Return to the FIRE Homepage

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 08198

DAVID ARLEN SCHAER,

Plaintiff-Appellee

v.

BRANDEIS UNIVERSITY,

Defendant-Appellant

Counsel for Foundation for (413) 586-8115

Individual Rights in

Education John Reinstein

BBO# 416129

ACLU of Massachusetts

99 Chauncy Street

Boston, MA 02111

(617) 482-3170

Counsel for the ACLU of

Massachusetts

TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER

AUTHORITIES iv

STATEMENT OF INTEREST OF THE AMICI CURIAE . 1

A. The American Civil Liberties

Union of Massachusetts 1

B. The Foundation for Individual

Rights in Education 2

STATEMENT OF THE ISSUE 5

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

I. MASSACHUSETTS LAW APPROPRIATELY

REGULATES A UNIVERSITY'S IMPOSITION

OF DISCIPLINARY SANCTIONS ON

A STUDENT 13

A. A University Has a Contractual

Obligation to Comply With the

Provisions Set Forth in Its

Handbook 13

B. The Covenant of Good Faith and

Fair Dealing Requires a University

to Comply with Its Published Rules 19

TABLE OF CONTENTS (continued)

Page

C. The Requirement That Associations

Reasonably Adhere to Their Internal

Rules Provides an Alternative Basis

For Holding That a University Is

Obligated to Follow the Disciplinary Procedures Which It Has Adopted and

Published 21

II. THE COMPLAINT ALLEGES A SUBSTANTIAL

BREACH OF A CONTRACT BETWEEN BRANDEIS

AND THE PLAINTIFF, A STUDENT AT THE

UNIVERSITY 24

- There Was a Binding Contract

Between The Plaintiff And

Brandeis University 24

B. The Complaint Alleges Substantial

Violations Of The Student's

Contractual Rights 26

III. THE DECISION AND RATIONALE OF THE

APPEALS COURT POSE NO THREAT TO THE

INDEPENDENCE OR THE INTEGRITY OF

PRIVATE UNIVERSITIES IN THE

COMMONWEALTH 34

A. The Concerns Expressed by

Brandeis and Its Amici

Regarding The Appeals Court's

Opinion Are Ill-Founded 34

B. The Substantial Deference

Accorded to Academic Decisions

Is Unaffected By the Appeals

Court's Decision; Discipline

Anthony's Pier Four, Inc. v. HBC Assoc.,

411 Mass. 451 (1991) 19

Barnard v. Inhabitants of Shelburne,

216 Mass. 19 (1913) 38

Blank v. Chelmsford Ob/Gyn, P.C.,

420 Mass. 404 (1995) 19

Bd. of Curators of the University of

Missouri v. Horowitz, 435 U.S. 78 (1978) 38

Buckholz v. Massachusetts Inst. of Technology,

No. 852720, 1993 WL 818618 (Mass.Super. 1993) 13n, 16

Cloud v. Trustees of Boston University,

720 F.2d 721 (1st Cir. 1983) 25n

Corso v. Creighton University,

731 F.2d 529 (8th Cir. 1984) 14n

Coveney v. President and Trustees of the

College of the Holy Cross,

388 Mass. 16 (1983) 3-4, 13, 15-18, 20, 24, 31

Derrig v. Wal-Mart Stores, Inc.,

942 F.Supp. 49 (D.Mass. 1996) 19

Dinu v. The President and Fellows of Harvard College,

56 F.Supp.2d 129 (D.Mass. 1999) 14n, 25n-26n

Druker v. Roland Wm. Jutras Assoc. Inc.,

370 Mass. 383 (1976) 20

Essigmann v. Western New England College,

11 Mass.App.Ct. 1013 (1981) 13n

Fellheimer v. Middlebury College,

869 F.Supp. 238 (D.Vt. 1994) 14n

Giles v. Howard University,

428 F.Supp. 603 (D.DC. 1977) 15n, 25n

Gray v. Christian Society,

137 Mass. 329 (1884) 22

Guckenberger v. Boston University,

957 F.Supp. 306 (D.Mass. 1997) 14n

Holert v. University of Chicago,

751 F.Supp. 1294 (N.D.Ill. 1990) 14n

Jackson v. Action for Boston Community Development,

403 Mass. 8 (1988) 25n

Lyons v. Salve Regina College,

565 F.2d 200 (1st Cir. 1977),

cert. denied, 435 U.S. 971 (1978) 25n

Kerrigan v. City of Boston,

361 Mass. 24 (1972) 20

Knapp v. Junior College of Dist. Missouri,

879 S.W.2d 588 (Mo.Ct.App. 1994) 15n

Mahavongsanan v. Hall,

529 F.2d 448 (5th Cir. 1976) 14n, 38

Mangla v. Brown University,

135 f.3d 80 (1st Cir. 1998) 14n, 25n

