



April 6, 2010

**Via Electronic and U.S. Mail**

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University of California  
Berkeley, CA 94720-1500

Christopher Kutz, Chair, Academic Senate  
341 Boalt Hall (North Addition)  
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Berkeley, CA 94720

Re: Improper Discipline and Inadequate Disciplinary Process for Student Protesters

Dear Chancellor Birgeneau and Professor Kutz:

It has come to the attention of the American Civil Liberties Union of Northern California that the University of California, Berkeley ("University") has imposed extremely restrictive suspensions on students without meeting the requirements of constitutional due process and in violation of constitutional guarantees of privacy, freedom of speech, and freedom of association. The University of California has a historic reputation as a seat for dynamic student protest which inspires social change; it is therefore likely that more students will face disciplinary hearings in the future. We write to detail the ways in which the University's disciplinary process has gone wrong, to set forth the ACLU's recommendations for improvement, and to urge the University to take steps to ensure that due process and fair treatment are honored in future disciplinary actions.

Zachary Bowin and Angela Miller were both placed on interim suspensions for their participation in an on-campus demonstration on December 11, 2009. While the charges against them, if proven, would certainly warrant disciplinary action, the interim suspensions were issued without a pre-suspension hearing and without regard for the purpose and limits of interim suspensions. Under the Berkeley Campus Code of Student Conduct ("Code"), "A student will be restricted *only to the minimum extent necessary* when there is reasonable cause to believe that the student's participation in University activities or presence at specified areas of the campus will lead to *physical abuse, threats of violence, or conduct that threatens the health or safety of any person* on University property or at official University functions, or other disruptive activity incompatible with the orderly operation of the campus." Code § VI, 105.08. Without any apparent basis to believe Mr. Bowin or Ms. Miller would engage in disruptive behavior in the immediate future or any attempt to limit the scope of the suspension to particular threats of

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disruption, the University barred the students from *any and all* communications with any member of the University community for any purpose, made no exceptions for class-related requirements or off-campus associations, and—most damaging—prevented the students from attending final exams.

These suspensions were issued without affording either student the absolute minimum process required by the Constitution—notice and an opportunity to be heard—and without meeting the factual predicate for an exception to that requirement. Moreover, as explained below the post-suspension hearings afforded to these students revealed several flaws in the University's disciplinary procedures.

## **I. FACTUAL BACKGROUND**

### **A. Interim Suspension Notices**

We understand that on December 11, 2009 Zachary Bowin and Angela Miller participated alongside about a hundred other students in a protest related to recent cuts to education funding. Mr. Bowin and Ms. Miller were arrested by campus police, but the District Attorney did not file charges against them.

On December 14, the University emailed Zachary Bowin a notice which placed him on "Interim Suspension, effective immediately."<sup>1</sup> This Notice of Interim Suspension purported to be based on "complaints" and "supporting evidentiary material" but did not describe or attach any complaints or other evidentiary material. The Notice alleged that Mr. Bowin "participated in a disturbance of the peace" on December 11 that "included actions of property damage, attempted arson, attempted burglary, threats and assault." However, the Notice did not state that Mr. Bowin personally damaged property, attempted arson, or attempted burglary. Nonetheless, the University charged Mr. Bowin with theft, physical abuse, disorderly conduct, a destructive devices offense, and several other related offenses.

As a result of this suspension, Mr. Bowin missed at least two final examinations and was unable to submit a term paper. Since the Notice was sent after the Chancellor's office had already approved the interim suspension, Mr. Bowin had no opportunity to send a written statement to the Chancellor to protest this action pursuant to the Code. Mr. Bowin immediately requested a "prompt hearing" and further requested all relevant evidence pertaining to this hearing. The University did not provide Mr. Bowin with information about the evidence that would be used against him before the hearing date. It also denied his request for a written explanation of the specific processes and procedures to be used at this hearing.<sup>2</sup>

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<sup>1</sup> The document is dated December 12, but was not delivered until December 14, and is referred to herein as "the December 14 notice." The December 14 notice did not indicate the length of his interim suspension, a violation of UC Code of Student Conduct, Sec. IV, 105.07.

