

# Legal Right to Have an Attorney at College Disciplinary Hearings in the USA

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## Keywords

academic, advocate, attorney, college, disciplinary, due process, *Esteban*, *Jaksa*, lawyer, represent, school, state action, student, university, *Wasson*

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## Introduction

Does a student who is accused by a college of some kind of misconduct (i.e., cheating, plagiarism, fraud, violation of college rules, ...) have the right to bring an attorney on campus to hearings or other disciplinary procedures? If yes, then does that attorney have the right to represent the accused (e.g., cross-examine witnesses), or is the attorney confined to some limited role (e.g., observer, whisper in the ear of the accused)? Attorneys who are *not* specialists in education law may assume — wrongly — that academic procedures are similar to criminal law.

This essay is concerned with legal rights of students in both state colleges and private colleges, but *not* concerned with legal rights of pupils in high school and below. However, I mention a few school cases that have been frequently cited in cases involving colleges. Most of this essay concerns students accused of misconduct, but I do have a brief discussion of professors denied tenure, at page 63.

### disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at <http://www.rbs2.com/advice.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

Litigants or their attorneys should *not* rely on this essay for legal research. In researching this essay, I concentrated on cases in the U.S. Courts of Appeals and state supreme courts, as well as frequently cited cases from U.S. District Courts. This essay also emphasizes cases in the

northeastern USA. This essay does *not* contain a comprehensive list of *all* cases in the USA. Of course, this essay does not include any cases decided after I finished my searches of Westlaw for this topic in January 2011.

## Overview

The federal government operates several military academies and postgraduate schools, but those institutions involve a tiny fraction of the students enrolled in colleges in the USA. State and local governments operate many universities and community colleges. For the purposes of this essay, I use the phrase “state college” to refer to a college operated by any government: federal, state, or local, by analogy with “state action” in constitutional law.

State colleges are constrained by the Fourteenth Amendment to the U.S. Constitution, which says: “... nor shall any state deprive any person of life, liberty, or property without due process of law; ....” We can ignore “life, liberty” in that quote, because state colleges neither impose the death penalty nor imprison anyone. The possibility of deprivation of property (e.g., suspending a student in mid-semester thus forfeiting his tuition payment, revoking an academic degree, terminating employment of a tenured professor) can implicate due process in the 14<sup>th</sup> Amendment.

The Sixth Amendment to the U.S. Constitution says “In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” Disciplinary proceedings on a college campus are *not* criminal prosecutions, therefore the Sixth Amendment does *not* apply to disciplinary hearings on a college campus. Disciplinary hearings on a college campus can be distinguished from criminal litigation for at least the following reasons:

- A student voluntarily agrees to obey the rules of a college when the student enrolls, unlike criminal law that applies to everyone.
- The case against an accused student in a disciplinary hearing at a state college is typically *not* made by an attorney, in contrast with criminal proceedings in a courtroom.
- While disciplinary hearings at a state university have some features of courts, such hearings have never been required to have all of the procedural protections for an accused student that one would find in a criminal trial.
- For most misconduct that is the subject of disciplinary hearings at a state college, the accused student will *not* also stand trial in a criminal court. Common student misconduct, such as cheating on examinations or plagiarism, is *not* a criminal offense.<sup>1</sup>

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<sup>1</sup> There is a line of cases (page 48, below) that involve a college disciplinary committee hearing for conduct that is essentially the same as a forthcoming criminal trial. In such cases, courts agree that the state college must allow the accused student to bring an attorney to the hearing.

- A college disciplinary hearing can only deprive a student of property (e.g., expelling the student denies the student an opportunity to complete his academic degree and he forfeits his tuition for the current semester). In contrast, criminal proceedings in a court can punish the defendant with imprisonment, supervised probation, and other losses of liberty. Because judges consider loss of liberty to be more serious than loss of property, there are more procedural protections for criminal defendants than accused students in college disciplinary hearings.

See the cases cited in the body of this essay.

### history

Like many rules of law, the topic of this essay can best be understood from a historical perspective. In 1961, a U.S. Court of Appeals in *Dixon* held that students could be expelled from a state college only after receiving some due process (e.g., notice and a hearing). At that time in the 1960s, most discussions of due process were in context of a criminal trial, not in context of an administrative proceeding (e.g., disciplinary hearing at a state college). Of course, in criminal proceedings, having an attorney represent the accused is a legal right established in the Sixth Amendment to the U.S. Constitution.

In 1970, the U.S. Supreme Court issued the landmark decision in *Goldberg v. Kelly*, a case involving termination of welfare benefits without due process. Slowly, courts grappled with establishing standards for minimal due process in administrative proceedings. By the mid-1980s, it was clear in most of the USA that minimally acceptable due process did *not* include the right of an accused student to hire an attorney and bring him/her to a disciplinary hearing on campus. However, courts in some states continue to require that a state college allow an accused student to bring an attorney to disciplinary hearings.

This topic may not have a unique correct answer for all situations. Allowing an attorney to represent a student at a disciplinary hearing provides more fairness for the accused student, but may slightly increase the cost for the college. *If*, sometime in the future, the U.S. Supreme Court rules that minimal acceptable due process does *not* include the right of an accused student to bring an attorney to a disciplinary hearing on campus of a state college, a state court can assert a higher level of due process for public colleges in their state.

### disciplinary vs. academic

As explained in my essay on Academic Abstention, <http://www.rbs2.com/AcadAbst.pdf> (2007), the U.S. Supreme Court has made a distinction between disciplinary offenses and purely academic decisions. I suggest defining the two areas in the following way:

1. **Academic decisions** evaluate merit or acceptability of academic work (e.g., grade on an examination, grade in a class, acceptability of a thesis or dissertation, expulsion of a student for either incompetence or an unprofessional attitude, establishment of rules for minimum

acceptable academic performance, evaluation of quality of a professor's research for tenure or promotion, etc.).

2. **Disciplinary decisions** involve either alleged violation of rules (e.g., plagiarism or cheating on examinations) or alleged harm to the college or to other students (e.g., theft, assault, vandalism, disruption of class, etc.).

Academic decisions are typically made by one professor alone in matters related to one class, or by a committee of professors in other matters, because these decisions require the knowledge, experience, and judgment of experienced professionals. Disciplinary decisions that result in suspension or expulsion of the student are made after fact-finding by jurors at a hearing on campus. Modern (i.e., since about 1970) practice is that disciplinary hearings on campuses use a jury that includes at least several students (and sometimes also several professors).

In some cases, the distinction between disciplinary and academic may be illusory or a false dichotomy,<sup>2</sup> in which cases the student should be given the due process of a disciplinary hearing. For example, resolving charges of plagiarism involve knowledge of academic writing style (e.g., citations, paraphrasing, indicia of quotation). Resolving charges of misconduct in scholarly research may involve familiarity with research techniques and advanced knowledge of the area of research. In other words, academic misconduct can be a disciplinary matter.

Some disciplinary offenses may be prosecuted *both* in criminal courts *and* in proceedings on campus. The criminal court could fine or imprison a guilty student, the college's procedure could temporarily suspend the student's enrollment or expel the student. In other cases (e.g., cheating on an examination, plagiarism, etc.), a disciplinary offense at a college is only prosecuted in proceedings on campus.

Finally, professors are capable of giving a false reason to expel a student or deny tenure. For example, one could declare work to be unacceptable in quality, while the real reason is gender or racial discrimination. In law, such a false (but apparently acceptable) reason is called a pretext. So instead of having a disciplinary committee hearing, professors might oust a student for poor academic performance, because academic decisions are more difficult to challenge in court than disciplinary decisions. Scrutiny in a court, or other external and independent review, appears to be the only reasonable way to avoid such pretexts and unfairness.

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<sup>2</sup> Douglas R. Richmond, "Students' Right to Counsel in University Disciplinary Proceedings," 15 JOURNAL OF COLLEGE AND UNIVERSITY LAW 289, 303-306 (Winter 1989); Fernand N. Dutille, "Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?" 29 JOURNAL OF COLLEGE AND UNIVERSITY LAW 619 (2003). See also William G. Buss, "Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process," 65 IOWA LAW REVIEW 1, 7-13 (Oct 1979).

## pupil vs. student

As mentioned in the Introduction, above, the scope of this essay is students in either a private college or a state college. Judges writing opinions about the role of attorneys in disciplinary hearings at a college often cite cases involving suspensions of pupils from public schools, as if there is no significant difference between pupils and students. To discuss this sloppiness by judges, it is necessary to clarify some basic principles of education law:

1. pupils are children, students are adults
2. pupils are required by law to attend school, students voluntarily attend college

Several U.S. Supreme Court opinions have carefully explained the legal distinction between children and adults. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Case prohibits death penalty for murderer who was 15 y old at time of his crime. The Court gives six examples of conduct where nearly all states distinguish children from adults. 487 U.S. at 839-848.); *New York v. Ferber*, 458 U.S. 747 (1982) (Upholding state statute criminalizing sexual exploitation of children.); *Ginsberg v. State of New York*, 390 U.S. 629 (1968) (Upholding state statute prohibiting sale of obscene materials to children under 17 y of age.).

I am extremely uneasy about mixing cases involving pupils and students, because the important factual distinctions become blurred and confused. The U.S. Supreme Court has not yet ruled on a case involving expulsion of a college student for disciplinary reasons, so we do *not* know how the Court might distinguish pupils from students. There are at least three possibilities:

1. There is a higher right to a pupil having an attorney than a student having an attorney, because (a) pupils are legally required to attend school, and (b) parents of pupils may not have the education to effectively represent the best interests of their pupil-children, while college students are better able to represent themselves (assuming the student is not opposing an attorney at the college disciplinary hearing).
2. Both pupils and students are entitled to hire an attorney and bring that attorney to a hearing at a public school or state college, because the government that operates the school or college is attempting (a) to deprive the pupil/student of some property or benefit and perhaps also (b) to impose some stigma (e.g., label of plagiarist or cheater).
3. As a third possibility, stigma imposed on older students (e.g., students in graduate school) might have more serious implications for their future than stigma imposed on pupils in high school.

For these reasons, it is *not* obvious how the U.S. Supreme Court might rule in the future in a case involving due process rights of college students.

There is an analogous question of whether the Eighth Amendment prohibition against “cruel and unusual punishments” applies to disciplinary hearings on a college campus. The leading education law case on this topic is a U.S. Supreme Court decision, *Ingraham v. Wright*, 430 U.S. 651, 664-671 (1977) (Eighth Amendment prohibition of “cruel and unusual punishments” did *not*

apply to corporal punishment of public school pupils.). But notice that no one would suggest paddling college students, who are adults.

why attorneys are persona non grata at colleges

Why are attorneys unwelcome on campus in both disciplinary and academic hearings involving students? It's not difficult to suggest some reasons.

First, experienced litigators, especially criminal defense attorneys, often have a style that is abrasive and argumentative. Litigation is inherently adversarial, while professors prefer to reach a consensus. Litigation in courtrooms involves propaganda and hyperbole that is offensive to professors. Litigators often make arguments that are specious, in the hope of confusing the judge or jury. Litigators sometimes cast doubt on evidence that they reasonably know to be true, because the litigator's loyalty is to the client, not to the Truth. Litigators spew clichés and assertions unsupported by reasons, words that would embarrass a scholar. The principal rule of law seems to be: "blame someone else". Each of these characteristics of litigators is antagonistic to professors, so that it would be difficult for a typical litigator and a typical professor to work together. Some of the view of attorneys in this paragraph is shared by a distinguished judge on the U.S. Court of Appeals for the Second Circuit:

Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. [footnote omitted] Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.

Henry J. Friendly, "Some Kind of Hearing," 123 *UNIV. PENNSYLVANIA LAW REVIEW* 1267, 1288 (June 1975).

Second, attorneys use technical phrases (e.g., due process, burden of proof, ...) that are unfamiliar to professors outside the law school. The natural reaction of people to unfamiliar concepts is to ignore or avoid those concepts, by saying they are "unimportant" or add unnecessary delay. In reading cases on this topic, I found one case that serves as an example of what can go wrong when a zealous attorney represents an accused student at a state college disciplinary hearing. The hearing committee did not have an attorney, so they did not understand the legal arguments that the attorney was making. A judge in a U.S. District Court wrote about the requests and demands made by the attorney for the accused:

These requests were denied, and it is fair to say that they confounded and angered the Committee. The Committee members were intimidated by the legalistic and technical nature of counsel's requests and by his indications that, if they did not comply with his ultimatums, they would be subject to civil litigation. The hearing ended in turmoil as the Committee retreated to the Director's office.

*Morale v. Grigel*, 422 F.Supp. 988, 994-995 (D.N.H. 1976).



Third, purely academic decisions (e.g., acceptability of a thesis or dissertation, requirements for graduation, etc.) are commonly made by a committee of professors, then approved by the department or graduate school. Professors do not want lawyers who have different values and different concerns contaminating, delaying, or complicating their academic decisions.

Fourth, criminal law is designed to protect the rights of the accused to a fair trial, even if it means that “obviously guilty” defendants are acquitted on some “technicality”.<sup>3</sup> Criminal law contains a presumption of innocence for defendants, burden of proof on the prosecution, right not incriminate oneself, restrictions on admissible evidence, assistance of counsel, ... all of which gets in the way of protecting society from dangerous criminals, and increase the duration and cost of the judicial process. In contrast to criminal courts, many professors would prefer to review *all* of the evidence (even improperly obtained or self-incrimination) and then make a quick decision. There is no way to reconcile the elaborate procedural rules of criminal trials with professors who want a quick decision with few procedural protections for the accused.

There is a clash of cultures and values between attorneys and professors. An attorney is an advocate for his/her client, even if the client is guilty of reprehensible conduct. An attorney is very concerned about procedure (i.e., due process), while a professor is more concerned with a result (i.e., determination of Truth). For an attorney, Truth is something determined by finder of fact (i.e., jury or judge).

To be blunt about it, professors and academic administrators have a stereotyped view of attorneys as barbarians, whose presence on campus would disrupt the collegial atmosphere. And some attorneys look at the lack of due process in campus academic and disciplinary hearings, and conclude that colleges sometimes attempt to purge irritating or unconventional students and professors.

Nonattorneys often *assume* that every lawyer is a litigator, because litigation has a high public profile (i.e., is frequently reported by the news media), while other areas of law are unknown by nonattorneys. Hearings before government administrative agencies are examples of lawyers’ persuasive work that does not involve litigation. Although few practicing attorneys engage in extensive legal research and scholarly analysis, some attorneys do write scholarly articles that appeal to intellectuals. And there are at least a few professors in every subject who are also attorneys — being an attorney does *not* relinquish prior or subsequent academic degrees and scholarly accomplishments. Attorneys do exist who could attend disciplinary committee hearings without being abrasive or disruptive. However, if the disciplinary committee wants to work in a

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<sup>3</sup> I put “obviously guilty” and “technicality” in quotes to indicate that these terms are commonly used by nonlawyers, but are misleading. The *only* way to determine guilt is by a verdict of a jury or judge. A defendant who is allegedly acquitted on a “technicality” is just as free as a defendant who is found “not guilty” — criminal law respects both procedural rules and rights of defendants.

quick, perfunctory way, then the client's attorney should object, and the committee would then be in conflict with the attorney.

### **Cases: No Attorney Required at Private College**

In contrast to colleges operated by a state or local government, there are also many colleges operated by corporations. Such private universities have no constitutional obligations to their students or professors. In particular, a private university can generally prohibit an accused student from bringing an attorney to a disciplinary committee meeting.

#### *Coveney (1983)*

The leading case is *Coveney v. President & Trustees of College of Holy Cross*, 445 N.E.2d 136, 140 (Mass. 1983) ("Because the college is a private institution, Coveney had no constitutional right to have an attorney present.").

#### *Beilis (1988)*

A first-year medical student at a private medical college in New York State cheated on two different examinations, and was suspended for one year. The student sued, the trial judge inexplicably granted her motion to annul the findings of cheating, the medical college appealed, and the state appellate court reversed the trial court. The appellate court wrote:

Nor do we find merit in the contention that petitioner was denied her constitutional due process rights. .... While students at public universities are entitled to due process (*Matter of Sofair v. State Univ. of N.Y. Upstate Med. Center Coll. of Medicine*, 44 N.Y.2d 475, 478, 406 N.Y.S.2d 276, 377 N.E.2d 730), students at private universities cannot invoke such rights unless they meet the threshold requirement of showing that the State somehow involved itself in what would otherwise be deemed private activity (*Stone v. Cornell Univ.*, 126 A.D.2d 816, 818, 510 N.Y.S.2d 313). There has been no demonstration of State involvement sufficient to invoke State constitutional due process rights. State financial assistance alone is insufficient to permit court involvement in a school's disciplinary proceedings ( *id.*; see also, *Powe v. Miles*, 407 F.2d 73 [2nd Cir.] ).

*Beilis v. Albany Medical College of Union University*, 136 A.D.2d 42, 44, 525 N.Y.S.2d 932, 934 (N.Y.A.D. 3d Dept. 1988). The appellate court held that a private college must follow "its own published guidelines or rules". *Beilis*, 525 N.Y.S.2d at 933.

#### *Okafor (2004)*

A student at Yale University was accused of cheating on a chemistry examination. During the disciplinary process, she was "assisted by an advisor", who was apparently a dean at Yale, but not a licensed attorney. After Yale suspended her for two semesters in 1998, the student sued Yale in state court. In an unreported decision, the trial judge wrote:

The plaintiff also claims that she failed to receive adequate and effective representation from the adviser she chose to represent her before the Executive Committee. The motion for summary judgment is also directed at this claim. It is difficult to understand whether this is a separate claim or an adjunct to the breach of contract claim.

Is this a civil action based on some alleged violation of a constitutional right? Assuming the criteria for advancing such a claim can be met and assuming such a claim can even be considered without it being explicitly set forth — both inappropriate assumptions — there cannot be the sixth amendment violation. This a contractual dispute between private process so that the sixth amendment guarantee of the effective assistance of counsel is not an issue. Are procedural due process questions presented? It has been held that when a student is expelled from a state college he or she is entitled to due process, *Donahue v. Baker*, 976 F.Supp. 136, 145 (N.D.N.Y., 1997), and “the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a reasonable manner,” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But this is a suit against a private institution. Cf. *Andersen v. Regents of Univ. of California*, 99 Cal.Rptr. 531, 535 (1972); *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1925), on this point. But even in the due process arena “The Second Circuit has never recognized any absolute right to counsel in school disciplinary proceedings.” *Donahue*, 976 F.Supp. at 146, citing, *Wasson v. Trowbridge*, 382 F.2d 807, 812 (CA2, 1967); *Wimmer v. Lehman*, 705 F.2d 1402, 1404-05 (CA 4, 1983). In *Coveney v. President & Trustees of Holy Cross*, 445 N.E.2d 136 (Mass. 1983), the Massachusetts Supreme Court held that because Holy Cross was a private institution the student who sued the university for damages and specific performance after his expulsion had not only no constitutional right to a hearing, but no constitutional right to have an attorney present at any hearing. *Id.*, at page 140. No civil claim can be based on an alleged violation of constitutional rights. If the foregoing is true, how can one claim the assistance of someone who is not a lawyer and who you chose to advise you gives you any rights, if that person was ineffective? *Okafor v. Yale University*, Not Reported in A.2d, 2004 WL 1615941 at \*12 (Conn.Super. 2004).

Note that the rules at Yale specifically say the adviser is *not* an advocate.

At that point the student has the right to choose an adviser. The adviser is a member of the Yale community such as a dean, faculty member, coach, etc. The regulations state the adviser is not an “advocate” but rather “a source of personal and moral support.”

*Okafor* at \*2.

#### *Kimberg (2009)*

In 2006, Terence Kimberg was dismissed from the University of Scranton’s Nurse Anesthesia Program. Despite its name, the University of Scranton is a private college that is operated by the Jesuits of the Catholic Church. The reason for dismissal was “clinical performance deficiencies”, which is an academic, not disciplinary, reason. When the student sued in federal court, the trial court granted summary judgment in favor of the University:

Plaintiff further avers in his complaint that the defendants agreed to provide him with certain due process rights. He asserts that these rights were violated because he did not receive a full and complete hearing with respect to the Due Process Review. (Doc. 1, Compl.¶ 57). Plaintiff’s brief more specifically indicates that the agreement to a full and fair due process review was breached because plaintiff was told that he could not be represented by counsel at

the hearing. (Doc. 60, Plaintiff's brief in opposition to Defendant University of Scranton's motion for summary judgment).

The parties agree that with regard to a private college, "students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides." *Psi Upsilon v. Univ. of Pa.*, 404 Pa.Super. 604, 591 A.2d 755, 758 (Pa.Super.Ct. 1991). The disciplinary procedures must, however, be "fundamentally fair". *Id.* Plaintiff's position, evidently, is that to be fundamentally fair, the plaintiff should have been able to be represented by counsel at the due process hearing. We disagree.

