THE STUDENT AND COLLEGIATE HEARINGS: A REVIEW OF CURRENT COURT DECISIONS AND AN OVERVIEW OF BALL STATE UNIVERSITY'S HEARING PROCESSES

HONORS THESIS
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STUDENT LEGAL RIGHTS IN COLLEGIATE HEARINGS

From the time an individual watches his first "cops-and-robbers" show on television, to his civics class in high school, to his political science classes in college, he hears of nothing but "Miranda rights," due process, "pleading the Fifth," and other legalistic catchphrases. The individual is constantly being told of his legal rights in criminal and civil proceedings. Our society provides massive protection for the individual's rights against the powers of government. The individual comes to take these safeguards for granted, and assumes that these safeguards and rights will follow wherever in the United States he goes and whatever he does. However it seems that, once an individual assumes the role of student in a college or university, many of the rights he has taken for granted no longer pertain to any disciplinary or academic hearing in which the student is involved, except in the broadest sense.

It comes as a shock to many students that such rights or safeguards as cross-examination of witnesses, protection from self-incrimination, or even right to counsel do not have to be given to those students called before a disciplinary or academic hearing panel. In fact, nothing beyond a minimum of certain standards set forth by the courts has to be given the student facing a collegiate hearing. The purpose of this paper is to discover those rights that students do have, explore the reasons why other "traditional" rights were not given to students, and ascertain how all of this pertains to Ball State University.
The entire discussion concerning student legal rights centers around how the courts decide to interpret the Fourteenth Amendment to the Constitution. The pertinent section of the Fourteenth Amendment reads:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.¹

The essential question concerning the Fourteenth Amendment then becomes, "What is due process?"

D. Parker Young (who seems to be the leading scholar on student legal rights) notes that the courts do not define due process, "but rather describe it as the gradual process of 'judicial inclusion and exclusion' on a case by case basis."² Thus, due process becomes an ever-evolving group of guidelines that bind authority as to how they may act. Due process is divided into two parts—procedural and substantive. "Procedural due process refers to the procedures and methods used in implementing and enforcing laws and rules."³ Substantive due process questions whether the "purpose of the law or regulation is fair, reasonable, and just."⁴ The courts have determined that colleges only have to, as a rule, meet the minimum of procedural requirements. These requirements are based upon the rulings of a series of court cases—Dixon vs. Alabama Board of Education, Scoggin vs. Lincoln University, and Estaban vs. Central Missouri State College.⁵ The courts have stated these guidelines apply in all disciplinary cases which could result in suspension or expulsion.

Three minimal requirements apply in cases of severe discipline, growing out of fundamental conceptions of fairness implicit in procedural due process. First, the student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based. Second, the student should be given the opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the
student's position, explanations, and evidence. The third requirement is that no disciplinary action be taken on grounds which are not supported by any substantial evidence.\(^6\)

While the above three guidelines are all that is currently demanded by the courts, it has been suggested that these guidelines be expanded to include the following points.

1. All rules, regulations, and appropriate standards of conduct, both scholastic and behavioral, should be stated in the college catalog and student handbook, if one exists, and should be made available at the time of his application for admission or ... certainly no later than his official matriculation.

2. If the student chooses to waive the hearing and accept the punishment or penalty without contesting it, he should sign a written waiver which states that he is fully aware of all his rights and does indeed waive such.

3. The student should be given a written report of the result and findings of the hearing.

4. If the hearing is not before the ultimate administrative authority of the institution, then an appeal procedure before that body should be made available.\(^7\)

The hearing required for university disciplinary proceedings should not be confused with the adversary proceedings used in the courtroom. The Dixon decision, which serves as a basis for defining how a school may act, denies the extension of many "rights" found in criminal cases. The Court has stated:

The nature of the hearing should vary depending upon the circumstances of the particular case. ... By its nature, a charge of misconduct, as opposed to a failure to the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the 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. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interest of the college.\(^8\)
As can be noted from the passage on the previous page, the courts are very reluctant to interfere with the way colleges and universities are run—particularly in the areas of discipline, grade appeal, or academic dishonesty. In the Barker Case the court expressed what seems to be the majority feeling on the part of the courts:

... the judiciary must exercise restraint in the questioning the wisdom of specific rules where the matter of their application since such matters are ordinarily the prerogative of school administrators rather than the Courts.9

The court in this instance was speaking specifically of the student code of conduct at Miami University,10 but it seems to be applicable to the feelings of the court on university disciplinary hearings and the like.

