STUDENT DISCIPLINARY PROCEDURES:
IS IT TIME TO SIMPLIFY PROCESS?

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Introduction

We consider student discipline to be part of the educational process. But is it still? Or have we adopted procedures which are so complicated that we struggle to get through the process and lose sight of our educational goals? Is this what “due process” requires?

1. Background
   a. Constitutional Requirement

The Fourteenth Amendment of the United States Constitution, ratified in 1868, prohibits the states from “depriving any person of life, liberty or property, without due process of law.” The application of the amendment to public colleges and universities was accepted in general, but the application to student disciplinary proceedings became focused in 1961 in Dixon v. Alabama Board of Education.¹ The Court in Dixon, made clear that attendance at a “tax-supported” college or university was a right, not a privilege, elevating the level of procedure due before an individual may be deprived of the right. It noted procedural guarantees public colleges and university must provide to students when expelling them for disciplinary reasons.

¹ 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S.Ct. 368 (1961).
By 1975, most public colleges and universities had put in place some type of student disciplinary procedure in place. It was no surprise to college and university administrators when the U.S. Supreme Court, in Goss v. Lopez,\(^2\) found that high school students should have some kind of hearing prior to a 10-day suspension. The Court made clear it was not requiring a elaborate trial-like proceeding. Students merely needed to be informed of the allegations against them and given an opportunity to explain what had occurred.

But, precisely, what procedure was due? The next year, in a case involving termination of Social Security benefits, the U.S. Supreme Court, applied the concept of flexible due process to administrative hearings.\(^3\) The essence of “flexible due process” is that the circumstances determine what nature and level of process is due. Thus, there is no set formula or procedure Constitutionally required in all instances, rather a balancing of the government’s interest with the interest of the individual whose rights are being affected. The Court identified three factors to be considered in deciding if the procedure followed adequately protected the Constitutional rights of the individual(s) affected:

- The private interest affected by the government action;
- The risk the procedure used will result in the interest being affected erroneously and the likely value of additional or different procedural safeguards; and
- The government’s interest which includes the nature of the activity and the burden of offering additional or different procedures.


Despite Constitutional latitude to tailor proceedings to the specific instance, most colleges and universities have adopted elaborate disciplinary procedures, providing much more than mere notice of charges and an opportunity for students to explain "their side" of what occurred or why they believe the proposed sanction should not be imposed.

b. State Administrative Procedures Acts

Not only federal Constitutional requirements influence disciplinary student disciplinary procedures. Many states have administrative procedures acts establishing hearing requirements for state or public agencies. In the 1930's, the American Bar Association issued a review of state administrative action and proposed a model administrative procedures statute. By 1946, the National Conference of Commissioners of Uniform State Laws adopted a model act. This act was revised in 1961. In response to the publication of the 1961 Revised Model Act, many states adopted their own administrative procedures acts. By 1978, forty-nine states and the District of Columbia had adopted state statutes, many adopting the Model Act itself.⁴

Both the 1946 and 1961 Model Acts established one type of formal adjudicatory process to be used whenever the "legal rights, duties, or privileges of a party are required by law to be determined by an agency after opportunity for a hearing."⁵ Under the 1961 Model, notice of the hearing must include the agency's authority and jurisdiction as well as a detailed statement of the


⁵ Model State Administrative Procedure Act, 13 Uniform State Laws Ann. 347, SECTION 1(2), defining "contested case."
matters involved. The Model Act prescribes the nature of the record of the hearing and rules regarding evidence that may be considered. It allows the parties cross-examination of all witnesses and requires a transcript to be provided upon request. It requires a final decision or order to include separate findings of fact and conclusions of law and provides for judicial review of final decisions.⁶

It is not surprising that the adoption in many states of formal procedures for state agencies coupled with court cases holding that students must be given “hearings” prior to disciplinary expulsions and suspension led colleges and universities all over the country to develop procedures that were complex, taking on a trial-like nature. While the procedures offer many of the protections afforded defendants in criminal proceedings, they are difficult to follow and often result in the expenditure of considerable amounts of time and money by both the student charged and the university, all without assurance of producing a fairer result.

