

Chapter 1

STUDENT DISCIPLINE

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Scope Note

This chapter introduces the reader to the disciplinary process in private postsecondary schools in Massachusetts. It begins with the contractual relationship between the student and the institution, and goes on to discuss the student handbook, disciplinary procedures, criminal matters, court review, the concept of “basic fairness,” and sanctions.

§ 1.1 CONTRACT BETWEEN SCHOOL AND STUDENT

It is generally recognized that when a student matriculates at a private college or university, a contract is created between the student and the university. *E.g.*, *Havlik v. Johnson & Wales*, 509 F.3d 25, 34 (1st Cir 2007). The terms are loosely defined: the student agrees to pay tuition and the university agrees to provide an education. (For purposes of this chapter, the terms “university,” “college,” and “school” will be used interchangeably unless otherwise noted.) Beyond these basic promises is where the university must define the additional terms of the contract to ensure that the promises it makes to one student can be provided to all. As such, many colleges create student handbooks that outline the rules that students must obey, the rights they possess, and the procedures for enforcing those rules and rights. This ensures that students are put on notice of the consequences of their actions and that courts will have a road map for determining whether a university acted appropriately when an institutional decision is challenged in court.

§ 1.2 STUDENT HANDBOOK

While not required by law, it is a best practice for a university to create a student handbook to codify its community standards and put students on notice of their rights and responsibilities. It is essentially the school's opportunity to write its own laws, as it can create standards and expectations distinct from statutory law. Furthermore, university conduct standards are independent of societal legal standards and are enforced separately, though sometimes concurrently. A handbook should make clear to students that a violation of the handbook is considered separate from any violation of state and federal law, and will be addressed separately by the university through its own disciplinary system. This does not mean, however, that universities cannot punish students for criminal conduct. It simply means that the university can use a separate process to do so, and can establish standards wholly distinct from the criminal law.

Schools possess a great deal of flexibility in the drafting of student handbooks. Courts do not typically apply strict commercial contract principles when interpreting handbook language. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994). Instead, they tend to recognize that “educational contracts have unique qualities and are to be construed in a manner which leaves the school sufficient discretion to ‘properly exercise its educational responsibility.’” *Fellheimer v. Middlebury Coll.*, 869 F. Supp. at 244 (quoting *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976)); see also *Gorman v. St. Raphael Acad.*, 853 A.2d 28, 34 (R.I. 2004) (affording broad discretion to private schools to interpret contracts with students in ways that further the school's legitimate “educational and doctrinal responsibilities”). Thus, schools are given greater leeway in the language that they choose and in their interpretation of such language. For instance, a college is not required to set forth in its handbook every specific offense that could lead to disciplinary action. Instead, it may define obligations generally, such as “exercising respect for persons,” as long as it interprets them reasonably. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. at 244–45.

Consistent with this need for flexibility, courts generally recognize reservation clauses in handbooks and permit universities to make unilateral language changes without notice to students. *Millien v. Colby Coll.*, 874 A.2d 397 (Me. 2005). Schools should be aware, however, that any university publication has the potential for being considered part of the contract with the student. Thus, it is important to craft publications (especially admission and registration materials) with an eye toward potential contract claims down the road by either eschewing language that could be construed as a promise, or incorporating a disclaimer, or both. See *Merrow v. Goldberg*, 672 F. Supp. 766, 774 (D. Vt. 1987) (“The terms of the contract are contained in the brochures, course offering bulletins, and other official statements, policies and publication of the institution.”); see also

Shin v. MIT, No. 020403 (Ma. Super. Ct. Jun. 27, 2005). Under Massachusetts law, statements in handbooks, policy manuals, brochures, catalogs, advertisements, and other promotional materials can form the basis of a valid contract. See *Russell v. Salve Regina Coll.*, 890 F.2d 484, 488 (1st Cir. 1989), *rev'd on other grounds*, 499 U.S. 225 (1991), *reinstated on remand*, 938 F.2d 315 (1st Cir. 1991). However, the promise must be “definite and certain so that the promisor should reasonably foresee that it will induce reliance” on the part of the student. *Shin v. MIT*, No. 020403 (Ma. Super. Ct. Jun. 27, 2005) (quoting *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 150 (D. Mass. 1997)). Thus, the more reservations, the better.

