

January 19, 2010

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

by email (wildsoet@berkeley.edu)

**RE: ANGELA MILLER'S REQUEST FOR RECONSIDERATION OF
INTERIM SUSPENSION AND DISMISSAL OF STUDENT CONDUCT
CHARGES**

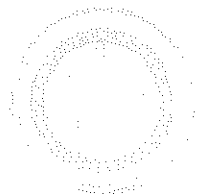
Dear Professor Wildsoet:

Angela Miller, an undergraduate student who was served a Notice of Interim Suspension (Campus Code of Student Conduct §VI-105.08) towards the end of last semester from the Vice Chancellor for Student Affairs, requests a reconsideration of the decision you wrote dated Jan. 15, 2010 upholding the suspension. She also requests dismissal of all pending conduct charges¹ unless the University is able to produce admissible evidence of a Code violation, capable of meeting its burden of proof, beyond what was offered at the *huis clos* hearing held on January 13, 2010.

During the January 13 hearing over which you presided, and where Ms. Miller appeared without counsel,² you accepted and relied on uncorroborated hearsay

¹ Ms. Miller 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.

² I have since been retained by Ms. Miller as her *pro bono* attorney, which I consider a part of my University community service. I am also authorized to act as her "advisor" for purposes of the Campus Code of Student Conduct (Code). Although not required for purposes of this communi-



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evidence and unsworn testimony, most of which was irrelevant to the question 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

The University failed to bear its burden of proof on the above question. While your written decision was expeditious, it is not based upon the preponderance of admissible evidence and your findings of fact were wholly inadequate to support your conclusion of continued suspension. *Policy on Student Conduct and Discipline* §103.11 (rev. Oct. 20, 2008), UC POLICIES (<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc100.html>)

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.

Rather than consider issues relevant to the need for continued exclusion from campus, the hearing panel³ attempted to adjudicate Ms. Miller's alleged involvement in a campus disturbance on December 11, the basis of the above conduct allegations. You never considered whether there was *reasonable cause* to believe she would be a threat to anyone's safety, and if so, how should her campus access be “*restricted only to the minimum extent necessary.*” Code, § VI-105.08 [emphasis added].

Indeed, since Ms. Miller was provided no notice that the issues ultimately considered by the panel were going to be addressed, the basic due process requirement of notice was never satisfied. Additionally, not a single piece of evidence was presented to support the claim that this student is a threat to the health and safety of the campus community. Even more egregiously, she was

ation, or as corroboration of my retention as her counsel, Ms. Miller has on file a waiver of confidentiality with the Center for Student Conduct and Community Standards.

³ Also serving on the Hearing Panel were Haas School Student Advocate H. Faye Lawson and UC, Berkeley undergraduate student Chen Ling.

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denied the opportunity to examine the evidence used against her, however irrelevant, such as described by UCPD Detective Miller. The findings are replete with innuendo and guilt by association, notwithstanding 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.

The findings in your January 15 decision are stitched from a patchwork of evidence wholly unrelated to the question before you, including Ms. Miller's extracurricular activities, her academic record and perceived attitude toward study, and a showing of remorse for allegedly participating in events not at issue in the hearing. You also based your decision on this sophomore's inability to demonstrate she is an asset to the University and that she had developed a nuanced plan for solving UC's current budget crisis. In particular, you took into account these observations made by you and your fellow panelists:

- 1) "apparent lack of concern that the existing sanction had prevented [her] from completing two final exams in the Fall semester,
- 2) "poor academic record,
- 3) " little evidence of positive contributions to the campus community,
- 4) "showed no remorse for [her] own involvement in this protest"⁴ and
- 5) "refused to consider that the action of the protestors... scared the Chancellor and his wife."

Finally, as if this student must adhere to a prescribed set of socio-political values, you write: "It was also unclear how protesting ('claiming the streets'), would address the current financial problems of UC, Berkeley, although it seemed to be the only mechanism considered by you up to the time of the hearing."

⁴ This was not at issue at this hearing and remains unproven.

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

The UC's *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 h[er], 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, Ms. Miller was denied the right to counsel. Although the University has no duty to provide a

lawyer, it cannot restrict the student's right to counsel.⁵ *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. Ms. Miller, however, was forced to enter a proceeding that prevented her from having fully active and participatory counsel. Code § I-F.⁶ This student was never advised that she had a Constitutional right to be represented by counsel, and if she *had* brought an attorney, his or her participation would be at the whim of the hearing panel. *Id.*

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)), and Ms. Miller was further advised that she could “place a statement in the record for the Chancellor’s consideration...” (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.⁷

⁵ See discussion below on the impact of the banning order on Ms. Miller’s access to counsel.