The 1981 Model State Administrative Procedures Act attempted to reflect the varied nature of matters requiring adjudication and a Constitutional tolerance for flexible due process by including informal or less-formal procedures than those required in the one-size-fits-all approach of the 1961 Act. Some states have adjusted their statutes to provide increased flexibility. However, colleges and universities often have not incorporated these changes into student disciplinary procedures. Or in other instances, states have not amended their statutes to reflect the flexibility now contained in the Model Act.

⁶ Model State Administrative Procedure Act, 13 Uniform State Laws Ann. 347, SECTIONS 9, 12, 15.
Even if college and university administrators want to simplify their codes they often are uncertain what to eliminate and what to keep; how to make sure that students are treated fairly while not creating procedures that are so complicated to follow, students believe they must hire private attorneys to represent them.

2. Is Process Due?

a. Private Colleges and Universities

In general, private colleges and universities are free to offer whatever type of student disciplinary process they choose. Occasionally courts have found private colleges to have engaged in state action bringing them under the requirements imposed on public colleges and universities. More routinely courts limit their inquiries to determining if the discipline “arbitrary or capricious” and if the college or university followed its own procedures.

In *Fraed-Wolff v. Vassar College,* a student challenged the college’s handling of a disciplinary matter, alleging the college failed to follow its own procedures. While the court acknowledged that state law in New York required colleges to follow their own procedures, it held Vassar had substantially done so. The disciplinary panel’s opinion stating “it was unable to reach a conclusion” based on the evidence substantially complied with the provision in the student handbook requiring an opinion regarding the student’s guilt or innocence. Because guilt was not

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established, Vassar treated the student as innocent which complied with the handbook requirement presuming innocence unless guilt was established.

Even when state law doesn’t expressly require colleges and universities to follow their own procedures, most courts consider the relationship between private colleges and their students to be a contractual one and will use student handbooks and policies to provide the terms of the contract. Courts often infer from statements in handbooks, from policies or from the contractual nature of the student-university relationship itself a requirement of fundamental fairness or a prohibition on arbitrary or capricious behavior in disciplinary suspensions and expulsions.

That was the case in *Fellheimer v. Middlebury College*, in which the court in reviewing the student handbook pointed to the colleges statements it would provide due process “insofar as the procedures of the College permit” and procedures designed to promote fairness would be adhered to “as faithfully as possible” but that variations from the hearing process would invalidate the decision only if they prevent “a fair hearing or abrogate student rights. Such statements made clear the only review would be for fundamental fairness, to ensure disciplinary actions were not arbitrary or capricious. However, even though the College was not obligated to comply with its procedures precisely, failure to give notice of all the charges and conduct supporting the charges, did not fulfill the promise of fundamental fairness also assured in the student handbook.

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9 See, e.g., *Consu v. Creighton University*, 731 F.2d 529 (8th Cir. 1984).

Private colleges need not satisfy constitutional requirements or follow state administrative procedures so long as they are careful to follow the procedures published in student handbooks or otherwise adopted and they make sure students are not treated arbitrarily or capriciously in disciplinary matters. Even where the university states no students shall be dismissed without receiving “due process,” this does not entitle to the same level of procedure required at a public college or university.\textsuperscript{11}

b. Public Colleges and Universities

Disciplinary procedures at public colleges and universities must provide protections whenever constitutional “interests” are at stake. In the disciplinary setting, two constitutional interests arise: property and liberty.

i. Property Interests

From the time of \textit{Alabama v. Dixon},\textsuperscript{12} courts have concluded that students’ continued enrollment in public educational institutions constitutes a property right. Thus, students who are expelled or suspended are entitled to receive some kind of protection before the sanction is imposed. Although property rights are created by state law,\textsuperscript{13} courts regularly hold that the creation under state law of colleges and universities open to the public, creates an entitlement for enrolled students.\textsuperscript{14}


\textsuperscript{12} See, \textit{Fellheimer, supra}, at 244.

\textsuperscript{13} \textit{Board of Regents v. Roth}, 408 U.S. 564, 92 S.Ct. 2701 (1972).

