



April 27, 2010

Via Electronic and U.S. Mail

George R. Blumenthal, Chancellor
University of California, Santa Cruz
200 Clark Kerr Hall
Santa Cruz, CA 95064

Lori G. Kletzer, Chair, Academic Senate
University of California, Santa Cruz
Economics Department
Engineering 2, 401
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Re: Improper Discipline and Inadequate Disciplinary Process for Student Protesters

Dear Chancellor Blumenthal and Professor Kletzer:

The American Civil Liberties Union of Northern California has been contacted by students at the University of California, Santa Cruz (“University”) that are being subjected to discipline and/or disciplinary proceedings due to allegations of misconduct related to a non-violent demonstration and occupation of Kerr Hall in November 2009. We believe the University’s failure to provide notice of specific factual allegations and evidence to be used against students and its imposition of significant restitution payments without a hearing violate the students’ constitutional rights to due process. We write to detail the ways in which the University’s disciplinary process has already gone wrong and to set forth necessary actions to bring the University’s discipline of the Kerr Hall protestors within constitutional parameters.

I. FACTUAL BACKGROUND

Our understanding of the facts is as follows: from November 19 through November 22, 2009, about a hundred people occupied Kerr Hall for approximately 66 hours in non-violent protest to bring attention to tuition and housing cost increases for students, loss of educational resources, and job reductions for staff at UCSC, among other issues. There was some flow of persons in and out of Kerr Hall over the course of the occupation, including faculty and student activists, journalists, and people serving as liaisons between the activists and the University administration. At one point in the process, occupiers barricaded the entrances to the building.

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The occupation ended, without arrests, when about 70 protestors dispersed after negotiations with the University. Some students leaving Kerr Hall asked for, and were denied, permission to clean up trash that was left after the occupation.

The disciplinary process for students alleged to have participated in the demonstration has been a moving target. In February 2010, the University sent summonses to about forty-five students, asking that the students meet with Doug Zuidema, the University's Director of Student Judicial Affairs, to discuss the occupation. The summonses included a brief statement of facts about the occupation generally and set forth the sections of the Code of Conduct allegedly violated by each student, including damage to University property, unauthorized entry or use of University property, conduct which constitutes a threat to the health or safety of any person, obstruction or disruption of University activities, disorderly or lewd conduct, participation in an unlawful assembly, failure to comply with official directions, blocking ingress or egress from buildings, and responsibility for violations committed by guests.¹ The charges also noted that, "Violators shall be subject to campus discipline procedures *as well as any civil or criminal action that may be taken.*" The summonses did not inform students that they had a right to a hearing regarding the charges and did not allege that the summoned student had individually engaged in specific damage to property.

In the meetings that followed the summonses, Mr. Zuidema shared or described evidence he had of some of the students' involvement in the occupation. In many of these meetings, Mr. Zuidema provided only general information about the occupation and damage to Kerr Hall, rather than direct evidence linking particular students to the occupation or property damage.

On April 7, 2010, the University sent "voluntary resolution" letters to about 36 students. The majority of the voluntary resolution terms included a warning, pursuant to Code § 105.01, and restitution in the amount of \$972, pursuant to Code § 105.09. The letters informed students that they could file an appeal or request a hearing by April 14, 2010. The voluntary resolution letters did not provide specific allegations of any individual student's involvement in the occupation or in the destruction of particular property. The letters did not provide information about the evidence the University planned to use against the students in any disciplinary hearing that might proceed, nor did it set out maximum alternative penalties that might be issued to students who rejected the terms of the "voluntary resolution."

Several students requested hearings in response to the April 7 letters. However, on or about April 14, the University informed students that because they had been issued "warnings," pursuant to Code § 105.01, they were not entitled to disciplinary hearings and would instead only be allowed to file an appeal if they disagreed with the terms of the University's proposed resolution. The deadline to file an appeal was extended to April 21, 2010. At some point, students were informed that the amount of restitution would be \$944 instead of \$972.

