b) where the agency has discretion to suspend or revoke a right or privilege of a person; or
c) for the suspension, revocation or refusal to renew or issue a license required to pursue any commercial activity, trade, occupation or profession where the licensee or applicant for a license demands such hearing; or where the agency by rule or order provides for hearings substantially of a character required by ORS 183.415, 183.425, and 183.450 to 183.470."

The standards set out in 183.310 seem much more succinct and well defined than the standard in the proposed bill: "the rules may establish, informal procedures for the resolution of all disputes in which a formal hearing is not required by some other statute or the United State Constitution or the Constitution of the state of Oregon."

Finally, the language of the bill indicates that the "State Board of Higher Education may delegate to the presidents of its institutions any part or all of its power to establish such rules." This language flies in the face of specific statutory authority given to the University of Oregon faculty to establish discipline of the University and the students therein. If this bill was passed as is that special authority maintained by the University of Oregon faculty since 1876 would be by later legislative pronouncement implausibly repealed. Again, to this time there has been no showing of a need to change this governance structure. On the other hand, it appears important that the faculty be aware of this attempt at superseding their authority in this area.

The second bill while more limited in its scope may have far reaching effects. At the present time the State Board of Higher Education has legal authority to create parking patrols via their general authority to provide for the policing, control and regulation of traffic and parking of vehicles on the property of any institution under the jurisdiction of the Board. The second bill makes four significant changes in that policing authority. First, it places proceedings to enforce parking regulations in the district or justice court of a county in which the violation occurred. This gives the Board the power to enforce its parking fines and penalties in a court of law rather than having to use administrative proceedings to collect such money. This authority is in addition to the administrative and disciplinary sanctions which may be opposed against students, faculty and staff for violation of the parking regulations, including but not limited to, a reasonable monetary penalty which may be deducted from student deposits and faculty or staff salaries or other funds in the possession of the institution. It appears that the import of this change would be that the State Board might enforce their parking regulations against non-students or non-faculty/staff persons in the district or justice court. In addition, this would allow the State Board to enforce parking regulations against former students,
faculty or staff. Up to this time the State Board had this authority only in enforcing regulations pertaining to the University of Oregon Health Sciences Center. The bill, then, would expand this present authority to include all institutions of higher education. A direct effect of this change may be that of forcing students to retain counsel in a case where they wish to fight the parking ticket violation. Nowhere in the proposed act is the State Board of Higher Education limited to using the administrative enforcement in cases pertaining to students, faculty or staff. Thus, it appears that the university could proceed against a student for a parking violation in the District Court of the State of Oregon for the County of Lane.

A second change in the present policy may be advantageous to students. This change would allow the State Board of Higher Education to use monies garnered from parking fees and tickets for not only facilities for motor vehicles but just vehicles in general. This may allow the State Board then to use the monies from this source for bicycle paths and bicycle racks. However, it should be noted that it is unclear exactly what is intended by striking the word "motor vehicles" when referring to additional parking facilities.

The third and most significant change gives the State Board the authority to establish a security patrol at all or any of its institutions. This may an attempt on the part of the Board to justify its deputizing of Oregon State University campus police to accomplish the same tasks that are now being accomplished by the Eugene police on the University of Oregon campus. The security patrol would be designed to "ensure the security of higher education personnel, students and all other persons lawfully upon and in the vicinity of the premises of such institution and the security of the real and personal property used, occupied by or in the possession of the institution."

Finally, the Board's bill would exclude the security patrol persons from the Public Employees Retirement System and also exclude them from the prohibition against public employee strikes that encompasses firepersons, police people and certain guards in mental hospitals and corrections institutions.

Here again the idea of a security patrol has not been justified in conversations with the Board staff. As a result it is difficult to argue with the rationale of creating a law that allows the State Board to create such a security force. Here at the University of Oregon of course the President may continue with the contract for security with the Eugene Police Department whether or not this bill is adopted.
STATEMENT OPPOSING PROPOSED LEGISLATION TO EXEMPT HIGHER EDUCATION FROM CERTAIN PORTIONS OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act, since 1957, has set down certain requirements for agency rulemaking and agency involvement in "contested cases." The rulemaking agency must, prior to the adoption, amendment or repeal of any rule, give notice of such to interested persons through a bulletin published by the Secretary of State and directly to persons who have requested notice. The notice must state the subject matter and purpose of the intended action in sufficient detail to inform a person that his or her interests may be affected, and the time, place, and manner in which interested persons may present their views on the intended action. Next, the agency must give a reasonable opportunity for interested persons to submit data or views. This must extend to an oral hearing if a request is received from ten or more persons requesting an oral hearing and that request is submitted within fifteen days after the agency notice of rulemaking. Third, the agency is required to consider fully any oral or written submission. Finally, the APA requires that the rulemaking agency submit their rules to Legislative Council Committee for review. In summary, the State Board of Higher Education, as an agency, must simply give notice to affected persons,
give those affected persons an opportunity to be heard, and must consider the testimony given in their final decisions. These provisions while occasionally administratively burdensome do give an opportunity for a free interchange of ideas between the citizen-based Board and the public which it serves.

