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## PROCEDURE FOR PUPILS: WHAT CONSTITUTES DUE PROCESS IN A UNIVERSITY DISCIPLINARY HEARING?

### I. INTRODUCTION

Imagine that you are a student in a public university, college, or graduate school;<sup>1</sup> you've likely spent thousands, if not tens of thousands, of dollars in pursuit of your education.<sup>2</sup> You have also invested many years in college. You know that your future happiness, income, and quality of life are contingent upon your personal and academic reputation in that setting as well as earning your degree.<sup>3</sup> One day, you are called into the dean's office or, perhaps, some other university official's office. You are informed that you have been accused of committing an act that warrants a disciplinary hearing to determine whether you will receive a significant suspension or even expulsion.<sup>4</sup>

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1. See, e.g., *Dixon v. Ala. Bd. of Educ.*, 294 F.2d 150, 157-58 (5th Cir. 1961) (identifying the differences between public and private universities with respect to the applicability of constitutional due process claims alleging due process deprivations). The *Dixon* court noted one may have a constitutional due process claim against a public university but not against a private university because the court found that there was a "well-settled rule that the relations between a student and a private university are a matter of contract." *Id.* at 157.

2. See COLLEGE BOARD, TRENDS IN HIGHER EDUCATION SERIES: TRENDS IN COLLEGE PRICING 5 (2005), <http://collegeboard.com/press/releases/48884.html> (follow "Trends in College Pricing 2005 (.pdf1/MB)" hyperlink) ("Average published tuition and fees in 2005-06 are \$5,491 at public four-year colleges and universities . . . and \$21,235 at private nonprofit four-year colleges and universities."). On average, over the last decade, the tuition and fees at public universities have risen at the rate of 6.9 percent per year or 4.4 percent per year after inflation. *Id.* at 10.

3. *Dixon*, 294 F.2d at 157-58. The *Dixon* court stated that no argument was required to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs [the students facing expulsion] would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

*Id.* at 157. See also Walter Saurack, Note, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings*, 21 J.C. & U.L 785, 785-86 (1995) (providing that students involved in disciplinary hearings, when compared to those who are not, may be rejected in admissions to other universities, receive lower pay upon earning a degree and gaining employment, and suffer serious emotional distress).

4. See *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (explaining that procedural due process measures become a greater concern in university disciplinary hearings when there is the potential for a significant suspension or expulsion); see generally *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988) (stating that there is a need for more stringent procedural protections where the accused student faces severe punishment). See also *Johnson v. Collins*, 233 F. Supp. 2d 241, 248 (N.D. Me. 2002) (reaffirming the proposition that more extended suspensions and expulsions, perhaps a period of ten days or more, invoke more stringent due process protections, but that shorter suspensions, those under ten days, still invoke some amount of due process protection).

You have no idea what to expect in a university disciplinary hearing, but at the same time, you are fully aware of the fact that your reputation and future rest upon the outcome of this hearing.<sup>5</sup> You probably have many questions about your upcoming hearing. How much time do I have to prepare for my hearing?<sup>6</sup> What am I being accused of?<sup>7</sup> What kind of evidence is there against me?<sup>8</sup> Can I call a lawyer to represent or assist me at the hearing?<sup>9</sup> What can I say on my own behalf?<sup>10</sup> Can I question the witnesses who will speak against me at the hearing?<sup>11</sup> Who will decide whether I actually performed the alleged bad act?<sup>12</sup> How much does the university have to prove to suspend or expel me?<sup>13</sup> With the growing importance of education in our society and the great number of students who attend public universities, colleges, or graduate schools, these legal questions are important to the individual student, the courts, and society at large.<sup>14</sup>

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5. See Saurack, *supra* note 3, at 821. Although university students may be literate and educated adults, they are often “inexperienced” in understanding and applying even basic procedural rules that govern disciplinary hearings. *Id.* The lack of experience, coupled with emotions such as fear and anger, creates an “inability to articulate their stor[ies],” and, therefore, students find it difficult to wage an adequate defense. *Id.*

6. See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 661 (11th Cir. 1987) (describing the controversy and ambiguity that exist with respect to the amount of time that the university or college must provide to the student in preparation for a disciplinary hearing).

7. See, e.g., *id.* at 662 (providing the basic content that must be present in the notice of the disciplinary hearing to the student). The content, at a minimum, should explain the accusation or charge against the student. *Dixon*, 294 F.2d at 157.

8. See, e.g., *Ctr. for Participant Educ. v. Marshall*, 337 F. Supp. 126, 136 (N.D. Fla. 1972) (explaining the proposition that a student should be afforded some information concerning the names of the witnesses who will testify and a summary of the testimony each will present).

9. See, e.g., *Gabrilowitz v. Newman*, 582 F.2d 100, 100-07 (1st Cir. 1978) (analyzing when, if ever, a student in a college or university hearing should be afforded the right to an attorney).

10. See, e.g., *Keene v. Rogers*, 316 F. Supp. 217, 221 (N.D. Me. 1970) (standing for the proposition that fairness in a disciplinary hearing requires a student be afforded the opportunity to speak on his own behalf).

11. See, e.g., *id.* (finding that the right to confront and cross-examine witnesses was instrumental in achieving fairness in a university disciplinary hearing).

12. See, e.g., *Nash*, 812 F.2d at 665 (stating that sufficient process would also require an impartial fact finder to determine the guilt of the student at the university disciplinary hearing). While there is no legal disagreement that an impartial fact finder is necessary for due process, controversy frequently arises over who may serve as that impartial fact finder. See, e.g., Saurack, *supra* note 3, at 817 (arguing that “[w]hen a university melds together the roles of prosecutor, enforcer, and adjudicator, the functions of each role no longer check one another.”).

13. See, e.g., *Keene*, 316 F. Supp. at 221 (discussing the requirement that a student be suspended or expelled only “on the basis of substantial evidence” presented during the disciplinary hearing). As discussed in the limitations on scope, see *infra* note 18, this note will not examine the quantum of evidence (e.g., probable cause, preponderance, clear and convincing, or beyond a reasonable doubt) required to achieve due process in a university disciplinary hearing.

14. See *Johnson v. Collins*, 233 F. Supp. 241, 251 (N.D. Me. 2000) (standing for the proposition that education is of monumental importance to both the individual student, society, and the government). See also NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., *Historical Summary of Faculty, Students, Degrees, and Finances in Degree-Granting Institutions:*

The purpose of this note is to examine the state of existing due process law in public universities, colleges, and graduate institutions. This note also discusses the procedures that public universities must provide to students during the course of a disciplinary hearing in order to achieve fundamental fairness or due process. Part II discusses the development of Fourteenth Amendment due process law in university settings.<sup>15</sup> Parts III through VII discuss the application of that law and what procedures, if any, universities should or must provide to students who face these hearings under certain factual circumstances.<sup>16</sup> Part VIII of this note will present several personal conclusions about the state of due process law in university disciplinary hearings.

This note will be limited to discussion and examination of only procedural due process issues<sup>17</sup> that may arise in this setting.<sup>18</sup> Substantive

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Selected Years, 1869-70 through 2003-04, <http://nces.ed.gov/programs/d97/d97t171.asp> (last visited May 22, 2006) (providing, among other information, the staggering increase in number of post-secondary institutions from 1869 to 2004). In 1869, there were only 563 post-secondary institutions in existence in the United States. *Id.* By 2004, the number of institutions skyrocketed to 4,236. *Id.* In the 1869-70 academic year, only 9,371 students earned bachelor's degrees. *Id.* By the 2003-04 academic year, 1,399,542 students earned bachelor's degrees. *Id.* These increases evidence the growing importance of post-secondary education in America.

15. U.S. CONST. amend. XIV, § 1.

16. *See, e.g.,* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 636-37 (6th Cir. 2005) (providing that the Due Process Clause “sets only the floor or lowest level of procedures acceptable” but also admitting the university’s rules were “far from ideal and certainly could have been better”). In essence, what a university *should* ideally provide to students faced with disciplinary hearings is not necessarily what it *must* provide according to the Constitution. *Id.*

17. *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (explaining that procedural due process, under the Fourteenth Amendment of the United States Constitution, refers to the right to fundamentally fair procedures before the government can deprive a citizen of a liberty or property interest). A life, liberty, or property interest must be implicated to invoke the due process protections of the Fourteenth Amendment; liberty and property interests are implicated in disciplinary hearings that threaten to suspend or expel a student at a post-secondary institution. *See, e.g.,* Saurack, *supra* note 3, at 786-88 (citing Goss v. Lopez, 419 U.S. 565, 572-73 (1975)) (providing that property and liberty interests are implicated in public university disciplinary proceedings).

18. Although not discussed in this note, “substantial” evidence in support of guilt and guilt warranting punishment are often regarded as fundamental procedural requirements in university disciplinary hearings. *Keene*, 316 F. Supp. at 221. *See generally* Nicholas T. Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71 (1985) (arguing that the “substantial” evidence requirement in these hearings should actually become a clear and convincing standard of evidence before suspensions or expulsions can occur). Also not discussed, but generally found to be essential to achieving procedural due process in these settings, is the requirement that findings of the tribunal be made in writing. *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967). *See also* Charles A. Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1071-72 (1969) (arguing that written findings with respect to evidence of guilt or innocence are due process requirements). *But see* Flaim, 418 F.3d at 636 (citing *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984)) (“It is always wise to produce some sort of record of the proceedings, . . . though a record may not always be constitutionally required.”).

due process claims will not be addressed.<sup>19</sup> This note will not discuss sufficient process with respect to private universities.<sup>20</sup> There will be little or no discussion of the specific claims that a student may allege or possible remedies that she may be afforded in bringing claims of procedural due process violations against her state university. This note also disregards other related issues such as immunity and official or individual liability for due process deprivations when these claims arise.