<sup>2</sup> The December 14 notice directed Mr. Bowin to the Code of Student Conduct. However, the section of the Code related to Interim Suspensions only mentions that the University will conduct a hearing on the interim suspension, and does not indicate whether the panel will use any of the procedures which the

Angela Miller received almost identical treatment. By means of an Interim Suspension Notice dated December 12, 2009 the University placed her on an immediate interim suspension, precluding her from taking her final exams, without any pre-suspension notice of the charges against her or the evidence to be relied on or any opportunity to be heard. In fact, Ms. Miller did not receive even an *interim* suspension hearing until January 13, 2010, more than a month after the original imposition of an interim suspension.

### **B. Terms of the Interim Suspensions**

Not only did the interim suspensions prevent Mr. Bowin and Ms. Miller from taking final exams without a hearing, they also imposed severe restrictions on the students' ability to associate and communicate with members of the University community. The Notice of Interim Suspension for both students set forth the following "guidelines and exclusions":

During the time of your Interim Suspension, you are hereby advised that you are strictly prohibited from any and all contact, at any time, for any reason, and /or by any manner (including the use of electronic equipment, telephones, the mail and/or all other potential means of contact) with any faculty, staff or students, including any witnesses who may be referenced in this letter and/or complainants who may have filed reports against you.

In addition, the students were "strictly prohibited from entering upon any part of the Berkeley campus, and any and all property of the University of California." This prohibition included the use of dorms, classrooms, and "computers or networks systems owned, maintained, or controlled by the University or funded by university budgets." In sum, Mr. Bowin and Ms. Miller were prevented from communicating with any member of the University community about any subject, on or off campus, whether in person, on the telephone, or by email. There were no exceptions made for communications necessary to their studies, for intimate associations, or for communications with student or faculty advocates in their disciplinary hearings. For Ms. Miller, who lived in student housing, this suspension was interpreted by the University to also require her immediate eviction from her University-leased co-op apartment unit *prior to any opportunity to respond to the charges against her*.

### **C. Interim Suspension Hearings**

On December 16, the University held a hearing to determine whether Mr. Bowin's interim suspension was proper, and whether it should be extended. In Mr. Bowin's case, the hearing panel, composed of a professor, a staff member, and one student, noted that the only incriminating "[i]nformation available to the panel about the events outside University House on the night of December 11, [was] limited to a news report," provided by the official representing

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Code lists for more formal hearings. Code of Student Conduct, § 105.08.

the University. *See* Zachary Bowin Hearing Report dated December 18, 2009. This University-issued news report only mentioned Mr. Bowin as one of eight arrestees, did not allege that the two Berkeley students mentioned in the report personally participated in any violence or property damage, and did not provide any named sources.<sup>3</sup> Mr. Bowin testified that he thought he was joining a peaceful protest and did not commit or approve of any acts of violence.

The panel noted that Mr. Bowin was “an outstanding student” with a “GPA of 4.0,” who deserved “high praise” for his “worthy contributions to campus life.” The panel decided, “based on the limited information provided” and Mr. Bowin’s “otherwise excellent student record,” to give Mr. Bowin, “the benefit of the doubt.” Therefore, the panel lifted most of the terms of Mr. Bowin’s interim suspension. Nowhere in its report did the panel mention consideration of whether Mr. Bowin should be or had appropriately been determined to pose a threat to the “health and safety” of the campus, or whether he would disrupt the normal operations of the University, the only valid bases for interim suspension under the Code.

