**Signature Assignment:**

# Due Process in Student Conduct Proceedings at Northeastern University

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Due process is an established constitutional right that has relevance to student conduct proceedings. In the following paper, an explanation of the origins of due process and relevant cases pertaining to education are presented. After a discussion on how due process functions on college campuses, three actionable suggestions are made to improve Northeastern's conduct proceedings: (1) a clause regarding a unanimous vote of the Student Conduct Board for expulsion decisions be added to the Code, (2) requiring the attendance of a Hearing Advisor, and (3) maintain consistency across all university websites pertaining to conduct hearings.

## Origins of Due Process: Magna Carta and Beyond

Due process has evolved over time from implied rights to a constitutional amendment. In fact, in order to understand due process in the United States, we first turn to the thirty ninth clause of the Magna Carta, the charter of English liberties granted by King John on June 15, 1215. Here the law decrees that no free man is to be "ruined…except by the lawful judgment of his peers or by the law of the land" (Encyclopædia Britannica, 2022; Stenton, 2022; Summerson, 2015). The Magna Carta represents the formative basis for the charters of the Thirteen Colonies, Massachusetts in particular. A charter was granted to the Massachusetts Bay Company in 1629, establishing the colony of Massachusetts and trade with England. The Massachusetts Body of Liberties became law in 1641, bearing a striking resemblance to clauses found in the Magna Carta; furthermore, the Massachusetts Charter of 1691 is itself a document that resembled English law and the Magna Carta " both in form and in substance" (Brink, 2014; Hazeltine, 1917).

The Magna Carta's influence did not end there. The United States Constitution also draws from this charter. Like the Magna Carta, the Constitution functions as a dynamic document, creating a framework for the laws of the land that supersede all state or regional legislation, and

is above the leaders of the land (The U.S. National Archives and Records Administration, 2019). The Fifth Amendment of the Constitution first uses the phrase "due process" and was ratified in 1791: "No person shall…be deprived of life, liberty, or property, without due process of law" (U.S. Const. amend. V). This in and of itself bears striking direct resemblance to the Magna Carta Clause 39.

The Fifth Amendment simply introduces the concept of due process, and is perhaps more commonly recognized as "the right to remain silent." Instead, due process as formal constitutional right was not recognized until the ratification of the Fourteenth Amendment in 1868 (Encyclopædia Britannica, 2022) which establishes that "no State shall…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" (U.S. Const. amend. XIV § 1). In determining if states are compliant with the Fourteenth Amendment, strict scrutiny is used to first identify what government interest is at stake and if it is compelling and second to determine if the government action is narrowly tailored and restricts no other fundamental rights.

**Due Process in Matters of Public Elementary and Secondary Education**

The Fourteenth Amendment as it pertains to matters of education is perhaps most notable for its use in the Supreme Court's determination that separate but equal schools are inherently unequal and violated citizens' rights to equal protection of the law (*Brown v. Board of Education*, 347 US 483 (S.Ct. 1954)). The basis of this ruling was also used in later determinations for the rights of disabled students (*Mills v. Board of Education*, 348 F.Supp. 866 (D.C. 1972)) in public education spaces. By establishing public education systems, states are held to the standard that no child can be denied access to state education or they violate the equal protection of the law. This is where due process becomes an incredibly important consideration. A student does not

forfeit their constitutional rights of the Fifth and Fourteenth Amendments because they have step foot on school grounds; instead the issue lies in how to apply these privileges to students accused of wrongdoing in schools (Goodwin, 1987).

The Supreme Court has determined both substantive and procedural ramifications from the Fourteenth Amendment (Fletcher & Ripps, 1977). Substantive due process protects the rights of parents to direct the upbringing of their child; this includes private education and religious education, and prohibits public institutions from limiting curriculum to suit their interests over the interest of parents (*Meyer v. State of Nebraska*, 262 US 390 (S.Ct. 1923); *Pierce v. Society of Sisters*, 268 US 510 (S.Ct.1925); *Wisconsin v. Yoder*, 406 U.S. 205 (S.Ct., 1972)).

