

State Legislative Impact To Your Code: Adapting Your Code to the Changing Landscape of Student Conduct

Jonathan Sanders, Ph.D.
Associate Dean and Director of SAA

Trey Jones, J.D.
Deputy General Counsel

OVERVIEW

- **Higher Education Case Law Review**
- **Overview of HB 364**
- **Code Impact**
- **Revisions to the Code**
- **Challenges Encountered**
- **Wrap Up**

WHAT IS DUE PROCESS?

- The concept of due process is derived directly from the U.S. Constitution
 - Fifth Amendment: No person shall be...deprived of life, liberty, or property, without due process of law...
 - Fourteenth Amendment: ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
 - From these amendments arose the notion of “procedural due process” – in order for a public entity to deprive an individual of a liberty or property interest, the individual must be afforded a fair process

IN LOCO PARENTIS

- In the early 1900s, the university operated *in loco parentis* (in place of the parents)
 - Constitutional rights were not of concern because the university was acting on behalf of parents
 - *Gott v. Berea College* (Ky. 1913): court upheld the right of Berea College to expel a student for eating at a facility not owned by the institution
 - Faculty created a rule forbidding students from going to “eating houses and places of amusement ... not controlled by the college ... on pain of immediate dismissal. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain.”
 - Berea College argued that the rule prevented students from wasting time and money
 - Court held that “college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils ... and ... they may [] make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.”
 - Students’ rights to regulate their own conduct not recognized

RECOGNITION OF STUDENT RIGHTS

- In the early 1960s, with many other changes, student activists began to mount legal challenges to university disciplinary rules
 - *Dixon v. Alabama* (5th Cir. 1961)
 - Plaintiffs were expelled by the President of Alabama State College by letter without explanation of the misconduct
 - The “misconduct” was a lunch counter sit-in and that the Governor and Board of Education pushed for the expulsions
 - On appeal, the court held that minimum due process requires notice and an opportunity to be heard before a public college could expel a student for misconduct
 - Full shift – courts began to find no duty to supervise and protect students and the university should no longer stand *in loco parentis* in relation to their students
 - Result: with no duty to protect, the focus began to shift to the students’ right, constitutional and otherwise, to define and regulate their own lives with the university’s role relegated to academics



EVOLUTION OF STUDENT RIGHTS

- Since the 1960s, a students' due process rights have evolved through judicial interpretation
 - *Goss v. Lopez* (U.S. 1975)
 - Ohio statute allowed a principal to suspend a student for misconduct for up to 10 days without a hearing and without the right to appeal
 - State argued because there is no constitutional right to a public education, there is no constitutional protection
 - U.S. Supreme Court: “the due process clause [] forbids arbitrary deprivations of liberty,” which includes risks to good name, reputation, honor or integrity based on government action, and property interest in educational benefits
 - Therefore, *at a minimum*, a student facing a short suspension must be provided:
 - Notice of the charges against the student, and
 - The opportunity to be heard.
 - Also recognized the difficulty of applying this standard uniformly – should a one-day suspension warrant the same procedural protection as a 10-day suspension, or expulsion?

FURTHER CONFUSION FOR STUDENT CONDUCT

- The minimum due process requirements were established by *Goss v. Lopez*. (1) notice, and (2) the opportunity to be heard
- Other considerations developed by the courts:
 - Appeal
 - *Flaim v. Medical College of Ohio* (6th Cir. 2005): due process generally does not require an appeal from a school's decision that is reached through constitutional procedures though most colleges and universities “wisely” provide for such appeals
 - But note, the court left the door open for a required appeal when the private interest is so significant, such as long-term stigma or expulsion (since *Flaim* was an expulsion case, what type of case will warrant this?)
 - Degree of notice
 - *Flaim*: notice satisfies due process if there is sufficient notice of the charges against the student and a meaningful opportunity to prepare for the hearing
 - But note, the same court also held that the stronger the student's property or liberty interest, the more likely a formal written notice is required explaining the charge, the policies violated and the potential sanction (what does this mean?)

