

January 25, 2010

Christine Wildsoet, Chair
Hearing Panel
c/o 588 Minor Hall
University of California
Berkeley, CA 94720

by email (wildsoet@berkeley.edu)

**RE: ZACHARY BOWIN'S REQUEST FOR RECONSIDERATION OF
TERMS OF INTERIM SUSPENSION AND DISMISSAL OF STUDENT
CONDUCT CHARGES**

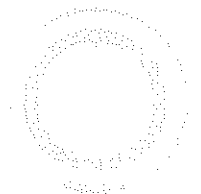
Dear Professor Wildsoet:

Zachary Bowin, an undergraduate student suspended on an interim basis (Campus Code of Student Conduct §VI-105.08) by the Vice Chancellor for Student Affairs, on the evening of the first day of finals week last semester, requests a reconsideration of your hearing decision dated December 18, 2009. Although the hearing panel¹ substantially modified the suspension, Mr. Bowin requests that you lift the two remaining restrictions on campus access and activities. We also renew the request to dismiss all pending conduct charges.²

To date, the University has been unable to produce admissible evidence of a Code violation capable of meeting its burden of proof. You will recall that you presided over a *huis clos* hearing on December 17, at which I appeared on behalf of the

¹ Also serving on the Hearing Panel were Haas School Student Advocate H. Faye Lawson and UC, Berkeley undergraduate student Chen Ling.

² Mr. Bowin has been charged with the following violations of the Campus Code (section V): §§102.04 (Theft); 102.06 (Unauthorized Conduct); 102.08 (Physical Abuse); 102.14 (Disorderly Conduct); 102.15 (Disturbing the Peace); 102.16 (Failure to Comply); 102.19 (Destructive Devices); 102.25 (Other Policies or Regulations). Notice of Interim Suspension dated Dec. 12, 2009 (Notice), at p.1. These are identical to the charges issued against all four University of California (Berkeley and Davis) students who were served interim suspension notices.



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accused student, with severe limitations on my ability to counsel,³ and Mr. Bowin was allowed to have only one of his parents attend as an observer. The University's sole evidence produced to date is a media statement prepared by the campus News Center (http://www.berkeley.edu/news/media/releases/2009/12/12_uhouse.shtml) in which Mr. Bowin was named as one of eight arrestees from an estimated crowd of 66 persons assembled outside University House on the evening of December 11. An "Editor's Note" was added to the News Center website just last Friday, January 22, which reads in part:

*"For the time being, the Alameda County district attorney is declining to press charges against any of the individuals arrested to date in connection with the Dec. 11 attack on the chancellor's residence. A spokesperson for the district attorney's office has cited a lack of sufficient evidence, while noting that the UC Police Department investigation continues."*⁴

The Remaining Restrictions are Arbitrary and Inhibit Free Inquiry and Expression.

The hearing panel lifted the ban on contact with members of the University community and access to the campus except that:

1. "student activities on campus [must] be limited to academically related ones; the panel agreed to accommodate collegial activities among friends in the definition of academic student activities but not organized protest meetings" and
2. "initial restrictions on access to the campus were reduced to preclude [emergency] area 1, with Hearst Street added as an artificial northern boundary, and area 5, with

³ I have been retained by Mr. Bowin as his *pro bono* attorney, which I consider a part of my University community service. I am also authorized to act as his "advisor" as that term is used in the Campus Code of Student Conduct (Code).

⁴ http://www.berkeley.edu/news/media/releases/2009/12/12_uhouse.shtml [emphasis added]. The Editor's Note continues: "According to UCPD Captain Margo Bennett, the inquiry remains a 'high priority' as officers work to develop additional information regarding who, exactly, was responsible for the various criminal actions." *Id.*

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Oxford and Hearst Streets added as northern and western boundaries.”

As to the latter restriction, you wrote: “It was recognized that these restrictions might need to be reviewed, should your case not be resolved before the start of the Spring semester, and classes were scheduled in buildings within these exclusion zones.”

