

NAVIGATING PAST THE  
“SPIRIT OF INSUBORDINATION”:  
A TWENTY-FIRST CENTURY  
MODEL STUDENT CONDUCT CODE  
WITH A MODEL HEARING SCRIPT\*

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“The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the greatest obstacle to science with us, and a principal cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather.”

—Thomas Jefferson<sup>1</sup>

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1. Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), in THOMAS JEFFERSON: WRITINGS 1463, 1465 (M. Patterson, ed., The Library of America) (1984) [hereinafter Letter to Cooper].

“[Higher] education deserves the highest respect and the fullest protection of the courts in the performance of its lawful mission. . . . If it is true, as it well may be, that man is in a race between education and catastrophe, it is imperative that educational institutions not be limited in the performance of their lawful missions by unwarranted judicial interference.”

—U.S. District Judges Becker, Oliver, Collinson,  
and Hunter sitting en banc<sup>2</sup>

“[S]chool regulations are not to be measured by the standards which prevail for criminal law and for criminal procedure.”

—Harry A. Blackmun, then, Eighth Circuit judge, later,  
Associate Justice of the U.S. Supreme Court<sup>3</sup>

Since the era when Thomas Jefferson wrote to Mr. Cooper,<sup>4</sup> higher education administrators have struggled with the task of responding to the spirit of insubordination of college and university students in ways that were not only developmentally sound but that also were effective to create an environment in which all members of the academic community could live, work, and learn together.

In recent years, the job has been complicated by the need to avoid judicial interference with the efforts of professional educators to guide the academic community. Some, even after Justice Blackmun's admonition not to do so, continue to analyze student conduct codes as if they were parsing a criminal code. As a result, commentators concerned that the moral and intellectual development of students not be lost observe, with concern, that: “Student affairs is at a crossroads. Contemporary administration of higher education often reflects a litigious and legalistic society on a collision course with developmental approaches to college and university administration. Student affairs should stand at the center of that intersection.”<sup>5</sup>

Thus, today, it remains as important as ever that college and university administrators continue to guide students through their era of development on

2. *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133, 136, 141, (W.D. Mo. 1968) (en banc) [hereinafter *General Order*]. This General Order is recommended reading to anyone seeking to understand the relationship between judicial systems and campus systems regulating student conduct.

3. *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1090 (8th Cir. 1969), *cert. denied* 398 U.S. 965 (1970), *aff'g* 290 F. Supp. 622 (W.D. Mo. 1968), *following new hearing order*, 277 F. Supp. 649 (W.D. Mo. 1967).

4. Thomas Cooper was the second President (1820-1835) of South Carolina College, later renamed the University of South Carolina. Mr. Jefferson was, according to his self-authored epitaph, the "Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom and Father of the University of Virginia." JEFFERSON, WRITINGS, *supra* note 1, at 706.

5. James M. Lancaster & Diane L. Cooper, *Standing at the Intersection: Reconsidering the Balance in Administration*, 82 NEW DIRECTIONS FOR STUDENT SERVICES 95, 100 (1998).

campus. Just as in Mr. Jefferson's day, the issue of discipline remains the most difficult in American higher education, for both the students and for the academy itself. It also remains the most important. As Supreme Court Justice Hugo Black once observed, "School discipline, like parental discipline, is an integral important part of training our children to be good citizens—to be better citizens."<sup>6</sup>

It is not an easy task. This new model code, however, is an attempt to aid the practitioner not only in navigating past the shoals of the spirit of insubordination but also in weathering the breakers of judicial processes followed by courts.

In contemplating how to provide a good living/learning environment for college and university students, our instincts today are the same as Mr. Jefferson's. When some students rioted on the early nineteenth century University of Virginia Lawn, Mr. Jefferson wrote that "we wished to trust very much to the discretion of the students themselves for their own government. With about four-fifths of them this did well, but there were about fifteen or twenty bad subjects who were disposed to try whether our indulgence was without limit."<sup>7</sup> From this experience, Mr. Jefferson learned one lesson that all college and university administrators know: we cannot hope that all students will behave themselves simply because they are adults.

Since then, generations of higher education administrators have tried both to give educational leadership to those wishing to develop into good citizens and, at the same time, to respond appropriately to aberrant behavior that damages the living/learning environment on campus, even if the unwanted behavior is prompted by the "spirit of insubordination."<sup>8</sup>

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6. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting).

7. Letter from Thomas Jefferson to Ellen W. Coolidge in 18 THE WRITINGS OF THOMAS JEFFERSON 346-47 (The Thomas Jefferson Memorial Ass'n ed., memorial ed. 1904), quoted in *General Order*, *supra* note 2, at 140 n.4 [hereinafter Letter to Coolidge].

8. Many recent resources exist, including other model codes and articles on issues peculiar to college and university student discipline including: Fernand N. Dutile, *Disciplinary Versus Academic Standards in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003); Lucien Capone III, *Jurisdiction Over Off Campus Offenses: How Long is the University's Arm?*, 43rd Annual Conf., Nat'l Ass'n of Coll. & Univ. Att'ys (2003) (on file with author); Nona L. Wood, *Due Process in Disciplinary Proceedings: Classic Cases and Recent Trends in Case Law*, Ass'n for Student Judicial Affairs, Donald D. Gehring Training Inst. of the Ass'n for Student Judicial Affairs (2003) (on file with author); William Fischer & Lori Fox, *The Sexual Assault Case and the Student Judiciary*, 42nd Annual Conf., Nat'l Ass'n of Coll. & Univ. Att'ys (2002) (on file with author); Lee E. Bird & Edward N. Stoner, *Lessons Learned from Student Conduct Hearings*, Univ. of Vt. Legal Issues in Higher Educ. Conf. (2002) (on file with author); Fernand N. Dutile, *Students and Due Process In Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L. REV. 243 (2001); Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653 (2001); Melinda W. Grier & Edward N. Stoner, *Student Misconduct in Instructional or Research Environments*, 21st Annual Nat'l Conf. on Law & Higher Educ., Stetson Univ. Sch. of Law (2000) (on file with author); Thomas R. Baker, *Judicial Complaint Resolution Models and Schemes: An Administrator's Reference Guide for Self-Assessment*, 12th Annual Conf. of the Ass'n for Student Judicial Affairs (2000) (on file with author); Gary Pavela, *Applying the Power of Association on Campus: A Model Code of Student Conduct*, 11 SYNTHESIS 817 (2000); Robert Bienstock, *STUDENT DISCIPLINE PRIMER* (Nat'l Ass'n of Coll. & Univ. Attys, pub. 1999); WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* §§ 4.5-4.6.2, 4.8.1-

Working toward these goals, college and university administrators strive to provide a living/learning environment with standards far exceeding the law of the streets regulated by the criminal law.<sup>9</sup> This factor alone illustrates why, as then-Judge Blackmun wrote in *Esteban v. Central Missouri State College*,<sup>10</sup> criminal

4.8., 4.10 (3rd ed. 1995 & 2001 Supp.); Edward N. Stoner, Pamela J. Bernard & Patricia Grunder, *Legal Issues Involved in the Processing of Student Grievances and the Revision of Student Conduct Codes or Policies*, 17th Annual Nat'l Conf. on Law & Higher Educ., Stetson Univ. Sch. of Law (1996) (on file with author); Pamela J. Bernard, *Academic Dismissals of Students Involved in Clinical, Internship or Externship Activities*, 16th Annual Nat'l Conf. on Law & Higher Educ., Stetson Univ. Coll. of Law (1995) (on file with author). Compare HARVEY A. SILVERGLATE & JOSH GEWOLB, *DUE PROCESS AND FAIR PROCEDURE ON CAMPUS* 3, 4 (2003) (noting that the book was written "to help accused students" from perspective that "campus courts lack the kinds of basic fact-finding mechanisms and procedural safeguards that a decent society should provide"); Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

9. Commentators have explained why colleges and universities seek to have higher behavioral standards than what the criminal justice system provides:

The college, the university, the community of scholars, the academy, is a very special place. The town and gown are different. Teaching and learning go on in a very special atmosphere. Educators attempt to create environments where dialogue, debate, and the exchange of ideas can proceed unfettered, environments in which there is concern about preserving the sanctity of the classroom and protecting academic freedom. These are the assumptions that educators have made when asserting the need to establish rules.

Donald D. Gehring & William R. Bracewell, *Standards of Behavior and Disciplinary Proceeding*, RIGHTS, FREEDOMS, AND RESPONSIBILITIES OF STUDENTS 89, 90 (1992). The district court in *Esteban v. Central Missouri State College* offered the following explanation:

The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal or state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.

290 F. Supp. 622, 628 (W.D. Mo. 1968).

10. 415 F.2d 1077 (8th Cir. 1969). Then-Judge Blackmun's opinion noted:

College attendance, whether it be a right or a privilege, very definitely entails responsibility. This is fundamental. It rests upon the fact that the student is approaching maturity. His elementary and secondary education is behind him. He already knows, or should know, the basics of decent conduct, of nonviolence, and of respect for the rights of others. . . . These plaintiffs are no longer children. While they may have been minors, they were beyond the age of [eighteen]. Their days of accomplishing ends and status by force are at an end. It was time they assumed at least the outward appearance of adulthood and of manhood. The mass denial of rights of others is irresponsible and childish. So is the defiance of proper college administrative authority ("I have the right to be here"; "I refuse to identify myself"; gutter abuse of an official; the dumping of a trash can at a resident's feet; "I plan on turning this school into Berkeley if . . ."; and being part of the proscribed college peace-disturbing and property-destroying demonstration). One might expect this from the spoiled child of tender years. One rightly does not expect it from the college student who has had two decades of life and who, in theory, is close to being "grown up."

codes are not good models for student conduct codes.<sup>11</sup> Unlike society, our institutions are voluntary associations of scholars who demand and deserve a positive—and special—living/learning environment, as well as a special approach for enforcing the academic community’s standards. This perspective is a common one.<sup>12</sup> As the judges of the United States District Court for the Western District of Missouri, sitting en banc, stated:

Attendance at a tax supported educational institution of higher learning is not compulsory. The federal constitution protects the equality of opportunity of all qualified persons to attend. Whether this protected opportunity be called a qualified “right” or “privilege” is unimportant. It is optional and voluntary.

The voluntary attendance of a student in such institution is a voluntary entrance into the academic community. By such voluntary entrance, the student voluntarily assumes obligations of performance and behavior reasonably imposed by the institution of choice relevant to its lawful missions, processes, and functions. *These obligations are generally much higher than those imposed on all citizens by the civil and criminal law.* So long as there is no invidious discrimination, no deprivation of due process, no abridgement of a right protected in the circumstances, and no capricious, clearly unreasonable or unlawful action employed, the institution may discipline students to secure compliance with these higher obligations as a teaching method or to sever the student from the academic community.<sup>13</sup>

Accordingly, colleges and universities also desire to use a student discipline process that, itself, will help to educate students about their responsibilities as members of an academic community and to impose educational sanctions when student conduct is beyond the limit of the community’s indulgence.<sup>14</sup>

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*Id.* at 1089.

11. *Id.*

12. Mr. Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) captured this point:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “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.

13. *General Order*, *supra* note 2, at 141. (emphasis added). This same conclusion is reached even by commentators whose view of student discipline is that, “Unfortunately, campus judicial systems are not always fair and decent.” SILVERGLATE & GEWOLB, *supra* note 8, at 57. The authors advise:

Because attendance at public colleges and universities is a privilege extended only to a select group of citizens, institutions may require that their students demonstrate superior moral or ethical standards. Even if courts think a university’s rules to be unwise, they do not have the authority to strike them down if these unwise rules nonetheless conceivably relate to legitimate behavioral or academic objectives.

*Id.* at 71–72.

14. Mr. Jefferson is not the only one who felt that the tendency of young adults to test the limits of insubordination was “too little repressed by parents.” A contemporary commentator put

Our effort, in 1990, to set forth some of this guidance in our first model student conduct code reflected evolution in the legal cases and began to explain three trends that are more obvious today.<sup>15</sup>

There is, first, continuing deference by the judiciary to efforts by educators when they are exercising their educational judgment,<sup>16</sup> including when they are dealing with student misconduct. For example, the Massachusetts Superior Court recently explained: "Courts are generally reluctant about second-guessing academic and disciplinary decisions made by private schools. This deference derives from a commendable respect for the independence of private educational institutions and a well-justified laissez-faire attitude toward the internal affairs of such institutions."<sup>17</sup> Likewise, the Arkansas Court of Appeals has been "reluctant to allow the judiciary to encroach upon disciplinary proceedings of an educational institution."<sup>18</sup>

Second, the judiciary understands that, as Justice Blackmun observed,<sup>19</sup> courtroom procedures including rules of evidence and numerous criminal law

it this way: "One senses, however, that some activist parents see college not 'in the place of the parent,' but simply *as* parent, enforcing standards that were never articulated or upheld at home." Gary Pavela, *Parents and Student Conduct*, SYNFAK WEEKLY REPORT 828-29 (March 15, 1999).

15. Edward N. Stoner & Kathy L. Cerminara, *Harnessing the "Spirit of Insubordination": A Model Student Conduct Code*, 17 J.C. & U.L. 89 (1990).

16. See Edward N. Stoner & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, As Shown by Rulings Involving College Students in the Eighteen Months before Grutter*, 30 J.C. & U.L. 583 (2004).

17. *Morris v. Brandeis Univ.*, No. CA002161, 2001 WL 1470357 at \*4 (Sept. 4, 2001 Mass. Super. Ct. 2001) ("Great deference is extended to university decision-making in academic and disciplinary matters.") *aff'd*, 804 N.E.2d 961, tbl. op. available at No. 01-P-1573, 2004 WL 369106 (Mass. App. Ct. Feb. 27, 2004). The Massachusetts Supreme Judicial Court had the same sentiment, a year earlier when it stated: "[C]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities. A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts." *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (internal citations omitted). A typical articulation of this judicial perspective was set forth a decade earlier, in Illinois:

Courts have adopted this deferential standard because of a reluctance to interfere with the academic affairs and regulation of student conduct at a private university. A private university may prescribe the moral, ethical and academic standards that its students must observe; it is not the court's function to decide whether student misbehavior should be punished or to select the appropriate punishment for transgressions of an educational institution's ethical or academic standards.

*Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (internal citations omitted).

18. *Lyon Coll. v. Gray*, 999 S.W.2d 213, 216 (Ark. Ct. App. 1999).

19. See *supra*, note 3 and accompanying text. Justice Blackmun's comments echoed the conclusions of the Missouri federal judges:

The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.

*General Order, supra* note 2, at 142.

principles not only do not control the efforts of educators to deal with student rule violators but also they are bad models for achieving a positive college or university environment for studying and learning. As the Missouri federal judges explained, "Standards so established [on campus] may require scholastic attainments higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal laws."<sup>20</sup>

Third, there is evolving recognition that educational models need to be applied when fact finding occurs in the student conduct arena. Accepting the wisdom of jurists that criminal principles are the wrong model, professional educators are challenged to create a fact finding atmosphere designed to reflect the values of the academic community itself.<sup>21</sup>

These trends did not happen in a vacuum. Since the publication of our first model student conduct code, nearly a generation of college and university students and administrators has passed through our institutions. Students have developed new ways to display their spirit of insubordination:<sup>22</sup> from rioting because their school's athletics team won or lost some now forgotten "important" sporting event,<sup>23</sup> to abusing drugs not even invented in the century now passed. At the

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20. *General Order*, *supra* note 2, at 145. Another federal judge observed, more recently, "[Student disciplinary proceedings] are not criminal in nature as they only regulate the relationship between the student and the university, and have no bearing on a student's legal rights or obligations under state or federal criminal laws." *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1157 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797 (6th Cir. 2002). Similarly, Professor Wright wrote: "[C]ourts will reach right results if they do not allow themselves to be distracted by analogies from criminal law or administrative law or elsewhere and keep their gaze fastened on the twin requirements of fairness and reasonableness as these apply in that unique institution, the academic community." Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1082 (1969). Educators, as well as legal scholars, agree that today's challenge is "to go beyond the minimalism of law and policy and strive for the possibilities of our highest expectations for success on behalf of our students and our institutions." James M. Lancaster & Diane L. Cooper, *Standing at the Intersection: Reconsidering the Balance in Administration*, 82 NEW DIRECTIONS FOR STUDENT SERVICES 95, 104–05 (1998).

21. As one commentator noted, "There is no indication courts will be obstacles to the ongoing reduction of proceduralism in college disciplinary proceedings." Gary Pavela, *Disciplinary and Academic Decisions Pertaining to Students: A Review of the 1995 Decisions*, 23 J.C. & U.L. 391, 393 (1997).

22. One judge had the spirit of insubordination too. When a varsity basketball player at the University of Missouri was suspended for a semester for stealing from the university bookstore, a federal district judge reviewed the discipline by exercising constitutional review. He revoked the suspension, explaining that it was a "damned outrage" that "sticks in my craw." *Coleman v. Monroe*, 977 F.2d 442, 443 (8th Cir. 1992). The Court of Appeals for the Eighth Circuit, Justice Blackmun's former court, reinstated the suspension. *Id.* at 444. It wrote, "Finding no 'sticks in my craw' test in the Constitution, we reverse." *Id.* at 843.

23. *Hill v. Michigan State Univ.*, 182 F. Supp. 2d 621 (W.D. Mich. 2001) (upholding student suspension issued for participation in riot after men's basketball team lost an National Collegiate Athletic Association ("NCAA") tournament game). Post-sports rioting is not unique to Michigan State University. In its *Report on the Sportsmanship and Fan Behavior Summit*, the NCAA identified twelve serious incidents between 1999 and early 2003 (report available online at <http://www.ncaa.org/sportsmanship/sportsmanshipFanBehavior/report.pdf>) (Feb. 20, 2003). Nor is such behavior limited to evenings after losing a game. In 2004, students and other fans rioted after the University of Maryland won the Atlantic Coast Conference men's basketball

same time, administrators have developed student conduct codes that fit the unique environment of their campuses<sup>24</sup> and that respond to the needs of their students—such as responding to sexual violence—in order to address issues that profoundly impact the living and learning environment.

As this process has developed on campus, judicial treatment of the legal relationship between a college or university and its students has not fit neatly within one legal doctrine.<sup>25</sup> During the first part of the twentieth century, the concept of *in loco parentis*<sup>26</sup> predominated. Under this doctrine, courts viewed institutions as standing in the place of students' parents. Courts tended to give colleges and universities a great deal of discretion when they viewed the institutions as standing *in loco parentis* to the students.<sup>27</sup>

During the 1960s, however, courts began to move away from the concept of *in loco parentis*. Instead, courts viewed the relationship between students and institutions as contractual. Under this view, institutions enter into contracts with their students to provide them with educational services in exchange for students' paying certain fees and obeying certain rules.<sup>28</sup> In addition, beginning with the

tournament and after the University of Connecticut won the NCAA men's basketball championship. Jon Ward & Judith Person, *Students Could Be Expelled for Post Game "Riot" at U Md*, WASHINGTON TIMES, March 16, 2004, at B1; Grace E. Merritt, *Rioting May Be the End; UConn Students Face Expulsion*, HARTFORD COURANT, April 9, 2004, at B9.

24. *General Order*, *supra* note 2, at 146: "Different standards, scholastic and behavioral, may be established for different divisions, schools, colleges, and classes or an institution if the differences are reasonably relevant to the missions, processes, and functions of the particular divisions, schools, colleges, and classes concerned." Student conduct codes go by a variety of names but have the same purposes. *E.g.*, "Code of Student Conduct" (Univ. of Florida); "Student Responsibilities" (Univ. of Iowa); "Standards of Conduct and Rules of Procedures" (Univ. of Missouri); "Community Standards" (Loyola Coll.); "Student Code of Conduct" (Normandale Community Coll.); "Code of Student Rights and Responsibilities" (Northern Kentucky Univ.); "Standards of Conduct" (Univ. of Virginia).

25. Donald R. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & EDUC. 401 (1984).

26. Literally, "in the place of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

27. *Gott v. Berea Coll.*, 161 S.W. 204 (Ky. App. 1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose."); *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435 (N.Y. App. Div. 1928) (permitting expulsion of student from private school for not being "a typical Syracuse girl"). See William A. Kaplin, *Law on the Campus 1960-1985: Years of Growth and Challenge*, 12 J.C. & U.L. 269, 272 (1985); Note, *Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 310 (1968).

28. Elizabeth M. Baldizan, *Development, Due Process, and Reduction: Student Conduct in the 1990's*, 82 NEW DIRECTIONS FOR STUDENT SERVICES 29, 3-31 (1998) (tracing the demise of *in loco parentis* and noting, "The issues students face today cry out not for less but for more moral and ethical reflection. Rather than stepping away in a neutral zone, hiding behind legal rationales, administrators of student policies desperately need to be addressing life and learning experiences that lead to ethical and moral outcomes."); See, *e.g.*, *Prusack v. New York*, 498 N.Y.S.2d 455 (N.Y. App. Div. 1986); *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984); *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721 (1st Cir. 1983). See also E.K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7

landmark case of *Dixon v. Alabama Board of Education*,<sup>29</sup> in 1961, courts have required public institutions of higher learning to afford students minimal procedural due process<sup>30</sup> before taking disciplinary action.<sup>31</sup>

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J.C. & U.L. 191 (1981) (discussing the incorporation and development of principles of contract law in cases between students and universities).

29. 294 F.2d 150 (5th Cir. 1961). *Dixon* was referred to as a "landmark" decision by the Supreme Court in *Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975). For a discussion of the importance of *Dixon*, see Donald Reidhaar, *The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationships Between the Student and the University*, 12 J.C. & U.L. 343, 346 (1985) and Wright, *supra* note 20, at 1031–32.

30. The Fourteenth Amendment to the United States Constitution provides in part: "No State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1. This provision regulates governmental action. It does not apply to private parties, such as private colleges and universities. See *Al-Khadra v. Syracuse Univ.*, 737 N.Y.S.2d 491 (N.Y. App. Div. 2002) (holding that judicial inquiry was complete once the institution demonstrated that it had complied with its own rules). In *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205, 209–10 (Md. Ct. Spec. App. 2000) (internal citations and quotations omitted), the court explained:

School discipline is not an area in which courts lay claim to any expertise. Consequently, courts will not generally interfere in the operations of colleges and universities. Courts must enter the realm of school discipline with caution . . . . Although the actions of public universities are subject to due process scrutiny, private institutions are not bound to provide students with the full range of due process protections. . . . [W]hen reviewing a private university's decision to discipline a student, Constitutional due process standards should not be used to judge the College's compliance with contractual obligations.

See also *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 579 (Pa. Super. Ct. 1990) ("[S]tudents [of private institutions] who are being disciplined are entitled only to those procedural safeguards which the school specifically provides."), *quoted in Centre Coll. v. Trzop*, 127 S.W.3d 562 (Ky. 2003); In re *Rensselaer Soc. of Eng. v. Rensselaer Poly. Inst.*, 689 N.Y.S.2d 292, 295 (N.Y. App. Div. 1999) ("[J]udicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious."); *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) ("Holert was entitled only to those procedural safeguards that the University agreed to provide.").

Thus, only public schools, or schools which have the requisite amount of interaction with the state to constitute "state action," are required to provide minimal constitutional procedural due process for their students. *Hankins v. Temple Univ. Health Sciences Ctr.*, 829 F.2d 437, 444 n.8 (3d Cir. 1987); *VanLoock v. Curran*, 489 So.2d 525, 528 (Ala. 1986). See generally H.L. Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 DEN. U. L. REV. 47 (1987) (discussing the application of due process principles to the enforcement of college and university honor codes); Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171 (1982) (discussing various jurisprudential theories used to apply due process requirements to colleges and universities); Annotation, *Action of Private Institution of Higher Education as Constituting State Action or Action Under Color of Law for Purposes of the Fourteenth Amendment and 42 U.S.C.S. § 1983*, 37 A.L.R. FED. 601 (1978) (examining circumstances in which action by colleges and universities constitutes state action or action under color of law under the Fourteenth Amendment and related statutory provisions). Students at private colleges and universities, however, have attempted to bring these minimal procedural due process and other constitutional cases against private institutions without success. See, e.g., *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) (en banc) (affirming dismissal of due process claims against Hamilton College);

Although twenty-first century courts no longer merely rubber-stamp college or university decisions, as they once may have done under the doctrine of *in loco parentis*, courts continue to afford institutions of higher education a great deal of discretion.<sup>32</sup> Nevertheless, when colleges and universities do specify the process they will follow for student discipline, courts expect them to follow the process they select.<sup>33</sup> Because institutions will be held by judicial reviewers to comply

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Cummings v. Va. Sch. of Cosmetology, 466 F. Supp. 780 (E.D. Va. 1979); Miller v. Long Island Univ., 380 N.Y.S.2d 917 (N.Y. Sup. Ct. 1976) (dismissing lawsuit). *But see* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (holding that there was no "state action" as to students at one college of the private university but that there was "state action" at another of its colleges which was separately funded by the state).

A case sometimes miscited for the proposition that requirements akin to those of minimal Constitutional procedural due process were required at Dickinson College, a private institution, in the nineteenth century does not stand for this proposition after all. Instead, *Commonwealth v. McCauley*, 2 Pa. C.C. 459 (Pa. Com. Pl. 1887) merely holds that the court should inquire further as to whether a private school's faculty had conscientiously determined to expel the student, notwithstanding the faculty's blanket denial that it had done anything wrong. *Id.* at \*5. There is no subsequent report as to whether the court made further rulings but it imposed no due process-like requirements.

In addition, of course, state law should be consulted to see whether state "due process" requirements apply. *Centre Coll. v. Trzop*, 127 S.W.3d 562 (Ky. 2003) (reversing holding that Kentucky state law required even private colleges to apply statutory due process to student disciplinary proceedings).

31. Immediate action may be taken in exceptional cases. Wright, *supra* note 20, at 1074. See Model Code, *infra* pp. 59–60, at art. IV(C).