The legislation before us today would exclude from this rulemaking procedure certain important items of public concern. These include "standards for admission; academic achievement, academic credits, graduation, the granting of degrees and similar academic matters; scholarships and financial aid;***fiscal processes; and post-tenure review of faculty members and administrators." Looking over this list of items we can see where the 60,000 students enrolled in institutions of higher education governed by the Board would have an interest in presenting their views. What evolves, in making this kind of review, is a balance between the public's guaranteed opportunity to participate and administrative inconvenience. We believe in the instance of the above areas the balance should swing to the guaranteed right to participate. On the other hand, it may be that the balance should swing in favor of administrative convenience in the areas of "prices of admission to athletic, entertainment or cultural events, prices of merchandise for resale, advertising rates in student or institutional publications, and charges for symposiums, conferences and short courses."

Some who have argued for inclusion of these public areas of concern, cite the Board's traditional procedures allowing for
public comment. Two points can be made here. First, despite the Board's history of public participation the APA provides a guarantee of a hearing to those who are concerned about the particular issue at hand. Second, the legislation being proposed allows the institution to also forego rulemaking procedures in adopting their rules in the listed areas. At the institutional level, there is at least an equal need for public comment and participation in the policies and regulations that govern individuals on the campuses.

The second major area of the bill, involving contested case procedures, has been changed to reflect some of the problems we and others mentioned before the Committee on Instruction, Research and Public Service Programs. We are pleased to note that the contested case procedures spelled out in this new draft allows for court review, declaratory rulings, subpoenas, and depositions. Further, we are pleased that the structure of Section 4 sets down more clearly the instances in which a formal "APA-type" hearing will be accorded.

On the other hand, there are still serious deficiencies in the bill which would force us to lobby against its passage in the 1977 Legislature. First, under Section 4, Subsection (2)(b), we believe that it is difficult if not impossible to distinguish between those instances in which a student is charged with an offense which could result in suspension for more than ten days from an offense which could result in suspension for nine days. For that matter, we
believe that the imposition of a 20-hour work sanction by a student court is significant enough deprivation of liberty to require a full formal APA hearing. The Washington statute after which this bill has been modeled requires a formal hearing in the case of any suspension.

That same Washington statute also includes explicitly the right to cross examine in a formal contested case procedure. This provision was left out of the bill before the Board in changes that were made after the Committee hearing. We believe the right to cross examination is an essential component of any formal contested case procedure.

As you may know, one of the leading forces in the creation of this proposed legislation was a finding by the Attorney General that the student conduct program at the various institutions come within the APA. Of specific concern was the requirement for a hearings officer to be assigned to each case. We contend, as the Attorney General pointed out in his opinion, that ORS 183.415(4) is intended to permit the parties in a contested case to use a less formal hearing procedure if they so desire. That subsection says:

"Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default."

As the Attorney General commented, "No reason appears which would prevent a student from opting for the existing or a similar conduct code procedure, where he is tried by a student court, if he is fully
informed and knowingly waives his right to a contested case hearing. It may be that students will see an advantage to having an informal court where they are judged by other students rather than face a hearing officer in a formal proceeding." Thus it appears that the real focus should be placed on the requirement of a hearings officer in the instance of a formal contested case procedure involving the student conduct programs. We would suggest that the bill be redrafted in a way that allows the student to opt out of the requirement for a hearings officer and at the same time assert those rights that have been set down in the formal hearing procedures of the proposed legislation.

Finally, notwithstanding the Attorney General's opinion, we believe that the Legislature has set down an appropriate test for when these APA protections should apply. This is found in the definition section under ORS 183.310: 

"'Contested case' means a proceeding before an agency:

A) in which the individual legal rights, duties or privileges of the specific parties are required by statute or Constitution to be determined only after an agency hearing at which specific parties are entitled to appear and be heard; or

B) where the agency has discretion to suspend or revoke a right or privilege of a person; or

C) for the suspension, revocation or refusal to renew or issue a license required to pursue any commercial activity, trade, occupation or profession where the licensee or applicant for a license demands such a hearing; or

D) where the agency by rule or order provides for hearing substantially of a character required by ORS 183.415, 183.425, and 184.450 to 183.470."
We respectfully doubt that the imposition of a $5 library fine would trigger the requirement for a "contested case" as the Attorney General asserted. Further, we believe that the test in Section 4 Subsection (4), in effect, is the exact same test found in ORS 183.310(2)(a). In Section 4, Subsection(4), the drafter has set down the constitutional test found in the Matthews case, which sets down the requirements for due process hearings. As a result, the standards in the present statute and the proposed legislation are virtually the same. In any event the language of Section 4 should be changed to eliminate any reference to "informal contested case procedures." This is because Section 4, Subsection(4), may indeed require the creation of formal contested case procedures when the Constitution so requires. Thus it is inappropriate to label this kind of hearing an "informal procedure."

Hopefully these suggestions and arguments will point to the need for further redrafting of this legislation. We call on the Board not to endorse this proposed bill until these many objections can be reviewed and dealt with appropriately.