

Due Process in the Realm of Higher Education:  
Considerations for Dealing with Students Rights

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## **Abstract**

Court decisions have laid out expectations of what due process procedures need to be followed in student disciplinary cases and academic dismissal cases due to poor academic performance. This paper will give show where due process comes from and how it found its way into higher education. It will show that there are differences in the ways public and private higher education institutions need to maintain different levels of procedures in the judicial affairs function. In addition, it will show that an institution that goes above the minimum standards of due process in their policies may put a student victim in an uncomfortable position. Information on due process is available through evaluating the outcomes of court cases and journal articles. The effects on a victim when due process standards are higher can be evaluated from research on victims having contact with their alleged violator, and my experiences in working with students as a Judicial Hearing Officer. The results show that due process standards differ between public and private institutions and much less then what procedures are required by the criminal courts. There is a difference between the due process rights that a student has as an alleged violator of a student conduct code and when they do not maintain academic standards. When an institution allows a higher then minimum standard of due process, and allows an accuser to have contact with a victim through the disciplinary process, it can be traumatic a student's development. Most importantly for the university is when due process standards are now followed, it can result in expensive lawsuits for the institution.

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## **Introduction**

Due process is a key component to what a student's rights are when dealing with the judicial affairs function of a higher education institution whether it be related to an academic or student conduct failure. These standards of due process layout what rights a student has when they are being processed through the campus judicial system. Even though due process is a key piece of the judicial process, it is often not understood by the student that is alleged to have violated their contractual obligations to the college. Since these due process procedures are less than what is required by criminal courts, they are often misunderstood by the student. For student conduct cases, there is a process that allows the accused student to make their case before being sanctioned by the college. At times because of the philosophy of the university, the minimal procedures that are allowable by law are increased to give more rights to the accused. When a victim is put into this position it is detrimental to the development of the student victim and puts the alleged violator in a position of power.

Research shows that due process differs for public versus private institutions. Using the minimum level of due process that courts have laid out is important for institutions to base their policies on. This allows college administrators to be flexible when it needs to add a greater level of due process if a case requires it. An effective use of adding a higher level of due process would be when college expulsion could be a possible outcome to a judicial case. When colleges set a level of due process that is too high in their college policies, such as allowing the face to face cross examination of a witness, it may allow the violator in a sexual assault case to have contact with the

victim again. As college administrators, this is not looking out for the best interests of the victim by allowing them do be questioned by their attacker.

Court cases beginning with *Powe v. Miles* makes the differentiation between the due process needed at public and private institutions. The courts found that students attending the publicly funded School of Ceramics at Alfred University had more due process rights than students enrolled in the private schools at Alfred (1968.) Some institutions go above the minimum due process requirements and allow in its policies the right for alleged student violators in disciplinary cases to ask questions directly to their accusers (State University of New York, College of Agriculture and Technology at Cobleskill 2006.)

### **Research Questions**

Throughout the course of this paper I will layout how due process relates to higher education, where it falls into the organizational structure, and what minimum standards are needed for due process. To accomplish this, there needs to be an understanding of where due process comes from and the history behind it. Doing so will layout a framework for who due process has an impact on and how it differs from the public and private sectors of higher education. In addition, it will show why these administrative disciplinary hearings differ from academic dismissals and the criminal courts.

I believe that there will be a difference in the public and private institutions due process since public institutions are in part publicly funded and get their power from state governments. Public institutions should be held to a higher standard of due process because of this association with the government. Since part of the purpose of

higher education, even through the discipline process is to educate its students, the conduct hearings should be less formal than a criminal court so that the student will be able to learn from their mistakes. To get a sense of these topics I will be reviewing United States law, court cases that are either precedent setting or recent cases that draw conclusions from precedent setting cases, journals, and textbooks.

## **Literature Review/Findings and Discussion**

### **Background of Due Process**

The Constitution and Bill of Rights were created to guarantee a set of minimum rights for people living in the United States. It gives protections to people from the government and agencies that are acting on behalf of the government. (Gehring 2000, 363.) Due Process is a concept that was formed when the Constitution and Bill of Rights were being written. In the Bill of Rights, it states that:

any person [may not] be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law (U.S. Constitution, Amendment V 1791.)

The amendment begins with not allowing the government to hold people accountable for the same crime more than once. However a student may be held accountable in criminal courts and on campus, these are considered to be two separate venues serving two separate purposes. It allows for guilty parties not to have to speak if it will incriminate them during hearing. Finally, it allows that no one will be deprived “life, liberty, or property” without first being entitled to due process. Due process being a set of procedures that are laid out to ensure a fair opportunity for the accused to have their side of a case heard.