## II. DEVELOPMENT OF PROCEDURAL DUE PROCESS LAW IN UNIVERSITY DISCIPLINARY SETTINGS

### A. THE STATE UNIVERSITY MEETS THE UNITED STATES CONSTITUTION

The right to due process arises under the Fourteenth Amendment of the United States Constitution.<sup>21</sup> “The Fourteenth Amendment forbids the State[s] to deprive any person of life, liberty, or property without due process of law.”<sup>22</sup> Essentially, procedural due process<sup>23</sup> requires that the party who is subject to the potential deprivation of a life, liberty, or property interest be afforded a fair and meaningful opportunity to tell his or her side of the story before the State takes away that protected interest.<sup>24</sup>

Classifying the state university as the “State” was one of the first hurdles the courts had to face in determining whether a student could effectively allege a constitutional due process violation against a state university.<sup>25</sup> A university is clearly not a “State” within the plain meaning

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19. See, e.g., *Pittsley v. Warish*, 927 F.3d 3, 6 (1991) (explaining that substantive due process under the Fourteenth Amendment refers to the right of citizens to be free from governmental deprivation of a right regardless of how fair the procedures for such a deprivation may be).

20. See discussion *infra* note 25 (explaining that private universities, at least those classed as private actors, would likely not be subject to the procedural constraints imposed on public or state actor universities).

21. U.S. CONST. amend. XIV, § 1. The relevant portion of this Amendment reads: “No State shall . . . deprive any person of life, liberty, or property without due process of law.” *Id.* The right to procedural due process is also guaranteed by the Fifth Amendment of the United States Constitution. U.S. CONST. amend. V. However, the Fifth Amendment’s guarantee of procedural due process restricts the federal government and its actors, and is, therefore, not particularly relevant for the purposes of constitutional due process guarantees with respect to state universities. *Id.*

22. *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

23. See *supra* notes 17 and 19 (distinguishing procedural due process from substantive due process).

24. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (explaining that procedural due process requires an opportunity to speak on one’s own behalf at a meaningful time and in a meaningful way).

25. See Carol J. Perkins, *Sylvester v. Texas Southern University: An Exception to the Rule of Judicial Deference to Academic Decisions*, 25 J.C. & U.L. 399, 404-06 (1998) (discussing the

of the word.<sup>26</sup> To transform the state university into the State itself, and thereby invoke at least minimal Fourteenth Amendment protections, the United States Supreme Court explained that there must be “a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself.”<sup>27</sup> That is to say, the university can be held to have violated the constitutionally guaranteed due process rights of the student only if the university can be classed as a “state actor” by showing that “the State was sufficiently involved to treat that decisive conduct [on the part of the university] as state action.”<sup>28</sup>

The actor (i.e., university) in question can be classified and treated as the State by a showing that either the State created the framework governing the conduct of the actor,<sup>29</sup> the State delegated its authority to the actor,<sup>30</sup> or the State knowingly accepted the benefits derived from the unconstitutional behavior.<sup>31</sup> Because the State often benefits from its state universities, by way of a university’s prestige or ability to create increased economic activity within the state, coupled with the fact that the state university is state-funded, the courts seem to have little or no trouble reaching the conclusion that state universities can be fairly treated as state actors.<sup>32</sup> The state actor doctrine effectively allows the courts to transform the state university into the State itself, and therefore subject the state university to the restraints of the Fourteenth Amendment.<sup>33</sup>

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state actor doctrine which, under certain conditions, allows the courts to treat both public and, at times, private universities as the state itself, and therefore, subject those institutions to the restraints of the Fourteenth Amendment); *see also* Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 191 (1988) (explaining that the Fourteenth Amendment protects only against injurious actions taken by the State or state actors, and that private actors are not constrained by the due process requirements inherent in the Fourteenth Amendment).

26. BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).

27. *Tarkanian*, 488 U.S. at 192 n.12 (quoting *Jackson v. Metro. Co.*, 419 U.S. 345, 351 (1974)).

28. *Id.* at 192; *see also* Perkins, *supra* note 25, at 404-06 (discussing generally the development and application of the state actor doctrine).

29. *Tarkanian*, 488 U.S. at 192 (citing *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)).

30. *Id.* at 192 (citing *West v. Atkins*, 487 U.S. 42 (1988)).

31. *Id.* (citing *Burton v. Wilmington Auth.*, 365 U.S. 715 (1961)).

32. *See, e.g., id.* (stating that “[a] state university without question is a state actor”); *Donohue v. Baker*, 976 F. Supp. 136, 142 (N.D.N.Y. 1997) (finding that there was no issue as to whether the state university in this case was a state actor).

33. *See Tarkanian*, 488 U.S. at 190 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)) (explaining that private entities can be treated as states for the purpose of implicating the Fourteenth Amendment so long as the requirements of the state actor doctrine are met).

## B. DIFFERENT KIND OF STATE ACTOR

### 1. *The Doctrine of In Loco Parentis*

If it is clear that a “state university is without question a state actor,”<sup>34</sup> why have courts historically been reluctant to weigh in on the procedures employed by universities to discipline students and the outcomes they reach?<sup>35</sup> Why have the courts decided that the full-scale procedural due process requirements characteristic of criminal or civil trials are unnecessary in serious university disciplinary settings?<sup>36</sup> The reasons likely include the history of the educational setting,<sup>37</sup> the historical view of the student,<sup>38</sup> and the evolution of the importance of education within society and the eyes of the court.<sup>39</sup> The university, due in part to its unique history, is treated with greater deference than the State itself with respect to the protections the university must provide under the Fourteenth Amendment.<sup>40</sup>

Arguably, courts of the past were less willing to impose even minimal rules that might hamper the wide discretion universities enjoyed in conducting and deciding university disciplinary hearings because of the applicability of the doctrine of *in loco parentis*.<sup>41</sup> The Latin term *in loco*

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34. *Id.* at 192.

35. *See, e.g.*, *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117, 125 (D. Me. 2004) (expressing the concern that judicial intervention in educational disciplinary hearings may not be appropriate in all cases, and such intervention should be exercised with care); *see also* *Dunn v. Fairfield Cmty. High Sch. Dist. No. 255*, 158 F.3d 962, 966 (7th Cir. 1998) (stating that the court had “concern[s] about transforming the federal courts into the appellate arm of the schools throughout the country”).

36. *See, e.g.*, *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (citing *Goss v. Lopez*, 419 U.S. 565, 583 (1975)) (explaining that due process in a university setting does not rise to the same level as the rights and protections that constitute due process in a civil or criminal trial).

37. *See* *Perkins*, *supra* note 25, at 406-07 (discussing the influence of *in loco parentis* on the history and development of due process in the realm of university disciplinary hearings).

38. *See Goss*, 419 U.S. at 574 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (explaining the view that even students under the age of eighteen are no longer expected to “shed their constitutional rights’ at the schoolhouse door”); *see also* *Perkins*, *supra* note 25, at 407-09 (discussing the evolution of courts’ view of the legal status of students).

39. *See, e.g.*, *Dixon v. Ala. Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (discussing the importance of education to both the student and society at large).

40. *See Goss*, 419 U.S. at 590-94 (Blackmun and Rehnquist, J.J., dissenting). In the dissent’s view, there was a need to defer to a school’s judgment in disciplinary matters. *Id.* According to the dissent, schools are responsible for maintaining order to foster the education and well-being of all students; to meet this end they use discipline as a learning tool. *Id.* Because of these responsibilities and the necessity of using discipline to carry out these responsibilities, schools play a role similar to that of parents when deciding the appropriate disciplinary measures. *Id.*

41. *See Booker v. Lehigh Univ.*, 800 F. Supp. 234, 238 (E.D. Pa. 1992) (stating “[t]here was a time when college administrators and faculties assumed a role *in loco parentis*.”) (citations omitted). *See generally* *Perkins*, *supra* note 25, at 406-07 (explaining the relationship between student and university under the doctrine of *in loco parentis*); KERN ALEXANDER & ERWIN S.

*parentis* literally means “to stand in the place of a parent.”<sup>42</sup> While the doctrine does not apply directly to the relationship of students and post-secondary institutions today,<sup>43</sup> the great discretion the doctrine afforded universities in the past has certainly left some imprint on the courts of today.<sup>44</sup>

Historically, under the *in loco parentis* doctrine, colleges and universities were perceived to play a role similar to that of parents while the students played the role of children.<sup>45</sup> A parent would certainly not be expected to give her child notice and a hearing before administering punishment in an ordinary parent-child relationship, and *in loco parentis* operated in roughly the same fashion when applied to post-secondary disciplinary settings.<sup>46</sup> When *in loco parentis* clearly applied to universities, the university, like the parent, was fully responsible for “the physical and moral welfare and mental training of the pupils” and, as such, was not required to provide notice of hearing nor to employ “fair” procedures during the course of that hearing to administer punishment.<sup>47</sup> Based on all of the parent-like

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SOLOMAN, COLLEGE AND UNIVERSITY LAW 411 (1972) (explaining that historically “*in loco parentis* has a surprisingly strong legal basis in higher education.”).

42. BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

43. See *Bradshaw v. Rawlings*, 612 F.2d 135, 138-40 (3d Cir. 1979) (finding as a matter of law that a university did not stand *in loco parentis* to an eighteen-year-old college student injured by another student on campus); *Booker*, 800 F. Supp. at 238-39 (explaining that “[t]he authoritarian role of today’s college administrations has been notably diluted in recent decades” and “eighteen year old students are now identified with an expansive bundle of individual and societal interests and possess discrete rights not held by college students from decades past”) (citations omitted). See generally *Perkins*, *supra* note 25, at 406 (noting the decline of the strict use of *in loco parentis* in the past).

44. See, e.g., *Dixon*, 294 F.2d at 160 (Cameron, J., dissenting) (expressing concern about judicial rulings that affected university disciplinary procedures). The dissent declared that the majority experienced a “basic failure to understand the nature and mission of schools.” *Id.* Schools and students, according to the dissent, are subject to a relationship that the majority did not grasp in coming to its decision. *Id.* The school has responsibility for “proper discipline” and “the morals of the other pupils” at the institution. *Id.* The dissent argued that the *Dixon* majority improperly added “crushing responsibilities” to universities by requiring them to conduct a hearing when a student faces significant suspension or expulsion. *Id.* Rather than providing hearings in these cases and effectively turning the administrators at the university into a “[g]argantuan aggregation of wet nurses and babysitters,” the court should defer to the school’s “honest exercise of discretion.” *Id.* at 160-61. In the dissent’s view, the only time the courts should interfere or intervene in university disciplinary matters are those “rare” instances where the school blatantly fails to use proper or honest discretion. *Id.*

45. *Perkins*, *supra* note 25, at 406-07. See also ALEXANDER & SOLOMAN, *supra* note 41, at 411 (“This theory places the school in the place of the parent . . .”).

46. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 590-94 (1975) (Blackmun and Rehnquist, J.J., dissenting) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524 (1969)) (stating that “[s]chool discipline, like parental discipline, is an integral and important part of training our children,” and that this heavy parent-like responsibility should not be hampered by procedural formalities in disciplinary matters that will ultimately diminish the authority of the school).

47. *Perkins*, *supra* note 25, at 406.

responsibilities that were once possessed by universities, the courts were highly reluctant to interfere with the disciplinary procedures and decisions universities made with respect to their students.<sup>48</sup>

It appears the former use of the doctrine has permanently affected the way courts perceive the relationship of the student and the university today.<sup>49</sup> Universities are still provided great deference in deciding the fates of students at university disciplinary hearings.<sup>50</sup> The past application of the doctrine of *in loco parentis* has arguably left modern courts with the lingering sense that universities are still charged, at least to some degree, with the parent-like responsibilities of teaching mental and moral skills.<sup>51</sup> Thus, even modern courts are likely to defer to universities to determine the appropriate discipline for their students.<sup>52</sup>

## 2. *Historical Student Status, Academic Deference, and the “Privilege” of Education*

The history of the courts’ perception of the student, in addition to the perception of the university itself, may also help to explain the reason universities are arguably a different kind of state actor.<sup>53</sup> Universities, unlike other state actors, possess remarkable discretion to decide what process is due at their disciplinary hearings.<sup>54</sup> The protections of the Fourteenth Amendment in past university disciplinary hearings were often nonexistent due to their inapplicability in this setting and, even today, are often minimal at best.<sup>55</sup>

Until the 1960s, the courts considered underage students, even at universities, to be “second class citizens.”<sup>56</sup> Before the 1960s, minors were

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48. *Id.* at 406-07.

49. *See, e.g.,* *Gardenhire v. Chalmers*, 326 F. Supp. 1200, 1202-03 (D. Kan. 1971) (stating that the courts “should accept any university procedure which is reasonably calculated to be fair to the student and lead to a reliable determination of the factual issues involved”).

50. *See* *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (explaining the need for flexibility not only because it is part of the very nature of due process itself, but also because the court was reluctant to lessen a university’s ability to use these hearings as a “learning tool”).

51. *See, e.g.,* *Gardenhire*, 326 F. Supp. at 1201-03 (discussing the responsibilities that schools have towards their students).

52. *See id.* at 1202 (finding that university rules and regulations should not be struck down by the courts under the due process guarantees of the Fourteenth Amendment if the rules are somewhat reasonable).

53. *See, e.g.,* *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 238-39 (E.D. Pa. 1992) (explaining the historical view that students at colleges were considered minors for many legal purposes until the civil rights movement of the 1960s).

54. *Perkins, supra* note 25, at 407-09.

55. *See Booker*, 800 F. Supp. at 238-39 (explaining the legally degraded status of students in the past, which afforded them very few rights). *See generally* *Perkins, supra* note 25, at 407-09 (explaining the courts continuing reluctance to weigh in on university disciplinary hearings).

56. *Perkins, supra* note 25, at 407-09.

not perceived as the types of “persons” protected under the Fourteenth Amendment, nor were they fully-realized “persons” for the purposes of invoking the protections guaranteed by other constitutional rights.<sup>57</sup> Students on campus were not fully entitled to invoke certain protections provided to them in the United States Constitution against state actor universities because they were lesser citizens by bearing the brand of “student.”<sup>58</sup>

Furthermore, because universities were perceived as the experts in delivering education, the courts were reluctant to criticize or strike down as unconstitutional the rules, regulations, and manner in which universities taught or disciplined students within the walls of the university.<sup>59</sup> Universities not only historically possessed roles comparable to the role of a parent, but they were also the “experts” regarding student education and educational disciplinary measures to foster mental and moral education.<sup>60</sup> The fact that universities were perceived as both parents, under the doctrine of *in loco parentis*, and experts in the realm of education, led courts to the logical conclusion that wide discretion should be afforded to universities in disciplinary matters.<sup>61</sup> The courts of the past were uncomfortable to weigh in against the decisions of the university, and the courts perceived their lack of expertise in education and educational disciplinary matters as a problem.<sup>62</sup>

Finally, universities were given greater discretion in the past because former courts placed less value on the pursuit and acquisition of education with respect to both the individual and society.<sup>63</sup> In the past, higher education was perceived as a mere unprotected privilege.<sup>64</sup> There was little recognition of a constitutionally protected right or interest in education, and, therefore, the courts of the past did not feel obliged to apply the

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57. *Id.*

58. *See, e.g., Booker*, 800 F. Supp. at 238-39 (explaining that even students over the age of eighteen were provided fewer legal rights than other adults because of their status as students).

59. Perkins, *supra* note 25, at 407-09.

60. *Id.*; *see also* Gardenhire v. Chalmers, 326 F. Supp. 1200, 1202-03 (D. Kan. 1971) (stating that “the courts should be careful not to impose upon the university any specific or particular procedural framework”).

61. Perkins, *supra* note 25, at 407-09.

62. *Id.*

63. *See, e.g.,* Dixon v. Ala. Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961) (discussing the courts’ changing perception of the importance of education to both individuals and society at large). *See generally* Perkins, *supra* note 25, at 407-09 (explaining the courts’ changing view of the importance of education).

64. Perkins, *supra* note 25, at 409. *See also* ALEXANDER & SOLOMON, *supra* note 41, at 411-12 (explaining that past courts viewed education as an unconstitutionally protected privilege until the Supreme Court decided *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), and found education to be a right, at least at the primary and secondary levels of education).

protections guaranteed by the Fourteenth Amendment to university disciplinary hearings that threatened to or did deprive students of the “privilege” of higher education.<sup>65</sup> Thus, the courts of pre-*Dixon* era were disinclined to forcefully weigh into the disciplinary procedures of state universities.

### C. THE LANDMARK CASE: *DIXON* REQUIRES NOTICE AND A HEARING

In *Dixon v. Alabama Board of Education*,<sup>66</sup> the Fifth Circuit Court of Appeals decided to look at what was happening behind the walls of Alabama State College (ASC).<sup>67</sup> In *Dixon*, six African-American students brought suit against ASC<sup>68</sup> after they were expelled for participating in a civil rights demonstration.<sup>69</sup> The students alleged that they were deprived due process of law upon expulsion.<sup>70</sup> All six of these students were in good academic standing at the time of the expulsion,<sup>71</sup> and were expelled from ASC after the Alabama State Board of Education ordered ASC officials to expel the students.<sup>72</sup> These six plaintiff-students were not given any notice that participation in the civil rights demonstrations would result in suspension or expulsion, nor were they provided with any type of hearing.<sup>73</sup> The district court upheld the expulsions, finding that ASC was not required to provide the students with notice or hearings before expelling them.<sup>74</sup> The Fifth Circuit disagreed.<sup>75</sup>

The Fifth Circuit came to several important revelations in deciding the *Dixon* case. First, even if a student’s education was a “privilege” rather than a right,<sup>76</sup> and attendance at a public university was voluntary rather than compelled as was the case in elementary and secondary education,<sup>77</sup> the State could not “condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process.”<sup>78</sup> The Fifth Circuit further explained, “The right to notice and a hearing is so fundamental to the conduct of our society that the waiver [of the constitutional

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65. *Id.* at 409-15.

66. 294 F.2d 150 (5th Cir. 1961).

67. *Dixon*, 294 F.2d at 152.