32. See *Schulman v. Franklin & Marshall Coll.*, 538 A.2d 49, 52 (Pa. Super. Ct. 1988).

33. Under Florida law, a student from a private law school stated a claim of violation of implied contract by alleging that the university did not follow its own disciplinary procedures, although it was subject to proof. *Jarzynka v. Saint Thomas Univ. Sch. of Law*, 310 F. Supp. 2d (S.D. Fla. 2004); *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283 (N.Y. Sup. Ct. 2004) (granting rehearing to remedy defective notice). A college was required to reinstate a student until it provided the Community Standards Board Hearing mandated by its policy rather than suspending the student using a Procedural Interview. *Ackerman v. President & Trs. of the Coll. of the Holy Cross*, 16 Mass. L. Rptr. 108 at \*1 (Mass. Super. Ct. 2003). While institutions have wide discretion in selecting the process to provide, *Ackerman* illustrates that a university must provide the specified process. Another University was ordered to provide a student with a new hearing when it did not give him the opportunity to "hear and question adverse witnesses" as specified in its Code of Conduct. *Morfit v. Univ. of So. Fla.*, 794 So.2d 655, 656 (Fla. Dist. Ct. App. 2001); *Wolff v. Vassar College*, 932 F. Supp. 88 (S.D.N.Y. 1996); *Gruen v. Chase*, 626 N.Y.S.2d 261 (N.Y. Sup. Ct. 1995) (new hearing ordered when process not followed); *Weidemann v. State Univ. of N.Y. at Cortland*, 592 N.Y.S.2d 99 (N.Y. Sup. Ct. 1992) (new hearing ordered when specified period of notice not given and new information was obtained after the hearing without notice to the student); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1305–6 (N.Y. 1980); *VanLoock v. Curran*, 489 So.2d 525, 528 (Ala. 1986); *Woody v. Burns*, 188 So.2d 56, 59 (Fla. 1966) (finding that faculty committee at the University of Florida failed to follow specified process); *Warren v. Drake Univ.*, 886 F.2d 200, 202 (8th Cir. 1989).

One may speculate that this is *not* the law in Kentucky, at least as to private institutions when a student admits conduct that violates a campus rule. In *Centre College*, the Kentucky Supreme Court stated that a college's obligation, under its handbook, to provide a disciplinary process was void once a rules violation was "admitted." It explained:

A contract between an educational institution and a student is only enforceable so long as the student complies with the college's rules and regulations. Therefore, even if Centre had guaranteed Trzop's due process, such was rendered unenforceable after

with their own choices about process, language must be selected carefully. There must not be a commitment—even a vague one—to observe murky general “legal sounding” ideals like “due process” or “fundamental fairness.”<sup>34</sup> A better practice is to state exactly what process is provided without using such platitudes.

In this environment, it is now normal practice for colleges and universities to have written student disciplinary codes. Such a written code is one step toward educating students about how to behave appropriately as members of an academic community.<sup>35</sup> The process of drafting or re-drafting a student conduct code<sup>36</sup> allows members of the academic community to evaluate what choices they believe are educationally appropriate—away from the heat of a specific incident. It may also provide a bulwark against charges of arbitrary action; for example, allegations that the school singled out one student for particularly unfair treatment or applied processes or sanctions that were inconsistent from case to case. This consideration applies to private institutions, as well as public ones even though the constitutional concepts of minimal procedural due process apply only to public institutions.<sup>37</sup> Thus, a written student code can benefit both public and private institutions, as

Trzop failed to comply with Centre's rules. When Trzop intentionally possessed a knife in violation of Centre's express prohibition, he breached his contract with Centre and therefore excused any further performance on the college's behalf.

127 S.W.3d at 568 (internal citations omitted).

The above statement, it must be noted, is *dicta*, because the Kentucky Supreme Court also held that the college did not guarantee the student the state law due process at issue in that case.

34. The term “fundamental fairness” that a college used in its student conduct code was construed against the college because it had not defined what the term meant. *Ackerman*, 16 Mass. L. Rptr. at 108. Another college was denied summary judgment when sued over whether it complied with the processes it designated for its conduct code. *Goodman v. President & Trs. of Bowdoin Coll.*, 135 F. Supp. 2d 40, 40 (D. Me. 2001). It had promised to “conduct judicial procedures which reflect fundamental fairness” but did not define what it meant by “fundamental fairness,” although it could easily have done so or could have chosen not to use the ambiguous term at all. *Id.* at 57. But the judge left it for a jury to decide what “fundamental fairness” meant. *Id.* at 43–44. Fortunately for the college, after a seven day trial, a jury determined that the college had provided “fundamental fairness” and the court of appeals affirmed the trial court’s instructions to the jury on how it should interpret and apply the phrase “fundamental fairness.” *Goodman v. President and Trs. of Bowdoin Coll.*, 380 F.3d 33, 42, 47 (1st Cir. 2004). The use of the undefined term “fundamental fairness” prevented another court from granting a university’s motion to dismiss. *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117 (D. Me. 2004). A case illustrating the folly of promising to provide “due process” without defining what, exactly, the institution meant when it used the term is *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238 (D. Vt. 1994).

35. In a legal sense, it also gives them “notice” of campus policies, procedures, and rules.

36. For a discussion of many considerations involved in drafting a code, including how to involve various campus constituencies in the process, see Edward N. Stoner, *A Model Code for Student Discipline*, in *THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT, ORGANIZATIONAL AND COMMUNITY ISSUES* 3 (Brent G. Paterson & William L. Kibler eds., 1998).

37. See Wright, *supra* note 20, at 1035 (“A wise university may well make a prudential judgment that it ought to give its students greater freedom, or more procedural protections, than the Constitution demands of it.”). See also KAPLIN & LEE, *supra* note 8, at 464–65 (arguing that while private institutions are not required to incorporate principles of constitutional due process into their codes of student conduct, they may wish to include these principles as a matter of good administration).

well as students.<sup>38</sup>

What follows is a model student conduct code that college or university counsel and administrators may use in creating or revising their own written student disciplinary code. Of course, decisions with regard to certain topics will depend upon the preference of each individual college or university. Such topics include choosing a person at the institution to administer student conduct code policies and procedures, establishing a minimum amount of notice of the alleged violation, setting a maximum period between the time students are notified of charges against them and the day on which those charges are heard, and deciding who will determine responsibility and sanctions. Nevertheless, the following model is a sound beginning upon which to build a student disciplinary code.

College or university counsel and administrators may wish to keep a few principles in mind when drafting their own student disciplinary codes.<sup>39</sup>

First, the institution, whether public or private, should try to follow the general requirements of minimal procedural due process. As the Supreme Court has indicated, these requirements vary, depending upon the circumstances, but do, at least, require some kind of notice and some kind of hearing.<sup>40</sup> If an institution is public, it is required to grant minimal procedural due process.<sup>41</sup> If the institution is

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38. There is one negative aspect to the promulgation of a written student code. "Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better-conceived and administered system, written rules also provide a specific target to aim at in a lawsuit." KAPLIN & LEE, *supra* note 37, at 462.

39. Many of the judicial decisions mentioned in this article are analyzed in more detail in earlier articles in this Journal. See Stoner & Showalter, *supra* note 16; Edward N. Stoner & Maraleen D. Shields, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education—2001*, 29 J.C. & U.L. 287 (2003); Edward N. Stoner & Bradley J. Martineau, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 28 J.C. & U.L. 311 (2002); Edward N. Stoner & Bradley J. Martineau, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 27 J.C. & U.L. 313 (2000); Edward N. Stoner & Corey A. Detar, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 26 J.C. & U.L. 273 (1999); Edward N. Stoner & Susan P. Schupansky, *Disciplinary and Academic Decisions Pertaining to Students: A Review of the 1997 Judicial Decisions*, 25 J.C. & U.L. 293 (1998); Gary Pavela, *Disciplinary and Academic Decisions Pertaining to Students: A Review of 1996 Judicial Decisions*, 24 J.C. & U.L. 213 (1997); Pavela, *supra* note 21; Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829 (1997).

40. See *Goss v. Lopez*, 419 U.S. 565, 579 (1975). See, e.g., *Clayton v. Trs. of Princeton Univ.*, 608 F. Supp. 413, 435–36 (D.N.J. 1985) (private institution). In applying a very minimal standard of "fundamental fairness," the court concluded:

Princeton places great reliance in the Honor Code and attaches considerable sanctity to it. It does not behoove this court to tell any private institution how they should handle alleged cheaters as long as the dictates of fundamental fairness are met. Clayton knew about the Honor Code when he arrived, and he was found to have violated it. If the Code needs correction, it is for Princeton to correct, and not this court.

*Id.* at 440.

41. See *supra* note 29, and accompanying text; Albert S. Miles, *The Due Process Rights of Students in Public School or College Disciplinary Hearings*. 48 ALA. LAW. 144, 146 (1987) ("[I]t is a good idea for a school or college to grant as much due process as it thinks is allowable, given a balance between the circumstances, the educational mission of the school and the rights of the student.").

private, such constitutional minimal procedural due process is not required,<sup>42</sup> but the institution's actions may appear more fair and more reasonable both to a court and to campus constituencies if it gives students the minimal procedural due process that would apply at a public institution.

As the *Dixon* court explained, the minimal procedural due process that public institutions are required to provide is, indeed, minimal. The Indiana Court of Appeals gave a typical contemporary description:

When a sanction is imposed for disciplinary reasons, the fundamental requirements of due process are notice and an opportunity for a hearing appropriate to the nature of the case. In order to be fair in the due process sense, the hearing must afford the person adversely affected the opportunity to respond, explain, and defend. For school expulsion, due process requires an informal give-and-take between the student and the disciplinarian, where the student is given an opportunity to explain his version of the facts. Due process further requires that a university base an expulsion on substantial evidence.<sup>43</sup>

Second, then-Judge Blackmun's observation that college and university conduct codes need not be "measured by the standards which prevail for the criminal law and for criminal procedure"<sup>44</sup> remains as accurate today as when he wrote those words two generations ago. The Missouri federal judges made the same point.<sup>45</sup>

There is no general requirement that procedural due process in student disciplinary cases provide for legal representations, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy,<sup>46</sup> compulsory production of

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42. See *supra* note 29 and accompanying text.

43. *Gagne v. Indiana Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998). The *Gagne* Court carefully tracked the instructions of the Supreme Court in *Goss v. Lopez*, 419 U.S. 565, 583–84 (1975) and of the Missouri federal judges in the *General Order*, *supra* note 2, at 147. See also *Nawaz v. State Univ. of N.Y. at Buffalo Sch. of Medicine*, 744 N.Y.S.2d 590, 591–92 (N.Y. App. Div. 2002) ("Due process requires that the petitioners be given the names of the witnesses against them, the opportunity to present a defense, and the results and finding of the hearing."); *Reilly v. Daly*, 666 N.E.2d 439, 444–45 (Ind. Ct. App. 1996) (following Professor Wright's description of the *Dixon* requirements of minimal procedural due process in cases implicating a possible serious penalty) "The student must be advised of the grounds of the charge, he must be informed of the nature of the evidence against him, he must be given an opportunity to be heard in his own defense, and he must not be punished except on the basis of substantial evidence." Wright, *supra*, note 20, at 1071–72.

44. *Esteban v. Central Mo. State Coll.*, 415 F.2d 1077, 1090 (8th Cir. 1969).

45. *General Order*, *supra* note 2, at 147–48.

46. As one commentator concluded, "The prohibition against double jeopardy has zero application to this situation. Double jeopardy only applies to criminal prosecutions within the same jurisdiction. By definition, adjudication of an offense under a student conduct code is not a criminal prosecution." Capone III, *supra* note 8, at 7. Professor Wright noted, "When a student's conduct leads both to a criminal charge and to disciplinary proceedings within the university . . . claims of 'double jeopardy' are not uncommon, but are utterly without merit." Wright, *supra*, note 20, at 1077–78. Judicial decisions uniformly reach the same conclusion. See *Missouri v. Mullenix*, 73 S.W.3d 32, 33 (Mo. Ct. App. 2002) (holding that student driving drunk on campus of Northwest Missouri State University could be subject both to university discipline and to criminal prosecution); *Oklahoma v. Kauble*, 948 P.2d 321 (Okla. Crim. App. 1997); *Maine v.*

witnesses, or any of the remaining features of federal criminal jurisprudence.

Thus, student disciplinary codes need not be drafted with the specificity of criminal statutes.<sup>47</sup> Nor do technical judicial hearing rules, like rules of evidence, apply on campus. The Supreme Court of Massachusetts recently joined others in emphasizing that student conduct code proceedings need not mirror courtroom proceedings. It approved a provision from the Brandeis University rules that stated, “[A]t a disciplinary hearing, [t]he technical rules of evidence applicable to civil and criminal cases shall not apply.”<sup>48</sup> A sentence like this one *must* appear in every well-drafted twenty-first century student conduct code.<sup>49</sup>

Similarly, in order to avoid implying that it expects its student code to be treated like a criminal statute, a college or university should avoid criminal law

Sterling, 685 A.2d 432 (Me. 1996); *City of Oshkosh v. Winkler*, 557 N.W.2d 464, 466 (Wis. Ct. App. 1996) (“This case primarily concerns whether student disciplinary action under University of Wisconsin System rules constitutes ‘punishment’ which triggers double jeopardy protection. We conclude that it does not.”); *Ohio v. Wood*, 679 N.E.2d 735, 741 (Ohio Ct. App. 1996) (holding that alumnus of Kent State University who was subject to University “*persona non grata*” proceeding could also be prosecuted for disorderly conduct in municipal court); *Paine v. Bd. of Regents of the Univ. of Tex. Sys.*, 355 F. Supp. 199, 203 (W.D. Tex. 1972), *aff’d per curiam*, 474 F.2d 1397 (5th Cir. 1973). For an enlightened discussion of the need to keep in mind the educational purposes of campus sanctions in the double jeopardy context, see Pavela, *supra* note 39, at 222–24.

47. Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 367 n.43 (1987). Justice Blackmun’s response to the claims of college students that college rules were not as specific as criminal statutes resonates today:

Roberds was disciplined because he had participated in the demonstrations in the face of specific warning delivered by personal interview with the dean. This was defiance of proper college authority. Esteban was disciplined because of his refusal to comply with an appropriate request by Doctor Meverden and because of his childish behavior and obscenity toward college officials. This, too, was defiance of proper college authority. There was no confusion or unawareness in either case. The exercise of common sense was all that was required. Each plaintiff knew the situation very well, knew what he was doing, and knew the consequences. Each, we might note, had had prior disciplinary experience. Their respective protestations of young and injured innocence have a hollow ring. . . . [W]e agree with Judge Hunter that it is not sound to draw an analogy between student discipline and criminal procedure . . . . [W]e do not find the regulation at all difficult to understand and we are positive the college student, who is appropriately expected to possess some minimum intelligence, would not find it difficult. It asks for the adherence to standards of conduct which befit a student and it warns of the danger of mass involvement. We must assume Esteban and Roberds can read and that they possess some power of comprehension. Their difficulty was that they chose not to read or not to comprehend.

*Esteban*, 415 F.2d at 1088.

48. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 n.15 (Mass. 2000). The Massachusetts Supreme Judicial Court explained that the college student discipline fact finding process is quite different from a judicial process:

Although these statements would be excluded from a courtroom under the rules of evidence, a university is not required to abide by the same rules. Brandeis may choose to admit all statements by every witness or it may choose to exclude some evidence. It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject.

*Id.* at 380.

49. See *infra* Model Code, art. IV(A)(4)(j).

language.<sup>50</sup>

The cardinal error of this type is the practice of calling student discipline proceedings “judicial.” This misnomer is unfortunate because rulings from members of the *real* judiciary have consistently held, when so urged by college and university officials, that campus proceedings are *not* “judicial” proceedings. Much confusion has been caused by calling the campus process a “judicial” one when it is not. Frequently, a college or university attorney’s explanation that judicial structures and technical judicial rules are not applicable on campuses has been derailed by a judge’s observation that, “The College itself calls it a ‘judicial’ process.” Luckily, most such derailments have been only temporary. The use of the term “judicial” may also contribute to similar confusion of elected officials and to the development of confusing legislation based upon a misunderstanding of the purpose and role of campus conduct codes. For these reasons, a sound twenty-first century student conduct code should eschew the word “judicial.”

While college and university rules should not use the wording of criminal statutes and are not required to be as specific as a criminal code, a student conduct code should be sufficiently specific to make the rules clear.<sup>51</sup>

Third, whatever process it adopts, the institution will want to remember the basic student affairs precept that it is important to treat all students with equal care, concern, honor, fairness, and dignity. For example, in student-on-student violence cases, the rights of the accused student, the student claiming to be the victim, and the academic community are equally important. It is helpful to judge potential process choices against this filter. The student who claims s/he is the victim of campus violence has the same rights to fair treatment as does the student accused of violating campus rules—and these expectations of both students spring from the same source: their honored status as students.

Fourth, student code drafters should be aware that, as in any generic document,

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50. A college or university would not want to use terms such as “guilty” or “beyond a reasonable doubt,” for example. Instead, students who do violate rules are found “responsible” for violating institutional rules, using a “more likely than not standard.” See *infra* Model Code, art. IV(A)(4)(i). Nor would it want to describe its fact finding process as a “trial,” the person presenting information (if it uses that model) as a “prosecutor” (s/he may be called a “presenter” or a “witness”), the consequences of misbehavior a “sentence” (instead, a “sanction”), the persons who determine what happened and/or recommend sanctions “judges” (they are “board members”), what fact finders consider “evidence” (instead, “information”), the students who allegedly violated the conduct code as “defendant” (instead, “Accused Student” or “student respondent”), or the person who alleges s/he was violated by another student’s misconduct a “victim” (instead, “student” or “witness”). See also *infra* note 152 (concerning the use of the word “victim”).

Similarly, one would want to avoid using criminal laws or criminal law words as, or in, institutional rules. See *Hardison v. Florida Agric. and Mech. Univ.*, 706 So. 2d 111 (Fla. Dist. Ct. App. 1998) (vacating student conduct panel’s finding of “assault and battery” because it did not find a violation of state criminal law offense by the same name).

51. James M. Picozzi, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 YALE L.J. 2132, 2155 (1987) (arguing that a written code ensures that both the administrator and the student know what process is due an accused student). Wright, *supra* note 20, at 1062–65 (noting that specific rules are desirable although not constitutionally required). On the other hand, a college or university will want to include some broadly worded rules in its student code in order to preserve as much flexibility as possible.

the principles set forth in the model student code represent the generally prevailing law and practice. In some instances, courts disagree. In others, administrators hold opposing views. In many cases, the model either offers the drafters alternative choices or advocates the position taken by the majority of courts or institutions, while noting that the position taken is not unanimously held. As with any form document, college or university counsel should review case law in his or her own jurisdiction to ensure that the institution is not bound by opposing precedent.

Finally, although such a section is not included in this model student code, the college or university may wish to emphasize, in addition to its prohibitions, rights that it recognizes. This can be included in a preamble to the student code<sup>52</sup> or in the college or university handbook.<sup>53</sup> The institution thereby assures its students that it does not intend to take away rights, but intends merely to control action going beyond, as Mr. Jefferson put it, “whether our indulgence was without limit.”<sup>54</sup> The institution can thus help to insulate itself from criticisms that the student code takes away some constitutional right.

The following model student code is organized so that all concerned—students, administrators and faculty members—can understand the concepts embodied therein. It progresses from a general definition section to a section outlining the authority of the institution’s student conduct bodies, a description of standards of conduct covered by the code, an outline of the procedures for bringing charges, holding hearings and deciding appeals and, finally, a section on interpretation and revision of the code. The commentary following various provisions sets forth not only the practical reason for including each section within the code, but also the legal support for each provision and, in some cases, suggestions on how the college or university official could approach certain situations.

The model student conduct code is followed by a model Student Conduct Board Hearing script. This script follows the model student conduct code and illustrates how a Student Conduct Board Hearing can be conducted effectively and in compliance with the dictates of minimal procedural due process, without using criminal law or courtroom models. Instead, the board chair runs the meeting of a committee—of which there are many in higher education—whose charge is to determine what the student did and to recommend the type of sanction that might be imposed if the student’s conduct violated institutional rules. The model and the atmosphere are educational, not adversarial.

Throughout the model code and script appear detailed discussions of thorny issues. For example, there is a discussion of the legal points to consider when a student who believes s/he was victimized by another student does not want to

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52. See, e.g., LOYOLA COLL. OF MD., COMMUNITY STANDARDS 2004–2005, at 5–8, available at <http://www.loyola.edu/campuslife/studentlife/42018%20Text.pdf> (2004); TEXAS A&M UNIV., STUDENT RULES AT TEXAS A&M UNIV. available at <http://student-rules.tamu.edu/> (last visited Oct. 12, 2004).

53. See, e.g., UNIV. OF S.C., 2003–2004 STUDENTS RIGHTS AND FREEDOMS WITHIN THE ACADEMIC COMMUNITY, available at <http://www.sa.sc.edu/carolinacommunity/rights.htm> (last visited Oct. 12, 2004); UNIV. OF FLA., DEAN OF STUDENTS OFFICE, STUDENT GUIDE, available at <http://www.dso.ufl.edu/studentguide/studentconductcode.html#studentrights> (last visited Oct. 12, 2004).

54. See Letter to Coolidge, *supra* note 7, quoted in General Order, *supra* note 2, at 140 n.4.

confront her/his alleged attacker in an institutional process.<sup>55</sup> What options may we consider? A physical screen? Remote testimony by television? Another section proposes an educational solution to a problem created on some campuses: reporting process results to alleged student victims.<sup>56</sup> In these, as in many other issues, the answer fortunately lies in our educational leaders exercising their education judgment to the advantage of both their students and the entire academic community.

As we noted in our first model student conduct code, even the adoption of a sound student code, applied with compassionate educational judgment, will not eliminate the “spirit of insubordination” that Thomas Jefferson saw as such a significant problem for higher education nearly two centuries ago.<sup>57</sup>

For this reason, the captains who navigate our ships of higher education know that the calm waters of consistently proper student behavior are unlikely ever to be reached. Instead, as Mr. Jefferson once feared, the challenges of student discipline are likely always to loom as breakers ahead. Nevertheless, a sound student code following this model, like a sound ship under a sailing captain of old, will enable college and university administrators to navigate confidently past the dangers of the spirit of insubordination, even when those dangers are accompanied, as they often are, by storm clouds of public concern and lightning bolts of campus unrest.

With luck, twenty-first century navigators of the spirit of insubordination will be as successful as Mr. Jefferson was. After responding to the University of Virginia riots by expelling four students,<sup>58</sup> submitting the matter to a criminal grand jury, and reprimanding the rest of the students involved, he wrote to Ellen Wayles Randolph Coolidge on November 14, 1825:

[The imposition of student discipline] determined the well-disposed among them to frown upon everything of the kind hereafter, and the ill-disposed returned to order from fear, if not from better motives. A perfect subordination has succeeded, entire respect towards the professors, and industry, order, and quiet the most exemplary, has prevailed ever since. Every one is sensible of the strength which the institution has derived from what appeared at first to threaten its foundation. We have no further fear of any thing of the kind from the present set, but as at the next term their numbers will be more than doubled by the accession of an additional band, as unbroken as these were, we mean to be prepared . . . .<sup>59</sup>

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55. See *infra* Model Code, art. IV(A)(7).

56. See *infra* Model Code, art. IV(B)(3)(b).

57. See Letter to Cooper, *supra* note 1, at 1463.

58. Just as modern student affairs officers face unusual challenges, Mr. Jefferson expelled his own great-great nephew, Wilson Miles Carey, from the University of Virginia. D. MALONE, 6 JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO 463–68 (Little & Brown, eds., 1977).

59. Letter to Coolidge, *supra* note 7, quoted in *General Order*, *supra* note 2, at 140 n.4. Mr. Jefferson was quite a dreamer, wasn't he!?

## A TWENTY-FIRST CENTURY MODEL STUDENT CONDUCT CODE

### PREAMBLE

*Commentary. A preamble could precede Article I reflecting the institution's mission, the principles that its faculty, students, and administrators value, and the community's commitment to establishing a special living/learning environment—all of which are intended to be reflected in the Student Conduct Code. These statements may, and do, take many forms and are worth the effort required to create one that reflects the culture of the institution.*<sup>60</sup>

### ARTICLE I: DEFINITIONS<sup>61</sup>

1. The term [College] [University] means [name of institution].
2. The term "student" includes all persons taking courses at the [College] [University], either full-time or part-time, pursuing undergraduate, graduate, or professional studies. Persons who withdraw after allegedly violating the

60. John Wesley Lowery, *Institutional Policy and Individual Responsibility: Communities of Justice and Principle*, 82 *NEW DIRECTIONS FOR STUDENT SERVICES* 15, 21–24 (1998). One example is "The Carolinian Creed" from the University of South Carolina. It is a general statement of values and is not a part of the student code per se:

The community of scholars at the University of South Carolina is dedicated to personal and academic excellence. Choosing to join the community obligates each member to a code of civilized behavior. As a Carolinian . . . I will practice personal and academic integrity; I will respect the dignity of all persons; I will respect the rights and property of others; I will discourage bigotry, while striving to learn from differences in people, ideas, and opinions; I will demonstrate concern for others, their feelings, and their need for conditions which support their work and development. Allegiance to these ideals requires each Carolinian to refrain from and discourage behaviors which threaten the freedom and respect every individual deserves.

UNIV. OF S.C., CAROLINIAN CREED, *available at* <http://www.sa.sc.edu/creed/> (last visited Oct. 12, 2004).

A second example is from at the University of Delaware:

[T]o adjudicate violations of the Student Code of Conduct. As such it functions as an aspect of the University's educational process. The goals of the [student discipline] System are (1) to promote a campus environment that supports the overall educational mission of the University; (2) to protect the University community from disruption and harm; (3) to encourage appropriate standards of individual and group behavior; (4) to foster ethical standards and civic virtues.

UNIV. OF DEL., OFFICE OF JUDICIAL AFFAIRS, MISSION STATEMENT, *available at* <http://www.udel.edu/judicialaffairs/> (last visited Oct. 12, 2004).

61. The authors recommend that, as in every good legal document, a student code should contain a section in which the code's drafters define all the terms of art that will appear throughout the code. The following is a partial list of definitions recommended for use with a college or university's student code. Definitions of some terms will, of course, vary with the type of disciplinary system established, and with the institution's traditional definitions of certain concepts.

Student Code, who are not officially enrolled for a particular term but who have a continuing relationship with the [College] [University] or who have been notified of their acceptance for admission are considered “students” as are persons who are living in [College] [University] residence halls, although not enrolled in this institution. This Student Code [does][does not] apply at all locations of the [College][University], including the campus in [e.g., a foreign country or another state].

*Commentary. This definition is intended to include persons not enrolled for a particular term but who were considered “students” when the conduct at issue occurred and could otherwise return. Such persons would be responsible for complying with the Student Code even between periods of their actual enrollment. Similarly, the Student Code would apply to students who have been accepted for admission but who are on campus prior to the beginning of their first semester. Also, under this model, students residing at one institution while enrolled at another would face the possibility of discipline at each institution for misbehavior in the institution of residence. The institution of residence should make sure that, if it follows this model, such visiting students are informed of the terms of the Code when they begin their residence. Similarly, it would be a good practice to advise students, in their letter of acceptance for admission or when they come to campus for events such as orientation, of the applicability of the student code (as well as other student affairs policies of importance, for example, a “three strikes and you’re out” alcohol policy, if the institution has one). This definition would also include students enrolled in courses delivered by some form of distance education. Institutions will have to consider carefully, however, the ramifications and possible adjustments necessary to the student conduct process to accommodate students who reside some distance from the physical campus.*

3. The term “faculty member” means any person hired by the [College] [University] to conduct classroom or teaching activities or who is otherwise considered by the [College] [University] to be a member of its faculty.
4. The term “[College] [University] official” includes any person employed by the [College] [University], performing assigned administrative or professional responsibilities.
5. The term “member of the [College] [University] community” includes any person who is a student, faculty member, [College] [University] official or any other person employed by the [College] [University]. A person’s status in a particular situation shall be determined by [title of appropriate college or university administrator].<sup>62</sup>
6. The term “[College] [University] premises” includes all land, buildings, facilities, and other property in the possession of or owned, used, or controlled by the [College] [University] (including adjacent streets and sidewalks).

