JUDICIAL REVIEW OF STUDENT CHALLENGES TO ACADEMIC MISCONDUCT SANCTIONS

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I. INTRODUCTION

According to some sources, academic misconduct by college students has increased in the past two decades,[1] stimulated in part by grade

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1. KIM PARKER, AMANDA LENHART & KATHLEEN MOORE, PEW RESEARCH CENTER, THE DIGITAL REVOLUTION AND HIGHER EDUCATION 1 (2011), *available at* http://pewinternet.org/~/media//Files/Reports/2011/PIP-Online-Learning.pdf. In a survey of college and university presidents conducted in 2011, the researchers reported,

inflation[2] and the ease of locating information on the World Wide Web.[3] Although some faculty react with anger to evidence of cheating or plagiarism, while others vow to "get" the offending students,[4] academic misconduct by students (as well as by faculty)[5] is considered to be an offense against the academic community as a whole, rather than simply a dishonest attempt to claim credit for work (or test answers) that are not one's own.

Searching the archives of the *Chronicle of Higher Education* identifies numerous articles about students being caught cheating at military academies, public colleges and universities, small private colleges and universities, and even in online courses. In fact, cheating or plagiarism in an online course may be *more* likely to occur because of the more impersonal relationship between instructor and student, and because assignments are typically submitted online,[6] which also may make digital comparisons with material on the Web easier to accomplish. Further, while some experts assert that faculty can reduce or even eliminate cheating through structuring class assignments and examinations specifically to discourage dishonesty,[7] creative students will continue to find ways to

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"[m]ost college presidents (55%) say that plagiarism in students' papers has increased over the past 10 years. Among those who have seen an increase in plagiarism, 89% say computers and the internet have played a major role." *Id.* at 1. *See also* Donald L. McCabe, Linda Klebe Treviño, and Kenneth D. Butterfield, *Cheating in Academic Institutions: A Decade of Research*, 11 ETHICS AND BEHAVIOR 219, 221 (2001) (noting that the proportion of students who admit to cheating has increased since 1990, with great increases attributed to more women cheating and to collaborative work on projects designed for individual work).

2. STUART ROJSTACZER & CHRISTOPHER HEALY, TEACHERS COLLEGE RECORD, GRADING IN AMERICAN COLLEGES AND UNIVERSITIES (2010), *available at* http://gradeinflation.com/tcr2010grading.pdf. *See also* STUART ROJSTACZER & CHRISTOPHER HEALY, TEACHERS COLLEGE RECORD, WHERE A IS ORDINARY: THE EVOLUTION OF AMERICAN COLLEGE AND UNIVERSITY GRADING, 1940-2009, at 114 (2012), *available at* http://gradeinflation.com/tcr2011grading.pdf. *See also* VALEN E. JOHNSON, GRADE INFLATION: A CRISIS IN COLLEGE EDUCATION (Springer—Verlag New York, Inc., 2003). For a wealth of information on grade inflation, see http://www.gradeinflation.com/.

3. PARKER, LENHART & MOORE, *supra* note 1.

4. PATRICK ALLITT, I'M THE TEACHER, YOU'RE THE STUDENT (Univ. of Pa. Press, 2005) cited in Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J. C. & U. L. 1 (2010).

5. A discussion of academic misconduct by faculty is beyond the scope of this article. For discussions of academic misconduct by faculty, *see generally* Roger Billings, *Plagiarism in Academia and Beyond: What is the Role of the Courts*?, 38 U.S.F. L. REV. 391 (2004).

6. Jeffrey R. Young, *Online Classes See Cheating Go High Tech*, CHRON. OF HIGHER EDUC., June 3, 2012, *available at* http://chronicle.com/article/Cheating-Goes-High-Tech/132093/. *See also* McCabe, Trevino & Butterfield, *supra* note 1, at 229.

7. Jeffrey R. Young, *High-Tech Cheating Abounds, and Professors Bear Some Blame*, CHRON. OF HIGHER EDUC., Mar. 28, 2010, *available at* http://chronicle.com/article/High-Tech-Cheating-on-Homework/64857/.

avoid doing their own work.

For purposes of this article, academic misconduct, or an "academic integrity violation," refers primarily to plagiarism,[8] cheating,[9] collaborative work on an assignment that is intended to be done by the student individually, or other violations of the academic expectations of a course or assignment. The use of fabricated data or unauthorized materials, or the destruction of materials in order to prevent other students from using them (such as library resources), is also a form of academic misconduct. Most of the litigation reviewed for this article involves plagiarism, although cheating cases occur with some frequency as well.

It is important to recognize that plagiarism differs from copyright infringement. A copyright infringement could occur when an individual uses a large portion of another's work, even with attribution, if that use diminishes the market value of the original work. Copyright law permits the "fair use" of a small portion of another's work if four criteria (called the "four factors") are met.[10] Courts hearing copyright infringement cases in which a fair use defense is mounted must balance the following factors:

- The purpose and character of the use, including whether the use is

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8. Definitions of plagiarism differ. Some institutional definitions include an intent factor, while policies at other institutions state that any unattributed copying or paraphrasing is plagiarism, whether intentional or mistaken. See, for example, the definition of plagiarism at the University of Illinois, which includes both intentional and unintentional misconduct: "Plagiarism is using others' ideas and/or words without clearly acknowledging the source of that information. It may be intentional (e.g., copying or purchasing papers from an online source) or unintentional (e.g., failing to give credit for an author's ideas that you have paraphrased or summarized in your own words." *Academic Integrity and Plagiarism*, UNIV. OF ILL., http://www.library.illinois.edu/learn/research/academicintegrity.html#def (last visited Mar. 24, 2013). The definition of plagiarism at Duke University, on the other hand, includes only intentional or reckless conduct: "Plagiarism occurs when a student, with intent to deceive or with reckless disregard for proper scholarly procedures, presents any information, ideas or phrasing of another as if they were his/her own and/or does not give appropriate credit to the original source." *Plagiarism Tutorial*, DUKE UNIV., https://plagiarism.duke.edu/def/ (last visited Mar. 24, 2013). Black's Law Dictionary defines plagiarism as "the deliberate and knowing presentation of another person's original ideas or creative expressions as one's own." BLACK'S LAW DICTIONARY (9th ed. 2009). For a thorough discussion of plagiarism and an argument that institutions should avoid "zero tolerance" plagiarism policies and analyze occurrences of plagiarism with particular attention to intent, see Latourette, *supra* note 4, at 87.

9. The Merriam-Webster Dictionary contains multiple definitions of "cheating." The most relevant to the purposes of this paper is "to violate rules dishonestly." *Cheating Definition*, MERRIAM-WEBSTER DICTONARY, http://www.merriam-webster.com/dictionary/cheat (last visited Mar. 24, 2013). Although using another's answers on a test is the most common form of cheating, violation of "rules," such as a professor's requirement that a course project be the product of an individual student's work, is also a form of cheating if the student collaborates with another in completing the project.

10. 17 U.S.C. § 107 (1992). *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994).

for educational versus commercial purposes.

- The nature of the copyrighted work – is it a factual or creative work?
- The amount and substantiality of the portion to be used in relation to the work as a whole.
- The effect or impact of the use upon the potential market for or value of the work.[11]

Thus, whether or not the use of another's words or ideas is permitted under copyright law, failure to attribute the words or ideas to the original author would constitute plagiarism.[12]

According to one scholar, when considering plagiarism and copyright infringement:

> [E]ach [is] distinguished by its definition, its duration, its requisite intent or lack thereof, the focus of its protection, the applicability of criminal law, the relevance of fair use, and the significance of acknowledgement or attribution. An individual set of circumstances may indeed give rise to both plagiarism allegations and copyright infringement claims, but the articulated standards for each ought not to be blurred. Plagiarism is an ethical violation, not a legal wrong; it serves to address a moral imperative of crediting one's sources through proper citation. It involves the purposeful misrepresentation of the ideas or expression of another as one's own, and a finding of plagiarism should demand the showing of intent, or minimally, the blatant disregard of the norms of attribution. . . . Plagiarism can theoretically consist of but a few distinctive words—in contrast to copyright infringement, which requires the copying to comprise a substantial amount of the copyrighted work.[13]

As noted above, intent to pass off another's work as one's own is not an element of a copyright infringement; whether or not the individual

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11. For a discussion of copyright law and the fair use doctrine, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* § 14.2.5 (Jossey-Bass, 5th ed. 2013) (contributed by Madelyn Wessel).

