

## PART II: DUE PROCESS AT PUBLIC UNIVERSITIES

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### *Due Process in American Law*

If you want to wield your due process rights to maximum advantage, you should have a basic understanding of 1) due process in the nonuniversity criminal justice system and 2) the legal and moral theories behind the ways due process does and does not apply to college disciplinary procedures.

Due process has evolved over the centuries as a way to ensure that accusatory proceedings produce accurate and truthful results. This is one of the most vital components of a free, decent, and fair society. The Anglo-American experience has taught us that the procedures of due process (the process that is “due” or “owed” to each citizen) are essential to ensure the best chance of learning the truth during the trial process. Juries stand the best chance of getting to the bottom of complicated factual

matters if, for example, the accused is allowed to be in the same room as his accuser, and if the accused's lawyer is given an opportunity to ask probing questions of the accuser and of hostile witnesses. How comfortable does an accusing witness appear as he or she looks the accused in the eye and testifies? How credibly does the accusing witness respond to hard questions put by a skilled cross-examiner? These are not "technicalities," but, rather, the stuff of fair decisions and justice. The jurisprudence of due process is greatly concerned with identifying specific procedures that are actually effective in discovering the truth.

### *Procedural Due Process*

**Procedural due process** (a legal term) refers to the rules that govern how an accusatory proceeding is carried out—the steps by which a matter is "tried" in order to determine the truth or falsity of an accusation. Examples of procedural due process might include the rules governing the defendants' rights to question witnesses who testify against them and to be tried by a jury of their peers. The use of these procedures reflects society's solemn commitment to the importance of obtaining an accurate result when a citizen stands accused. (While the rights of most interest to you as a student accused of a disciplinary infraction are those of **procedural** due

process, due process also confers another set of rights, known as **substantive** due process rights, which are defined and discussed in Part IV, Section I.)

The right to procedural due process in contemporary America comes from the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment's due process requirement acts as a limit on the power of **federal** government and its institutions, while the Fourteenth Amendment's due process restricts the power of **state** governments. As a practical matter, most of the restrictions on the federal government's power over the rights of citizens also apply, through the Fourteenth Amendment, to state government. These constitutional provisions guarantee that the federal and state governments, respectively, may not deprive any person "of life, liberty, or property, without due process of law." Your interest in your diploma and in the value of a clear academic record establishes a property right. Your interest in your reputation and good name establishes a liberty right.

Each of the tens of thousands of court opinions that have interpreted these constitutional guarantees proceeds basically in a simple two-step manner:

**First**, the court looks to see whether due process applies—that is, whether a person's life, liberty, or property is being put at risk because of something the government is doing.

**Second**, if the person is entitled to due process, the court determines what process actually is due under the particular circumstances.

Due process is flexible. The process that is due depends largely on the context. As the United States Supreme Court held in *Mathews v. Eldridge* (1976), courts must consider three factors to see whether a particular protection is required in a given situation:

1. What is at stake for the person?
2. How risky is it that under the current procedures the person will be wrongly punished and how likely is it that more safeguards would reduce the risk?
3. How costly and time consuming would the new protections be for the government?

Some situations clearly require the most protective due process, such as the criminal trial of a person on a serious charge such as murder, which may result in the defendant's being deprived of liberty or even life. Other situations, including civil cases and charges brought against students in disciplinary tribunals of public colleges and universities, require a different—and much less elaborate—level of procedural protections. Still other situations, such as the suspension or expulsion of a student for poor academic performance, require even fewer safeguards.

*Procedural Protections in  
Disciplinary Cases*

University officials often say that since college disciplinary proceedings are “educational” rather than punitive, students in such proceedings are not entitled to procedural protections. The law, however, is clear that protections of due process are in fact required for disciplinary hearings at public universities.

This is the case because, as noted above, people are entitled to due process rights whenever they have what are known as “liberty” or “property” interests at stake. Both interests are most certainly at stake in university disciplinary hearings.