¹ All Code references are to the University of California, Santa Cruz, Code of Conduct, available at in the Student Policies and Regulations Handbook, <http://www2.ucsc.edu/judicial/handbook09-10/PDFview/CodeStudentConduct09.pdf>.

We are informed that since April 7, and even since April 14, charges have been dismissed against at least two students from whom restitution had been required. In recent meetings with Mr. Zuidema, evidence that had been believed to support the April 7 letters to those students was found to be inadequate to support the University's claim that the students were present for the Kerr Hall occupation. We are also informed that since April 14, the University extended the appeal deadline to April 23, 2010 and that at least one student was told she would be given an "administrative hearing," before a single administrator, which she understood to be different from the formal hearing procedure before a hearing panel, as set forth in Code §§ 108.30-108.40.

II. LEGAL ANALYSIS

A. Due Process Standards for Student Disciplinary Action Resulting in Suspension or Expulsion.

The U.S. Constitution requires due process of law for disciplinary hearings in public universities. *Gorman v. University of Rhode Island*, 837 F.2d. 7, 14 (1st Cir. 1988). A California Court of Appeal recently recounted the basic constitutional requirements for even short suspensions, which include:

- Oral or written notice of the charges,
- An explanation of the evidence against the student,
- An opportunity to contest the charges, and
- A fair and unbiased adjudicator.

These procedures must "precede the actual imposition of a suspension unless the student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." *Thompson v. Sacramento City Unified School Dist.*, 107 Cal. App. 4th 1352, 1363-64 (Cal. App. 3d. 2003); *Goss v. Lopez*, 419 U.S. 565, 581 (1975). Moreover, longer suspensions, expulsions, underlying charges that require resolution of credibility determinations, and charges that may result in criminal liability require greater procedural protections, such as access to counsel or the right to cross-examine witnesses. *See Johnson v. Collins*, 233 F. Supp. 2d 241, 248 (N.D. Me. 2002) (right to counsel and cross-examination of witnesses); *University of Texas Medical School at Houston v. Than*, 901 S.W. 2d 926, 931 (1995), *aff'd* 188 F.3d 633 (5th Cir. 1999); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir.1972) (where credibility is at issue, due process may require opportunity to cross-examine witnesses); *Gabrilowitz v. Newman*, 582 F.2d 100, 104-06 (1st Cir. 1978) (if the incident in question involves an arrest and the possibility of future criminal charges, courts also require a heightened degree of due process); *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (right to counsel, cross-examination, notice of rights and procedures); *Gomes v. University of Maine System*, 365 F. Supp.2d 6, 16 (D.Me. 2005) (depending on sanction imposed, due process may require right to counsel).²

² Disciplinary hearings must provide more due process of law than those for suspensions based on academic failure. *See Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

B. Due Process Is Also Required for Deprivations of Property, Such As Fines and Restitution.

The University has imposed a significant monetary sanction—\$944 in “restitution”— as a disciplinary measure without due process. The Fourteenth Amendment of the U.S. Constitution and Article I, § 7 of the California Constitution prohibit the state from depriving “any person of life, liberty or *property* without due process of law.” (Emphasis added.) This due process requirement means that people are entitled to a hearing before a judge, even to contest a parking ticket. *See Tyler v. County of Alameda*, 34 Cal.App.4th 777, (\$250 parking ticket could not be enforced without due process, which was satisfied by predeprivation written review procedure and prompt postdeprivation hearing before a judicial officer; statute did not allow imposition of \$25 nonrefundable administrative fee for hearing process). Thus, due process required for disciplinary suspensions under the University’s Code is also required, as a matter of constitutional law, for the imposition of restitution at issue here.

C. The University’s Disciplinary Procedures Have Not Met Constitutional Standards.

1. Students Are Entitled to Notice of Particular Factual Allegations Against Them and the University’s Supporting Evidence.