Almost eighty years later, United States Constitutional Amendment XIV becomes more specific than Amendment V in regards to due process and who is not able to restrict the rights of United State citizens. This states that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law (Section 1, 1868.)

This amendment is specific in the fact that no state government or its agencies are able to make rules that restrict the rights of people that live in the United States. The two amendments are specific in the fact that “any person” not “any citizen” is entitled to life, liberty, and property without first having gone through due process. Given this, protections would be granted to international students as well (Gehring 2000, 368.)

The government expresses the idea that any person is guaranteed these rights more clearly three years after Amendment XIV was passed. United States Code 42, section 1983 clarifies that the government should not restrict “any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” (1871.) Over the last century, it has been tried in the courts whether or not these rules of due process applies to higher education.

### Due Process in the University Structure

When observing the structure of an institution, you can see due process being implemented for student discipline in the academic affairs and the student affairs divisions. It is important to train university staff that may need to have knowledge of what due process is and when it needs to be used. Having prepared college staff in advance can reduce the chance of being involved in a lawsuit, and increase the chances



of winning if one should arise. This will result in decreased court and legal costs, lower the chance for the college to have to payout costly settlements, the costs of expert witnesses, and the cost of the manpower to prepare for a court case (Janosik 2004, 412.)

Looking closer at the student affairs division, due process is at work in different functional areas. Dungy breaks down the student affairs division into thirty one different areas (2003, 342-353). The primary area that due process would fall into is judicial affairs. The purpose of judicial affairs is to ensure that “academic integrity, ethics, and behavioral standards” that the university sets forth are being followed. This function also creates, interprets, creates, and maintains the application of the conduct codes of the institutions (Dungy 2003, 349). The judicial process is in place to serve two main functions: 1) to educate students of an institutions expectations through holding them responsible for their actions and 2) to protect the campus community (Pearson 2001, 218.)

There is not just one sturcture that is the best to put the judicial affairs function into the organization. Where it goes depends on many factors and circumstances at an individual institution. (Bowman and Deal 2003, 67). These include whether a campus is a commuter or residential campus, how large the student population is, is the university budget large enough to be able to fund a judicial position, and the organizational mission of the institution can determine which departments take on the judicial affairs function.

Campuses with a larger residential population and in turn having greater financial resources available, might make it more advantageous to create a separate department that deals strictly with the judicial affairs function. In a university of this

size, violations that could be considered a lower level offense such as music that is playing too loud in a residence hall, not signing in a guest to your hall, or smoking inside of a residence hall could be handled by a Residence Hall Director. More severe offenses including alcohol, drugs, disorderly conduct, and sexual misconduct among others would be handled at a higher level in an office dedicated to the judicial affairs function. At a residential institution during the fall 2005 semester, only 1.53% of conduct code violations were committed by off-campus students (Fishner 2006, A-4.) For a campus of all commuter students, it would seem that there would be less conduct violations since there are no students living on campus.

This type of school can be compared to a community college that is primarily a commuter campus. In this case there would not be a large number of alcohol and drug cases, noise problems, guest policy violations, and other problems that a residential campus faces in large numbers since students are not residing on campus. With limitations on staffing without having residential life professionals able to handle some of the judicial affairs functions and having a smaller number of conduct violations, this function may be better served by a Dean's Office or a Vice-President for Student Affairs.

Institutions can differ on where academic misconduct cases are handled. Depending on the organizational structure, cases that are in violation of academic standards such as cheating or plagiarism may be handled under the academic affairs division rather than under a department in the student affairs division. Teachers at times carry out the judicial function when having been witness to a violation of academic misconduct. It is important that faculty is aware of and provide a student due

process. They should also be following all institutional policies related to academic misconduct.

Regardless of where the judicial affairs function is placed, it is important to look at the role of judicial affairs in the institution and who is responsible for implementing and executing policies, and following through to see that consequences are completed. For every person that is added into the process, there are additional costs for the institution both in training employees and the man hours that are put into carrying out the judicial affairs function. Disseminating the process amongst a greater number of employees risks a consistency in the process, therefore training is important. Lack of training can result in a low level of quality and service of the employee, and can lead to mistakes that can be costly to the organization (Bowman and Deal 2003, 142). For the university, it could result in being sued by a student who was not given all of the rights that should have been afforded to them.

#### Criminal Courts versus Campus Proceedings

The distinction needs to be made that on campus disciplinary proceedings are not a criminal court proceeding. Even though a student may have been in violation of a criminal law, the campus is not responsible for carrying out any proceedings for the illegal act. Although at times, student conduct codes established by an institution may in part mimic already established laws. For example, possession of drugs could be a student conduct code and is already law. It is the conduct code that the college will hold the student accountable for not the law.

