

# Do Process Don't's

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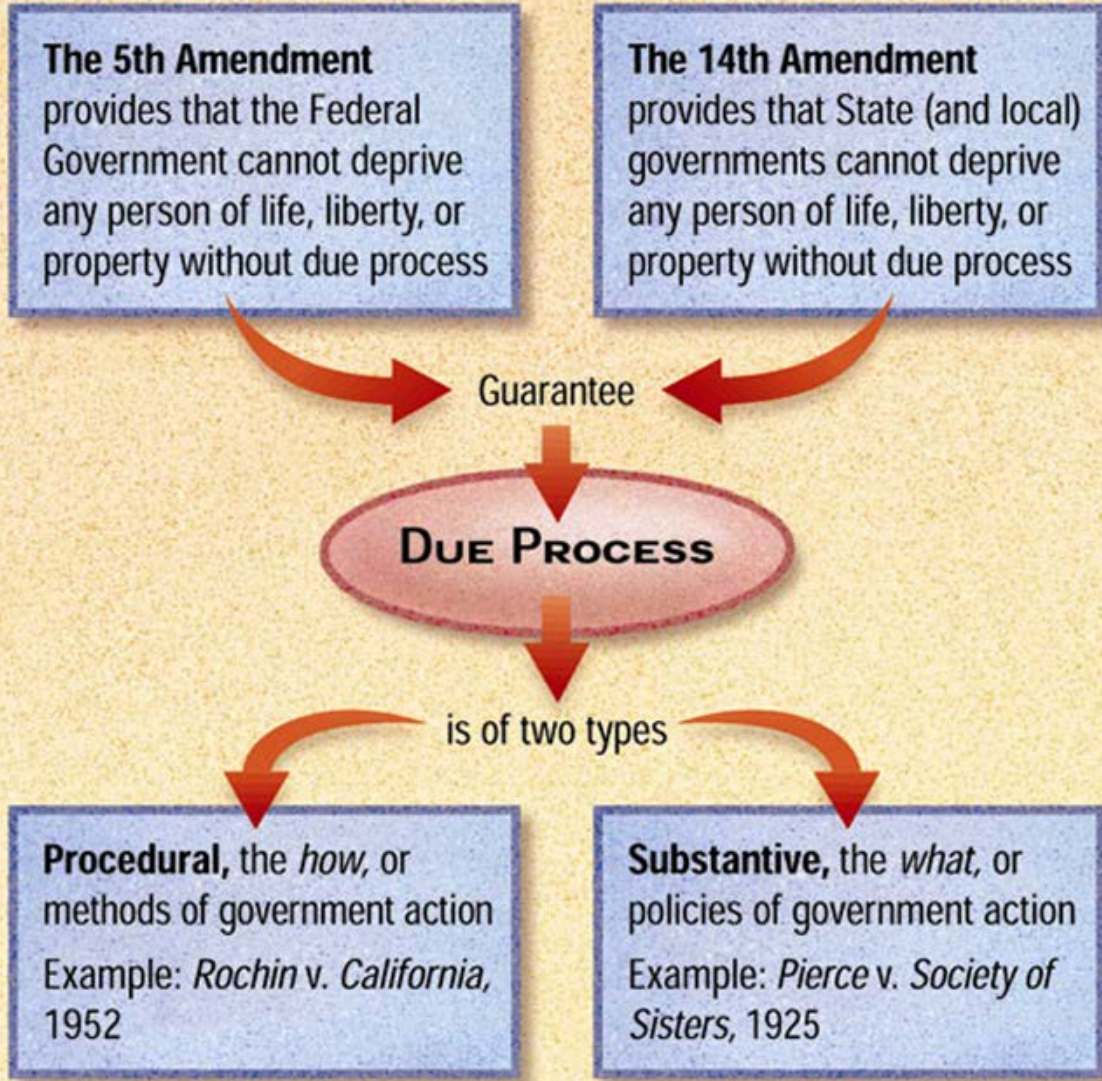


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# Due Process



# The 5th and 14th Amendments

- The 5th Amendment provides that “no person ... shall be deprived of life, liberty, or property without due process of law...”.
- The 14th Amendment extends that restriction to State and local governments.
- Due process means that the government must act fairly and in accord with established rules at all times.