The parties cite no cases, and our research has uncovered none, that directly address this issue with regard to a private school.<sup>4</sup> With regard to a public school, however, the Pennsylvania Commonwealth Court has held that "fundamental fairness" is met even where the school does not provide a " 'full-dress judicial hearing,' subject to the rules of evidence or representation by counsel." *Ruane v. Shippensburg Univ.*, 871 A.2d 859, 862 (Pa.Comm. Ct. 2005). If fundamental fairness is met in a public school without representation by counsel, then surely, it is met in a private school where there is not representation by counsel. Moreover, this case is a breach of contract action. Plaintiff has pointed to nothing in the contractual relationship that specifically provides that he will be allowed to bring counsel to the due process hearing. As such, he has not made out a breach of contract claim. Accordingly, judgment will be granted to the defendants on the plaintiff's due process claim.

*Kimberg v. University of Scranton*, Slip Copy, 2009 WL 222658 at \*4-\*5 (M.D.Pa. 2009).

The U.S. Court of Appeals affirmed the summary judgment in favor of the University.

Moreover, Kimberg claims that Defendants breached the parties' agreement by denying Kimberg the opportunity to be represented by legal counsel at his hearing before the University's Due Process Review Committee. As the District Court properly concluded, this position lacks support in either Pennsylvania law or within the scope of the contractual language.

Because the relationship between a private college and its students is contractual in nature, a student being disciplined is entitled "only to those procedural safeguards which the school specifically provides." *Psi Upsilon of Phila. v. Univ. of Pa.*, 404 Pa.Super. 604, 591 A.2d 755, 758 (Pa.Super.Ct. 1991) (quotation omitted). While private colleges enjoy wide latitude to structure their internal disciplinary procedures as they see fit, *Schulman v. Franklin & Marshall Coll.*, 371 Pa.Super. 345, 538 A.2d 49, 52 (Pa.Super.Ct. 1988), they are limited by the principle that such procedures must be "fundamentally fair," *Psi Upsilon*, 591 A.2d at 758.

The Program's Due Process Policy grants students the right to appeal any action they feel violates their rights under established policies, rules and regulations. The terminal step of the grievance procedure consists of a hearing before a Due Process Review Committee, a body charged with rendering an impartial determination as to the fairness of the sanctions imposed upon the student. The Committee is empowered only to decide if the student was afforded adequate process; determining the clinical competency of the student rests within the exclusive preserve of the student's CRNA supervisors.

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<sup>4</sup> The plaintiffs, college, and judge all did inadequate legal research. They missed the leading case of *Coveney v. President & Trustees of College of Holy Cross*, 445 N.E.2d 136, 140 (Mass. 1983), as well as missed *Beilis v. Albany Medical College of Union University*, 525 N.Y.S.2d 932, 934 (N.Y.A.D. 3dDept. 1988).

First, the District Court correctly concluded that a college's disciplinary procedures are not necessarily unfair simply by virtue of their failure to provide a student with the right to representation by counsel. The Pennsylvania Commonwealth Court has held that public universities do not have to afford a “‘full-dress judicial hearing,’ subject to the rules of evidence or representation by counsel” to satisfy the “fundamental fairness” standard. *Ruane v. Shippensburg Univ.*, 871 A.2d 859, 862 (Pa.Comm. Ct. 2005). Private institutions need not endow their students with the constitutional due process protections that state universities are obligated to provide. *Psi Upsilon*, 591 A.2d at 758. Hence, as the District Court astutely noted, “[i]f fundamental fairness is met in a public school without representation by counsel, then surely, it is met in a private school where there is not representation by counsel.”

Second, the Handbook did not entitle Kimberg to representation by counsel at the Due Process Review Committee hearing. Although the Due Process Policy does not stipulate that a student who requests a hearing will be prohibited from appearing alongside an attorney, Defendants bore no obligation to afford Plaintiff protections in addition to those expressly embodied in the written agreement. *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 392 Pa. Super. 502, 573 A.2d 575, 579 (Pa. Super. Ct. 1990) (“[T]he relationship between a private college and its students [is] contractual in nature. Therefore, students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides.”). As explained above, the University's procedures were sufficiently robust as to be fundamentally fair. In disallowing Plaintiff's request, Defendants merely opted to abide by the literal terms of the Handbook rather than to insert a new safeguard alongside those already in place.

*Kimberg v. University Of Scranton*, Slip Copy, 2010 WL 4230711 at \*6-\*7 (3d Cir. 2010).

Note that the judges ignored the fact that the reason for dismissal was academic performance of the student, not misconduct. In academic decisions, there is no due process and courts should refuse to review the dismissal, because of academic abstention.

#### conclusion for private colleges

It is elementary constitutional law that the U.S. Constitution, including the right to due process, only apply when a government (i.e., “state action”) is depriving someone of liberty or property. This rule of law is so well known to attorneys that it hardly needs a citation to authority, but the following U.S. Supreme Court cases are typical of many dozen that could be cited:

- *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (Fourteenth Amendment only protects against “state action”, not invasion of rights by an individual.)
- *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) (“The Fourteenth Amendment protects this [property] interest, however, only from a deprivation by state action.”);
- *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989) (“But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”);

- *U.S. v. Morrison*, 529 U.S. 598, 599 (2000) (“However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States v. Harris*, 106 U.S. 629 ... [(1883)], and the *In re Civil Rights Cases*, 109 U.S. 3 ... [(1883)], ....”).

For this reason, it is well-settled law that private universities do *not* need to provide due process to their students or faculty.

Private universities — which are not legally required to provide “due process,” as that term is used in constitutional law — often forbid a student from bringing an attorney to a hearing on campus. The people making the rules (i.e., the college administration) make the rules to simply their life.

Recognize that when a private college forbids bringing an attorney on campus, a grieved student or professor can still hire an attorney and obtain advice from that attorney, although the attorney can not attend disciplinary hearings. Attorneys are experienced in reviewing evidence and crafting persuasive rhetoric, so attorneys can draft material that may help an accused student or professor in making a presentation to the hearing on campus.

There are theoretical possibilities that, in some circumstances, a private college *might* be found to be a state actor, and therefore legally required to provide due process rights to students. For example, if a corporation operates a town for its employees, then the corporation must provide civil liberties, including due process. *Marsh v. Alabama*, 326 U.S. 501 (1946). I have written a separate essay at <http://www.rbs2.com/esa.pdf> that discusses state action by private schools and private colleges, especially in Massachusetts, New York, and Pennsylvania. Since U.S. Supreme Court decisions in 1982, it is very *unlikely* that a private college would be held to be a state actor.

### **U.S. Supreme Court on Due Process**

The U.S. Supreme Court has never ruled on a case involving a college student who was expelled from a college because of misconduct. Lower federal courts have looked to analogous U.S. Supreme Court cases, such as denial of welfare benefits and suspension of pupils from schools, to attempt to formulate rules for minimal due process in disciplinary hearings at state colleges. The major U.S. Supreme Court cases are discussed below.

*Goldberg v. Kelly* (U.S. 1970)

*Goldberg v. Kelly* is a landmark case on due process rights in a civil (i.e., noncriminal) context. The plaintiffs in *Goldberg* were “residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program”. *Goldberg*, 397 U.S. at 256. The city had been terminating welfare benefits without holding a hearing. The U.S. Supreme Court in *Goldberg* held that termination of benefits required due process, due process required some kind of hearing, and then came to the details of the opportunity to be heard:

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. [footnote omitted] It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. ....

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. [citations omitted] .... Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.’ *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. .... *Goldberg v. Kelly*, 397 U.S. 254, 268-271 (1970).

Note that *Goldberg* cites a criminal law case, *Powell*, for the importance of an attorney. But *Powell* involves a specific right to counsel under the Sixth Amendment in criminal prosecutions, while *Goldberg* is a civil matter that involves weaker due process rights. The Supreme Court in *Goldberg* invented new law, which is not dependent on *Powell*.

Note that the majority opinion in *Goldberg* was written by Justice Brennan, one of the most liberal justices in the history of the U.S. Supreme Court. This was not a unanimous decision: three justices dissented. *Goldberg*, 397 U.S. at 271 (Black, J., dissenting), companion case of *Wheeler v. Montgomery*, 397 U.S. at 282 (Burger, C.J., dissenting), *Wheeler*, 397 U.S. at 285 (Stewart, J., dissenting). If this case were presented during the 1990s, when the Court had more conservative Justices, there might not be a due process right to bring an attorney to a hearing.

Justice Black dissented, arguing both with the right to allow the recipient's attorney to be present at a hearing and with the stringent rules for removing a recipient from the welfare roles:

After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963). Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

*Goldberg*, 397 U.S. at 1025-1026 (Black, J., dissenting).

The holding that the government is not required to provide a no-cost attorney to recipients was still good law in the year 2001. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting). See also *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333-334 (1985).

#### *Goss* (U.S. 1975)

The U.S. Supreme Court has not ruled on a case involving expulsion of a student from public college for disciplinary reasons. The most relevant case seems to be in 1975, when the U.S. Supreme Court wrote the following in *Goss*, a famous education-law case involving suspension of high school pupils for less than ten days:

**We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions [i.e., not exceeding 10 days] must afford the student the opportunity to secure counsel,**<sup>5</sup> 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.

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<sup>5</sup> Boldface added by Standler.



On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

....

We should also make it clear that we have addressed ourselves **solely to the short suspension, not exceeding 10 days**.<sup>6</sup> Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required. *Goss*, 419 U.S. 565, 583-584 (1975).

The first paragraph of this quotation seems to be design to make life easier for school administrators, instead of providing fairness to the accused pupils. *Goss* is cited (misapplied?) in many cases involving student disciplinary committees at state colleges:

1. The bold-faced holding above — about no need to give the “student the opportunity to secure counsel” — is often quoted by judges without mentioning the critical restriction to “short suspensions”. Indeed, *Goss* is often cited in cases involving permanent expulsions or suspensions for more than one semester, when the holdings in *Goss* only apply to suspensions for no more than 10 days.
2. In the third paragraph quoted above, the Court explicitly says “Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” This sentence is relevant to cases involving college students who are suspended for at least one semester or permanently expelled.
3. Judges cite *Goss* in cases involving students at a college. But *Goss* is only concerned with high school pupils. Pupils are children, while students in college are adults — an important factual distinction in education law that was explained at page 7, above.
4. Note that the Court, in the second paragraph quoted above, allowed the disciplinarian to “permit counsel” in “more difficult cases”. See also the last sentence of the third paragraph quoted above: it is possible “that in unusual situations, ..., something more than the rudimentary procedures will be required.” I think these two sentences are hedging — sometime in the future, *if* the Court finds more due process is due for some special type(s) of short suspension from school, then it will not be necessary to overrule *Goss*, because the additional rule is a “unusual situation” under *Goss*.

Children are required by statute to attend school, so suspension of a pupil from school involves deprivation of a legal right. The *Givens* case, discussed at page 27, below, is an example

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<sup>6</sup> Boldface added by Standler.

of where parents are too poorly educated to be able to represent the best interest of their child(ren). For these reasons, it would seem that children often need representation by an attorney in school disciplinary procedures.

For nonlawyers reading this essay, let me remark that a court properly decides only the issue(s) in the case that is before the court. A judicial decision is *not* the place to sketch broad rules that will apply to future cases with different facts. Therefore, *Goss* does not decide due process rules for long suspensions from high school, and *Goss* does not say anything about college students. In order to understand the complete set of rules that apply to a situation, an attorney may need to read dozens of cases and extract one or two rules from each case. In practice, there may be inconsistencies amongst rules formulated by different courts in different jurisdictions. And some issues may not have been decided by any court, leaving a hole in the development of the law.

*Mathews v. Eldridge* (U.S. 1976)

In *Mathews v. Eldridge*, the plaintiff had his Social Security disability benefits terminated without an evidentiary hearing. The U.S. Supreme Court found no violation of due process. The Court stated three elements to be evaluated in deciding the requirements of due process:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., *Goldberg v. Kelly*, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

*Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

The Court tersely noted that retained counsel is welcome in the process:

The hearing is nonadversary, and the SSA [Social Security Administration] is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. 20 CFR § 404.934.

*Mathews v. Eldridge*, 424 U.S. 319, 339 (1976).

In my view, the application of the three elements in *Mathews v. Eldridge* to college disciplinary hearings gives the following:

- (1) the “private interest[s] that will be affected by the official action” is that (a) an expelled student may be deprived of the fruits of several years of his/her labor, tuition payments, and expenses and (b) a student expelled for plagiarism or cheating will suffer stigma that makes admission to another quality college unlikely (see page 61, below).

- (2) the risk that the procedures will lead to erroneous deprivation[s] is difficult to evaluate, since there are no statistics regarding innocent students who are erroneously expelled. My personal opinion is that the risk of error is generally small, except in cases where the accused used speech that was not only unpopular but also not politically correct.

Further, the disciplinary hearing on campus is the last reasonable time to influence the decision, because an administrative appeal on campus is generally futile, and litigation on merits of expulsion in court faces the “arbitrary or capricious” standard — plus deference to the university from academic abstention — that is almost impossible for an accused student to prevail. The absence of meaningful review makes it critically important to have near zero risk that the hearing will produce an erroneous decision.

- (3) allowing an accused student’s attorney to attend a disciplinary hearing poses minimal “administrative burden” to the college, provided that the college issue rules to control the role of the attorney.

I conclude that *Mathews v. Eldridge* favors allowing an accused student to bring his/her retained counsel to a disciplinary hearing at a state college, subject to some limitations by the college on the role of the attorney at the hearing. However, numerous federal courts in the USA — as explained below, beginning at page 33 — have ruled that accused students can *not* bring their attorney to hearings on campus of a state college. One reason for the divergence of my opinion from the law is that judges have not considered the role of attorneys on campus, and the ability of colleges to make rules that would restrict the roles of attorneys. This topic is discussed further in the section on “potted plants” that begins at page 64.

#### *Bethel* (U.S. 1986)

In a famous education-law case, the U.S. Supreme Court held that a high school could suspend for two days a pupil for giving an “offensively lewd and indecent speech” at a school assembly. The Court’s concluding paragraph says:

We have recognized that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.” *New Jersey v. T.L.O.*, 469 U.S., at 340, 105 S.Ct., at 742. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, **the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.**<sup>7</sup> Cf. *Arnett v. Kennedy*, 416 U.S. 134, 161, 94 S.Ct. 1633, 1647-1648, 40 L.Ed.2d 15 (1974) (REHNQUIST, J., concurring). Two days’ suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. Cf. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The school disciplinary rule proscribing “obscene” language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions. [footnote omitted]

*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

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<sup>7</sup> Boldface added by Standler.

The facts of this case make it irrelevant to college students, because students are adults who have a right to use lewd language in campus politics. Nonetheless, the remark boldfaced above is a valid statement of law for both high schools and colleges. The *Arnett* case cited in *Bethel* involves termination of employment of a federal employee because of he made defamatory statements about other employees, it is *not* an education-law case. Furthermore, the cite to 416 U.S. at 161 probably should be 159, because page 161 does not mention criminal law. *Arnett* is weak, if not irrelevant, authority for the rule I set in boldface type.

The boldfaced statement in the above quotation from *Bethel* has been quoted by the U.S. Courts of Appeals in the following cases (amongst others):

- *Palmer v. Merluzzi*, 689 F.Supp. 400, 410-411 (D.N.J. 1988), *aff'd*, 868 F.2d 90, 94, n.3 (3dCir. 1989);
- *Woodis v. Westark Community College*, 160 F.3d 435, 438 (8thCir. 1998) (nursing student in community college);
- *Fuller v. Decatur Public School Bd. of Education*, 78 F.Supp.2d 812, 826-827 (C.D.Ill. 2000), *aff'd*, 251 F.3d 662, 667 (7thCir. 2001);
- *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 260 (3dCir. 2002);
- *Newsom ex rel. Newsom v. Albemarle County School Board*, 354 F.3d 249, 258-259 (4thCir. 2003);
- *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 225 (5thCir. 2009);
- *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 520 (7thCir. 2010).

I see the boldfaced statement in the above quotation from *Bethel* as important for establishing the minimum preciseness of school and college rules, for example, in the area of appropriate use of computers on campus. This is a different concern than whether attorneys are allowed on campus during student disciplinary hearings, but precision of rules is also a due process concern.

### **Cases: at State College**

#### *Dixon* (1961)

Black students at a state college in Alabama were expelled without a hearing. The college dismissed the students without giving a reason, although the opinion of the U.S. District Court says that the students participated in a civil rights demonstration off campus. *Dixon*, 186 F.Supp. 945, 947-948 (M.D.Ala. 1960). In a landmark decision, the U.S. Court of Appeals in *Dixon* held that some due process was required before students could be expelled from a state college.

It is not enough to say, as did the district court in the present case, 'The right to attend a public college or university is not in and of itself a constitutional right.' 186 F.Supp. at page 950. That argument was emphatically answered by the Supreme Court in the *Cafeteria and Restaurant Workers Union* case, *supra*, ([367 U.S. 886, 894] 81 S.Ct. [at] 1748.) when it said

that the question of whether ‘\* \* \* summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment \* \* \* cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. ‘One may not have a constitutional right to go to Bagdad [sic], but the Government may not prohibit one from going there unless by means consonant with due process of law.’ As in that case, so here, it is necessary to consider ‘the nature both of the private interest which has been impaired and the governmental power which has been exercised.’

The appellees urge upon us the under a provision of the Board of Education's regulations the appellants waived any right to notice and a hearing before being expelled for misconduct. ‘Attendance at any college is on the basis of a mutual decision of the student's parents and of the college. Attendance at a particular college is voluntary and is different from attendance at a public school where the pupil may be required to attend a particular school which is located in the neighborhood or district in which the pupil's family may live. Just as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult.’

We do not read this provision to clearly indicate an intent on the part of the student to waive notice and a hearing before expulsion. If, however, we should so assume, it nonetheless remains true that **the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process.**<sup>8</sup> See *Slochower v. Board of Education*, 1956, 350 U.S. 551, 555, 76 S.Ct. 637, 100 L.Ed. 692; *Wieman v. Updegraff*, 1952, 344 U.S. 183, 191, 192, 73 S.Ct. 215, 97 L.Ed. 216; *United Public Workers of America (C.I.O.) v. Mitchell*, 1947, 330 U.S. 75, 100, 67 S.Ct. 556, 91 L.Ed. 754; *Shelton v. Tucker*, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231. Only private associations have the right to obtain a waiver of notice and hearing before depriving a member of a valuable right. And even here, the right to notice and a hearing is so fundamental to the conduct of our society that the waiver must be clear and explicit. *Medical and Surgical Society of Montgomery County v. Weatherly*, 75 Ala. 248, 256-259. In the absence of such an explicit waiver, Alabama has required that even private associations must provide notice and a hearing before expulsion. In *Medical and Surgical Society of Montgomery County v. Weatherly*, supra, it was held that a physician could not be expelled from a medical society without notice and a hearing. In *Local Union No. 57, etc. v. Boyd*, 1944, 245 Ala. 227, 16 So.2d 705, 711, a local union was ordered to reinstate one of its members expelled after a hearing of which he had insufficient notice.

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

There was no offer to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course of studies in mid-term. It is most unlikely that a public college would accept a student expelled from another

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<sup>8</sup> Boldface added by Standler. This is a statement of the doctrine of unconstitutional conditions.

public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.

Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded, as was held by the district court, that that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of the issue. In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education.

*Dixon v. Alabama State Board of Education*, 294 F.2d 150, 156-157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). For more on the general doctrine of unconstitutional conditions, see my essay at <http://www.rbs2.com/duc.pdf> (2005). Notice that *Dixon* recognizes that expulsion from a state college involves both a property interest (“interruption of their course of studies in mid-term”) and a stigma (“prejudice the student in completing his education”), each of which would justify requiring due process before expelling.

The U.S. Court of Appeals specified what is required by due process of law in such cases:

We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. 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 interview 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 the facts 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.**<sup>9</sup> Such a hearing, with the attending 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

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<sup>9</sup> Boldface added by Standler.

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.

*Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158-159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

Notice that the U.S. Court of Appeals did *not* require “a full-dress judicial hearing, with the right to cross-examine witnesses”. The court did *not* require the students to be represented by attorneys. The court did *not* say whether a state college could prohibit the student from bringing an attorney to the disciplinary hearing on campus. The judges in *Dixon* were exercising judicial restraint: the judges only required the University to give students due process. If the University gave too little due process, then that error could be the subject of future litigation, with perhaps a second appeal.

#### **attorney permitted at state colleges**

*Esteban* (1967)

*Esteban v. Central Missouri State College*, 277 F.Supp. 649, 651 (W.D.Mo. 1967) (“The procedures to be followed in preparing for and conducting such hearing shall include the following procedural features: ... ; (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them; ....”), *aff’d*. 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

The U.S. Court of Appeals affirmed and remarked:

... school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement.

*Esteban v. Central Missouri State College*, 415 F.2d 1077, 1090 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

In 1992, the U.S. Court of Appeals heard another college disciplinary case from Missouri, see *Coleman v. Monroe*, 977 F.2d 442 (8th Cir. 1992), which is discussed at page 56, below. In 1998, the U.S. Court of Appeals for the Eighth Circuit affirmed a dismissal from a state community college and rejected a student’s due process claim. *Woodis v. Westark Community College*, 160 F.3d 435, 440-441 (8th Cir. 1998). Both of these cases in the 1990s followed *Esteban*.