68. *See id.* at 151 n.1 (describing the complaint filed by the students).

69. *Id.* at 152 n.3.

70. *Id.* at 151 n.1.

71. *Id.* at 152 n.3.

72. *Id.* at 151-54.

73. *Id.* at 154-55 n.4.

74. *Id.* at 155.

75. *Id.*

76. *Id.* at 156.

77. *Id.*

78. *Id.*

right to fundamental elements of procedural due process] must be clear and explicit.”<sup>79</sup> In essence, the *Dixon* court found that notice and a hearing were fundamental to achieving due process in a university disciplinary setting, and that students did not waive or renounce their rights to constitutional due process simply because their attendance at the university was voluntary or perhaps only a privilege.<sup>80</sup> *Dixon* set the stage for students to protect a privilege under the Fourteenth Amendment which had gone largely unprotected in the past.<sup>81</sup>

The *Dixon* court also opined that the importance of higher education had become “vital and, indeed, basic to civilized society.”<sup>82</sup> The court noted the importance of education to the individual pursuing it stating that “[w]ithout sufficient education the plaintiffs [students] would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.”<sup>83</sup> In *Dixon*, the Fifth Circuit openly suggested that the old notion of education as an unprotected “privilege” was outdated and education was actually more of a necessity to both the individual and society than past courts acknowledged.<sup>84</sup> In this sense, the *Dixon* court helped to revolutionize the definition of due process in a university disciplinary hearing. The Fifth Circuit suggested that the pursuit of education was so important that before a student could be deprived of such an opportunity, the university would have to ensure some level of protection and fairness inherent in the due process clause of the Fourteenth Amendment.

Finally, the *Dixon* court showed less deference to the university than courts of the past.<sup>85</sup> The doctrine of *in loco parentis* and the past courts’ perception of the “expert” university were less binding on the *Dixon* court.<sup>86</sup> The Fifth Circuit in *Dixon* did not completely defer to the decisions and procedural system created by the expert university.<sup>87</sup> While the court did not prescribe precise procedural rules, telling the university what it had to do to achieve sufficient process before administering punishment, the

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79. *Id.* at 157.

80. *Id.*

81. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 238-39 (E.D. Pa. 1992) (explaining that prior to the 1960s, students were provided with very few rights on college campuses).

82. *Dixon*, 294 F.2d at 157.

83. *Id.*

84. *Id.*

85. Perkins, *supra* note 25, at 409-15.

86. *Dixon*, 294 F.2d at 157. The Fifth Circuit in this case chose to consider the importance of education to both the individual and society. *Id.* The *Dixon* court did not pay much attention to the old notion that universities were expert, parent-like entities that should be afforded great leeway in deciding all disciplinary rules and procedures with respect to their students. *Id.*

87. *Id.* at 159.

*Dixon* court told the university what it could not do.<sup>88</sup> After *Dixon*, students at public universities had at least some comfort in the knowledge that universities could not arbitrarily exercise the great power of expulsion.<sup>89</sup> *Dixon* required students in jeopardy of suspension or expulsion to be provided with some notice of the charges and some opportunity to defend themselves.<sup>90</sup>

#### D. THE POST-*DIXON* ERA

After *Dixon*, the courts were more inclined to examine, discuss, and help shape the finer points of university disciplinary hearings.<sup>91</sup> The progeny of *Dixon* have generally found adequate notice, with respect to both timing and content, to be a fundamental element of due process in a university disciplinary setting.<sup>92</sup> The post-*Dixon* courts have also discussed, at some length, the right to counsel in these settings and have come to different conclusions as to whether counsel is essential to achieving sufficient process.<sup>93</sup> Furthermore, the courts have considered whether due process in a university setting requires the right to cross-examine witnesses at the hearing.<sup>94</sup> The post-*Dixon* courts have unanimously agreed that an impartial fact finder is imperative to achieving fairness in any disciplinary

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88. *See id.* at 157-59 (requiring universities to employ elementary principles of fair play and procedure, such as notice and a hearing, which universities must not deny to students facing suspension or expulsion).

89. *Id.* at 157.

90. *Id.*

91. *See, e.g.*, *Nash v. Auburn Univ.*, 812 F.2d 665 (11th Cir. 1987) (analyzing a variety of alleged due process violations after students were charged with academic dishonesty, rather than criminal-like accusations, and faced suspension); *Gabrilowitz v. Newman*, 582 F.2d 100, 100-07 (1st Cir. 1978) (considering whether procedural due process violations would occur at a university hearing in which a student was criminally charged with rape and assault and denied the assistance of counsel); *Keene v. Rogers*, 316 F. Supp. 217 (N.D. Me. 1970) (discussing the possibility of due process violations and adopting a list of procedural requirements in deciding the constitutionality of quasi-military academy disciplinary hearing in which a student was accused of possessing marijuana and alcohol in violation of academy's rules).

92. *See, e.g.*, *Nash*, 812 F.2d at 661-63 (discussing notice requirements as to both content and timing). *See generally* *Wright*, *supra* note 18, at 1070-72 (discussing the notion that notice and a hearing are fundamental requirements for due process in student disciplinary hearings).

93. *See, e.g.*, *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (finding that access to counsel was a necessary element of due process); *Esteban v. Cent. Mo. State Coll.*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (finding counsel necessary to achieve due process in a university disciplinary hearing). *But see* *Nueze v. Castleton State Coll.*, 335 A.2d 321, 326 (1975) (finding that even in the face of pending criminal charges a student was not entitled to an attorney for the purposes of due process).

94. *See* *Dixon v. Ala. Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (finding that the right to cross-examine witnesses was not necessarily a fundamental aspect of due process in university disciplinary hearings). *But see* *Winnick v. Manning*, 460 F.2d 545, 549-50 (2d Cir. 1972) (holding that when the weight of the evidence against the student is subject to serious issues of credibility, an opportunity to cross-examine witnesses may be a necessary element of due process).

hearing,<sup>95</sup> but many have also pointed out the inherent difficulty in proving that the fact finder lacked impartiality in these settings.<sup>96</sup>

The courts have come a long way by deciding that due process applies in these higher educational settings and in defining the procedural elements that may not be ignored by universities in conducting disciplinary hearings.<sup>97</sup> Since *Dixon*, the courts have clearly displayed concern for the protection of the students subject to these hearings. However, because of the very flexible nature of procedural due process itself and the balancing test that must be performed on an ad hoc basis, there is still much ambiguity in discerning when and how certain elements may be necessary to preserve due process in university disciplinary hearings.<sup>98</sup>

### III. NOTICE

It should be noted from the outset that “[t]here are no hard and fast rules by which to measure meaningful notice.”<sup>99</sup> Notice with respect to time should be “reasonably calculated, under all the circumstances”<sup>100</sup> such that the accused student can prepare to defend herself at her upcoming hearing.<sup>101</sup> As to the content of the notice, there is also no fixed concept;<sup>102</sup> rather, the university must take “rudimentary precautions” to ensure its students are informed of the accusations against them.<sup>103</sup> Much like the flexibility in timing, the sufficiency of the content of the notice is highly dependent upon the particular circumstances of each disciplinary hearing.<sup>104</sup>

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95. See, e.g., *Winnick*, 460 F.2d at 548 (finding that an impartial decision maker is absolutely essential in achieving due process in these settings).

96. See, e.g., *id.* (discussing different ways in which a tribunal may be found to lack impartiality).

97. Compare *Keene v. Rogers*, 316 F. Supp. 217, 221 (N.D. Me. 1970) (explaining that the “minimum requirements” for due process in university disciplinary hearings include at least four elements) with *Dixon*, 294 F.2d at 158-59 (holding that the minimum requirements of due process in a university setting are only notice and a hearing).

98. *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987). The *Nash* court explained that once it was determined that due process applied in this setting, the court would have to assess each element of the alleged deprivation of due process by considering the following three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

99. *Id.* at 661.

100. *Id.* (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)).

101. *Id.* at 661-62.

102. *Id.* at 662.

103. *Id.* (quoting *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975)).

104. *Id.* at 662.

## A. TIMING

In *Nash v. Auburn University*,<sup>105</sup> the Eleventh Circuit discussed the sufficiency of the six-day<sup>106</sup> period that the accused students were afforded to prepare for their disciplinary hearings.<sup>107</sup> The students in *Nash* requested a longer time period to prepare their cases and more specific notice of the charges at their first hearing.<sup>108</sup> The university provided them with two extra days.<sup>109</sup> However, the university did not deliver notice of the rescheduled date to the students until the day before the rescheduled hearing was to be held.<sup>110</sup> The students argued that one day of notice for their rescheduled hearing was insufficient, and therefore, violated their rights to procedural due process.<sup>111</sup>

In determining whether the timing of the notice was sufficient, the *Nash* court discussed both the one-day notice for the students' rescheduled hearing,<sup>112</sup> and the total time that had accrued between the initial notice of the disciplinary hearing and the time at which the hearing was actually conducted.<sup>113</sup> The court discussed a line of cases in other administrative settings, which clearly pointed to the conclusion that one day of notice was insufficient.<sup>114</sup> However, despite this authority, the Eleventh Circuit found that the students were afforded due process, at least with respect to timing, for two reasons.<sup>115</sup> First, the students did not object to the one-day notice when they arrived at the rescheduled hearing.<sup>116</sup> The students' failure to object to the one day notice at the rescheduled hearing constituted acquiescence to the rescheduled hearing and the notice it carried with it.<sup>117</sup> In this regard, even if the notice was insufficient for purposes of due

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105. 812 F.2d 655 (11th Cir. 1987).