Stoner and Lowery created a model student conduct code to lend assistance and provide reasoning to creating a certain set of codes. One of the codes that they suggest

be established is to hold a student responsible when they are in “violation of any federal, state or local law” (2004, 29). This conduct code holds a student responsible for violating a law, and allows a campus to take action and hold the student responsible for their actions on campus. The federal, state, or local jurisdictions still have the option to hold the student responsible in a court of law.

While this conduct code is vague, it provides the institution a wide breadth of power. This wording for a conduct standard has been upheld as an appropriate standard for students. In the case of *Woodis v. Westark Community College*, Woodis was dismissed from her school after pleading no contest to a misdemeanor drug charge. Since she was found to have attempted to get a controlled substance using a forged prescription, as a student in a nursing program, she was suspended. The Eight Circuit U.S. Court of Appeals upheld that the conduct code is appropriate (1998). When a student enrolls at a campus with a standard of conducting themselves in a manner that is not in violation of any laws, the student is responsible for maintaining such a code. This is an instance of a code where a student can find themselves responsible both in criminal courts and through the on campus student conduct system.

A Resident Assistant contacts the University Police Department because they smell the odor of marijuana coming from a resident’s room. University Police come to the room and the resident consents to a search. In the room University Police find a bag a marijuana and rolling paper. It is at the discretion of the University Police Officer whether to charge the student criminally or not. Acting as an employee of the college, the officer would refer the student to be processed through the college judicial system. Ironically, from the experience of University Police Officers, students now are

more concerned of the consequences on campus rather than that of the criminal courts (Kowalski 2006; Reyes 2006.)

Although the court system can result in fines, jail time, and community service; for a student over the age of eighteen, the student's parents may never be aware of the situation. However, for a student under the age of twenty-one, a substance violation of either alcohol or drugs can result in the student's parents being notified of the incident (U.S. Department of Education 1998.) Regardless of the age of a student, subsequent violations of any kind could put a student's career at a university in jeopardy. Being suspended from an institution could result in not being able to be admitted into another institution and receiving a degree. The consequence of not earning a degree could be that a student would not be living up to their full potential.

If an officer makes the decision to process the student criminally and on campus, the student is responsible for completing both processes, including any consequences the courts and the campus decide upon. When going through the two separate systems there are differences in the due process procedures and rights that a campus and the courts are required to provide to the student. Some examples of these due process procedures in both include the use of lawyers, cross examination of witnesses, the burden of proof needed to find the accused guilty, and a trial by a jury of your peers. The amount of due process procedures that needs to be used differs as well depending on whether the institution is public or private.

For a student that is going through both processes, they believe that the person bringing the charges has the same level of proof that they need to show in the courts and the campus hearing in order for the student to be held responsible for their actions.

In truth, a student can be found responsible in a campus hearing and not guilty in the courtroom because of the different burdens of proof that need to be shown. In comparison to the burden of proof that is required in criminal courts, the evidence can be less compelling to make a finding that the student is responsible for violating a conduct code. To find someone guilty in the criminal courts, a standard of evidence termed beyond a reasonable doubt is used. This requires that the jury in the criminal court needs to be “fully satisfied, entirely convinced...that facts proven must...establish guilt (Black 1990, 161).

Black’s Law Dictionary (1990) lays out three other standards of proof which are cited from the most convincing evidence to the least. These are a range of what most institutions follow depending on their individual policies. Evidence that is “reasonably certain... [and] that truth of facts asserted is highly probable” (251) is clear and convincing evidence. Preponderance of the evidence is considered to be “more probable than not” (1182) that an event occurred. This is the standard of evidence that is used in civil trials. Finally, substantial evidence is “evidence that a reasonable mind might accept as adequate to support a conclusion” (1428).

#### Differences in Public and Private Institutions

Courts are careful that they do not to interfere in either academic or disciplinary situations where private institutions have made a decision in that case (Stoner and Bradley 2002.) *Powe v. Miles* decided in 1968 by the U.S. Court of Appeals for the Second Circuit shows the differentiation between the standards that are required in public versus private schools and determines why the two are different. This case examines the relationship that Alfred University has with their students. Alfred

University is predominantly a private school with a School of Ceramics which is publicly funded, and overseen by the State University of New York system.