Mariani v. Trustees of Tufts University,

1 Mass.App.Ct. 869 (1974) 13n

Merrimack Valley Nat'l Bank v. Baird,

372 Mass. 721 (1977) 25n

Merrow v. Goldberg,

672 F.Supp. 766 (D.Vt. 1987) 14n

Napolitano v. Trustees of Princeton University,

186 N.J.Super. 548,

453 A.2d 279 (1982) 21, 25n

O'Brien v. New Eng. Tel. & Tel. Co.,

422 Mass. 686 (1996) 18-19, 19n, 24-25, 25n

Pacella v. Tufts University Sch. of Dental Med.,

66 F.Supp. 3d 234 (1999) 25n-26n

Peretti v. Montana,

464 F.Supp. 784 (D.Mont. 1979) 15n

Pyle v. Committee of South Hadley,

423 Mass. 283 (1996) 1

Russell v. Salve Regina College,

890 F.2d 494 (1st Cir. 1989) 14n

Schaer v. Brandeis University,

48 Mass.App.Ct. 23 (1999) 37

Showell v. Trustees of Boston University,

No. 935815, 1994 WL 879638 (Mass.Super. 1994) 13n, 17

Tedeschi v. Wagner College,

49 N.Y.2d 652,

404 N.E.2d 1302 (1980) 15n, 22, 38

University of Miami v. Militana,

184 So.2d 701 (Fla.Ct.App. 1996) 15

advance that interest, ACLUM often participates, either through direct representation or as an *amicus*, in appellate cases that significantly affect the rights of students, *e.g.*, Pyle v. School Committee of South Hadley, 423 Mass. 283 (1996), and cases of citizens' rights to due process.

ACLUM and ACLU believe that students who face serious sanctions in college and university disciplinary proceedings should be entitled to procedural safeguards that are commensurate with the possible sanctions and that are sufficient to insure that the proceedings are fundamentally fair. The Board of Directors of ACLU has adopted a formal policy on the civil liberties of college students which calls upon colleges and universities to adopt detailed formal procedures for disciplinary hearings which may lead to serious penalties such as suspension, expulsion or notation on a student's permanent record. The ACLU policy is attached to this brief as an appendix.

B. Interest Of The Foundation For Individual Rights In Education

The Foundation for Individual Rights in Education, Inc. ("FIRE") is a non-profit, tax-exempt foundation incorporated in 1999 in Massachusetts, with offices in Boston and Philadelphia. FIRE's mission statement, which can be found in full text at www.TheFire.org, sets forth the Foundation's goals -- to defend and sustain individual liberties at America's colleges and universities. Those rights include freedom of speech, due process or at least elementary fairness, legal equality, religious liberty, and the sanctity of conscience. When colleges and universities, particularly secular liberal arts institutions, fail to adhere to these essential core values and litigation ensues, FIRE participates as *amicus curiae*.

FIRE is dedicated to the pluralistic notion of a wide variety of educational institutions within civil society, each free to pursue the goals it chooses by the means it determines. There should be one *caveat*. The institution should be forthright as to the nature of those goals and means, a sort of "truth in advertising" standard. FIRE believes that a university that portrays itself as a secular liberal

arts institution and purports to value procedural fairness, has a legal obligation to adhere to the promises and representations it has made regarding fairness -- particularly when the stakes are high. Further, the institution should adhere to the commonly accepted

Whether this court should dramatically change the law in the Commonwealth by restricting the contractual, associational and common law rights that have long protected university students in disciplinary proceedings, when those proceedings could result in a student's expulsion, loss of degree and forfeiture of professional and employment opportunities.