## General Order (1968)

In response to *Esteban*, above, and *Scoggin v. Lincoln University*, 291 F.Supp. 161 (W.D.Mo. 1968),<sup>10</sup> the U.S. District Court for the Western District of Missouri issued an en banc General Order on due process in student disciplinary proceedings at tax-supported colleges:

There is no general requirement that procedural due process in student disciplinary cases provide for legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, .... [footnote citing *Dixon* and *Madera*.] Rare and exceptional circumstances, however, may require provision of one or more of these features in a particular case to guarantee the fundamental concepts of fair play. General Order on Judicial Standards of Procedure and Substances in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147-148 (W.D.Mo. 1968). I wonder about the precise meaning of “no general requirement ... [to] provide for legal representation”. I think those words mean the college is *not* required to supply<sup>11</sup> an attorney for an accused student. That interpretation is consistent with *Esteban*, which holds that an accused student may retain counsel and bring that counsel to a hearing. Another possible interpretation is that the college may prohibit an accused student from bringing a private attorney to the hearing on campus, but that would contradict *Esteban*, and there is no mention in the General Order of any departure from *Esteban*. It is strange that this General Order mentions “providing” (i.e., appointing) counsel, when this issue is rarely raised by plaintiffs, as discussed at page 65, below. The common issue is whether a state college can prohibit a student from bringing a retained attorney to a disciplinary hearing at the college.

This General Order gives three minimal due process requirements: (1) “adequate notice in writing,” (2) “opportunity for a hearing,” and (3) “substantial evidence” is required to support any disciplinary action.<sup>12</sup> 45 F.R.D. at 147. An example of “rare and exceptional circumstances” may be concurrent criminal prosecution for the same occurrence, an issue discussed beginning at page 48, below.

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<sup>10</sup> In *Scoggin* the court held that there was “no substantial evidence” that the accused students had either (1) caused damage to the University or (2) planned the demonstration. 291 F.Supp. at 166. The accused students did not have an attorney at the hearing, but the judicial opinion does not consider the absence of counsel.

<sup>11</sup> Perhaps even providing a no-cost attorney at no cost to an indigent student, although neither *Esteban* nor the *General Order* mentions a no-cost attorney. See page 65, below.

<sup>12</sup> The substantial evidence standard was later criticized by a dissenting judge on the U.S. Court of Appeals. *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1090, n.1 (8th Cir. 1969) (Lay, J., dissenting), *cert. denied*, 398 U.S. 965 (1970).



This General Order compares (1) disciplinary actions against students by colleges with (2) criminal law.

The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. **The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.**<sup>13</sup>

In the lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. [footnote omitted] The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.

General Order on Judicial Standards of Procedure and Substances in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 142 (W.D.Mo. 1968).

The first paragraph of this quotation tells attorneys for students to stop analogizing disciplinary hearings at colleges to criminal law. But, at the time this General Order was written, there was no well developed law for due process in contexts other than criminal law.<sup>14</sup> This paragraph contains a classic statement that, because there is no loss of liberty (i.e., “not imprisoned, ... or subjected to probationary supervision”), full due process of criminal law does *not* apply to college disciplinary hearings.

The second paragraph quoted above is explicitly limited to “lesser disciplinary procedures” that do *not* involve permanent expulsion. The last sentence of the second paragraph of the General Order (“render the institutional control impotent”) must be read in the limited context of lesser disciplinary procedures. But note that the first paragraph already rejected full due process of criminal law, even in cases of permanent expulsions. Surely the judges would not require *more*

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<sup>13</sup> Boldface added by Standler. This sentence was later approved by *Esteban*, 415 F.2d 1077, 1088 (8thCir. 1969) (“Secondly, we agree with Judge Hunter that it is not sound to draw an analogy between student discipline and criminal procedure, ....”). Quoted with approval in *Woodis v. Westark Community College*, 160 F.3d 435, 440 (8thCir. 1998); *Sill v. Pennsylvania State Univ.*, 462 F.2d. 463, 467 (3dCir. 1972); *Norton v. Discipline Committee of East Tennessee State Univ.*, 419 F.2d 195, 200 (6thCir. 1969) (not citing *Esteban*).

<sup>14</sup> The landmark decision of *Goldberg v. Kelly* by the U.S. Supreme Court in 1970 began a new area of law, for due process in a civil context. See page 15, above.

due process for *lesser* sanctions, so full due process of criminal law is rejected again. In my view, the Court should have said that lesser disciplinary procedures require less due process.

If we read the last sentence of the second paragraph as not limited to “lesser disciplinary procedures”, then this sentence is hyperbole that is unsupported by any evidence or reason. There is a spectrum of alternatives between no due process and full due process of criminal law. Slightly increasing the amount of due process in disciplinary hearings (e.g., allowing an accused student to bring an attorney to the hearing on campus) would be a minor inconvenience to a college.

My search of all state and federal cases in Westlaw on 13 Feb 2011 showed that this General Order has been cited in 48 cases nationwide, most recently in *Siblerud v. Colorado State Board of Agriculture*, 896 F.Supp. 1506 (D.Colo. 1995) (Colorado State University).

### *Zanders* (1968)

Several students were expelled from Grambling, a state college for Negroes in Louisiana, after the students participated in demonstrations on campus. The first hearing at the college was deficient in due process and the students obtained an injunction from a federal court.

In obedience with that Order, the College scheduled a second hearing for Monday, November 27. All expelled students were notified in writing one week in advance of the charges against them; [footnote omitted] were informed that they had the right to be represented by counsel of their choice, cross-examine all witnesses and present any evidence in their own behalf.

At the November 27 hearing, the Chairman of the Disciplinary Committee, Dean E.L. Cole, obviously unadvised, announced that the College did not intend to present any evidence but instead would listen to the evidence presented by the students alone. Some of the previously expelled students' names were not even mentioned during the hearing, and after two and one-half hours of testimony, all twenty-nine students were again expelled. *Zanders v. Louisiana State Bd. of Education*, 281 F.Supp. 747, 752-753 (W.D.La. 1968).

The students were then given a third hearing, this one before the State Board of Education. The new hearing satisfied due process requirements and lasted more than 13 hours:

At the hearing before the State Board of Education, all parties were ably and adequately represented by counsel. Pursuant to request by students' counsel, the Board agreed to treat each plaintiff's case individually, and, accordingly, the evidence against each was presented separately. The widest possible latitude was given on direct and cross examination. But for a single exception, plaintiffs chose not to present evidence in their own behalf.

*Zanders v. Louisiana State Bd. of Education*, 281 F.Supp. 747, 753 (W.D.La. 1968).

See also *Zanders*, 281 F.Supp. at 766 (“the opposing sides were ably represented by counsel”). Because Grambling College corrected its due process error at the second hearing, this opinion tells us little about the right of accused students to be represented by counsel.

*Moore (1968)*

*Moore v. Student Affairs Committee of Troy State University*, 284 F.Supp. 725, 731 (D.Ala. 1968) (“... plaintiff was given the right to have his counsel attend and the opportunity to confront and fully cross-examine all witnesses against him. In addition, a full transcript of the hearing was made by a court reporter and is a part of the record in this cause. .... The hearing afforded Moore by Troy State University in this case was in all respects fair and none of Moore’s constitutional rights were infringed by reason of the University’s action in suspending him.”).

*Keene (1970)*

In 1970, a U.S. District Court noted that the Maine Maritime Academy had allowed a student at a disciplinary hearing to be represented by an attorney. In reviewing the law, the judge noted:

... there appears to be substantial agreement that due process requires that ... the student must be permitted the assistance of a lawyer, at least in major disciplinary proceedings [citations to *Esteban*, 277 F.Supp. at 651; *Moore*, 284 F.Supp. at 731], but see *Wasson v. Trowbridge*, supra, 382 F.2d at 812 (student not entitled to a lawyer so long as ‘the government does not proceed through counsel’); General Order on Judicial Standards, supra, 45 F.R.D. [133] at 147-148 (no ‘general requirement’ of counsel) [(W.D.Mo. 1968) (en banc)]; ....

*Keene v. Rodgers*, 316 F.Supp. 217, 221 (D.Me. 1970).

Note that in 1970, the law was unsettled. *Moore* only acknowledges the fact that a state college allowed a student to have an attorney at a disciplinary hearing, the presence of an attorney was *not* a judicial requirement. Similarly, in *Keene*, the college allowed the accused student to have an attorney at the disciplinary hearing, so this was *not* an issue in subsequent litigation. And, as the judge in *Keene* admits, there were already two contrary authorities.

*Givens (1972)*

In 1969, two girls, 11 and 13 y of age, had a “dispute” with a teacher at a public school in Charlotte, North Carolina. The girls were suspended from school without any hearing to determine the facts of the case, which was a due process violation. Note that this case does *not* involve a college. Because children are legally required to attend school, but adults are not required to attend college, there may be factual differences that distinguish school cases from higher-education cases. In discussing the requirements of due process, the judge wrote:

Not all school discipline due process cases have reached identical results. The Supreme Court has written no blueprint. However, where exclusion or suspension for any considerable period of time is a possible consequence of proceedings, modern courts have held that due process requires a number of procedural safeguards such as: (1) notice to parents and student in the form of a written and specific statement of the charges which, if proved, would justify the punishment sought; (2) a full hearing after adequate notice and (3) conducted by an impartial tribunal; (4) the right to examine exhibits and other evidence against the student;

**(5) the right to be represented by counsel (though not at public expense);**<sup>15</sup> (6) the right to confront and examine adverse witnesses; (7) the right to present evidence on behalf of the student; (8) the right to make a record of the proceedings; and (9) the requirement that the decision of the authorities be based upon substantial evidence. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir., 1961), *cert. denied*, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); *Esteban v. Central Missouri State College*, 277 F.Supp. 649 (W.D.Mo., 1967), *affirmed*, 415 F.2d 1077, Blackmun, J. (8th Cir., 1969); *Black Students v. Williams*, 335 F.Supp. 820 (M.D.Fla., Ft. Myers Div., 1972); *Breen v. Kahl*, *supra*; *Vought v. Van Buren Public Schools*, *supra*. For additional citations of authority see R. Butler, "The Public High School Student's Constitutional Right to a Hearing," 5 CLEARINGHOUSE REVIEW 431 (1971) and W. Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 Penn.L.Rev. 547 (1971).

Not all courts have expressly required all the items listed above, but all items do appear essential if both the substance and the appearance of fairness are to be preserved. *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972).

The mother of the two children is described by the judge as "37-year-old Maggie Givens, who has a fifth grade education, had her first child at age 16, is black, unemployed and separated from her husband. .... The mother, being sick and unable to come [to the school principal's office], sent her older daughter (age 22, an eighth grade dropout) to the principal's office with" the two children, where they were informed of the reason for the suspension. *Poe*, 346 F.Supp. at 203-204. Clearly, the mother and her 22 y old daughter were in a weak position to represent the best interests of the children before the principal of the school, so representation by counsel was essential to the children. The plaintiffs in the case were represented in federal court by attorneys from the Legal Aid Society.

There are important factual distinctions between pupils in high schools, and students in colleges, as explained at page 7, above. This case is mentioned here only because it was cited by *Gabrilowitz v. Newman*, 582 F.2d 100, 105 (1stCir. 1978) and *Jaksa v. Regents of University of Michigan*, 597 F.Supp. 1245, n. 8 (E.D.Mich. 1984).

#### *Black Coalition* (1973)

An early case held that high school students in Portland Oregon who were facing a permanent expulsion or long-term suspension (484 F.2d at 1044) must be allowed to be represented by an attorney at a school disciplinary hearing. In the only reported opinion in this case, the U.S. Court of Appeals tersely wrote:

The district court held that the expulsion procedures were unconstitutional for failing to provide a hearing at which the student could be represented by counsel and, through counsel, present witnesses on his own behalf, and cross-examine adverse witnesses. Other courts have held that a hearing incorporating these safeguards must be held before or shortly after a child is expelled or suspended for a prolonged or indefinite period. *Esteban v. Central Missouri*

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<sup>15</sup> Boldface added by Standler.

*State College*, 277 F.Supp. 649 (W.D.Mo. 1967). See also *Goldberg v. Kelly*, supra, and its companion, *Wheeler v. Montgomery*, 397 U.S. 280, 90 S.Ct. 1026, 25 L.Ed.2d 307 (1970). See, generally, C. Wright, *The Constitution on the Campus*, 22 VANDERBILT LAW REV. 1027 (1969); W. Seavey, *Dismissal of Students: "Due Process,"* 70 HARVARD LAW REV. 1406 (1957). We agree and therefore affirm the district court's holding that the expulsion procedures followed by defendant school board were unconstitutional.

*Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1045 (9thCir. 1973).

There are important factual distinctions between pupils in high schools, and students in colleges, as explained at page 7, above. This case is mentioned here only because it was cited by Judge Posner in *Osteen v. Henley*, 13 F.3d 221, 225 (7thCir. 1993).

#### *North* (1977)

In December 1975, Charles W. North was accused of including false information in his application for admission to the West Virginia University School of Medicine. After a disciplinary hearing, which his attorney was not allowed to attend, North was expelled from the medical school in February 1976. North sued in state court. The state trial court refused to review the expulsion. North appealed and the West Virginia Supreme Court reversed. The West Virginia Supreme Court wrote a good explanation of why due process rights were important to students facing expulsion from college:

The development of the law regarding students' rights to a due process hearing when expelled from school has been of rather recent origin. Its growth is largely attributed to politically active students, particularly those involved in the civil rights movement, whose activities resulted in the unrest manifested on many college campuses during the 1960's. The traditional view was that a student attending college did so as a matter of privilege and therefore had no right to complain if he were summarily expelled or suspended. *Steier v. New York State Education Commissioner*, 271 F.2d 13 (2d Cir. 1959). It has been generally recognized that the due process door opened for students in the case of *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961), where the court held that students expelled from Alabama State College for attempting to integrate lunchroom counters were required, under due process concepts, to have notice of the charges and an opportunity to be heard prior to being expelled.

It was not until *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), that the United States Supreme Court required the application of due process standards in student disciplinary proceedings. While the students in *Goss* attended high school, and were suspended for ten days for disruptive conduct, the Court did not suggest that there is any differentiation of due process standards according to the level the student occupies in the educational system. The Court found that Federal due process extends to protect a property or liberty right. It recognized that students at free public schools have sufficient entitlement to a public education to create a property interest that would prevent summary suspension.

The Court in *Goss* also concluded that students have a liberty interest which requires due process protection. Under this concept the student's good name, reputation, honor or integrity, which attributes are a part of a person's liberty, are adversely affected when a suspension is given. Thus, where the government takes arbitrary action which damages these attributes, it violates the due process standard. In this, the Court relied upon *Board of Regents v. Roth*,

408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

We believe this same reasoning applies with equal force to a student at a state-supported university. His interest in obtaining a higher education with its concomitant economic opportunities, coupled with the obvious monetary expenditure in attaining such education, gives rise to a sufficient property interest to require procedural due process on a removal. From a liberty standard there can be little question that an expulsion from college damages the student's good name, reputation and integrity, even more so than an expulsion from high school. The higher the level of achievement, the greater the loss on removal.

*North v. Board of Regents*, 233 S.E.2d 411, 414-415 (W.Va. 1977).

This statement is an unusually detailed justification for due process rights for state college students who are accused of misconduct.

In discussing the due process requirement to permit an accused student's attorney to attend a hearing, the West Virginia Supreme Court tersely said:

Petitioner North was not given a suspension, but was expelled in effect ab initio with all earned credits cancelled. This is the most severe penalty that can be inflicted upon a student by academic authorities. Not only is his academic career terminated at the particular institution, but his chance of successful application at another institution of higher learning is, at best, minimal. Finally, with all academic credits removed, he must begin anew.

In this type of situation a student is entitled to substantial due process protection. The standard of due process should comport with *Beverlin [v. Board of Education of Lewis County, W.Va.]*, 216 S.E.2d 554 (W.Va. 1975), and [*State ex rel. Rogers v. Board of Education of Lewis County*, 25 S.E.2d 537 (W.Va. 1943)], and require the following rights: [1] a formal written notice of charges; [2] sufficient opportunity to prepare to rebut the charges; [3] opportunity to have retained counsel at any hearings on the charges, [4] to confront his accusers, and [5] to present evidence on his own behalf; [6] an unbiased hearing tribunal; and [7] an adequate record of the proceedings.

It is not possible from the meager record before this Court to determine if all of these rights were afforded North. It does appear that he was not permitted to have his retained counsel present and a question exists on whether there was any proof of the charges independent of North's explanation.

*North v. Board of Regents*, 233 S.E.2d 411, 417 (W.Va. 1977).

The list of seven due process rights is quoted with approval in *North v. West Virginia Bd. of Regents*, 332 S.E.2d 141, 143 (W.Va. 1985), and in a dozen other West Virginia Supreme Court opinions, most recently in *Zaleski v. West Virginia Mutual Insurance*, 687 S.E.2d 123, 127 (W.Va. 2009) (physician seeking renewal of malpractice insurance).

On remand, the state trial court held in April 1977 that the University's

refusal to allow North's counsel to be present at the hearing ... violated his right to due process and ordered that North be reinstated.

This victory was short-lived, however, when almost immediately the University notified North that another hearing before the Committee on Student Discipline would be held in June, 1977, regarding the earlier charges. North was also informed that counsel of his choice would be permitted to attend the proceeding. After the completion of the scheduled hearing, which North's counsel attended, a recommendation for expulsion was once again forwarded to the University President, who once again notified North that he was expelled.

*North v. Budig*, 637 F.2d 246, 248 (4thCir. 1981).

Notice that after North “won” in the West Virginia courts, all he won was more process (i.e., another hearing), and the second hearing gave the same result as the first hearing.

Following the second expulsion, North’s attorney filed litigation in federal court, also pursued an administrative appeal to the Board of Regents, and filed litigation again in state court. The federal court should have abstained under *Pullman* doctrine, because of the parallel proceedings in state court. *North v. Budig*, 637 F.2d 246 (4thCir. 1981). The Board of Regents and state trial court both affirmed the second expulsion. North appealed and the West Virginia Supreme Court affirmed. *North v. West Virginia Bd. of Regents*, 332 S.E.2d 141 (W.Va. 1985). North then appealed to the U.S. Supreme Court, which refused to hear the case. 475 U.S. 1020 (1986). The entire litigation, including two trips to the West Virginia Supreme Court, took more than ten years.

In quick summary of this case, the University gave North inadequate due process when the University denied him the right to bring an attorney to the first disciplinary hearing. At the second disciplinary hearing, North had adequate due process. North had made false statements on his application for admission (i.e., fraud in procuring admission). Because of this fraud, North was never properly admitted to medical school, and so the University properly expelled him and properly denied him a diploma, despite North’s completion of all academic requirements for the degree. 332 S.E.2d at 143.

Finally, in a gratuitous remark near the end of their second opinion in *North*, the West Virginia Supreme Court invoked a bogus kind of academic abstention to justify refusing to review academic decisions:

... as we held in *North*, the courts of this state have traditionally given substantial deference to the discretion of officials of colleges and universities with respect to academic dismissal and such decisions “... are not ordinarily reviewable by the courts.” *North*, at 160 W.Va. at 258, 233 S.E. 2d 417-418. Indeed, there is a substantial justification for giving such discretion to school officials. Those officials are in the best position to understand and appreciate the implications of various disciplinary actions. Specifically, the President of West Virginia University and the Board of Regents have the best perspective to make disciplinary decisions based upon their impact on general admissions practices, the prospect of displacement of other students, the value of exemplary discipline, and the need to assure a high level of personal character in the graduates of professional schools.

.... The initial responsibility for determining the competence and suitability of persons to engage in professional careers lies with the professional schools themselves. As long as the conduct of educators is not high-handed, arbitrary or capricious, educators should be left alone to do their job without interference from those of us in the judiciary who have neither the expertise nor the insight to evaluate their decisions.

*North v. West Virginia Bd. of Regents*, 332 S.E.2d 141, 146-147 (W.Va. 1985), *cert. denied*, 475 U.S. 1020 (1986). The last sentence in the above quotation was quoted with approval in *Love v. Duke University*, 776 F.Supp. 1070, 1074 (M.D.N.C. 1991), *aff’d without opinion*, 959 F.2d 231 (4thCir. 1992); *Bender v. Alderson Broaddus College*, 575 S.E.2d 112, 117 (W.Va. 2002) (reviewing academic decisions of private colleges under an arbitrary and capricious standard). The

West Virginia Supreme Court overlooked that fraud on an application for admission is a disciplinary offense, which is not a purely academic matter. Moreover, judges routinely review civil and criminal cases involving fraud, so judges do have expertise and insight to evaluate fraud, despite the last sentence of *North* in the above quotation.

*Nash* (1985)

David M. Nash and Donna C. Perry, Plaintiffs, were first-year Veterinary students at Auburn University, which is operated by the state of Alabama. Plaintiffs were charged with "academic dishonesty" during an examination: Nash allegedly copied from Perry. After a hearing by the student honor court, Plaintiffs were suspended for one year. Plaintiffs sued in federal court for alleged violations of their due process rights. The District Court granted summary judgment for the University and the U.S. Court of Appeals affirmed. *Nash v. Auburn University*, 621 F.Supp. 948 (M.D.Ala. 1985), *aff'd*, 812 F.2d 655 (11thCir. 1987).