LIBERTY AND PROPERTY INTERESTS

The United States Supreme Court has held that “liberty interests” are involved (lawyers would say “implicated”) whenever a person’s good name, reputation, honor, or integrity is at stake. The tarnishing of a student’s reputation by a disciplinary board can have a devastating effect on his or her future education and career. An expulsion from college may not be as serious as a prison sentence in terms of deprivation of liberty, but there is no question that it can have a profound impact on the rest of a student’s life.

The progress that a student has made toward a degree constitutes property—a thing of value that belongs to a person—because of all the time and money that he or she has invested in this education. Once the state has chosen to grant students a property right by admitting them to an institution of higher education, it cannot revoke this right arbitrarily or unfairly.

Students facing disciplinary hearings at public colleges and universities, thus, have **both** liberty and property interests at stake.

The more serious the possible deprivations of liberty and property—generally, the more serious the accusation—the greater the kind of due process, with more substantial procedural protections, that is required. Most of our discussion focuses on the protections due to students facing possible suspension or expulsion, but liberty and property are also at stake in cases involving more minor potential punishments. Students are entitled to a different kind of due process, with fewer procedural protections, however, in cases involving only minor sanctions. There are some cases where the potential deprivations of liberty and property are so minor that very little or no process is due. The courts have not laid out precisely where this threshold lies in the university context. This is an area of law very much in development and formation.

*Disciplinary Cases Involving Suspension  
or Expulsion*

Students facing possible suspension or expulsion from public colleges and universities are entitled to due process because liberty and property are clearly at stake. This raises the question of precisely **what** process is due. As noted, because the liberty and property interests involved in suspension or expulsion from institutions of higher education are much smaller than those posed by criminal conviction, less procedural protection is required in a campus tribunal than in a court of criminal law.

The consensus established by the courts is that, at the absolute minimum, students in campus disciplinary cases are entitled to have **notice of the charges against them**, a **disclosure or explanation of the evidence** behind the charges, and an **opportunity to contest** this evidence.

The United States Supreme Court established these minimal requirements in *Goss v. Lopez* (1975), where nine suspended Ohio high school students sued their school, claiming that they had been denied due process. The Court, weighing the costs and benefits to the school and to the students, held that although the most severe suspensions were only ten days long, the students had

constitutional rights protected by the due process clause of the Fourteenth Amendment. The Court ruled that in student disciplinary cases involving short suspensions, an accused student must be “given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” The Court held that, at the very least, administrators must engage in an “informal give-and-take” with a student immediately after an incident of alleged misconduct and before

### **Isn't *Goss* a High School Case?**

It is. Typically, however, courts have held that students in higher education are entitled to **more** procedural protections than students in the lower grades, because college students are adults in the eyes of the law. As a university student, you certainly need to consult **university** cases to understand the full scope of your rights. High school cases are very useful to you too, however, because as a college student you have **at least** the same rights accorded to high school students. Further, because there are more high school than college students, high school jurisprudence may be better developed on the point at issue in your case. Thus, secondary school legal precedents establish a **floor**, but **not** a ceiling to the rights accorded a college student.

imposing a penalty. However, the Court specifically stated that administrators may wish, in more difficult cases, to permit counsel, to hold hearings, or to allow cross-examination.

Although, to a certain extent, *Goss* left the decision of whether to offer these greater protections to the “discretion” of administrators, it also stated that due process “may require more formal procedures” in more serious cases. Since *Goss*, the lower federal courts and various state courts have wrestled on a case-by-case basis with the issue of when such requirements apply. (There has been no higher court decision to clarify things more generally.) The principle firmly established by these federal and state courts is that the amount of due process required in campus disciplinary cases must be based on the particular nature and gravity of the charges and circumstances.

Exactly what protections are required in particular cases, however, remains unsettled. Courts have allowed protections such as cross-examination and the right to an attorney in cases where they have judged these safeguards to be critical to basic fairness, but they have denied them in other cases where they believed that students could get a just hearing without such extra protections.