STATEMENT OF THE CASE

We adopt the factual statement of the plaintiff and in particular note the following:

The student handbook of Brandeis University sets forth in detail the "community standards of behavior" to which students must adhere. Appendix (hereinafter "App.") 41-53. Those standards include some that are mundane or relatively inconsequential: Bicycles and motorcycles should be operated only on authorized roadways, §3.4 (App. 43); "food fights" are prohibited, §10.4 (App. 47); plasticware should not be removed from the dining areas, §10.7 (App. 47). No specific punishment is stated for a violation of rules of this sort.

In contrast, three standards specifically state the potential of serious punishment for a violation. One, "infringement of academic honesty by a student," subjects the student to "possible failure in the course (with or without a notation in the transcript)," as well as other sanctions, including the possibility of probation, suspension or dismissal. §5 (App. 43).

Only two other prohibited acts specifically state the possibility of a student's dismissal from the University: sexual harassment, §6.3, and racial harassment, §6.4 (App. 44). Schaer was accused of sexual harassment of a female student on the basis of facts that would

constitute rape. (App. 39).

Enforcement of the code of behavior is entrusted to a Student Judicial System under rules which impose significant obligations on the student and the university. The first section of the handbook requires a student to:

1.1 Furnish correct, truthful and complete information to University officials or Boards.

1.2 Preserve and maintain evidence so as not to deny its presentation to University offices, officials, or Boards.

1.3 Appear before a Board or University official when properly notified to appear.

(App. 4).

The Student Judicial System requires alleged violations of community standards or behavior to be heard by the University Board on Student Conduct (UBSC). §18.1 (App. 53). Before a student faces charges, he is entitled to an impartial good faith determination as to whether he must face a hearing. §17 (App. 53).

A student who must face the UBSC has the right to written notice of the charges, §19.6 (App. 55), as well as the right to disqualify for cause any member of the hearing panel. §19.7 (App. 55). He also is promised the rights set forth in §19 of the handbook, entitled, "Procedural Standards in the Judicial Process." (App. 54-59). Those include the promise that "[t]he accused student and the accuser shall each have the right to bring an advisor of his/her choice from the

University community to assist in presenting the case before the Board or for advice during the hearing. §19.8 (App. 55) The advisor may present evidence and introduce witnesses on behalf of the accused student." §19.9 (App. 55). In addition, "the accused student and/or his or her advisor shall have the right to question all witnesses and to view and question all evidence presented to the board during the hearing." §19.11 (App. 55). Although "the technical rules of evidence applicable to civil and criminal cases shall not apply," §19.10,deMerimi

For nearly twenty years the law in the Commonwealth has been that the disciplinary rules and procedures in a university's handbook set forth obligations binding on both the students and the university. Brief (hereafter "Br.") at 16. The law on the rights and responsibilities of students at private universities has had as its foundation two distinct doctrinal bases -- the law of contracts and the law of membership associational rights. Br. at 21-22. In recent years, however, the law of contracts has become the preferred legal analysis. Br. at 23.

Contrary to Brandeis's assertions, there is no sound reason at this time to dramatically change the law of the Commonwealth and to abrogate the common sense and well-founded legal principles that have governed college disciplinary cases for decades. The Appeals Court in this case places no noticeable burden on, and in no way interferes with, the mission of the university. Br. at 35.

Colleges have had, and will continue to retain, the broadest possible discretion in matters of academic performance. However, when a student faces a serious disciplinary sanction such as suspension or dismissal for his behavior, and the college has guaranteed the student rights in its disciplinary proceedings, the college is legally bound to those promises. Br. at 32.

ARGUMENT

I. MASSACHUSETTS LAW APPROPRIATELY REGULATES A UNIVERSITY'S IMPOSITION OF DISCIPLINARY SANCTIONS ON A STUDENT

A. A University Has a Contractual Obligation to Comply With the

Provisions Set Forth in Its Handbook

The Appeals Court rested its decision, in part, on the contractual relationship between the University and the student as set forth in the handbook. In concluding that the complaint should have survived the University's Rule 12(b)(6) motion, the court adhered to long-established precedent and broke no new ground. The rule recognized in Coveney v. President and Trustees of The College of the Holy Cross, 388 Mass. 16 (1983), that a contractual relationship may exist between the student and the university, is well established in Massachusetts[(1)] and is recognized in many other jurisdictions as well.[(2)] For many years, following the decision in Coveney, students and their parents have relied on college handbooks to set forth contractual rights to which the institutions are bound. In Coveney, this court made explicit

was one of bias towards the accuser regarding his credibility. The Superior Court ruled that although the claim was in the court's opinion, weak, the case should go forward to trial.