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62. The college or university must designate a person within its administration to oversee the operation of the student code and to be responsible for its administration. See *infra* Model Code art. I(13). The person designated should be the same person assigned under art. V(A), to resolve other questions of interpretation.

7. The term "organization" means any number of persons who have complied with the formal requirements for [College] [University] [recognition/registration].
8. The term "Student Conduct Board" means any person or persons authorized by the [title of administrator identified in Article I, number 13]<sup>63</sup> to determine whether a student has violated the Student Code and to recommend sanctions that may be imposed when a rules violation has been committed.

*Commentary.* A "Student Conduct Board," sometimes called a "hearing board," need not be comprised of any particular number of persons. A single person could be authorized to serve as the Student Conduct Board. Concerns recur about the composition of such bodies. An impartial decision maker is essential.<sup>64</sup> Courts have recognized, however, that in the college or university context it is often impossible to assemble a group who has not in some way heard of the charges at issue or who do not know the person(s) involved.<sup>65</sup> Frequently, a "Student Conduct Board" that determines whether the Student Code has been violated includes both students and faculty members or administrators.<sup>66</sup> In this model, the student conduct administrator defines the composition of hearing boards but, if the history or social system on campus dictates otherwise, the composition may be defined in more detail in the Student Code.

A critical point in naming the boards and job titles of persons involved in student discipline is not to fall into the old pattern of using criminal law or civil law sound-alike words, such as "judicial" (as in "student judicial board"). Use of such language creates the false impression that the Student Code is intended to "model" courtroom or judicial procedures. Instead, the process is an educational one by which the institution applies its values to establishing the best possible living/learning environment for students. It is not a "judicial" process at all and does not either enforce outside criminal or civil law or intend to mimic such

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63. The person who authorizes the Student Conduct Board should be the same person designated to be responsible for the administration of the student code. See *infra* Model Code art. I(13).

64. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975).

65. "Members of the college community, including students, usually comprise the hearing board. Given the nature of the academic community, members of the hearing board may know the student outside the context of the disciplinary proceeding." Swem, *supra* note 47, at 371. *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) ("In a University setting, prior contact among the faculty and students is likely; that fact alone does not indicate bias or partiality."). See *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951, 954 (Ark. Ct. App. 1993) (holding that it was not a deprivation of procedural due process for fraternity brother of victim to serve on student conduct board that suspended student for one year); *Nash v. Auburn Univ.*, 812 F.2d 655, 666 (11th Cir. 1987) (finding that participation of a student on the student conduct board who had prior knowledge of the charge did not indicate bias).

66. There are many permutations on the composition of such boards. For example, Washington University's Judicial Board is comprised of six student members, six faculty/administrative staff members, and a chairperson. WASHINGTON UNIV. IN ST. LOUIS, POLICIES AND PROCEDURES: UNIV. JUDICIAL CODE, § IV available at <http://www.wustl.edu/policies/judicial.html> (last visited Oct. 12, 2004). The panel selected to meet in individual cases is comprised of at least three student members and three faculty/staff members and the chairperson. *Id.*

*judicial processes.*<sup>67</sup>

9. The term “Student Conduct Administrator” means a [College] [University] official authorized on a case-by-case basis by the [title of administrator identified in Article I, number 13] to impose sanctions upon any student(s) found to have violated the Student Code. The [title of administrator identified in Article I, number 13] may authorize a Student Conduct Administrator to serve simultaneously as a Student Conduct Administrator and the sole member or one of the members of the Student Conduct Board. The [title of administrator identified in Article I, number 13] may authorize the same Student Conduct Administrator to impose sanctions in all cases.

*Commentary.* Just as courts have recognized that persons comprising a Student Conduct Board may have prior knowledge of the events at issue or the person(s) involved, they have recognized that it is not always easy to avoid having one person occupy multiple roles with respect to disciplinary proceedings, even when suspension or expulsion is a possible outcome.<sup>68</sup> While it is not improper for student affairs professionals to serve in multiple roles, whenever possible the college or university should avoid putting someone in the position of “wearing two hats.” If the size of the institution’s staff permits, it is preferable to have the functions of informal investigating and/or mediating separated from that of determining whether a violation has occurred and setting the sanction. Thus, this model recognizes the advisability of separating the functions when possible, while preserving the flexibility to combine functions—which usually will be a fact of life

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67. See *supra* text following note 50.

68. In *Gorman v. University of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1987), the court explained:

Nor do the various roles of Weisinger, while inappropriate in a judicial setting, necessarily violate the requirement of fairness. As Justice Blackmun noted in *Richardson v. Perales*, 402 U.S. 389 (1971), ‘the advocate-judge-multiple hat suggestion . . . assumes too much and would bring down too many procedures designed, and working well. . . .’ *Id.* at 410. Gorman’s contention that Weisinger’s various roles or ‘multiple hats’ are evidence of bias and undue influence, also ‘assumes too much.’ The University procedures are designed to give students an opportunity to respond and defend against the charges made, and there is no evidence which would show that Gorman was denied a fair hearing because of Weisinger’s multiple roles.

See also *Nash*, 812 F.2d at 666 (11th Cir. 1987) (“In *Duke*, we refused ‘to establish a *per se* rule that would disqualify administrative hearing bodies . . . solely for the reason that . . . some of [the members] participated in the initial investigation of the incident and initiation of the cause under consideration.”); *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972) (holding that accused students’ due process right to an impartial decision-maker did not preclude the dean from the office which brought disciplinary action against students from serving as decision-maker); *Hillman v. Elliott*, 436 F. Supp. 812, 816 (W.D. Va. 1977) (holding that principal should be permitted to serve as hearing officer despite his prior involvement in the disciplinary matter in question). *Cf. Megill v. Bd. of Regents*, 541 F.2d 1073, 1079 (5th Cir. 1976) (holding that mere familiarity with the facts of the case gained by school board members in the performance of their statutory role did not disqualify them as decision-makers); *Alex v. Allen*, 409 F. Supp. 379, 387–88 (W.D. Pa. 1976) (stating that unless the record indicates partiality, it is assumed that the administrative body is unbiased).

at many institutions.

A student challenging a Student Conduct Board's decision on the grounds of bias must demonstrate actual bias or that the board acted improperly.<sup>69</sup> There is, however, nothing improper about a college or university official advising the Student Conduct Board during the disciplinary process.<sup>70</sup> This model anticipates that a college or university official will determine sanctions after a violation has been found. In some systems sanctions are set by the same Student Conduct Board which determines whether a violation has occurred.<sup>71</sup>

10. The term "Appellate Board" means any person or persons authorized by the [title of administrator identified in Article I, number 13] to consider an appeal from a Student Conduct Board's determination as to whether a student has violated the Student Code or from the sanctions imposed by the Student Conduct Administrator.
11. The term "shall" is used in the imperative sense.
12. The term "may" is used in the permissive sense.
13. The [title of appropriate administrator] is that person designated by the [College] [University] President to be responsible for the administration of the Student Code.
14. The term "policy" means the written regulations of the [College] [University] as found in, but not limited to, the Student Code, Residence Life Handbook, the [College] [University] web page and computer use policy, and Graduate/Undergraduate Catalogs.

*Commentary.* Listed herein is a sampling of the types of other sources of rules and regulations governing colleges or universities. The institution should include here a list of the primary places where such rules and regulations may be found.

15. The term "cheating" includes, but is not limited to: (1) use of any unauthorized assistance in taking quizzes, tests, or examinations; (2) use of

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69. *Holert*, 751 F. Supp. at 1301 ("The disciplinary committee, which included a student representative, is entitled to a presumption of honesty and integrity, absent a showing of actual bias, such as animosity, prejudice, or a personal or financial stake in the outcome."); *Gorman*, 837 F.2d at 15 (1st Cir. 1988) ("In the intimate setting of a college or university, prior contact between the participants is likely, and does not *per se* indicate bias or partiality."); *Nash*, 812 F.2d at 666 (finding no bias where student conduct board member had prior knowledge of the incident); *Duke v. N. Tex. State Univ.*, 469 F.2d 829, 834 (5th Cir. 1972) ("Alleged prejudice of university hearing bodies must be based upon more than mere speculation and tenuous inferences."); *Barker v. Hardway*, 283 F. Supp. 228, 237 (S.D. W.Va. 1968) ("[T]he law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been actuated by proper motives.").

70. *Morris v. Brandeis Univ.*, 804 N.E.2d 961, 964 (Mass. App. Ct. 2004) ("There was no fiduciary relationship between [an accused] student and a university administrator/advisor like Tenser in these circumstances [serving as the advisor to the student conduct board during the discipline process].").

71. See *infra* note 163, and accompanying text.

sources beyond those authorized by the instructor in writing papers, preparing reports, solving problems, or carrying out other assignments; (3) the acquisition, without permission, of tests or other academic material belonging to a member of the [College] [University] faculty or staff (4) engaging in any behavior specifically prohibited by a faculty member in the course syllabus or class discussion.

16. The term “plagiarism” includes, but is not limited to, the use, by paraphrase or direct quotation, of the published or unpublished work of another person without full and clear acknowledgment. It also includes the unacknowledged use of materials prepared by another person or agency engaged in the selling of term papers or other academic materials.

*Commentary. Cheating and plagiarism are the two most common types of academic misconduct.<sup>72</sup> Faculty should be strongly encouraged to discuss academic misconduct in the course syllabus and their course web page if they have one, so that it is in writing, and in class discussion. The courts’ views about institutional decisions regarding such academic misconduct will be discussed in greater detail hereafter.<sup>73</sup> In any event, drafters must assure that the possible overlap between faculty response and student affairs’ response to academic misbehavior be addressed directly and thoughtfully so that there is no confusion as to the process that applies to such situations.*

17. The term “Complainant” means any person who submits a charge alleging that a student violated this Student Code. When a student believes that s/he has been a victim of another student’s misconduct, the student who believes s/he has been a victim will have the same rights under this Student Code as are provided to the Complainant, even if another member of the [College][University] community submitted the charge itself.

*Commentary. Normally, a student who believes s/he has been the victim of another student’s misconduct becomes the Complainant. This is not always the case. For example, a member of campus security may be the technical Complainant if a matter begins with a security report. In that event, this provision preserves for the student who believes s/he was a victim the same rights (such as to attend the entire hearing or to appeal) as are also accorded to the Complainant.*

18. The term “Accused Student” means any student accused of violating this Student Code.

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72. William Kibler, *Addressing Academic Dishonesty and Promoting Academic Integrity*, in THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT, ORGANIZATIONAL, AND COMMUNITY ISSUES 161 (Brent G. Paterson & William L. Kibler, eds., 1998).

73. See *infra*, notes 91–92, and accompanying text; Dutile, *supra* note 8; Grier & Stoner, *supra* note 8; Bernard, *supra* note 8. See also CENTER FOR ACADEMIC INTEGRITY KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, at <http://www.academicintegrity.org> (providing links to member institution honor codes) (last visited Oct. 12, 2004).

## ARTICLE II: STUDENT CODE AUTHORITY

1. The Student Conduct Administrator shall determine the composition of Student Conduct Boards and Appellate Boards and determine which Student Conduct Board, Student Conduct Administrator and Appellate Board shall be authorized to hear each matter.
2. The [title of appropriate administrator] shall develop policies for the administration of the student conduct system and procedural rules for the conduct of Student Conduct Board Hearings that are not inconsistent with provisions of the Student Code.

*Commentary.* This provision is intended to allow the institution to adopt and to revise operating procedures in a nimble fashion, not invoking the more complicated formal process used to review and to revise the Student Code itself.

3. Decisions made by a Student Conduct Board and/or Student Conduct Administrator shall be final, pending the normal appeal process.

## ARTICLE III: PROSCRIBED CONDUCT

## A. Jurisdiction of the [College] [University] Student Code

The [College] [University] Student Code shall apply to conduct that occurs on [College] [University] premises, at [College] [University] sponsored activities, and to off-campus conduct that adversely affects the [College] [University] Community and/or the pursuit of its objectives. Each student shall be responsible for his/her conduct from the time of application for admission through the actual awarding of a degree, even though conduct may occur before classes begin or after classes end, as well as during the academic year and during periods between terms of actual enrollment (and even if their conduct is not discovered until after a degree is awarded).<sup>74</sup> The Student Code shall apply to a student's conduct even if the student withdraws from school while a disciplinary matter is pending. The [title of administrator identified in Article I, number 13] shall decide whether the Student Code shall be applied to conduct occurring off campus, on a case by case basis, in

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74. Inappropriate conduct occurring, for example, during on-campus visits by applicants or by students who have completed classes awaiting graduation ceremony are covered by this student conduct code. *Dinu v. Harvard Coll.*, 56 F. Supp. 2d 129, 133 (D. Mass. 1999) (rejecting assertion that college rules did not apply between completion of course work and graduation day); *O'Sullivan v. N.Y. Law Sch.*, 22 N.Y.S. 663, 665 (N.Y. Sup. Ct. 1893):

It cannot be that a student having passed all examinations necessary for a degree can, before his graduation, excite disturbance and threaten injury to the school or college without being amenable to some punishment. No course would seem open except to forthwith expel him or refuse his degree. . . . The faculties of educational institutions having power to confer degrees . . . are necessarily vested with a broad discretion as to the persons who shall receive those honors. . . . Any other rule would be subversive of all discipline in the schools. . . . We see no reason why the right to discipline is not as great between the final examination and the graduation as before.

*See infra* Model Code, art. IV(B)(1)(k).

his/her sole discretion.

*Commentary.*<sup>75</sup> *The college or university should state in general terms the conduct which the institution intends to reach. A college or university has jurisdiction to impose sanctions upon a student for activities that take place off campus when those activities adversely affect the interests of the college or university community. School officials have wide latitude in determining whether an activity adversely affects the interests of the college or university community.*<sup>76</sup>

*In 1968, one court noted the demise of 'in loco parentis' and opined that it foresaw "a trend to reject the authority of university officials to regulate 'off-campus' activity of students."*<sup>77</sup> *The actual trend was to embrace and to encourage institutions that worked to regulate off-campus student misbehavior. The Missouri federal judges concluded that it was appropriate for institutions to regulate such off-campus behavior and even to expect "superior ethical and moral behavior."*<sup>78</sup> *So did the courts in Esteban v. Central Missouri State College,*<sup>79</sup> *Krasnow v. Virginia Polytechnic Inst. & State Univ.,*<sup>80</sup> *Hill v. Michigan State University,*<sup>81</sup> *Ray*

75. An excellent discussion of both legal and practical considerations involved in dealing with "off-campus" student behavior is set forth in, Capone III *supra* note 8; KAPLIN & LEE, *supra* note 8, §4.12.2.

76. See Wright, *supra* note 20, at 1068. In *Kusnir v. Leach*, 439 A.2d 223 (Pa. Commw. Ct. 1982), a college disciplinary board suspended a student for two semesters for participating in misconduct at a private party at a private off-campus residence. *Id.* at 225. The student asserted in part that the college lacked jurisdiction to punish students for off-campus misconduct. *Id.* The court disagreed, saying the argument had "no merit." *Id.* at 226. "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body." *Id.*

77. *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968).

78. *General Order*, *supra* note 2, at 145:

Standards so established may apply to student behavior on and off campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes and functions of the institution.

79. 290 F. Supp. 622 (W.D. Mo. 1968) (holding that the college had substantial justification for subjecting to discipline students involved in demonstrations which blocked traffic on and near campus).

80. 414 F. Supp. 55, 57 (D. Va. 1976), (off-campus drug possession) (upholding higher standards of morals and behavior despite questioning whether the off-campus acts had "little to do with university life").

81. 182 F. Supp. 2d 621 (W.D. Mich. 2001). The court found:

Hill fails to cite any case holding that a university violates the Constitution by suspending a student for off-campus acts. This Court doubts such a case exists because universities typically take into consideration many off-campus acts in deciding whether to admit or retain a student. For example, if a student sold drugs across the street from campus, or committed arson one block from campus, such acts could certainly be taken into account in determining whether to retain a person on campus. These acts raise legitimate concern, even fear, as to the safety of the property and persons on campus—i.e., if he does it off-campus, he is as likely to do it on campus. Likewise, encouraging fires, rocking vehicles, and kicking telephone booths, even though occurring off-campus, shows a disregard for the property and safety of others that raises a legitimate concern as to the safety of the property and persons on-campus.

v. *Wilmington College*,<sup>82</sup> *numerous other cases*,<sup>83</sup> and, even a state attorney general.<sup>84</sup>

*Under this Model Student Code, when an activity occurs off campus, that is not at a college or university sponsored event, it would be the responsibility of the administrator designated in Article I, number 13, to determine whether college or university jurisdiction should be asserted.*<sup>85</sup> Utilizing this procedure on a case-by-case basis allows the institution to consider the unique facts of each situation without the impossible problem of drafting language to cover every possible situation.

*Id.* at 637.

82. 667 N.E.2d 39 (Ohio Ct. App. 1995) (approving application of student conduct code to off-campus sexual conduct, under language from the 1990 Model Code). The *Ray* court explained: "An educational institution's authority to discipline its students does not necessarily stop at the physical boundaries of the institution's premises. 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." *Id.* at 41.

83. *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117 (D. Me. 2004) (stating that accused student's argument that University could not deal with alleged sexual assault because it occurred off campus was "simply frivolous."); *Reliford v. Univ. of Akron*, 610 N.E.2d 521 (Ohio Ct. App. 1991); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975) (upholding expulsion of graduate student for fraud in publications); *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966) (upholding suspension of student after multiple driving offenses in city). See *Hart v. Ferris State Coll.*, 557 F. Supp. 1379 (W.D. Mich. 1983); *Sohmer v. Kinnard*, 535 F. Supp. 50 (D. Md. 1982); *Wallace v. Florida A&M Univ.*, 433 So. 2d 600 (Fla. Dist. Ct. App. 1983); Dale R. Agthe, Annotation, *Misconduct of College or University Student Off Campus As Grounds for Expulsion, Suspension, or Other Disciplinary Action*, 28 A.L.R. 4th 463 (1984).

84. Referring to the University of Maryland College Park, Maryland Attorney General J. Joseph Curan, Jr. concluded that "it is constitutionally permissible for a public college or university to impose disciplinary sanctions on students for misconduct that occurs off-campus." 74 Op. Md. Atty. Gen. 147 at \*4 (1989). He added, "Any statute or university rule authorizing an institution to sanction such conduct . . . must limit disciplinary actions to misconduct that is detrimental to the institution's interests." *Id.*

85. See *infra* Model Code, art. V(A). University of Florida Rule 6C1-4.018 gives guidance on when and how it deals with off-campus conduct:

When a student violates city, state or federal law, by an offense committed off campus and which is not associated with a University-connected activity, the disciplinary authority of the University will not be used merely to duplicate the penalty awarded for such an act under applicable ordinances and laws. The University will take disciplinary action against a student for such an off-campus offense only when it is required by law to do so or when the nature of the offense is such that in the judgment of the Director of Student Judicial Affairs, the continued presence of the student on campus is likely to interfere with the educational process or the orderly operation of the University; the continued presence of the student on campus is likely to endanger the health, safety or welfare of the University community or is intimidating or threatening to another individual within the University community; or the offense committed by the student is of such a serious nature as to adversely affect the student's suitability as a member of the University community. If the Director of Student Judicial Affairs determines that disciplinary action is warranted, the Director of Student Judicial Affairs shall so notify the student . . . . The action of the University with respect to any such off-campus conduct shall be taken independently of any off-campus authority.

*Institutions with multiple, remote or overseas locations will wish to state here whether the student code applies in those locations.*

## B. Conduct—Rules and Regulations

Any student found to have committed or to have attempted to commit the following misconduct is subject to the disciplinary sanctions outlined in Article IV:

1. Acts of dishonesty, including but not limited to the following:
  - a. Cheating, plagiarism, or other forms of academic dishonesty.
  - b. Furnishing false information to any [College] [University] official, faculty member, or office.
  - c. Forgery, alteration, or misuse of any [College] [University] document, record, or instrument of identification.
2. Disruption or obstruction of teaching, research, administration, disciplinary proceedings, other [College] [University] activities, including its public service functions on or off campus, or of other authorized non- [College] [University] activities when the conduct occurs on [College] [University] premises.
3. Physical abuse, verbal abuse, threats, intimidation, harassment, coercion, and/or other conduct which threatens or endangers the health or safety of any person.<sup>86</sup>

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86. While this language is appropriate for a private university or college which need not worry unduly about due process requirements under federal or state constitutional or statutory law, persons drafting a code at a public institution should review with their institutional counsel whether more specific language is required in their situation. One court, however, noted that this language was not too vague to enforce, noting that, “Any ordinary reasonable person could understand the [college] code. . . .” *Cady v. S. Suburban Coll.*, 310 F. Supp. 2d 447 (N.D. Ill. 2004).

A broadly worded provision such as this one would bring within the Student Code incidents of alleged sexual misconduct, hazing and, when coupled with rule number 4, “riots.” There are many more specific definitions of inappropriate sexual conduct in Student Codes. Here are two approaches, defining inappropriate sexual conduct:

Sexual misconduct that involves:

- i. Deliberate touching of another's sexual parts without consent;
- ii. Deliberate sexual invasion of another without consent;
- iii. Deliberate constraint or incapacitation of another, without that person's knowledge or consent, so as to put another at substantially increased risk of sexual injury; or
- iv. Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that expressly or implicitly imposes conditions upon, threatens, interferes with, or creates an intimidating, hostile, or demeaning environment for an individual's (I) academic pursuits, (II) University employment; (III) participation in activities sponsored by the University or organizations or groups related to the University, or (IV) opportunities to benefit from other aspects of University life.

UNIV. OF N.C. AT CHAPEL HILL, INSTRUMENT OF STUDENT JUDICIAL GOVERNANCE ILC.1.b., available at <http://instrument.unc.edu/instrument.text.html#IIOffenses> (July 1, 2003);

Sexual misconduct.

1. Any sexual act that occurs without the consent of the victim, or that occurs when the victim is unable to give consent.

*Commentary. It is very important to include a broadly worded rule, such as this one, so that there are no gaps of misconduct between the areas covered by more specific rules.*<sup>87</sup>

4. Attempted or actual theft of and/or damage to property of the [College] [University] or property of a member of the [College] [University] community or other personal or public property, on or off campus.
5. Hazing,<sup>88</sup> defined as an act which endangers the mental or physical health or safety of a student, or which destroys or removes public or private property, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in, a group or organization.<sup>89</sup> The express or

2. Obscene or indecent behavior, which includes, but is not limited to, exposure of one's sexual organs or the display of sexual behavior that would reasonably be offensive to others.
3. Conduct of a sexual nature that creates an intimidating, hostile, or offensive campus, educational, or working environment for another person. This includes unwanted, unwelcome, inappropriate, or irrelevant sexual or gender-based activities or comments.

FLA. STATE UNIV., STUDENT CONDUCT CODE 5(a), *available at* <http://www.fsu.edu/Books/Student-Handbook/2003codes/conduct.html> (last visited Oct. 12, 2004).

For opposing resources on dealing with sexual assault on college and university campuses, compare CAL. COALITION AGAINST SEXUAL ABUSE, *at* <http://www.calcasa.org> (last visited Oct. 12, 2004) (focusing on protecting victims of sexual assault) *with* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *at* <http://www.thefire.org/issues.php> (last visited Oct. 12, 2004) (focusing on rights of students accused of misconduct).

In *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 634 (6th Cir. 2003), a student's expulsion was upheld despite his Title IX lawsuit. He had been found in violation of the university's sexual assault policy, with the disciplinary board stating that the female student's "degree of intoxication was such 'that the victim's judgment was so impaired that she would not have been capable of making rational decisions about her welfare; as such she could not have given consent to engage in sexual intercourse with the accused student.'" *Id.* at 637.

87. It would be impossible for any committee of administration, faculty and students to compose rules and regulations so specific as to cover every possible offense, which the fertile imagination of present day students might conceive or perpetuate. *Herman v. Univ. of S.C.*, 341 F. Supp. 226, 232 (D.S.C. 1971).

88. An excellent discussion of legal and practical considerations involved in dealing with Greek organization hazing is Melinda W. Grier, *Regulating and Disciplining Fraternities and Sororities*, 38th Annual Conf., Nat'l Ass'n of Coll. & Univ. Att'ys (1998) (on file with author).

89. *See* PA. STAT. ANN. tit. 24, §5352 (West 1992). In Pennsylvania, the legislature has promulgated an anti-hazing law, PA. STAT. ANN. tit. 24, §§ 5351–5354 (West 1992), requiring all public or private institutions of higher education to adopt a written anti-hazing policy and to establish rules for enforcement of the policy and punishment of offenders. As part of this law, the legislature has defined what it considers to be hazing. Student code drafters would be well advised to determine whether applicable state law provides a definition of hazing and, if so, to use that definition as a reference when drafting the language of their student code in order to make the provision self-executing, i.e., to provide a free standing rule which prohibits hazing whether it constitutes a precise violation of the criminal law, or not. In so doing, the drafter must take care not simply to make reference to the state statute, so that there is no implication that there is no college or university rule violated unless or until the state criminal law processes first find a violation of the criminal law. For a link to forty-two state laws on hazing, see <http://www.stophazing.org/laws.html> (last visited Oct. 12, 2004).

implied consent of the victim will not be a defense. Apathy or acquiescence in the presence of hazing are not neutral acts; they are violations of this rule.<sup>90</sup>

6. Failure to comply with directions of [College] [University] officials or law enforcement officers acting in performance of their duties and/or failure to identify oneself to these persons when requested to do so.
7. Unauthorized possession, duplication or use of keys to any [College] [University] premises or unauthorized entry to or use of [College] [University] premises.
8. Violation of any [College] [University] policy, rule, or regulation published in hard copy or available electronically on the [College][University] website.
9. Violation of any federal, state or local law.<sup>91</sup>

Two other groups' explanations of conduct prohibited as hazing include:

Any action taken or situation created, intentionally, whether on or off fraternity premises, to produce mental or physical discomfort, embarrassment, harassment, or ridicule. Such activities may include but are not limited to the following: use of alcohol; paddling in any form; creation of excessive fatigue; physical and psychological shocks; quests, treasure hunts, scavenger hunts, road trips or any other such activities carried on outside or inside of the confines of the chapter house; wearing of public apparel which is conspicuous and not normally in good taste; engaging in public stunts and buffoonery; morally degrading or humiliating games and activities; and any other activities which are not consistent with academic achievement, fraternal law, ritual or policy or the regulations and policies of the educational institution or applicable state law.