The most general statement that can be made is that judges must weigh the costs and benefits, for the institution and for the parties involved, in each particular case.

In considering the cost of more elaborate procedures or new procedural safeguards—in terms of time, effort, money, and interference with the smooth running of the university—that cost must be balanced against the likelihood of grave error or injustice if the procedural safeguard were not offered.

Under this analysis, many courts insist on stricter procedural protections in cases involving or even touching upon freedom of speech. Constitutionally protected vital rights are the foundation of our liberty, and when they are at stake, the need for fair procedure is at its most critical.

Several factors keep the courts from establishing more specific rules. First, due process by its very nature is supposed to be flexible. The establishment of one-size-fits-all rules would be contrary to the constitutional premise that one has a right only to the process that is “due.” Second, only a small number of campus due process cases have reached the courts, and it would take more cases than those to smooth out the differences among how various jurisdictions treat the same situation. Third, the courts are generally very wary about interfering with the internal affairs of a college or university, seeing the freedom of campuses from government interference as essential to “academic freedom”—which can be loosely defined as the right of higher education to proceed in its teaching and its scholarship without government interference. No meaning of academic free-

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dom, however, gives higher education the right to break the law.

Even though the law is unsettled and even a bit conflicted, it is still possible to get a general sense of how courts approach particular aspects of campus due process. Part IV of this guide reviews the state of the law with respect to particular procedural safeguards.

### *Procedural Protections in Pedagogical Cases*

So far we have spoken only about disciplinary cases. Students who face suspension or expulsion because of poor academic performance are also entitled to due process. Only minimal protections are required, however. Universities must make academic decisions in a manner that is careful and not arbitrary, but they do not have to grant students any of the procedural safeguards required in disciplinary matters.

Fewer procedural protections are required in academic cases because the evaluation of academic merit rarely hinges on common facts but, rather, on subjective assessments of ability that professors, almost by definition, are better equipped to make than judges. The procedural protections of the criminal law are useful for fact-finding and therefore not required in cases involving subjective judgments of performance. A professor's grading of a student's academic performance is protected from court interference by the principle of academic freedom,

unless the professor's assessment can be shown to have been influenced by improper factors, such as the student's race or political viewpoint.

The United States Supreme Court considered the balance, in academic expulsions, between academic freedom and due process in two major cases of the late 1970s and early 1980s. In *Board of Curators of the University of Missouri v. Horowitz* (1978), the Court reviewed a due process claim advanced by a student who was dismissed from a public medical school because of poor academic performance. The student was never given an opportunity to be heard by any of the university committees that took up her case. However, the Court held that hearings and associated procedural protections are not required in academic dismissal cases, because they do not involve the kind of factual determinations in which heightened protections would be useful. The Court ruled that Horowitz's treatment was consistent with due process because of a few basic conditions. Her academic work had been reviewed in a "careful and deliberate" manner by both faculty members and school committees; she had been given ample notice that her work was judged to be unsatisfactory; and she had been granted a number of chances to exhibit improvement.

The United States Supreme Court expanded on this in *Ewing v. University of Michigan* (1985), in which a student alleged that due process was denied when he was dismissed from a medical program after receiving the

lowest score ever recorded on a standardized test in the history of that program. He complained that many other students with even poorer overall academic records had been allowed to retake the standardized test. In refusing to interfere with the expulsion, the Court invoked the principle of academic freedom. It ruled that courts should defer to universities' judgments on **academic matters** unless there is such a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Because the student's overall record was exceptionally poor, the university's decision to dismiss him was well within its discretion.

Lower courts have interpreted these decisions to require that colleges and universities make academic decisions in a manner that is "careful and deliberate," or at least not "arbitrary and capricious." Courts will intervene in academic decisions only if you were treated with gross unfairness or on the basis of prohibited factors and criteria.