In 1994, the Massachusetts Superior Court reached the same decision in Showell v. Trustees of Boston Univ., No. 935815, 1994 WL 879638 at 2-3, and, in 1995, a third Superior Court judge reached the same decision, Anderson v. Massachusetts Inst. of Technology, No. 940348, 1995 WL 813188, at 5 (Mass.Super. Jan. 31, 1995). In that case the court denied MIT's motion for summary judgment where question of fact remained concerning whether "MIT conducted its hearing fairly in accordance with its own rules."

Practitioners and courts in Massachusetts, at least since Coveney was decided in 1984, have conducted themselves with the understanding that the handbooks set forth binding contractual terms.[(3)] Brandeis has not proffered any compelling reason why that established law should now be changed. Indeed, as the university *amici* have conceded, under the present state of the law, only a minute number of disciplinary matters go to court. Brief of Babson *Amici*, pp. 1-2.[(4)]

The continuing vitality of Coveney was underscored by the decision in O'Brien v. New Eng. Tel. & Tel. Co., 422 Mass. 686, 691 (1996), where the Court held that a private employer was bound to the representations contained in its *employee* handbook. In so holding, this court ruled that even the employer's reservation of rights to modify the terms of the manual did not obviate the contractual obligations of the handbook. Rather,

[i]f an employee reasonably believed that the employer was offering to continue the employee's employment on the terms stated in the manual, the employees' continuing to work after receipt of the manual would be in the nature of an acceptance of an offer of a unilateral contract...and the promise would not be illusory...That there was no explicitly bargained-for exchange does not matter if employees in general would reasonably conclude that the employer was presenting the manual as a statement of the conditions under which employment would continue.

Id. at 692-93. Thus, under O'Brien the question is whether the employee believed that the terms and conditions set forth in the manual were binding and whether that belief was reasonable.(5) If there is a reasonable belief, then the company is bound. See also Derrig v. Wal-Mart Stores, Inc., 942 F.Supp, 49, 51-52, 56 (D.Mass. 1996).

We suggest that students at a private college should have at least as many rights under a college handbook as at-will employees have under a company handbook.

B. The Covenant of Good Faith and Fair Dealing Requires a University to Comply with Its Published Rules

In Massachusetts, every contact contains an implied covenant of good faith and fair dealing. Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995) (employment contract); Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 475-476 (1991) (commercial contract); Warner Ins. Co. v. Comm'r of Insur., 406 Mass. 354, 362 n.9 (1990) (insurance); Druker v. Roland Wm. Jutras Assoc. Inc., 370 Mass. 383, 385 (1976); Kerrigan v. City of Boston, 361 Mass. 24, 33 (1972) (teachers' collective bargaining agreement).

The plaintiff in Coveney enjoyed no contractual protections, and therefore was protected only by the terms that could be inferred by his attendance at the school. Here, in contrast, the college has provided detailed guarantees of the disciplinary procedures to be followed.

Although the phrase, "good faith and fair dealing is hardly self-defining," Berger & Berger, supra, 99 Colum.L.Rev. at 331, in the context of school disciplinary cases, the obligation has meant at a minimum the principle assumed in Coveney, "that the school must adhere to its established procedures." Id. at 332

C. The Requirement That Associations Reasonably Adhere to Their Internal Rules Provides an Alternative Basis For Holding That a University Is Obligated to Follow the Disciplinary Procedures Which It Has Adopted and Published

Student discipline cases at first noted a contractual underpinning for the student-university relationship, but also invoked the doctrine of members' associational rights. These cases, in addition to applying contract theories, analogized students at a university to members of a voluntary association and applied this body of law as well.

Although the results from the courts have consistently held, on one theory or the other -- and sometimes both -- that the University was bound to its rules, the doctrinal basis for these holdings was not, at least according to some commentators, as clear as they might have been. Berger and Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 Colum.L.Rev. 273 (1999).

