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Constitutional Law--Procedural Due Process-- Right To Counsel At College Disciplinary Hearings

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CASE COMMENTS

**Constitutional Law—Procedural Due Process—Right
To Counsel At College Disciplinary Hearings**

The plaintiffs were students at Bluefield State College, a state supported institution, operated by and under the control and supervision of the West Virginia Board of Education. The plaintiffs planned a student demonstration to begin during the half-time of a football game. The demonstration was peaceful in the beginning but subsequently became violent to the extent that the president of the college was in danger of bodily injury. The president thereafter attempted to locate the students for purposes of a personal conference, but was unable to do so. He then mailed suspension letters to each of them and notified their parents by telegram. In the letters, the plaintiffs were advised of the reasons for the action, their right to an appeal hearing, and the appropriate method of requesting one. Six of the ten plaintiffs appeared before the Faculty Committee on Student Affairs and, upon the refusal of their request to be represented by legal counsel, they read a prepared statement and refused to continue with the hearing. The remaining four plaintiffs appeared and had a hearing. Thereafter, on two separate occasions, the Committee extended further opportunities for a hearing to the six remaining plaintiffs, but none appeared.

Plaintiffs brought this action in the Federal District Court for the Southern District of West Virginia to enjoin defendants from continuing to enforce the suspension. *Held*, plaintiffs' denial of reinstatement affirmed. The students were not entitled to legal representation before the Committee. The proceedings satisfied the requirements of the due process clause of the fourteenth amendment. *Barker v. Hardway*, 283 F. Supp 228 (S.D.W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968).

I. DUE PROCESS REQUIREMENTS IN COLLEGE DISCIPLINARY HEARINGS

Although the issue of college student dismissals is not new, the issue of procedural due process in college disciplinary hearings is a relatively young but developing area of the law. As early as 1891 the Supreme Court of Illinois upheld the power of the university to dismiss any student for disciplinary reasons. In so ruling the Illinois court employed the theory which has prevailed until

recently, *i.e.*, by voluntarily entering a college or university of his choice a student necessarily surrenders many individual rights which otherwise would be protected by the Constitution.¹ Utilizing this theory, the courts refused to overrule the decisions of college officials unless there was a clear showing of abuse of discretion, such as arbitrary or capricious action.² It is generally recognized today that school authorities have the right to define offenses for which a student may be expelled, to determine whether the offense has been committed, and to exercise broad discretionary power in student discipline.³ However, it is increasingly recognized that this discretionary power is not unlimited.⁴

Until recently it was thought that student disciplinary proceedings at a state, tax-supported college could not be brought within the protection of procedural due process under the fourteenth amendment. *State ex rel. Sherman v. Hyman*⁵ denied the applicability of the fourteenth amendment to student disciplinary proceedings at a state-supported institution. The court held that no issue of due process is raised where the university "is rightfully exercising its inherent authority to discipline students."⁶

Whether the right to remain in college is a constitutionally protected right was considered in *Dixon v. Alabama State Board of Education*.⁷ This case involved students who were expelled from Alabama State University on the grounds of conduct unbecoming a student because they participated in a racial demonstration at a lunch grill which refused to serve Negroes. The court recognized "that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value."⁸ Furthermore "there must be some reasonable constitutional ground for

¹ *North v. Bd. of Trustees of Univ. of Ill.*, 137 Ill. 296, 306, 27 N.E. 54, 56 (1891).

² *Buttny v. Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968); *Zanders v. La. St. Bd. of Educ.*, 281 F. Supp. 747, 769 (W.D. La. 1968); *Goldberg v. Regents of U. of Calif.*, 57 Cal. Rptr. 463, 473 (1st D.C.A. 1967).

³ *Cornette v. Aldridge*, 408 S.W.2d 935, 939 (Tex. Civ. App. 1966). At page 942 the court said:

It is difficult to imagine a period in the life of our nation when the courts need to give greater support to public school authorities concerning their discretion in dealing with students than now, so long as such discretion is not exercised in an unreasonable, arbitrary and capricious manner.

⁴ *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

⁵ 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).

⁶ 180 Tenn. at 111, 171 S.W.2d at 827.

⁷ 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

⁸ *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

expulsion or the courts would have a duty to require reinstatement."⁹ In *Knight v. State Board of Education*¹⁰ the court stated that *Dixon* expressly rejected the theory that one's interest in remaining in college was a mere privilege¹¹ and indicated that any attempt to distinguish between a privilege and a right is a "mere play upon words."¹²

The *Dixon* case specifically held "that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."¹³ However, the problem left unsolved by the *Dixon* case is a determination of precisely what type of hearing will satisfy the requirements of due process.¹⁴ The format suggested by *Dixon* merely provides a forum in which the student may present his side of the dispute, with no corresponding provision for the right to have an attorney present to advise him, to cross-examine witnesses or to present rebuttal evidence.¹⁵

II. RIGHT TO COUNSEL IN COLLEGE DISCIPLINARY PROCEEDINGS

The right to counsel is not an essential element of a fair hearing in all types of college disciplinary proceedings.¹⁶ It would seem desirable to limit the right to counsel to those circumstances in which the student may be expelled or suspended for one term or more for disciplinary reasons. The crucial problem is to find a proper balance between the school's interest in establishing disciplinary rules for the protection of the institution and the student's valuable interest in not being arbitrarily deprived of educational opportunities.¹⁷

In determining whether students should have the right to counsel at disciplinary hearings, one can compare the interests involved

⁹ *Id.*

¹⁰ 200 F. Supp. 174 (M.D. Tenn. 1961).

