

ACADEMIC STUDENT DISMISSALS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION: WHEN IS ACADEMIC DEFERENCE NOT AN ISSUE?

JOSEPH M. FLANDERS*

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* Bachelor of Arts, 2003, University of Iowa; Juris Doctorate, *with distinction*, 2007, University of North Dakota School of Law. During law school, the author served as a published member of the 2006–2007 North Dakota Law Review Board of Editors. This article has been accepted for online publication and presentation at the Education Law Consortium which is co-sponsored by the University of Georgia School of Law and the University of Georgia Institute of Higher Education (online publication forthcoming at <http://www.educationlawconsortium.org/forum>). The author would like to thank Professor Jeffrey C. Sun at the University of North Dakota Educational Leadership Department for his editing assistance and for his teaching excellence in the field of Higher Education Law.

INTRODUCTION

An academic dismissal from an institution of higher education can have a profound negative impact on the career and life of a student.¹ Indeed, students at both public and private colleges and universities often spend increasingly large amounts of money in the pursuit of their education, and a dismissal would undoubtedly affect many students' already fragile financial stability.² As such, all students, whether undergraduate or graduate, have a keen interest in ensuring they are not arbitrarily deprived of their hard-earned and costly education. However, colleges and universities undoubtedly have an equally vital interest in protecting their integral academic standards as well as their autonomy to set those standards. Consequently, a question arises: When do a college or university's academic standards and guidelines, which are signals of its professional autonomy and discretion, prevail over arguments of students interested in maintaining their enrollment at a given institution? In other words, when is a student's academic failure or misconduct of such an egregious nature that it warrants dismissal, ensuring that courts will review a school's decision with academic deference? Many administrators and faculty members may espouse that the answer is clear: Academic deference must be afforded to matters concerning academic decisions. Yet, this deference leaves little opportunity for those students who are facing the burdens of academic dismissal such as financial strain, humiliation, loss of time, no degree, and the opportunity cost associated with foregoing work opportunities to enroll in school. In short, the consequences of such a dismissal are undoubtedly immense.

Recognizing students' interest in ensuring a job-producing and personally edifying education, courts throughout the United States have consistently assumed that students enjoy a protected property or liberty interest in continuing their post-secondary education under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.³ Because students are assumed to have a

1. See Hazel Glenn Beh, *Student Versus University: The University's Implied Obligation of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 183 (2000) ("The stigma of [dismissal] may dog [a student] for the rest of [his] life; [a student] will probably have to disclose [his] failure to every potential employer with whom [he] seek[s] work.").

2. COLLEGE BOARD, TRENDS IN HIGHER EDUCATION SERIES: TRENDS IN COLLEGE PRICING 5 (2006) available at http://collegeboard.com/prod_downloads/press/cost06/trends_college_pricing_06.pdf. The average tuition for the 2006–2007 academic year was \$5,836 at public four-year colleges and universities and \$22,218 at private nonprofit four-year institutions. *Id.* at 5. See Elizabeth L. Pendlay, Note, *Procedure for Pupils: What Constitutes Due Process in a University Disciplinary Hearing?*, 82 N.D. L. REV. 967, 967 (2006) (discussing the increasing trend of rising tuition for students at public and private colleges and universities and its effect on students facing disciplinary dismissals).

3. U.S. CONST. amend. XIV, § 1. See, e.g., *Greenhill v. Bailey*, 519 F.2d 5, 7 (8th Cir. 1975); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975); *Stoller v. Coll. of Med.*, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (discussing students' property interest and the necessity of due process in university dismissal decisions); *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 107 (D. Minn. 1982). *But see* *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (declining to hold specifically that college and university students have a protected property interest in pursuing their education but nonetheless assuming that one likely exists due to students' potential reliance on manifestations made by the state in which they reside and in which they go to school); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978). For brevity's sake, this article

protected interest in their education, they are provided rights protecting against arbitrary dismissal decisions made by school faculty or administrators.⁴ Furthermore, although the United States Supreme Court has held there is no constitutional right to an education,⁵ the Court has recognized that providing education is a key function of state and local governments⁶ and that having an educated body of citizens is a cornerstone of democracy.⁷

Unfortunately, for many students facing dismissals based on academic grounds, courts are hesitant to second-guess decisions made by college and university administrators and faculty,⁸ because courts view themselves as inappropriate arbiters of academic decisions. “A graduate or professional school is, after all, the best judge of its students’ academic performance and their ability to master the required curriculum.”⁹ Consequently, the notion of “academic” or “judicial”

is only concerned with academic, as opposed to disciplinary, dismissals from public colleges and universities.

4. *See* Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972) (holding that the requirements of procedural due process apply only to deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property).

5. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declining to hold that the right to education is a fundamental right under the Fourteenth Amendment’s Due Process Clause).

6. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”). Although the decision in *Brown* dealt with kindergarten through twelfth-grade, higher education has also been recognized as vital to the well-being of both individuals and society as a whole. For a discussion of the value of higher education, see generally CARDINAL JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* (Oxford ed. 1976) (discussing the need for higher education to develop a literate and functioning society); *see also* Connick v. Myers, 461 U.S. 138, 145 (1983) (explaining the limits of First Amendment protection of speech afforded public employees at institutions of higher education); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (discussing the need for academic freedom in institutions of higher education); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) (discussing a professor’s First Amendment right to use profane language in the classroom).

7. *Brown*, 347 U.S. at 493. *See* JEAN-JACQUES ROUSSEAU, *A DISCOURSE ON POLITICAL ECONOMY* (1755) (G.D.H. Cole trans., J. M. Dent and Sons, Ltd., 1913) (providing that “[p]ublic education . . . under regulations prescribed by the government . . . is one of the fundamental rules of popular or legitimate government”). It is important to note that courts and lawmakers have traditionally supported policy-making that promotes everyone’s right to a public education but not necessarily everyone’s right of access to higher education institutions beyond kindergarten through high school.

8. *See* Regents of Univ. of Mich. V. Ewing, 474 U.S. 214 (1985) (providing the standard upon which the lower courts have discussed whether judicial review should be granted to consider academic decision-making); Bd. Of Curators of Univ. of Mo. V. Horowitz, 435 U.S. 78 (1978); *see also* Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 272–73 (1992) (reviewing academic dismissal case law and literature and concluding that judicial review should not be extended to most academic dismissal cases). *See generally* John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701, 703 (2000) (providing a lucid discussion of the topic of non-academic or “disciplinary” dismissals at higher education institutions).

9. *Horowitz*, 435 U.S. at 86 n.2. The court also stated:

Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires

deference has become an accepted maxim of both the American judiciary and institutions of higher education.¹⁰ On a doctrinal level, “academic deference” can be defined as deference the judiciary grants to public colleges and universities out of respect for the academic decision-making of faculty and administrators because courts disclaim the necessary expertise to intelligently review purely academic judgments.¹¹ Despite the seemingly clear doctrine for academic dismissals, the elements behind judicial deference for academic decision-making and the conditions that indicate when academic deference should be applied are not always apparent.¹²

Necessarily connected with the issue of academic deference is the doctrine of “academic freedom.”¹³ Academic freedom has been defined as the “independent and uninhibited exchange of ideas among teachers and students.”¹⁴ It has also been explained as the autonomous decision-making of the academy itself.¹⁵ An

an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 90.

10. “Academic deference” applies to a wide range of situations where the judiciary chooses not to second-guess the judgment of a college or university. See Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1 (2006) (discussing “academic deference” in tenured faculty decisions). Professor Moss notes that “defendant[] [institutions] and sympathetic courts have asserted that ‘of all fields . . . the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.’” *Id.* at 2 (quoting *Faro v. N. Y. Univ.*, 502 F.2d 1229, 1231–32 (2d Cir. 1974)).

11. Moss, *supra* note 10, at 2–5. Academic dismissals are not the only area of academic decision-making granted deference. Professor Moss explains that, in the context of academic deference being granted to faculty tenure disputes, most judges ask: “How can courts evaluate a professor’s scholarship on Beowulf in the original Old English, or on competing theories of cosmology? Even if judges understood the relevant writings, how can they decide whether the plaintiff’s theories of the unknowable are ‘better’ than those of rival professors?” *Id.* at 5–6. This anecdote helps to conceptualize the concerns judges face with academic dismissal disputes.

12. See Fernand N. Dutilleul, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619, 619–21 (2003) (arguing that, in many student dismissal cases, the line between academic and disciplinary dismissals is often very fine where facts may be argued persuasively to support either position).

13. See generally John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 328 (1985). Professor Beach discusses the traditional principles governing judicial deference to academic decision-making in cases of academic dismissals:

The courts declare themselves unqualified to review academic decisions, but will insist on fundamental fairness or due process in behavioral decisions. The duality of course is strained when behavior is intertwined within academic performance. Thus where plagiarism or cheating is alleged, or where clinical performance of the student is being evaluated, *the wiser courts are neither doctrinaire in abstaining from judgment, nor heavy-handed in regulating conduct.*

Id. at 328 (emphasis added).

14. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

15. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (discussing academic admissions policies at public colleges and universities and the academic freedom schools enjoy in setting those policies); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (setting the new standard on issues pertaining to academic freedom and public college and university admissions policies).

institution's discretion to determine, on academic grounds, who may be admitted to study or be dismissed has been described as one of the four essential freedoms of a college or university.¹⁶ In the seminal case of *Sweezy v. New Hampshire*,¹⁷ Justice Frankfurter, in his concurrence, set out the four essential academic freedoms: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁸ Rightly or wrongly, these essential freedoms are repeatedly raised and used by courts to explain their deference to academic decision-making.¹⁹ Further echoing Justice Frankfurter's concurring opinion, the American Association of University Professors (AAUP) set out what is now a widely accepted definition of the term in its *1940 Statement on the Principles of Academic Freedom* ("1940 Statement").²⁰ In sum, the *1940 Statement* grants freedom of research and publication to college and university professors, freedom to teach and discuss in the classroom their expert knowledge of their particular subject, and freedom from institutional censorship.²¹ Given these broad rights of academic freedom and integrity, it is no surprise that judges often see themselves as inappropriate proxies of academic

16. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (discussing the standards of academic freedom the Court has utilized in numerous opinions).