12. In a case that, on the surface, blends plagiarism and copyright, A.V. v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009), four high school students sued Turnitin.com, an online system for detecting plagiarism, for copyright violations. Schools and colleges contract with Turnitin.com and submit a student's written work online to ascertain whether the student's paper is similar or identical to the written work of others, either in the company's database or in commercial databases of journals and periodicals. The students claimed that the use of their written work by Turnitin.com violated the principles of fair use, described above. The court disagreed, ruling that the use of the students' work was "transformative" because its purpose was to deter plagiarism, not to reduce the market value of high school students' written work, and thus the use satisfied all four fair use factors.

13. Latourette, *supra* note 4, at 46.

infringing another's copyright includes an attribution to the author of the work is irrelevant to copyright, but is essential for plagiarism.

In reviewing the response of courts to student legal claims involving plagiarism and cheating, this article will first discuss the discipline/academic misconduct dichotomy and the differences in the amount of deference afforded by courts to the institution's sanctioning process and its determinations regarding each type of misconduct. It will then review court opinions, both published and unpublished, that range from substantial deference on the one hand to a painstaking review of each step of the institution's determination as to the existence of academic misconduct and the outcome of that determination on the other. The article will conclude with a discussion of the implications of these cases for institutional policies and practices in dealing with allegations of academic misconduct.

II. IS ACADEMIC MISCONDUCT "ACADEMIC" OR "DISCIPLINARY"?

Colleges and universities typically develop academic integrity policies (or, put negatively, policies forbidding academic misconduct).[14] The academic integrity policy may be incorporated into the institution's code of student conduct, or it may be a separate policy. At some institutions, violations of the academic integrity policy may be adjudicated through the student judicial process used for all conduct code violations,[15] or there may be a separate process for these violations.[16]

Student challenges to sanctions levied for violations of academic integrity at colleges and universities are few in number when compared with litigation over dismissals for "academic failure"[17] or dismissals for nonacademic misconduct; however, since academic misconduct at colleges

14. For resources on developing and evaluating academic integrity policies, see THE INT'L CENTER FOR ACAD. INTEGRITY, http://www.academicintegrity.org/icai/home.php (last visited Mar. 24, 2013).

15. *See, e.g.*, *Student Conduct and Honor Code*, THE UNIV. OF FL., www.dso.ufl.edu/sccr/process/student-conduct-honor-code/ (last visited May 16, 2013).

16. Some institutions have honor codes that utilize a separate judicial process for adjudicating alleged honor code violations. *See, e.g.*, *The Honor Committee*, UNIV. OF VA., http://www.virginia.edu/honor/ (last visited May 16, 2013). *See also Rights Rules and Responsibilities*, PRINCETON UNIV., http://www.princeton.edu/pub/rrr/part2/index.xml#comp22 (last visited May 16, 2013), for a code that divides academic integrity violations into examination offenses, which are handled by the Undergraduate Honor Committee, and misconduct involving other academic assignments, such as papers, lab reports, and essays, which are handled by the Faculty/Student Committee on Discipline. This committee also handles charges of social misconduct against students.

17. For a discussion of judicial deference to cases involving "academic failure" compared with those involving academic misconduct, see Curtis J. Berger and Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

and universities has increased in recent years,[18] we can expect student challenges to dismissals for academic misconduct to increase as well. In mounting these challenges, students (and some scholars)[19] have argued that they should be provided the type of due process afforded to students who are accused of nonacademic misconduct, and that judicial review of both the process and the outcome of academic misconduct charges should resemble the judicial scrutiny of an institution's sanctions for nonacademic conduct code violations because academic misconduct is "behavior," and therefore should be adjudicated like other forms of misconduct.[20] They argue that *Goss v. Lopez,*[21] a case involving the suspension of students for social misconduct, should apply to students at public colleges and universities who are sanctioned for academic misconduct. The colleges and universities, on the other hand, tend to argue that determining whether an academic integrity violation has occurred is a professional or academic judgment and deserves the deference that courts have afforded "academic" decisions, starting in 1978 with the *Horowitz* case.[22]

In 1975, the U.S. Supreme Court, in *Goss v. Lopez*, determined that students who risked sanctions resulting from alleged code of conduct violations at public institutions were entitled to due process—notice of the charges against them and "some kind of hearing."[23] *Goss* was a landmark decision that moved some federal appellate courts to rule that *all* decisions involving student misconduct at public colleges and universities required due process, whether the decision involved social misconduct or academic matters.[24]

Three years later, however, the U.S. Supreme Court declared that judicial review of *academic* judgments by higher education officials should

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18. *75 to 98 Percent of College Students Have Cheated*, available at http://education-portal.com/articles/75_to_98_Percent_of_College_Students_Have_Cheated.html.

19. *See* Berger & Berger, *supra* note 17. In 1967, The American Association of University Professors, joined by several other higher education associations, issued a Joint Statement on Rights and Freedoms of Students. AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS: JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS 273—79 (Johns Hopkins Univ. Press, 10th ed. 2006), *available at* http://www.aaup.org/file/joint-statement-on-rights-and-freedoms-of-students.pdf. The Statement recommends that students be given due process and a full evidentiary hearing for both academic and social misconduct. *Id.* at 276–78.

20. *See, e.g.*, Napolitano v. Princeton University, 453 A.2d 263 (N.J. Super. App. Div. 1982) (discussed in Section III, *infra*).

21. 419 U.S. 565 (1975).

22. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

23. *Goss*, 419 U.S. at 579.

24. *See, e.g.*, Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) (holding that a medical student dismissed for inadequate academic performance was entitled to hearing prior to dismissal; dismissal of his 42 U.S.C. §1983 claim was reversed), Horowitz v. Bd. of Curators of the Univ. of Mo., 538 F.2d 1317 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978).

be much more deferential. In *Board of Curators of the University of Missouri v. Horowitz*,[25] a medical student challenged her dismissal from the institution because she claimed not to have been afforded the type of due process discussed in *Goss*. She was dismissed for her alleged failure to meet the academic and professional standards of a physician. The Court rejected her due process claim, explaining:

> A school is an academic institution, not a courtroom or administrative hearing room. In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact finding to call for a "hearing" before the relevant school authority. . . .
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> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.[26]

The Court revisited the issue of the nature of judicial review of academic judgments in *Regents of the University of Michigan v. Ewing*.[27] Ewing, also a medical student, had challenged his dismissal from medical school without a hearing and also asked the Court to require the school to allow him to retake a test he had failed. The Court rejected his claims, noting:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional

25. *Horowitz*, 435 U.S. at 78.
26. *Id.* at 88–90.
27. 474 U.S. 214 (1985).

judgment.[28]

Violations of academic integrity, however, have a mixed status. Plagiarism, cheating, and other forms of academic misconduct have a behavioral component, but determining whether academic misconduct occurred also requires professional judgment on the part of faculty or administrators—particularly in the case of plagiarism. One commentator has argued that the dichotomy between "academic" and "disciplinary" misconduct, and thus the differing procedural rights of the accused students, is unfair to students and actually encourages students to litigate.[29] And the prevailing view of courts across the federal circuits is that academic misconduct (as opposed to academic failure) should be viewed as a disciplinary matter, which entitles the student to procedural due process.[30]

Given the mixed status of academic misconduct, how have the courts responded? Do they bifurcate their review, deferring to institutional representatives' academic judgment with respect to whether plagiarism occurred, but scrutinizing the institution's adherence to its policies, or do they conduct a *de novo* review of the misconduct determination itself? Do they require the college or university to provide Fourteenth Amendment due process protections to students accused of academic integrity violations at public institutions, and if so, how elaborate must the protections be? Do they apply the deferential "arbitrary and capricious" standard to private institutions' determinations of academic misconduct, or do they simply apply common law breach of contract theories? Do private institutions

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28. *Id.* at 225.

29. Ferrnand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy*? 29 J. C. & U. L. 619 (2003). ("Yet concerns that more intensive judicial oversight and more extensive internal procedures would promote litigation against colleges and universities and thus perhaps dilute their credibility seem misplaced. First, there has been no shortage of such lawsuits under the current 'procedure-lite' approach to academic decisions. Second, one might persuasively counter that the more careful the institutional process, the less the judicial involvement. This flows from two different sources. First, the student who feels fairly treated will more likely not sue. Second, courts will more quickly and easily deal with such a case; review may center not on the substance of the decision, but on whether institutional procedures provided a fair method of resolution. Such a fair method of resolution would obviously incorporate academic (and disciplinary) expertise, as relevant, and some method for resolving disputes concerning facts 'susceptible of determination by third parties.' To some extent, of course, this reflects current judicial practice. Elevating the due process requirements for academic decisionmaking by higher-education institutions can be expected to reduce still further the number of controversies making it to court." *Id.* at 641–49 (footnotes omitted).