One of the issues at the trial court was whether the accused students had a right to their attorney participating in the hearing. The facts were "... plaintiffs were accompanied by an attorney, who was allowed to counsel and advise plaintiffs during the hearing, but who was not allowed to participate directly in the proceedings." *Nash*, 621 F.Supp. at 952. The District Court held that allowing an attorney was more than minimal required due process:

Plaintiffs allege that although they were allowed to have counsel present during the June 12 hearing, their constitutional right to counsel was denied because their attorney was allowed only to advise plaintiffs and was not permitted to actively participate in the proceedings. However, the great majority of cases support the conclusion that students facing disciplinary charges have no absolute right to have an attorney present their case. E.g., *Henson v. Honor Committee of University of Virginia*, 719 F.2d 69, 74 (4th Cir. 1983); *Gabrilowitz v. Newman*, 582 F.2d 100, 104 (1st Cir. 1978); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Garshman v. Pennsylvania State University*, 395 F.Supp. 912, 920-21 (M.D.Pa. 1975); *Haynes v. Dallas County Junior College District*, 386 F.Supp. 208 (N.D.Texas 1974); *Barker v. Hardway*, 283 F.Supp. 228 (S.D.W.Va.), *cert. denied*, 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217 (1969); *Due v. Florida A & M University*, 233 F.Supp. 396 (N.D.Fla. 1963). But see *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866, 881 (D.D.C. 1972); *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972).

The First Circuit in *Gabrilowitz*, *supra*, did allow a student to have counsel present, but only in an advisory capacity to lessen the risk of self-incrimination, because a separate criminal action was pending. Such extreme circumstances do not exist in this case; consequently, the right of plaintiffs to have counsel present at the June 12 hearing afforded them more, not less, than the Constitution requires. *Nash*, 621 F.Supp. at 957-958. The Plaintiffs apparently did not appeal the issue of the presence of accused students' attorney at the hearing. Note that the University exceeded minimal due process in allowing the accused students to bring an attorney to the hearing.

The judges in *Nash* followed *Dixon* and *Jaksa* that the University did not need to allow cross-examination of witnesses. In this case, "[Plaintiffs] were allowed to hear the testimony against them and were given an opportunity to direct questions to the witnesses through the student



chancellor of the Board.” Such indirect cross-examination exceeded minimal due process requirements. *Nash*, 621 F.Supp. at 955, *aff’d*, 812 F.2d at 663-664.

### **attorney not allowed at state colleges**

#### *Wasson* (1967)

In 1967, the U.S. Court of Appeal for the Second Circuit considered the case of Robert F. Wasson, a student at the U.S. Merchant Marine Academy who was expelled for disciplinary reasons, and held:

Wasson most strenuously has urged that he was entitled to representation by counsel at one or both of the challenged hearings. We disagree. The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events of March 30th should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel. It is significant that in the *Dixon* case [294 F.2d 150 (5thCir. 1961)] where the balancing of government and private interests favored the individual far more than here, the court did not suggest that a student must be represented by counsel in an expulsion proceeding.

*Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).

Note the remark that “the government does not proceed through counsel” as justification for not requiring the accused student be represented by an attorney.

#### *Madera* (1967)

The U.S. Court of Appeals in New York City held that a city school could forbid an attorney from attending an educational conference between parents and school administrators.

At the very outset it should be made clear what this case does not involve. First, the Guidance Conference [meeting between school superintendent and parents of suspended junior high school pupil] is not a criminal proceeding; thus, the counsel provision of the Sixth Amendment and the cases thereunder are inapplicable. Second, there is no showing that any attempt is ever made to use any statement at the Conference in any subsequent criminal proceeding. .... Therefore, there is no need for counsel to protect the child in his Fifth Amendment privilege against self-incrimination.

*Madera v. Board of Education of City of New York*, 386 F.2d 778, 780 (2dCir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

Note that this decision involves a pupil in junior high school, which is distinguishable from students in college. Furthermore, in *Madera* the pupil had already been suspended by the principal of the school. The *only* purpose of the conference was to decide whether to transfer the misbehaving pupil to another school or reinstate the pupil. 386 F.2d at 782. Because of these facts in *Madera*, this case is **not** relevant to disciplinary hearings at a state college. *Madera* is mentioned here because it has been cited in cases involving college students: *Wasson v.*

*Trowbridge*, 285 F.Supp. 936, 945 (E.D.N.Y. 1968); *General Order ...*, 45 F.R.D. 133, nn. 1, 14 (W.D.Mo. 1968); *French v. Bashful*, 303 F.Supp. 1333, 1337 (E.D.La. 1969); *Jaksa v. Regents of University of Michigan*, 597 F.Supp. 1245, n. 8 (E.D.Mich. 1984); *Gorman v. University of Rhode Island*, 646 F.Supp. 799, 806 (D.R.I. 1986); *Lieberman v. Marshall*, 236 So.2d 120, 130 (Fla. 1970); *University of Houston v. Sabeti*, 676 S.W.2d 685, 688 (Tex.App. 1984).

A similar case to *Madera* is *Jennings v. Wentzville R-IV School Dist.*, 397 F.3d 1118, 1124 (8th Cir. 2005) (No Sixth Amendment right for high school pupils: “No criminal charges were brought against Rachel and Lauren, and there is no evidence such charges were even considered. The District officials did not assume a law enforcement role. The school was enforcing standards promulgated for the students’ own welfare. Accordingly, the right to counsel was never implicated in this case.”).

### *French* (1969)

*French* is a difficult case to classify. I am including it with the cases holding that state colleges can prohibit an attorney on campus, because the opinion in *French* cites the holdings in *Wasson* and *Madera*. The facts of *French* include that a third-year law student — almost an attorney — conducted the prosecution at the hearing, thereby motivating the court to declare that the attorneys hired by plaintiffs must be allowed to attend the hearing.

Ten students at Southern University in New Orleans participated in “campus disturbances” in 1969, specifically they forcibly occupied university offices that disrupted the normal operation of the University. The University refused to allow the students’ attorneys to attend disciplinary hearings. The University expelled the students. The students sued. The U.S. District Court ordered the University to provide a new hearing, with the students’ attorneys allowed to attend a new hearing:

However, the plaintiffs raise another important issue: was it a denial of due process to refuse to permit the plaintiffs to have the assistance of their retained legal counsel at the hearings? There is little jurisprudence on this point. The right to counsel was not listed by the court in *Dixon* as one of the necessary elements of procedural due process which must be afforded to the student at a tax supported university, and there are no appellate cases in this circuit which deal directly with this point. The Second Circuit has held that the student does not have the right to be represented by counsel in disciplinary proceedings. *Madera v. Board of Education of City of New York*, 386 F.2d 778 (2nd Cir. 1967); *Wasson v. Trowbridge*, 382 F.2d 807 (2nd Cir. 1967). On the other hand, two district courts have ordered colleges to hold hearings before expelling or suspending students and have further ordered such colleges to permit the students to be represented by legal counsel at such hearings. *Zanders v. Louisiana State Board of Education*, 281 F.Supp. 747,752 (E.D.La. 1968); *Esteban v. Central Missouri State College*, 277 F.Supp. 649, 651 (W.D.Mo. 1968). Professor Charles Alan Wright takes the position that the right to counsel should be recognized in ‘major disciplinary proceedings’ in colleges and universities. Wright, *The Constitution on the Campus*, 22 VANDERBILT LAW REV. 1027, 1075 (1969). Professor Arthur Sherry is of the opinion that at a university disciplinary proceeding the student’s ‘right to counsel, should the matter appear to

him to be of sufficient gravity to make legal assistance desirable, should receive ungrudging recognition \* \* \*.' Sherry, *Governance of the University: Rules, Rights, and Responsibilities*, 54 CALIFORNIA LAW REV. 23, 37 (1966).

The plaintiffs in this case are faced with the loss of an extremely valuable right. 'It is trite, at the least, to say that the obtention of a college degree in his Country has gained tremendous stature and personal importance in the last twenty-five to fifty years.' *Zanders v. Louisiana State Board of Education*, supra, 281 F.Supp. 747, 754 (E.D.La. 1968). Although this is not a criminal proceeding so as to require counsel under the Sixth Amendment, nevertheless, the right to an education has become so vital in our present-day society that the procedure whereby one may lose this right should be heavily stocked with procedural safeguards. We are also of the opinion, however, that disciplinary proceedings which do not involve expulsion or suspension, but which only deal with lesser penalties such as the loss of certain social privileges, do not have to be protected by the same procedural safeguards which are necessary in expulsion or suspension proceedings.

Although the right to counsel was not among the rights specifically enumerated by the court in *Dixon*, it cannot be denied that the assistance of an attorney in a trial-type proceeding is of considerable value. An attorney is experienced in legal and quasilegal proceedings. Counsel is best qualified to prepare a defense to the charges, examine the evidence against the defendant, cross-examine witnesses if such a right is permitted, and to otherwise plead the defending student's cause.

In spite of the invaluable assistance to a defendant in a university disciplinary proceeding, it may well be that in many cases the student will not be at such a disadvantage so as to require the assistance of counsel. But here there is more reason for counsel than in most cases. The prosecution of these cases was conducted by Overton Thierry, a senior law school student, who is now a member of the Louisiana State Bar Association. A member of the Discipline Committee testified that Thierry was chosen to prosecute these cases because of his familiarity with legal proceedings. Even in *Wasson v. Trowbridge*, supra, 382 F.2d 807, 812 (2nd Cir. 1967), where the Second Circuit held that the student did not have the right to be represented by counsel in expulsion proceedings, the court qualified its holding by saying:

'The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is noncriminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events of March 30th should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.'

Professor Wright noted the above-emphasized language in the *Wasson* case and said:

'It is worth noting that a leading case holding that counsel need not be allowed qualifies this by saying that this is true so long as 'the government does not proceed through counsel.' \* \* \* If universities \* \* \* provide their own lawyer to assist a tribunal, in those cases at least the student can hardly be denied the right to his own counsel, even if, as I doubt, there is no right to counsel generally in disciplinary proceedings.'

22 VANDERBILT LAW REV. 1027, 1075-1076.

Of course, Thierry was not a lawyer at the time of the hearings. But he had nearly completed his studies and was to be admitted to the Louisiana State Bar Association in a very few months. Surely, it cannot be doubted that his ability to conduct himself in a proceeding of this sort was likely to be far superior to that of the defendants who, as far as can be ascertained from the record, had no legal education or experience whatsoever.

In view of the particular and special circumstances of this case, we therefore hold that procedural due process requires that these students be permitted to be represented by their retained legal counsel at the hearing. In holding as we do, we want to make it clear that we are limiting this holding to retained legal counsel as opposed to appointed counsel. In cases of this kind it is necessary to weigh the interests of the two sides to the controversy. As the Second Circuit said in *Wasson v. Trowbridge*, supra, 382 F.2d 807, 811 (2nd Cir. 1967):

‘Thus to determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand.’

*French v. Bashful*, 303 F.Supp. 1333, 1337-1338 (E.D.La. 1969),

*appeal dismissed*, 425 F.2d 182 (5thCir. 1970), *cert. den.*, 400 U.S. 941 (1970).

After the U.S. District Court opinion, the University provided a second hearing and again expelled the plaintiffs. This is a problem with due process cases: a winning plaintiff receives more process, but not necessarily a different result than before.

Notice that because the University used a prosecutor who was a third-year law student (i.e., almost a lawyer), due process required that the attorneys hired by the students be allowed to attend the hearings. We do not know how the court would have ruled if the prosecution was by a nonlawyer, but there are hints in the quotation above that the court might have required the University to allow retained counsel at the hearing. I see three hints that favor allowing an attorney to attend the hearing, even if the University did not use an attorney or law student:

1. The subject matter of the misconduct in *French* is demonstrations on campus, the same topic as *Zanders* and *Esteban*, but distinguishable from *Wasson*. (*Wasson* was expelled for a long list of demerits, the last of which involved throwing a cadet officer into the water.)
2. The judge in *French* cited law review articles by Prof. Wright and Prof. Sherry, each of which recommends an accused student be allowed an attorney at disciplinary hearings. No articles were cited that made the opposite recommendation.
3. The judge in *French* recognized: “the assistance of an attorney in a trial-type proceeding is of considerable value.” 303 F.Supp. at 1337.

Further, *Zanders* is also a Louisiana case and *Esteban* is from almost-neighboring Missouri, while *Wasson* is from distant New York State. Sometimes judges favor cases from neighboring states more than distant states, perhaps to reflect regional values.

For a quotation of the paragraph from *French* about not requiring the University to provide a no-cost attorney to indigent students, see the section on indigent students, beginning at page 65 below.

*Grabinger (1970)*

In a case brought by two suspended policemen in Chicago, a U.S. District Court wrote the following paragraph about rights of students:

The Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the Assistance of Counsel for his defence.' While it is true that decisions such as *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); and *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) have expanded the Sixth Amendment's guarantee of right to counsel in criminal and semi-criminal proceedings, all involving the right to liberty, they have no application to matters purely of a civil nature. The disciplinary proceedings here in no manner may be classified as criminal or even quasi-criminal. Cf., *Barker v. Hardway*, 283 F.Supp. 228 (S.D.W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217 (1969), where students at a state supported university suspended for their violent misconduct were held not to have a Sixth Amendment right to counsel at a university disciplinary hearing, a civil proceeding; *Nickerson v. United States*, 391 F.2d 760 (10 Cir. 1968), *cert. denied*, 392 U.S. 907, 88 S.Ct. 2061, 20 L.Ed.2d 1366 (1968); *Haven v. United States*, 403 F.2d 384 (9 Cir. 1968), *cert. dismissed*, 393 U.S. 1114, 89 S.Ct. 926, 22 L.Ed.2d 120 (1969), where the Sixth Amendment's guarantee of right to counsel was held not to apply to administrative proceedings in the selective service process. *Grabinger v. Conlisk*, 320 F.Supp. 1213, 1218 (N.D.Ill. 1970), *aff'd*, 455 F.2d 490 (7th Cir. 1972) (per curiam).

Ironically, this paragraph, which is obiter dictum, is a more articulate discussion of the right to counsel than what is found in most cases involving college students.

*Garshman (1975)*

Mitchell B. Garshman was accused of cheating on an examination at The Pennsylvania State University College of Medicine. The University denied his request to bring an attorney to the disciplinary hearing on campus. Garshman then filed litigation in the U.S. District Court, requesting an injunction that would permit him to bring his attorney to the hearing on campus. The court denied the injunction because Garshman did not prove he had a "reasonable probability of eventual success on the merits of this case" and also because Garshman assumed that the University would expel him after a hearing. *Garshman*, 395 F.Supp. at 920.

The judge in *Garshman* mentioned *Goldberg v. Kelly*, which held that a person could bring an attorney to a welfare termination hearing, but there was no requirement to appoint an attorney for indigent persons. Strangely, the judge only mentioned the second half of the holding in *Goldberg*. *Garshman*, 395 F.Supp. at 921 ("The Supreme Court agreed with their contention but declined to go so far as to conclude that they were entitled to appointment of counsel.") Appointment of counsel was not an issue in *Garshman*, since Garshman had retained counsel. The judge distinguished *Goldberg* because "Garshman is a literate and educated individual who, unlike the

vast majority of welfare recipients, has the ability to understand his rights and express himself.” *Garshman*, 395 F.Supp. at 921. In effect, stupid people have more legal rights in the USA.

The judge in *Garshman* considered only two due process cases involving colleges: *Hagopian v. Knowlton*, 470 F.2d 201, 211-212 (2dCir. 1972) and *In-Cho Chung v. Park*, 514 F.2d 382 (3dCir. 1975). *Hagopian* involved a cadet at the U.S. Military Academy at West Point, who was subject to military rules. *Chung* involved dismissal of a professor, which is a purely academic decision, unlike the disciplinary hearing in *Garshman*. Both cases are easily factually distinguishable from *Garshman*. In the key paragraph in *Garshman*, the judge wrote:

In *Hagopian v. Knowlton*, supra, a case involving the potential dismissal of a cadet from West Point for deficiency in conduct, the Second Circuit held that while Hagopian could not be denied the advice and assistance of counsel in preparation of his defense, he could be denied that counsel's presence at the hearing before the Academic Board which was to consider his separation. This Court recognizes that *Hagopian* paid great deference to the fact that the institution in question was a military academy and that that factor played a significant role in the Second Circuit's decision to deny Hagopian's request. However, the interests of a tax-supported state institution in an orderly procedure confined to its own community for the handling of instances of alleged academic dishonesty is not to be regarded lightly. **Judicial reluctance to force the inclusion of a non-University individual into this delicate decision-making process should be that much greater where, as here, the procedures involve elaborate efforts to insure that a fair result is reached.**<sup>16</sup> The Court is of the view that a determination as to the academic honesty of a student is analogous to the determination of professional competency of a professor and is a matter peculiarly within the discretion of a college administration. See *In-Cho Chung v. Park*, supra. In *In-Cho Chung*, the Third Circuit in delineating those safeguards to which a professor faced with termination is entitled nowhere included the right to representation of counsel at the pre-termination hearing. That Dr. Chung was in fact represented by counsel at his hearing does not affect the holding in his case nor its application to the instant case. The Third Circuit stated that if the procedures followed by the college are adequate to prevent unreasonable, arbitrary or capricious termination decisions, they satisfy due process. In the face of the extensive procedural safeguards afforded to *Garshman* by the University with respect to the charges against him, the Court cannot accept the proposition that the one factor — exclusion of counsel at the hearing — renders the University's procedure susceptible to unreasonable, arbitrary or capricious termination decisions.

*Garshman v. Pennsylvania State University*, 395 F.Supp. 912, 921 (M.D.Pa. 1975).

I think *Garshman* is badly reasoned.

One wonders if plaintiff's attorney failed to do legal research that would have found favorable cases (e.g., *Esteban*), or if the judge ignored cases cited by plaintiff. Similarly, one wonders if the University's attorney failed to do legal research that would have found *Wasson*.

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<sup>16</sup> Boldface added by Standler.

*Henson* (1983)

Josiah Henson was expelled from law school at the University of Virginia because he failed to submit term papers in a timely fashion for several classes. He also faced two honor code charges. Note that disciplinary hearings at the University of Virginia are conducted by students, without involvement of faculty. He sued the University on denial of due process in the honor code proceedings. The part relevant to this essay is his allegation that “the student is denied the right to have experienced legal counsel conduct his defense and cross-examine witnesses”. *Henson*, 719 F.2d at 73. The U.S. Court of Appeals wrote:

The University's Honor System provides the accused student with an impressive array of procedural protections. The student, for example, receives what is essentially an indictment, specifying both the charges and the factual allegations supporting them. Virginia Honor Code, Art. III, § C(4). He has a right to a hearing before a committee of his peers. He is entitled, at no personal cost, to have a student-lawyer represent his interests at all critical stages in the proceedings. He may also retain a practicing attorney to assist in his defense, although the attorney can assume no active role in the Honor trial itself. *Id.* at Art. III § C(1). The individuals who brought the charges must face the student at the hearing and state the basis of their allegations. *Id.* at Art. III § D(2). They, in turn, must submit to cross-examination by the student, or his designated student counsel, and by the members of the hearing committee. The student then has the right to present evidence in opposition to the charges and to offer witnesses for the sole purpose of bolstering his character. *Id.* at Art. III § D(5)(a). He may, if he chooses, demand that the hearing be conducted in public, where impartial observers can make an independent assessment of the proceeding's fairness. *Id.* at Art. VIII § E. If, after hearing the evidence, four-fifths (4/5) of the committee members find the student guilty beyond a reasonable doubt, he has the right to appeal the decision to a five-member board comprised of members of the student government. *Id.* at Art. V. This board is empowered to review the record of the Honor trial and to grant new trials when, in its judgment, the correct procedures were not followed or the evidentiary findings of the trial committee were deficient.

In some respects, these procedures concededly fall short of the stringent protections afforded the criminal defendant; that is not, however, a defect of constitutional dimension. “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Board of Curators v. Horowitz*, 435 U.S. 78, 102, 98 S.Ct. 948, 961, 55 L.Ed.2d 124 (1978) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)). The Supreme Court has made it plain that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’ ” *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976) (quoting *Joint Anti-Fascist Commission v. McGrath*, 341 U.S. 123, 171-72, 71 S.Ct. 624, 648-49, 95 L.Ed. 817 (1951)). In the academic setting particularly, the Supreme Court has recognized that the requirements of due process may be satisfied by something less than a trial-like proceeding. See *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

The decision in *Board of Curators v. Horowitz*, *supra*, is instructive on this point. In *Horowitz*, a medical student was denied permission to graduate after several tiers of evaluators concluded she did not possess the requisite skills to perform surgery. The student was never given a formal hearing to rebut the charges of incompetence, but the Supreme

Court nonetheless found no violation of due process. “A school,” the Court noted, “is an academic institution, not a courtroom or administrative hearing room.” *Horowitz*, 435 U.S. at 88, 98 S.Ct. at 954. It must, therefore, have greater flexibility in fulfilling the dictates of due process than a court or an administrative agency. The Court further explained that when the school's procedures permit a meaningful exchange between officials and student, and are designed to safeguard against an erroneous evaluation of the student's skills, judicial intrusion into academic decisionmaking should be avoided.