17. *Id.*

18. *Id.* at 263 (Frankfurter, J., concurring).

19. When confronting many types of academic decision-making issues, courts often explicitly assert their own lack of competence in assessing academic judgments. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments.") (quoted in *Urofsky v. Gilmore*, 216 F.3d 401, 433 (4th Cir. 2000) (Wilkinson, C.J., concurring)); *Huang v. Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1142 (4th Cir. 1990) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment.") (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. at 225). See also Beach, *supra* note 13 (discussing the reluctance shown by courts to second-guess academic decisions).

20. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE. The AAUP defines academic freedom as:

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Id. at 3–4.

21. *Id.*

decision-making.²²

Additionally, due in large part to academic freedom concerns, courts often grant higher levels of judicial deference to college and university decision-makers by requiring lower levels of due process in student *academic* dismissals.²³ However, lower levels of judicial deference and slightly higher levels of due process may be required by courts in student *disciplinary* dismissals.²⁴ This distinction occurs because disciplinary dismissals do not traditionally involve purely academic issues, where academic freedom is the foremost concern.²⁵ On the one hand, disciplinary dismissals are often concerned with student misconduct such as vandalism, sexual harassment, rape, other criminal activity, and, at times, cheating.²⁶ On the other

22. See Schweitzer, *supra* note 8, at 272 n.20 (“Freedom to determine who may be admitted to study obviously includes freedom to determine who may be permitted to remain a student and necessarily implies the freedom to dismiss students who have failed to measure up in a relevant fashion.”). See generally Jeffrey C. Sun, *Trumping the Faculty: The Creep Effect of Institutional Academic Freedom and its Impact on the Professoriate*, Address Before the American Educational Research Association (Apr. 11, 2006) (transcript on file with author) (arguing that academic freedom and academic deference are two distinct issues that should be analyzed accordingly).

23. Schweitzer, *supra* note 8, at 274. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 985 (4th ed. 2006) (“Since courts attach markedly different due process requirements to academic sanctions than to disciplinary sanctions, it is crucial to be able to place particular cases in one category or the other.”).

24. See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 87 (1978)

Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter. *Id.*

See generally Friedl, *supra* note 8, at 703 (discussing the judicial standards involved in disciplinary dismissals). Professor Friedl notes that “[e]ven when the conduct in question is not academic, courts nevertheless tend to grant substantial deference to university administrators, as long as minimal procedural safeguards are provided to students.” *Id.* at 709.

25. Friedl, *supra* note 8, at 709. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). In *Keyishian*, the United States Supreme Court explained the necessity of protecting academic freedom at American universities:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’

Id. at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

26. See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988) (verbal abuse and harassment); *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972) (disruption); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573 (E.D. Va. 1996) (sexual harassment); *Jackson v. Ind. Univ. of Penn.*, 695 A.2d 980 (Pa. Commw. Ct. 1997) (weapons); see also Beach, *supra* note 13, at 329 (discussing the paradigm of “conduct” versus “academic” issues in the United States Supreme Court’s decision in *Horowitz*, 435 U.S. at 86). Professor Beach notes that:

Whether [the paradigm] creates an axis properly characterized as having “academic matters” at one pole and “conduct” or “disciplinary matters” at the other was the basis for most of the bickering.

Justice Marshall believed that the student’s clinical performance, while related to her potential to be a good doctor and thus “academic” in that sense, was nevertheless

hand, academic dismissals are consistently viewed by the courts as an area over which college and university administrators and faculty members have unfettered control to decide whether a student's poor academic performance warrants dismissal. Finally, since the academic deference cases deal primarily with constitutional matters, the focus of this article is on public institutions. In the case of private institutions, courts are more likely to apply contract-related doctrines to student academic dismissal cases.²⁷ This is because private colleges and universities are not "state actors," and their relationship with enrolled students is much more contractual in nature.²⁸ Accordingly, the discussion in this article will pertain only to academic deference and its application to public institutions of higher education.

Despite the traditional deference given to academic decision-making in academic student dismissals, drawing the line between academic decisions deserving judicial deference and those decisions that courts consider arbitrary, capricious, or made in bad faith, is an issue that has not been sufficiently analyzed in higher education scholarly literature. Further, despite the reluctance of courts to second-guess academic decisions, there are circumstances where courts have dispensed with the necessity of academic deference.²⁹ Accordingly, this article highlights scenarios where academic deference *has not* been applied to academic student dismissals. Part I discusses the Fourteenth Amendment's due process standards and the applicable case law on academic dismissals from the United States Supreme Court. Part II explores relevant case law where administrator and faculty decisions regarding academic dismissals were not granted judicial deference. That section will also offer guidelines that colleges and universities should consider in the case of an academic dismissal. Finally, this article concludes by considering the proper balance between academic freedom and academic deference. Overall, the article aims to educate administrators and faculty

"conduct" and amenable to third-party hearing-type review. The majority, and Justice Powell, showed less interest in dissecting the components of academic performance if the end were to enlarge judicial review

Beach, *supra* note 13, at 329. *See generally* Friedl, *supra* note 8, at 703 (discussing the "disciplinary" or "conduct" versus "academic" dismissal issues); *see* discussion *infra* Section II (B) (addressing case law involving whether "cheating" is considered an academic or a disciplinary cause for dismissal).

27. *See* Beh, *supra* note 1, at 197–224 (providing exhaustive coverage of academic dismissal cases involving contract claims). Much of the discussion in this article focuses on decisions made by public as opposed to private institutions due to the application of less contractual and more constitutional protections for academically dismissed students. *But see* Schweitzer, *supra* note 8, at 361 (arguing that private colleges and universities should not be treated differently from public institutions in academic dismissal cases).

28. *See* NCAA v. Tarkanian, 488 U.S. 179, 191–99 (1988) (discussing the "state action" requirement in the Fourteenth Amendment and its application to public and private entities). In that case, the Court held that the National Collegiate Athletic Association was a private entity and it did not become a "state actor" simply because of its dealings with athletic programs at public institutions of higher education. *Id.* *But cf.* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (finding that the organization's activities were found to be state actions because the state was so intertwined with the private organization).

29. *See infra* Section II (discussing case law examples where academic deference was not granted to academic dismissals).

members at public institutions of higher education on the legal issues pertaining to academic dismissals and to stimulate debate around traditional understandings of academic freedom and judicial deference.

I. THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE: CONSTITUTIONAL PROTECTIONS OF PUBLIC HIGHER EDUCATION STUDENTS

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."³⁰ As previously noted, the United States Supreme Court, various federal courts, and state courts have assumed that students at public institutions of higher education have a protected property or liberty interest in continuing their education.³¹ However, students' protected interests do not arise from the U.S. Constitution itself.³² Instead, students' interests are protected by an invocation of state law.³³ In order for the Due Process Clause to apply to student dismissals, a state-funded school must have deprived a student of life, liberty, or property in some way.³⁴

When the Fourteenth Amendment is properly invoked by a student, courts throughout the United States may find that student has a protected property or liberty interest and, therefore, is guaranteed at least some form of due process.³⁵ If a school wishes to dismiss a student for alleged academic failures, the school must provide the student with a flexible level of due process which includes "an 'informal give-and-take' between the student and the [college or university] dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'"³⁶ This "informal give-and-take" should include the institution providing written notice to the student that documents and explains the student's alleged academic failures.³⁷ Further, this notice should inform the student that he will have the opportunity to meet with school officials, however informally, to explain or contest his failing

30. U.S. CONST. amend. XIV, § 1.

31. See *supra* note 3 and accompanying text.

32. See *Powe v. Miles*, 407 F.2d 121 (6th Cir. 1971) (defining the proper distinction between federal and state law in higher education cases involving state actions). See generally JOSEPH BECKHAM & DAVID DAGLEY, *CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW* 35 (2005).

33. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing the relationship between the federal Constitution and individual state rights). In *Roth*, the Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

34. *Id.* at 570–71 (stating that procedural due process applies only to the deprivation of those interests that are protected by the Fourteenth Amendment as liberty or property).

35. See *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975) (invoking a student's protected liberty interest); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (invoking a student's protected property interest); see also Schweitzer, *supra* note 8, at 314–15 (discussing students' due process liberty and property interests).

36. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85–86 (1978) (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)).

37. *Id.* at 85.

grades.³⁸ However, how much process is actually due in the academic dismissal context remains somewhat questionable and may vary according to state law.³⁹ In two landmark decisions in the field of higher education, *Board of Curators of the University of Missouri v. Horowitz*⁴⁰ and *Regents of University of Michigan v. Ewing*,⁴¹ the Supreme Court set the legal framework upon which all instances of academic dismissal are governed.

A. *Board of Curators of the University of Missouri v. Horowitz*

In *Horowitz*, the United States Supreme Court was faced with a decision by the University of Missouri-Kansas City Medical School to dismiss Horowitz, a medical student, for her failure to meet the university's academic standards.⁴² After conducting her third-year rotations in pediatrics and surgery at the medical school, Horowitz's performance was considered unsatisfactory and she was put on academic probation for her fourth and final academic year.⁴³ As required by the school's written policies, every medical student's academic progress was to be evaluated on a periodic basis by the Council on Evaluation ("Council").⁴⁴ The Council's decisions were reviewed by a faculty coordinating committee and ultimately approved or rejected by the school's dean.⁴⁵ In Horowitz's case, the Council expressed dissatisfaction with her clinical performance during her rotations.⁴⁶ One reviewing doctor "emphasized that plaintiff's problem was that she thought she could learn to be a medical doctor by reading books, and he advised her [that] the clinical skills were equally as important for obtaining the M.D. degree."⁴⁷ The Council also questioned her attendance at clinical sessions and her personal hygiene.⁴⁸ It concluded that if Horowitz did not show adequate clinical progress, she should not be allowed to graduate.⁴⁹ Moreover, without a show of "radical improvement," the Council recommended she be dismissed from the program.⁵⁰

To remedy her deficiencies, Horowitz was permitted to appeal the Council's

38. See *Greenhill*, 519 F.2d at 9 (providing that an academically dismissed student must be "accorded an opportunity to appear personally to contest the allegations of academic deficiency").

