Selected Legal Issues Relating to Due Process and Liability in Higher Education

A Policy Statement

Council of Graduate Schools

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COUNCIL OF GRADUATE SCHOOLS

SELECTED LEGAL ISSUES

RELATING TO DUE PROCESS AND LIABILITY IN HIGHER EDUCATION

A Policy Statement

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FOREWORD

Graduate deans and graduate schools are responsible for overseeing the quality of a university's graduate programs. Such oversight includes ensuring that equitable academic standards are upheld across all disciplines throughout the university. Excellence and equity are inseparable not only in matters of academic standards, but also in the institutional handling of grievances and disputes. While it is part of the graduate dean's responsibility to make sure that principles of fairness and equity of treatment are upheld in such disputes, it is clearly beyond a graduate dean's capacity to resolve such disputes once they take the form of legal challenges.

When legal challenges do arise, it is important that graduate administrators seek legal experts. Expert legal counsel may also help to ensure that university policies and practices are sufficiently responsive to the complex and growing number of laws and cases. In those instances where legal adjudication is unavoidable, the courts have generally been reluctant to infringe upon the university's processes and procedures, especially in matters related to academic conduct. However, an enhanced understanding of the legal issues that may arise can put graduate education administrators in a better position to craft policies and procedures that prevent conflicts from escalating into legal issues in the first place.

Legal issues affecting graduate education arise in a number of areas that are at the very heart of the university's graduate academic enterprise: from academic and research misconduct to admissions and employment to disputes regarding the measurement and communication of academic progress. This revised CGS publication is not intended as a substitute for expert legal counsel, which should be sought if and when legal disputes arise involving the university or graduate school. Rather, it is intended to provide a general guide for graduate deans and other university administrators to the range of issues that may arise in graduate education that may have legal implications. The publication does not address legal proceedings but rather institutional procedures for investigating griev-

ances, conducting hearings, and arriving at judgments. It is our hope that, with this guide, graduate education leaders may be better informed when disputes first emerge so as to discourage legal challenge and may better fashion policies and advocate for practices that will stand up to judicial scrutiny. CGS is grateful to Elsa Kircher Cole, General Counsel for the NCAA, for her expert authorship of the original publication and for her recent expert revisions.

Debra W. Stewart
President
Council of Graduate Schools

INTRODUCTION

Individuals charged with the administration and operation of higher education share a responsibility for ensuring that the institution is fair and equitable in its treatment of everyone involved in the enterprise. At one level, this involves defining the conditions under which academic programs are carried out and developing policies and procedures covering everything from admissions to graduation, performance standards and expectations for faculty and students, and evaluation processes for assessing accomplishments at all levels. At another level, policies that make clear the institution's commitment to the highest ethical and professional standards in teaching, research, and scholarship need to be articulated and procedures established for dealing with situations in which those standards are not met.

It is important that all policies and procedures be as clear and as unambiguous as possible and, in addition, be perceived as being not only fair but consistent with the objectives of higher education. This is best done by developing them in a collegial manner that involves all those affected. Obviously, such policies and related matters must be written, must be public, and must be distributed to all faculty, students, administrators, and other personnel who participate in instruction and research.

At some point, challenges will arise to all of these conditions. Individuals may object to a policy itself or to the way it has been implemented in their particular case. There may be conflicting views among those involved about what happened and how it should be interpreted. In addition, allegations of improper conduct may arise that involve academic programs or research activities. In all of these cases, there must be processes defined before the fact for investigation of conflicting views and/or allegations of improprieties and a setting provided in which conflicts and disputes concerning academic issues can be resolved.

While the processes we are describing must be general and broad in scope, certain kinds of problems arise with greater frequency than others, and university administrators and faculty members should be prepared to deal with them. These include:

- Academic and research misconduct
  - Cheating
  - Plagiarism
  - Falsification or fabrication of data or experiment results
- Admissions and employment issues
  - Credential fraud
- Disputes involving a difference of opinion
  - Outcome of examinations, particularly comprehensive examinations for the master's degree and admission to candidacy and final defense of dissertation for the Ph.D.
- Specific issues
  - Dismissal from the institution
  - Revocation of degrees
  - Sexual harassment

In most institutions, a multilevel system exists for dealing with such issues. For example, a student may seek assistance from his or her adviser in resolving a problem. If no satisfactory resolution is reached, the individual may choose to bring the issue to a departmental committee. The next stage might be a college grievance committee. All of these venues can be considered "local" and most problems are best resolved at this level. Certainly, an individual should explore and exhaust these options before seeking an institutional level of resolution.

In some cases, however, the local level may be too close, with too many people directly involved in the case, so that questions of fairness or conflict of interest might be raised. If, for that reason or any other, resolution seems to be impossible at the local level, the next step is for the aggrieved party to take the complaint to some central office. In many institutions, for problems involving graduate programs, the graduate school provides a process for hearing and resolving cases of this kind. This is most often accomplished through committees made up of faculty members and, usually, graduate students, from departments or administrative units other than that of the individuals involved in the complaint. There may be additional procedures involving other offices in the university—perhaps the Office of Academic Affairs—that deal with complaints or grievances on a university-wide basis and across all degree levels. Whatever the particulars, the faculty and departmental administra-

tors are responsible for making sure that the proper procedure, or sequence of procedures, is used. Bypassing or mishandling established procedures for resolving problems can cause many complications for all involved, ranging from unnecessarily embarrassing individuals to compromising the ability of the institution to make judgments based upon the substance of the issues.

None of the foregoing discussion has to do with legal proceedings. Instead, it represents a very general description of *institutional* procedures for investigating grievances of disputes, conducting hearings, and arriving at judgments. Universities, like many other organizations in society (particularly the professions, e.g., medicine and law) have insisted on preserving and protecting both their right and their responsibility to deal with their own problems. The idea of a hearing by one's peers in matters involving professional conduct is firmly established, even though it may come under attack as, for example, in recent discussions of research misconduct and the ability of universities to effectively "police" themselves.

Although we have stated that institutions have a responsibility to deal with these issues as academic rather than legal problems, there is an overriding concept that forms the bedrock of all procedures of the kind we have described: the concept of due process.

In this booklet, we discuss due process—what it means and how it affects the design of institutional procedures. We also discuss what happens when institutional procedures fail to produce a satisfactory outcome and an aggrieved party seeks legal recourse. In both of these cases, a key individual is the institution's legal counsel, and it is particularly important for administrators—primarily deans and department chairs entrusted with the design and implementation of policies and procedures—to establish contact with this individual, preferably in a noncrisis situation, to discuss legal issues affecting education and research.

DUE PROCESS IN THE HIGHER EDUCATION SETTING

A college or university administrator makes many decisions affecting students and faculty. At a public institution some of those decisions may affect rights that the courts have identified as protected by the "due process" of law. Administrators at private institutions may also find their decisions affected by the need for due process through handbook and policy statements that say that due process will be observed by the institution. An understanding of the concept of "due process" is therefore a logical place to begin a discussion of the legal requirements that affect the actions and decisions of today's academic administrator.

The Fourteenth Amendment to the U.S. Constitution provides that no state shall deprive any person of life, liberty or property without "due process of law." Public institutions, as state entities, are bound to observe due process in any decision regarding a student or faculty member that affects a "liberty" or "property" right.

Since the early 1960s, courts have debated what decisions in academia implicate liberty or property rights. Courts generally recognize that a person's interest in his or her reputation, when connected with a tangible interest such as employment or ability to continue pursuing a particular academic field, is a liberty interest.[1]

Courts have found property interests created by implied and express contracts between a student and an institution. For example, the United States Supreme Court has assumed that a student at a public college or university has a Fourteenth Amendment property interest in attending a college or continuing his or her education there.[2]

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[1] Paul v. Davis, 424 US 693, 96 SCt 1155 (1975), reh'g denied, 425 US 985, 96 SCt 2194 (1976); Greenhill v. Bailey, 519 F2d 5 (8th Cir 1975).

[2] Other cases finding such interest in attending a college or continuing education are Picozzi v. Sandalow, 623 F Supp 1571 (ED Mich 1986), aff'd, 827 F2d 770 (6th Cir 1987), cert denied, 484 US 1044; 108 SCt 777 (1988); Jaksa v. Regents of the Univ of Michigan, 597 F Supp 1245 (ED Mich 1984); aff'd, 787 F2d 590 (6th Cir 1986); Hart v. Ferris State College,

However, students probably do not have a property interest in admission to college. At least one court has held that admission to a professional school is a privilege and not a constitutional or property right.[3]

Faculty members can also have property rights through implied or express contracts with an institution. For example, a faculty member who has been granted tenure (even by default) has a protected property interest in continued employment.[4] A nontenured academic employee with a contract of employment for a specified term also has a protected property interest in that employment for the duration of the contract.[5]

Because an individual's liberty and property interest can be affected by a public college or university's decision, the institution must provide some "due process" protections. Since the early 1960s, courts have had to decide what the due process must be. In the decisions, courts recognize that due process is a flexible concept and the level of procedural protections that must be accorded a student or faculty varies with the circumstances.

The key to deciding the appropriate level of due process is whether the decision-making process and procedures used to make that decision are fundamentally fair. A court generally weighs the following factors to decide if a certain element of traditional due process is required in a college or university proceeding:

(1) the faculty member or student's interest affected by the public institution's action;

(2) the risk of an erroneous deprivation of that interest; and

(3) the public interest, weighed against the fiscal and administrative burden on the institution of any additional procedural requirements.[6]

The following sections will describe the common situations involving liberty and property interests that an academic administrator may face and the requirements the courts have imposed in such situations. In addition

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557 F Supp 1379 (WD Mich 1983); Martin v. Helstad, 578 F Supp 1473 (WD Wis 1983); Univ of Houston v. Sabeti, 676 SW2d 685 (Tex 1984); Ross v. Pennsylvania State Univ, 445 F Supp 147 (MD Pa 1978); Hennessy v. City of Melrose, 194 F3d 237 (1st Cir 1999).

[3] Phelps v. Washburn Univ of Topeka, 634 F Supp 556 (D Kan 1986). See also Fleming v. Adams, 377 F2d 975 (10th Cir 1967), cert denied, 389 US 898 (1967).

[4] Bd of Regents of State Colleges v. Roth, 408 US 564, 92 SCt 2701 (1972).

[5] Perry v. Sinderman, 408 US 593, 92 SCt 2694 (1972).

[6] Mathews v. Eldridge, 424 US 319, 334-35 (1976).

to the due process required by the Fourteenth Amendment to the U.S. Constitution, other strictures on academic administrators are described:

(1) the requirements of certain federal and state laws; and

(2) the principles of contract law that apply to student/institution and faculty/institution relationships, e.g., the need for the institution to follow its own rules and regulations regarding students and faculty.

EVALUATION OF ACADEMIC PERFORMANCE

Some decisions by higher education administrators or faculty rest on the exercise of their academic expertise. The evaluation of a student's progress toward a degree, a faculty member's qualifications for tenure, or a program's continued relevance to a department are all situations that require the exercise of academic judgment.[7]

Courts generally acknowledge that academic evaluations are not readily adaptable to the procedural tools of judicial or administrative decision making. As such, courts have been reluctant to reverse academic assessments because they respect the subjective and evaluative nature of these decisions. Courts therefore have held that there is no substantive due process right to have a judicial review of an academic decision.[8]

However, just because decisions require academic expertise does not mean they are insulated from court scrutiny and review. Courts will interfere in such a decision if it can be shown that it was motivated by ill-will or bad faith unrelated to academic performance. Courts will also reverse or send back for a new institutional hearing a decision that is arbitrary or capricious or that is based on illegal discrimination.[9]

The courts will not get involved in a student's academic performance, whether at a public or a private educational institution. The controlling case on that issue is Regents of the University of Michigan v. Ewing.[10]

The Supreme Court in Ewing refused to review a state university's determination that a student was not academically qualified to continue in medical school. The court said:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the

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[7] A court has even determined that sleeping in class and turning in assignments late are academic, not disciplinary, matters. Wheeler v. Miller, 168 F3d 241 (5th Cir 1999).