Early in 1968 Alfred University passed a policy that required students to notify the Office of the Dean of Students at least 48 hours in advance of a demonstration. The code was put in place as a response to problems that other campuses were experiencing with student protests against the Vietnam War. During an Army ROTC exhibition that was taking place in May 1968, students staged a non-violent protest against requiring male students at Alfred to participate in the ROTC program. They did this without properly notifying the college as required by the policy. During the demonstration, the Dean of Students told the group of students and a faculty member to leave the field and that they were in violation of the school's policy. Some of the students left but seven remained. The Dean repeated his requested four times, twice to the students and twice to the faculty member. He then told the group that they were "provisionally suspended" and to pick up charges at his office in the afternoon and a hearing would be conducted. Of these students, four were enrolled in the private sector of Alfred University, and three were students of the College of Ceramics at Alfred.

When the hearing concluded, all of the seven students were suspended for the following academic year. The students petitioned the courts and requested to the courts that the decision for suspension be changed since the college violated the students' right to free speech. To determine whether or not the students' rights had been violated, the court viewed the students in the Ceramics College different than those in the Liberal Arts College. The United States Court of Appeals in their decision concentrated on the students enrolled in the College of Ceramics to determine if their constitutional rights

were violated since it is statutory college of the State University of New York System (1968.) Students enrolled in private colleges are not necessarily guaranteed all constitutional rights, even though their policies may reflect some of the constitution (Kaplin and Lee 1995, 54.)

If the actions of the Dean were considered to be state action, being that the action of suspending the students was performed as a delegated function of the government; the students of the College of Ceramics are guaranteed certain rights (Kaplin and Lee 1995, 47; *Powe v. Miles* 1968.) The students would be entitled to their first amendment right of free speech, if a policy that required advanced notification of demonstrations was not in place. All of the students suspensions were upheld since the policy for demonstrations was considered to be reasonable. The policy did not restrict the students' right to demonstrate, as long as advance notice be given (*Powe v. Miles* 1968.)

For a private institution's work to be considered state action, Kaplin and Lee layout three possible determinants for the act to qualify:

1. The organization is delegated by the government to carry out a specific tasks
2. The organization is performing a task that is usually one that is carried out by the government
3. A substantial piece of the "resources, prestige or encouragement" for the organization come from being involved with the government (1995, 47.)

In the case of *Powe v. Miles*, since the College of Ceramics was delegated by the State University of New York System to operate, the action of those acting on behalf of the college are considered to be state action.



Although the Constitution does not apply to private universities when they do not fall under state action, this does not mean that the institution is protected from the law. Employees and students do have rights certain legal rights when it comes to areas such as discrimination since the majority of institutions public and private receive some funding from the federal government (Kaplin and Lee 1997, 47.) An example of this aid from the federal government is in the form of student aid.

### Due Process in Higher Education Discipline

The concept of due process first had a precedent setting case for higher education in 1961. *Dixon v. the Alabama State Board of Education* provided a link to a public institution being a property right as set forth by the Fifth Amendment, and therefore setting a standard for public institutions needing to provide due process to their students. The case laid out minimal standards for students that are being expelled from their public institution.

Several African-American students that were involved in several protests were warned by the President of the college that demonstrations that they were taking part in were affecting the work of the college and the students. A few days after being warned, the six students that were expelled were classified as leaders in a protest at the State Capitol that involved over 600 students. The students that were expelled were given no advance notice and no chance to defend themselves before the decision to expel was made by the President of the college, with pressure coming from the Alabama State Board of Education.

The question was put forward whether or not due process was essential to have been provided to the students. In the court's decision there was a lengthy discussion of

whether a public education was a constitutional right and therefore students would have been allowed to have due process. While it was determined that a public education itself was not a constitutional right, what comes of public education could be considered liberty or property right as laid out in Amendments V and XIV. Without an education, a student 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” (Dixon v. Alabama State Board of Education 1961.)

At the conclusion of the majority opinion in Dixon v. Alabama State Board of Education, the U.S. Court of Appeals laid out a standard for future institutions to take into consideration before going to expel a student. The court gives two considerations for due process which include:

- Notice of the specific conduct violations that the college is holding the student responsible for violating and the grounds for the charges.
- A chance for the accused student to be heard. The hearing should allow both sides of the incident to provide information on the incident. It is stressed that this hearing should not be “a full-dress judicial hearing, with the right to cross-examine witness.” If the hearing does not take place in front of a board, there should be documentation of the board’s decision that the student is able to review (1961.)

These minimal due process procedures that were created were for public institutions only. Students are bound to private institutions by contractual obligations rather than already being enrolled at a public institution as a constitutional right (Dixon v. Alabama State Board of Education 1961.)