39. See also *infra* Section II(B) (discussing specific case law examples where state law has given an academically dismissed student a somewhat higher level of due process). See also *Horowitz*, 435 U.S. at 84–86. In *Horowitz*, the Court discussed the dichotomy between academic and disciplinary dismissals, and explained that somewhat lower levels of due process (such as no formal hearing) will be applied to academic dismissals. "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Id.* at 86.

40. 435 U.S. 78 (1978).

41. 474 U.S. 214 (1985).

42. *Horowitz*, 435 U.S. at 79.

43. *Id.* at 81.

44. *Id.* at 80.

45. *Id.*

46. *Id.* at 80–81.

47. *Id.* at 95 n.4 (alteration in original).

48. *Id.* at 81.

49. *Id.*

50. *Id.*

decisions by undergoing oral and practical examinations under the supervision of seven practicing physicians.⁵¹ While the school was not legally obligated to grant Horowitz this level of due process, doing so certainly insulated it from Horowitz's complaint.⁵² After completing the appeal, two of the physicians recommended her for graduation, three recommended continued probation, and the final two recommended immediate dismissal.⁵³ Due to continuing negative evaluations, the Council reaffirmed its position that Horowitz should be dismissed.⁵⁴ The Council's decision was affirmed by both the faculty review committee and by the school's dean.⁵⁵ Subsequently, Horowitz was dismissed from the medical school during her fourth-year rotations.⁵⁶

Horowitz appealed to the Provost for Health Sciences who upheld her dismissal.⁵⁷ After being notified of this decision, Horowitz appealed the university's decision to the United States District Court for the Western District of Missouri.⁵⁸ She claimed she had been discriminated against in violation of 42 U.S.C. § 1983 and that her due process rights under the Fourteenth Amendment had been violated.⁵⁹ After conducting a full trial, the district court dismissed her complaint.⁶⁰ The court held that Horowitz had been afforded due process, finding she had been given an adequate opportunity to remedy her deficiencies and respond to allegations of academic failure.⁶¹ Subsequently, the United States Court of Appeals for the Eighth Circuit reversed and remanded the case.⁶² The Eighth Circuit held that Horowitz had not been afforded due process because the school failed to provide her with a full hearing where she could "defend her academic ability and performance."⁶³

The Supreme Court granted certiorari to determine what procedures must be granted to students who may have a liberty or property interest under the Fourteenth Amendment against governmental intrusion into their rights as higher education students.⁶⁴ In its decision, the Court assumed Horowitz had a liberty or

51. *Id.*

52. *Id.* at 85. It should be noted that although the school may have insulated itself from liability, it did not insulate itself from the expenses of Horowitz's subsequent lawsuit.

53. *Id.* at 81.

54. *Id.* at 82.

55. *Id.*

56. *Id.*

57. *Id.* at 82.

58. *Id.* at 79–80.

59. *Id.*

60. *Id.* at 80.

61. *Id.*

62. *Id.*

63. *Id.* at 85 n.2.

64. *Id.* at 80. Because the Fourteenth Amendment's protections only extend to state actions, private colleges and universities are not subject to the provisions of federal constitutional law unless it can be proven that the institution engaged in "state actions." *See Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (discussing the application of the "state action doctrine"); *see also* BECKHAM & DAGLEY, *supra* note 32, at 35–36 (explaining that students at private colleges and universities are barred from bringing claims against their respective colleges or universities unless they have engaged in state actions). Beckham and Dagley state: "A claim that a private college or

property interest.⁶⁵ Because of this assumption, the Court reviewed whether Horowitz was afforded the procedural protections guaranteed to every student under the Due Process Clause of the Fourteenth Amendment.⁶⁶

Ultimately, the United States Supreme Court found no violation of Horowitz's procedural due process rights.⁶⁷ The Court held that Horowitz had "been awarded at least as much due process as the Fourteenth Amendment requires."⁶⁸ The Court concluded that Horowitz had been given more than adequate notice of the faculty's dissatisfaction with her academic standing and that her deficiencies were endangering her ability to graduate.⁶⁹ The school's decision to grant Horowitz a faculty review by seven physicians evidenced the school's effort to comply with her due process rights.⁷⁰ The Court ultimately determined that the faculty's decision to dismiss Horowitz had been "careful and deliberate" because "[t]he school fully informed [Horowitz] of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment."⁷¹

Quoting *Goss v. Lopez*,⁷² the Court found that students must be given "'oral or written notice of the charges against [them] and, if [they] den[y the charges], an explanation of the evidence the authorities have and an opportunity to present [their] side of the story.'"⁷³ Elaborating, the Court explained that in *Cafeteria*

university was engaged in state action will depend on the nature and degree of contacts between the private institution and state government." *Id.* at 36.

65. *Horowitz*, 435 U.S. at 84–85.

66. *Id.* Procedural due process requirements in academic dismissal cases often include written or oral notice of the charges against them and an "informal give-and-take" where the student has a chance to present his or her side of the story. *Id.* at 85–86.

67. *Id.* at 92.

68. *Id.* at 85.

69. *Id.* The Supreme Court explained that the Eighth Circuit Court of Appeals had overturned the District Court's decision because the Eighth Circuit believed Horowitz's dismissal had been "effected without the hearing required by the fourteenth amendment [sic]." *Id.* at 85 n.2. The Supreme Court disagreed, finding that no formal hearing was required. *Id.* The Court explained that "[a] graduate or professional school is, after all, the best judge of its students' academic performance and ability to master the required curriculum." *Id.*

70. *Id.* at 85.

71. *Id.* The Supreme Court agreed with the District Court's ruling that the school "went beyond" the necessary procedural due process requirements because the school afforded Horowitz the additional opportunity of being reviewed by seven qualified physicians. *Id.*

72. 419 U.S. 565 (1975).

73. *Horowitz*, 435 U.S. at 85 (quoting *Goss*, 419 U.S. at 581). The Court explained in *Horowitz* that all the *Goss* decision required was "an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" *Id.* (citing *Goss*, 419 U.S. at 584). See also Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FL. COASTAL L.J. 243 (2001). Dutile explains the Supreme Court's rationale, stating:

At bottom, three rationales seemed to underlie the Court's efforts to distance *Horowitz* from *Goss*: 1) the flexibility needed by educational institutions to deal with a panoply of situations; 2) the supposed greater subjectivity involved in "academic" decisions, a subjectivity not given to effective judicial review; and 3) the decreased adversariness typifying the teacher-student relationship in "academic" matters.

Workers v. McElroy,⁷⁴ it was held that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”⁷⁵ The Court found that, especially in academic dismissal cases, “[c]ourts are particularly ill-equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decision-making.”⁷⁶ Consequently, the Supreme Court concluded that academic dismissal cases require “far less stringent procedural requirements” than do disciplinary dismissals.⁷⁷

Despite requiring less procedural due process for academic dismissals, the Court’s decision indicates that at least some procedural due process is needed in such situations. The Supreme Court was careful to note that students must be afforded a flexible amount of due process allowing the student “the opportunity to characterize his conduct and put it in what he deems the proper context.”⁷⁸ Furthermore, in dicta, the Supreme Court noted that a student’s investment of large amounts of time and money into her professional education is a factor that courts may consider when analyzing the extent of a student’s property or liberty interests.⁷⁹ The Court stated that “a relevant factor in determining the nature of the requisite due process is ‘the private interest that [was] affected by the official action.’”⁸⁰ As is considered later in this article, a professional student’s educational investment has been discussed by numerous courts as being an important factor in denying academic deference to a school’s academic dismissal decision.⁸¹

Finally, the Court noted that colleges and universities are obligated to provide students with minimal amounts of due process, and it found the academic decision makers at the University of Missouri had provided Horowitz with at least the minimal requirements of due process.⁸² She had received ample notice via several letters that explained the school’s concern about her academic failures, she had been afforded a panel of seven physicians to review her performance, and she had been given several chances to remedy her poor performance.⁸³ In fact, the Court stated that “the school went beyond [constitutionally required] procedural due process by affording [Horowitz] the opportunity to be examined by seven independent physicians.”⁸⁴ In effect, the Supreme Court evoked the concept of academic deference and found that courts should not second-guess the decisions of college or university faculty and administrators, when (1) the decisions relate to

Id. at 249–50.

74. 367 U.S. 886 (1961).

75. *Horowitz*, 435 U.S. at 86 (citing *Cafeteria Workers*, 367 U.S. at 895).

76. *Id.* at 92.

77. *Id.* at 86.

78. *Id.*

79. *Id.* at 86 n.3.

80. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (alteration in original).

81. See *infra* Section II(A–F) (discussing, in particular, students’ liberty interests and their right to continue their educational investments).

82. *Horowitz*, 435 U.S. at 85.

83. *Id.*

84. *Id.*

the evaluation of actual academic content, and (2) the school provides the student his or her due process rights.⁸⁵ Arguably, the Court's decision in *Horowitz* provided college and university administrators and faculty insulation from judicial intrusion into their decision-making processes.⁸⁶ Despite this relatively clear framework, the Supreme Court again felt the need to elucidate this standard in its 1985 decision in *Ewing*.

