

Ensure you have safeguards for charged students

By William F. Maderer, Esq.

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

About the Author

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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 safeguards must at least be “fundamentally fair.” Also, both public and private institutions must substantially adhere to their policies.

Written policy is essential

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.

Determine counsel’s role

The most controversial aspect of disciplinary hearings is whether students are entitled to have counsel participate. 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. 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 disciplinary hearing has been held to not be essential for it to be considered fair. The rationale 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 toward 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 and the prosecutor seeks to subpoena the hearing recording or transcript. But under those circumstances, no constitutional mandate requires that the attorney be permitted to play an active role. ■

HELPFUL HINTS

Follow these best practices

Just as you should care about ensuring victims get justice, you should care about protecting the rights of students who have been charged. So 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. ■

— William F. Maderer, Esq.