FRATERNITY INSURANCE PROTECTION GROUP, RISK MANAGEMENT MANUAL, 45 available at <http://www.fipg.org/media/FIPGRiskMgmtManual.pdf> (last updated Dec. 2003).

"Hazing" refers to any activity expected of someone joining a group (or to maintain full status in a group) that humiliates, degrades or risks emotional and/or physical harm, regardless of the person's willingness to participate. In years past, hazing practices were typically considered harmless pranks or comical antics associated with young men in college fraternities. Today we know that hazing extends far beyond college fraternities and is experienced by boys/men and girls/women in school groups, university organizations, athletic teams, the military, and other social and professional organizations. Hazing is a complex social problem that is shaped by power dynamics operating in a group and/or organization and within a particular cultural context. Hazing activities are generally considered to be: physically abusive, hazardous, and/or sexually violating. The specific behaviors or activities within these categories vary widely among participants, groups and settings. While alcohol use is common in many types of hazing, other examples of typical hazing practices include: personal servitude; sleep deprivation and restrictions on personal hygiene; yelling, swearing and insulting new members/rookies; being forced to wear embarrassing or humiliating attire in public; consumption of vile substances or smearing of such on one's skin; brandings; physical beatings; binge drinking and drinking games; sexual simulation and sexual assault.

STOPHAZING.ORG, at <http://www.stophazing.org/definition.html> (last visited Oct. 12, 2004):

90. Pavela, *supra* note 8 at 830, n.18.

91. This language is not too vague to enforce. *Woodis v. Westark Comm. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (holding that student who pled *nolo contendere* to misdemeanor controlled substances charge was in violation of rule requiring her to "obey all federal, state and local laws" and was properly expelled); *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1082 (8th Cir. 1969) (rejecting vagueness challenge to regulation requiring students to abide by "all local, state and federal laws"). It is a wise practice to cite other campus rules if relevant to the alleged misconduct, rather than to rely upon this rule, in order to avoid the criminal defense

*Commentary.* It is an appropriate practice to cite another rule that a student's conduct may also have violated whenever this rule is cited so that the institution is enforcing its rules rather than the standards set by persons outside the academic community for law enforcement purposes. This practice will help to avoid the mistaken notion that the institution is enforcing the criminal laws.

10. Use, possession, manufacturing, or distribution of marijuana, heroin, narcotics, or other controlled substances except as expressly permitted by law.
11. Use, possession, manufacturing, or distribution of alcoholic beverages (except as expressly permitted by [College] [University] regulations), or public intoxication. Alcoholic beverages may not, in any circumstance, be used by, possessed by or distributed to any person under twenty-one (21) years of age.

*Commentary.* This rule should be consistent with the institution's alcohol policy, for example, by making reference to the policy or to special features of it (such as a "three strikes and you're out" policy, or a parental notification policy, if applicable). Rules such as 10 and 11 comply with the Drug-Free Schools and Communities Act<sup>92</sup>, and 34 C.F.R. Part 86, requiring higher education institutions receiving any federal financial aid to have "standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students"<sup>93</sup> for which the institution will impose sanctions.<sup>94</sup>

12. Illegal or unauthorized possession of firearms, explosives, other weapons, or dangerous chemicals on [College] [University] premises or use of any such item, even if legally possessed, in a manner that harms, threatens or causes fear to others.<sup>95</sup>
13. Participating in an on-campus or off-campus demonstration, riot or activity that disrupts the normal operations of the [College] [University] and/or infringes on the rights of other members of the [College] [University] community; leading or inciting others to disrupt scheduled and/or normal activities within any campus building or area.
14. Obstruction of the free flow of pedestrian or vehicular traffic on [College] [University] premises or at [College] [University] sponsored or supervised functions.

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lawyer's argument that a violation of this rule should be predicated upon a prior final determination of criminal responsibility.

92. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 20 U.S.C.).

93. 34 C.F.R. § 86.100(a)(1) (2004).

94. *Id.* § 86.100(a)(5).

95. This would be the spot to make it a rules violation to possess even a legal firearm on campus if that is the institution's choice but an administrator at a public institution would be well advised to consult campus counsel on this choice. Under such a rule, one court upheld the suspension of a student who refused to promise that he would not bring a gun onto a private institution's campus. *Ali v. Stetson Univ., Inc.* \_\_\_ F. Supp. 2d \_\_\_, No. 6:03-CV-975-ORI28, 2004 WL 2309552 (M.D. Fla. Oct. 8, 2004) (lawsuit brought under 42 U.S.C. § 1981).

15. Conduct that is disorderly, lewd, or indecent; breach of peace; or aiding, abetting, or procuring another person to breach the peace on [College] [University] premises or at functions sponsored by, or participated in by, the [College] [University] or members of the academic community. Disorderly Conduct includes but is not limited to: Any unauthorized use of electronic or other devices to make an audio or video record of any person while on [College][University] premises without his/her prior knowledge, or without his/her effective consent when such a recording is likely to cause injury or distress. This includes, but is not limited to, surreptitiously taking pictures of another person in a gym, locker room, or restroom.

*Commentary. The provisions set forth in rule fifteen (adapted in part from a rule at the University of Denver) are intended to give student affairs professionals some tools to deal with inappropriate conduct in the ever-changing electronic age.*

16. Theft or other abuse of computer facilities and resources, including but not limited to:
- Unauthorized entry into a file, to use, read, or change the contents, or for any other purpose.
  - Unauthorized transfer of a file.
  - Use of another individual's identification and/or password.
  - Use of computing facilities and resources to interfere with the work of another student, faculty member or [College] [University] Official.
  - Use of computing facilities and resources to send obscene or abusive messages.
  - Use of computing facilities and resources to interfere with normal operation of the [College] [University] computing system.
  - Use of computing facilities and resources in violation of copyright laws.
  - Any violation of the [College][University] Computer Use Policy.<sup>96</sup>
17. Abuse of the Student Conduct System, including but not limited to:
- Failure to obey the notice from a Student Conduct Board or [College] [University] official to appear for a meeting or hearing as part of the Student Conduct System.
  - Falsification, distortion, or misrepresentation of information before a Student Conduct Board.
  - Disruption or interference with the orderly conduct of a Student Conduct Board proceeding.
  - Institution of a student conduct code proceeding in bad faith.

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96. Each public institution will want to have its counsel review the institution's computer use policy to consider speech issues. It is recommended that each institution have a separate computer use policy and that reference be made to it in the student conduct code. Many excellent policies are maintained by EDUCAUSE/Cornell Institute for Computer Policy and Law, at <http://www.educause.edu/icpl> (last visited Oct. 12, 2004). See AM. COUNCIL ON EDUC., UNIV. POLICIES AND PRACTICES ADDRESSING IMPROPER PEER-TO-PEER FILE SHARING, available at <http://www.acenet.edu/hena/pdf/P2P2.pdf> (Apr. 2004).

- e. Attempting to discourage an individual's proper participating in, or use of, the student conduct system.
- f. Attempting to influence the impartiality of a member of a Student Conduct Board prior to, and/or during the course of, the Student Conduct Board proceeding.
- g. Harassment (verbal or physical) and/or intimidation of a member of a Student Conduct Board prior to, during, and/or after a student conduct code proceeding.
- h. Failure to comply with the sanction(s) imposed under the Student Code.
- i. Influencing or attempting to influence another person to commit an abuse of the student conduct code system.

*Commentary.* Colleges or universities are, of course, free to include in their lists of misconduct as many types of acts as they choose. The list of acts of misconduct that constitute violations of the Student Code should give students notice of the types of conduct that may result in sanctions but not every specific type of misconduct is listed because it would not be possible to do so.

Courts give college and university officials much greater freedom concerning purely academic decisions than they do concerning purely disciplinary decisions.<sup>97</sup> Academic misconduct cases involving cheating or plagiarism, for example, present a unique hybrid of academic and disciplinary decisions.<sup>98</sup> Because courts have a real challenge in deciding whether misconduct is academic or disciplinary,<sup>99</sup> the authors suggest that public institutions review with campus counsel each case of

97. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Bd. of Curators v. Horowitz*, 435 U.S. 78, 87-91 (1978). The dichotomy has developed because "disciplinary determinations are based on objective findings of fact so that hearings are useful and appropriate in this context. However, academic determinations are quite different because they are more subjective and evaluative." Ronald M. Levin, *Constitutional Law - Due Process of Law*, 47 U. CIN. L. REV. 514, 517 (1978). See generally Emogene C. Wilhelm, *Academic or Disciplinary Decisions: When is Due Process Required?*, 6 U. BRIDGEPORT L. REV. 391 (1985); M. Michele Fournet, *Due Process and the University Student: The Academic/Disciplinary Dichotomy*, 37 LA. L. REV. 939 (1977); KAPLIN & LEE, *supra* note 8, at 491-97; *Pugel v. Univ. of Ill.*, 378 F.3d 689 (7th Cir. 2004).

98. Dutile, *supra* note 8; Bernard, *supra* note 8; Steve Milam & John Marshall, *Impact of Regents of the University of Michigan v. Ewing on Academic Dismissals from Graduate and Professional Schools*, 13 J.C. & U.L. 335 (1987). The safest approach is clear: "When dismissal or other serious sanctions depend more on disputed factual issues concerning conduct than on expert evaluation of academic work, the student should be accorded procedural rights akin to those for disciplinary cases." KAPLIN & LEE, *supra* note 8, at 491.

99. See, e.g., *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); *Hall v. Medical Coll. of Ohio*, 742 F.2d 299, 308-09 (6th Cir. 1984). But see *Corso v. Creighton Univ.*, 731 F.2d 529, 532 (8th Cir. 1984) (holding that "[c]heating on exams is clearly an academic matter. . ."); *Garshman v. Pa. State Univ.*, 395 F. Supp. 912, 921 (M.D. Pa. 1975) (holding that "a determination as to the academic honesty of a student is . . . peculiarly within the discretion of a college administration."); *McDonald v. Bd. of Trs. of Univ. of Ill.*, 375 F. Supp. 95, 104 (N.D. Ill. 1974). See also Robert N. Roberts, *Public University Responses to Academic Dishonesty: Disciplinary or Academic*, 15 J.L. & EDUC. 369, 384 n.16-32 (1986) (noting that "even if a public university classifies the punishment of cheating as an academic matter, the courts may not hold the same view").

“academic misconduct” which might result in suspension or expulsion to assure that the minimal procedural due process required in the particular circumstance is provided. No such dilemma is presented at private institutions. Academic misconduct also may be grounds for academic sanctions, such as the imposition of a lower grade. This system must be dovetailed with the institutional process for disciplinary review of misconduct in the academic setting if additional sanctions are possible.

Concerning items number three, thirteen, fifteen, sixteen, and seventeen, a public institution must ensure that regulations that may infringe upon the right of free speech do not violate the First Amendment because of overbreadth or vagueness.<sup>100</sup>

Generally, it is not considered to be a separate student code violation for a student to remain mute in his/her hearing, as if the Fifth Amendment (applicable in criminal cases) applied. Some schools expressly give Accused Students that option. Of course, mute students give up the chance to explain their side of the story. Moreover, a violation of the Student Code may nevertheless be found based upon the other evidence presented.<sup>101</sup>

## 18. Students are required to engage in responsible social conduct that reflects

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100. Courts have traditionally taken a dim view on the efforts of public colleges and universities to regulate the content of student speech. *See, e.g., Bair v. Shippensburg State Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003).

Many commentators also have called into question the efficacy of such policies in responding to underlying prejudices and bigotry. For example, Robert O’Neil, the former president of the University of Virginia who is currently professor of law at the University of Virginia and director of the Thomas Jefferson Center for the Protection of Free Expression, states:

Speech that wounds or insults or demeans by reason of gender, religion or sexual preference has no place on a university campus. In fact, such expression seems least tolerable in an academic setting, where the values of rational discourse and the quest for truth are paramount. Universities also have a special need to establish an environment hospitable to persons who have felt unwelcome there for far too long and whose very ability to learn may depend on civility and respect. Yet it is also in this setting – and for the most central educational reasons, that, in the words of the recent AAUP statement, ‘no viewpoint or message may be deemed so hateful or disturbing that it may not be expressed.’ And, as the statement adds, ‘by proscribing ideas, a university sets an example that profoundly disserves its academic mission.’ Thus, penalties or policies that might be found acceptable in the industrial workplace simply do not belong in the classroom or the laboratory, or even the dormitory or the locker room.

Robert O’Neil, *A Time To Re-Evaluate Campus Speech Codes*, CHRON. HIGHER EDUC., July 8, 1992, at A40 (internal citations omitted). *Compare* Harvey Silverglate & Greg Lukianoff, *Speech Codes: Alive and Well at Colleges . . .*, CHRON. HIGHER EDUC., August 1, 2003, at B7 (arguing that speech codes are the rule rather than the exception in higher education) *with* Robert O’Neil, . . . *but Litigation is the Wrong Response*, CHRON. HIGHER EDUC., August 1, 2003, at B9 (arguing that the number of genuine “speech codes” is much smaller).

101. A student who exercised his choice to remain silent was, nevertheless, expelled. *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 634 (6th Cir. 2003). *Compare* *Morale v. Grigel*, 422 F. Supp. 988, 1003 (D.N.H. 1976) (finding that it was proper to draw an inference from a student’s silence that he had violated the state institution’s rule against drug possession), *with* SILVERGLATE & GEWOLB, *supra* note 8, at 109 (stating that no right to remain silent exists in student disciplinary process).

credit upon the [College][University] community<sup>102</sup> and to model good citizenship in any community.<sup>103</sup>

*Commentary.* Although it is most common to enforce negatively worded community standards, ones stated in the affirmative are permissible, too. They are used most commonly at private institutions. Endorsing the view of one commentator who urged that detailed codes of prohibition not be used in higher education, the Missouri judges noted:

The notice of the scholastic and behavioral standards to the students may be written or oral, or partly written and partly oral, but preferably written. The standards may be positive or negative in form . . . . For this reason, general affirmative statements of what is expected of a student may in some areas be preferable in higher education. Such affirmative standards may be employed, and

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102. A rule using this language was sustained against an attack of being too vague when it was enforced, resulting in suspensions and expulsions at a public institution, Southern University in New Orleans. *French v. Bashful*, 303 F. Supp. 1333, 1339 (E.D. La. 1969). Some other older cases involving private institutions, which may be followed cautiously, endorse the practice of basing student discipline on religious standards. *Carr v. St. John's Univ.*, New York, 231 N.Y.S.2d 403, 407 (N.Y. App. Div. 1962), (holding permissible rule under which students were expelled provided that "in conformity with the ideals of Christian education and conduct, the university reserves the right to dismiss a student at any time on whatever grounds the university judges advisable"), *aff'd*, 187 N.E.2d 19 (N.Y. 1962). -See also *Denham v. Brandeis Univ.*, 150 F. Supp. 626, 627 (D. Mass. 1957) (holding that the university may reserve "the right to sever the connection with any student with the university for appropriate reason."). A later New York case required "procedures which are fair and reasonable and which lend themselves to a reliable determination." *Kwiatkowski v. Ithaca Coll.*, 368 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975).

103. A rule using this language was sustained against an attack by students suspended from the University of Southern Mississippi for possessing false and inflammatory literature. *Speake v. Grantham*, 317 F. Supp. 1253, 1270-71 (S.D. Miss. 1970). The court explained:

An institution may establish appropriate standards of conduct, both scholastic and behavioral, in any form and manner reasonably calculated to give adequate notice to the scholastic attainments and behavior expected of the student. The notice of these standards may be written or oral, or partly written and partly oral, but preferably written and may be positive or negative in form. . . . [T]here was no confusion or unawareness on [the part of the Accused Students]. The exercise of common sense is all that was required. Each plaintiff as a reasonably intelligent college student certainly was given adequate, sufficient and reasonable notice of what he was charged with and certainly he knew what he was doing and knew the consequences thereof. Secondly, it is not sound to draw an analogy between student discipline and a criminal procedure . . . . the attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.

*Id.* at 1257.

The *Speake* court took a different tack than the Seventh Circuit had a year earlier. In *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969), the court ruled that the University of Wisconsin had acted unconstitutionally in sanctioning students for "misconduct" when no rules specifically defined what the university viewed as "misconduct." *Id.* at 166-67. The court ruled that while a university had the power to punish misconduct, it had to promulgate rules describing such misconduct to avoid punishing students on the basis of unconstitutionally vague, overbroad criteria. *Id.* at 167-68.

Given this difference of judicial perspectives, it would be wise to combine violation of such an affirmative expectation with an allegation that a negatively worded expectation was violated, as well.

discipline of students based thereon.<sup>104</sup>

### C. Violation of Law and [College] [University] Discipline

#### 1. [Alternative A]

[College] [University] disciplinary proceedings may be instituted against a student charged with conduct that potentially violates both the criminal law and this Student Code (that is, if both possible violations result from the same factual situation) without regard to the pendency of civil or criminal litigation in court or criminal arrest and prosecution. Proceedings under this Student Code may be carried out prior to,<sup>105</sup> simultaneously with, or following civil or criminal proceedings off campus at the discretion of [the person identified in Article I (13)]. Determinations made or sanctions imposed under this Student Code shall not be subject to change because criminal charges arising out of the same facts giving rise to violation of University rules were dismissed, reduced, or resolved in favor of or against the criminal law defendant.

#### [Alternative B]

If a violation of law which also would be a violation of this Student Code is alleged, proceedings under this Student Code may go forward against an Accused Student who has been subjected to criminal prosecution only if the [College] [University] determines that its interest is clearly distinct from that of the community outside the [College] [University]. Ordinarily, the [College]

104. *General Order*, *supra* note 2, at 146.

105. The imposition of college or university discipline need not await the outcome of other proceedings. *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1384–85 (W.D. Mich. 1983); *Gossner v. Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968); *Goldberg v. Univ. of Cal.*, 57 Cal. Rptr. 463 (Cal. Ct. App. 1967). *See generally* *DeVita v. Sills*, 422 F.2d 1172, 1178–1180 (3d Cir. 1970) (holding that the Fifth Amendment does not require postponement of civil proceedings whenever related criminal charges are pending). Even commentators writing to support accused students conclude, “Courts have held, however, that due process does not require campus disciplinary proceedings to be postponed until related criminal matters are settled.” SILVERGLATE & GEWOLB, *supra* note 8, at 59.

When a student testifies in a campus proceeding before a criminal process takes place, the student may argue that his oral testimony to the student conduct board (and the “fruits” of it) should be excluded from a later criminal proceeding as “compelled” testimony. *Compare* *Furutani v. Ewigleben*, 297 F. Supp. 1163, 1164–65 (N.D. Cal. 1969) (holding that testimony from student discipline proceeding could not be used in criminal trial) *and* *Garrity v. N.J.*, 385 U.S. 493 (1967) (holding that testimony from job investigation could not be used in criminal proceeding), *with* *Nzuve v. Castleton State Coll.*, 335 A.2d 321, 326 (Vt. 1975) (holding that student conduct code testimony was voluntary and could be used in criminal trial) *and* *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978) (allowing attorney to advise student quietly in student conduct matter to ameliorate the problem). Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829, 848 (1997) (“[W]hile the student’s decision [to remain silent in the college proceeding or to participate, knowing that statements made on campus may be used in a later judicial trial] is a difficult one, it must be made. The courts refuse to require the university to delay disciplinary proceedings until completion of a criminal trial.”). For a discussion of practical considerations involved when a student is charged with violations of both campus rules and the criminal law, see Capone III, *supra* note 8, at 7–9.

[University] should not impose sanctions if public prosecution of a student is anticipated or until law enforcement officials have disposed of the case.<sup>106</sup>

*Commentary.* A college or university may take student disciplinary action before possible criminal charges arising out of the same facts are resolved. There are two basic approaches to the recurring dilemma of how a college or university should proceed when a student is accused not only of violating school regulations, but also of breaking the criminal law. Alternative A is the proactive approach, in which the institution has reserved the authority to take action under the Student Code in all such situations. A college or university may choose this approach because it does not wish to trivialize its code. To postpone the use of its disciplinary code and system of factual determinations and appeals in those cases involving criminal conduct would lead, in the words of one court, to an "absurd situation:" A student who violated a rule or regulation short of committing a crime receives immediate discipline, while a student who committed a more serious

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106. THE UNIVERSITY OF KANSAS, YOU AND THE UNIVERSITY OF KANSAS, STUDENT HANDBOOK, 1988–89, as quoted in Douglas. R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289, 312 n.166 (1989). In the view of the authors of this Model Code a college could, of course, voluntarily adopt the policy of not imposing student discipline if the conduct might also violate a criminal law or ordinance and might be the subject of a criminal prosecution. While this would be legal, there are a number of policy issues to consider before proceeding down that path. Here are a few:

Aside from minor residence hall infractions such as violating quiet hours for studying, virtually all student discipline is based upon misconduct that does overlap with some criminal law proscription. For example, the criminal code prohibits underage alcohol use, throwing things out windows, turning in false fire alarms, stealing property, fighting, hazing, dating violence, and other types of student-on-student violence. Adopting a policy of delay whenever conduct might violate a criminal standard will prevent the school from responding promptly to virtually all misconduct that undermines a positive living/learning environment.

The criminal law process is a slow one. Deference to it would mean that campus discipline standards would go unresolved for a long period of time. Worse, the criminal law often reaches no resolution at all because witnesses move away (or graduate) or become discouraged by the repeated delays or by the discomfort of being "put on trial" by criminal defense counsel. Thus, delay pending the completion of criminal processes is unlikely to result in prompt reinforcement of living/learning standards on campus. To the contrary, delay in enforcing the college's rules may mean that no one deals with the behavior, ever.

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Prompt response to campus misconduct reinforces our values and delay does not. Deferral to criminal law process does not create campus conduct standards that support a quality living/learning environment. Instead, delay creates standards that mimic the environment in the society at large, and the quality of life on campus will suffer by being reduced to "the law of the street." By contrast, prompt response to campus misconduct helps to convince students that the institution is, indeed, committed to creating a quality environment for them. On every campus in this country, student leaders and student affairs professionals urge student victims of dating violence to come forward.

Edward N. Stoner, *Reviewing Your Student Discipline Policy: A Project Worth The Investment*, 9–10 (2000), available at <http://www.nacua.org/publications/pubs/pamphlets/StudentDiscipline-Policy.pdf>.

offense is entitled to attend school without immediate disciplinary action.<sup>107</sup> Alternative B illustrates the other approach. Although such an approach is not often admitted explicitly, it is not uncommon in practice. It does, however, lead to a Student Code which deals only with minor offenses. The authors recommend Alternative A.

2. When a student is charged by federal, state, or local authorities with a violation of law, the [College] [University] will not request or agree to special consideration for that individual because of his or her status as a student. If the alleged offense is also being processed under the Student Code, the [College] [University] may advise off-campus authorities of the existence of the Student Code and of how such matters are typically handled within the [College] [University] community. The [College] [University] will attempt to cooperate with law enforcement and other agencies in the enforcement of criminal law on campus and in the conditions imposed by criminal courts for the rehabilitation of student violators (provided that the conditions do not conflict with campus rules or sanctions). Individual students and other members of the [College] [University] community, acting in their personal capacities, remain free to interact with governmental representatives as they deem appropriate.

*Commentary.* It is important to establish a solid relationship with the local prosecuting attorney in anticipation of such situations. The prosecuting attorney should be educated about the institution's student code and the general philosophy regarding discipline. By doing this, the institution may better coordinate its efforts with that of the prosecuting attorney when a disciplinary problem overlapping criminal charges arises. In addition, the prosecuting attorney who understands that the college or university will handle matters appropriately may choose instead to allow the institution to handle the situation. Finally, familiarizing the prosecuting attorney with the student code before an incident arises helps to avoid misunderstandings and media errors when an incident arises.

This area requires a delicate balance, good judgment, and an appreciation of the separate rules of student discipline and law enforcement. College and university officials must take care not to attempt, or appear to attempt, to influence prosecutorial decision making. This is the same balance followed by law enforcement when they avoid suggesting to college and university officials when or how to proceed in enforcing campus rules or what campus sanctions to impose. Although the campus and criminal systems must remain distinct, with neither dictating to the other, it is nevertheless important to have a clear line of communications. In addition, college officials must take care not to discourage or to appear to discourage the student "victim" from pursuing criminal charges.<sup>108</sup>

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107. See *Johnson v. Bd. of Educ.*, 310 N.Y.S.2d 429 (N.Y. Sup. Ct. 1970).

108. Claims that victims of sexual assault were discouraged from reporting to authorities are common. E.g., Catherine Lucey, *Group Asks State to Investigate Handling of Rape Allegation at LaSalle*, MONTEREY HERALD, June 29, 2004, available at <http://www.montereyherald.com/mld/montereyherald/sports/9035385.htm>. The Jeanne Clery Disclosure of Campus Security Policy

*In addition to working with the prosecuting attorney, the college or university attorney should establish a relationship with the attorney(s) for the Accused Student or for a student who feels s/he has been a victim of another student's conduct. This is important because the college or university attorney can help the outside attorney make an informed decision as to how his/her client will interact with the student code system. For example, if the Accused Student is found to have violated college or university rules, sanctions will be imposed and law enforcement may decide, at their discretion, to take these sanctions into account in making prosecutorial decisions. Campus sanctions most likely will be different than criminal sanctions. Complainants who feel vindicated and satisfied with the result of the institutional disciplinary hearing may be inclined to drop the criminal charges. In any case, the institution's representative must be mindful of trying to provide a process that reinforces campus values and that is fair for both the student who has alleged a violation of the Student Code and the alleged violator.*

#### ARTICLE IV: STUDENT CONDUCT CODE PROCEDURES

##### A. Charges and Student Conduct Board Hearings

1. Any member of the [College] [University] community may file charges against a student for violations of the Student Code. A charge shall be prepared in writing and directed to the Student Conduct Administrator. Any charge should be submitted as soon as possible after the event takes place, preferably within [specify time period].