*Horowitz*, of course, involved the school's prerogatives in evaluating the academic fitness of a student. The Court was careful to distinguish this situation from a case in which the student faced disciplinary charges stemming from “the violation ... of valid rules of conduct.” *Horowitz*, 435 U.S. at 86, 98 S.Ct. at 953. The clear implication of *Horowitz* is that disciplinary proceedings require more stringent procedural protection than academic evaluations, even though the effects of an adverse decision on the student may be the same. Labeling a school proceeding disciplinary in nature, however, does not mean that complete adherence to the judicial model of decisionmaking is required. See *Goss v. Lopez*, supra. There are numerous instances in which courts have permitted variations on the “trial model” in differing settings even though individual interests of significant importance were at risk. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); see also *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Wimmer v. Lehman*, 705 F.2d 1402 (4th Cir. 1983); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 159 (5th Cir. 1961). Although *Dixon* was decided more than twenty years ago, its summary of minimum due process requirements for disciplinary hearings in an academic setting is still accurate today.

In the instant case, Henson's personal stake in the Honor Code proceedings was substantial. The Honor Committee had the power to end his academic affiliation with the University and possibly to jeopardize his entry into the legal profession. The procedural steps the University employed in Henson's disciplinary case, however, were constitutionally sufficient to safeguard his interest from an erroneous or arbitrary decision. Henson had adequate notice of the charges against him and the opportunity to be heard by disinterested parties. He also was confronted by his accusers and given the right to have a record of the hearing reviewed by a student appellate body. It is true that Henson was not permitted to have a practicing attorney conduct his defense, but this is not a right generally available to students facing disciplinary charges. *Gabrilowitz v. Newman*, 582 F.2d 100, 104 (1st Cir. 1978). Henson was provided with two student-lawyers who consulted extensively with his personally retained attorney at all critical stages of the proceedings. The due process clause would impose no greater obligations on the University than it placed on itself in conducting its disciplinary proceedings. *Dixon v. Alabama*, supra.

We do not suggest that the procedures for judging Honor Code violations at the University of Virginia represent a model for assuring constitutional due process in all administrative settings. The designed procedures, however, withstand constitutional condemnation upon facial attack. Since the record establishes that these constitutionally valid procedures were followed by the Honor Committee in Henson's case, he was not denied due process of law.

*Henson v. Honor Committee of Univ. Virginia*, 719 F.2d 69, 73-75 (4th Cir. 1983).

I have three remarks on *Henson*:

1. Henson was allowed to hire a licensed attorney, and that attorney assisted in the planning of a defense, including consulting with the two “student lawyers” who actually conducted Henson's defense at the hearing.



2. The entire disciplinary hearing at the University of Virginia is operated by students on the Honor Council, so no faculty were involved. If Henson had been represented by an attorney at the hearing, that attorney would have been the only professional person in the room. This aspect of *Henson* is consistent with *Wasson*, above, and *Jaksa*, below, in which no attorneys were present at the hearing. But *Henson* goes farther than *Wasson* and *Jaksa*, in that *Henson* finds adequate due process in a hearing conducted by amateurs (i.e., students) alone.
3. The U.S. Court of Appeals repeatedly cites *Horowitz*, a case involving expulsion for purely academic reasons, where no due process is required. One should not confuse academic reasons with disciplinary reasons. Similarly, the Court of Appeals repeatedly cited *Goss*, a case involving discipline at a high school. One should distinguish schools, where the accused pupil is a child, from colleges, where the accused student is an adult, as explained at page 7, above. Citing irrelevant — or easily distinguishable — cases indicate that the judges did not understand education law.

*Mary M.* (1984)

A college student, Mary M., confessed to collaboration or plagiarism on her term paper at the State University of New York at Cortland. Then she was accused of cheating on an examination. She was suspended for one semester. She sued in state court, which “concluded that [the college’s] determinations of cheating on the part of the [student] must be annulled and all references thereto expunged from her record”, because she was denied due process. *Mary M. v. Clark*, 460 N.Y.S.2d 424, 430 (N.Y.Sup. 1983). The appellate court reversed:

We concur with the policy considerations enunciated in cases dealing with student discipline which recognize that the student's welfare is best served by a nonadversarial setting which emphasizes the educational functions of disciplinary proceedings (cf. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725). We hold, too, that Special Term erred in finding that a written record of the proceedings and the right to counsel were rights fundamentally due petitioner (*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18). Such mandates would be counterproductive to the balance struck here between the rights of the student and the university. To do so would place on the university system an onerous fiscal and administrative burden. We note, too, that *Matter of Ryan v. Hofstra Univ.*, 67 Misc.2d 651, 324 N.Y.S.2d 964 is distinguishable on its facts from the instant matter. *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y.A.D. 3 Dept. 1984).

*Hall* (1984)

Robert Hall was expelled from a state medical school for “academic dishonesty”. He filed civil rights litigation and also alleged due process violations. The U.S. District Court granted summary judgment for the school, without a published opinion in the Federal Supplement. The U.S. Court of Appeals affirmed:

Hall first asserts that he was denied due process of law when he was prevented from having his attorney present in the formal disciplinary hearing before the defendant faculty members Sodeman, Higgins, Budd, Ross and Gandy. However, just because his expulsion from a state medical school on grounds of academic dishonesty may implicate a liberty interest protected by constitutional due process guarantees, this does not mean that Hall was necessarily entitled to all the incidents of a full-blown judicial trial. We can find no case authority to “clearly establish” that he had the right to counsel in such a hearing in 1978.

As stated by the Supreme Court in *Goss v. Lopez*, “ [o]nce it is determined that due process applies, the question remains what process is due.” 419 U.S. 565, 577, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)). The Court in *Goss* dealt with the nature of due process required before public high school students could be suspended for up to ten days, and held that only an oral or written notice of the charges and an opportunity by the student to present his side of the story were “due” in those circumstances. Stating that “[w]e stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student 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,” *Id.* 419 U.S. at 583, 95 S.Ct. at 740. Justice White, writing for the Court, made it clear that they were then addressing only the question of short suspensions, and that “[l]onger suspensions or expulsions ... may require more formal procedures.” *Id.* at 584, 95 S.Ct. at 741.

Three years later, and approximately one month before Hall’s disciplinary hearing was conducted, the Supreme Court had occasion to address the issue of when such “more formal procedures” might be required. *Board of Curators v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In *Horowitz*, a divided Court held that a student dismissed for academic deficiencies (not disciplinary reasons) from the University of Missouri-Kansas City Medical School was not entitled to a hearing before the school’s decisionmaking body. Justice Rehnquist, in his majority opinion, distinguished disciplinary proceedings, as discussed in *Goss*, from academic evaluations which are, by nature, more subjective than “the typical factual questions presented in the average disciplinary decision.” *Id.* at 90, 98 S.Ct. at 955.

Thus, the posture of the law in 1978 was such that some kind of formal hearing was apparently required before a student could be expelled for disciplinary causes (such as cheating). But there was no certainty as to what these formalities might entail. Hall, in his memorandum in support of his motion for partial summary judgment in the trial court, cited a number of cases purporting to require the right to have counsel present in school disciplinary hearings. *Norton v. Discipline Committee*, 419 F.2d 195 (6th Cir. 1969) (East Tennessee State University), *cert. denied*, 399 U.S. 906, 90 S.Ct. 2191, 26 L.Ed.2d 562 (1970); *Mills v. Board of Education*, 348 F.Supp. 866 (D.D.C. 1972) (D.C. public schools); *Givens v. Poe*, 346 F.Supp. 202 (W.D.N.C. 1972) (N.C. public schools); *Jones v. State Board of Education*, 279 F.Supp. 190 (M.D.Tenn. 1968) (Tennessee A & I State University), *aff’d*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31, 90 S.Ct. 779, 25 L.Ed.2d 27

(1970); *Esteban v. Central Missouri State College*, 277 F.Supp. 649 (W.D.Mo. 1967), *aff'd*, 415 F.2d 1077 (8thCir. 1969), *cert. denied*, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970). A review of these cases shows that the district courts in *Givens* and *Esteban* did, in fact, hold that there was a right to counsel. However, this Court in *Norton* went no further than to note, in finding that due process had been satisfied in that case, that the students in question had had the opportunity to be represented by counsel at their hearing. 419 F.2d at 200. District Judge Miller in *Jones* (whose opinion this Court adopted) made a similar finding, and did not expressly hold that the right to counsel was a requisite to due process in such circumstances.

.... When *Norton* and *Jones* are construed in light of *Dixon* [*v. Alabama State Board of Education*, 294 F.2d 150, 158-159 (5thCir. 1961), *cert. denied*, 368 U.S. 930 (1961)], and of the later developments in *Goss* and *Horowitz*, we cannot see any basis for Hall's claim that he was deprived of any right to counsel which was "clearly established" in this Circuit. We do not, however, speak to the issue of whether such a right should exist in this kind of disciplinary proceeding.

*Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 308-309 (6thCir. 1984), *cert. den.*, 469 U.S. 1113 (1985). Note that a dissenting judge mentioned the right to counsel was not raised on appeal. *Hall*, 742 F.2d at 311 (Merritt, J., dissenting).

The U.S. Court of Appeals rejected the plaintiff's request to be reinstated as a medical student:

We note, though, that there was clear evidence that Hall had improperly consulted an old examination in his student mailbox while he was still taking the locomotor segment test on February 3, 1978. Moreover, there was evidence that he was not a good student, did not get along with his fellow students, and received barely passing grades except on the exams in which he was accused of cheating (and his papers received excellent grades). It was obvious that he would not be a good doctor, assuming that he would have otherwise graduated from medical school and passed the state medical board examination. Therefore we hold, as a matter of law, that MCO had good cause for expelling Hall from medical school, and thus his expulsion was not caused by whatever due process violation might have occurred when he was denied the assistance of legal counsel at his disciplinary hearing. See *Codd v. Velger*, 429 U.S. 624, 628-29, 97 S.Ct. 882, 884-85, 51 L.Ed.2d 92 (1977); *Kendall v. Board of Education*, 627 F.2d 1, 6 n. 6 (6thCir. 1980). As a result, there is no need to remand for consideration of the claim for reinstatement and the merits of Hall's argument that a right to counsel exists at such a hearing.

*Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 310 (6thCir. 1984).

The above paragraph is justified under academic abstention, because refusal to reinstate a marginal student is a purely academic decision.

#### *Jaksa* (1984)

In April 1982, Christopher Jaksa was accused of cheating on a final examination in a statistics class at the University of Michigan at Ann Arbor. Jaksa had placed his cover sheet on another student's answers. In June 1982, Jaksa was given a hearing before a panel of two students and two professors, who unanimously found Jaksa guilty of cheating and recommended a two-semester suspension. Jaksa then sought advice of an attorney. On appeal within the University,

his suspension was reduced to one semester. Jaksa then filed litigation in U.S. District Court, alleging due process violations by the University.

The District Court judge held that this was a disciplinary matter, *not* an academic matter. The judge noted the U.S. Supreme Court case of *Goss* required notice and an opportunity to be heard.

*Goss* involved a suspension for disciplinary reasons. *Academic* suspensions or dismissals, by contrast, require only the barest procedural protections. *See Board of Curators v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (dismissal for academic reasons does not require a hearing). In this case, plaintiff was accused of cheating, an offense which cannot neatly be characterized as either "academic" or "disciplinary". The Supreme Court's reasoning in *Horowitz*, however, persuades me that cheating should be treated as a disciplinary matter. In declining to impose a hearing requirement on a medical school in an academic dismissal case, the Court noted that academic dismissals involve "a judgment [that] is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." *Horowitz*, 435 U.S. at 90, 98 S.Ct. at 955. In this case, the proceedings against plaintiff primarily involved resolution of factual disputes, and there was little need for subjective judgment or evaluation. Further, dismissal for cheating requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future. *But see Corso v. Creighton University*, 731 F.2d 529, 532 (8th Cir. 1984) (cheating on an exam is "clearly an academic matter"). Accordingly, I hold that plaintiff is entitled to the higher level of procedural protection guaranteed in school disciplinary proceedings.

*Jaksa v. Regents of University of Michigan*, 597 F.Supp. 1245, 1248, n. 2 (E.D.Mich. 1984).

I believe that *Jaksa* is correct that cheating on an exam is a disciplinary matter, *not* an academic matter.

The District Court Judge distinguished universities from courtrooms.

In analyzing plaintiff's due process argument that he is entitled to a variety of formal procedural safeguards in a suspension hearing, it is important to keep in mind that the primary purpose of a university is to educate its students. "A school is an academic institution, not a courtroom or administrative hearing room." *Board of Curators v. Horowitz*, 435 U.S. 78, 88, 98 S.Ct. 948, 954, 55 L.Ed.2d 124 (1978). Similarly, a school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants. *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992, 1000 (5th Cir. 1975); *Betts v. Board of Education*, 466 F.2d 629, 633 (7th Cir. 1972); *Esteban*, 415 F.2d at 1089-90. Formalizing hearing requirements would divert both resources and attention from the educational process. *See Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir.), *cert. denied*, 400 U.S. 850, 91 S.Ct. 55, 27 L.Ed.2d 88 (1970). (Maintaining a relationship between schools, parents and students "in an adversary atmosphere and according [to] the procedural rules to which we are accustomed on a court of law would hardly best serve the interests of any of those involved." (quoting District Judge Gray)). While a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms.

*Jaksa*, 597 F.Supp. at 1250.

The judge's last sentence quoted here is hyperbole. Jaksa did *not* ask that *classrooms* be transformed into courtrooms. Jaksa may have asked that *hearings* on disciplinary matters have some of the traditional procedure used in courtrooms, in order to ensure fairness.

no right to attorney in *Jaksa*

The District Court judge in *Jaksa* addressed the issue of representation by an attorney at disciplinary hearings on campus:

Second, plaintiff argues that he was denied due process because he was not permitted to bring a representative to the hearing. Plaintiff does not contend that he has a constitutional right to an attorney; rather, he argues that it is fundamentally unfair to deprive him of the assistance of *any* representative, such as a student-attorney, to aid in the presentation of his case. Plaintiff relies primarily on *Henson v. The Honor Committee*, 719 F.2d 69, 73 (4th Cir. 1983). There, the Court noted that the right to have a student lawyer represent an accused student at all critical stages of the proceedings was among the "impressive array of procedural protections" which the University afforded its students. Although the courts are split on the issue of the right to representation in student disciplinary proceedings, [FN8] I am not persuaded that plaintiff had a constitutional right to be represented at his suspension hearing.

FN8. Compare *Givens v. Poe*, 346 F.Supp. 202 (W.D.N.C. 1972) (Due process clause requires representation by counsel at suspension hearings.) and *Esteban v. Central Missouri State College*, 277 F.Supp. 649 (W.D.Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970) (Due process clause requires representation by counsel at a suspension hearing.) with *Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028, 88 S.Ct. 1416, 20 L.Ed.2d 284 (1968) (No right to counsel at a conference relating to the suspension of a student) and *Everett v. Marcuse*, 426 F.Supp. 397 (E.D.Pa. 1977) (Due process does not require the presence of an attorney at a formal hearing on disciplinary transfers).

The proceedings against plaintiff in this case were not unduly complex, nor was plaintiff unguided through the Academic Judiciary proceedings. The Manual of Procedures for the Academic Judiciary is written in plain English, and is comprehensible to the average college student. Plaintiff spoke with Dean Nissen twice concerning his case, and had the benefit of Dean Nissen's responses to his questions. Significantly, the University did not proceed against plaintiff through an attorney or other representative. Had an attorney presented the University's case, or had the hearing been subject to complex rules of evidence or procedure, plaintiff may have had a constitutional right to representation. But here, Prof. Rothman presented the case against plaintiff, and there was nothing mysterious about the Academic Judiciary proceedings. Plaintiff was able to present his case effectively to the Academic Judiciary, and suffered no disadvantage due to the lack of representation at the hearing. *Jaksa*, 597 F.Supp. at 1251-52.

The District Court Judge held that Jaksa received more due process than he was legally entitled. The U.S. Court of Appeals tersely affirmed the District Court's decision, providing neither analysis nor citations to authority. *Jaksa v. Regents of University of Michigan*, 787 F.2d 590 (6th Cir. 1986) (per curiam).

cases approving of *Jaksa*

The holding in *Jaksa* that an accused student has no right to bring an attorney to a disciplinary hearing at a state college is cited with approval in the following cases, amongst others:

- *Gorman v. University of Rhode Island*, 646 F.Supp. 799, 806 (D.R.I. 1986), *aff'd*, 837 F.2d 7, 16 (1st Cir. 1988);
- *Boehm v. Univ. of Pennsylvania*, 573 A.2d 575, 579 (Pa.Super. 1990);
- *Ahlum v. Administrators of Tulane Educational Fund*, 617 So.2d 96, 100 (La.App. 1993);
- *Gomes v. University of Maine System*, 365 F.Supp.2d 6, n. 34 (D.Me. 2005);
- *Flaim v. Medical College of Ohio*, 418 F.3d 629, 636, 640 (6th Cir. 2005);
- *Nguyen v. University of Louisville*, Not Reported in F.Supp.2d, 2006 WL 1005152 at \*6 (W.D.Ky. 2006).

The citations show that the rule in *Jaksa* about no right to an attorney at disciplinary hearings on campus is conventionally accepted law in the USA, although the issue is rarely litigated. I suggest that *Jaksa* is the leading case on rights of an accused student to have an attorney at a disciplinary hearing at a state college.

*Wasson* and *Jaksa* suggest that if the “prosecutor” in a disciplinary hearing at a state college is not an attorney, then a college can forbid an accused student from bringing an attorney to the disciplinary hearing. Below, at page 69, I disagree with that holding. The implication of these cases is that, as a college makes a hearing more like a court proceeding (e.g., by hiring a “prosecutor” who is an attorney), then there should be a corresponding obligation for the defendant to be represented by an attorney.

*Gorman* (1986)

Raymond J. Gorman III was active in student politics at the University of Rhode Island (URI) and was the subject of three disciplinary hearings during his senior year, which punished him with a one-year suspension. In my quick read of the case, it seems that the charges may have been political in nature, making this case distinct from many other cases involving discipline of students. The U.S. District Court held that a student had no right to be assisted by an attorney in disciplinary hearings on campus of a state college.

The plaintiff requested that he be allowed to be assisted by an attorney at the Murphy hearings and at the Rainville hearings. Defendant Weisinger, on behalf of U.R.I., denied the plaintiff's requests, but the plaintiff was permitted to be advised and assisted by a fellow student at the hearings. The plaintiff contends that the denial of his request to be assisted by legal counsel deprived him of due process, and he cites two cases that required students to be permitted such assistance at school disciplinary hearings.

In one case, the First Circuit held that a university had denied a student due process by refusing permission to his attorney to assist the student's defense on a rape charge before a disciplinary board. *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978). *Gabrilowitz* is distinguishable from the case now before this Court. As I stated in ruling on the plaintiff's

motion for a preliminary injunction, “[t]he First Circuit has required the presence of counsel only under the unusual circumstance where a student faces criminal charges based on an incident which also gives rise to the University disciplinary proceeding,” *Gorman v. University of Rhode Island*, No. 85-0210 (D.R.I. Sept. 6, 1985) (order granting preliminary injunction in part and denying preliminary injunction in part); see also *Jaksa v. Regents of the University of Michigan*, 597 F.Supp. 1245, 1253-54 n. 10 (E.D.Mich. 1984), *aff’d mem.* 787 F.2d 590 (6th Cir. 1986) (“These cases are distinguishable because they involve the rights of prisoners and parolees, whose liberty interests in their freedom and conditions of confinement are greater than a student’s interest in uninterrupted education and remaining free from the stigma of being convicted of cheating on an exam.”) The plaintiff has made no showing that criminal charges have been filed because of the incidents that led to his suspension, nor do I find any reason to expect that such charges may be filed.

The plaintiff cites one case in which a federal court required students to be permitted the assistance of legal counsel at a university disciplinary hearing, even though no criminal charges on the acts at issue were pending, *Esteban v. Central Missouri State College*, 277 F.Supp. 649 (W.D.Mo. 1967). The weight of authority does not support *Esteban’s* holding on this issue, however. See *Madera v. Board of Education of the City of New York*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028, 88 S.Ct. 1416, 20 L.Ed.2d 284 (1968); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (“Where the proceeding is non-criminal in nature ... due process does not require representation by counsel.”); *Jaksa v. Regents of the University of Michigan*, 597 F.Supp. 1245, 1252 (E.D.Mich. 1984); *Everett v. Marcase*, 426 F.Supp. 397 (E.D.Pa. 1977).

For the above reasons, I hold that the defendants did not deprive the plaintiff of due process by refusing to permit the presence of legal counsel in the disciplinary hearings that led to the plaintiff’s suspension.

*Gorman v. University of Rhode Island*, 646 F.Supp. 799, 805-806 (D.R.I. 1986), *aff’d in part*, 837 F.2d 7 (1stCir. 1988).

The U.S. Court of Appeals affirmed the part of the District Court’s opinion about right to counsel.

The district court rejected Gorman’s contention that he was deprived of his constitutional right to retain counsel, and to cross-examine his accusers on his allegations of bias. On these two allegations of error, we agree with the holding of the district court. As indicated in the district court’s opinion, the weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question. *Gorman*, 646 F.Supp. at 806; see *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Jaksa v. Regents of the Univ. of Michigan*, 597 F.Supp. 1245, 1252 (E.D.Mich. 1984), *aff’d mem.*, 787 F.2d 590 (6th Cir. 1986). This, however, does not preclude a student threatened with sanctions for misconduct from seeking legal advice before or after the hearings. Furthermore, as permitted by the University Manual, Gorman was allowed, and did in fact, choose someone from within the University community to assist him in presenting his case to the UBSC [University Board on Student Conduct].