[8] Regents of the University of Michigan v. Ewing, 474 US 325, 106 SCt 507 (1985).

[9] Hines v. Rinker, 667 F2d 699 (8th Cir 1981); Stevens v. Hunt, 646 F2d 1168 (6th Cir 1981); Wilkenfield v. Powell, 577 F Supp 579 (WD Texas 1983).

[10] Ewing, cited above, fn 8.

> faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not exercise professional judgment.[11]

A similar decision was reached in a case involving a private law school.[12] A law student challenged her dismissal from the school for poor grades, claiming the grade given for an exam was not a rational exercise of discretion by the professor. The trial court dismissed the claim, but the appellate court reversed. However, the state's highest court reversed the appellate court saying:

> As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities is beyond the scope of judicial review.

In another case, a nursing student challenged her receipt of a failing grade. The court refused to interfere, saying the student did not present any evidence from which it could be concluded that the giving of the grade was arbitrary or done in bad faith.[13] The college had presented proof that the student had acted in an unsafe and unprofessional manner and may have placed patients in danger.

It is important to note that courts do occasionally find a university's academic evaluation to be arbitrary and capricious. For example, in one case, a college, for no discernible reason, required a student to participate in a course other than the one for which he had registered. The college

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[11] Ewing, at 513, cited above, fn 8.

[12] Susan "M" v. New York Law School, 556 NE2d 1104 (NY 1990). This New York Court of Appeals case has become nationally recognized as emblematic of the deference that courts should observe regarding university academic decision-making; see, for example, its citation in Alden v. Georgetown Univ, 734 A2d 1103, 1109, (Dist. of Col. Ct. of App 1999).

[13] Davis v. Regis College, Inc., 830 P2d 1098 (Colo App 1991).

gave the student an incomplete because he did not attend that course but instead attended his original class. When the college refused to grant the student a degree, the student sued to compel the award of the degree. The appellate court reviewing the matter ordered a trial on the issue as the college's action appeared arbitrary and capricious.[14]

Such a result can be avoided if (a) a public or private institution considers the totality of a student's performance before deciding to dismiss for academic failure and (b) the ultimate decision is made conscientiously with careful deliberation.[15]

Since the Ewing decision, courts have consistently required only a limited amount of notice before a public or private college or university takes action to discipline for poor academic performance, as opposed to discipline for misconduct. Courts continually say that they will interfere in academic misconduct cases only with the greatest reluctance.[16]

In a 1989 case, a university student received a series of poor evaluations before he was dismissed. The court held that those evaluations were sufficient notice of his academic problems and that it would not interfere with the university's decision to dismiss the student.[17] Likewise, in another case the court held that giving a nursing student three attempts to pass before dismissal was enough notice of academic problems.[18]

Further, it can be argued that those making an academic decision should be entitled to a presumption of honesty and integrity. That presumption should be overcome only if the student can prove the faculty member had actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome.[19]

However, in some instances there may be an exception to the rule that only the limited due process described above is required in an academic evaluation decision. If the fact of the decision will be made known outside of the institution and the institution is a public one, a student arguably has a liberty interest involved. That liberty interest is created by the potential damage to the student's reputation and his or her

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[14] Shuffer v. Bd of Trustees of the California State Universities and Colleges, 67 Cal App 3d 208, 136 Cal Rptr 527 (1977).

[15] Ewing, at 513, cited above, fn 8.

[16] Doherty v. Southern College of Optometry, 962 F2d 570 (6th Cir 1988) cert denied, 493 US 810, 110 SCt 53 (1989); Mauriello v. Univ of Medicine and Dentistry of New Jersey, 781 F2d 46 (3rd Cir 1986).

[17] Ross v. University of Minnesota, 439 NW2d 28 (Minn App 1989).

[18] Clements v. Nassau County, 835 F2d 1000 (2nd Cir 1987).

[19] Ikpeazu v. Univ of Nebraska, 775 F2d 250 (8th Cir 1985).

loss of ability to continue his or her education in a particular field. For example, in 1975, a federal court of appeals found that the communication of a negative assessment of a student's intellectual ability by a medical school to a committee of the Association of American Medical Schools imposed a stigma on him. That stigma deprived him of a liberty interest because the Association would allegedly release the assessment to medical schools across the country. The court, therefore, required a hearing with notice to the student of his deficiencies and an opportunity to be heard before the academic decision was final.[20]

[20] Greenhill, cited above, fn 1.

STUDENT MISCONDUCT

UNRELATED TO ACADEMIC PERFORMANCE

When misconduct unrelated to academic performance occurs at a public or private institution, the institution has several options for dealing with the misconduct. The institution can: (a) use its own disciplinary procedures; (b) encourage the victim to file a criminal complaint with the local prosecutor or to pursue a civil action against the student perpetrator; or (c) use a combination of these approaches.[21]

Although there may be instances involving criminal behavior when the institution may prefer to defer any disciplinary action until the criminal process runs its course, generally institutions will want to deal internally with an incident of misconduct. This is because the institution has its own standards of conduct in the academic community that it wishes to enforce. In addition, dealing with a matter internally gives the institution control over the proceedings, their timing, and the sanctions to be imposed—controls the institution typically lacks in the civil or criminal courts.

As stated above, an institution's disciplinary action for misconduct that affects the student's standing with the institution or results in termination of a benefit, such as financial support, invokes (at least in public universities) a due process concern. The courts have established due process guidelines for administrators to follow that vary depending on the severity of the discipline proposed.

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[21] There is one area in which federal law mandates the institution inform students about internal disciplinary procedure: sexual offenses. §486(c) of the Higher Education Amendments of 1992, Pub. L., No. 102-325, amending the Campus Security Act, Pub. L. No. 101-542 (codified at 20 USC § 1092). For a collection of excellent but succinct articles on the issue, see Brent Paterson and William L. Kibler, eds., *The Administration of Campus Discipline: Student Organizational and Community Issues.* Asheville, N.C.: College Administration Publication, Inc., 1998.

At Public Institutions

Dismissals

If a public college or university wishes to dismiss a student for nonacademic reasons, certain due process procedures must be followed. Courts often cite the 1961 5th Circuit case of Dixon v. Alabama State Board of Education[22] for the minimum elements of due process required in that situation:

i. A notice that contains a statement of the specific charges and the grounds which, if proven, would justify expulsion.

ii. A hearing that gives the governing board or the administrative authorities of the college or university an opportunity to hear both sides in considerable detail. A full-dress judicial hearing, with the right to cross-examine witnesses, is not necessarily required.

iii. The right to the names of the witnesses against the student and an oral or written report on the facts to which each witness testified. Note: This assumes no face-to-face confrontation by the student with the witnesses.

iv. The opportunity to present the student's own defense against the charges and to produce either oral testimony or written affidavits of witnesses on the student's behalf to the institution's governing board or at least to an administrative official of the college or university.

v. Presentation of the results and findings of the hearing in a report open to the student's inspection if the hearing is not before the governing board.[23]

Suspensions

A public college or university contemplating a student suspension for nonacademic misconduct generally need not give the student the same due process it would for a dismissal. The U.S. Supreme Court has said, however, that due process requires that even secondary school students facing suspension be given two things:

i. Some kind of notice, and

ii. Some kind of hearing.[24]

The U.S. Supreme Court has recognized the flexibility inherent in due process. It has said that the timing of the notice and the nature of the

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[22] 294 F2d 150 (5th Cir 1961).

[23] Dixon, at 158-59.

[24] Goss v. Lopez, 419 US 565 (1975).

hearing depend upon the appropriate accommodation of the student and the institution's interests.[25] This means that before a decision to suspend is made, the student must receive:

i. Oral or written notice of the charges and, if the student denies the charges,

ii. An explanation of the evidence the authorities have, and

iii. An opportunity to present his or her side of the story.[26]

All the other due process protections that would be available in a more formalized procedure in court are not required.

Note: A public institution does not have to hold a presuspension hearing in all cases. If a student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the student may be immediately removed from school. In such cases, the necessary notice and a rudimentary hearing should follow as soon as practicable.[27]

Courts have upheld such immediate suspension. One example involved a dean's immediate suspension of a student after a suspicious residence hall fire.[28] The student challenged the suspension on due process grounds. The court upheld the dean's action because the court recognized the dean had a duty to protect the security of the academic community.

The dean had also refused to write the student a letter of good standing to another school prior to a hearing. The court upheld that refusal, saying a dean must have the authority to take prompt and reasonable preliminary action that preserves a school's interest without finally and permanently depriving a student of his/her interest in continuing his/her education.[29]

Additional Guidelines for Conducting Hearings

Since the 1960s, additional procedural guidelines have emerged from the courts. The following elements of due process have been discussed and reviewed by at least one court, but other courts might dispute the decisions:

i. *Clear Standards:* Institutional proceedings must be based on standards of conduct that are expressed in clear and narrow

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[25] Id.
[26] Id.
[27] Id.
[28] Picozzi, cited above, at 1578, fn 2.
[29] Picozzi, at 1579.

terms that are not unconstitutionally vague or overbroad under the First Amendment.[30]

ii. *Type of conduct regulated (including off-campus conduct):* The standard of conduct that a college seeks to impose must be one relevant to the lawful mission, process, or function of the educational institution.[31] This means a college or university may discipline a student for off-campus actions if, for example, the institution demonstrates it "has a vital interest in the character of its students" and the off-campus behavior acts "as a reflection of a student's character and his fitness to be a member of the student body."[32]

iii. *Notice:* Notice to the student of the nature of the allegations against the student may be oral or written in the case of a suspension of 10 days or less.[33] If more severe penalties are contemplated, written notice may be required.[34] The timing and content of the notice and nature of the hearing will depend on the appropriate accommodation of the competing interests of the student and the institution.[35]

iv. *Opportunity to be heard:* Normally a student has the right to appear in person at his or her disciplinary hearing.[36] There may be exceptions to this practice, however, due to the student's distance from the hearing site or his or her inability to attend.[37]

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[30] Esteban v. Central Missouri State College, 415 F2d 1077 (8th Cir 1969), cert denied, 398 US 965 (1970).

[31] Id.

[32] Kusnir v. Leach., 439 A2d 223, 226 (Pa 1982). Accord, Sohmer v. Kinnard, 535 F Supp 50, 54 (D Md 1982) (competent authorities, using established procedures, judge the actions of a student to be "detrimental to the interest of the University community"); Hart v. Ferris State College, 557 F Supp 1379, 1380 (WD Mich) (1983); Wallace v. Florida A&M Univ, 433 So 2d 600 (Fla App 1 Dist 1983) (the student's conduct interfered with the educational and orderly operation of the school in light of the school's aggressive stance on the ethical conduct of its students); Ray v. Wilmington College, 106 Ohio App 3d 707, 667 NE2d 39 (1995) (The institution has the prerogative to decide that certain types of off campus conduct are detrimental to the institution and to discipline a student who engages in that conduct.)

[33] Goss, cited above, fn 24. See, also, Salehpour v. University of Tennessee, 159 F3d 199 (6th Cir 1998). (A notice of general charges is adequate when the student has knowledge of the misconduct of which he is accused.)

[34] See, e.g., Esteban, cited above, fn 30.

[35] Goss, cited above, fn 24.

[36] Crook v. Baker, 813 F2d 88 (6th Cir 1987).