In fact, three of Mr. Bowin’s classes were scheduled to be held in the oddly-configured⁵ exclusion zone. Furthermore, he had anticipated joining a CalSO training class, but has been heavily questioned by the program’s director about the pending charges. In an email of January 21, she wrote: “You are still a CalSO counselor-in-training, will attend class, and will participate in CalSO sponsored activities. Depending on the outcome of your hearing with the student conduct office, I will re-visit your status and discuss it with you.” Finally, the ban on “protest meetings” interferes with Mr. Bowin’s freedom of speech and association.

Section 311 of the Campus Regulations Concerning the Time, Place, and Manner of Public Expression states:

“The University has a special obligation to protect free inquiry and free expression. On University grounds open to the public generally, all persons may exercise the constitutionally protected rights of free expression, speech and assembly. Such activities must not, however, interfere with the right of the University to conduct its affairs in an orderly manner and to maintain its property, nor may they interfere with the University's obligation to protect the rights of all to teach, study, and freely exchange ideas....”
(<http://students.berkeley.edu/uga/regs.stm>).

⁵ The zone, shaped like the State of Idaho, bears no obvious relationship to campus safety, public order or to the underlying charges.

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See also, UC, Berkeley Police Dep't, Safety Counts (09-10) at p. 47 (campus has "tradition of being an open forum for the expression of political and social ideas" and recognized right "to engage in constitutionally protected free speech and public assembly...in a reasonable and responsible manner.").

The regulations were evoked at the outset of Spring Semester in a joint communiqué issued last week by the Chancellor, Provost and Academic Senate Chair and Vice Chair, reminding the campus community that we now "embark on a season of renewed discussion and debate concerning the path forward for Berkeley and higher education." While their message was largely about adhering to campus regulations on time, manner and place, they nonetheless acknowledged that discussion and debate about the fiscal crisis and the direction of UC will continue, amongst other important topics of the day. (Email of Jan. 20, 2010).

The Hearing Panel's Findings are Based on Evidence which is Insubstantial and Not Relevant to Whether a Student Poses a Threat to Campus Health, Safety or Order.

During the hearing, you stated that its purpose was not to adjudicate the underlying conduct charges but to address the matter of the interim suspension. Despite being pressed to articulate the standard for review, you and your fellow panelists received uncorroborated hearsay evidence and elicited unsworn testimony, most of which was irrelevant to the only question properly before the hearing panel:

Whether, if "restricted only to the minimum extent necessary," this student's "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...or other disruptive activity incompatible with the orderly operation of the campus" pending a hearing on the underlying Code charges.
Code, § VI-105.08.⁶

⁶ I had requested from Dean Susan Trageser, in advance of the hearing, the written procedures, guidelines or other written authority governing hearings for interim suspensions, including: (1) standards for review and burden of proof; (2) hearing procedures; and (3) provisions for the

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The University failed to bear its burden of proof on the above question. Moreover, your written decision was not based upon the preponderance of the evidence and the findings of fact do not support your conclusion of continued restrictions on Mr. Bowin's physical access and his right to engage in First Amendment activities. *Policy on Student Conduct and Discipline* §103.11 (rev. Oct. 20, 2008), UC POLICIES (<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc100.html>).

Rather than consider issues relevant to the need for exclusion from campus, and notwithstanding your own assertion to the contrary, the panel attempted to adjudicate Mr. Bowin's alleged involvement in a campus disturbance on the basis of the above conduct allegations. You write of his "reluctance to share information about the [December 11] events" or "how and why [he] joined" a peaceful protest march that night. Decision at p.1. The panelists displayed little understanding of the Code's explicit "presum[ption] that a student charged with a violation of the Conduct Code is not responsible for such violations unless it is proven otherwise or the student admits responsibility." § I-B.

You write that a UCPD detective "was available to give an account of events outside the Chancellor's residence" but that Mr. Bowin "had not anticipated being able to bring [his] own witnesses." *Id.* There was no reason for this student to present witnesses about any alleged conduct or misconduct on December 11, as the panel's charge was to consider whether there was *reasonable cause* to believe he would be a threat to anyone's safety pending a hearing, and if so, how should his campus access be "*restricted only to the minimum extent necessary.*" § VI-105.08 [emphasis added].

