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EXAMINING THE ROLE OF THE STUDENT CONDUCT ADVISOR AT PUBLIC INSTITUTIONS WITHIN AN ALTERNATIVE DISPUTE RESOLUTION FRAMEWORK

A Dissertation in
Higher Education

by
Duane P. Rohrbacher, Jr.

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The dissertation of Duane Rohrbacher was reviewed and approved* by the following:

Neal Hutchens  
Associate Professor of Education, Department of Education Policy Studies  
Senior Research Scientist, Center of the Study of Higher Education  
Dissertation Advisor  
Chair of Committee  
Graduate Program Coordinator

Dorothy Evensen  
Professor of Education, Department of Education Policy Studies  
Senior Research Scientist, Center of the Study of Higher Education

Nancy A. Welsh  
William Trickett Faculty Scholar  
Professor of Law  
The Pennsylvania State University, The Dickinson School of Law

*Signatures are on file in the Graduate School
ABSTRACT

Student discipline is one of the biggest challenges faced by college and university administrators today. One of the primary goals of student discipline is student development. Promoting student development within the current student conduct framework is difficult. One of the campus administrators who can help to promote student development within the student conduct process is the student conduct advisor. Little research has addressed the role of the student conduct advisor. This multi-method study examined the role of the student conduct advisor within an alternative dispute resolution framework. Alternative dispute resolution is the method of resolving disputes outside of the court context. Using the Guill (1997) framework for evaluating dispute resolution systems, student conduct administration analysis was done to provide a comprehensive view of student conduct processes. Then, examining the use of student conduct advisors at four-year, public institutions provided insight into how institutions view the role of the student conduct advisor.

The findings indicated that student conduct administration is a form of binding arbitration. Binding arbitration is an adversarial form of alternative dispute resolution. Findings from four-year public institutions revealed that 95% of institutions allow student conduct advisors and 70% of institutions allow attorney-advisors to accompany students through the conduct proceedings. These findings suggest that the role of the student conduct advisor must be taken into account and more closely examined at public institutions. These conclusions have implications for public institutions and how they define the role of the student conduct advisor. These findings highlight the continued
division of how different entities believe the student conduct advisor should be used in student conduct proceedings. Suggested areas of future research include qualitative studies of students’ perceptions of student conduct advisors’ roles as well as more qualitative analyses on student conduct advisors at both public and private institutions.
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Thank you to everyone who helped me throughout this journey.
Chapter 1

Introduction

Statement of the Problem

In Spring 2011, while in law school, I took a class on conflict resolution theory. In that class, I had to write a paper about a conflict resolution system, and I decided to examine student conduct administration. As I started looking at student conduct as a form of alternative dispute resolution—that is a resolution system not relying on formal court proceedings—more questions arose than I could address in the single paper assigned. The most perplexing question that arose was the role of representation for both accused and complainant students in student conduct proceedings. To gain a better sense of this issue, I decided to become a student conduct advisor, or a person who assists undergraduate students who are involved in the student conduct process. Yet as I became more familiar with the world of student conduct advising, my confusion increased rather than lessened. I had stumbled into the murky world of student conduct advising, and I now felt more confident than ever about the need for better knowledge regarding this important university function. Seeking to connect my training as a lawyer with current higher education research, I decided to study student conduct advising within the framework of alternative dispute resolution.

In my research on student conduct, I have found that institutions approach student conduct advising, and student conduct administration as a whole, in a variety of ways. In particular, institutions seem to differ on regulations regarding who can serve as a student
conduct advisor, when a student can have a student conduct advisor, and what the role of a student conduct advisor is. Recent legislation in both Wisconsin and North Carolina has only increased the possible arrangements. In Wisconsin, students now have the right to be counseled by an advisor, who may be a lawyer, in student disciplinary matters (Wisc. Admin. Code, 2009). In North Carolina, students have the right to be fully represented by lawyers or non-lawyers in disciplinary student conduct proceedings (N.C. House Bill 843, 2013). These legislative mandates may be alarming if one believes that student conduct proceedings should essentially be non-adversarial in nature, as institutions often describe the process. Along with general debate and legislative initiatives related to use of attorneys in conduct proceedings, developments in Title IX resulting from guidance from the Office for Civil Rights have had important implications for student conduct (Office for Civil Rights [OCR], 2011, 2014). The current study, then undertakes an examination of student conduct proceedings at a time of discussion and debate related to student conduct proceedings in multiple areas, including in the context of advisors for students involved in a conduct proceeding.

In this study, I examine the role of the student conduct advisor in two ways. First, I examine the nature of the participants in student conduct proceedings using an evaluative alternative dispute resolution framework. Second, I discuss the results of collecting and codifying student conduct codes from four-year public institutions across the United States; this analysis was undertaken in order to gain information regarding how institutions are using and defining the role of the student conduct advisor. Ultimately, the findings of this study are used to reimagine the nature and role of student conduct advisors using an alternative dispute resolution framework.
Competing Standards over the Best Way to Conduct Student Conduct Hearings

Three major bodies have weighed in on student conduct advisors, either from the perspective of legal requirements or suggested best practices to colleges and universities. More specifically, federal and state courts and legislatures, policy organizations, and legal and higher education scholars have all provided guidance, in some cases conflicting, on the roles of student conduct advisors and which individuals (e.g., attorneys) should be able to fulfill these roles.

Courts, for example, agree that under the 14th Amendment, students at public institutions have the right to due process in disciplinary cases that could result in a student being removed from his or her institution (Dixon v. Alabama, 1961; Goss v. Lopez, 1975). Yet courts do not agree on what constitutes the opportunity to be heard, one element of due process addressed in student conduct cases such as Dixon (Marin v. Puerto Rico, 1982; Osteen v. Henley, 1993). Part of the opportunity to be heard, according to some courts, is the right to have an advisor (Gabrilowitz v. Newman, 1978; Mary M. v. Clark, 1980). Other courts have not held that advisors are a required component of due process in student conduct proceedings, and only ostensibly require them under special circumstances.

The Association for Student Conduct Administrators (ASCA), the authority on student conduct administration, has weighed in on the legislative developments in North Carolina. In a letter to its members from January 2014, the ASCA stated:

The representation of a student by counsel, thereby distancing the student from any potential for personal learning, growth, and development, violates the very purpose of an educational proceeding…If attorneys are permitted to engage in the process at the level described by House Bill No 1123 much, if not all, of that process will be lost and our campuses, and students, will be impacted negatively as a result. (ASCA, personal communication, 2014).

The ASCA follows the Council for Advancement of Standards (CAS)’s guidance on the role of student conduct programs\(^2\) in determining how to design and carry out student conduct proceedings. Guides have also been provided by the American College Personnel Association (ACPA), which defines the role of a student conduct advisor slightly differently than CAS, and the Foundation for Individual Rights in Higher Education\(^3\) (FIRE), whose guide closely aligns with the North Carolina legislation.

Besides courts, legislatures, and policy organizations such as ASCA, ACPA, and FIRE, various individual scholars have likewise offered their opinions on the most effective ways to utilize student conduct advisors in disciplinary proceedings. These scholars have produced multiple model policies for student conduct offices to imitate, many of which will be discussed in this study (i.e. Berger & Berger, 1999; Bostic & Gonzalez, 2000; Footer, 1996; Stoner, 2000; Tenerowicz, 2001). Considered alongside the competing standards established by the courts, legislatures, and policy organizations,

\(^2\) The Council for the Advancement of Standards in Higher Education is a national organization that’s purpose is to achieve consensus on the nature and application of standards that guide the work of practitioners.

\(^3\) The Foundation for Individual Rights in Higher Education is a national organization that’s purpose is to defend and sustain individual rights at America’s colleges and universities.
these model codes provide an excellent window of opportunity for reexamining the role of student conduct advisors, specifically through an alternative dispute resolution lens.

**Purpose of the Study**

Cognizant of the varied approaches that currently exist to student conduct representation, I have purposefully chosen to investigate student conduct administration from a unique perspective, at least in relation to current scholarship on the student conduct process. Alternative dispute resolution (ADR) is the private resolution of disputes outside of formal litigation. In higher education, student conduct offices have increasingly come to incorporate various aspects of ADR practices into their student conduct programming. Yet, the application of ADR principles and practices has not received attention in the scholarly literature addressing student conduct proceedings. Additionally, as reflected in current legal and policy debates over student conduct proceedings and the use of advisors and their roles, including roles for attorneys, examining student conduct through an ADR framework can potentially contribute to these ongoing policy and legal debates.

The purpose of this study is to illuminate how institutions use student conduct advisors by analyzing the advisors’ defined and executed roles via a multidisciplinary approach. Legal analysis is performed to better understand the history of student misconduct and student conduct advisors. Descriptive analysis is used to quantify how four-year, public institutions in the United States use student conduct advisors in varying capacities. Then, a purposefully selected sample of institutions is analyzed in order to

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4 Mediation, Restorative Justice, and Conflict Coaching are all becoming a major part of conflict resolution in higher education, and I will discuss these in Chapter 4.
apply the alternative dispute resolution framework to a select number of student conduct codes and procedures. All of these analyses are executed using an ADR lens, meaning that literature outside of the scholarly field of higher education was consulted in order to determine the utility and effectiveness of current approaches to student conduct advising.

Studies by Golden (1982) and Bostic and Gonzalez (1999) on student conduct advisors have been key to the development of this study. Collectively, these studies have found that more than 87% of institutions allow student conduct advisors to accompany students in disciplinary proceedings; moreover, more than 55% of institutions allow attorney-advisors to accompany students (Bostic & Gonzalez, 1999). These studies have provided key insights into the defined and perceived roles of student conduct advisors.

This study builds on the work begun by Golden (1982) and Bostic and Gonzalez (1999) by investigating how various institutions approach conflict, as well as how the roles of student conduct advisors intersect with an emphasis on rights versus interests in the conflict resolution process.

**Research Questions**

The research questions for this study are as follows:

1. In what ways do student conduct proceedings constitute a form of alternative dispute resolution, and where do these proceedings fall on the ADR continuum?

2. How do institutions define the role of the student conduct advisor?

To address the first question, I provide a comprehensive review of relevant ADR literature. I also adopt a framework for evaluating ADR processes that is used subsequently to address the two remaining research questions. To address the second
question, I performed an analysis of student conduct codes at four-year public institutions, of which I purposefully selected five out of 599 based on key features of the student conduct codes, including the scope (system-based or institution-only), the foundation (institution-specific or state-mandated), and personal experience.

**Significance of the Study**

Some forms of alternative dispute resolution focus on the interests, rather than the rights, of the parties because the underlying needs of the parties and their interest in resolving the dispute without third-party intervention is held to be more important than an executive decision (Bingham et al., 2009). Unlike in most other forms of ADR, however, there are three interested parties in student conduct administration: the accuser, the accused, and the institution. Trying to provide an interests-based resolution for parties with potentially divergent interests remains a cumbersome task.

Resultantly, one of the most significant challenges facing student conduct administration today is balancing the interests and rights of the parties. Higher education institutions tend to agree that students’ actions should conform to the values of their universities. Yet how do students become familiar with the values of their universities? This question is important to consider when examining the role of the student conduct advisor. Because students are likely to be unfamiliar with the student conduct process and policies at their institutions, as well as the implications of violating particular policies, it is important that the students have help in understanding their institutions’ policies. Student conduct advisors can play this role.

One of the most basic tenets of student conduct is student development. Dannells (1997) has argued for the importance of student development in student conduct, and
while his text remains highly influential in higher education, it seems that his argument loses traction with student conduct offices once the violations reach the level of suspension or greater, especially in Title IX cases. While it may appear straightforward a task, even if not always easy, to develop students’ moral and ethical compasses through teaching (Ardaiolo, 1983; Travelstead, 1987) and counseling (Williamson and Foley, 1949) for minor violations such as underage drinking, it is much more difficult to use teaching and counseling when courts have mandated strict due process requirements for students who are being removed from their institutions (Dixon v. Alabama, 1961).

Part of student development is addressing and encouraging growth in students’ identities (Boots, 1987); values (Greenleaf, 1978); self-control (Pavela, 1985); responsibilities (Caruso, 1978); and accountability for their actions (Pavela, 2000) by confronting the impact of student misconduct on the university community (Pavela, 1985). Researchers who have studied student development in the student conduct context have cited Kohlberg’s (1969, 2005) and Chickering’s (1969, 1993) models of student development as appropriate frameworks for analyzing student misconduct (Dannells, 1997; Karp & Sacks, 2012; Roter, 1998). The majority of the discussion, however, continues to revolve around how to use restorative-based models to resolve disputes in the case of minor violations, thereby neglecting the importance of restorative-based methods in more major cases in which sanctions of suspension or greater are possible.

One such major violation area is sexual assault, which is currently an area of particular focus in student conduct (OCR, 2011, 2014). The Office of Civil Rights prohibits the use of alternative practices, like mediation and restorative justice, when a Title IX violation occurs (OCR, 2014). A scared (Howell, 2005) and ill-informed
(Gutmann, 2008) student who is facing suspension or greater, as in a sexual assault case, often has the opportunity to be accompanied by an advisor throughout the conduct process. In most cases, the purpose of the advisor is to guide the student through the process, rather than to represent him or her. If student development is the ultimate goal of the student conduct process, it is essential to examine the role of the student conduct advisor, the only person who may be assisting the student throughout the proceedings.

A student conduct advisor should be trained to handle students’ conflicts. In many cases, a student conduct advisor is simply a volunteer who accompanies the student as a support person. With the educational, reputational, and community interests of the student, the accuser, and the institution at risk, however, being overly prescriptive or dismissive about the role of the student conduct advisor is a mistake. This study examines the role of the student conduct advisor to ensure that student conduct offices are balancing the rights and interests of students in a way that encourages student development.

**Limitations**

There are several limitations to this study. The most prominent limitation is researcher bias. Because of my experiences studying conflict resolution and familiarity with student conduct proceedings at my own graduate institution, I entered this study predisposed to believe student conduct processes are unfair and that student conduct advisors’ roles are too limited. Though I have taken measures to mitigate the effects of this possible bias, I recognize that it may exist.

Focusing exclusively on public four-year institutions is another limitation of this study. I have chosen to examine public institutions because of the federal constitutional
due process elements that are required in student conduct proceedings at public institutions, but I could have also examined private institutions through the lens of contract law and fundamental fairness. Indeed, one study has shown that private institutions often exceed basic due process standards in their codes of student conduct (Berger & Berger, 1999), and I may have successfully used that study’s findings as the foundation for examining student conduct codes at all four-year institutions. It is impossible, of course, to survey all institutions, however, and thus though cognizant of the limitation of my sample size, the implications of the study are, I believe, important for both public and private institutions across the United States.

Finally, selecting exclusively four-year institutions is a limitation of this study as there are a number of two-year institutions that have comprehensive student conduct codes and even greater student populations than some four-year institutions. Bostic & Gonzalez (1999) have examined two- and four-year public institutions, finding no significant differences in how the different types of institutions used student conduct advisors. I may have found similar results examining two-year institutions. Concentrating on four-year institutions, however, provides broad insight into how student conduct administration works on a macro level.
Chapter 2

Literature Review

Introduction

The purpose of this literature review is four-fold. The review first aims to contextualize student conduct administration in terms of student adjudication and student development. It then seeks to explore how competing standards in case law, legislation, and scholarly work have defined student conduct practice. The review subsequently angles to examine differing student conduct practices, including the complementary and supplementary mechanisms comprising student conduct administration at four-year public institutions. Finally, the review aims to investigate the spectrum of alternative dispute resolution practices as they relate to student conduct administration.

The first part of the review, a historical contextualization of student conduct administration in the United States, provides a timeline of how four-year public institutions have handled student conduct proceedings from the inception of higher education to the case Dixon v. Alabama (1961), paying particular attention to the doctrine of in loco parentis. In doing so, the review sets the stage for a discussion of institutional adjudication patterns and student development theories that have shaped student conduct practice. This discussion of institutional adjudication and student development theories leads into an examination of normative student conduct processes and practices, including suggested guidelines, model codes, and types of processes, as well as legal perspectives on these processes and practices. Finally, an examination of alternative
dispute resolution mechanisms places student conduct administration within the broader field of conflict resolution. In providing this discussion, the review invites closer inspection of student conduct administration and the student conduct process.

**Student Conduct Administration in the United States (1636-1961).**

This section provides a brief historical overview of how institutions handled student disciplinary matters from the beginning of higher education in the United States, commonly assumed to be in 1636 with the establishment of Harvard University (Rudolph, 1962), to *Dixon v. Alabama* (1961). Currently, student conduct administration at public institutions requires due process, fairness, and a focus on student development; this has not always been the case, however. In fact, in the late seventeenth and early eighteenth centuries, student conduct issues were generally handled directly by tutors or college presidents (Smith, 1994). Tutors were often young men who were waiting on ministerial positions and in the meantime performed teaching, mentoring, and monitoring functions at institutions. Their students were typically young (between the ages of 14 and 20) and affluent males. Since education was closely aligned with religion, most students desired to become part of the clergy and promote Christianity (Lancaster & Waryold, 2008).

During this time, every aspect of students’ lives was closely regulated and monitored by their institutions and tutors (Rudolph, 1962); in fact, institutions were typically seen as replacing the students’ parents, providing food, shelter, discipline, and education. This understanding of tutors as surrogate parents stemmed from the lack of educated citizens in the United States, the very small number of higher education institutions that existed, and the general population’s lack of mobility. Eventually, this
understanding was made legally binding in the doctrine of *in loco parentis*. *In loco parentis* meant that because institutions acted in place of students’ parents, institutions had the freedom to discipline students and monitor students’ lives in any way they saw fit. Exemplifying administrators’ belief in this doctrine, in 1876, President Gilman of Johns Hopkins University said:

> the College implies, as a general rule, restriction rather than freedom; tutorial rather than professional guidance; residence within appointed bounds; the chapel, the dining hall, and the daily inspection. The college theoretically stands *in loco parentis*; it does not afford a very wide scope; it gives a liberal and substantial foundation on which the university instruction may be wisely built. (Gilman, 1876, para. 24)

Here, Gilman illustrates why institutions’ protection of minors was seen to outweigh the potential harms, both physical and psychological, that could come to students when being disciplined.

Indeed, student conduct issues were sometimes addressed through physical measures, considered typical during the early collegiate era. While these forms of punishment varied, flogging was common. Another popular punishment was boxing of the ears. Of course, verbal abuse also was common. Students might be made to perform public confessions, for example, or be made subject to open ridiculing. The rationale behind these forms of punishment was that students needed to be brought to “moral submission” (Smith, 1994, p. 78). In this way, institutions suggested that students’ lives were not their own, and that to become prominent and successful clergy members, students must first submit to God (Thelin, 2011).
Regardless of any student conduct issues that might arise, until the mid-twentieth century, courts, scholars, and college administrators considered higher education a privilege (Gelber, forthcoming). For this reason, courts generally deferred to faculty and administrators in both academic and disciplinary matters for the first 150 years of higher education in the United States (see, for example, *Commonwealth ex rel. Hill v. McCauley*, 1887; *c.f., Gott v. Berea*, 1913). It was not until 1802 at Princeton University that students started demanding due process and protection of their constitutional rights. Thomas Jefferson stated:

> the article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination which is the great obstacle to science with us and a principal cause of its decay since the Revolution. (Jefferson, 1822)

Yet the rise of public institutions in higher education due to the land-grant movement in the 1860s (and later the GI bill in the 1940s) ultimately invited court involvement. Courts had initially treated public primary and secondary schools and private institutions of higher education, including normal schools, similarly in terms of student rights. Indeed, the Supreme Court of California in *Miller v. Dailey* (1902) had held that “the right to be admitted to a normal school is as valuable a right as that entitling a child to be admitted to the primary or grammar schools” (p. 220). Now, however, courts seized the opportunity to differentiate between the new state-created and state-funded public institutions and

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5 For an in-depth examination of courts that have gone against the norm of the day and sided with students in disciplinary matters regarding *in loco parentis*, see Gelber.
6 Rights were highly contentious in the United States at this time as two northern states (New York and Ohio) emancipated slaves two years prior to 1802 (Finkelman, 2003).
their private counterparts, particularly regarding student rights and the disciplinary process.

Between 1802 and 1910, there were a number of cases in which courts established a framework for siding with students in disciplinary matters at public institutions specifically, with the first case revolving around enrollment. In *State ex rel. Stallard v. White* (1882), for example, the Indiana Supreme Court held that:

we think it may be safely said that every inhabitant of this State, of suitable age, and of reasonably good moral character, not afflicted with any contagious or loathsome disease, and not incapacitated by some mental or physical infirmity, is entitled to admission as a student in the Purdue University (p. 284).

The Indiana Supreme Court went on to state that a school cannot disqualify a student from admission because of his membership in a given organization, as to do so would be “in utter disregard of the fundamental ideas upon which our entire educational system is based” (*State ex rel. Stallard v. White*, 1882, p. 287). Explicitly, the Indiana Supreme Court stated that the role of a state institution is to educate all suitable residents of the state. Implicitly, the Court’s ruling favored a student’s right to enrollment at public institutions insofar that a student should not be removed from an institution unless the reasoning behind such removal was explicitly authorized by legislation or statute (*Stallard*, 1882). The case *Jackson v. State ex rel. Majors* (1898) saw the Supreme Court of Nebraska hold similarly. There, the Supreme Court held that a faculty member could not arbitrarily remove a student from an institution without a reason related to either a lack of diligent study or good conduct.

This framework of a student’s right to not be arbitrarily expelled led to a further
series of court battles between students and institutions in order to determine which entity controlled the right to enrollment at public colleges and universities: the institution or the state. As they do today, courts then intervened only in the process afforded to students and their right to not be expelled (or to be enrolled) at public institutions, most specifically the land-grant institutions that were created to educate the masses (Thelin, 2011). Regarding private institutions, which educated the vast majority (87%) of students during this time, courts exercised judicial restraint in intervening in disputes between students and their institutions. Instead, courts allowed private institutions to operate more or less autonomously, thus following the traditions that had been in place for hundreds of years in England (Travelstead, 1987).

The transformation from a faculty-run, punishment-based process that could result in arbitrary expulsion and denial of enrollment, to a student affairs-run, rehabilitation-based process that encouraged student education and development took time. A number of historically-important events were crucial in this transformation. High-profile cases such as *Gott v. Berea* (1913) and *Anthony v. Syracuse* (1928) saw courts define a college’s role as parental in nature and suggested that the institutions could enforce the same rules that parents would likely adopt.

In 1937, the American Council of Education, a consortium of higher education institutions founded in 1918, published the Student Personnel Point of View, a policy paper that declared that student moral and behavioral development was an objective equivalent in importance to academic development for higher education institutions (American Council on Education, 1937). This declaration came at a time when the United States was just pulling out of the Great Depression and many college-aged men were
soon to leave to fight in World War II.

A few decades later, at the height of the American Civil Rights movement and just seven years after *Brown v. Board of Education* (1954), the Fifth Circuit Court of Appeals, a court which jurisdiction then covered Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida and led by four civil-rights-oriented judges, lay the foundation for the future of students’ rights in disciplinary proceedings with *Dixon v. Alabama* (1961). The *Dixon* case centered on students, from the Alabama State College for Negroes, who had been expelled for their 1960 participation in a civil rights demonstration. They were notified of their expulsions or suspensions without receiving either notice or hearings. The Fifth Circuit held that tax-supported institutions are required to offer students both notice and some type of opportunity for a hearing (the opportunity to be heard) in the event of a possible suspension or expulsion.

*Post-Dixon*, a series of other student-rights’ movements occurred, including the United States National Student Association’s (USNSA) declaration that procedural and substantive due process were required for student disciplinary matters that could result in suspension or greater (Smith, 1994). Due to this heightened scrutiny that institutions came under as a result of cases like *Dixon* and the rise of the American culture of litigation, institutions came together to form the Association for Student Judicial Affairs (ASJA) in 1978. This national organization organized student conduct professionals and institutions looking for guidance on how to codify and implement their policies. The ASCA’s first meeting occurred in 1987 (ASCA, 2008). ASCA is now the premier source

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7 As of 2008, the ASJA is called the Association for Student Conduct Administrators. This body will be referred to as the ASCA for the rest of this study.
for matters related to student conduct.

Institutional Adjudication and Student Development (1961-Present).

Student conduct administration encompasses institutional adjudication and student development, two areas that though intended to be complementary, can be in conflict. In order to better elucidate the relationship between these two areas, this section of the review addresses the legal standards set for student conduct administration, including the legal interests students have in their educations; the constitutional and contractual principles to which public institutions must adhere; the right to representation as part of the opportunity to be heard; and the various federal and state legislative mandates that have impacted student conduct administration. It also addresses student development theories. By examining the student development theories that govern student conduct administration, this section illustrates how legal foundations and student development theories can often be in tension. The balance between adjudication and development is a primary motivation for this study.

Legal Standards. Because of courts’ oftentimes-vague and inconsistent rulings, the legal standards, particularly those of due process, that are applied to student conduct proceedings at public higher education institutions are subject to a level of uncertainty. While courts have generally shown consistency in applying due process principles to student conduct proceedings at public institutions, they have not been uniform or always explicit regarding the attributes of due process in a public collegiate setting. Due process can broadly be divided into two categories: substantive due process and procedural due process. While substantive due process in student conduct administration at public institutions revolves around the legal interests that students have in their educations,
procedural due process concerns notice and the opportunity to be heard. This discussion focuses on aspects of procedural due process. Public institutions are required to give students procedural due process throughout student conduct proceedings based on courts’ analyses of the relationship between students and their institutions. Because courts have generally used either a contractual or constitutional framework to analyze the relationship between students and their institutions regarding student conduct proceedings, this section focuses on each of these frameworks in turn. Other than court decisions, federal legislation and state statutes have also come to influence how public higher education institutions handle student disciplinary matters, a concern with which this section closes.

**Legal interests.** To better understand why students are given due process, whether at public or private institutions, it is important to understand how courts view the legal interests that students have in their educations. Institutions have historically had the authority to remove students that the institution did not view as suitable for enrollment, whether that lack of suitability was due to academic or disciplinary concerns. As institutions have evolved, however, courts, too, have evolved in their understandings of how to treat student issues. More specifically, courts tend to differentiate between institutions removing students for academic reasons as opposed to disciplinary reasons; courts have also begun to differentiate among the various legal interests students have in their educations. The following discussion of interests—interests that might be said to comprise the “why” of why students have legal rights in their educations—thus serves to provide a foundation for understanding the “how”—that is, how institutions protect students’ interests through procedural due process.

Ruling in disciplinary cases, a number of courts have indicated that students have
a legal interest in pursuing higher education, but such courts generally have avoided determining what type of legal interest students have: while the interest is presumed to be either liberty or property, courts have refused to be explicit about this interest, instead suggesting that students have private interests at stake during their educations. In the aforementioned *Dixon* (1961) case, for example, the Fifth Circuit Court of Appeals indicated that students attending public colleges and universities have a generic private interest in their higher education; this meant that going forward, courts had to use constitutional analyses that included the Fourteenth Amendment for cases involving removal from institutions. In *Board of Curators of University of Missouri v. Horowitz* (1978), the U.S. Supreme Court likewise assumed that students have private legal interests (either liberty or property). This decision was grounded in procedural due process rather than legal interests.

**Property.** While in disciplinary cases most courts have avoided identifying which interest, whether liberty or property, is at stake, in academic cases, a number of appellate courts and the Supreme Court have clarified students’ interests. The Tenth Circuit Court of Appeals and the Third Circuit Court of Appeals have held that students’ property interest in their public educations stem from the payment of tuition, which creates an entitlement. In both *Harris v. Blake* (1986) and *Ross v. Pennsylvania State University* (1978), for example, the courts held that the students had a property interest in their continued enrollment in higher education that existed under state statutes (those of Utah and Pennsylvania, respectively) and that could not be arbitrarily taken away without procedural due process of law under the Fourteenth Amendment. In *Regents of University of Michigan v. Ewing* (1985), the Supreme Court also weighed in on property interests in
academic dismissals. The Supreme Court’s finding in Ewing makes clear that “[the respondent’s] implied contract [gives him the] right to continued enrollment free from arbitrary interference qualified as a property interest protected by the Due Process Clause” (p. 221). Notably, a property interest is seen as existing only in cases involving expulsion or other circumstances that would force a student to discontinue his or her studies.

**Liberty.** Like property, liberty is considered an appropriate legal interest of students during their educations. Liberty interests implicate sanctions on students that can affect legally recognized freedoms or concerns. The Supreme Court held in Goss v. Lopez (1975) that students’ reputations could be damaged through academic removal, which could in turn negatively impact students’ employment and education opportunities, thus creating a liberty interest in education. In Board of Regents v. Roth (1972), the Supreme Court likewise held that the liberty interest arose from the stigma created by academic removal and that could prevent the respondent from seeking out other opportunities. Finally, the Supreme Court in Wisconsin v. Constantineau (1971) held that when a respondent’s name, reputation, and integrity are at stake due to governmental action, a liberty interest is implicated.

**Students’ Rights: A Contractual Framework.** Alongside potential constitutional interests, contractual principles have also been used by courts in adjudicating student conduct cases (e.g., Merrow v. Goldberg, 1987). Applied in the context of higher education disciplinary proceedings, often at private institutions, contract
theory means that a student promises to pay tuition, obey the rules, and fulfill other necessary contractual obligations while enrolled at an institution. In return, the institution promises to not arbitrarily or capriciously remove the student from the institution (Mangla v. Brown, 1998). The contract between the student and his or her institution is often derived on the basis of statements made in documents that can include student handbooks or other brochures or materials (Merrow v. Goldberg, 1987). Though they have indicated that contract theory should be applied in such cases, courts such as the Supreme Court in Goss and the Fifth Circuit Court of Appeals in Dixon have held that due process applies to those student conduct violations that could result in suspension or greater. This is based on the principle of fundamental fairness that stems from applying contract theory.

Another contractual perspective that courts have used in cases of student removal from institutions is students’ interest in their continued enrollment (Bernard v. N. Kent. UNIV., 2012; Flaim v. Med. College of Ohio, 2005; Zwick v. UNIV. of Mich., 2008). Yet the limited number of courts that have applied this principle to student disciplinary removal have all applied it in cases involving students in graduate programs. Furthermore, the courts held narrowly in each of these cases, meaning that those holdings might not apply in another context (e.g., in Flaim, the student’s contractual interest in continued enrollment stemmed from the fact that the student was a medical student in his last year of medical school). The Supreme Court's failure to provide resolution to property, liberty, and contractual interest issues has led a lack of clarity in students’ rights
As non-governmental actors, private institutions do not have to adhere to the same constitutional standards that public institutions do regarding due process in student discipline (Anderson v. Univ. Cal., 1972; Carr v. St. John’s Univ., 1962). Rather, private institutions must adhere to a fundamental fairness standard based on the implied contract that exists between students and institutions (e.g., Albert v. Carovano, 1988; Cummings v. Virginia Sch. of Cosmetology, 1979; Papelino v. Albany Coll. of Pharm. of Union Univ., 2011). As part of this implied contract, a private institution, by accepting money from its student, must provide clearly-stated policies (Cloud v. Boston Univ., 1983; Slaughter v. Brigham Young UNIV., 1975). The Second Circuit Court of Appeals in Papelino illustrates what an implied contract between a private institution and its student is when it notes:

An implied contract is formed when a university accepts a student for enrollment…the terms of the implied contract are contained in the university’s bulletins, circulars and regulations made available to the student. Implicit in the contract is the requirement that the institution act in good faith in its dealing with its students, [and] the student must fulfill his end of the bargain by satisfying the university’s academic requirements and complying with its procedures (p. 93).

Further emphasizing that courts apply contract law in student disciplinary cases through a lens of fundamental fairness, the Third Circuit found that:

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9 While Goss v. Lopez (1976) is a Supreme Court case often applied in the context of higher education, the case was about a student facing removal from a public secondary school. Unlike enrollment in higher education, enrollment in public secondary education is, of course, a requirement.
Because the relationship between a private college and its students is contractual in nature, a student being disciplined is entitled to only those procedural safeguards which the school specifically provides. While private colleges enjoy wide latitude to structure their internal disciplinary procedures as they see fit, they are limited by the principle that such procedures must be fundamentally fair (Kimberg v. Univ. of Scranton, 2010, p. 481).

In this decision, the Third Circuit equated fundamental fairness with the same due process requirements used in Dixon and Goss: notice and the opportunity to be heard.

Using contract law to analyze the relationships between students and institutions is not new. Courts started applying contract law to the relationships between students and institutions when the age of eighteen became the age of majority in 1971 (Cloud v. Boston Univ., 1983). Indeed, the Tenth Circuit in Slaughter v. Brigham Young Univ. (1975) held that “some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University” (p. 626). Yet the Court went on to find that contract law need not be rigidly applied, given that the relationships between students and their individual universities are unique and thus require custom application. That being said, many courts continue to use a contract law theory framework to analyze the relationship between institutions and their students, particularly in cases of removal.

According to the Supreme Court of New York, this implied contract between students and private institutions should be extended to public institutions and community colleges. In Healy v. Larsson (1971), the New York court held that there “is no reason why [an implied contract] should not apply to a public university or community college”
The Court of Appeals in Kentucky in *Stathis v. Univ. of Kentucky* (2005) held that a contractual relationship should also apply to public institutions, this time in the case of Kentucky (p. 25). In broadening the understanding of contractual relationships to include not only students at private institutions but also students at public institutions, the courts of New York and Kentucky have signaled that all institutions, regardless of their missions, demographic profiles, enrollments, or any other attributes, must offer very similar processes, whether under contract law or constitutional law, to students facing situations that may remove them from the institutions in question (see also *Winokur v. Yale Univ.*, 1977; *Zumbrun v. Univ. S. Cal.*, 1973).

While courts have identified fundamental fairness as the principle that must be applied to disciplinary proceedings between students and private institutions, what courts have held to be fair is constantly evolving. Even though courts have provided a framework for private institutions to follow, the only actual requirement for private institutions in student disciplinary proceedings is that the institutions follow their own stated rules (e.g., *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 2011).

**Students’ Rights: A Constitutional Framework.** The Fourteenth Amendment to the United States Constitution imposes legal obligations in determining the role of a student conduct advisor in a public university setting. The Fourteenth Amendment states that individuals possess the right to due process in a setting that could deprive one of a fundamental right, namely life, liberty, or property (U.S. Const. amend. XIV). Noted in the earlier overview of liberty and property interests, courts use the Fourteenth Amendment's due process clause to evaluate disciplinary cases in higher education (*Dixon v. Alabama*, 1961). The text of the Fourteenth Amendment states, “No state shall
deprive a person…of life, liberty, or property without due process of law” (UNIV.S. Const. amend. XIV, emphasis added). A public institution of higher education is considered a state actor, so the Fourteenth Amendment’s due process clause applies to cases in which a public institution would deprive a student of his or her liberty or property. Most of the legal decisions concerning due process for students, until 1961, had consistently sided with the institutions (e.g., Anthony v. Syracuse UNIV., 1928; Gott v. Berea Coll., 1913; c.f., Commonwealth ex rel. Hill v. McCauley, 1887; Koblitz v. Western Reserve, 1901). Then, in 1961, the Fifth Circuit Court of Appeals, ruling in the aforementioned Dixon case, handed down the first decision addressing college students’ rights on campus that favored students.