106. *See Nash*, 812 F.2d at 661-62 (stating that the six-day period was calculated to include the time from the initial notice to the date that the rescheduled disciplinary hearing was actually conducted).

107. *Id.*

108. *Id.* at 662. The initial hearing in which the students requested extra time was held on June 10. *Id.*

109. *Id.* The disciplinary hearing was originally scheduled for June 10, but based on the students' request for additional time, the university rescheduled the hearing for June 12. *Id.*

110. *Id.* The students received notice of the June 12 hearing on June 11. *Id.*

111. *Id.* at 661-62.

112. *Id.*

113. *Id.* at 662.

114. *See id.* at 661 (citing *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970); *Walker v. United States*, 744 F.2d 67, 70 (10th Cir. 1984); *Wagner v. Little Rock Sch. Dist.*, 373 F. Supp. 876 (E.D. Ark. 1974)) (supporting the proposition that one day of notice violated due process with respect to timing).

115. *Id.* at 661-62.

116. *Id.*

117. *Id.*

process, the students waived their right to argue the insufficiency of the timing by appearing at the hearing and failing to object to the alleged insufficiency.<sup>118</sup>

The *Nash* court also observed that the students actually ended up with a total of six days to prepare their defenses from the time of the initial notice.<sup>119</sup> The court suggested that the severity of the alleged misconduct<sup>120</sup> and the severity of the punishment that accompanied such an offense<sup>121</sup> should be considered in deciding whether or not the timing was adequate.<sup>122</sup> However, even in light of these circumstances, the court found the timing was adequate because it allowed the students to produce witnesses on their behalf<sup>123</sup> and provide documentation in support of their defense.<sup>124</sup> The court also discussed the fact that the students did not request additional time to prepare at the rescheduled hearing.<sup>125</sup>

While *Nash* indicated that six days was enough time to prepare a defense in this case, the Eleventh Circuit suggested that in other cases, where the charge and penalty are serious and the student needs more time to prepare her defense, additional time may be required.<sup>126</sup> While the *Nash* court was not forced to consider whether due process required the university to grant several extensions between the initial notice and the actual disciplinary hearing<sup>127</sup> or past the time allotted in its own regulatory code,<sup>128</sup> the case could be read to suggest such a possibility in a different factual setting.

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118. *Id.*

119. *Id.*

120. *Id.* at 662. The students were accused of serious academic dishonesty. *Id.*

121. *Id.* The plaintiffs were in a graduate school of veterinary medicine and faced suspension if the hearing was not resolved in their favor. *Id.* at 663.

122. *Id.* at 662.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 661.

127. *Id.* The court found that because the students agreed to the rescheduled date, they waived the opportunity to argue it was unfair. *Id.* at 661-62. However, a student who does not acquiesce to the rescheduled date may perhaps be afforded several continuances if her case warrants the extra time. *Id.* at 661.

128. *Id.* The issue was not presented in *Nash*, but the case indicated that the appropriateness of timing is contingent on the facts unique to each case, such that a student in need of greater time to create a meaningful defense would likely have a fair chance at extending the period for preparation well beyond that provided by the university's rules or regulations. *Id.* at 661-62. In *Nash*, the university's code required the university to afford a student only three days to prepare, but *Nash* received six. *Id.* The court found six days, rather than three, to be reasonable and fair under the circumstances. *Id.*

In *Donohue v. Baker*,<sup>129</sup> a federal district court reached a conclusion similar to that of the *Nash* court regarding the sufficiency of the timing of notice<sup>130</sup> given to a student charged with sexual misconduct.<sup>131</sup> The accused student in *Donohue* was provided with initial notice by phone and through his parents.<sup>132</sup> The university notified him that he would be called into a disciplinary hearing three days later.<sup>133</sup> Donohue was provided with written notice only one day before the hearing.<sup>134</sup> Like the students in *Nash*, the student in *Donohue* did not object to the time allotted to him by the university.<sup>135</sup> In fact, in *Donohue*, the accused student “agreed, if not demanded” to hold the hearing on the date scheduled by the university.<sup>136</sup> The *Donohue* court, like the *Nash* court, found that the student’s failure to object constituted a waiver of his possible due process right to greater notice.<sup>137</sup>

However, the *Donohue* court did note that the charge of sexual misconduct was a serious, rather than minor, accusation.<sup>138</sup> Further, since much of the proceeding required the tribunal to assess the credibility of witnesses testifying about the sexual assault charge, the student might have been entitled to more time to prepare his defense if he had objected to the three-day notice period.<sup>139</sup> While the court declined to find three days insufficient in this case,<sup>140</sup> the court did suggest that the severity of the charge, coupled with the issues of credibility of the witnesses, would probably require more time to prepare a meaningful defense than a less serious charge with fewer credibility issues.<sup>141</sup>

Overall, the timing of notice necessary for due process in a university disciplinary hearing is incredibly flexible.<sup>142</sup> However, so long as a student does not acquiesce to the timing set by the university, the length of time required to achieve due process should be determined by circumstances particular to the case, including: (1) the severity of the charge against the

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129. 976 F. Supp. 136 (N.D.N.Y. 1997).

130. *Donohue*, 976 F. Supp. at 146.

131. *Id.*

132. *Id.* at 145.

133. *Id.*

134. *Id.*

135. *Id.* at 146.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

student;<sup>143</sup> (2) the severity of the potential punishment;<sup>144</sup> (3) the time required for a student to access witnesses, documentation, or other evidence to create a meaningful defense;<sup>145</sup> and (4) the nature of the issues or evidence that will be heard and presented at the hearing.<sup>146</sup>

## B. CONTENT

Much like the flexibility in timing, the content required for sufficient notice will vary from case to case based on the unique circumstances presented in every hearing.<sup>147</sup> “The concept of due process is, of necessity, a flexible one.”<sup>148</sup> In *Nash*, the Eleventh Circuit explained that, at a minimum, “rudimentary precautions”<sup>149</sup> must be taken to inform the students of the “specific charges [against them] and grounds, which if proven, would justify expulsion [or significant suspension].”<sup>150</sup> The *Nash* court rejected the argument that students must be provided “the substance of the evidence to be presented against them,” or that students “were entitled to a summary of the testimony expected” of the witnesses against them.<sup>151</sup> This type of notice would not be required in cases where the students would be present at the disciplinary hearing and have the opportunity to confront the witnesses against them.<sup>152</sup> The courts regularly hold that the content of the notice meets the minimum requirements for specificity so long as it includes the charge and the grounds upon which the charge rests.<sup>153</sup>

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143. *Nash v. Auburn Univ.*, 812 F.2d 655, 662 (11th Cir. 1987); *Donohue*, 976 F. Supp. at 145-46.

144. *Nash*, 812 F.2d at 662.

145. *Id.*

146. *See Donohue*, 976 F. Supp. at 146 (indicating that where the quality or weight of the evidence turns on the credibility of the witnesses involved in the hearing, greater time should be allowed for preparation). This argument might also be extended to situations where there is a large quantity of evidence in the case, or perhaps where the evidence is of such complexity that neither the accused student nor the tribunal would be able to come to accurate conclusions without additional time for preparation. *Id.*

147. *Id.* at 145 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

148. *Id.* (citing *Bd. of Curators of Univ. of Miss. v. Horowitz*, 435 U.S. 78, 86 (1978)).

149. *Nash*, 812 F.2d at 662 (quoting *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975)).

150. *Id.* at 663 (quoting *Dixon v. Ala. Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961)).

151. *Id.* at 662.

152. *Id.* at 663.

153. *See, e.g., id.* at 662-63 (requiring that the notice provides students with the alleged offense or violation); *Dixon*, 294 F.2d at 158 (requiring that the notice contains both the alleged offense and a summary of the evidence that will be used against the student); *Gomes v. Univ. of Me. Sys.*, 304 F. Supp. 2d 117, 128 (D. Me. 2004) (requiring that students are provided with notice of the charges against them). *See generally* *Wright*, *supra* note 18, at 1071-72 (discussing the importance of notice which provides the student with specific charges and the nature of the evidence against him).

#### IV. RIGHT TO COUNSEL

The right to counsel has often been found to be a nonessential element with respect to achieving a fundamentally fair university disciplinary hearing.<sup>154</sup> However, some courts have explicitly<sup>155</sup> or implicitly<sup>156</sup> suggested an exception to this rule exists in disciplinary cases which involve serious accusations of misconduct and when there is or likely will be a criminal action taken against the student.<sup>157</sup> Further, the role counsel intends to play in the hearing may affect the student's ability to access counsel under the above-described circumstances.<sup>158</sup> In addition, some courts have considered the complexity of the university's procedures and if the university is represented by counsel to determine whether the assistance of counsel is necessary to satisfy sufficient process.<sup>159</sup>

##### A. THE IMPLICATION OF THE FIFTH AMENDMENT IN A MAJOR DISCIPLINARY HEARING

As stated above, the right to counsel, at least in most jurisdictions, is not deemed to be a procedural "right" essential to achieving due process in a university disciplinary hearing.<sup>160</sup> The right to counsel, or perhaps the lack thereof, is one of the most troubling areas in determining whether a student has had a meaningful opportunity to tell her side of the story and defend against the accusations.<sup>161</sup> A student finds herself in a "Catch 22" when she is faced with a serious accusation from a university which carries the penalty of significant suspension or expulsion, and, at the same time, she is or likely will be facing a serious criminal charge arising out of the same series of events. If she speaks at the university disciplinary hearing without the advice of counsel, she puts herself in jeopardy of providing

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154. *Gabrilowitz v. Newman*, 582 F.2d 100, 104 (1st Cir. 1978).

