UNT DALLAS COLLEGE of LAW

2021 ON • THE • CUSP 2022

LAW REVIEW

"THE RIGHT TO COUNSEL IN DISCIPLINARY PROCEEDINGS IN PUBLIC UNIVERSITIES"

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Students across the United States believe universities can do more to safeguard basic due process protections in university disciplinary proceedings. Samantha Harris, vice president of policy research at the Foundation of Individual Rights in Education, in reporting the results of a recent Foundation survey of over 2,200 college students from all 50 states, criticized universities for *failing to provide students with basic legal protections*.[1] She observed that:

> There's a vast gulf between the robust protections that students want and to which they are morally entitled, and the meager protections that most colleges actually provide . . .Campus proceedings can have permanent, life-altering consequences. It's time for colleges and universities to start listening to their students and providing safeguards that reflect the seriousness of these processes.[2]

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[1] Grace Gottschling, *SURVEY: 'Vast Majority' of College Students Demand Due Process*, CAMPUS REFORM (Jun. 13, 2018 at 4:07 PM), https://www.campusreform.org/?ID=11016.

[2] *Id.*

The United States Supreme Court has provided some guidance on the parameters of Due Process Clause protections for students in the context of disciplinary proceedings. The Court has treated students in matters involving academic sanctions differently than matters involving disciplinary proceedings. The Court instructs that courts should be much more deferential to the academic judgment of school administrators in academic proceedings versus disciplinary matters. The important question in both contexts is how much process is due to a student in disciplinary proceedings in public institutions of higher education? Even in the context of disciplinary proceedings however, many courts, citing the increased cost and complexity of such disciplinary proceedings, have often resisted fully *judicializing* due process in student disciplinary proceedings.[3]

> Even if a student has a constitutional right to *consult* counsel . . . 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 perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation . . . . The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc."[4]

In spite of those concerns, when balancing the rights of students, who are paying what is often significant tuition and incurring substantial debt in return for something of greater value (e.g., education), the time has come to afford students the full protections of the Due Process Clause in the imposition of disciplinary sanctions by public universities. This article addresses (1) what due process rights are; (2) explains the difference between academic and disciplinary proceedings; and (3) describing the right, if any, to counsel in an academic setting.

I. STUDENTS HAVE A PROPERTY INTEREST IN EDUCATION

In *Goss v. Lopez,* the United States Supreme Court recognized the due process rights of Columbus, Ohio public high school students who were suspended from several schools without hearings prior to their suspensions, or within a reasonable time thereafter.[5] The students were suspended for participating in demonstrations which resulted in their arrests.[6] "The Fourteenth Amendment

[3] *See* Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993); *see also* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925–26 (6th Cir. 1988); *see also* Gorman v. Univ. of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988).
[4] *Osteen*, 13 F.3d at 225.
[5] 419 U.S. 565 (1975).
[6] *Id.* at 570.

forbids the State to deprive any person of life, liberty, or property without due process of law."[7]

Public universities, like public elementary and secondary school systems, are state institutions, and therefore, their actions implicate the procedural protections of the Due Process Clause of the Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[8] On the other hand "[i]n private institutions, rights tend to be contractual rather than Constitutional and are based on the private institutions' own documents."[9] Here, we have state actors and thus constitutional rights are implicated, including due process rights.

While recognizing the Court's reluctance to interfere in the operation of the nation's public-school systems, the Court in *Goss* nonetheless recognized the *protected property interest* in the students' public education.[10] The Court specifically noted that "[a]t the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."[11] "The fundamental requisite of due process of law is the opportunity to be heard . . . ."[12]

It's not just a property interest that implicates due process; there is also a liberty interest at stake. The Court also noted that the deprivation of that protected property interest impacts the liberty interest of suspended students, recognizing the potentially negative impact the institution's disciplinary proceedings may have on "a person's good name, reputation, honor, or integrity . . . ."[13] The essence of the protected liberty interest is the damage a deprivation of the liberty interest may have on "the students' standing with their fellow pupils and their teachers as well as interfer[ing] with later opportunities for higher education and employment."[14]