In 1975, the U.S. Supreme Court ruled that public institutions are required to provide notice of impending sanctions and the opportunity to be heard via a hearing to students who are facing removal from a public institution, following the precedent set in Dixon. The Supreme Court in Goss (1975) also established that notice and the opportunity to be heard are the only due process requirements in circumstances that would remove a student from his or her respective institution. In situations in which the possible sanction is less than suspension, courts have held that institutions can use less formal processes because the student is not facing a loss of a protected interest. Any separation from a public higher education institution, even if brief, invokes either the property interest or liberty interest of the Fourteenth Amendment, which students can use to challenge the sanction (e.g., Dixon v. Alabama, 1961; Mary M. v. Clark, 1980). In practice, this means that institutions can use informal hearings for conduct violations that are less than a suspension (i.e., Herman v. Univ. of S. Carolina, 1971). To further explore
constitutional due process requirements, the two tenants of due process in disciplinary proceedings, notice and the opportunity to be heard, are examined below.

**Notice.** The nature of due process in an educational setting is not the same as in a court setting. In an educational setting, the rules of evidence, for example, do not apply like they would in a court setting. Furthermore, in an educational setting, the claimant and respondent are not represented like they would be in a court setting; they must speak for themselves throughout the process. Finally, while in a court setting, federal and state rules and guidelines have outlined very specific due process elements that must exist to ensure a fair and equitable trial (e.g., cross-examination of witnesses; a fair and speedy trial; the right to representation; particular rules of evidence; the right to remain silent; and formal appeals, among others), in an educational setting, administrators only have to abide by notice and the opportunity to be heard, neither of which has been clearly defined by the courts.

The rights to due process are particularly crucial in cases of removal. In cases of immediate removal, conduct administrators and other university officials must have a reasonable belief that a student's continued enrollment is a clear and present danger of harm to him- or herself, other students, faculty, staff, or community members, or that the student poses an immediate threat of disrupting or interfering with institutional activities; in all other cases, however, students must be given notice and the opportunity to be heard.

The courts have elaborated on the definition of notice in the context of education hearings. In *Jenkins v. Louisiana State Board of Education* (1975), the United States Court of Appeals for the Fifth Circuit, relying on *Dixon*, established that notice must be sufficient to allow the accused to present a defense (*Jenkins v. Louisiana*, 1975). The
Supreme Court further stated that notice requires that the student be told what he or she is accused of and on what basis the accusation exists (Goss v. Lopez, 1975). Courts have resisted determining what amount of notice is required, instead deferring to institutions to clearly define their individual policies on notice in the student handbook, student conduct code, or another student guide published by the institution. The Northern District of New York in Donohue v. Baker (1997) held that:

the timing of the notice plaintiff received will comport with due process if it is reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (p. 146). declaring only that no undue delay may occur between the accusation, the notice, and the hearing if the institution does not have a clear, published requirement on how many days notice it will give to its accused students (Hill v. Bd. of Trs. of Mich. State Univ., 2001).

In most cases, courts have found that almost any notice is enough notice, but in some rare cases, courts have ordered new hearings if the notice was deemed insufficient. In Fellheimer v. Middlebury Coll. (1994), for example, the Vermont district court held that the college breached its promise of notice to the student because it never clearly informed the student what the actual conduct violation was. Likewise, in Weidemann v. SUNY (1992), the Supreme Court of New York held that even in a case of clear academic dishonesty, the institution violated its own procedures by not giving the accused the institutionally-required five days’ notice, and this violation of their own rules was enough to annul the expulsion.

**Opportunity to be heard.** Students are generally afforded the opportunity to be
heard, which is defined as the ability to defend oneself and to hear opposing evidence
(Dixon, 1961). Some courts, usually ruling in Title IX cases, have argued that another
element of the opportunity to be heard is the opportunity to be in front of an impartial
decision-maker, with the use of independent investigators a further possibility being
discussed. The Second Circuit Court of Appeals in Wasson v. Trowbridge (1967) likewise
held that a student should be afforded the opportunity to present his or her understanding
of events in front of an impartial trier of fact because someone who was previously
involved in the case would have a difficult time remaining impartial to the hearing (see
also Winnick v. Manning, 1972).

Though courts have advocated for students’ right to be heard, such courts have
consistently ruled in favor of institutions in this matter, giving deference to the
institutions to maintain integrity in their processes (e.g., Hill v. Mich. St. UNIV., 2001;
decision of the First Circuit Court of Appeals in the case of Gorman v. Univ. Rhode
Island (1988) is particularly illustrative here. In this case, the First Circuit Court found
that the respondent Raymond J. Gorman III, who was a student at the University of
Rhode Island facing suspension due to multiple conduct code violations, had the
opportunity to be heard. Gorman was ultimately afforded 27 hours’ worth of hearings in
which he was able to defend himself, cross-examine witnesses, and present evidence.

Many other challenges regarding the opportunity to be heard have arisen, with one
of the most common being the right afforded Gorman: that is, to cross-examine
witnesses. Some courts consider the right to cross-examine witnesses necessary to ensure
procedural fairness (e.g., Donohue v. Baker, 1997). The First Circuit Court of Appeals in
Gabrilowitz v. Newman (1978), for example, held that the right to cross-examine witnesses was appropriate because the student conduct proceeding was so similar to a trial: indeed, it was an adversarial proceeding arising from the same set of facts as its concurrent criminal trial. While holding that cross-examination was inappropriate in the particular circumstances of its case, the Second Circuit in Winnick v. Manning (1972) likewise stated that cross-examination of witnesses could be warranted if credibility was in question to ensure a fair hearing.

While these decisions may suggest parallels between student conduct proceedings and court trials in terms of the opportunity to be heard, in practice, student conduct proceedings are generally dissimilar to court proceedings. More specifically, student conduct proceedings do not have to mirror court proceedings because of the educational and non-litigious nature of the student conduct process. Student conduct administrators have the freedom to conduct disciplinary conferences and student conduct hearings however they see fit, as long as they meet minimum and basic components of due process, particularly the opportunity to be heard. Moreover, because the opportunity to be heard has not been defined by any court, student conduct administrators are free to limit the proceedings to maintain the educational nature of them.

**Related rights.** Courts have considered a number of rights that are distinct from yet closely related to the opportunity to be heard when contemplating what amounts to fair and appropriate due process. One common challenge is the right to clear, specific policies. Vague institutional rules and policies can be struck down as unconstitutional (Esteban v. Cent. Missouri St. Coll., 1969; Siegel v. Univ. Cal., 1970; Soglin v. Kauffman, 1969). In Woodis v. Westark Comm. Coll. (1988), for instance, the Eighth Circuit Court
of Appeals held that the community college’s standards passed the “as applied” standard for constitutional vagueness, meaning that the standards were precise enough to notify the accused that her actions could lead to the consequences that she faced. The court acknowledged that this “as applied” standard for constitutional vagueness could apply to conduct processes at institutions of higher education in other circumstances as well.

Another common challenge is whether students should be afforded the right to an all-student tribunal. As in academic challenges, courts have deferred to institutions in cases where impartiality is in question, finding that institutions are in fact unlikely to be partial. This behavior on the part of the courts is known as academic deference and is exemplified in the case of *Gomes v. Univ. of Maine Syst.* (1978). *Gomes* involved two students who were accused of sexual assault and expelled by their institution. The students challenged the expulsion, claiming that they were deprived of due process and claiming a breach of contract. Even though the hearing chair was a member of the victim response team, the District Court did not find that she was biased enough to be recused from chairing the sexual assault case. While the court held that an impartial and independent adjudicator is a fundamental aspect of procedural due process, the court also held that the challenger must show that the hearing body or tribunal has actual bias or evidence of bias based on material facts and not mere speculation.

Several other challenges have been raised. For example, students have requested a right to transcripts of their hearing in a number of cases (*Due v. Florida*, 1961; *Schaer*, 2000; *Trahms*, 1998). In *Gorman* (1988), the First Circuit held that while a lack of transcript or recording is not grounds for reversing a decision, the transcript or recording could be required if the institution has it in its code and the accused requests a copy of it.
Other challenges that have been considered are the right to an explanation of the decision (Jaska v. Univ. of Mich., 1984); the right to an appeal (Nash v. Auburn Univ., 1986; Winnick v. Manning, 1972); courts’ obligation to abide by stated processes (Holert v. Univ. of Chicago, 1990; Slaughter v. Brigham Young Univ., 1975); and courts’ obligation to provide fundamental fairness (Goodman v. Bowdoin Coll., 2001). While these cases remain distinct from one another, in all cases, students challenged specific aspects of the student conduct process, with courts finding that the opportunity to be heard, the legal concept guiding the cases, did not include a transcript, an appeal, or an explanation. No matter what type of violation (academic or disciplinary); institution (public or private; secondary or post-secondary); or student (graduate or undergraduate) was involved, the courts followed Dixon and Goss, reiterating that the opportunity to be heard refers to some sort of hearing, not a complete litigation proceeding.

Perhaps the most important right related to the opportunity to be heard that has recently come under scrutiny is the right to representation. Courts have come to different decisions about whether this right, a concept often applied as part of due process in the Fourteenth Amendment, should apply in student conduct proceedings. The majority of courts have decided that the right to representation should not be a part of the student conduct process (Barker v. Hardway, 1968; Cosme v. Bd. of Educ., 1966; Donohue v. Baker, 1997; Due v. Univ. of Florida, 1963; Garshman v. Penn. St. Univ., 1975; Greenhill v. Bailey, 1975; Haynes v. Dallas Count. Comm. Coll., 1974; Kolesa v. Lehman, 1982; Madera v. Bd. of Educ., 1967). In the most recent case, Osteen v. Henley (1993), the Seventh Circuit Court of Appeals held that:

we don’t think he is entitled to be represented in the sense of having a lawyer who
is permitted to examine or cross-examine witnesses, to submit and object to
documents, to address the tribunal, and otherwise to perform the traditional
function of a trial lawyer. To recognize such a right would force student disciplinary
proceedings into the mold of adversary litigation (p. 225).

In this case, the court held that the concerns regarding timing and finances outweighed
the due process benefits that a student would receive from representation. The courts
have likewise stated that there is no need to force student disciplinary proceedings into
the mold of adversarial litigation (Barker v. Hardway, 1968; Osteen v. Henley, 1993;
Wasson v. Trowbridge, 1967) or to turn student conduct hearings into litigation scenarios

This sense of anxiety regarding student conduct hearings is similarly felt by the ASCA
through a number of member-only e-mails that the organization has recently sent out
addressing the shifting landscape (ASCA, personal communication, 2014).

While most courts have decided against students’ right to representation, a smaller
number of courts has decided that students may have the right to have legal counsel
present but that the counsel’s role should be limited to advising (Dillon v. Pulaski Cnty.
Nguyen v. Univ. of Louisville, 2006; Turof v. Kibbee, 1981; Univ. of Houston v. Sabeti,
Gorman (1988), the most recent circuit court case, the First Circuit Court of Appeals held
that:

As indicated in the district court’s opinion, the weight of authority is against
representation by counsel at disciplinary hearings… this, however, does not
preclude a student threatened with sanctions for misconduct from seeking legal advice before or after the hearings (p. 25).

The First Circuit court found that while having counsel present could be important before and after a hearing, during the hearing, it was more important to avoid the formalistic, adversarial mode of litigation than to allow counsel to represent a student’s interests in an administrative process (see also *Osteen v. Henley*, 1993).

Toeing the line between the majority of courts and this smaller set of courts, a third set of courts has signaled that students should be allowed to be represented only in special circumstances (e.g., major proceeding: *Gomes v. Univ. of Maine Sys.*, 2005; *Keene v. Rodgers*, 1970; criminal charges pending: *Gabrilowitz v. Newman*, 1978; *Gorman v. Univ. of Rhode Island*, 1988; *Richards v. McDavis*, 2013; *Wasson v. Trowbridge*, 1967; university has attorney: *French v. Bashful*, 1969; *Jaska v. Univ. of Mich.*, 1984). In this limited number of cases, courts have consistently looked to the holding of *Gabrilowitz* (1978). In *Gabrilowitz*, the First Circuit Court of Appeals held that:

> because of the pending criminal case, the denial to appellee of the right to have a lawyer of his own choice consult with and advise him during the disciplinary hearing without participating further in such proceeding would deprive appellee of due process of law (p. 17).

The courts in both *Osteen* and *Gorman* held that if the circumstances in *Gabrilowitz* were present in their own cases, they would consider a student’s right to counsel. The *Gabrilowitz* court narrowly held that counsel should only be allowed to represent a student in a limited context.
There are, of course, rare cases in which students have the right to full attorney representation (e.g., *Black Coalition v. Portland Sch. Dist.*, 1973; *Kusnir v. Leach*, 1982; *Speake v. Grantham*, 1970). The District Court of Puerto Rico, in *Marin v. Univ. Puerto Rico* (1974), stated that:

> no sound reason appears why, in light of the individual’s significant [liberty] interest, these state goals, however important, need to be vindicated in the normal case without a full, expedited evidentiary hearing with the assistance of retained counsel (p. 623).

The *Marin* court believed that students have such a significant legal interest in their educations that any deprivation of that interest warrants full legal representation in the related student conduct proceedings. The *Marin* court is an albatross in case law and literature, both of which are filled with discussions of why the representation of students in disciplinary proceedings is inappropriate for higher education administration.

Ultimately, there is wide variability in considering whether the right to representation should be afforded to students in disciplinary proceedings. This variability is partially due to the fact that the Supreme Court has yet to hear a higher education case that focuses on this issue of representation in disciplinary proceedings. As a result, the majority of courts have come follow the Fifth Circuit decision in *Dixon*, even though the law applied there is only persuasive outside of the Fifth Circuit and is not binding.

With students’ right to representation yet to be fully determined, courts have sought to tease out the differences between representation and advising, as well as the differences between legal counsel representation and non-legal counsel representation and advising. In *Mary M. v. Clark* (1980), the New York Appellate Court found that the
institution gave the defendant adequate due process in considering her removal from the institution, determining that she received notice and a hearing. Yet the court went on to establish a framework for student conduct processes regarding advising. Relying on *Dixon* and *Goss*, the court found that student conduct processes should be non-adversarial so that the process can emphasize the educational aspect of the proceeding. The court also found that legal representation was not a requirement of due process because it would “be counterproductive to the balance struck between the rights of the student and the university” (p. 42). According to the New York Appellate Court, the rights that are normally afforded a defendant in an adversarial legal context would create an unfair fiscal and administrative burden if applied to the university system.

Even though the New York Appellate Court declined to afford the student a right to legal counsel, it did afford the student the right to assistance. More specifically, the student was “accorded the right to have someone from the college community to assist her in the proceedings” (*Mary M. v. Clark*, 1980, p. 41). The difference between assistance (or advising) and representation is noteworthy. While courts use the words ‘advise’ and ‘represent’ somewhat interchangeably, they distinguish between those terms when considering passive assistance. In *Gabrilowitz*, for example, the First Circuit held that counsel should advise a student if the student is simultaneously going through a criminal trial. In *Osteen*, the Seventh Circuit held that a student’s right to consult counsel existed, but the court did not go so far as to grant representation. In *Gorman*, also a decision of the First Circuit, the student had the opportunity for counsel to assist him during the process and advise him both before and after.
In each of these cases, though the court did not grant the student in question the right to representation, the court did rule that the university handbook gave the student the right to be assisted by counsel. In none of these cases did a court find that the student’s due process rights had been violated by the absence of full legal representation by counsel in a disciplinary proceeding. Today, however, students persist in challenging whether they should be afforded the right to attorney representation in student disciplinary proceedings. To better understand why higher education institutions provide students with the opportunity to be assisted by legal or non-legal counsel in higher education disciplinary matters, a discussion of federal and state mandates underlying student conduct administration is required.

**Federal and State Legislation**

With so much scrutiny placed on student conduct proceedings due to numerous Title IX investigations and advocacy by various policy organizations, federal offices and state legislatures have begun to weigh in on how higher education institutions should manage their student conduct policies and proceedings. At the federal level, discussions of Title IX, which centers on gender discrimination and governs cases including those of sexual harassment, misconduct, and assault, have changed how student conduct administration is executed and have contributed to shifts in understandings of institutional liability (OCR, 2011, 2014). Another important legal consideration relates to state laws, and in particular for this study, statutes enacted in Wisconsin and North Carolina that deal with attorney representation in student conduct proceeding (N.C. House Bill 843, 2013; Wisc. Admin. Code, 2009).

**Federal mandates.** The abundance of high-profile sexual assault and sexual
misconduct cases on college campuses has led branches of the U.S. Department of Education to take action in presenting a unified federal front on what is and is not appropriate in terms of handling sexual misconduct and sexual assault cases; this occurs most notably through Title IX policymaking that aims to protect institutions from further liability and show support for those who have been victimized. These Title IX issues have changed how student conduct offices and institutions operate in cases involving Title IX violations. Mandatory reporting, immediate action, and the involvement of new Title IX coordinators in all aspects of the student conduct process are some of the most pertinent mandates from the Office of Civil Rights (Sun et al., 2014). These developments also indicate a shift towards institutional liability for Title IX issues.

A number of Title IX cases show that institutions are not always insulated from liability. For example, a college student settled with her institution for $50,000 after she filed a Title IX lawsuit against the institution for failing to protect her from a sexual assaulter (Redmond v. Univ. Nebraska, 1995). Another institution was held liable for its “lax adjudication of the students [in the sexual assault case] and [its] fail[ure] to discuss sexual harassment policies with its students (Williams v. Univ. Sys. of Georgia, 2006). Both of these cases illustrate the dangers for institutions in sexual assault cases. These cases also show that while not explicit, a duty of care under the purview of in loco parentis still exists in some situations, an occurrence that has been explored in detail by Blanchard (2006) and Lake (2013).

The applicability of the now-defunct-legally, but still functional-in-practice concept of in loco parentis has also been addressed through non-Title IX cases. A seminal case, Rabel v. Illinois Wesleyan Univ. (1987), saw the Illinois appellate court hold that a
collegiate environment constitutes an educational, rather than custodial, environment, and this means that colleges and universities are not responsible for injuries that occur on campus among students. A second court, the Delaware Supreme Court, found that a higher education institution owes its students merely reasonable care because college students are adults, and institutions must enforce only the rules and policies they themselves make (Furek v. Univ. of Del., 1991). A third court, the California appellate court, held that “it would be against public policy and impractical to require universities to closely monitor, and subsequently be held liable for, the behavior of adult students” (Tanja H. v. Univ. California, 1991, p. 920).

A number of circuit courts at the federal level have reiterated that institutions do not act in loco parentis over their students. Among the most important of these courts is the Second Circuit in Guest v. Hansen (2010), which held that “under New York law, colleges have no legal duty to shield students or their guests from the harmful off-campus activity of other students. They do not act in loco parentis” (p. 21). The Third Circuit in Bradshaw v. Rawlings (1979) likewise held that:

College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties in loco parentis, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives (p. 140).

Finally, the Eighth Circuit in Freeman v. Busch (2003) held that there is “no special relationship between a college and its own students because a college is not an insurer of the safety of its students” (p. 587).

Together these cases have established a precedent for institutions to no longer be in
*loco parentis* over their students. This substantially limits the liability that institutions take on by enrolling, housing, and feeding students. Moreover, although not explicit, in general, these cases demonstrate that institutions are not held liable for the actions between adult students. While these cases illustrate that *in loco parentis* is no longer a doctrine that courts use to analyze the relationship between institutions and students, the rise of Title IX cases involving sexual misconduct shows that institutions still have duties to their students in some circumstances.

**State mandates.** Like federal offices’ interventions, state mandates have come to influence the execution of student conduct administration. Wisconsin was the first state to codify students’ rights in non-academic disciplinary proceedings (Wisc. Admin. Code, 2009) via Chapter 17 of its administrative code. The code addresses institutional policies; notice requirements; the process of designating an investigating officer, a hearing examiner, and hearing committee; the conduct that is subject to disciplinary action; the available sanctions; appropriate disciplinary procedures; the effects of removal; and the grounds for emergency suspension. Regarding advisors, the Wisconsin code states:

[The student has the] right to be accompanied by an advisor of the student’s choice. The advisor may be a lawyer. In cases where the recommended disciplinary sanction is [not removal], the advisor may counsel the student, but may not directly question adverse witnesses, present information or witnesses, or speak on behalf of the student except at the discretion of the hearing examiner or committee. In cases where the recommended sanction is [removal], or where the student has been charged with a crime in connection with the same conduct for which the disciplinary sanction is sought, the advisor may question adverse
witnesses, present information and witnesses, and speak on behalf of the student. In accordance with the educational purposes of the hearing, the student is expected to respond on his or her own behalf to questions asked of him or her during the hearing (Wisc. Admin. Code 17.12(4)(b)).

This legislation corresponds with the ruling from *Gabrilowitz*, in which the court decided that a student should be afforded the right to attorney representation if the student is facing criminal charges external to his or her student conduct proceedings. In 2013, North Carolina’s House of Representatives went one step further than Wisconsin’s state legislature did in 2009, adopting the same language that the court in *Marin* did. More specifically, North Carolina House Bill 843 states:

> Any student enrolled at a constituent institution who is accused of a violation of the disciplinary or conduct rules of the constituent institution shall have the right to be represented by a licensed attorney or non-attorney advocate who may fully participate during any disciplinary procedure or other procedure adopted and used by the constituent institution regarding the alleged violation [except for when] the institution implements a fully-student-run “Student Honor Code” or when the violation is of “academic dishonesty” (N.C. House Bill 843, 2013).

North Carolina’s bill effectively turns student conduct proceedings into full adversarial hearings. This and Wisconsin’s legislative developments in state statutes are recent, and the effects are yet to be realized, as it is inconclusive whether there is a broader shift towards allowing attorney representation in student conduct or whether these two states are anomalies.
Student Development Theories

Certain norms exist in student conduct administration in higher education in the United States. As discussed, institutions originally viewed student discipline from a punishment-and-retribution perspective (Smith, 1994) and saw themselves as caretakers of students (in loco parentis), and courts most often gave institutional deference in matters of disciplinary conduct (e.g., Anthony v. Syracuse, 1913; Gott v. Berea Coll., 1928). In the last fifty years, however, the norms have shifted towards protecting students’ rights and providing educational outcomes. This shift can be traced to the theoretical foundations of student development. Student development theories directly impact the goals of student conduct administration (Baldizan, 2008; Cooper & Schwartz, 2007; Dannells, 1997; Meagher, 2009). Before the student conduct process is put in motion, student affairs practitioners can use student development theories to assess where a given student is along a path. Once the process begins, a practitioner can help to move the student through his or her current developmental stage. Following the process, a practitioner can assess the student’s current position to determine whether the process has cultivated within the student a more mature and nuanced perspective. Depending on which theory is used, the process will be executed in a particular way and the end assessment will register differently.

There are five major types of student development theories: psychosocial, cognitive-structural, maturity models, typological, and person-environment (Nuss, 1988). Student conduct administrators and higher education scholars have identified psychosocial student development theory, and particularly its sub-theories of moral and ethical development theory and identity development theory, as the foundations for
student conduct practice (Cooper & Schwartz, 2007; Dannells, 1977, 1997; McBee, 1982; Mullane, 1999; Pavela, 1985; Smith, 1978; Travelstead, 1987). The foundation of moral and ethical development theory is in Kohlberg’s Theory of Moral Development and Rest’s modifications. The theory includes the following six stages: (1) obedience; (2) instrumental egoism; (3) interpersonal concordance; (4) law and duty to the social order; (5) societal consensus; and (6) non-arbitrary social cooperation (Kohlberg, 1976). The identity development theory rests upon Chicerking’s seven vectors: (1) developing competence; (2) managing emotions; (3) moving through autonomy toward interdependence; (4) developing mature interpersonal relationships; (5) establishing identity; (6) developing purpose; and (7) developing integrity (Chickering & Reisser, 1993).

Scholars of student conduct administration and student development have specifically looked to the former of these theories, moral and ethical theory, in order to understand and examine student misconduct (Cooper & Schwartz, 2007; Dannells, 1977, 1997; McBee, 1982; Mullane, 1999; Pavela, 1985; Smith, 1978; Travelstead, 1987). Many of these researchers have suggested that colleges are not effectively teaching moral development and that student conduct sanctions do a disservice to students by not considering that students who commit conduct violations reason at a lower moral level than their non-violating peers.

While moral and ethical theory is the theory most commonly applied to student misconduct, a variety of other approaches have also been used to interrogate student conduct administration. Still using a psychosocial lens, several scholars have examined self-control, responsibility, accountability, and the insight of accused students (Caruso,
1978; Dannells, 1997; Pavela, 1985; Travelstead, 1987). These scholars have found that a belief in students’ accountability to their communities and the social responsibility of students as adults in a functional society should guide student conduct administrators in ensuring that campus safety and community protection underlie any developmental effort. Other scholars have applied a cognitive-structural lens to student development, examining self-understanding of identity, attitudes, and values in relation to authority for accused students and students who are on conduct boards (Boots, 1987; Greenleaf 1978). The person-environment and maturity models perspectives have also been used, particularly by scholars who see students’ moral development as falling outside the institution’s sphere of influence and who challenge what they see as an overly-litigious institutional atmosphere (Hoekema, 1994; Hoekema & Lake, 1999, 2005, 2013).

**Inside the Student Conduct Office: Guidelines, Model Codes, and Processes**

**Student Conduct Guidelines.** Institutions’ student conduct offices are those offices responsible for establishing student conduct codes; such codes are designed to create accountability frameworks within their given institutions and to aid in the resolution of certain student conduct concerns. This move towards accountability frameworks reflects the desire of present-day institutions to have student conduct processes that not only ensure that their students’ rights are protected, but that also help support their students’ development. One of the earliest iterations of such an accountability framework, provided by Williamson and Foley, outlines fifteen steps for student affairs officials to take in disciplinary proceedings. These steps include the following:

1) identify the situation; 2) identify involved students; 3) report situations to
disciplinary authority; 4) make charges against student; 5) investigate; 6) interview student; 7) identify causes of behavior; 8) assess potential for rehabilitation; 9) formulate steps for rehabilitation; 10) report to committee or other officials; 11) committee review; 12) committee consult student face-to-face informally; 13) committee action; 14) enforce committee action; and 15) rehabilitate student as long as necessary (Williamson & Foley, 1948, pp. 61-62).

The content of these steps reflects the bifurcated focus of higher education institutions today, a focus on both rights and development, and is in fact closely aligned with the steps in place in many student conduct offices across the United States.

Like Williamson and Foley, Greenleaf has also provided a set of mission statements for governing how student conduct administration balances students’ rights and students’ development. The four mission statements require that administrations: (1) allow individuals to live and work together in a campus community with concern for one another; (2) protect property and individual students; (3) assist individual students in personal growth and development; and (4) help meet the academic goals of the institution (Greenleaf, 1978, p. 34). This set of mission statements reflects the legal authority and the meaning of fundamental fairness handed down by Dixon and its progeny by providing a balance between protecting the legal interests and rights of students and their campus communities with promoting student development. Indeed, Greenleaf’s statements invite a focus on students’ development as well as the pedagogical imperative underlying student discipline. Whereas before institutions sought primarily to ensure that suspension and expulsion were neither arbitrary nor capricious, institutions have now come to focus on maintaining university communities that are livable and workable for all involved.
Greenleaf’s mission statements have led to the commonly-held belief that as long as institutions are following basic tenants of due process, they are free to form any kind of developmentally-advantageous disciplinary policy that they want, as long as it is legally-sound. As such, guidance from higher education scholars has continued to help to shape the developmental aspects of student conduct administration to create an overall balanced process, as reflected in the establishment of model student conduct codes.

**Model Student Conduct Codes.** The ASCA provides model standards for institutions based on the Council for the Advancement of Standards in Higher Education (CAS) for student conduct. These standards include: (1) a clear written description of the policies (*Schaer v. Brandeis*, 2000); (2) substantive and procedural due process at public institutions and fundamental fairness at private institutions (*Dixon v. Alabama*, 1961); (3) fair disciplinary administrative action (*Fellheimer v. Middlebury Coll.*, 1994); (4) institutions’ establishment of transparent jurisdictions, or jurisdictions whose boundaries are clearly delineated; (5) appropriateness of sanctions (*Schaer v. Brandeis*, 2000); and (6) diligent follow-up (evaluation). CAS also suggests having a hearing board that is comprised of members of the campus community at-large and training provided for hearing board members. Finally, CAS recommends that student conduct administrators be conscious of legal precedents and take actions to limit their institution’s legal liability. In spite of providing such ample standards, however, CAS insists that it “does not prescribe or proscribe ways of using the standards; rather, they are intended to be tools for practitioners to use to improve practice” (CAS, 2013).

Building off of these joint ASCA / CAS standards, the American College Personnel Association (ACPA) has developed its own set of guidelines for institutions on how to
address issues in student conduct so that appropriate codes can be developed. While these standards are largely similar, unlike the joint ASCA / CAS standards, the ACPA calls the respondent’s advisor a consultant and who is “a standing member of the University community” and “serves to help the respondent feel comfortable and to provide the respondent advice on how to behave during the hearing” (ACPA, 2010, p. 2). Further distinguishing it from the joint ASCA / CAS standards, the ACPA, when “expulsion is threatened, criminal prosecution has been commenced, and the college proceeds through its attorney,” suggests that “full adversarial representation might be appropriate” (p. 14).

The table below depicts this ACPA model code in conjunction with codes from Pavela (1979); Stoner and Cerminara (1990); Berger and Berger (1999); Tenerowicz (2001); and Stoner and Lowery (2004). While the codes from Pavela; Stoner and Cerminara; and Stoner and Lowery have been chosen for their distinct perspectives on the role of the advisor during the student conduct process, Berger and Berger (1999) and Tenerowicz (2001) are included in the chart to illustrate how legal scholars view representation in student conduct matters. Both Berger and Berger and Tenerowicz agree that students should be allowed to be fully represented by attorneys in cases of concurrent criminal proceedings or cases in which students are facing removal from their institutions. The Bergers even suggest that institutions might partner with local attorneys to enhance the fundamental fairness of student conduct proceedings. The following codes were selected due to their prevalence in the literature
Table 2-1: Model Conduct Codes Language Concerning Advisors.

<table>
<thead>
<tr>
<th>Models</th>
<th>Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACPA (2010)</td>
<td>The respondent’s consultant serves to help the respondent feel comfortable and to provide the respondent advice on how to behave during the hearing. The consultant is not allowed to argue for, advocate for, or present the case for the respondent.</td>
</tr>
<tr>
<td>Berger &amp; Berger (1999)</td>
<td>To accommodate those who need assistance, schools might create and maintain a list of local attorney who have agreed, if called upon, to provide service on a pro bono basis.</td>
</tr>
<tr>
<td>Pavela (1979)</td>
<td>Respondents or complainants participating in any disciplinary proceeding may be accompanied by a representative, who may be an attorney. Parties who wish to be represented by an attorney must inform the Judicial Programs Office in writing at least two business days prior to the scheduled date of the proceeding. Representatives may not appear in lieu of respondents. *Students have not been determined to have a constitutional right to full legal representation in University disciplinary hearings. The privilege of legal representation, granted in this part, should be carefully reviewed in any subsequent revision of the code.</td>
</tr>
<tr>
<td>Stoner &amp; Cerminara (1990)</td>
<td>Although the courts are split on the issue, a student need not be permitted to be represented by counsel at most student disciplinary hearings. Second, if criminal charges are either pending or potential, the college or university must permit the student to have counsel. Even in these cases, however, counsel may be restricted to an advisory role.</td>
</tr>
<tr>
<td>Stoner &amp; Lowery (2004)</td>
<td>The Complainant and the Accused Student have the right to be assisted by an advisor they choose, at their own expense. The advisor must be a member of the [College][University] community and may not be an attorney. The Complainant and/or the Accused Student is responsible for presenting his or her own information, and therefore, advisors are not permitted to speak or to participate directly in any Student Conduct Board Hearing before a Student Conduct Board. A student should select as an advisor a person whose schedule allows attendance at the scheduled date and time for the Student Conduct Board Hearing because delays will not normally be allowed due to scheduling conflicts of the advisor. <strong>Addendum:</strong> If an Accused Student is also the subject of a pending subsequent criminal matter arising out of the same circumstances, s/he may be allowed to have an attorney serve as his/her advisor, at his/her own expense, to behave in the same manner as any other advisor. <strong>Alternative:</strong> The Complainant and the Accused Student have the right to be assisted by any advisor they choose, at their own expense. The advisor may be an attorney. The Complainant and/or the Accused Student is responsible for presenting his or her own information and, therefore, advisors are not permitted to speak or to participate directly in any Hearings before a Student Conduct Board.</td>
</tr>
<tr>
<td>Tenerowicz (2001)</td>
<td>Because an accused student’s statements in a hearing may be relevant to subsequent or concurrent criminal proceedings, accused student should be entitled to representation by an attorney when they face potential criminal charges arising out of the same set of facts that led to the school’s disciplinary charges. Faced with serious disciplinary consequences, including expulsion, the accused student undoubtedly experiences an intense emotional response. School disciplinary hearings are intimidating; as a result, the student may not be able to effectively articulate his or her side of the story or version of the facts in a coherent and logical manner. With the potential of an erroneous expulsion, accused students should not be forced to “go at it alone” an attorney can better articulate the student’s position and protect his considerable interests.</td>
</tr>
</tbody>
</table>
The Student Conduct Process in Practice: Types and Participants Types.

According to Narbeth Emmanuel and Keith Miser, “Each college and university is unique, and each judicial system must be especially designed to be sensitive to the values, traditions, and constituents of each institution” (1987, p. 92). Despite this uniqueness, however, there are three types of student conduct processes from which all institutions typically generate their own: rights-based processes, interests-based processes, and honor code-based processes. Among these processes, rights-based processes are the most popular and follow the same basic structure: a one-on-one disciplinary conference that can be appealed to an administrative or formal hearing, which can then be appealed again to a board or final hearing. No university offers an interests-only conflict resolution system, perhaps because interests-only conflict resolution has been shown to be extremely effective in empowering disputants and resolving difficult issues (Brett, Goldberg, Ury, 1990). Some institutions, including military institutions, use honor code-based processes that are exclusively student-run; these processes are often considered some of the most effective and punitive. An examination of these varied processes helps to illustrate the tensions, flaws, and dynamics of different institutions’ approaches to student conduct administration.

Rights-based processes. The rights-based approach is typical among student conduct offices, with a straightforward example coming from Coastal University (CU10). The procedures listed below are taken directly from Coastal University’s conduct code and read as follows:

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10 Coastal University is a pseudonym of a large, public, research-based university on the East Coast.
Disciplinary conference. The disciplinary conference is the initial, informal, and quick stage of the student conduct process that many institutions use to determine guilt regarding simple violations. The steps leading up to the conference are as follows:

1. Student receives e-mail from Office of Student Conduct notifying student of allegation and requesting that student schedule appointment as soon as possible. Generally, Office provides notice of violation within thirty days of allegation.

