

Ensure your disciplinary policy includes safeguards for charged students

By William F. Maderer

Hardly a college or university exists that has not had to take disciplinary action — up to and including expulsion — of students who have violated their disciplinary policies. The great majority of cases interpreting due process requirements for university disciplinary proceedings involve public universities, which as state-sponsored institutions are required to apply the 14th Amendment.

Although private universities are not required to follow these constitutional standards, most have chosen to institutionalize procedural safeguards that afford the same procedural due process rights as those offered by public institutions. And courts that have addressed the issue of procedural due process at private institutions have determined that procedural safeguards must at least be “fundamentally fair.” Also, both public and private institutions must substantially adhere to their written policies to avoid judicial scrutiny.

Whether public or private, each institution should have a clearly articulated, written policy that addresses each aspect of the disciplinary procedure to afford students an opportunity to defend themselves at a hearing.

Although courts have been hesitant to specify what information should be included in a notice of violation, at a minimum, it should include a specific description of the charges alleged, the sections of university policy alleged to be violated, the time and place of the scheduled hearing, the student’s right to submit written documentation to the hearing body, and the identification and composition of the hearing body.

The most controversial aspect of disciplinary hearings is whether students are entitled to have counsel participate in the hearings. At a minimum, students should be encouraged to consult with their counsel prior to the hearing to discuss the violations of policy charged and the relevant evidence to be presented. With academic careers often at stake, some question why students should not be allowed to retain counsel to fully participate in the questioning and cross-examination of witnesses.

Generally, a student’s right to counsel at a campus disciplinary hearing has been held to not be essential for it to be considered fundamentally fair. The rationale for this conclusion is that a disciplinary hearing

is not meant to be an adversarial proceeding and that participation by counsel would make it one. However, when universities have their own in-house counsel present and participating in hearings, some states have held that a due process violation may occur if

a similar right is not accorded to students. In each instance, the specific statutes and regulations of the state where the university is located must be consulted.

Recognizing the importance of counsel in assisting a student, some universities allow counsel to be present outside of the hearing room and be available for the student to consult with during the hearing. Unfortunately, this

arrangement can be disruptive if a student repeatedly interrupts the hearing to consult with counsel concerning the introduction of evidence or questioning of witnesses.

An alternative would be to allow counsel to be present in the hearing room to evaluate the evidence being presented and to advise the student (and perhaps to make opening or closing statements), but not to participate in questioning witnesses. Although not the equivalent of full participation, that partial role would go a long way in defeating a due process claim.

Finally, some courts have made an exception to the general rule that counsel are not permitted in the hearing room where the charges involve a parallel violation of criminal law and the student’s Fifth Amendment rights are at stake. That becomes critical when the student testifies (whether under oath or not) and the prosecutor seeks to subpoena the hearing tape recording or transcript. But under those circumstances, no constitutional mandate requires that the attorney be permitted to play an active role in the proceedings. ■

About the author



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Follow these best practices

When establishing or updating your disciplinary procedure:

- Publish a clear policy delineating students’ due process rights.
- Provide clear, comprehensive notice of violations.
- Set forth what role, if any, an attorney may have during disciplinary hearings. ■