Procedural due process pertains predominantly to student and teacher discipline. Students have a "legitimate entitlement to a public education as a property right" that can only be taken away after the implementation of due process protections (*Goss v. Lopez*, 419 US 565 (S.Ct. 1975)). These protections generally include notice and explanation of the accusation against a student and an opportunity for the student to explain and defend themself before disciplinary action is administered. Even so, courts have determined there is a limit to this and that the same rights are not always applicable to higher education as in middle school public education (*Austin v. University of Oregon*, 925 F.3d 1133 (9th Cir. 2019)). To determine a procedural due process violation, the courts first determine if an individual had an interest (life, liberty, or property) where due process applies and second if that process was constitutionally adequate (Patrickus, 2022).

## Due Process in Matters of Higher Education

Unlike public elementary and secondary education systems, where states have created compulsory attendance laws (with appropriate exceptions as determined in *Meyer, Pierce,* and

*Yoder*), higher education attendance is not compulsory and therefore functions differently under state and federal laws. Higher education is not in and of itself a constitutional right (*Hamilton et al. v. Regents of the University of California et al.*, 293 U.S. 245, (S.Ct. 1934); *Waugh v. Board of Trustees*, etc., 237 U.S. 589 (S.Ct. 1915)). Furthermore, while K-12 institutions might operate *in loco parentis*, higher education institutions do not operate within those parameters; higher education institutions must follow proper due process when expelling or punishing students (*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961)).

When institutions create and implement policy, policies must be clear and have reasonable criteria (*Vlandis v. Kline*, 412 U.S. 441 (S.Ct. 1973)). Once those policies are established, institutions have the right to enforce them (*Woodis v. Westark Community College*, 160 F.3d 435 (8th Cir. 1998)); however, institutions are cautioned in vagueness of language. The court has offered a potential structure to avoid any violation of due process: "procedural due process must be afforded a student on the college campus by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures" (*Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969); (*Jones v. Snead*, 431 F.2d 1115 (8th Cir. 1970)).

Private versus public status must also be considered. Public institutions are inherently subject to stricter rulings of due process simply because they act as state actors. Private institutions are not necessarily subject to the same restrictions; therefore suits are often filed under 42 U.S.C § 1983 to determine at what point a private educator or administrator at a private institution is considered a state actor. Though an institution might be generally classified as private, areas that receive state funding and governorship can be classified as public within a private institution (*Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968)) which further complicates matters.

Three general tests of this exist and are regularly considered by the courts (*Rendell-Baker v. Kohn*, 457 U.S. 830 (S.Ct. 1982)): (1) the "nexus" approach, wherein institutions are compelled by the state to take such actions; (2) a "public function" approach, where the court considers if the specific action being performed by a private entity is "traditionally exclusively reserved to the State" (*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (3rd Cir. 1974)); and (3) the "symbiotic relationship" approach, when a state has ingratiated itself so thoroughly in private affairs, their involvement is implied (*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (S.Ct. 1961)). Generally speaking, an institution is more often than not found to not be acting in state interests (Kaplin et al., 2020) and institutions are more likely to win in arbitration of these cases (Blackwell & Blackwell, 2015).

## Due Process in Massachusetts Schools

Massachusetts has a long standing history of being one of the nation's leaders in academic matters. In 1642, Massachusetts required parents to ensure their children's ability to read; and in 1647, Massachusetts passed the Old Deluder Satan Act declaring that towns with populations of 50 must hire a reading and writing teacher and those holding 100 requiring a Latin Grammar School (Hazlett, 2011), further laying the basis for public schools in America. This model established townships and schools were to be local or municipal governed by boards made up of laypersons with authority restricted to education, and later spread throughout New England (Cubberley, 1947).