# Types of Due Process

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- Substantive due process—the fairness of the laws themselves
- Procedural due process—the fairness of the procedures used to enforce the laws

# Procedural Due Process

- Same base as substantive
- Goes back to the Magna Carta
- Two basic tenets in procedural:
  - Rule against bias
  - Right to some sort of hearing

# Substantive Due Process

- Originally designed for courts
- In 1961 (Dixon) applied to schools or quasi-judicial proceedings
- Provides for fundamental fairness and opportunity for each side to present its case
- Many court cases revolve around this issue

# So when do schools have to provide “due process”

## ■ Students

- Curricular Discipline
- Extracurricular Discipline

## ■ Staff

- Probationary staff
- Tenured staff
- Classified staff

## • Patrons

- Sex Offender
- Policy on being placed on agenda

# Students: Curricular Discipline

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"I wouldn't say I'm guilty, but I do feel a little bad."



# Goss v. Lopez

## (U.S. 1975)

- Nine students were suspended from Columbus schools for food fight over Vietnam War
- State law allowed suspension of up to 10 days or expulsion
- If expulsion, students could appeal
- No appeal or formal hearing for suspension

# Goss v. Lopez

(U.S. 1975)

- Court ruled that there was a constitutional right to an education
- That right could not be taken away without due process
- The right to procedural due process was inherently involved when fundamental rights are removed

# McClain v. Lafayette County

(5<sup>th</sup> Cir. 1982)

- PE teacher saw a switchblade knife on a student and reported him to the office
- Principal took the knife, sent him to class, and required parent conference next day
- Informed parent that the boy was suspended indefinitely
- Board appeal

# McClain v. Lafayette County

(5<sup>th</sup> Cir. 1982)

- Parent attended the (9) Board meeting and told her side, questioned witnesses, and was told the boy was suspended for the rest of the year
- Parent sued for relief
- Indefinite suspension prior to hearing

# McClain v. Lafayette County

(5<sup>th</sup> Cir. 1982)

- Parents' lawyer quoted *Goss v. Lopez*
- Contended that long-term suspension required a hearing
- Court
  - Michael was given an opportunity to tell his side and confront witnesses
  - Due process is "a flexible concept"

# Student Handbook

**Due Process:** In the event of a violation of the rules and regulations that govern all participants, any action taken by the school will be taken in such a manner as to guarantee due process to the student or students who have allegedly committed a violation. The procedure to be followed in order to guarantee due process is summarized below.

*no Due process*

- 1) **Investigation** In the event of an alleged infraction, the principal shall investigate the alleged infraction.
- \* 2) **Pre-decision Hearing** If the investigation discloses the probability of an infraction, an informal hearing will be held by the administration. Written or oral notice will be given the student. The notice will contain a brief description of the alleged infraction and the charges to which the student must answer. The student will be given an opportunity to tell his/her side of the story. Witnesses may be called to testify, and the student will be given an opportunity to call witnesses on his/her behalf and are allowed counsel if they so desire.
- 3) **Facts** A statement of findings of facts from the informal hearing will be compiled by the administrator. The student and parent/guardian will be provided a copy.
- 4) **Decision** The administrator shall make a decision on the case and inform the student and parent/guardian. The decision will be accompanied with a written statement detailing the decision.
- \* 5) **Right to Appeal** If the student and parent/guardian are not satisfied with the finding of the

# Student Discipline

- The 2 worst words in any student discipline policy: “Due Process”
- Any references to “hearing” or “due process” must track the Student Discipline Act
- *Do not* create your own “system” or “process” for addressing discipline
- Avoid things like “3 strike” rules and standard consequences

# Students: Extracurricular Discipline

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"Unfortunately, while everything was done to the letter of the law, we forgot to spellcheck."



# Braesch v. DePasquale

## (Neb. 1978)

- Members of the Arlington basketball team attended “beer party”
- Coaches found out; told principal
- Principal met with kids and parents, students admitted
- Expelled from the team
- Told they could appeal to the board
- Instead sued and won an injunction

# Braesch v. DePasquale

## (Neb. 1978)

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- Court: “participation in . . . athletics ordinarily has significantly less important constitutional dimensions than does participation in . . . academic education. A student’s interest in participation in high school athletics is nevertheless a significant one.”
- Court: Families chose not to appeal to board

# French v. Cornwall

(Neb. 1979)

- 15 year West Point student “cited for intoxication”
- Dad reported to wrestling coach
- Principal met with student and dad, student admitted to drinking suspended from wrestling for 6 weeks
- Student sued citing *Braesch v. DePasquale*

# French v. Cornwall

(Neb. 1979)

- Court: if “rudimentary requirements of *Goss v. Lopez*” are enough to impose academic suspension, they “would certainly be more than sufficient” for sports
- Court: when the “acts . . . are admitted, the requirements of due process are far less stringent.”