B. *Regents of University of Michigan v. Ewing*

In *Ewing*, the United States Supreme Court faced a similar fact pattern to that presented in *Horowitz*. In 1975, Scott Ewing enrolled as a medical student in the University of Michigan's "Inteflex" program, a six-year program combining undergraduate and medical school curricula.⁸⁷ Beginning in 1975, Ewing had difficulties handling the workload that the Inteflex program required.⁸⁸ He had low, failing, or incomplete grades in biology, chemistry, Freshmen Seminar, and psychology.⁸⁹ His poor academic performance resulted in the university placing him on academic leave.⁹⁰ While on leave, he took several physics courses at Point Loma College in California.⁹¹ In 1977, he reentered the Inteflex program, repeated Chemistry, and eventually passed his Introduction to Patient Care course.⁹²

Despite having been readmitted into the program, Ewing's difficulties continued.⁹³ He received low or failing grades in Clinical Studies 400, Microbiology, Gross Anatomy, Genetics, and Microanatomy 410.⁹⁴ He retook several exams in these courses and appealed his Microanatomy and General Pathology grades.⁹⁵ Ewing then requested to be placed on an "irregular program" with a lessened course-load, but the Promotion and Review Board denied his requests.⁹⁶ Subsequently, he continued through the program, eventually passing

85. *Id.* at 92 ("Courts are particularly ill-equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking."). See Dutile, *supra* note 12, at 625–26 ("The Court seems to have assumed that [academic versus disciplinary] situations fall easily into one category or the other. But does the distinction survive scrutiny? Or is it, as Justice Marshall said, futile to attempt 'a workable distinction between "academic" and "disciplinary" dismissals'?" (quoting *Horowitz*, 435 U.S. at 104 n.18 (Marshall, J., concurring in part and dissenting in part))).

86. See KAPLIN & LEE, *supra* note 23, at 987–88 ("*Horowitz* also supports the broader concept of academic deference, or judicial deference to the full range of an academic institution's academic decisions. Both trends help insulate postsecondary institutions from judicial intrusion into their academic evaluations of students by members of the academic community.").

87. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 215 (1985).

88. *Id.* at 217–19.

89. *Id.* at 217–18 n.4.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

enough coursework to enable him to take the National Board of Medical Examiners (“NBME”) Part I exam in 1981.⁹⁷ Ewing took the exam and received the lowest score in the history of the program.⁹⁸ A passing score on the NBME Part I exam was a 345 and Ewing’s total score was a 235.⁹⁹

After failing the exam, the medical school’s Promotion and Review Board again convened and considered Ewing’s academic record in detail.¹⁰⁰ The nine member board unanimously decided to dismiss Ewing from the Inteflex program.¹⁰¹ A week later, Ewing submitted a written request for the Board to reconsider its decision.¹⁰² Ewing appeared before the Board and attempted to clarify why he failed the exam.¹⁰³ He explained that, aside from his inadequate preparation for the exam which caused him to panic, eighteen months prior to taking the exam his mother had suffered a heart attack, his girlfriend had broken up with him six months earlier, he was spending an exorbitant amount of time on an essay for a contest, and he had a makeup exam in Pharmacology which was administered just before the NBME Part I.¹⁰⁴ Not persuaded by Ewing’s arguments, the Review Board again unanimously affirmed his dismissal.¹⁰⁵ Ewing then appealed the Board’s decision to an Executive Committee that upheld the dismissal.¹⁰⁶ Subsequently, Ewing applied for reinstatement twice more, but his appeals were denied by the university.¹⁰⁷ Ewing then commenced his suit in the United States District Court for the Eastern District of Michigan.¹⁰⁸

At the district court level, Ewing argued that he had the right to retake the exam because he had a property interest in his continued education and enrollment in the program.¹⁰⁹ Ewing further alleged that his dismissal was arbitrary and capricious and was in violation of his substantive due process rights under the Fourteenth Amendment of the United States Constitution.¹¹⁰ While it determined Ewing had a protected interest in continuing his education, the district court found no violation of his due process rights given his long history of academic failure and the school’s attempt to provide him with notice and ample time to remedy his deficiencies.¹¹¹ On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that Ewing’s due process rights had been violated

97. *Id.* at 216. The NBME Part I is “a 2-day written test administered by the National Board of Medical Examiners.” *Id.*

98. *Id.*

99. *Id.* The Supreme Court also noted that a score of 380 is required for state licensure and the national mean is 500. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 216 n.2.

105. *Id.* at 216.

106. *Id.*

107. *Id.* at 217.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 220.

ostensibly because he was a “qualified” student and was not allowed to retake the NBME examination.¹¹² On appeal, the United States Supreme Court granted certiorari and reversed and remanded the case.¹¹³

In a unanimous opinion, the Court assumed that Ewing had a protected property interest but held his dismissal was not arbitrary or capricious.¹¹⁴ Although Ewing felt the university had “misjudged his fitness” to remain enrolled as a student, the Supreme Court held that the faculty had conscientiously made their decision after careful deliberation over Ewing’s entire academic record.¹¹⁵ Accordingly, the Court found that the school’s judgment must be respected.¹¹⁶ Discussing its prior ruling in *Horowitz*, the Supreme Court reiterated that courts should not second-guess the academic decisions of college or university administrators and faculty.¹¹⁷ The Court noted that it was “reluct[ant] to trench [our decision] on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment.’”¹¹⁸ The Court concluded that judges “may not override [the faculty’s decision] 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 judgment.”¹¹⁹

As the United States Supreme Court’s opinions in *Horowitz* and *Ewing* demonstrate, the scope of judicial review for academic decision-making is narrow. Courts are to respect the content evaluation of academics,¹²⁰ and are warned

112. *Id.* at 221.

113. *Id.* at 221, 228.

114. *Id.* at 223 (“We therefore accept the University’s invitation to ‘assume the existence of a constitutionally protectible property right in [Ewing’s] continued enrollment’”) (first alteration in original).

115. *Id.* at 225, 227–28.

116. *Id.* at 227–28.

117. *Id.* at 225 n.11 (“University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”) (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)).

118. *Id.* at 226 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). The Court also explained:

If a “federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” *Bishop v. Wood*, 426 U.S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.”

Id. (citing *Horowitz*, 435 U.S. at 78, 89–90) (internal citation omitted) (second alteration in original).

119. *Id.* at 225.

120. The academic setting is not the lone setting where courts often grant deference to expert opinions. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (setting the standard for judicial deference to administrative agency decision-making which was made based on congressional mandates). In *Chevron*, the Court stated: “We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” *Id.* at 844. See also *Moss*, *supra* note 10, at 8–12

against overriding a school's academic decisions.¹²¹ Without a finding that an administrator or faculty member failed to exercise professional judgment or acted arbitrarily and capriciously, courts presume the administrators and faculty members have acted within the bounds of their academic freedom, and, therefore, will grant the decision-makers academic deference.¹²² Consequently, in the academic dismissal context, it has routinely been found that the level of due process may be considerably lower than in a disciplinary dismissal.¹²³

However, despite the presumption of academic deference, courts have often held that students are entitled to notice of the institution's dissatisfaction with them, an opportunity to rebut the charges against them, and the chance to redress their poor academic performance.¹²⁴ Additionally, although a *formal* hearing is not necessarily constitutionally required,¹²⁵ an institution would be wise to provide some form of hearing for the potentially dismissed student, even if that hearing is only an informal one.¹²⁶ Colleges and universities are also advised to practice

(discussing judicial deference to a university's "expert" academic opinion in regard to granting tenure and tenure review of school faculty members); James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act*, 75 NEB. L. REV. 27, 66-67 (1996) ("The threshold for deference to [disability] decisions is remarkably low. In *Doe*, for example, the Second Circuit called for deference to academic evaluations unless there is proof that the institution's standards serve no purpose other than to exclude a disabled person from an educational program.") (citing *Doe v. N.Y. Univ.*, 666 F.2d 761, 776 (2d Cir. 1981)). See generally Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 941-45 (1999) (highlighting certain dubious constitutional civil rights cases, such as *Koremotsu v. United States*, 323 U.S. 214 (1944), where judicial deference to equal protection decisions made by bureaucratic branches of the United States government was later shown to be morally and ideologically reprehensible).

121. See generally Schweitzer, *supra* note 8.

122. *Id.*

123. See *Horowitz*, 435 U.S. at 89 ("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."); see also *Harris v. Blake*, 798 F.2d 419, 423 (10th Cir. 1986) (requiring only "minimal procedures" for university academic dismissals); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (holding that only the "barest procedural protections" are needed for academic dismissals); *Frabotta v. Meridia Huron Hosp. Sch. of Nursing*, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995) (stating that because the plaintiff's dismissal was a purely academic decision, she had to show that the decision was arbitrary and capricious).

124. See *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996) (finding that due process was met when a student was allowed to make up several quizzes and then given an administrative review of her grades); see also *Dutile*, *supra* note 73, at 264-88 (discussing the due process requirements that courts throughout the United States have generally required of institutions of higher education).

125. See *Horowitz*, 435 U.S. at 86 n.3 ("We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment."); see also *Miller v. Hamline Univ. Sch. of Law*, 601 F.2d 970, 972 (8th Cir. 1979); *Cobb v. Rector of Univ. of Va.*, 84 F. Supp. 2d 740, 749 (W.D. Va. 2000) (stating that no formal hearing was necessary).

126. See *Horowitz*, 435 U.S. at 86 ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); see also *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("At the very minimum . . . students facing suspension and the

preventative measures by granting higher levels of due process to students facing a potential academic dismissal. Because at least minimal due process is required of colleges and universities in academic dismissal cases, it is important for faculty and administrators to remember their obligation to treat every student equally when considering a potential dismissal. Treating a student in a significantly different manner from his peers may result in a due process violation and invite closer scrutiny by the judiciary.¹²⁷ Ultimately, although the United States Supreme Court has seemingly provided colleges and universities with wide discretion on the content evaluation of academic dismissals, administrators and faculty members are not given *carte blanche* to wantonly dismiss students without following internal institutional procedures.¹²⁸ Internal institutional procedures and professional ethics codes should include a written school policy detailing the necessary procedural steps to be taken in every case of an academic dismissal. Further, a school should be prepared to give fair warning or notice to the student, provide the student with a chance to reform his or her behavior, allow a neutral panel or committee to review the student's case to ensure protection against potentially biased administrators or faculty members, and offer the student a chance to present his or her side of the story.¹²⁹ Failing to follow these minimal safeguards may result in courts dispensing with academic deference.