One of the traditional rights of individuals in judiciary proceedings is the right to counsel, and in those cases that have come before the courts, it seems to be the greatest point of contention. The reason for this dispute concerning counsel, is that the courts have repeatedly ruled that except in one special circumstance the student coming before a hearing board is not automatic. Counsel in this case does not necessarily refer to lawyers, but also includes any individual who would represent or assist the student before the hearing panel. (It should be noted, however, that most universities while not permitting outside legal counsel to accompany the student to the hearing do permit the student to bring along another member of the university—a fellow student, an administrative member, or a faculty member.) The courts in Barker vs. Hardway, Haynes vs. Dallas County Junior College District, (both dealing with disciplinary hearings) and Garshman vs. The Pennsylvania State University (academic dishonesty hearing) have stated that the right to counsel is not mandatory in university hearings.11 The court commented in the Barker vs. Hardway that:
While it is true that recent Supreme Court decisions have expanded the Sixth Amendment's guarantee of right to counsel in criminal and semi-criminal cases, they have no application to matters purely of a civil nature. There has been no decision by the Supreme Court or any other court expressly extending the right of counsel to a student in a school disciplinary hearing.\textsuperscript{12} 

The court again expressed its reluctance to enter the realm of the university, and stated how the court viewed decisions regarding academics in the Garishman Case.

Judicial reluctance to force the inclusion of a non-university individual into this delicate decision making process. . . . The Court is of the view that a determination as to the academic honesty of a student is analogous to the determination of professional competency of a professor is a matter peculiarly within the discretion of a college administration.\textsuperscript{13} 

As was stated earlier the courts have recognized one exception to the rulings concerning counsel—the exception occurs when the university uses legal counsel during the hearing itself. French vs. Bashful was the case which created this decision, and it is noteworthy to review some of the facts of the case.

Students at Southern University in New Orleans participated in the forcible occupation of offices and sections of the administration buildings of the University. The University allowed the prosecution of the students to be conducted by a senior law student who later became a member of the bar. The students were not permitted to be represented by their retained attorneys and therefore claimed that they were denied their constitutional rights.

The court ruled in favor of the students seemingly due to the question of substantive due process—is it fair for the university to use legal counsel, and deny the same privilege to the students?

The students in this case were at a great disadvantage by the virtue of the University selecting one who was well versed in legal proceedings to prosecute the cases. "In spite of the valuable assistance to a defendant in a university disciplinary proceeding, it may well be that in many cases the student will not be at such a disadvantage so as to require counsel. But here there is more reason to require counsel than in most cases."\textsuperscript{14}
From the case on the previous page an informal "rule of thumb" has been established for campus disciplinary hearings—whatever the university grants for its own use (outside legal counsel and the like) must also be granted to the students who come before the hearing board.\textsuperscript{15} If this "equal treatment" is not afforded the students who come before hearing boards, then the courts could consider this a violation of substantive due process.

The right to the cross-examination of witnesses is secured in criminal proceedings by the Sixth Amendment to the Constitution. The courts though have ruled that, since neither collegiate disciplinary hearings nor academic dishonesty hearings are to be considered criminal proceedings, there is no absolute right to confront and cross-examination of witnesses.\textsuperscript{16} The same rulings apply to the right not to incriminate oneself and the question of double jeopardy—whether one can be tried for the same offense twice. Both rights—the right against self-incrimination and against double jeopardy—are mentioned in the Fifth Amendment to the Constitution, but again the courts have decided that since collegiate hearings are not to be considered criminal proceedings, then these rights are not applicable. The court has ruled that testimony given in a collegiate hearing might be excluded under the double jeopardy rule.\textsuperscript{17}

It is noteworthy at this time to note several cases which have further defined university hearings and the position of due process in such hearings.