There have been a few courts that have held schools to a higher standard, but that is not currently the prevailing theory. For instance, in *Ackermann v. College of the Holy Cross*, the court considered ambiguities in the handbook to “be construed against the College as the drafter” because there was no evidence that students “had any meaningful opportunity . . . to negotiate any of the terms within that document.” *Ackermann v. Coll. of Holy Cross*, No. 030577B (Ma. Super. Ct. Apr. 1, 2003). The weight of this unpublished Massachusetts Superior Court decision is obviously limited, though the same argument was also made by Justice Roderick Ireland in his dissenting opinion in *Schaer v. Brandeis University*, 432 Mass. 474 (2000). The majority implicitly rejected the argument, ruling that, “A college must have broad discretion in determining appropriate sanctions for violations of its policies.” *Schaer v. Brandeis Univ.*, 432 Mass. at 482.

Finally, while the student handbook generally covers student conduct on campus, a university also has the authority to extend its jurisdiction beyond campus. Universities routinely retain the right in student handbooks to discipline students for off-campus conduct, even conduct unrelated to the student’s educational experience, if that conduct adversely impacts or has the potential to adversely impact the university community. Courts have routinely sanctioned universities’ exercise of this authority for the safety and well-being of the university community. See generally *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25 (1st Cir. 2007).

§ 1.3 DRAFTING DISCIPLINARY PROCEDURES

It is advisable that private universities set forth written protocols for handling disciplinary matters. Discipline can be invoked for academic as well as nonacademic misconduct.

Academic misconduct cases have included discipline for plagiarism, *Morris v. Brandeis Univ.*, Mass. Super. Ct. No. CA002161 (Sept. 4, 2001), *aff'd*, 60 Mass. App. Ct. 1119 (2004); and misrepresentation of an academic record, *Bhatt v.*

Univ. of Vt., 2008 Vt. 76 (2008); while nonacademic misconduct cases have included sexual misconduct, *Schaer v. Brandeis Univ.*, 432 Mass. 474 (2000); *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721 (1st Cir. 1983); failure to abide by a weight loss contract, *Russell v. Salve Regina Coll.*, 938 F.2d 315 (1st Cir. 1991); violation of another student's rights, *Coveney v. President & Trustees of Coll. of Holy Cross*, 388 Mass. 16 (1983); assault and battery, *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25 (1st Cir. 2007); theft, *Dinu v. President & Fellows of Harvard College*, 56 F. Supp. 2d 129 (D. Mass. 1999); and harassment and disorderly conduct, *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13 (1st Cir. 1989).

The protocols should provide students with basic process to ensure fundamental fairness, but do not have to rise to the level of Fourteenth Amendment due process guarantees. (The exception to this rule is public universities, which courts have found are bound by the Fourteenth Amendment due process provisions and are subject to much more rigorous judicial review.) Within the parameters of basic fairness, universities have broad discretion in designing a disciplinary process that suits their pedagogical and administrative objectives. Thus, whether they permit counsel, cross-examination of witnesses, and other procedural hallmarks of the court system largely turns on policy, not legal, judgments.

A disciplinary process for private universities could look something like this: A student charged with violating community standards is entitled to a hearing before a student conduct board comprised of faculty and students. The student is entitled to testify before the board and to cross-examine his or her accuser. The student is also entitled to present evidence and witnesses; however, the rules of evidence do not apply. The board is permitted to make its own determinations regarding what evidence to accept and reject. Students are permitted to bring an adviser to the proceeding, but may not have an attorney present, except when there are concurrent criminal charges pending, in which case passive assistance of counsel is permitted. The burden of proof rests with the accuser and a finding of responsibility must be based upon a clearly articulated standard. The hearing is not recorded and the student does not have the right to record it. The board issues a written report, which includes a summary of the evidence presented, a decision as to responsibility, and a recommended sanction, if applicable. The dean of students, or another appropriate university officer, makes the decision as to the sanction. There is also a right to appeal the decision and the sanction to a separate appellate board after a decision is rendered. The appeal follows a separate set of procedural rules.