Your decision to modify the terms of the suspension seems based entirely on this student's 4.0 GPA and "many worthy contributions to campus life..." While Mr. Bowin appreciates the "high praise" and recognition of his "excellent student record," the submission of his résumé and scholastic achievements was intended in large part to demonstrate his desire to complete his exams and term paper, and to attend his Spring Semester classes and engage in other intellectual and collegiate pursuits on this campus.

suspension of due process protections or evidentiary rules. Ltr. of Dec. 16, 2009. She simply referred me back to the text of the Code of Conduct.

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Students Subject to University Discipline Enjoy Basic Constitutional Rights Under State and Federal Law.

The UC *Policy on Student Conduct and Discipline* makes plain that “[p]rocedural due process is basic to the proper enforcement of University policies and campus regulations.... Consistent with this requirement, procedures specified in such regulations shall be appropriate to the nature of the case and the severity of the potential discipline.” *Supra*, §103.11.

This policy is not created from whole cloth. Under longstanding California jurisprudence, rules governing disciplinary hearings at public universities are subject to Constitutional due process restrictions. *Goldberg v. Regents of Univ. of Cal.* (1967) 248 Cal. App. 2d 867, 875 (holding that “the University's rule-making powers and its relationship with its students are subject to federal constitutional guarantees.”). The elements of due process include: “(1) notice containing a statement of specific charges against him, the names of witnesses and a statement of the gist of their proposed testimony, and (2) a hearing, the scope and nature of which should vary according to the circumstances of the particular case.” *Andersen v. Regents of Univ. of Cal.* (1972) 22 Cal. App. 3d 763, 772.

Also contained in the Constitutional right to a hearing at public universities is the requirement of fairness. Under this basic requirement, the student should not be punished unless: “(1) the student [is] advised of the charges against him; (2) he [is] informed of the nature of the evidence against him; (3) he [is] given an opportunity to be heard in his own defense; and (4) he [is] not . . . punished *except on the basis of substantial evidence.*” *Keene v. Rodgers* (D. Me. 1970) 316 F. Supp. 217, 221 (quoting Wright, *The Constitution on the Campus*, 22 *Vand. L. Rev.* 1021, 1071-1072 (1969) [emphasis added]).

The Right to Counsel is Denied when an Attorney May Only Speak at the Panel's Discretion.

While permitted to bring an “advisor” to the closed-door hearing, Mr. Bowin was denied the right to counsel. Although the University has no duty to provide a

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lawyer, it cannot restrict the student's right to counsel.⁷ *Andersen v. Regents of Univ. of Cal.*, *supra* at 773. The *Andersen* court did not even come close to contemplating a procedural rule that would prevent a student from retaining the full and vigorous advocacy of an attorney. Mr. Bowin, however, was forced to enter a proceeding that prevented him from having fully active and participatory counsel.⁸ In the end, my participation was at the whim of the hearing panel—and you, with ample coaching from Center for Student Conduct Director Trageser, eventually ejected me from the hearing.⁹

The Campus Disciplinary Process Lacks Other Procedural Safeguards.

Under the terms of the Code, an interim suspension must be “reviewed by the Chancellor within twenty-four hours...” §VI-105.08. Mr. Bowin was further advised that he could “place a statement in the record for the Chancellor’s consideration...” by mailing it “immediately” to the Center for Student Conduct. Notice, at p.3. However, no evidence has been offered of the Chancellor’s recusal and delegation of authority, much less any indication of considered review, all of which took place prior to actual service of the Notice.¹⁰

⁷ See discussion below on the impact of the banning order on Mr. Bowin’s access to counsel.

⁸ “*Students must speak on their own behalf* but may be accompanied by one advisor at any stage of the proceedings, at his or her own expense....In a formal hearing, the student may consult with his or her advisor throughout the proceedings, however, *advisors may only participate directly if the hearing panel, in its discretion, believes such participation would benefit the proceedings.* The extent of such participation will be determined by the hearing panel.” Code§ I-F [emphasis added].

⁹ When I later attempted to reenter the waiting room to see Mr. Bowin, while the panel was deliberating in the hearing chamber, the two UCPD officers stationed outside the locked facility received instructions not to let me in.

