

**DUE PROCESS IN STUDENT DISCIPLINE:
A PRIMER**

by

Nona L. Wood
Associate Director of Student Rights and Responsibilities
NORTH DAKOTA STATE UNIVERSITY

and

Robert A. Wood
Associate Professor of Political Science
NORTH DAKOTA STATE UNIVERSITY

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DUE PROCESS IN STUDENT DISCIPLINE: A PRIMER
by Nona L. Wood and Robert A. Wood
North Dakota State University

INTRODUCTION

In residence halls there inevitably are occasions when students come into conflict with university rules and regulations. Frequently, undergraduates assist in the adjudication of rule violations as Resident Assistants or members of student judicial boards. Graduate students also may assist as Hall Directors or Complex Managers. Undergraduates, in particular, may have little or no training in student judicial affairs when they assume their duties.

Because state colleges and universities are governmental entities (Williams v. Wheeler, 1913), any residence life employee acting officially is considered an agent of the state. As a result, it is important that all housing personnel involved in the student judicial function be aware of the procedures by which individuals are afforded due process protections.

In private institutions, rights tend to be contractual rather than Constitutional and are based on the private institutions' own documents (Holert v. University of Chicago, 1990; Melvin v. Union College, 1993). If those documents do not afford contract protections similar to due process, then the private institutions need not provide them. Decisions of private institutions, in general, may be subject to review only if they are arbitrary or capricious (Ahlum v. Administrators of Tulane Educational Fund, 1993; MU Chapter of Delta Kappa Epsilon v. Colgate, 1992). The courts also may assume jurisdiction when private, as well as public, institutions fail to follow their own policies and procedures (Gruen v. Chase, 1995; Melvin v. Union College, 1993; Smith v. Denton, 1995; Weidemann v. State University of New York College, 1992). Courts also may intervene if there is a violation of statutorily imposed duty (e.g., Family Educational Rights and Privacy Act [FERPA], Title IX) on the part of the institution.

At public institutions, observing due process meticulously serves several purposes. First, the chances that an appropriate sanction will be assigned are enhanced when proper procedures are followed. Second, strict adherence helps assure the university community that an appropriate response was made. Third, observance of due process helps reduce the risks associated with unfavorable external scrutiny by the public, the media, and the courts. Fourth, it is the law of the land.

Baker (1992) identified several additional purposes of due process, all of which are expressions of fundamental fairness: (a) to reduce the risk that a student has been wrongfully accused; (b) to conduct an objective investigation; c) to provide administrator accountability; and (d) to balance countervailing interests.

The purpose of this article is to provide a basic primer for residence life administrators who must teach students the fundamental elements of due process and how these components are safeguarded in their student judicial systems. This article begins with a review of the theoretical underpinnings of due process and then moves to a discussion of specific procedural protections.

DUE PROCESS

Due process is a term that has no single definition or exhaustive checklist that will guarantee that students' rights have not been abridged. At a minimum, the common elements in student disciplinary due process cited by the courts include "notice of the charges, notice of the evidence to be used against the student, and a hearing" (Alcorn v. Vaksman, 1994, p. 397). An understanding of basic concepts will provide general guidelines that may be applied to the circumstances of individual cases. The stronger the possible penalty, the more process is due (Kaplin & Lee, 1995).

A property or liberty interest must be threatened before a student is entitled to the protections afforded by due process. A property interest "refers to any type of right to specific property whether it is personal or real property, tangible or intangible" (Black, Nolan, & Nolan-Haley, 1991, p. 847). In public higher education, a property right may include the right to a residence hall room, to continue a course of study (Board of Curators v. Horowitz, 1978; Regents of University of Michigan v. Ewing, 1985); Smith v. Denton, 1995), or the ability not to have these rights taken away arbitrarily or capriciously. The guarantees in this domain generally are defined by law, by university documents, and by contracts between the student and the university, such as the student housing contract.