In court cases in Massachusetts, many similar rulings and interpretation of law have been issued in line with federal interpretation. Students have a right to due process at public institutions and private institutions that have initiated a policy outlining disciplinary procedures; however, the burden is on the student to prove in court that a policy has been breached and to

establish that such a policy even exists (*Govan v. Trustees of Boston University*, 66 F.Supp.2d 74 (D.Mass. 1999)). Regardless, an institution is not contractually bound to the terms of the student handbook and such policies can be vague in order to account for a variety of situations (*Pacella v. Tufts University School of Dental Medicine*, 66 F.Supp.2d 234 (D.Mass. 1999)).

The Massachusetts court system has routinely held that colleges must have broad discretion in determining appropriate sanctions for violations of its policies, and state law allows institutions flexibility to adopt diverse approaches to student discipline matters that do not meet federal due process requirements (*Coveney v. President & Trustees of Holy Cross College*, 445 N.E.2d 136 (Mass. 1983)). This means that institutions also have discretion at the content of any proceedings related to these matters, and is therefore not obligated to hear all statements and can choose which statements to admit in a hearing process; they are furthermore not required to adhere to the standards of due process to the same degree as a criminal proceeding (*Schaer v. Brandeis University*, 735 N.E.2d 373 (Mass. 2000)).

Massachusetts courts have also made clear the distinction between public and private institutions. Students at public institutions retain the right to due process on campus and procedures that uphold this right are required to be issued in the Code of Student Conduct (*Haidak v. University of Massachusetts*, 933 F.3d 56 (1st Cir. 2019)). Though federal due process law does not dictate private college policy and student discipline (*Doe v. Trustees of Boston College*, 19 N.E.3d 1871 (Mass. 2019)), private institutions are still required to give students some form of fair play including a fair and impartial process, meaning that sanctions of great severity should require that students have the opportunity to defend themself with an impartial arbiter (*Doe v. Brandeis University*, 177 F. Supp. 3d 561 (D. Mass. 2016)).

A notable recent case has changed how courts might interpret such cases in the future. Previous policy and precedent held that a court should interpret school policies and handbooks with the expectations a student reading it might hold; when a school fails to follow its set policy (see *Haidak* and *Govan*), students can utilize the courts to hold them accountable for a breach of contract. A recent ruling suggests that courts must view statements from these policies in totality and not isolation, and not as literally as previous cases have indicated; furthermore, if a student's interpretation is reasonably supported in the policy itself, even if this reading contradicts other parts of the policy, they have enough basis to seek arbitration (*Sonoiki v. Harvard University*, 20 F.3d 1869 (1st Cir. 2022)).

**Northeastern University and Due Process**

In determining what level of protections students have at Northeastern University, two important characteristics come to mind. First, the institution is a private institution and is therefore not subject to the same scrutiny as a public institution as it pertains to students' due process rights (see *Doe v. BC*, *Doe v. Brandeis*, and others). However, Northeastern also operates in a unique arrangement that many other institutions do not have. This introduces the second characteristic: the co-op program.

The co-op program allows students to attain work experience while at the institution and is unique from an internship; a co-op job is traditionally full-time and paid. In finding these positions, students engage in relationships with co-op coordinators who act similarly to recruiting agencies in the workforce. While there is no formal precedent that indicates how a court might interpret due process cases for co-op students, precedent does exist to find parts of a private institution functioning in a public capacity (see *Powe*).

Independent research, which Masscachusetts courts have indicated as a potential impartial option to consider (see *Doe v. Brandeis*) and as published by the Foundation for Individual Rights in Education (FIRE) in 2017, 2018, and 2019, indicate that Northeastern's conduct hearings and policies are subpar in comparison to other top 50 schools (as ranked by the U.S. World News, with 4 institutions tied for 50th). FIRE measured 10 safeguards that institutions might utilize to ensure fair proceedings for students and assigned institutions a score out of 20 points. Northeastern scored a 7 for general misconduct and a 6 for sexual misconduct in 2017, and an 11 and a 6 in 2018, respectively. The highest and lowest scores across 53 institutions in 2017 were 15 and 0; in 2018, scores ranged from 15 to 1.