2. Student meets with student conduct administrator, who
   
   2a. explains to student the conduct violation by giving student access to case file,

   2a(1). if student accepts responsibility, go to 2d

   2a(2). if student denies responsibility, go to 2b

   2b. gives student the opportunity to respond and call relevant witnesses,

   2c. decides whether the student violated the conduct code using a preponderance of the evidence standard, and

   2d. provides written decision within ten calendar days of sanction and provides student with appeal procedures.

Appeal. The appeal provides the student with the chance to have a hearing board or higher-level administrator hear his or her case. The appeal also gives the student the opportunity to present new evidence. The student has the chance to provide written appeal within ten calendar days of written
decision from disciplinary conference. The appellant student has the burden of showing that the disciplinary decision violates either substantive or procedural standards, and student can introduce new evidence. The appellate committee or professional staff can deny the appeal, return case to disciplinary conference for further consideration, review case *prima facie*, or grant an appeals committee/professional staff hearing. The appeals committee can affirm, return to disciplinary conferences, or reverse decision.

*Final appeal.* The final appeal, at this institution, is only in cases of suspension or expulsion. The final appeal is heard by a senior administrator at this institution, and this person can provide a final judgment. The student may submit a final appeal to the President, Dean of Students, or equivalent as a last measure. The student must show evidence that previous decision makers violated procedural or substantive due process rights, including procedural errors that led to an unfair hearing or a lack of information to support the decision or sanction. During the final appeal, the student may not present any new information or evidence, the student must show that no reasonable person could have come to the decision and imposed the sanction that was issued (CU, 2013).

CU’s disciplinary process is a good example of a rights-based process, or a process that focuses on the procedural and substantive due process aspects of student conduct proceedings. Examining such a rights-based process provides insight into how judicial student conduct can be and provides a foundation for examining parallel processes. It also
provides a foundation for placing this type of student conduct process within a larger alternative dispute resolution spectrum, which will be done in chapter 4.

**Interest-based processes.** Mountain State University’s (MSU) office is called the conflict resolution and student conduct services office. It bears that name because MSU offers its students a number of conflict resolution options, including mediation and facilitation, restorative justice, and conflict coaching. On its Web site, MSU states that the purpose of its conflict resolution services is to provide information and advice, to develop options, and to assist students in pursuing resolutions to their own conflicts. This suggests that the conflict resolution services do not apply in normal disciplinary matters, including underage drinking, sexual misconduct, or other disciplinary violations against the institution. Rather, the conflict resolution services apply only to conflicts between faculty and students, staff and students, supervisors and employees, co-workers, and roommates.

The mediation and facilitation service is one in which MSU provides a neutral third party to facilitate the resolution of a dispute between two people or groups, with MSU stating that it is ultimately up to the parties to reach a mutually-agreeable solution. The restorative justice option MSU offers provides students with the opportunity to bring harmed parties together with the parties who inflicted the damage in order to discuss what happened, what harm was done, and how to restore the relationship among all persons involved. Finally, the conflict coaching option is one in which MSU coaches interested people on how to resolve disputes on their own using key conflict resolution skills such as empowerment. Together, these conflict resolution services provide interests-based approaches to resolving conflicts among a number of different parties on a number of
different topics. The biggest hindrance to these services is that if a student violates the MSU student conduct code, he or she is prohibited from using one of the interest-based approaches; rather, he or she must use the rights-based approach illustrated above.

**Honor-code based processes.** A number of higher education institutions use honor codes and honor code procedures as part of their student conduct processes. Honor codes are different from rights-based and interest-based approaches, and depending on the violation, students generally also must use a rights-based approach. Honor codes typically apply only to academic violations, but they are noteworthy insofar that they are entirely student-run. A typical honor code process follows the following format:

1. University community member accuses a student of violating honor code.
2. Student investigators interview accused student and accusing university community member.
3. Honor councilperson meets with accused student to
   3a. determine whether panel hearing is necessary (go to step 4) and either remands to full panel hearing or makes decision of guilt, or
   3b. allow student to admit guilt and proceed to removing student from institution
4. Investigators provide report to honor council.
5. Panel convenes and accumulates evidence, listens to testimony (both written and oral) from material and character witnesses, and conducts a hearing.
6. Panel provides final decision, including sanction. The student may appeal this decision within ten days to appellate review board, which then turns the process back into the rights-based process administered by the institution’s office of student conduct.

Participants. Regardless of the type of process employed, there are three main participants in the student conduct process: the accused student, the accusing person, and the student conduct administrator. Each participant will be examined in kind below (any student conduct code).

The accused student. While much research on the student conduct process has attempted to determine the most salient characteristics of student offenders, the first study to look at characteristics of college-aged students who commit misconduct occurred in 1952 (Williamson, Jorve & Lagerstadt-Knudson, 1952). This study analyzed case files to determine if students who misbehaved were a randomized representation of the student population or if they had certain characteristics in common that distinguished them from the students who did not misbehave. The researchers found that men in their freshman year were the most likely to commit conduct violations. Scholars subsequently conducted similar studies to determine how to characterize accused students. Yet many of these early studies, including Williamson, Jorve, and Lagerstadt-Knudson’s, were criticized for being too topical and including too few variables to systematically determine how demographic information (e.g., sex; class; residency status) impacted outcome variables such as recidivism rates (LeMay, 1968).

For the next twenty years, from approximately 1970 to 1990, only a limited number of studies investigating non-academic misconduct at public institutions were
undertaken. Like their predecessors, each of these studies analyzed preexisting case files. These studies elevated and added nuance to previous studies’ findings, expanding, for example, upon the demographic characteristics of students in different settings. The overall findings of these studies were markedly similar, however: first- and second-year men living in residence halls and under the influence of alcohol are the students most likely to commit conduct violations (Tracey, Foster, Perkins, & Hillman, 1979). These student characteristics (white; male; under the influence; residential) were confirmed by a much more recent study, which analyzed eighteen separate institutions to determine how students viewed institutions incorporating restorative justice components into student conduct policies and proceedings (Karp & Sacks, 2012). Recent studies have likewise found that grade-point average (GPA) influences student misconduct. According to such studies, lower GPAs are correlated with more conduct violations. None of these studies, however, has analyzed whether lower GPAs lead to violations or whether such violations negatively affect GPAs (Cruise, 2009; Janosik, 1985; Tracy, 1979).

In addition to their overly-topic nature and inclusion of too-few variables, another major flaw in many of these descriptive case studies on student conduct is that they have assessed only a small number of institutions. Recognizing this limitation, a study done by Dannells took a different approach to analyzing why students might misbehave by examining institutions’ actual codes of conduct (1997). Ultimately, the study found that institutions could be considered blameworthy for who is charged with conduct violations because of how their student conduct offices define misconduct and how those offices interpret and enforce the rules.
In examining how codes of conduct influence charges against students, Dannells’s (1997) study paved the way for examining student misconduct from a psychological perspective. More specifically, the study indicated that intrapersonal origins of student misconduct could be broken down into pathological and non-pathological origins. Whereas pathological behavior stems from premeditated awareness, non-pathological misbehavior stems from a lack of information or understanding or incomplete student development. Non-pathological misbehavior has been seen as the primary type of student misbehavior (Footer, 2006; Howell, 2005).

Within the realm of non-pathological misbehavior, students’ expectations of institutional codes of conduct are often the source of the lack of information or understanding that leads to misbehavior (Gutmann, 2008). Data collected from 273 first-year students at a small, private institution revealed that: (1) male students expected to violate more rules than female students did; (2) male students expected their peers to commit violations that resulted in sanctions less severe than suspension; (3) students from non-urban backgrounds expected their peers to commit more low-level violations than their urban counterparts expected their own peers to commit; (4) first-generation college students expected their peers to commit more high-level violations than non-first-generation college students; and (5) Native American/Pacific Islander first-year students and students from urban communities were less likely than their counterparts to believe that the student conduct process would be fair for them. Overall, the students’ expectations of sanctions for violations were far more modest than the sanctions possible and annually reported, signaling that greater awareness among students regarding codes
of conduct is necessary.\textsuperscript{11} Ultimately, recognizing who is most likely to commit conduct violations provides a context for understanding why these students might require or need advising or representation in student conduct matters. It also provides a context for understanding how institutions’ development of policies might affect students’ behavior.

\textit{The accusing person.} Accusing students and other accusing parties often do not actively participate in the student conduct process because most student conduct issues are resolved in informal, one-on-one disciplinary conferences. Accusing persons, in those situations, are represented by student conduct administrators through incident reports that have been either anonymously submitted; submitted through the universities’ residence life divisions; submitted by police; or submitted by someone else. The accusing persons thus usually only actively participate when decisions made in the informal conferences are appealed or when the conduct violations are automatically sent to hearings. For this reason, they have not received much critical attention. The only exception is the accusing person in a Title IX proceeding, a figure who has received much scholarly and popular attention, as highlighted by (1 in 4 researcher) in the controversial study 1 in 4 (cite).

\textit{The student conduct administrator.} Student conduct administrators are generally white (Dowd, 2012) and highly educated (Bostic & Gonzalez, 1999; Dowd, 2012), with titles ranging from chief administrator (Nagel-Bennett, 2010) to coordinator. While their

\textsuperscript{11} An interesting dynamic exists between students and institutions. One could easily argue that codes of conduct are not just for students. The code serves the students as much as it serves those who assist students and others who may become involved in a dispute (Footer, 1996). One issue that arises with these stated policies is that students do not read them unless they have to (Footer, 1996). While ignorance is not an excuse in almost any legal circumstance (\textit{ignorantia juris non excusat}), one could argue that because education is the main priority of student conduct offices, taking into account that students are ignorant of policies is important. Furthermore, knowing that students’ expectations of student conduct do not closely align with the possible sanctions and number of violations that actually occur gives insight into the difficulties of developing a student conduct policy.
roles and responsibilities vary accordingly, such administrators typically use a combination of justice and care in exercising their duties (Waller, 2013). These two dimensions particularly come into play during the dispute resolution process. During the findings phase of the dispute resolution process, administrators use a justice lens to determine whether accused students have violated their institutions’ codes of conduct (Waller, 2013). During the sanctioning phase, administrators are more likely to use care because of their belief in the importance of learning and reflection (Waller, 2013). This belief closely aligns with restorative justice practices (Karp, 2009; Schrage & Thompson, 2009). Indeed, when asked, administrators have identified accepting responsibility for one’s actions, understanding the effects of one’s actions on others, making constructive changes, and understanding the seriousness of behavior as the most important learning outcomes for students (Allen, 1994).

Over the course of their careers, administrators are likely to face myriad ethical issues, including issues concerning preferential treatment with student athletes and members of Greek communities (Dowd, 2012), that are not neatly resolvable (Bostic & Gonzalez, 1999; Dowd, 2012; Nagel-Bennett, 2010). Complicating these ethical concerns is the lack of required training programs and affordable professional development opportunities. In fact, although alternative restorative practices are increasing in popularity among administrators, administrators are generally not trained in how to execute them (Meagher, 2009). As a result of these trying conditions, job satisfaction varies significantly among administrators. Davidson (2009) surveyed entry- and mid-level administrators, finding that these administrators were the least satisfied in their positions when compared to other student affairs professionals. This disparity in job
satisfaction suggests that administrators’ training must be standardized and their roles more clearly defined (Lancaster, Cooper, & Harman, 1993). While a multiplicity of perspectives is important and encouraged in higher education administration (Jackson & O’Callaghan, 2009), misperceptions among administrators regarding praxis are dangerous for the accused student, the administrator, and the institution.

**The student conduct advisor.** As has been made clear, the majority of four-year higher education institutions, both public and private, allow student conduct advisors to accompany students during student conduct proceedings. In the early stages of the student conduct process, the student conduct administrator stands in place of the accuser and the accuser is replaced by an incident report, which the student conduct administrator uses to determine whether a student violated the code. As the student conduct process progresses, the student conduct advisor shifts to accompanying his or her students through the process in order to ensure that the process is fundamentally fair, that the student has the ability to advocate for him- or herself, and that the student understands the significance and complexity of the process.

**The Student Conduct Process: Legal Perspectives.** Recent literature suggests that a divide continues to exist between scholars and institutions in determining how to formulate, execute, and modify student conduct codes so that student development is able to guide students in personal development. Some legal scholars, usually those who have been trained as attorneys themselves, have praised colleges and universities for offering notice, allowing students to cross-examine witnesses, permitting students to have attorneys present during their hearings, and involving legal counsel in creating and evaluating student conduct programs (Berger & Berger, 1999, Dutile, 2001; Stoner,
2000). Others, usually those who have not been trained as attorneys, have argued that these legal-based procedures may make the student conduct process an adversarial process that does not promote student development (Gehring, 2001; Lowery, 2008; Pavela, 1985). The changing perspectives of student conduct administrators; the debate over advisor versus attorney representation; the composition of hearing boards; and the language used in student conduct codes are all particularly indicative of the degree to which the student conduct process is entwined with the law and the dilemma that exists in attempting to negotiate between the two.

**The changing perspectives of student conduct administrators.** James Picozzi, once an accused student in a disciplinary proceeding and thus cognizant of his own bias, has questioned whether administrators, though competent as educators to hand down academic sanctions, have the competence to address disciplinary issues that could remove students from their institution (Picozzi, 1987). This concern regarding administrative competence is complicated when considering that administrators are often charged with simultaneously playing the roles of judge, jury, and sanctioner during the dispute resolution process. Administrators’ multi-faceted role does not allow for the normal checks and balances system that one sees in other contexts where liberty and property interests are at stake (Dutile, 2001; Picozzi, 1987). Further complicating administrators’ role in the process is that administrators may have political motivations that prevent them from remaining impartial, such as a case in which the given student has significant support for his or her misconduct (e.g., *Barker v. Hardway*, 1968). This support may

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12 The “judge” plays a multi-faceted role in some ADR settings. Chapter 4 will examine these parallels.
come from coaches, honors colleges, donors, lawyers, or even upper-level administrators, and may detract from administrators’ competence in exercising their duties. Indeed, the normative injunction against bias seem not to apply to higher education disciplinary proceedings, even though being part of a higher education community makes it nearly impossible to insulate oneself from bias (Picozzi, 1987). No research to date has considered the political motivations of student conduct administrators.

Building upon the idea that the training, philosophies, and motivations of student conduct administrators necessitate further study, given their importance in the educational experiences of college students, Bostic and Gonzalez (1999) conducted a national survey of 541 two- and four-year higher education institutions’ judicial affairs officers and administrators in 1994. Expanding upon the work of Dannells (1990; 1991), Bostic and Gonzalez investigated which rights administrators identified as rights that students should have during a student conduct process. Over 80% of those surveyed identified nine major student rights, including (1) a hearing with explicit charges; (2) written notice of the hearing; (3) awareness of opposing testimony; (4) the opportunity to present a defense; (5) the opportunity to present witnesses; (6) the opportunity to have counsel; (7) the opportunity to not self-incriminate; (8) written notice of the decision; and (9) the opportunity to appeal (p. 168).

The main tenets of due process in student conduct proceedings, notice and the opportunity to be heard, have undergone significant shifts both in theory and in practice in recent years. Notably, 97% of administrators now agree that students should be offered written notice to a hearing, an increase of (what percentage) (Bostic & Gonzalez, 1999; Esteban v. Cent. Mizz. St. Coll., 1967). This increase in the number of institutions that
offer written notice is a further indication of the ASCA’s influence, as well as institutions’ more in-depth knowledge of the legal decisions that have been handed down requiring written notice.

While there have been significant shifts in administrators’ attitudes towards notice between the Dannells and Bostic and Gonzalez studies, the most significant shifts in administrators’ attitudes concern the opportunity to be heard, and more specifically, the right to have counsel and the right to have an attorney, with approximately 15% more administrators concurring with both rights in the Bostic and Gonzalez study than in the Gonzalez study. According to Bostic and Gonzalez (1999), over 87% of institutions offer their students the opportunity to have advisors with them during proceedings and 55% of institutions allow attorneys to accompany their students during conduct hearings. A chart comparing the findings of the Dannells (1990; 1991) and Bostic and Gonzalez (1999) studies is below.
In the aftermath of Goss and Dixon, these findings are particularly significant. Goss and Dixon suggested that students had the opportunity to be heard and that student conduct offices had to adhere to this standard. While the scope of the notice and the nature of the opportunity to be heard was, at the time, undefined, Bostic and Gonzalez’s study makes evident that more and more institutions are seeking guidance in creating their conduct codes, a development that may be traced back to the founding of the ASCA.

Another significant shift in administrators’ perspectives regarding the opportunity to be heard can be seen in the accused students’ ability to present a defense (Davis 1942; Swem, 1988). Bostic and Gonzalez found a 3% increase in the number of administrators who are in agreement with this right (from 95% to 98%), suggesting that presenting a

Table 2-2: Comparison of Studies Examining Student Rights in Student Conduct Proceedings.

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Present a defense – 98%</td>
<td>Present a defense – 95.6%</td>
<td>Appeal – 95.6%</td>
</tr>
<tr>
<td>Written notice of hearing – 97%</td>
<td>Appeal – 94.9%</td>
<td>Present a defense – 94.7%</td>
</tr>
<tr>
<td>Hearing with explicit charges – 97%</td>
<td>Written notice of the decision – 93.9%</td>
<td>Written notice of decision – 92.5%</td>
</tr>
<tr>
<td>Written notice of the decision – 96%</td>
<td>Present witnesses – 91.5%</td>
<td>Present witnesses – 89.9%</td>
</tr>
<tr>
<td>Present witnesses – 95%</td>
<td>Hearing with explicit charges – 89.1%</td>
<td>Hearing with explicit charges – 86.8%</td>
</tr>
<tr>
<td>Not self-incriminate – 92%</td>
<td>Written notice of hearing – 84.3%</td>
<td>Written notice of hearing – 85%</td>
</tr>
<tr>
<td>Appeal – 90%</td>
<td>Not self-incriminate – 78.5%</td>
<td>Not self-incriminate – 80.6%</td>
</tr>
<tr>
<td>Have counsel (not an attorney) – 87%</td>
<td>Awareness of opposing testimony – 75.4%</td>
<td>Awareness of opposing testimony – 74.9%</td>
</tr>
<tr>
<td>Awareness of opposing testimony – 83%</td>
<td>Have counsel (not an attorney) – 74.7%</td>
<td>Have counsel (not an attorney) – 70%</td>
</tr>
<tr>
<td>Have an attorney – 55%</td>
<td>Have an attorney – 39.9%</td>
<td>Have an attorney – 43.2%</td>
</tr>
</tbody>
</table>
defense has become a hallmark of student conduct proceedings since the Supreme Court’s decision in *Goss*. It has been shown that one’s ability to present a defense is a measure of perceived process fairness (Tyler, 2006), thus suggesting administrators’ firmer adherence to certain constitutional requirements of due process since Dannells’s studies.

Ultimately, even more notable than the shifts in administrators’ attitudes towards notice and the opportunity to be heard is administrators’ belief in contract theory. In the Bostic and Gonzalez study, administrators signaled that contract theory (rather than fiduciary theory, *in loco parentis*, constitutional theory, or privilege theory) is the most appropriate theory for governing the relationship between students and institutions. Contract theory dictates that institutions are contractually bound to students upon matriculation. This means that when a student violates an institution’s code of conduct, he or she is essentially violating the contract between him- or herself and the institution, thus giving the institution the power to levy sanctions against the student.

Contract theory is not markedly different from constitutional theory; the latter of which courts have generally signaled governs student disciplinary proceedings at public institutions. While contract theory relies on the premise that the written documents are agreed upon by both parties, constitutional theory assumes that a constituency will rely upon a unilaterally-formed written document (Barnett, 2009). In higher education, one could argue that the implied contract between a given student and his or her institution is in fact more akin to a constitutional requirement to abide by certain rules and policies.

The counterargument is that the student can choose which institution he or she applies to and subsequently attends before being bound by contract, but the same
argument could be made for national citizenship. Therefore, even though administrators believe that contract theory is the most appropriate theory for analyzing student disciplinary matters, that constitutional theory, rather than contract theory, applies at public institutions, does not drastically change how administrators or courts have analyzed disciplinary matters across institutions. Moreover, even though they are bound by contract, institutions should be given broad discretion for determining the appropriate sanctions for students who violate institutional policies (Cloud v. Boston UNIV., 1983; Fellheimer v. Middlebury Coll.; 1994; Schaer v. Brandeis, 2000). Given that administrators believe that contract theory governs the relationship between students and institutions, it would seem that institutions do not have a legal reason to allow students to have advisors (87%) or attorneys (55%) accompany them to hearings. This is especially relevant given the legal precedent that bans most attorneys’ functions in conduct proceedings (e.g., the right to cross-examine witnesses, rejected in Donohue v. Baker, 1997; Gabrilowitz v. Newman, 1978; Winnick v. Manning, 1972).

The debate over advisor versus attorney representation. Though only 55% of institutions reported allowing attorneys to act as advisors in 1999, this, too, is changing rapidly. In Wisconsin, for example, all public institutions are now required to allow attorneys to accompany students in student conduct proceedings (Wisc. Admin. Code, 2009). In North Carolina, all public institutions are not only required to allow students to have attorneys, but they also are required to allow attorneys to fully participate in all student conduct proceedings (N.C., 2013). Legislation that mirrors the recent legislation in North Carolina is currently tabled in Virginia (Cavalier Daily, 2015). An analysis of the case of Doe v. Univ. of the S. (2011) suggests why some states and institutions are
erring on the side of allowing attorneys to accompany students in student conduct proceedings.

In the case of *Doe*, a hearing advisor was called to testify on behalf of James Doe (pseudonym to protect the identity of the complainant) in a case against the university regarding many alleged violations. The hearing advisor was one of four people assigned to advise students on sexual assault cases during that school year and thus was familiar with the formal process of a sexual assault hearing and deemed potentially “helpful to the respondent” (*Doe v. UNIV. South*, 2011, p. 16). The advisor was not allowed to “provide absolute confidentiality” to the accused; rather, the advisor was “obligated to inform the Dean of Students” if the student were to provide testimony during the sexual assault hearing that contradicted what the advisor and student had discussed privately (*Doe v. UNIV. South*, 2011, p. 16). This case illustrates how what an advisor says and does during a student conduct hearing could have legal implications, particularly if he or she is then called to testify.

One might imagine, for example, a situation in which a student conduct advisor consults with a student who believes that what he or she did was wrong and would like to accept punishment. Knowledgeable of the student conduct code but unaware of the sanctioning protocol, the student’s advisor may suggest that the student accept the sanctions in the interest of moving forward. This student, who is likewise unaware of the sanctioning protocol, might thus accept a high-level sanction, such as a one-semester suspension, for his or her actions. Yet after speaking with legal counsel, his or her parents, or others, the student realizes that he or she likely did not deserve the sanction that he or she accepted. As a result, the student may wish to take legal action against the
advisor, and vicariously the university, for the advice to accept the high-level sanction that he or she was given. This situation commonly occurs when advisors ‘advise’ students to accept particular sanctions, but the advisors are unable to ‘represent’ the students if they challenge the sanctions otherwise.

In analyzing the example above, one could argue that because student conduct advisors are in non-adversarial settings and are not technically representing students insofar as they are not advocating for students, they should be insulated from suit. This issue has not come before a court, though, so it is difficult to surmise how a court would rule. This concern looks to become even more pertinent, as a recent case has indicated that an advisor may be able to provide absolute confidentiality to his or her student if the institution does not specify otherwise (Dempsey v. Bucknell Univ., 2013). As the courts continue to decipher what the role of a student conduct advisor is, a crucial question remains: Could the advice given by a student conduct advisor be considered an unauthorized practice of law, especially when students are being subjected to court proceedings external to his or her student conduct proceedings? Certainly situations in which a student conduct advisor incidentally offers legal advice to a student, thereby incurring liability, may arise, particularly given that many student conduct advisors are trained by and are employees of their universities. These questions merit continued scholarly investigation.

Comparing the articulated and perceived roles of the student conduct advisor is supported empirically and theoretically (Graen; 1976; Morrison, 1994). In the employee-employer relationship context, Graen (1976) found that roles in organizations are rarely fixed and that role perceptions evolve as employers and employees negotiate the scope of
work activities. Other research on employers and employees indicates that employees almost always have a different understanding of their roles than their employers do because jobs are cognitive constructions (Rousseau, 1989; Salancik & Pfeffer, 1978). The organizational theory community has agreed that job roles, including during the job and beyond the job, differ between employers and employees. This provides justification for comparing the defined and perceived roles of student conduct advisors, who are all contractually bound\textsuperscript{13} to their institutions (Graen, 1976; Morrison, 1994; Rosch, 1978; Salancik & Pfeffer, 1978).

\textit{Hearing boards’ composition.} Examining the three possible types of student conduct hearing boards—administrative, peer-majority, and peer-minority—is one way to better understand how institutions have adopted standards for and incorporated legal precedents into their student conduct offices (O'Reilly & Evans, 2007). A conduct process that involves a peer-minority board, or a board on which more administrators than students serve (e.g., 2:1 or 3:2) process that incorporates both administrators and peers (albeit more administrators than peers) is the most effective type of process for reducing recidivism rates (O'Reilly & Evans, 2007). Administrative-only and peer-majority boards result in a 9\% higher recidivism rate than the minority-peer board. Interestingly, student affairs professionals perceive the administrator-only board as the most effective, when it has actually been proven the least effective in terms of recidivism reduction (O'Reilly & Evans, 2007). Scholars have argued that the administrative-only board is the least effective because students learn better from peers than adults, a finding

\textsuperscript{13} Non-peer advisors are employed by the institution, while peer advisors create a contractual relationship with the institution through payment of tuition.
that is supported in other research in the area of student conduct administration (O’Reilly & Evans, 2007; Topping, 1998).

**Language of student conduct codes.** Another way to examine student conduct is by examining the processes themselves, and in particular, the language that they adopt. While these processes are given different names at different institutions, they are generally referred to as the disciplinary conference, the appeal, and the final, or board, appeal. Fitch and Murray have examined student conduct processes at four-year doctoral-granting institutions, identifying formal, informal, and mixed-methods processes among them (2001). The formal system generally uses more legal language and criminal court procedures in its process, whereas the informal does not. The informal process gives the student the opportunity to be empowered through a one-on-one educational conversation with a student conduct administrator, without having to resort to witnesses, testimony, and other evidence. The mixed process may use certain legal terminology but uses more informal proceedings. Based on a review of the literature, Fitch and Murray surmised that the less formal the process, the more effective the process would be (Footer, 1996; Stoner, 2000; Zacker, 1996). At the 141 institutions studied, however, the authors found no statistically-significant relationship between the formality of an institution's student conduct system and language, its appeals, the number of cases adjudicated, repeat offenders, or lawsuits filed against the institution. The authors actually found that the most formal institutions had the least number of adjudicated cases, appeals, and recidivists, which was counter to their original hypothesis. These findings suggest that highly-formal systems based on criminal systems are not less effective than their less formal counterparts, given the desired outcomes (Fitch & Murray, 2001, p. 152).
Synthesizing the findings of the Fitch and Murray study with the findings of the O’Reilly and Evans study provides insight into what the most educationally-effective formulation of a student conduct board is. On the one hand, one study has argued that students learn better from their peers, and that a peer-minority board (a board comprised of at least half administrators) is more effective than a peer-majority or administrative-only board for reducing recidivism (O’Reilly & Evans, 2007). Yet another study has suggested that a more formal system leads to a lower number of recidivists than an informal or mixed-methods system (Fitch & Murray, 2001). Though just one outcome is shared by the two studies, the findings suggest that a formal, peer-minority process is the most likely to produce the fewest recidivists. This examination of student conduct process research makes clear that institutional policies are closely intertwined with the reasons that students commit conduct violations (Dannells, 1997; Gutmann, 2008).

**Conclusion**

The purpose of this literature review has been to bring into conversation competing schools of thought. On the one hand, there is student adjudication, with the goals of accountability, community protection and safety, and efficiency. On the other hand, there is student development, which aims to facilitate the interpersonal and social growth of students during their collegiate experiences. Alternative dispute resolution serves to bridge these two competing schools of thought, thereby providing insight into how to use student conduct administration as both a way to hold students accountable for their actions and a way to cultivate student development throughout the conduct process.

In emphasizing the developments that have led to alternative dispute resolution, this review has focused three separate constructs: the legal and non-legal foundations of
student conduct administration; the elements of the student conduct process; and a framework with which to examine these ideas. Student conduct administration exists in two realms. It must take into account the legal principles and case decisions that have been handed down by courts and legislatures to protect institutions from liability; yet it must also work to educate students. Accordingly, there are a number of elements that student conduct policy-makers need to take into account if they are to protect their university community, distribute justice, hold students accountable, and facilitate student moral and identity development. These include the constitutional and legal principles that are in place and that institutions must follow; they also include the student development and community protection goals that student conduct offices have. While a number of guidelines and model codes exist for student conduct offices to adopt, most student conduct models do not take into account the entire body of literature that exists on alternative dispute resolution processes and dispute system design. By providing an analytical framework for designing and evaluating student conduct processes, this review puts into dialogue student conduct administration and student affairs processes.

Ultimately, understanding the nature of a basic student conduct process, the types of student conduct processes available, the participants in such a process, and the research that exists on each of these concerns enables a more nuanced perspective on the role that student conduct administration plays in the United States’ larger dispute resolution system. Yet much work remains to be done. In particular, further research on the role of the student conduct advisor is required. In the following chapters, I trace the characteristics of student conduct codes as they relate to broader dispute resolution
constructs; and generally how student conduct administration, as a field, fits into alternative dispute resolution as a field.
Chapter 3

A Theoretical Framework for Analyzing Student Conduct Administration

Introduction

This chapter will provide an overview of alternative dispute resolution from multiple perspectives. First, ADR will be examined from a historical perspective. Then, ADR will be examined from a dispute-system-design perspective, which functions as the foundation for creating an ADR system, and in this case, creating a student conduct system. Finally, this chapter will end with a framework for analyzing an existing system from an ADR perspective.

While this chapter provides an overview of the theoretical framework that will be used throughout the rest of the study, it specifically explains ADR from differing perspectives and sets the context for applying the theoretical framework. Applying a theoretical framework of alternative dispute resolution to the field of student conduct administration will enhance student conduct administration practice and push assessment forward. In practice, using an ADR lens to analyze student conduct administration is especially useful considering the current lack of theoretical frameworks being used and applied in the field. Instead of coming towards student conduct administration from a purely student development perspective, it is important to reconsider student conduct administration as a subset of a larger ADR field, as student conduct administration has both an educational and punitive function.
This chapter will provide a foundation for analyzing student conduct processes and procedures in multiple ways. First, this chapter will describe two dispute system design frameworks that the researcher chose elements of to analyze the procedural aspects of the student conduct process. Second, this chapter will narrow focus to the participants in the student conduct process and how to evaluate the process from the participants’ perspectives. Lastly, this chapter provides a continuum of alternative dispute resolutions processes as a metric for evaluating how legalistic certain purposefully selected institutions’ student conduct processes are. Together, these theoretical constructs will be used together to create a comprehensive framework to analyze the totality of student conduct administration, including the processes, procedures, and participants.

**Alternative Dispute Resolution (ADR) Mechanisms**

Student conduct is a form of alternative, internal dispute resolution. The current literature in higher education has failed to connect constructs of alternative dispute resolution with internal policies governing student conduct and conflict resolution, which is an important contribution of this study to the field. Like any large organization, higher education institutions seek to resolve disputes without formal litigation and via internal means in order to avoid the cost, time, and energy associated with court cases. Many previous studies have examined conflict resolution in higher education by focusing on disputes and the actors at work within them, rather than the dispute mechanisms in place. To understand the dispute mechanisms as applied to student conduct processes within a larger body of research, it is appropriate to examine student conduct administration within a framework of alternative dispute resolution.
The Origins and Components of ADR. Dispute resolution professionals have existed in the United States since at least the late nineteenth century. Alternative dispute resolution (ADR) mechanisms arose independently of the legal system because of concerns regarding rising legal costs, the adversarial nature of the legal process, and a general distrust of the legal system (Appleman, 2012; McManus & Silverstein, 2011; Welsh, 2002). Early in the 1920s, the government established arbitration laws as a method to resolve disputes outside of litigation (McManus & Silverstein, 2011). ADR’s popularity continued to grow throughout the twentieth century as law schools and universities established courses and degrees that focused on ADR-specific topics (i.e. conflict studies, mediation, arbitration, or negotiation). The evolution of ADR professionals and legal regulation of ADR mechanisms (including arbitration) together has helped to create a shift from very formal, legalistic systems to less formal, less adversarial systems. Though similar in composition, three distinct forms of ADR exist in the United States: adjudicative ADR (e.g. binding arbitration); evaluative ADR (e.g. evaluative mediation); and facilitative ADR (e.g. facilitative mediation) (McManus & Silverstein, 2011). Courts have embraced these ADR methods as a way to expedite cases and clear dockets (Johnson, 2000).

When examining an ADR process, one must examine what the basis of the dispute is. More specifically, determining whether rights or interests (or combinations thereof) are at stake is the first step in an ADR process (Guill, 1997). A rights-based approach to ADR involves focusing on the law (Bingham, 2009; Nolan-Haley, 2002). This is often the approach taken in arbitration and other forms of ADR where the parties are unable to come to a resolution on their own. An interest-based approach to ADR
involves focusing on the interests of the parties and how a resolution can positively benefit both (Bingham et al., 2009). When designing a dispute resolution system, interests should be the first focus, with rights being an alternative in a so-called “loop back” (e.g., Ury, Brett, & Goldberg, 1988) or “loop forward” (e.g., Wolski, 1998). Power should never govern the system’s design (Bingham, 2002; Brett, Goldberg, & Ury, 1990).

Regardless of type, ADR proceedings typically involve the two parties who are in dispute, as well as a neutral third party who either singlehandedly decides the outcome of the dispute or assists the parties in coming to their own resolution by facilitating their negotiation or providing an evaluation. Though there is a neutral third party present, the parties in dispute often still have attorney representation (Shestowsky, 2008a). The participation of attorneys has not been shown to inhibit the effectiveness or efficiency of ADR proceedings (Greiner & Pattanayak, 2012). Rather, attorney participation has been shown to increase the likelihood of a fair and impartial hearing and to increase participant empowerment and outcome satisfaction (Greiner & Pattanayak, 2012).