\textbf{Wright vs. Texas Southern University}: the U.S. Court of Appeals held that due process was not denied, in view of a university regulation requiring students to notify of any change of address if notices were sent by certified mail but were returned undelivered.\textsuperscript{18}

\textbf{Still vs. Pennsylvania State University}: the U.S. Court of Appeals ruled that the Board of Trustees had the right to appoint "a distinguished
group of private citizens" as a hearing board, and did not thereby violate the constitutional rights of students.\(^\text{19}\)

Winnick vs. Manning: a University of Connecticut case, the U.S. Court of Appeals ruled that "the mere fact that the decision maker in a disciplinary hearing is also an administrative officer of the University does not in itself violate the dictates of due process."\(^\text{20}\)

Blayton vs. State University of New York: the U.S. Court of Appeals held that students are not denied due process if the dean—who had asked protesting students to identify themselves and to leave the scene of the protest—functions as a "non-voting coordinator" at the subsequent hearing. The court further held that in this case the students were not entitled to as a matter of right to confront and cross-examine their accusers, though it did leave the question open regarding other circumstances, and stated that where suspension of a student turns on questions of credibility "cross-examination of witnesses might be essential to a fair hearing."\(^\text{21}\)

As one may perceive, the courts have been firmly supportive of the powers of the university. It is worth noting however, that in the Blayton Case in the area of cross-examination of witnesses, while not by any means granting cross-examination as a right, it may be considered a "right" in those cases where the question of credibility is considered crucial for a fair hearing.

While it may be claimed that procedural rights for students in public institutions, it may be stated with some confidence that due process safeguards are even fewer in private institutions. In Kwiatowski vs. Ithaca College, the Supreme Court affirmed a number of due process rights that were established for public universities as applicable to private colleges. However, private institutions are highly autonomous since the powers of state control are strictly limited. The relationship between a student and a private school is considered contractual in nature, and as such due process is not as strict or as binding, unless a state agency is involved.\(^\text{22}\) Judicial relief may only be granted from a private college's disciplinary decision only if the decision was found to be patently illegal or arbitrary.\(^\text{23}\)
In one area the courts have found for the students—the area of the university code of conduct. While colleges are not required to have a code of conduct as specific as criminal statutes, "misconduct" as a standard of discipline has been found to be too vague to be used.

Students at the University of Wisconsin engaged in a "demonstration" and were charged with intentionally denying others the right to interview with Dow Chemical Corporation. Several were expelled for "misconduct." The court ruled that "misconduct" as a standard for disciplinary action by a university violates the United States Constitution because of vagueness. The court did not dispute a university's right or power to protect itself against disruptive students, but pointed out "expulsion and prolonged suspension may not be imposed on the basis of allegations of 'misconduct' without reference to any preexisting rule which supplies an adequate guide."24

Though it seems at this time that the courts have decided the minimum necessary standards of procedural due process, there is a court case underway which could have possible ramifications on disciplinary hearings. Currently, the University of North Carolina is suing the Department of Health, Education, and Welfare to prevent the cutting off of at least twenty million dollars in federal aid. H.E.W. was going to cut off its aid because the university refused to accept H.E.W.'s demands concerning completely desegregating all of the University of North Carolina's campuses.25