Schools should draft hearing procedures to incorporate as much flexibility and discretion as possible. There should be no mandatory language defining the obligations of the university. For instance, in *Fellheimer* the court sanctioned the college's use of the following language in its hearing procedures: "The following procedures are designed to promote fairness, and will be adhered to *as faithfully*

as possible. If exceptional circumstances dictate variation from these procedures, the variation will not invalidate a decision unless it prevented a fair hearing or abrogated the rights of a student.” *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994).

The court determined that:

This provision negates any argument that the College has contractually guaranteed that the specific procedures it has outlined will always be scrupulously adhered to. Rather, this provision, when read with the other provisions of the handbook, merely points out that the procedures of the College, are designed to “promote fairness” and to “protect students from arbitrary or capricious disciplinary action,” but that in exceptional circumstances, any procedure that does not prevent a fair hearing or abrogate the rights of the student will be acceptable.

Fellheimer v. Middlebury Coll., 869 F. Supp. at 244.

Similarly, the court in *Sullivan v. Boston Architectural*, 57 Mass. App. Ct. 771 (2003), gave the university broad discretion in defining policies and establishing student rights in disciplinary situations. The court reasoned that students were “entitled only to those procedural safeguards that the University agreed to provide.” *Sullivan v. Boston Architectural*, 57 Mass. App. Ct. at 774 (quoting *Holert v. Univ. of Chicago*, 751 F. Supp. 1294 (N.D. Ill. 1990)). In *Havlik*, the court ruled that it interprets

contractual terms in accordance with the parties’ reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them. Thus, if the university explicitly promises an appeal process in disciplinary matters, that process must be carried out in line with the student’s reasonable expectations.

Havlik v. Johnson & Wales Univ., 509 F.3d at 34–35.

By contrast, the court ruled that students could not read new terms or rights into the contract that would not otherwise be reasonably anticipated by the parties. *Havlik v. Johnson & Wales Univ.*, 509 F.3d at 34–35. Thus, the *Havlik* court sent the message that to the extent that disciplinary procedures are spelled out in the handbook, students can reasonably rely on the university to follow them. However,

should a university choose to stay silent on certain provisions or processes, the court will not interpret such silence to the detriment of the university or impose additional procedural burdens on the university at the behest of the student. Schools can rest on their generalized need to further their educational responsibilities in taking a flexible approach to setting forth and interpreting their disciplinary procedures.

Finally, private universities should avoid the use of terms that incorporate constitutional rights into the proceeding, such as “due process.” Also, universities should be careful about the burden of proof articulated in the process, as it may invite greater scrutiny from the court if it is a standard commonly applied in the courts.

§ 1.4 UNIVERSITY HEARINGS WHEN CRIMINAL CHARGES ARE PENDING

In the event that a student engages in conduct that appears to violate both the university’s conduct expectations and the law, the university can retain the right to proceed with its own internal judicial process regardless of any state action that might be commenced. This can present a problem for the accused as any statements made at the university hearing would not be privileged and could be used against him or her in a subsequent criminal proceeding. As a result, students charged with concomitant crimes often seek to have an attorney present at board hearings.

Consistent with its right to control the proceeding, a university does not have to permit the presence of counsel, or can place restrictions on the extent of counsel’s participation. In *Coveney*, the court ruled that, “Because the college is a private institution, Coveney had no constitutional right to have an attorney present.” *Coveney v. President & Trustees of Coll. of Holy Cross*, 388 Mass. 16, 22 (1983). The exception to this rule has been proceedings by a public university when criminal charges are pending. In those situations, courts have found that due process requires that the student be allowed to have counsel. *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988). Some schools will allow counsel to attend when there are outstanding criminal proceedings to ensure that the accused is fully apprised of his or her other rights during the hearing and can make an informed decision about participation. This does not mean, and courts have not held, that the attorney must be allowed to present the case, and many schools allow only passive assistance of counsel at such hearings.

Some universities choose to defer disciplinary cases while criminal proceedings are pending; however, there is no legal obligation to do so and the criminal process can often take months. As such, many universities conclude that the community’s

interest in addressing the matter expeditiously outweighs the student's interest in delaying the process until the criminal process has ended. Furthermore, because the school is enforcing its own code of conduct, the ultimate disposition by the Commonwealth should have no impact on the school's decision and vice versa.