The general continuum of ADR processes include specific features that serve to create an ADR continuum. All ADR processes include eight main features: (1) the decision-maker (the parties or a third-party); (2) the focus of the dispute (interests or rights); (3) the formality of the process (informal or formal); (4) the authority over the process (the parties or a third-party); (5) the nature of the process (consensual or forced); (6) the level of third-party assistance (none or total); (7) the finality of the decision (non-binding or binding); and (8) the costs of the process (low or high). These features are what the researcher considered when doing his analysis around different ADR processes at different public institutions. These features also provide an outline for what the
Dispute system design (DSD) is not a construct that often needs to be used in creating ADR processes (Smith & Martinez, 2009), as many dispute systems, including student conduct administration, have long histories. Dispute system design is crucial, however, for understanding how to improve ADR processes. More specifically, given that a dispute system is “one or more internal processes that have been adopted to prevent, manage, or resolve a stream of disputes connected to an organization or institution” (Smith & Martinez, 2009, p. 126), dispute system design provides a way to analyze the rules, steps, and processes of student conduct, as it is based on a combination of conflict resolution theory and organizational theory (Bingham, 2011; Welsh & Schneider, 2013).

**Combining ADR frameworks.** The researcher will integrate theories from Constantino & Sickles Merchant, Ury, Brett, & Goldberg, and Guill when creating a new framework to use in the analysis and assessment of different ADR policies at different institutions. These theories consider dispute system design and alternative dispute resolution. The dispute system design theories provoke a pre-creation analysis of student conduct processes and procedures while Guill’s ADR framework provokes a post-implementation analysis of student conduct processes and procedures. Each authors’ theory will be presented in detail in this chapter along with reasons for choosing specific aspects to apply and utilize as part of the theoretical framework.

**Dispute System Design Framework.** It is written, “[n]o dispute or dispute resolution process exists in a vacuum” (Welsh & Schneider, 2013). Student conduct is a
unique but *normative* form of dispute resolution, and as such, it adheres to a set of rules, processes, and steps, just like any other dispute resolution mechanism. Examining student conduct from a dispute system design perspective enables a better understanding of the structure, components, and effectiveness of the system; to date, however, no such research has been undertaken. This methodology will utilize dispute system design perspectives to situate different types of ADR polices. There are two layers to this analysis. The first layer considers Constantino and Sickles Merchant and focuses on the simplicity and applicability of the proposed dispute resolution process for its participants. The second layer utilizes Ury, Brett, and Goldberg considers a simplified framework that focuses on the financial, social, and intrapersonal costs associated with implementing an ADR process. Constantino and Sickles Merchant (1996) have outlined six principles for designing dispute systems. The following section examines their tenets retroactively to determine whether colleges and universities have incorporated dispute system design principles into student conduct.

**Constantino and Sickles Merchant’s framework.** Constantino and Sickles Merchant (1996) have created a six-part framework for determining whether a dispute system can be effective in particular circumstances. The scholars’ framework is based on yet deviates from Ury et al.’s (1988) six-part framework insofar as it synthesizes some of Ury’s tenets and adds new features that are more tightly coupled with current ADR practices. The six questions Constantino and Sickles Merchant ask follow below.

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**Is ADR appropriate?** The ASCA has stated that more appropriate forms of dispute resolution than adjudication are needed for student conduct (Schrage, 2009). A number of practitioners and scholars are now examining such forms of dispute resolution, including mediation, facilitated dialogue, and restorative justice (Karp & Sacks, 2012; Schrage, Giacomini, & Stoner, 2009). Ombudsman offices also exist at many institutions and may facilitate conflict resolution not only between employees of the institution but also between students. This new approach to student conduct administration signals that ADR is an appropriate form of dispute resolution, thus satisfying the first tenet. This question will be used to assess where on the ADR continuum an institution is situated and whether student conduct administration is the appropriate venue for resolving the dispute.

**Are the ADR processes tailored to the problem?** ADR processes are now being tailored to specific problems in student conduct administration (Schrage & Thompson, 2009), but there remains no consensus on best practices. Approaching student conduct using different ADR mechanisms is still relatively novel so many institutions continue to use a one-size-fits-all approach to student conflict resolution. A linear path typically characterizes this one-size-fits-all approach: namely, an informal, one-on-one disciplinary hearing, after which a student can appeal to a formal hearing, and which can ultimately be appealed to a full board hearing. Most institutions use the same process regardless of offense, choosing to tailor the sanctions to the offense instead of the dispute resolution mechanism. While much research exists on tailored sanctions and their effectiveness (Asher, 2008; Olshak, 1999), it is problematic that institutions rely on one process to resolve a wide range of disputes. This question will be used to assess which aspect of the student conduct process should be used to resolve the dispute in question. Further, this
question will be used to demonstrate how student conduct administration approaches vastly different student problems within the student conduct process.

*Are preventative methods built into the mechanism?* Prevention takes on many forms in college and universities. While a number of preventative methods exist in higher education (e.g., residence life programming), the number of students who are cognizant of student conduct procedures is low (Gutmann, 2008). Students also have low expectations of sanctions (Footer, 1996; Rubington, 1997) and generally distrust student conduct processes (Howell, 2005). This suggests that more preventative methods must be built into student conduct processes in order to ensure that students better understand the potential results of their actions. The preventative methods must also be broadened in scope. Current preventative practices focus on alcohol and drug use as well as sexual misconduct (Exner & Cummings, 2011; Larimer & Cronce, 2007), but these practices are geared more towards social and moral awareness than accountability to institutions. This question will be used to address whether student conduct administration uses prevention in the actual student conduct process and how that prevention can situate the process on the larger ADR continuum.

*Do disputants have the necessary knowledge and skills to use the ADR system?* The most recent study to account for the personal characteristics of student conduct administrators at public institutions found that over 86% of student conduct administrators have master’s degrees or greater, not including those who are juris doctors (Bostic & Gonzalez, 1999). The same study attempted to determine the level of knowledge and understanding of existing law concerning students in disciplinary cases. The results were striking. At four-year institutions in particular, when given a ‘yes or no’
question regarding two basic legal principles, the researchers found that 25% of administrators were not aware of students’ right to face and know their accusers, and 42% were unaware that sanctions need not be applied in the exact same way for every student (Bostic & Gonzalez, 1999). Furthermore, when given the option of what constitutes the most appropriate relationship between students and their institutions, administrators at four-year institutions were divided on whether contract theory (43.7%); constitutional theory (18.6%); privilege theory\textsuperscript{15} (16.8%); or fiduciary theory\textsuperscript{16} (13.5%) best governed the relationship, again demonstrating a lack of awareness and a divide in practices (Bostic & Gonzalez, 1999).

Even though the Bostic and Gonzalez study is fifteen years old, it is not difficult to imagine that student conduct administrators still do not have the necessary knowledge and skills to utilize effectively their own ADR systems. Student conduct administrators are generally required only to have advanced degrees in student affairs or law, with no specialized training or coursework necessary to run their institutions’ complex and diverse dispute resolution systems. Uninformed or misinformed students and students’ advisors do not have the skills necessary to navigate the student conduct system, and as a result, student conduct has been designed and executed in a way that disadvantages students, administrators, and advisors alike. This question will be used to address where on the ADR continuum a student conduct process is situated based on basic rules of

\textsuperscript{15} Privilege theory is extremely uncommon, and it is difficult to understand why it was included in the study’s survey. Privilege theory regards a public higher education institution as an artificial entity created by its state, giving it separate a legal status as a concession by the state that created it.

\textsuperscript{16} Fiduciary theory provides that an institution’s role (via a student conduct administration) in the student-institution relationship is to perform actions that benefit the student in matters that relate to their relationship.
fundamental fairness, insofar that a student and a student’s advisor should have the requisite knowledge and skills to navigate the student conduct process for it to be considered fair.

*Is the ADR system simple and easy to use and access?* Determining the simplicity and ease of use and access of the student conduct system is difficult because students, administrators, advisors, and other entities in the process likely have differing opinions on the system’s simplicity and ease of use and accessibility. One way to measure the simplicity of a student conduct system is to analyze its language. Generally, student conduct codes are straightforward, in that a student should not encounter any surprises in the process if he or she is familiar with the code. Public institutions’ should publish their student conduct codes either online or in another form that is publicly accessible. In the age of the Internet, it should also be easy to find out who administers student conduct at public institutions. Therefore, in terms of use and access, it seems that student conduct systems are often built with students in mind, insofar that they are transparent and accessible. This question will be used to determine where to situate a student conduct process on the ADR continuum.

*Do disputants retain maximum control over the ADR method and selection of a neutral?* Generally, there are three disputants in a student conduct system: the accused student, the accuser, and the institution. The number of disputants is one way that student conduct is unique. Only one of the disputants in the system retains control over the method and neutral selection: the institution. In the majority of cases, the accused student has no say in the selection of a neutral (because there is no neutral) and has either no or limited control over the method (mediation; informal hearing; or restorative justice) that
the institution uses to resolve the dispute. The lack of disputant control over neutral selection and the ADR method chosen is another fallacy of student conduct administration. This question will be used to address where to situate a student conduct process on the ADR continuum as it relates to the students’ rights in choosing how to navigate the student conduct process.

**Ury, Brett, and Goldberg’s framework.** The framework for designing conduct systems that has been proposed by Brett, Goldberg, and Ury (1990) serves as an update to the researchers’ original 1988 six key principles for designing an interests-oriented dispute resolution system. The four-part framework is more applicable to student conduct than the original six principles because it simplifies the framework for organizations; it also takes into account the important combination of rights, interests, and fairness (Ury et al., 1988).

**Transaction costs.** Transaction costs include the time, money, and emotional energy spent by parties during the dispute (Brett, Goldberg, & Ury, 1990, p. 163). The transaction costs in student conduct are generally thought to be high. The accused student can be subject to simultaneous conduct and court proceedings (cost); the student conduct process, including appeals, can last over one academic year (time); and the accused student (and accusing student if applicable) can experience an emotional rollercoaster (e.g., shame, fear, anxiety, frustration, anger, angst) as a young adult (emotional energy).

**Satisfaction with outcomes.** Satisfaction with outcomes reflects whether the resolution both meets the parties’ interests and is procedurally fair (Brett, Goldberg, & Ury, 1990). In student conduct, students believe that the processes are not procedurally fair, yet students’ perceptions are rarely taken into account (Howell, 2005; cf. King,
Students’ interests in student conduct processes are also understudied. Other than studies using the catchall term ‘educational interest,’ no empirical studies identifying students’ interests in student conduct processes exist. Of course, the interests and perceived fairness of the accusing party and the institution are likely to be higher than that of the accused, especially considering that the institution controls the process. It is unlikely that there is an ADR system designer who believes that the ADR process is not procedurally fair and does not take into account the institution’s interests.

**Effects on relationship.** The relationship between the accused student, accusing party, and the institution is interesting. On the one hand, the relationship is ongoing, as the accused student will likely continue enrollment at his or her institution for some period after the dispute has been resolved. On the other hand, the relationship between the accused student and his or her institution might be considered temporary if one considers the student as temporary and the institution as permanent. At the most, the accused student will continue at a given institution for eight years (through graduate school), and at the least, the student will maintain enrollment for two years (in community college). Two to eight years is a small amount of time to consider the lasting effects on the relationship from an institution’s perspective, but from a student’s perspective, college years are the most influential years of one’s life. The dynamic between a ‘visitor’ student (someone who will only be at an institution for 4-6 years) and a professional staff member (someone who may live and work in the community far beyond 4-6 years) is important to consider when designing and evaluating a student conduct system.
Recurrence of disputes. Individual recidivism has been adequately addressed in student conduct literature (Cruise, 2009; Emmanuel & Miser, 1987; Fitch, 1997; Mikus, 2014), but from a macro-perspective, the recurrence of disputes has not. That is, the recurrence of the same dispute (e.g., underage drinking at a certain fraternity house) by different parties over time remains understudied. While student conduct is designed to address individual disputes in the hope of limiting recidivism through effective sanctioning, student conduct is not designed to address the same disputes arising from different parties.

Framework Summary.

Ultimately, student conduct systems do not meet the criteria of either Constantino and Sickles Merchant’s (1996) or Brett, Goldberg, and Ury’s (1990) dispute system design frameworks. In considering these two frameworks, Brett, Goldberg, and Ury’s framework works best to frame and describe this study because it focuses on measurable metrics that can easily be assessed in the context of a higher education setting. On the one hand, satisfaction of outcome and recurrence of disputes are two of the most commonly applied assessment metrics in student conduct administration; and, on the other hand, because student conduct administration is so well established, measuring the transaction costs is more challenging.

Pre-dispute design and post-dispute evaluation.

Student conduct administration does not tightly fit the parameters of these DSD frameworks for a variety of reasons, which will be highlighted to illustrate the challenges of incorporating general ADR framework tenets in an analysis of student conduct administration. First, student conduct is a unique form of ADR with unique features—it
is a *de facto* form of ADR because it involves a private resolution to a conflict. The features that set student conduct apart from other forms of ADR are as follows: (1) student conduct systems are designed to take into account three disputants instead of two; (2) student conduct proceedings can occur simultaneously with criminal or civil court proceedings; (3) there is no neutral decision-maker; the decision-maker is also the third-party disputant; (4) the institution and the accused student are contractually bound to one another\textsuperscript{17}; and (5) the transaction costs of an accused student are almost immeasurable. Likewise, the goal of the student conduct system, unlike the goals of the majority of ADR systems, is to educate. This is not to say that some ADR systems’ purposes is not to educate, such as victim-offender mediation, especially when the offender/respondent is a youth. Finally, the relationship between the three parties is unique in that the student has an ongoing but temporary relationship with the institution, but the institution has a permanent relationship with the outside community. The varied relationships make creating and managing the dispute system, as well as placing student conduct administration within the spectrum of ADR processes, challenging.

The DSD frameworks described above provide a foundation for examining how to design a student conduct process from the ground up, from the beginning. While these frameworks are applicable to the general study of student conduct administration, for the purposes of this study, only a small number of the metrics are going to be used later in Chapter 6. Specifically, Constantino and Sickles Merchant’s framework still provides value for this study’s analysis as examining whether the process is tailored to the problem

\textsuperscript{17} In a number of cases, the accusing party is also contractually obligated to the institution (e.g., the accusing party is a student; the accusing party is faculty/staff member).
is particularly relevant when framing student conduct administration through an ADR continuum. In Chapters 5, 6, and 7, this part of the framework will be used to analyze a small sample of institutions’ student conduct codes to place them on an ADR continuum, followed by a recommendation of how to use these two frameworks in full to create a dispute system for student conduct administration that is tailored more closely to traditional ADR processes.

Of equal importance is evaluating the roles of the persons who participate in the student conduct process. Dispute system design provides a framework for analyzing the process and the next framework, Guill’s (1997) framework, provides a framework for analyzing the participants in the process. Together, using the dispute system design frameworks and Guill’s framework provide a foundation for comprehensively analyzing a purposefully selected sample of student conduct procedures and processes at public, four-year institutions.

**Guill’s framework for evaluating ADR systems.** In order to begin considering where ADR and student conduct administration intersect, it is necessary to consider the framework proposed by Guill (1997). Although it has not been widely adopted, the Guill (1997) framework for evaluating ADR systems provides significant insight into key elements of student conduct administration. The Guill (1997) framework aligns with other analytical frameworks for evaluating dispute systems (Brett, Goldberg, & Ury, 1990; Smith & Martinez, 2009; Ury, 1988), insofar as it consists of examining: 1) the nature of the right at stake to determine the public interest in the resolution of the dispute; 2) the interests of the parties and how the proceeding may compromise or
promote certain interests; and 3) the nature of the third-party, the person who facilitates
the dispute resolution process (p. 1332).

In addition to providing this framework, however, Guill (1997) offers an analysis
of the role of attorneys in evaluating ADR systems and discusses three aspects of legal
training that promote skills for use in a fair ADR system. Those aspects are:
1) compassion and dispassion in assessing factual scenarios; 2) a broad understanding of
interchangeable methods and strategies with both uses and limitations depending on the
context; and 3) balancing being a “hired gun” and a “watchdog of the American system
of justice” (p. 1335). This analysis adds to the frameworks already presented by focusing
in on the participants of the process instead of the process itself.

The components of Guill’s (1997) framework together provide a sound
foundation for the evaluation of a student conduct system. Taken together with the
relevant pieces of the dispute system design frameworks presented and put in the context
of student conduct administration, using Guill’s framework might be said to invite
examination of the following:

1) the nature of the right at stake to determine the university community interest
in the resolution of the dispute; 2) the interests of the accused student, the
accusing party, and the institution and how the proceeding may compromise or
promote certain interests; 3) the nature of the student conduct administrator, the
person who facilitates the dispute resolution process; and 4) the nature of the
student conduct advisor, the person who assists the accused student in the
dispute resolution process. The emphasis serves to illustrate which aspects of
student conduct administration will be focused upon using Guill’s more broadly-scoped ADR framework.

To better understand how Guill’s larger ADR framework will be used to examine the participants of the student conduct process, the researcher will briefly analyze the framework to highlight areas in which the framework is and is not applicable for student conduct administration. While Guill provides a thoughtful framework for student conduct, several areas of her framework merit further investigation. Guill (1997) sees the rights at issue in ADR as the “primary indicator of that area’s susceptibility to successful nonadjudicatory resolution” (p. 1332). There could be a number of cases in which the public—here identified as the university community—has an interest in the outcome of a case or the general direction of the resolution in a particular realm of misbehavior. Because student conduct proceedings are private, however, the public has no access to the outcome of disputes or how disputes are resolved. This could be particularly problematic in a number of student conduct cases, such as those concerning sexual assault, if the public is not made aware of how its tax dollars are being used and there is no public debate or public scrutiny of the methods that have led to a given result. An examination of to what extent the university community has a stake in the resolution of student conduct disputes is thus required.

The effects of the ADR process on the parties to the dispute also merits further investigation. Guill (1997) argues that parties who come to a dispute with a power imbalance might have that imbalance reinforced through ADR procedures, a claim that holds true for student conduct. One element that will be assessed further throughout this study is that a student has less emotional, social, and financial power than an institution.
Auerbach (1983) has found that a weaker party may be at a greater disadvantage in an ADR setting than in a court setting because “informality compounds inequality” (p. 120). The procedural safeguards in place to protect weaker parties in traditional litigation do not exist in some forms of ADR; more specifically, the procedural safeguard of the right to legal representation often does not exist in student conduct settings, and this component will be analyzed in a future chapter.

Guill (1997) neglects to sufficiently address the nature of the third-party facilitator, instead using Auerbach’s outdated “justice without law” perspective of third-party facilitators to make her argument. Auerbach (1983) has criticized the use of ADR, believing that third-party neutrals in ADR processes are limited to judges and lawyers with questionable intent. While Auerbach may have been correct in his assessment of ADR at the time of his work’s publication, there have been several studies conducted since 1983 that dispel the notion that third-party facilitators are lawyers and judges whose sole purpose is to dispense legal tyranny on unsuspecting parties. A more updated approach to examining third-party neutrals in ADR settings is accordingly required. Indeed, the student conduct administrator, considered the third-party facilitator in institutional proceedings, is what sets student conduct apart as a form of ADR. In court cases, an accused party faces his or her accuser and sees a judge as a third-party neutral decision-maker; in criminal cases, an accused party also sees the jury as an unbiased group of peers. Yet in student conduct cases, the accused student faces an administrator who is the opposing party, the judge, and the jury in one. The administrator is all-powerful. The administrator’s power is akin to that of an administrative judge in administrative adjudication. The benefits of both student
conduct administration and administrative adjudication are the speed, efficiency, and the mitigation of the process being overly adversarial. The drawbacks of these systems are the perceived and actual unfairness placed on the defending party as well as the lack of control over the process.

Finally, while Guill (1997) examines the role of attorneys in an ADR system, she neglects to consider that this role may be played by figures other than attorneys themselves. This is especially true in student conduct proceedings. In addressing the role that attorneys generally play, Guill suggests that lawyers’ skill sets—namely, their training in morality and policy, which informs their balancing of legal concepts and individual needs—makes lawyers able to approach ADR with “the empathy of a social worker and the legal acumen of the disinterested professional” (Guill, 1997, p. 1336). Similarly, lawyers’ combined legal, practical, and logical tools enable lawyers to navigate through ADR processes and facilitate emotionally, financially, and politically beneficial results for their clients. Guill also believes that lawyers’ training allows lawyers to promote their clients’ legal and non-legal interests while simultaneously promoting the justice and fairness of the ADR system, calling lawyers “cooperative advocate[s]” (p. 1338). In student conduct, however, this multi-faceted role often falls to untrained advisors who are barred from representing interests and rights. This is an important caveat for student conduct-based ADR systems that must be further considered.

**ADR and Student Conduct Administration**

The presented framework will be used to evaluate the design of and implementation of student conduct processes and procedures as well as how the participants play a role in the process. The problem is how institutions should navigate
students’ rights and interests in the student conduct process, and part of the DSD framework will be used to show how a selected number of institutions have tailored their student conduct processes to this problem. The following visual representation of the core features of student conduct administration will also be used to navigate where on the ADR continuum that certain student conduct processes belong. In their 2008 study on *ex ante* and *ex post* perceptions of disputes, Shestowsky and Brett (2008) identify the core characteristics of legal and non-legal procedures (p. 16). Using their feature options, outcome, process, and substantive rules, the chart below places student conduct procedures on a continuum of ADR processes.
Table 3-1: Core Features of Student Conduct Administration.

<table>
<thead>
<tr>
<th>Feature Options</th>
<th>Pre-Conduct Office Procedures</th>
<th>Disciplinary Conference</th>
<th>Administrative Hearing</th>
<th>Final Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcome</td>
<td>Decision maker</td>
<td>Co-decider</td>
<td>Admin</td>
<td>Panel/Admin</td>
</tr>
<tr>
<td></td>
<td>Binding</td>
<td>Yes, appealable</td>
<td>Yes, appealable</td>
<td>Yes</td>
</tr>
<tr>
<td>Process</td>
<td>Formal</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Control</td>
<td>Both</td>
<td>Admin</td>
<td>Admin</td>
</tr>
<tr>
<td></td>
<td>Substantive Rules</td>
<td>Applicable Law</td>
<td>Code of Conduct</td>
<td>Code of Conduct</td>
</tr>
</tbody>
</table>

This table illustrates the core characteristics of student conduct administration at every stage of the process. The feature options are subsets of the overall core characteristics of outcome, process, and substantive rules. Together, these feature options provide an in-depth look at the foundation of student conduct administration and help place student conduct administration within the general continuum of ADR processes. At one end of the ADR continuum is unassisted negotiation, which is a very personal, informal form of dispute resolution that often goes unnoticed and overlooked because it is unassisted. At the other end of the ADR continuum is formal, adversarial trial litigation, which includes a judge, sometimes a jury, and an adversarial model in which the participants are encouraged to seek out representation to navigate the system. Student conduct administration falls somewhere in between these two extremes, with its exact location discussed below.

**Student Conduct Administration on the ADR Continuum**
To provide a deeper and more comprehensive understanding of the ADR continuum and how student conduct administration and its accompanying processes fit within that continuum, a thorough examination of the continuum’s core features, including process, outcome, and substantive rules, must be considered in relation to student conduct administration. The breadth of student-centered higher education processes and procedures that exist in student conduct administration and conflict resolution in particular must also be considered. Table 3-2 below illustrates such processes and the potential outcomes that could arise from each process.

![Figure 3-1: Student Conduct on an ADR Continuum.](image-url)

<table>
<thead>
<tr>
<th>Core Features</th>
<th>Process</th>
<th>Outcome</th>
<th>Substantive Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Formality</td>
<td>Control</td>
<td>Third-party assistance</td>
</tr>
<tr>
<td></td>
<td>Control</td>
<td>Type</td>
<td>Decision-maker</td>
</tr>
<tr>
<td></td>
<td>Costs</td>
<td>Parties</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Formality</td>
<td>Consensual</td>
<td>Non-binding</td>
</tr>
<tr>
<td></td>
<td>Low</td>
<td>Parties</td>
<td>None</td>
</tr>
</tbody>
</table>

Table 3-2: Illustration of processes and outcomes.

To provide a deeper and more comprehensive understanding of the ADR continuum and how student conduct administration and its accompanying processes fit within that continuum, a thorough examination of the continuum’s core features, including process, outcome, and substantive rules, must be considered in relation to student conduct administration. The breadth of student-centered higher education processes and procedures that exist in student conduct administration and conflict resolution in particular must also be considered. Table 3-2 below illustrates such processes and the potential outcomes that could arise from each process.
Table 3-2: List of Violations and Accompanying Sanctions.

<table>
<thead>
<tr>
<th>Types of Violations*</th>
<th>Types of Sanctions*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Minor</strong></td>
<td></td>
</tr>
<tr>
<td>Disorderly Conduct; Retail Theft; Criminal Mischief; Loitering; Public Nuisances; State Alcohol Violations, except Furnishing Alcohol to Minors and Driving Under the Influence (included in the Moderate category); Public Drunkenness; Possession of Illegal Drugs and Public Damage</td>
<td>Passive: Conduct Conversation; Conduct Warning; Conduct Probation; Housing Review; Room Reassignment; Loss of Housing; Loss of Privilege Active: Administrative Directives; Alcohol or Drug Education; Counseling; Reflection Papers; Projects; Modules; Meetings; Restitution; Service</td>
</tr>
<tr>
<td><strong>Moderate</strong></td>
<td></td>
</tr>
<tr>
<td>Simple Assaults; Fights with Injury; Driving Under the Influence; Furnishing Alcohol to Minors; Endangering Self or Others; Unlawful Entry; Theft; False Swearing, Reports, Witness and Identification; Impersonating a Public Servant; Obstructing an Official in their Duties; Aiding or Abetting in a Crime; Public Lewdness; Firearms Violations; Obstructing a Public Throughway; Public Drunkenness; Disrupting Meetings or Operations of Others and Processions; and Corruption of Minors.</td>
<td>Passive: Conduct Probation; Conduct Suspension; Indefinite Expulsion; Loss of Housing; Loss of Privilege Active: Counseling; Reflection Papers; Projects; Modules; Meetings; Restitution; Service</td>
</tr>
<tr>
<td><strong>Major</strong></td>
<td></td>
</tr>
<tr>
<td>Homicide; Manslaughter; Kidnapping; Delivery of Illegal Drugs; Assault and Abuse of a Person; Sexual Assault; Rape; Incest; Ethnic Intimidation; Crimes Motivated by Intolerance; Child Pornography; Confining Others; Domestic Violence; Burglary; Robbery; Major Thefts; Arson; Resisting Arrest or Detainment; Creating or Contributing to a Dangerous Condition; Engaging in acts which encourage, prolong or contribute to a public disturbance (e.g. riot, failure to disperse); Distribution of Illegal Drugs; and Serious cases of: Hazing, Harassment and Stalking; Direct Threat of Harm; Unlawful Use or Possessions of Weapons</td>
<td>Passive: Conduct Suspension; Indefinite Expulsion Active: Service, Restitution</td>
</tr>
</tbody>
</table>

*Not a comprehensive list

Adapted from The Pennsylvania State University Office of Student Conduct (2014)

Table 3-2 indicates that conduct violations may be either directly or peripherally related to a violation of law. When the violation is directly related, it is considered a
major violation and might be compared to a felony in the legal process. When the violation is peripherally related, it is considered a minor violation and might be compared to a misdemeanor. Of course, with these differences in violations come different levels of sanctions. As in criminal courts, major-level sanctions put institutions in a position to take away property and liberty interests through suspension or greater. On the other hand, lower-level sanctions for minor violations are probationary in scope, and they do not often result in the loss of an interest. The unique case is housing, in which a student may be prohibited from living in university housing, but given that living in university housing is a privilege, not a right, the sanction might be said to match the violation. In all cases, however, conflict resolution in higher education is made remarkably complicated due to its many stakeholders, varying rules and standards, and varying foci of outcomes. This will be taken into consideration when applying the framework established in this chapter to the institutions in later chapters because of the messiness surrounding student conduct administration as a form of dispute resolution. Table 3-3 below offers a list of some of the most common conflict resolution mechanisms used in higher education, suggesting how each of the core characteristics of the ADR continuum applies to each mechanism.
<table>
<thead>
<tr>
<th>Conflict Resolution Mechanism</th>
<th>Types of Violations</th>
<th>Potential Outcome</th>
<th>Decision Maker</th>
<th>Applicable Rules</th>
<th>Outcome Focus</th>
<th>Finality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residence Life</td>
<td>Minor</td>
<td>Warning to Probation</td>
<td>RA/RD Student</td>
<td>Code of Conduct</td>
<td>Interests</td>
<td>Appealable</td>
</tr>
<tr>
<td>Athletics Coaches</td>
<td>Minor</td>
<td>Warning to Probation</td>
<td>Coaches</td>
<td>NCAA + Code of Conduct</td>
<td>Interests</td>
<td>Appealable</td>
</tr>
<tr>
<td>Greek Life Board</td>
<td>Minor</td>
<td>Warning to Probation</td>
<td>Greek Board Ind. Chaps.</td>
<td>Code of Conduct + Greek Rules</td>
<td>Interests</td>
<td>Appealable</td>
</tr>
<tr>
<td>On-campus Police</td>
<td>Minor to Major</td>
<td>Warning to Expulsion</td>
<td>Police</td>
<td>Local, State, Federal Law</td>
<td>Rights</td>
<td>Final</td>
</tr>
<tr>
<td>Ombudsperson</td>
<td>Minor to Moderate</td>
<td>Warning to Expulsion</td>
<td>Ombudsperson</td>
<td>Dispute-Specific + Rights</td>
<td>Non-binding</td>
<td></td>
</tr>
<tr>
<td>Title IX Coordinator</td>
<td>Moderate to Major</td>
<td>Probation to Expulsion</td>
<td>Title IX Coordinator</td>
<td>Title IX + Code of Conduct</td>
<td>Rights</td>
<td>Final</td>
</tr>
<tr>
<td>Student Conduct Disciplinary Conference</td>
<td>Minor to Major</td>
<td>Warning to Expulsion</td>
<td>Case Manager</td>
<td>Code of Conduct</td>
<td>Rights + Interests</td>
<td>Appealable</td>
</tr>
<tr>
<td>Student Conduct Administrative Hearing</td>
<td>Moderate to Major</td>
<td>Probation to Expulsion</td>
<td>Board</td>
<td>Code of Conduct</td>
<td>Rights</td>
<td>Appealable</td>
</tr>
<tr>
<td>Student Conduct Final Appeal</td>
<td>Major</td>
<td>Suspension or Greater</td>
<td>VPSA, Director, President, Board</td>
<td>Code of Conduct</td>
<td>Rights</td>
<td>Final</td>
</tr>
<tr>
<td>Honor Code System</td>
<td>Minor to Major</td>
<td>Warning to Expulsion</td>
<td>Student Panel</td>
<td>Honor Code</td>
<td>Rights</td>
<td>Appealable</td>
</tr>
<tr>
<td>Peer Mediation</td>
<td>Minor</td>
<td>Warning to Probation</td>
<td>Parties</td>
<td>Dispute-Specific</td>
<td>Interests</td>
<td>Non-binding</td>
</tr>
<tr>
<td>Mediation</td>
<td>Minor to Moderate</td>
<td>Warning to Indefinite Expulsion</td>
<td>Parties</td>
<td>Dispute-Specific</td>
<td>Interests + Rights</td>
<td>Non-binding</td>
</tr>
<tr>
<td>Restorative Justice</td>
<td>Minor to Major</td>
<td>Warning to Expulsion</td>
<td>Parties</td>
<td>Dispute-Specific</td>
<td>Interests</td>
<td>Non-binding</td>
</tr>
</tbody>
</table>

As in Figure 3-1, Table 3-3 combines ADR processes into two categories based on the nature of the process and the focus of the outcome of the process. The first
category in Figure 3-1 (on the left side) includes the ADR processes in which the parties have the greatest control over the process and outcome: that is, these are the least adversarial and most party-focused processes. These processes may involve a neutral third party, but in these cases, the neutral acts as a facilitator rather than an evaluator. Such processes include negotiation, facilitation, and facilitative forms of mediation, ombudsperson, and restorative justice programs. The other category (on the right side) includes the ADR processes in which a neutral third party provides guidance and evaluates the dispute, with this type of dispute being less consensual and more adjudicative than that in the first category. This type of dispute focuses primarily on rights rather than parties or interests. Student conduct processes belong to the second category of ADR processes because they involve third-party decision-makers; their decisions are binding; the parties have no control over the processes or outcomes; the processes are not consensual; and the outcome focus is almost entirely on rights.

Regardless of particular circumstance, the student conduct disciplinary process always involves a one-on-one meeting between a conduct officer who administers student conduct and the accused student. Before this meeting, the conduct officer who administers the student conduct process has typically received information regarding the alleged violation via a report from another office, whether on campus (such as the university’s student affairs office) or off campus (the local police). There are two models of the student conduct disciplinary process that the conduct officer may then choose to follow, as is required by his or her university—the hearing model or the investigative model. In the hearing model, an outside person investigates the alleged violation and sends the report to the conduct office. In the investigation model, the conduct officer
performs an investigation of an alleged conduct violation based upon a referral. In both processes, the conduct officer\textsuperscript{18} uses the report as one perspective of what has happened. The student’s testimony, whether written, oral, or a combination of the two, serves as the other perspective on the events that have led to the alleged conduct violation.

After discussing the report of what has occurred, the conduct officer has multiple options. In some situations, such as those in which the conduct officer does not have the power to issue a sanction,\textsuperscript{19} the conduct officer makes a recommendation to the person who does have the power to issue a sanction. On the other hand, if a conduct officer does have the authority to issue a sanction, the conduct officer may issue that sanction, throw out the allegation altogether, or send the conflict to an administrative hearing. If the conduct officer issues a sanction, he or she may only hand down a sanction that falls within the code of conduct guidelines, as shown in the table above. If the conduct officer elects not to sanction the student, he or she cannot pursue the same allegation in the future. If the conduct officer elects to send the conflict to an administrative hearing, he or she may either act as the primary conduct officer during the hearing or discontinue his or her involvement in the hearing completely.

As will be illustrated, student conduct administration aligns very closely with how binding arbitration works. And as illustrated previously, the way that this study is analyzing student conduct administration and its accompanying processes is through

\textsuperscript{18} The conduct officer in this case refers to anyone who administers any aspect of the conduct process at the beginning stage. This may include, for example, a resident assistant, residence hall director, Greek life coordinator, graduate student assistant, or student conduct professional, among others.

\textsuperscript{19} There are situations, such as with resident assistants, in which the person administering conduct does not have the authority to levy a sanction for the violation; the person in these situations thus serves as an investigator or equivalent.
placing selected institutions’ conduct policies on an ADR continuum that addresses how the institutional policies are tailored to the problems described above. So, analyzing student conduct policies through the DSD frameworks by placing them on an ADR continuum will illustrate, as described below, that student conduct administration and its policies are akin and analogous to binding arbitration.

**Student Conduct-Based ADR Processes and Binding Arbitration.** As seen in Figure 4-1 above, student conduct processes fall within the adversarial category of alternative dispute resolution processes. Among these processes, the disciplinary conference is the least adversarial and most party-focused of the student conduct processes. It is somewhat informal and focuses on active sanctions that may contribute to student development. An administrative hearing or final appeal, on the other hand, is the most adversarial and most rights-focused process among these processes. A hearing or appeal is very formal and focuses almost exclusively on passive sanctions and rights, with a view to student development as stemming from students taking responsibility for their actions. Because of this, it could be argued that each stage of the student conduct process represents a form of binding arbitration.

