CONSTITUTIONAL AND CONTRACT LAW ISSUES PERTAINING TO STUDENT DISCIPLINE

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I. The Constitutional Background

In any review of the law which applies--or which a Judge may apply--to disputes which arise which the institution imposes discipline against a student for misbehavior, it is appropriate to ask whether there are "Constitutional" issues. Of course, this applies mainly to state related colleges and universities because Constitutional provisions typically restrict the actions by the government, not by private actors like private colleges and universities. On this front, there are both State and Federal constitutional provisions which may come into play, but here we will discuss only the Federal provisions. Finally, we note that it is important even for private actors to know what the Constitutional issues are because they DO have an impact on private colleges, even if, technically speaking, they should not. This is not only because people often become confused and apply Constitutional standards to private actors but also because Constitutional standards--to the extent that they reflect some seasoned view of what is "fundamentally fair"--will be

manipulated into the legal formula which applies to your actions even if the application is under the rubric of contract law, rather than Constitutional command.

With these caveats, we look first at the Constitutional framework which applies to the discipline of college students.

Goss v. Lopez, 419 U.S. 565 (1974)(White, J.)(5-4 decision)(Only Justice Rehnquist is still on the Court from those who participated in this case and he dissented). This case is one usually cited for the proposition that US Constitutional protections apply to students at state related colleges and universities.

Goss arose in the high school setting. It involved nine students who were suspended from various Ohio high schools for periods not in excess of ten days. None of them were given notice of a hearing or a hearing prior to their suspensions, because the state statute permitted a procedure whereby parents were given notice of the details after the suspension and, at that time, had a chance to meet with school officials about their children's future. The students were suspended for a variety of misconduct, ranging from assaulting a police officer, to disrupting a class, to damaging cafeteria, equipment, to "demonstrating" at a high school other than her own.

The Supreme Court decided the case under the Fourteenth Amendment to the US Constitution which prohibits the State from depriving any person of life, liberty or property without due

process of law. In the decision, the Supreme Court made a number of applications of law which are still relevant today.

--Even though a short suspension is not so serious, it is not "de minimum" and the Court held it cannot be imposed without "adherence to the minimum procedures required by" the Fourteenth Amendment. **Id.** at 574.

--"At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing." **Id.** at 579. (Italics in original.)

--"[T]he timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." **Id.** at 579 (e.g., educational order v. property interest).

--"Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device." **Id.** at 580.

--"There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the

accusation is. . . . Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. 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 rudimentary hearing should follow as soon as practicable . . . . **Id.** at 582-83.

"We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." **Id.** at 583.

"Longer suspensions or expulsions for the remained of the school term, or permanently, may require more formal procedures." **Id.** at 584.

We each readily recognize that may of the "rules" we now follow--whether we are at private or public institutions--flow directly from this 5-4 decision of the United States Supreme Court.

Even while we are protesting that Due Process Clause cases do not control actions at private institutions, we should note a second case arising at a state institution, because it applied, earlier than **Goss** many of the same concepts articulated in that case--and at a college, Alabama State College.

In **Dixon v. Alabama State Bd. of Ed.**, 294 F.2d 150 (5th Cir. 1961)(2-1 decision)(Thurgood Marshall was one of the attorneys for the students), 23 students were expelled or placed on probation for taking part in a civil rights sit in at a lunch counter. The Court held that the due process clause required notice and some opportunity to be heard before the discipline was imposed.

The following passage, in which the Court provides the unusual service of giving prospective advice, is instructive, **Id.** at 158-59:

"For the guidance of the parties in the event of future proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of

the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal review with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of fact concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attendant publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

Another case which discusses due process requirements in detail and which is interesting, at least from an educational perspective, is **Esteban v. Central Missouri State College,** 277 F.Supp. 649 (W.D. Mo. 1967)(on appeal, 415 F.2d 1088 (8th Cir. 1969)).

contract issues: a separate contract for student athletes.

II. The Law Under Contract Theory

In strict theory, these Constitutional law concepts do not apply to private institutions. [1]But the law is not that simple. In reality, one wishing not to get drawn into the morass of complex litigation is well advised to use Constitutional standards as the floor for the process provided to students in discipline cases--even at private schools.

1. **Commonwealth ex rel Hill v. McCauley,** 3 Pa. Co. Ct. 77 (1887). In this case, involving Dickinson College, a private institution, the Court imposed "notice and hearing" requirements in favor of the student. This was in 1887.

2. **Boehm v. University of Pa. School of Veterinary Medicine,** 392 Pa.Super. 502 (1990)(Penn is a private school)(Contemporary discussion of distinctions in applying due process to private v. public universities).

3. **Kwiatkowski v. Ithaca College,** 368 N.Y.S.2d 973 (Sup.Ct. 1975)(College disciplinary procedures must be "fair and reasonable" and promote a "reliable decision").

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[1] An example of this "old" view is **Anthony v. Syracuse University,** 224 A.D. 487, 231 N.Y.S. 435 (1928) noting that the University need give "no reason" for dismissing a student although it must have one!

4. **Slaughter v. Brigham Young University,** 514 F.2d 622 (10th Cir. 1975)(implying that this is no distinction in the minimum requirements for dismissing students between public and private universities--using Constitutional due process standards).

With this backdrop, the presentation will discuss the following issues, in the context of what private colleges and universities may do.

--**Maine v. Sterling,** 1996 WL 675817 (Sup.Ct. Nov. 21, 1996)(Fact that a football playing student-athlete received campus discipline does not excuse him from responsibility under the criminal law for the same conduct, even under the theory of "double jeopardy").

--Notice, hearing "requirements."

--Role of adversary attorneys.

--Separate procedures/proceedings/standards for student athletes.

--How to design flexibility into your Code so that you do not fail to do what you said you were going to do--while still preserving the opportunity to treat different cases differently.

--Remedies sought in discipline case litigation; practical comments.