The University’s Code of Conduct §§ 103 and 108 provide much of the process due under constitutional standards. However, in practice, the facts alleged to support particular charges have been lacking from notices to students.³ Instead of setting forth specific facts tying each individual student to particular conduct which is alleged to have violated University rules, each summons and voluntary resolution letter contains only a general summary of the occupation of Kerr Hall. In order for “notice” of the charges against each student to be meaningful for due process purposes, that notice must inform students of the factual basis for the charges against them as individuals, so that they can adequately prepare their arguments and evidence for a hearing on those charges.

One due process requirement missing from the University’s *written* procedures is an explanation of the *evidence* to be used against a student in any disciplinary hearing. Before sanctioning students for the range of charges the University claims arise from the protest, the University must first provide notice of the evidence to be used to prove the students violated University rules and an opportunity for the student to respond to that evidence before an impartial tribunal. *Thompson v. Sacramento City Unified School Dist.*, 107 Cal. App. 4th at 1363-64. Thus, the University must provide notice of the evidence that any particular charged student engaged in “disorderly or lewd conduct,” “conduct which constitutes a threat to the health or safety or any person,” “damage to or destruction of . . . any property of the university,” and any other charges for which students have requested a hearing. To the extent that expulsion

³ This defect is a problem with implementation of the Code, as opposed to the Code itself, which requires, “written notice to the accused student, including a brief statement of the factual basis of the charges.” Code §§ 103.11(a) and 108.31(a).

is contemplated or criminal charges could be brought based on the charged behavior, students have a right to counsel in their student disciplinary proceedings. *Gabrilowitz v. Newman*, 582 F.2d 100, 104-06 (1st Cir. 1978) (if the incident in question involves an arrest and the possibility of future criminal charges, courts also require a heightened degree of due process); *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) (right to counsel, cross-examination, notice of rights and procedures); *Gomes v. University of Maine System*, 365 F. Supp.2d 6, 16 (D.Me. 2005) (depending on sanction imposed, due process may require right to counsel). Critically, as set forth below, students are entitled to confront University evidence concerning the actual cost of the damage claimed and each individual student's misconduct which is alleged to have caused the damage before restitution may be imposed.

2. *Students Cannot Be Charged with Restitution Where Individual Responsibility Is Not Proven by the University in a Hearing.*

Students have been ordered to pay restitution in a set amount without any specific allegations or notice of evidence linking them with particular acts that damaged University property. As has been made clear by recent student meetings with Mr. Zuidema leading to dismissal of charges based on the absence of evidence that certain students were *present* at the occupation, there is real doubt about whether the University has adequate evidence to prove even unlawful entry in many individual cases. We are also informed that some of the students charged did not participate in the occupation as protestors, much less engage in any conduct that could reasonably be tied to the University's costs. One student who has been charged with restitution was a journalist. He was present as an observer and reporter, not as a participant. Another student charged with restitution was serving as a liaison between the protestors and the administration, rather than participating as a protestor. *Cf.* Code § 105.09, Restitution ("Restitution may be imposed on any student who alone, or through group or concerted activities, *participates* in causing the damages or costs") (emphasis added). Moreover, even for students who admittedly participated in the occupation with the purpose of engaging in political protest and civil disobedience, the University must present specific evidence that each individual student engaged in conduct that actually caused damage to property before it can require him or her to pay restitution.

In the seminal case *N.A.A.C.P. v. Claiborne Hardware*, the U.S. Supreme Court held that participants in a boycott of white businesses could not be required to share liability for the total cost of the boycott when only some of the activity at issue was unlawful. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." 458 U.S. 886, 920 (1982). Because restitution as a remedy is tied to a person's responsibility for causing particular, identifiable cost, the University may not simply divide the alleged cost among the number of protestors it is able to show participated. Rather, it must tie the amount of restitution to each individual student's actions and responsibility with evidence of "specific behavior leading to specific damage." *Vodak v. City of*

Chicago, 624 F.Supp.2d 933, 969 (N.D.Ill. 2009).⁴ The University's own Code of Conduct recognizes this principle and states: "Any sanction imposed should be appropriate to the violation, taking into account the context and seriousness of the violation." § 105.00, Types of Sanctions. While some other sanction *may* be permissible for "unauthorized entry . . . or use of" of Kerr Hall under § 102.06, where that use did not cause any damage to the property, restitution would not be an appropriate remedy. *See* Code § 105.09 ("restitution in the form of reimbursement may be imposed for *expenses incurred*").