II. CASE LAW REVIEW: WHEN DOES ACADEMIC DEFERENCE NOT APPLY?

Given that the Supreme Court's decisions in *Horowitz* and *Ewing* require only minimal due process for academic dismissals, the limited number of cases on the subject matter is not surprising. At the outset of this article, it was noted that a large majority of academic dismissal cases are decided in favor of public colleges and universities, and the cases in which the courts have not granted judicial deference to academic decisions are also very rare.¹³⁰ As previously noted, the

consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) ("It is always wise to produce some sort of record of the proceedings . . . though a record may not always be constitutionally required."). *See, e.g., Rossomando v. Bd. of Regents of Univ. of Neb.*, 2 F. Supp 2d 1223, 1229 (D. Neb. 1998) (stating that the hearing does not have to be recorded).

127. *See infra* section II(D) (discussing case law where students were dismissed for academic reasons while their peers were not dismissed for similar reasons). In these situations, absent an academic justification, courts may closely scrutinize why the dismissed student was treated differently.

128. *See* KAPLIN & LEE, *supra* note 23, at 988 ("But just as surely, these trends emphasize the institution's own responsibilities to deal fairly with students . . . and to provide appropriate internal means of accountability regarding institutional academic decision making.").

129. *See Horowitz*, 435 U.S. at 85 (stating that students facing academic dismissals are entitled to "oral or written notice of the charges against [them] and, if [they] den[y the charges], an explanation of the evidence the authorities have and an opportunity to present [their] side of the story" (quoting *Goss v. Lopez*, 419 U.S. 565, 581 (1975))); *see also* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999) (discussing the need for clearly written and defined institutional procedural policies).

130. *See Schweitzer*, *supra* note 8, at 269 n.10 (providing an excellent perspective on the history of academic dismissal cases, often brought by graduate and professional school students, including a survey of cases in which courts have granted academic deference to higher education

overwhelming body of academic dismissal case law has been decided under the assumption that courts are reluctant to overturn the content of academic decisions.¹³¹ Taking this general rule into consideration, the discussion in this section is meant to isolate the cases in which administrators and faculty members have either made arbitrary decisions¹³² or have failed to act in good faith when considering whether to dismiss, or, in some cases, readmit a student.¹³³ It is important to keep in mind that these cases are currently the exception to the rule. The purpose of discussing these cases is to illustrate and analyze academic decisions that were not granted academic deference and, by doing so, to modify the doctrinal parameters surrounding academic deference and inform academic decision-makers of acceptable practices within the law.

Throughout the cases, seven established norms and practices are discussed. First, administrators and faculty members at public institutions of higher education must remember that although many courts will defer to their academic judgments, those courts may not grant them summary judgment if academic as well as disciplinary issues are present.¹³⁴ The administrators and faculty members must not fail to work with a student by undertaking the necessary procedural and

institutions). Professor Schweitzer points out:

Most academic challenge cases are likely to be unsuccessful for the foreseeable future. There may be no foolproof way to guarantee that professors will be fair and objective in making those decisions which are so important for their students' future, but society no doubt believes that this is their job and that it is emphatically not the province of judges to intervene in routine cases.

Id. at 366. See generally *State ex. rel. Mercurio v. Bd. of Regents of Univ. of Neb.*, 329 N.W.2d 87, 91 (Neb. 1983) (disagreeing with the trial court's order that defendant university remove a failing grade from a dismissed student's transcript because there was no evidence of "bad faith, malice, or fraud" on the part of the university); *Johnson v. Cuyahoga County Cmty. Coll.*, 489 N.E.2d 1088, 1090 (Ohio Ct. Com. Pl. 1985) (granting the defendant university's motion for summary judgment and finding that judicial economy supports judicial deference to school's academic decision-making).

131. See generally Dutile, *supra* note 73, at 283 (explaining that courts have "consistently set a rather low threshold for institutions" in academic dismissal cases). See, e.g., *Paulsen v. Golden Gate Univ.*, 602 P.2d 778, 783 (Cal. 1979) (holding for the defendant law school); *Enns v. Bd. of Regents of Univ. of Wash.*, 650 P.2d 1113, 1117 (Wash. Ct. App. 1982) (holding for the university where a student had repeatedly failed numerous examinations necessary to achieve a degree and where the university had provided ample notice of his deficiencies); *Marquez v. Univ. of Wash.*, 648 P.2d 94, 97-99 (Wash. Ct. App. 1982) (affirming summary judgment for a university after a law student was dismissed for failing to maintain the required grade point average).

132. See *Harvey v. State*, 458 P.2d 336, 338 (Okla. Civ. App. 1969) (defining abuse of discretion by a trial court as: "unreasonable, unconscionable [or] arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted").

133. Although several of the cases pre-date the *Horowitz* and *Ewing* opinions, every case follows similar legal frameworks to those espoused by the United States Supreme Court in their seminal opinions regarding higher education academic dismissals.

134. See *Bergstrom v. Buettner*, 697 F. Supp. 1098, 1102 (D.N.D. 1987) (acknowledging that students face an extremely difficult challenge in contesting an academic dismissal: "Ms. Bergstrom is engaged in a war which cannot be won. If the medical school faculty has in fact determined that she should not be a graduate of the school, no performance level on the remaining courses will prove to be satisfactory. No coerced unilateral resolution appears possible.").

substantive safeguards when dismissing him or her for academic reasons.¹³⁵ Second, schools should never conduct independent fact-finding without a student's knowledge.¹³⁶ The goal in any due process proceeding is to keep the student as informed as possible as to the steps taken that may lead to his or her dismissal. Failure to do so may lead to a court overturning a school's academic dismissal.¹³⁷ Third, especially in disputes with professional schools, such as law schools or medical schools, courts may find that, given the proper fact pattern, students may have a protected right to continue their education. Arguably, courts may be more willing to review a student's dismissal from a professional school than from other institutions, because professional students, as opposed to undergraduate students, have often invested larger amounts of time and money in their education.¹³⁸ Fourth, if a school allows some students to raise or fix grades, or to retake examinations, the school may be required, under a proper invocation of federal *or* state law, to allow other students the same rights.¹³⁹ Fifth, schools must be very careful to abide by the language contained within the school's student handbooks, catalogs, and guidelines.¹⁴⁰ Failing to abide by written school guidelines may

135. *See infra* Section II(A).

136. *See infra* Section II(B).

137. *Id.* *See Morrison v. Univ. of Or. Health Scis. Ctr.*, 685 P.2d 439, 440–42 (Or. Ct. App. 1984) (providing that off-the-record fact-finding or inappropriate *ex parte* communication without the other side's knowledge is, at the most, against the law, and, at the least, casts suspicions on university administrator or faculty decision-making). In *Morrison*, the Oregon Court of Appeals said state law “requires that in contested cases: All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to . . . no other factual information or evidence shall be considered in the determination of the case.” *Id.* at 441 (citing OR. REV. STAT. § 183.450(2) (1984)) (alteration in original); *see also Swank v. Smart*, 898 F.2d 1247, 1253–55 (7th Cir. 1990) (holding that *ex parte* presentation of evidence during an employee's discharge hearing was an unconstitutional violation of that employee's procedural due process rights).

138. *See infra* Section II(C). *See also Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968) (stating that an expulsion from an institution of higher education amounts to a very serious penalty for the dismissed student). It is arguable that a law or medical student, due to his or her education's focus on specific purposes and outcomes—for example, professional licensure—is more likely than another type of graduate student to have his or her interests protected. *See generally* Enid L. Veron, *Due Process Flexibility in Academic Dismissals: Horowitz and Beyond*, 8 J.L. & EDUC. 45, 53 (1979) (arguing that dismissals have the greatest consequences “for graduate and professional schools, clinical programs and other courses where evaluation procedures lack anonymity, where they involve the so-called gray areas between academic performance and behavior, and where academic requirements are vague or ambiguous”).

139. *See infra* Section II(D). *But see Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (finding that, given the particular facts of Ewing's case—his general academic failure as a whole—the school's decision not to allow him to retake the NBME examination was not an unlawful academic decision. If Ewing's academic performance, however, was not an academic outlier, he would have likely had the same opportunities to retake the exam). In *Ewing*, the Supreme Court explained in dicta: “We recognize, of course, that ‘mutually explicit understandings’ may operate to create property interests [to retake tests]. . . . [b]ut such understandings or tacit agreements must support ‘a legitimate claim of entitlement’ under ‘an independent source such as state law.’” *Id.* at 224 n.9 (citing *Perry v. Sindermann*, 408 U.S. 593, 601, 602 n.7 (1972)).

140. *See infra* Section II(E).

result in a court applying contract law principles and dispensing with academic deference altogether.¹⁴¹ Sixth, under a fiduciary duty analysis, colleges and universities may be bound by advice or recommendations given to students by administrators and faculty members. If administrators or faculty members advise a student that completing a certain course or courses will ultimately lead to obtaining a degree, and the student relies on that advice to his or her detriment, the college or university could be bound because it appeared to the student that the administrator or faculty member had the apparent authority to act on behalf of the institution.¹⁴² Finally, these categories do not cover every situation where academic dismissal decisions may not be granted academic deference. However, what the cases do offer is an in-depth look at factual scenarios where courts did not grant academic deference due to a school's failure to protect the dismissed student's liberty or property interests under state law or the Fourteenth Amendment of the federal Constitution.¹⁴³

A. Schools Should Not Rely on Courts Granting Summary Judgment in Deference to the School's Decision-Making Processes

In *Connelly v. University of Vermont and State Agricultural College*,¹⁴⁴ the United States District Court for the District of Vermont was presented with a case involving a third-year medical student, Thomas Connelly, Jr., who was dismissed from the College of Medicine in the midst of a twelve-week pediatrics-obstetrics rotation.¹⁴⁵ After missing from May 11 to June 7 of the rotation, Connelly received a failing grade.¹⁴⁶ He claimed that he made up the missed time during the month of July.¹⁴⁷ It was school policy that no student could advance to the fourth year if he or she failed more than twenty-five percent of his or her courses.¹⁴⁸

Connelly believed his grades in previous rotations prior to his missed time were an 82 in pediatrics and an 87 in obstetrics.¹⁴⁹ After his dismissal, Connelly alleged that, due to the time he missed, his instructor for the pediatrics-obstetrics rotation would not grant him a passing grade in the rotation regardless of prior class work and the quality of his work during the make-up period.¹⁵⁰ Because of failing that

141. *Id.*

142. *See infra* Section II(F) (providing a discussion of case law where colleges and universities claimed a student was dismissed for academic performance issues, but courts found instead that faculty and administrators had acted arbitrarily and capriciously and were responsible for those actions).