The membership rights analysis works particularly well in matters involving scholarship and learning, matters at the core of the University's mission. Tedeschi v. Wagner College, 49 N.Y.S.2d 652, 658, 659-660 (1980). Berger and Berger, supra, pp. 309-316

The analysis comports with venerable principles of Massachusetts law. Indeed, it is interesting to note that for more than a century members of an association have had the right to enforce the rules of the association concerning expulsion, Gray v. Christian Society, 137 Mass. 329 (1884), yet students, who are considered and often referred to as members of the academic community, do not -- in the view of the universities that have joined the Babson *amici* brief -- have that right.

The associational right analysis can yield the same result as contractual analysis, and sustain its intellectual rigor, if one assumes that the rules apply to a distinct and defined group, such as undergraduates, and that the group impliedly ramifies the rules

through attendance and agreeing to live by them. Colleges and universities, however, look less like the utopian community of scholarship and more often resemble large corporate organizations that have arm's length relationships with the various groups within their ambits -- administrators, faculty, researchers, teaching assistants, full and part-time students, administrative staff and unionized employees.

These groups have distinctly different interests and different relationships with the organization. This segregation of interests has caused some commentators to assert that associational rights analysis had become increasingly hard to sustain and therefore it is the law of contracts that provides the appropriate analytical framework. Id. at Berger and Berger, supra, p. 315

Amici believe, however, that the membership rights analysis generally is consistent with, but does not add significantly to, the contract analysis.

II. THE COMPLAINT ALLEGES A SUBSTANTIAL BREACH OF A CONTRACT BETWEEN BRANDEIS AND THE PLAINTIFF, A STUDENT AT THE UNIVERSITY.

- There Was a Binding Contract Between The Plaintiff And Brandeis University.

The plaintiff, as a student at Brandeis, was entitled to rely on the procedural guarantees contained in the University's student handbook. The guarantees were framed in explicit and often mandatory language. Unlike the regulations at issue in Coveney, there appears to be no question that these rules were in effect at all relevant times.

All of the conditions for offer and acceptance identified in O'Brien have, beyond question, been met in this case. As in O'Brien, the University decided what the content of the handbook would be, the University derived benefits from distributing the handbook and the

University expected that students would follow its terms.(6) And as in O'Brien, the student's reliance on the manual was reasonable.(7)

Here, the University clearly gives students every reason 0 [36.t

record, noting that six hours of testimony was compressed into an 11½ line statement containing only a summary of the contentions of the accuser and the accused. The Appeals Court found the truncated record of significance because it reflects on the "care with which the tribunal analyzed what was before them" and because it affected Schaer's ability to pursue an appeal.

c. Consideration of inflammatory and irrelevant evidence. Section 19 of Brandeis's rules provides that any decision will be based on clear and convincing evidence. Schaer's complaint alleged that the tribunal heard speculative and unqualified opinion testimony that the accuser "looked like a rape victim" and that Schaer was "a self-motivated egotistical bastard who had no respect for women." To be sure, Brandeis was not required to observe the rules of evidence applicable in a criminal or civil court, but the vice of these statements goes far beyond the question of their admissibility. The Appeals Court was appropriately concerned that these statements tainted the tribunal's ultimate finding.

d. Clear and convincing evidence. Schaer alleges that the tribunal failed to apply the "clear and convincing evidence" standard mandated by §19.13. It is Brandeis's contention that the standard was applied and was satisfied, citing the summary of the accuser's contentions contained in the "Referral Report" that triggered the disciplinary proceedings. Brandeis's reliance on material that is not contained in the Hearing Report only serves to highlight the concern about the standard that was applied here and, we believe, supports the conclusion reached by the Appeals Court. Reference to this document is necessary because it contains factual assertions that were not included in the Hearing Report prepared by the Board. And, of course, there is nothing in the Hearing report to suggest that the Board's findings were based on clear and convincing evidence.

e. The Board Advisor. The complaint sets forth an additional violation of the rules regarding the Board Advisor. Section 18.11 requires that members of the adjudicating Board (mostly students) be advised by the Board Advisor, an administrator from the Office of Campus Life, concerning the requirements of substantive and procedural due process which are to govern the hearing. Schaer's complaint alleged that this prophylactic measure, self-imposed by Brandeis under its own rules, was not taken here. Given the fact that four of six members of this Board were students without any prior experience in fact-finding, in the absence of such counsel, Schaer faced the equivalent of a jury

that must decide a case without any instruction on the applicable presumptions, standards for evaluating evidence or any applicable law.