[37] Martin, cited above, fn 2.

v. *Double jeopardy:* A student is not placed in double jeopardy where sanctions may be imposed. Double jeopardy only prevents successive criminal or punitive sanctions imposed by the same entity. There also can be no double jeopardy where sanctions have two different underlying purposes. In a student disciplinary hearing the institution's interest is in protecting the campus community. The purpose of the criminal proceeding is the public's need for justice.[38]

vi. *Confrontation and cross-examination:* The U.S. Constitution does not require confrontation or cross-examination of witnesses at a student misconduct hearing.[39] However, courts that have reached this conclusion based their decisions on facts that indicated that some form of cross-examination was in fact afforded the student. Other courts have suggested that when suspension or expulsion may result, the right to cross-examination is preferable.[40]

vii. *Legal representation:* Most courts have declined to grant students the right to counsel in disciplinary proceedings.[41] In certain cases, however, particularly where criminal charges are also pending against the student arising out of the same set of facts that form the basis for the misconduct hearing, due process may require the student be allowed to have counsel present to advise him or her. The student still does not have the right to have the counsel actually participate in the hearing.[42] This is generally considered to be a best practice in both public and private university settings even if right to counsel is not a due process requirement. Another exception occurs when the institution proceeds through counsel. When the university uses counsel in the hearing to present its case against a student, the student is entitled to counsel.[43]

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[38] Paine v. Bd of Regents of Univ of Texas Sys, 355 F Supp 199 (WD Tex 1972), aff'd, 474 F2d 1397 (5th Cir 1973); State v. Sterling, 685 A2d 432 (Sup Ct Maine 1996); State v. Kauble, 948 P2d 321 (Ct Crim Appls Okla 1997).

[39] Dixon, cited above, fn 23.

[40] Esteban, cited above, fn 30.

[41] Hall v. Medical College of Ohio at Toledo, 742 F2d 299 (6th Cir 1984), cert denied, 469 US 1113, 105 SCt 796 (1985); Nash v. Auburn Univ, 621 F Supp 948 (DC Ala 1985), aff'd, 812 F2d 655 (11th Cir 1987).

[42] See, e.g., Gabrilowitz v. Newman, 582 F2d 100 (1st Cir 1978); Boyle v. Newman, 414 A2d 491 (Ct App RI 1980); McLaughlin v. Massachusetts Maritime Academy, 564 F Supp 809 (D Mass 1983); Hart, cited above, fn 2.

[43] French v. Bashful, 303 F Supp 1333 (ED La 1969), appeal dismissed, 425 F2d 182 (5th Cir 1970), cert denied, 400 US 941 (1970).

viii. *Other representation:* If a case involves a sexual assault, the Campus Sexual Assault Victim's "Bill of Rights"[44] requires that both the accuser and the accused have the same opportunity to have others present, for support or advice, during the accused's disciplinary hearing.

ix. *Self-Incrimination:* A constitutional right against self-incrimination exists only in criminal matters. A student may choose to remain silent during an institutional disciplinary proceeding, but that silence may be used against the student.[45]

x. *Timing When Criminal Charges Are Pending:* A student generally does not have the right to delay a university hearing until after his or her criminal trial, if the student has the right to remain silent at the university hearing.[46] Institutions may or may not want to grant delays in specific instances.

xi. *Transcript:* A transcript or recording of the hearing is not required.[47] The absence of a written transcript has not been grounds for reversing a disciplinary action. However, several courts have required the institution to keep some form of record. One court stated that either party may record the proceedings.[48]

xii. *Open or closed hearings:* Courts do not allow a student to choose whether the student's disciplinary hearing is open to the public or closed.[49] State open meeting laws may require an open or closed hearing and should be reviewed to determine if they apply to this type of proceeding.[50]

xiii. *Statement of reasons for the decision:* There is no requirement that the hearing board issue written findings of fact or conclusions of law similar to those required under the Federal Rules of Civil Procedure.[51] However, state administrative laws

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[44] 20 U.S.C. § 1092 (f)(8)(B)(iv)(I).

[45] Picozzi and Hart, cited above fn 2.

[46] Wimmer v. Lehman, 705 F2d 1402 (4th Cir 1983), cert denied, 464 US 992.

[47] Jaksa, cited above, fn 2.

[48] Esteban, cited above, fn 30.

[49] Zanders v. Louisiana State Bd of Education, 281 F Supp 747 (WD La 1968). See, e.g., Morrison v. Univ of Oregon Health Sciences Center, 685 P2d 439 (Or App 1984).

[50] See, e.g., Morrison v. Univ of Oregon Health Sciences Center, 685 P2d 439 (Or App 1984).

[51] Herman v. Univ of South Carolina, 341 F Supp 226 (D SC 1971), aff'd, 457 F2d 902 (4th Cir 1972).

may require such, even though they are not constitutionally mandated. If a criminal act is involved, such a statement of reasons may also be required.[52]

xiv. *Confidentiality of Proceedings:* Federal law protects the privacy of student education records, including the findings made by a hearing board or officer in a student disciplinary matter.[53] Those final results cannot be released without the student's permission, unless the requesting individual or entity is allowed access under one of the listed exceptions provided by law.[54]

One exception allows, but does not require, disclosure of the results to an alleged victim of any crime of violence or nonforcible sex offense, as defined by law.[55] Only the name of the student, the violation committed, and the sanction imposed, if any, may be released. The name of any other student, such as a victim or witness, may be disclosed only with the consent of that student. Students must also be informed of their options to notify outside law enforcement authorities and to be assisted by campus authorities in making such notification.[56]

Another exception permits disclosure of final results to parents of a student under age 21 who violates campus rules regarding alcohol.[57] Before releasing any information from a student disciplinary hearing, the exceptions should be reviewed with legal counsel.

Contractual Obligations

In addition to complying with due process when disciplining students, public institutions must be careful not to breach any contractual obligations they have with their students. The same is true of private institutions.[58]

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[52] See, e.g., Kusnir, cited above, fn 32.

[53] Family Educational Rights and Privacy Act, aka FERPA or the Buckley amendment, 20 USC § 1232g.

[54] FERPA's confidentiality requirements trump state open records law requirements. United States v. Miami Univ, 91 F Supp 2d 1132, aff'd, 294 F3d 797 (6th Cir 2002) (newspaper denied access to student disciplinary records).

[55] 20 USC § 1232g(b)(6)(A).

[56] See fn 21.

[57] 20 USC § 1232g(i)(1)(A).

[58] Cloud v. Trustees of Boston Univ, 720 F2d 721, 724 (1st Cir 1983); Slaughter v. Brigham Young Univ, 514 F2d 622, 626 (10th Cir 1975), cert denied, 423 US 898 (1975); Corso v. Creighton Univ, 731 F2d 529 (8th Cir 1984); Felheimer v. Middlebury College, 869 F Supp 238, 244 (D Vt. 1994).

Courts consider the rules and regulations published by a public or private institution to form a contract between a student and the institution. Courts also have found that statements in college and university handbooks, brochures, and other institutional publications can form the terms of additional contractual obligations. Courts allow students to sue public and private institutions for breach of contract if the institutions fail to abide by those statements and promises.

Courts examine closely the published disciplinary procedures promulgated by higher education institutions. If an institution varies materially from those procedures, e.g., if a university fails to hold a hearing despite a university regulation saying one will be provided, a court would probably find a breach of contract.[59]

However, if a college or university fails to comply strictly with its written procedures and the omission does not amount to a substantial, material, or prejudicial violation of its rules, a court will generally not invalidate the disciplinary action. For example, a student challenged a college's failure to allow the student to confront witnesses during the student's disciplinary hearing. The student cited the general statement in the college's bulletin that "due process is followed in all disciplinary cases."[60] The reviewing court found no breach of contract. It said that solid evidence supported the college's conclusions about the student, and there was no showing of harm resulting from the college's failure to allow the student to confront witnesses.[61] On the other hand, failure of a school to provide a student with the right to cross-examine witnesses, when that right was explicitly granted in the school's disciplinary procedures, did result in the overruling of a school's determination. The court ordered the school to re-hear the matter in accordance with the published rules.[62]

Courts also do not require literal adherence to institutional rules when a dismissal rests upon experts' judgment as to academic or professional standards of conduct or when a state's interest in the substance of the matter outweighs the individual's rights. In an Indiana case, a dental student claimed a school had not followed all its written procedures in his dismissal. The court found substantial compliance

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[59] Tedeschi v. Wagner College, 427 NYS2d 760, 404 NE2d 1302 (Ct App 1980), rev'g 417 NYS2d 521 which aff'd 402 NYS2d 967; Lightsey v. King, 567 F Supp 645 (ED NY 1983); Morrison, cited above, fn 50.

[60] Clayton v. Trustees of Princeton Univ, 608 F Supp 413 (NC NJ 1985).

[61] Life Chiropractic College Inc v. Fuchs, 337 SE2d 45, 176 Ga App 606 (1985).

[62] Napolitano v. Trustees of Princeton University, 453 A2d 279 (NJ Super Ch Div 1982).

because it believed placing an incompetent or irresponsible dentist in active practice would ignore the institution's administrative duty to the public.[63]

Another academic dismissal case reached the same result. The court found no abuse of discretion in the school's failure to follow its rules. The court determined literal adherence to internal rules is not required when a dismissal rests upon expert judgments as to academic or professional standards and such judgments are fairly and nonarbitrarily arrived at.[64]

At Private Institutions

Administrators at private institutions have more latitude in taking disciplinary action than those at public institutions. Private institutions are not subject to the Fourteenth Amendment of the U.S. Constitution.[65] Courts have also generally held that students at private universities do not have a cause of action against the institution under 42 U.S.C. 1983; that is, they have not accepted a theory that acts of a private university may constitute "state action" even though a "public interest" might be imputed to the institution.[66]

Most private universities have voluntarily adopted student disciplinary codes.[67] Such codes typically provide for at least the following:

i. A written notice of charges,

ii. A hearing before an administrative judicial panel, whose membership will consist of at least some students, with the opportunity to present evidence and witnesses and to cross-examine adverse witnesses, and

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[63] Neel v. Indiana Univ Bd of Trustees, 435 NE2nd 607 (Ind App 1982).

[64] Sofair v. State Univ of New York, 388 NYS2d 453, 456 (SCt App Div 1976), rev'd on other grounds, 406 NYS2d 276 (1978); Bonwitt v. Albany Medical Ctr School of Nursing, 353 NYS2d 82 (SCt 1973); see also, Balogun v. Cornell Univ, 333 NYS2d 838 (SCt 1971).

[65] Rendell-Baker v. Kohn, 457 US 830 (1982).

[66] The vast majority of cases hold that no such claim is stated. See, for example, Berrios v. Inter-American University, 535 F2d 1330 (1st Cir 1976); Blackburn v. Fisk Univ, 443 F2d 121 (6th Cir 1971). But see Belk v. Chancellor of Washington Univ, 336 F Supp 45 (ED Mo 1970) which held that the issuance of a charter to a private university confers a public interest in a private university and thus renders that university's actions subject to constitutional restraints.

[67] See Jason J. Bach, Students Have Rights, Too: The Drafting of Student Conduct Codes, 2003 BYU Educ. & L.J. 1, 6 (2003).

iii. The requirement for a written determination, usually based upon a preponderance of evidence standard, and a limited appeal process.[68]

Private institutions should refrain from using the phrase "due process" in their literature unless it is their intent to deliberately exceed the judicial standard otherwise imposed on them and voluntarily assume the same procedural standards that would be imposed on their public counterparts.

In meting out discipline for nonacademic misconduct, private institution administrators must not act (1) arbitrarily or capriciously or (2) out of conformance with their institution's published regulations. The breach of contract situation that can result from the latter is described in the section above.

Because private institutions are not subject to the Fourteenth Amendment, courts have consistently held that students at private institutions have no due process right to a hearing for nonacademic misconduct.[69] Courts have noted that while it might be better policy to hold a hearing whenever any disciplinary action is contemplated, as a matter of law, private institutions are not required to do so.

Some courts find it difficult to grant private institutions complete discretion to take disciplinary action without affording any hearing to a student. These courts will occasionally find an implied contract of fair dealing between the student and the institution.

In one case a court said, "The college or university's decision to discipline that student [must] be predicated on procedures which are fair and reasonable and which lend themselves to a reliable determination."[70] Another court said, "The standard of basic procedural fairness is to be used to measure the student disciplinary proceeding. The key to the standard is reasonableness."[71] On the other hand, courts tend to allow private institutions some discretion in fashioning the standard of process to be applied. For example, a court did not overturn the expulsion of a student even though he did not have a hearing or even an interview with

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[68] See, for example, the Model Student Code, contained in an article authored by Edward N. Stoner II and Kathy L. Cerminare for the Journal of College and University Law entitled "Harnessing the 'Spirit of Insubordination: Student Disciplinary Code," 17 J.C. & U.L 89, contained in Brent C. Paterson, and William L. Kibler, eds., *The Administration of Campus Discipline: Student Organizational and Community Issues.* Asheville, N.C.: College Administration Publication, Inc., 1998.