## Policy Recommendations for Northeastern University

Given the positive trajectory of the overall scores for Northeastern and the stagnancy of the scores related to sexual misconduct, change has been made and implemented on campus to improve student's rights in conduct proceedings. By looking across each of FIRE's identified safeguards, comparing the individual categories and their scores, examining Northeastern documents, and relying on policy and precedent set by the courts, this researcher suggests the following changes to Northeastern policy and policy management. As a university may face legal action based not only on the position it takes in a matter of disputed facts, but also on how it arrives at the position (Stephens, 1999), the intentionality of campus policies is all the more important.

These changes support students' due process rights on the Northeastern campus and generally exceed what Massachusetts holds as standards for private institutions, which are not legally required to be held to due process standards. Rather, these suggestions are made to the benefit of students' clarity of the rules, and with the notion that it is in an institution's best

interest to avoid litigation and suits of any kind, particularly those that the institution feels confident in winning; those cases represent a potential waste of time and resources that could be utilized elsewhere at the institution (Stephens, 1999).

**Changes to the student code of conduct**

Several key areas of student protections are failing at Northeastern as written in the Code of Student Conduct (the Code). This academic year's Code, as well as the two previous, are available on the Office of Student Conduct and Conflict Resolution (OSCCR) website. First, the Code does not acknowledge the severity of expulsion and correlated consequences. On page 10, responsible parties are found in violation of a university policy in all hearings by the "'preponderance of evidence' standard, also known as 'more likely than not' standard to determine if a violation of University policy occurred." It is this researcher's recommendation that a clause regarding a unanimous vote of the Student Conduct Board for expulsion decisions be added to the Code. Campus policies must be clear and reasonable (*Vlandis, Goss, Esteban*, and *Jones*). By allowing a hearing to expel a student with a verdict of "more likely than not" does not seem reasonable for the ramifications expulsion will have against the quality of life and liberty allowed by the Fourteenth Amendment.

Second, the role of an advisor in conduct proceedings is contradicted in the policy itself. Page 10 of the Code outlines students' rights to have an advisor present. It clearly states that a hearing will not be rescheduled "solely due to a Hearing Advisor's inability to attend;" however, a Hearing Advisor's stated role includes "attending the hearing…[and] providing emotional support before, during, and after a hearing." How can a Hearing Advisor conduct their role if the hearing does not account for their presence? Furthermore, students are not allowed external legal counsel, even if they have someone representing them in related criminal proceedings, and are

instead required to pick from a list of university volunteers who have been "trained in the conduct process. These advisors are also not allowed to speak on behalf of the student or to the Board directly.

Therefore, this researcher suggests requiring the attendance of a Hearing Advisor (should a student choose one). Since the policy states a student's right to an advisor, and describes in detail the role of the advisor, the university must allow the advisor to be present or it would be in violation of its own code (*Vlandis, Woodis, Esteban, and Jones*). Since this policy contradicts part of another policy and is a reasonable reading a student might take of the Code, a student would have the right to submit a suit on this matter in a court of law (*Sonoiki*). Rather than wait for that to happen, the university should be proactive in these matters.

**Changes to OSSCR website**

In accordance with consistency of policy as grounds for suit (*Sonoiki*), the OSSCR websites also need to be closely examined and updated to align properly. One such example is the "Student Expectation" and the "Frequently Asked Question" pages: they each set different expectations for timelines as it pertains to student notice of report filing. The first indicates that "written notification of any and all alleged Code of Student Conduct violations within a reasonable (as determined by OSCCR) period of time from the filing of the complaint or incident report pertinent to those allegations." This statement is vague at best. The second site indicates that students can expect an update via email within three days of the filing of a report.

This researcher's suggestion pertains not to the timeline itself but to the confusing nature of the expectations. Since a notice of a report is a precedent that institutions must follow (*Goss*) and that these rules need to be clear and reasonable (*Vlandis, Goss, Esteban*, and *Jones*) and not contradicting (*Sonoiki*), a review and streamlining of the OSSCR website must be conducted.

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