The question before this Court, of course, is not whether Schaer should be disciplined or whether the charges against him were supported by the evidence. What the Court must consider is limited at this time to the question of whether the plaintiff stated a claim on which relief could be granted. And the question which must be resolved at trial or on summary judgment is not, as Brandeis and its *amici* contend, what the members of the panel thought, but whether the evidence was sufficient under the standards adopted by Brandeis to support its conclusion.

The rationale for Brandeis's rules is that the observance of due process will produce an accurate result. A hearing, contrary to the university's assertion, is not simply a swearing contest between two individuals -- in the case of a sexual charge, nothing more than a "he

In college disciplinary cases, courts normally take into account the seriousness of the charge in determining the extent to which the college should be held to its own procedural promises and assurances. It is not a matter of the court's insistence on different rules to govern serious cases in contrast to more routine cases. Rather, it is simply a matter of the court's insistence upon a higher level of observance to the college's own stated rules when there is much at stake.[(9)]

This requirement means that when a college such as Brandeis makes a specific promise of insuring due process for a student in a disciplinary proceeding, the student will in fact receive the process that is due, that the student will receive the protections the college has promised to afford and the protective benefits of the process to which the institution has bound itself. A student who selects and pays tuition to a college because of its humane and rational assertions is entitled to the benefit of his bargain.

III. THE DECISION AND RATIONALE OF THE APPEALS COURT POSE NO THREAT TO

so, subject only to the requirement that its procedures be fundamentally fair and that disciplinary measures against students are neither arbitrary nor capricious.

Pursuing this theme, the Babson *amici* contend that the Appeals Court decision somehow would interfere with the ability of a university to "create its own culture" or to "impose on their students standards that are higher than those imposed on them by society at large." Babson *Amici* Brief at 12. The grounds for this assertion, however, are not readily apparent. The Appeals Court did nothing to alter the "culture" established by Brandeis. Indeed, all the Appeals Court did was insist that Brandeis conform its conduct to the rules and policies it promulgated, to honor the culture of due process and the rule of law it promised its students.

The college *amici* make another charge that is as revealing as it is misleading. They assert that the Appeals Court "ignored the actual nature of the charges against Schaer by Brandeis" and accuse the court of substituting its own notion of "heightened judicial standards" appropriate to a criminal charge of rape. There is no foundation for this claim. The Appeals Court's decision does not impose any greater obligation on Brandeis than Brandeis itself had undertaken to insure that a just and correct result was reached. The college *amici* seem not to understand that there is no conflict between truth-finding and the protection of an accused's rights.

Nor do the college *amici* suggest a single step taken by the Appeals Court that would make it more difficult for Brandeis to engage in truth-finding. Again, quite the contrary is true. The Appeals Court has insisted only that Brandeis follow its own procedural rules that seek to assure a fair and rational process and an accurate outcome,

[illegible]

Even though Brandeis is a private university, it has in its code adopted detailed procedures to be followed in disciplinary matters, (App. 41-62), which were apparently intended to afford its students both substantive and procedural due process. See §18.11, (Board Advisor required to advise the board "regarding the requirements and provisions of substantive and procedural due process"). (App. 54). As a private institution, Brandeis had no legal obligation to adopt a code granting its students the same rights assured to students in public colleges by the Fourteenth Amendment, but for its own legitimate reasons it undertook to guarantee those rights. It should be bound by that promise.

B. The Substantial Deference Accorded to Academic Decisions Is Unaffected By the Appeals Court's Decision; Discipline For Behavioral Violations Should Be Distinguished From Academic Deficiencies

The opinion of the Appeals Court appropriately notes the judicially accepted distinction between a sanction based on academic reasons and one that results from behavioral misconduct. "Courts are chary," Justice Kass wrote for the Appeals Court, "about interfering with academic and disciplinary decisions made by private colleges and universities." Schaer v. Brandeis University, 48 Mass.App.Ct. 23, 26 (1999) (citations omitted). However, the "[r]eluctance of courts to become involved in student discipline diminishes as the subject matter graduates from academic issues to misconduct." Id. at 26-27, citing Bd. of Curators of the Univer. of Mo. v. Horowitz, 435 U.S. 78, 87-91 (1978) (dismissal for disciplinary reasons requires a hearing, whereas dismissal for deficient academic performance may not) and Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 22 (1913) ("misconduct is a very different matter from failure to obtain a standard of excellence in the studies") (citations omitted).