⁶ “*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.” [emphasis added].

⁷ The Center’s January 13 evidence packet contained a cursory statement by Provost Breslauer, which is *not* on letterhead. Dated Saturday, December 12, 2009 at 2:15 p.m., the statement simply reads: “I have reviewed the case of Ms. Angela Miller and concur with your decision to proceed with interim suspension of this student.” As Ms. Miller did not actually receive the Notice of Interim Suspension until approximately 48 to 72 hours later, the offer to submit a statement was meaningless and remains unfulfilled.

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Moreover, the Notice of Charges must contain “a brief explanation of the facts supporting the charge(s),”⁸ “a [t]imeline for the disciplinary process” §1-A⁹ and must state “the duration of the Interim Suspension.” *Id.* The Vice Chancellor’s Notice contains neither a timeline, nor duration of the suspension, much less a date for hearing the underlying charges.

The University Cannot Restrict Access to an Advisor Nor Terminate a Student’s Tenancy Through its Banning Order

The Interim Suspension’s ban on campus access and physical or electronic communication with *any* faculty, staff or students is so beyond “the minimum extent necessary” and yet its overbreadth is so much within the grasp of any grade-school educated layperson that it warrants little discussion here.¹⁰

Suffice it to say that, at a minimum, your ratification of this ban restricts Ms. Miller’s right to assistance in this matter by her fellow students or campus faculty.¹¹ Moreover, your attempt to preclude her from “entering and using” her

⁸ The explanation of facts simply reads: “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.

⁹ In the website version of the Campus Code—to which an accused student is referred in the Notice of Suspension—the reader is directed to “Click here for a [Timeline for the disciplinary process](#)” only to discover the hyperlink leads back to the home page for Campus Life and Leadership. §1-A

¹⁰ Also implicated are Ms. Miller’s associational rights under the First Amendment, U.S. Constitution, which the University cannot restrict.

¹¹ Indeed, her ability to contact me or her fellow student advocates last semester was explicitly prohibited—and continues to be—by the overly broad terms of the Vice Chancellor’s Notice.

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University-leased housing runs counter to the basic due process protections afforded tenants under state law. Ms. Miller is a tenant of the Berkeley Student Cooperative (BSC) and her tenancy is governed by California Landlord Tenant Law. Cal. Code Civ. Proc. §§ 1161-1162. Without following the procedures required by law, the hearing panel has no authority to order Ms. Miller's lease terminated or to modify it in any way. The hearing panel likewise has no authority to exclude this student from her legal residence.¹²

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." 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, in this case, as discussed above, Ms. Miller's due process rights were not only left unsatisfied, they were completely disregarded. The result is that she 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.

On this the first day of Spring Semester, Ms. Miller is barred from attending classes, utilizing campus libraries, laboratories and other facilities and—as of 5 p.m. yesterday—was ordered to be evicted from her housing. This is not a restriction to the minimum extent necessary, nor is it founded on any reasonable cause. In fact it makes a mockery of the Code of Conduct's insistence that an

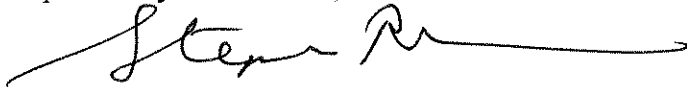
¹² Ms. Miller is a registered UC, Berkeley student as required by her contract with BSC. This status cannot be revoked by the University without the due process guarantees and protections outlined in the Code of Student Conduct and required by state and federal law.

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interim suspension not impede academic success¹³—not to mention The Code’s *raison d’être*: to encourage personal and intellectual growth of a community of scholars within a civil and educational setting.¹⁴

In this case, Ms. Miller attended a hearing where the only issue to decide was if there is “reasonable cause” to believe that her immediate suspension is required in order to protect lives or property and to insure the maintenance of order. Code, § V-105.08. On top of the host of the other procedural deficiencies noted above, this student was denied right to counsel, suspended without substantial evidence of wrongdoing, was provided no notice of the subject of the hearing she attended, and denied the opportunity to examine the evidence used against her. Since Angela Miller was never afforded a hearing that satisfied her basic due process rights,¹⁵ she 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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¹³ § VI-105.08. (“The University is committed to a policy whereby reasonable efforts are taken to assist an individual who has been disadvantaged with respect to...academic status.”)

¹⁴ “The University of California at Berkeley is a community of scholars committed to maintaining an environment that encourages personal and intellectual growth. It is a community 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*.

¹⁵ Temporary or emergency suspensions require also basic due process. *Goss v. Lopez* (1975) 419 U.S. 565, 579 (holding that even short-term suspensions must be accorded fair process).