30. *See, e.g.*, Guse v. Univ. of S.D., 2011 U.S. Dist. LEXIS 34621 (D. S.D. Mar. 30, 2011) (concluding that student ethical violations are disciplinary in nature) (citing Butler v. Rector & Bd. of Visitors of Coll. of William & Mary, 121 Fed. Appx. 515, 519 n.2 (4th Cir. 2005)); Nash v. Auburn Univ., 812 F.2d 655, 658–59 (11th Cir. 1987)). *See also* Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 931 (Tex. 1995) ("Than's dismissal for academic dishonesty unquestionably is a disciplinary action for misconduct.").

experience the type of scrutiny applied to public institutions? Do courts attempt to evaluate the fairness of the process used, or simply require the institution to follow whatever procedures it has developed? Do they evaluate the severity of the sanction, or do they defer to the institution's judgment?

III. JUDICIAL REVIEW OF STUDENT CHALLENGES

Although only public colleges and universities are subject to the U.S. Constitution's Fourteenth Amendment Due Process Clause,[31] many private colleges include a form of due process protection for students accused of both nonacademic and academic conduct code violations in their student handbooks or policy statements.[32] Therefore, analysis of judicial review of these cases is less likely to find differences between public and private institutions in the courts' analysis, but differences in judicial deference to the adjudication process, the propriety of the determination of guilt, and the severity of the sanction, are evident. Judicial review ranges from virtually carte-blanche deference[33] to a *de novo* review of the procedures used and the substantive judgments reached.[34]

A. Degree of Judicial Deference

As noted in Section II, most courts cite *Ewing* and *Horowitz* as the justification for a deferential review of academic judgments, including, in many cases, the determination of whether a student engaged in academic misconduct. An early, and influential, state court case, *Napolitano v. Princeton University*,[35] helped set the stage for the application of *Horowitz*

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31. U.S. CONST. amend. XIV, §1. *See also* Goss v. Lopez, 419 U.S. 565 (1975).

32. Berger & Berger, *supra* note 17, at 297. Consider, for example, the Student Disciplinary Process at Bowdoin College, a private institution. The process provides, among other rights, the right to a "Judicial Board hearing" and protections for the accused, such as written notice of the charges against the student, an opportunity to have individuals speak on behalf of the student, the right by the student to present evidence, and the right of appeal. Bowdoin Student Disciplinary Process, http://www.bowdoin.edu/studentaffairs/student-handbook/college-policies/student-disciplinary-process.shtml (last visited Mar. 24, 2013). *See also* the Student Conduct Process of Kenyon College, a private college, which guarantees, among other rights, that the accused has the right to a written statement of charges against the student, provides for an "unbiased hearing" based upon evidence presented at the hearing, the right to present evidence, the right to question witnesses against the student, and the right of appeal. Kenyon College Student Handbook, http://documents.kenyon.edu/studentlife/studenthandbook.pdf (last visited Mar. 24, 2013).

33. Di Lella v. Univ. of the D.C. David A. Clark Sch. of Law, 570 F. Supp. 2d 1 (D.D.C. 2008).

34. *See, e.g.*, Faulkner v. Univ. of Tenn., 1994 Tenn. App. LEXIS 651 (Tenn. Ct. App. Nov. 16, 1994) and Napolitano v. Trustees of Princeton Univ., 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

35. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

deference to judicial review of academic misconduct determinations. Although the *Napolitano* court closely scrutinized every aspect of the determination (and required a rehearing by the university), it resisted the student's insistence that trial courts should perform a true *de novo* review of the correctness of the determination that academic misconduct had occurred and the appropriateness of the sanction.

In *Napolitano v. Princeton University*,[36] a second semester senior was accused of plagiarizing a substantial portion of a required term paper. The university held a hearing, and the hearing committee unanimously determined that the student had violated the university's academic integrity policy. The sanction imposed was withholding her degree for one year. The student challenged the procedures used by the committee to reach the academic misconduct finding, and also argued that the sanction was too severe. Her challenge involved close judicial scrutiny of the process used, the sufficiency of the evidence considered by the hearing committee, and the appropriateness of the sanction—all demonstrating an unusual lack of deference in this line of cases.

The plaintiff sued for breach of contract (and made numerous other claims), and the trial judge ordered the university to repeat the hearing because the committee had not made an explicit finding as to whether the student's actions of plagiarizing were intentional (as required by the university's academic integrity policy).[37] The trial judge ordered the parties' attorneys to develop specific instructions for the second hearing by the hearing committee,[38] and also ordered that a number of trial-type actions be taken, including requiring that the hearing be tape-recorded, that a written summary of the hearing be created, and that the decision be based only upon evidence presented at the rehearing. The trial judge rejected the student's request to be represented by counsel at the rehearing. The committee reached the same result after the second hearing, and the trial

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36. *Id*.

37. *Id.* at 269–70.

38. *Id.* According to the appellate court, the instructions, which were approved by the judge, were: "The Committee should first focus upon whether the offense of plagiarism has occurred. In so doing, it should determine whether there has been deliberate use of an outside source without proper acknowledgment. In this regard, "deliberate" means "intention to pass off the work as one's own." If the question of a penalty is reached, the Committee should then focus upon: (a) the seriousness of the offense that has been found to have been committed, (b) the character and accomplishments of the person who has committed the offense, (c) the penalties assigned in other cases, and (d) the purposes—including educative—of the penalty to be assigned in this matter." In addition, according to the appellate court, "[a]t plaintiff's request, the trial judge directed that the documents which were submitted to him be made available to the Committee prior to the rehearing. They included: (1) plaintiff's three-volume appendix; (2) the complete transcripts of all depositions and (3) unannotated copies of the English translations of plaintiff's paper and the *Ludmer* text [the text from which the student had allegedly copied]."

judge, who had retained jurisdiction, held a subsequent bench hearing and determined that the committee's decision was supported by the evidence adduced at the second hearing. He entered summary judgment for the university, and the student appealed.[39]

The appellate court affirmed the trial judge's ruling, noting that this was a case of first impression for the state's courts. The trial judge had relied on cases involving the law of private associations; the appellate court said that these cases were useful, but that private higher education was different from a private association.[40] Discussing the outcome of *Horowitz*,[41] the appellate court decided that that case's reasoning was the most appropriate standard of review for judgments regarding academic misconduct, and that deference to the university's internal decision-making process was appropriate.[42] The appellate court explicitly rejected the plaintiff's contention that the trial judge should have held an evidentiary hearing—which would have meant a repeat of the second hearing before the trial judge, who would then determine whether the academic policy had been violated.[43] Despite that statement and its insistence on the propriety of deference, the appellate court reviewed the evidence of intentional plagiarism considered by the hearing committee, finding both the outcome of the hearing and the penalty imposed to be justified. Subsequent courts have cited *Napolitano* for its language on academic deference, but most have not replicated its close scrutiny of the evidence and its insistence on a variety of trial-type protections for the hearing committee procedure.[44]

Even if a college's academic misconduct policy provides for notice, a hearing, and an opportunity to appeal, some courts still look to *Ewing*[45] and apply its deferential standard of review for cases involving *academic failure* when reviewing student challenges to *academic misconduct* charges. For example, in *Mawle v. Texas A&M University-Kingsville*, a

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39. *Id.* at 270.

40. *Id.*

41. *See* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

42. *Napolitano*, 453 A.2d at 273. The appellate court stated: "Courts have also recognized the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student. We have noted heretofore that we regard the problem before the court as one involving academic standards and not a case of violation of rules of conduct."

43. *Id.* at 276.

44. *See, e.g.*, Partovi v. Felician Coll., 2011 No. DC-022681-09, 2011 WL 867275 (N.J. Super. Ct. App. Div. Mar. 15. 2011); Mittra v. Univ. of Med. and Dentistry of N.J., 719 A.2d 693 (N.J. Super. Ct. App. Div. 1998). Both of these cases involved dismissals for academic failure, not for academic misconduct. Given the teachings of *Horowitz* and Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985), which would subject decisions involving academic failure to minimal judicial scrutiny, this is the appropriate level of scrutiny for cases not involving academic misconduct.