¹¹ *Id.* at 178. "Private interests are to be evaluated under the due process clause of the Fourteenth Amendment not in terms of labels or fictions, but in terms of their true significance and worth."

¹² *Id.*

¹³ *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961).

¹⁴ The court in *Dixon* said:

In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. *Id.* at 159.

¹⁵ Note, *Due Process in Public Colleges and Universities: Need for Trial-Type Hearings*, 13 How. L.J. 414, 417 (1967).

¹⁶ *Madera v. Bd. of Educ.*, 386 F.2d 778, 786 (2d Cir. 1967). This case involved a junior high school guidance counseling session in which the parents, acting on behalf of the child, were denied the right to counsel.

¹⁷ Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME LAWYER 174 (1963).

with analogous situations where this right has been upheld. For instance, the right to counsel is granted to persons accused of misdemeanors. Standards set out by courts to insure fair hearings at both the judicial and administrative levels have included the right to counsel. In *Bolkovac v. State*¹⁸ the court observed that the right to counsel exists in misdemeanor causes to the same extent that it applies to felony cases. Since the punishment of a misdemeanor may involve a fine only, it would seem unreasonable to deprive a student of the right to counsel when the student stands to lose a college education which is considerably more valuable than the mere loss of money. By the mere phrasing of the notice of dismissal on a student's transcript, the school can make it virtually impossible for this student to gain admission elsewhere.¹⁹ It has been suggested that the right to a hearing, in order to meet the constitutional standards of fairness, requires the right to counsel, if desired.²⁰

In *Almon v. Morgan County*²¹ the Alabama Supreme Court discussed the elements of procedural due process necessary to meet the requirements of fair play, whether in a court or an administrative hearing. Included in these elements were notice of an open hearing before a legally constituted court or *other authority*, an opportunity to present evidence and argument, the right to counsel, if desired, and information concerning the allegations of the opposing party.²² Another 1944 decision²³ stated that a proper hearing included reasonable notice of the offense charged, an opportunity for one to face his accusers and hear their testimony, submission of evidence in his own behalf, and the right to be represented by counsel, if desired.²⁴ Considering the present disposition to deny students the right to counsel at a college disciplinary hearing, as indicated in the *Barker* case, it seems that due process may have suffered a set back in the area of student rights.

¹⁸ 229 Ind. 294, 98 N.E.2d 250 (1951). See also W. VA. CODE ch. 62, art. 3, § 1 (Michie Supp. 1968) which specifically provides for the right to counsel in misdemeanor cases and for the court appointment and payment of such counsel in cases of indigent misdemeanants.

¹⁹ See Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1365 (1963).

²⁰ 46 N.C.L. REV. 398, 403 (1968).

²¹ 245 Ala. 241, 16 So. 2d 511 (1944).

²² *Id.* at 246, 16 So. 2d at 515.

²³ *Geiger v. Milford Independent School District*, 51 Pa. D. & C. 647 (1944).

²⁴ *Id.* at 652.

At least one state legislature has, however, taken a more liberal view of the rights of students enrolled in state-supported institutions of higher learning. Oregon has declared the University of Oregon to be a state agency thereby subjecting it to the Oregon Procedure Act.²⁵ This Act requires that a proceeding in a state agency include reasonable notice, right to counsel, compulsory process, cross-examination, evidentiary limitations, and written findings.²⁶ As one noted commentator observed, "Nothing is lost by giving the student the chance to confer with a counsellor during the proceedings if he wishes. His confidence is bolstered and the committee might be aided."²⁷ Professor Seavey has observed, "It is shocking that the officials of a state educational institution . . . should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket."²⁸

III. CONCLUSION

It appears as though the law requires only the barest semblance of procedural due process in college disciplinary proceedings, even though a student's opportunity to continue his education may be substantially affected. As exemplified in *Dixon*, a student may not be expelled without at least notice and a hearing. Therefore, it appears that whether or not a student will be allowed to utilize counsel in a disciplinary hearing will be determined by the particular practices of the school involved.

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Constitutional Law—Validity of Safety Helmet Requirements

The State of Michigan amended its motor vehicle code to require all persons operating a motorcycle to "wear a crash helmet

²⁵ ORE. REV. STAT. § 352.010 (1965).

²⁶ ORE. REV. STAT. §§ 183.420-470 (1965).

²⁷ Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 79-80 (1966).

²⁸ Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).