In contrast, liberty interests are interests "recognized as protected by the due process clauses of state and federal constitutions" (Black et al., 1991, p. 633). Examples include the right to contract, to acquire useful information, and to pursue a particular occupation (Board of Regents v. Roth, 1972; Regents of the University of Michigan v. Ewing, 1985; Tynecki v. Tufts University School of Dental Medicine, 1994). Other more intangible liberty interests may involve cases in which the student's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him" (Wisconsin v. Constantineau, 1971, p. 510), or those in which the student may be harmed by a governmental action that deprives that person of a future opportunity, such as admission to law or medical school (Greenhill v. Bailey, 1975; Picozzi v. Sandalow, 1986; Tynecki v. Tufts University School of Dental Medicine, 1994).

Further, a distinction exists between procedural and substantive due process. Procedural due process refers to whether the methods used to restrict a property or liberty interest were carried out fairly. These generally include, at a minimum, notice and an opportunity for a hearing.

Substantive due process refers to the content or subject matter of a rule or law that governs a liberty or property interest. In addition, it means that the outcome must have a rational relationship to the information uncovered in the hearing and cannot be arbitrary or capricious. In other words, the rule

and the outcomes of not following the rule must be fair. Administrators are expected to act in “good faith” or without ill will. If malice or bias is present, the decision making process may be considered tainted (Wasson v. Trowbridge, 1967; Winnick v. Manning, 1972), no matter how firm the evidence or how fair the methods employed.

How does one recognize what process is due? Courts often have employed a “balancing test,” which weighs the interests of the individual against those of the state. For guidance on weighing these interests, many higher education cases have relied on the three-part balancing test established in Mathews v. Eldridge (1976). In Mathews the Supreme Court examined Social Security procedures for ending a client’s disability benefits. Rules permitted the preliminary termination of payments with an evidentiary hearing to be held before benefits were permanently discontinued. The plaintiff sued, alleging that the payments should not cease until the hearing was held. In this case, the Court did not permit the temporary cessation of benefits pending the evidentiary hearing.

Under the Mathews test, the first consideration is the nature of the private interest that will be affected by the official action. The institution must consider what the student stands to lose in an adjudication. A good guide is that the greater the possible loss, the greater the degree of due process which must be afforded. For example, a student facing a contract cancellation should be given greater due process than someone facing a lesser sanction, such as a verbal or written warning.

Second, the student’s possible loss must be balanced with the additional steps that can or should be taken to ensure an appropriate decision is reached. For example, courts have explored whether due process requires students be given stenographic transcripts of disciplinary hearings at institutional expense (Hall v. Johnstone, 1994). Providing transcripts might help students avoid a significant loss, such as suspension or expulsion. At the same time, costs would rise dramatically. In one case (Gorman v. University of Rhode Island, 1986), the court found a compromise by stating that the institution should have permitted the student to make his own recording, rather than the institution providing a stenographic transcript. By failing to provide either, the student was denied due process when faced with the possible loss of student leadership positions and attendance at his institution.

Finally, under Mathews, the university’s interest in a case must be balanced against the additional procedural steps that might be taken. For example, in Osteen v. Henley (1993) the Seventh Circuit Court examined whether Northern Illinois University owed its student the right to have an attorney present, and to allow that individual to perform full trial functions. The court rightfully acknowledged that to permit the student’s attorney full participation in the hearing would change the nature from an educational proceeding to an adversarial one. Costs would increase substantially in that the University would be obliged to have University counsel present to meet the challenge of student legal counsel. Thus, the University would risk burdensome costs, financially and procedurally, which could destroy the educational nature of its disciplinary proceeding.

There are some conditions under which courts have permitted universities to deviate from their own due process procedures as published in university documents. One of these conditions includes situations in which a student “knowingly and freely” waives those rights (Ahlum v. Administrators of Tulane Educational Fund, 1993; Kaplin & Lee, 1995).