§ 1.5 CIRCUMSTANCES WARRANTING IMMEDIATE ACTION

Although most universities attempt to provide process in most cases, there are times when immediate, unilateral action is needed and thus, exceptions to the process should be preserved in the handbook to ensure that the university can respond to exigent circumstances. For instance, if the dean believes that a student's presence poses a significant threat to his or her physical or emotional safety or well-being, or may disrupt the safety or well-being of another student, faculty, staff, guest, or other university community member, the university may take any action that it believes to be appropriate and reasonable under the circumstances. In addition, the university should reserve the right to take unilateral action against students for off-campus conduct that has an adverse effect on the university community, or in the event that a student is charged with or convicted of a crime. In these instances, the university is acting on its inherent power to protect the community.

The nature of these cases often requires a university to act immediately to respond to an impending threat to an individual or the community. As such, administrators generally do not have time to wait for a disciplinary process to play out before making a decision. However, the university may still afford the student an opportunity to make a case for reinstatement, just not to the extent that would be afforded in the typical case of a rule violation. Furthermore, many of these cases are not traditional disciplinary matters as they often involve students engaged in self-harm and universities are reluctant to treat them as disciplinary matters. As such, in addition to a traditional disciplinary process, schools should have in place protocols for taking immediate, unilateral action in cases involving students engaged in self-destructive or other dangerous behavior.

In these situations, the university may decide to remove the student from campus and then afford the student a hearing before permitting reinstatement. As an alternative, the student may be afforded the opportunity to meet with the dean and present his or her case, but the dean's decision would be final.

Practice Note

Situations involving potential self-harm or disruption of the community may involve disability issues. Practitioners should reference Chapter 5 herein, Students with Disabilities, in handling these matters.

§ 1.6 COURT'S REVIEW OF DISCIPLINARY PROCESS

Courts generally defer to university decision making, but do not abrogate their role altogether when a student challenges a university disciplinary decision in court. The courts ask two questions:

- Did the university follow its established procedures?
- Was the process basically fair (which does not equate to due process for private universities)?

If those two questions are answered in the affirmative, the courts will typically sanction the university's conduct. These principles were codified in the seminal Supreme Judicial Court decision in *Schaer v. Brandeis University*.

In *Schaer*, David Arlen Schaer, an undergraduate, brought an action against Brandeis for alleged breach of contract arising from a disciplinary decision. In 1996, a female student filed a report with the student judicial system against Schaer for sexual misconduct. After conducting a hearing, the university board on student conduct found that Schaer “engaged in unwanted sexual activity and [. . .] created a hostile environment” and suspended him for the summer months while placing him on disciplinary probation for his remaining time at Brandeis. Schaer requested a new hearing, but his request was denied by the appeals board on student conduct. Schaer then filed a complaint in Superior Court alleging that he was unfairly disciplined and sought injunctive relief. His request for an injunction was denied and the Superior Court granted Brandeis’ motion to dismiss.

Schaer appealed, eventually landing at the Supreme Judicial Court, which held that the Superior Court correctly dismissed the breach of contract claim based on Schaer’s failure to establish that the university did not meet reasonable expectations under the contract and demonstrate that the hearing was unfair. Schaer argued that the disciplinary hearing was unfair because he was not interviewed by the board in response to the allegations against him, testimony from one of his witnesses was excluded, and that the record of the hearing was insufficient. However, the court disagreed, reasoning that the hearing was fair because Brandeis followed the disciplinary procedures outlined in the student handbook.

The *Schaer* court reasoned that courts must afford private universities a certain level of deference in their academic decision making:

We adhere to the principle that “[c]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities.” A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. “A college must have broad discretion in determining appropriate sanctions for violations of its policies.”

Schaer v. Brandeis Univ., 432 Mass. 474, 482 (2000) (citations omitted) (quoting *Schaer v. Brandeis Univ.*, 48 Mass. App. Ct. 23, 26 (1999) and *Coveney v. President & Trustees of Coll. of Holy Cross*, 388 Mass. 16, 20 (1983)).