The Court also recognized that once due process is due, courts must tread carefully in the "[j]udicial interposition in the operation of the public school system of the Nation . . . requiring care and restraint . . . ."[15] "[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[16] So while the Court recognized that the Due Process Clause must be applied in a manner consistent with the circumstances of each individual situation, the Court fully recognized the potentially negative

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[7] *Id.* at 572.
[8] U.S. CONST. amend. XIV, § 1.
[9] Nona L. Wood & Robert A. Wood, *Due Process in Student Discipline: A Primer*, 26 THE J. OF C. AND U. STUDENT HOUSING, no. 1, at 1.
[10] *Goss,* 419 U.S. at 579.
[11] *Id.*
[12] *Id*. (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
[13] *Id.* at 574 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).
[14] *Id*. at 575.
[15] *Id.* at 579 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
[16] *Id*. at 578 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

consequences of disciplinary proceedings on the future of students.[17] Those decisions may possibly leave serious and sometimes indelible marks on students' reputations, inhibiting educational opportunities and potential future success. Therefore, student disciplinary proceedings are important and consequential, and arguably, should be accompanied by the full range of Due Process Clause protections.

II. ACADEMIC SANCTIONS

Although the Court has recognized the importance of Due Process Clause protections in student disciplinary proceedings, it has shown a reluctance to require the same level of due process in assessing the academic dismissal process. For example, in *Board of Curators of the University of Missouri v. Horowitz*, the Court drew a sharp distinction between academic decisions and disciplinary actions by university administrators.[18] In *Horowitz,* a student was dismissed from medical school during her final year of studies for failing to meet academic standards.[19] The student sued the university alleging a violation of her due process rights because she was not afforded all of the procedural safeguards guaranteed by the Fourteenth Amendment.[20]

The Supreme Court rejected this argument; reasoning that students should not necessarily be entitled to the full range of procedural protections afforded by the Due Process Clause in the context of academic.[21] The Court noted that, prior to her dismissal, the student's academic performance was evaluated by her professors and that she was informed of the results of those academic reviews, including her need for "radical improvement" to avoid dismissal from the program.[22] Therefore, after providing the student with opportunities for improvement, with little success, the Court found that the University's dismissal procedure was sufficient under the Due Process Clause.[23]

Consistent with its analysis in *Goss v. Lopez*, the Court again stressed that flexibility should be afforded to public universities in their application of due process to certain situations. The Court stated that "[t]he need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal."[24]

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[17] *Id.*
[18] 435 U.S. 78 (1978).
[19] *Id*. at 79.
[20] *Id*. at 80.
[21] *Id.* at 85, 90.
[22] *Id*. at 80–82.
[23] *Id.* at 85.
[24] *Id.* at 86.

The Supreme Court's analysis is understandable. Courts are much less positioned to assess academic performance than to pass judgment on a university administrator's application of established disciplinary standards of conduct and on the procedures used in applying those standards of conduct. Absent "clearly arbitrary or capricious"[25] substantive due process violations, "[c]ourts are particularly ill-equipped to evaluate academic performance."[26]

Consideration of academic sanctions often involves more evaluative and subjective considerations by professors and school administrators; those circumstances are less suited to the application of objectively defined rules and standards of conduct. A decision based upon a failure to meet academic standards will not violate a student's due process rights unless the decision is "based on bad faith, ill will or other impermissible ulterior motives."[27]

III. DISCIPLINARY SANCTIONS

In contrast to how the Court has viewed academic sanctions, the Court has viewed disciplinary proceedings quite differently. Depriving a student of the ability to continue pursuing an education at a public university clearly implicates procedural protections of the Due Process Clause. Generally, universities, for the most part, provide some level of process that comports with the Constitution's due process requirements. The ultimate question is how much process is due. The Supreme Court's seminal decision in *Mathews v. Eldridge* provides guidance on how to analyze the question.[28] *Mathews* involved the termination of a citizen's social security disability benefit payments and answered whether the Due Process Clause required an opportunity for an evidentiary hearing before benefits could be terminated.[29]

The Court acknowledged that it "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."[30] "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[31] The Court addressed the "extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest . . . ."[32]

While acknowledging that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands,"[33] the resolution of