Second, some courts have allowed minor deviations in a university’s procedures as long as those changes do not interfere with achieving fundamental fairness (Schuler v. University of Minnesota, 1986; Sohmer v. Kinnard, 1982; Turof v. Kibbee, 1981; Winnick v. Manning, 1972). For example, in Turof the student did not receive the predisciplinary hearing conference provided in the institution’s bylaws. The student did, however, receive a disciplinary hearing with notice, participation of his attorney, and the cross-examination of one witness by his attorney. The court held that due process was provided adequately, even though Turof complained he was unable to compel witnesses to appear and that his attorney was not granted full participation in the hearing.

Third, some universities’ policies and procedures provide more safeguards than constitutional minimums require. If protections above and beyond the minimums are stated, but not provided, such omissions may not necessarily violate due process (Kaplin & Lee, 1995). For instance, one court determined that failure to record a student disciplinary hearing in accordance with an institution’s policies and procedures did not violate a student’s due process rights when the student failed to raise this issue on appeal and failed to demonstrate that having a recording would have revealed errors which would have changed the outcome (Ahlum v. Administrators of Tulane Educational Fund, 1993). Thus, this student waived the right to this contractual provision and the mechanical failure of the recorder was a “harmless error.”

SPECIFIC PROCEDURAL PROTECTIONS

Notice

Students accused of misconduct are entitled to a notice that describes what they have done to possibly violate university rules or regulations (*Dixon v. Alabama State Board of Education*, 1961). This notice may be oral or written; the more serious the offense, the greater the need for a written notice. Notice generally includes the date, time, and place that the violation allegedly occurred; the individuals present; a statement of the rule or policy possibly breached; and a description of the conduct observed. This description answers basic questions such as who, what, when, and where, and is most useful when written clearly and chronologically. Students should be provided a summary of the facts to which each witness will testify, although it is not necessary to give advance notice of all available evidence, as would be expected in a criminal prosecution (*Swem*, 1987).

To comply with due process, the notice should include the date, time, and place of the hearing, and should be given to the student in sufficient time for the accused to prepare an adequate defense (*Smith v. Denton*, 1995; *Weidemann v. State University of New York College*, 1992). Two to 10 days usually is considered reasonable, with more time being allowed if the case is particularly complex (*Kaplin & Lee*, 1995).

Finally, students need to know the likely consequences if they are found in violation of university rules or policies. Although a specific sanction need not be named, students should know the maximum penalty that might be assessed. Possible sanctions also could be listed or stated as a range of penalties.

The Hearing

The student conduct hearing has been described as “a meaningful hedge against erroneous action” (*Goss v. Lopez*, 1975, p. 583) and may be formal or informal, open or closed. If there is reason to believe that a case is so controversial as to incite campus unrest, or if a case is highly politicized, it would not violate due process if the hearing was closed. Most courts have determined that having a closed hearing does not violate a student’s due process rights (*Hart v. Ferris State College*, 1983; *Henderson State University v. Spadoni*, 1993).

Although not a due process decision, in Georgia it was recently decided that under the state’s “sunshine” law, all student conduct hearings must be open (*Gregory*, 1994). The Supreme Court of Georgia ruled in *Red & Black Publishing Co. v. Board of Regents* (1993) that the disciplinary hearings of a student organization were not educational records under FERPA. This same court stated that FERPA provides no Department of Education funds be given to institutions which routinely release individual students’ educational records without the consent of the students involved.

Rulings to the contrary were reached in subsequent court decisions in two other states. In Louisiana, a trial court held that FERPA *does* forbid the release of student disciplinary records (Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport, 1994), while an Oklahoma district court likewise found that student judicial hearings and their findings are educational records under FERPA (Selkirk v. University of Oklahoma, 1994). These seemingly contradictory decisions from different states are troubling; future court decisions and or regulatory clarifications may provide additional guidance.

If a case is already highly notorious, an open hearing might remove allegations of secrecy and could strengthen the viability of the process by being public. This decision is best made by a senior housing official or other university administrator; however, the open hearing never should be held without the written permission of both the complainant and the accused. Institutional regulations concerning open hearings should be clearly stated in the code of student conduct or other university documents.