45. *Ewing*, 474 U.S. at 214 (1985).

graduate student, who was a native of India, was found to have plagiarized two term papers. [46] One term paper had been submitted to Turnitin.com, and was found to contain a high "similarity index" of seventy percent.[47] The second term paper was also submitted to Turnitin.com, which found a "similarity index" of eighty-eight percent.[48] University policy provided that cases of "repeated plagiarism" would result in a student's expulsion.

Two hearings were held, as well as an appeal; the student was found to have plagiarized and was expelled. He claimed violations of procedural and substantive due process, discrimination, and retaliation. With respect to the student's substantive due process claim, the court, relying on *Ewing*, reasoned:

> Whether Plaintiff in fact plagiarized or whether Defendants reached the *wrong* conclusion regarding the same is not for this Court to decide. Even if Plaintiff did not plagiarize, the issue before this Court is whether Defendants exercised their professional judgment in concluding that Plaintiff had in fact done so. Based on the foregoing, the Court finds Defendants (1) had a legitimate basis to conclude that Plaintiff had plagiarized and should be expelled, and (2) used their professional judgment in making those decisions.[49]

The court also rejected the student's procedural due process, discrimination, and retaliation claims.

On the other hand, a few courts have concluded that academic misconduct should receive the same level of scrutiny that judges use to review sanctions for nonacademic misconduct. For example, in *University of Texas Medical School at Houston v. Than*,[50] a medical student, Than, was dismissed for allegedly cheating on an examination. He sued, claiming that an *ex parte* portion of the dismissal hearing violated procedural due process. The university argued that the dismissal was for academic reasons, and that Than had no right to procedural due process. The court disagreed:

> UT argues that Than's dismissal was not solely for disciplinary reasons, but was for academic reasons as well, thus requiring less stringent procedural due process than is required under *Goss* for disciplinary actions . . . . This argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct . . . . Than's dismissal for academic dishonesty

46. No. CC- 08-64, 2010 WL 1782214 (S.D. Tex. Apr. 30, 2010).
47. *Id. at 9.* For a description of Turnitin.com, *see supra* note 12.
48. *Id.*
49. *Id*. at 10.
50. Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926 (Tex. 1995).

unquestionably is a disciplinary action for misconduct.[51]

Yet other courts have failed to distinguish between the standard of review for challenges to academic misconduct sanctions and sanctions imposed for poor academic performance (or "academic failure"). For example, in *Di Lella v. University of the District of Columbia David A. Clarke School of Law*,[52] a law student who had submitted examination answers copied directly from websites challenged her one-year suspension under District of Columbia and federal disability discrimination laws. In reviewing her claim, the court cited *Alden v. Georgetown University*,[53] a case involving a medical student's dismissal for failing grades and excessive absences from clinical responsibilities ("academic failure"), not academic misconduct. The *Di Lella* court characterized the determination of plagiarism as an "academic judgment" and declined to review it.[54]

For purposes of this article, emphasis has been placed on cases decided since 2000, since other scholars have reviewed and assessed cases decided prior to this time period.[55] Most opinions in student challenges to

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51. *Id.* at 931. *See also* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (1984)(concluding that a student suspended for cheating on a final exam had a right to procedural due process, and that under the *Goss* standard, he had received it), In re Kalinsky v. State Univ. of N.Y. at Binghamton, 557 N.Y.S.2d 577 (N.Y. App. Div. 1990) (student found guilty of plagiarism was entitled to statement detailing the factual findings and evidence relied upon by the Academic Honesty Committee in its determination; lack of such a statement denied her due process).

52. 570 F. Supp. 2d 1 (D.D.C. 2008).

53. Alden v. Georgetown Univ., 734 A.2d 1103 (D.C. 1999).

54. *Di Lella*, 570 F.Supp.2d at 9. The court stated: "First, to the extent that Di Lella seeks review of the Committee's decision, the court 'follow[s] the lead of the Supreme Court as well as other courts across the country in declining to engage in judicial review of academic decision-making by educational institutions'" (citing *Alden*, 734 A.2d at 1103). However, Berger and Berger scoff at such judicial deference to judgments about academic misconduct: "Traditionally, courts have been hostile to claims challenging disciplinary procedures in institutions of higher education. More so than most other professionals—such as doctors, lawyers, accountants, architects, or engineers—university professors and deans have enjoyed an almost total de facto immunity from judicial review of their methods. Strong adherence to the ideal of academic freedom, possibly combined with a mystical (and mythical) attitude that professors really do know best, may help explain why courts have been so leery of trumping a school's views about an educational subject with the court's own. While this attitude may be appropriate on truly academic matters like exam grades or the quality of a Ph.D. dissertation, a panel composed of non-academics can surely decide whether X peeked at Y's exam, or Z plagiarized another's paper —a concession that schools, in providing for disciplinary hearings, have already made." Berger and Berger, *supra* note 17, at 301 (footnotes omitted).

55. *See* Berger and Berger, *supra* note 17. *See also* Billings, *supra* note 5; Ralph D. Mawdsley, *The Tangled Web of Plagiarism Litigation: Sorting Out the Legal Issues*, 2009 BYU EDUC. & L. J. 245 (2009); Dutile, *supra* note 29; Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183 (2000); Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War Against Student Plagiarism*, BYU EDUC. & L. J. 119 (2007).

academic discipline are from trial courts; students are overwhelmingly unsuccessful in their quests to overturn the colleges' judgments,[56] and few of the trial court opinions are appealed.

B. Procedural Due Process Claims

In order for an individual to state a due process claim under the U.S. Constitution's Fourteenth Amendment, the plaintiff must have a "property right" that was denied without the appropriate procedural protections.[57] The U.S. Supreme Court has not yet ruled on whether a student at a public college or university has a right to continued enrollment, assuming compliance with the institution's rules and regulations (and acceptable academic performance). In addressing students' procedural due process claims when sanctioned for academic misconduct, most courts have assumed, without deciding, that a student has such a property right.[58] A federal appellate court has ruled, however, that students at public institutions do not have a property right in continued enrollment.[59] In

56. Even when student claims involve academic misconduct rather than academic failure, courts tend to cite *Ewing* and defer to the college's determinations in cases where the court has found the institution's behavior reasonable. *See* Mawle v. Tex. A&M Univ.-Kingsville, No. CC-08-04, 2010 WL 1782214 (S.D. Tex. Apr. 30, 2010) (discussed in this Section), Bisong v. Univ. of Houston, 493 F.Supp.2d 896, 906 (S.D. Tex. 2007). But in one case the court sided with students who accused a professor of conduct that most academics would view as outrageous. In Papelino v. Albany Coll. of Pharmacy, 633 F.3d 81 (2d Cir. 2011), three students claimed that they were falsely accused of cheating by a professor because one had rejected her sexual advances; a state court proceeding found the college's determination that they had cheated to be arbitrary and capricious (Basile v. Albany Coll. of Pharmacy of Union Univ., 719 N.Y.S.2d 199 (N.Y. App. Div. 3d Dep't 2001)). The three plaintiffs then brought claims under Title IX for harassment and retaliation, as well as claims for negligence, intentional infliction of emotional distress, and breach of contract. The court concluded that the plaintiffs were entitled to a jury trial, stating: "This is one of those rare education cases where it is appropriate for a court to intervene. Indeed, the Third Department has already done so, setting aside the College's determination that plaintiffs had cheated. . . . we conclude that genuine issues exist for trial with respect to whether the College breached its implied duty of good faith by, inter alia, failing to investigate Papelino's complaint of sexual harassment, mishandling the Honor Code proceedings after Nowak accused plaintiffs of cheating, and denying (at least initially) Papelino and Basile a diploma and failing Yu in a course. Accordingly, we conclude that the district court erred in granting summary judgment dismissing plaintiffs' breach of contract claim." *Id.* at 94. The court allowed the remaining claims to be tried as well.

57. Bd. of Regents v. Roth, 408 U.S. 564, 569–571 (1972).

58. For a discussion of whether a student has a property right in continued enrollment, and citation to cases on both sides of this issue, see Lee v. Univ. of Mich.-Dearborn, No. 5:06-CV-66, 2007 WL 2827828 (W.D. Mich. 2007) at 19–23.

