

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
94th General Assembly
Regular Session, 2023

As Engrossed: S3/9/23
A Bill

SENATE BILL 365

By: Senator Irvin
By: Representative Dalby

For An Act To Be Entitled

AN ACT TO CREATE THE ARKANSAS STUDENT DUE PROCESS AND PROTECTION ACT; TO ESTABLISH PROCEDURAL PROTECTIONS APPLICABLE TO STUDENT CONDUCT DISCIPLINARY PROCEEDINGS AT PUBLIC TWO-YEAR AND FOUR-YEAR INSTITUTIONS OF HIGHER EDUCATION; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE ARKANSAS STUDENT DUE PROCESS AND PROTECTION ACT; AND TO ESTABLISH PROCEDURAL PROTECTIONS FOR STUDENT CONDUCT DISCIPLINARY PROCEEDINGS AT PUBLIC TWO-YEAR AND FOUR-YEAR INSTITUTIONS OF HIGHER EDUCATION.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 6-60-109 is repealed.

~~6-60-109. Right to counsel.~~

~~(a) As used in this section, "disciplinary appeal proceeding" includes an appeal hearing or other appeal procedure conducted by the institution of higher education relating to the alleged violation by the student that has resulted in disciplinary action against the student.~~

~~(b)(1)(A) A student enrolled at a state-supported institution of higher education who has received a suspension of ten (10) or more days or expulsion may request a disciplinary appeal proceeding and choose to be~~



~~represented at the student's expense by a licensed attorney or, if the student prefers, a nonattorney advocate who, in either case, may fully participate during the disciplinary appeal proceeding used by the state-supported institution of higher education except as provided under subdivision (b)(2) of this section.~~

~~(B) If the disciplinary appeal proceeding used by the state-supported institution of higher education arises from a complaint by a student against another student, the student who filed the complaint also has the right to be represented as allowed under subdivision (b)(1)(A) of this section.~~

~~(2) A student shall not have the right to be represented under this section by a licensed attorney or nonattorney advocate in a disciplinary appeal proceeding used by the state-supported institution of higher education, if any, regarding any allegation of academic dishonesty as defined by the state-supported institution of higher education.~~

~~(c) This section does not create the right of a student to be represented at public expense.~~

SECTION 2. Arkansas Code Title 6, Chapter 60, is amended to add an additional subchapter to read as follows:

Subchapter 14 – Arkansas Student Due Process and Protection Act

6-60-1401. Title.

This act shall be known and may be cited as the "Arkansas Student Due Process and Protection Act".

6-60-1402. Legislative findings.

The General Assembly finds that:

(1) The United States Supreme Court held in "Goss v. Lopez", 419 U.S. 565, 574 (1975), that when a right is protected by the Due Process Clause, a state may not withdraw the right "on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred";

(2) The principle opined upon in "Goss v. Lopez" was reemphasized in "Doe v. Purdue University", 928 F.3d 652 (7th Cir. 2019), as authored by United States Supreme Court Associate Justice Amy Coney Barrett,

noting that "a hearing must be a real one, not a sham or pretense", and that "even in the disciplinary context, the process due depends on a number of factors, including the severity of the consequence and the level of education";

(3) The Eighth Circuit has opined in "Winegar v. Des Moines Indep. Community Sch. Dist.", 20 F.3d 895, 899-900 (8th Cir. 1994), that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner", which was originally declared by the United States Supreme Court in "Matthews v. Eldridge", 424 U.S. 319, 33 (1976);

(4) The Eighth Circuit has further asserted in "Esteban v. Central Missouri State College", 415 F.2d 1077, 1089 (8th Cir. 1969), that "procedural due process must be afforded by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures"; and

(5) It is necessary to statutorily guarantee fundamentally fair procedures that will ensure disciplinary proceedings at institutions of higher education carry out the necessary steps to ensure constitutionally required due process.

6-60-1403. Definitions.

As used in this subchapter:

(1) "Disciplinary proceeding" means a hearing, appeal, or investigatory interview conducted by an institution's administrator relating to an alleged serious violation of the code of student conduct;

(2)(A) "Fully participate" means the opportunity for an institution, a student complainant, a student respondent, or a student organization to be provided an opportunity to be present and advised by an attorney or non-attorney advocate.

(B)(i) "Fully participate" does not require an institution to use formal rules of evidence in a disciplinary proceeding.

(ii) However, an institution shall make good faith efforts to include relevant evidence and exclude evidence that is neither relevant nor probative;

(3) "Institution" means an Arkansas public two-year or four-year institution of higher education; and

(4)(A) "Serious violation" means a violation of a nonacademic rule under a student code of conduct that an institution's official determines, at the inception of the case, could result in a sanction of suspension or expulsion.

(B) "Serious violation" does not include an act of academic dishonesty.

6-60-1404. Procedural protections.

(a)(1) The procedural protections established by this subchapter shall apply only to a serious violation.

(2) An institution shall not impose a sanction of suspension or expulsion for a violation of a nonacademic rule under an institution's student code of conduct unless the procedural protections established by this subchapter are followed.