Because the amount of restitution the University can justly extract from any student depends on the student's individual actions in causing damage, students must be given prior notice of the evidence against them and an opportunity to contest the amount of restitution being imposed upon them at a hearing before an impartial tribunal.

3. Students Charged with Restitution Are Entitled to Notice and an Opportunity to Respond to the University's Claims of Damage.

Media reports of damage range from a University spokesperson describing "portions" of Kerr Hall as "damaged and in disarray" (CBS News, November 22, 2009), photos on the University website showing trash, a refrigerator that was used as a barricade, a broken table, and one set of electronic conferencing equipment that was removed from a conference table (U.C. Santa Cruz Administrative Messages, November 22, 2009, available at http://www.ucsc.edu/news_events/messages/text.asp?pid=3403); "early estimates" that the cost was over \$50,000 (November 25, 2009, *Santa Cruz Sentinel*); and the University's current assertion that the occupation cost the University about \$34,000 (April 13, 2010, *Santa Cruz Sentinel*). An itemized list of costs that was made available for students to review included general topics such as "Vendor cleanup \$14,279.85," and somewhat more specific items such as "Custodial—Custodial Swing Shift \$495.60." Prior to depriving students of property based on these figures, the University must provide students an opportunity to question University witnesses about these charges, including for example, whether the "Custodial Swing Shift" is a standing expense or one incurred specifically because of the occupation, and whether the cost of the "Vendor cleanup" was warranted relative to janitorial services that could have been provided by University employees pursuant to regular work schedules and wages. *See e.g. Johnson v. Central Aviation Corp.*, 103 Cal.App.2d 102, 117 (Cal.App. 3d Dist. 1951) (appropriate for trial court to weigh conflicting evidence about reasonable cost of repairs in suit for damages related to collision).

⁴ It is worth noting that even if an even share of the cost could be evenly divided—if, for example the University was able to prove that all participants agreed to engage in property damage and intended to further the group's unlawful purpose—the University's calculations are faulty. Newspaper reports suggest about 70 students left Kerr Hall on the morning of November 22, 2009 but, the University's restitution amounts appear to be based on the total cost divided by 36—the number of students served with voluntary resolution notices.

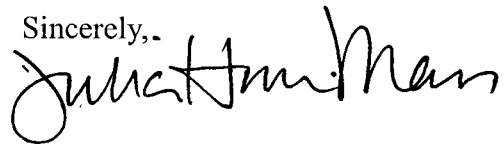
III. CONCLUSION

The right to due process prior to imposition of discipline is a fundamental constitutional protection, especially at institutions of higher learning. "Our sense of justice should be outraged by denial to students of the normal safeguards [of due process]. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play." *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961); see also *Golberg v. U.C. Regents*, 248 Cal. App. 2d 867, 876, 881-882 (Cal. App. 1st 1967) (quoting *Dixon* and *Knight* with approval).

Here, the University has not met constitutional standards for due process of law in its disciplinary procedures with respect to students charged with occupying Kerr Hall. Not only is imposition of restitution without a hearing a violation of the students' constitutional rights to due process, but students who are being afforded a hearing for other penalties are not being provided notice of the specific allegations against them and of the evidence the University intends to present at their hearings. The University should reverse the "voluntary resolution" terms imposing restitution without any hearing process, negotiate restitution terms that more accurately reflect particular students' actual misconduct if requested, and take steps to ensure that all students are afforded notice of the factual allegations and evidence against them and a meaningful opportunity to be heard by an impartial tribunal.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions or additional information that you think would aid our evaluation of the University's practices. We look forward to your prompt response.

Sincerely,



Julia Harumi Mass
Staff Attorney

cc: Felicia McGinty, Vice Chancellor of Student Affairs
Jean Scott Marie, Assistant Vice Chancellor of Student Affairs
Doug Zuidema, Director, Student Judicial Affairs