Informal proceedings are generally called administrative hearings. The hearing officer may be a Hall Director or other administrator, while a more formal inquiry might occur before a student judicial board. The process and the rights observed should be the same, with the major differences being the number of people involved and the time necessary to convene a hearing. Judicial board decide whether a student is in violation of a rule and may assign a sanction. If the board is not empowered to impose a penalty, a higher level official often then determines a sanction that may or may not be similar to that recommended by the hearing panel.

A major concern is that both types of proceedings should have impartiality (Henderson State University v. Spadoni, 1993; Wasson v. Trowbridge, 1967; Winnick v. Manning, 1972). For instance, if the hearing officer were the victim of a crime by a resident, it would be inappropriate for that person to adjudicate that case. Students should have the right to challenge the impartiality of the hearing officer or other members of the judicial board; however, participants cannot be considered biased simply by virtue of the position they hold within the University (Holert v. University of Chicago, 1990; Turof v. Kibbee, 1981), nor are they biased simply because they were knowledgeable about a specific case (Henderson State University v. Spadoni, 1993; Hillman v. Elliot, 1977, Winnick v. Manning, 1972).

In such a challenge to impartiality, the student bears the burden of proof. If there is any doubt about the suitability of any individual, and sufficient staff permits a replacement, administrators might wish to err on the side of caution and replace that person, rather than raise the appearance of unfairness. The timing of such a challenge will determine, in part, an institution's response. Ideally, such issues would be raised prior to the hearing itself. Should a legitimate challenge arise during the initial course of a hearing, the institution may wish to postpone the hearing to allow appropriate replacements and to forestall any allegation of bias.

When a student has committed an act that represents a *substantial* threat to life or property, or a disruption of the academic process, an emergency suspension may be invoked and the hearing can follow in the next few days (Goss v. Lopez, 1975; Picozzi v. Sandalow, 1986). This decision is not undertaken lightly and would normally be made by an upper level housing or other university official. In making such a decision, the university official must weigh the substantial risk to persons and property versus the individual rights of the student. Care should be taken to ensure that there has been no mistaken identity or that there was not extreme provocation or other mitigating circumstances leading to the misconduct. If a preliminary investigation reveals that substantial risk remains, then the official should err on the side of protecting the institution and its students (Picozzi v. Sandalow, 1986). A full hearing, however, should follow as soon as is reasonably possible to determine whether the student was responsible for the act, and if so, what should be a suitable sanction (Los v. Wardell, 1991).

The Attorney Role in Student Conduct Hearings. In residence life, there is rarely a need for an attorney to be present at a student conduct hearing. The courts have frequently found that banning attorneys' participation in student disciplinary hearings is not a violation of due process (Gorman v. University of Rhode Island, 1986; Osteen v. Henley, 1993). In cases where civil or criminal charges also are pending, or when the university proceeds through counsel, the presence of counsel during the hearing would not be an unreasonable request. This has even been required by one court which stated, "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" (Gabrilowitz v. Newman, 1978, p. 106).

Many institutions allow the accused student to have a lay adviser present, such as a friend, another student, a family member, or a faculty member. The advisor would be available to make recommendations to the student and, in most cases, would not be allowed to intrude into the proceeding.

These represent general guidelines, not inflexible rules. The active participation of the student's attorney might be necessary to satisfy due process if the case is complex, the potential sanction severe, or if the university uses an attorney to represent its interests (Richmond, 1989).

Evidence. Students should be given the chance to speak on their own behalf, to present evidence and witnesses if appropriate, and to examine affidavits and other exhibits. The use of hearsay evidence should be avoided whenever possible, but is permissible because the hearing is not bound by strict rules of evidence.