Binding arbitration refers to the private, litigious resolution of disputes, in which arbitrators or panels of arbitrators take on the role of judges (Bingham, 2009). Some researchers have argued for binding arbitration’s efficiency, speed, and cost-effectiveness (e.g., Carbonneau, 1996, 2004; Rogers, 2008), while others researchers have suggested that there are myriad problems with binding arbitration, including the intense public interest in the resolution of some disputes that have gone to binding arbitration and that prevents the results from being private (e.g., Johnson, 2000; Sternlight, 1997; Ware,
An additional difficulty posed by binding arbitration is that its resolution is not consensual; rather, the parties are able to choose whether they enter arbitration through contract negotiation (e.g., Carbonneau, 2004). Outlining the features of student conduct proceedings that parallel binding arbitration provides further insight into these concerns.

In the case of students and student conduct, students are bound to abide by the rules of their institutions based on the payment of tuition and the implied contracts between the students and their institutions (Kashmiri v. California, 2008). Of course, a student does not sign a contract upon matriculation stating that he or she agrees to binding arbitration if he or she were to violate the student code of conduct, but this implied contract creates an obligation for the student, and the consequences that result from breaching the contract are difficult to challenge (Kashmiri v. California, 2008; State v. Schmid, 1980).

A student conduct disciplinary conference functions as an evaluation of the accused student’s position. In a disciplinary conference, the student conduct officer assigned to the case assesses the student’s position based on an evaluation of both the student’s perspective regarding what happened and the report accusing the student of misconduct.

A final appeal, which is also often referred to as a board hearing, occurs when a student is either faced with removal from his or her institution or appeals sanctions from lower proceedings. The final appeal board is made up of trained experts, who may be

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administrators, students, or a combination of both. These trained experts conduct a private trial. In a final appeal, the student typically may be accompanied by an attorney or non-attorney advisor, often is allowed to face his or her accuser, and is able to present witnesses and testimony, among other pieces of evidence. The board’s role is to conduct the hearing, find facts, and make a final, binding decision.21

In this regard, the final or board appeal is almost identical to binding arbitration and is not governed by formal rules of evidence or other rules that are accorded to parties in traditional litigation. Rather, there are only two due process elements required in such an appeal: notice and the opportunity to be heard (Dixon v. Alabama, 1961; Goss v. Lopez, 1975). Given the similarities between the final board appeal and binding arbitration, then, it becomes natural to place this final appeal close to binding arbitration on the ADR continuum referenced in Figure 4-1. However, because institutions most often do not allow students to be represented by legal counsel, the final board appeal is generally less adversarial than binding arbitration (see Dixon v. Alabama, 1961).

Associating student conduct administration and its accompanying processes with binding arbitration ultimately provides a framework for evaluating the various features and participants in the student conduct process.

Conclusion.

In considering student conduct administration, examining dispute system design in conjunction with the principles and history of ADR provides a theoretical foundation

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21 While generally final and binding, a board hearing’s decision can be appealed at many institutions. The final arbitrator or arbitration panel at many institutions consists of either a vice president of student affairs, dean of students, the president of the institution, members of the board of trustees, or the equivalent. Generally, a student has an extremely high burden of proof if he or she wishes to have the final arbitrator overturn his or her decision, which is why I have chosen to leave this entity out of the analysis.
for improving student conduct processes in order to benefit institutions, administrators, and students alike. Repurposing an already existing framework for application in student conduct administration will make assessment efforts in the field more efficient as the framework provides a foundation for future research, as will be discussed in this study’s conclusion. The applicable component of the dispute system design frameworks analyzed in this chapter will used to place student conduct processes at both public, four-year institutions and purposefully selected institutions on the ADR continuum in Chapters 5 and 6. A dispute system design framework will used to place the student conduct process on the ADR continuum. Then, an ADR framework for analyzing the participants in the student conduct process will be used to illustrate how student conduct advisors’ roles fit within the student conduct process and how that impacts where the processes are on the ADR continuum. The overall and primary purpose of using multiple frameworks to analyze multiple components of the student conduct process and student conduct administration is to provide a comprehensive way to analyze student conduct administration as a subset of alternative dispute resolution.
Chapter 4

Methods

Introduction

The primary purpose of this study is to present how the researcher examines the role of student conduct advisors within an alternative dispute resolution (ADR) framework. This examination consists of (1) analyzing and updating key studies that previously examined the use of student conduct advisors and (2) purposefully sampling a number of institutions to determine how they fit on the alternative dispute resolution spectrum within the established ADR framework. Analyzing and updating key studies was conducted through a descriptive analysis of a large sample of institutions. A subset of the large sample of institutions were purposefully selected and analyzed within the ADR framework to illustrate key themes in varying public institutions’ administration of student conduct.

Descriptive Analysis of Student Conduct Codes

Data Sources. The data sources for the following descriptive student conduct analysis include the student conduct codes of 599 four-year public institutions, and more specifically, the sections of these codes that discuss student representation. Using Prior’s method (2008) for analyzing documents, themes within the student conduct codes were identified. In order to categorize the codes, previous case law decisions were employed. Examining student conduct codes for themes helped address research question #2: “How do four-year public institutions articulate the roles of student conduct advisors?” Many
court rulings have occurred since the codes were last assessed, and this study aims to evaluate the way that these court rulings (and other legislative proceedings) have impacted institutions’ understandings of the roles of student conduct advisors, as articulated in the institutions’ student conduct codes.

**Document Analysis.** This study’s analysis is limited to 673 four-year public institutions of higher education in the United States. Such institutions were chosen because, by virtue of being both four-year and public, they (1) must adhere to constitutional standards of due process, including the opportunity to be heard; (2) have Web sites that are readily available; and (3) given the greater proportion of students living on campus, are more likely than two-year institutions to have separate, more comprehensive student conduct offices. Graduate-only institutions, state systems (not the actual institutions), and military institutions were excluded since they do not have conduct systems comparable to other four-year public institutions.

In order to analyze these institutions, data from the National Center for Education Statistics (NCES, 2012) were used. All student conduct codes were located using the institutional Web sites listed in the NCES dataset. One institution did not make its code publicly available, thus causing it to be eliminated from the study (n=672). Sixty-nine more institutions were eliminated after an initial examination of student conduct codes, as these particular institutions’ codes did not include statements regarding student conduct advisors. A final four institutions were eliminated for their lack of clearly-defined offices of student conduct. The 599 institutions that were selected for analysis, then, were four-year public institutions with clearly-defined statements regarding the role of student conduct advisors.
conduct advisors; clearly-defined offices for administering student conduct; and clear undergraduate populations.

Among the 599 institutions ultimately selected for analysis, there were cases in which the codes were nearly identical but listed differently. For example, The Pennsylvania State University branch campus system has one code that originates from Penn State (University Park). This code applies to the 26 Penn State branch campuses as well, yet each of these branch campuses includes in its publication of the code a subsection that provides the campus’s own interpretation of some aspects of the code.

Systems such as the Penn State system are common across states and differ from state systems such as the State University of New York system, the University of California and California State systems, and the University of Wisconsin system. Within such state systems, the individual institutions operate independently of one another, but they have a common comprehensive student conduct code that applies to each institution in the system. Because both branch campus institutions and state system institutions serve unique demographics, and confer degrees on students independently of the given main campus, it is appropriate to count these institutions’ student conduct codes as distinct from one another.

To organize the content of the student conduct codes, the codes were categorized using terms derived from case decisions and model standards, including the ACPA and CAS model codes. More specifically, a comparative coding method was used to examine the relationship between the student conduct codes and case law (Charmaz, 2006). Table 3-1 provides a comprehensive picture of the characteristics, sub-characteristics, types of codes, and dimensions of codes.
These categories were created based on the student conduct codes for three purposes. The first purpose was to expand upon studies from Bostic and Gonzalez (1999) and Golden (1982), both of which examine the role of representation in student conduct proceedings but are no longer up-to-date. The second purpose was to provide insight into how institutions employ and define the roles of student conduct advisors, with the ultimate goal of determining whether any parallels exist in similar contexts. The final purpose was to examine similarities and differences among various public four-year institutions’ student conduct codes in order to establish the potential relevancy of the current study’s findings at institutions with similar student conduct codes.

In addition to the aforementioned four characteristic-based categories, supplemental categories were created to account for variation among the student conduct code...
codes. For instance, some characteristics were combined because they were very different (i.e., “Office Name” – “other”); in other cases, the definitions were so closely related that it became apparent that having multiple categories was ineffective (i.e., “Status” – combining friend/family member and emotional support to “support person”).

Accordingly, content analysis was used to address all parts of student conduct codes that were relevant to student conduct advisors (Prior, 2008).

Many student conduct codes contain very similar language in addressing the role of a student conduct advisor. This language stems from the ACPA’s model code, which reads:

A respondent may bring any person he or she wants to the hearing as a consultant (aka “advisor”) … The respondent’s consultant serves to help the respondent feel comfortable and to provide the respondent advice on how to behave during the hearing. The consultant is not allowed to argue for, advocate for, or present the case for the respondent (ACPA, 2010).

Reflecting this language and typical of many public institutions, Ball State’s student conduct code states:

The accused student and the complainant may be accompanied and assisted at the hearing by an advisor of their choice. At no time may the advisor participate directly in the hearing proceedings. He/she may only consult with the student (Ball State, 2013).

With the ACPA code as a model, student conduct codes such as Ball State’s were placed into categories that indicated how closely the codes’ discussions of advisors aligned with the model. Both legal and non-legal practitioners ideally have vetted a model code. If
institutions do not adhere to their own student conduct policies, there could be legal ramifications (*Boehm v. UNIV. Penn.*, 1990; *Holert v. UNIV. Chicago*, 1990; *In re Rensselaer Soc. of Eng.*, 1999; *Nguyen v. UNIV. Louisville*, 2006; *Slaughter v. Brigham Young UNIV.*, 1975). These codes will be discussed in Chapter 5.

**Purposeful Sample of Institutions**

Purposeful sampling is a widely used qualitative research technique for researchers with limited resources that want to show a rich diversity of cases (Patton, 2002). To sample purposefully, it is important to select a phenomenon of interest (Bernard, 2002). This purposeful sample was selected because of an emphasis on variation, specifically focusing on the theory-based strategy, with the goal of using a theoretical construct (e.g., alternative dispute resolution) combined with underlying mandates (e.g., state legislation) to portray a representation of both simultaneously (Palinkas et al., 2013).

To dig deeper into different types of conduct codes, a purposeful sample was taken of five institutions. These institutions were selected for a variety of reasons. The first two institutions, UNC-Chapel Hill and UW-Madison, were selected because the elements of their student conduct codes that focus on advisors is based on state statute. The second two institutions, Penn State–University Park and Cal State–San Luis Obispo were chosen because they are schools that exist within a system of state schools. University Park is the flagship campus in the Penn State system, and the student conduct code for all of the campuses derives from the University Park code. Cal State–San Luis Obispo, or Cal Poly, exists within a state-wide conduct code that all twenty-three Cal State universities must use and adopt from the Cal State Chancellor’s Office, which is
different from North Carolina and Wisconsin, because Cal State’s statute only applies to the Cal States, not all of the public institutions in the state. Finally, the University of Michigan was selected for its alternative dispute resolution-centered principle of conduct that exists outside of most public institution’s perspective of what conduct is supposed to be and how it is administered. The University of Michigan’s system is also based upon the spectrum of conflict resolution that was adapted for this study. These sampled institutions will be discussed in Chapter 6.

**Applying the ADR framework**

To create a new framework that can be used to analyze student conduct administration, a unique form of dispute resolution, the researcher took pieces of multiple frameworks in different arenas of alternative dispute resolution. Specifically, the researcher will use the questions listed in table 4-2 below. The framework will be applied differently depending on whether the large sample or small sample is being analyzed. Piecing together the framework in this way was done because of the nature of the collected information. To maximize exposure to different arenas of student conduct administration, the researcher selected samples that broadly reflect a general understanding of student conduct administration at public institutions in the United States. The general understanding of student conduct administration at public institutions also led to the adaptation and creation of a new ADR continuum that places student conduct administration into the vein of a form of alternative dispute resolution, which further and more tightly couples and frames student conduct administration as a form of ADR.
Table 4-2: Alternative Dispute Resolution Framework for Student Conduct Administration.

<table>
<thead>
<tr>
<th>Name</th>
<th>Elements</th>
<th>Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constantino and Sickles</td>
<td>Are preventative methods built into the mechanism?</td>
<td>Small sample</td>
</tr>
<tr>
<td>Merchant (1996)</td>
<td>Do disputants have the necessary knowledge and skills to use the system?</td>
<td>Both large and small sample</td>
</tr>
<tr>
<td></td>
<td>Are the ADR processes tailored to the problem?</td>
<td>Both large and small sample</td>
</tr>
<tr>
<td>Ury, Brett, and Goldberg</td>
<td>Satisfaction with outcomes</td>
<td>Large sample</td>
</tr>
<tr>
<td>(1990)</td>
<td>Effects on relationship</td>
<td>Large sample</td>
</tr>
<tr>
<td></td>
<td>Recurrence of disputes</td>
<td>Large sample</td>
</tr>
<tr>
<td>Guill (1997)</td>
<td>Nature of student conduct administrator</td>
<td>Large sample</td>
</tr>
<tr>
<td></td>
<td>Interests of accused student, the accusing party, and the institution</td>
<td>Large sample</td>
</tr>
<tr>
<td></td>
<td>University community interest</td>
<td>Large sample</td>
</tr>
</tbody>
</table>
Chapter 5

Using an Alternative Dispute Resolution Framework to Evaluate Student Conduct Administration

Introduction

This chapter places the entire student conduct process, including the disciplinary conference, appeal, and final appeal, along the spectrum of ADR processes by addressing the question, using parts of the DSD framework established in Chapter 3, of how the student conduct process is tailored to the problem of where the student conduct process fits in alternative dispute resolution. It then utilizes the framework from Guill (1997), also established in Chapter 3, in order to evaluate the role of each participant in the student conduct process. Together, these two frameworks, pre-dispute and post-dispute, lay the foundation to add a new piece to the framework. Finally, this Chapter adds a new tenet to the ADR framework: namely, the role of the person assisting someone in the ADR process, which, in the case of student conduct, is the student conduct advisor. Throughout the chapter, parallels are drawn between general ADR and administrative proceedings and student conduct processes in order to provide further insight into how student conduct fits within the ADR continuum. Also throughout the chapter, the odds at which institutions and students are is highlighted, considering the institution’s interest in maintaining a good public image and students’ interests in maintaining access to their constitutional rights while going through a fair and equitable process.
Moreover, while student conduct processes fit within an ADR framework, student conduct processes are often at odds with the original intent of ADR. ADR’s primary focus was to put decision-making and dispute resolution back into the hands of the parties, or at the very least, make the outcomes of disputes private. Universities’ processes are private, but are more akin to ADR processes in which the decisions are outside of the hands of the less-empowered party, the student. Students and their parents really do not have a choice of recourse in University-related matters so they agree to it, even if the outcome of the student conduct process does not align with what they perceive to be fair or just.

**Evaluating Student Conduct Processes Using an ADR Framework**

Following the evaluation of ADR participants by Guill (1997), this section examines: (1) the nature of the rights of the students to determine the university community interest during dispute resolution; (2) the interests of the students and their institutions, as well as how student conduct proceedings may compromise or promote certain interests; and (3) the role of student conduct administrators, or those who facilitate the dispute resolution process. Perhaps most interestingly, it also investigates (4) the role of student conduct advisors, or those who assist disputants once the dispute resolution process has commenced. Adding this fourth element to the ADR framework enhances the scope and applicability of the framework, thus resulting in an innovative contribution to the current literature on ADR, which has thus far neglected to take into account this fourth and crucial participant in ADR processes.

**The Nature of Students’ Rights.** Because courts use rights to evaluate the legality of student conduct processes, understanding the nature of such rights is important. At their core, rights are the legal entitlements that arise out of contracts,
statutes, regulations, and court decisions (e.g., Bingham et al., 2009). Rights may be procedural, as in due process rights, or substantive, as in civil rights.

**Origins of students’ rights.** In order to examine the nature of modern student rights, it is necessary to revisit the origins of students’ rights. In the early days of higher education, students had few, if any, rights (Rudolph, 1962). Rather, the high level of autonomy granted to higher education institutions allowed the institutions to closely monitor and regulate the lives of their students. Indeed, courts would often exercise judicial restraint when students brought legal action against their institutions claiming violations of their rights (Travelstead, 1987). Yet over time, courts started listening to students’ claims about their procedural and substantive due process rights as well as their contractual rights (Gelber, 2014). Finally, with *Dixon v. Alabama* (1961), the Fifth Circuit Court of Appeals provided students with definitive rights—the right to notice and the opportunity to be heard. The Fifth Circuit’s decision indicated an important shift towards acknowledging students’ rights from both legal and student affairs perspectives.

Following *Dixon v. Alabama*, students won\(^{22}\) the right to free speech (*Tinker v. Des Moines*, 1969), including both verbal and written political speech (*Rosenberger v. Rector*, 1995); the right to participate in student organizations (e.g., religious, gun-rights, marijuana-oriented, anti-religious, LBGTQ, and political; *Healy v. James*, 1972); the right to equal funding for those student organizations (despite prejudices towards the viewpoints of those organizations; *Christian Legal Society v. Martinez*, 2010); the right to reasonable searches and seizures (*Donohue v. Baker*, 1997; *Keene v. Rodgers*, 1970); and

\(^{22}\)“Won” indicates that the students did not have these rights prior to challenging them in the courts.
the right to not be discriminated against on the basis of race, sex, or disability (Americans with Disabilities Act, 2006; Civil Rights Act of 1964; Education Amendment Acts, 1972). None of these rights exists in a vacuum, though, and many of the rights are subject to various balancing tests and other legal inquiries. Within an ADR framework, these student rights are stronger than what exists in many other ADR contexts as ADR processes are meant to be private and malleable to particular parties’ situations.

Perhaps most importantly for the purposes of student conduct administration, it has been settled that students have a right to due process if they are being removed from public institutions of higher education (Dixon v. Alabama, 1961). A student’s right to due process stems from his or her liberty or property interest in this education (e.g., Gorman v. UNIV. Rhode Island, 1988; McSparron v. McSparron, 1995). A student may also have a right to continued enrollment based on contract law (Dutile, 2001). Ultimately, courts only determine whether a student has a property or liberty interest in his or her education if the student is facing discontinued enrollment at a given institution (suspension or expulsion). In student conduct administration, this means that the maximum constitutional protections apply only to the most egregious violations or, put differently, the less egregious the violation, the less due process is required of the institution. In a traditional ADR process, such as mediation or arbitration, lesser due process is counterbalanced by the presence and decision-making of a truly neutral third party, who is often trained in and has experience with issues like power imbalance. Because of the

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nature of ADR processes, parties often feel like they received more opportunity to be heard, which can also counteract a perception of less formal due process rights.

As suggested earlier in this chapter, uncertainty regarding the right to representation in student conduct proceedings remains, especially given that the student-institution relationship is different depending on whether the institution is public (constitutional) or private (contractual). In many alternative dispute resolution processes, denying parties the right to attorney-representation is harmful (Engler, 2010), and unrepresented parties have an entirely different relationship to the dispute resolution system in terms of their knowledge of the system and their perceptions of its fairness (Nolan-Haley, 1998; Wissler, 2010). The implications of this will be further addressed in Chapter 6.

*University community interest.* The speed and efficiency of ADR processes, along with the privacy of the decisions they yield, has led to the creation of a strong public policy favoring ADR over traditional litigation that has immeasurable costs (*Haworth v. Steelcase*, 1993; *Pokorny v. Quixtar*, 2008).24 Because funding for public institutions comes from taxpayers, there is an inherent public interest in how the institutions are operated and maintained. Particularly at large institutions, this public interest extends to the university communities more generally because of the role institutions have in protecting their communities. One of the ways that student conduct offices protect their universities’ communities is by punishing students who violate the universities’ codes of student conduct. This requires the efficient and fair resolution of

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24 Here, “immeasurable costs” refers to the psychological, financial, and time costs associated with traditional litigation.
student conduct matters. It also requires the disclosure of information regarding student conduct matters. Even though decisions regarding student conduct proceedings are private, the Clery Act (20 UNIV.S.C. § 1092(f), 1990) mandates that universities report statistics concerning student violations, thus allowing the communities at large to know at least generally the nature and frequency of the crimes that are occurring (20 UNIV.S.C. §1092(f), 1990).

The Nature of Students’ and Institutions’ Interests. Unlike rights or even a property or liberty interest, interests more generally are taken to refer to underlying needs (e.g., Bingham et al., 2009)—that is, the intrinsic values held by a party that underlie the dispute itself. Underlying interests that arise in ADR proceedings may include the need for security, well-being, belonging, recognition, empowerment, autonomy, control, fairness, and social justice (e.g., Bingham et al., 2009, n.6). In interests-based ADR processes, interests are of primary concern to the resolution of the dispute; winning or losing the dispute becomes secondary. Of course, this acknowledgement and incorporation of parties’ interests does not foreclose feelings of competition or a discussion of rights. Indeed, an interests-focused dispute mechanism does not preclude parties from feeling that they have won or lost; it merely serves to reduce the sense of winning and losing or, conversely, provide both parties with some opportunity for a “win.” Likewise, most court-connected mediation involves a discussion of both interests and rights. Because students’ interests and Universities’ interests are so often misaligned and because of the power difference between a student and a student’s institution, the challenge of taking into account interests of both parties within the student conduct process is evident through an examination of students’ and institutions’ interests.
Students’ interests. Some researchers have argued that students have an interest in higher education because higher education is the foundation for becoming a successful member of society (e.g., Picozzi, 1987; Duteil, 2001). Within their institutions, then, students have an interest in both their academic and social reputations. A student’s academic interest is in higher education and the potential financial and intellectual benefits that come out of completing a degree. Depending on the circumstance, a reputational interest can rise to the level of a protected liberty interest (Paul v. Davis, 1976; Wisconsin v. Constantineau, 1971). Students also have an interest in fairness because the fairer a dispute resolution process is, the more satisfied its participants tend to be with its outcome (Tyler, 2006). These interests, academic, social, and fairness, relate back to the underlying foundation of ADR, that is, taking into account the interests of parties to the dispute to fairly and equitable resolve the dispute. In the case of a student, the intangible value of the student’s social interests and fairness and the tangible value of the student’s academic interests create a nexus for examining student conduct administration within the ADR model because student conduct administration and its accompany processes lack the foundational components to be able to examine a student’s interests.

Institutions’ interests. As indicated by most student conduct codes, higher education institutions recognize that they have an interest in student development and learning (CAS, 2012). Of equal importance are those institutions’ interests in autonomy (Golden, 1982); compliance (Ball, Trevino, & Sims, 1992); student safety (Schulman v. Franklin & Marshall Coll., 1988); student retention (Cruise, 2009); fairness (Sinson, 1997); efficiency (Carlos, 1997); and relationship maintenance (Lake, 2013). Some
scholars argue that higher education institutions also still maintain an intrinsic interest in acting \textit{in loco parentis} for their students (Gibbs & Szablewicz, 1988; Gregory & Ballou, 1986; Jackson, 1991; Zirkel & Reichner, 1986). While these interests may appear divergent, they are in fact complementary. From an educational perspective, institutions wish to retain their students in order to encourage students’ learning and development. From a policy perspective, institutions seek to ensure student safety, their own autonomy in decision-making, and efficiency in resolving disputes. Finally, from the financial and reputational perspectives, institutions desire their students to graduate, donate, and take part in informal and formal recruitment efforts. The educational, political, financial, and reputational costs of failing to promote these interests are accordingly too great for institutions to withstand.

\textit{Intersection of students’ and universities’ interests.} Both students and universities have interests in students staying at institutions of higher education through the completion of the students’ degree programs. For students, graduation affords important advantages socially and financially, such as being intellectually well rounded through experiencing diverse cultures and ideas and being financially stable to afford modern luxuries. For universities, students’ graduation provides a new pool of both donors and recruiters. Yet even during students’ enrollment, institutions heavily rely on their students to bolster program rankings, provide community service, offer student-run leadership, and staff various institutional facilities.

Ultimately, however, there are important differences between the interests of students and their institutions. The overarching interests of institutions are in efficiency, autonomy, and the maintenance of \textit{in loco parentis}, and these interests may negatively
impact students’ own interests in their education and reputations when student conduct situations arise. Students have a strong interest in their education for the aforementioned social and financial reasons, but institutions’ limited resources, coupled with a sense of parochialism, may push student conduct administrators to favor swift, rights-based quasi-judicial action over student development via teaching and learning.

Put more specifically, because many institutions discourage or even prohibit the use of representatives for students in major disciplinary proceedings (autonomy) and often use informal, one-person disciplinary conferences as an initial step in determining whether a student is “guilty” (efficiency), institutional interests often serve to contradict students’ educational interests (student learning and development). For example, if a young male student allegedly sexually assaults a female student, institutions will often put the objectives of limiting liability and protecting the victim ahead of student development, which effectively renders the student conduct process more akin to a judicial or legal process than an academic or educational process. Of course, external pressures from the government, states, donors, lawyers, and parents often force institutions’ hands in situations like these, but a truly educational process would overcome such external pressures and incorporate development in any disciplinary process applied. Institutions’ continued belief in in loco parentis further exacerbates this divergence of interests (e.g., institutions exerting control over students’ off-campus conduct that is deemed a ‘substantial university interest’). These interests will be further discussed in Chapter 6. This divergence of interests problematizes the positive aspects of ADR (swiftness of judgment, confidentiality, lower costs) that make it a preferable method. The divergence further mitigates the perceived benefits of student conduct
administration (private, confidential) because of the lack of ability that students have to articulate their own interests without the guidance of an advisor.

**The Nature of Student Conduct Administrators.** In most ADR situations, a third-party neutral serves as the person who facilitates parties’ resolution of a dispute, evaluates parties’ legal positions, and either offers a recommendation or decides the outcome of a given ADR process. The exact nature of the third-party neutral’s role, of course, depends on the situation at hand. Adopting a facilitative role, the third party clarifies substantive issues and enables the parties to work towards solving those issues (Welsh, 2004). Inhabiting an evaluative role, the third party directs his or her attention towards specific issues, makes suggestions on how to resolve the dispute, and provides clarity on how the dispute might be resolved based on law (Welsh, 2004). If the third party serves as a decision-maker, the third party is effectively a private judge focusing more on rights and legal outcomes than interests and future relationships.

In some ADR settings, third-party neutrals may perform multiple roles, such as the roles of advocate-representative and decision-maker (i.e., Social Security Administrative Hearings; Bloch, Lubbers, Verkuil, 2003). In other ADR settings, third parties may serve as neutrals in disputes while maintaining their status as employees (i.e. Employment Mediation; Bingham, 2009). Anytime that a third-party neutral also serves in another capacity within the institution, the parties to the dispute presume bias (Bingham, 2002, 2009; Bloch, Lubbers, Verkuil, 2003; Richardson v. Perales, 1971; Rubin et al., 1994). In student conduct administration, the third-party neutral simultaneously represents one party and serves as an employee of the institution. To understand better the nature of the student conduct administrator and his or her
relationship to other third parties in ADR processes, the administrators’ training and authority must be further investigated.

**Training.** A student conduct administrator is typically someone who has a master’s degree (or greater) in student affairs, higher education administration, social work, counseling, or another related field (Bostic & Gonzalez, 1999). Generally, institutions do not require their student conduct administrators to have formal alternative dispute resolution training (www.higheredjobs.com). It is also usual of student conduct administrators to have no formal legal training and limited exposure to legal doctrines and concepts like procedural and substantive due process.  

**Authority.** Aside from formal job descriptions, student conduct codes typically serve as the best articulations of the authority bestowed upon student conduct administrators. Of course, there are varying levels of student conduct administrators with varying roles (i.e., coordinator; hearing advisor or case officer; assistant director or associate director; director). From the top of the hierarchy (director) to the bottom (coordinator), student conduct administrators have authority-based rights. Directors have five major authoritative rights: (1) the right to review and reverse any resolution of a conference or administrative hearing; (2) the right to issue an administrative directive (similar to an executive order) requiring certain actions to occur; (3) the right to notate disciplinary actions on transcripts; (4) the right to delay graduation or revoke degrees until a disciplinary matter is solved; and (5) the right to request a review of a board’s decision. Non-directors have more basic authoritative rights, including: (1) the right to

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25 Refer to Chapter 2 for an examination of student conduct administrators’ knowledge of legal doctrines.
autonomously issue sanctions; (2) the right to deny appeals; (3) the right to determine fault; and (4) the right to speak for the accusing party. In terms of ADR, student conduct officers fill the role of private judge of arbitrator given their control of the both the process and the outcome of the proceedings while simultaneously serving in the role of the “other party” – the University.

Throughout the student conduct process, the student conduct administrator serves as a master or neutral expert, which Constantino and Sickles Merchant (1996) define as the person who is the decision-maker as well as an expert in the content area of the dispute. At various stages of the student conduct process, though, the role of administrator may slightly shift. During the first stage, the disciplinary conference, a student conduct administrator’s function is akin to that of a social security hearing administrative law judge (ALJ) or a judge-advocate who determines social security benefits as a neutral third-party while simultaneously representing the interests of the government. During an administrative hearing, appeal, or final appeal, a student conduct administrator’s role is more similar to that of an arbitrator or a third-party neutral who acts as a private judge of the dispute between two opposing parties. Unlike in most other forms of dispute resolution, in student conduct processes, a neutral, expert third-party is assigned to a case and makes a binding decision on a less powerful party. This situates the student conduct disciplinary appeal, as seen on page 95, on the far right of the ADR continuum as the third-party holds all of the cards while the underpowered student must naively navigate a complicated process.

**The Nature of Student Conduct Advisor.** To understand the nature of a student conduct advisor, it is necessary to first understand the nature of those who assist parties in other
ADR settings: that is, attorneys. Though not mandated by law, there are many reasons that attorneys are allowed and encouraged to accompany parties in ADR proceedings, including to guarantee the parties’ informed consent (Nolan-Haley, 1998); to ensure procedural fairness (Wissler, 2010); to ensure substantive fairness (Wissler, 2010); and to provide expert knowledge (Engler, 2010).

Though there are multiple reasons for lawyer participation in ADR proceedings, there has been scant discussion of lawyers’ roles in actual ADR procedures. In her evaluation of ADR systems, Guill (1997) sought to investigate the role of attorneys; she did not examine the role of attorneys in ADR procedures, however. Furthermore, Guill (1997) omitted from her discussion the role of non-attorney advocates and representatives as well, discounting the role that these people often play in ADR settings. Regarding lawyers, Guill (1997) has indicated that lawyers are specifically trained to possess a combination of compassion and dispassion in assessing facts and in being able to balance advocating for a given party and advocating for justice. As such, examining the role of the representative who assists a party in an ADR process, whether lawyer or non-lawyer, provides a clearer evaluation of ADR as a whole.

In student conduct administration, there is continued debate over whether an attorney or non-attorney may be allowed to represent a student (Donohue v. Baker, 1997; Gabrilowitz v. Newman, 1978; Marin v. UNIV.P.R., 1982; Osteen v. Henley, 1993), though multiple courts have held attorneys or non-attorneys should be allowed to advise students going through the process (Danso v. UConn, 2007; Mary M. v. Clark, 1980). To better understand advisors’ roles in student conduct administration, a consideration of
advisors as advocates or representatives (Gabrilowitz v. Newmann, 1978); support persons (Mary M. v. Clark, 1980); or university community members is required.

**Advocate.** An advocate is the type of advisor most frequently seen in an ADR process (Shestowsky, 2008). In the student conduct setting, advocates generally provide students with support both before and after the student conduct process, though they are not permitted to represent students during the proceedings.

Advocates are usually lawyers or professionals with specialized training, such as victim advocates or other trained advocates (Welsh, 2004). In cases where an attorney is allowed to be an advocate, “the role of [the] attorney could be analogized to that of counsel representing a client at a congressional investigative hearing” (Gabrilowitz v. Newman, 1971, p.106). The First Circuit in Gabrilowitz v. Newman held that the student in question should be entitled to attorney-representation because he was facing criminal charges outside of the university setting. There are other circumstances in which courts have indicated that trial-like lawyers should be allowed, such as in cases that are particularly complex and involve expulsion (Gomes v. UNIV. Maine Sys., 2005) and in cases in which the university is being represented by an attorney (Jaska v. UNIV. Mich., 1984). In most cases, though, courts have indicated that lawyers’ roles should be limited to advising (Donohue v. Baker, 1997; Nash v. Auburn UNIV., 1986; Osteen v. Henley, 1993). Only in very rare cases, such as in Marin v. University of Puerto Rico (1972), has a court indicated that a student should be allowed to be represented by an attorney through the entire process. That being said, the North Carolina House of Representatives recently passed a bill that requires institutions to allow students to be represented by attorneys in all student conduct cases (N.C., 2013). The implications of the North
Carolina bill have yet to be fully realized. As mentioned earlier in the chapter, lawyers are allowed, in some institutions, in only the most egregious cases that could result in suspension or expulsion and not allowed in the less egregious cases that could result in probation or community service. This demonstrates that University and student interests intersect such as in cases in which a student’s education is on the line, while in some cases, they do not intersect such as in cases in which a student violates a minor policy that could not lead to larger punitive ramifications.

**Support person.** A support person is the person most commonly allowed to assist a student during a student conduct proceeding, different from the advocate who is most common in ADR proceedings. A support person is generally defined as someone who may consult and interact privately with the student. In doing so, a support person provides informational and functional assistance, which is crucial given that students are often unfamiliar with and have unrealistic expectations of the student conduct process (Footer, 1996; Gutmann, 2008). A support person may be a licensed physician, whose role is to provide support for those who are mentally or physically disabled (ADA) or a victim advocate, whose role is to aid those alleging sexual assault (Title IX).

While not explicit, the role of a support person likely stems from institutions’ long-standing belief in the doctrine of *in loco parentis*. Yet the doctrine of *in loco parentis* is alone insufficient to explain the relationship between today’s institutions and students. Originating with Lake (2013), the idea of the “facilitator university” refers to the combination of old and new ways used to govern universities’ relationships with their students and that takes into account the unprecedented nature of the millennial student. Because millennial students have attributes that are unique to their generation, institutions
have had to reconsider how they treat their students by providing more overall support. This “facilitator university” model sheds light on why many institutions today provide millennial students with support persons during the student conduct process.

In light of how ADR works, it may not be aligned with the “facilitator university.” While the “facilitator university” framework helps illuminate why the support-person role exists at so many institutions, another explanation also exists. The support-person role may be growing because of the nature of the power differential between an accused student and his or her university. A university has the power to obtain information from police officers, seek advice from in-house or external legal counsel, and use its resources to gather evidence against the accused student. Conversely, the accused student likely has no meaningful access to police, limited access to legal counsel, and little to no information about how to gather witnesses and evidence. In the name of procedural and substantive fairness, institutions may incorporate the support-person role as a means of mitigating the fear that Howell (2005) has found accompanies students into the student conduct process, while concurrently providing students with assistance during the often-unfamiliar process.