143. Although due process is predominantly enforced via the Fourteenth Amendment of the federal Constitution, colleges and universities should be mindful that their state's constitution may provide distinct due process protection. *See infra* Section II(B). At times, the state constitution may require more or less due process than does the Fourteenth Amendment in academic dismissal proceedings. *Id.*

144. 244 F. Supp. 156 (D. Vt. 1965).

145. *Id.* at 158.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

rotation, Connelly could not advance to his fourth year because he had failed twenty-five percent of his coursework.¹⁵¹ Facing dismissal, Connelly appealed to the school's Committee on Advancement for permission to repeat his third year of medical school.¹⁵² His appeal was denied and he was dismissed from the school.¹⁵³ Connelly then challenged the school's decision before the United States District Court for the District for Vermont.¹⁵⁴ He claimed his work in medical school was of passing quality and that the school's decision to dismiss him was "wrongful, improper, arbitrary, summary and unjust."¹⁵⁵

At the federal district court, the school filed a motion to dismiss Connelly's complaint and, in the alternative, a motion for summary judgment.¹⁵⁶ The court did not grant either motion; instead, it held that issues of material fact remained to be decided and, therefore, that summary judgment was improper.¹⁵⁷ The court held that Connelly had properly alleged that the professor who gave him a failing grade in his pediatrics rotation may have done so in an arbitrary, capricious, or unreasonable manner.¹⁵⁸ The court noted that "to the extent that the plaintiff has alleged his dismissal was for reasons other than the quality of his work, or in bad faith, he has stated a cause of action."¹⁵⁹ The court did not pass judgment on whether the school's decision was, in fact, arbitrary; instead, it set the case for a hearing because there existed a disputed issue and a jury could decide whether the professor had indeed violated Connelly's due process rights.¹⁶⁰

Discussing its proper role in academic dismissal cases, the court explained that:

Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously? In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable.¹⁶¹

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 157–58.

157. *Id.* at 161.

158. *Id.*

159. *Id.* The court explained that if the medical school had dismissed Connelly for solely academic reasons, the court would not intervene. *Id.* at 160–61. The court stated:

The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a medical school. A medical school must be the judge of the qualifications of its students to be granted a degree; courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.

Id.

160. *Id.* at 161.

161. *Id.* at 159.

This passage clearly illustrates the academic deference principle. If the issue is wholly cognitive and academic in nature, academic freedom principles are correctly applied. However, should the school act in such a capricious matter that any academic issues are secondary or non-existent, academic deference should not be granted. Further, seemingly academic or cognitive issues may become so hopelessly intertwined with disciplinary or traditionally non-cognitive issues that courts may question granting automatic academic deference.¹⁶²

In another highly discussed academic dismissal case, *Greenhill v. Bailey*,¹⁶³ the Eighth Circuit Court of Appeals overturned the University of Iowa College of Medicine's decision to dismiss a medical student for alleged academic failures, because the school failed to provide the student with the minimal level of due process while relying on an erroneous assumption of academic deference.¹⁶⁴ The medical student, Bernard Greenhill, was dismissed by the school "due to Poor Academic Standing."¹⁶⁵ He had been denied admission to the school on two prior occasions and, as a result, had attended and completed two years of medical education at the College of Osteopathic Medicine and Surgery where he passed his coursework but was ranked at the bottom of his class.¹⁶⁶ After passing Part I of the NBME, Greenhill applied for and was finally admitted as a junior-year medical student in advanced standing at the College of Medicine.¹⁶⁷ During his junior year, Greenhill participated in clerkships in various medical fields.¹⁶⁸ Through the course of the year, he missed two clerkship rotations and failed two additional clerkships in the fields of obstetrics-gynecology and internal medicine.¹⁶⁹ At the end of the year, the Junior Promotions Committee convened to determine whether to promote each medical student to his or her senior year of study.¹⁷⁰ Viewing the entirety of Greenhill's academic record, the Committee voted to suspend Greenhill, and the Medical Counsel and Executive Committee of the College of Medicine voted unanimously to support the Promotions Committee's recommendations.¹⁷¹

Under school policy, Greenhill was not permitted to appear before either of the committees to contest his case.¹⁷² Instead, he was allowed to appeal the school's decision by letter.¹⁷³ In the letter, Greenhill admitted his deficiencies and sought to re-enroll in the school at essentially the same level as a second-semester sophomore.¹⁷⁴ Additionally, Greenhill's father, a licensed dermatologist, wrote a

162. See Dutile, *supra* note 12, at 651-52 (arguing courts should dispense with the cumbersome and often unhelpful distinction between allegedly academic versus disciplinary student dismissals).

163. 519 F.2d 5 (8th Cir. 1975).

164. *Id.* at 9-10.

165. *Id.* at 7.

166. *Id.* at 6.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 7.

174. *Id.*

letter to the school on his son's behalf asking the school to remove the suspension.¹⁷⁵ The school ultimately rejected the appeal, and the Assistant Dean sent a Change of Status Form to the Liaison Committee on Medical Education of the Association of American Medical Colleges, located in Washington, D.C.¹⁷⁶ The Assistant Dean's letter indicated that Greenhill had been dismissed "due to Poor Academic Standing" apparently caused by "[l]ack of intellectual ability or insufficient preparation."¹⁷⁷

Following the school's actions, Greenhill brought suit before the United States District Court for the Southern District of Iowa, alleging that he had been denied both procedural and substantive due process because he was not given notice or an opportunity for a hearing and because the faculty had wrongfully judged his academic performance based on non-objective standards.¹⁷⁸ Like the lower court in *Connelly*, the District Court of Iowa dismissed Greenhill's complaint, finding the Fourteenth Amendment's procedural safeguards have no application to an academically dismissed student.¹⁷⁹ Greenhill subsequently appealed this decision to the Eighth Circuit Court of Appeals.¹⁸⁰

Although the Eighth Circuit acknowledged that "courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students,"¹⁸¹ the court found that Greenhill's liberty interest had been violated and remanded the case for an administrative hearing.¹⁸² Explaining its ruling, the court stated that "[n]otwithstanding this customary 'hands-off' policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property."¹⁸³ Discussing Greenhill's liberty interest in continuing his costly and time-consuming medical education, the Eighth Circuit found that Greenhill's dismissal "admittedly 'imposed on him a stigma or other disability that foreclose[s] his freedom to take advantage of other . . . opportunities.'"¹⁸⁴ The court explained that a person may be deprived of a liberty interest where officials at a state-funded institution "make[] 'any charge against him that might seriously damage his standing and associations in his community.'"¹⁸⁵

The court also explained its reasoning, stating that it was most concerned about

175. *Id.*

176. *Id.*

177. *Id.* (alteration in original).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (citing *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Tex. 1973); *Connelly v. Univ. of Vt. and State Agric. Coll.*, 244 F. Supp. 156 (D. Vt. 1965); *Foley v. Benedict*, 55 S.W.2d 805 (Tex. 1932); *Wong v. Regents of Univ. of Cal.*, 93 Cal. Rptr. 502 (Cal. Ct. App. 1971)).

182. *Id.* at 8–9.

183. *Id.* at 7 (citing *Goss v. Lopez*, 419 U.S. 565 (1975); *Perry v. Sindermann*, 408 U.S. 593 (1972)).

184. *Id.* at 8 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)) (alterations in original).

185. *Id.* at 8 n.8. (quoting *Roth*, 408 U.S. at 573).

the Assistant Dean's letter to the Liaison Committee of the Association of American Medical Colleges which alleged Greenhill lacked intellectual ability and noted the school had "all but conceded" that, with this information available to all other accredited medical schools, Greenhill "will be foreclosed from pursuing his education not only at Iowa but everywhere else as well."¹⁸⁶ The court went on to hold that "the action by the school in denigrating Greenhill's intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty," because of the long stigma it would impose upon him for the duration of his career (or lack thereof).¹⁸⁷ Because the court found that Greenhill was denied due process, it held that "at the very least, Greenhill should have been notified in writing of the alleged deficiency in his intellectual ability . . . and should have been accorded an opportunity to appear personally to contest such allegation."¹⁸⁸ The court, however, did not require that the school grant Greenhill "full trial-type procedures," but rather an "informal give-and-take" between him and the school body dismissing him.¹⁸⁹

Much like the *Connelly* court's ruling, the Eighth Circuit, in *Greenhill*, did not pass judgment on the school's substantive evaluation of Greenhill's academic qualifications. Instead, it remanded the case to the trial court for a hearing on its merits and was careful to note that "[a] graduate or professional school is, after all, the best judge of its students' academic performance and their ability to master the required curriculum."¹⁹⁰ Again, it is important to note that academic deference is certainly the norm, and courts, given their admitted lack of expertise, will not pass judgment on the academic nature of a particular school's decisions. However, a court will dispense with academic deference and scrutinize the process afforded a student if a school's decision is arbitrary.

As the *Connelly* and *Greenhill* rulings demonstrate, summary judgment is not always an appropriate remedy in academic dismissal cases—especially when facts exist supporting a student's assertion that his or her dismissal may have been for non-academic reasons or was based on arbitrary judgments made by an institution's administrators or faculty members.¹⁹¹ Although summary judgment is

186. *Id.* at 8.

187. *Id.*

188. *Id.* at 9.

189. *Id.* The court stated: "The purpose of the hearing, as set forth in an appropriate notice, shall be to provide Greenhill with an opportunity to clear his name by attempting to rebut the stigmatizing material made available to other schools. Procedural due process under these facts requires no more." *Id.* at 10.