59. Williams v. Wendler, 530 F.3d 584 (7th Cir. 2008). *See also Lee*, No. 5:06-CV-66, 2007 WL 2827828 (W.D. Mich. 2007) at *24–25 ("This court finds that plaintiff had no clearly established constitutional right to substantive or procedural due process in her disciplinary proceeding at the University based upon her expectation of

Williams v. Wendler, a challenge to discipline for social misconduct (sorority hazing), the court rejected the plaintiffs' contention that they had a protected property right in continued enrollment at Southern Illinois University, a public institution:

> The plaintiffs' problem in this case, and the justification for the district court's dismissing their due process claim without awaiting the presentation of evidence, is that they premise the claim entirely on the bald assertion that any student who is suspended from college has suffered a deprivation of constitutional property. That cannot be right. And not only because it would imply that a student who flunked out would have a right to a trial-type hearing on whether his tests and papers were graded correctly and a student who was not admitted would have a right to a hearing on why he was not admitted; but also because the Supreme Court requires more. It requires, proof of an entitlement, though it can be a qualified entitlement (most entitlements are), in this case an entitlement not to be suspended without good cause. That is a matter of the contract, express or implied.[60]

Because the plaintiffs had not made contract claims, the court affirmed the lower court's award of summary judgment.

Many of the students attempting to state procedural due process claims argue that the notice and hearing provided by the institution is defective, or insufficient in some way. For example, in *Van Le v. University of Medicine and Dentistry of New Jersey*,[61] a dental student expelled for cheating on an examination challenged the period of time given him to prepare for the hearing (one week) and the hearing board's decision to admit testimony from a professor who had observed earlier cheating by the plaintiff, but had not reported it, as violations of procedural due process. The court disagreed, noting:

> Le was afforded extensive procedural protections: notice, a

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continued enrollment, much less her expectation of a certain type of due process itself. . . Here, although some courts have concluded that post-secondary students, such as plaintiff, have procedural or substantive due process rights protected by the federal constitution, the existence and 'contours' of those rights appear to be an issue of judicial debate, even between different panels at the Sixth Circuit. 'If judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy.'") (citing Wilson v. Layne, 526 U.S. 603, 618 (1999)).

60. *Id*. at 589. *Accord* Park v. Trustees of Purdue Univ., 2011 U.S. Dist. LEXIS 39250 (N.D. Ind. 2011). The plaintiff in *Park* had also claimed an equal protection violation, as well as race, sex, and national origin discrimination; these claims were not dismissed. The author of the *Williams* opinion, Judge Posner, has authored a book entitled *The Little Book of Plagiarism*. RICHARD POSNER, THE LITTLE BOOK OF PLAGIARISM (2007).

61. 379 Fed.Appx. 171 (3d Cir. 2010).

> hearing before a panel of students and faculty, the right to present witnesses and evidence, the right to cross examine witnesses, a lay adviser in the room, an attorney outside the hearing room, two levels of appeal (during one of which he was represented by counsel), and the opportunity to submit further evidence after the hearing. Le argues that the notice was insufficient because he was not advised that evidence would be presented against him regarding other incidents. However, Le was aware of rumors regarding other incidents of cheating. Such evidence also served to rebut his defense that a back problem caused his unusual movements. In addition, there was a period of at least four days between the two days of the hearing to develop a response to these allegations. He was permitted to submit further material after the hearing.[62]

The court credited the defendants' explanation that the hearing needed to be held before the end of the academic semester to avoid a several-month delay and ruled that the plaintiff was "educated [and] capable;" thus one week was sufficient time to prepare his defense.[63]

Student claims that an institution did not follow its own procedures typically do not convince a court that a procedural due process violation has occurred if the procedures used to make the decision actually satisfied Fourteenth Amendment standards.[64] Several courts have ruled that an institution's failure to follow its own procedures is not itself a due process violation,[65] although it might provide a student with a breach of contract claim.[66] And, of course, if procedures are available to the student that he or

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62. *Id.* at 175.

63. *Id.* at 174.

64. *See, e.g.*, Newman v. Burgin, 930 F.2d 955, 960 (1st Cir. 1991). "Dismissal of a student for academic reasons comports with the requirements of procedural due process if the student had prior notice of faculty dissatisfaction with his or her performance and of the possibility of dismissal, and if the decision to dismiss the student was careful and deliberate" (citing Schuler v. Univ. of Minn., 788 F.2d 510, 514 (8th Cir. 1986)).

65. *See, e.g.*, Schuler v. Univ. of Minn., 788 F.2d 510, 515 (8th Cir. 1986) (ruling that, despite the fact that the plaintiff may not have received all of the procedural protections provided for in university policy, the hearing she received exceeded constitutional due process requirements). *See also* Flannery v. Bd. of Tr. of Ill. Comm. College, 1996 U.S. Dist. LEXIS 17049, 8–9 (N.D. Ill. Nov. 4, 1996) (same ruling).

66. Many courts reviewing breach of contract claims brought by students disciplined for social misconduct have ruled that a college is contractually bound to follow the procedural safeguards included in student handbooks and codes of conduct. *See* Felheimer v. Middlebury Coll., 869 F. Supp. 238, 246 (D. Vt. 1994) (ruling that a disciplinary hearing was "fundamentally unfair" because the college had not provided all of the "due process" protections included in the student handbook). *But see* Schaer v. Brandeis Univ., 735 N.E.2d 373 (Mass. 2000) (assuming, without deciding, that a contractual relationship existed between the student and the college, but ruling that, despite the fact that the college had apparently not followed all of its handbook policies

she fails to use, such as an appeal process or the opportunity to provide exculpatory information, or a complete refusal to attend the hearing at all,[67] no due process violation has occurred.[68] Courts have determined that an institution's procedure that provides for an informal "hearing" before an academic administrator, who then makes the determination as to whether misconduct occurred, satisfies due process requirements, particularly because the student had an opportunity to appeal that determination.[69]

Furthermore, courts have ruled that a student who admits to the accusation of academic misconduct is not entitled to procedural due process. For example, in *Anvar v. Regents of the University of California*,[70] a student who admitted to changing incorrect answers to correct answers on a graded examination, then submitting it for regrading, nevertheless claimed that because he did not receive an evidentiary hearing, he was denied due process. The court disagreed for two reasons: procedural due process does not require an evidentiary hearing, and because he had admitted to cheating, he was not entitled to any process beyond the notice and hearing provided by his meeting with the dean.[71]

C. Breach of Contract Claims

Students subjected to sanctions for alleged academic misconduct at private colleges and universities rely primarily on breach of contract claims, typically claiming that the institution did not follow its own procedures.[72] Just as courts addressing due process claims tend to decide that substantial, rather than complete, compliance with the institution's policies is all that is required, so do courts addressing breach of contract claims.[73]

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and procedures, the student had not stated a breach of contract claim).

67. *See, e.g.*, Chalmers v. Lane, 2005 U.S. Dist. LEXIS 1793 (N.D. Tex. Jan. 25, 2005).

68. *See, e.g.*, Morris v. Rinker, 2005 U.S. Dist. LEXIS 33919 (M.D. Fla. Apr. 14, 2005). In *Morris*, a student who claimed that he did not receive a letter from the college advising him of the plagiarism charge against him "because his ex-girlfriend was tampering with or 'vandalizing' his mail" admitted receiving a second such letter; his failure to respond in a timely manner was not attributable to the college and not a denial of due process. *Id.*

69. Anvar v. Regents of the Univ. of Cal., 2005 Cal. App. Unpub. LEXIS 9850 (Cal. Ct. App. Oct. 27, 2005).

70. *Id. See also* Viriyapanthu v. Regents of the Univ. of Cal., 2003 Cal. App. Unpub. LEXIS 8748 (Cal. Ct. App. Sept. 15, 2003).

71. *Id.* at 19.

72. Although the majority rule seems to be that the relationship between a student and a college or university is contractual in nature, some courts hesitate to apply contract law principles to disputes between students and their institutions. For a discussion of this issue and the varying approaches used by courts, see Kaplin and Lee, *supra* note 11, Section 8.1.3.

