

1 State of Arkansas
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4

As Engrossed: S3/9/23

A Bill

SENATE BILL 365

5 By: Senator Irvin
6 By: Representative Dalby
7

For An Act To Be Entitled

9 AN ACT TO CREATE THE ARKANSAS STUDENT DUE PROCESS AND
10 PROTECTION ACT; TO ESTABLISH PROCEDURAL PROTECTIONS
11 APPLICABLE TO STUDENT CONDUCT DISCIPLINARY
12 PROCEEDINGS AT PUBLIC TWO-YEAR AND FOUR-YEAR
13 INSTITUTIONS OF HIGHER EDUCATION; AND FOR OTHER
14 PURPOSES.
15

Subtitle

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18 TO CREATE THE ARKANSAS STUDENT DUE
19 PROCESS AND PROTECTION ACT; AND TO
20 ESTABLISH PROCEDURAL PROTECTIONS FOR
21 STUDENT CONDUCT DISCIPLINARY PROCEEDINGS
22 AT PUBLIC TWO-YEAR AND FOUR-YEAR
23 INSTITUTIONS OF HIGHER EDUCATION.
24
25

26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
27

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 Arkansas Code § 6-60-109 is repealed.

29 ~~6-60-109. Right to counsel.~~

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

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



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

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

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

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

18
19 SECTION 2. Arkansas Code Title 6, Chapter 60, is amended to add an
20 additional subchapter to read as follows:

21 Subchapter 14 – Arkansas Student Due Process and Protection Act

22
23 6-60-1401. Title.

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

26
27 6-60-1402. Legislative findings.

28 The General Assembly finds that:

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

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

1 noting that "a hearing must be a real one, not a sham or pretense", and that
2 "even in the disciplinary context, the process due depends on a number of
3 factors, including the severity of the consequence and the level of education
4";

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

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

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

20
21 6-60-1403. Definitions.

22 As used in this subchapter:

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

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

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

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

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

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

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

7
8 6-60-1404. Procedural protections.

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

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

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

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

23 (A) Exculpatory evidence;

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

26 (C) Third-party witness statements;

27 (D) Electronically stored information;

28 (E) Written communications;

29 (F) Social media posts;

30 (G) Demonstrative evidence;

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

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

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

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

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

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

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

10 (a) An attorney; or

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

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

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

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

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

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

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

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

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

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

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

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

6 (2) A waiver under subdivision
7 (c)(1)(D)(i)(b)(1) of this section shall be:

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

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

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

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

21 (ii) Make an opening and closing statement;

22 (iii) Present relevant evidence; and

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

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

28 (i) Before a disciplinary proceeding is scheduled;
29 and

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

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

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

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

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

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

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

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

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

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

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

29 (b) Investigator;

30 (c) Adjudicator; or

31 (d) Appellate adjudicator.

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

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

1 purposes of a disciplinary hearing to:

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

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

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

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

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

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

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

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

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

1
2 6-60-1405. Interim measures.

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

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

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

15 (i) Counseling;

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

18 (iii) Campus escort services;

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

21 (v) Modifications of class schedules or housing
22 locations;

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

25 (vii) Other similar services.

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

29 (A) Undertakes an individualized safety and risk analysis;

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

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

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

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

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

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

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

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

21
22 6-60-1406. Cause of action.

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

26 (1) Compensatory damages;

27 (2) Attorney's fees;

28 (3) Expert witness fees; and

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

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

35
36 6-60-1407. Statute of limitations.