190. *Id.*

191. See *Clements v. County of Nassau*, 835 F.2d 1000, 1005 (2d Cir. 1987) (finding that summary judgment in academic dismissal cases is unwarranted where state of mind is the critical issue and "solid circumstantial evidence exists to prove plaintiff's case") (citing *Wakefield v. Northern Telecom, Inc.*, 813 F.2d 535, 540–41 (2d Cir. 1987)); see also *Dutile*, *supra* note 12, at 626 (noting that the academic versus disciplinary distinction is, at best, confusing and difficult to properly distinguish). *Dutile* observes that "[t]he [United States Supreme] Court seems to have assumed that situations fall easily into one category or the other. But does the distinction survive scrutiny? Or is it, as Justice Marshall said, futile to attempt 'a workable distinction between "academic" and "disciplinary" dismissals'?" *Id.* at 625–26 (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 104 n.18 (Marshall, J., concurring in part and dissenting in part)).

certainly common in the majority of academic dismissal cases,¹⁹² schools should not rely on courts simply giving a perfunctory resuscitation of the “academic deference” standard and then summarily dismissing a student’s lawsuit. When facing a potential academic dismissal, schools are advised to consider the facts of every student’s case, and, when doing so, decide what level of due process should be afforded to the student. For instance, a school should ask itself: Was the decision behind the student’s failing grade(s) or dismissal made in a reasonable manner or was there potentially extenuating circumstances—such as illness—that might explain the student’s failures? Were there facts outside of the student’s low academic performance that might have also lead to the student’s dismissal?¹⁹³ Could the student persuasively argue that his dismissal was for nonacademic or disciplinary reasons? If any of these questions are affirmatively answered, colleges and universities must be cognizant of the potential issues created and have procedures in place to ensure that the student facing potential dismissal is afforded due process.

Finally, as the Eighth Circuit noted in *Greenhill*, courts are “well aware” of the long-standing history of distinguishing between academic and disciplinary cases.¹⁹⁴ The court stated: “Our holding today is not an effort to blur that distinction but rather an acknowledgment that the dictates of due process, long recognized as applicable to disciplinary expulsion (and suspensions of significant length), may apply in other cases as well”¹⁹⁵ As the court’s language illustrates, for better or worse, a dichotomy has been developed by the courts between non-cognitive, or disciplinary, student offenses and cognitive, or academic, issues.¹⁹⁶ For example, failing to meet a specified minimal grade point average appears unquestionably cognitive. Likewise, issues of vandalism, underage drug and alcohol abuse, or rape appear to be disciplinary issues. Nonetheless, many issues are not easily defined as cognitive or disciplinary. For instance, where does the issue of cheating belong?¹⁹⁷ Further, as many of the cases discussed herein demonstrate, the issues in every student’s case can be

192. See *Steere v. George Washington Univ. Sch. of Med. & Health Scis.*, 439 F. Supp. 2d 17, 25–26 (D.D.C. 2006) (granting summary judgment for medical school after student failed to evidence a disability explaining his long history of academic failure); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 332 (E.D. Va. 2005) (granting school summary judgment); see also *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 51 (3d Cir. 1986) (“[A] student bears a heavy burden in persuading the courts to set aside a faculty’s judgment of academic performance.”).

193. See *Dutile*, *supra* note 12, at 630 (discussing case law where disciplinary and academic actions often appear indistinct).

194. *Greenhill*, 519 F.2d at 8.

195. *Id.* at 8–9.

196. *Dutile*, *supra* note 12, at 619.

197. See Aron E. Goldschneider, *Cheater’s Proof: Excessive Judicial Deference Toward Educational Testing Agencies May Leave Examinees No Remedy to Clear Their Names*, 2006 BYU EDUC. & L.J. 97 (2006) (discussing the use of standardized testing by colleges and universities and the ramifications to students seeking admissions to increasingly competitive institutions of cheating on those tests). Goldschneider argues: “[I]t is unduly burdensome for a test-taker to pursue a worthy claim under existing ‘testing law,’ due to the excessive deference paid to testing services by the courts, the difficulties in bringing equitable actions, and the limited legal avenues available to plaintiffs.” *Id.* at 100.

muddled at best, and the discovery process is meant to unearth issues that a school or a student may not have recognized.

As Professor Fernand N. Dutile argues, “[N]o manageably clear line separates the disciplinary matter from the academic one and, further, . . . the courts’ pronouncements that different constitutional rules should apply to each fail to persuade.”¹⁹⁸ Indeed, in his dissenting opinion in *Horowitz*, Justice Marshall noted that the academic/disciplinary distinction places “undue emphasis on words rather than functional considerations.”¹⁹⁹ In sum, colleges and universities must keep in mind that contested facts, where academic and disciplinary issues are intermingled, may lead to a full trial on the merits of a student’s case against his or her respective school, a scenario that schools would be wise to avoid.²⁰⁰ Whether or not the academic-versus-disciplinary line is clear, the United States Supreme Court in *Horowitz* held that a student is entitled to some type of informal hearing and that a school’s decision must be “careful and deliberate.”²⁰¹ Should a school fail to provide these measures, an issue of fact may arise that a court might send to a jury to consider.

B. Schools Should Not Conduct Independent Fact-Finding Without the Dismissed Student’s Knowledge

In a 1995 case, *University of Texas Medical School v. Than*,²⁰² the Texas Supreme Court found that a medical student who was dismissed “for academic dishonesty” from the University of Texas Medical School was denied procedural due process.²⁰³ *Than* is also notable because the facts of the case precariously straddle the line between academic and disciplinary dismissals. The student, Than, was dismissed for allegedly cheating on his NBME examination for surgery.²⁰⁴ During the exam, two school proctors alleged that they witnessed Than repeatedly looking at another student’s answer sheet.²⁰⁵ The proctors reported what they had witnessed, and the university requested the NBME conduct a statistical analysis of Than and the other students’ exams.²⁰⁶ After comparing their joint wrong answers, the NBME found that the students gave the same wrong answer on eighty-eight percent of the questions.²⁰⁷ After receiving this data, the school gave Than a failing grade on the exam and commenced proceedings against him.²⁰⁸

198. Dutile, *supra* note 12, at 619.

199. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 104 (1978) (Marshall, J., dissenting).

200. *Id.* at 106. Although there are always contested facts in academic dismissal disputes, colleges and universities must be wary of assuming that their decisions will be granted judicial deference. Therefore, colleges and universities are advised to utilize their own methods of internal investigation to assess the truth of each student’s assertions.

201. *Id.* at 85.

202. 901 S.W.2d 926 (Tex. 1995).

203. *Id.* at 928.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 928–29.

The school gave Than oral and written notice of the charges against him, including notice of several pieces of evidence that would be used against him at his dismissal hearing.²⁰⁹ A full hearing was conducted with Than present and representing himself.²¹⁰ At the hearing, the school called the two proctors as witnesses and Than cross-examined them extensively.²¹¹ Than also called two student witnesses who testified on his behalf.²¹² At the end of the proceedings, the hearing officer and Dr. Margaret McNeese, the associate dean of the medical school, viewed the room where Than took the NBME.²¹³ Than requested to be allowed into the room with the hearing officer and Dr. McNeese but was not allowed to do so.²¹⁴ After inspecting the room and sitting in the seat where Than took his exam, the hearing officer recommended expulsion and Than was expelled for academic dishonesty.²¹⁵

Subsequently, Than retained counsel and brought suit against the university.²¹⁶ He claimed a violation of his procedural due process rights and asked for a temporary injunction against the school.²¹⁷ Both the trial and appellate courts granted Than an injunction to be reinstated as a student, but the school refused to provide him with a certificate necessary to participate in a residency program.²¹⁸ Subsequently, the university was found in contempt of court and appealed its case to the Texas Supreme Court.²¹⁹ The Texas Supreme Court sustained the lower court's rulings and agreed that Than had not been afforded "due course of law" protection under the Texas Constitution,²²⁰ because the school had violated his constitutionally protected liberty interest by unjustly depriving him, without due

209. *Id.* at 928.

210. *Id.* It is common that university academic dismissal proceedings will be conducted without the presence of an attorney representing the student. *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 n.2 (1978) ("The presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration.") (alteration in original).

211. *Than*, 901 S.W.2d at 928.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 928, 932.

216. *Id.* at 928.

217. *Id.*

218. *Id.* at 928–29.

219. *Id.* at 929.

220. *Id.* at 932. As the Texas Supreme Court noted, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *Id.* at 929 (quoting TEX. CONST. art. I, § 19). The court also stated that "[t]he Texas due course clause is nearly identical to the federal due process clause" of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty or property without due process of law." *Id.* (quoting U.S. CONST. amend. XIV, § 1). "While the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction." *Id.* (citing *Mellinger v. City of Houston*, 3 S.W. 249, 252–53 (Tex. 1887)).

process, of his right to an education.²²¹ The Court modified but affirmed the permanent injunction by requiring the “F” on Than’s transcript and any records of his expulsion be removed. However, the court remanded the case for a new hearing.²²²

Citing both Texas constitutional law and federal law, the Court found Than had a liberty interest in continuing his education.²²³ Defining Than’s liberty interest, the Court stated that “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of due process must be satisfied.”²²⁴ The Court also explained that a medical student who is charged with academic dishonesty “faces not only serious damage to his reputation but also the loss of his chosen profession as a physician.”²²⁵

The university argued that Than’s dismissal was not solely for disciplinary reasons, but also for academic reasons which require less stringent due process.²²⁶ Disagreeing with the school’s argument that the cheating issue was more academic, the Court stated that “[t]his 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.”²²⁷ According to the Texas Supreme Court, Than’s dismissal for cheating was not an academic but rather a disciplinary decision; therefore, the decision required heightened due process.²²⁸

With this analysis in place, the Court found Than was afforded a “high level of due process” by the university.²²⁹ However, because the hearing officer and Dr. McNeese viewed the examination room by themselves and denied Than’s request to accompany them to the room, Than’s due process rights were violated.²³⁰ Because of this, the Court held that the school must remove the “F” on his transcript for the NBME examination and remove all records of Than’s expulsion.²³¹ Finally, the Court held that Than was entitled to another hearing, but that the original injunction issued by the trial court “exceed[ed] the proper remedy” and had to be removed.²³²

This case stands for a number of key propositions. First, medical students like

221. *Id.* at 929.