In *Goss v. Lopez*, the U.S. Supreme Court decided disruption of enrollment by a ten-day suspension for high school students involved interference with a student’s property right. While the Supreme Court has not decided a case involving a disciplinary suspension at a college and university, courts have applied the same standard in postsecondary settings. Thus, when public colleges and universities hold disciplinary hearings from which a student’s enrollment could be disrupted either by suspension or expulsion, most courts will consider the student’s property rights are implicated and the student must be afforded procedural protections.

Aside from disruption of enrollment, courts have found disciplinary sanctions to involve students’ property rights in only limited settings. Courts considering participation in extracurricular activities have consistently held termination does not require hearings or other procedural protections. Most cases arise in the high school settings and involve athletics. Some courts have suggested an exclusion from all extracurricular activities permanently or for a long period of time might create some procedural requirement. At the college level, exclusion from post-season and televised athletic contests also does not

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16 In *University of Texas Medical School v. Than*, 901 S.W.2d 926 (Tex. 1995), the University argued a student had no property interest in postsecondary education because the state makes no promise to provide it and attendance is not compulsory, unlike elementary and secondary education. The Court, finding a liberty interest requiring procedural protections, declined to decide the question. Similarly, in *Sibren v. Colorado State Bd. of Agriculture*, supra, the court rejected the University’s argument that a student’s enrollment at a university with highly competitive enrollment standards does not implicate a property interest.

require any type of procedural protection, but discontinuing an athletic grant-in-aid award would do so.

ii. Liberty Interests

Although liberty interests are commonly associated with freedom to move about, in a constitutional context, liberty interests include the right to engage in an occupation, to marry, to establish a home, to acquire useful knowledge, to enter into contracts and "to enjoy those privileges... essential to the orderly pursuit of happiness." Additionally, a liberty interest is implicated whenever the government (including public colleges and universities) take an action that, because of the stigma attached to it, would harm someone’s reputation, honor, integrity or ability to find other employment. Courts hold that the suspension or expulsion of a student not only seriously harms the student’s reputation, but may preclude the student from completing her education at other colleges and universities, affecting her ability to engage in her chosen occupation.

iii. Disciplinary vs. Academic Sanctions

Even though actions affecting property or liberty interests and require procedural protections for students who face suspension or expulsion, courts have consistently

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19 Id.
21 Id. and Goss v. Lopez, supra.
22 See, e.g., University of Texas Medical v. Than, supra.
treated disciplinary matters and academics matters differently. In Board of Curators of University of Missouri v. Horowitz, the U.S. Supreme Court noted the difference between a violation of student conduct rules and failure to meet academic standards, commenting, “This difference calls for far less stringent procedural requirements in the case of an academic dismissal.” The Court reaffirmed this in Regents of the University of Michigan v. Ewing, limiting its due process review to substantive due process, that is the consideration whether there was any rational basis for the decision or whether it was motivated by ill-will or bad faith unrelated to academic performance. Courts since Ewing, have strictly adhered to this standard in an attempt to provide university faculties with the “widest range of discretion in making judgments as to the academic performance of students.”

Within the limited review of academic matters, courts have been reluctant or refused to review any but the most serious actions, such as dismissal from programs. For example, courts have refused to consider challenges to grades, finding them too inconsequential to deserve the court’s attention.

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26 Horowitz, supra, at n. 6, cited in Ewing, supra, at n. 11.
Having established a dual standard of scrutiny, courts are alert to attempts, perceived or real, by college and university administrators, or their lawyers, to characterize disciplinary actions as academic decisions. When the action is based on academic dishonesty, courts consider the action to be disciplinary. As one recent court noted in concluding a student’s dismissal was disciplinary not academic, “Academic dismissals arise from a failure to attain a standard of excellence in studies where disciplinary dismissals arise from acts of misconduct.”

The distinction between academic actions and disciplinary sanctions can become more complicated in graduate and professional programs, especially those with a clinical or practice component. In Horowitz, the academic decision to dismiss was based on the student’s appearance, demeanor and interactions in the clinical part of her program. Similarly, the decision to dismiss a surgery resident from a medical program because she failed to follow lines of authority was academic. But the decision to dismiss a graduate student for misrepresenting his relationship to the department on a paper submitted to a journal was disciplinary. Whenever a student may be dismissed for behavioral reasons that could appear to be disciplinary, it is wise to review with counsel what type of procedures are appropriate.