73. Trahms v. Tr. of Columbia Univ., 666 N.Y.S.2d 150 (N.Y. App. Div. 1997) (finding that four days' notice of scheduling of hearing was sufficient; student could

A federal trial court addressed a breach of contract claim by a student taking online courses at the University of Scranton, a private university. In *Hart v. University of Scranton,*[74] a student submitted a paper for a course that contained a portion of a paper she had submitted for a different course. No hearing was held, and the student was expelled. The student claimed that the university's definition of plagiarism did not include submitting portions of a paper for two different courses because "one cannot plagiarize her own work,"[75] and thus the university had breached its contract with her. In a striking example of deference, the court disagreed, saying:

> Hart alleges that the University had a "contractual duty" not to violate the Handbook, but she has not provided any specific provision giving rise to such a duty. While the University may have misconstrued "plagiarism" as per the Handbook, this passage is merely a definition, not a promise, and Hart points to no clause that would bind the University to strictly adhere to that definition. Moreover, Hart has not identified any contractual provision that dictates under what conditions the University could expel her. Simply, the term Hart relies on is a definition, and she has not shown how this term has created an affirmative duty on the part of the University.[76]

And because the student had not specified where in the university's procedures it promised her the right to confront witnesses and present evidence before dismissal, that claim was dismissed as well.[77]

In another breach of contract claim, a student was accused of plagiarism and attempted to obtain a faculty member or graduate student to serve as an advisor to him during the hearing process. No one that he asked would agree to serve, and he was found guilty of plagiarism and suspended. [78]

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not demonstrate any harm and institution substantially complied with the provisions of the student handbook). *See also* Anderson v. Vanderbilt Univ., 2010 U.S. Dist. LEXIS 52381 (M. D. Tenn. May 27, 2010) (holding that minor procedural deviations did not disadvantage the student and the outcome would have been the same had procedural compliance been complete); Okafor v. Yale Univ., 2004 Conn. Super. LEXIS 1657 (Conn. Super. Ct. June 25, 2004) (holding that the university substantially complied with procedures; no evidence of bias or ill will by hearing committee members).

74. Hart v. Univ. of Scranton, 2012 U.S. Dist. LEXIS 42629 (M.D. Pa. Mar. 28, 2012).

75. *Id*. at 8. The university's definition stated that plagiarism included "giving the impression that you have written or thought something that you have in fact borrowed from someone else." *Id*. There is apparently little consensus as to whether "self-plagiarism" is an ethical violation; the American Psychological Association recommends that an individual who wishes to re-use his or her previously written material should cite the earlier writing. *See* THE ETHICS OF SELF-PLAGIARISM, *available at* http://www.ithenticate.com/Portals/92785/media/ith-selfplagiarism-whitepaper.pdf.

76. *Hart*, 2012 U.S. Dist. LEXIS 42629 at 9.

77. *Id*. at 11–12.

78. Morris v. Brandeis Univ., 2001 Mass. Super. LEXIS 518 (Mass. Super. Ct.

The student claimed that the university's deprivation of an advisor constituted a breach of contract; the court disagreed, saying that the policy allowed the student to bring an advisor to the hearing, but did not require the university to provide him with one.[79]

Students' breach of contract claims are rarely successful, but if the facts are egregious enough the student may prevail. In *Papelino v. Albany College of Pharmacy*,[80] three students were accused of cheating on tests by a professor who had made sexual advances toward one of the students. After the target of the alleged sexual advances reported the situation to the associate dean of students, who did not investigate and did not report the complaint to anyone, the professor made the cheating accusations, and was the primary witness and "prosecutor" at the academic misconduct hearing. Two of the students were expelled. All three students brought a state court claim against the college, and the court found that the cheating determination was arbitrary and capricious because it was based upon insufficient evidence.[81] The court in the later case, *Papelino v. Albany College of Pharmacy*, determined that summary judgment for the college was inappropriate because of what it considered to be clear evidence of misconduct on the part of the associate dean and the professor, and reversed the award of the trial court.[82]

In some breach of contract cases, student plaintiffs have asserted that the outcome of the academic misconduct hearing was arbitrary and capricious.[83] They appear to use this claim when the institution has complied with the provisions of the student handbook or other relevant policies, but they assert that the decision itself was too harsh.[84] Berger and Berger criticize use of the arbitrary and capricious standard in academic misconduct cases:

> "Arbitrary and capricious" is an administrative review standard. It is also the standard that courts have ordinarily used when testing the dismissal of a student for academic failure. This test seems appropriate where the agency's or school's decision calls

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Sept. 4, 2001).

79. *Id.* at 9-10.

80. Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81 (2d Cir. 2011).

81. Basile v. Albany Coll. of Pharmacy of Union Univ., 719 N.Y.S.2d 199 (3d Dep't 2001).

82. *Papelino*, 633 F.3d at 94.

83. *See, e.g.*, McCawley v. Universidad Carlos Albizu, 461 F. Supp. 2d 1251 (S.D. Fla. 2006) (holding that the decision by university not to award doctoral degree to student who had completed all academic requirements but who had engaged in academic misconduct and a variety of unethical and unprofessional actions was neither arbitrary nor capricious); Shah v. Union Coll., 2012 N.Y. App. Div. LEXIS 5502 (N.Y. App. Div. July 12, 2012) (holding that since student admitted to plagiarism, committee's finding and sanction were neither arbitrary nor capricious).

84. *Id*.

> for an expert judgment in the area in which the institution, not the court, has greater expertise. But where a student's career may be at stake because of an academic "crime," akin to fraud or copyright infringement, matters courts handle as fact-finders routinely, colleges should not enjoy quite the same degree of deference. Nor does the phrase "good faith and fair dealing" warrant so cramped an interpretation.[85]

In New York and California, students who wish to challenge the decision of a private college or university in state court in cases not involving discrimination claims are limited to proceedings under state administrative law, rather than bringing breach of contract claims in civil court. In these cases, the judge is limited to evaluating whether the college followed its policies and procedures; such review uses the "arbitrary and capricious" standard.[86]

In summary, most courts have concluded that, at public universities, a form of procedural due process is required for proceedings involving a sanction for academic misconduct, usually citing *Goss*.[87] This does not mean, however, that their deference to the academic judgment of faculty and administrators has diminished, as the cases discussed in this Section have demonstrated. And the standard of review for proceedings at private institutions, where due process is not required, continues to be substantial compliance with the institution's policies and procedures, along with an occasional foray into whether the decision was arbitrary and capricious.

D. Discrimination Claims

The review of cases conducted for this article identified several in which the student claimed that the academic misconduct with which they were charged was a result of a learning disorder or some other disability. Such claims, as in the *Di Lella* case noted earlier in this Section, are typically unsuccessful because courts state that compliance with academic integrity rules is an essential function of being a student; a student whose disability

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85. Berger and Berger, *supra* note 17, at 334 (footnotes omitted).

86. *See, e.g.*, Shah v. Union Coll., 948 N.Y.S.2d 456 (N.Y. App. Div. 2012) (holding that judicial review of a private university's disciplinary determinations is limited to whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings). *See also* Idahosa v. Farmingdale State Coll., 948 N.Y.S.2d 104, 106 (N.Y. App. Div. 2012) ("An administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law . . . . It cannot be concluded, as a matter of law, that the penalty of dismissal is so disproportionate to the petitioner's misconduct as to be shocking to one's sense of fairness, particularly in light of the facts that he was put on notice of that possible disciplinary measure, that he continued to deny his plagiarism, and that he provided an implausible explanation for the similarity between his paper and that of the other student.").

87. *Goss v. Lopez*, 419 U.S. 565 (1975).

prevents such compliance thus is not qualified and not protected by the disability discrimination laws.[88]

In *Kiani v. Trustees of Boston University*, a law student with learning disorders was found guilty of plagiarizing in six courses.[89] Although she claimed that she lacked the intent to plagiarize because of the medication she was taking, she was expelled because her grade point average fell below the required minimum after the grades in the courses in which she had plagiarized were changed to "F"s. The student claimed that she had not been advised in writing of her right to remain silent during the hearing, as required by the law school's policies. The court found several instances of oral notice to her and to her attorney of her right to remain silent.[90] The court awarded summary judgment to the university on her discrimination and breach of contract claims, noting that the plagiarism determinations had been made on the basis of documents (course papers), not on the basis of her testimony, which, the court said, actually persuaded the hearing committee to hand down a lesser sanction (suspension) than the typical suspension for repeated plagiarism (expulsion).[91]

A claim of discrimination brought by a doctoral student against the University of Houston demonstrates the lengths to which a student may go to attempt to persuade a court to reverse a plagiarism determination. In *Bisong v. University of Houston*, a student from Cameroon enrolled in the doctoral program in English was accused of plagiarism twice and eventually was expelled.[92] She brought race discrimination and breach of contract claims, asserting that the professors who discovered the plagiarism, and the hearing panel, were biased against her on the basis of race. One of the faculty defendants had worked extensively with the student to help her understand the requirements of scholarly attribution and had also recommended a tutor for her. An academic honesty panel, in two separate hearings, upheld the department chair's determination that both papers were plagiarized.[93]

In an effort to rebut the plagiarism determinations, the plaintiff obtained affidavits from two professors of English from other institutions; one from the University of Phoenix and a second from DeVry University. Both individuals reviewed the papers at issue and concluded that the student had not committed plagiarism. In arguing that the court should not award summary judgment to the university, the plaintiff claimed that the views of these "external experts" created issues of fact that a jury must resolve. The court disagreed:

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88. *See, e.g.*, Childress v. Clement, 5 F. Supp. 2d 384 (E.D. Va. 1998)
89. 2005 U.S. Dist. LEXIS 47216 (D. Mass. 2005).
90. *Id.* at 18.
91. *Id.* at *23.
92. 493 F. Supp. 2d 896 (S.D. Tex. 2007).
93. *Id.* at 90–91.

