

To: Vice Chancellor Harry Le Grande<sup>1</sup>

**Re: BERKELEY CAMPUS STUDENT GRIEVANCE AND REQUEST FOR EXPEDITED REVIEW AND DISPOSITION**

**Fr:** Angela R. Miller, Complainant  
Stephen A. Rosenbaum (Designated Representative)

George Breslauer, Harry Le Grande, Jonathan Poullard, Christina Gonzales, Susan Trageser, Jeff Woods, Christine Wildsoet, H. Faye Lawson and Chen Ling, Respondents

**Date:** February 22, 2010

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**Name:** Angela Rose Miller

**Mailing Address:** 2600 Ridge Road / Berkeley, CA 94720

**Telephone:** 561.213.0175

**Email:** [angelamiller@berkeley.edu](mailto:angelamiller@berkeley.edu)  
[angelarosemiller@gmail.com](mailto:angelarosemiller@gmail.com)

**The action being grieved was:**  
\_\_\_\_\_discrimination on the basis of \_\_\_\_\_.

**unfair application of University policy or procedures.**

**The date(s) of most recent occurrence(s) leading to this complaint:** December 12, 2009 (Notice of Interim Suspension) and continuing (Center for Student Conduct and Community Standards, Record Number: 9383-18619).

**What was the result of the unit level grievance procedure:** N/A

**The date you received the result of the unit level procedure:** N/A

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**Provide a short description of the action(s) being grieved under this procedure:**

The Berkeley Campus Student Grievance Procedure is available to students, in part, to challenge "legally impermissible, arbitrary, or unreasonable discriminatory practices."

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<sup>1</sup> As the Vice Chancellor is one of the named Respondents in this grievance, we would expect that you recuse yourself from the process of designating a Complaint Resolution Officer (Griev. Proc. § IV-B).

(Griev. Proc., Intro & I-A.) The procedure “is also available for the resolution of complaints alleging inappropriate application to a student of any other rules or policies of the Berkeley campus resulting in injury to the student...” (*Id.*, § I-A.)

This grievance is brought by Angela Miller, a Berkeley undergraduate student, to challenge the legally impermissible, arbitrary, and unreasonably discriminatory practices associated with the Berkeley Campus Code of Student Conduct (Code), on its face and as applied to her. Additionally, this grievance claims that the following persons in their official capacities, jointly or severally, have failed to follow (or misapplied) the Code, resulting in injury to Ms. Miller:

Provost and Executive Vice Chancellor George Breslauer

Vice Chancellor for Student Affairs Harry Le Grande

Dean of Students Jonathan Poullard

Associate Dean of Students Christina Gonzales

Assistant Dean of Students and Director (Center for Student Conduct and Community Standards) Susan Trageser

Assistant Director (Center for Student Conduct and Community Standards) Jeff Woods

Hearing Panelists Professor Christine Wildsoet, Haas School Student Advocate H. Faye Lawson, and Undergraduate Student Chen Ling.

Due to the nature of this grievance, there was no informal or formal process initiated at the departmental level. (Griev. Proc. § III). Because the Complainant has a case pending before the Center for Student Conduct and Community Standards (Center), and the outcome of this grievance will have an impact on those proceedings, she requests that the review and disposition of this grievance be expedited.

**1. Due Process:** In general, the Code, as written and/or applied, constitutes a legally impermissible policy or practice insofar as it violates students' due process rights under the University of California *Policy on Student Conduct and Discipline* and the state and federal Constitutions. 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: a notice of specific charges against the student; the names of witnesses and a statement of the gist of their proposed testimony; and a hearing. *Andersen v. Regents of Univ. of Cal.* (1972) 22 Cal. App. 3d 763, 772. Arguably, the elements also include the right to counsel in certain circumstances. *Gonzales v. McEuen* (C. D. Cal. 1977) 435 F. Supp. 460, 467.

**2. Interim Suspension:** The Code’s provision for interim suspension, §VI (105.08), is sparse. Moreover, the Center and its hearing panels interpret that provision as if it stands apart from all other sections of the Code. For example, the Center’s Director maintains that the informal resolution processes are not applicable to interim suspensions, and that she and her staff have no authority to modify suspension terms.

A panel convened by the Center for a “prompt hearing” on Ms. Miller’s suspension had no procedural rules to guide panelists, the student and her advisor on (a) the evidentiary standards and burdens of proof and (b) its mandate to determine whether the suspension

“restrict[s the student] only *to the minimum extent necessary* when there is *reasonable cause* to believe that the student's participation in University activities or 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.” Code, § VI-105.08 [emphases added].