28 University of Texas Medical v. Than, supra, at 931. It is illustrative to compare Reilly v. Daly, 656 N.E.2d 439 (Ind.App. 1996), a student’s dismissal for failing two courses as a result of cheating (discipline) to Schuler v. University of Minnesota, 788 F.Supp. 510 (D.Minn. 1986), a student’s dismissal for failing two oral exams based on her inadequate performance (academic).

29 Supra.


31 Silbernd, supra.
Unlike the distinction between academic and disciplinary matters, most courts considering disciplinary sanctions imposed against college and university students do not distinguish between a student’s property or liberty interest in determining if procedural protections must be afforded when the sanction or potential sanction is suspension or expulsion. This is because property and liberty interests do not inherently require different level of procedural protections. However, courts do distinguish between students whose enrollment is disrupted and those who are denied admission. A number of courts have held due process protections are required only if a student’s education is interrupted not if a student has yet to enroll.\textsuperscript{32} However, once a student has enrolled, if the university learns the student provided inaccurate information on his application, termination of the student’s enrollment requires procedural protections even though the student’s admission was predicated on misrepresentation.\textsuperscript{33} On the other hand, where a student stated he was leaving the program and left the program site after being warned of disciplinary dismissal, the college was not required to provide a hearing.\textsuperscript{34}

3. \textbf{What Process is Due?}

As discussed above, at private colleges and universities the answer is simple — so long as the disciplinary process isn’t arbitrary or capricious, the process due is the process the college or university promises students in handbooks, policies, etc. At public colleges and universities, the answer is more complicated. Courts have uniformly rejected the notion that even the most severe


\textsuperscript{33} See, e.g., \textit{Gagne v. Trustees of Indiana University}, 692 N.E.2d 489 (Ind. 1998).

sanctions require trial-like proceedings and the now well-established flexible due process concept offers the imprecise answer: It depends on the circumstances. Although the U.S. Supreme Court has not considered the answer and lower courts have not reached uniform conclusions, the substantial body of case law provides guidance to college and university administrators and lawyers.

a. Notice of the charges

In Goss,35 the Supreme Court made clear constitutional standards included notice, meaning the student should be told what charges or accusations the student would form the basis for imposing sanctions. The charges must be clear enough for the student to understand and to respond to them.36

In Woodis v. Westark,37 a student who was expelled argued she did not have notice of the charges because the conduct standards were so vague she could not know her conduct would violate them. In considering if criminal conduct qualified as “behavior not compatible with good citizenship,” the court made clear student conduct codes need not be as clear as restrictions on First Amendment rights or criminal codes.38 Instead, they must establish enforceable standards which will not result in arbitrary or discriminatory application. For example, a nursing student’s

35 Supra.


37 160 F.3d 435 (8th Cir. 1998).

38 Id., citing Bethel School District v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986). Although Bethel, as a high school case, may not be fully applicable to colleges and universities, the court there acknowledged the wide range of unanticipated conduct that could disrupt the educational process supports the position disciplinary rules need not be as detailed as criminal codes.
drug conviction clearly was “behavior not compatible with good citizenship” so the student had ample notice her behavior would violate the code.

In Reilly v. Daly, 39 the court held even if the charge, “the appearance of cheating” was unconstitutionally vague, the decision was based on a determination the student, in fact, cheated. Thus the constitutionally of the university’s conduct code was irrelevant because the basis for the disciplinary action, “cheating”, was not unconstitutionally vague. However, in another case, when a Law School Dean, who ordered a student suspended, gave the student an opportunity to present the student’s version of the event that precipitated the suspension but, without informing the student, also considered other incidents the Dean believed supported the suspension, the student did not have adequate notice of the charges. 40

b. Notice of the Hearing

Students may object to the length of time from when they receive notice of the charges and a hearing to when the hearing is held. The Goss court did not find a due process violation even when there was no delay between the time of notice and the time of hearing. Courts are rarely interested in the time between the notice and the hearing, but instead look to ensure the substance of the notice is reasonably calculated, under the circumstances to make the student aware of some disciplinary action is pending and to provide an opportunity for the student to present

