision of the president shall be "final and binding." Doing so would open the door to arguing that, as in labor disputes in which the parties have agreed that disputes submitted to binding arbitration, the decision of the president as "arbitor" should not be disturbed by a court as long as it is reasonable and derives its essence from the student code.101

4. In cases involving appeals by students accused of violating the Student Code, review of the sanction by the Appellate Board may not result in more severe sanction(s) for the accused student. Instead, following an appeal, the [title of administrator identified in Article I, number 13] may, upon review of the case, reduce, but not increase, the sanctions imposed by the Judicial Advisor.

Commentary. Providing that an appeal may result in decreased, but not increased, sanctions ensures that accused students will feel free to exercise their rights of appeal. Students may be deterred from appealing if they fear that sanctions may be increased as a result. Granting a right of appeal under conditions which actually deter such appeals only serves to lessen the perception of fairness in the process.

5. In cases involving appeals by persons other than students accused of violating the Student Code, the [title of administrator identified in Article I, number 13] may, upon review of the case, reduce or increase the sanctions imposed by the Judicial Advisor or remand the case to the original judicial body and Judicial Advisor.

Commentary. To grant a complaining student a right of appeal would be of little value without this provision. In cases in which a complaining student appeals a decision in which no violation was found, this provision is not necessary. In cases in which a complaining student is appealing only the sanction imposed against a student found to have violated the student code, however, the complaining student presumably believes that a stiffer sanction should be imposed.

In most cases in which the administrator believes that the appeal of a person other than the accused student should be granted, the remedy should be to remand the case to the original judicial body and Judicial Advisor. That body or person may further consider the evidence and either render a new decision or better explain the basis for the original decision.

ARTICLE V: INTERPRETATION AND REVISION

A. Any question of interpretation regarding the Student Code shall be referred to the [title of administrator identified in Article I, number 13] or his or her designee for final determination.

B. The Student Code shall be reviewed every [——] years under the direction of the Judicial Advisor.

Commentary. Every Student Code should be reviewed periodically, at least every three years. Specifying some "normal" period for review may help ensure that such a review is done.

100. See, e.g., Compass, 1989 Student Handbook of Allegheny College, Judicial System Art. VI § 3 at p. 85.