The panel wrongly considered evidence that was not presented at the hearing and was never made available to Ms. Miller. Additionally, the panelists failed to apply the appropriate evidentiary standards in its decision and never actually heard any evidence on the matter at issue, *i.e.*, whether or not there was reasonable cause to believe Ms. Miller was a threat to campus safety and welfare, pending a hearing on the underlying Code charges.

**3. Chancellor’s Review:** An interim suspension must be “reviewed by the Chancellor within twenty-four hours,” §VI (105.08). In Ms. Miller’s case, she was further advised in the December 12 Notice that she could “place a statement in the record for the Chancellor’s consideration...” Yet, no evidence has been produced of: (a) the Chancellor’s recusal from review and delegation of authority to the Provost or (b) a “considered” review by the Provost. The Center’s January 13 evidence packet contains only a cursory statement by Provost Breslauer (*not* on letterhead, dated Saturday, December 12, 2009, 2:15): “I have reviewed the case of Ms. Angela Miller and concur with [the Vice Chancellor for Student Affairs’] 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.

**4. Burden and Standard of Proof:** It is presumed that a student charged with a violation of the Code is not responsible for any violation unless she admits responsibility or a hearing determines otherwise. Code, §I(B). Furthermore, the Center bears the burden of proving the charges. This is consistent with Systemwide policies, *Policy on Student Conduct and Discipline* §103.11 (rev. Oct. 20, 2008), UC POLICIES (<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc100.html>), and constitutional jurisprudence. Notwithstanding, there was no such presumption for Ms. Miller before, during or after her “prompt hearing,” and she remains to date on interim suspension status.

Similarly, the standard of proof for all hearings is a preponderance of evidence (“generally defined as ‘greater than 50%’ or alternatively ‘more likely than not.’) Code, § II (C)(2)( b)(4). This standard was not applied in the decision of the hearing panel issued on January 15 in Ms. Miller’s case.

**5. Timeline:** The Notice of Charges must contain “a [t]imeline for the disciplinary process” and must state “the duration of the Interim Suspension.” Code §1-A. The Vice Chancellor’s Notice contains neither a timeline, nor duration of the suspension, much less

a date for hearing the underlying charges.<sup>2</sup> Until the recent revision, the timeline in the Code provided for 30 days of investigation and 45 days to hold a formal hearing. This 75-day timeline represents the bulk of an academic semester at UC Berkeley, and is also ample time to complete any proceeding under the Code. In the event of “unusual circumstances,” the Dean of Students or his designee has the flexibility to alter the timeline. Code § III-D. However, that “flexibility” should be cautiously exercised, and in no event should it allow for total suspension of the hearing timeline without any notice, as apparently is the case, effective August 28, 2009.

**6. Informal Resolution:** Students charged with conduct violations must be offered the opportunity to resolve their case without a formal hearing. Code, § II-C(1). Under the recently revised Code, “additional options for informal resolution may [also] be appropriate... includ[ing], but ... not limited to: mediation, peer review boards, and restorative processes. Student Conduct and Community Standards staff will determine when these options for resolution may be appropriate and make referrals.” *Id.*, §(C) (1)(b). As stated above, this option was not made available to Ms. Miller and her advisor before her suspension hearing. To date, there has been no serious effort to offer informal resolution or any of the newly created alternative dispute processes prior to issuing a notice for a February 24, 2010 pre-hearing.

**7. Access to Counsel:** Although the University has no duty to provide a lawyer for student conduct proceedings, it cannot restrict a student's right to counsel at her own expense. *Andersen v. Regents of Univ. of Cal.*, *supra* at 773; *Gonzales v. McEuen*, 435 F. Supp., *supra* at 467. Ms. Miller was forced to appear before a hearing panel that prevented her from having fully active and participatory counsel and continues to be so deprived. Under § I-F of the Code, in effect in December 2009, “the student may consult with his or her advisor throughout the [formal hearing] 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].” In the revised version of the Code, effective this semester and posted in mid-January 2010,<sup>3</sup> “[A]dvisors may not participate directly in the hearing process. Exceptions will only be made by the hearing panel or hearing officer in unusual circumstances (i.e. need for translator).”

The Complainant was never advised that she had a Constitutional right to be represented by counsel, and she continues to be deprived of counsel for her upcoming conduct

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<sup>2</sup> At the time Ms. Miller received the Notice of Suspension, the website version of the Campus Code—to which she was referred in the Notice—directed visitors to “Click here for a [Timeline for the disciplinary process](#)” (§1-A), only to discover the link leads back to the Campus Life and Leadership home page. The website was later redesigned over a weekend last month. The entire Code now appears as a PDF document without hyperlinks. The last sentence in §1-A currently 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>).