[69] See John B. Stetson Univ v. Hunt, 102 So 637 (Fla 1924); Dehaan v. Brandeis Univ, 150 F Supp 626 (D Ct Mass 1957).

[70] Kwiatkowski v. Ithaca College, 368 NYS2d 973, 977 (SCt 1975).

[71] Swanson v. Wesley College, Inc., 402 A2d 401, 403 (Del Super Ct 1979).

the sanctioning administrator before his dismissal. The court found it was adequate that the student was given the right to present witnesses and offer his version of the facts at an appeal hearing.[72]

Other "best practices" are recognized as appropriate and useful for private universities. For example, carefully drawn emergency and interim suspension procedures are often employed. So, too, are leave-of-absence policies. The better practice in dealing with students demonstrating behavior reflective of emotional or mental problems may be that of placing the student on a voluntary (or involuntary) leave of absence. This procedure, when spelled out in the student handbook, can also provide for nonpunitive entries on transcripts, refunds of tuition, and the imposition of conditions for return to the campus, which may include medical intervention initiated by the student.[73]

Best practices at private universities are not restricted to policies relating to students. While discussed in more detail later in this booklet, carefully created policies that afford hearing rights to private university employees can serve to avoid problems without triggering the full array of due process obligations. For example, it is nearly universally accepted that private universities should have a published, carefully drafted fair hearing process for termination of, at a minimum, tenured faculty employees. Separate policies providing hearing rights for faculty and other research staff accused of scientific misconduct should also be crafted. It should be noted that, as a result of federal and state regulations regarding the disbursement of public research funds, procedural rights of a person accused of scientific misconduct may be the same for both the private and the public university employee.

Best practices also recommend written policies regarding other employee matters. For example, policies that clarify a private university's position regarding consensual relations among all employees—both academic and nonacademic—should be considered. Private colleges generally have more latitude in expressing their preferences in such policies. So, too, policies that enforce affirmative action and prohibitions against sexual harassment should be promulgated. Personal liability for public or private university employees on these matters should be

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[72] Mitchell v. Long Island Univ, 309 NYS2d 538 (SCt 1970).

[73] Great care, however, should be taken when dealing with students (or employees) who may be disabled. See Gary Pavela, *The Dismissal of Students with Mental Disorders*. Washington, D.C.: National Association of College and University Attorneys, 1990.

carefully reviewed and explained in light of statutes in some states that may limit indemnification (and therefore insurability) of employees for punitive damages.[74]

The critical role of educational outreach to both academic and nonacademic staff is also a recognized best practice. Sexual harassment training is an obvious example. Another example of proactive academic outreach might be information to the faculty on the differences between public constitutional protections of free speech and the limitations of academic freedom on the private college campus.

RELATED TO ACADEMIC PERFORMANCE

Plagiarism and Cheating

In cases of plagiarism and cheating, misconduct may be inextricably mixed with an academic matter. As a result, courts often consider such cases to revolve around factual issues rather than academic judgments. In addition, disciplinary actions for plagiarism and cheating are more stigmatizing and may have a greater impact on the student's future. Therefore, they may call for procedural protections.[75] A safe practice for public institutions to follow for student nonacademic misconduct hearings in a plagiarism or cheating situation is the due process procedures described above.

Private institutions may punish students for plagiarism without deciding if it is academic rather than nonacademic misconduct, as long as the institution's own rules regarding such are followed. In addition, private institutions can discipline students for conduct that might go unpunished, or be dealt with less harshly, at a public institution. For example, a doctoral candidate at a private institution submitted two articles for publication, using his adviser's name as coauthor without the adviser's knowledge. He did it to improve the chances of publication. The court upheld the school's dismissal of the graduate student, stating that such acts were "dishonest" in the context of a church school.[76]

A similar example is a case in which a university charged a student in her final semester with plagiarism on a term paper. The student had taken sections verbatim from a particular book recommended by her

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[74] See, for example, New York Public Officers Law § 19, which prohibits municipal indemnification of a public employee for damages that arise out of the intentional acts of the employee.

[75] See, e.g., Jaksa, cited above, fn 2.

[76] Slaughter v. Brigham Young Univ, 514 F2d 622 (10th Cir 1975), cert denied, 423 US 898 (1975).

professor, without using quotation marks or footnotes. The book was the only work cited in the paper. The court rejected the student's demand to be represented by counsel at a university hearing. The university found the student guilty and her degree was withheld for one year. The trial judge, while stating that he personally believed the penalty to be too harsh, upheld the university's right to impose it as reasonable.[77]

In a different case, a student submitted a fraudulent letter attesting to his status as an employee of a university in order to retain his university-owned apartment. When the fraud was discovered, the student was dismissed prior to his re-enrollment as a student. The lower appellate court reversed the institution's decision. The high court adopted the position of the dissent in the lower court. The dissent had said that the student's character was a key element in the university's graduate program, and therefore the fraudulent submission was of legitimate concern to the university. The court held that the student's action evinced a degree of dishonesty and lack of character that was a matter of vital interest to an academic institution, which may reasonably expect honesty and fairness from its students in dealing with it.[78]

Revocation of a Degree or Credits

If a student's plagiarism or fabrication of data is discovered after an academic degree is awarded, a public institution can revoke that degree. Revocation can only occur after observing appropriate due process procedures.[79]

The due process required to revoke a degree is to provide the student with notice of the academic deficiencies discovered and give the student an opportunity to be heard as to those deficiencies. Cross-examination of witnesses is not required.

The same principles apply to revocation of credits for fraudulent acts.[80] Notice and opportunity to be heard must precede the credit revocation at a public institution. For example, if a public college or university learns from a prospective employer about a graduate's alteration of his or her transcript, the institution may wish to take action to revoke the student's degree or certain academic credits. Before

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[77] Napolitano v. Trustees of Princeton Univ, 453 A2d 279, aff'd, 453 A2d 263 (NJ Super Ct App Div 1982).

[78] Harris v. Trustees of Columbia Univ, 479 NYS2d 216 (1984), rev'g, 470 NYS2d 368 (1983).

[79] Crook, cited above, fn 36. Waliga v. Bd of Trustees of Kent State, 488 NE2d 850, 22 Ohio St 2d 55 (1986).

[80] Merrow v. Goldberg, 672 F Supp 766 (D Vt. 1987).

revocation can occur, the institution must give notice to the student of the discovery of the fraudulent act and the institution's intended response and allow an opportunity for the student to present his or her explanation for the transcript alteration.

At a private university, a degree or credits can be revoked for academic reasons if some minimal procedural protections exist to ensure, at least, fundamental fairness.[81] The courts will determine the sufficiency of the procedures based on the facts and circumstances of each case. One court found it was sufficient that the student received adequate notice of the charges against him, the possible consequences, and the procedures to be used.

[81] Abalkhail v. Claremont Univ Ctr, 2nd Civ No. 13014012 (Cal AD 1986), cert denied, 479 US 853, 107 SCt 186 (1986). See also, Clayton v. Trustees of Princeton University, 608 F Supp 413 (D. N.J. 1985).

DIFFICULT OR TROUBLED STUDENTS

Occasionally, a college or university administrator must deal with a student with emotional or mental problems. Sometimes the institution will want an evaluation of a student's fitness to remain a part of the campus community. An institution can only require a student to have such an evaluation against the student's wishes if its rules and regulations make an evaluation a condition of continued enrollment.

A stigma may result from a psychological evaluation that will affect the reputation of the student and his or her ability to pursue future academic endeavors or even subsequent employment. At a public institution, requiring a psychological evaluation may give rise to a liberty interest if the results are not kept confidential.

A liberty interest would require a student to receive a due process hearing prior to the mental examination. The institution might be forced to show a compelling state interest in having the exam take place, such as the student posing a serious threat to himself or herself or others.[82]

If the institution's own rules are silent or state only that the institution may request but cannot require an evaluation, it may not be permissible to condition a student's continued enrollment on a medical review. In this situation, the institution may decide a student's suspension or dismissal is the only solution. Difficult or troubled students can be suspended or dismissed in this way only as a consequence of their actions or to protect the safety of all students. A college or university cannot discipline a student just because of an emotional or physical disorder. Such a condition is protected by federal statutes, specifically, Section 504 of the 1973 Rehabilitation Act and the Americans with Disabilities Act (ADA).[83]

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[82] Gorman v. Univ. of Rhode Island, 646 F Supp 79; see also, Gomes v. Univ of Maine Sys., 365 F Supp. 2d 6 (D Me. 2005).

[83] 29 USC § 794, et seq., 42 USC § 1201, et seq.

In 1990, Congress enacted the ADA.[84] That law prohibits excluding qualified students from participation in or denying them the benefits of the services, programs, or activities of a public or private institution. Section 504 provides that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[85] The Act applies to both public and private institutions. If one program or activity at an institution receives federal funding, the entire institution is covered by the Act.

In order to successfully discipline a troubled or difficult student without violating ADA, or Section 504, the student's behavior or failure to make academic progress must be separated from his or her physical, mental, or emotional problems. The key question for a court will be whether the student would have been disciplined for the behavior or lack of academic progress if he or she had no handicap. For example, a suicidal and violent medical student sued her university alleging handicap discrimination when it denied her readmission. The court found the disciplinary action was based on the student's lying about her medical history of "borderline personality" disorders, and therefore no discrimination had occurred.[86] Likewise, in another case, a court upheld a university's action in expelling a psychotic student; the action was based on the student's behavior and not the underlying medical problem.[87]

An institution may take action to protect the life and safety of other students without violating handicap discrimination laws. For example, a university has the right to restrain physically, and later expel, a student whose loss of control over his behavior poses a danger to other students and administrators.[88]

Note that an alcoholic or drug-dependent student may also be viewed as having a handicap.[89] However, if, as a consequence of the drug or alcohol problem the student has a poor academic record or is disruptive, an educational institution can dismiss the student by focusing on the consequences of the dependency.

Having AIDS or HIV is also a handicap. A student with either cannot, on that basis alone, be prevented from continuing in a program if

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[84] 42 USC § 1201, et seq.

[85] 29 USC § 794.

[86] Doe v. New York Univ, 666 F2d 761 (2nd Cir 1981).

[87] Corso, cited above, fn 58.

[88] Furth v. Arizona Bd of Regents, 676 P2d 1141 (Ariz App 1983).

[89] Anderson v. University of Wisconsin, 841 F2d 737 (7th Cir 1988).

the student is otherwise qualified for the program and, by reasonable accommodation to the student's disability, can participate in the program. Accommodation may not be possible in certain academic programs, such as the health professions.[90]

To prevent litigation, it is best for colleges and universities to make clear what behavior will not be tolerated through rules and regulations. Punishment should then be based on violations of those rules, not on an individual's mental or physical circumstances.

[90] Doe v. Washington University, 780 F Supp 628 (ED Mo 1991). See also, Doe v. University of Maryland Medical Sys. Corp., 50 F3d 1261 (Md 1995).

FRAUD IN ADMISSION

As stated, once a student has matriculated at a public institution, courts recognize that a student obtains a proprietary interest in continuing his or her education there. Therefore, courts require that there be due process—notice and opportunity to be heard—accorded to that person before admission can be rescinded by the school. For example, a student was admitted to a public university's law school. He failed to disclose complete or accurate information on his admission form concerning his criminal record and current incarceration. The court found some minimal due process was due before the law school could rescind the admission. In that instance, the court held that a written offer to the student to present his side of the story was sufficient to meet the university's due process burden of affording the student an opportunity to be heard. The court noted that under different circumstances the school might be constitutionally required to provide a hearing at which the admittee could appear in person, for example, if the student disputed the facts underlying the school's determination that the application was incomplete or untruthful.[91]

If a student has actually commenced studies at a public institution and is to be expelled for fraudulent application, courts require additional due process protections. For instance, where a student had completed all the requirements for a degree, a court found due process entitled the student to a written notice of charges, a sufficient opportunity to prepare to rebut charges, an opportunity to retain counsel at any hearing on the charges, confrontation of accusers, presentation of evidence on his own behalf, an unbiased hearing tribunal, and an adequate record of the proceedings.[92]

Private institutions do not have to provide due process if they dismiss students because of fraudulent applications. However, as with other disciplinary actions, private schools must follow their own

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[91] Martin, cited above, fn 2.