*Gorman v. University of Rhode Island*, 837 F.2d 7, 16 (1stCir. 1988)

*Miami University (2002)*

The U.S. Government moved to enjoin colleges in Ohio from releasing records of student disciplinary hearings, in violation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. *The Chronicle of Higher Education* (a national weekly newspaper) intervened and wanted access to records of student disciplinary hearings at the Ohio State University and Miami University, a state college in Oxford, Ohio. The U.S. Court of Appeals wrote:

University disciplinary proceedings are not criminal proceedings despite the fact that some behavior that violates a university's rules and regulations may also constitute a crime. For many reasons, student disciplinary proceedings do not "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." *Goss v. Lopez*, 419 U.S. 565, 583, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Not only are students often denied the procedural due process protections cherished by our judicial system, they are also denied procedural finality. The protections against "double jeopardy" do not attach to university disciplinary proceedings; therefore, as the Ohio State and Miami student handbooks explain, a student may be disciplined or sanctioned by the Universities and still be subject to local, state or federal criminal prosecution for the same offense. [footnote omitted] This is true because student disciplinary proceedings govern the relationship between a student and his or her university, not the relationship between a citizen and "The People."

*U.S. v. Miami University*, 294 F.3d 797, 821-822 (6thCir. 2002).

Notice the Court of Appeals cited a high-school case, *Goss*, for the proposition that college students do *not* have the right to secure counsel.

**when also future criminal prosecution**

When a student is charged in *both* criminal court *and* in disciplinary proceedings at a state college for essentially the same incident, there is an interesting problem. If the college's disciplinary proceedings reach a hearing before the criminal case, then the accused student needs an attorney at the disciplinary hearing to protect the accused's right against self-incrimination and to properly cross-examine witnesses against the accused.

One way to avoid this problem is for the college to wait until after the criminal trial and all appeals are finished, in a way analogous to concurrent tort and criminal litigations. However, such a wait could take several years. If the accused student is not confined to jail while awaiting trial (i.e., on bail), the college needs to act promptly to consider whether to remove a potentially dangerous person (e.g., rapist, violent person) from campus.

Note that this special consideration applies *only* when a disciplinary hearing at a state college occurs *before* a trial in criminal court on essentially the same incident.



*Furutani* (1969)

A U.S. District Court in California in 1969 wrote tersely about the need of judges to defer to administrators of educational institution in a case involving demonstration campus.

It is clear from all of the foregoing that plaintiffs' request for a preliminary injunction seeks intervention by this Court into matters relating to student discipline at a college without any showing of actual or prospective unlawfulness in the disciplinary proceedings.

[footnote omitted]

College authorities should be free to enforce fair and reasonable disciplinary regulations necessary to the orderly functioning of the educational institution. Otherwise, the campus marketplace for competition in ideas can all too readily be monopolized by ruthless minorities or ruthless majorities determined to have their way regardless of others.

*Furutani v. Ewigleben*, 297 F.Supp. 1163, 1165 (N.D.Cal. 1969).

*Nzuve* (1975)

Stephen Nzuve, a citizen of Kenya, was a student at a state college in Vermont. He was charged in criminal court when “burglary of a sleeping apartment in the nighttime, attempted rape, and simple assault” in a women's dormitory on campus. When the college began disciplinary proceedings against him on the same charges, he filed for an injunction in state court. *Nzuve v. Castleton State College*, 335 A.2d 321, 322-323 (Vt. 1975). The trial court dismissed the complaint and the Vermont Supreme Court affirmed. The Vermont Supreme Court held that the student was entitled to due process under the Fourteenth Amendment to the U.S. Constitution:

It is both undisputed and certain that the rights of plaintiff here threatened are neither insubstantial nor de minimis. With prior investment in his pursuit of a degree, he stands threatened with expulsion and loss of good name and reputation. This is ‘loss of liberty’ within the purview of the Fourteenth Amendment, and due process of law is required if plaintiff is to sustain such loss. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, (5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961).

*Nzuve*, 335 A.2d at 323.

I wonder if there is also an argument about deprivation of property. A typical student would have paid tuition that would contractually entitle him to take classes and examinations. Suspension or expulsion in the middle of a semester would deprive him of his property right to take classes and examinations. In other words, the student has purchased a ticket entitling him to enter classrooms, participate in class, and take examinations. The college can void his ticket only after giving him due process of law.

The student's allegation about being deprived of counsel was tersely rejected by the Vermont Supreme Court, without any discussion:

An alleged lack of right of confrontation and examination is contrary to the findings of the trial court, and we do not, therefore, consider it. The same is true with respect to an alleged deprivation of counsel.

....

In addition to the *Dixon* requirements enumerated above, we would point out that the trial court found numerous laudable, if not mandated, provisions in the Castleton College Court procedures. .... On trial, he was entitled to an advisor, who could be legal counsel. *Nzuve*, 335 A.2d at 323-324. It seems that, because the state college routinely allowed an accused student to bring an attorney to a disciplinary hearing on campus, the student was not deprived of due process.

The Vermont Supreme Court mentioned the college disciplinary proceedings before a criminal trial on the same incident. *Nzuve*, 335 A.2d at 325-326. I am omitting that material here, because later cases, quoted below, did a better job at discussing this law.

*Gabrilowitz* (1978)

Steven A. Gabrielowitz, a senior at the University of Rhode Island, was charged with assault to commit rape in criminal court. The University directed him to appear at a student disciplinary hearing on campus. "One of the rules [of the student disciplinary hearing] prohibits the existence or presence of legal counsel at the hearing." 582 F.2d at 101-102. He applied to a U.S. District Court for an injunction against the hearing, unless the University allowed him to be represented by an attorney. The District Court granted the injunction, the University appealed, and the U.S. Court of Appeals affirmed:

**[Cite as: 582 F.2d at 103.]**

Were the appellee to testify in the disciplinary proceeding, his statement could be used as evidence in the criminal case either to impeach or as an admission if he did not choose to testify. Appellee contends that he is, therefore, impaled on the horns of a legal dilemma: if he mounts a full defense at the disciplinary hearing without the assistance of counsel and testifies on his own behalf, he might jeopardize his defense in the criminal case; if he fails to fully defend himself or chooses not to testify at all, he risks loss of the college degree he is within weeks of receiving and his reputation will be seriously blemished. Appellants respond that appellee risks nothing by mounting a full defense at the hearing because his words would be compelled testimony precluded from admission at the criminal case under the doctrine of *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). See also *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977). It is our opinion that neither *Garrity* nor *Lefkowitz* apply to the facts of this case.

[Discussion of *Garrity v. New Jersey* omitted here, because that case has the irrelevant issue of dismissal from employment if the accused policemen refused to answer questions.]

FN3. Appellants misconstrue the reliance of the Vermont Supreme Court on *Garrity* in *Nzuve v. Castleton State College*, 133 Vt. 225, 232, 335 A.2d 321, 326 (1975), a case involving a factual situation nearly identical to the one at hand. The court in *Nzuve* concurred with the line of reasoning advanced in *Furutani v. Ewigleben*, 297 F.Supp. 1163 (N.D.Cal. 1969), that any statement made under compulsion by students subject to disciplinary proceedings would not be admissible at a subsequent criminal proceeding. However, the court also found no compulsion to exist in *Nzuve*, and ruled that any statement made by the student would be voluntary and subsequently admissible at the criminal proceeding. We also note that the student in *Nzuve* was entitled to counsel at the disciplinary proceeding. *Nzuve*, supra, 133 Vt. at 232, 335 A.2d at 326.

[Discussion of *Lefkowitz v. Cunningham* omitted here, because that case has the irrelevant issue of duress if the accused officer of a political party refused to answer questions.]

The case at bar does not involve compelled testimony. The U.R.I. standards governing a disciplinary hearing neither require nor prohibit the drawing of an adverse inference from the silence of the accused. The procedures outlined in Section 23.10 state simply: "Decisions shall be based only upon evidence and testimony [Cite as: 582 F.2d at 104] introduced at the hearing." The letter of suspension enclosed a list of procedures to be followed during the hearing which included the right "(t)o remain silent and not testify against himself/herself." The outline of procedures also stated: "Student(s) should remember that if they remain silent, the Board is compelled to hear the case and render a decision based on the evidence presented." Exhibit No. 4 at I(c)(5). There is no indication that the hearing board will consider the silence of an accused as either pointing to or being conclusive evidence of guilt. Appellee's testimony would be, therefore, entirely voluntary and subsequently admissible at the criminal case. Although the possibility of expulsion may make participation a wise choice, the hearing procedures do not place appellee "between the rock and the whirlpool." *Garrity v. New Jersey*, supra, 385 U.S. at 498, 87 S.Ct. at 619. He can, if he wishes, stay out of the stream and watch the proceedings from dry land. But, if he does so, he forfeits any opportunity to control the direction of the current. Appellee must decide whether or not to testify at the hearing with the knowledge that, if he does, his statements may be used against him in the criminal case.

A factor which further complicates the choice is an awareness of his own inability to evaluate the effect his statements may have in the criminal case. Although the choice facing him is difficult, that does not make it unconstitutional. In *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), a case involving a convicted murderer faced with the Hobson's choice of testifying in the hope of a lenient sentence and risking self-incrimination or remaining silent and facing a harsh sentence, the Court said: "The criminal process, like the rest of the legal system, is replete with situations requiring the 'making of difficult judgments' as to which course to follow." *Id.* at 213, 91 S.Ct. at 1470. This court followed *McGautha* when considering the case of a convicted felon found in violation of a deferred sentence agreement. *Flint v. Mullen*, 499 F.2d 100 (1st Cir. 1974). In rejecting the contention that defendant was unconstitutionally forced to choose between testifying at the sentencing hearing and risking self-incrimination at a criminal trial arising out of the same facts, we noted the applicability of the principle applied in *McGautha*:

A defendant at a criminal trial for a substantive offense may wish to speak in his own defense but refrain, fearing a subsequent conspiracy prosecution. The choice is a strategic one, within a setting which requires many strategic choices.

We would view the choice as less strategic were an adverse finding to be based on the fact of defendant's silence, rather than independent evidence, as here.

*Flint v. Mullen*, supra, 499 F.2d at 103.

The issue is not whether it is unconstitutional to force appellee to decide whether or not to testify in the disciplinary proceeding. The issue is whether he is unconstitutionally deprived of due process of law because he is forced to make that choice, or other choices, without the benefit of a lawyer in the face of a pending criminal case arising from the same facts that triggered the disciplinary proceeding.

We recognize, as did the district court, that most courts have declined to grant students the right to counsel in disciplinary proceedings. But, with the exception of *Nzuve v. Castleton State College*, 133 Vt. 225, 232, 335 A.2d 321, 326 (1975), and *Furutani v. Ewigleben*, 297 F.Supp. 1163 (N.D.Cal. 1969), these cases did not involve the specter of a pending criminal case hovering over the hearing. See e. g., *Wasson v. Trowbridge*, supra, 382 F.2d 807; *Garshman v. Pennsylvania State University*, 395 F.Supp. 912; *Haynes v. Dallas County Junior College District*, 386 F.Supp. 208 (N.D.Tex. 1974); *Barker v. Hardway*, 283 F.Supp. 228 (S.D.W.Va.), cert. denied, 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217 (1969); *Due v. Florida A. & M. University*, 233 F.Supp. 396 (N.D.Fla. 1963).

There are cases, however, holding that due process mandates the right to counsel at student expulsion proceedings. [Cite as: 582 F.2d at 105] *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866, 881 (D.D.C. 1972); *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972); *Esteban v. Central Missouri State College*, 277 F.Supp. 649, 651 (W.D.Mo. 1967).[FN4]

FN4. We are aware, of course, of those cases holding that prisoners in disciplinary proceedings are not allowed counsel. *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). We do not find those cases controlling because of two key distinguishing features: (1) the absence of pending criminal charges in those cases, and (2) the exceptional nature of the prison context. In *Baxter*, the Court specifically noted that “(n)o criminal proceedings are or were pending against Palmigiano.” 425 U.S. at 317, 96 S.Ct. at 1557. The Court also observed that the “peculiar environment of the prison setting”, *Id.* at 322 n. 5, 96 S.Ct. at 1560, made inappropriate certain procedural requirements. We do not read *Palmigiano* or *Wolff* as applying to situations outside the prison walls. Indeed, the Court observed that “one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.” 418 U.S. at 560, 94 S.Ct. at 2977. Repeated references to the exigencies attending prison settings and the concomitant inappropriateness of applying inflexible due process standards are sprinkled throughout both *Palmigiano* and *Wolff*. Cf. *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), for an analysis by the Court of a situation where even a prisoner is entitled to counsel and the warning of his right to remain silent. *Mathis* involved a prisoner, incarcerated for one crime, who was interrogated by an I.R.S. agent concerning possible tax violations. As a result of the questioning, criminal charges were brought against the prisoner. The Court there held that, because the tax investigation was always colored by the possibility of a subsequent criminal prosecution, *Miranda* rights attached. The importance of *Mathis* is that it illustrates that, even within the prison setting, there are instances where the right to counsel is essential to ensure due process. The likelihood or pendency of criminal charges resulting from the interrogation presents such circumstances. See also *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), for a discussion of the

case-by-case approach to be taken in parole and probation revocation hearings on the issue of whether counsel should be permitted. “The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases.” *Id.* at 789, 93 S.Ct. at 1763. In making the analysis of whether counsel is required, the “touchstone” should be “fundamental fairness.” *Id.* at 790, 93 S.Ct. at 1763.

Because of the lack of compelling precedent, we apply the traditional due process balancing test as delineated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976):

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See also *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 99-100, 98 S.Ct. 948, 55 L.Ed.2d 124, 46 U.S.L.W. 4179, 4185 (1978); *Goldberg v. Kelly*, 397 U.S. 254, 263-271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

The private interest and risk of erroneous deprivation that will be affected by the refusal of the hearing board to allow appellee the assistance of counsel depend upon the choice made at the hearing. If appellee chooses not to risk self-incrimination, he risks loss of his college degree. If he chooses to protect his degree, he risks self-incrimination and possible imprisonment of up to twenty years.[footnote to R.I.Gen.Laws s 11-5-1 (1970).] All that appellee asks is that he be allowed the advice of counsel when he throws his college degree into the balance against a possible loss of liberty. Appellee has not asked that the hearing be postponed until after the criminal case has been tried; he is willing to participate in the hearing provided he is accompanied by [Cite as: 582 F.2d at 106] counsel to advise and guide him. The role of his attorney could be analogized to that of counsel representing a client at a congressional investigative hearing. We echo the comments of the district judge:

Further, the charge of assault with intent to rape is decidedly a matter of legal construction. Indeed, the definition of assault by itself, known and applied by legal professionals, is markedly different from the concept of laymen of what actions constitute an assault. The consequences of this plaintiff's participation in what otherwise might be strictly a University affair, reaches well beyond the University walls in terms of potential effect upon this plaintiff.

In *Flint v. Mullen*, supra, 499 F.2d 100, we found the convicted felon not to be presented with an unconstitutional choice because, Inter alia, “(p)etitioner, however, was provided with counsel, and both petitioner and his counsel had full opportunity to cross-examine every adverse witness and could have called their own.” *Id.* at 103. More recently, we reversed the enjoining of disciplinary proceedings against a physician until criminal charges arising out of the same actions were completed, finding: “The disciplinary proceeding was not brought solely to obtain evidence for the criminal prosecution; the doctor was aware during the hearing of the pending criminal actions; The doctor had counsel ; . . .” (emphasis added). *Arthurs v. Stern*, supra, 560 F.2d at 479 n.5. See also *United States v. Kordel*, supra, 397 U.S. at 12 n.25, n.27, 90 S.Ct. 763.

Appellee's need for an attorney at the hearing seems obvious. With the exception of the denial of counsel, the disciplinary proceedings are, in many respects, similar to that of a criminal trial. Only a lawyer is competent to cope with the demands of an adversary proceeding held against the backdrop of a pending criminal case involving the same set of facts. The risk involved in participation at the hearing is substantial with counsel present; without counsel, it is enormous. The presence of counsel will, of course, not remove all risks. It will, however, enable appellee to make an intelligent, informed choice between the risks presented.

Academic institutions have a significant interest in the promulgation of procedures for the resolution of student disciplinary problems. *Healy v. James*, 408 U.S. 169, 184, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Wasson v. Trowbridge*, supra, 382 F.2d 807; *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); *Morales v. Grigel*, 422 F.Supp. 988, 997 (D.N.H. 1976); *Furutani v. Ewigleben*, supra, 297 F.Supp. 1163. The limited role of counsel that we are considering, however, would not be very intrusive. Counsel would be present only to safeguard appellee's rights at the criminal proceeding, [FN6] not to affect the outcome of the disciplinary hearing. Counsel's principal functions would be to advise appellee whether he should answer questions and what he should not say so as to safeguard appellee from self-incrimination; and to observe the proceeding first-hand so as to be better prepared to deal with attempts to introduce evidence from the hearing at a later criminal proceeding. [FN7] To fulfill these functions, counsel need speak to no one but appellee. Counsel should, however, be available to consult with appellee at all stages of the hearing, especially while appellee is being questioned. Appellee, or his chosen U.R.I. counsel, will conduct the defense. The board will be conscious of the presence of an outsider, but this will emphasize the potential as well as present gravity of the charge. The presence of counsel will not place any financial or administrative burden on the University. It will set a precedent only for a truly unusual situation. See *Garshman v. Pennsylvania State University*, 395 F.Supp. 912 (M.D.Pa. 1975). The [Cite as: 582 F.2d at 107] most serious effect on the hearing of having counsel present that we can anticipate is that it will probably take longer to complete.

FN6. We note that this relief is designed to protect his rights to due process. He has no constitutional right to counsel Per se in this context.

FN7. For example, the presence of counsel may help ensure accuracy as well as identify points of inconsistency.

We hold that, because of the pending criminal case, the denial to appellee of the right to have a lawyer of his own choice consult with and advise him during the disciplinary hearing without participating further in such proceeding would deprive appellee of due process of law. *Gabrilowitz v. Newman*, 582 F.2d 100, 103-107 (1st Cir. 1978).

Notice this case is *not* about the absolute right of a student to be represented by an attorney at any disciplinary hearing on campus, the right is *only* in the context of a student who will face charges in a criminal court for essentially the same offense. Notice this case only orders the University to *allow* the accused to bring an attorney to the disciplinary hearing, the right to an attorney is permissive instead of mandatory. Nothing was said in this case about the University providing a no-cost attorney to an accused student. Finally, there is some discussion of the role of the student's attorney at the disciplinary hearing:

At the outset, we note that the issue before us is somewhat different than that presented by the terms of the injunction. We interpret the injunction to mean, as counsel did in their briefs, that appellee's attorney, if allowed to represent him at the hearing, would do so in the traditional sense, i.e., he would conduct direct and cross-examination. At oral argument, counsel for appellee [i.e., the student] stated in response to a question from the bench that it was not necessary for the lawyer to participate in direct or cross-examination; all that appellee wanted was that a lawyer be at his side during the hearing for consultation and advice. It is in this context, therefore, that we address ourselves to the case.

*Gabrilowitz*, 582 F.2d at 101.

*McLaughlin* (1983)

Eric McLaughlin, a cadet at the Massachusetts Maritime Academy, was arrested by New Orleans police for possession of amphetamines and hashish. While facing criminal charges, he was ordered before an Academy hearing board, and expelled. The accused student had a right to a faculty advisor at the hearing, the student selected an advisor, but that advisor was unable to attend the hearing. The hearing proceeded without the accused student having an advisor. "It is a fact that he was not granted permission to have civilian counsel present." *McLaughlin*, 564 F.Supp. at 810. The cadet filed for an injunction in U.S. District Court, which injunction was granted.

Allowance of the motion for preliminary injunction would prevent dismissal of the plaintiff unless another hearing were granted to the cadet with those safeguards deemed essential to the court's conception of the requirements of due process (representation by an Academy staff advisor and by a civilian attorney, both of whom would participate simply as advisors).

*McLaughlin v. Massachusetts Maritime Academy*, 564 F.Supp. 809, 811 (D.Mass. 1983).

The judge cited *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978) as the only case involving a college disciplinary hearing. Note in *McLaughlin*, the rules of the Academy specify that the accused cadet presents his own case, the faculty advisor is not an advocate for the accused cadet. *McLaughlin*, 564 F.Supp. at 811.

Similar facts, issues, and result were in *Crowley v. U.S. Merchant Marine Academy*, 985 F.Supp. 292, 297 (E.D.N.Y. 1997) ("In the Court's opinion, the best way to address the issue is not by staying the hearing, but by affording the cadet the presence of counsel at the disciplinary hearing. Indeed, due process dictates this result.").

*Coleman (1992)*

Luiet Jamal Coleman, a college basketball player at the University of Missouri at Columbia, was accused of stealing \$688 from bookstore. Coleman's attorney obtained an agreement with the University to delay any disciplinary action until after the criminal prosecution was completed. Coleman then pled guilty, and was sentenced to ten days in jail, plus two years supervised probation. Following *Esteban*, the University allowed the accused student to have an attorney at the student disciplinary hearing. The University suspended Coleman for one semester. Coleman then sued in federal court, alleging violation of his constitutional rights. The trial judge, in an unpublished opinion, found for the student. The University appealed and the U.S. Court of Appeals reversed. *Coleman v. Monroe*, 977 F.2d 442, 443-444 (8th Cir. 1992).