**University community member.** A university community member is someone who is affiliated with the university as a faculty member, staff member, or student. Many institutions restrict those who can serve as advisors to members of the university community, including students, faculty, staff, and other affiliated university members. These university community members are almost always employed by or paying tuition to the university. This means that the university community member is contractually bound to the institution.
There are significant advantages to using university community members. Community support both drives and fosters a healthy community; likewise, maintaining autonomy from outside counsel and outside advisors is in the best interest of a university. Courts have acknowledged the benefits of this institutional autonomy (Dixon v. Alabama, 1961; University of Missouri v. Horowitz, 1978). Indeed, some courts have even gone so far as to hold that judicial interference with the disciplinary process should only occur if a punishment is shown to be arbitrary or an institution failed to meet its own standards (Dixon v. Alabama, 1961; Schulman v. Franklin & Marshall Coll., 1988).

Coupled with institutions’ interests in serving their own communities at large (Lake, 2013), these court decisions have likely led to the exclusion of outside persons in most disciplinary proceedings. Yet the purpose of a university community member’s role as an advisor remains debated. Chapter 6 explores how trained university community members at one public institution view their role, thus providing further insight into university community members’ function during student conduct proceedings.

Ultimately, limiting advisors to university community members keeps student conduct matters in-house, which is consistent with what other large institutions do when faced with internal matters. Current research on community (Hedeen, 2004) and in-house (Welsh, 2004) mediation suggests that such programs are successful at resolving disputes so that both parties, the third-party neutral, and the parties’ lawyers are procedurally and substantively satisfied. Student conduct proceedings are not mediation, however, so the research on this type of dispute resolution provides only limited insight. Community members’ involvement in the student conduct process could help to balance the interests of both institutions and students as well as balance the rights when community members
serve as student conduct advisors. Therefore, university community members serve a unique role in the student conduct and larger ADR process similar to how a Special Master serves as a neutral with both the courts’ interests and a child’s interests and rights in mind during a dependency hearing. Previous studies conducted in the area of student rights in disciplinary proceedings, considering specifically those persons who participate in some way in the proceedings, will be discussed next to provide more background on past practices and how current trends in student conduct administration and alternative dispute resolution have contributed to a shifting landscape in the profession.

A Brief History of Student Conduct Advisors in Student Disciplinary Proceedings

Studies conducted in the 1980s and 1990s have shown that the overwhelming majority of institutions allow student conduct advisors (Bostic & Gonzalez, 1999; Dannells, 1990; Golden, 1982). Allowing students to have advisors accompanying them throughout the disciplinary process positively impacts students’ perception of their own rights in the process and can balance the perceived fairness of the process. Allowing advisors to accompany students aligns with basic tenets of alternative dispute resolution insofar that parties are generally encouraged and supported to have another set of eyes on the process to ensure fairness, even if the advisor does not participate in any meaningful way. Several studies have examined student conduct codes in relation to student conduct advisors. Golden (1982), for example, has examined student conduct codes at tax-supported institutions, including doctorate-granting (45%), comprehensive (27%), liberal-arts (13%), and professional institutions (15%), finding that over half of institutions allow advisors in some capacity. Bostic and Gonzalez (1999) have surveyed student conduct administrators at two- and four-year institutions, calculating that the percentage of
institutions that allow student conduct advisors and attorney-advisors is approximately 87% and 55% respectively. Golden (1982) has also examined institutions’ conduct codes from a due process perspective, looking specifically at whether institutions provide students with notice and the opportunity to be heard. In his investigation of disciplinary proceedings, Golden (1982) found that 62% of institutions allowed legal counsel to accompany students but not represent them, 71% of institutions allowed advisors to accompany students but not represent them, 40% allowed legal representation, and 40% allowed advisor representation. Similarly, Bostic and Gonzalez (1999) reported that, of all institutions, 87% allowed students to have non-attorney advisors (84% at four-year institutions) and 55% allowed students to have attorney-advisors (51% at four-year institutions). The study did not report whether institutions allowed both, one, or neither (Bostic & Gonzalez, 1999).

One of the motivations of the Bostic and Gonzalez (1999) study was to update the Dannells (1990) study, which had found that 70% of institutions allow students to be accompanied by non-attorney counsel and 43% allow students to be accompanied by attorney-counsel. Yet neither Dannells or Bostic and Gonzalez examine the representative or advisory capacity of the non-attorney and attorney counsel (Bostic & Gonzalez, 1999; Dannells, 1990). Building on prior findings, this Chapter 6 will examine not only what types of representation various institutions allow, but also whether the person accompanying the student is the same person who is allowed to represent the student.

The difference between advising and representation is subtle, and it will be explained in detail further in the Chapter 7, but it is important to provide some initial
context here. In student conduct administration, when someone advises a student, that person has the opportunity to interact with the student about the allegation both before and after the disciplinary proceeding. During the proceeding, however, the advisor does not have the right, under most student conduct codes, to meaningfully participate in the process: that is, he or she cannot speak on behalf of the student or ask content-based questions during the proceeding. A representative, conversely, acts similarly to how a lawyer or attorney would act in court. If the student is allowed to be represented throughout the student conduct process, the student need not speak for him or herself throughout the process, as the representative makes the case for the student. It is important to note that representation in student conduct does not necessarily mean full legal representation, given that the student conduct process likely does not have the same rules of evidence, burden of proof, and other formal requirements that a court of law does.  

Table 5-1: Results of Prior Studies on Institutions’ Use of Student Conduct Advisors.

<table>
<thead>
<tr>
<th>Study</th>
<th>Right to non-attorney counsel</th>
<th>Right to attorney counsel</th>
<th>Right to non-attorney representation</th>
<th>Right to attorney representation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bostic &amp; Gonzalez (1999)*</td>
<td>87%</td>
<td>55%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(all institutions)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bostic &amp; Gonzalez (1999)</td>
<td>84%</td>
<td>51%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(four-year institutions)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dannells (1991)</td>
<td>75%</td>
<td>40%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dannells (1990)</td>
<td>70%</td>
<td>43%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Golden (1982)^</td>
<td>71%</td>
<td>62%</td>
<td>40%</td>
<td>40%</td>
</tr>
</tbody>
</table>

26 The student conduct process is substantively dissimilar from a formal trial, insofar as that it is a private form of dispute resolution and the only laws that must be followed are the rules printed and illustrated in the student conduct code. This means that many procedural safeguards and checks and balances that exist in court do not exist in the student conduct process.
Summary

In order to be considered comprehensive, an ADR framework for the evaluation of student conduct processes must account for the person who assists disputants throughout the ADR process. Examining the nature of the person who assists those in conflict highlights the impact that such a person may have on the outcome of the dispute, the procedural and substantive fairness of the dispute, and the parties’ perceptions of that outcome. Oftentimes lawyers assist disputants in ADR proceedings. Lawyers have been shown to have a significant impact on the outcome of ADR processes (McEwen, Rogers & Maiman, 1995; Sternlight, 2010; Wissler, 2010). Yet non-lawyers may play a similar role as that of lawyers in a variety of dispute resolution processes (Nolan-Haley, 2002) and may have similarly significant influence.

In the context of student conduct-based ADR processes, the role of the person who assists remains both ambiguous and dynamic. Evaluating student conduct processes using the DSD and Guill’s frameworks provides insight into the role of each participant in the student conduct process: more specifically, Guill’s framework shows that each party to a dispute has both rights and interests that must be addressed for the dispute resolution mechanism to be effective and compliant. Likewise, considering the growth of the “facilitator university” model suggests another reason for the increasing use of advisors. Finally, courts, legislatures, and researchers have all suggested that the use of advisors from the community (university community members) may help to promote better community relations. To understand better the role of these advisors during student
conduct proceedings, an examination of the student conduct process through the DSD framework and how public, four-year institutions both theoretically and practically construe the function of student conduct advisors is necessary. The next chapter thus draws on a content analysis of both student conduct codes across the majority of four-year, public institutions in the United States and a purposefully selected sample to see how the theoretical principles and practical implementation of student conduct advising and representation intersect. The next chapter also takes those purposefully selected policies and places them on an ADR continuum by using tenets from the DSD framework established in Chapter 3. This analysis will further shine light onto how student conduct processes vary at public institutions while maintaining that a common set of institutional interests remain at the heart of student conduct administration and to show how one institution’s process (as compared to others), which emphasizes ADR processes and student rights, can benefit both the student and institution.
Chapter 6
Analysis of Select Student Conduct Codes

Introduction

The purpose of this chapter is to investigate further some of the features of student conduct processes at both the macro- and micro-levels, focusing on how student conduct processes utilize student conduct advisers. The first part of the chapter examines in what capacity the selected public four-year institutions allow students to use student conduct advisors and attorney-advisors, as well as shifts in how these restrictions have shifted since the studies of Golden (1982) and Bostic and Gonzalez (1999). The second part of this chapter uses student conduct codes in order to discuss the restrictions that institutions place on advisors’ participation in student conduct proceedings. The student conduct codes selected were chosen for their ready availability on institutions’ web sites and for their association with four-year institutions, which are more likely than two-year institutions to have stand-alone student conduct programs.

The third part of this chapter examines five institutions through the alternative dispute resolution (ADR) framework established in Chapter 3. Specifically, this chapter examines these institutions’ policies by placing them on the ADR continuum that was adapted and molded through the DSD framework. The five institutions, University of North Carolina, Penn State University, University of Wisconsin, Cal Poly, and the
University of Michigan, were purposefully selected based on key features and foundations in place that underlie the student conduct codes. These institutions also represent different types in that their student conduct codes are based on and/or developed from different sources. These types include student conduct codes that can be classified as the following: legal mandates, state statutes, campus mandates, system-wide policies, and ADR-focused polices. In terms of levels and types of ADR, these vary from institution to institution and this chapter focuses on how the select student conduct policies align with the established ADR framework, focusing on students' rights within the student conduct process. This analysis is seeking to see how close and how far these different institutions adhere to ADR principles and in what cases they move towards other types of quasi-legal procedures.

More specifically, the University of North Carolina (UNC) system was selected because it uses an honor court and honor code, both of which were arguably created in response to state legislation passed that forced UNC student conduct administration into the mold of adversarial litigation and places UNC into the category of legally mandated student conduct codes. The University of Wisconsin (UW) system was selected because its foundation also stems from state legislature. The Pennsylvania State University (Penn State) was selected because it is a system that exists autonomously from state legislation, and the researcher has personal familiarity with the system. California State Polytechnic University (Cal Tech) was selected because its foundation stems from state legislation, but the state legislation only applies to the Cal State system; moreover, the Cal State system faces unique challenges, and the researcher currently works there, giving him insight into those challenges. Finally, the University of Michigan (UM) was selected
because its foundational principles seem to align closely with alternative dispute resolution principles, stemming from a foundational text in student conduct administration.

Descriptively examining these student conduct codes provides insight into how institutional culture combined with state and federal legislation may have contributed to the evolution of student conduct administration, and the role of advisors in particular, over the last fifteen years. The insight provided in the descriptive analysis lays the groundwork for the analysis of selected student conduct codes that follows. The selected student conduct codes, analyzed within an ADR framework, further show how institutional beliefs regarding how to formulate and execute student conduct have changed over time. Many factors can contribute to how campuses change and enforce student conduct codes. For cases that involve sexual offenses, for example, the media attention brought to a campus may cause administrators to act quickly and change the scope of the student conduct process, which can include the participation of student conduct advisers. Other internal and external pressures, from key stakeholders, including university policymakers, state legislatures, the federal government, and the Courts, have also contributed to a marked change in the role of both attorney and non-attorney student conduct advisors from a strictly advisory role to an advocacy and representative role.

Advisors. Out of the 599 examined institutions, 95% explicitly allow advisors, in some form, to accompany students in student conduct proceedings. No institutions were found to explicitly prohibit advisors from accompanying students to student conduct proceedings. Twenty-nine institutions’ codes were difficult to decipher, so they were marked as ‘unclear’ as to whether they allowed advisors. Compared to Bostic and
Gonzalez (1999), an 11% increase in the number of institutions that allow advisors was observed.

Table 6-2: Current Institutional Limitations on Advising.

<table>
<thead>
<tr>
<th>Advisors</th>
<th>N</th>
<th>Allow</th>
<th>Deny</th>
<th>Unclear</th>
<th>% Change from 1999</th>
</tr>
</thead>
<tbody>
<tr>
<td>246</td>
<td>206 (84%)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0%</td>
</tr>
<tr>
<td>599</td>
<td>570 (95%)</td>
<td>-</td>
<td>29 (5%)</td>
<td>+11%</td>
<td></td>
</tr>
</tbody>
</table>

Overall, 222 of the sampled institutions allow advisors with stated restrictions or requirements. Restrictions most commonly arose in relation to either the circumstances under which the advisor could accompany a student or the status of the person who could be designated an advisor. Restrictions like these would most likely occur within institutions that fall outside of the extremes (i.e., state-mandated to force student representation or ADR-focused) and fall within the general “best practices” standards promoted by CAS, discussed in Chapter 2. The circumstances in which a student could bring an advisor to his or her hearing were cases of dismissal or during formal hearings, cases of sexual misconduct or criminal cases, or what some institutions vaguely referred to as “other.”27 The persons who could serve as advisors were only university community members, only support persons, only advocates, or “other.”28

A number of institutions also established certain requirements for students who

27 “Other” means any instance in which an institution narrows the circumstances down to a specific instance, but there are not enough institutions providing similar enough descriptions to warrant creating a new category.
28 “Other” here means any instance in which an institution narrows who is eligible to be an advisor to an identifiable person, but there are not enough institutions providing a similar enough description to warrant creating a new category.
chose to bring advisors with them to a hearing. For example, some universities required anywhere from twenty-four hours’ to seven days’ notice prior to the hearing if a student wished to be accompanied by an advisor. In other cases, institutions reserved the right to retain legal counsel if the student elected to bring counsel of his or her own. This positions students as defendants and universities as plaintiffs, creating an adversarial mold in student conduct proceedings that can mirror formal litigation, which is outside the scope and framework of alternative dispute resolution.

Table 6-3: Non-Inclusive List of Statuses of Student Conduct Advisors at Public Institutions.

<table>
<thead>
<tr>
<th>Role Status*</th>
<th>Advocates</th>
<th>U. Comm. Member</th>
<th>Support Person</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>lawyers</td>
<td>faculty members</td>
<td>parents/guardians</td>
</tr>
<tr>
<td></td>
<td>law students</td>
<td>staff members</td>
<td>Friends</td>
</tr>
<tr>
<td></td>
<td>trained advocates</td>
<td>Students</td>
<td>mental health</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>professional</td>
</tr>
</tbody>
</table>

*Note: This is not an exhaustive list.

In identifying who can accompany students, some institutions explicitly state who among peer, non-peer, or university community members may be student conduct advisors. Institutions have not been found to restrict in what types of conduct proceedings advisors are allowed if they allow advisors as part of their student conduct codes. Of the institutional codes that state who may serve as an advisor, 9 prohibit peers from serving as advisors and 74 limit advisors to those individuals who are university community members. One hundred forty institutions allow peer advisors, 149 allow non-peer advisors (chosen from among faculty, staff, community members), and seven allow only peers to serve as advisors. As this relates to the ADR framework, institutions’ widely differing policies regarding advisors’ roles, from some institutions offering untrained
peers and community members as advisors and others offering trained lawyers as advisors demonstrates that institutions’ interpretations of students’ rights may be inconsistent with basic tenets of procedural fairness, which, in the civil and criminal contexts, always allow for trained advisors. Institutions that are not required to allow lawyers are more likely to allow peer advisors.

Table 6-4: Advisor Status.

<table>
<thead>
<tr>
<th>All institutions</th>
<th>Peer</th>
<th>Non-Peer</th>
<th>U. Comm. Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allow (N=599)</td>
<td>140 (23%)</td>
<td>149 (25%)</td>
<td>599 (100%)</td>
</tr>
<tr>
<td>Exclusive</td>
<td>7 (1.1%)</td>
<td>-</td>
<td>74 (12%)</td>
</tr>
<tr>
<td>Prohibit</td>
<td>9 (1.5%)</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

**Attorney-Advisors.** While a peer-only advising program would fall on one side of the advising spectrum, a program that allows attorney representation would fall on the other side. Out of the 599 institutions examined, 419 (70%) allow attorneys to accompany students in some capacity, and this number is rising each year. For example, in 1999, only 55% of institutions allowed attorneys to accompany students. Yet as organizations like FIRE lobby for legislation requiring institutions to allow attorneys to represent students, more and more institutions are adapting their rules; one need only look to the recent North Carolina legislation to see this shift in action. Currently, only 122 institutions explicitly prohibit attorneys from accompanying students to hearings. Fifty-four institutions require that students provide notice if they are being accompanied by attorneys. As mandated by some case law, 84 institutions allow attorneys only if criminal charges arising from the same dispute are simultaneously pending for those students. Twenty-eight institutions allow attorneys to accompany students only in cases
that may result in suspension or worse, and 27 institutions require the student conduct office to bring an attorney if the student in question chooses to be accompanied by one.

Table 6-5: Attorney-Advisors.

<table>
<thead>
<tr>
<th>All institutions (N=599)</th>
<th>All Circumstances*</th>
<th>Only Simultaneous Criminal</th>
<th>Only Removal from Institution</th>
<th>Requires Institutional Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allow</td>
<td>419 (70%)</td>
<td>84 (14%)</td>
<td>28 (5%)</td>
<td>27 (5%)</td>
</tr>
<tr>
<td>Prohibit</td>
<td>122 (20%)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Note: Fifty-four (9%) institutions require notice if the student wishes to bring an attorney.

Institutions that allow attorneys to accompany students in student conduct proceedings are institutions that are mandated to do so through either a state statute or state/system-wide policy. Prohibiting attorney-advisors are institutions that fall into the ADR-focused conduct policies as introducing attorneys, even just as advisors, creates at minimum the perception that the process is adversarial. As it relates to ADR, allowing attorneys to serve solely as advisors (as opposed to advocates or representatives) could be construed as procedurally and fundamentally fair as it is unlikely that students are aware of the legal and non-legal consequences of the outcome of a student conduct proceeding.

**Defined Roles.** The second question that this study addresses is how institutions define the roles of the student conduct advisor. Of the institutions examined, 395 specify a particular role for the student conduct advisor in disciplinary proceedings. These definitions range from allowing the advisor to fully participate in the proceedings to limiting the advisor to advising the student in question. Out of these 395 institutions that specify the role of the advisor, 333 limit the role of the advisor to simply advising. Here, advising refers to conferring with the accused student during the proceedings but not
meaningfully participating in any aspect of the proceedings him- or herself. Twenty-six institutions allow the advisor to fully participate in the proceedings; this participation may include making opening and closing statements, cross-examining witnesses, and speaking on behalf of the student. There are a number of other circumstances in which advisors are allowed to participate, including if the sanction is expulsion, if a conduct board official allows it, or if a student is facing an accuser who is represented by an attorney. At 36 institutions, these circumstances are explicitly delineated.

**Summary of Descriptive Analysis**

Institutions define the role of the student conduct advisor differently. Most often, institutions define the role of the advisor rather simply as someone who can accompany a student to a student conduct proceeding. However, how this plays out is often different. Institutions consistently limit the role of this person who accompanies a student during the student conduct process, however, oftentimes making it so that the person can only provide advising and not representation. That being said, compared to 1999, more institutions today allow attorneys to accompany students to student conduct proceedings, and an increased number of institutions allow attorneys to represent students in student conduct proceedings. Although the total number of institutions that allow attorneys to represent students remains low (4% of public institutions), it is important to note this growing access to attorney advising and representation in the student conduct process.

Revisiting the continuum from Chapter 3 provides a foundation for analyzing the purposeful sample of institutions. To reiterate, the left side of the continuum is unassisted

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29 This still remains relatively infrequent among public institutions, however.
negotiation, an informal form of dispute resolution that is not part of the student conduct process. The right side is formal litigation, including a judge and jury, which is also outside the scope of what student conduct administration can be. For the sample below, each institution will exist between restorative justice and an administrative hearing as the student conduct administrator often has to serve as both the representative of the University and simultaneously the judge/mediator.

An ADR framework for evaluating parties in an ADR process that does not account for the person who assists a disputant throughout the process is ultimately incomplete. Examining the nature of the person who assists those in conflict sheds light onto the impact that the person may have on the outcome of the dispute, the procedural and substantive fairness of the dispute, and the parties’ perceptions of the process. Lawyers typically have a high impact on the outcome of ADR processes (McEwen, Rogers & Maiman, 1995; Sternlight, 2010; Wissler, 2010); however, non-lawyers, too, often play a similarly significant role in a variety of dispute resolution processes (Nolan-Haley, 2002). In essence, the person who assists, regardless of whether he or she has legal training, can, and often does, play a major role throughout an ADR process.

In the context of the ADR process under discussion here, the student conduct process, the role of the person who assists remains unclear and continues to change. Being able to place these institutional policies onto a continuum provides insight into how institutions have tailored their processes to the problems described above. Evaluating student conduct processes using an ADR framework provides insight into the role of each participant in this process. Universities’ roles in students’ lives are dynamic, and the rise of the facilitator university is occurring across the country. Using an
established ADR framework to examine a select number of institutions provides further insight into how these shifting circumstances intersect with the nature of the student conduct process.

**Sample of Institutions**

Sampling institutions that are guided by different student conduct paradigms provides insight into the policies and procedures of student conduct administration as well as how advisors fit within those policies and procedures. In this chapter, five institutions are analyzed. Out of the five institutions chosen, two institutions (University of North Carolina and University of Wisconsin) are guided by statute in their use of advisors. Two institutions are institutions somewhere in between, neither guided purely by statute or principles of ADR (Pennsylvania State University and California Polytechnic State University), thereby providing additional context and comparison. The final institution (University of Michigan) was selected because of its unique approach to student conduct administration. Each of these institutions’ codes, including the institutions’ respective policies and procedures, will be examined using the alternative dispute resolution (ADR) framework established in Chapter 3, focusing on the role of the advisor, as well as on the philosophical approaches, conflict resolution services, and paradigms upon which the offices base their operations. Specifically, each institution will be placed along the continuum of alternative dispute resolution to determine how certain types of institutions manage students’ rights within their policies and processes to promote their notions of fairness. Also, the role of the advisor, the person who accompanies the student throughout the student conduct proceeding, will be examined as it relates to both the continuum of alternative dispute resolution and the established
alternative dispute resolution framework for analyzing student conduct policies. The institutions will be examined in the following order: UNC (statutory), Wisconsin (statutory), Penn State (system, personal experience), Cal Poly (system, personal experience), and University of Michigan (spectrum). At the end of the examination the results will be summarized

**University of North Carolina—Legally Mandated Student Conduct Code.** The University of North Carolina (UNC) is a public four-year institution that is governed by the Students and Administration Equality Act, or House Bill 843, which gives accused students the right to “be represented by an attorney during any formal stage of any disciplinary procedure” (Students & Administration Equality Act §116-40.11). A caveat to this right, however, can be found in Section (a)(1), which states that “if the constituent institution has implemented a ‘Student Honor Court’ which is fully staffed by students to address such violations,” then the student does not have the right to be represented by an attorney or non-attorney advocate. UNC’s Instrument of Student Judicial Governance (hereafter referred to as “Instrument”) will be analyzed for its policies and procedures.

From an ADR perspective, the beginning of this Instrument closely aligns with the framework established in Chapter 3. The beginning of the Instrument focuses heavily on the interests, both legal and non-legal, of the students, the institution, and the other university community members, which is in line with a truly alternative and non-judicial form of resolution.

The advisors’ roles would be to represent students who are going through the

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student conduct process. Examples from the large sample that address advisor roles in this capacity include only institutions that are statutorily mandated to allow representation of students. UNC, likely in reaction to House Bill 843 (2013) had to create an adversarial process in which representation of students is allowed, going against norms of student conduct administration that focuses on holistically educating the student throughout the process and going towards an adversarial, legal framework (Bennett, 2013).

Policy. Likely in response to House Bill 843, UNC amended its policies and procedures for student conduct administration in August 2014. Currently UNC’s policies and procedures document is 52 pages long and includes a preamble and six premises that explain the rationale for the policies and procedures. The preamble describes the Instrument as a commitment to pursue truth and disseminate knowledge through the lens of intellectual honesty and personal integrity. More specifically, the preamble contains six premises and three allocations of responsibilities. The premises include the students’ commitment, the university’s interests, educational activities, freedoms, the role of the chancellor, and the connection between the university and the broader community. The allocations of responsibilities include the responsibilities of the students and faculty members, the location of misconduct, and action taken outside of the Instrument. From an ADR perspective, the beginning of this Instrument closely aligns with the framework established in Chapter 3. The beginning of the Instrument focuses heavily on the interests, both legal and non-legal, of the students, the institution, and the other university community members, which is in line with a truly alternative and non-judicial form of resolution. The language of the Instrument indicates that the purpose of the
conduct system at UNC is focused on repairing harm, upholding certain moral standards and a high level of integrity, and maintaining a sense of community rather than enacting punitive measures, the latter of which is seen in dispute resolution systems that are not ADR-based.

UNC has also adopted an honor code system, which is described in Part C of the Instrument and identifies the types of conduct that may negatively affect the university community. The types of conduct are divided into three sections: conduct affecting persons, conduct affecting property, and conduct affecting integrity. These three sections include subsections that describe actions violating the honor code and the Instrument. Among the non-academic pieces of this section are misconduct items that are considered illegal both within and outside of the university setting. These conduct violations are considered part of the university’s interest insofar as they are detrimental to the university’s goal of maintaining a safe and healthy campus community.

In Section IV are the procedural rights of students and complainants, which again fall directly in line with the ADR framework established in Chapter 4. Parts A, B, and C of this procedural rights section includes a total of thirteen rights afforded to parties who are going through the student conduct process. The accused student’s rights include the right to information, a presumption of innocence, the right to counsel, a fair hearing, the right to refuse to speak, the right to present evidence and witnesses, a clear and convincing evidentiary standard, and the right to an appeal. The accuser’s rights include the right to notification of the outcome of the disciplinary proceeding, the right to privacy, the right to challenge a board member and provide substantive sanction recommendations, the right to be present, and other rights as determined on a case-by-
When considering the rights provided to a student who is going through the UNC process alone (e.g., without an advisor), it appears that many of the rights afforded to the student are similar to those afforded to a person going through an arbitration proceeding. While most forms of arbitration require a neutral third-party decision-maker, some forms of arbitration allow for a non-third-party, at the agreement of the parties, to arbitrate the case. By attending UNC, students are submitting to have a hearing board of UNC students arbitrate their cases. In the context of student rights, this means that unrepresented students are facing a much tougher road to fundamental fairness, having to stand up against a board of peers who have been trained in UNC’s adversarial process.

Considering the compliance-driven climate of student conduct administration today, UNC’s reactive approach to student conduct administration, based on state legislation, an unrepresented student faces a tougher challenge in this type of process than that student would face in a less adversarial, more alternative student conduct process.

The Instrument then describes the officers, responsibilities, and structure of the honor system. Under the UNC system, a student attorney general is elected by the student congress. This person must meet minimum criteria to be elected, including being of sophomore standing and having two semesters of staff experience. This electoral approach to student discipline is analogous to administrative and arbitration proceedings that use elected or appointed judges or magistrates (administrative proceedings) or agreed-upon or designated third parties (arbitration proceedings). The student attorney general at UNC has the power to recruit, appoint, train, and certify the student general staff, with the caveat that approval from the Vice Chancellor for Student Affairs (a staff member) is required. The Vice Chancellor’s approval can be challenged, however, and in
this case, the Committee on Student Conduct, a committee made up of students, faculty, and staff, ultimately decides the disagreement.

The rest of the Instrument outlines the entire undergraduate honor system, including the Office of the Undergraduate Honor Court, the Honor System Outreach Coordinator, the Graduate and Professional Honor System, and the Faculty Honor System Advisory Committee. On the staff side, UNC has created a Judicial Programs Officer who oversees, coordinates, advises, supervises, and trains all members of the Honor System in conjunction with the Committee on Student Conduct, which oversees, interprets, advises, coordinates, and reports policy issues and recommendations to the Vice Chancellor. The entire system mirrors a hierarchical political system that exists within the university and that aligns more with an arbitration arrangement than with a less-adversarial, more mediation-focused policy. The policies governing the honor system and student conduct as a whole come close to mirroring a traditional judicial court structure in form, but ultimately better align with an arbitration model in policy.

Examining UNC’s policies and procedures using an ADR framework suggests that the university employs a student-centered approach to student conduct administration that meets many of the requirements of effective dispute system design. Because the student government elects the student attorney general, who then elects the honor court, it follows that the students of the university, or the disputants in this case, do retain control over the dispute mechanism to which they must submit during disciplinary matters. The Instrument is easy to read and understand, and there is an outreach coordinator in place whose purpose is to disseminate information to the student body at large regarding the nuances of the system, thus ensuring that potential disputants are knowledgeable of the
Procedure. The Instrument’s operating procedures are described in Appendix C. Appendix C is thirteen pages long and broken down into nine sections, all of which are very detailed. The nine sections, each of which will be discussed here to demonstrate how students’ rights are established within UNC’s Instrument to better illustrate where UNC is on the student conduct continuum and within the ADR framework, are identified in the table below.
Table 6-6: UNC’s Instrument, Appendix C.

<table>
<thead>
<tr>
<th>Reports of Possible Violations</th>
<th>Initial Report</th>
<th>Report of Academic Dishonesty</th>
<th>Notice, Review, and Investigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initiation of Charges</td>
<td>Charge/Notice to Appear</td>
<td>Preliminary Conference / Hearing Date</td>
<td>Recommendation / Referral for Expedited Sanctioning</td>
</tr>
<tr>
<td>Authority of the Honor Court</td>
<td>Undergraduate Honor Court</td>
<td>Summer School Court</td>
<td>Graduate / Professional Honor Court</td>
</tr>
<tr>
<td>Procedural Protections</td>
<td>General Protections</td>
<td>Compositions of Hearing Panels</td>
<td>Participations in Hearing Panel</td>
</tr>
<tr>
<td>Proceedings by Student Courts Exercising Original Authority</td>
<td></td>
<td>Presiding Officer</td>
<td></td>
</tr>
<tr>
<td>Expedited Hearing Panels</td>
<td>Undergraduate Court Panels</td>
<td></td>
<td>Graduate / Professional Honor Court</td>
</tr>
<tr>
<td>Honor Court Alternative Resolution</td>
<td>Alternative Resolution Meeting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Large Scale Cases</td>
<td>Five or More Students Plan</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeals</td>
<td>Appeal from Original Proceeding</td>
<td>Petition for further review by the Chancellor</td>
<td>Relief Based on Newly Discovered Evidence</td>
</tr>
</tbody>
</table>

UNC allows and encourages anyone who witnesses an honor code violation to report it to the student attorney general for review. This reporting structure is very common in student conduct administration. As with an anonymous tip-line, the reporter’s information is protected to the extent that the reporter is able to remain anonymous if he
or she is not a party to the violation. If the reporter is a harmed party or claimant, the reporter is unable to remain anonymous due to the protections that are necessarily afforded to the accused or respondent student during the investigation. In cases of academic dishonesty, the reporting to the student conduct office is separate from reporting of disciplinary issues. Instructors at UNC are mandated to report instances of academic dishonesty, meaning that instructors are held to a higher standard than others. In cases of academic dishonesty, instructors have the opportunity to meet with the students in question, recommend sanctions, and under certain conditions, choose alternative resolution over an honor court hearing. This suggests that instructors have the freedom to resolve some academic violations on their own. Allowing faculty and students to resolve conflict on their own without formal disciplinary proceedings is similar to the function served by small-claims court, in which judges often give parties the opportunity to mediate prior to going through formal court proceedings. In doing so, the parties aim to arrive at a settlement, thereby saving both money and time. The difference here, though, is that based on the Instrument, it is unclear whether a third-party neutral is responsible for mediating the case between the instructor and the student or whether the instructor and student are indeed resolving the problem independently. The latter scenario is problematic from a dispute resolution perspective as the instructor wields all of the power in the situation, having the ability to lower the student’s grade on an assignment or in the course as a whole, or to fail a student and force the student to withdraw from the course. The instructor may not have the necessary training required to understand conflict resolution systems, particularly in light of the power imbalance that exists between an instructor and his or her student.
The next step is the initiation of charges. Due process requires notice, but what constitutes notice is vague and unclear in the case law. UNC conducts a preliminary investigation to determine whether charges should be filed, and then, if the student Attorney General determines that there is a reasonable basis that the student violated the code, the Attorney General notifies the student in writing that action is being taken, what charges are being pursued, the underlying allegations and factual basis of the charges, possible sanctions, and the student’s procedural rights. Notice must be provided within thirty days of the initial preliminary investigation (except in special circumstances) and should be delivered by either regular, certified, or electronic mail in order to schedule a preliminary conference.

The preliminary conference occurs at least ten days before the date of the hearing. The purpose of the conference is for the Attorney General to detail the charges against the accused student, the character of the evidence, the alternatives for responding to the charge, possible sanctions, and the student’s procedural rights. Essentially, the purpose of the conference is to explain the letter that the student received from the Attorney General regarding the violation. This step in the conference is focused heavily on educating the accused party about his or her rights and interests, thereby empowering the party to make appropriate decisions. Students have reported anxiety about going into student conduct proceedings (Howell, 2005), and one of the easiest ways to mitigate that anxiety is to be transparent and forthcoming about the allegations as well as explanatory and communicative throughout the process. This is particularly true given that the majority of students are unaware of the policies that exist regarding student disciplinary matters.

After the preliminary conference takes place, the attorney general decides whether
to recommend expedited sanctioning. This recommendation is typically made if the student accepts responsibility for the violation in the preliminary conference. This step allows for the student to undergo a less arduous process as the expedited board is smaller, and the purpose of convening the board is to review the implications of the sanctions rather than to retrace the steps of the preliminary investigation. Without sacrificing procedure, this step encourages efficiency. From an ADR perspective, this step takes into account both the interests of the student and the interests of the institution because the more expeditiously a conflict can be resolved while still maintaining fairness, the more resources will be conserved for other conflicts. The next two pieces of the conduct code refer to the option to stay a university conduct case while a state or federal court case is going on and that students may not graduate pending a conduct proceeding.