If you made a clear case, however, that the academic sanctions against you were not based on reason or fact—or arose from other grudges held against you—you then might convince a court to set aside its presumption in favor of the university. For example, in *Vaksman v. Alcorn* (1994), the Court of Appeals of Texas ordered that a public university readmit an expelled graduate student. The court ruled that the dismissal was made on the basis of

personal hostility arising from the student's intellectual disagreements with the faculty and his outspoken criticism of university policies—not on the basis of the student's erratic (but occasionally distinguished) academic record.

Additionally, courts have sometimes required that students be given advance notice that their poor performance has placed their status in jeopardy, or, failing that, be given notice of the general standard of performance expected of students.

### *Cheating: The Border Between Academic and Disciplinary Offenses*

Cheating—the use of fraud or deception to enhance one's academic performance—stands at the boundary of academic and disciplinary realms.

Sometimes, for due process purposes, cases of cheating are clearly disciplinary cases, as, for instance, when a student copies from another student's paper by looking over his shoulder during an exam. Determining guilt or innocence in such cases is a matter of fact-finding: Did the student actually copy? If the facts indicate that a rule was broken, the student is guilty; if they do not, the student is innocent. The procedural protections of due process are designed to assist precisely these sorts of factual judgments.

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In contrast, charges of plagiarism, a form of cheating, include both academic and disciplinary elements. On the one hand, the real question in a plagiarism case is whether or not you committed the particular act of using someone else's work without attribution. That is a factual question. On the other hand, the question of whether your words were so close to those of another, uncited source that your work constitutes plagiarism also requires skilled academic judgment. The issue to be resolved in a campus plagiarism case is thus both factual and judgmental.

When you seek a court's intervention, it is in your interest to define the charge as "disciplinary," offering you more safeguards, while it is in the interest of the school's administrators and lawyers to define the charge as "academic," offering them greater discretionary power. Sometimes that line is quite vague, as in the case of plagiarism. Having your case treated as disciplinary in the campus proceedings themselves would create a record that strengthens your argument in court that the case is indeed a disciplinary rather than an academic matter.

### *The University Must Deliver What It Promises*

A public college or university may not decide on its own not to grant the due process rights that the Constitution requires. The Constitution mandates these rights. If

your college or university denies you any of the protections required by due process, you can make a due process claim in federal or state court.

Many public colleges and universities, however, actually promise students considerably more than due process requires. The law does not oblige campuses to offer a full and formal judicial hearing, for example, but many universities provide something fairly close to one. The law does not always require campus tribunals to permit formal cross-examination of witnesses, but many universities themselves have chosen to allow for such cross-examination.

Courts will generally compel **public** universities to give you all of the procedural protections that they have promised. The courts enforce these obligations, however, not as a matter of your rights to due process, but as a right you have under state contract law. This same doctrine also binds **private** universities to follow their advertised or published disciplinary policies as discussed in Part III. Some states also have rules that require administrative agencies to follow their own regulations. If you live in such a state, these administrative rules may provide an additional legal theory useful to force a public university to obey its own rules.

The case of *Morrison v. University of Oregon Health Science Center* (1984), decided by the Court of Appeals of Oregon, illustrates the advantages of making a contract claim, rather than a due process claim, if your university

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deviates from the rules it established for itself. The issue was whether or not a university had followed its own procedures when it dismissed a dental student for academic reasons. The university's policy stated that only evidence raised at a student's actual hearing could be considered in reaching such a decision, but the record showed that the university had considered evidence never raised at this hearing. The court ordered the university to annul a dismissal that had been reached by a violation of its own promised procedures. This victory could not have been gained on due process grounds, because due process does not **require** universities to grant students a hearing in academic cases.

In sum, if your public college or university denies you basic procedural protections guaranteed by the Constitution, you may have a due process claim. If your public college or university fails to follow its own rules, you may have a claim under several other headings, including state doctrines about contract that oblige organizations to honor their own promises, a reasonable obligation indeed.