Though the case deals with desegregation, the real question is the amount of control the federal government is and will be able to exercise over higher education. If the courts uphold the government then federal control will be strengthened. And it is possible, not necessarily probable, that new federal regulations could be handed down concerning increasing the procedural due process requirements of universities. It may be that going from increased federal influence or control to increasing procedural due process seems a rather tenuous extrapolation; but, looking at the...
past history of the government's becoming involved in protecting citizen-consumers, it is believed that members of Congress or the Executive Branch may see increased procedural due process as a relevant means of protecting the students in their role as citizen-consumers. Also, with the great increase in federal aid, the question becomes whether or not the use of federal funds for higher education would be considered by the courts as justification for federal participation in a university's decision-making processes. And, therefore, the tradition of limited due process for students in hearings, in fact the tradition of university autonomy may be in question in the years to come.
AN OVERVIEW OF BALL STATE DISCIPLINARY REGULATIONS

One should, whenever possible, go from general statements to specific examples. Therefore, the remaining portion of this paper shall review the standards by which Ball State judges the conduct of its students; it will also examine the policies of the Housing Office in relation to student rights and discipline; and finally review the running of the University Board of Review. Also included are the author's recommendation for changes in the last two areas.

Ball State as an institution has made two key statements as to the rights and responsibilities of students in the "Joint Statement of the State Universities of Indiana," and the "Bill of Rights and Responsibilities."26 The "Joint Statement" includes mention of those acts of the Indiana State Legislature which gives the trustees of the four state universities the "duty and authority . . . to regulate conduct upon their respective universities."27 This statement seems to be the closest to a general guide of unacceptable conduct that Ball State makes available to students.

A. Unlawful possession of or use of alcoholic beverages or illegal drugs;
B. Action which threatens or endangers the safety of others;
C. Action which destroys or damages property;
D. Action which disrupts by any means the rights of others to meet and to exchange ideas;
E. Actions which disrupt activities of the institution;
F. Falsifying or entering misrepresentations upon university records;
G. Action which constitutes academic dishonesty, such as cheating, plagiarism, and the like;
H. The possession of weapons or various dangerous substances;
I. Theft and other action affecting individuals that endanger the health, safety, and welfare of the university community; and
J. A wide range of offenses hampering orderly group life in residence halls, in the classroom, and on property owned, used, or occupied by the university.28

As one can tell, the "Joint Statement" is simultaneously precise and broadly worded to give Ball State and its sister universities sufficient latitude to govern their schools as they see fit, yet not so vague as to be meaningless.

The "Bill of Rights and Responsibilities" is Ball State's statement of the rights of all its members—students, faculty, and administrators—and of the institution. It describes the individual's relation to civil law, academic freedom, individual's relation to the university, Ball State's judicial process, and a statement on academic freedom and tenure.29

The statement in its preamble mentions four key rights:

1. The fundamental rights of others as citizens
2. The rights of others based upon the nature of the educational process
3. The rights of the institution
4. The rights of members to fair and equitable procedures for determining when and upon whom penalties for violation of campus regulations should be imposed.30

In that last statement, Ball State has guaranteed that it will provide at the minimum all the due process rights as suggested by the courts.

In the section stating the principles by which Ball State's judicial process operates, it is quite specific in noting what rights each individual has going through the judicial process. It states that:

The procedures shall be structured so as to facilitate a reliable determination of the truth or falsity of charges and to meet the fundamental requirements of fairness (i.e. right to notice of charge in advance, right to a hearing, right to examine evidence, right to prepare a defense, and right to counsel) and to be an effective instrument for the maintenance of order.31

When the "Joint Statement of the State Universities of Indiana" and the "Bill of Rights and Responsibilities" are considered together it becomes quite evident that Ball State University has done a very good job in
informing and describing broadly the due process rights it grants and the expectations of conduct it has for the members of the Ball State community.

**Housing Disciplinary Procedures**

This concern for due process is carried down other levels of Ball State—in particular the Housing Office. The Housing Office in great detail has outlined its due process procedures in its "Disciplinary Procedures in Residence Halls."³² A great deal of emphasis is placed by the Housing Office, but it remains informal only to the extent that it becomes apparent that informal warnings or suggestions are not effective.

... each student will be treated as an individual, with formal disciplinary procedures instituted only at such time that it becomes apparent that informal procedures are not producing desired changes in behavior nor increasing the ability to live with others in a group situation.