(b)(1) An institution shall maintain an administrative file of all disciplinary proceedings.

(2) The administrative file required under subdivision (a)(1) of this section shall include without limitation all documents and evidence in the institution's possession or control that is relevant to an alleged violation of the institution's code of student conduct and the institution's investigation into the alleged violation of the institution's code of student conduct, including without limitation:

(A) Exculpatory evidence;

(B) Statements by an accuser or an accused student or a student organization;

(C) Third-party witness statements;

(D) Electronically stored information;

(E) Written communications;

(F) Social media posts;

(G) Demonstrative evidence;

(H) Documents submitted by any participant involved in disciplinary proceedings; and

(I) The institution's choice of a video recording, an audio recording, or a transcript of any disciplinary hearing ultimately held on the matter.

(3) The administrative file required under subdivision (b)(1) of

this section shall not include privileged documents, internal communications, or communications from nonparties that the institution does not intend to introduce as evidence at a disciplinary proceeding.

(c)(1) A student who is accused of a serious violation and who is enrolled at an institution shall have the following disciplinary rights and be subject to the following procedures:

(A) The right to receive a copy of this subchapter at the inception of the disciplinary matter;

(B)(i) The right to be represented by:

(a) An attorney; or

(b) A non-attorney advocate if the student or student organization prefers.

(ii) An attorney or non-attorney advocate representing a student or student organization under subdivision (c)(1)(B)(i) of this section may fully participate during a disciplinary proceeding.

(iii) The right of a student or student organization to be represented by an attorney or non-attorney advocate under subdivision (c)(1)(B)(i) of this section applies until the conclusion of any institution appellate process.

(iv)(a) It shall be the student's or the student organization's responsibility to make arrangements for the use of an attorney or a non-attorney advocate as permitted under subdivision (c)(1)(B)(i) of this section.

(b) An institution shall not be responsible for providing, training, or paying for the services of an attorney or a non-attorney advocate;

(C)(i) The express presumption of innocence.

(ii) A student or student organization shall not be deemed guilty of a violation of the code of student conduct of an institution until:

(a) A student or student organization formally acknowledges responsibility for a violation of the code of student conduct;
or

(b) The conclusion of a disciplinary proceeding during which an institution has established every element of an alleged violation by the student or student organization;

(D) The right to have the opportunity for a live hearing, including the right to:

(i)(a) Be present at a disciplinary proceeding.

(b)(1) A student or student organization may waive the right to be present at a disciplinary proceeding.

(2) A waiver under subdivision

(c)(1)(D)(i)(b)(1) of this section shall be:

(A) Provided in writing by the student or student organization; and

(B) Signed by the student or student organization and the adjudicator of the disciplinary proceeding.

(3) A copy of the signed waiver required under subdivision (c)(1)(D)(i)(b)(2)(B) of this section shall be provided to the student or student organization and placed in the administrative file required under subdivision (b)(1) of this section.

(4) If a student or student organization waives the right to be present at a disciplinary proceeding under subdivision (c)(1)(D)(i)(b)(1) of this section, the student or student organization shall not have a right to appeal an institution's initial decision under subdivision (c)(1)(F) of this section;

(ii) Make an opening and closing statement;

(iii) Present relevant evidence; and

(iv) Cross-examine adverse witnesses through an attorney or non-attorney advocate, which the student is responsible for selecting and compensating;

(E) The right to be advised by an institution of the student's or student organization's rights under this subchapter:

(i) Before a disciplinary proceeding is scheduled;
and

(ii) At least twenty-four (24) hours before a student or student organization may be questioned by the institution or an agent of the institution regarding any allegation of a serious violation, provided that nothing in this subchapter restricts the ability of campus law enforcement to investigate a possible criminal violation;

(F)(i) The opportunity to appeal an institution's initial decision to an appellate entity that is an institutional employee or body

that did not make the initial decision finding the student or student organization to be in violation of the institution's non-academic or code of student conduct rules.

(ii) An appeal under subdivision (c)(1)(F)(i) of this section shall be filed within twenty-five (25) days after a student or student organization receives final notice of an institution's decision.

(iii)(a) An institution may designate the appellate entity as the final institutional authority.

(b) However, nothing in this subchapter precludes a court from granting a prevailing plaintiff equitable relief;

(G)(i) Reasonable continuing access to the administrative file required under subdivision (b)(1) of this section that pertains to the student's or student organization's alleged violation and the ability to review all evidence or documents in the administrative file beginning at least seven (7) business days before a disciplinary hearing, or sooner if otherwise specified by federal law.

(ii) However, individual portions of the administrative file shall be redacted if confidentiality of the evidence is required by law;

(H)(i) The right for a disciplinary proceeding to be carried out free from conflicts of interest by ensuring that there is no commingling of administrative or adjudicative roles.

(ii) An institution shall be considered to be commingling administrative or adjudicative rules if an individual carries out more than one (1) of the following roles with respect to the disciplinary proceeding:

(a) Attorney or non-attorney advocate for a complaining or accused student or student organization;

(b) Investigator;

(c) Adjudicator; or

(d) Appellate adjudicator.