*Commentary. This section not only describes who may file charges, but also requires that such charges be in writing and that they all be submitted to the same person. Such measures are desirable because: (1) they ensure that college or university officials can immediately assess the gravity of each complaint; and (2) they help to provide notice in an orderly fashion.<sup>109</sup> The use of a standard form for charges will ensure the receipt of all the necessary information.*

*Practice varies widely concerning the time in which charges may be presented. For example, at Westminster College, Complainants are asked to file charges within forty-eight (48) hours.<sup>110</sup> At Pratt Institute, charges of discriminatory treatment must be submitted within twenty-eight (28) days of the date the Complainant first attempted to resolve the matter, which must be done within*

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and Campus Crime Statistics Act requires that the Annual Security Report include “[i]nforming students of their options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying such authorities, if the student so chooses.” 20 U.S.C. §1092(f)(8)(v) (2000). *See also* 34 C.F.R. § 668.46 (2004) (providing further guidance on obligations of an institution).

109. *See* Dutile, *supra* note 8; Grier & Stoner, *supra* note 8. James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2157 n.107 (1987).

110. *See, e.g.*, OFFICE OF STUDENT AFFAIRS, WESTMINSTER COLLEGE, STUDENT HANDBOOK BULLETIN 14 (1989–90) (on file with author).

ninety (90) days of the incident.<sup>111</sup> At Northwestern University, Complainants have one year during which to file charges.<sup>112</sup> Finally, Indiana University's Code of Student Rights, Responsibilities, and Conduct contains no "statute of limitations" period at all.<sup>113</sup> The key, however, is to provide a flexible guideline, so that student victims will come forward even if they are "late" in doing so.

2. The Student Conduct Administrator may conduct an investigation to determine if the charges have merit and/or if they can be disposed of administratively by mutual consent of the parties involved on a basis acceptable to the Student Conduct Administrator. Such disposition shall be final and there shall be no subsequent proceedings. If the charges are not admitted and/or cannot be disposed of by mutual consent, the Student Conduct Administrator may later serve in the same matter as the Student Conduct Board or a member thereof. If the student admits violating institutional rules, but sanctions are not agreed to, subsequent process, including a hearing if necessary, shall be limited to determining the appropriate sanction(s).

*Commentary.* As noted previously,<sup>114</sup> courts have recognized that it is not easy in the college and university setting to ensure that the participants in the disciplinary process have not had prior contact with the student(s) involved or prior knowledge of the events which are the subject of the proceeding. Where staffing permits, it is preferable to separate the administrative and mediation<sup>115</sup> functions from the fact finding and sanctioning functions.

3. All charges shall be presented to the Accused Student in written form. A time shall be set for a Student Conduct Board Hearing, not less than five nor more than fifteen calendar days after the student has been notified. Maximum time limits for scheduling of Student Conduct Board Hearings may be extended at the discretion of the Student Conduct Administrator.

*Commentary.* Notice and an opportunity to be heard are essential to all student disciplinary proceedings, at least in the public college and university settings.<sup>116</sup>

111. PRATT INSTITUTE NON-DISCRIMINATION GRIEVANCE PROCEDURES 1-2 (on file with author).

112. NORTHWESTERN UNIV., OFFENSES AND HEARING PROCEDURES 24 (on file with author).

113. IND. UNIV., CODE OF STUDENT RIGHTS, RESPONSIBILITIES, AND CONDUCT, available at <http://www.dsa.indiana.edu/Code> (last visited Oct. 12, 2004).

114. See *supra* notes 68–69 and accompanying text.

115. See, e.g., Eugene L. Zdziarski, *Alternative Dispute Resolution: A New Look at Resolving Campus Conflict*, in THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT, ORGANIZATIONAL AND COMMUNITY ISSUES 237–252 (Brent G. Paterson & William L. Kibler eds., 1998). The Association for Student Judicial Affairs sponsors tracks of introductory and advanced mediator training at its annual Donald D. Gehring Institute. See ASS'N FOR STUDENT JUDICIAL AFFAIRS, at <http://asja.tamu.edu> (last visited Oct 12, 2004).

116. Goss v. Lopez, 419 U.S. 565 (1975); Dixon v. Ala. Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

*Requiring that the Accused Student receive written notice of the charge ensures that the Accused Student receives adequate notice of the alleged violations. Such notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."*<sup>117</sup>

*Further, there is no bright-line rule governing how far in advance of a Student Conduct Board Hearing notice should be given.*<sup>118</sup> *Indeed, some courts have indicated that notice of charges may be given at the same time the student has an opportunity to defend against those charges at least in less serious cases.*<sup>119</sup> *Nevertheless, it seems fairer to give some reasonable amount of time to allow an Accused Student to prepare. The institution must, however, be sure to follow its own rules once it establishes an amount of time which is to pass between notice and the Student Conduct Board Hearing.*<sup>120</sup>

*Granting the Student Conduct Administrator discretion to extend the maximum time limits permits the institution flexibility in cases in which examination periods, breaks, holidays, and other occurrences disrupt the time at which Student Conduct Board Hearings would otherwise be scheduled. Some institutions may wish to deal with break and/or holiday issues more explicitly by providing in their codes for dates certain to be used in such situations. For example, a college or university may wish to provide that, in cases in which an examination period or break intervenes between the time of notice and the Student Conduct Board Hearing date, such hearings always will be held during the first week in which classes are again in session.*

4. Student Conduct Board Hearings<sup>121</sup> shall be conducted by a Student Conduct Board according to the following guidelines except as provided by article IV(A)(7) below:
  - a. Student Conduct Board Hearings normally shall be conducted in private.<sup>122</sup>

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117. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978) (quoting *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950)). The court in *Goss v. Ala. Bd. of Educ.*, stated that the student must be told "what he is accused of doing and what the basis of the accusation is." 419 U.S. at 582. The court in *Dixon* required "a statement of the specific charges and grounds." 294 F.2d at 158.

118. *See Nash v. Auburn Univ.*, 812 F.2d 655, 661 (11th Cir. 1987).

119. *Goss*, 419 U.S. at 582.

120. *See supra* notes 33–34.

121. The guidance of the Supreme Court in *Goss* was that "there be at least an informal give-and-take between student and disciplinarian." 419 U.S. at 584.

122. Fact finding in student discipline matters is rarely done in public. Disciplinary records are education records covered by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232g (2000 & West Supp. 2004) [hereinafter FERPA]. *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002). Dr. William Bracewell, former director of Judicial Programs at the University of Georgia, described some of problems with open hearings at that institution:

The *Red & Black* decision [*Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257 (Ga. 1993)] has produced two significant results. First, complaining parties do not wish to participate in a hearing. The individuals report incidents to the

- b. The Complainant, Accused Student and their advisors,<sup>123</sup> if any, shall be allowed to attend the entire portion of the Student Conduct Board Hearing at which information is received (excluding deliberations).<sup>124</sup> Admission of any other person to the Student Conduct Board Hearing shall be at the discretion of the Student Conduct Board and/or its Student Conduct Administrator.<sup>125</sup>
- c. In Student Conduct Board Hearings involving more than one Accused Student, the Student Conduct Administrator, in his or her discretion, may permit the Student Conduct Board Hearings concerning each student to be conducted either separately or jointly.
- d. The Complainant and the Accused Student have the right to be assisted by an advisor they choose, at their own expense. The advisor<sup>126</sup> must be a

university, but when told that the matter needs to be referred to a hearing they decline to pursue it. Without their participation, the university can not meet its obligation of showing with clear and convincing proof whether a university rule was violated.

Second, those hearings which are held are shallow. Members of the hearing panel or the administrative hearing officer are reluctant to ask questions which might expose a personal matter, for fear it will be printed in the paper. Many of the details which give context to the incident and lead to sound decisions in terms of student development are not discussed.

The university continues to work to find ways to respond to student misconduct in a way that is educational and fair. The presence of undergraduate student reporters makes this task very difficult.

John Wesley Lowery, *The Family Educational Rights and Privacy Act and Student Disciplinary Records*, 6 SYNTHESIS 464, 465 (1995).

Under 1998 FERPA amendments, institutions may release the final results of the disciplinary process including the name, violations of institutional rules, and sanctions imposed, for students found responsible for violating campus rules that correspond to the criminal offenses of arson, assault and battery, burglary, destruction/damage/vandalism of property, criminal homicide-manslaughter by negligence, criminal homicide-murder and non-negligent manslaughter, forcible and nonforcible sex offenses, kidnapping/abduction, and robbery. *See* 34 C.F.R. § 99.39 (2004). *See also* 34 C.F.R. pt. 99, app. A (providing definitions of the stated offenses).

123. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act provides that an alleged sexual assault victim and an Accused Student have the same rights to have others present at the Student Conduct Board Hearing. 20 U.S.C. § 1092(f)(8)(B)(iv)(I) (2000).

124. If a Student Conduct Board visits the location of an alleged violation, the Accused Student, Complainant and their advisors should be allowed to participate. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 932 (Tex. 1995). In *Than*, an ex parte visit to the classroom site of a cheating allegation which was attended by a hearing officer and the person advocating violation of rules but excluding the Accused Student violated a Texas constitutional guarantee of due course of law and new hearing was ordered. *Id.*

Similarly, an Accused Student should be allowed to make his/her presentation to the person or entire group of persons who are to decide the matter if credibility is an issue. *E.g.*, *Esteban v. Cent. Mo. State Coll.*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (ordering that a new hearing before the entire board be held when students were allowed to present to only one person of a group that recommended suspension).

125. Normally, other witnesses are permitted to attend the Student Conduct Board Hearing only when they are providing information.

126. One court quoted with approval former Princeton President Dr. William G. Bowen's explanation about the roles of an advisor:

member of the [College][University] community<sup>127</sup> and may not be an attorney.<sup>128</sup> The Complainant and/or the Accused Student is responsible for presenting his or her own information, and therefore, advisors are not permitted to speak or to participate directly in any Student Conduct Board

The University is an institution which proceeds very much on the basis of freely given cooperation, and . . . with a very limited set of punishments . . . for being sure that conduct stays within certain specified bounds. There are, of course, rules and regulations of a general kind that we do our best to uphold. But we do not have a whole set of arrangements concerning perjury or whatever that guide and protect the proceedings of a court of law . . . . And since we do not have that whole panoply of protections . . . or means of enforcing those guidelines, we do expect advisers who are meant to be peers and not meant to be attorneys, to be direct and clear, helpful [and] not deliberately misleading in their relationship to the Committee and to the University.

Clayton v. Princeton Univ., 608 F. Supp. 413, 439 (D.N.J. 1985).

127. The rule that a student facing dismissal could be assisted "by an advisor of his choice who is a member of the University community" but not by legal counsel complies with minimal procedural due process at a public institution. Garshman v. Pa. State Univ., 395 F. Supp. 912, 914 (M.D. Pa. 1975). The court stated: "Judicial reluctance to force the inclusion of a non-University individual into this delicate decision-making process should be that much greater where, as here, the procedures involve elaborate efforts to insure that a fair result is reached." *Id.* at 921.

128. An institution concerned about the interaction with a subsequent pending parallel criminal matter could add a sentence at the end to provide: "If an Accused Student is also the subject of a pending subsequent criminal matter arising out of the same circumstances, s/he may be allowed to have an attorney serve as his/her advisor, at his/her own expense, to behave in the same manner as any other advisor."

Some institutions reach a different conclusion and allow the participation of attorneys on the same basis as other advisors. If that choice is made, the language may read:

The Complainant and the Accused Student have the right to be assisted by any advisor they choose, at their own expense. The advisor may be an attorney. The Complainant and/or the Accused Student is responsible for presenting his or her own information and, therefore, advisors are not permitted to speak or to participate directly in any Hearings before a student conduct board.

A university process was approved as complying with procedural due process at a public institution in which an attorney was allowed "to advise his clients during the hearing, but he was not permitted to participate in the proceedings." Nash v. Auburn Univ., 812 F.2d 655, 658 (11th Cir. 1987).

As noted in the commentary immediately below, there is no requirement to allow either the presence or participation of attorneys, except in a few circumstances in some jurisdictions at public institutions. In a male/male sexual conduct case resulting in expulsion at a public institution, the court denied a student's claim that he was denied procedural due process when he was allowed to have the assistance of a second year law student but not his own private attorney:

We first address plaintiff's contention that he was denied procedural due process because he was not permitted to have a private attorney represent him at the disciplinary hearing. . . . Plaintiff does not appear to contend, however, that he had a constitutional right to be represented by a private attorney at the hearing. In any event, such an argument is without merit. The consensus of the courts of appeal that have directly addressed the issue is that a university student has no constitutional right to counsel at a university disciplinary hearing. Although the Court of Appeals for the Third Circuit has not addressed the issue, there is no reason to believe that it would reach a different result on similar facts.

Woodard v. Univ. of Pittsburgh, No. 95-1299, at 4-5 (W.D. Pa. 1995) (internal citations omitted).

Hearing before a Student Conduct Board. A student should select as an advisor a person whose schedule allows attendance at the scheduled date and time for the Student Conduct Board Hearing because delays will not normally be allowed due to the scheduling conflicts of an advisor.<sup>129</sup>

- e. The Complainant, the Accused Student and the Student Conduct Board may arrange for witnesses to present pertinent information to the Student Conduct Board. The [College][University] will try to arrange the attendance of possible witnesses who are members of the [College][University] community, if reasonably possible, and who are identified by the Complainant and/or Accused Student at least two weekdays prior to the Student Conduct Board Hearing.<sup>130</sup> Witnesses will provide information to and answer questions from the Student Conduct Board. Questions may be suggested by the Accused Student and/or Complainant to be answered by each other or by other witnesses.<sup>131</sup> This will be conducted by the Student Conduct Board with such questions directed to the chairperson, rather than to the witness directly. This method is used to preserve the educational tone of the hearing and to avoid creation of an adversarial environment. Questions of whether potential information will be received shall be resolved in the discretion of the chairperson of the Student Conduct Board.
- f. Pertinent records, exhibits, and written statements (including Student Impact Statements) may be accepted as information for consideration by a Student Conduct Board at the discretion of the chairperson.
- g. All procedural questions are subject to the final decision of the chairperson of the Student Conduct Board.<sup>132</sup>

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129. Unfortunately, some advisors (particularly attorneys) try to delay the student discipline process by contending that their "other commitments," personal and professional, conflict with the dates scheduled, even though they are not participants in the process. It is a bad practice to allow such manipulation. For another view, see Pavela, *supra* note 8, at 825. If you do accommodate conflicts of advisors' schedules, be careful, in cases involving a student who feels s/he has been victimized by another, to consider the scheduling conflicts of the advisors of both students.

130. While there is no constitutional requirement for this offer to arrange the attendance of witnesses, it is common practice. One court noted that a college could not do more. *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983) ("It is not clear how the College could be required to compel the attendance of witnesses over whom it has no power by subpoena or otherwise.").

131. This method of "cross-examination" was specifically approved by the Court of Appeals for the Eleventh Circuit. In a case of two students who had been suspended from a public institution, the court ruled that "there was no denial of appellants' constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner." *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987). Similarly, a court approved a process in which a student submitted a written statement, followed by a roundtable discussion. "The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding." *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986). "[A] student charged in a disciplinary process has no right to call or cross-examine witness[es] as long as the student has a full opportunity to defend herself or explain her position." *Grier & Stoner, supra* note 8, at 7.

132. The chair can set a good tone for the fact finding process and it is a normal expectation that s/he will do so. In *Henderson State Univ. v. Spadoni*, S.W.2d 951, 954 (Ark. Ct. App. 1993),

- h. After the portion of the Student Conduct Board Hearing concludes in which all pertinent information has been received, the Student Conduct Board shall determine (by majority vote if the Student Conduct Board consists of more than one person) whether the Accused Student has violated each section of the Student Code which the student is charged with violating.
- i. The Student Conduct Board's determination shall be made on the basis of whether it is more likely than not that the Accused Student violated the Student Code.
- j. Formal rules of process, procedure, and/or technical rules of evidence, such as are applied in criminal or civil court, are not used in Student Code proceedings.<sup>133</sup>

*Commentary. The law requires no particular form of hearing.<sup>134</sup> For two reasons, however, the institution should establish guidelines pursuant to which hearings are to be conducted. First, doing so will ensure that the institution treats students accused of misconduct evenhandedly. That is, a college or university can feel safe in knowing that, as long as the student disciplinary board follows the procedures set forth in its code, each Accused Student will receive the same treatment. Thus, there is less opportunity for any student to complain of unequal treatment. Second, establishing such guidelines in advance will avoid ad hoc decisions on many difficult issues.*

*This compendium of hearing guidelines incorporates the following legal principles: the hearing need not be open to the public,<sup>135</sup> and neither the Federal Rules of Evidence nor any state's rules of evidence apply in student disciplinary proceedings.<sup>136</sup>*

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the court upheld the chair's actions to run an orderly hearing, noting "that [the Accused Student's] witnesses were required to testify in response to questions instead of being permitted to tell whatever they wanted to say, but this is normal procedure even in a judicial proceeding."

133. It is wise to include an express statement such as this within the body of the Student Code so that no one has an expectation that such formalistic legal rules are pertinent. This rule is not a new one. *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077 (8th Cir. 1969). Recent cases approve of such express statements. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 n. 15 (Mass. 2000):

Although these statements would be excluded from a courtroom under the rules of evidence, a university is not required to abide by the same rules. Brandeis may choose to admit all statements by every witness or it may choose to exclude some evidence. It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject.

134. *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961).

135. *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983).

136. *Nash*, 812 F.2d at 665 (11th Cir. 1987) (holding that "student disciplinary hearings follow flexible rules and need not conform to formal rules of evidence"); *Boykins v. Fairchild Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974). Indeed, one court noted that the absence of "complex rules of evidence or procedure" in the student discipline hearing helped to explain why the Accused Student was not entitled to any representative to be with him, whether an attorney or lay advisor. *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967)

*Third, a student has no right to be represented by an attorney in the adversarial manner in which attorneys represent clients in judicial proceedings, at student disciplinary hearings at private institutions,<sup>137</sup> and in most proceedings at public institutions, even including public K-12 schools at which, unlike public colleges, attendance is mandatory.<sup>138</sup>*

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(describing a process that resulted in a student's expulsion from the Merchant Marine Academy, the Court stated that "[t]he hearing may be procedurally informal and need not be adversarial."), *rev'd on other grounds*, 269 F. Supp. 900 (E.D.N.Y. 1967).

137. *Ahlum v. Adm'rs of Tulane Educ. Fund*, 617 So.2d 96 (La. Ct. App. 1993) (holding that there was no right to counsel in a sexual assault rules violation hearing resulting in suspension).

Again it must be noted that the standards of due process imposed upon a public institution do not apply to a private actor. Thus, Tulane, as a private actor is not required to abide by the United States Supreme Court pronouncements of what process is due to students of public educational facilities.

*Id.* at 99 n.1.

138. *Compare Goss v. Lopez*, 419 U.S. 565 (1975) (holding that in K-12 setting, short suspensions include no right to counsel) and *General Order*, *supra* note 2, at 147 and *Madera v. Bd. of Educ.*, 386 F.2d 778, 788-89 (2d Cir. 1967) (holding that even in public seventh grade, no right to counsel in superintendent's process that resulted in suspension: "Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspension, into criminal adversary proceedings--which they definitely are not."), and *Brown v. W. Conn. State Univ.*, 204 F. Supp. 2d 355 (D. Conn. 2002) (holding that there is no constitutional right to counsel), and *Fedorov v. Univ. of Ga.*, 194 F. Supp. 2d 1378, 1393 (S.D. Ga. 2002) (holding that although student was prohibited from having an attorney, university "exceeded" due process requirements), and *Everett v. Marcase*, 426 F. Supp. 397 (E.D. Pa. 1977) (holding that there is no right to counsel in K-12 disciplinary setting), and *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (stating that there was no right to counsel at Merchant Marine Academy disciplinary hearing resulting in expulsion) ("[T]he proceeding is non-criminal in nature, . . . the hearing is investigative and not adversarial and the government does not proceed through counsel"), *rev'd on other grounds*, 269 F. Supp. 900 (E.D.N.Y. 1967), and *Haley v. Va. Comm. Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996); and *Woodard v. Univ. of Pittsburgh*, No. 95-1299, at 4-5 (W.D. Pa. 1995) (declaring that attorney need not be permitted at public university at hearing resulting in expulsion), and *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245, 1251-52 (E.D. Mich. 1984) (declaring that student was not entitled to have any representative with him at disciplinary hearing resulting in one semester suspension, whether representative was an attorney or a lay person, the court noted that "there was nothing mysterious about the Academic Judiciary procedures" and that "[t]he Manual of Procedures for the Academic Judiciary is written in plain English, and is comprehensible to the average college student."), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986), and *Bleicker v. Ohio State Univ., Coll. of Veterinary Med.*, 485 F. Supp. 1381, 1387-88 (S.D. Ohio.1980), and *Haynes v. Dallas County Jr. Coll. Dist.*, 386 F. Supp. 208, 211-12 (N.D. Tex. 1974), and *Barker v. Hardway*, 283 F. Supp. 228, 236-38 (S.D. W.Va. 1968) (holding that students disciplinarily suspended from Bluefield State College had no right counsel in discipline hearing), and *Due v. Fla. A&M Univ.*, 233 F. Supp. 396, 402 (N.D. Fla. 1961) (holding that students convicted of criminal contempt had no right to counsel in student disciplinary hearing in which they were suspended for "misconduct"), and *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623-24 (D.P.R. 1974) (holding that when institution imposed suspension without notice or hearing, court's remedy included allowing students to have the "assistance" of their retained attorney "if his or her attendance does not unduly delay the hearing."), and *French v. Bashful*, 303 F. Supp. 1333, 1337 (E.D. La. 1969) (stating that a new hearing was required where Southern University at New Orleans, a public university, had process in which "prosecution" was done by third year law student "chosen to prosecute because of his familiarity with legal proceedings" and student was refused participation of his attorney but the court refused to require University to pay for student's attorney).

*There are two exceptions to this rule that are applicable to public institutions. First, a public institution's disciplinary board may be considered a state agency in some situations. Being deemed a state agency may bring into play certain state administrative agency laws, which may allow full courtroom-like representation by an attorney.<sup>139</sup> Thus, as always, one must consider the requirements of state law. Second, if parallel criminal charges are pending,<sup>140</sup> some courts have required a*

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139. Compare *Kusnir v. Leach*, 439 A.2d 223, 226–27 (Pa. 1982) (holding that Clarion State College was a commonwealth agency under state law), and *Mull v. Or. Inst. of Tech.*, 538 P.2d 87 (Or. 1975) (applying state administrative procedures act to suspension for misconduct and remanding for statement of findings of fact and conclusions of law), with *Mary M. v. Clark*, 473 N.Y.S.2d 843 (N.Y. App. Div. 1984) (refusing to apply New York administrative procedure act to disciplinary suspension).

140. See, e.g., *Gabrilowitz v. Newman*, 582 F.2d 100, 106 (1st Cir. 1978) (involving student who was also facing criminal charge of assault with intent to commit rape of another student). The Court of Appeals noted, that the student had not requested that the University of Rhode Island delay its process until after the criminal trial and emphasized that there was no constitutional right to counsel in the discipline proceeding per se, but only to advise about the pending criminal case. *Id.* at 105, 106 n.6. It added:

Counsel would be present only to safeguard appellee's rights at the criminal proceeding, not to affect the outcome of the disciplinary hearing. Counsel's principal function would be to advise appellee whether he should answer questions and what he should not say so as to safeguard appellee from self-incrimination, and to observe the proceeding first-hand so as to be better prepared to deal with attempts to introduce evidence from the hearing at a later criminal proceeding. To fulfill these functions, counsel need speak to no one but appellee.

*Id.* at 106.

The Seventh Circuit disagreed with the First Circuit's decision in *Gabrilowitz*, siding instead with the dissenter in *Gabrilowitz* who had noted that the Supreme Court had rejected the argument that prisoners were entitled to the advice of counsel in prisoner disciplinary proceedings in *Baxter v. Palmigiano*, *Osteen v. Henley*, 13 F.3d 221, 225–26 (7th Cir. 1993) (internal citations omitted). The court explained:

Even if a student has a constitutional right to *consult* with counsel—an issue not foreclosed by *Baxter*, as we shall see—we do not think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional functions of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in—from the law faculty or elsewhere—to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc. Concern is frequently voiced about the bureaucratization of education, reflected for example in the high ratio of administrative personnel to faculty at all levels of American education today. We are reluctant to encourage bureaucratization by judicializing university disciplinary proceedings, mindful also that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference.

*Id.* at 225 (emphasis in original).

Compare *Wimmer v. Lehman*, 705 F.2d 1402, 1404 (4th Cir. 1983) (deciding that when parallel criminal prosecution was pending, due process requirements of *Gabrilowitz* were met when the student “could have counsel present to advise him with respect to safeguarding his interests regarding his pending state criminal trial, but that in all other respects he must conduct his own defense.”), and *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1386–88 (W.D. Mich. 1983)

public college or university to permit the student to have his/her own attorney present.<sup>141</sup> Even in these cases, however, the attorney may be restricted to the same quiet advisory role served by non-attorney advisors.<sup>142</sup>

It is not required that either students or their advisor be given the opportunity to cross-examine witnesses directly. Cross-examination by or through the Student Conduct Board, as suggested in the appended model Student Conduct Board Hearing script, is sufficient at the college and university level.<sup>143</sup>

It is rare that college or university counsel take part in student conduct hearings,<sup>144</sup> although they often attend to make sure that other attorneys attending as advisors behave properly.

A college or university may wish to institute either an arbitration or a mediation requirement prior to reaching the more formal Student Conduct Board Hearing

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(holding that with parallel criminal matter pending, attorney's role was as a consultant, but not as participant, complies with due process), *with Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (finding that there is no right to counsel in case where no criminal charges were pending).

141. *Esteban v. Cent. Mo. State Coll.*, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967) (holding that counsel for suspended students could be present at hearing "to advise them" and students "not their attorney" could ask questions of witnesses). Interestingly, the *General Order*, *supra* note 2, at 147 states: "There is no general requirement that procedural due process in student disciplinary cases provide for legal representation . . . ."