At such time as formal procedures are initiated, due process appropriate to the situation will be followed. Fairness to the individual rather than a rigid procedure will be emphasized. It is necessary that anecdotal records be kept of contacts, and important that students be aware of these contacts.

Throughout the entire section on disciplinary procedures in residence halls there is a repeated emphasis on notification, discussion of charges, and appeal. In fact there appears to be nothing at all wrong with residence hall disciplinary procedures. In only one area could there be improvement, and that is in providing information on due process procedures to the Ball State community before a student goes through the process. The reason for this information at this time is that in case a director or student staff does not give a student their full rights under the due process procedures used at Ball State, the student will be informed of what he or she is missing. Also, stories of students being put on residence hall probation without a meeting with the director or any chance
of appeal have reached the Student Association and the campus at large. While noting the questionable validity of such stories, even the presence of such stories brings the Housing Office, its programs, and Ball State into question. Therefore, this writer recommends that at least a summary of the section on disciplinary procedures in residence halls be made available to all students upon matriculation, and that it be placed in the Ball State University Student Guide.

University Review Board

The next area of concern in this paper deals with the University Review Board. The Board, a student-faculty/administrator committee, is in theory an advisory body to the President of the University, delegated the responsibility of providing advisory opinions on grade appeals and disciplinary actions. In practice, it is the final decision-making body on grade appeals and disciplinary actions due to the fact that the President has always supported the decision of the Board, and it is doubtful whether that will change.

The due process procedures of the Review Board, like the Housing Office procedures, are fairly elaborate in that the procedures spell out how the Review Board is to act when hearing a case. However, the language is quite vague and the entire document is awkwardly worded. Section II J of the Review Board procedures shows this vagueness:

J. The findings and recommendations of the Review Board can determine if:
1. The act itself or the results of the act are sufficient punishment;
2. The student needs to be reprimanded;
3. The student needs to be placed on probation for a period of time. The terms of the probation and length shall be determined by the Hearing Committee;
4. Probationary status and further acts will cause separation;
5. Separation is necessary for the student; consideration could be given to the student completing educational objectives at Ball State University at a later date;
6. Referral will be made to appropriate University services to assist the student in attaining personal or social growth.

Throughout this writer's tenure on the Review Board, the Board members showed consistently that they did not understand this section. In particular, they were unsure of what probation is, especially in light of Housing Office Probation and Residence Hall Probation. The Board finally created "University Probation," which stated that if an individual who was placed on University Probation reappeared before the Board, the Board would consider immediate separation from the University as its first course of action. However, "University Probation" is a creation of the current Board and may not be maintained in the future. Therefore, it is suggested that a clear definition of probation by the Board be determined and that this definition be placed in the catalogue.

There is also a major structural problem with the Board in that the procedures describing the function of the Board state:

E. To conduct a hearing for a student disciplinary case, a hearing committee composed of six members of the Review Board, at least three of whom must be students, will be designated by the representative of the Dean of Students in consultation with the Vice-President of the Student Association. Two-thirds of the Hearing Committee shall constitute a quorum, of whom two must be students and two must be faculty.

Yet the Board refuses to hear a case unless a quorum of the entire Board is present. Under Section I, it is stated that membership of the Board "shall consist of seven students and seven university faculty members and/or administrators. Two-thirds of the total membership shall constitute a quorum." Due to the current enormous backlog of cases before the Board, it might be advisable to use the Hearing Committee to double the speed of the hearings; but if the Board prefers to have hearings done by the entire Board, then Section I E should be changed.
The question of counsel is probably the most pressing question of due process facing the Board. At present the only counsel permitted is a member of the Ball State community or the parents of the student involved. It is this writer's belief that this system should continue as long as Ball State refrains from using an adversary approach. The Board does not permit cross-examination of witnesses; in fact usually there are no witnesses called, as the Board usually works from written statements. Without an adversary approach to the hearings the use of a lawyer would be meaningless and it serves only to antagonize the members of the Board.