[25] *Id.* at 91 (quoting Mahavongsanan v. Hall, 529 F.2d 448, 449 (1976)).
[26] *Id.* at 92.
[27] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 220 (1985) (citing Ewing v. Bd. Of Regents, 559 F.Supp. 791, 793 (E.D. Mich 1983)).
[28] Mathews v. Eldridge, 424 U.S. 319 (1976).
[29] *Id.* at 323.
[30] *Id.* at 333.
[31] *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
[32] *Id.*
[33] *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

"whether the administrative procedures . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected."[34] Importantly, the Court then proceeds to identify three distinct factors to be considered in conducting that analysis:

> 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.[35]

The Court elaborated on its analysis of these factors, identifying other relevant considerations:

- ◊ the degree of potential deprivation that may be created by a particular decision[36]
- ◊ the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards;[37] and
- ◊ the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.[38]

The application of these factors is significantly impacted by the characterization of the relationship between students and their educational institutions in the context of disciplinary sanctions. In. *Horowitz*, the Court, in contrasting disciplinary proceedings from academic evaluation, noted that "[t]he educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, 'one in which the teacher must occupy many roles—educator, advisor, friend, and, at times, parent-substitute.'"[39] The court specifically declined "to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."[40]

Even in *Goss*, where the Court stressed that the Due Process Clause protections of notice and hearing procedures are "rudimentary precautions against

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[34] *Id.* at 334.
[35] *Id.* at 335.
[36] *Id.* at 341.
[37] *Id.* at 343.
[38] *Id.* at 348.
[39] Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 90 (1975) (citing Goss v. Lopez, 419 U.S. 565, 594 (1975).
[40] *Horowitz*, 435 U.S. at 90.

unfair or mistaken findings of misconduct and arbitrary exclusion from school,"[41] the Court cautioned that "further formalizing the suspension process and escalating its formality . . . may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."[42]

In many ways, the focus on the importance and the *beneficial aspects* of the faculty-student relationship is misplaced. The concern over the increased judicial presence in the academic community masks the student's right to continuing his or her pursuit of a higher education degree. It's widely accepted that, a student's academic pursuits are a precursor to success in the employment marketplace. While acknowledging the importance of the academic process and the relationship between the student and the administration, the consequences of an adverse decision by a public institution in a disciplinary proceeding can have enormous negative consequences for students.

A study of lifetime earnings by the Georgetown University Center on Education and the Workforce, based on an analysis of the 2007-2009 American Community Survey, concluded that the economic benefit associated with a college degree is enormous:

> With median earnings of $56,700 ($27.26 per hour), or $2.3 million over a lifetime, Bachelor's degree holders earn 31 percent more than workers with an Associate's degree and 74 percent more than those with just a high school diploma. Further, obtaining a Bachelor's is also the gateway to entering and completing graduate education. About one-third of Bachelor's degree holders obtain a graduate degree. All graduate degree holders can expect lifetime earnings at least double that of those with only a high school diploma.[43]

When balancing the concern over upsetting a student-teacher relationship against the increased judicial presence in the academic community, the importance of effective legal representation in the student disciplinary process should not be underestimated. A student who has a disciplinary sanction imposed by a public university likely faces the prospect of potentially limited academic options and the reputational consequences of that sanction. The protections afforded by the Due Process Clause, including the right to the *opportunity to be heard*, should include the right to be effectively represented by counsel in all meaningful stages of the university disciplinary process.

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[41] *Goss*, 419 U.S. at 583.
[42] *Id.*
[43] Anthony P. Carnevale, et al., *The College Payoff: Education, Occupations*, *Lifetime Earnings*, GEORGETOWN UNIVERSITY CENTER ON EDUCATION AND WORKFORCE 4 (2011) https://cew.georgetown.edu/wp-content/uploads/collegepayoff-completed.pdf.