Many institutions ask students to address their guilt or innocence, although obviously it is not appropriate to use intimidation or other coercive means. Should the student choose to remain silent, the decision should be made based on all evidence, absent the student's own declaration (MU Chapter of Delta Kappa Epsilon v. Colgate University, 1992). A student's refusal to make a statement should not necessarily be viewed as indicative of guilt, although drawing a negative inference against the silent

student is permissible if the institution's rules so provide. During the hearing, the presiding officer may exclude evidence if the data being provided are unnecessarily repetitive, are not pertinent to the proceedings, or if the data are not useful (Osteen v. Henley, 1993). For instance, audiotapes that are unintelligible and written affidavits that are illegible would not be useful in reaching an appropriate decision and could be excluded without violating the due process rights of the student.

Confrontation and Cross-examination of Witnesses. These are rights that exist in the courts. The names of witnesses need not be revealed (Dixon v. Alabama State Board of Education, 1961; Winnick v. Manning, 1972), if students admit guilt and can prepare appropriate defenses without that knowledge. If students do not admit that they are in violation of university rules and demand the identity of witnesses, it is appropriate that these be provided.

There is no expectation that students be given the chance to cross examine those who would testify against them (Hall v. Johnstone, 1994; Jaska v. Regents of the University of Michigan, 1984). If the possible sanction is severe, then individuals should be offered the opportunity to confront witnesses. Should key witnesses not be available, officials may need to postpone the hearing to allow for their testimony (Goldberg v. Regents, University of California, 1967). Such a delay usually will not be detrimental to the interests of the university and will help preserve fairness to the student. Another alternative would be to permit absent witnesses to submit affidavits in lieu of testimony at the hearing.

Sometimes witnesses may refuse permission to release their names. If the student who denies guilt demands to know and the university fails to release this information, the adjudication will probably not withstand external scrutiny. Thus, housing personnel at public universities must be prepared to drop adjudications under these circumstances. To do otherwise would violate fundamental fairness and expose university personnel to a potential lawsuit for violating the student's constitutional rights to due process.

Self-incrimination. Due process in student conduct hearings generally does not require that students be warned of their constitutional right to avoid self-incrimination. If there are parallel civil or criminal proceedings pending, however, offering such a warning to the student would be helpful.

Colleges and universities are not required to wait until proceedings are final in the courts before pursuing their own adjudications (Goldberg v. Regents, University of California, 1967; Hart v. Ferris State College, 1983, Kaplin & Lee, 1995; Nzuve v. Castleton State College, 1975). Because the very nature of the two proceedings is different, there is no double jeopardy to the student in simultaneous campus and civil/criminal proceedings. Different decisions may result due to the generally lower standard of proof and fewer stringent rules of evidence found in campus proceedings. The courts have recognized that, "College authorities should be free to enforce fair and reasonable disciplinary regulations necessary to the orderly functioning of the educational institution" (Furutani v. Ewigleben, 1969, p. 1165).

Standard of Proof. The standard of proof refers to the quantity or level of the evidence needed to make a decision. Most student judicial decisions will be reached using a preponderance of the evidence (Golden, 1982), which means that it is *more likely than not* that the student did violate a university rule or policy, based on the evidence provided. This is the standard of proof in civil matters. Although students may be more familiar with proof beyond a reasonable doubt, that standard is more commonly and appropriately used in criminal trials rather than student judicial proceedings whose purposes are administrative and not analogous to criminal prosecutions.

Some authors recommend the adoption of clear and convincing as the standard of proof in student conduct adjudications (Long, 1985). This standard is greater than preponderance of the evidence but less stringent than beyond a reasonable doubt. As long stated, “The ‘clear and convincing’ standard weighs the balance in the student’s favor while not placing an undue burden of proof on the institution” (p. 80). Although unstated, many institutions unconsciously shift to this higher standard when reviewing cases with possible significant sanctions, such as suspension or expulsion (Long, 1985).

Burden of Proof. The burden of proof refers to the individual who has the responsibility of proving a violation occurred. Usually this is the individual who is making the complaint, frequently the Resident Assistant who observed a specific act of misconduct, or the university if the Resident Assistant is viewed only as a witness. In very serious cases, the burden of proof may rest with the institution, not necessarily the staff member who observed the behavior, depending on the institution’s policies and procedures.