## **Level of Due Process Required**

Overtime due process has evolved to become more specific as to the amount of due process that is required for conduct hearings. *Goss v. Lopez* adds onto *Dixon v. Alabama* in the amount of due process that is required. Even though this case derived from a public high school, the minimal due process standards have been used and tested in the courts for public higher education institutions. One of the primary points in *Goss v. Lopez* is that the higher the consequence for the action, the greater amount of due process is required. If there is a possibility that a student is going to be suspended for ten days or more, a greater more formalized level of due process is required. The threshold of ten days was given since it was not considered to be a detrimental loss to a student's education (1975.)

There are times that require an institution to suspend a student on a temporary basis in emergency situations. Whenever a student is a threat to others, disruptive to the academic environment, or damages property; the administration has the flexibility to suspend a student. The institution is still required to have a hearing within 72 hours of the student's dismissal with due process procedures in place (*Goss v. Lopez* 1975.) It is important that the courts recognized that some incidents require a swift response when a student is causing a disturbance on campus through threats of violence to others. Dismissing a student immediately pending the outcome of a hearing gives others on campus a sense of safety and confidence in the administration when a violent student is removed from the community.

## **Cross Examination of Witnesses**

Donohue v. Baker was considered to be a key case that reaffirmed whether or not the rights to cross examine witnesses in student conduct cases is a required component of due process (Pavela 2001.) Among other issues brought in the Donohue v. Baker lawsuit, during a student conduct hearing of an alleged sexual assault, the accused was not permitted to cross-examine his victim. The case was to determine if the student was responsible for allegedly assaulting a female student.

During the hearing, the staff member that was chairing the judicial board directed the accused and the victim not to address each other and to address the board. At the time of the hearing the accused did not object to this procedural change, or does it seem that the accused was directly asked whether or not he objected to this change. The institution's conduct codes stated that the accused have the right to cross-examine witnesses during their judicial hearing, and that this requirement can be waived if the sensitivity of the case permits it. Although the courts agreed that this case was sensitive in nature, the decision of the case was based on the victim's word versus the word of the accused. In cases such as this where suspension may be an outcome and the school's conduct code specifically states that cross examining a witness is allowed, the ability to question the accuser and witnesses should be permitted since it is a matter of credibility (Donohue v. Baker 1997.)

Even after being sued, the institution still has in their conduct codes that accused has the right to question witnesses in a case and to question the person bringing the charges (State University of New York, College of Agriculture and Technology at Cobleskill 2006.) This does not allow for written statements or undercover informants

if used. It seems counter productive for an institution to put a requirement in their conduct code to allow cross examination in all cases when the courts have ruled that it is not a requirement. This binds the institution to a standard that must always be followed regardless of the severity of the case.

Having this restrictive policy does not allow for alternative arrangements to be made in cases that may be sensitive to a victim and can have an affect of student development. It also limits the use of written statements and anonymous reporting of conduct code violations since the accused is not able to cross examine either of these two situations. Policies would require an accuser to come forward if a hearing was to go forward. In a sensitive issue or where an student accuser is trying to morally do the right thing, their identity would become known to the accused. For a victim, it could cause them not to come forward knowing that they will probably be confronted by a perpetrator later on at a hearing.

### **Arbitrary and Capricious Standards**

A hearing body is in place to make a decision that is fair and consistent with the policies of the institution and past decisions that a conduct review committee has made. Arbitrary and capricious standards are decisions made that do not have reason behind them or are made irrationally based on the information that is provided to the decision making body (Kaplin and Lee 1995, 35.) When an institution makes arbitrary and capricious decisions in the disciplinary system, they are considered to be unjust to the student. This is a violation of a student's due process rights as well.

Staff at the State University of New York, University at Albany was found to have made an arbitrary and capricious decision in 2002 while processing a student

through the judicial system. A student in his senior year without any prior judicial history at the University was put through the campus judicial system for hitting a police officer in the nose at the end of September 2002. The referral to the judicial system occurred when a student was being attacked by four to five unidentified males after trying to prevent a fight. During which the student was pinned to the ground, his face and eyes were punched and was unable to see. When the officer arrived, many fled the scene with the exception of one of the attackers and the student. The officer could not remove the attacker from the student, and picked up both the student and the attacker and placed them on the police car. The student was able to free an arm and punched the officer in the face; he unaware of the police presence (Greenberg v. The State of New York, University at Albany 2003.)

According to the University at Albany's Community Rights and Responsibility at the time stated:

**Threatening or Abusive Behavior**

Intentionally or recklessly causing physical harm to any person on University premises or at University-sponsored activities, or intentionally or recklessly causing apprehension of such harm. This Conduct includes but is not limited to inflicting bodily harm upon a person by using a self-defense spray in circumstances that do not justify the use of such a device (Greenberg v. The State of New York, University at Albany 2003.)