<sup>3</sup> The Code has been intermittently posted and removed from the Campus Life and Leadership website since the beginning of the Spring Semester 2010.

hearing on March 3—in a manner even more limited than in the Code version in effect at the time of her suspension and notice of conduct violations. This makes any hearing held under these circumstances legally inadequate. *See, Black Coalition v. Portland Sch. Dist. No. 1* (9th Cir. 1973) 484 F.2d 1040, 1042. Having an advisor present in a token capacity is not tantamount to having the right to counsel of one’s choosing and zealous representation.

**8. Open Hearing:** Under the Code, hearings are closed unless the accused student and the hearing body mutually agree to open the hearing. §-II (C)(2)(g). There are no guidelines in the Code for determining when the panel or its chair deems it appropriate to close a hearing beyond this oblique reference: “The hearing body may close any hearing to the public when necessary to maintain order or to protect the rights of the participants including the privacy rights of student witnesses.” The chair has less drastic means to maintain order or to protect witness privacy, should the occasion arise. Where the accused student waives any right to privacy or confidentiality, it is fundamentally unfair to conduct a hearing closed to the campus community and/or the general public.

**9. Free Speech and Association:** The Interim Suspension’s total ban on campus access and physical or electronic communication with *any* faculty, staff or students was overbroad and well beyond “the minimum extent necessary...” 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. *Eisen* at 701, 702, 706 (citations omitted). No such purpose was demonstrated here. Alternatively, narrower means were available for maintaining order and preventing harm.

In Ms. Miller’s case, the ban remains in effect, except to the extent she needs to attend classes and communicate with her professors, teaching assistants and students during class hours.

**10. Eviction from Housing:** The University’s attempt to preclude the Complainant from “entering and using” her UC Berkeley-leased housing runs counter to the basic due process protections afforded tenants under state law. Ms. Miller is a tenant of the Berkeley Student Co-operative (BSC) and her tenancy is governed by California Landlord Tenant Law. Cal. Code Civ. Proc. §§ 1161-1162. Without following the procedures required by law, neither the Vice-Chancellery, the Center for Student Conduct nor a Center-convened hearing panel has authority to order Ms. Miller’s lease terminated or to modify it in any way. The hearing panel likewise has no authority to exclude a student from her legal residence.<sup>4</sup>

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<sup>4</sup> 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.

**State the resulting injury or harm because of this action:**

1. The Complainant was prevented from attending and participating in her enrolled classes and communicating with faculty, GSIs and students and from taking examinations.
2. The Complainant has been prevented from full access to campus academic, administrative, intellectual, social, political and recreational services and activities.
3. The Complainant was, and continues to be, deprived of civil rights affecting her status as a student, a tenant and member of the campus community and civil society (including, but not limited to, due process and free speech and association rights under the California and U.S. Constitutions and California statutes).

**If known, state the specific law, policy, or rule alleged to have been violated (optional):** See above.

**Provide a description of the evidence supporting the grievance (may be attached):**  
See attached Letters from S. Rosenbaum (Jan. 19 & Feb.1, 2010); e-mails from S. Trageser (Jan. 15, 19 & Feb. 3, 2010).

**State the remedy or relief you are requesting:** (see also footnote 1).

1. That the Campus Code of Conduct not be applied further to the Complainant or any other student with pending charges.
2. Dismissal of Case No. 9383-18619.
3. Reimbursement of Complainant's educational, registration, campus and other fees for period in which she was denied enrollment in her classes or full access to campus.
4. Damages to Complainant (in an amount to be determined) for wrongful eviction from University-leased housing.
5. Damages to Complainant (in an amount to be determined) for violation of her rights under the California and U.S. Constitutions.

**If you will be assisted in the grievance process by an advisor, please indicate the individual's name, title, phone number and address:**

Stephen A. Rosenbaum  
Lecturer and Attorney  
510.387.3956  
510.267.1233  
c/o Boalt Hall School of Law  
Berkeley, CA 94720  
srosenbaum@law.berkeley.edu

**Is the advisor a lawyer?** \_\_\_X\_\_\_ yes \_\_\_\_\_no

**Please submit any additional background information that will be beneficial in resolving your grievance. (See above)**

**Signature:** Stephen Rosenbaum **Date:** February 22, 2010  
Designated Representative (Griev.Proc., § IV(A))

**Signature:** Angela R. Miller **Date:** February 22, 2010

**Please note: If you indicate you will be assisted by an advisor, your signature below authorizes the named individual to receive copies of relevant student records and correspondence regarding the grievance and to accompany you to any meetings.**

**Signature:** Angela R. Miller **Date:** February 22, 2010