Part C of the Instrument discusses the authority of the Honor Court. The Honor Court has authority over all honor code violations that fall outside of those sent to the University Hearings Board. The Honor Court is divided into three smaller courts: the undergraduate honor court, the summer school court, and the graduate and professional honor court. Separately, the University Hearings Board has authority in four circumstances: cases involving complex medical situations, cases in which age difference between the parties is substantial or the timing of the case is inconvenient, cases in which a student requests the University Hearings Board, or cases that fall outside of the authority of the honor court. The Honor Court’s authority is wide and expansive, not dissimilar to that of a trial court. Only in special circumstances are any non-students allowed to participate in the honor court process. One could liken the Honor Court to an appellate court or arbitration panel and the University Hearings Board to a Supreme
Court. Ultimately, the dynamic between the Honor Court and the other entities that have authority to make decisions, such as the University Hearings Board, aligns closely with the arrangement of a traditional court system, with the purposeful intention of providing the accused party many opportunities to receive access to a fair and impartial disciplinary process. As it relates to the ADR continuum, this appellate process aligns more closely with a traditional legal system than an informal, alternative system. While the procedural safeguards make the process fairer, the heavy focus on rights situates this into the right side of the continuum, the more adversarial side of the continuum.

Part D contains information on procedural protections provided to students and refers back to Section IV of the Instrument. Part E discusses the proceedings by the student honor courts or the University Hearings Board. This part is divided into seven sections: the composition of the hearing panels, the presiding officer, the responsibilities of hearing panel members, participation in the hearing, respect for impartiality, conduct of the hearing, and deliberations and judgment. The student courts are comprised of a presiding officer and four randomly-selected Honor Court members. Considered from an ADR perspective, the random selection of court members shows a commitment to impartiality, neutrality, and fairness because each hearing panel member has an equal opportunity to serve on the panel. The presiding officer is tasked with controlling the hearing, including monitoring the qualifications of those on the panel. This model is standard in any conflict resolution setting that involves a panel; one person is almost always appointed the presiding officer, and that person is tasked with monitoring the proceedings.

The hearing panel members are mandated to disclose liabilities and possible biases
immediately in order to ensure impartiality and fairness. The hearings should be
generally closed, except in those cases in which the accused student requests, in writing,
to have the hearing remain open. One of the reasons that UNC has adopted such a
student-centered Honor Court system is because of the language of the legislative
initiative, previously described in detail. The House Bill has a clause that states that a
student is not entitled to attorney representation in a student disciplinary proceeding if the
people who are hearing the proceedings are students. While it is noteworthy that UNC
uses an entirely student-based panel for the majority of its student discipline proceedings,
it is perhaps even more noteworthy that this new system is a direct result of the House Bill passed in 2013.

The conduct of the hearing involves presenting the charges, the accused student
responding to the charges presented, discussing evidence and summoning witnesses, and
finally the questioning of witnesses. All proceedings are recorded. The deliberations and
judgment of the hearing include finding guilt by a clear and convincing evidence standard
or acquitting, ensuring that there is no error in the initial charge, determining the
appropriate sanctions, and announcing the judgment. The conduct, deliberations, and
judgment of the hearing panel process are almost identical to those of an arbitration panel
process, especially considering the flexibility that the hearing panel has to establish and
apply various rules.

Part F discusses the expedited hearing panel, which is essentially a sentencing panel
that collectively operates similarly to a sentencing judge. The purpose of the expedited
hearing panel is to provide expedited sanctions when a student has agreed to take
responsibility for his or her actions under the honor code. A student who has gone to an
expedited hearing panel has limited appellate grounds and can be accompanied by an attorney-advocate solely for the purposes of negotiating the sanctions. From an ADR perspective, the negotiation that occurs as part of the expedited hearing panel satisfies a number of tenets of dispute system design, including the desire to give the accused student control over the process (to an extent) and the outcome (to an extent). What is troubling is that this sort of disputant control and its correspondent negotiated sanctioning agreement arise only after a student accepts responsibility for the initial honor code charges. The student who accepts responsibility is the student who has the most power throughout the conduct proceedings, indicating that UNC values accountability over traditional methods of empowerment in the dispute resolution process.

Part G discusses alternative resolution as described within the Instrument. For a student to be allowed to participate in the alternative resolution program, the student must accept responsibility for the charges and accept the sanctions; otherwise, the case is referred to the expedited hearing panel. In essence, the alternative resolution provision is merely an even more expedited hearing in which the student meets with the chair and vice chair of the Honor Court in order to accept the sanctions. The use of the phrase “alternative resolution” to describe this process is particularly deceiving, given that such a phrase typically refers to procedures and processes that are alternative to a formal process. The process described here is in fact no process at all; rather, it refers to an administrative proceeding in which a student documents with his or her signature that an agreement regarding sanctions has been reached based on the charges.

Part H is for large-scale cases, and it includes simple language on what the Honor Court may or may not do in cases involving five or more students. UNC’s procedures for
handling large-scale cases are similar to those of a court attempting to settle a case involving multiple defendants, insofar as that each person is being identically charged and sanctioned, and those charged have the opportunity to waive their right to a hearing by accepting the proposed settlement. Finally, Part I is the section that discusses appeals. The appeals part is divided into three sections: appeals based on the original proceedings, petitions for further review by the chancellor, and relief based on newly-discovered evidence.

The authority of the appellate panel is wide, and it can hear cases from any level. It is comprised of two faculty members, one student affairs administrator, and two students. One of the faculty or staff members on the panel serves as the presiding officer. An accused student has the right to appeal if either he or she has been found guilty by the Honor Court or he or she disagrees with the sanctions proposed by the expedited hearing panel. The student must appeal within five business days of the panel’s decision. The appeal may be based on insufficient evidence, the severity of the sanctions, or a violation of basic rights. These grounds indicate that UNC gives the student the opportunity to appeal both substantive and procedural issues of due process. The appeal petition must be detailed, and the Judicial Programs Officer may accept or deny the appeal. If the appeal is denied, the student has the further right to appeal his or her originally-denied appeal to an appellate review board of three members within five business days of the denial. The appellate review board has final appellate review authority. UNC gives its accused and charged students many opportunities to have their charges and sanctions reviewed, a sign of both procedural and substantive fairness that aligns with the tenets of the judicial court process, in which there are multiple levels of case review. This differs from arbitration
proceedings in which outcomes are generally deemed final and not subject to appeal. The other pertinent section of Part I is its discussion of relief based on newly-discovered evidence, which suggests that a student can file a petition for a new hearing if there is new evidence brought to light. The new hearing would entail a complete reconsideration of the case, making it very similar to a mistrial in the criminal and civil court system.

On the spectrum. The UNC honor court model system is a very formal, rules-based process that, while being student-run, does not align with many tenets of traditional ADR procedures and processes, but instead more closely aligns with traditional legal remedies that one might see in arbitration or court proceedings. Because of this, UNC’s honor court system is on the right side of the ADR spectrum established in Chapter 4, placing the student conduct process in an adversarial mold that while procedurally and substantively fair, may foreclose students from having access to the educational opportunities that less formal and adversarial processes offer.
The University of Wisconsin-Madison (UW) is a public four-year institution that is governed by the Board of Regents of the University of Wisconsin System (UWS) Chapters 14 and 17 for student conduct issues (CR 08-099 No. 644). Chapter 14 covers student academic disciplinary procedures. Because the focus of this study is on disciplinary procedures, Chapter 14 is excluded from this analysis. Chapter 17 was created in 1996 and subsequently repealed and replaced with a new version in 2009. UWS’s Student Nonacademic Disciplinary Procedures will also be analyzed for its policy and procedures. The advisors’ roles would be as an advisor, not as a representative or advocate, focusing on the process. Examples from the large sample that address advisor

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roles in this capacity include many institutions that rely on state-wide referendums and focus on CAS standards, as UW’s policy concerning advisors mirrors CAS best practices. Similar to UNC, UW’s student conduct process is situated more towards the adversarial side of the continuum as, again, state legislatures writing student conduct processes tend to err on the side of compliance, mirroring a criminal court system.

**Policy.** The UWS system operates according to the guidelines specified in Chapter 17. UWS 17.01 is a policy statement, 17.02 provides definitions, and 17.03 outlines consistent institutional policies. The policy statement in Section 17.01 covers the three missions of UWS, which include encouraging a safe learning environment by addressing nonacademic misconduct, emphasizing that the conduct process is independent of any civil or criminal action, and respecting students’ constitutional rights to due process and free speech. Section 17.02 provides a list of seventeen definitions for terms used in the chapter. Particularly relevant to this study are subsections 2, 9, 11, 13, and 15. According to these subsections, UWS uses two different evidentiary standards, either that of clear and convincing evidence (2) or a preponderance of evidence (13), depending on the type of misconduct. This is similar to how civil and criminal courts differ in their evidentiary standards. UWS also uses the subsections to identify different staff administrators who are responsible for carrying out different aspects of the student conduct process, including a hearing examiner (9), an investigating officer (11), and a student affairs officer (15). As will be discussed in the procedure section, these different entities all serve very distinct roles, as do the police, judge, and jury in civil and criminal court contexts. Section 17.03 demonstrates that while Chapter 17 governs the UWS, individual institutions within the system (e.g., UW-Madison or UW-Eau Claire) are free to adopt
their own institutional policies as long as they are consistent with the framework established in Chapter 17. This suggests that UWS acknowledges that each of its constituent institutions is different. Allowing institutions to tailor policies and procedures to their own unique populations is a hallmark of ADR, as well as a clear deviation from traditional court practices that require every court to enact state and federal policies identically.

Table 6-7: UWS Chapter 17.

<table>
<thead>
<tr>
<th>Authority</th>
<th>Procedure</th>
<th>Impact</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designation of Investigating Officer</td>
<td>Disciplinary Procedure</td>
<td>Effect of Discipline within the Institution</td>
<td>Consistent Institutional Policies</td>
</tr>
<tr>
<td>Nonacademic Misconduct Hearing Examiner</td>
<td>Hearing</td>
<td>Effect of Suspension or Expulsion within the University System</td>
<td>Notice to Students</td>
</tr>
<tr>
<td>Nonacademic Misconduct Hearing Committee</td>
<td>Appeal to the Chancellor</td>
<td>Petition for Restoration of Rights after Suspension or Expulsion</td>
<td>Disciplinary Sanctions</td>
</tr>
<tr>
<td>Nonacademic Misconduct occurring on or outside of University Lands</td>
<td>Discretionary Appeal to the Board of Regents</td>
<td>Emergency Suspension</td>
<td></td>
</tr>
<tr>
<td>Conduct Subject to Disciplinary Action</td>
<td>Settlement</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Authority. According to UWS Chapter 17.05, the president or equivalent at each University of Wisconsin institution has the ultimate authority to designate one or more people to be what UWS calls investigative officers of nonacademic misconduct. Investigative officers differ from nonacademic misconduct hearing examiners, who are discussed in UWS 17.06. While the hearing examiner is also designated by the president or his or her equivalent, the president must first consult with faculty, staff, and students in creating a policy that outlines this officer’s responsibilities; the president must also select
this officer from the institution’s faculty or staff. The president or his or her equivalent
must then create a policy governing the hearing committee, which according to
subsection 2, consists of at least three people, including one student. Interestingly, two of
the three members is considered to represent a quorum, even though there is no majority
with only two members present. Taken together, these three sections create a framework
for UWS to adjudicate nonacademic cases. It is unclear whether the investigative officer
and the hearing examiner can be the same person; this situation would be highly
problematic because procedural fairness, from an ADR perspective, would require a
different person to hear the appeal of a case as to prevent any sort of anchoring bias,
however, as the investigator might maintain bias due to the investigation. It is also
unclear, given that the hearing examiner plus one is a quorum and that the hearing
examiner cannot be a student, if students ever serve on the hearing committee. While the
language is inclusive, UWS 17.07(2) renders it possible to exclude students.

The next two sections, UWS 17.08 and 17.09, lay the foundation for the types of
misconduct the hearing committee can adjudicate; they also clarify the university’s
jurisdiction. UWS 17.08 gives the university the ability to adjudicate nonacademic
misconduct on university grounds and beyond university grounds if it is determined that
there is a substantial university interest in the conduct. This substantial interest may be
construed as: (1) conduct that is a serious criminal offense, (2) conduct that presents a
danger or threat to the health or safety of self or others, or (3) conduct that demonstrates a
pattern. This broad, inclusive language indicates that UWS may adjudicate any conduct
that takes place off university grounds, which may be considered problematic for
students. For example, if a student goes to Arizona for spring break and is arrested for
public intoxication, he or she could be held liable under UWS, even though his or her conduct may have resulted from a number of issues that could have nothing to do with student status. That kind of jurisdiction is uncommon in many judicial and private systems and indicates that the contract established between UW institutions and their students is both strict and expansive. UWS 17.09 provides a list of sixteen behaviors that are subject to disciplinary action according to UWS, only one of which is very broad. The broad piece can be found in subsection 15, which suggests that any violation of university rules is subject to disciplinary action. This vague language further expands the reach of the UWS conduct system over its students.

Procedure. The rest of UWS Chapter 17 is divided into seventeen subsections, including subsections describing procedure (17.11-17.15) and the impact of nonacademic misconduct on the university system (17.16-17.19). The first of these subsections, UWS 17.11, provides the disciplinary procedure that UWS has adopted for all of its schools. The second subsection describes the initial conference with the student. In this conference, the investigating officer evaluates the information given to him or her, allows the student the opportunity to be heard, and finally decides whether a sanction is warranted. This subsection mirrors due process requirements and demonstrates a very strict approach to an investigative conference. The third subsection articulates the need for the investigating officer to make a determination about whether nonacademic misconduct occurred, but the language is unclear regarding the standards the officer uses make this determination. Finally, the fourth subsection discusses the dissemination of the report to the student whom the officer has found in violation of the code. The five-part report includes a description of the misconduct, a description of the incident report, a
specification of the sanction, a notification of the student’s opportunity for a hearing, and a copy of UWS Chapter 17. The burden is on the student to elect to move to a hearing, and he or she must tell the officer so in writing within a certain timeframe.

UWS 17.12 describes the hearing process. The description of the hearing process consists of four subsections, with the fourth subsection divided into twelve parts detailing in precise language the nature of the hearing procedure. The first three subsections describing the hearing procedure identify the student’s right to choose the hearing will be conducted by an examiner or a committee, the timely requirements of the hearing (within 45 days), and the process by which the hearing examiner or committee receives the investigative report from the investigative officer. Giving the accused student the option to elect either a hearing examiner or committee corresponds with the ADR understanding that parties should have a say in the process. Specifically, allowing a party in an ADR process the ability to have a say in the procedural aspects of the process is a key tenet to a well-designed dispute resolution system. In this case, allowing a student to select even one small aspect of the larger dispute resolution process indicates that UW’s system adheres to at least one component of ADR. The timely requirements fall in line with notions of fairness, speed, and efficiency, which have been hallmarked throughout the years by many judicial and non-judicial dispute resolution processes.

Subsection 4 describes aspects of the hearing in detail. The subsection first outlines the mission of the hearing, which is to further educational purposes, noting that the hearing need not conform to state or federal rules of procedure and evidence but rather, that the purpose of the hearing is to balance education and accountability. It then outlines the student’s rights, including the right to cross-examine witnesses, present information,
be heard, and be accompanied by an advisor who may, if the student chooses, be a lawyer. The advisor’s role is limited to consulting with and counseling the student at the discretion of the hearing officer(s), but in cases in which the student is simultaneously facing criminal charges, the advisor’s role may be expanded to representing the student in the hearing.

The third part of subsection 4 goes into detail about the hearing examiner’s or committee’s actions in regard to fact-finding and legal privileges, while the next subsection identifies that the hearing will be recorded and available to the charged student. The rest of the hearing subsections provide information on the preparation of the findings, the standards of burden for the university when imposing sanctions, and the number of sanctions allowed to be imposed, among other considerations. The level of detail used in describing the hearing paints a picture of formal, adversarial, and court-like doctrine. It likewise demonstrates the amount of time and effort that a hearing requires, further suggesting that the hearing process tends to be more formal and legalistic than it does informal and educational, one of the supposed hallmarks of student conduct administration. UWS subsections 17.13 through 17.15 discuss appeals and settlements, indicating that while a student has the right to appeal a decision to the Board of Regents, the university has the right to settle with the student in order to bypass much of the hearing process. This demonstrates an element of party control and negotiation in the student conduct process that is not apparent in the policy and procedures prior to subsection 17.15. It is important to note, however, that students often lack the knowledge and skills to use this complex system.

UWS subsections 17.16 through 17.19 discuss effects and interim remedies.
Disciplinary action of any kind may result in the denial of a student’s degree from the particular institution, while suspension or expulsion may result in the denial of a student’s degree from any University of Wisconsin system school. The institution also reserves the right to take immediate emergency interim remedies to protect the health and safety of its community. All of these items, including disciplinary action resulting in the loss of degree conferral and emergency remedies such as suspension, however, may be petitioned by the student in question directly to the chief administrative officer of the imposing institution or the institution to which the student wishes to transfer. These sections indicate a punitive approach to discipline throughout the University of Wisconsin system that is not unlike how a local court decision applies throughout the state or a federal court decision applies across the country. This severely limits the educational value of any of these disciplinary-like proceedings, especially the hearings.

*On the spectrum.* Chapter 17 describes a formal, legalistic process for students who face nonacademic disciplinary action, and the consequences of such actions may include the loss of one’s right to an education within the University of Wisconsin system, even if the conduct occurs far and away from campus, because of the broad reach of UWS jurisdiction. Nowhere in the document is education emphasized or are informal resolutions considered. For these reasons among others, the UWS student conduct process may be said to align most closely with that of a formal administrative hearing.
The Pennsylvania State University. The Pennsylvania State University (Penn State) is a 24-institution system with its flagship campus at University Park and with branch campuses located throughout Pennsylvania. Penn State is unique insofar as its flagship campus is the primary transfer-in campus, whereas the UNC and UW systems consider their branch campuses separate institutions. Also unlike the UNC and UW systems, Penn State’s code of student conduct only applies at the flagship campus, whereas all of the institutions within the other systems are bound by statute to follow certain codes of conduct. Penn State’s student conduct code is available on the student conduct website.32

**Policy.** Penn State’s code of conduct is divided into eight sections: introduction and

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32 Available at [http://studentaffairs.psu.edu/conduct/Procedures.shtml](http://studentaffairs.psu.edu/conduct/Procedures.shtml).
definitions, the authority, the code, the procedures for both disciplinary and academic violations, disciplinary records, and interpretations. Most relevant to a discussion of policy are Sections 1 through 4 and 7 through 8. Section 1, the introduction, discusses the university's values, including personal and academic integrity, respect for dignity, respect for rights, and concern for others. This discussion of values sets an expectation for how students are to behave when experiencing student conduct proceedings. The fact that they are included as overarching values, however, suggests that Penn State holds its students to a certain ethical standard that exists beyond the boundaries of the conduct process.

Accordingly, the process and policies may be said to take into account the interests of both the students and the institution, one of the hallmarks of an effective ADR process.

As it relates to the continuum, Penn State’s student conduct policy indicates that Penn State has a dual-focus on both the rights of the student and the interests of both the student and institution, placing it more towards a restorative-based process and less like a punitive, legalistic process.

Table 6-8: Penn State Code of Student Conduct.

<table>
<thead>
<tr>
<th>Authority</th>
<th>Code</th>
<th>Disciplinary Procedures</th>
<th>Academic Integrity Protocol</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senior Director of the Office of Student Conduct</td>
<td>Seventeen Codes</td>
<td>Reports, Disciplinary Conference, Advisors, Charges</td>
<td>Process</td>
</tr>
<tr>
<td>Hearing Decisions</td>
<td>Code of Conduct and Violations of Law</td>
<td>Hearings</td>
<td>Role of the Office of Student Conduct</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Sanctions</td>
<td>Special Protocol for Crimes of Violence</td>
<td>Record Keeping</td>
</tr>
<tr>
<td>Interim Actions</td>
<td>Disciplinary Records</td>
<td>Special Protocol for Title IX Allegations</td>
<td></td>
</tr>
<tr>
<td>Interpretation and Review</td>
<td></td>
<td>Sanction Reviews and Appeals</td>
<td></td>
</tr>
</tbody>
</table>

This first section also discusses definitions, none of which fall outside of the norm
established by other conduct codes. Section 3 addresses the authority that the senior director of student conduct has over the code of conduct. The subsection on the senior director is four parts long and includes important information about the senior director’s authority to review and reverse any resolution made by any designee, make modifications to hearing board decisions, delay a student’s graduation, or request a decision review from the university conduct board. The rest of the subsection gives the senior director the ability to appoint designees to maintain authority over other items, but the senior director has the ultimate say in many situations, similar to how the vice president or president is given the power of ultimate appellate review at other institutions. In this case, however, the senior director is also the manager of the Office of Student Conduct, which may lead to a conflict of interest. Having managerial oversight over the office while simultaneously having administrative authority over all of the conduct decisions could create a sense of bias or a lack of checks-and-balances from an outsider’s perspective, especially given the checks-and-balances that are generally in place for who reviews decisions at both the court and non-court level. Yet the hearing board has final authority over the decision process when it goes beyond normal review and appeal, or the review by the senior director. In terms of being situated within the ADR process, Penn State’s procedures protect students’ rights while promoting students’ interests, having the mold of a less-than-adversarial and more holistic conduct process.

Section 4, the code of conduct, describes the jurisdiction that Penn State has in regards to student conduct issues; it also outlines possible code violations. Penn State claims jurisdiction over all activities on campus, including university-sponsored activities; it also suggests that it has jurisdiction over all activities that constitute a
substantial university interest. The code dictates that a "Substantial University Interest" is one that violates the law; presents a danger or threat to self or others; impinges upon the rights, property, or achievements of others; and/or is detrimental to an educational interest of the university. This definition is extremely broad, essentially giving Penn State the authority to adjudicate all off-campus conduct issues that meet one of the four criteria constituting a Substantial University Interest. The actual code of conduct, divided into seventeen sections, is relatively standard. Prioritizing Substantial University Interest may conflict with ADR in that it could be viewed as too far-reaching, fitting into the guise of the dead doctrine of in loco parentis instead of tightly fitting violations of policies to the University itself. The next subsection discusses the relationship between student conduct and the law, and suggests that a student may request a delay or withdrawal if simultaneous criminal charges are pending. The senior director or a designee has the ultimate authority to grant or deny the student’s request for either a delay or withdrawal. From an ADR perspective, giving the parties the opportunity to work out other legal matters in lieu of an ADR proceeding is an example of fundamental fairness and equity within a process.

Sections 7 and 8 discuss recordkeeping and interpretation. Section 7 establishes a seven-year timeframe for the preservation of all files related to student conduct cases; it also establishes that permanent records will be created for cases of suspension and expulsion as well as for cases involving litigation. Section 7 also discusses how decisions regarding the interpretation and review of the code of conduct are made. These decisions are handled solely by the senior director, who has complete and final authority over the code's content.
Procedure. The procedures are listed in Sections 5 and 6 of the code of conduct, with Section 5 pertaining to disciplinary procedures and Section 6 pertaining to academic integrity procedures. Of particular interest here, Section 5 is divided into seven subsections: reports and conferences, hearings, protocol for crimes of violence, protocol for Title IX, sanctions, interim measures, and appeals. More specifically, Section 5 starts with an explanation of the reports, disciplinary conferences, advisors, and charges. At Penn State, anyone can file a report alleging that a student has violated the code of conduct; this report automatically triggers a disciplinary conference, regardless of the merit of the report. The disciplinary conference is informal and non-adversarial, and its purpose is to describe and discuss the merits of the complaint. The accused student has the right to be accompanied by an advisor of his or her choice. After the conference, the student has up to three business days to make a decision regarding whether to accept the charges and sanctions or to contest them. This deliberation process is particularly important from a fundamental fairness perspective. Rarely in any sort of ADR setting is a party forced to make a decision immediately, yet many student conduct offices operate in just such a manner. Penn State’s allowance of time and consideration places it further on the side of the parties and the parties' interests than most student conduct offices. Ultimately, if the accused student contests the charges or sanctions, the process moves forward in one of three ways: to an administrative hearing, a conduct board hearing, or a sanction review.

The hearing process at Penn State is described in subsection B of Section 5. The administrative hearing is an informal hearing conducted by an appointed hearing officer. This type of hearing is nearly always only used in cases not rising to the level of
suspension. The conduct board hearing is utilized for cases in which suspension and expulsion are possibilities. During a conduct board hearing, which is private, the accused student, working alongside his or her advisor, has the opportunity to submit a statement of facts, ask questions of witnesses, present evidence, and prepare an impact statement. The hearing does not adhere to any specific rules of evidence, and the hearing officer may exclude witnesses, disregard facts, and take any other actions that are deemed appropriate in order to maintain a fair, equitable hearing. Using the preponderance of evidence standard, the hearing officer ultimately determines whether the student has violated the code of conduct. This decision must be made within five business days of the hearing. Finally, subsections C and D of Section 5 address crimes of violence and Title IX allegations: in these cases, the normal disciplinary and hearing processes take place, with one of the most important differences being that both the respondent and complainant are allowed to participate in the hearing process. Another important difference is that if a hearing occurs, it must be recorded. The compliance-driven culture of Title IX investigations within the overall student conduct process pits an accused student and Penn State as adversaries to avoid an external investigation or audit. But, this small piece of the larger student conduct process does not take away from Penn State’s policies focusing equally on students’ rights and interests, placing it to the left of the other two institutional systems previously discussed.

**On the spectrum.** The Pennsylvania State University Code of Conduct is indicative of a process guided by informality and fairness. The process may become more formal during the hearing stage, but in general, the process is limited to an informal disciplinary conference during which the respondent can contest the charges and sanctions levied
against him or her in an educational way. The Penn State process only becomes particularly legalistic and formal in cases of violence or Title IX allegations, in this way aligning with the national models for addressing such complaints. These processes situate students and the student conduct officer as adversaries, situating this niche piece of Penn State’s student conduct process on the very right side of the ADR continuum. Outside of these unique and rare circumstances, however, Penn State’s process corresponds with many tenets of ADR, including those of disputant control and a focus on parties' interests, placing Penn State’s more general student conduct process more in the middle of the ADR continuum. Unique as to the processes examined in the small sample, Penn State’s student conduct process can be both at both ends of where student conduct processes exist on the larger ADR continuum.
California Polytechnic State University. California Polytechnic State University, also known as Cal Poly, is a California State system school. Cal Poly exists within a 23-institution system, all of which are four-year public institutions of varying sizes, demographics, residential populations, and achievement levels. Generally, the Cal State system of schools is comprised of teaching-focused schools rather than research institutions. All of the CSUs adhere to a system-wide executive order on student disciplinary procedures; written by the CSU chancellor’s office, Executive Order 1098 is its current iteration.

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33 I am currently the Assistant Dean of Students for Student Rights & Responsibilities at this institution.
34 Available at: http://www.calstate.edu/EO/EO-1098.html.
Policy. Cal Poly’s code of conduct is divided into seven articles, established by law under California Code of Regulations Title V, §41301. Articles 1 and 2 of the executive order supplement Articles 2 through 5. Article 1 establishes that Executive Order 1098 has authority under the California Code of Regulations. Article 2 defines general terms, often referring back to Executive Order 1097, which governs discrimination on the basis of gender. Nothing in the definitions falls outside the scope of the typical general conduct code, except for the definition of a Management Personnel Plan (MPP) employee, who, in California, is a management or supervisory person under the Higher Education Employer-Employee Relations Act. Under Executive Order 1098, only an MPP can administer the student conduct code, which may make the code’s administration challenging for larger campuses like that of Cal Poly. As it relates to the ADR continuum, the CSU Executive Order 1098 exists somewhere between the normal Penn State student conduct and the UW and UNC processes.

Table 6-9: California Code of Regulations Executive Order 1098 and Article II.

<table>
<thead>
<tr>
<th>Authority and Purpose</th>
<th>Code / Purpose</th>
<th>Proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority and Purpose</td>
<td>Definitions</td>
<td>Complaint Intake / Investigation</td>
</tr>
<tr>
<td>Student Conduct Administrator</td>
<td>Academic Dishonesty</td>
<td>Notice of Conference / Conference</td>
</tr>
<tr>
<td>Interpretation / Delegation</td>
<td>Sanctions</td>
<td>Notice of Hearing / Hearing</td>
</tr>
<tr>
<td>Interim Suspension</td>
<td></td>
<td>Final Decision / Notification</td>
</tr>
</tbody>
</table>

Article 3 establishes that the student conduct administrator, who must be an MPP employee, is the sole judicial officer on his or her respective CSU campus. Article 3 also specifies the training that the student conduct administrator must have, on an annual basis, to be a conduct administrator in the CSU system. CSU conduct administrators must
receive extensive training on the discipline process, including on investigation skills, Title IX laws, confidentiality, and the Family Educational Rights and Privacy Act (FERPA). The article also sets out requirements for the hearing officers. The hearing officers must be university employees, managers, or directors of auxiliary organizations; licensed attorneys in California; or administrative law judges. The hearing officers must receive training on privacy, discipline, Title IX, and FERPA as well, and are held to the same standard of professionalism as the student conduct administrator. The fact that the executive order specifies the provision of seemingly neutral and expert third parties indicates that hearings in the CSU system are set up like arbitration tribunals that often employ expert arbitrators. As this relates to ADR, this system places a large burden on students who go through the hearing process, and cannot be represented, to navigate a complex process chaired by an expert, placing CSU’s hearings towards the right of the continuum as a more formal and institutionally-focused process.

According to Article 3, outside of hearing procedures, the student conduct code may only be interpreted by a campus vice president of student affairs or his or her designee, thereby theoretically taking away interpretive authority from the person who is responsible for the implementation of the executive order, the student conduct administrator. In practice, however, is unlikely that the campus vice president would not designate the student conduct administrator to interpret the code. Likewise, the duties that are afforded to the president in the proceedings may only be delegated to a vice president. The CSU system thus emphasizes a strict authoritative structure within its code of conduct, which is not unlike many judicial systems. From a dispute system design and ADR perspective, taking the interpretive authority out of the hands of the person
conducting the disciplinary proceedings goes against the interests of one of the parties of the proceedings, rendering this conduct code more akin to an administrative hearing or arbitration than any informal dispute resolution mechanism.

Article 6 discusses interim suspension, which is given a special section in the corresponding executive order. A student who is placed on interim suspension has a right to a prompt hearing within ten days of the start of the interim suspension, meaning that a very swift investigation must occur to keep a student on interim suspension. Because of the nature of higher education and the timeliness required for conducting an investigation, Cal Poly and other CSUs are likely not to interim-suspend a student. The authority to interim-suspend, or to effectively banish an accused student from campus and campus-related activities, represents a clear deprivation of substantive rights and should be considered in only the most serious of circumstances.

Article 5 provides a broad overview of the sanctions that Cal Poly can impose. Among these sanctions are restitution, loss of financial aid, denial of access to campus or persons, disciplinary probation, and suspension or expulsion, among other educational and remedial sanctions. These actions may be taken based upon any of the twenty grounds given for student discipline in Article 2 (Cal. Code Regs. §41301(5)(2)). Subsections 16 through 18 of the grounds for discipline are particularly noteworthy, as they make a student accountable for his or her actions anywhere at any time. Violations enforceable anytime and anywhere include: subsection 16, violation of any published university rule; subsection 17, failure to comply with a university official; and subsection 18, any act chargeable as a violation of law or that poses a threat to university operations. These three broad grounds for discipline indicate that Cal Poly and the CSU system
arrogate broad authority to discipline to themselves; they also claim broad jurisdiction. This is in spite of the fact that the majority of the interpretive authority and power to levy sanctions lies with the president of the university, making the system itself rather hierarchical in nature, especially when considering that the president has no day-to-day involvement with student conduct matters. Like a government, Cal Poly and the CSUs give the president, at a minimum, the opportunity to hire those whom he or she believes will best execute the student conduct procedures, with the right training and within certain parameters. This is problematic from an ADR perspective because the interests of the student conduct administrator, a party to the proceedings, are not readily taken into account.

**Procedure.** Cal Poly’s procedures are described in Article 4. Like most conduct proceedings, Cal Poly's begin with a complaint intake and investigation. The complaint may be either verbal or oral. The investigation occurs promptly thereafter, with the conduct administrator seeking to determine whether to charge the accused student with a violation of the conduct code or to put interim measures in place to protect either the complainant or the campus community at large. The executive order pays particular attention to Title IX complaints, establishing a more formal and rigid process for complaints involving allegations of discrimination, harassment, or retaliation based on gender than it does for other complaints.

After the complaint intake and investigation, there is the notice of conference and the conference itself, with the conference needing to occur within ten working days of the completion of the investigation. The stipulations for what must to be included in the notice are very specific, and the parameters of the conference, including how it should
and should not be conducted, are made clear as well. Under this language, the student conduct administrator becomes a mere executor of the code with limited flexibility and interpretive authority to adjust for the nuances of an individual hearing. This becomes problematic when a student conduct administrator attempts to interpret a policy and its accompanying procedures that are meant for twenty-three separate, completely different campuses and cannot tailor that process to the individual campus culture and demographics. As it relates to ADR, this lack of ability to tailor the process to the campus is contrary to both the students’ and institutions’ interests. Rather, it is subsection 2.9 of Article 4 that a commitment to alternative dispute resolution appears. This subsection states:

Nothing in this Executive Order shall prevent the Student and the University from entering into a voluntary resolution of an actual or anticipated student disciplinary case at any time, provided that the Student is first given a reasonable opportunity to review any proposed settlement agreement with an advisor/support person of his/her choice (Cal. Code Regs. §41301(4)(2.9)).

This settlement agreement acts as a resolution that is akin to mediation and other less formal dispute resolution mechanisms, in which the goals are having the parties come to an agreement, encouraging empowerment, and promoting recognition, rather than obtaining a just or correct outcome. While the authority to interpret, delegate, and impose interim remedies still lies with the president, the ability to enter into an informal, interests-based resolution with a student now lies with the student conduct administrator, making this subsection a powerful tool in an alternative dispute resolution setting. This subsection also gives the student conduct administrator the authority to act on behalf of
the interests of the institution, thereby suggesting the administrator’s knowledge of the institution’s best interests—another powerful demarcation of authority. Such a settlement agreement is essential in any truly alternative dispute resolution process.

Following this discussion is a discussion of the notice of hearing and the actual hearing. As with the disciplinary conference, the notice of hearing and the hearing itself must meet strict requirements, as laid out in the executive order. This means that the hearing officer has only limited interpretive authority over the procedures. The most significant difference between the disciplinary conference and the hearing is that the hearing is recorded. The hearing places the accused student against the institution, with the institution, represented by the student conduct administrator, making its case for why the accused student should be punished and why the suggested sanction is appropriate. Unlike in a criminal court, in a hearing, the burden of proof is always on the institution to show that the student violated the student conduct code. The standard of evidence is preponderance of evidence. Moreover, at any time during the hearing, the student may elect to sign the previously-offered settlement agreement, thus providing another narrow avenue for empowerment within an otherwise judicially-inclined system. At the close of the hearing, the hearing officer makes a recommendation to the president or a designee regarding the outcome. The president or his or her designee is the person who actually signs the sanctioning document, thereby rendering the hearing officer a second investigator instead of an authority who is able levy sanctions. At this point, the president also has the opportunity to change any of the sanctions, including dismissing them wholesale; he or she may also, like any upper-level court, choose to refer the matter back for further investigation. As it relates to ADR, a President’s autonomous, unyielding
authority aligns contrary to any basic tenets of ADR as the President is never part of any investigation, conference, or hearing. While, practically, this may never occur, this language is problematic from a student-rights perspective.

