

Disciplinary Appeals: Getting Stickier on Campus

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What are the parameters of appeals on your campus? May any student-party appeal the decision of the hearing board, or just the accused? May the appealing student(s) have access to a transcript or copy of the audiotape/videotape of the hearing for use in crafting their appeals? Does your college make it standard practice to request that mutual FERPA waivers should be signed by the appropriate students upon filing the complaint and response. Who are appeals decided by? Is a final appeal to the University President possible as a formal or informal route? Within what period of time must students file an appeal after being informed of the outcome of the original hearing? Must a student submit a written request to make an appeal? Do you have a time parameter for when a decision to grant an appeal will normally be decided after the filing of an appeal request? Once an appeal is granted, will the appeal be remanded to the original hearing board to make a determination in light of the ground or grounds that form the basis of the grant of the appeal? If not, what standard of proof will be used to decide a granted appeal? Do the appellate officers have the right to review any and all materials/transcriptions from the original hearing, to meet with the original hearing officers, to call new witnesses or recall prior witnesses or to hold an entirely new hearing, if necessary? Can remanded decisions be re-appealed if any of original grounds for appeal are met?

Are appeals granted on the basis that:

- 1) The finding is against the substantial weight of the evidence;
- 2) New evidence is available that could change the outcome;

- 3) Errors were made by the hearing board procedurally or in admitting or excluding evidence that could have impacted the outcome;
- 4) Bias of adjudicator produced a fundamentally unfair hearing or denied due process;
- 5) A finding of not-guilty was made in a criminal trial for the same offense (and all avenues of appeal have not already been exhausted).

Within the past three years, there has been a particular uproar on college campuses related to the appeals process. Invariably, the tumult has been caused by high-level reversals of decisions, the Brown University case being a notable example. In nearly all of these cases, judicial bodies, and often the first appellate level, found students to have violated college policy, and sanctions were imposed.

Upon final appeal, often to a provost, vice president or college president, the finding was reversed, or the sanction was changed, often being reduced. For the most part, these appellate decisionmakers had only transcripts of the hearings, and were not present at the initial presentation of the evidence. In all of these cases, enraged students, faculty and the public responded to the appearance of impropriety, heavy-handedness, or a perception of institutional desire to “CYA.” Through these cases, it has become clear that the appellate power needs to be wielded with great discretion. Some principles to guide appellate power:

- If all of the questions asked above are not addressed by written policies and procedures, your process has gaps that should be filled in.

- Appeals should be granted and decided expeditiously.
- Granting of an appeal on one or more of the bases listed above is different from deciding an appeal, once it is granted.
- Decisions of the judicial officers should be given great deference by each layer of appellate decisionmaker. Judicial officers are trained professionals. Appellate officers often are not trained in or experienced with judicial affairs, but must make the same scrupulous efforts to adhere to published college rules and standards as were made by the hearing board officers who decided the original complaint.
- If you do re-hear or re-decide a case without remand, use the same standard of proof utilized by the original hearing officers to decide the case.
- Only in cases of clear error should a decision be overturned. But, using a remand is an even better approach. Instead of reversing the decision of the judicial body, direct that an error occurred, and remand the decision back to the initial decisionmakers to reverse the error, change the procedures, consider the new evidence, substitute new adjudicators, or otherwise repair the grounds that gave rise to appellate jurisdiction in the first place.
- Where a decision has already survived a layer of appeal (or more), it is due even greater deference.
- Retain the power to reduce or increase a sanction, and steadfastly adhere to the standard that it takes a compelling justification to modify a sanction.
- Insulate appellate decisionmaking from the appearance of impropriety. Many colleges are utilizing appeals committees to guard against the appearance of placing too much discretion in the hands of one high-ranking administrator. Allowing

committee appeals has the appearance of being more democratic, even if it is necessary to create committees at several different appellate levels.

- Involve the college's legal advisors, but remember that doing the right thing is not always the same as doing what will most reduce the college's exposure to liability. This is the risk management conundrum. Decisions are sometimes taken based not on the evidence, but upon the greater cost to the institution. This type of risk management is very likely to backfire. The loss of public prestige and alumni support following a "blow-up" case is usually far worse than the liability the college was seeking to avoid.
- Appellate officers must take the time to internalize the reasoning of the judicial officers. They should not simply impose what they think is right. The hearing officers did what they thought was right. Appellate officers must meet with them to find out why, and why a different appellate conclusion might be warranted or unwarranted.
- Appellate officers must be guarantors of a fundamentally fair outcome and process. Where a reasonable decision is taken by the original hearing officers, appellate officers should not tinker, bearing in mind consequences to the credibility and consistency of the campus judicial apparatus.
- Remember that it is easier for the judicial officers to assess the value and credibility of evidence presented live than it is for an appellate officer to make the same judgments based on a sterile transcript.
- Reduce all decisions to writing, giving the full basis for the taking of the appeal and for the decision rendered, regardless of whether it is the finding or the sanction that is

altered by the appeal. Note all evidence that was used as a basis for the decision, and any evidence that was disregarded or ruled inadmissible, and note why.

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