IV. THE RIGHT TO COUNSEL IN DISCIPLINARY PROCEEDINGS

"The stakes are high for university students accused of misconduct. When expulsion is a possible sanction, an accused student faces a financial loss and a stigma that may preclude admission to another university or access to a career that requires a clean conduct record."[44]

In the Seventh Circuit's oft-cited student due process case, *Osteen v. Henley*, the court squarely rejected a student's argument of entitlement to a right to counsel in a university disciplinary proceeding.[45] Osteen sought the right to be represented in a disciplinary proceeding seeking his expulsion from a public university for committing an assault on two students.[46] The court of appeals held that while "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."[47]

While acknowledging that a student has a constitutional right to *consult* counsel,

> [W]e 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 of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation.[48]

In fact, disciplinary proceedings that can have the previously noted significant consequences on a student's future *are* in the nature of adversarial proceedings. The Court argues that "the cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc" by judicializing university disciplinary proceedings.[49]

However, whether characterized as a property or a liberty interest, a student's continued pursuit of his or her academic pursuits and the potentially significant personal and financial detriments they face as a result of the imposition of disciplinary sanctions, demands the right to be fully represented by counsel. While universities cite the cost to the university of *judicializing* the student disciplinary process, the cost of not judicializing the process can be arguably far

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[44] Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN. ST. L. REV. 1001, 1001 (2016).
[45] Osteen v. Henley, 13 F.3d 221 (7th Cir. 1993).
[46] *Id.* at 225.
[47] *Id.*; *see e.g.* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 925–26 (6th Cir. 1988); Gorman v. Univ. of Rhode Island, 837 F.2d 7, 16 (1st Cir.1988).
[48] *Osteen,* 13 F.3d at 225.
[49] *Id*.

greater to the student from a due process standpoint. The right of counsel to fully participate in the disciplinary proceeding results in a process that will be fair to all parties, and it would ensure accountability by the university as it imposes sanctions for violations of university standards of conduct. That is the balance that should be expected in applying the protections afforded by the Due Process Clause.

The "fundamental requirement of due process is the opportunity to be heard . . . 'at a meaningful time and in a meaningful manner.'"[50] The Court in *Mathews v. Eldridge* identified three factors to consider when determining what constitutes the opportunity to be heard "in a meaning manner" in the context of student disciplinary proceedings:

- ◊ The "private interest" of the student in an erroneous application of the disciplinary process is significant, [51]
- ◊ The "risk of an erroneous deprivation" of the student's private interest is significant if the "procedures used" do not include the full participation of counsel of the student's choosing, and a recognition of what should clearly constitute the "probable value" to the student and the university of the full participation of the student's counsel in the university's adversarial disciplinary process,[52] and
- ◊ What should prevail is the Government's interest in fairness and accountability that the "additional procedural requirement" of representation of counsel will entail, even if there are additional fiscal and administrative burdens placed on the university in its prosecutorial efforts.[53]

The economic consequences of increasing student due process protections in disciplinary proceedings cannot be underestimated. Thus, while balancing these interests, a court applying the Mathew factors should weigh in favor of increasing student due process protections for students subject to serious disciplinary sanctions.

Acknowledging that judicializing public university disciplinary may create disparity between students that can afford representation and those that cannot, the future for all students will be positively impacted by a standard that allows representation in disciplinary proceedings, especially as the standard evolves and the process becomes more commonplace. The market will adapt to a changing disciplinary environment, as occurs in most legally challenging evolution.

V. STATE LEGISLATION

In fact, several states have recently passed legislation that guarantees a student's due process right to counsel during the state university disciplinary

[50] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
[51] Mathews v. Eldridge, 424 U.S. 319, 332–36 (1976).
[52] *Id.*
[53] *Id.*

process. In 2013, the State of North Carolina passed the "Student Administrative Equality Act" which, *inter alia*, provides the right to be represented in disciplinary proceedings by a licensed attorney, who, at the student's expense, "may fully participate during any disciplinary procedure or other procedure adopted and used by the constituent institution regarding the alleged violation."[54]

The legislation was introduced after student members of the Sigma Alpha Epsilon (SAE) Fraternity at the University of North Carolina at Wilmington faced formal expulsion for violating university anti-hazing regulations and for providing alcohol to minors in violation of the North Carolina Criminal Code.[55]

> Although the penalty was severe, the students faced a university attorney while being denied a reciprocal right to legal counsel. Twice they requested but were denied legal representation, each time in response to questions from the administration about the alleged alcohol-related violations. Since what they said on campus could lead to misdemeanor convictions in the criminal justice system, they essentially would have to give up their due process rights to an attorney and remain silent . . . .[56]

At the time, the University's policy was to permit an accused student to have an advisor from within the university to "advise the respondent concerning the preparation and presentation of his/her case . . . not speak for the respondent."[57] How fair, or unfair, is that?