[92] North v. West Virginia Bd of Regents, 332 SE2d 141 (WVa. 1985).

published procedures regarding such actions or be liable to a student for breach of contract. Again, it is worth noting that private colleges should avoid a reference to "due process" unless they mean to adhere to its legal requirements.

Courts recognize that both private and public colleges and universities have a particularly strong interest in the integrity of their programs and, therefore, need to be able to discipline their students for fraudulent actions. For example, a court found that although a student had completed all requirements for his degree, because he had committed fraud to obtain admission to medical school, he could be expelled as, ". . . fraud is an all-pervading vice and whatever it touches it taints throughout, part cannot be bad and the rest good."[93]

[93] Id at 147 quoting Landerman v. Wilson and Beardsley et al, 29 WVa. 702, 2 S.E. 203 (1887).

TERMINATION OR DISCIPLINE OF FACULTY AND OTHER ACADEMIC EMPLOYEES

EMPLOYMENT AT WILL

An employee such as a lecturer, instructor, adjunct professor, or one who does not have a contract granting some assurance of continued employment (i.e., termination for "just cause"), and who is not employed for a definite term, is said to be terminable "at will." At-will employment, which may include high-level officials, is typified by a provision in a handbook, an employment application, or other confirmation of employment that says the at-will employee serves "at the pleasure" of the employer or "can be terminated with or without cause and with or without notice." No hearing to terminate such an employee is required as a matter of law. The only limitation on the employer's discretion to terminate is that the termination cannot be based upon an unlawful motive. All employees covered by employee welfare acts, including those providing nondiscrimination, family and medical leave, workplace safety, etc., are protected by the terms of that legislation regardless of at-will status.

TERM CONTRACT

If an employee is hired under a definite term contract, such as a one-year period or renewable terms of a probationary tenure contract, the employee can be "nonrenewed" by simple virtue of the expiration of the term. No specified reason, notice, or hearing is required.[94] However, as with at-will employees, the reason for the nonrenewal cannot be based upon an unlawful motive. Termination of term contract employees before the expiration of the specified term would generally give rise to "just cause" or "due process" rights as explained below.

[94] Board of Regents v. Roth, 408 US 564, 92 SCt 2701 (1972).

PROPERTY RIGHTS IN CONTINUED EMPLOYMENT: DUE PROCESS

Any employee who has a property right in continued employment, such as tenure, a contract right to be employed until the end of a specified term, or a contract right not to be terminated except for just, adequate, or reasonable "cause" and who is employed by a public institution, has a constitutional right under the Fourteenth Amendment to due process before termination.[95] Term contract employees have this right if the employer terminates prior to the expiration of the term but not when the contract is simply "nonrenewed."

Private colleges and universities generally have termination and discipline policies that afford academic due process as a matter of policy or contract. The United States Supreme Court has held that pretermination due process requires that, at a minimum, an employee receive:

(1) A notice of the reason(s) for termination,

(2) A basic explanation of the evidence supporting those reasons, and

(3) An opportunity to respond before the termination.[96]

Regardless of the application of constitutional due process rights, an employer must scrupulously follow its own promulgated policies, procedures, and employment contract terms regarding any discipline determination.

TENURED EMPLOYEES

The contractual employment relationship can take a form defined by a contract of tenure. Although each institution is free to specify exactly what its tenure contract means, tenure contracts are generally characterized by their indefinite term with provisions stating tenure can be terminated only for reasons such as adequate or just cause, resignation or

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[95] Id; Perry v. Sindermann, 408 US 503, 92 SCt 2694 (1972) (a professor should be permitted to show that while no explicit tenure system existed at his institution, a "de facto" tenure system existed such that due process should attach); Weiman v. Updegraff, 344 US 183, 73 SCt 215 (1952) (public college professor dismissed from an office held under tenure provisions protected by due process); Slochower v. Board of Education, 350 US 552, 76 SCt 637 (1956) (public college professor dismissed from an office held under tenure provisions protected by due process).

[96] Cleveland Board of Education v. Loudermill, 470 US 532, 105 SCt 1487 (1985).

relinquishment, medical disability, retirement, retrenchment due to serious financial conditions, or program elimination.[97]

Tenure bestows increased prestige, compensation, and academic freedom.[98] However, it does not give a faculty member the right to teach a particular course, to have any particular office or laboratory space, to receive a particular salary, or to hold any particular position in a department. Nor does tenure allow a faculty member the right to ignore the concomitant professional responsibilities that are a basic element of any tenure contract.[99]

Tenured and academic employees with contracts giving assurance of continued employment have property rights that arise from their contracts with an institution. Those individuals can be terminated prior to the expiration of their contracts only for reasons stated in their contracts. Careful review of the contractual language or causes for tenure termination should precede any action to ensure that those conditions are clearly met.

Most institutions either have a brief, very general description of "cause" or a list of reasons for tenure termination. An example of a short-form articulation:

> Cause shall be restricted to physical or mental incompetence or moral conduct unbefitting the position. Academic cause shall be defined as the failure by a member of the faculty to discharge responsibly his or her fundamental obligations as a teacher, colleague, and member of the wider community of scholars.[100]

An example of the detailed description:

> Just cause shall include, but not be limited to, demonstrated incompetence or dishonesty in professional activities related to

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[97] See AAUP Policy Documents & Reports (9th Edition; 2001; popularly known as the "Redbook") for policy statements reflecting the AAUP's definitions of tenure and recommended policies regarding termination of tenure for cause, "financial exigency," programmatic reasons, etc. These should serve as a starting point in policy consideration, remembering that they are written from the faculty's perspective.

[98] Id, as to the classic *1940 Statement on Principles of Academic Freedom and Tenure;* Univ Education Association v. Regents of the University of Minnesota, 353 NW2d 534 (Minn 1984). The *Statement* is a landmark document developed by the American Association of University Professors and the Association of American Colleges and Universities and subsequently endorsed by over 180 scholarly and professional organizations.

[99] For example, see AAUP Redbook, cited in fn 97, policy statements on professional ethics, plagiarism, sexual harassment, etc.

[100] University of Rochester policy (as of 2000).

> teaching, research, publication, other creative endeavors, or service to the university community; unsatisfactory performance over a specified period of time and a failure to improve that performance to a satisfactory level after being provided a reasonable opportunity to do so; a neglect of or refusal to carry out properly assigned duties demonstrated through the board-approved post-tenure review process; personal conduct that substantially impairs the individual's fulfillment of properly assigned duties and responsibilities; moral turpitude; misrepresentation in securing an appointment, promotion, or tenure at the university; or proven violation of Board or university rules and regulations (including the code of conduct or any other disciplinary rules), depending upon the gravity of the offense, its repetition, or its negative consequences upon others.[101]

There are hundreds of cases that sustained a university's judgment that cause for termination existed.[102]

At public institutions, since tenure creates a property right in continued employment, tenure also means that notice of the reasons for termination, an explanation of the evidence upon which those reasons are based, and an opportunity to be heard must precede termination of employment.[103] For example, if fraudulent credentials are alleged to have been used to obtain employment or if scientific misconduct is alleged to have occurred, a pretermination hearing would be required.

An employment contract does not have to be labeled "contract" to exist. A good plaintiff's attorney will argue that a contract consists of oral promises (if not disclaimed) and any written statements, whether they are in a letter, a faculty handbook, or other policy manual.

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[101] Arizona Board of Regents policy (as of 2000).

[102] For a few examples, see Chung v. Park, 377 F Supp 524 (MD Pa 1974) (intransigence with respect to dealings with superiors and incompetence); Kowtoniuk v. Quarles, 528 F2d 1161 (4th Cir 1975) (a series of instances of "unprofessional conduct" such as failing to serve on department committees, failing to work cooperatively with members of the department, etc.); Smith v. Kent State University, 696 F2d 476 (6th Cir 1983) (persistently flouting the authority of the department head and refusing to meet scheduled classes); Samaan v. Trustees of California State University, 197 Cal Rptr 856 (1983) (conviction of grand theft relative to submitting false claims for Medi-Cal reimbursement, unrelated to work done for the university); Korf v. Ball State University, 726 F2d 1222 (7th Cir 1984) (improper advances toward and gifts to male students); Levitt v. Moore, 590 F Supp 902 (WD Tex 1984) (improper sexual advances toward female students in a class); Agarwal v. Regents of the University of Minnesota, 788 F2d 504 (8th Cir 1986) (plagiarism and incompetence).

[103] Loudermill, cited in fn 96.

ACADEMIC FREEDOM

Both tenured and nontenured faculty members at private and public institutions enjoy the right to academic freedom in teaching, research, and classroom activities. The paradigmatic definition of academic freedom is contained in the *1940 Statement of Principles on Academic Freedom and Tenure.* It provides, in part:

- Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties. . . .
- Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.
- College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[104]

Many courts, including the United States Supreme Court, have relied on the *1940 Statement of Principles* in defining the concept of academic freedom.[105]

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[104] See AAUP Redbook, cited in fn 97, at 3–4. The text of the *1940 Statement of Principles* is available online at www.aaup.org/statements/Redbook/1940stat.htm.

[105] Roermer v. Board of Public Works of Maryland, 426 US 736, 756 (1976); Tilton v. Richardson, 403 US 672, 681–82 (1971); Hulen v. Yates, 322 F3d 1229, 1239 (10th Cir 2003); Vega v. Miller, 273 F3d 460, 476 (2nd Cir 2001), cert denied, 537 US 1097 (2002). ("The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic freedom and tenure."). For a good treatment of the history and meaning of academic freedom and its recognition by American courts, see Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 Wash. & Lee L. Rev. 299, 307–321 (2002).

In recent years, judges and legal commentators have distinguished between two separate strands of academic freedom jurisprudence: one that protects faculty members in teaching, publication, and research (individual academic freedom) and another that extends that protection to the educational functions of colleges and universities in their own capacities (institutional academic freedom).[106] In its most traditional form, individual academic freedom protects a faculty member's freedom of utterance, both within and outside the classroom. Subject to reasonable limitations, a faculty member has the right to determine for himself or herself what subjects to cover in class,[107] how to teach those subjects,[108] how to assign grades,[109] and how and where to publish the results of research.[110] The claim of individual academic freedom is strongest when applied to teaching activities undertaken in the classroom or laboratory and related to the subject matter of the class. Ordinarily, academic freedom does not protect classroom speech that is unrelated to the professor's teaching duties[111] or that violates federal or state laws.[112] Such speech can be grounds for discipline or termination.

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[106] The phrases in parentheses are taken from J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment"; 99 Yale L. J. 251, 314, 315 (1989).

[107] E.g., Axson-Flynn v. Johnson, 151 F Supp 2d 1326 (D Utah 2001) (professor in the theater department was entitled to require students to undertake training exercises using provocative language); Edwards v. California Univ of Pennsylvania, 156 F3d 488 (3d Cir 1998) (professor could not be disciplined for using a nonapproved syllabus to teach his media studies class).

[108] E.g., Hardy v. Jefferson Community College, 260 F3d 671 (6th Cir 2001) (teacher of a communications class was entitled to use deliberately provocative language as part of a pedagogical effort to show how language is used to marginalize oppressed groups in society).

[109] E.g., Parte v. Isibor, 868 F2d 821 (6th Cir 1986) (teacher was inappropriately disciplined for refusing to change a "B" grade to an "A". But see Brown v. Armenti, 247 F3d 69 (3d Cir 2001) (rejecting Isibor and holding that a university has the inherent right to determine what grade should be assigned in a particular course).