The principle that the law distinguishes between behavioral misconduct and academic shortcomings has been consistently applied. See, for example, Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976) and

cases cited therein. Similarly, see, Tedeschi v. Wagner College, 49 N.Y.2d 652, 660, 404 N.E.2d 1302 (1980). Brandeis's supporters urge this court to ignore this long-established dichotomy. College *Amici* Brief at p. 6, n. 2. That request conflicts with the case law and common sense.

Gaining and imparting knowledge is the central mission of the University. Imposing discipline for bad behavior is not. Courts, which defer to the university's expertise in matters connected to theo7Br to t

convincing evidence, presumably in a fair proceeding, before a jury of his peers. Protestations of innocence would mean little.

CONCLUSION

For the foregoing reasons, and for the reasons set out in the opinion of the Appeals Court, the dismissal of Count Three of the Complaint should be vacated and the case should be remanded to the further proceedings on that claim.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

By_

William C. Newman

BBO# 370760

ACLUM Western Mass. Office

39 Main Street

Northampton, MA 01060

99 Chauncy Street

Boston, MA 02111

(617) 482-3170

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

By:_

Harvey A. Silverglate

BBO # 462640

SILVERGLATE & GOOD

83 Atlantic Avenue

Boston, MA 02110

(617) 523-5933

April 10, 2000

1. Mariani v. Trustees of Tufts University, 1 Mass.App.Ct. 869 (1974) (rights against the university are contractual in nature); Essigmann v. Western New England College, 11 Mass.App.Ct. 1013, 1014 (1981) (assuming there was a contractual relationship between college and student, no violation of c. 93A or implied terms); Buckholz v. Massachusetts Inst. of Technology, No. 852720, 1993 WL 818618 at 3 (Mass.Super. 1993) (procedures described in university handbook entitled students to those protections); Showell v. Trustees of Boston University, No. 935815, 1994 WL 879638 at 2-3 (Mass.Super. 1994) (school catalogue constitutes contract terms); Anderson v. Massachusetts Inst. of Technology, No. 940348, 1995 WL 813188 at 5 (1995) (student has right to require university to comply with disciplinary procedures in student handbook); Dinu v. The President and Fellows of Harvard College, 56 F.Supp.2d 129, 131 (D.Mass. 1999) (District Court, applying Massachusetts law, held that provisions of college handbook govern contractual relationship between college and student); Guckenberger v. Boston Univ., 957 F.Supp. 306, 307 (D.Mass. 1997) (brochures, policy manuals and other advertisements from Boston College formed the basis of contractual agreement between the University and the student to provide certain educational opportunities)

2. Mangla v. Brown University, 135 F.3d 80, 83 (1st Cir. 1998) (student-college relationship essentially contractual in nature; terms of contract include statements in student manuals and registration materials); Russell v. Salve Regina College, 890 F.2d 484, 489 (1st Cir. 1989), reversed on other grounds, 499 U.S. 225 (1991), reinstated 938 F.2d 315 (1st Cir. 1991) (relationship between student and university governed by state contract law theories); Holert v. University of Chicago, 751 F.Supp. 1294, 1300 (N.D.Ill. 1990) (under Illinois law university and students have a contractual relationship generally set forth in university catalogues and manuals); Wilson v. Illinois Benedictine College, 112 Ill.App.3d 932, 937, 445 N.E.2d 901, 906 (Ill. 1983) (same); Fellheimer v. Middlebury College, 869 F.Supp. 238, 242 (D.Vt. 1994) (under Vermont law college is contractually bound to provide students with procedural safeguards promised in student handbook); Merrow v. Goldberg, 672 F.Supp. 766, 774 (D.Vt. 1987) (under Vermont law relationship between student and college contractual in nature, contract terms being set forth in the policies and publications of the institution); Corso v. Creighton University, 731 F.2d 529, 532-533 (8th Cir. 1984) (relationship between student and university is contractual, and statements in student handbook, that student was entitled to a hearing in cases of serious penalties,