The question of witnesses is another area of concern for the Board to decide. At present it decides the question of whether or not someone may bring witnesses to support a point of view on a case by case basis. However, it should determine a set policy, again in writing and available for all to read, so that those called before the Board may best plan their case.

The final major area of concern is how the Board deals with informing the student involved of all of its charges, or as the Board calls it, concerns. At present the Board sends a letter to the individual involved listing all the concerns the Board shall consider during the hearing. During the hearing, each of the Board members has a copy of the student's file, while the student only has the letter listing the concerns. It is recommended that the student be given either A) a copy of his/her file to use to prepare his/her case and for use during his/her hearing, or B) that the student be able to view his/her file in the Office of Student Affairs and make notes from it, but not be given a copy. It would be preferrable for the student to be given a copy, but either method is acceptable. The reasoning behind this recommendation is that since some
of these concerns may date back to his/her freshman year, the student may not recall all portions of the incident involved. Also the student may not be aware of all the statements made concerning his behavior that may appear in his file. Therefore, it is believed to be essential that the student receive or use a copy of his/her file.

One small additional area of concern remains, that of jurisdiction. At present the Board is empowered to hear disciplinary cases from all areas of the University. However, the question of a student appealing being fired from his/her job on campus has arisen. The question of whether this falls under disciplinary appeals is questionable. However, this writer believes that due to the wide range of members of the Board—students, faculty, and administrators—that the Board is best qualified to hear appeals on any decision affecting a student's relationship to the University. Therefore, it is recommended that the jurisdiction of the Board be expanded to deal with appeals of any decision affecting the relationship of the student to the University.

Disciplinary Considerations in Discrimination Cases

Ball State University through the Office of Equal Opportunity and Affirmative Action has created a policy for student or faculty grievances concerning discrimination. While this does not directly pertain to disciplinary problems, it is possible that some students may perceive that disciplinary action taken toward them are based upon their race, color, religion or some other consideration which has no standing in dealing with disciplinary problems.

After reviewing both the policy and procedures for dealing with discrimination grievances, this writer believes that both are clear, to the point, and extremely fair to all concerned.
The grievance procedures provide ample opportunity for witnesses, presentations by both sides, and rebuttal (if necessary). The Grievance Appeals Board has both student and staff representation in order to insure that all major groups on campus are represented.

If a case concerning discipline does go to the Grievance Appeals Board, there is no reason that it could go to the University Review Board for consideration or action at a later time, thus insuring complete due process for the student(s) involved.

Summary and Conclusion

Overall, Ball State deals quite appropriately with its students in disciplinary hearings. It fully follows the court guidelines, outlined in the first part of this paper. If there is an inadequacy within the system, it is that students should be more fully informed regarding the disciplinary process. This shortcoming is relatively minor, and Ball State University can assure its students that it does try to insure protection of their rights.
ENDNOTES


3Ibid., p. 99.


5College and University Reports (Handout available in Student Association Office), p. 17751.

6Ibid., p. 17752.

7D. Parker Young, Legal Aspects of Student Dissent in Higher Education (Handout available in Student Association Office), p. 27.

8D. Parker Young, "Due Process Studies and Guidelines for Student Discipline," (Available in Student Association Office).


10Mimeographed material available in Student Association Office noted as "Barker Case."


12Ibid., p. 14-1.


15Discussion with Dean Collier.

16Young, Legal Aspects of Student Dissent in Higher Education, p. 27.

18 Ibid., pp. 17-18.
19 Ibid., p. 18.
20 Ibid., p. 18.
21 Ibid., p. 18.
22 Ibid., p. 19.
23 Ibid., p. 19.
27 Ibid., p. 38.
28 Ibid., p. 38.
29 Ibid., pp. 39-41.
30 Ibid., p. 39.
31 Ibid., p. 41.
33 Ball State University Undergraduate Catalog, 1978-80, p. 7.
34 Ibid., p. 6.
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