In April 2015, the State of Arkansas passed HB 1892, which, similar to the North Carolina legislation, provides that a student "who has received a suspension of ten (10) or more days or expulsion may request a disciplinary appeal proceeding and choose to be represented at the student's expense by a licensed attorney . . . who . . . may fully participate during the disciplinary appeal proceeding."[58]

In April 2015, the State of North Dakota passed Section 15-10-56 of the North Dakota Century Code, which similarly provided:

> Any student enrolled at an institution under the control of the state board of higher education has the right to be represented, at the student's expense, by the student's choice of either an attorney or nonattorney advocate, who may fully participate during any disciplinary proceeding or during any other procedure adopted and used by that institution to address an alleged violation of the institution's rules or policies.[59]

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[54] N.C. GEN. STAT. § 116-40.11 (West 2013).
[55] KC Johnson & Mike Adams, *The Student Right to Counsel*, FEDERALIST SOC'Y REV., 42, 44-45 (Aug. 2019).
[56] *Id.* at 45.
[57] *Id*. at 45.
[58] *Id*. at 46.
[59] N.D. CENT. CODE ANN. § 15-10-56 (West 2015).

The legislative history of Section 15-10-56 (SB 2150) speaks volumes about the nature of the problem and the justification for its passage. When SB 2150 was introduced by the sponsoring senator, he captured the underlying basis for its passage:

> It is designed to bring fairness to a process that is flawed and unfair in its design and application . . . . It encompasses the principle that the state must respect all the legal rights that are owed to a person. This bill provides that a student at our university system or also organization who was accused of committing an[] act that could lead to his or her expulsion or suspension is allowed legal coun[s]el who can represent the student during the hearing process. . . . A stigma visited upon him by a flawed process without d[ue] process will be with him for the rest of his life and this [is] unacceptable.[60]
> The author proposing the bill went on to testify:
> As I understand it . . . in the process . . . often the student or even sometimes the people from the campus are not fully apprised that anything you say at one of these university type hearings is admissible in the court of law. So you have an 18 year old arguing with an experienced lawyer without . . . the benefit of having an attorney present to speak for him. What happens then is a student who is going to be expelled . . . you spend hours trying to teach this 19 year old how to be a lawyer and protect his rights because he may say something that is admissible in . . . court . . . later.[61]

Section 15-10-56 specifically defines *fully participate* to include "the opportunity to make opening and closing statements, to examine and cross-examine witnesses, and to provide the accuser or accused with support, guidance, and advice."[62]

Both statutes specifically exclude the right to counsel in proceedings involving academic dishonesty or misconduct.[63] That exclusion recognizes the important distinction between disciplinary proceedings involving clearly defined standards of conduct versus academic sanctions, which often involve academic judgment and discretion. In those situations where disciplinary violations warrant severe sanctions, regardless of the university setting, the consequences demand the full representation of counsel.

VI. CONCLUSION

[60] *Relating to Student and Student Organization Disciplinary Proceedings at Institutions Under the Control of the State Board of Higher Education: Hearing on S.B. 2150 Before the House Judiciary Comm*, 2015 LEG., 64TH SESS. 45 (N.D. 2015) (statement of Senator Holmberg, Member, Senate Judiciary Comm.).
[61] *Id.* at 46.
[62] N.D. CENT. CODE ANN. § 15-10-56.
[63] N.C. GEN. STAT. § 116-40.11; N.D. CENT. CODE ANN. § 15-10-56.

The right of students to be fully represented by counsel in public university disciplinary proceedings should be recognized as an essential element of due process protections. While the university administration may incur additional administrative and fiscal responsibilities, the value of a higher education degree cannot be disputed. The deprivation of a student's ability to complete that endeavor, or the permanent stigma associated with state-imposed disciplinary sanctions, clearly warrant full due process protections, specifically including the right to be fully represented by counsel during those consequential proceedings.

Granted, the full participation of counsel in state-sanctioned disciplinary proceedings may pose challenges for universities and students. However, the importance of due process protections should prevail as universities and courts weigh the enormous consequences of serious disciplinary proceedings on the future job prospects, and the personal harm which students will inevitably encounter in those situations.