In a subsequent case also involving Brandeis, the Appeals Court followed *Schaer* in upholding the university’s decision to suspend a student for plagiarism. In *Morris v. Brandeis University*, the court cited the principle that “courts are generally reluctant about second-guessing academic and disciplinary decisions made by private schools” and reasoned that “[t]his deference derives from a commendable respect for the independence of private educational institutions and a well-justified laissez-faire attitude toward the internal affairs of such institutions.” *Morris v. Brandeis Univ.*, Mass. Super. Ct. No. CA002161 (Sept. 4, 2001), *aff’d*, 60 Mass. App. Ct. 1119 (2004) (citing *Schaer v. Brandeis Univ.*, 432 Mass. at 482). *Morris* argued that the sanction he received was too harsh and therefore unfair. However, the court determined that since Brandeis acted “in good faith and on reasonable grounds” to suspend *Morris*, it would not second-guess the university’s decision. *Morris v. Brandeis Univ.*, Mass. Super. Ct. No. CA002161 (Sept. 4, 2001), *aff’d*, 60 Mass. App. Ct. 1119 (2004) (citing *Coveney v. President & Trustees of Coll. of Holy Cross*, 388 Mass. at 19).

This principle was echoed in a recent First Circuit opinion involving a student who was dismissed for beating up another student. The court, citing *Schaer*, ruled that the university had met its obligations under the handbook, despite the fact that the university handbook’s procedures were “sketchy.” *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 35 (1st Cir. 2007). The court reiterated the need for deference in these matters and upheld the university’s decision, reasoning that Rhode Island contract law

requires, among other things, that parties to a contract act pursuant to an implied duty of good faith and fair dealing. Good faith and fair dealing cannot be separated from context, however—and in evaluating those

covenants in the educational milieu, courts must accord a school some measure of deference in matters of discipline.

Havlik v. Johnson & Wales Univ., 509 F.3d at 35.

§ 1.7 LESS DEFERENCE ACCORDED TO DECISIONS REGARDING “SOCIAL OFFENSES?”

While courts are generally unwilling to interfere with the internal decisions of private institutions, where the allegations against a student are especially severe, such as sexual assault, courts may examine the allegations and university procedures more closely. The Appeals Court in *Schaer* reasoned:

Reluctance of courts to become involved in student discipline diminishes as the subject matter graduates from academic issues to misconduct. So, for example, a court is most unlikely to adjudicate whether an examination has been graded fairly or a student has been fairly placed on probation by reason of poor academic performance. Plagiarism is more an academic than social offense. If a student is disciplined for defacing college property or postgame brawling, the degree of deference will still be very considerable because this involves concerns peculiar to the educational institution. Should the student, however, be suspended or expelled for misconduct, such as theft or—as here—rape, the subject matter is not only familiar to courts but mars the record of the student in a manner that is likely to have serious consequences for the student in admission for graduate study or competition for a job.

Schaer v. Brandeis Univ., 48 Mass. App. Ct. 23, 26–27 (1999) (citations omitted).

It should be noted, however, that the Supreme Judicial Court in *Schaer* overruled the Appeals Court and deferred to the university’s decision, even though the alleged offense was one of significant social concern. The Supreme Judicial Court did not comment on, adopt, or refute the Appeals Court’s suggestion that the level of deference applied depended on the offense. Thus, although current Massachusetts law does not provide a basis for a court to apply heightened scrutiny to

more serious cases, practitioners should bear this risk in mind when dealing with a claim in court.

By contrast, when it comes to academic judgments, courts are particularly deferential to universities. Since the seminal U.S. Supreme Court decision in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), courts have espoused the “widely accepted rule of judicial nonintervention into the academic affairs of schools.” *Lachtman v. Regents of Univ. of Cal.*, 158 Cal. App. 4th 187 (2007). As such, courts have generally taken the position that they will only interfere with an academic judgment when it is deemed to be arbitrary or capricious. *See, e.g., Regents of the Univ. of Mich. v. Ewing*, 474 U.S. at 225 (courts may not overturn an academic judgment “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment); *Clements v. Nassau County*, 835 F.2d 1000, 1004 (2d Cir. 1987) (“The legal standard in challenging an academic [decision] is necessarily a higher one than for disciplinary [decisions] because . . . the determination is more subjective and evaluative than the factual questions present in most disciplinary decisions”).