FURTHER CONFUSION FOR STUDENT CONDUCT

- Right to cross examination
 - *Overdam v. Texas A&M University* (5th Cir. 2022): due process in the university disciplinary setting requires some opportunity for real-time cross examination, though it need not necessarily be by the accused party
- Right to counsel
 - *Jaksa v. Regents of Univ. of Michigan* (E.D. Mich. 1984): the right to counsel *might* exist is an attorney presents the university's case or if the hearing is subject to complex rules of evidence (when is a case complex enough to warrant this?)
- Unbiased decision-maker
 - *Doe v. Miami University* (6th Cir. 2018): recognized a third tier to the minimum due process requirements
 - an unbiased decision-maker
 - But note:
 - School disciplinary committees are presumed to be impartial absent a showing of *actual* bias
 - The dual-role of a school administrator does not *per se* disqualify them from participation; but when a school administrator acting as investigator, prosecutor and judge compromises the process, it can impact the student's right to an unbiased decision-maker
 - Being a feminist, alone, is not evidence of bias against a male student facing discipline

LEGISLATIVE PUSH BACK ON STUDENT CONDUCT PROCESS

- By the 2020s, direction from the courts is clear as mud
- Amendments to Title IX regulations in the prior decade had taken shape and several high-profile cases demonstrated that some universities had gone too far
 - *Doe v. Miami University* (6th Cir. 2018): perfect example of due process abuse
 - Equally situated female student not investigated for sexual misconduct
 - Person who decided to bring the charge also a decision-maker
 - Accused student not provided the evidence against him prior to the hearing

LEGISLATIVE PUSH BACK ON STUDENT CONDUCT PROCESS

- Considering the evolution of due process rights, from *Goss* to *Dixon* and forward
- Considering that students and society are becoming increasingly litigious
- Considering growing distrust in higher education (DEI, CRT, free speech battles, etc.)
- Legislatures have begun to meddle in student conduct
- Several states have introduced attorneys and other “due process protections” into student conduct processes
 - As the fiscal note for the recently introduced Montana legislation indicated, “this bill would change the relationship between the institution and student from educational to adversarial”



HOUSE BILL 364

SUMMER 2022

OVERVIEW OF HB 364

ATTORNEY PARTICIPATION

- Students has right to be represented by an attorney who may **“Fully Participate”** (Suspension, Expulsion, and Deferred Suspension cases).
- Attorney rights for Student Orgs.
- Victim also has same rights.
- Legislation carved out academic misconduct.

OVERVIEW OF HB 364

Attorney Participation

- Defines “Fully Participate”: opportunity to make opening and closing statements, examine or cross examine witnesses, and provide support, guidance, and advice.

Overview of HB 364

Suspensions & Expulsions

- ➔ Suspension 10 or more days or Expulsion
 - Student or organization presumption of innocence.
 - Maintain an administrative file and allow access to it at least 7 days before a disciplinary hearing.
 - Disciplinary proceedings free from conflicts: victim counselor or advocate, investigator, institutional prosecutor, adjudicator, appellate adjudicator.
 - Student or Org has right to appeal up to 10 days after decision. Victim has same right if applicable. Attorney can fully participate in the appeal.
 - If appeal reverses decision or lessening of sanction, institution shall reimburse tuition and fees paid for the period of suspension, etc.

Overview of HB 364

Court

- ➔ Student or Student Org has right to bring private right of action against institution and its agents acting in their official capacities, with management board named as a party, to recover actual damages.
- ➔ If court determines rights to due process has been violated, court shall award any mental or emotional distress, loss of wages or earning capacity, and costs.



Overview of HB 364

Interim Measures

→ Interim Measures Requires

- Within 72 hours threat has been determined, written notice sent with reasons why enacting the measure.
- Within seven business days- interim measures hearing occurs to review the appropriateness or interim measure. Student and victim can be represented by an attorney.
- No mention of Student Orgs. in this section

CODE CONCERNS

- **Staffing Concerns**
- **Additional step in the process with Investigation, then Charge and implement full rights**
- **Attorney/Advisor Role (Fully Participate)**
- **Burden of the law focuses on non-academic which really focuses it on all student conduct to include academic**