¹⁰ Despite earlier requests for production, Ms. Trageser did not provide any evidence until the day of the hearing—and only then when requested by the student himself. The cursory statement, signed by the Provost and dated Saturday, December 12, 2009 at 2:15 p.m. (*not* on letterhead), simply reads: “I have reviewed the case of Mr. Zachary Bowin and concur with your decision to proceed with interim suspension of this student.” As Mr. Bowin did not actually receive the Notice of Interim Suspension until it was emailed to him two days later by Ms. Trageser, after business hours, the offer to submit a statement was meaningless and remains unfulfilled.

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The Notice must also state “the duration of the Interim Suspension.” *Id.* Moreover, the Notice of Charges must contain “a brief explanation of the facts supporting the charge(s)”¹¹ and “a [t]imeline for the disciplinary process.” §I-A.¹² The Vice Chancellor’s Notice contains neither a timeline, nor an explanation of the timeline or overview, nor duration of the suspension, much less a date for hearing the underlying charges.

Finally, in a January 15 email message, Ms. Trageser writes (more than one month after the suspension hearing): “At this time I am still gathering information regarding the incident that occurred and the allegations of violation of the Code of Student Conduct stand.” If the investigation is incomplete, then the charges should never have been issued and must be dropped. Code, § II-B(1)(charges not pursued if insufficient evidence; written notification issued in lieu of charges).¹³

¹¹ The explanation of facts in Mr. Bowin’s letter simply reads—as it does for all four of the charged UC students: “This action is imposed based upon complaints received by this office. *For example*, on December 11, 2009 you participated in a disturbance of the peace at University House that included actions of property damage, attempted arson, attempted burglary, threats, and assault.” Notice at p.1 [emphasis added]. It is unclear why the sentence begins with “For example,” as requests for production of additional evidence or “supporting evidentiary material” have yielded nothing more about December 11 or other incidents.

¹² In a disservice to students in what the Center deems “an educational process,” the website version of the Campus Code—to which an accused student is referred in the Notice of Suspension—had directed the reader to “Click here for a Timeline for the disciplinary process” only to discover the link leads back to the Campus Life and Leadership home page. §1-A. It appears that the website was redesigned over this past weekend. In lieu of the old format, the entire Code now appears as a PDF document. The last sentence in §1-A now reads: “See *Notice of Charges*, page 7 and the *Overview of the conduct process in Appendix III*” (italics in original). The timeline and “overview” still remain a mystery to the uninitiated, as Appendix III is nowhere to be found in the PDF document or on the new website (<http://studentconduct.berkeley.edu>). In a further affront to transparency, it appears that the timeline for case resolution was suspended altogether by the Center, effective August 28, 2009. *See infra* note 13.

¹³ For example, students accused of blocking Wheeler Hall access and egress last November were typically issued a “Notice of Possible Violation of Code of Student Conduct” informing them that an investigation was in process, based on a report or complaint. Students were invited to make an appointment with the Center to “review possible options for resolving this matter.” *See, e.g.*, Ltr. to K.G. (Dec. 5, 2009). Unlike the letter to Mr. Bowin, this version advises students that the timeline

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The University Cannot Restrict Access to an Advisor Through its Banning Order.

The Interim Suspension's prohibition on campus access and physical or electronic communication with *any* faculty, staff or students¹⁴ is reminiscent of the banning orders favored by the discredited *Nasionale Party*-dominated *apartheid* regime in South Africa. The ban is well beyond "the minimum extent necessary" and its overbreadth is well within the grasp of any primary school-educated layperson. It therefore warrants little discussion here, except to note that the University's broad restriction on the exercise of Constitutional rights cannot be lightly imposed.