(iii) It is not a conflict of interest under this subdivision (c)(1)(H) for the institution's investigator to simultaneously serve as the individual who presents evidence to an adjudicator; and

(I) The right of a student or student organization that makes a complaint against another student or student organization for

purposes of a disciplinary hearing to:

(i)(a) Be represented at the student's or student organization's own expense by an attorney or, if the complaining student or student organization prefers, a non-attorney advocate, who may fully participate during a disciplinary proceeding.

(b) The right of a student or student organization to be represented by an attorney or non-attorney advocate under subdivision (c)(1)(I)(i)(a) of this section applies until the conclusion of any institution appellate process;

(ii)(a) Have reasonable continuing access to the administrative file required under subdivision (b)(1) of this section that pertains to the student's or student organization's allegation and the ability to review all evidence or documents in the administrative file beginning at least seven (7) business days before a disciplinary hearing, or sooner if otherwise specified by federal law.

(b) However, individual portions of the administrative file required under subdivision (b)(1) of this section shall be redacted if confidentiality of the evidence is required by law; and

(iii)(a) Appeal an institution's decision following a disciplinary proceeding on grounds set forth in the institution's student code of conduct.

(b) An institution shall provide simultaneous notification to both the student or student organization that makes a complaint against another student or student organization and the student or student organization that is the subject of a complaint regarding the institution's procedures to appeal the result of a disciplinary hearing.

(2) The rights provided under subdivision (c)(1) of this section shall be included in each institution's code of student conduct.

(d)(1) At the conclusion of a disciplinary proceeding or an appeal that involves a serious violation, an institution's chancellor or vice chancellor of student affairs shall certify that the substantial rights of student complainants and respondents as established under this subchapter have been followed.

(2) The certification required under subdivision (d)(1) of this section shall be maintained in the administrative file required under subdivision (b)(1) of this section.

6-60-1405. Interim measures.

(a)(1) Nothing in this subchapter precludes an institution from providing at any time an individualized service to an accused student or an accusing student that is nondisciplinary, nonpunitive, reasonably available, and without fee or charge to the accused student or accusing student.

(2)(A) An individualized service offered to an accused student or accusing student under subdivision (a)(1) of this section shall be designed to restore or preserve equal access to the institution's education programs or activities without unreasonably burdening the other party.

(B) An individualized service offered to an accused student or accusing student under subdivision (a)(1) of this section may be designed to protect the safety of all involved parties or the institution's educational environment, which may include without limitation:

(i) Counseling;

(ii) Extensions of deadlines or other course-related adjustments;

(iii) Campus escort services;

(iv) Mutual restrictions on contact between the involved parties;

(v) Modifications of class schedules or housing locations;

(vi) Increased security and monitoring of certain areas of the institution's campus; and

(vii) Other similar services.

(b)(1) An institution may remove an accused student from the institution's programs or activities on an emergency basis if the institution:

(A) Undertakes an individualized safety and risk analysis;

(B) Determines that an immediate threat or the safety of a student or another individual arising from the allegations of misconduct justifies removal of the accused student; and

(C) Provides the accused student with notice and an opportunity to challenge the decision immediately following his or her removal.

(2) An institution that removes an accused student on an

emergency basis under subdivision (b)(1) of this section shall:

(A) Within twenty-four (24) hours of an institution removing an accused student on an emergency basis, provide written notice to the accused student that explains the institution's reasons for removing the accused student on an emergency basis;

(B)(i) Within three (3) business days of the written notice required by subdivision (b)(2)(A) of this section, unless otherwise waived by the removed accused student, convene an interim hearing to determine whether there is substantial evidence that the removed accused student poses a risk to the health or safety of any student or other individual and that the emergency removal of the accused student is appropriate to mitigate that risk.

(ii)(a) At an interim hearing, the removed accused student and the accusing student may be represented by an attorney or a non-attorney advocate who may fully participate to the same extent as in a final hearing to determine responsibility.

(b) An accused student's waiver of his or her right to be represented by an attorney or a non-attorney advocate under subdivision (b)(2)(B)(ii)(a) of this section shall not constitute an admission of guilt or a waiver of additional rights under this subchapter.

6-60-1406. Cause of action.

(a) If a student or student organization's rights under this subchapter have been violated, the student or student organization may file a claim with the Arkansas State Claims Commission to recover:

(1) Compensatory damages;

(2) Attorney's fees;

(3) Expert witness fees; and

(4) Monetary damages consisting of any financial losses, such as lost scholarship funds or unnecessary tuition payments, proximately caused by a substantial violation of this subchapter.

(b) Any error, defect, irregularity, or variance that does not affect a student's or student organization's substantial rights under this subchapter shall be not be considered.

6-60-1407. Statute of limitations.

(a)(1) A student or student organization shall bring suit for a violation of this subchapter not later than one (1) year after the day the cause of action occurred.

(2) For purposes of calculating the one-year limitation period, the cause of action shall be deemed accrued on the date that the student or student organization receives final notice of discipline from an institution.

(b) This subchapter shall apply to disciplinary proceedings beginning on or after its effective date.

/s/Irvin