> [T]he question is not whether the university made an erroneous decision, but whether the university's decision was made with discriminatory motive. Even an incorrect determination that plaintiff submitted a plagiarized paper constitutes a legitimate nondiscriminatory reason for her expulsion. Since motive is the issue, a dispute in the evidence concerning academic performance does not provide a sufficient basis for a reasonable fact-finder to infer that the proffered justification is unworthy of credence. . .
>
> [P]laintiff has failed to present any evidence that the graduate students or faculty members who comprised the Academic Honesty Panel failed to conduct an independent review of the evidence before concluding that plaintiff's paper was plagiarized, or that any of them harbored discriminatory animus towards plaintiff's race and/or national origin. At best the affidavits of Dr. Bartlett-Pack and Dr. de Vita raise a fact issue about the accuracy of the panel's determination, but that fact issue is not a genuine issue of material fact that precludes summary judgment unless it is also accompanied by evidence from which a reasonable jury could infer that the panel's decision to expel the plaintiff was motivated by unlawful discriminatory intent.[94]

Although the court concluded that the plaintiff had not provided sufficient evidence of race discrimination to avoid a summary judgment ruling, its discussion of the views of the "external experts" solicited by the plaintiff is troubling because it suggested that, had the plaintiff been able to allege facts suggesting actual bias, the court might have allowed the determination of whether, in fact, the plaintiff had committed plagiarism to go to a jury. The plaintiff was inviting the court (and potentially a jury) to determine whose judgments were more credible—those of the university representatives who made the plagiarism determinations or those of individuals from other institutions. Even if the plaintiff had obtained "expert opinions" from scholars from highly-ranked research universities, opening the door to a judicial or lay determination of whether to affirm the institution's decision or not involves the court in a decision that many courts believe judges (and juries) are not qualified to make.

If the student plaintiff can demonstrate that institutional faculty or administrators were unresponsive to attempts to understand, rectify or avoid academic misconduct, he or she may be able to deflect a motion for summary judgment or dismissal. For example, in *Peters v. Molloy College of Rockville Centre*,[95] an African-American master's student enrolled in a

94. *Id*. at 907–908.

95. 2008 U.S. Dist. LEXIS 52194 (E.D.N.Y. July 8, 2008).

nursing program was accused by a professor of plagiarizing a course paper from another student. The professor required the student to redo the paper but still found it unsatisfactory. According to the student, the professor refused to meet with her to discuss the problems with the paper. When the student asked to meet with the associate dean to discuss a grade appeal and showed up with her attorney, the dean refused to meet with her and required all communications to be made through the college's attorney and hers. The attorneys subsequently agreed on two possible resolutions of the grade appeal, neither of which the student selected. She sued, claiming race discrimination under Title VI of the Civil Rights Act of 1964[96] and Section 1981 of the Civil Rights Act.[97] The court, noting that the student had made earlier complaints about alleged race discrimination by certain faculty and administrators, rejected the college's motion to dismiss the race discrimination claim against the institution.[98]

Even though a discrimination claim, compared with a breach of contract or due process claim, presents a stronger rationale for judicial scrutiny of the evidence and process used to make an academic misconduct determination (because the decision-makers' motive is at issue), the cases discussed in this Section (with the exception of *Peters*) are as deferential to institutional processes and determinations as those grounded in contract or constitutional claims.

E. Severity of the Sanction

A few cases, including the early *Napolitano* case,[99] include student claims that the sanction was too harsh—either a due process claim if the student is suing a public institution or a breach of the covenant of good faith and fair dealing if the student is suing a private college.[100]

In *Smith v. VMI*, a cadet at Virginia Military Institute was expelled for

96. 42 U.S.C. § 2000d.

97. 42 U.S.C. § 1981.

98. 2008 U.S. Dist. LEXIS 52194 at *37. In earlier complaints, students had alleged that African-American students were graded more harshly than white students; plaintiff alleged that these complaints had been ignored. *Id.* at *7. If, however, there is no credible factual link between the academic misconduct determination and alleged discrimination, the court will likely dismiss the case or award summary judgment to the institution. *See, e.g.*, Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71 (D.D.C. 2003) (dismissing a case where an undergraduate student found to have plagiarized could not demonstrate race discrimination as a motive); Cobb v. Univ. of Va., 84 F. Supp. 2d 740 (W.D. Va. 2000), *aff'd without opinion*, 229 F.3d 1142 (4th Cir. 2000) (holding that an African American student expelled for cheating had not alleged facts that demonstrated that honor code prosecution was racially motivated, and granting summary judgment to university).

99. Napolitano v. Princeton Univ., 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982)

100. *See* Beh, *supra* note 55 (discussing the use of the contractual covenant of good faith and fair dealing in student challenges to institutional decisions).

making a false statement on a required course paper.[101] He had stated that he had not received assistance from anyone on the paper, yet inserted another cadet's name instead of his own in the signature block for the honor code statement. Another cadet had proofread the paper and had suggested certain editing—which was considered "assistance" at VMI. Although a hearing panel cleared him of plagiarism, he was found responsible for another honor code violation (making the false statement); the only sanction for any honor code violation at VMI is expulsion.[102] The cadet claimed procedural and substantive due process violations in that if he were cleared of plagiarism he could not have violated the honor code. The court rejected that claim, determining that the evidence supported the hearing panel's conclusion and the sanction of dismissal, although harsh, did not "shock the conscience."[103]

In cases in which the student plaintiff asks the court to reverse or at least reduce the sanction, the courts have refused to do so, even if the judge's personal belief is that the sanction is too harsh.[104] In *Cho v. University of Southern California*,[105] a state appellate court rejected a doctoral student's charge that, because this was her first offense, expulsion was too harsh a penalty:

> Although [the plaintiff] contends that the decision to expel her was unduly harsh given her lack of prior discipline, she does not dispute USC's power to expel a first-time student miscreant for plagiarism, and nothing in the record shows that a different result would have or should have been reached had her lack of prior discipline been considered.[106]

The court added in a footnote: "Even so, we believe a lesser punishment could have been justified given the fact that Cho's plagiarism was limited to one of the three essay questions, and the fact that expulsion from the university under these circumstances may effectively foreclose her from ever obtaining an advanced degree elsewhere,"[107] but left the sanction undisturbed.

F. Lack of Understanding of Academic Integrity Requirements

Although few cases discussed the issue of whether the student had been instructed in the institution's expectations for proper attribution of the ideas and words of others,[108] the sizable proportion of international student

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101. 2010 U.S. Dist. LEXIS 52900 (W.D. Va. May 27, 2010).
102. *Id*. at *5.
103. *Id.* at *16.
104. *See, e.g.*, *Napolitano*, 453 A.2d at 270 (discussed in Section III of this article).
105. 2006 Cal. App. Unpub. LEXIS 4681 (Cal. Ct. App. May 31, 2006).
106. *Id.* at *20.
107. *Id.* at note 9.
108. *See, e.g.*, Mawle v. Tex. A&M Univ.-Kingsville, 2010 U.S. Dist. LEXIS

plaintiffs in the cases reviewed for this article, and the apparent difficulties of native students in understanding proper citation and attribution requirements, suggest that additional instruction in the college's or university's expectations for academic integrity may be necessary. No case has been identified that "blamed" the college for not making its expectations clear; the courts said that students should be familiar with the contents of handbooks and policies. Of course, it is not clear whether the student plaintiffs really did not understand the requirements, which would suggest that the plagiarism was unintentional, or whether they hoped their falsifications would be excused on that ground.