155. *Id.* at 104-06.

156. *See Donohue v. Baker*, 976 F. Supp. 136, 146 (N.D.N.Y. 1997) (indicating that an accused student may be entitled to an attorney for due process at his university disciplinary hearing if the attorney will be present to protect the student's right against self-incrimination rather than to sway the outcome of the hearing).

157. *Id.*

158. *Id.*

159. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 (2005).

160. *See Gabrilowitz*, 582 F.2d at 104 (finding that an attorney's advice and presence at a disciplinary hearing is a requirement of due process only when the student has an implicated Fifth Amendment right and is facing a pending criminal charge). *But see Keene v. Rogers*, 316 F. Supp. 217, 221 (N.D. Me. 1970) (stating that "the student must be permitted the assistance of a lawyer, at least in major disciplinary proceedings"). In this jurisdiction, *Keene* created what appears to be a bright-line rule for the assistance of an attorney in university disciplinary hearings. *Keene*, 319 F. Supp. at 221.

161. *See, e.g., Gabrilowitz*, 582 F.2d at 104 (discussing whether counsel is necessary to preserve due process in a university disciplinary hearing).

what may very well be incriminating statements that could be used against her in a pending criminal trial.<sup>162</sup> However, if she preserves her right to silence and refuses to participate in or speak during the course of the university disciplinary hearing, she has probably not made a meaningful case and may well be suspended or expelled from the university after she fails to openly explain or defend herself.<sup>163</sup> In either case, without counsel, the student lacks the knowledge of an attorney who may be of assistance in protecting her against incriminating herself, and at the same time, affording her the opportunity to speak on her own behalf and present a meaningful defense at the university disciplinary hearing.<sup>164</sup>

Much like the hypothetical student above, in *Gabrilowitz v. Newman*,<sup>165</sup> Gabrilowitz, a student at the University of Rhode Island (URI), was notified by the local police department that he was facing a criminal charge of assault with intent to rape a fellow university student.<sup>166</sup> Shortly thereafter, URI notified Gabrilowitz of its intention to charge him with assault with intent to rape and with an additional assault charge stemming from the same incident or series of events that led to his initial criminal charge.<sup>167</sup>

The notice of the university disciplinary hearing also described the procedures and rules the university would employ in conducting the hearing.<sup>168</sup> These rules and procedures explained, among other things, that Gabrilowitz could not be assisted by counsel nor even have counsel present at his university disciplinary hearing.<sup>169</sup> Gabrilowitz sought an injunction barring URI from holding his disciplinary hearing until after his pending criminal case was resolved or until such time that he would be afforded counsel of his choice to assist him at the disciplinary hearing.<sup>170</sup> The district court issued the injunction; URI appealed.<sup>171</sup>

The First Circuit Court of Appeals sought to determine whether the limited<sup>172</sup> use of counsel in this situation was appropriate and necessary to

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162. *Id.* at 104-06.

163. *Id.*

164. *Id.* at 104.

165. 582 F.2d 100 (1st Cir. 1978).

166. *Gabrilowitz*, 582 F.2d at 101-02.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 101. The student requested counsel so that “a lawyer [could] be at his side during the hearing for consultation and advice.” *Id.* The student did not request the university allow him to use his counsel to participate in the examination of any witnesses. *Id.*

achieve procedural due process, and therefore, whether the district court properly issued the injunction against URI.<sup>173</sup> In assessing whether counsel would be necessary to ensure sufficient process, the court considered whether there was an implication of the Fifth Amendment<sup>174</sup> right against self-incrimination.<sup>175</sup> The court found that the Fifth Amendment was implicated.<sup>176</sup> The court noted that, in most instances, a student would not be deprived of due process in a university disciplinary hearing without the assistance of counsel.<sup>177</sup> However, the court also distinguished those cases which expressly found the right to counsel to be unnecessary in preserving a student's right to due process from Gabrilowitz's situation.<sup>178</sup> The cases that found no counsel was necessary to preserve a student's due process rights lacked the "specter of a pending criminal case hovering over the hearing."<sup>179</sup> Ultimately, the implication of the Fifth Amendment, the possibility of a forced Hobson's choice without his lawyer,<sup>180</sup> and the severity of the pending criminal charge<sup>181</sup> rendered an advising attorney necessary to the preservation of due process in Gabrilowitz's university disciplinary hearing.<sup>182</sup> Because of the flexibility inherent in university disciplinary hearings,<sup>183</sup> most jurisdictions agree that the assistance of an attorney is generally not necessary to achieve sufficient process unless there is an implication of the Fifth Amendment.<sup>184</sup>

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173. *Id.* at 101, 104.

174. U.S. CONST. amend. V.

175. *Gabrilowitz*, 582 F.2d at 102-07.

176. *Id.* at 106.

177. *Id.* at 104.

178. *Id.* The court noted that with the exception of two cases, which disallowed students the use of an attorney, were also cases where the students were not facing pending criminal trials. *Id.*

179. *Id.*

180. *Id.* The Hobson's choice consisted of remaining at the hearing and facing likely expulsion, or speaking without the advice of an attorney and compromising the right against self-incrimination and jeopardizing the pending criminal trial. *Id.*

181. *Id.* at 105. Gabrilowitz faced imprisonment of up to twenty years if found guilty of the criminal rape charge he faced. *Id.*

182. *Id.* at 107.

183. *See, e.g., Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (explaining that the role of counsel should be limited).

184. *Donohue v. Baker*, 976 F. Supp. 136 (N.D.N.Y. 1997). In this case, the student faced a criminal rape charge after local police investigated the incident in question. *Id.* at 139. The student's university charged him with sexual misconduct. *Id.* at 140. The student alleged a violation of his procedural due process rights because he was not afforded an attorney during the hearing, but at the same time, he did not allege that the absence of counsel infringed upon his Fifth Amendment right against self-incrimination. *Id.* at 146. Accordingly, the court found that without the implication of the Fifth Amendment, the university's refusal to allow the assistance of an attorney did not violate the student's due process rights in this hearing. *Id.*

## B. ROLE OF COUNSEL

Once it becomes clear that the charge is serious, there are or likely will be pending criminal charges, and the assistance of an attorney is necessary to protect the Fifth Amendment rights of the student, a student must also explain the role that counsel is to play at the hearing.<sup>185</sup> Because the assistance of counsel is not required to preserve a student's due process rights in every university disciplinary hearing,<sup>186</sup> the courts also consider the role that counsel will play at the proceeding.<sup>187</sup>

If counsel attends the disciplinary hearing in a watchdog or assistance capacity for the purpose of protecting the implicated Fifth Amendment rights of the student, then the attorney's presence and assistance may be a necessary element of the proceeding.<sup>188</sup> However, the attorney likely will not be necessary to preserve the procedural due process rights of the student if her presence there is solely because she and her client wish to favorably affect the outcome of the university disciplinary hearing itself.<sup>189</sup> In *Donohue*, the court explained this distinction by stating, "In view of the [self-incrimination] peril faced by the student, . . . a limited role of counsel [is] necessary, 'only to safeguard [the student's] rights at the hearing, *not to affect the outcome of the hearing.*'"<sup>190</sup> The *Donohue* court further explained that the role of counsel was not necessary in this case because the student intended to use counsel "as a sword"<sup>191</sup> to challenge the credibility of the witnesses that would be used against him.<sup>192</sup> Counsel would have been necessary to achieve due process in the hearing only if the student used his attorney "as a shield to protect his Fifth Amendment rights."<sup>193</sup> *Donohue* suggested that counsel is only necessary in a disciplinary hearing when counsel's role is one in which she serves to protect the student from self-incrimination, and not when counsel is present to sway the decision of the hearing tribunal.<sup>194</sup>

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185. *Id.*

186. *Gabrilowitz*, 582 F.2d at 107.

187. *Id.* at 106.

188. *Id.*

189. *Id.*

190. *Donohue*, 976 F. Supp. at 146 (quoting *Gabrilowitz*, 582 F.2d at 106) (emphasis in original).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

C. DEVIATION FROM INTERNAL PROCEDURES OR ASSURANCES,  
COMPLEXITY OF UNIVERSITY DISCIPLINARY PROCEDURES, OR  
PRESENCE OF AN ATTORNEY ON BEHALF OF THE UNIVERSITY

The final instances in which a university student may invoke the right to counsel in a disciplinary hearing arise when: (1) the hearing is governed by “complex rules of evidence or procedure;” (2) the university is represented by counsel in the disciplinary hearing; or (3) if the university deviates from its procedures or assurances and the deviation creates an unfairness in and of itself.<sup>195</sup>

The courts have been reluctant to describe with much precision what constitutes an unfair complexity in university procedure for the purposes of due process.<sup>196</sup> In *Flaim v. Medical College of Ohio*,<sup>197</sup> Flaim, a medical student, was expelled after he was convicted of a felony drug crime while attending the institution.<sup>198</sup> Following the criminal charge but prior to his conviction, the medical college informed Flaim that he was suspended until his criminal proceedings were concluded or until he participated in an “internal hearing” at the college.<sup>199</sup> Flaim decided not to participate in the internal hearing until his criminal proceedings were completed.<sup>200</sup> Following the conclusion of his criminal case, Flaim requested his internal hearing, and requested the assistance of counsel at that hearing.<sup>201</sup> The college told Flaim that he could have an attorney present at the hearing.<sup>202</sup> However, when the hearing was conducted, the college did not allow Flaim to consult with his attorney during the hearing, nor was his attorney allowed to actively participate in the hearing.<sup>203</sup> Flaim was formally expelled after the internal hearing.<sup>204</sup> He alleged several due process violations, including an infringement of his procedural due process right to counsel.<sup>205</sup>

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195. *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984).