142. In *Donohue v. Baker*, 976 F. Supp. 136, 146 (N.D.N.Y. 1997), a student at the State University of New York at Cobleskill College had been accused both of the felony of rape and violating university rules. He challenged not being allowed to be represented by an attorney in the university proceeding, citing *Gabrilowitz*. *Id.* He had not, however, limited his request to having his attorney sit quietly and advise him only about the interplay with his criminal matter. This, the court held, meant he had no right to an attorney at all, even under *Gabrilowitz*. *Id.* "Plaintiff thus claims that he was denied due process because the defendants prevented him from using his attorney as a sword to challenge [his accuser's] credibility, rather than as a shield to protect his Fifth Amendment rights. . . . [This] did not infringe upon his due process rights." *Id.*

143. *Roach v. Univ. of Utah*, 968 F. Supp. 1446, 1452 (D. Utah 1997) (finding no due process violation applying *Dixon* when student was not allowed to cross-examine or hear witnesses but was allowed to present his side); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (holding that student dismissed from Indiana University Medical School for cheating was not denied due process when conduct board read a transcript of her meeting with accusing professors but the professors were not present for her to cross-examine at the hearing itself, with Court noting, "[W]here basic fairness is preserved a student subject to dismissal for disciplinary reasons is not entitled to formal cross-examination of her accusers."); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (holding that Accused Students' ability to submit questions to the disciplinary board, to be asked of the witnesses, rather than direct cross-examination, was sufficient); *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 689 (Tex. Ct. App. 1984) (holding that a student expelled from public institution was afforded procedural due process when he was allowed to submit questions for other witnesses to the hearing officer, who then asked some, but not all, of the questions, because "a form of cross-examination was allowed"); *Wimmer v. Lehman*, 705 F.2d 1402, 1404 (4th Cir. 1983) (denying any requirement that attorney be allowed to do cross-examination rather than the student); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1386-87 (W.D. Mich. 1983) (holding that the probable value of cross-examination by student's counsel is minimal compared to significant burden it would impose); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (holding that the right to unlimited cross-examination is not an essential requirement of due process).

144. See George M. Shur, *The Role of University/College Counsel at Student Disciplinary Proceedings*, 3rd Annual Conf. of the Ass'n for Student Judicial Affairs (1991) (on file with author).

stage. Such an option is acceptable because the concept of due process is flexible, requiring no more than is necessary to provide fair notice and an opportunity to be heard. In other words, in some cases a formal fact finding process is not required; an informal meeting between the students involved and college or university administrators suffices, as long as Accused Students are informed of the charges and given an opportunity to tell their side of the story.

Other schools may not want to require such an initial meeting because such meetings could consume all of the administrator's time with little benefit. Local experience will dictate whether it is effective to attempt to resolve alleged Student Code violations through such a meeting, although the most common practice is to emphasize efforts at mediation or other informal resolution.

This Model Student Code advocates using a "more likely than not" or "preponderance of the evidence" standard for disciplinary decision making. This is because the "beyond a reasonable doubt" standard applied in criminal cases is too demanding for college and university disciplinary proceedings.<sup>145</sup> After all, criminal law standards were never intended to be standards for student behavior within an academic community. Some codes use a "clear and convincing" standard, but such a standard is not as common, nor is it required by law.<sup>146</sup> The use of the "more likely than not" standard is normal for important civil judicial proceedings.<sup>147</sup> More importantly, it reflects the difference between college and

145. *Sill v. Pa. State Univ.*, 462 F.2d 463, 467 (3d Cir. 1972); *Speake v. Grantham*, 317 F. Supp. 1253, 1281–82 (S.D. Miss. 1970); *Jones v. State Bd. of Educ.*, 407 F.2d 834, 836 (6th Cir. 1969); *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970); *Esteban*, 415 F.2d 1077, 1088–90 (8th Cir. 1969). See also Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 81 (1985) ("No court will require school discipline to rest on 'proof beyond a reasonable doubt' . . .").

146. *Smyth v. Lubbers*, 398 F. Supp. 777, 797–99 (W.D. Mich. 1975) (stating, in dicta, in a matter arising at Grand Valley State University, that the court "believed" that a clear and convincing standard "may be required" and, thus, the court "recommended" that the university "give serious consideration to adopting" clear and convincing as the standard for future cases, citing no education case to support this mild recommendation); Long, *supra* note 145, at 80–82; *Schaer v. Brandeis Univ.*, 735 N.E.2d at 379 n.9 (Mass. 2000) (stating that clear and convincing standard voluntarily used by Brandeis was not judicially required). *But see* Charles F. Carletta, *The Campus Judicial Process* at 10, 7th Annual Donald D. Gehring Training Inst. of the Ass'n for Student Judicial Affairs (1999) (on file with author) (recommending use of "more likely than not" standard); Swem, *supra* note 47, at 359–360 (1987) ("[T]he substantial evidence standard remains the norm" [as opposed to "clear and convincing"] . . . . Unless an institution's code of conduct provides otherwise, basing a decision on substantial evidence is acceptable."). One survey found that the "more likely than not" standard was the most common standard of proof used in campus sexual assault cases. Sophie W. Penney, Lawrence Tucker & John Wesley Lowery, *National Baseline Study on Campus Sexual Assault: Adjudication of Sexual Assault Cases* 11 (Ass'n for Student Judicial Affairs 2000), available at <http://asja.tamu.edu/news/ASJA%20-%20Baseline%20Study%20Report%20Published.pdf>. Another commentator noted that the "vast majority" of colleges and universities use the "more likely than not" standard. SILVERGLATE & GEWOLB, *supra* note 8, at 101.

147. In *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993) Justice Souter, speaking for the Court, wrote:

The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'

university student discipline and judicial processes. The “clear and convincing” and “beyond a reasonable doubt” standard inaccurately treat the Accused Student as more important than the student who believes s/he was a victim of misconduct and/or as having more important interests than all other members of the academic community have in the maintenance of a calm, peaceful and productive living/learning environment. The “preponderance” standard correctly treats each one of these constituencies as equally important when a fact finder tries to decide what happened when the facts are disputed.

Courts review disciplinary decisions of colleges or universities under a “substantial evidence” standard. Courts examine whether there was enough information in the fact finding process to support the determination that it was “more likely than not” that the Accused Student violated the Student Code. In doing so, courts do not make new credibility determinations but assume that the information supporting the determination was deemed credible by the fact finder. In this sense, the “substantial evidence” review is a relatively easy standard to meet. The same standard applies as one of the standards for internal appellate review under most student conduct codes.<sup>148</sup>

5. There shall be a single verbatim record, such as a tape recording, of all Student Conduct Board Hearings before a Student Conduct Board (not including deliberations). Deliberations shall not be recorded. The record shall be the property of the [College] [University].<sup>149</sup>

*Commentary.* This provision has several purposes. First, it assures that a record will be made of the hearing,<sup>150</sup> and deters students from asking to make

(internal citations omitted).

148. See Model Code, art. IV(D)(2)(b).

149. The tape recording or other verbatim record of the hearing will be an education record under FERPA that a student with FERPA access rights would be allowed to review but not to copy. 34 C.F.R. § 99.10 (2003).

150. Most authorities agree that no transcript is required, even for public institutions, as a matter of minimal procedural due process. A recent ruling to this effect involved Brandeis University, where no verbatim transcripts of hearings are kept—not even tape recordings. In one hearing concerning sexual conduct, at which there were thirteen witnesses and over five hours of testimony, the Supreme Judicial Court of Massachusetts approved a “summary” only twelve lines long. *Schaer v. Brandeis Univ.*, 735 N.E. 2d at 382 (Mass. 2000) The Court noted that the report correctly reflected the credibility judgments upon which the decision turned: “The report, although short, reflects a judgment by the board that the Complainant and the corroborating witnesses were credited; Schaer and his witnesses were not credited.” *Id.* at 379 n.9. See *Trahms v. Columbia Univ.*, 245 N.E.2d 124 (N.Y. Sup. Ct. App. Div. 1997) (holding that no transcript of an Honor Board Hearing is required in expulsion case); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (holding that summary handwritten notes was sufficient); *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (“I am not persuaded that the due process clause requires the University to provide a verbatim transcript of the hearing. While this case illustrates the wisdom of recording such hearings, it is clear that the Constitution does not impose such a requirement.”), *aff’d per curiam*, 787 F.2d 590 (6th Cir. 1986); *Due v. Fla. A&M Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1961) (“There need be no stenographic or mechanical recording of the proceedings.”).

At least one court, however, has required that a transcript be made of student disciplinary hearings. *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1973). When this need arises, an institution should explore having a careful typist transcribe statements from an

their own copies. Second, it establishes that the record is the property of the institution. Third, it can be used to assist the fact-finder when deliberating over whether a student violated the institution's rules or in setting sanctions. Fourth, it can be used by a person appealing in preparation for his/her appeal. Finally, it enables an appellate reviewer (internal or external) to know what "really" happened before the Student Conduct Board and keeps others from misrepresenting what occurred.<sup>151</sup>

In some cases, a student may request permission to make a record of the proceedings. An institution may not wish to permit a student to do so because, for example, it may not want its students to replay tapes of the disciplinary proceedings as a form of entertainment, in addition to other privacy concerns.

6. If an Accused Student, with notice, does not appear before a Student Conduct Board Hearing, the information in support of the charges shall be presented and considered even if the Accused Student is not present.

*Commentary.* "Judgment by default" without considering the information available about the student's conduct is a rather harsh penalty to impose upon a student.

7. The Student Conduct Board may accommodate concerns for the personal safety, well-being, and/or fears of confrontation of the Complainant, Accused Student, and/or other witness during the hearing by providing separate facilities, by using a visual screen, and/or by permitting participation by telephone, videophone, closed circuit television, video conferencing, videotape, audio tape, written statement, or other means, where and as determined in the sole judgment of [title of administrator identified in Article I, number 13] to be appropriate.<sup>152</sup>

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audio tape rather than going to the expense of using a court reporter.

151. A discussion of considerations to observe in audiotaping appears in Stoner, *supra* note 106, at 14.

152. This provision is modeled after one appearing in the *Alfred University Judicial System Policies and Regulations*. ALFRED UNIV., JUDICIAL SYS. POLICIES AND REGULATIONS, at <http://www.alfred.edu/policies/index.cfm?fuseaction=viewPolicy&id=10> (last revised July 2004). The need for this type of accommodation occurs most often in sexual conduct cases, in which the alleged victim fears visual or verbal confrontation during courtroom-type "cross-examination," and/or retaliation. See William Fischer & Lori Fox, *The Sexual Assault Case and the Student Judiciary*, 42nd Annual Conf., Nat'l Ass'n of Coll. & Univ. Attys 10 (2002) (on file with author) (stating that "one of the most traumatic aspects of [sexual assault] cases for Complainants is cross-examination by the Accused Student"); Maryalice (Qui Qui) Ledee, *Due Process Rights and Special Considerations in Sexual Assault Cases*, 1 STUDENT AFF. L. & POL'Y Q. 18, 19 (2004), at [http://www.clhe.org/lawpolicyquarterly/salpq1\\_1.pdf](http://www.clhe.org/lawpolicyquarterly/salpq1_1.pdf). Witnesses in violent cases not involving sexual conduct and other cases, such as those involving academic dishonesty, also may be reticent to testify for various reasons. While it is important to respect these concerns, most college and university students are adults of eighteen years of age or older—not children of tender years. See *supra* note 10 and accompanying text. Thus, student affairs professionals will be careful not to create such concerns accidentally. In academic dishonesty cases, the reluctant student witnesses may not even be necessary to a fair review process, as those witnesses may not have anything valuable to add. This is especially true if they provide only the anonymous "tip"

*Commentary.* This section concerns what to do about a witness who is reluctant to tell his/her story to a conduct board, because, for example, s/he does not desire a confrontation.<sup>153</sup> The accommodations discussed below should be used rarely, only after efforts to educate and to reassure the reluctant witness about how the student discipline process functions normally have failed. Student affairs professionals dealing with these fearful students must be careful to be sensitive to genuine concerns while also realizing that the students involved are adults, not children of tender years.

As in all student discipline cases, the students involved must first be educated about the student discipline process because they may not understand how the process works. Worse, they may assume that campus procedures resemble criminal law processes. Furthermore, victim support groups unfamiliar with the student discipline process may discourage student accusers from sharing information in the normal manner in the student conduct board hearing because victim advocates, too, confuse campus processes with witness-unfriendly systems, such as the ones used in criminal court. Once they realize that the student discipline process has an educational tone rather than an adversarial one, student

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that leads the accusing faculty member to investigate the incident. See, e.g., *Jaksa*, 597 F. Supp at 1252 (asserting that the real accuser in an academic dishonesty case is the professor, whom the student does have an opportunity to confront). Thus, while an alleged victim's testimony in student conduct proceedings is usually critical to a fair outcome, "victim-less" infractions such as academic dishonesty can often be fairly resolved without the testimony of a reluctant student witness. Therefore, this section will be most important where the reluctant witness is an alleged victim.

153. Only a few colleges and universities have provisions in their discipline codes dealing with this issue expressly. See, e.g., ALFRED UNIV. JUDICIAL SYS. POLICIES AND REGULATIONS, *supra* note 152; PA. STATE UNIV., JUDICIAL AFFAIRS VICTIMS' RIGHTS, available at <http://www.sa.psu.edu/ja/rights.shtml> (last visited Oct. 12, 2004) (providing for the opportunity to testify with special accommodations); GA. INST. OF TECH., STUDENT CODE OF CONDUCT: PROCEDURAL RIGHTS, ADJUDICATION, AND SANCTIONS, available at [http://www.deanofstudents.gatech.edu/integrity/policies/code\\_of\\_conduct.html](http://www.deanofstudents.gatech.edu/integrity/policies/code_of_conduct.html) (last visited Oct. 12, 2004) ("Testimony may be taken in person, in writing, or by other reliable means of communication including, but not limited to electronic, email, telephone or video conferencing."); FLA. INT'L UNIV., JUDICIAL AND MEDIATION SERVICES, VICTIM RIGHTS available at <http://www.fiu.edu/~jms/> (last modified Dec. 2002) (stating that "victims" have the right "to testify in limited privacy, as long as the process does not compromise the charged students' right to confront and question witnesses") (The authors note that this language may not give the student affairs professional the discretion that was intended because it may be viewed as giving complete priority to confrontation and questioning of witnesses.); WRIGHT STATE UNIV. OFFICE OF JUDICIAL AFFAIRS, STUDENT RIGHTS: RIGHTS OF COMPLAINANT, at <http://www.wright.edu/students/judicial/rights.html> (last updated August 2004) (making provisions "in cases of sexual assault only" whereby "victims" are given the "right to answer questions posed by the accused out of the presence of the accused"). The authors suggest that, once a determination is made that such fears are genuine, they be accommodated when *any* type of offense is alleged rather than limiting a response to such fears only in situations in which the misconduct at issue is sexual. In addition, it is suggested that the label of "victim" not be formally attached to a student in a student conduct code hearing. Attaching such a label gives the erroneous impression that the institution has determined that a rules violation occurred prior to hearing the case; moreover, an Accused Student may feel that s/he has been wrongly accused and is, therefore, also entitled to be called the "victim" of someone else's wrongful accusation. The authors suggest that the better practice is to call students "students" or "witnesses" rather than to give them judgment-laden labels. See *supra* note 50.

witnesses who were initially fearful often feel differently. Thus, they may agree to testify without special accommodations. In addition, once wary support groups realize that the campus discipline process is purposefully not run like an adversarial criminal proceeding, student accusers may be encouraged to participate in the normal manner.

When a witness remains fearful even after reassurance attempts by student affairs professionals, however, there are competing concerns. The student discipline process aims to treat alleged victims and Accused Students with equal care and dignity and also to reach fair and correct results. A witness may need to feel safe and ought not be re-victimized by reliving any traumatic experiences. The Accused Student desires not to be wrongly sanctioned. The community desires a safe living and learning environment and wishes to be confident in its discipline process; that is, if a rule violation is found, the community seeks to be confident that one actually occurred. In addition, student affairs professionals need to have conduct code language that enables them to accommodate genuine fears appropriately without creating a lawsuit alleging failure to follow the college or university's own rules once the difficult job of determining responsibility and/or sanctions is completed. The language proposed in article IV(A)(7), coupled with the other provisions of this Model Code, attempts to address the two process issues that contribute to making witnesses reluctant: fear of visual confrontation and fear of direct cross-examination confrontation in the abrasive style used by attorneys in criminal and civil cases in court.

At first blush, it may appear that private institutions have more flexibility in dealing with this challenge than their public counterparts.<sup>154</sup> Upon closer scrutiny, however, the same solutions appear to be available at all institutions. As we have discussed elsewhere in this Model Code,<sup>155</sup> part of the solution is that direct adversarial cross-examination in the criminal law sense is not required in student discipline hearings unless it is provided by the institution as a matter of

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154. Public colleges and universities, as state actors, are required to provide minimal constitutional procedural due process to students when disciplining them for violating campus rules. See *supra* notes 29–31 and accompanying text. Private institutions are not subject to this standard. See *supra* note 30. It is, however, easy to comply with the requirement of providing a student minimal constitutional procedural due process. See *supra* notes 43–45 and accompanying text. Even commentators writing to support accused students concluded, while citing a sexual conduct case, “Due process, as indicated by [Donohue v. Baker, 976 F. Supp. 136, 146 (N.D.N.Y. 1997)], does not generally require face-to-face confrontation in campus disciplinary proceedings.” SILVERGLATE & GEWOLB, *supra* note 8, at 105 (speculating, however, that such face-to-face confrontation might be required in a case of alleged mistaken identity).

155. See Model Code, *supra* article IV(A)(4)(e); *supra* note 142 and accompanying text; Model Student Conduct Board Hearing Script, *infra* notes 196, 203, and 222. Scholars agree that some form of cross-examination is appropriate when credibility is at issue. See, e.g., Wright, *supra* note 20, at 1076 (arguing that “if the case resolves itself into a problem of credibility, and the tribunal must choose to believe either the accused or his accuser, cross-examination is . . . required in the interest of fairness”); Thomas R. Baker, *Judicial Complaint Resolution Models and Schemes: An Administrator’s Reference Guide for Self-Assessment* 10–12, 12th Annual Conf., Ass’n for Student Judicial Affairs (2000) (on file with author) (noting that where a long suspension is imposed upon the accused student and he or she denies the allegations, the U.S. Constitution may require . . .” that accused students have the opportunity to pose questions to accusers in some manner).

educational preference. Cross-examination through the Student Conduct Board, through questions suggested to the chair, as urged in this model, suffices.

As the language in article IV(A)(7) suggests, there are several options available if a witness remains reluctant even if s/he understands that the abrasive criminal law model of cross-examination is not to be used. One option, if technologically feasible, is to proceed with the hearing through closed-circuit television, with the reluctant witness in another room from the Student Conduct Board and the Accused Student but remaining visually and aurally available to all. Another approach is to allow the reluctant witness to participate by telephone, again from a location remote from the Student Conduct Board and the Accused Student. This is a less desirable approach because visual contact is lost. A third option that addresses the issue of visual confrontation might be to use a hearing room with a one-way mirror (sometimes available in counseling centers) so that the Student Conduct Board, Accused Student, and reluctant witness can all see and hear each other, except that the reluctant witness cannot see the Accused Student. Others have set up a physical screen to shield the reluctant witness and Accused Student from seeing each other.<sup>156</sup> These approaches have the advantage of allowing both students to be “present” in some sense while information is received by the Student Conduct Board.<sup>157</sup>

Another option, but one that does not have the advantage of having all parties present simultaneously in any sense, is for the Student Conduct Board to hold separate interviews with the reluctant witness and the Accused Student and to allow the Accused Student to read a verbatim transcript of the reluctant witness’s interview (or to allow the Accused Student to hear that portion of the tape recording) and to allow the Accused Student an opportunity to respond.<sup>158</sup> This

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156. See Ledee, *supra* note 152, at 19 (suggesting use of speakerphones, screens or dividers); Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FL. COAST. L. REV. 243, 271 n.198 (2000) (suggesting possibility of closed-circuit television use); Baker, *supra* note 158, at 10 (“If live video technology is available, institutions may prefer to seat the complainant and accused student in separate rooms and permit the accused student to view the proceedings via a television camera.”). Also, *Dillon v. Pulaski County Special School District* recognized that “the need for anonymity of student accusers . . . could prevail over the right to confrontation,” suggesting the possibility of less direct confrontation such as with the use of a screen separating the parties. 468 F. Supp. 54, 58 (E.D. Ark. 1978). The use of a screen was approved in *Cloud v. Boston University*, in which a law student accused of peeping was separated from his accusers as they testified behind a screen, although his attorney and the panel could see the witness. 720 F.2d 721, 725 (1st Cir. 1983). The court dismissed the plaintiff’s argument that the use of a screen and anonymous testimony was prejudicial because it gave the impression he was threatening, observing that “the balance of the equities favored protecting the witness’s identity.” Note that Boston University is a private university, but other courts have cited *Cloud* favorably in the public institution context. See, e.g., *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 117 (D. Me. 2004).

157. See Dutile, *supra* note 156 (noting “one could hear all evidence (for example, through close[d]-circuit television) and still not be physically present.”).

158. A verbatim transcript (video or tape recording) is required to use this option so that the Accused Student may hear the information against him, and also to insure compliance with minimal procedural due process at public institutions. See *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) at 664 (emphasizing that the accused students heard all testimony against them and holding that the process afforded was sufficient); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that “the student should be given . . . an oral or written

may be a practical solution because of cost (if a regular tape recorder is used) and time concerns, but it is the least desirable because it does not provide the Student Conduct Board an opportunity to clarify or to probe further with either student after receiving information from the other.

If this last procedure is modified a bit, however, it can provide the Student Conduct Board such an opportunity, even if the description sounds a bit silly. The Student Conduct Board can sit in a room and invite the Complainant to give information that is either audio or videotape recorded. The Complainant would exit the room, and the Accused Student would be invited in. The recording would be played back for the Accused Student, who then would suggest questions for the Complainant to the Student Conduct Board. The Accused Student would leave again, and the Complainant would come back in and answer questions asked by the board. Then the Accused Student would come back in and listen to the Complainant's responses. The board could follow the same procedure for the Accused Student. This would continue until all questioning was completed. Other than the revolving door and the necessity to play back portions of the testimony, this rudimentary solution preserves all aspects of the ideal Student Conduct Board Meeting set out in Article IV(A)(4), while avoiding a visual confrontation.

## B. Sanctions

1. The following sanctions may be imposed upon any student found to have violated the Student Code:
  - a. Warning—A notice in writing to the student that the student is violating or has violated institutional regulations.
  - b. Probation—A written reprimand for violation of specified regulations. Probation is for a designated period of time and includes the probability of more severe disciplinary sanctions if the student is found to violate any institutional regulation(s) during the probationary period.
  - c. Loss of Privileges—Denial of specified privileges for a designated period of time.
  - d. Fines—Previously established and published fines may be imposed.
  - e. Restitution—Compensation for loss, damage, or injury. This may take the form of appropriate service and/or monetary or material replacement.
  - f. Discretionary Sanctions—Work assignments, essays, service to the [College] [University], or other related discretionary assignments.
  - g. Residence Hall Suspension—Separation of the student from the residence halls for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
  - h. Residence Hall Expulsion—Permanent separation of the student from the residence halls.

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report on the facts to which each witness testifies"). It is not clear whether a summary of the evidence by the Student Conduct Board would suffice based on the language in *Dixon* but, at least in cases where the sanctions imposed are great, it is safer and relatively easy for the college or university to provide some form of transcript. In addition, this Code recommends that a verbatim record such as a tape recording be taken of the entire meeting. See *supra* Model Code, art. IV(A)(5).

- i. [College] [University] Suspension—Separation of the student from the [College] [University] for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
- j. [College] [University] Expulsion—Permanent separation of the student from the [College] [University].<sup>159</sup>
- k. Revocation of Admission and/or Degree—Admission to<sup>160</sup> or a degree awarded from the [College][University] may be revoked for fraud, misrepresentation, or other violation of [College][University] standards in obtaining the degree, or for other serious violations committed by a student prior to graduation.<sup>161</sup>
- l. Withholding Degree—The [College][University] may withhold awarding a degree otherwise earned until the completion of the process set forth in this Student Conduct Code, including the completion of all sanctions imposed, if any.<sup>162</sup>

*Commentary.* Colleges and universities may, within certain limitations,<sup>163</sup> authorize as many types of sanctions as they wish. This section gives the institution maximum flexibility by permitting the Student Conduct Administrator to

159. A student who is expelled or suspended may ask a court to enjoin the discipline. Courts have held that suspension does not constitute irreparable harm so as to support a motion for injunctive relief. *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575 (Pa. 1990); *Schulman v. Franklin and Marshall Coll.*, 538 A.2d 49, 51–52 (Pa. Super. Ct.); *Barker v. Bryn Mawr Coll.*, 122 A. 220 (Pa. 1923) (refusing to enjoin college's decision to expel student after conclusion of internal process). This reluctance to disturb internal decisions extends beyond student affairs to employment. *See, e.g.,* *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418 (Pa. 2001) (refusing to allow de novo review of university's reasons for terminating employment of tenured professor after conclusion of internal process); *Baker v. Lafayette Coll.*, 532 A.2d 399 (Pa. 1987) (refusing to allow de novo review of college's reasons for not continuing employment of non-tenured teacher after conclusion of internal process); *Stoner & Showalter, supra* note 16, at 583. This deference, however, does not extend to situations in which a college does not follow its own express rules. *See supra* note 33.

160. *Martin v. Helstad*, 699 F.2d 387 (7th Cir. 1987) (involving revocation of acceptance to law school for omitting securities fraud conviction).

161. Courts support the revocation of degrees in these circumstances in order to protect the integrity of the institution's degrees and to protect the public from being victimized by a person displaying false credentials. *Crook v. Baker*, 813 F.2d 88, 93 (6th Cir. 1987); *Waliga v. Kent State Univ.*, 488 N.E.2d 850, 852 (Ohio 1986). *See* *Jayne L. Butcher, MIT v. Yoo: Revocation of Academic Degrees for Non-Academic Reasons*, 51 CASE WEST. L. REV. 749 (2001); *Gary Pavela, For the Same Reasons That Students Can Be Expelled, Degrees Ought to be Revocable*, CHRON. HIGHER EDUC., Oct. 22, 1999 at B6; *Bernard Reams Jr., Revocation of Academic Degrees by Colleges and Universities*, 14 J.C. & U.L. 283, 300 (1987). *See also* *Pavela, supra* note 8, at 829 (discussing another formulation of this sanction).

162. *Vandereerden v. Yale Sch. of Mgmt.*, No. 0438876, 2000 WL 727515, at \*2 (Conn. Super. Ct. May 18, 2000) (upholding right to withhold degree pending six month suspension imposed after completion of course work, even in the absence of a specific clause).

163. The district court in *Gorman v. University of Rhode Island*, for example, found that the University of Rhode Island's sanction of compulsory psychiatric treatment was a "shocking extreme" and would violate the student's right to privacy. 646 F. Supp. 799, 814 (D.R.I. 1986). A commentator, no doubt intending to be thought provoking, proposed that colleges and universities impose sanctions to change both the wrongdoer and the entire community. She proposed shaming. *Katharine R. Baker, Sex, Rape and Shame*, 79 B.U. L. REV. 663 (1999).