G. Lack of Intent to Deceive

Even in cases involving institutions whose academic misconduct policies required the hearing board to find an *intentional* violation, findings that plagiarism or cheating actually occurred, without clear evidence of intent, were found to be sufficient indicators of intent to deceive.[109] For example, in *Kiani v. Boston University*, a law student found guilty of plagiarism argued that she lacked the intent to plagiarize because she was taking the wrong medication for a disability and the medication clouded her judgment.[110] The law school's academic integrity policy defined plagiarism as "the knowing use, without adequate attribution, of the ideas, expressions, or work, of another, with intent to pass such materials off as one's own."[111] Despite the student's claim that she lacked the intent to deceive, a professor who reviewed of all of her written work in law school found that papers she wrote for six different courses contained instances of plagiarism. A divided Judicial Discipline Committee ruled that the student had violated the academic integrity policy. The court rejected the student's breach of contract and discrimination claims, finding that the process had been fair and that the law school had followed its discipline policies.[112]

In *Chandamuri v. Georgetown University*, an undergraduate was found guilty of plagiarism because he did not use quotation marks around material copied from other sources, although the student had cited all of the sources.[113] The student argued that, because he had cited the sources, his conduct was not plagiarism, and that the finding was discriminatory. The Georgetown University policy included both intentional and unintentional

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42496 (S.D. Tex. Apr. 30, 2010) (concerning an international student who alleged that he did not understand U.S. academic expectations for citation; standards in his native India permitted students to turn in drafts that professors would correct and return for editing).

109. *See, e.g.*, Napolitano v. Princeton Univ., 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

110. 2005 U.S. Dist. LEXIS 47216 (D. Mass. Nov. 10, 2005).

111. *Id.* at *5.

112. *Id*. at *31.

113. 274 F. Supp. 2d 71 (2003).

plagiarism in its academic misconduct policy; the court ruled that the determination that he had violated the academic misconduct policy was supported by evidence and that the student had not provided a causal link between the determination and any form of discrimination.[114]

H. Summary

The cases reviewed for this article, spanning the first twelve years of the twenty-first century, suggest that little has changed in several decades with respect to judicial review of challenges to academic misconduct determinations. What *has* very likely changed, however, is that both public and private institutions appear to be providing a form of due process to accused students; in most cases, evidentiary hearings were held, students were permitted to question witnesses and provide evidence on their behalf, and in some cases students were permitted to be accompanied by counsel to the hearing (although it appears that in most of these cases, counsel were not permitted to advocate for the student or to question witnesses). And, although the opinions suggest that in most cases the protections given to the student do not resemble trial-type protections (or even those required of the hearing committee in *Napolitano*), students are receiving more due process than the bare notice and "some kind of hearing" dictated by *Goss*. Despite the apparent increase in protections for students accused of academic misconduct, however, the full panoply of due process protections and the right to counsel suggested by some scholars[115] does not appear to be common, at least at those institutions whose lawsuits were reviewed for this article.

IV. SUGGESTIONS FOR INSTITUTIONAL POLICIES AND PRACTICE

Accusations of academic misconduct are very serious, and may halt or at least sidetrack a student's academic career. The unfortunate fact that instances of academic misconduct are increasing suggests that institutions may wish to ensure that their policies provide appropriate procedural

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114. *Id*. at 86.

115. *See* Berger and Berger, *supra* note 17, at 336 ("The school must satisfy two tests. First, the school must establish 'just cause' by a preponderance of the evidence; in short, the school carries the burden of proving that the offense has occurred. Second, the school must create a process, which has to include an impartial hearing panel in serious cases, that gives to students charged with wrongdoing a fair opportunity to contest the charges against them. This means, where the charges are the academic equivalent of criminal fraud, that the process should contain most of the safeguards provided by the Constitution for persons charged with ordinary crime. Among the protections too often missing from a school's disciplinary code that we believe fairness requires are the right to counsel, adequate preparation time, the right of cross-examination of adverse witnesses, the right to a hearing transcript, notice of the school's witnesses and evidence, and the privilege of calling one's own witnesses."). *See also* Dutile, *supra* note 29.

protections for students, and that the policies are followed consistently. In addition, the review of cases for this article suggests additional considerations.

A. Provide instruction to all students on the institution's academic integrity expectations.

Most of the cases reviewed for this article involved graduate students, some of whom argued that they had never been instructed on how to cite and reference sources properly.[116] And although faculty may expect that once a student has completed an undergraduate degree, he or she should know the fundamentals of proper attribution for the discipline, that assumption may be incorrect.[117] Providing *required* instruction for all students on 1) the correct manner of attribution and 2) the institution's expectations for academic integrity could reduce academic misconduct, or at least prevent students from blaming anyone but themselves for academic integrity violations.[118] Required instruction may be even more important for international students, given the cultural differences in attitudes toward copying or paraphrasing the ideas of others.[119]

B. Review the academic integrity policy and determination process.

In some of the lawsuits discussed in this article, students complained that definitions of academic misconduct were vague and difficult to understand. Policies that not only clearly define plagiarism and cheating, but also provide examples of plagiarism and other forms of academic misconduct, should help students understand what is expected of them in citation and attribution. The possible sanctions for academic misconduct should also be spelled out clearly.

The process of determining whether or not a student committed academic misconduct need not be formal, as long as it satisfies due process

116. *See generally* the discussion in Section III-F; *see also* Mawle v. Texas A&M Univ.-Kingsville, 2010 U.S. Dist. LEXIS 42496 (S.D. Tex. April 30, 2010).

117. For example, in some disciplines, student learning at the undergraduate level may be measured by tests rather than by research papers; at large institutions, learning may be measured by multiple choice examinations that can be graded by a machine rather than by a human.

118. A number of institutions of higher education provide web-based information on the proper manner of attributing and citing the work of others. *See, e.g.*, http://owl.english.purdue.edu/owl/section/3/33/ (the Purdue University Online Writing Lab) and http://www.indiana.edu/~wts/pamphlets/plagiarism.shtml (Indiana University's Writing Tutorial Services). It is not clear, however, whether students are required to read and understand these helpful resources.

119. *See, e.g.*, D. A. Thomas, *How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic.* 2 BYU EDUC. & L. J. 421 (2004). *See also* Jon Marcus, *Foreign Student Rule-Breaking: Culture Clash or Survival Skills*? Oct. 6, 2011, *available at* http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=417650&c=1.

(for public institutions) and fundamental fairness (for private institutions). Courts have upheld decisions made using a relatively informal process where a neutral, objective decision-maker meets with the student, explains the alleged misconduct, allows the student to respond, and then makes the decision. Allowing the student to appeal that decision will reinforce the fairness of the process.

C. Reinforce the institution's emphasis on academic integrity.

Requiring that faculty include a statement on course syllabi regarding academic integrity and reminding students where the policy can be located can impress upon students the professor's interest in and concern for academic integrity. Asking faculty to spend some class time discussing academic integrity should also heighten student awareness of the importance of compliance with the integrity policy. Some institutions require students to sign a statement that they have read, understand, and followed the institution's honor code or academic integrity policy, either at the beginning of the academic year or when each examination or paper is handed in.[120]

Finally, faculty can make it more difficult for students to commit academic integrity offenses by varying assignments each time they teach the class, using digital resources, such as Turnitin.com, and utilizing multiple versions of examinations.[121] Scholars have concluded that faculty efforts to reduce cheating or plagiarism can have positive effects on student compliance with academic integrity policies.[122]

Despite the fact that colleges and universities prevail virtually all the time when a student challenges an academic integrity violation, these lawsuits could be minimized, if not completely avoided, if colleges and universities placed more emphasis, time, and resources toward educating students about academic integrity and reinforcing its importance. In the absence of this heightened attention to academic integrity, it is likely that student violations will continue and academe will be tarnished as result.

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120. *See, e.g.*, the statement that appears on examinations at the University of Virginia, *available at* http://www.virginia.edu/uvatours/shorthistory/code.html. *See also* Jeffrey R. Young, *Coursera Adds Honor-Code Prompt in Response to Reports of Plagiarism*, CHRON. HIGHER EDUC. Aug. 24, 2012, *available at* http://chronicle.com/blogs/wiredcampus/coursera-adds-honor-code-prompt-in-response-to-reports-of-plagiarism/39328. Coursera, a company offering free online courses, experienced substantial amounts of plagiarism in some of the courses it offered. *Id.* It has added a requirement that students certify that the answers on the assignments they submit are their own work and that all external sources used have been acknowledged. *Id.*

121. *See, e.g.*, Anita Banerji, *Professors Could All but Wipe Out Student Cheating, Study Finds*, CHRON. HIGHER EDUC., July 9, 1998, *available at* http://chronicle.com/article/Professors-Could-All-but-Wipe/104621/.

122. *See* McCabe, Trevino and Butterfield, *supra* note 1, at 229.