*Osteen (1993)*

Thomas Osteen was expelled for two years from Northern Illinois University, a state college, for aggravated battery. Judge Posner of the U.S. Court of Appeals in Chicago wrote the opinion for a unanimous three-judge panel:

The most interesting question is whether there is a right to counsel, somehow derived from the due process clause of the Fourteenth Amendment, in student disciplinary proceedings. An oldish case (by the standards of constitutional law at any rate) says yes, *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973),<sup>17</sup> but the newer cases say no, at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal. E.g., *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 925-26 (6th Cir. 1988); *Gorman v. University of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988). **Especially when the student faces potential criminal charges (Osteen was charged with two counts of aggravated battery; the record is silent on the disposition of the charges), it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment.**<sup>18</sup> [*Gorman*, 837 F.2d] at 16. In fact *Gabrilowitz v. Newman*, 582 F.2d 100, 105-07 (1st Cir. 1978), so holds, though over a dissent which points out that the Supreme Court had rejected the same argument in the parallel context of prison disciplinary proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 315, 96 S.Ct. 1551, 1556, 47 L.Ed.2d 810 (1976).

Even if a student has a constitutional right to consult counsel —an issue not foreclosed by *Baxter*, as we shall see — we do not think he 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

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<sup>17</sup> Because *Black Coalition* involved high school pupils, Judge Posner should have cited *Esteban v. Central Missouri State College*, 277 F.Supp. 649, 651 (W.D.Mo. 1967), *aff'd*. 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

<sup>18</sup> Boldface by Standler. I think Judge Posner is stating his view of the law, if there were no prior cases to influence his decision.



of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in — from the law faculty or elsewhere — to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc. Concern is frequently voiced about the bureaucratization of education, reflected for example in the high ratio of administrative personnel to faculty at all levels of American education today. We are reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings, mindful also that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference. *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985), and cases there. The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight. The relation of students to universities is, after all, essentially that of customer to seller. That is true even in the case of public universities, though they are much less dependent upon the academic marketplace than private universities are. Northern Illinois University can't have been happy to lose a student whom it had wanted so much that it had given him a football scholarship, and who had made the team to the greater glory of the institution.

The canonical test for how much process is due, laid down by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and applied to school or college disciplinary proceedings in such cases as *Newsome* and *Gorman*, requires consideration of the cost of the additional procedure sought, the risk of error if it is withheld, and the consequences of error to the person seeking the procedure. The cost of judicializing disciplinary proceedings by recognizing a right to counsel is nontrivial, while the risk of an error — specifically the risk that Osteen was unjustly “sentenced” — is rather trivial.<sup>19</sup> Not only has the university, as we have said, no incentive to jerry-rig its proceedings against the student — and there is no indication of that here, for even permanent expulsion would not have been an excessive sanction for Osteen's brutal and gratuitous misuse of his football player's strength. In addition the issue of the proper sanction generally and here involves no subtleties of law or fact, being judgmental rather than rule-guided, like federal sentencing before the Sentencing Guidelines. Finally, the consequence for Osteen — a nonpermanent expulsion that did not prevent him from enrolling in another college — is not so grave as to entitle him to the procedural protections thought necessary in litigation because large interests of liberty or property may be at stake.

The last point gives us the most pause, as we suspect, though the record is barren on the point, that the expulsion cost Osteen scholarship assistance that he or his family needed. But when we consider all the factors bearing on his claim to a right of counsel, we conclude that the Constitution does not confer such a right on him. We doubt that it does in any student disciplinary proceeding. After *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 330-32, 105 S.Ct. 3180, 3194-95, 87 L.Ed.2d 220 (1985), the scope of the due process right to counsel seems excruciatingly narrow. *Gabrilowitz v. Newman* may survive, because “right to counsel” is rather a misnomer for the far more limited, and hence less costly and disruptive, right of consultation recognized there and not at issue in *Baxter v. Palmigiano*, where the prisoners were seeking the full right of counsel. But Osteen was not denied the right to consult counsel; and he had no greater right.

*Osteen v. Henley*, 13 F.3d 221, 225-226 (7th Cir. 1993) (Posner, J.).

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<sup>19</sup> Osteen did not believe it was trivial: he paid for an attorney to litigate his claim in trial court and then appeal.

*Flaim (2005)*

Michael Flaim was a third-year medical student at a state college in Ohio, when he was arrested and convicted in criminal court of a drug felony. He was subsequently expelled from medical school. The U.S. Court of Appeals summarized the law:

Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate. *Jaksa*, 597 F.Supp. at 1252. But see *Gomes v. Univ. of Maine System*, 365 F.Supp.2d 6, 16 (D.Me. 2005) (citing *Keene v. Rodgers*, 316 F.Supp. 217, 221 (D.Me. 1970)) (“the student must be permitted the assistance of a lawyer, at least in major disciplinary proceedings”). In *Jaksa*, the court noted, however, that counsel may be required by the Due Process Clause to ensure fundamental fairness when the school proceeds through counsel or the procedures are overly complex. *Jaksa*, 597 F.Supp. at 1252. Other courts have concluded that the “weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question.” *Gorman [v. Univ. of R.I.]*, 837 F.2d 7, 16 (1stCir. 1988) ]; see also *Gabrilowitz v. Newman*, 582 F.2d 100 (1stCir. 1978) (right to counsel when criminal charges pending based on same incident).

*Flaim v. Medical College of Ohio*, 418 F.3d 629, 636 (6thCir. 2005).

The U.S. Court of Appeals applied the law to the facts of this case:

Flaim argues that he was denied the right to counsel at his disciplinary hearing in violation of the Due Process Clause. Prior to the hearing, Medical College of Ohio notified Flaim that its policy granted an accused student the right to counsel only if the student faced outstanding criminal charges at the time of the hearing. The notice further explained, however, that the college would allow Flaim to have his attorney present. At the hearing, while Flaim's attorney was permitted to remain in the room, Flaim was not permitted to consult with his attorney nor was the attorney permitted to participate in the proceedings. Flaim argues therefore, that Medical College of Ohio unfairly deceived him. We conclude, however, that Flaim was not denied due process based on these procedures.

Assuming Flaim was led to believe that he would be permitted to have active counsel at the hearing, it does not necessarily follow that what occurred violated his constitutional rights. As this Court has stated,

It is not every disregard of its regulations [or assurances] by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules [or assurances] results in a procedure which itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions.

*Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976). Assuming without deciding that there is a right to counsel in some academic disciplinary proceedings, FN4 we think that the procedures utilized here were sufficient. In *Jaksa*, the court noted that a right to counsel may exist if “an attorney presented the University's case, or [ ] the hearing [was] subject to complex rules of evidence or procedure.” *Jaksa*, 597 F.Supp. at 1252. Here, Medical College of Ohio did not present its case through an attorney. The hearing was not procedurally complex. There were no rules of evidence. Flaim was provided with an opportunity to appear in person before the committee to present his defense. Flaim was permitted to listen to adverse witnesses and to rebut that testimony while addressing the committee with his version of events. Flaim's complaint really boils down to the assertion that he was denied the

opportunity to present his case as effectively as he would have wished — he could not reasonably claim that he was denied the opportunity to present his case at all due to the lack of legal counsel. Flaim's attorney may have been more articulate, but there is no indication that the hearing was so complex that only a trained attorney could have effectively presented his case. See *Jaksa*, 597 F.Supp. at 1252.

FN4. We need not consider here all the circumstances under which an accused may have a right to counsel. See *Jaksa*, 597 F.Supp. at 1252 n. 8 (discussing diversity of decisions on the right to counsel).

Under *Mathews*, Flaim does no better. While the additional safeguard of professional advocacy may lessen the risk of erroneous expulsion by improving the quality of the student's case, the administrative burdens to a university, in the business of education, not judicial administration, are weighty. Full-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause and conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity. Moreover, the presence of an attorney, however articulate, would not likely have obscured from the Committee the fact of Flaim's felony drug conviction. We conclude that *Mathews* counsels against this additional procedural safeguard on these unique facts. *Flaim v. Medical College of Ohio*, 418 F.3d 629, 640-641 (6th Cir. 2005).

The U.S. Court of Appeals was not happy about the level of due process at the medical school, which the Court characterized as “consistent with the bare-minimum requirements of due process, though perhaps less-than-desirable for an institution of higher learning”. *Flaim*, at 632.

#### *Coulter* (2010)

On 18 March 2010, a University police officer found twelve tablets of an illicit drug in Julie Coulter's dormitory room at a state college. The U.S. District Court judge recited the facts:

A disciplinary hearing was scheduled for April 21, 2010. At the hearing, Plaintiff's counsel was allowed to attend and advise plaintiff, but not otherwise participate. During the hearing East Stroudsburg University Police Chief, Robyn Olson, was the only witness that testified against Plaintiff; Olson's testimony was essentially limited to reading the arresting officer's report. When asked if Plaintiff had any questions for the witness, Plaintiff declined to speak, upon counsel's advice that she exercise her right to remain silent; likewise, Plaintiff chose not to present any witnesses on her own behalf. Plaintiff chose to remain silent at the hearing because she had been advised that the matter was under investigation by the Monroe County District Attorney.

At the conclusion of the hearing, it was recommended that Plaintiff be immediately suspended from the university until the end of the spring 2011 semester, be placed on academic probation until the end of the spring 2012 semester, be subject to a drug and alcohol evaluation upon return to school, and be ineligible for campus housing upon return to school. On April 23, 2010, the recommendations were adopted by the Vice President of Student Affairs.

*Coulter v. East Stroudsburg University*, Slip Copy, 2010 WL 1816632 at \*1 (M.D.Pa. 2010) (citations to Complaint, affidavits, and other documents omitted here). Plaintiff then applied for an injunction prohibiting the University from expelling Plaintiff, and allowing Plaintiff to attend classes and final examinations for the Spring 2010 semester. The judge granted the injunction:

The crux of Plaintiff's argument is that the University violated her due process rights when it did not allow her to have an attorney or some other representative actively participate in the hearing process, despite the fact that Plaintiff believed that she might be facing criminal prosecution stemming from this incident. Plaintiff was confronted with the choice of either making a statement or cross-examining the witness at the risk of having those statements used against her in future criminal proceedings, or remaining silent and having her academic future decided on the basis of adverse evidence only, namely the police report. Plaintiff claims that denying her some sort of representation such that she would not be required to speak at the hearing herself robbed her of a meaningful opportunity to be heard and defend herself.

In *Garsham v. Pennsylvania State University*, 395 F.Supp. 912 (M.D.Pa. 1975), the court held that there is no due process right to counsel in academic disciplinary hearings. In that case, the plaintiff was going to be dismissed from medical school for academic dishonesty, and sought to enjoin the university from requiring him to attend the disciplinary hearing without counsel. *Id.* at 919-20.

This case is distinguishable from *Garsham*; the fact that Plaintiff faced the possible criminal sanctions likely tips the *Mathews* balancing test in favor of Plaintiff. The private interest affected in this situation is a very serious one; Plaintiff will not be allowed to finish her semester, thereby setting her academic progress back by half a year, and she will have lost the money she spent in tuition. The risk of erroneous deprivation through the procedures used is extremely high in this instance. By denying Plaintiff any type of active representation in this situation, the University was essentially forcing Plaintiff to choose between exposing herself to criminal liability and the serious consequences associated therewith or protecting herself from possible academic sanctions. In most circumstances, students put in that situation will be driven to make the same decision. This means that the students will not be able to defend themselves properly, present evidence, or cross-examine the witness, leading to a one-sided hearing that might very likely result in an erroneous suspension or expulsion. Finally, the value of additional safeguards is extremely high. If Plaintiff could have had counsel or some other representative, Chief Olson could have been cross-examined to disclose his lack of personal knowledge of the situation. The cost to defendants is very low, considering that they already allow counsel to be present during the hearing and guide students during the course of hearing. Allowing counsel or a representative to ask questions in the circumstances presented by this case would not likely hamper the University in any significant manner.

I hold that where a student is simultaneous facing criminal sanctions and academic discipline, it is probable that the student must be allowed to have counsel or some other representative actively participate during the hearing to ensure that due process is satisfied.

[footnote omitted]

*Coulter*, 2010 WL 1816632 at \*2-\*3.

There was nothing further for this case in Westlaw when I looked on 9 Mar 2011. I then looked at the online docket for federal courts, this case is 3:2010-cv-00877 in the Middle District of Pennsylvania, the order quoted above is document 20, dated 5 May 2010. The University appealed the above-quoted order. On 28 Oct 2010, the Third Circuit issued a stay: "to the limited extent that any interpretation of the District Court's Order that would require public universities to allow counsel to participate in all<sup>20</sup> disciplinary hearings is hereby stayed." In Jan 2011, the Third Circuit terminated the appeal and ordered the District Court to dismiss the case, because the issue

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<sup>20</sup> Notice that the University, which requested the stay, seems to have missed the significance of the concurrent or future criminal prosecution for the same occurrence as the college's disciplinary hearing. The *Coulter* case does not establish minimum rules for *all* disciplinary hearings at colleges.

was moot — Coulter was not expelled and she did complete the Spring 2010 semester at East Stroudsburg University.

### **Stigma requires due process**

A Wisconsin statute allowed the mayor, police chief, and/or other specified authorities to designate persons who should not be sold alcoholic beverages and distribute their names to retail liquor stores. There was no due process provided to the designated persons: neither notice nor hearing. The U.S. Supreme Court held the statute was unconstitutional, because it violated procedural due process.

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

*Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

In 1972, the U.S. Supreme Court considered the case of Prof. Roth, a nontenured assistant professor whose contract was not renewed by a state college after his first year. Roth sued and the U.S. District Court held that minimal procedural due process required that the college give him a reason for termination of his employment and give him a hearing. *Roth v. Board of Regents of State Colleges*, 310 F.Supp. 972, 980 (D.Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971). The U.S. Supreme Court reversed the two lower courts, and wrote two famous paragraphs:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; *United States v. Lovett*, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; *Peters v. Hobby*, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials. [footnote omitted] In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. ....

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573-574 (1972).

So while Prof. Roth lost, another professor (e.g., a professor charged with incompetence, misconduct, dishonesty, etc.) would be entitled to reason(s) for dismissal and an opportunity to present evidence opposing his dismissal. The Supreme Court in *Roth* holds that it is the stigma of some reasons for termination of employee that triggers due process rights. See also *Owen v. City of Independence, Mo.*, 445 U.S. 622, 633, n.13 (1980) (“In *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), we explained that the dismissal of a government employee accompanied by a ‘charge against him that might seriously damage his standing and associations in his community’ would qualify as something ‘the government is doing to him,’ so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name.”)

While *Roth* and *Owen* are both employment cases, it is easy to extend such stigma to college disciplinary actions against students. After being labeled a plagiarist or cheater, a student is probably less likely to be admitted to a first-rate college, which diminishes the future educational opportunities available to plagiarists and cheaters. Before such stigmatizing labels are attached, a college should be reasonably certain of the guilt of the student. Notice the analysis of due process law in employment cases involving stigmatizing labels may be *inconsistent* with the due process law in student disciplinary cases at state colleges, because the two areas of law evolve separately.

This concept is mentioned in *Goss*, the leading U.S. Supreme Court case on disciplinary hearings for high school pupils:

The Due Process Clause also forbids arbitrary deprivations of liberty. ‘Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,’ the minimal requirements of the Clause must be satisfied. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); *Board of Regents v. Roth*, supra, 408 U.S. at 573, 92 S.Ct. at 2707. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. FN7 It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

FN7. Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. Brief for Appellees 34-35 and n. 40. Appellees also contend that many employers request similar information. *Ibid.* ....

*Goss v. Lopez*, 419 U.S. 565, 574-575 (1975).

## Professor dismissed

In the 1950s and 1960s, the U.S. Supreme Court was protective of freedom of speech, including academic freedom of professors. However, in later cases, the U.S. Supreme Court retreated from broad support of both academic freedom and freedom of speech for government employees.

In the case of a professor who is being dismissed, the professor has no right to have his/her attorney present his/her case at hearings on campus. *Toney v. Reagan*, 467 F.2d 953, 958 (9thCir. 1972), *cert. den. sub nom. Mabey v. Reagan*, 409 U.S. 1130 (1973); *Frumkin v. Board of Trustees, Kent State University*, 626 F.2d 19, 21-22 (6thCir. 1980).

Denial of tenure, like expulsion of a student for poor academic performance, is a purely academic decision. Because of academic abstention, courts will refuse to review denial of tenure, unless the academic reason is a pretext for gender or racial discrimination, or some other legally protected reason. Adding to academic abstention, the doctrine of at-will employment<sup>21</sup> allows colleges to terminate untenured professors for any reason, or no reason at all.

In agreeing that a college professor could *not* bring an attorney to hearings at a state college campus about his denial of tenure, the U.S. Court of Appeals wrote:

We are not unmindful of *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), in which the Supreme Court held that welfare recipients threatened with termination of their benefits, an action which would infringe their statutory right to uninterrupted public assistance, were entitled to have the assistance of retained counsel if they wished. However, welfare recipients dealing with state officials are a class far more likely to be in need of the services of counsel than college professors dealing with their peers. *Toney v. Reagan*, 467 F.2d 953, 958 (9thCir. 1972).

Above, at page 15, I discussed *Goldberg v. Kelly*. I think the judge in *Toney* assumed that tenure disputes are purely intellectual matters. In practice, a slick political administrator can terminate the career of an idealistic professor, simply because the administrator was irritated by the professor's opinions. I am also troubled by the assertion that poor people need an attorney more than intelligent people — I think *any* individual confronted by a government agency needs an attorney. Few professors being denied tenure are an expert on employment law, academic freedom, and rules of college procedures. On the other hand, the college has available legal counsel on these areas of law.

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<sup>21</sup> See, e.g., Standler, History of At-Will Employment Law in the USA, <http://www.rbs2.com/atwill.htm> (July 2000).

See also *Keen v. Penson*, 970 F.2d 252, 259 (7thCir. 1992) (“A university need not adopt a quasi-criminal code before it can discipline its professors or other employees, and should not be expected to foresee every particular type of unprofessional behavior on the part of its professors. .... ‘Judicial review of academic decisions ... is rarely appropriate, particularly where orderly administrative procedures are followed.’ *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 230, 106 S.Ct. 507, 516, 88 L.Ed.2d 523 (1985) (Powell, J., concurring).”).

### “Potted Plant”

State universities generally allow a grieved student to bring an attorney to a hearing on campus, but the rules of the university often consign that attorney during the hearing to the role of an observer — which is sometimes sarcastically said to be assigning the attorney to the role of a “potted plant”. There are a few judicial opinions that condemn attorney’s as a “potted plant” in the context of criminal trials:

- *Childress v. Johnson*, 103 F.3d 1221, 1226, 1231 (5thCir. 1997) (“... the court concluded that counsel took ‘a potted plant approach’ to Childress's representation. That is, counsel’s role was essentially passive. .... In these circumstances, we are convinced that counsel, though surely more sentient than a potted plant, was not the advocate for the defense whose assistance is contemplated by the Sixth Amendment.”);
- *Elizalde v. Dretke*, 362 F.3d 323, 329 (5thCir. 2004) (Quoting: *Ex Parte Graves*, 70 S.W.3d 103, 114 (Tex.Crim.App. 2002): “... it would seem an empty gesture to appoint incompetent counsel. We agree a ‘potted plant’ appointed as counsel is no better than no counsel at all.”);
- *Ex parte McFarland*, 163 S.W.3d 743, 752 (Tex.Crim.App. 2005) (“This prong of [*U.S. v. ] Cronin* [, 466 U.S. 648 (1984),] is epitomized by the ‘inert’ or ‘potted plant’ lawyer who, although physically and mentally present in the courtroom, fails to provide (or is prevented from providing) any meaningful assistance. [two footnotes omitted]”).

I am not aware of any judicial remarks about “potted plant” lawyers in the context of disciplinary hearings at a school or college campus. Similarly, on 11 Feb 2011, I made a quick search of law review articles in Westlaw, but found no mentions of “potted plant” in the context of disciplinary hearings for college students.

An attorney who is a “potted plant” is *not* acceptable at a criminal trial, where full due process applies. However, a potted plant might be acceptable at a college disciplinary hearings, where courts are agreed that less due process applies. Even at the extreme of an attorney who remains silent at the hearing, the attorney can still be useful to the accused student (1) by passing notes or whispering advice, (2) by providing moral support, and (3) by reminding the hearing to follow the rules of the college.

Attorneys and judges talk about allowing an attorney on campus as if the decision is binary, like switching a light on or off, whereas the college’s rules can vary the role of the accused’s



students attorney continuously, like a dimmer for a light. The rules could run the a continuous range between (1) allowing the attorney to represent the accused (i.e., like a criminal trial) and (2) consigning the attorney to the role of a “potted plant”. Very few judicial opinions have discussed in detail what kind of role is appropriate for an attorney at a disciplinary hearing on a college campus. I suggest that the college permit the student to bring his/her attorney, subject to various rules established by the college. The rules might forbid cross-examinations of witnesses that are intended to humiliate or embarrass the witness. The rules might forbid cross-examination of witnesses by an attorney, unless both the prosecution and defense use an attorney. The rules might limit opening and closing statements by each party (or his attorney) to a maximum duration of ten minutes.