In contrast to Mr. Bowin, Ms. Miller did not receive a hearing until January 13, 2010. Prior to the hearing, the University did not inform Ms. Miller that her “advisor” could be an attorney, and she only had the support of a student advocate.<sup>4</sup> In Ms. Miller’s hearing, the panel—composed of the same members who served on Mr. Bowin’s panel—relied on the same deficient news report presented at Mr. Bowin’s hearing, as well as the testimony of Detective Nicole Miller.<sup>5</sup> Detective Miller was permitted to present the “personal perspective of her experience,” and to testify that she had seen a photograph “confiscated from a protestor” that showed Ms. Miller, largely obscured by another person, appearing to hold a torch. Detective Miller did *not* testify that she actually witnessed Ms. Miller at the protest or carrying a torch, much less committing any acts of violence or property destruction. The detective did not offer any opinion regarding whether a complete ban on association, communication, and access to the University and all University staff, faculty and students was necessary to campus safety or to ensure that Ms. Miller did not unduly disrupt the effective operations of the campus.

In its report, the panel noted perceived “inconsistencies” in Ms. Miller’s testimony and several ways in which the panel believed Ms. Miller’s contributions as a student fell short. *See* Hearing Report for Angela Miller dated January 15, 2010. The panel indicated skepticism regarding Ms. Miller’s contention the torch she carried was meant to provide light, rather than as

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<sup>3</sup> It appears that a news report naming Mr. Bowin and Ms. Miller has been removed from the UC Berkeley website but another news report, similar to the one used in the hearings, remains online: “Protesters Attack Berkeley Chancellor’s Home,” UC Berkeley News, Public Affairs, December 12, 2009, updated January 22, 2010, available at [http://www.berkeley.edu/news/media/releases/2009/12/12\\_uhouse.shtml](http://www.berkeley.edu/news/media/releases/2009/12/12_uhouse.shtml).

<sup>4</sup> Mr. Bowin appeared with an attorney on December 16, but Mr. Bowin’s counsel was not permitted to speak for his client throughout the hearing, and was ultimately excluded.

<sup>5</sup> Detective Miller had been present to testify at Mr. Bowin’s hearing, but due to evidentiary objections of Mr. Bowin’s attorney, the panel excluded her testimony. Ms. Miller did not have the benefit of an attorney and Detective Miller’s testimony was considered by Ms. Miller’s panel.

a tool of arson. The January 15 Panel Report indicated that Ms. Miller's "commitment to [her studies] was not clear," she "provided little evidence of positive contributions to the campus community," showed "no remorse for [her] involvement in this protest," and refused to consider that her actions could have "scared the Chancellor and his wife." The panel concluded that Ms. Miller's "attitude" in failing to be remorseful did not fit with her claims to be against vandalism and violence.

The panel also communicated its disagreement with Ms. Miller's method of expressing her concerns, noting it was "unclear how protesting ('claiming the streets'), would address the current financial problems of UC Berkeley." It appeared important to the panel's decision that Ms. Miller had continued to attend meetings at International House and continued to live in University housing, in violation of the terms of her interim suspension. Based on these findings, but without concluding that Ms. Miller posed any threat to safety, health or the orderly operation of campus, the panel indefinitely upheld Ms. Miller's interim suspension and ordered her to vacate her student housing within 72 hours.<sup>6</sup>

## II. LEGAL ANALYSIS

### A. Due Process Standards for Student Disciplinary Action

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 students,
- 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

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<sup>6</sup> On January 30, 2010, Ms. Miller's suspension was modified to allow her to attend class and contact professors outside of class for class-related purposes.

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).<sup>7</sup>

## **B. Berkeley's Code of Conduct and Due Process Violations Against Mr. Bowin and Ms. Miller**

A review of the Code and the hearing panel decisions for Mr. Bowin and Ms. Miller, as well as the underlying facts, reveal a number of problems in the Code as written, and as applied in these cases.