196. *See, e.g., Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005) (finding that a medical college’s rules governing a hearing were not overly complex because there were no rules of evidence, despite the fact that the plaintiff-student felt deceived when the university allegedly departed from its own assurances regarding assistance of counsel during the proceedings).

197. 418 F.3d 629 (6th Cir. 2005).

198. *Flaim*, 418 F.3d at 631-32.

199. *Id.* at 632.

200. *Id.*

201. *Id.* at 632-33.

202. *Id.* at 633.

203. *Id.* at 640.

204. *Id.* at 633.

205. *Id.* at 640.

The Sixth Circuit found that Flaim had not suffered a due process deprivation due to lack of counsel.<sup>206</sup> Because his criminal proceedings had already been decided, the Sixth Circuit found that Flaim was not entitled to counsel to protect his Fifth Amendment right against self-incrimination.<sup>207</sup> Flaim, however, argued that he had a right to the assistance of counsel based on the fact that the college informed him that he could have counsel present, and prohibiting him from the assistance of that counsel was deceptive and unfair due to the fact that he would have to navigate the procedural aspects of the hearing himself.<sup>208</sup>

The Sixth Circuit disagreed, stating that even if it were assumed that Flaim had been assured that he could have active counsel at the disciplinary hearing, not every deviation from the college's "regulations [or assurances] . . . give[s] rise to a cause of action for violation of constitutional rights."<sup>209</sup> The court explained that only when a college or university disregards its own regulations or assurances and that disregard "results in a procedure which itself impinges upon [a student's] due process rights" should the federal courts intervene in the decisions of state institutions.<sup>210</sup> Further, the Sixth Circuit found that the hearing was not so procedurally complex that Flaim was unfairly disadvantaged by the absence of active counsel.<sup>211</sup> The court agreed that Flaim's attorney may have been more articulate "but there [was] no indication that . . . only a trained attorney could have effectively presented his case."<sup>212</sup> Finally, the Sixth Circuit hinted that an active attorney for the student may be required to satisfy constitutional due process in instances where the college is represented by counsel, but, in Flaim's hearing, the college did not employ counsel on its behalf.<sup>213</sup>

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206. *Id.* at 640-41.

207. *Id.* at 640. The Sixth Circuit explained that "an accused student [possesses] the right to counsel *only* if the student face[s] outstanding criminal charges at the time of the hearing." *Id.* (emphasis in original).

208. *Id.*

209. *Id.* (citing *Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976)) (brackets in original).

210. *Id.*

211. *Id.* The Sixth Circuit did not detail the procedures or rules employed by the university. *Id.* Rather, the court premised this conclusion on the mere fact that "[t]here were no rules of evidence." *Id.*

212. *Id.*

213. *Id.* (citing *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984)). *But see* Saurack, *supra* note 3, at 821 (stating that even when the university does not employ an attorney on its behalf, "the university has a greater familiarity with school procedures" which carries with it an unfair advantage when one considers the student's lack of experience and familiarity with the governing procedures).

## V. OPPORTUNITY TO BE HEARD IN ONE'S OWN DEFENSE

Since *Dixon*, there has been little or no disagreement concerning the idea that a student subjected to the possibility of suspension or expulsion must be afforded the opportunity to speak in her own defense at a university hearing.<sup>214</sup> This part of the note is provided, in part, to help clarify and deliver additional information concerning the inherent problem with speaking on one's own behalf and the possibility of self-incrimination discussed under Part IV of this note.

The courts have “uniformly held in student discipline cases that ‘fair process requires . . . an opportunity [for the student] to be heard before the expulsion or significant suspension’” occurs.<sup>215</sup> However, the courts have also repeatedly found that a student's right to be heard in her own defense is not as extensive as it might be in a full-scale criminal trial. Yet, this limited opportunity to speak in one's own defense may still be considered sufficient process for purposes of a disciplinary hearing.<sup>216</sup> The courts decide whether this fundamental aspect of due process has been fulfilled by determining whether the student “has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.”<sup>217</sup> It is undeniable that the ability to state one's own version of events about the disciplinary matter in question is fundamental to achieving sufficient process, but it is possible, if not probable, that a student in a disciplinary hearing may be more limited in delivering her defense than she would be in an actual judicial setting.

## VI. CROSS-EXAMINATION OF WITNESSES

In *Dixon*, the court stated that a university disciplinary hearing could not be considered “a full-dress judicial hearing, with the right to cross-examine witnesses” as a requirement in preserving the due process rights of the student.<sup>218</sup> But the *Dixon* court also concluded that the students in that case should have been given the names of the witnesses against them and an oral or written report of the facts to which each witness would testify.<sup>219</sup> More recently, courts have adopted a different view of the necessity of

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214. See, e.g., *Keene v. Rogers*, 316 F. Supp. 217, 221 (N.D. Me. 1970) (citing *Wright*, *supra* note 18, at 1071-72) (stating that the student “must be given an opportunity to be heard in his own defense”).

215. *Johnson v. Collins*, 233 F. Supp. 2d 241, 248 (N.D. Me. 2002) (quoting *Gorman v. Univ. R.I.*, 837 F.2d 7, 13 (1st Cir. 1988)).

216. *Id.* at 248 (quoting *Gorman*, 837 F.2d at 13).

217. *Gorman*, 837 F.2d at 14.

218. *Dixon v. Ala. Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961).

219. *Id.*

cross-examination in achieving due process in university disciplinary hearings.<sup>220</sup>

Because “the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation,” some student disciplinary hearings may require the use of cross-examination of witnesses.<sup>221</sup> In instances where the credibility of witnesses is essential to finding a student guilty or innocent of the university’s charge and determining the severity of the student’s potential suspension or expulsion, cross-examination may be essential in administering a fair hearing.<sup>222</sup> In these “he-said-she-said” cases, cross-examination may be essential to due process because the weight the testimony is given will be highly dependent upon the credibility of the individual witness.<sup>223</sup> Statements that will be used as evidence of guilt, which are worth only as much as the credibility of the witness delivering them, should be subject to cross-examination because the outcome of the hearing rides on the weight given to these statements.<sup>224</sup>

The other instance in which cross-examination may be necessary occurs in cases where effective rebuttal of the evidence, by way of cross-examination, would affect the severity of the punishment imposed on the student.<sup>225</sup> In *Winnick v. Manning*,<sup>226</sup> the accused student wished to refute the dean’s testimony that characterized the student as the “ringleader” of the disruption giving rise to the disciplinary hearing.<sup>227</sup> The Second Circuit explained that even if the tribunal believed that the student truly was the ringleader of the disruptive conduct, and that perception may have been disproved through the use of cross-examination, the accused student did not receive a heftier penalty than those who were not characterized as “ring-leaders.”<sup>228</sup> Because the use of cross-examination would not have affected the student’s punishment, even if he had been able to disprove his role as ringleader, “no useful purpose would have been served by permitting Winnick to cross-examine Dean Hewes.”<sup>229</sup> Therefore, due process did not

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220. See, e.g., *Winnick v. Manning*, 460 F.2d 545, 549-50 (2d Cir. 1972) (discussing the proposition that cross-examination is necessary to achieve fairness in a university disciplinary hearing where there are serious issues as to witness credibility).

221. *Id.* at 549 (citation omitted).

222. *Id.*

223. *Id.* at 550.

224. *Id.* at 549.

225. *Id.*

226. 460 F.2d 545 (2d Cir. 1972).

227. *Winnick*, 460 F.2d at 549.

228. *Id.*

229. *Id.* The critical fact in this case was not what *role* the student played in the alleged misconduct, but rather whether he *participated* in the alleged misconduct. *Id.* at 549-50.

require cross-examination of witnesses at the student's disciplinary hearing.<sup>230</sup>

Ultimately, whether cross-examination is essential to a fair hearing depends on the unique circumstances of each disciplinary hearing.<sup>231</sup> If cross-examination is required to determine the weight evidence should be given based on the credibility of the witnesses, cross-examination is likely an essential element of due process.<sup>232</sup> If cross-examination would allow the student to prove or disprove facts that would affect the severity of her punishment, it would likely be instrumental in achieving due process.<sup>233</sup> Without a showing that cross-examination materially affects the weight of the evidence, or has great potential to prove or disprove facts that will affect the severity of the student's punishment or the outcome of the hearing altogether, cross-examination is probably not a due process requirement in a university disciplinary hearing.<sup>234</sup>

## VII. IMPARTIAL DECISION MAKERS

“While there remain many vexing questions as to what due process requires in school disciplinary proceedings, a fundamental requirement is that a hearing must be accorded before an impartial decision maker.”<sup>235</sup> University disciplinary hearings, without a doubt, require that the student can plead her story to an unbiased tribunal.<sup>236</sup>

In *Nash*, several students alleged that the university violated their rights to due process during their administrative hearings because the university failed to provide an impartial hearing body.<sup>237</sup> The Eleventh Circuit explained that “an impartial decision maker [i]s an essential guarantee of due process.”<sup>238</sup> The students alleged a constitutional due process violation; they alleged that they were deprived of an impartial tribunal.<sup>239</sup> This allegation arose from the “emotionally charged atmosphere” surrounding the supposed academic dishonesty committed by the students before the

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230. *Id.* at 550.