**Activity Eligibility:** (Will be governed by the following rules and regulations after due process is allowed the student.)

The staff may take action regarding behavior, other than those specifically provided hereafter, which are reasonable and necessary to aid the student in the activity, further school purposes, or prevent interference with the educational process. Such corrective measures may include, but shall not be limited to the following: counseling of student, parent conferences, requirement of increased workout by student, or restriction of extra-curricular activities.

**1. ALCOHOLIC BEVERAGES, DRUG ABUSE**

Students participating in activities shall refrain from the following at all times:

- (a) Possession of, or indulging in the consumption of alcoholic beverages.
- (b) Unlawful possession and misuse of a controlled substance (drug abuse).

**2. TOBACCO**

Students, while participating in activities, shall refrain from having in their possession tobacco of any kind. This includes smoking tobacco, chewing tobacco, and electronic cigarettes to include any alternative nicotine products or vapor products.

Policy Steps: Once the infraction has been observed or documentation submitted the following steps shall be taken.

1. The appropriate activity sponsor and/or activities director shall discuss with the named or observed student in an attempt to determine the validity of the accusation. The sponsor and/or activities director may administer the punishment. If both the coach/sponsor and the activities director determines there is insufficient evidence to administer punishment further action may be terminated. If the activities director is also the sponsor of the activity, the chairman of the committee shall be the second. If the student elects to appeal, the accusation shall be forwarded to the committee for their consideration. (The make-up and duties of the committee are defined below.)
2. A committee consisting of five certified staff members will review the allegation and reject or propose the need for disciplinary action to be taken.
  - i. Five(5) certified staff members of District #5. These members are to be selected by the total certified staff. A chairman will be appointed from the committee.
  - ii. Five alternates are to be selected to serve in case of absence of "conflict of interest" by one or more of the members of the committee.
  - iii. The committee will "hear the evidence" as well as give the student(s) and/or the parent(s) or guardian(s) an opportunity to present "their side of the story".
  - iv. A secret ballot shall be taken, with a majority vote determining the verdict.
  - v. During the school year, every effort will be made for this committee to meet within three school days of a reported infraction.
  - vi. During the summer months (when school is out in session) every effort shall be made to hear the case within ten days.
  - vii. At least three committee members must be present in order to have a quorum.

# Extracurricular Discipline

- Avoid setting up complicated systems, panels, appeals and the like
- *Goss v. Lopez* is sufficient
- Consider one level of appeal (we like to superintendent)
- Avoid things like "3 strike" rules and standard consequences