The hearing board for the case found although the student's action were unintentional, he was still responsible for violating this standard. Disciplinary Probation and a Warning were the recommendation of the hearing panel to the Director of Judicial Affairs. Suspension for the remainder of the academic year was the decision handed down by the Director. The suspension was put on hold until the student had completed the appeals process, during which a temporary restraining order was put in

place by a judge until a decision was reached whether the Director's decision was arbitrary and capricious.

The New York Supreme Court in January 2003 ruled that the Director's decision to suspend after the having the recommendation of the hearing panel was "arbitrary, capricious, and an abuse of discretion." The court overturned the decision of the University and reinstated the student (Greenberg v. The State of New York, University at Albany 2003.) The actions of the Director were considered unfair and not rational given the facts of the case.

Being a senior student, the Director's decision would have prohibited him from graduating. For a student that did not have any prior disciplinary history, the decision to suspend after the minimal recommendation of the hearing panel was considered not to be a rational decision. Furthermore, the conduct code stated that to be in violation of the "Threatening or Abusive Behavior" code, the action needed to take place on "University premises or at University-sponsored activities" (Greenberg v. The State of New York, University at Albany 2003.) In the most recent edition of the University at Albany's Community Rights and Responsibilities the phrase "University premises or at University-sponsored activities" has been removed (2004, 4.) When an institution is evaluating their conduct codes, wording should be carefully looked at. A few words added or removed can change the meaning of the entire code. It is important for administrators to consider exactly what they want the institutions code to say, scrutinize it, and confer with their legal counsel so that the correct message is being sent to the students.

## Due Process and Academics

Maintaining academic standards is part of the responsibility of the student when entering a higher education institution. When considering due process in academic cases, there is a differentiation between failing to maintain academic performance, and acts of academic dishonesty. When a student does not stand up to their agreement with the college to maintain their grades at an acceptable level, there is no due process that is in place for the student. There is typically a procedure in place for this where a student would be placed on academic probation for a semester and given the opportunity to bring up their grades. When a student is involved in an act of academic dishonesty such as plagiarism or cheating they are entitled to due process. These actions would be considered to be violations of conduct codes, rather than academics standards.

Dixon v. Alabama State Board of Education made the distinction that a violation of a conduct code by its nature would need due process since there are facts surrounding an alleged violation. When a student fails to meet academic standards, there are no facts surrounding the deficiency as with a conduct code violation (1961.) Regardless of whether an institution is public or private, the courts have generally sided with the decision of the college as long as they have followed their procedures. These are laid out in advance to the student through materials such as a student catalog or handbook (Stoner and Bradley, 2002.)

Academic standards were tested in the case of the Regents of the University of Michigan v. Ewing that went to the U.S. Supreme Court when a student sued the university after he was dismissed from the university because of consistently not meeting academic standards. The student who was in a six year medical program that



included an undergraduate and medical degree continued to not meet academic expectations. Throughout the course of his program, even after a leave of absence which included taking courses at another institution, he received the lowest failing score recorded to date which was required for entrance into the last two years of his program. The student contended that his rights were violated since other students that had failed the exam were permitted to retake it.

The courts respected the decision of the institution to suspend the student since they felt they did not make a decision that was arbitrary and capricious. After several reviews over the course of the student's academic career, the institution gave the student a number of opportunities to improve his academic record. The victory for academia was that the U.S. Supreme Court in this case did not find it acceptable to override what was considered to be acceptable academic standards and fair professional judgment on behalf of the university (1985.)

#### Due Process Considerations on Student Development

With institutions required to have some level of due process, as college administrators we need to reflect how these procedures will affect a student. In cases involving a student violating the rights of another student, consideration needs to be given to the rights of the accused versus respecting the needs and feelings of the victim. The university has a responsibility to serve the needs of the victim and the accused, this can put an administrator in difficult position to serve both parties needs (Pearson 2001, 218.) Whether it is a student that is constantly on the radar as a student that has low grades, or an alleged victim of a sexual assault, they each have different needs which need to be addressed.

For a victim, it is important that the disciplinary process does not seem like another attack on them. When questioning takes place, the administration needs to look at the whole picture and do what they can to prevent additional trauma that the victim may suffer. If questioning the victim is needed based on the facts of the case, allowing the accused to ask questions to the victim through a closed circuit audio and video system would satisfy the requirement to allow questioning (Pearson 2001, 240.) This would limit the direct face to face contact that the victim and the accused have, and can minimize additional trauma.