REVISIONS TO CODE PROCESS

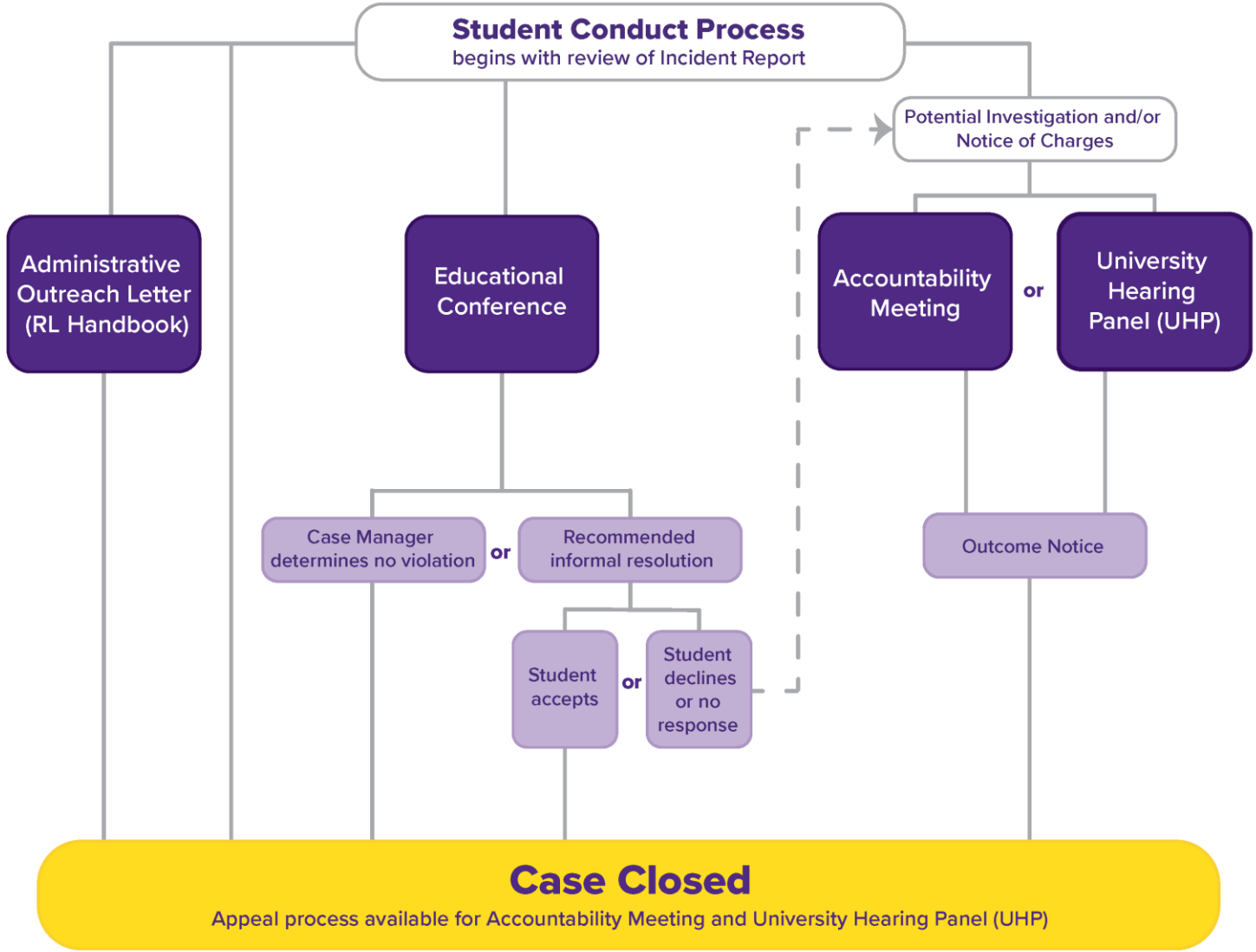
- **Added Informal Resolution option for Behavioral Misconduct (Currently not available for Academic)**
 - Incentivize students with a more streamlined process
 - Non-Suspension and Expulsion cases will not be on Academic Transcript
 - Agree to educational outcomes
 - Waive their right to a formal hearing
 - Case is listed as FYI instead of Responsible
 - Single staff member involved

REVISIONS TO CODE PROCESS

- Rights of a Charged Student Modified
- Expanded requirements around Interim Measures
- Formalized “Partnership Process” for RSO misconduct
- Updated University Hearing Panel procedures & formalized Order of Proceedings
- Removed Deferred Suspension as a status
- Educational Conference Option- No charges, Informal Resolution, or Formal process option

REVISIONS TO CODE PROCESS

- Increased due process through Appeals process updates (Sec 11.5)
 - Changed to committee review from single reviewer
 - Expanded length of time and types of cases eligible to appeal
 - Further separation from Student Conduct office



CHALLENGES ENCOUNTERED

- Need to implement boundaries for procedures with UHP
 - Number of material observers, timing, use of outside materials, etc.
- Transfer of cases when Informal Resolution is not pursued.
- LSU Attorneys representative in UHP's
- Conversion of non-confrontational process to what can be seen like a confrontational for UHP's

FINAL THOUGHTS

- ➔ Overall Code Process is better for Students and University
- ➔ Students have more options for resolution
- ➔ Created alternate pathways for resolution with General Counsel
- ➔ Additional bandwidth of staff (Informal Resolutions)
- ➔ Four months in and will be making further tweaks to the process

Academic Misconduct- Process and AI Use
UHP Constraints

Questions?

Jonathan Sanders, Ph.D.

jsanders@lsu.edu

Trey Jones, J.D.

jones@lsu.edu