On the spectrum. California Polytechnic State University exists within the 23-campus California State system, which makes it more similar to UNC or UW than it is to Penn State. Executive Order 1098 and Title V of the California Code of Regulations govern Cal Poly. Generally speaking, the executive order outlines a student conduct system whose proceedings are similar to those of an administrative hearing, but the executive order also gives the student conduct administrator the opportunity to promote truly alternative forms of dispute resolution like negotiation, restorative justice, and transformative mediation via voluntary settlement agreements, which are a hallmark of ADR systems. The other feature of the Cal Poly system that is particularly empowering is the student’s ability to settle before or during a hearing, not unlike the parties' abilities to settle a civil court case out of court.
University of Michigan—ADR Focused. The University of Michigan (UM) is a stand-alone institution. Like the other institutions surveyed for this chapter, UM is public. UM was purposefully selected for examination because of the unique features of its conduct process, including its use of a conflict resolution model spectrum (Schrage & Giacommini, 2009), which was adapted for this study in each of the figures, above. The university's Statement of Student Rights and Responsibilities (hereafter referred to as "Statement") is the most important document issued by its Office of Student Conflict Resolution and was most recently amended in July 2013. The institution is ADR focused and is situated the most left on the continuum. This is unique in that very few institutions use alternative dispute resolution as their foundation for student conduct.

35 Available at: http://oscr.umich.edu/statement.
administration. If any institutions do, it is not published directly on their websites like UM’s is.

**Policy.** The Statement is divided into eight sections, with Sections 1 through 5 focusing on policies regarding conflict resolution at UM, Sections 6 and 7 identifying the procedures that help to enforce these policies, and Section 8 providing insight into related procedures that may impact student discipline at UM. Section 1 introduces the purpose of the institution and the scope of the Office of Student Conflict Resolution. One major focus of Section 1 is the high standard of conduct to which UM holds its students. Another major focus is to demonstrate the university’s overall commitment to these conduct standards, indicating a unified approach.

Section 2 discusses UM students’ rights. Among the students’ rights are the right to freedom of expression under the First Amendment; the right to be treated fairly; the right to be protected from arbitrary and capricious campus decision-making; and the right to informal, adaptable conflict resolution pathways. Section 3, which is only one sentence long, establishes the students’ corresponding responsibilities, which are cursorily summarized as to act consistently with university values. Both of these sections establish a unified approach to student conduct, one in which the rights and responsibilities of students are similar to those of the general public. This challenges some conflict resolution norms that encourage taking the parties’ particular interests into account when establishing a conflict resolution process.

Section 4 is a list of twenty-one potential violations of the Statement. The Statement is particular in its articulation of potential violations: it distinguishes between the use/possession and the distribution/manufacturing/selling of drugs and alcohol, for
example, as well as among different types of sexual and domestic harassment and violence. These distinctions seem to impact UM's sanctioning process as well. Section 5 identifies the jurisdiction that UM has over its students regarding the Statement. More specifically, the Statement suggests that any behavior that occurs in the city of Ann Arbor (where UM is located), on any UM-controlled property, or at any UM sponsored event, falls under the scope of the Statement. Behavior outside of that jurisdiction may also be subject to the Statement’s policies if the behavior impacts the university community members in a threatening or harmful way. The Statement then acknowledges that there are other policies in which students may be subject to discipline but that the Office of Student Conflict Resolution will intervene only if the violation of the internal policy is above and beyond the capabilities of those offices addressing the conduct. Unlike the other policies that have been evaluated in this chapter, the policy of UM indicates limited jurisdiction. By limiting its jurisdiction, UM demonstrates that it is more interested in resolving conflict that immediately impacts the interests of the university than monitoring its students’ behaviors wholesale, an indication that the principles of ADR have been taken into account.

Procedure. Section 6 lays out the procedures, which are divided into three stages. The first stage is identified as the initiation of the resolution process. During this stage, a student, staff, or faculty member may contact the resolution coordinator to learn about the resolution options available or, if he or she is already aware, to initiate a resolution process. Some of the more informal resolution pathways can be accessed without written complaint, meaning that UM is invested in resolving conflict expediently, rather than conducting lengthy hearings for the sake of hearings. The variety of dispute mechanisms
available gives the parties to the dispute unique opportunities for empowerment. Yet it is noteworthy that the first stage also includes a six-month statute of limitations, and that only the resolution coordinator can waive this statute and decide whether the resolution process proceeds to the second stage.

The second stage of the resolution process involves a meeting between the resolution coordinator and the respondent. At this meeting, the resolution coordinator explains both the complaint and the process. This initial intake meeting can be found in many forms of dispute resolution, including mediation and negotiation, and is designed to mitigate any conflict that may arise if the respondent were not made aware of the complaint prior to being initiated into the dispute resolution process. The resolution process from the perspective of the respondent involves right to remain silent, the right to confidentiality, the right to know the sanctions and interventions, and the ability to consult with an outside advisor. It is also crucial that the respondent be made aware that any statement he or she gives may be used against him or her in a hearing. Informing the respondent of this is akin to informing a citizen of his or her Miranda rights.

Once the respondent has completed the initial intake meeting, he or she has three options for proceeding in the resolution process. The respondent can choose from settling right away; going to an adaptable conflict resolution mechanism, including mediation; or going to a formal hearing. The first option, settlement, is focused on restoring and repairing harm done to the complainant and/or the community (Umbreit, Vos, Coates, & Lightfoot, 2005), meaning that the respondent accepts responsibility for wrongdoing; he or she also foregoes the right to appeal. The respondent can also accept responsibility but challenge the proposed sanctions or interventions, thereby leading to further discussion
with the resolution coordinator and the complainant. Because the respondent has the opportunity to request a hearing regarding the proposed sanctions, it is unlikely that the respondent has had input into the actual sanctions; otherwise, there would be little reason to challenge those sanctions. This nuance indicates that the language of a policy may not reflect its actual execution; in UM’s case, however, the policy’s existence couples with other indicators to suggest an espousal of traditional ADR methods.

If the respondent elects to pursue an adaptable conflict resolution process, the respondent must come to an agreement with the resolution coordinator and the complainant that the proposed method is appropriate for the given violation. Regardless of whether an agreement is reached, the adaptable conflict resolution mechanism may put an end to the conflict if the parties determine that a satisfactory resolution has been reached. This is akin to very informal forms of dispute resolution, such as negotiation, mediation, and facilitation. If the adapted conflict resolution mechanism fails to satisfy both parties, the respondent may elect to revert to a settlement agreement or to move forward to a hearing, another moment at which the respondent is thus empowered with choice.

If the respondent elects to move forward to the hearing, here, too, the respondent is presented with options, including the ability to choose between having a resolution officer or a student resolution panel presides over the hearing. If the complainant disagrees with the respondent’s choice, the resolution officer, whether officer or hearing panel, has the opportunity to determine which would be most appropriate for the conflict. The hearing is transparent insofar as that the respondent and all other parties have access to all written information relevant to the hearing, and during the hearing, everyone who
participates in the hearing has the opportunity to question the complainant and the resolution coordinator (on behalf of the university). The participants may also question the respondent, if he or she chooses to participate, and any relevant witnesses, all the while acknowledging that silence is not an admission of guilt. This caveat regarding silence is highlighted using both bold and italics within UM's code, implying that UM may have had difficulty at some point with one or more participants seeing silence as evidence of guilt, which is against the constitutional principles of due process and the principle of fundamental fairness. Ultimately, in arriving at decisions, UM uses the phrase “arbitrated resolutions.” This phrase suggests that UM acknowledges that the hearings are essentially a form of arbitration; it also suggests that UM is aware of the spectrum of dispute resolution practices and recognizes how to apply different principles of the various dispute resolution mechanisms to facilitate a comprehensive process.

The third and final stage is the appeal process. The appeal process is made available to both parties and can be initiated for a number of substantive or procedural reasons, so long as it is begun within ten days of the hearing decision. Once filed, the appeal is reviewed by an appeals board, which is comprised of one student, one faculty member, and one administrator. The appeals board can recommend one of four different options: altering the sanction, confirming the sanction, sending back the sanction to the original fact-finder for review, or ordering a new hearing and fact-finder de novo. The appeals board has broad appellate review, similar to any administrative or court appellate board. UM has twelve different sanctions or interventions that could come out of the dispute resolution process and that are able to be contested through the appeals process. These include punitive actions (formal reprimand, probation, restitution, employment
restriction, housing removal, course/activity removal, no contact, suspension, expulsion) and educational actions (service, class/workshop, project).

**On the spectrum.** UM’s Statement of Student Rights and Responsibilities, as promulgated by the Office of Student Conflict Resolution, is the most alternative dispute resolution and dispute system design-focused system out of the five sampled institutions. UM takes into account the rights and interests of the complainant, the respondent, and the third-party during the dispute resolution process, which is the foundation of an effective alternative process. The UM dispute resolution mechanisms range from *prima facie* informal negotiation or facilitation all the way to formal arbitration, with the opportunity to opt for a number of other types of dispute resolution processes along the way. The transparency of the Statement indicates that UM understands that the disputants must be able to understand an ADR mechanism in order for the mechanism to be a successful one.
Conclusion

The theoretical foundation of student conduct administration arises out of alternative dispute resolution, and the sample of institutions provided in this chapter offers a new way for considering the execution of student conduct administration. Student conduct administration is more than just disciplinary conferences and appeals; it is the entirety of conflict resolution for students who are pursuing higher education. With much at risk for the many students who undergo the process each year, it is imperative that we examine current practices, and in particular, how institutions do or do not use student conduct advisors. Only in this way might we be able to improve student conduct administration. Facing pressure from state legislatures, donors, parents, lawyers, and their institutions themselves, student conduct administrators are caught in an extremely
difficult balancing act. The concluding chapter provides some recommendations for redefining the role of student conduct advisors at public four-year institutions of higher education.
Chapter 7

Conclusions, and Recommendations for Practice

Evaluating Student Conduct Using an ADR Framework

As demonstrated in this study, student conduct administration is a form of binding arbitration. The framework created in Chapter 3 along with the policies analyzed in Chapter 6 show that student conduct administration and its processes can be examined through dispute system design. Student conduct processes may place an unfair burden on administrators and students to navigate a complex system in which they lack the knowledge and expertise to produce outcomes that will lead to student development, especially in cases of suspension, expulsion, or in cases involving complex facts. This can happen, for example, in cases that could result in suspension and expulsion from an allegation of a Title IX violation, but has the potential to occur in many different cases. It is difficult to develop students, both morally and socially, using a process that is adversarial in nature and almost completely rights-based. While measures are being taken to shed the legal framework and reframe student conduct, most student conduct programs have yet to fully adopt new approaches. Some institutions have begun to conceptualize student conduct administration as non-adversarial and student-development focused, but it is crucial that these institutions create actual processes that reflect their new understandings of student conduct administration.
Institutions’ Use of Student Conduct Codes. A descriptive analysis of four-year public institutions’ student conduct codes corroborates previous studies’ findings on student conduct advisors. Studies have shown an increase in the number of institutions that allow advisors, attorneys, or a combination of the two to represent students in student conduct proceedings. Studies have also indicated the presence of different definitions of the role of the student conduct advisor. Representative-advisors play a role similar to that of a trial attorney, when there is the adversarial nature of the student conduct process and the elements of the student conduct process that are similar to a trial, like witnesses, a panel, and a judgment. Advocate-advisors hold less adversarial-focused roles than representative advisors, but they still support students functionally and emotionally. Finally, undefined advisors, the most common type of advisor seen at public four-year institutions, act as guides through the student conduct process. Yet it is time for institutions to reexamine how they define the role of the student conduct advisor. There is a national shift in how institutions are handling student conduct cases, in part, because governments are taking larger roles in policy-making that impacts how student conduct administration works (Russlynn, 2011). With federal and state governments pressuring or forcing institutions to change how they handle, for example, Title IX sexual assault issues, leading to policy organizations, for example the Association for Title IX Administrators (ATIXA), developing best practices on how to adhere to the governmental pressure, now is the time to focus more closely on the types of advisors that should be present in student conduct proceedings (Russlynn, 2011).

Implications. One of the primary goals in conducting this study was to use a multi-method approach to examine student conduct with intention of discovering a student
conduct process that would be more beneficial for students and institutions alike.

Evaluating student conduct within an ADR framework and examining the codes of many public institutions has allowed some of the shortcomings of student conduct to emerge. These shortcomings require that the focus on dispute system design (DSD) be viewed from different angles, which include how to manage the role of the student conduct advisor, how to make the process more inclusive and accessible to students, and how to navigate the wants and needs of the various stakeholders who initiate the policies. Additionally, these shortcomings also require that the use of attorney and non-attorney advocates and the role of the student conduct advisor can be evaluated for fairness, equity, and expediency.

When higher education was first introduced in the United States, discipline was seen as one of its most vexing questions. Indeed, as Thomas Jefferson declared:

The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the greatest obstacle to science with us, and a principle cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather. (1822)

Even though the field of student development has significantly shifted since the days of Jefferson, determining how to administer student conduct remains one of the most difficult tasks in higher education. An institution has to take into account a number of stakeholders: students, administrators, the university community, staff, alumni, donors, the courts, police, the legislature, and even the federal government. With so many stakeholders, each with his or her own interests, it becomes difficult to reimagine how to
administer student conduct. Considering student conduct as a form of ADR, however, leads to recommendations for improving student conduct that are both highly practical and likely to be successful.

**Dispute system design.** Welsh and Schneider (2013) have emphasized that “[n]o dispute or dispute resolution process exists in a vacuum” (p. 91). Yet student conduct administration has been treated as if it exists in a vacuum for several decades. More specifically, courts and commentators have long considered student conduct administration exclusively as a quasi-judicial proceeding or a higher education student affairs process. Only recently have some scholars started to examine student conduct administration with alternative lenses (e.g., Schrage & Giacommini, 2009; Karp & Sacks, 2012). Rogers et al. (2013), for example, provide a step-by-step guide to designing dispute systems and processes for managing disputes. Step one of the process is the design initiative, which refers to the reimagining of a given system and was the impetus for this study. Steps two and three involve planning and are the primary focus of this section. Step four is the implementation and evaluation of the system. It is the intention of this study that the recommendation that follows is ultimately put into practice.

As currently constructed, student conduct processes are a rights-based form of binding arbitration. Yet when planning a system using DSD, one recognizes that such a rights-based form of binding dispute resolution is considered a last resort; rather, when designing a system using DSD, it is commonly held that the disputants should initially go through an interests-based, consensual form of dispute resolution (Constantino & Sickles Merchant, 1996; Rogers et al., 2013; Ury et al., 1988). Of course, in student conduct, change does not occur very quickly, and many student conduct systems are set up as
interest-based approaches with rights-based designs. Constantino and Sickles Merchant outline the dangers of this approach, noting:

Organizational leaders have flocked to ADR courses to learn the newer and perhaps more enlightened methods of resolving disputes…[but] these interest-based methods are often imposed or required through rights-based designs, with little or no input from stakeholders. (p.52)

This is particularly problematic given the shifts towards restorative justice and mediation within student conduct, as it indicates that institutions are still imposing their wills on systems without taking into account the main disputants: the students. Similar to Ury et al., Constantino and Sickles Merchant suggest drawing on interest-based methods, which are more stable and more satisfactory, when creating a student conduct process.

**Interests-based methods.** Commentators argue that mediation should take into account interests first and foremost (Bingham, 2009; Poitras, Le Tareau, 2008; Welsh, 2001). Such an interests-based approach is appropriate when the parties know their interests are as important as, or even more important than, their legal rights (Kurtzberg & Henikoff, 1997). In designing a student conduct process based on interests, there are multiple perceived benefits to the parties to be considered (Moffitt, 1997). Parties may think one-dimensionally in a rights-based process, but in an interests-based process, parties typically recognize shared and compatible interests (Moffitt, 1997) such as efficiency, expediency, fairness, and equity. Moreover, even when parties have opposing interests, an interests-focused approach tends to be more beneficial because it creates opportunities for conversation that lead to creative ways of resolving the dispute (Moffitt, 1997) between the student facing student conduct charges and the institution. While it is
difficult to imagine a student conduct system going to a completely interest-based approach, those in charge of designing student conduct processes can put certain mechanisms into place that enhance their systems’ abilities to take into account the interests of the parties, which include the students’ educations, reputations, and equity in the process. These mechanisms, including education and access to advising, are detailed below.

**Education.** Education is one of the most crucial mechanisms to put in place in order to help ameliorate current problems with the student conduct process, and in particular, problems caused by power imbalances that exist within the process. According to Simons (1985), a formal system is difficult for people without training or experience to participate in effectively. The institution often “convince[s] the disadvantaged that their losses are the result of a fair contest by making disadvantaged [parties] feel incompetent and by making [them] feel dependent on [the institution]” (Simon, 1985, p. 387). While Simon is referring to litigation, his message resonates in similarly litigious settings, like those of current student conduct proceedings. Yet, neither is a formal, normalized form of alternative dispute resolution a solution to this difficulty. According to Delgado (1988), “[the structure of] ADR and absence of formal rules increase the likelihood of an outcome colored by prejudice” (p. 153). Ultimately, regardless of exact nature of the student conduct system, whether formal or informal, whether arbitration or another form of ADR, the absence of educated decision-making in dispute resolution proceedings may result in harmful consequences (Nolan-Haley, 1998).36

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36 A different issue is why the institution insists on prohibiting the student conduct advisor to advise the student to remain silent. There are cases and scholarly opinions that support a student’s right to remain
One way to account for these power imbalances is through education, which can occur through training (Constantino & Sickles Merchant, 1996), awareness education (Constantino & Sickles Merchant, 1996), or community participation (Welsh & Gray, 2002), among other types of programs. Through these programs, participants in ADR processes gain the opportunity to express their concerns prior to dispute resolution. These pre-dispute measures of informing the potential stakeholders about the how’s and why’s of the ADR process may be considered preventative (Rogers et al., 2013). This type of education has shown to be effective in multiple settings (Constantino & Sickles Merchant, 1996; Welsh & Gray, 2002). Built-in preventative measures on campus may include residence life and alcohol awareness programming, for example (Lewis & Thombs, 2005). While they do not address the procedures involved in the student conduct process, these preventative programming measures do provide the kinds of education that ADR commentators believe to be effective.

**Access to advising.** Legal and non-legal advisors can play an important role in balancing power, promoting interests, and ensuring justice in ADR settings such as those of student conduct proceedings (Engler, 2010; Metzger, 2003; Nolan-Haley, 2002; Popkin, 1977; Sternlight, 1999). Sternlight in particular (2010) provides a comprehensive overview of the use of lawyers and non-lawyers in ADR proceedings. Summarizing over fifty years of Supreme Court holdings, Sternlight (2010) found that:

silent, even if it can be used as an admission of guilt (*Minnesota v. Murphy*, 1984; *Murphy v. Waterfront*, 1964). Rosenthal’s (1997) powerful article on a student’s right to remain silent in a disciplinary proceeding if he or she is also confronted with a criminal charge captures the essence of the due process debate surrounding disciplinary proceedings. For the purpose of this study, though, the institution is not bound by law or contract to allow the student to remain silent, and further, mandating that an advisor not suggest remaining silent to a student falls in line with the overall message of not interfering with the proceeding.
The need for attorney representation is greatest when: 1) the client has something very important at stake; 2) the client’s participation in legal proceedings is involuntary; 3) the hearing is formal and adversarial in nature; and 4) the client has shown that he or she may lack sufficient expertise or competence to adequately express her own interests. (p. 394)

Yet in non- or less-adversarial contexts, Sternlight observed a different consensus among the courts: that is, that “allowing participation of counsel [in a non- or less-adversarial process] may somehow impede the value of such process” (p. 398). While this synthesis of Supreme Court holdings is consistent with the general findings of courts on the issue of attorney representation in student conduct matters (that is, that no court has held that students must be allowed to be represented by attorneys), it is ultimately unsatisfactory, as student conduct proceedings, in practice, often are governed by circumstances similar to those that the Supreme Court deems as most appropriate for attorney representation. By all accounts, the accused student has something very important at stake in student conduct proceedings, whether it be his or her reputation, education, or job opportunities; a student’s participation in the proceedings is also involuntary. Finally, student conduct proceedings, even if institutions deny it, tend to be formal and adversarial in nature, and students demonstrate a lack of expertise and competence in expressing their interests.

Legal and non-legal advocates can play an important role in such contexts. In a study on the special mediation context, it was found that parents (who were *in loco parentis* of their students) who were represented by attorneys found the process to be fairer than those with non-attorney advocates or who had no representation at all
The presence of lawyers can also help in promoting students’ interests and protecting students’ rights. McEwen et al. (1995) has found that when lawyers are not present during mediation, clients are unprotected and lack bargaining power. When lawyers are present, they can provide a check on inappropriate third-party conduct, which may then promote the quality of the mediation (McEwen et al., 1995). Similarly, in the litigation context, Metzger (2003) has found that lawyers help individuals who do not understand the complexities of the system navigate the system. Finally, in the context of arbitration, Colvin (2007) has found statistically significant differences in both the rates and recovery amounts based on whether parties are represented by attorneys.

**Recommendations**

This study uncovered a number of issues with the current way that institutions administer the student conduct process. This section provides an outline of two recommendations for improving current student conduct policies. The first recommendation centers around how institutions could tier their uses of student conduct advisors to better answer serve students going through the process. The second recommendation centers around how institutions could better incorporate principles of ADR into their processes to better serve students, specifically by focusing more closely on students’ interests and a facilitative, rather than evaluative process.

**Recommendation One.** Students must have the opportunity to be accompanied by a specially-trained advisor, who, depending on the tier, can either advise or represent a student going through the student conduct process. The importance of advisors to parties who have little knowledge or expertise of a conduct system cannot be overstated (Engler, 2010; Farmer & Tiefenthaler, 2003; Hagen, 1983; Krtizer, 1998; Millemann, 1997;
Monsma & Lempert, 1992; Sandefur, 2010; Sternlight, 2010). Advisors are so crucial, in fact, that Sandefur (2008) has found that parties who were represented by lawyers were nine times more successful than unrepresented parties in less-than-complex (e.g., cases involving minimal evidence and witnesses) cases. It is likewise true that the more training and the more expertise advisors have, the better the outcome will be for the parties.

Taking into account both the importance of education and access to advising for accused students facing student conduct proceedings, a tiered advising system is proposed. This tiered advising system fits within both a DSD and ADR framework because it balances the power between the student and institution and also addresses the significance of the rights in their education that students could potentially lose at various levels of the student conduct process.

The foundation of the tiered advising system rests on the notion that certain conduct issues could rise to the level of taking away a student’s interest in his or her education, which necessitates a more formalized and legalistic approach to student conduct proceedings. A tiered advising approach is warranted because student conduct policies are generally not tailored to specific outcomes or conduct issues. This becomes problematic when, for example, a student is afforded the right to be represented by an attorney during a proceeding in which the student may only be placed on probation, which could result in a drain on time and resources for both the student and the institution. Comparatively, the same issue arises in situations in which a student could be facing expulsion from a University, a deprivation of the student’s right, while going through the process without an advisor who can successfully navigate the process and advocate for the student, who likely cannot advocate for him or herself. In the tiered
system, minor conduct violations could lead to a student having an advisor accompany him or her to the proceeding. For moderate and major conduct violations, a student could have an advocate and representative accompany him or her, respectively. This tiered system brings balance to a one-size-fits-all approach to student conduct administration.

**Status and training.** Before addressing a tiered approach to advising, it is important to talk about who should be allowed to be advisors and how advisors should be trained. It is important to note that student conduct administration is likely not going to change dramatically from its arbitration-like form, and expecting the student conduct administrator to simultaneously promote the interests of the student and institution while maintaining fairness and neutrality as a judge is unrealistic. Yet putting some restrictions on the advising system is imperative to ensuring, insofar as possible, the efficacy of the process. In particular, in cases of violations that rise to the level of suspension or less, institutions should limit who can be a student conduct advisor to university community members. Keeping student conduct matters within institutions not only promotes a sense of community, but empirical research has shown that keeping the participants in an ADR process in-house has benefits for the parties and institution alike (Bingham, 2002). Indeed, institutions and students would benefit from limiting the advisors to university community members because of the nature of the university community and many institutions’ missions that revolve around building a university community for the benefit of their students.

However, in cases that arise to the level of suspension, a punishment that could materially harm a student’s underlying interests, it is important that the accused student receives full legal representation throughout each stage of the student conduct process.
Legal representation helps to ensure that when the student’s underlying interests are at stake, an attorney representative can, at the very least, empower the student to tell his or her own story (Sternlight, 2010). In cases that do not reach suspension, students would still benefit from a non-attorney advocate representing students’ interests for the same reasons. Attorney-advocates adversarial training and nature would detract from the benefits of being an advocate in a student conduct setting.

Whether the advocate is a peer or non-peer is immaterial. Both non-peer and peer advisors have expressed that they have the ability to adequately advocate for students’ interests and protect students’ rights. Because students are more likely to seek out and trust their peers, it may be beneficial for an institution to have more trained peer advocates than non-peer advocates.
Figure 7-2: Spectrum* of Student Conduct Advisors’ Training in Student Conduct.

Figure 7-2 represents the spectrum of student conduct advisors and the training that these student conduct advisors have or receive as part of student conduct processes (or their equivalent). Life experience appears to be the most useful piece of training that non-peer advisors bring to the role of student conduct advisor, as it is largely assumed that non-peer advisors already have the tools necessary to handle student conduct issues. Extensive training on the nuances of student conduct, including student development goals and theories, would be insightful additions to any student conduct advocate training. This training should be supplemented with basic legal training on due process, fundamental fairness, and conflict resolution. While trainings should be tailored to institutions’ unique goals, it is important to remember that the common goals of student development and protecting the community are prevalent at every institution. Remembering that most of the training will be applied to situations that occur outside of the actual student conduct hearing should be emphasized.
Placing student conduct issues and violations in tiers seems appropriate because of the implications that might arise out of certain violations. The first tier of student conduct issues would revolve around minor violations, allowing students to bring advisors with them. The advisor’s role would be limited, like it currently is at many institutions. The second tier would be for advocates, who could advocate on behalf of the students who were involved with moderate violations. The third tier would be for representation, which should be reserved only for the most egregious cases that could result in suspension or expulsion and should be framed in an adversarial mold.

**Tier 1: Advisor.** Tier 1 would include violations that do not go on a student’s record permanently but instead likely result in some sort of active sanction (such as drug or alcohol counseling). Student advocates advising students who commit Tier 1 violations should focus on restorative and educational outcomes that may result from the violation. Advocates should be encouraged to have in-depth conversations with the student about the actual harm caused, and the potential harm that could have been caused, because of the student’s actions. Because a student who has committed a Tier 1 violation will likely not proceed further than the disciplinary conference in student conduct proceedings, the role of the student conduct advisor should be tailored to assisting the student before the conference.

**Tier 2: Advocate.** Tier 2 would include violations that go on a student’s permanent record but that do not result in suspension and do not involve simultaneous external criminal proceedings. Because they go on students’ permanent records, Tier 2 violations do, however, put students’ academic and professional reputations at risk. These reputational interests are underlying interests that need to be accounted for by the student
conduct advisor. Here, the advisor’s role should be to advocate for the student. While advocacy does not rise to the level of representation, it does involve potentially rearticulating what the student says or requesting permission to speak on behalf of the student if the student is unable to speak on his or her own. Students are often unable to manage certain conduct situations both psychologically and emotionally. In Tier 2 situations, allowing students to have access to advocates who can address students’ concerns benefits both students and institutions alike.

**Tier 3: Representative.** The most serious of violations, Tier 3 violations, require full representation for the student as substantial interests and rights are put in jeopardy. Students will likely have the most difficult time navigating Tier 3 cases as Tier 3 cases are likely to be both procedurally and substantively complex. Furthermore, Tier 3 violations will likely go directly to administrative or board hearings. Allowing students to be represented when facing powerful opponents, their institutions, provides students with a sense of fairness and will likely contribute to students’ acceptance of the outcomes (Tyler, 2006). Although attorney representation is preferred for Tier 3 violations because of the nature of the rights involved and the complexity of the cases at issue, it would suffice to allow the student to be fully represented by a student conduct advocate who is trained to handle complex student conduct proceedings.

**Recommendation Two.** While being accompanied by a trained advisor will level the playing field for the students in a student conduct process, it is only one piece to making the process align more closely with ADR principles. The second step is to use two other principles from ADR and the DSD frameworks: using interests-based processes and creating a facilitative process. This second recommendation extends the efficacy of the
first recommendation, and together, will fundamentally change how public higher education institutions deal with student conduct issues.

**Interests-based process.** To create a process that is interests-based, it is necessary to outline what the common interests for students and institutions are. As outlined previously, those interests include interests in both academic and social reputations. An academic interest is in higher education and the potential financial and intellectual benefits that come out of completing a degree for both the student and the institution. A social interest is in both the student’s and institution’s reputation and in fairness. These interests, academic, social, and fairness, relate back to the underlying foundation of ADR, that is, taking into account the interests of parties to the dispute to fairly and equitable resolve the dispute.

Creating an interests-based process would mean amending the current adversarial nature of the student conduct policies by building in a process that enables both the students and administrators in the process to focus on the interests of all involved. To do this, the process would have to be set up in a different way. The process would have to be set up as a facilitative process that puts the institution and the student as entities in conflict rather than pitted as adversaries with limited recourse to problem solve. Setting up the process so that it focuses on interests and is facilitative involves having a truly neutral third-party, someone who can facilitate the resolution of the problem without also being a party to the dispute. As currently constituted, it is impossible to have a facilitative and interests-based process when the student conduct administrator acts both the resolver to the dispute and as a representative of one of the parties to the dispute.
**Facilitative process.** Student conduct processes, in their current forms, cannot be facilitative due to the two-party construction of the process. To make a process facilitative, student conduct processes would have to have a neutral, third-party facilitate the process pitting the student against the institution. It would also be easier to make a process an interests-based process by making that process facilitative through having a neutral third party facilitate the resolution of the dispute. As described in the literature review, the vast majority of cases are resolved in the informal, one-on-one stage of the student conduct process, the stage where the student conduct administrator serves as both the resolution facilitator and the representative of the institution’s interests. In the facilitative process, the institution’s interests would be represented by an institutional representative and a third party, whether it’s the student conduct administrator or someone else, would facilitate each process. This does not apply to all situations, such as the most serious conduct situations that require a hearing.

In the hearing board process, a hearing officer plays the role of facilitator to a certain extent. For a third-party facilitator to be neutral, it would be difficult for that party to have a stake in the institutions’ interests. In hearing board models, the hearing officers serve as neutrals, but one could question their neutrality due to most-often being employees of the institutions. The biggest change that would need to be made to the hearing board process is that the hearing board would have to be amended to resemble a mediation more closely than an administrative hearing. With plenty of mediation or mediation-like processes to draw from, the hearing board model could be made a facilitative, interests-based process without much tinkering.
Together, the new interests-based, facilitative process could be designed using the DSD framework described in Chapter 3, a process that is tailored to the problem. As with any interests-based process, if the parties are unable to come to a settlement or agreement, a neutral third-party in a separate process could act as an evaluator and come up with a resolution that is based on the rights of both parties involved. But, with most student conduct proceedings ending in the informal process, the opportunity to incorporate students’ interests in a facilitative model would make student conduct administration more closely align with other processes towards the middle of the ADR continuum.

**Conclusion**

Student conduct proceedings have the potential to alter a student’s life. While many student conduct administrators believe that representation is unnecessary because several conduct issues are handled during the first stage of the process (personal communication with ASCA, 2013), it is important to remember that student conduct administrators’ perceptions of fairness, complexity, and outcomes are likely much different from those of students (Howell, 2005). Student conduct advisors, advocates, or representatives can help rectify power imbalances by providing experiences that are more educational for the accused student, while simultaneously turning student conduct proceedings into more than just binding arbitration through the provision of guidance and support. Along with student conduct advisors, redefining the student conduct process and molding it into a facilitative, interests-based process that allows advisors not only would benefit the students and the institutions, but also it would create an educational atmosphere that upholds the educational nature of institutions of higher learning.
**Future Research**

The primary framework for this study evolved from tenets of dispute system design. While this study’s primary focus surrounded the role of the student conduct advisor, much of the framework and analysis of the purposefully selected student conduct codes could lead to further examination of the student conduct process to address questions from the DSD framework that this study did not. First and most importantly, it is important to examine the first question in the DSD framework, whether the processes are tailored to the problem. Addressing that question could lead to examining further why student conduct processes are primarily set up as evaluative, rather than facilitative, and what impact a facilitative process could have on students and institutions. While investigating the process, it would next be important to examine how and why the process focuses on rights more than interests, and what could be done to develop an interests-focused process. Together, these questions could lead to the development of a new student conduct process, one that more closely aligns to DSD tenets, specifically tailoring the process to the problem, focuses on the interests of the parties, and is more facilitative than evaluative.

When looking just at student conduct advisors, there are a number of important questions that must be asked. First, it is important to gather more information about student conduct advisors. More specifically, institutions should start gathering demographic data on their advisors, including the advisors’ roles in the university, gender, ethnicity, and other factors that influence power and status. These factors may help in determining why students select certain advisors. Furthermore, researchers must examine students’ perceptions of the role of advisors. Institution should conduct
interviews with students who have used student conduct advisors, posing questions about why the students chose particular advisors, the purpose the advisors served during the student conduct process, and the impact the students perceived the advisors to have on the proceedings, if any. Finally, researchers should compare institutions that use advisors in different capacities and the impact that these differently defined roles have on the student conduct process. More specifically, they should compare institutions that provide lawyers as advisors with institutions that provide trained advisors, with institutions that do not train their advisors at all.

Asking these questions would allow further insight into the impact that student conduct advisors have in proceedings; they would also promote a better understanding of how to address concerns of fairness for students going through the student conduct process. Together, these research efforts would enhance the scope of student conduct proceedings from both fairness and educational perspectives.
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VITA

Duane P. Rohrbacher, Jr.

Education

Doctor of Philosophy in Higher Education Administration 2016
The Pennsylvania State University

Dissertation Topic: Examining the Role of the Student Conduct Advisor through an ADR Framework

Juris Doctor 2012
The Pennsylvania State University, The Dickinson School of Law

Bachelor of Arts in Linguistics 2009

Bachelor of Arts in German 2009
The Ohio State University

Experience

Palmer College of Chiropractic
Director of Student Services 2015 - present
• Oversee Student Services on San Jose Campus
• Supervise Registrar, Financial Aid Manager, Student Services Specialist

California Polytechnic State University
Assistant Dean of Students 2014 - 2015
• Oversee the Office of Student Rights & Responsibilities as the primary conduct officer
• Conduct conflict resolution for both disciplinary and academic dishonesty violations
• Supervise two graduate students and two full-time staff members

Publications


Presentations