# Staff



**"I'm fluent in several languages. I speak schmooze, spin, evasion, bull, and old fashioned common sense."**



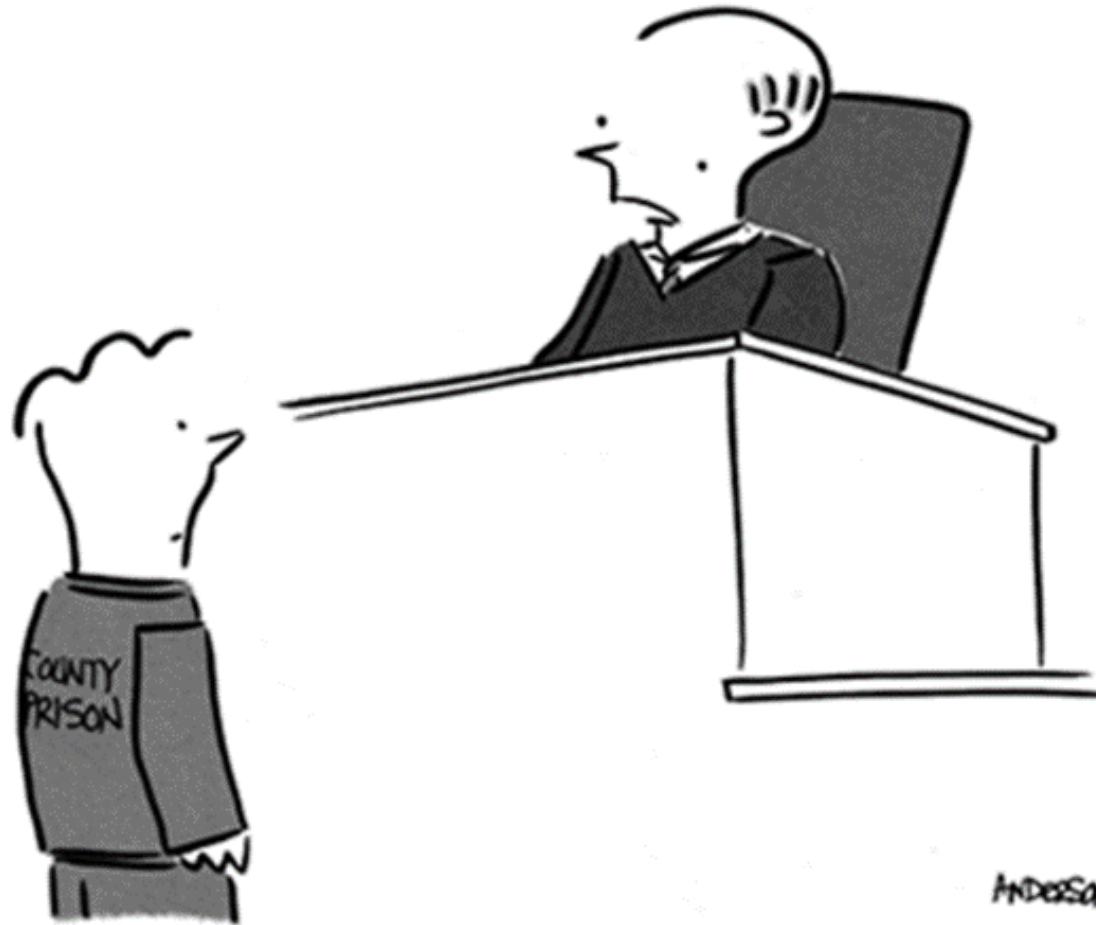
# Staff: Certificated

- Certificated staff governed by statute
  - Reprimand
  - Nonrenewal
  - Termination
  - Cancellation
- DON'T EVEN THINK ABOUT TRYING TO WRITE A POLICY THAT RESTATES THESE STATUTES

# Staff: Classified

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"I understand it was cathartic, but it was also arson."

# Loudermill v. Cleveland Board of Ed. (U.S. 1985)

- Security guard stated on application that he had never been convicted of a felony
- 11 months later Board discovered grand larceny conviction from 1968
- Dismissed for dishonesty in employment application
- Not afforded an opportunity to respond to the charge or to challenge his dismissal

# Loudermill v. Cleveland Board of Ed. (U.S. 1985)

- Appealed claiming denial of due process
- Supreme Court: "some kind of a hearing" required prior to the discharge of an employee who has a property interest in his employment
- Requires only notice of the charges, an explanation of the employer's evidence, and an opportunity to present his side of the story

# Board Policy on Suspension

## SUPPORT STAFF SUSPENSION

Support staff shall perform their assigned jobs, respect and follow board policy and obey the law. The superintendent is authorized to suspend a support staff member with or without pay pending board action on a discharge or during investigation of charges against the employee or for disciplinary purposes. It shall be within the discretion of the superintendent to suspend a support staff member with or without pay.

In the event of a suspension, due process will be followed.

# Board Policy on Dismissal

## SUPPORT STAFF DISMISSAL

The board believes classified employees should perform their jobs, respect board policy and obey the law. A support staff member may be dismissed upon thirty days notice or immediately for cause. Due process|procedures shall be followed.

It shall be the responsibility of the superintendent to make a recommendation for dismissal to the board. A support staff member may be dismissed for any reason, including, but not limited to, incompetence, willful neglect of duty, reduction-in-force, willful violation of board policy or administrative regulations, or a violation of the law.

# Classified Staff

- The 2 worst words in any classified staff policy: “Due Process”
- Your policy should state “at will”
- No right to a formal “hearing” or “appeal”
- Cover terms, leaves, conditions in contracts (and handbooks, but only if done properly)
- The “pick a horse and ride it” theory: stick to nondiscriminatory reasons for termination
- Do not require or guarantee “2 weeks notice”

SIX MONTHS OLD AND  
I STILL HAVEN'T BEEN  
SUED OR AUDITED.  
LIFE IS GOOD!



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