



Keeping Students In Line – Without Repercussions

Insights

1.02.15

In 1958, a Brown University senior was expelled because he had the temerity to bring his girlfriend to his dorm room. He did not contemplate litigation. Instead, Ted Turner moved back home to Atlanta to work at his family business and ultimately became a media mogul worth over \$2 billion.

A lot has changed in the intervening 60 years. For starters, it is hard to imagine a modern-day college student getting expelled for such a transgression. In addition, it is considerably more likely that students will decide to challenge such discipline in court, a fact confirmed by a significant uptick in the number of lawsuits brought by students challenging the discipline meted out by their schools.

In contrast to their public-school colleagues who have to satisfy clearly articulated constitutional standards when handling student conduct issues, some private-school administrators believe they are immune from such litigation and have unfettered discretion when disciplining students. But as discussed below, that is not the case. As a result, we recommend that you review your student-conduct policies and practices to ensure that they are well positioned for potential litigation.

Why School Discipline Policies Matter

Generally, when a student matriculates into a private school, an implied contract is created between the school and the student. The terms of that contract are typically contained in the school's bulletins, circulars, and regulations, which are made available to the student. When a disciplinary dispute arises between a student and a private school, courts throughout the country generally require the school to substantially comply with its contract (*i.e.*, the applicable disciplinary rules and processes) and not to act arbitrarily in determining whether a student violated an institutional policy. Some jurisdictions go a step further and conduct substantive reviews of policies to ensure that the school's disciplinary process is "fundamentally fair."

Litigation over discipline policies has cost private schools significant amounts in legal fees. The issue also directly impacts a core function of a school, namely, the ability to determine who should be a member of its academic community and the rules that apply to all members of the academic community.

Creating Enforceable Policies

Private schools should conduct a review of their internal disciplinary policies and practices to

ensure that their student codes are legal and fundamentally fair. In addition, employees tasked with administering the codes should be trained to impose discipline on students uniformly and pursuant to the discipline process so that the school will be an unattractive target for attorneys looking to sue on behalf of disciplined students.

At a minimum, your review should focus on the following issues:

1. **Are the policies clearly communicated to students?** At least once every school year, document that you have informed students about the applicable code of conduct and where it can be found. To maintain as much flexibility as possible, be clear in your policies and communications that you reserve the right to change those rules and that such changes will be clearly communicated to students.
2. **Is sufficient notice being provided to students accused of misconduct?** Students have most often been successful challenging disciplinary decisions of schools when there is evidence that they were not provided with reasonable notice of the allegations against them. In most circumstances, you should provide students *in writing* with: a) notice of the specific infraction they are being accused of; b) facts sufficient to allow the students to meaningfully defend themselves; c) clear guidance on the students' rights within the disciplinary process; and d) a summary of the disciplinary process that will be followed.
3. **Do your policies comply with applicable laws and regulations?** In several months, new regulations from the U.S. Department of Education go into effect which require colleges and universities to include specific provisions in their student disciplinary processes. Similarly, states are beginning to wade into this area as well.

For example, California enacted the "Yes Means Yes" legislation which mandates certain student disciplinary-code provisions and is being considered by other states. Additional state laws may come into play, such as those that extend free speech rights to private institutions. When reviewing your disciplinary policies, ensure that your school's policies and practices comply with these new federal and state regulations.

4. **Will your internal documentation be helpful in litigation?** Consider developing template documents for frequently issued communications in the student conduct and disciplinary process. The language in those templates should track school policy. For example, when providing a student with notice of a pending disciplinary hearing, the communication should refer back to the alleged student-conduct violation, the rights conferred to the accused, etc.

Similarly, determinations from hearing boards ought to track the language in your school's code of conduct about the standard of review and appeal rights, as well as meticulously explain how a decision was reached so that a reviewing court can see that the decision was not reached arbitrarily.

5. **Have you deleted obsolete or conflicting policies?** Often, schools retain old student conduct codes or outdated disciplinary policies, primarily on their institutional websites. This can create problems for private schools when it is unclear which policy applies.

Additionally, especially in the higher education setting, different departments may post rules without the approval of senior administration that apply to students of their departments that conflict with general institutional policy. This creates needless confusion that can be exploited in litigation. Conduct an internal review of your policies and communications to ensure everyone is on the same page about the conduct code that applies. In addition, scrub from all institutional communications any material which might create ambiguity about what policies apply.

If you have questions or would like an external review of your policies and practices to ensure that you are well positioned to deal with litigation from a disgruntled student, please contact your Fisher Phillips attorney or the author at SSchneider@fisherphillips.com or 504.522.3303.

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