*impose any sanction(s) for any infraction of the Student Code. An experienced student affairs administrator will consider all of the facts and circumstances to apply a sanction appropriate for the offender, the community, and the victim (if there is one).<sup>164</sup> An alternative approach is to enumerate those offenses carrying the more serious sanctions (i.e., expulsion and suspension), and to allow the Student Conduct Administrator to choose among the remaining sanctions as to other offenses.<sup>165</sup> As to discretionary sanctions, the language is purposefully broad to allow an educator to impose sanctions from a wide range of possibilities in order to help the student to understand more fully the consequences of his/her conduct.*

2. More than one of the sanctions listed above may be imposed for any single violation.
3. (a) Other than [College] [University] expulsion or revocation or withholding of a degree, disciplinary sanctions shall not be made part of the student's permanent academic record,<sup>166</sup> but shall become part of the student's disciplinary record. Upon graduation, the student's disciplinary record may be expunged of disciplinary actions other than residence hall expulsion, [College] [University] suspension, [College] [University] expulsion, or revocation or withholding of a degree, upon application to the Student Conduct Administrator. Cases involving the imposition of sanctions other than residence hall expulsion, [College] [University] suspension, [College] [University] expulsion or revocation or withholding of a degree shall be expunged from the student's confidential record [insert preferred number] years<sup>167</sup> after final disposition of the case.
  - (b) In situations involving both an Accused Student(s) (or group or organization) and a student(s) claiming to be the victim of another student's conduct, the records of the process and of the sanctions imposed, if any, shall be considered to be the education records of both the Accused Student(s) and the student(s) claiming to be the victim because the educational career and chances of success in the academic community of each may be impacted.

*Commentary. Institutions may define that such records are education records of the complaining students, as well as of the Accused Student. Educationally speaking, this is surely valid, as the incident may directly impact the educational environment and performance of each student. Treating such records as education*

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164. In *Haley v. Virginia Commonwealth University* a student-on-student harassment case, the accused student was suspended for two years to permit the victim to complete school without him present. 948 F. Supp. 573, 576 (E.D. Va. 1996).

165. See, e.g., Gary Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137, 143 (1979).

166. Some institutions include information regarding suspensions from the institution on the student's permanent academic transcript, at least for the period of the suspension.

167. Records substantiating the statistics must be maintained for three years after publication (approximately seven years after the conduct). See Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f)(1)(F) (2000); 34 C.F.R. § 668.46 (c)(1) (2004).

records of the complaining student, as well as of the Accused Student, also avoids strange results under the Family Education Right to Privacy Act ("FERPA")<sup>168</sup> because the complaining student would then have access to his/her own records—rather than being told that the result of the process concerning them could not be disclosed because they were records only of another student. Thus, the results of the student discipline process are communicated to the complaining student.<sup>169</sup>

4. The following sanctions may be imposed upon groups or organizations<sup>170</sup>:
  - a. Those sanctions listed above in article IV(B)(1)(a)–(e).
  - b. Loss of selected rights and privileges for a specified period of time.
  - c. Deactivation. Loss of all privileges, including [College] [University] recognition, for a specified period of time.

*Commentary.* When a recognized student organization engages in some act of misconduct, the college or university may take action not only against the student(s) involved, but also against the organization itself. This procedure does not violate the double jeopardy clause of the Constitution<sup>171</sup> for two reasons. First, the double jeopardy clause applies only to criminal, not civil, proceedings.<sup>172</sup> Proceedings under a school's student code are not criminal proceedings.<sup>173</sup> Furthermore, the actors (student(s) and organization) are separate offenders. Punishing each of them for the same act is not punishing the same offender twice for one act of misconduct.<sup>174</sup> Similarly, it does not violate the

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168. 20 U.S.C.A. § 1232g (2000 & West Supp. 2004). One court discussed the conclusion that discipline records are education records under FERPA in student-on-student violence situations:

First, the disciplinary records at issue in this case clearly 'contain information directly related to a student.' The offenders being disciplined, and often the victims of the offense, are students of the respective universities, and the matters addressed in the disciplinary records pertain to actions committed or allegedly committed by or against those students.

United States v. Miami Univ., 91 F. Supp. 1132, 1150 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797 (6th Cir. 2002).

169. See *infra* Model Code, art. IV(B)(5).

170. See Grier, *supra* note 88.

171. The Fifth Amendment to the United States Constitution provides in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This provision applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). See *supra* note 46 and accompanying text.

172. Paine v. Bd. of Regents, 355 F. Supp. 199, 203 (W.D. Tex. 1972), *aff'd*, 474 F.2d 1397 (5th Cir. 1973). Cf. Oliver v. U.S. Dept. of Justice, 517 F.2d 426, 428 (2d Cir. 1975) (holding that deportation proceedings following a criminal conviction do not violate double jeopardy clause); United States v. Forty-Two Jars "Bee Royale Capsules," 160 F. Supp. 818, 821 (D.N.J. 1958) (holding that double jeopardy does not apply to drug misbranding proceedings); Attorney Grievance Comm. v. Andresen, 379 A.2d 159, 160 (Md. 1977) (holding that double jeopardy clause does not apply to attorney disciplinary proceedings). See also George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 4 U. ILL. L. REV. 827, 837 (1988). See *supra* note 46 and accompanying text.

173. See, e.g., Nzuve v. Castleton State Coll., 335 A.2d 321, 323 (Vt. 1975).

174. See United States v. Richmond, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983) (holding that

*double jeopardy clause for the same student to be subjected to both criminal and student-code (civil) sanctions for the same misconduct.*<sup>175</sup>

*The private/public institution distinction remains important. As elsewhere in student discipline, a private institution has more discretion in disciplining student organizations, mainly needing just to follow institutional rules.*<sup>176</sup> *Public institutions must follow the requirements of minimal procedural due process and may be limited by other constitutional provisions as well.*<sup>177</sup>

5. In each case in which a Student Conduct Board determines that a student and/or group or organization has violated the Student Code, the sanction(s) shall be determined and imposed by the Student Conduct Administrator. In cases in which persons other than, or in addition to, the Student Conduct Administrator have been authorized to serve as the Student Conduct Board, the recommendation of the Student Conduct Board shall be considered by the Student Conduct Administrator in determining and imposing sanctions. The Student Conduct Administrator is not limited to sanctions recommended by members of the Student Conduct Board. Following the Student Conduct Board Hearing, the Student Conduct Board and the Student Conduct Administrator shall advise the Accused Student, group and/or organization (and a complaining student who believes s/he was the victim of another student's conduct) in writing of its determination and of the sanction(s) imposed, if any.<sup>178</sup>

*Commentary. Imposition of sanctions by the Student Conduct Administrator ensures some consistency among the sanctions meted out over time. A college or university may choose to allow the Student Conduct Board, rather than a college or university official, to impose sanctions in each case.*<sup>179</sup> *Such a choice is not unusual. It may be more equitable, however, to have the Student Conduct Administrator choose the sanction in all situations, so as to avoid putting students who sit on the Student Conduct Board in the position of imposing a sanction on a*

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punishment of both a corporation and its officers does not constitute double punishment).

175. See *Paine*, 355 F. Supp. at 203.

176. *Mu Chapter of Delta Kappa Epsilon v. Colgate Univ.*, 176 A.2d 11 (N.Y. App. Div. 1992); *Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755 (Pa. 1991) (holding that withdrawal of recognition for hazing permitted under fundamental fairness standard).

177. See, e.g., *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (holding that First Amendment prohibited sanction for racially and sexually offensive skit).

178. At the Pennsylvania State University, the "victim" has the right to "hear" the results of the disciplinary process even if the "victim" is not a student. PA. STATE UNIV. DIV. OF STUDENT AFFAIRS, JUDICIAL AFFAIRS, VICTIM'S RIGHTS, available at <http://www.sa.psu.edu/ja/rights.shtml> (last visited Oct. 12, 2004).

179. See, e.g., UNIV. OF S.C., CODE OF STUDENT CONDUCT 11.3. DELIBERATIONS AND DECISIONS OF THE COUNCIL, available at <http://www.sa.sc.edu/carolinacommunity/judicial.html> (last visited Oct. 12, 2004); NORTHEASTERN UNIV., STUDENT HANDBOOK, CODE OF STUDENT CONDUCT, available at <http://www.neu.edu/handbook/studenthandbook.pdf> (last visited Oct. 12, 2004).

peer. In this manner, the administrator could take into account sanctions given in prior similar cases in order to provide consistency—without disclosing all prior details to the current conduct board. Moreover, the administrator would be an appropriate witness for a court challenge, if one arises. Finally, the administrator may be better trained than the board to bring educational judgment to bear in setting the sanction(s). In this Model, the authors recommend that, when the board consists of more persons than just the administrator, the board recommend sanctions to the administrator, who makes the final decision.<sup>180</sup>

### C. Interim Suspension

In certain circumstances, the [title of administrator identified in Article I, number 13], or a designee, may impose a [College] [University] or residence hall suspension prior to the Student Conduct Board Hearing before a Student Conduct Board.

1. Interim suspension may be imposed only: 1) to ensure the safety and well-being of members of the [College] [University] community or preservation of [College] [University] property; b) to ensure the student's own physical or emotional safety and well-being; or c) if the student poses an ongoing threat of disruption of, or interference with, the normal operations of the [College] [University].
2. During the interim suspension, a student shall be denied access to the residence halls and/or to the campus (including classes) and/or all other [College] [University] activities or privileges for which the student might otherwise be eligible, as the [title of administrator identified in Article I, number 13] or the Student Conduct Administrator may determine to be appropriate.
3. The interim suspension does not replace the regular process, which shall proceed on the normal schedule, up to and through a Student Conduct Board Hearing, if required.<sup>181</sup>

*Commentary.* It is permissible to impose an interim suspension in certain limited instances.<sup>182</sup> It has been noted:

180. As to the practice of informing student “victims” of the results of the process, see *supra* Model Code, art. IV(B)(3)(b) and *infra* Model Hearing Script, n. 219.

181. Suspending a student on an interim basis without following the Ohio State University hearing process converted the interim suspension to a permanent expulsion in violation of due process principles. *Ashiegbu v. Williams*, No. 97-3173, 1997 WL 720477 (6th Cir. Nov. 12, 1997), discussed in KAPLIN & LEE, *supra* note 8, at 319.

182. *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464 (Minn. Ct. App. 2001) (approving interim suspension in sexual harassment matter). *Ali v. Stetson Univ., Inc.* \_\_\_ F. Supp. 2d \_\_\_, No. 6:03-CV-975-ORI28, 2004 WL 2309552 (M.D. Fla. Oct. 8, 2004) (granting summary judgment to university on lawsuit challenging interim suspension following off campus arrest on felony aggravated assault with a firearm charge). This concept stems from a passage in *Goss v. Lopez*, 419 U.S. 565, 582–83 (1975), stating that “[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and . . . hearing should follow as soon as practicable.” In *Cleveland Board of Education. v. Loudermill*, 470 U.S. 532,

However, the student should be notified in writing of this action and the reasons for the suspension. The notice should include the time, date, and place of a subsequent hearing at which the student may show cause why his or her continued presence on the campus does not constitute a threat [and at which they may contest whether a campus rule was violated].<sup>183</sup>

*An unusual case allowed the immediate dismissal of a student at a Kentucky private college without using the process for resolving what happened.*<sup>184</sup>

#### D. Appeals

1. A decision reached by the Student Conduct Board or a sanction imposed by the Student Conduct Administrator may be appealed by the Accused Student(s) or Complainant(s) to an Appellate Board within five (5) school days of the decision. Such appeals shall be in writing and shall be delivered to the Student Conduct Administrator or his or her designee.

*Commentary. This is another point at which it may be wise to grant students more rights than they might otherwise have. Although there is some authority for the proposition that students need not be given the right to appeal from a decision rendered as a result of a hearing,<sup>185</sup> providing an appellate process promotes an image of fairness. Further enhancing the image of fairness, this model affords not*

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538 (1985), however, the Supreme Court indicated that in most cases an interim suspension without some sort of hearing beforehand is something to be avoided if possible. *Loudermill* was not a school case, but it indicated that, at least in the public employment context, a predetermination hearing serves as "an initial check against mistaken decisions." *Id.* at 545. See Picozzi, *supra* note 51, at 2158 n.111, in which the author indicates that judgments of whether the imminent danger necessary to justify an interim suspension is present should be left to the discretion of the administrator responsible for implementing the student code but that the administrator's decision should be reviewed as soon thereafter as is practicable.

183. Gehring & Bracewell, *supra* note 9, at 97–98. As Professor Wright noted, "[T]here must be power in a University, when circumstances compel it, to suspend students summarily pending a later hearing at which they will be given all of the ordinary procedural protections." Wright, *supra* note 20, at 1074.

184. *Centre Coll. v. Trzop*, 127 S.W.3d 562 (Ky. 2003) (upholding dismissal of student who admitted possessing a five inch knife on campus, a violation of campus rules, although he explained that it was part of his National Guard equipment). The Kentucky Supreme Court upheld his dismissal, done with minimal notice and hearing and without following the college's usual procedure, explaining:

In its "contract" with Trzop, Centre never guaranteed the right to due process. In fact, the Centre Student Handbook clearly states that such process may be withheld in certain circumstances:

Although students are ordinarily disciplined through the judicial process involving the Student Judiciary or the executive committees of the Intrafraternity Council or the Panhellenic Association, the college administration may invoke sanctions including dismissal from the College in unusual circumstances. The need for confidentiality, for immediate action, or for protection of others might prompt such action.

*Id.* at 568.

185. *Goss*, 419 U.S. at 582–83.

only the Accused Student but also the Complainant a right to appeal.<sup>186</sup> This is consistent with the basic student affairs precept that all students are entitled to be treated with equal care, concern, honor, and dignity. Particulars, such as the amount of time within which to permit appeals, may vary from school to school. Regardless of the result initially, the appeals process further assists the institution to get the “right” result.

2. Except as required to explain the basis of new information, an appeal shall be limited to a review of the verbatim record of the Student Conduct Board Hearing and supporting documents for one or more of the following purposes:
  - a. To determine whether the Student Conduct Board Hearing was conducted fairly in light of the charges and information presented, and in conformity with prescribed procedures giving the complaining party a reasonable opportunity to prepare and to present information that the Student Code was violated, and giving the Accused Student a reasonable opportunity to prepare and to present a response to those allegations. Deviations from designated procedures will not be a basis for sustaining an appeal unless significant prejudice results.
  - b. To determine whether the decision reached regarding the Accused Student was based on substantial information, that is, whether there were facts in the case that, if believed by the fact finder, were sufficient<sup>187</sup> to establish

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186. At the Pennsylvania State University, the “victim” has the right to appeal the results of the disciplinary process, perhaps even if the “victim” is not a student. *See supra* note 178 and accompanying text.

187. *Papachristou v. Univ. of Tenn.*, 29 S.W.3d 487 (Tenn. Ct. App. 2000) (deferring to fact finder’s decision and sanction of indefinite suspension once the court concluded there was substantial evidence to support the conclusion). The court held:

The testimony in this record is in conflict. Therefore, what really happened in that classroom and what motivated Mr. Papachristou to do what he did requires the fact finder to assess the credibility of many witnesses. . . . When reviewing administrative decisions, the courts do not make de novo decisions about the credibility of witnesses. . . . Neither the trial court nor this court may review issues of fact de novo or substitute the court’s judgment for that of the agency as to the weight of the evidence. . . . With substantial and material proof in the record on which the university, Chancellor’s findings could be based, the action taken must be affirmed.

*Id.* at 490–91.

The information from a single witness found to be credible by the finder of fact is sufficient to sustain a finding that a student violated institutional rules. This happens often on campus when the incident involves two persons and it must be determined who is credible. In a male/male sexual conduct case resulting in expulsion, United States District Judge Lancaster explained that the testimony of one credible witness was sufficient to sustain the expulsion from a public institution:

Plaintiff’s argument appears to be that because the tribunal based its decision on the student’s uncorroborated version of the events, the evidence was insufficient to warrant expulsion. We disagree.

Tribunals of every level, whether trial courts, administrative agencies or school disciplinary boards, by their very nature, must resolve disputes of fact. In doing so, they weigh the evidence, assess the credibility of witnesses, and make factual findings based on the testimony they find most credible. *Merely because a tribunal decides to rely on one witness’s word rather than another’s does not mean that the procedure was*

that a violation of the Student Code occurred.

- c. To determine whether the sanction(s) imposed were appropriate for the violation of the Student Code which the student was found to have committed.
- d. To consider new information, sufficient to alter a decision, or other relevant facts not brought out in the original hearing, because such information and/or facts were not known to the person appealing at the time of the original Student Conduct Board Hearing.

*Commentary. The appellate body should review the Student Conduct Board's decision in order to determine whether it was supported by substantial information or, synonymously legally speaking, substantial evidence.<sup>188</sup> Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>189</sup> In making such a determination, the Appellate Board should not substitute its judgment for the judgment of the Student Conduct Board. Instead, it should respect the credibility judgments made by the Student Conduct Board and review the Student Conduct Board's determination only to see whether there was information before the Student Conduct Board that supported the result it reached.<sup>190</sup>*

3. If an appeal is upheld by the Appellate Board, the matter shall be returned to the original Student Conduct Board and Student Conduct Administrator for re-opening of Student Conduct Board Hearing to allow reconsideration of the original determination and/or sanction(s).<sup>191</sup> If an appeal is not upheld, the matter shall be considered final and binding upon all involved.

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*unfair. It simply means that the tribunal made credibility determinations, its primary purpose.*

Woodard v. Univ. of Pittsburgh, No. 95-1299, at 6 (W.D. Pa. 1995) (emphasis added).

188. Speake v. Grantham, 317 F. Supp. 1253, 1282 (S.D. Miss. 1971); Jones v. State Bd. of Educ., 407 F.2d 834, 836 (6th Cir. 1969); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972); Herman v. Univ. of S.C., 341 F. Supp. 226, 231 (D.S.C. 1971), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972). See also Swem, *supra* note 47, at 379-80 ("University officials bear the burden of proof in producing evidence to sustain the charges against the student and must base their disciplinary decisions on substantial evidence.").

189. Sill v. Pa. State Univ., 318 F. Supp. 608, 621 (M.D. Pa. 1970), (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)), *aff'd*, 462 F.2d 463 (3d Cir. 1972). A student may be held responsible if the information supports a "reasonable inference" that he violated institutional rules, even in the absence of direct, eye-witness testimony of the precise conduct alleged. *E.g.*, Esteban v. Cent. Mo. State Coll., 290 F. Supp. 622, 631 (W.D. Mo. 1968).

190. *Cf.* Mullins v. Sec'y of Health & Human Services, 680 F.2d 472 (6th Cir. 1982).

191. In a process that allowed the president, upon appeal, to reset the sanction, his decision to increase the sanction's severity was upheld even though he only reviewed the record and did not "hear" the testimony anew himself. The court approved this process because the Accused Student had had a "meaningful" hearing before the hearing board. Smith v. Univ. of Va., 78 F. Supp. 2d 533, 538-541 (W.D. Va. 1999)

*Commentary.* A smaller institution may choose to permit yet another step in the appeal process by providing that a person disagreeing with the decision of the Appellate Board may appeal to the president or other top-ranking official. In such cases, the institution may want to provide that the decision of the president shall be “final.”<sup>192</sup> Doing so would open the door to arguing that, as in labor disputes in which the parties have agreed that disputes be submitted to binding arbitration, the decision of the president as “arbitrator” should not be disturbed by a court as long as it is reasonable and derives its essence from the student code.<sup>193</sup>

#### ARTICLE V: INTERPRETATION AND REVISION

- A. Any question of interpretation or application of the Student Code shall be referred to the [title of administrator identified in Article I, number 13] or his or her designee for final determination.

*Commentary.* Typically, the person making these decisions would be the institution’s chief student affairs officer. This is a very important provision and should be included in every institution’s code of student conduct. It allows ambiguous situations to be resolved by a person with training in educational development of students and in the context of the institution’s mission, instead of leaving such judgment calls to persons outside of the academic community.

- B. The Student Code shall be reviewed every [ ] years under the direction of the Student Conduct Administrator.

*Commentary.* Every Student Code should be reviewed periodically, at least every three years. Specifying some “normal” period for review may help to ensure that such a review is done.

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192. See, e.g., COMPASS, 2003-2004 STUDENT HANDBOOK OF ALLEGHENY COLLEGE, JUDICIAL SYSTEM Art. IV, 3.D (on file with author).

193. See, e.g., Baker v. Lafayette Coll., 516 Pa. 291, 299-300, 532 A.2d 399, 403 (Pa. 1987); United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, (1987); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

## A TWENTY-FIRST CENTURY MODEL STUDENT CONDUCT BOARD HEARING SCRIPT

An important component of the Model Student Code is the Student Conduct Board. It is composed of one or more members of the college or university community and is designated to hear cases under the student code system, especially the more serious cases. One resource that members of Student Conduct Boards often find useful both in training<sup>194</sup> and in conducting hearings to determine what happened and to recommend sanctions, if necessary, is a script for the Student Conduct Board Hearing.

The following Model Student Conduct Board Hearing Script was developed to reflect the procedures outlined in the Model Student Code. The script provides an outline to be followed during the Student Conduct Board Hearing so that the necessary procedural steps may be followed without intervention by the Student Conduct Administrator. The Model Student Conduct Board Hearing Script should be revised to fit the institution's specific procedures.

This Model Script is intended to suggest "some kind of hearing" that follows the lead of *Goss v. Lopez*.<sup>195</sup> Courts have consistently recognized that a college or university may (if not *should*) consciously design its process for determining facts about student conduct *not* so that it models a criminal prosecution<sup>196</sup> because that is contrary to creating an educational atmosphere.<sup>197</sup> Rather, it should be tailored to fit the circumstances of what is to be heard<sup>198</sup> and the educational mission that is to

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194. Diane M. Waryold, *Increasing Campus Judicial Board Effectiveness: Are Two Heads Truly Better Than One?* in *THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT, ORGANIZATIONAL, AND COMMUNITY ISSUES* 227-36 (Brent G. Paterson & William L. Kibler, eds. 1998).

195. 419 U.S. 565, 583 (1975) (noting that "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process"). See *supra* note 40 and accompanying text.

196. See *Esteban v. Cent. Mo. State Coll.*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (asserting that "the Court does not hold that the procedural due process which must be afforded these plaintiffs before they can be validly suspended implies a formal court type judicial hearing such as is required in criminal cases").

197. "This is not to imply that a full-dress judicial hearing, with right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out." *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (contemplating that a disciplinary hearing could be "not before the Board directly" and that student could give his version of events "to the Board, or at least to an administrative official of the college" instead).

198. The court notes that the observations of the Supreme Court in *Mathews* are appropriate here:

The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances. . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard to insure that they are given a meaningful opportunity to present their case.

*Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1390 (W.D. Mich. 1983) (quoting *Mathews v.*

be accomplished.<sup>199</sup>

Thus, this model of a script for the Student Conduct Board Hearing envisions a process that is calm rather than confrontational. It challenges us to achieve an atmosphere more consistent with the educational and academic setting in which it is occurring,<sup>200</sup> as contrasted to the “trial by combat” behaviors often exhibited in courtroom proceedings.<sup>201</sup> “The hearing may be procedurally informal and need not be adversarial.”<sup>202</sup>

It is believed that this script provides dignity for all students involved and that the finders of fact are enabled to do their job: resolving questions of credibility, determining whether institutional rules were violated, and, if so, recommending sanctions to fit the misconduct and the institution’s mission.

This Model empowers the chair and the Student Conduct Board to set the tone for the hearing.<sup>203</sup> All questions are directed to all witnesses by or through the Student Conduct Board, including questions that are in the nature of cross-examination.<sup>204</sup>

This method was specifically approved by the Court of Appeals for the Eleventh Circuit.<sup>205</sup> In a case of two students who had been suspended from a public institution, the court ruled that “there was no denial of appellants’ constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner.”<sup>206</sup> The court explained that:

Although appellants were not allowed to ask questions directly of the adverse witnesses, it is clear that they heard all of the testimony against them. Appellants were told they could pose questions to the presiding

Eldridge, 424 U.S. 319, 348–349 (1976)) (internal citations omitted).

199. Wright v. Tex. So. Univ., 392 F.2d 728 (5th Cir. 1968)

This does not mean that the student is entitled to the formality of a trial, in the usual sense of that term, but simply requires that he must be given a fair and reasonable opportunity to make his defense to the charges and to receive such a hearing as meets the requirements of justice both to the school and to himself.

*Id.* at 729.

200. In a student discipline hearing that resulted in a one semester suspension, the court approved an informal process: “At the hearing itself, plaintiff read a prepared statement to the panel, and participated in an informal discussion of his case.” *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984), *aff’d per curiam*, 787 F.2d 590 (6th Cir. 1986). See *supra* note 191 and accompanying text.

201. One commentator contrasts his campus process with the “adversarial” model by calling it the “investigatory” model, such as is used in Europe and in American “drug courts.” Pavela, *supra* note 8 at 827.

202. *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967), (affirming expulsion of student from Merchant Marine Academy), *rev’d on other grounds*, 269 F. Supp. 900 (E.D.N.Y. 1967).

203. “The hearing was non-criminal, and was conducted in a non-adversarial manner, there was no opposing counsel, and the hearing was conducted entirely by the Investigating Officer.” *Wimmer v. Lehman*, 705 F.2d 1402 (4th Cir. 1983) (upholding dismissal of student from United States Naval Academy).

204. See *Jaksa*, 597 F. Supp. at 1252 (“The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding.”).

205. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987).

206. *Id.*

board chancellor, who would then direct appellants' questions to the witnesses. Appellants were clearly informed when the time came for them to ask questions in the prescribed manner.<sup>207</sup>

The Court of Appeals of Texas also approved this approach. At the University of Houston, a public institution, this same process was followed in reaching the decision to expel a student:

The [Accused Student] was assisted by his counsel of choice, a law student. This counsel attended the hearing and advised the [Accused Student] during the hearing; however, he was not allowed to speak, argue, or question witnesses during the hearing. The [Accused Student], speaking for himself, was allowed to testify and to make opening and closing statements, but was not permitted to question witnesses directly. All questions were referred to the hearing officer, who would ask the question directly of the witness. The hearing officer asked some, but not all the questions requested by the [Accused Student].<sup>208</sup>

In a civil action for money damages in connection with an arrest for rape (that was allegedly a wrongful arrest) when the student was expelled from a public institution for the same alleged conduct, the court approved the method of allowing the Accused Student to direct questions to his accuser through the Student Conduct Board:

It is understandable that the panel would wish to alter the proceedings in an effort to protect the alleged victim from additional trauma. . . . At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel.<sup>209</sup>

Thus, legal authorities clearly permit, if not urge, colleges and universities to create an atmosphere for student conduct boards, like the script proposed here, that is adopted because it fits the goals of the educational community it serves. Student affairs professionals also see educational value in conducting hearings in this manner.<sup>210</sup>

Student development theorists support the notion that peer influences can be extremely persuasive for traditional aged students. Therefore, students dialoguing with students in a disciplinary hearing regarding the behavioral expectations of the college or university community can be the best method for redirecting behavior.<sup>211</sup>

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207. *Id.*

208. *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 686 (Tex. Ct. App. 1984).