### **1. Notice of Charges and Evidence**

One commonly-accepted aspect of due process is notice to the student of the evidence to be used against them. *Thompson v. Sacramento City Unified School Dist.*, 107 Cal. App. 4th at 1363-64; *Johnson v. Collins*, 233 F. Supp. 2d at 248. However, Berkeley's Code places a one-sided requirement on the *student* to provide prior notice of the evidence and witnesses she intends to use, while the Office of Student Conduct and Community Standards "may" provide information on behalf of the University in advance of the hearing. As the person subject to discipline, and therefore entitled to process, the *student* is to be provided information about the evidence that will be used against her, rather than the other way around. Indeed, without information about the evidence to be used against her, a student is in no position to marshal her own evidence and witnesses to respond to the University's case. As mentioned above, the Notices of Interim Suspension received by Mr. Bowin and Ms. Miller set forth charges, but no specific facts or evidence in support of either the charges *or* the interim suspensions.

### **2. Hearing Procedures**

**Access to Counsel.** While access to counsel has not been uniformly required by courts, many courts have required universities to allow students to use retained counsel in disciplinary hearings. See *Johnson v. Collins*, 233 F. Supp. 2d at 248, *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 624 (D.P.R. 1974); *French v. Bashful*, 303 F. Supp. 1333, 1338 (E.D. La. 1969); *North v. W. Va. Bd. of Regents*, 332 S.E.2d 141, 143 (W.Va. 1985). In order for access to counsel to be meaningful, notice of the right to retained counsel should be included in any notice of charges. In addition, counsel must be permitted to actually *represent* students in their hearings. Mr. Bowin's attorney was not permitted to fully represent him during his hearing, and was ultimately excluded altogether.

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<sup>7</sup> 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).

**Preponderance of Evidence.** The Code's requirement that the University prove its case by a preponderance of evidence is constitutionally adequate. Code § 2(b)(4), Standard of Proof. However, it is necessary that the evidence be both *reliable* and *relevant* to the question before the panel. In the case of Ms. Miller, the evidence presented in her interim suspension hearing consisted of a (1) a news report in which Ms. Miller was named as an arrestee but not alleged to have engaged in particular conduct, (2) testimony regarding a photograph of Ms. Miller carrying a torch, (3) the testimony of a detective who did not see Ms. Miller at the protest, much less engaging in any chargeable conduct; and (4) Ms. Miller's own answers to the panel's questions. Unless carrying a torch, without more, is adequate to prove the charges against Ms. Miller or to justify a complete ban on her communication with any University student, faculty or staff, the evidence provided was *not* adequate to sustain the underlying charges or extend her interim suspension. Evidence of Ms. Miller's lackluster academic performance—obviously given weight by the hearing panel—was *irrelevant* for purposes of her hearing.

The question before the panels should have been whether Mr. Bowin and Ms. Miller presented safety risks or risks to the orderly operation of campus, and what minimal restrictions were necessary to address these risks. Instead, the panels judged the students based on their academic performance and "contributions to campus life," reaching vastly different results despite a similar dearth of evidence of actual misconduct, violence or property damage by either student. In the case of Ms. Miller, the panel revealed inappropriate bias in the form of its political judgment by stating it was "unclear how protesting ('claiming the streets'), would address the current financial problems of UC Berkeley."

### 3. Interim Suspensions Not Justified by Safety Considerations

As suggested throughout this letter, the University's use of interim suspensions to deny Mr. Bowin and Ms. Miller access to final exams, classes, and campus housing, and the University's ongoing *indefinite* "interim" suspension of Ms. Miller were highly improper. The Code itself allows for interim suspensions only to the extent necessary to ensure campus safety. Code § VI, 105.08.<sup>8</sup> Both Mr. Bowin and Ms. Miller should have been given opportunities to turn in term papers and take proctored final exams. It is difficult to imagine—given the paltry evidence of their actual participation in violence or property damage during the December 11 protest—that a more limited suspension could not have adequately protected the University's interests in a safe environment while allowing the students to complete their class work pending a hearing on the merits of the charges against them. The *indefinite* interim suspension issued to Ms. Miller violates § 105.08, which requires that the duration of an interim suspension be included on the notice. Moreover, it is not rationally related to any need to protect the University