required a hearing); Mahavongsanan v. Hall, 529 F.2d 448, 449-450 (5th Cir. 1976) (under Georgia law student has contractual right to enforce university rules); Williams v. Howard University, 528 F.2d 658, 660, 174 U.S.App. D.C. 85 (D.C. Cir. 1976), cert. denied, 429 U.S. 850 (1976) (a cause of action for specific performance of a contract between a college and its students is permissible); Peretti v. Montana, 464 F.Supp. 784, 786-788 (D.Mont. 1979) (under Montana law, students have contract with university with specific terms found in university bulletin and other publications; other reasonable contractual terms implied, citing at 464 F.Supp. 787 numerous decisions from other jurisdictions to the same effect), reversed on other grounds, 661 F.2d 756 (9th Cir. 1980); Knapp v. Junior College

reasonable expectations of the weaker party, specifically, the student. Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998); Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977), cert. denied, 435 U.S. 971 (1978); Dinu v. President and Fellows of Harvard College, supra; Giles v. Howard University, 428 F.Supp. 603, 605 (D.DC. 1977); Napolitano v. Trustees of Princeton University, 453 A.2d 279, 284 (N.J.Super.Ct.1982); Merrimack Valley Nat'l Bank v. Baird, 372 Mass. 721, 724 (1977).

7. [7] In Pacella v. Tufts University, Sch. of Dental Med., 66 F.Supp. 3d 234 (D.Mass. 1999), Judge Young declined to follow Massachusetts case law governing the academic context and instead relied upon Jackson v. Action for Boston Community Development, 403 Mass. 8, 14-15 (1988) for the proposition that handbooks do not constitute a contract. In so ruling, the court ignored that Jackson was significantly modified or explained by O'Brien and that all the conditions set forth in O'Brien for a manual constituting an agreement were met. Significantly, the federal court agreed that all state cases have held that a handbook sets forth contractual obligations. The federal judge points to what he considers the confusion caused by another federal case, Cloud v. Trustees of Boston Univ., 720 F.2d 721, 724 (1st Cir. 1983), in interrupting state law. The state courts, however, have not been confused about the contractual nature of the relationship between the student and the university.

Judge Young also made no mention of Dinu v. The President and Fellows of Harvard College, 56 F.Supp.2d 129, 131 (D.Mass. 1999), which was decided shortly before Pacella and reached the opposite result. In Dinu the Court stated, "that the relationship between a university and its student has a strong, albeit flexible, contractual flavor is an idea pretty well accepted in modern case law...So too, is the proposition that a student handbook, like the occasional employee handbook, can be a source of the terms defining the reciprocal rights and obligations of a university and its students." (Citation omitted) The issue according to Dinu is what meaning the university should reasonably expect the student would give to the promises in the handbook. In Dinu the court stated, "Counsel for Harvard framed the test...very neatly at oral argument in asking the question 'Could a student upon reading the disciplinary provisions of the Handbook reasonably believe [the position the plaintiff was asserting].'"

The Pacella court also seemed unaware that the instant case was pending at the Appeals Court. The Appeals Court's opinion here issued

four days after Judge Young's.

8. Our concerns about the evidentiary standard which was employed are underscored by the outcome of the hearing. The charge here was sexual harassment, but it was based on factual allegations that would have constituted rape. If Schaer was guilty by clear and convincing evidence of rape, it is likely that there would have been a criminal complaint and expulsion from the University. But Schaer was neither criminally charged nor administratively expelled. Rather, he received a three month suspension over summer vacation. This result, particularly when coupled with the nature of the on-campus discussion of the proceedings reflected in the record, raises a question about whether in practice the nature of the accusation itself may have been sufficient to result in the disciplinary sanction.

9. [9] It is an Orwellian mis-use of the English language to insist that by utilizing the euphemism of "unwanted sexual activity," one is able to treat a charge of rape as casually as one might treat, for example, a charge of making too much noise in the dormitory at night. The correctness of the Appeals Court's decision does not turn on the seriousness of the charge, but it was certainly appropriate for the court to consider the impact that a guilty finding would have on the student's life in holding that Brandeis must follow its own rules.