209. *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997).

210. *See, e.g., Thomas R. Baker, Judicial Complaint Resolution Models and Schemes: An Administrator's Reference Guide for Self-Assessment* at 11–12, Annual Conf. of the Ass'n for Student Judicial Affairs (2000) (discussing many of the details involved in what he calls "non-confrontational" and "quasi-confrontational" "adjudications"—including use of video equipment to avoid confrontations of students—in an excellent practitioner's guide).

211. Diane M. Waryold, *Increasing Campus Judicial Board Effectiveness: Are Two Heads Truly Better Than One?* in *THE ADMINISTRATION OF CAMPUS DISCIPLINE: STUDENT,*

The approach recommended here has an added advantage. There is no “prosecutor” or specially trained expert to “present” the case “against” the Accused Student. Instead, the institution is not “against” any student at all. It makes a forum available—not as an advocate but as a stake holder—to determine what happened and to recommend sanctions, if necessary. The organizing and questioning is done primarily by the Student Conduct Board (the Complainant and Accused Students may identify and invite witnesses and pertinent documents as well). This allows all witnesses who come before the board to be treated with equal dignity. Whether they are students, faculty members, security officers, or others, they are likely to be adults, and each has the same role: to share the pertinent information they have with the Student Conduct Board.

This arrangement dispenses with feelings that it is “unfair” to pit an expert “prosecutor,” professor, or person trained in the law “against” a “mere” student. Thus, this approach creates a fair hearing and avoids either the imposition of attorneys to “equalize” the skills of “presenters”<sup>212</sup> or the requirement to start over because the skills of the presenters were not equal.<sup>213</sup>

The Model Student Conduct Board Script follows.

#### PRE-STUDENT CONDUCT BOARD HEARING OF THE STUDENT CONDUCT BOARD WITHOUT THE PARTIES PRESENT

It can be useful for the Student Conduct Administrator to conduct a meeting with the members of the Student Conduct Board prior to the beginning of the Student Conduct Board’s Student Conduct Board Hearing without the parties present. Issues to be considered during this meeting include:

A review of any written materials.

A review of procedures to be followed during the Student Conduct Board Hearing.

A discussion of any potential for bias on the part of any Student Conduct Board member.

ORGANIZATIONAL, AND COMMUNITY ISSUES 228 (Brent G. Paterson & William L. Kibler, eds. 1998).

212. *Jaksa*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff’d per curiam*, 787 F.2d 590 (6th Cir. 1986).

Significantly, the University did not proceed against plaintiff through an attorney or other representative. Had an attorney presented the University’s case, or had the hearing been subject to complex rules of evidence or procedure, plaintiff may have had a constitutional right to representation. But here, Professor Rothman presented the case against plaintiff and there was nothing mysterious about the Academic Judiciary proceedings.

*Id.* at 1252.

In *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967), *rev’d on other grounds*, 269 F. Supp. 900 (E.D.N.Y. 1967), the Accused Student had no right for an attorney to present his case “where the hearing is investigative and not adversarial and the government does not proceed through counsel.”

213. *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969) (requiring new hearing where Southern University at New Orleans, a public university, had process in which “prosecution” was done by third year law student “chosen to prosecute because of his familiarity with legal proceedings” and Accused Student was refused participation of his attorney).

## STUDENT CONDUCT BOARD HEARING SCRIPT

*Begin tape recorder.*<sup>214</sup>

Good afternoon, my name is [\_\_\_\_\_], and I will be serving as the chair of the Student Conduct Board. My role is to oversee the Student Conduct Board Hearing that will be conducted today.

Please note that today's Student Conduct Board Hearing is being tape recorded. This recording represents the sole official verbatim record of the Student Conduct Board Hearing and is the property of this institution.

At this time, I will ask the members of the Student Conduct Board to introduce themselves.

Would the Accused Student(s) introduce himself/herself (themselves)?<sup>215</sup>

Would the Accused Student's advisor introduce himself/herself (*if present*)?<sup>216</sup>

Would the Complainant introduce himself/herself?

Would the Complainant's advisor introduce himself/herself (*if present*)?

Would the individuals who are here today as possible witnesses introduce themselves?

*If the Complainant or the Accused Student has an advisor read the following statement.* The role of the advisor during this Student Conduct Board Hearing is limited. It reflects that this process is not a courtroom proceeding but is part of the institution's programs that are designed to provide a good living/learning environment for all members of our academic community. An advisor may not question witnesses or make statements before the Student Conduct Board. The only appropriate role for the advisor is to provide advice to the student who has requested his/her presence in a manner which does not disturb the proceedings of

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214. It is important to maintain a verbatim record, such as a tape recording, of the Student Conduct Board Hearing for use in deliberations by the Student Conduct Board and in any subsequent internal appeal. Such a record is anticipated by the Model Student Code. It is necessary to test the recorder prior to the beginning of the Student Conduct Board Hearing to ensure that the recorder will capture the voices of all present. The tape should be retained until after all appeals under the Code have been completed, at least. *See also* Edward N. Stoner, *Reviewing Your Student Discipline Policy: A Project Worth the Investment* 14 (2000), at <http://www.nacua.org/publications/pubs/pamphlets/StudentDisciplinePolicy/pdf> (discussing important considerations to follow in making an audiotape record).

215. Throughout the Student Conduct Board Hearing, the chair should be careful to assure that each speaker is identified, even if s/he spoke earlier, so that the audio recording may be understood by a subsequent listener, such as on appeal.

216. In cases in which an advisor is present, it is important for the board chair to communicate clearly the appropriate role of the advisor in the Student Conduct Board Hearing and to respond immediately if the advisor oversteps these bounds. The courts have not created a legal right for students to have an advisor present in student discipline proceedings except in certain limited circumstances at public institutions and, even then, their role is to quietly advise their client, not to participate directly in the Student Conduct Board Hearing. *See supra* Model Code, art. IV(A)(4)(d). The Campus Security Provisions of the Student-Right-to-Know and Campus Security Act as amended do, however, require, in sexual assault cases, that the accused and the accuser be allowed the same rights to have others present during the Student Conduct Board Hearing. Rather than creating separate procedures for sexual assault cases, it is advisable to apply the same standard to all cases. This is the normal practice under the student affairs maxim that all students (including alleged victims and alleged rule violators alike) be treated with equal care, concern, fairness, and dignity.

the Student Conduct Board. If an advisor fails to act in accordance with the procedures of the Student Conduct Board, he/she will be barred from these proceedings.

I would like to remind everyone participating in this Student Conduct Board Hearing that falsification, distortion, or misrepresentation before the Student Conduct Board is a violation of the Student Code. Any person who abuses the Student Code System in this way may face disciplinary charges for that violation.

Witnesses, other than the Accused Student and the Complainant, are present in the Student Conduct Board Hearing only while offering their information.<sup>217</sup> Would all witnesses, other than the Accused Student and the Complainant, please leave the Student Conduct Board Hearing room and wait outside. You will be asked to reenter the Student Conduct Board Hearing to offer your testimony.

Before we proceed, are there any questions?

The Accused Student and the Complainant may challenge any member of the Student Conduct Board for bias if you believe that he or she cannot be fair in this Student Conduct Board Hearing.

Does the Accused Student wish to challenge any member of the Student Conduct Board for bias?

Does the Complainant wish to challenge any member of the Student Conduct Board for bias? [If so, the student should be asked to explain what might prevent the member from participating fairly in the Student Conduct Board Hearing and the chair may then recess the Student Conduct Board Hearing briefly to consider and to decide the challenge.]

The Student Conduct Board is considering charges which have been brought against [\_\_\_\_], the Accused Student, by [\_\_\_\_], the Complainant in today's Student Conduct Board Hearing.

Under the Student Code, [\_\_\_\_], the Accused Student, has been charged with the following violations of the Student Code:

*The Student Conduct Board Chair reads each of the violations of the Student Disciplinary Code which the Accused Student is alleged to have violated.*

Would the Accused Student please respond to each of the charges which I have just read indicating whether you accept responsibility for violating this provision of the Student Code?

*If the Accused Student does not accept responsibility for violating each of the provisions of the Student Code listed above, then the Student Conduct Board Hearing shall proceed.*

*If the Accused Student does accept responsibility for violating each of the provisions of the Student Code listed above, then the Student Conduct Board*

217. Witnesses other than the Accused Student and the Complainant are present in the Student Conduct Board Hearing only while providing information. This is to prevent them from being influenced by what they hear others say and is designed to preserve the confidentiality of the process. It is important to provide a location where the witnesses may wait until they are called into the Student Conduct Board Hearing. If there are two contentious "sides," two rooms may be provided. If, under an institution's process, a "victim" student is not considered to be the "Complainant," this language must be modified to allow him/her to attend the entire process because that result is contemplated by the Model Student Conduct Code.

*Hearing shall proceed with the presentation of information limited to that which should be considered in the imposition of sanctions.*

At this time, we will begin the portion of the Student Conduct Board Hearing during which information is presented for consideration in determining if the Accused Student has or has not violated the Student Code. *Witnesses may be asked to swear or affirm to tell the truth at this point if the institution wishes to follow this practice.*

The Complainant and Accused Student will be provided the opportunity to share introductory remarks which should not exceed five (5) minutes. You are not required to do so.<sup>218</sup> If you have prepared an Impact Statement<sup>219</sup> in writing or wish to make one orally, you may do so at this time.<sup>220</sup>

Are there any questions before we proceed with any introductory remarks?

Would the Complainant in this case like to make introductory remarks? If so, please proceed.

Would the Accused Student in this case like to make introductory remarks? If so, please proceed.

At this time, the Student Conduct Board will hear witnesses offer testimony for consideration in determining if the Accused Student has or has not violated the Student Code. The Student Conduct Board will begin by calling witnesses to present testimony. After the Student Conduct Board has called all the witnesses it considers appropriate, the Complainant, followed by the Accused Student, will be afforded the opportunity to call additional witnesses.<sup>221</sup>

The members of the Student Conduct Board will have the opportunity to question each witness.<sup>222</sup> Witnesses called by the Student Conduct Board may be questioned by the Complainant, followed by the Accused Student, after the Student

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218. There is no requirement that students be allowed to make "introductory remarks" and some have found them unnecessary and, possibly, redundant or confusing when compared to the students' subsequent "testimony."

219. Some courtroom proceedings contemplate a similar presentation, commonly called a "Victim Impact Statement." In an educational setting, the term "Victim" is not used. This reflects that some Accused Students consider themselves to be "Victims" because they feel they have been unjustly accused. It also reflects the educational perspective that the academic community is concerned about the impact of the events and the process upon all students equally. Thus, a more appropriate terminology is "Impact Statement" or "Student Impact Statement."

220. One practice is to reserve the presentation of Student Impact Statements unless and until a rules violation is found, in the sanctioning phase. There is no requirement to break up the process in this manner, and this Model reflects the choice to allow each student to share with the board the impact that events and the process have had upon him/her as part of the board's work to determine what happened.

221. The Complainant and the Accused Student will have advised the Student Conduct Administrator prior to the Student Conduct Board Hearing of the names of the witnesses s/he wishes to have offer information at the Student Conduct Board Hearing. This allows the Student Conduct Administrator to require these persons to attend the Student Conduct Board Hearing and for the Hearing to proceed smoothly. There is no requirement that a witness be identified as "for" one student or "for" a version of "what happened." Indeed, all community members are presumed to be doing their best to assist the community, not to act as advocates for a particular student.

222. By having the Student Conduct Board question each witness first, it is hoped that the educational nature of the Hearing will be emphasized and the potential adversarial nature will be downplayed.

Conduct Board has concluded its questioning. Witnesses called by the Complainant and Accused Student will be questioned initially by the Student Conduct Board. Following the conclusion of the Student Conduct Board's questioning, the individual calling the witness will have the opportunity to have questions asked of the witness. Following the conclusion of this questioning, the other individual will have the opportunity to have questions asked of the witness. Before a witness is excused, the chair will ask members of the Student Conduct Board and the Complainant and Accused Student if they have any final questions.

All questions by the Complainant and Accused Student of witnesses should be directed to the chair of the Student Conduct Board.<sup>223</sup>

Are there any questions before witnesses testify? [Typically, the Complainant will be asked to testify first, followed by the Accused Student, and then other witnesses.]

At this time, the Board will hear from the Complainant.

Do the members of the Student Conduct Board have any questions for this witness?

*After completion of questioning by the Student Conduct Board:* Does the Complainant wish to provide any additional information to the Board?

Does the Accused Student have any questions to be directed to the Complainant? Please remember to direct your questions to the chair of the Student Conduct Board.

At this time, the board will hear from the Accused Student.

Do the members of the Student Conduct Board have any questions for this witness?

After completion of questioning by the Student Conduct Board, does the Accused Student wish to provide any additional information to the board?

Does the Complainant have any questions to be directed to the Accused Student? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the Complainant and the Accused Student have testified, the following procedures will be followed for additional witnesses called by the Student Conduct Board.*

The next witness to be called by the Student Conduct Board is [\_\_\_\_\_].

Do the members of the Student Conduct Board have any questions for this witness?

*After the completion of the questioning by the Student Conduct Board.* Does the Complainant have any questions for this witness? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the completion of questions suggested by the Complainant.* Does the Accused Student have any questions for this witness? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the completion of questions suggested by the Accused Student.* Are there

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223. The purpose of directing cross-examination questions to the chair is twofold: to set an educational instead of adversarial tone for of the Hearing and to provide the opportunity for the chair to regulate inappropriate questions.

any final questions before this witness is excused?<sup>224</sup> Thank you very much for taking the time to participate in this Student Conduct Board Hearing of the Student Conduct Board. Your participation is appreciated. Please do not discuss with other potential witnesses the information you have shared with us today.

*This process is repeated until the Student Conduct Board has called each witness.*

Does the Complainant wish for the Board to call any additional witnesses?

*The next witness is called into the Student Conduct Board Hearing.*

Do the members of the Student Conduct Board have any questions for this witness?

*After the completion of the questioning by the Student Conduct Board.* Does the Complainant have any questions for this witness? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the completion of questions suggested by the Complainant.* Does the Accused Student have any questions for this witness? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the completion of questions suggested by the Accused Student.* Are there any final questions before this witness is excused?<sup>225</sup> Thank you very much for taking the time to participate in this Student Conduct Board Hearing of the members of the Student Conduct Board. Your participation is appreciated. Please do not discuss with other potential witnesses the information you have shared with us today.

*This process is repeated until each of these witnesses have been called.*

Does the Accused Student wish for the Board to call any additional witnesses?

*The next witness is called into the Student Conduct Board Hearing.*

Do the members of the Student Conduct Board have any questions for this witness?

*After the completion of questions by the Student Conduct Board.* Does the Accused Student have any questions for this witness? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the completion of questions suggested by the Accused Student.* Does the Complainant have any questions for this witness? Please remember to direct your questions to the chair of the Student Conduct Board.

*After the completion of questions suggested by the Complainant.* Are there any final questions before this witness is excused?<sup>226</sup> Thank you very much for taking the time to participate in this Student Conduct Board Hearing of the members of the Student Conduct Board. Your participation is appreciated.

*This process is repeated until each of these witnesses have been called.* At this point, the chair should ask the members of the Student Conduct Board if they have

224. Final questions may be proposed by board members, the Complainant, or the Accused Student.

225. Final questions may be proposed by board members, the Complainant, or the Accused Student.

226. Final questions may be proposed by board members, the Complainant or the Accused Student.

any final questions for the Complainant or the Accused Student. Please do not discuss with other potential witnesses the information you have shared with us today.

At this time, the Complainant and the Accused Student will be provided the opportunity to make concluding remarks. You are not required to do so.<sup>227</sup>

Are there any questions before we proceed?

Would the Complainant in this case like to make concluding remarks? If so, please proceed.

Would the Accused Student in this case like to make concluding remarks? If so, please proceed.

At this time, we would ask that the Complainant, Accused Student, and their advisors (*if any*) leave the Student Conduct Board Hearing room so that the members of the Student Conduct Board may determine if the Accused Student is responsible for any of the violations of the Student Code with which he/she has been charged.<sup>228</sup>

After the determination regarding responsibility is made, you will be asked to return to this room. The Student Conduct Board will announce its decision regarding responsibility. If the Accused Student is found not responsible concerning all charges, the Student Conduct Board Hearing will be adjourned. If the Accused Student is found responsible concerning any charges, the Student Conduct Board will consider the following additional information related to sanctioning.

- A. Character witnesses on behalf of the Accused Student;<sup>229</sup>
- B. Any prior violations of the Student Code by the Accused Student; and
- C. Recommendations for sanctioning from the Complainant and the Accused Student.

*Turn the tape recorder off.*<sup>230</sup>

*Once the Student Conduct Board has concluded its deliberations concerning responsibility on each alleged violation, the Complainant, and Accused Student are called back into the Student Conduct Board Hearing.*

*Turn the tape recorder on.*

This Student Conduct Board Hearing of the Student Conduct Board is now back in session. The Student Conduct Board has considered the charges against [\_\_\_\_], the Accused Student. The Student Conduct Board has evaluated all of the information shared with it and has determined which information was more credible, when the information was in conflict.

227. This is another occasion at which a student may be given the opportunity to share an Impact Statement.

228. Under these Student Conduct Board Hearing procedures, the determination of responsibility and sanctions have been separated so that the introduction of character witnesses, prior violations, and recommendations for sanctioning may be heard after the determination of responsibility is made. It is permissible to combine the determination of responsibility and sanctions into one deliberation.

229. This Model allows for the possibility of character witnesses; they are not required.

230. In the Model Student Conduct Board Hearing Script, the presentation of information during the hearing is recorded, but the deliberations of the Student Conduct Board are not.

Regarding the charge of [\_\_\_\_], the Student Conduct Board finds you [responsible] [not responsible]. *Repeat this sentence for each violation of the Student Code with which the Accused Student has been charged.*

*If the Accused Student is found not responsible of all charges, read the following statement.* This Student Conduct Board Hearing of the Student Conduct Board is now concluded.

Any further questions regarding the student code system or this decision of the Student Conduct Board should be directed to [\_\_\_\_]. Questions regarding this case should not be directed to any member of Student Conduct Board. The members of Student Conduct Board are cautioned not to discuss this matter with anyone to respect the privacy of all persons involved. Thank you very much for your participation.

*If the Accused Student is found responsible of any charge, read the following statement.* At this time, the Accused Student may ask the Board to call a reasonable number of character witnesses.

Does the Accused Student wish to do so?

Would the character witness please state your name and tell us the nature of your acquaintance with the Accused Student and comment on the student's character?

Do the members of the Student Conduct Board have any additional questions for this character witness?

Does the Accused Student wish to have any questions asked of this character witness? Please remember to direct any questions to the chair of the Student Conduct Board.

Does the Complainant wish to have any questions asked of this character witness? Please remember to direct any questions to the chair of the Student Conduct Board.

*Repeat as necessary for each witness.*

Would the Complainant like to offer any comments for consideration in the imposition of sanctions?<sup>231</sup>

Would the Accused Student like to offer any comments for consideration in the imposition of sanctions?

At this time, we would ask that the Complainant, Accused Student, and their advisors leave the Student Conduct Board Hearing room so that the members of the Student Conduct Board may determine the sanctions to be recommended in this case.

The Student Conduct Board will now request information regarding the Accused Student's prior violations of the Student Code, if any. Has the Accused Student been found responsible for violating the Student Code in any prior incidents?<sup>232</sup>

231. If the Complainant wishes to make an Impact Statement, this would be the time to do so if the choice is made to present these statements during the sanctioning phase.

232. The Student Conduct Administrator should bring this information to each Student Conduct Board Hearing, but it is recommended that information regarding the Accused Student should be shared with the Student Conduct Board only if it is determined that the Accused Student has violated the Code in the current case.

After the Student Conduct Administrator considers the Student Conduct Board's sanctioning recommendations, and determines what sanctions to impose, the Accused Student and Complainant have the opportunity to return to this room. The decision regarding sanctions will be announced. You may choose not to attend the announcement of the sanctions. Regardless, the Accused Student and Complainant (if a student) will receive written notification of the outcome of the Student Conduct Board Hearing.<sup>233</sup>

*Turn the tape recorder off.*

*Once the Student Conduct Board has concluded its deliberations the Accused*

233. For institutions at which all matters involving student versus student conduct are considered part of the educational records of each student, the same written notification should be given to each student. See *supra* Model Code, art. IV(B)(3)(b) and art. IV(B)(5). Complainants who are not students but need to know the result to do their jobs as institutional employees (e.g., security or a professor in a plagiarism case) may also be given the results, consistent with FERPA.

It seems an appropriate choice to consider records of the process initiated by a student to address an experience that occurred during his/her educational experience (e.g., a rules violation as to which he/she was the "victim") as equally that student's educational records as they are of the accused rules violator's. If one takes this approach, the "victim" student is entitled to see his/her own records under FERPA. Some schools, probably without considering the point that such records are surely records pertaining to the impacted student, define such records as "only" those of the Accused Students. This has led to absurd results of victims not being told the results of their own processes—and of congressional responses to "correct" this misidentification of whose record it is, by the institution. Thus, for institutions who choose to define a record of the process used by an impacted student as being *not* part of his/her educational records, Congress has nevertheless provided FERPA exceptions in extreme cases. It remains inexplicable, however, why an institution would define the process of records of a non-violent rules violation (e.g., theft of a TV from a residence hall room) to be *not* the record of the impacted student (and, thus, to refuse to tell the student whether he would get his TV back). Here are the Congressional responses.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act requires that the victim of a sexual assault be informed of the final outcome of any campus disciplinary proceeding against the alleged attacker in the matter of the sexual assault. 20 U.S.C. § 1092(f)(8)(B)(iv)(II) (2000). FERPA allows institutions to share the outcome of a disciplinary proceeding with the alleged victim of a "crime of violence." 20 U.S.C. § 1232g(b)(6)(A) (2000). In 1998, FERPA was further amended to allow institutions to release to the public the final results of a campus disciplinary proceeding alleging a "crime of violence" when the Accused Student is found responsible, and to release information to parents of a student under the age of 21 when the institution determines that the student violated a campus rule or law governing the use of alcohol or drugs. *Id.* § 1232g(b)(6)(B) (2000). Institutions should carefully examine their policies to insure compliance with these provisions, to consider that records of a hearing's results are education records of a "victim" student, and to consider whether to release information to the public or to parents.

In a decision dated July 16, 2004, the U.S. Department of Education ruled that Georgetown University had violated the Campus Security Act by requiring that victims sign an agreement promising not to re-release the final results of the disciplinary proceeding before the university would make the required notification. See Letter from M. Geneva Coombs, Director, Case Management Teams—Northeast, U.S. Dept. of Educ. to Dr. John J. DeGioia, President, Georgetown University (July 16, 2004) available at <http://www.securityoncampus.org/reporters/releases/degioia071604.pdf>.

At the Pennsylvania State University, the "victim" has the right to "hear" the outcome of the disciplinary process even if the "victim" is not a student. PA. STATE UNIV. DIV. OF STUDENT AFFAIRS, *supra* note 178.

*Student and Complainant are called back into the Student Conduct Board Hearing.*

*Turn the tape recorder on.*

This Student Conduct Board Hearing of the Student Conduct Board is now back in session. The following sanction(s) will be imposed in this case:<sup>234</sup>

*Read each of the sanctions.*

This decision may be appealed within five (5) working days of receipt of written notification of the decision in this case. Appeals should be made in writing and delivered to [\_\_\_\_\_]. Decisions of the Student Conduct Board and/or the Student Conduct Administrator may be appealed on the following grounds only:

- A. The original Student Conduct Board Hearing was not conducted fairly in light of the charges and information presented, and not in conformity with prescribed procedures giving the Complainant a reasonable opportunity to prepare and to present information that the Student Code was violated, and giving the Accused Student a reasonable opportunity to prepare and to present a rebuttal of those allegations.
- B. The decision reached in this case was not based on substantial information.
- C. The sanctions were not appropriate for the violation of the Student Code which the Accused Student was found to have committed.
- D. New information, sufficient to alter a decision, is now available which was not available to the person appealing at the time of the original Student Conduct Board Hearing.

For more information, please refer to the Student Code which is published in the [\_\_\_\_\_].

Are there any final questions at this time?

Any further questions regarding the student code system or this decision of the Student Conduct Board should be directed to [\_\_\_\_\_], the Student Conduct Administrator. Questions regarding this case should not be directed to any member of Student Conduct Board. The members of Student Conduct Board are cautioned not to discuss this matter with anyone, to respect the privacy of all persons involved.

This Student Conduct Board Hearing of the Student Conduct Board is now concluded. Thank you very much for your participation.

*Turn tape recorder off.*

#### END OF STUDENT CONDUCT BOARD HEARING SCRIPT

The written record of the process need not include a lengthy “opinion” like judges sometimes issue in certain courtroom proceedings.<sup>235</sup> On the other hand, it

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234. If the Student Conduct Administrator needs additional time to consider which sanction(s) to impose, the Accused Student and Complainant should be advised as to when and how they will be told about the sanctions.

235. *Jaksa v. Univ. of Mich.*, 597 F. Supp. 1245, 1253 (E.D. Mich. 1984) (upholding one semester suspension despite being told only that he was found in violation “as a result of the case presented by Professor Rothman,” and finding no requirement for a more detailed explanation), *aff’d per curiam*, 787 F.2d 590 (6th Cir. 1986); *Herman v. Univ. of S.C.*, 341 F. Supp. 226, 232 (D.S.C. 1971), *aff’d*, 457 F.2d 902 (4th Cir. 1972) (finding that the university’s procedures adequately protected student’s interests). “There is no requirement in law or reason that suggests

is advisable to provide at least a little more information than the “responsible/not responsible” conclusion given by courtroom juries. The board could state, “We carefully considered the testimony of all persons who provided information to the board and we considered all documents we received. We evaluated the credibility of each witness and the relevance and importance of all information we received. We resolved conflicts in the information we received in this manner.” Use of an explanation, like this, will enable a subsequent reviewer—whether an internal appeal or a court—to respect the factual determinations made by the board.<sup>236</sup>

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or demands the Board to issue written findings of fact or conclusions of law similar to those required by Rule 52 of the Federal Rules of Civil Procedure.” *Id.*

236. See, e.g., *Schaer v. Brandeis Univ.*, 735 N.E. 2d 373, 379 n.9 (Mass. 2000) (“The report, although short, reflects a judgment by the board that the complainant and the corroborating witnesses were credited; Schaer and his witnesses were not credited.”); *Stoner & Martineau*, *supra* note 39, at 313 (recommending, if possible, this type of additional statement: “On disputed issues of credibility, we believed student X rather than student Y.”).