39 Supra.

40 Herbert v. Reinstein, et al., Unpublished Opinion of the United States Court of Appeals for the Third Circuit, dated October 6, 1995, cited in Stoner, Byman and Solomon, “What Every NACUA Lawyer Needs To Know About Student Discipline,” NACUA Annual Conference Materials, June 22, 1998. In this instance, a subsequent hearing before a Disciplinary Counsel, for which the student received adequate notice of the charges against him, prevented the court from overturning the suspension.
objections.\textsuperscript{41} Courts holding lack of adequate time between notice of the charges and hearing and the hearing itself, usually do so based on failure of colleges and universities to follow the requirements they have established in student conduct policies.\textsuperscript{42}

c. Notice of Evidence

Since \textit{Dixon},\textsuperscript{43} courts have frequently imposed a requirement for students to have the names of witnesses and information of other evidence to be considered prior to their hearing despite the fact the U.S. Supreme Court set down no such requirement in \textit{Goss}.\textsuperscript{44} More recent cases, have been less likely to require students to be informed of the names of witnesses and evidence against them before the hearing.\textsuperscript{45} In one often cited case, the court distinguished \textit{Dixon} where students were not present when witnesses testified against them from a setting where the students hear the witnesses and even have an opportunity to cross-examine them.\textsuperscript{46} However, consistent with holdings in other areas, courts find due process violations if student disciplinary procedures require students to have notice of witnesses and evidence in advance and it is not provided.\textsuperscript{47}

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\textsuperscript{43} \textit{Supra}.
\textsuperscript{44} \textit{Supra}.
\textsuperscript{45} \textit{See, e.g.}, \textit{Knapp v. Junior College Dist. of St. Louis County, Mo.}, 879 S.W.2d 388 (Mo.App.E.Dist. 1994).
\textsuperscript{46} \textit{Nash v. Auburn University, supra}.
\textsuperscript{47} \textit{See, e.g.}, \textit{Smith v. Denton, supra}; \textit{Knapp v. Junior College Dist. of St. Louis County, Mo., supra}.
\end{flushright}
d. The Right to a Hearing

While the nature of the required hearing could vary under a flexible due process analysis depending on the potential sanction and the university's interest, even in matters possibly resulting suspension or expulsion, the right to a hearing is no more than an opportunity for the student charged to present the student's side of the story. Challenges to the various aspects of the process generally are reviewed to determine if the student had a fair opportunity to respond to the charges and if the university followed its own procedures.

i. Right to Counsel

Most courts do not require colleges and universities to allow students charged in disciplinary proceedings to be represented by counsel. This is especially true in more recent cases, but many early cases reached the same conclusion. Courts seem especially satisfied where university allowed the student charged to confer with counsel, even though the lawyer was not allowed to present the student's case or question witnesses. Similarly, courts have not objected when disciplinary procedures provide for representation by advocates or student lawyers. Courts have noted two situations in which students may have the right to some level of representation or advice of counsel — to protect against self-incrimination when the student is also charged in a parallel

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48 Earlier cases holding representation by counsel was not required include Jackson v. Regents of the University of Michigan, 597 F.Supp. 1245; Hall v. Medical College of Ohio at St. Louis, 742 F.2d 299 (6th Cir. 1984) and Heaton v. Honor Committee of Univ. of Va., 719 F.2d 60 (4th Cir. 1983). Cf. Elizens v. Fee, 346 F.Supp. 202 (W.D.N.C. 1972).


criminal proceeding\textsuperscript{51} and, if expulsion is a potential sanction, where credibility is at issue.\textsuperscript{52}

ii. Right to Call and Cross-examine Witnesses

Courts have not found a right to call or cross examine witnesses so long as the student has a full opportunity to defend herself or to explain her position. As one court described, "[T]he federal courts have consistently held that where basic fairness is preserved a student subject to dismissal for disciplinary reasons is not entitled to formal cross-examination of her accusers."\textsuperscript{53} The court continued, "In the few instances where some right to cross examination has been recognized, the courts have not required the formalities mandated in criminal or civil proceedings.\textsuperscript{54} As the court noted, other courts have been satisfied when questions were submitted to the hearing officer who directed the questions to witnesses,\textsuperscript{55} where witnesses were not required to answer any questions,\textsuperscript{56} and where limits were placed on the type or extent of questioning.\textsuperscript{57} However, where it was unclear if the student charged had any opportunity at all to direct questions toward

\textsuperscript{51} See, e.g., Gabriowicz v. Newman, 582 F.2d 100 (1st Cir. 1978) and Black Coalition v. Portland Pub. Sch., 484 F.2d 1040 (9th Cir.). In a more recent opinion, the same court which decided Gabriowicz, referred to Hall, supra, and Jackson, supra, in concluding "The weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges."