From my experience, with the exception of conduct codes that affect another student directly, most first time offenses do not directly lead to suspension or expulsion as a result of a student's actions. For example, a first time alcohol violation would result in educational sanctioning so that the student is able to learn more about alcohol consumption and able to reflect on the situation. This gives the university time to educate the student and the opportunity to learn more of why alcohol consumption can lead to other problems such as academic deficiencies.

Students that have constant disciplinary issues usually have a history of low academic performance and/or poor attendance in their courses. If they do not leave school on their own, those with behavioral problems are removed from the school through the disciplinary process (Falk 2003.) At this point the student has been provided with a variety of sanctions to try and educate them on why their behaviors are disruptive to themselves and in some cases to others in the college community. The institution has put forth the effort to provide the student the tools and opportunity to succeed. In the student's eyes, they see a due process hearing as a formalize way to

separate the student from the university (Falk 2003.) With a student that is this far into the judicial process, their perceptions of the institution have changed. Since their view of the institution is now negative, it may have an impact of the student choosing on their own to separate from the university on their own (Braxton 2003, 324.)

### **Conclusions & Recommendations**

Due process is a concept that comes from the Constitution and Bill of Rights which allows students that are both United States Citizens and International Students protections from having their “life, liberty, or property” (U.S. Constitution, Amendment V 1791) taken away from them by a government agency. In the case of public higher education, the idea of removing a student from having an education and not allowing them the standard of living that an educated person would have is depriving them of these Amendment V rights. If a public university is going to do this, then due process procedures must be followed. Failure to give a student due process rights can result in lawsuits that can be costly to the institution.

It is clear that there is a differentiation between public and private institutions that are acting on behalf of the government when dealing with students’ rights in campus judicial proceeding. Public campuses are more restricted by the guidelines and laws that are laid out by the U.S. Constitution and Statutes. The guidelines are not to the strict manner that criminal courts are required to follow, but there is a certain element of due process that needs to be followed. Due process falls into two categories, procedural which includes giving advance notice of the charges, and a hearing for both sides to offer their side of the incident. Substantive due process requires that arbitrary

and capricious standards are not made, meaning that all decisions are fair and justified based on the evidence presented.

As the due process increases for a student to be suspended or expelled from an institution, the administration should consider increasing the level of due process that is given to the student during the judicial hearing. A procedure such as cross examining witnesses does not normally need to be given, but could be used to increase the student's due process or when a case is based on the credibility of a witness. This particularly applies in a case where it is the word of one student versus another. When an institution creates their standards for due process, it would be wise to layout a minimum standard. A higher level of due process laid out from the start requires all cases, even something as minor as a noise violation, to maintain this high standard. It is always easier to add more procedures later if needed than to remove something that is already in place.

Regardless of whether a university is public or private, it is clear that being removed from an institution for failure to maintain academic standards is different from removal because of a violation of student conduct codes. Failing to maintain academic standards of the institution does not give the student the same due process rights when they are academically withdrawn. The students have been given a set of academic standards in advance and know that they are required to keep their grades up to stay enrolled in the university.

During conduct hearings the accused is put in a position to defend themselves against a member of the college community. This can create a negative view of the institution for the student, and may not help with retaining the student at the institution

in the future. As administrators, it is possible that when a student violates a conduct code by harming another student we need to look out not only for the rights of the accused, but for the victim as well. Having a victim who needs to go through a hearing and be questioned by the accused may cause the victim to be victimized over again and go through additional trauma.

Due process when used correctly is a benefit to the institution because it provides a procedure for conduct hearings. It gives rights to a student, and a standard for institutions that the courts have provided. Based on the institutional structure, it should be determined where best the judicial affairs function goes so that one area is responsible for implementing policies, interpreting them, and training staff how to use them. Since due process is needed in the academic and student affairs realms, all those that may come in contact with it should be trained on what needs to be followed so that lawsuits are avoided.

## Bibliography

Barr, Margret J. "Legal Foundations of Student Affairs Practice." In *Student Services: A Handbook for the Profession*, 4<sup>th</sup> ed. Komives, Susan R., Dudley B. Woodward Jr., & Associates, 128-149. San Francisco: Jossey-Bass, 2003.

Black, Henry Campbell. *Black's Law Dictionary*, 6<sup>th</sup> ed. Minnesota: West Publishing Co., 1990.

Bolman, Lee G., Terrence E. Deal. *Reframing Organizations: Artistry, Choice and Leadership*. San Francisco: Jossey-Bass, 2003.

Braxton, John M. "Student Success." In *Student Services: A Handbook for the Profession*, 4<sup>th</sup> ed. Komives, Susan R., Dudley B. Woodward Jr., & Associates, 315-335. San Francisco: Jossey-Bass, 2003.