231. *Nash v. Auburn Univ.*, 812 F.2d 655, 663-64 (11th Cir. 1987).

232. *See, e.g., Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (quoting *Winnick*, 460 F.2d at 550) (“[I]f a case is essentially one of credibility, the ‘cross-examination of witnesses might [be] essential to a fair hearing.’”).

233. *Winnick*, 460 F.2d at 449-50.

234. *Id.*

235. *Id.* at 448.

236. *Winnick*, 460 F.2d at 548.

237. *Nash v. Auburn Univ.*, 812 F.2d 655, 665-66 (11th Cir. 1987).

238. *Id.* at 665.

239. *Id.*

hearing was administered.<sup>240</sup> The students also alleged the tribunal may not have been neutral because, at the hearing, it heard evidence that was both irrelevant and highly prejudicial.<sup>241</sup> The students further alleged one particular member of the hearing body lacked impartiality because he failed to recuse himself during the hearing; this tribunal member had prior knowledge of the charge of academic dishonesty and other alleged facts to support the accusations before the administrative hearing was conducted.<sup>242</sup>

However, the *Nash* court concluded that none of these allegations provided a legitimate basis upon which to find that the students were afforded a less than fair hearing because of a biased tribunal.<sup>243</sup> The court found that the atmosphere before the hearing, emotionally charged or otherwise, was not a problem constituting bias that was captured anywhere in the record of the hearing.<sup>244</sup> The fact that there may have been some controversy on campus surrounding the allegations of academic dishonesty was not enough for the court to draw the inference that the tribunal was unfairly prejudiced by the controversy.<sup>245</sup> The court explained that “[a]ny alleged prejudice . . . must be evident from the record and cannot be based in speculation or inference.”<sup>246</sup> The court further found that no other evidence showed that the hearing body made any decisions about the students’ guilt before the hearing was completed.<sup>247</sup>

The *Nash* court also dismissed the students’ arguments alleging the tribunal’s prejudice because of the admission of irrelevant or highly prejudicial evidence as well.<sup>248</sup> The court found that the evidentiary rules in university disciplinary hearings need not conform to the more rigid and formal rules of judicial courtrooms.<sup>249</sup> The court stated that the university and the hearing body had a great deal of latitude in admitting evidence under the flexible framework of due process in this setting, and therefore, concluded that the allegedly prejudicial evidence did not affect the ability of the tribunal to come to an impartial conclusion.<sup>250</sup>

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240. *Id.*

241. *Id.* The hearing body was presented with and accepted evidence relating to the students’ conduct during prior exams rather than the exam in question. *Id.*

242. *Id.* at 666.

243. *Id.* at 665.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 665-66.

249. *Id.* at 665. The court observed that the evidence may have been permissible in a judicial proceeding, even with the protections of formal rules of evidence. *Id.*

250. *Id.* at 665-66.

Finally, with respect to the hearing body member who had some knowledge of the charges and allegations before the hearing but did not recuse himself, the Eleventh Circuit found that the record did not demonstrate any prejudice on his part.<sup>251</sup> The court also explained that it had already “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.’”<sup>252</sup> Allegations that the hearing body member was involved in the investigation, had prior knowledge of the charges, and had possibly been privy to some of the evidence were not enough for the *Nash* court to find prejudice and lack of sufficient process.<sup>253</sup>

Other courts, however, have been more concerned with the impartiality issue. For instance, in *Center for Participant Education v. Marshall*,<sup>254</sup> a federal district court left some room to contest the impartiality of a tribunal.<sup>255</sup> When allegations of prejudice and fundamental unfairness were premised on the school’s seemingly conflicting roles as both prosecutor and adjudicator, the court stated that unfairness was not evident “in the absence of a showing of other circumstances such as malice or personal interest in the outcome of the case.”<sup>256</sup> While the court found that the tribunal was not biased in this case, it acknowledged that there was certainly the potential for instances in which malice or personal stake could create a serious bias in the tribunal, and therefore, the hearing would fail to provide sufficient process.

In *Winnick*, the Second Circuit also suggested that some solid evidence, beyond mere employment or administrative capacity within the university, must be introduced to show bias on the part of the hearing body or one of its members.<sup>257</sup> There would have to be evidence demonstrating that the tribunal member was incapable of impartial application of rules and regulations governing the hearing,<sup>258</sup> or that the member “observed, investigated, or made [some] prehearing decisions” about the accused.<sup>259</sup> Thus, if a student can demonstrate that the tribunal member participated in much of the investigation leading up to the hearing, or that the tribunal

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251. *Id.*

252. *Id.* at 666 (citing *Duke v. N. Tex. State Univ.*, 469 F.2d 829, 834 (5th Cir. 1973)).

253. *Id.*

254. 337 F. Supp. 126 (N.D. Fla. 1972).

255. *Ctr. for Participant Educ.*, 337 F. Supp. at 135.

256. *Id.* (quoting *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 200 (M.D. Tenn. 1968)).

257. *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972).

258. *Id.*

259. *Id.*

member unfairly administered the university's rules and regulations governing the hearing, a court may very well find that a due process violation occurred.

The mere allegation of impropriety based on the position of the tribunal member with respect to the university, or even the fact that the adjudicator might also be the prosecutor, is not by itself enough to reach the conclusion that a university disciplinary hearing lacked impartiality.<sup>260</sup> Further, without some record or evidence of actual prejudice, malice, or personal interest, a tribunal member may be allowed, at least to some degree, to investigate the alleged events giving rise to the hearing and initiate the hearing process; arguably, the hearing body is still impartial so long as that decision maker does not come to any conclusions about the guilt or innocence of the accused student before the disciplinary hearing is completed.<sup>261</sup>

### VIII. CONCLUSION

*Constitution or no, it is hardly thinkable that we would deny to today's generation of students . . . procedural fairness.*<sup>262</sup>

In the forty-five years following the student-friendly landmark decision in *Dixon*, the hypothetical student discussed in the introduction, and many in the real world, should relax a bit about the over-bearing, parent-like universities of the past as they stroll through their campus days.<sup>263</sup> Or should they?<sup>264</sup>

Although the courts have made great strides in the quest to treat university students like other adults who have certain constitutionally protected rights or interests, it still seems as though there are several issues that might make a student's skin crawl in a university disciplinary hearing. Despite the growing importance of education, the Constitution does not

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260. *Id.*

261. *Id.*

262. Wright, *supra* note 18, at 1086.

263. *See, e.g.,* Booker v. Lehigh Univ., 800 F. Supp. 234, 238-39 (E.D. Pa. 1992) (explaining that students in contemporary academic disciplinary settings are afforded far greater rights than students of the past because the formerly "authoritarian" nature of universities has been "diluted" to a large degree at present).

264. *See, e.g.,* Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978) (holding that the assistance of counsel may only be a fundamental aspect of due process if there is a pending criminal charge, the implication of the Fifth Amendment, or serious issues as to the credibility of witnesses).

protect students against procedures that are “unwise,” “floor-level,” or “minimal.”<sup>265</sup>

At present, the only protections that students must be afforded in every serious university disciplinary hearing are: notice, a hearing, a finding of guilt based only on substantial evidence, and written findings and record of the proceeding.<sup>266</sup> There is still disagreement as to whether an attorney should be afforded to students, and, if an attorney is provided, there are questions as to the scope of the role that attorney may assume.<sup>267</sup> Cross-examination may also be limited depending on the particular circumstances of each case.<sup>268</sup>

The United States Supreme Court stated in 1943 that “[t]he history of liberty has largely been the history of observance of procedural safeguards.”<sup>269</sup> Yet, while there is a recognition that “the risk of error [in these proceedings] is not at all trivial,” contemporary courts will affirm suspensions and expulsions from universities that employ procedures which are “far from ideal” or meet only “the lowest level” of fairness acceptable under the Due Process Clause.<sup>270</sup> It is encouraging that the Fourteenth Amendment has become more protective of the rights of post-secondary students over the last several decades, but still very troubling that students are only entitled to the most rudimentary levels of fairness acceptable under the Constitution.

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265. See *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) (distinguishing between disciplinary procedures that are “wise” but not “constitutionally required” because the Due Process Clause sets only “the floor or lowest level of procedures acceptable”).

266. See *Keene v. Rogers*, 316 F. Supp. 217, 221 (N.D. Me. 1970) (listing the minimum requirements to achieve due process in a university disciplinary hearing). *But see Flaim*, 418 F.3d at 636 (finding that even a record of the proceeding may not be constitutionally required in all university disciplinary cases).

267. See *supra* note 160.

268. See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 663-65 (11th Cir. 1987) (discussing the situations in which due process may or may not require an opportunity for the students to cross-examine witnesses.)

269. *McNabb v. Unites States*, 318 U.S. 332, 347 (1943).

270. *Flaim*, 418 F.3d at 636, 642.

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