THE DECISION

The decision must be based upon the information presented in the hearing. As Leahy observed, “Fundamental fairness as embodied in due process also demands that people be punished for what they do, not for what they are, or even what they think” (1993, p. A4). Several basic questions should have been answered in the hearing. Was there a specific rule, policy, or law violated? Is the evidence sound? Are the witnesses credible? Were there any mitigating circumstances, such as extreme provocation or mistaken identity? Other issues to consider include the type and severity of the offense.

THE SANCTION

A sanction is the penalty assigned consequent to violating a university rule or policy. Many institutions focus on educational sanctions with some punitive actions such as fines, confiscation, loss of privileges, and restitution. The sanction should be one that is appropriate to the violation, and “within reasonable and constitutional ground[s]” (Dixon v. Alabama State Board of Education, 1961, p. 157). The hearing officer or board may consider any previous incidents of misconduct in assigning an appropriate sanction.

Some attention must be paid to the relationship between residence life and the institution. On some campuses, the most severe sanction housing personnel may assign is eviction. On other campuses, sanctions up to expulsion from the university may be possible, although not likely. Care should be taken not to exceed the authority of the department; consultation with the disciplinary agent of the university or others may be necessary.

THE RECORD

A record of the decision should be made in writing and conveyed to the student promptly. The document should include the findings of fact drawn from the hearing, the conclusions drawn from those facts, and the sanctions, if any, which were assigned. These records should be retained according to the policies of the institution and in accordance with the privacy requirements of FERPA. Generally, the more severe the misconduct, the longer the record should be kept. Students should be advised who has access to these materials and for what purpose, and for how long they will be kept.

For cases involving severe misconduct, a tape recording of the proceeding may be critical. This record helps to provide accountability, a means to check for procedural errors, and a defense against the accusation that the hearing officer acted in bad faith. The student need not be provided a copy of the actual tape; however, the student should have access to prepare an appeal or to prepare a transcription of the hearing for a pending litigation. Alternatively, students may make recordings at their own expense (Esteban v. Central Missouri State College, 1969; Gorman v. University of Rhode Island, 1986).

THE REVIEW OR APPEAL

“Due process of law does not require the right of appeal or review if fairness has been accorded in the original proceedings” (Golden, 1982, p. 356). Educational institutions, however, generally provide some form of reexamination of the initial decision. A review does not need to involve a second hearing, but merely may be another look at the record to determine if the evidence warranted the decision, the sanction fit the violation, or whether there was any arbitrary or capricious actions demonstrated by the hearing officer or body (Golden, 1982). Some institutions, however, do provide for a *de novo* hearing on appeal, one which disregards the previous hearing and begins anew.

An appeal generally is initiated by the student and may involve a rehearing of the case or merely a further reconsideration of the record. Until an appeal is heard, the imposition of sanctions should be suspended (Melvin v. Union College, 1993), unless there is substantial risk to persons or property, such as in the appeal of an emergency suspension. The sanction on appeal should never be more severe than that imposed by the original decision maker or body (Smith v. Denton, 1995). Although some institutions’ policies require an automatic appeal, this is not a requirement of due process. Such a practice could be over burdensome on personnel and may create an atmosphere of a lack of confidence in the process.

SUMMARY

Inherent in the mission statements of many colleges and universities is a commitment to model and teach the responsibilities of citizenship. The operation of a fundamental fair student judicial process is an important expression of that belief. When residence life departments hire students to perform the important roles of Resident Assistants, Hall Directors, Complex Managers, and the like, it is critical that students be given training in due process issues to assist them in fulfilling their job responsibilities with care.

Such efforts can result in a better functioning student judicial system, which residents view with confidence and in which residence life personnel can serve with pride. Knowing that complaints are handled promptly and fairly may encourage students and staff to report violations, thus helping to create and maintain a more effective educational environment.

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