\textsuperscript{52} See, Osteen, supra.

\textsuperscript{53} Reilly v. Daly, supra, at 444, citing a number of cases.

\textsuperscript{54} Id.

\textsuperscript{55} Nash, supra.


\textsuperscript{57} Nash, supra. Also, see, Henderson State University v. Spadoni, 848 S.W.2d 951, (Ark.App. 1993)
the student accusing him of rape, the court concluded a due process violation could have occurred.\textsuperscript{58}

iii. Double Jeopardy or Other Issues in Simultaneous Criminal Proceedings

Initially courts rejected assertions of double-jeopardy when a student was charged in both student disciplinary proceedings and criminal proceedings for the same behavior. However, as Gary Pavela points out,\textsuperscript{59} a 1986 U.S. Supreme Court case holding civil penalties which are solely punitive, i.e., deterrence and retribution, rather than remedial in nature has led a few courts to examine simultaneous proceedings closely to determine if they result in double jeopardy. Courts considering this possibility have been persuaded by the non-punitive nature of college and university sanctions that simultaneous proceedings don’t result in double jeopardy for students. Courts have been receptive to the need to protect the integrity of the University and its programs, to help students graduate, to rehabilitate students and to protect the safety of students on campus in finding sanctions non-punitive (withdrawal of athletic scholarship,\textsuperscript{60} community service/probation\textsuperscript{61} and issuance of “persona non grata” letter,\textsuperscript{62}). This is not to say

\begin{itemize}
\item[58] Denahoe v. Baker, supra.
\item[59] Pavela, supra, at 221.
\item[60] State of Maine v. Sterling, 685 A.2d 432 (Me. 1996).
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sanctions cannot include a punitive purpose as well. The U.S. Supreme Court has previously acknowledged the importance of punishment in an educational setting.  

iv. **Impartial Decision-maker**

A fundamental component of a fair hearing is an impartial decision-maker. In determining whether a disciplinary process fulfills this requirement, courts look to the behavior of the decision-maker more than the external appearance of a individual or board with no prior information about occurrence, familiarity with the individuals involved, or responsibility within the university. Although a hearing officer may have made derogatory comments about the students charged or acted in a manner that gave the appearance of bias, there was no evidence hearing board members who actually made the decision were prejudiced against the students.  

It is common for the decision-maker to be a student affairs staff member. In general, courts understand and accept the university’s need to have staff members serve multiple roles. For example, it was not a problem where the judicial officer held multiple roles and the judicial affairs assistant who reported to the judicial officer acted as the presiding officer at the hearing to impose a sanction or where some staff members from the residence life program perform prosecutorial and others perform adjudicative functions.

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63 Pavela at 223, citing Justice Powell in *Goss*, supra.


65 *Osteen v. Henley*, supra.

But in another case, where a single individual served as investigator, prosecutor, witness and judge, the court was less approving.  

While an impartial decision-maker is a requirement, knowledge of the surrounding facts or individuals involved does not mean the decision-maker is bias. A hearing panel which included a member of the victim’s fraternity was not bias. And when a Dean acted as hearing officer, his knowledge of other incidents involving the student did not violate the student’s procedural rights; but his consideration of those incidents without telling the student did.

v. Consideration of Evidence Not Made Known to the Student

Although due process does not require elaborate procedures, courts are troubled when decision-makers consider evidence not made known to the student. This concern arises because of the possibility a student may have been able to shed a different light on, or explain, the evidence if it was made known. In University of Texas Medical School v. Than, the court found a violation of the student’s due process rights because the student charged with cheating was not allowed to accompany the hearing officer and the university official who acted as prosecutor when they visited the room where the alleged cheating had occurred. This allowed the hearing officer to gather facts with the university

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67 Smith v. Deaton, supra.
68 Henderson v. Spadoni, supra.
69 Herbert v. Reinstein, et al., supra.
70 Supra
officer present but without providing the student an opportunity to respond.