[110] E.g., United States v. Microsoft Corp., 162 F3d 708 (1st Cir 1998) (quashing subpoenas for the research notes of two professors preparing a book-length study of Microsoft's predatory marketing practices).

[111] E.g., Southern Christian Leadership Conference v. Louisiana Supreme Court, 252 F3d 781 (5th Cir), cert denied, 534 US 995 (2001) (rules restricting the kinds of community groups qualifying for representation by a student-staffed law school clinic did not violate the academic freedom of law school faculty members because interference with pedagogical goals was deemed too remote).

[112] E.g., Urofsky v. Gilmore, 216 F3d 401 (4th Cir 2000) (en banc), cert denied, 531 US 1070 (2001) (academic freedom does not protect a professor from prosecution for violating a state antipornography statute prohibiting the use of state-owned computers to download sexually explicit material); Rubin v. Ikenberry, 933 F Supp 1425 (DD Ill. 1996) (academic freedom does not allow a professor to tell dirty jokes, make demeaning sexist comments, and

Institutional academic freedom derives from what Supreme Court Justice Felix Frankfurter, in a leading academic freedom case decided almost fifty years ago, referred to as "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[113] In a series of cases decided since then, courts have allowed colleges and universities—not just members of their faculties—to assert institutional academic freedom as a shield against judicial review of decisions relating to the admission of students and the design of the curriculum. Just a few years ago, when affirmative action policies at the University of Michigan were the subject of court challenges, the United States Supreme Court upheld the university's policies on the grounds that, among others, "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."[114]

At public institutions, individual academic freedom claims frequently surface when institutions attempt to discipline faculty members for speaking out on matters of public concern not immediately related to their teaching or classroom duties. Under a separate line of Supreme Court cases, the so-called *Pickering-Connick* test (named after the two leading cases in this area)[115] requires courts to balance the interests of the faculty member as a citizen in commenting on matters of general public concern, against the interests of the institutional employer in providing the public services it performs through its employees. Although the case law is far from uniform in this area, some general propositions can serve as guidance to college and university administrators. In broad terms, a faculty member's utterances, whether delivered in the classroom or outside it, are not protected by academic freedom if the comments threaten to disrupt the educational environment.[116] Nor can academic

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create a hostile environment for female students in his classroom). But see Cohen v. San Bernardino Valley College, 92 F3d 968 (9th Cir 1996), cert denied, 520 US 1140 (1997); Silva v. Univ of New Hampshire, 888 F Supp 293 (D.N.H. 1988) (both holding that professors could not be disciplined under impermissibly vague sexual harassment policies).

[113] Sweezy v. New Hampshire, 354 US 234, 263 (1957) (internal quotations omitted).

[114] Grutter v. Bollinger, 539 US 306, 333 (2003), quoting Regents of the Univ of California v. Bakke, 438 US 265, 312 (1978) (Powell, J., concurring).

[115] Pickering v. Board of Education, 391 US 563 (1968); Connick v. Myers, 461 US 138 (1983).

[116] E.g., Waters v. Churchill, 511 US 661, 673 (1994) (a government employer may fire an employee for speaking on a matter of public concern if (1) the employer's prediction of disruption is reasonable, (2) the potential disruptiveness is enough to outweigh the value of the speech, and (3) the employer took action against the employee based on this potential disruption and not in retaliation for the speech).

freedom be invoked to justify noncollegial, inappropriately aggressive, or criminal behavior.[117] Academic freedom is not a license for activity at variance with institutional procedures and requirements. Under all these circumstances, an institution can appropriately discipline or terminate a faculty member whose conduct violates legal or institutional norms.

At private institutions, individual academic freedom is usually a contractual right given content by the faculty member's appointment letter, the faculty handbook, and academic custom and usage.[118] Public colleges and universities must respect constitutional protections of free speech and academic freedom in addition to whatever rights are accorded in their faculty contracts.

DISCLAIMERS AGAINST ORAL PROMISES

Both public and private colleges and universities can potentially subject themselves to unnecessary lawsuits by virtue of "oral" promises made by administrators.[119] For example, a dean could promise employment "as long as I am Dean," or suggest that an employee will be employed "as long as you do your job." This kind of exposure can be avoided by the insertion of a simple disclaimer in employment contracts and or employee handbooks. The disclaimer takes the form of words to the effect that "no one but the President (or governing Board) has the authority to make any

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For a good discussion of the applicability of the Pickering-Connick test in the higher education context, see Ailsa W. Change, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search For a Standard Beyond Pickering and Connick*, 53 Stan. L. Rev. 915 (2001).

[117] E.g., Mayberry v. Dees, 663 F2d 502 (4th Cir 1981), cert denied, 459 US 830 (1982) (university was justified in basing a denial of tenure on the candidate's demonstrated record of noncollegiality in dealings with department peers).

[118] As one court observed in Greene v. Howard University, 412 F2d 1128, 1135 (DC Cir 1969): Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the marketplace are not invariably apt in this noncommercial context. See Perry v. Sindermann, at 601, cited above, fn 95 (just as there may be a "common law of a particular industry or of a particular plan," so there may be an "unwritten 'common law' in a particular university" so that even though no explicit tenure system exists, the college may "nonetheless . . . have created such a system in practice"); Board of Regents of Kentucky State University v. Gale, 898 SW 2d 517 (Ky. Ct App 1995) (examining the "custom" of the academic community in order to determine the meaning of academic terminology in the faculty handbook).

[119] For a discussion of various cases, see Hustoles, "Faculty and Staff Dismissals: Developing Contract and Tort Theories," 10 Journal of College and University Law 479 (1984).

oral promise regarding employment, or to vary the terms and conditions of employment as specified in the university's written employment policies." Courts almost always enforce such a disclaimer.

LIBERTY INTERESTS/DEFAMATION

Even though an employee may not have a property interest in continued employment, such as an at-will employee or a term contract employee whose contract is not renewed, any public employee may possess a constitutional "liberty" due process interest in his or her name or reputation that would be affected if a public disclosure of the reasons for his or her discharge is made.[120] A public or private employee also has general state law privacy rights and rights not to be defamed by libel, an untrue written publication, or slander, an untrue oral publication. Such situations may arise if the employee is being terminated for fraudulent credentials or for scientific misconduct and the reasons for dismissal are shared with individuals who do not have an absolute need to know. Legal counsel should be consulted prior to the dissemination of any reason for discipline or termination.

THE IMPACT OF APPLICABLE COLLECTIVE BARGAINING AGREEMENTS ON DISCIPLINE AND TERMINATION ISSUES

A flurry of recent legal activity has revolved around the seminal question of whether graduate students are employees subject to collective organization. This question has been established by state law decisions regarding public institutions.[121] These courts generally have ruled that graduate teaching assistants may be employees in certain jurisdictions but graduate research assistants generally are not. At private institutions, the situation was muddled but has been clarified recently. The National Labor Relations Board long held that graduate students are not subject to collective organization.[122] The Board then reversed that ruling to hold that

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[120] Bishop v. Wood, 426 US 341, 96 SCt 2074 (1976); Roth, cited in fn 4.

[121] E.g., the State of Michigan Public Employment Relations Act has been interpreted to allow the organization of graduate teaching assistants but not graduate research assistants.

[122] Leland Stanford Junior University, 214 NLRB 621 (1974).

they are.[123] Most recently, the NLRB returned to the long-standing rule that graduate research assistants are not employees subject to collective organization.[124]

The practical result of these developments is fairly clear. If there are graduate teaching assistants or any other employees that are members of a unit covered by a collective bargaining agreement, then the termination and discipline policies and procedures will undoubtedly be spelled out in that agreement. The agreement then must be followed to its spirit and its letter. At public institutions in states where graduate students may organize but have not, attention must be paid to fair and reasonable termination as well as discipline processes and results. This should be done in any event, but in this context, unfair treatment could be a cause to encourage collective organization.

[123] New York University, 332 NLRB 1205 (2000).

[124] Brown University, 342 NLRB 42 (July 13, 2004).

SPECIAL ISSUES

SCIENTIFIC MISCONDUCT

Scientific misconduct has been defined in many ways, but the current preferred definition within the academic community is the fabrication or falsification of data or plagiarism in a scientific research project.[125] A student or a faculty member can commit scientific misconduct. The due process afforded before disciplinary action is taken against the perpetrator of scientific misconduct should be consistent with that afforded for other types of cheating, plagiarism, or fraudulent acts as described in previous sections on those topics.

Colleges and universities are required by federal regulations to establish uniform policies and procedures for investigating instances of alleged or apparent misconduct involving research or research training, applications for support of research, or training or related research activities that are supported with federal funds.[126] An institution must comply with these procedures when investigating a student or faculty member or risk a breach of contract action by the person being investigated.

Federal regulations provide that the institution must make an inquiry into allegations of possible misconduct. If after the inquiry the investigation appears warranted, the institution must notify the federal government.[127]

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[125] For the National Science Foundation definition of misconduct, see 45 CFR § 689.1; for the Public Health Service (PHS) definition, see 42 CFR § 50.102. As of this writing, Health and Human Services has promulgated proposed regulations, which would replace existing PHS regulations, which will be codified at 42 CFR Part 93. The proposed definition of misconduct eliminates a controversial "catch-all" provision in the existing PHS regulations prohibiting "other practices that seriously deviate from those that are commonly accepted within the scientific community." 42 CFR § 50.102.

[126] 42 CFR § 50.103(c)(1); 45 CFR § 689.3(d); proposed revisions to these regulations to be codified at 42 CFR Part 93.

[127] 42 CFR § 50.103(d); 45 CFR § 689.3(a).

The sharing of the name of the alleged perpetrator with the federal government arguably affects the alleged perpetrator's liberty interest in his or her reputation. Therefore, an inquiry conducted by a public institution may create a need for due process.[128] While there has not been much case law in this area, it is arguable that the rudiments of due process—notice and an opportunity to be heard—should be provided to the subject of the inquiry, unless to do so would result in immediate damage to persons or property.

Ownership of data can be a troubling area within research. Disputes can be avoided by discussing the ownership of data at the outset of a project and entering into a written agreement regarding ownership. An institution may have policies regarding ownership of data, and, if so, the policies would control, unless the institution agrees to waive them. Without such documentation, a court will examine all the evidence, written and oral, as to the creation of the data, and review any institutional or accepted academic practice regarding ownership of data in order to resolve the issue. Judicial solutions in this fact-bound type of matter are rarely satisfactory to the parties involved. Attention to the issue of ownership at the commencement of a project can avoid difficulty at the end.

SEXUAL HARASSMENT

The U.S. Supreme Court has defined sexual harassment in the workplace as: Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature . . . when

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual [these two are also known as 'quid pro quo' sexual harassment], or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, offensive working environment. [This is also known as 'hostile or abusive environment' sexual harassment.][129]

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[128] But see Popovic v. United States, 997 F Supp 672 (D. Md. 1998), aff'd, 175 F3d 1015 (1999) (no infringement on liberty or property rights from adverse inquiry findings).

[129] Meritor Savings Bank, FSB v. Vinson, 477 US 57, 66–67, 106 SCt 2399, 2405 (1986); Harris v. Forklift Systems, 510 US 17, 114 SCt 367 (1993).

Public and private colleges and universities can be held liable for quid pro quo harassment by their faculty and academic administrators toward subordinate faculty and staff under federal law[130] and toward students under a different federal law.[131] A single incident of quid pro quo harassment, if serious enough, can be sufficient for liability to occur.[132]

Public and private colleges and universities can also be liable for abusive environment sexual harassment by faculty and academic administrators toward subordinate or peer faculty and staff. Such liability occurs when the college or university knows or should have known that the harassment was occurring or the harassing employee has authority to make employment decisions regarding the employee being harassed.[133]

Institutional liability for abusive acts toward students is determined under a different standard. The college or university will be liable for abusive acts by a faculty or staff member or a fellow student only when an administrator at the school with authority to discipline the alleged harasser has actual knowledge of the misconduct and responds with deliberate indifference to it.[134] To be actionable, abusive environment harassment must be pervasive and continuous. An isolated, sporadic incident will not be sufficient to find this type of harassment has occurred.[135] Conduct that a reasonable person would find hostile or abusive is enough to be actionable if the employee or student also perceives the conduct to be abusive.[136] An employee's or student's psychological well-being does not need to be seriously affected for him or her to bring a claim of abusive sexual harassment.