### **Indigent students not entitled to no-cost attorney**

Indigent criminal defendants are constitutionally entitled to have the prosecuting government provide an attorney at no cost to the defendant. *Powell v. Alabama*, 287 U.S. 45 (1932) (14<sup>th</sup> Amendment applies 6<sup>th</sup> Amendment right to counsel to the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendant in state court has right to no-cost counsel); *Miranda v. Arizona*, 384 U.S. 436, 472-473, 479 (1966) (right to no-cost attorney attaches at custodial interrogation by police). Interestingly, there is little discussion in judicial opinions about a state college being *required* to provide an attorney at no charge to an accused student. The discussion about the role of an attorney on campus seems confined to students who can afford to hire their own attorney. As explained above, beginning at page 23, some courts hold that due process requires only that state colleges *allow* (i.e., permissive instead of mandatory) an accused to bring an attorney to a hearing. And some courts have allowed a state college to *prohibit* an accused student from being represented by an attorney at a hearing on campus.

In my searches of reported cases on Westlaw, I have found only two cases that mention no-cost attorneys for indigent students:

1. *French v. Bashful*, 303 F.Supp. 1333, 1338 (E.D.La. 1969) (“too high a price for the college to pay”);
2. *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972) (“... the right to be represented by counsel (though not at public expense); ...”).

I find it strange that the concept is not mentioned more frequently by judges. *Givens* tersely disposes of the issue with a five-word phrase. *French* gives a whole paragraph on this topic:

When the right to retained counsel is involved, we feel that any burden which such a right places on the university is inconsequential compared to the vital interest of the student in being represented by counsel. But a similar holding as to appointed counsel would have a far greater effect on the university. If a college administration were forced to provide counsel for defendant students at every disciplinary proceeding, the cost to the school would be considerable. It is no secret that the universities are not unlimited in their funds. It is therefore this Court’s opinion that this would be too high a price for a college to pay for the privilege of enforcing discipline among its students.

*French v. Bashful*, 303 F.Supp. 1333, 1338 (E.D.La. 1969) (dictum).

This quotation is obiter dictum, because the plaintiffs in *French* had retained their own counsel.

The U.S. Supreme Court has recognized the right to no-cost counsel in only a few non-criminal proceedings:

- *In re Gault*, 387 U.S. 1 (1967) (right to appointed counsel in a juvenile delinquency proceeding);
- *Gagnon v. Scarpelli*, 411 U.S. 778, 790-791 (1973) (revocation of probation or parole does not always require appointment of counsel);
- *Vitek v. Jones*, 445 U.S. 480, 487-489, 496-497 (1980) (transfer of prisoner to mental hospital required appointment of counsel);
- *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 25 (1981) (termination of parent's custody of children does *not* require appointment of counsel, because no loss of liberty);
- *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (Convicted criminals entitled to appointed counsel only for "the first appeal of right, and no further.").

Similarly, U.S. Courts of Appeals have rejected appointed counsel for indigent plaintiffs in civil litigation:

- *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3dCir. 2002) ("Indigent civil litigants possess neither a constitutional nor a statutory right to appointed counsel. See *Parham v. Johnson*, 126 F.3d 454, 456-57 (3dCir. 1997).");
- *Romanelli v. Suliene*, 615 F.3d 847, 849 (7thCir. 2010) ("... under *Luttrell v. Nickel*, 129 F.3d 933, 936 (7thCir. 1997), civil litigants are not, as a matter of right, entitled to court-appointed counsel in federal court, and that pursuant to *Farmer v. Haas*, 990 F.2d 319, 322 (7thCir. 1993), only under 'exceptional circumstances' will a court appoint counsel for indigent litigants.").

In looking at the above list of cases, it seems unlikely that courts will require colleges to provide no-cost attorneys for indigent students at disciplinary hearings, since there is no legal right to a no-cost attorney in civil litigation, and no legal right to no-cost attorneys in administrative hearings.

The U.S. Supreme Court has held that an accused prisoner in a disciplinary hearing at a prison has a legal right to neither retained nor appointed counsel. *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976), quoting *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). Because of the obviously dangerous environment in a prison plus the prisoner's lack of freedom, if an attorney is not required in disciplinary hearings at a prison, then one can hardly argue for the requirement of an attorney in disciplinary hearings at a state college.

For state colleges that are interested in providing more than the minimum due process, there are some possibilities. If a university has a law school on campus, it may be possible to use law professors to provide free advice to accused students. In cases involving minor disciplinary accusations, law students supervised by law professors might give adequate advice to an accused student.

There may be a backwards kind of logic that prevents judges from *requiring* an accused student to be represented by counsel at a disciplinary hearing at a state colleges. *If* such a requirement were imposed on state colleges, then colleges would likely be required to provide a no-cost attorney to indigent students. Providing attorneys to indigent students would be expensive. Judges are unwilling to impose such costs on colleges. Therefore, the most that one can hope to achieve is for a college to *allow* a student to bring an attorney to a disciplinary hearing. This paragraph is speculative, because judges have rarely written an articulate explanation of their decision that attorneys are not required at college disciplinary hearings.<sup>22</sup> In the absence of clear explanations by judges, all one can do is speculate.

### Law Review Articles

Back in 1957, a short article in HARVARD LAW REVIEW expressed outrage over the denial of due process to students:

... our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.

Warren A. Seavey, "Dismissal of Students: 'Due Process'," 70 HARVARD LAW REVIEW 1406, 1407 (June 1957), quoted with approval in *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 158 (5th Cir. 1961); *Zanders v. Louisiana State Bd. of Ed.*, 281 F.Supp. 747, 757, n. 21 (W.D.La. 1968).

Seavy's remark about "pickpockets" having more legal rights than students at a state college is rhetoric. Pickpockets are accused of a crime, and therefore they have the right to an attorney, under the Sixth Amendment. Students accused of a disciplinary offense generally are not also charged with a crime, so these students have no Sixth Amendment rights. In those cases where an accused student also faces future criminal charges, courts do give the student the right to counsel in disciplinary hearings at state colleges, as explained above, beginning at page 48.

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<sup>22</sup> One exception is *French v. Bashful*, 303 F.Supp. 1333, 1338 (E.D.La. 1969).

Seavy seems to suggest that intelligent people (e.g., students) should have the same legal rights as stupid people (e.g., common criminals, pickpockets). The law in the USA actually gives stupid people more legal rights than intelligent people.<sup>23</sup> This backwards logic is explained partly by entitlements from President Johnson's war on poverty and subsequent government programs, and partly from judicial sentiment that stupid people *need* more help in dealing with government agencies.

In 1970, the U.S. Supreme Court in *Goldberg v. Kelly* created a new body of law concerning due process in an administrative hearing, distinct from full due process in criminal courts. Five years after *Goldberg*, Judge Henry J. Friendly surveyed due process requirements and concluded that any right to counsel is less fundamental than an unbiased tribunal, notice, opportunity to be heard, and three other factors. Friendly, "Some Kind of Hearing," 123 UNIV. PENN. LAW REVIEW 1267, 1278-1289 (1975). As evidence of the importance of this article, it has been cited in eleven opinions of the U.S. Supreme Court. See, e.g., *Parham v. J. R.*, 442 U.S. 584, 605, n.14 (1979); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Sims v. Apfel*, 530 U.S. 103, 110 (2000).

A list of some of the major law review articles on this topic is given at page 74, below.

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<sup>23</sup> See e.g., welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970); professors compared to welfare recipients in *Toney v. Reagan*, 467 F.2d 953, 958 (9th Cir. 1972); parents of misbehaving pupils in *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972). Each of these cases are discussed above.

## Discussion

This subject is difficult to discuss because there are so many valid points of view: (1) academics who are distrustful of litigators, (2) a terrified accused student, (3) idealistic people who want to maximize fairness, (4) college administrators worried about financial cost of more due process, (5) colleges are allegedly paternalistic to students, (6) futility that more due process would probably not change the result.

### view of professors

Above, beginning at page 8, I listed some reasons why lawyers are not welcome on college campuses. In general, professors and college administrators want to quickly determine the Truth in a disciplinary committee hearing, without being burdened by all of the formal procedure of a criminal trial. These academics are supported by judges who note that there is neither deprivation of life nor liberty<sup>24</sup> at a college hearing, so the hearing does not need the full due process of a criminal trial, and there is no requirement that an accused student be represented by an attorney.

### view of accused

Judges in *Wasson* and *Jaksa* held that, when the “prosecutor” in a disciplinary hearing at a college is *not* an attorney, there is no need for the student to have an attorney. This judicial view is overly simplistic. The judges simply assume, with no evidence, that a 20 y old college student — probably terrified of being in the worst trouble of his life — can easily match wits with professors and college staff members who may be two or three times his age. And the fact that the “prosecutor” is not an attorney is of little comfort to the accused student, when the “prosecutor” may be a college staff employee who may have experience in dozens, or even hundreds, of previous disciplinary hearings.

A law review article makes another point:

A college or school might feel that use of counsel is too burdensome in routine disciplinary expulsions. The short answer to the school’s claim is that what seems to the administrator a minor problems may be to the student the disaster of his life. [footnote omitted] anonymous, "Developments in the Law: Academic Freedom", 81 HARVARD LAW REVIEW 1045, 1141 (1968). And recall Prof. Seavey’s remark about denying to students legal protections given to a pickpocket, quoted at page 67, above.

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<sup>24</sup> The words “life” and “liberty” are mentioned in the Fourteenth Amendment to the U.S. Constitution, so these words have great legal significance.

### idealism

From an idealistic viewpoint, we would want maximum fairness for the accused. Judges and academics who want a quick hearing on campus would discard the cumulative wisdom of the English-American judicial system, which has evolved over hundreds of years, to develop rules of procedure for fair criminal trials. In an idealistic perspective, both private colleges and state colleges *could* provide the following due process protections in disciplinary hearings:

- allowing attorney for the accused to read all written evidence against the student in advance of the hearing.
- allowing an accused student to have an attorney present at hearings.
- giving the accused the right to confront all witnesses against him/her.
- allowing the accused to present evidence and call witnesses.
- providing a court reporter to make a verbatim transcript of hearing.
- allowing the public and/or journalists to attend, but only if the accused wishes

### cost

An idealist would say these procedural safeguards in criminal trials also make sense in hearings for misconduct in colleges, because we should *not* sacrifice fairness on the altar of economy and convenience.

Providing due process protections will increase costs of disciplinary hearings. I don't see such costs as a waste of money. Aside from increasing fairness to the accused, the procedure provides a sincere lesson in citizenship to both students and professors involved.

There are dozens of court cases cited above involving a college that expelled or suspended a student. That is just the tip of the iceberg: for every reported appellate case, there are many more unreported cases that are not appealed. Having more than minimal due process at disciplinary committees in state colleges will help motivate judges to grant summary judgment against expelled students, which may reduce litigation expenses of colleges.

Some of the case law involving suspensions or expulsions from college is a remnant of either civil rights demonstrations that began in the late-1950s, or anti-Vietnam war demonstrations in the 1960s and 1970s. In those cases, a college may be suddenly be burdened with hearings for dozens or hundreds of students who participated in occupations of campus buildings, vandalism, or disruption of classes. That is a different scale than the steady trickle of cheaters and plagiarists every year.

Note that there is little cost or harm to the college if an accused student were *permitted* to hire an attorney (paid by the student), and bring that attorney to the hearing, *but* the attorney can not speak for the accused, and the attorney can not cross-examine witnesses. While such an attorney might be denigrated as a “potted plant”, the attorney could whisper in the accused’s ear or pass a written note to the accused, and still be useful to the accused.

no bias in colleges?

During my 13 years as a full-time student in colleges, and during my 10 years as a professor of electrical engineering, I saw occasional cases of student misconduct, as well as various students with abysmal academic performance. In general, professors seem to want to give students another chance to succeed, instead of failing or expelling students. Expelling students decreases a college’s revenue from tuition, and sometimes generates a public relations problem, or even litigation,<sup>25</sup> so — if college administrators have any bias — the administrators would prefer not to expel students.<sup>26</sup> Attorneys for grieved students often portray a college as malicious, while my view is that colleges are generally — but not always — benevolent.

I am more concerned about having due process in disciplinary hearings on campus when there are First Amendment (e.g., freedom of speech) implications to the alleged misconduct. It is easy for academic administrators to want to improperly suppress speech that annoys them — or annoys benefactors of the university.

futility

Most defendants in criminal trials are found guilty. When there is serious doubt about guilt of a defendant, an ethical prosecutor should decline to prosecute.<sup>27</sup> Despite the “obvious guilt” of the defendant, we still have criminal trials with elaborate procedures to protect the legal right of the accused, who is facing a possible prison sentence. Having a public trial also helps inform, and remind, the public of the wrongfulness of criminal behavior.

I suspect that most defendants in disciplinary hearings at colleges are found guilty. When there is serious doubt about the guilt of a defendant, professors and administrators don’t want to waste their time preparing and prosecuting marginal cases. Therefore, marginal cases are likely not prosecuted by the college. As mentioned above in this essay, there are fewer due process

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<sup>25</sup> The ten years of litigation in *North* is an egregious example. See page 29, above.

<sup>26</sup> A similar point is made by Judge Posner in *Osteen*, 13 F.3d at 226, quoted above.

<sup>27</sup> American Bar Association Standards Relating to the Administration of Criminal Justice, Standard 3-3.9 (1992).

protections in student disciplinary hearings than in criminal trials. But having more due process is unlikely to affect the result, as explained in the next paragraph.

Consider a student who blatantly plagiarizes by verbatim copying of several paragraphs of text from a book into the student's term paper, *both* without citing the source *and* without indicating that the copied text is a quotation. No amount of huffing and puffing by an attorney will disguise the fact that this is blatant plagiarism. It is a waste of the student's money — and a waste of the college's resources — to produce and evaluate specious excuses for blatant plagiarization. (To prevent being misunderstood, let me say that — as someone familiar with the law of plagiarism<sup>28</sup> — doubtful cases of alleged plagiarism do exist, but it is *not* doubtful when there is verbatim copying of several paragraphs, *both* without citing the source *and* without indicating that the copied text is a quotation.)

There are many cases involving a student suing a college that are cited in this essay, and the college won nearly all of those cases. The few cases won by students can be divided into two groups:

1. Archaic cases from the civil rights or anti-Vietnam war eras during the 1960s and early 1970s, in which some state college administrations blatantly violated civil rights of students who had offended the administrators or community. For example, *Dixon*, *Esteban*, *Scoggin*, and *French*.
2. Occasional cases where the college administration behaved unreasonably. For example, *North* and *Gabrilowitz*.

Not only is the probability small that students will win due process litigation against a state college, but also when the students win, all they receive is more process (i.e., a hearing). The result of more due process is probably the same as before: the accused student is either suspended or expelled. This makes litigation by students against colleges futile, unless a state college has violated the First Amendment rights of the students, or unless a state college had engaged in some legally impermissible discrimination (e.g., racial, gender, etc.) against the students.

As mentioned above in the case of *Kimberg v. University of Scranton*, neither party nor the judge could find the leading case after doing legal research. I suspect that, in many cases, plaintiffs hire attorneys who are not specialists in education law, and these attorneys simply *guess* — wrongly — that disciplinary hearings at colleges involve similar legal rights to a defendant in a criminal case. Many attorneys hate doing legal research.<sup>29</sup>

Where an attorney could really be useful to an accused student is in cases involving First Amendment rights (e.g., freedom of speech) of the student. An attorney could remind the disciplinary committee of the admonition in *Tinker v. Des Moines Independent Community School*

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<sup>28</sup> Standler, Plagiarism in Colleges in USA, <http://www.rbs2.com/plag.htm> (Feb 2000).

<sup>29</sup> See, e.g., Standler, Why do Legal Research?, <http://www.rbs2.com/legres.pdf> , (Mar 2005).



*District*, 393 U.S. 503, 506 (1969) (Neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”) and other important constitutional principles.

### Conclusion

1. Private colleges are required to follow their own rules, but have no constitutional requirement to provide due process to accused students. Private colleges may legally forbid an accused student from bringing an attorney to a disciplinary hearing.
2. *Wasson* and *Jaksa* — and their progeny — hold: *if* the state college does not use a “prosecutor” who is an attorney, then the state college may legally forbid an accused student to bring an attorney to a disciplinary hearing. Alternatively, if the state college permits the accused student to bring an attorney to the hearing, then the state college may restrict the attorney’s role to an observer (i.e., “potted plant”), or privately advising the accused student, *but not* representing the accused student in the traditional courtroom way (e.g., speaking for the accused student, cross-examining witnesses, objecting, etc.). Note that there is a split amongst courts, in that Missouri still follows the rule in *Esteban* (and West Virginia the rule in *North*) that allows an accused student to have an attorney at a disciplinary hearing.
3. There is a small line of cases (page 48, above) that involve a college disciplinary committee hearing for conduct that is essentially the same as a forthcoming criminal trial. In such cases, courts agree that the state college must allow the accused student to bring an attorney to the hearing. However, one case, *Gabrilowitz*, involved facts in which the attorney would only advise the accused student, but *not* cross-examine witnesses.
4. My legal research has found *no* case in which a college was ordered to provide a no-cost attorney to an indigent student who is accused in a disciplinary hearing. The most due process that an accused student can obtain is to be allowed to bring an attorney to the hearing, and — perhaps — for that attorney to cross-examine witnesses.

Note that not only is there a low level of due process (i.e., compared to a criminal trial for a misdemeanor) for disciplinary hearings on state college campuses, but also judges have poorly articulated the reasons for the low level of due process. In my opinion, the reluctance of judges to establish minimum procedural rules for disciplinary hearings at state colleges is analogous to the complete abstention of judges in academic decisions by colleges.<sup>30</sup> So even in disciplinary cases that are discussed in this essay, it seems that the college nearly always wins litigation.

When an accused student is forbidden by the college’s rules from bringing an attorney to a disciplinary hearing on campus, the student can still hire an attorney and obtain advice from that

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<sup>30</sup> See, e.g., Standler, Academic Abstention, <http://www.rbs2.com/AcadAbst.pdf> (June 2007).

attorney, although the attorney can not attend disciplinary hearings. Attorneys are experienced in reviewing evidence and crafting persuasive rhetoric, so attorneys can draft material that may help an accused student in making an articulate presentation to the hearing on campus.

Writing in 1989, Douglas Richmond concluded: “With no significant case law developments since *Gabrilowitz* in the late 1970’s, a general expansion of students’ right to counsel through allowing assistance by counsel at most suspension or expulsion proceedings seems improbable.”<sup>31</sup> In January 2011, Mr. Richmond’s prediction has been accurate for more than twenty years, and I agree that his prediction will continue to be accurate.

### **List of Law Review Articles**

The following list is *not* a bibliography for this essay. The judicial opinions cited in the text and footnotes above are the principal authority for the law described in this essay. In choosing articles to read, I have concentrated on articles since the year 1985, and neglected many of the earlier articles.

Curtis J. Berger and Vivian Berger, “Academic Discipline: A Guide to Fair Process for the University Student,” 99 COLUMBIA LAW REVIEW 289 (March 1999).

William G. Buss, “Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process,” 65 IOWA LAW REVIEW 1 (Oct 1979).

Fernand N. Dutile, “Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?” 29 JOURNAL OF COLLEGE AND UNIVERSITY LAW 619 (2003).

Edgar Dyer, “Off-Campus Behavior of Students in Higher Education and the Jurisdiction of Institutional Codes of Conduct,” 208 WEST’S EDUCATION LAW REPORTER 1 (15 June 2006).

Joseph M. Flanders, “Academic Student Dismissals at Public Institutions of Higher Education: When is Academic Deference Not an Issue?” 34 JOURNAL OF COLLEGE AND UNIVERSITY LAW 21 (2007).

Henry J. Friendly, “Some Kind of Hearing,” 123 UNIV. PENNSYLVANIA LAW REVIEW 1267 (June 1975).

Jack L. B. Gohn, “Seeking Justice in Quasi-Judicial Proceedings: Three Modest Proposals,” 39 MARYLAND BAR JOURNAL 42 (Feb 2006).

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<sup>31</sup> Douglas R. Richmond, “Students’ Right to Counsel in University Disciplinary Proceedings,” 15 JOURNAL OF COLLEGE AND UNIVERSITY LAW 289, 312 (Winter 1989).

Robert B. Groholski, Comment, "The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law," 19 NORTHERN ILLINOIS UNIVERSITY LAW REVIEW 739 (Summer 1999).

Douglas R. Richmond, "Students' Right to Counsel in University Disciplinary Proceedings," 15 JOURNAL OF COLLEGE AND UNIVERSITY LAW 289 (Winter 1989) (good legal research).

Warren A. Seavey, "Dismissal of Students: 'Due Process'," 70 HARVARD LAW REVIEW 1406 (June 1957).

Lisa L. Swem, Student Note, "Due Process Rights in Student Disciplinary Matters," 14 JOURNAL OF COLLEGE AND UNIVERSITY LAW 359 (Fall 1987) (good legal research).

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