§ 1.8 DETERMINING BASIC FAIRNESS

Basic fairness (also referred to by some courts as “fundamental fairness”) in its most essential form consists of two requirements: notice and the opportunity to be heard. Most courts are satisfied by a private university’s student judicial process if students are notified of the charges against them and are given an opportunity to state their case. In *Fellheimer v. Middlebury College*, the court also required that the student be given an explanation of the factual predicates behind each offense. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 246 (D. Vt. 1994).

Many schools provide students with a disciplinary hearing before a panel of their peers and faculty. It should be noted, however, that the *Coveney* court ruled that “It is clear that because the college is a private institution, Coveney had no constitutional right to a hearing.” *Coveney v. President & Trustees of Coll. of Holy Cross*, 388 Mass. 16, 21 (1983). This is consistent with the distinction between the different levels of process required in public versus private universities.

While it may not be required of private universities, a hearing does bring credibility to the eventual decision. However, the *Coveney* reasoning certainly suggests that the student’s opportunity to be heard does not require the granting of a formal hearing process. It should also be noted that in a recent case involving a private prep school, the Appeals Court upheld Milton Academy’s expulsion of

four students for sexual misconduct despite the fact that it did not hold a formal hearing. The court ruled:

The student was given an opportunity to explain his behavior. Both of his parents were informed of the proceedings shortly thereafter. The four other boys involved in the incident were treated similarly in the proceedings and likewise expelled. Nothing alleged here amounts to arbitrary or capricious conduct or actions taken by the school in bad faith.

Driscoll v. Bd. of Trustees, 70 Mass. App. Ct. 285, 295 (2007). The court cited *Schaer* and reasoned that its analysis held for private prep schools as well. *Driscoll v. Bd. of Trustees*, 70 Mass. App. Ct. at 293.

The most common requirement of courts is that the university act in a manner that students would reasonably expect. In *Mangla v. Brown University*, 135 F.3d 80 (1st Cir. 1998); *Dinu v. President & Fellows of Harvard College*, 56 F. Supp. 2d 129 (D. Mass. 1999); *Morris v. Brandeis University*, Mass. Super. Ct. No. CA002161 (Sept. 4, 2001), *aff'd*, 60 Mass. App. Ct. 1119 (2004); *Goodman v. Bowdoin College*, 380 F.3d 33 (1st Cir. 2004); and *Havlik v. Johnson & Wales University*, 509 F.3d 25, 35 (1st Cir. 2007), the courts applied the standard of “reasonable expectations” to interpret the contractual relationship between the university and its students. Not only are universities expected to act according to handbook procedures, but students are expected to be aware of these procedures as long as they are sufficiently distributed. For instance, the court in *Havlik* concluded that the handbook offered the promise of an appeal, which was carried out in line with the student’s reasonable expectations. In order to meet this expectation, courts examine whether procedures are outlined in handbooks or pamphlets and whether students are adequately exposed to this material.

Courts have been relatively silent on what other standards universities must apply in order to qualify as meeting “basic fairness,” though from a paradigmatic standpoint, courts often juxtapose the concept with the “arbitrary and capricious” standard when seeking to define it. The only case in which other due process requirements were addressed was *Millien v. Colby College*, where the court considered a student’s right to counsel. The court found that the hearing was fair even though the student’s attorney was not present at the hearing. *Millien v. Colby Coll.*, 874 A.2d 397, 404–05 (Me. 2005). In this case the court held that a hearing is still fundamentally fair even when the complainant has legal representation but the accused student does not. *Millien v. Colby Coll.*, 874 A.2d at 404–05.

Standard conflict principles also do not tend to limit universities' right to choose the method of adjudication. Courts have ruled that a university may permit a dean to bring a charge against a student and also serve as a decision maker in the hearing without violating fundamental fairness. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. at 244.