Colleges and universities are able to prevent liability for sexual harassment by their faculty and administrators by (1) promulgating a procedure to employees and students for receiving and addressing complaints of sexual harassment and (2) taking prompt corrective action

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[130] Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2 et seq; Meritor at 2408.

[131] Title IX of the Education Amendments of 1972, 20 USC § 1681 et seq; Franklin v. Gwinnett County Public Schools, 503 US 60, 112 SCt 1028 (1992).

[132] See, e.g., Downes v. Fed Aviation Admin, 775 F2d 288, 291 (Fed Cir 1985), Joyner v. AAA Coop Transp., 597 F Supp 537, 542 (MD Ala 1983), aff'd, 749 F2d 732 (11th Cir 1984).

[133] Meritor at 2408.

[134] Gebser v. Lago Vista Indep. Sch. Dist., 524 US 274 (1998) and Davis v. Monroe County Bd. of Educ, 119 SCt 1661 (1999).

[135] See, e.g., Scott v. Sears, Roebuck & Co., 798 F2d 210 (7th Cir 1986); Freedman v. American Standard, 41 FEP 471, 476 (D NJ 1986), aff'd, 833 F2d 304 (3d Cir 1987); Volk v. Coler, 638 F Supp 1555, 1556–7 (CD Ill 1986), rev'd in part, aff'd in part, 845 F2d 1422 (7th Cir 1988).

[136] Harris, fn 129.

when a complaint is received.[137] The procedure must be one that encourages employees and students to come forward with complaints. For example, a court would probably look with disfavor on a procedure that required all complaints to be made to a supervising administrator first as that person might well be the alleged harasser.[138]

The courts have not defined "prompt corrective action." Courts will decide if the action taken by an institution is sufficient based on factors such as the seriousness of the offense, the due diligence exercised in an investigation of a complaint, the corrective action sought by the harassed person, the type and speed of discipline meted out to the offending faculty or administrator, the impact of the resolution on the harassed person, and whether the problem persisted thereafter.[139]

Consensual relations between faculty and students or faculty and other faculty is a controversial subject in the sexual harassment discussion. Some colleges and universities believe that if one participant in a relationship is in a power position over the other, such as a teacher is with a student in his or her class or on whose dissertation committee he or she sits, that the relationship cannot truly be consensual. Some colleges and universities, therefore, have adopted consensual relationship policies that range from forbidding relationships in such situations, to strongly discouraging them, to presuming them to be non-consensual if sexual harassment is later claimed. Opponents of such policies argue that they infringe on First Amendment rights of freedom to associate or rights of privacy. However, most academics agree that perceived or actual favoritism by a faculty member toward a student in such a relationship is a problem for other students and the academic integrity of the program.

Many states and some municipalities have enacted laws dealing with sexual harassment. A college or university administrator should be familiar with the requirements of those laws as they may be more stringent and specific than the federal laws in this area.

PRIVACY OF STUDENT RECORDS

The Family Educational Rights and Privacy Act (FERPA)[140] is a federal law that protects the confidentiality of educational records maintained by the nation's colleges and universities. FERPA generally prohibits public

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[137] Meritor at 2408–9.

[138] Id.

[139] See, e.g., Barrett v. Omaha Nat'l Bank, 726 F2d 424 (8th Cir 1984); Swentek v. US Air, Inc., 830 F2d 552 (4th Cir 1987); Ford v. Revlon, Inc, 153 Ariz 38, 734 P2d 580 (1987).

[140] Cited above, fn 53.

and private postsecondary education institutions from disclosing, without a student's written permission, most information in student records to anyone outside the institution or to those within the institution who do not have a legitimate need to know. FERPA also gives a student the right to inspect and obtain a copy of the student's own records.

FERPA is administered and enforced by the United States Department of Education. The Department's Family Policy Compliance Office hosts a useful Web site containing the full text of FERPA, implementing regulations, leading court decisions construing FERPA, and a helpful set of frequently asked questions about the most important provisions in the law.[141]

FERPA protects the educational records of an institution's current and former students. It does not apply to the records of unsuccessful applicants for admission to the institution or unsuccessful candidates for admission to a different part of the institution; in other words, if an undergraduate student applies for admission to a graduate or professional school at the same institution and is not admitted, then the student is not entitled under FERPA to inspect the admission file maintained by the graduate or professional school.[142] The application file of an *admitted* student, on the other hand, *is* an educational record under FERPA and ordinarily can be accessed by the student. An admitted student can review letters of recommendation, evaluations, and notes placed in the admissions office file, whether confidentiality was promised to the author or not, unless the student voluntarily waives the right of inspection in a manner deemed to be noncoercive.[143]

With only a few exceptions, FERPA applies to all records maintained by the institution that directly relate to a student, not just records kept in formally maintained "student files." The broadly encompassing statutory term "educational record," however, does not include an administrator's or faculty member's own notes if the notes are kept solely in the possession of the note taker for the purpose of serving as a personal memory aid and are not shown to or shared with anyone else. Educational records do not include campus security or police department's records, records relating to students in their capacities as

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[141] "About the Family Policy Compliance Office," www.ed.gov/policy/gen/guid/fpco.

[142] 34 C.F.R. § 99.5(c).

[143] 34 C.F.R. § 99.12(b). "A waiver [of the right to inspect confidential letters of recommendation] . . . is valid only if: (i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and (ii) The waiver is made in writing and signed by the student. . . ." 34 C.F.R. § 99.12(c)(1).

institutional employees, and medical, psychiatric, or psychological records not shared with the institution.[144] Nor are faculty members' grades, grade books, or grading records considered to be educational records within the meaning of FERPA.[145]

Under FERPA, institutions are allowed to disclose "directory information" without written permission of the student. Directory information is generally defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed."[146] It typically consists of a student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.[147] A student, however, can file a written denial of permission, generally with the institution's registrar, prohibiting the disclosure of information that would otherwise be categorized as directory information under the institution's FERPA policy.[148]

FERPA allows information from a student's educational records to be shared without the student's prior written permission in a few limited circumstances. The information can be shared in response to a lawfully issued subpoena or a judicial order. An institution can share with the victim of any crime of violence the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator of the crime.[149] A 1998 amendment to FERPA authorizes disclosure to parents of infractions of liquor laws, drug laws, or institutional alcohol or controlled-substance policies committed by their child.[150] FERPA was amended again in 2000 following the enactment of the Campus Sex Crimes Prevention Act. That well-publicized statute requires registered sex offenders to indicate whether and where they are enrolled as postsecondary students and requires colleges to share information on the attendance of registered offenders with students, faculty, and other members of the campus community. Under FERPA, information concerning a student's status as a registered sex offender can be

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[144] 34 C.F.R. § 99.3.

[145] Owasso Independent School District No. I–011 v. Falvo, 534 U.S. 426 (2002).

[146] 34 C.F.R. § 99.3.

[147] 34 C.F.R. §§ 99.3, 99.31(a)(11).

[148] 34 C.F.R. § 99.37.

[149] 34 C.F.R. § 99.31.

[150] 20 U.S.C. § 1232g(i); 34 C.F.R. § 99.31(a)(15).

disseminated without the consent of the subject of the record.[151] Most recently, following the terrorist attacks on the World Trade Center and other American locales on September 11, 2001, the USA PATRIOT Act[152] amended FERPA in several respects. The Attorney General now possesses the authority to obtain *ex parte* orders requiring colleges and universities to produce educational records when "relevant to an authorized [terrorism] investigation or prosecution of . . . an act of domestic or international terrorism"—without disclosing the existence of the order to the subject of the record or giving that student the opportunity to contest the order.[153]

Information from student files can be shared with the Secretary of the U.S. Department of Education and other specified federal and state educational authorities. It can be given to accrediting organizations and organizations conducting studies for the institution for developing, validating, or administering predictive tests, student aid programs, or improving instruction. It can be disclosed in connection with a financial aid application.[154]

Parents of a student do not have a right to see their child's educational record or to have information from it. However, institutions may disclose information from the record to parents if their child is claimed as a dependent by them for tax purposes.[155]

An institution that unlawfully discloses FERPA-protected educational records without obtaining the consent of the subject of the records is subject to the enforcement jurisdiction of the U.S. Department of Education, which can be triggered by the filing of a written complaint by an aggrieved student or parent.[156] An administrative finding of statutory noncompliance can lead to a cease-and-desist order, the withholding of federal funds, and, under the most egregious circumstances, the termination of institutional eligibility for future federal grants and contracts.[157] Enforcement, however, is the exclusive prerogative of the U.S. Department of Education. No private right of action exists under FERPA, and students and parents are not entitled to bring enforcement actions in their own name.[158]

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[151] 20 U.S.C. § 1232g(b)(7).
[152] Pub. L. No. 107–56, § 507, 115 Stat. 272 (2001).
[153] 20 U.S.C. § 1232g(j)(1)(A).
[154] Id.
[155] Id.
[156] 34 C.F.R. §§ 99.63, 99.64.
[157] 34 C.F.R. § 99.67.
[158] Gonzaga Univ v. Doe, 536 U.S. 273 (2002).

In addition to the federal law, state constitutions and state statutes may provide additional privacy rights to students. For example, one court held that a student's state constitutional right to privacy was violated when the university to which he had been admitted gave a copy of his transcript to the state scholarship board without the student's permission.[159]

HATE SPEECH

In recent years, a number of higher education institutions, public and private, have adopted rules or amended existing ones to make it a violation of university or college policy for a student to harass someone verbally on the basis of race, ethnicity, sex, color, or religion. In 1992, the U.S. Supreme Court held a similar city ordinance unconstitutional on First Amendment freedom of speech grounds.[160] That decision provides guidance on how public institutions must write such rules to survive a court challenge.

R.A.V. was a challenge to a municipal "Bias-Motivated Crime Ordinance" that made it unlawful to place on public or private property a symbol or object "including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . ."[161] After a teenaged boy was charged under the ordinance with burning a cross on the lawn of a home owned by an African-American family, the teenager claimed that the ordinance was "impermissibly content based and therefore facially invalid under the First Amendment."[162] For a unanimous Supreme Court, Justice Antonin Scalia held that the ordinance unconstitutionally infringed upon the expressional rights of the teenaged criminal defendant. Justice Scalia noted that even though the government may regulate speech—even so-called "fighting words"—based on content, it may not do so "based on hostility—or favoritism—toward the underlying message expressed." The St. Paul ordinance outlawed expression that was based on race, color, creed, religion, or gender. Persons who wished to use "'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are

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[159] Porten v. Univ of San Francisco, 134 Cal. Rptr. 839 (Cal. App. 1st Dist. 1976).

[160] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). See also Virginia v. Black, 538 U.S. 343 (2003).

[161] R.A.V., 505 U.S. at 380.

[162] Id.

not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[163]

The courts have long recognized that a public college or university can regulate the time, place, and manner of speech on campus.[164] Public institutions also can prohibit the use of "fighting words" on their premises—"words that, by their very utterance, are likely to provoke an immediate and violent reaction by a listener.[165] However, rules governing the time, place, and manner of campus expression and rules prohibiting "fighting words" must be "content neutral." This means that an institution cannot generally prohibit or regulate certain categories of speech on campus, notwithstanding the fact that the speech might be deemed incendiary or offensive—even gravely so—to a large number of people.[166] Under the Supreme Court's 1992 decision in R.A.V., rules that punish only certain categories of "fighting words," such as rules prohibiting racial slurs, are not "content neutral." If an institution wanted to ban invective based on race, ethnicity, color, or religion, it would have to ban all "fighting words," not just words motivated by hostility toward particular racial, ethnic, or religious groups.