Dungy, Gwendolyn Jordan. "Organization and Functions of Student Affairs." In *Student Services: A Handbook for the Profession*, 4<sup>th</sup> ed. Komives, Susan R., Dudley B. Woodward Jr., & Associates, 339-378. San Francisco: Jossey-Bass, 2003.

*Dixon v. Alabama State Board of Education*. 294 F.2d 150. 1961. *Westlaw Campus Database*. (15 June 2006.)

Dungy, Gwendolyn Jordan. "Organization and Functions of Student Affairs." In *Student Services: A Handbook for the Profession*, 4<sup>th</sup> ed. Komives, Susan R., Dudley B. Woodward Jr., & Associates, 339-378. San Francisco: Jossey-Bass, 2003.

Falk, Jessica. "Overcoming a Lawyer's Dogma: Examining Due Process for the Disruptive Student." *University of Michigan Journal of Law Reform*. Winter 2003. *Westlaw Campus Database*. (8 July 2006.)

Fishner, Jason. "Judicial Statistics: Fall 2005." Cobleskill, New York: State University of New York, College of Agriculture and Technology at Cobleskill, 2006. Photocopied.

Gehring, Donald D. "Understanding the Legal Implication of Student Affairs Practice." In *The Handbook of Student Affairs Administration*, 2<sup>nd</sup> ed. Barr, Margaret J., Mary K. Desler, and Associates, 347-376. San Francisco: Jossey-Bass, 2000.

*Goss v. Lopez*. 419 U.S. 565. 1975. *Westlaw Campus Database*. (15 June 2006.)

*Greenberg v. State University of New York, University at Albany*. 2003.

Janosik, Steven M. "Anticipating Legal Issues in Higher Education." *National Association of Student Personnel Administrators, Volume 42, Number 4*. (2004): 401-414.

Kaplin, William, and Barbara Lee. *The Law of Higher Education, Third Edition*. New York: Jossey-Bass, 1995.

\_\_\_\_\_. *A Legal Guide for Student Affairs Professionals*. New York: Jossey-Bass, 1997.

Kowalski, Daniel, Lieutenant of University Police at State University of New York, College of Agriculture and Technology and Cobleskill. Interview by author, 18 July 2006, Cobleskill, New York.

Pavela, Gary. "The Professional Responsibilities of Professors, Due Process and the Right of Cross-Examination, and Key Case Review: *Donohue v. Baker*." *Law and Policy Report* #29. 12 September 2001.

Pearson, Douglas R. "Sexual Assault and the University Judicial Process." In *Sexual Violence on Campus: Policies, Programs, and Perspectives, 1<sup>st</sup> ed.* Ottens, Allen J., Kathy Hotelling, 218-253. New York: Springer, 2001.

*Powe v. Miles*. 407 F. 2d 73. 1968. *Westlaw Campus Database*. (15 June 2006.)

*Regents of the University of Michigan v. Ewing*. 474 U.S. 214. 1985. *Westlaw Campus Database*. (20 July 2006.)

Reyes, Angel, Officer of University Police at State University of New York, College of Agriculture and Technology and Cobleskill. Interview by author, 18 July 2006, Cobleskill, New York.

State University of New York, College of Agriculture and Technology at Cobleskill. *On the Hill*. 2006. <<http://www.cobleskill.edu/StudentAffairs/On%20The%20Hill.asp>> (20 July 2006.)

State University of New York, University at Albany. *Community Rights and Responsibilities 2004-2007*. 2004. <[http://www.albany.edu/judicial\\_affairs/CRR-7\\_04.pdf](http://www.albany.edu/judicial_affairs/CRR-7_04.pdf)> (10 July 2006.)

Stoner, Edward, and Bradley J. Martineau. "Disciplinary and Academic Decisions Pertaining to Students in Higher Education." *Higher Education and the Courts: 2000 in Review* (2002.) *Westlaw Campus Database* (15 June 2006.)

Stoner, Edward, and John Wesley Lowery. "Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script." *Journal of College and University Law* (2004.) *Westlaw Campus Database*. (8 June 2006.)

*Woodis v. Westark*. 160 F.3d 435. 1998. *Westlaw Campus Database*. (20 June 2006.)

United States Codes. 42 USC § 1983. 1871.

United States Constitution, Amendment V. 1791.

United States Constitution, Amendment XIV, Section 1. 1868.

U.S. Department of Education. *1998 Amendments to the Higher Education Act of 1965, Section 952, Alcohol of Drug Possession Disclosure*. 1998.  
<<http://www.ed.gov/policy/highered/leg/hea98/sec952.html>> (15 July 2006.)