Finally, basic fairness does not require that the hearing be tape-recorded, though a case involving a public university ruled that Fourteenth Amendment due process rights require "some form of record," which can be in the form of a written summary of the testimony and evidence, and the decision rendered. *See Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (R.I. 2004). Thus, it can be inferred that this would not necessarily be required of a private institution, though the Supreme Judicial Court in *Schaer* suggested that such a practice would be advisable. *Schaer v. Brandeis Univ.*, 432 Mass. 474, 480–81 (2000). However, the overriding theme of these cases seems to be that unless a private university affirmatively commits to providing a particular process, such as a written hearing summary or the right of cross-examination, a student cannot expect to receive any process beyond what is written.

§ 1.9 SANCTIONS

In adherence to the principle that "courts are chary about interfering with academic and disciplinary decisions made by private colleges and universities," most courts do not question or overrule disciplinary sanctions imposed on students. The court in *Woods v. Simpson*, 146 Md. 547 (1924), set a high standard for when courts can intervene in disciplinary matters:

[o]nly in extraordinary situations can a court of law ever be called upon to step in between students and the officers in charge of them. When it is made clear that an action with respect to a student has been, not an honest exercise of discretion looking to the proper ends, but beyond the limits of that proper discretion, or arising from some motive extraneous to the purposes committed to that discretion, the courts may be called upon for relief. In such case, [where] the officials have [...] acted arbitrarily [...] the courts may be required to remedy that.

Woods v. Simpson, 146 Md. at 551.

When faced with claims of "arbitrary and capricious" university sanctioning decisions, courts may look to the way in which the university has treated similarly

situated students in the past, but will not require that every student involved in the incident be treated the same. Sometimes, however, courts use comparisons to determine how the university arrived at its decision. In *Dartmouth Review v. Dartmouth College*, the students, who were white, alleged that Dartmouth made race a determining factor in handling the situation and in giving them a disproportionately severe punishment. They claimed that William Cole, a black professor they attempted to interview, behaved far worse but was treated more solicitously, and that Dartmouth did not punish prior student protests that became violent. The court declined to compare the punishment of the students with the treatment of Cole because “a tenured faculty member and a student are not similarly situated simply because they were involved in the same incident.” *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 20 (1st Cir. 1989). The court also distinguished them from the students involved in a prior protest against Dartmouth’s investment holdings in South Africa. The court found that those students (who were not disciplined) were engaged in mass protest activities, while the *Dartmouth Review* students were involved in a personal attack of a faculty member, conduct that would be of particular concern to a college administration. *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d at 20.

In contrast to *Dartmouth Review*, the court in *Coveney* did not compare the punishments of students involved in the same incident in a direct fashion but did explain why the differences in sanctions were appropriate. The court ruled that

mere comparisons between punishments imposed on students are immaterial to the issue of whether a particular punishment imposed on a particular student is arbitrary and capricious In dealing with students who have violated rules or who have been guilty of conduct requiring discipline, differences may exist requiring, or at least reasonably permitting, differences in treatment.

Coveney v. President & Trustees of Coll. of Holy Cross, 388 Mass. 16, 20–21 (1983) (quoting *Frank v. Marquette Univ.*, 209 Wis. 372, 377 (1932); *Deehan v. Brandeis Univ.*, 105 F. Supp. 626, 627 (D. Mass. 1957)). The court concluded that one of the students received a reduced punishment because he violated fewer handbook provisions and had a lesser role in the incident. *Coveney v. President & Trustees of Coll. of Holy Cross*, 388 Mass. at 21.

In *Morris*, the court upheld the university’s sanctions despite the student’s claims that they were too harsh. The court again indicated its reluctance to second-guess the academic and disciplinary decisions of private schools. However, the court noted that there was ample evidence to support the disciplinary board’s

finding. Likewise, the court found that the dean's method of comparing Morris' situation to that of other students in meting out discipline was not unfair.

Thus, it appears that while courts will not engage in making comparisons between students, they support the university's use of comparisons when determining sanctions for misconduct. This is because courts view the university as the best decision maker on what sanctions are appropriate since university officials understand the campus community and are knowledgeable about university policies. Only in cases where the punishment is extreme and the university shows a lack of judgment will courts consider changing university sanctions imposed on students.

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