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<sup>8</sup> Under a due process analysis, short safety-based interim suspensions have been upheld in exceptional cases, such as when a student set fire to a dorm room. See e.g., *Picozzi v. Sandalow*, 623 F. Supp. 1571 (E.D. Mich. 1986), *aff'd*, 827 F.2d 770 (6th Cir. 1987). And, in cases where interim suspension is permissible without a prior hearing, a hearing on the merits that meets constitutional requirements of due process must take place "as soon as practicable." *Goss*, 419 U.S. at 583; *Gonzales v. McEuen*, 435 F. Supp. at 467.

from harm. A prompt formal hearing on the merits followed by a formal suspension or expulsion (if warranted) would meet the University's safety and disciplinary interests, as well as allowing the students an opportunity to clear their names and be released from severe restrictions on their access to and communications with the campus community.

### **C. Freedom of Association and Expression**

The interim suspensions imposed on Mr. Bowin and Ms. Miller so broadly infringe on communications and activities outside the scope of campus life as to be quite remarkable examples of an abuse of University authority. By interfering in the students' communications with willing listeners who happen also to be members of the University community, the suspensions immediately infringed on the students' exercise of several fundamental rights.

***First Amendment Speech and Association.*** Students have the right to speak to and associate with others for political and other purposes. Banning Mr. Bowin and Ms. Miller from speaking to other students, faculty, and staff directly interferes with their ability to organize and attend meetings, coordinate political strategies, or even to participate in a letter-writing campaign to University officials on matters of public concern.<sup>9</sup>

***Rights to Intimate Association.*** The substantive due process clause of the Fourteenth Amendment to the U.S. Constitution and Article I, section 1 of the California Constitution protect the intimate association rights of Californians, including the right to live with whom one chooses. The overbroad interim suspensions imposed on Mr. Bowin and Ms. Miller purported to limit the students' ability to speak to, meet with, and live with close friends or life partners if they were also students, staff or faculty of the University. Such a prohibition is obviously beyond the University's jurisdiction and violates the students' fundamental rights to privacy and autonomy.

In general, government restrictions that burden speech and associational rights may only be justified if narrowly tailored to further significant or compelling government interests. *Citizens United v. Federal Election Com'n*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 876, 898 (2010) (compelling interest for political speech); *Washington State Grange v. Washington Republican Party*, 552 U.S. 442, 451 (2008) (compelling interest required for election regulations that burdened associational rights); *City of Los Angeles v. Alameda Books, Inc.*, 525 U.S. 425 (2002) (zoning limits on adult bookstores upheld as narrowly tailored to significant government interest). Without belaboring the different legal standards for intruding upon each of these fundamental rights in different contexts, suffice it to say the University's interest in controlling Mr. Bowin's and Ms. Miller's communications and relationships with willing recipients falls far short of what would be necessary to justify the remarkably overbroad restrictions imposed by these interim suspensions.

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<sup>9</sup> In addition, the terms of the interim suspensions are easily read to prohibit the students from attending religious services with other members of the University community, whether on or off-campus, in violation of their First Amendment right to freely worship.



### III. CONCLUSION

The right to due process prior to imposition of discipline is a fundamental constitutional protection, especially at institutions of higher learning. "Whether the interest [in continued enrollment] involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training. Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth." *Knight v. State Board of Education*, 200 F. Supp. 174, 175 (D.C. Tenn. 1961). "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).

As set forth above, the University has not met constitutional standards for due process of law in its disciplinary procedures and the terms of Mr. Bowin's and Ms. Miller's interim suspensions violated constitutionally protected freedoms of association and expression. The University should immediately take steps to change its policies and procedures to address these concerns. In addition, the University must ensure that any faculty, administrators, or students charged with implementing the Code of Conduct be provided training on due process requirements, how evidence should be judged as supporting charges, and limits on the use of interim suspensions.

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: George W. Breslauer, Executive Vice Chancellor and Provost  
Harry Le Grande, Vice Chancellor, Student Affairs  
Prof. Dennis K. Lieu, Chair, Student Affairs Committee, Academic Senate  
Jonathan Poullard, Dean of Students