In *Eisen v. Regents of the Univ. of Cal.*, (1969) 269 Cal.App.2d 696, the California Court of Appeal reiterated that under state and federal case law "the alleged impairment of constitutional rights" flowing from a University policy can only be justified when outweighed by "a sufficient state interest." *Id.* at 700 (citing *Canon v. Justice Court* (1964) 61 Cal.2d 446, 456). The court went on to say that where narrower means are available, the University cannot infringe on the freedom of assembly and association unless necessary to achieve an "overriding and compelling" governmental purpose. *Id.* at 701 (citing *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449 and *Bates v. Little Rock* (1960) 361 U.S. 516); 702 (citing *Shelton v. Tucker* (1960) 64 U.S. 479, 489); 706. In Mr. Bowin's case, the interim suspension restrictions on his associational and free speech rights left in place by your decision are not outweighed by any overriding and compelling University purpose. If indeed he poses any danger at all, the campus administration has narrower means at its disposal to guard against that danger.

for case resolution has been suspended through August 2010 and that copies of the Code could be obtained at the Center, and not simply on-line. *Id.*

¹⁴ Indeed, his ability to contact me or his fellow student advocates last semester was explicitly prohibited by the overly broad terms of the Vice Chancellor's Notice.

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The Hearing Panel Has Jurisdiction to Consider a Rehearing Request When a Student's Constitutional Rights Were Not Protected at a Prior Hearing.

In an email message of January 15, 2010, Center Director Susan Trageser writes, without citing any authority: "There are no appeals or other hearings [following an initial hearing] allowed under the Code of Student Conduct to review the interim suspension."¹⁵ Ms. Trageser is correct when she states that there is no legally required *appeal* of the interim suspension if it is imposed following a hearing where the student's Constitutional due process rights were satisfied. *Winnick v. Manning* (2d Cir. 1972) 460 F.2d 545, 549 n.5. However, as discussed above, Mr. Bowin's due process rights were not only left unsatisfied, they were completely disregarded.¹⁶ The result is that he never had an adequate hearing, and the University is bound to provide one. We therefore do not request an appeal, we request a hearing that satisfies the basic notions of due process underlying our system of law and codified in the California and United States Constitutions.

As we begin the second week of Spring Semester, Mr. Bowin is inexplicably banned—for an indefinite period—from certain campus buildings and from non-

¹⁵ Ms. Trageser had also informed me that notwithstanding the many references in the Code of Conduct, her office does not engage in informal resolutions for *interim suspensions*. Alternative dispute resolution is a fixture of virtually every American judicial and quasi-judicial entity and the Center for Student Conduct should be no exception. *See, e.g., Code, General Overview* ("Most often, claims are resolved informally through discussions with Student Conduct and Community Standards staff"); §I-D ("Students charged with violations of the Code are encouraged to fully explore informal resolution of their case"); §VII –C ("Whenever it is possible and reasonable to do so, student conduct cases will be handled in an informal manner that encourages students to learn from their experiences and be positive contributors to the community"). In the January 2010 Code revisions, additional options for informal resolution have been added, *viz.*, mediation, peer review boards and restorative processes. §II-C(1)(b). The University's refusal to attempt to resolve this prior to a finals week hearing not only resulted in wasted resources, but compounded the obstacles this student faced in sitting for his exams and submitting a term paper. This calls into question the Code's "commit[ment] to a policy whereby reasonable efforts are taken to assist an individual who has been disadvantaged with respect to...academic status." VI-105.08.

¹⁶ Temporary or emergency suspensions also require procedural safeguards. *Goss v. Lopez* (1975) 419 U.S. 565, 581-84 (holding that even short-term suspensions must be accorded basic due process).

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“academic” and non-“collegial” activities such as “organized protest meetings.” No date has been set for a hearing on the underlying charges and whatever timeline does or *did* exist has been suspended. Lastly, the Center’s Director says she will continue to “gather[] information.” This is not a restriction to the minimum extent necessary, nor is it founded on any reasonable cause that he poses a threat to campus safety or order. In fact, it makes a mockery of the Code of Conduct’s *raison d’être*: to encourage personal and intellectual growth of a community of scholars within a civil and educational setting.¹⁷

Zachary Bowin requests the immediate lifting of the interim suspension and dismissal of all campus conduct charges or, in the alternative, a prompt rehearing.

Respectfully submitted,



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¹⁷ “The University of California at Berkeley is a community of scholars committed to maintaining an environment that encourages personal and intellectual growth....with high standards and high expectations for those who choose to become a part of it, including established rules of conduct intended to foster behaviors that are consistent with a civil and educational setting.” Code, *General Overview*.