Similarly, when a dean based a decision to suspend a student on prior incidents without informing the student, the student did not have an opportunity to respond to all the evidence.\textsuperscript{71} (However, because a separate hearing board was responsible for making the final decision and the student had an adequate opportunity to respond to evidence in the proceeding, the disciplinary action was not reversed.)

vi. Other Miscellaneous Procedural Concerns

Students often raise other issues to challenges suspensions and dismissals. Courts tend to rely on the procedures promised to the student and the overall harm, if any, to student because the university did not follow or offer a procedure. Students have been unsuccessful in challenging the failure of the university to record the hearing or prepare a transcript.\textsuperscript{72} But, failure to give students adequate notice of the appeal process or to consider a student’s submission of appeal materials denied a student the process due,\textsuperscript{73} because, along with other errors it prejudiced the student’s ability to get a fair hearing.

4. How Much Process is Best?

The simple answer is: a procedure that is fair to the student and allows the university to gain the

\textsuperscript{71} Herbert v. Reinstein, et al., supra.

\textsuperscript{72} See, e.g., German v. University of Rhode Island, 837 F.2d 7 (1st Cir. 1988); Esteban v. Central Missouri State College, 277 F.Supp. 649 (W.D.Mo. 1967)

\textsuperscript{73} Weidman v. State University of New York College at Cortland, supra.
best understanding of relevant information. In an educational setting, courts have recognized that elaborate procedures aren’t necessary to treat students fairly. Nor do more elaborate procedures allow universities to get more complete information. Often student disciplinary proceedings are characterized by student affairs staff and hearing boards struggling to follow complicated procedures. For a number of reasons such procedures may result in a process that is less fair to the student charged than a simple procedure and results in the university gaining less information about what occurred. In addition, more trial-like procedures often result in sanctions which appear more punitive and less educational.

Student affairs officers often refer to student disciplinary proceedings as offering the potential for a “teachable moment,” a time when students can become painfully aware of the consequences of their actions. However, too often the “teachable moment” is lost when students view a disciplinary proceeding that contains confusing legal terms and sounds much like a criminal proceeding. The student, or the student’s parent, rushes off to seek assistance in responding to the charges. Frequently the assistance comes from an attorney, perhaps a criminal defense attorney who, viewing this from like a criminal proceeding, advises the student not to discuss the matter with any representative of the university. Letters fly, demands for discovery are sent, and soon other students, who might be witnesses, are trying to decide which “side” they will talk with and whether they are willing to be involved.

As a result of the complicated procedures involved, the amount of preparation required to put on evidence under court-like rules, difficulties scheduling a long proceeding involving a large number of individuals including lawyers, the process drags on for months. During this time the
student, becomes defensive and more convinced by the arguments made by the student’s lawyer that the student is wrongly accused. Friends take sides, witnesses become unavailable, and the potential discipline effects the charged student’s academic performance. And when all is over, the danger a court will reverse the findings is as likely because the university failed to follow its own procedures rather than the university failed to offer procedures adequate to protect the student’s interest.

Perhaps the public relations adage should be applied to student disciplinary procedures — KISS (Keep It Simple Stupid). Students must receive full notice of the allegations against them and told the disciplinary process to be followed. They should have an opportunity to present evidence to an impartial decision-maker who may be an University employee; they should be told of, and have an opportunity to respond to, the evidence that will be used in reaching a decision. The student should have an opportunity to have any witnesses answer questions suggested by the student. If the student is also charged with criminal charges arising out of the event, the student should be able to be assisted by an attorney on matters of potential self-incrimination. The student should be notified of the result, any sanction and any opportunity for appeal. Even if a state’s administrative procedures act requires a more formal procedure, universities can offer students a less trial-like alternative. Most importantly, universities should keep in mind the goal of student discipline. As the U.S. Supreme Court pointed out in Goss v. Lopez, an elaborate disciplinary procedure is not only too costly but it “destroys its effectiveness as a part of the teaching process.”74

74 Goss v. Lopez, 419 U.S. 565 at 583.