Complex legal considerations arise when the rights of students to be protected from harassing or racially, sexually, or religiously offensive speech collide with the academic freedom of faculty members to make pedagogical and curricular decisions in their classrooms. Consistent with widely recognized principles of academic freedom, colleges and universities have the right to determine for themselves "what may be taught . . . [and] how it shall be taught . . . ."[167] This is generally understood to mean that classroom teachers exercise considerable latitude in determining what reading to assign, what teaching methods to employ, and what language to use—even when the sensibilities of students may be offended in the process. In one recent case, for example, an

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[163] Id. at 386, 391.

[164] E.g., Univ and Community College System of Nevada v. Nevadans for Sound Gov't, 100 P.3d 179 (Nev. 2004); Lahme v. University of Southwestern Louisiana, 692 So. 2d 541 (La. App. 1997).

[165] Chaplinsky v. New Hampshire, 315 US 568, 62 SCt 766 (1942). See Doe v. Univ of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post, Inc. v. Bd. of Regents of the Univ of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991).

[166] There are a very few exceptions to this rule that allow the prohibition of obscenity and libel. See, e.g., Miller v. California, 413 US 15,22, 93 SCt 2607, 2613 (1973) (obscenity); Dun & Bradstreet v. Greenmoss Builders, 472 US 749, 105 SCt 2939 (1985) (libel).

[167] Sweezy, cited above, fn 113.

African-American student complained about allegedly offensive language used by a professor in a lecture on language and social constructivism. Students in the class were asked to examine how terms such as "bitch," "faggot," and strongly offensive racial epithets are "used to marginalize minorities and other oppressed groups in society." Following student complaints, the professor's teaching contract was not renewed, and he filed suit alleging that he had been disciplined on the basis of his constitutionally protected classroom utterances. The court held that "a teacher's in-class speech deserves constitutional protection. . . . Reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment."[168]

In addition, colleges and universities should be familiar with their state laws on this subject as some state legislatures have placed restrictions on the disciplining of students alleged to have violated campus speech codes. For example, California law prohibits disciplining a student at a public college or university for using speech that would have First Amendment protection if uttered off campus. That state's law also gives a student a cause of action against any institution that disciplines a student in violation of that law.[169]

Private institutions ordinarily are not subject to the requirements of the First Amendment for the same reasons they are not subject to the Fourteenth Amendment. Thus, unless private institutions have imposed upon themselves the requirement of compliance with the First Amendment through statements in brochures or handbooks or unless state law requires they comply with the First Amendment, private colleges and universities can regulate the content of student speech on campus without the restrictions described above.

IMMIGRATION

Students born outside the United States play an increasingly important role in many graduate programs. Most of these students rely on

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[168] Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001), cert. denied sub nom. Besser v. Hardy, 535 U.S. 970 (2002). See also Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996), cert. denied, 520 U.S. 1140 (1997), and Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994) (finding sexual harassment policies vague or overbroad as applied to punish professors who used legitimate pedagogical techniques, including provocative language, to illustrate points in class and to sustain their students' interest in the subject matter of the course).

[169] Calif. Ed. Code Ch. 5, 66301.

institution-sponsored visa programs (usually F or J) not only to enter the U.S. but to maintain their legal nonimmigrant status during their stay. Recent regulatory and administrative changes have significantly complicated both entry and ongoing status issues for international students. Automated information sharing programs, like the Department of Homeland Security's new Student and Exchange Visitor Information System (SEVIS), require care and vigilance to help students avoid serious and potentially permanent consequences for what in the past would have been minor and easily correctable oversights. Deans and other administrators responsible for graduate education should work closely with those who oversee and administer these government-sanctioned programs at their institution to ensure that process and policy issues are being properly addressed and that students and those who assist them are fully informed of their significant responsibilities.

While the general rules of due process, fundamental fairness, and other rights and responsibilities addressed in this booklet apply equally to international and to domestic students, there *are* special requirements for nonimmigrant visitors to this country (such as maintaining a full-time course load, timely reporting of address and other personal information changes, and prior authorization for off-campus employment) that may need to be considered in some academic, evaluation, or discipline settings. Listing all of those requirements or even just naming the various governmental agencies that implement them is beyond the scope of this publication. However, being aware of the requirements and of the need to work closely with those responsible for them on campus will both improve institutional compliance and enhance international graduate study.

LIABILITY OF AN INSTITUTION, ADMINISTRATION, OR STAFF

LIABILITY FOR DEFAMATION

Faculty or administrators may be reluctant to evaluate a student or other faculty honestly and candidly because of fear of litigation for defamation. However, such evaluations carry little risk of personal liability under the law of defamation.

For example, a student sued an institution for defamation over faculty statements made in the course of an unfavorable evaluation of his clinical work. The court found the student had impliedly consented to publication of the evaluation within the institution. The court said,

> A person who seeks an academic credential and who is on notice that satisfactory performance is a prerequisite to his receipt of that credential consents to frank evaluation by those charged with the responsibility to supervise him.[170]

In another defamation case, a student sued a professor for writing a letter regarding a student's performance. The professor wrote the letter at the request of the university ombudsman to determine if the student's academic dismissal hearing should have been reopened. The court found the letter was intended to be confidential and therefore the professor had not "published" it. The court further held the sharing of information occurred on a "conditionally privileged" occasion, between two administrators concerned with a common issue. This also prevented the letter from being defamatory.[171]

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[170] Kraft v. William Alanson White Psychiatric Foundation, 498 A2d 1145, 1149 (DC App 1985).

[171] Beckman v. Dunn, 276 Pa Super 527, 419 A2d 583 (1980).

Courts have made similar rulings regarding the evaluations of professors by each other.[172] Note that professors may obtain those peer evaluations, even though they are intended to be confidential, through discovery in litigation brought by themselves or a federal or state agency charged with investigating discrimination claims.[173] State law may also require the release of such evaluations with the name of the author deleted.[174]

LIABILITY FOR ALLEGED WRONGFUL ACTS

A college or university administrator or faculty member may be named at some time as a defendant in a lawsuit involving the institution. Most colleges and universities have written defense and indemnification policies that explain the extent to which the institution will provide legal counsel and pay legal expenses as well as any civil penalty that might be assessed in such a situation. Generally, an institution will defend and indemnify an employee, including faculty members, if the employee was acting in good faith and within the scope of his or her employment at the time the incident occurred.

"Within the scope of employment" usually means the incident in question occurred while the employee was on the job. "Within the scope of employment" would not include an incident that arose in connection with a personal matter, or in outside employment, or in a matter that was not of college or university business. Depending on an institution's policy, it might include work done for a professional journal or service on a professional board, especially if such was expected by the institution to be eligible for promotion.

An employee also must be "acting in good faith." This means that the employee acted with the honest and reasonable belief that he or she was undertaking an activity that was appropriate under the circumstances.

Whether an employee meets the standard to be defended and indemnified by his or her institution will be decided by that institution. Employees should familiarize themselves with the college or university policy and discuss any concerns about coverage for particular activities with the policy's administrator before a lawsuit arises.

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[172] Baker v. Lafayette College, 516 Pa 291, 532 A2d 399 (1987).

[173] Univ of Pennsylvania v. EEOC, 493 US 999, 110 SCt 577 (1990).

[174] See, e.g., Moskovitz v. Lubbers, 182 Mich App 489 (1990), lv denied, 437 Mich 895 (1991).

CONCLUSION

The number of laws, regulations, and cases that affect college and university administrators grows exponentially each year. It is beyond the capacity of this publication to encompass all of them. This booklet also cannot substitute for the advice and assistance of your institution's legal counsel as to the peculiarities of the laws of your state and the requirements of your institution's own policies and rules. This booklet is best used to alert you to areas in which you should seek the advice of counsel so that your decisions may discourage legal challenge or, if they are reviewed by a court of law, so that they withstand judicial scrutiny.

APPENDIX

CHECKLIST TO MINIMIZE ACADEMIC LEGAL PROBLEMS

Student Misconduct Unrelated to Academic Performance

If at a public or private institution:

1. Check institution's own rules and regulations for procedural requirements to be followed.
2. Check local or state laws to determine if they contain any requirements to be followed.
3. Check to be sure the disciplining administrator(s) has not acted arbitrarily or capriciously.

If at a public institution:

1. If a property or liberty interest is involved and
   a. If a suspension is contemplated:
      i. Provide some kind of notice of the charges—oral or written if for 10 days or less—written if for more than 10 days.
      ii. Provide an explanation of the evidence the institution has against the student.
      iii. Provide an opportunity for the student to present his/her side of the story.
   b. If a dismissal is contemplated:
      i. Provide written notice of the specific charges and the grounds for same.
      ii. Provide a hearing before an administrator or committee to hear both sides in some detail.

      Decide what due process procedures will be included (confrontation/cross-examination of witnesses, presence or participation of attorneys, self-incrimination, etc.)

iii. If no face-to-face confrontation of witnesses occurs, provide the student with the names of the witnesses and the facts to which each testified.

iv. Provide the student a chance to present his/her own defense and the testimony of witnesses and/or the affidavits of same.

v. Prepare a report of results and findings and provide same to the student.

Difficult or Troubled Students

If at a public or private institution:

1. Check to see if institution's own rules reserve the right to demand a psychological examination.

2. Discipline only for the conduct, not the condition, of the student.

If at a public institution and results of the examination will not be kept confidential:

1. Provide an opportunity to the student to be heard before the examination.

2. Demonstrate that the student poses a serious threat to himself or herself or others.

Student Misconduct Related to Academic Performance

If at a public or private institution:

1. Check institution's own rules and regulations for procedural requirements to be followed.

2. Inform the student of the dissatisfaction with his/her performance in advance of the decision.

3. Make sure the ultimate decision is careful and deliberate, not motivated by ill-will, bad faith, or illegal discrimination and is not arbitrary or capricious.

If at a public institution and the fact of the decision will be made known outside the institution and may affect employment or future academic endeavors:

1. Provide an opportunity to the student to be heard before an administrator or committee before the decision is final.

Fraud in Admission

If at a public or private institution:

1 Check institution's own rules and regulations for procedures to be followed.

If at a public institution and studies have not commenced

1. Provide notice of intention to rescind admission and why.
2. Provide opportunity to be heard in writing or, if facts are contested, in person.

If at a public institution and studies have commenced or degree received:

1. Provide a written notice of charges.
2. Provide a hearing with opportunity to have counsel present, confrontation of accusers, presentation of evidence, and some record of the hearing.

Plagiarism and Cheating

If at a public or private institution:

1. Check institution's own rules and regulation for procedures to be followed.

If at a public institution:

1. Follow procedures for misconduct related to academic performance above.

Revocation of a Degree or Credits

If at a public or private institution:

1. Check institution's own rules and regulations for procedures to be followed.

If at a public institution:

1. Provide notice of the academic deficiencies.
2. Provide an opportunity to be heard.

If at a private institution:

1. Provide some minimal procedural protections, e.g., notice and procedures to be followed.

Termination or Discipline of Faculty

If at a public or private institution:

1. Check institution's own rules and regulations for procedures to be followed. If the institution is unionized, review the union contract for procedures to be followed.
2. Determine if employee is "terminable at will" or at contract end. If so, can terminate or discipline without notice or a hearing for any reason that does not violate public policy or federal or state laws against discrimination.

   Exception: If public disclosure of reasons for termination or discipline will occur, a hearing must precede action at a public institution.
3. Determine if employee is tenured or holds an unexpired contract, express or implied. If so, can only terminate or discipline for reasons stated as part of the contract or for good cause. Notice and an opportunity to be heard must precede termination or discipline at a public institution.

Scientific Misconduct

If at a public or private institution:

1. Check institution's own rules and regulations for procedure to be followed.
2. Conduct an inquiry into allegations that provides the alleged perpetrator with notice and opportunity to be heard unless to do so would result in immediate damage to persons or property.
3. If an investigation appears warranted, notify the federal government of same.
4. If discipline appears warranted: for students, follow the procedures for misconduct unrelated to academic performance described above; for faculty, follow those for disciplining of faculty.

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