222. *Id.*

223. *Id.* at 930. Because the Court found that Than had a liberty interest, it stated that it was not necessary to consider whether he also had a property interest. *Id.* at 930 n.1.

224. *Id.* at 930 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

225. *Id.* See Warren A. Seavey, *Dismissal of Students: “Due Process,”* 70 HARV. L. REV. 1406, 1407 (1957).

226. *Than*, 901 S.W.2d at 931.

227. *Id.* (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86–87 (1977)).

228. *Id.* Whether cheating qualifies as an academic or disciplinary cause for dismissal is not readily apparent. However, as the Texas Supreme Court’s decision in *Than* indicates, courts may be willing to view cheating as a disciplinary issue and, therefore, a court will grant less deference to a school’s decision to dismiss a student for cheating. See Friedl, *supra* note 8, *passim*.

229. *Than*, 901 S.W.2d at 931.

230. *Id.* at 932.

231. *Id.* at 934.

232. *Id.*

Than have a significant liberty interest in being awarded a professional license by proceeding through their education. As the Texas Supreme Court noted, a medical student's time, money, and integrity are clearly at stake should a student face the possibility of an academic dismissal.²³³ Second, given the level of interest a professional student has in continuing his or her education, even if a school grants a student a high level of due process, the school cannot rely on cheating as being solely an academic issue that entitles it to academic deference from the courts.²³⁴ Instead, a school must realize that an allegation of cheating may be viewed by courts as misconduct relating to discipline and not academics. Third, the case serves as an example of when courts may be willing to expand the typical deference granted to state universities when a school arbitrarily deprives a student of the right to an education without allowing the student to take part in the fact-finding that leads to dismissal. In sum, courts may be more willing to apply a liberty interest analysis to professional student cases because "[t]he stigma is likely to follow the student and preclude him from completing his education at other institutions."²³⁵ Schools should be careful when attempting to dismiss professional students who have much invested in their costly and time consuming education.²³⁶ Whether professional students have higher liberty and/or property interests than undergraduate students is debatable; still, in *Than*, the Texas Supreme Court determined that "Than's interest in continuing his medical education and preserving his good name was substantial."²³⁷

In another case where an institution claimed a student's academic failure as the reason for treating the student differently, *Ezekwo v. New York City Health & Hospitals Corporation*,²³⁸ the United States Court of Appeals for the Second Circuit held that a medical resident had a protected property interest in taking her turn as the Chief Resident of a hospital.²³⁹ In *Ezekwo*, a third-year resident, Dr. Ifeoma Ezekwo, alleged that she was denied her opportunity to serve as Chief Resident at Harlem Hospital Center (HHC) due in large part to difficulties with her supervising physician, Dr. Farris.²⁴⁰ In an HHC recruiting brochure, the Chief

233. *Id.* at 930.

234. *Id.* at 931. The Texas Supreme Court explained that cheating is a disciplinary issue, stating that "[a]cademic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct." *Id.*

235. *Id.* at 930. *See also* *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975) (discussing the potential career-ending stigma medical students face when dismissed from a college or university for their alleged academic failures).

236. *See* *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 n.3 (1977) ("[A] relevant factor in determining the nature of the requisite due process is 'the private interest that [was] affected by the official action.'" (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (second alteration in original).

237. *Than*, 901 S.W.2d at 932.

238. 940 F.2d 775 (2d Cir. 1991).

239. *Id.* at 783. The case serves as an example of the nexus between education and employment law issues. Often, especially in professional school cases, courts are faced with legal issues that do not fit neatly into the academic versus disciplinary dismissal paradigm. *See* *Dutile*, *supra* note 12, *passim* (discussing the challenges courts face when dealing with academic and disciplinary dismissal cases at colleges and universities).

240. *Ezekwo*, 940 F.2d at 777.

Resident position at the hospital was to be granted, on a rotational basis, to all third-year students.²⁴¹ The Chief Resident position carried with it additional administrative and organizational responsibilities and its designation had significant future professional value to employers.²⁴²

During her three-year residency, Dr. Ezekwo had many conflicts with Dr. Farris which resulted in Dr. Ezekwo writing numerous memoranda and submitting them to the HHC's medical directors.²⁴³ In one, Dr. Ezekwo alleged that Dr. Farris and other attending physicians had poor management and motivational skills, had unfairly evaluated her, had failed to show up at meetings and lectures, were poor teachers, and had discriminated against her due to her race.²⁴⁴ Dr. Ezekwo also filed complaints with the Committee of Interns and Residents (CIR) and the equal employment opportunity officer (EEO) alleging that Dr. Farris had fabricated information in her file and engaged in "smear tactics" aimed at damaging her career.²⁴⁵

Shortly after learning of Dr. Ezekwo's complaints to the CIR and EEO, Dr. Farris, in unrecorded and undocumented meetings, began discussions with other supervising physicians about not making Dr. Ezekwo Chief Resident and even about the possibility of dismissing her from the program altogether.²⁴⁶ In the private meetings, Ezekwo's "academic performance, her medical skills, and her memo writing campaign were the focus of discussion."²⁴⁷ Nearly two weeks after Dr. Farris began these discussions with other resident faculty, Dr. Ezekwo was to assume her position as Chief Resident, as per the original, scheduled rotation. However, under Dr. Farris' supervision, the HHC Chief Resident Policy was changed from a rotational system to a "merit based" system.²⁴⁸ Under this new system, the residents would be awarded the position of Chief Resident on the bases of their demonstrated leadership ability, residency training evaluations, and performance on the "national examination administered by the American Academy of Ophthalmology known as the OKAP examination."²⁴⁹ The hospital had never used this academic performance system before Dr. Farris' various meetings with the residency faculty.²⁵⁰

Dr. Ezekwo was never named Chief Resident, but she continued through her residency program and graduated.²⁵¹ After her graduation, she brought suit against HHC.²⁵² She argued that HHC had violated her protected property and liberty due process rights by denying her the opportunity to serve as Chief Resident without

241. *Id.*

242. *Id.*

243. *Id.* at 777-78.

244. *Id.*

245. *Id.* at 778.

246. *Id.*

247. *Id.*

248. *Id.* at 778-79.

249. *Id.* at 779.

250. *Id.*

251. *Id.*

252. *Id.*

due process.²⁵³ The district court concluded that Dr. Ezekwo had a protected property interest, but dismissed her suit because HHC's decision was academic, not disciplinary, and she was not entitled to further due process.²⁵⁴

The Second Circuit granted Dr. Ezekwo's appeal and reversed the trial court's finding that she was not entitled further due process.²⁵⁵ The Second Circuit held that HHC's decision was not necessarily purely academic, and, regardless of its terminology, academic decisions are entitled to at least "some modicum of process."²⁵⁶ The court also noted that although a medical residency program is largely academic, it is also an employment situation.²⁵⁷ Because of this categorization, the court found that Dr. Ezekwo was entitled to be notified of HHC's change in the Chief Resident Policy and that she should have been allowed to demonstrate her past performance and persuade the decision-makers as to her worth.²⁵⁸ Explaining its holding, the court stated that "the injection of entirely new selection criteria at the eleventh hour casts some doubt on the truly 'academic' nature of the decision."²⁵⁹

As shown in the Texas Supreme Court's decision in *Than*, courts may be more apt to find a due process violation when a clear liberty or property interest is at stake and when that interest is taken away by administrators or faculty conducting independent fact-finding without the student's knowledge.²⁶⁰ The rulings in *Than* and *Ezekwo* also illustrate that academic deference may be dispensed with if higher education institutions make arbitrary and capricious decisions under the guise of an academic judgment. In *Horowitz*, the United States Supreme Court discussed the balancing act that courts must perform when considering students' liberty and property interests and institutions' interests in maintaining academic autonomy.²⁶¹ As summarized in the three-part test invoked in *Mathews v. Eldridge*,²⁶² the

253. *Id.* at 782.

254. *Id.* at 777.

255. *Id.* at 786.

256. *Id.* at 784.

257. *Id.* at 785.

258. *Id.*

259. *Id.* at 784.

260. Furthermore, one must consider that, in *Ezekwo*, the court premised parts of its analysis on the duality created by the educational/employment relationship where Ezekwo's position as Chief Resident was effectively protected twice by due process safeguards pertaining to her liberty and property interests. This issue differentiates *Ezekwo* from *Than* because, in *Than*, the Texas Supreme court was concerned with the relationship between conduct (relating to discipline) and academics.

261. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 n.3 (1978) ("[A] relevant factor in determining the nature of the requisite due process is 'the private interest that [was] affected by the official action.'") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (second alteration in original); *see also Carr v. St. John's Univ.*, N.Y., 231 N.Y.S.2d 410, 413 (N.Y. App. Div. 1962) ("The University cannot take the student's money, allow him to remain and waste his time in whole or in part . . . and then arbitrarily expel him or arbitrarily refuse, when he has completed the required courses, to confer on him that which it promised, namely, the degree . . .").

262. *Mathews*, 424 U.S. at 319. The three principal factors that are to be considered in all due process interest cases are:

First, the private interest that will be affected by the official action; second, the risk of

Supreme Court stated that “a relevant factor in determining the nature of the requisite due process is ‘the private interest that [was] affected by the official action.’”²⁶³ The Court recognized that “the deprivation to which [Horowitz] was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension” to which several high school students had been subjected in *Goss v. Lopez*.²⁶⁴ However, while noting the significance of many students’ interests in maintaining their education, the Court concluded that academic deference should be afforded to higher education institutions if their decisions are not arbitrary or capricious.²⁶⁵ Again, to ensure that all students’ interests are protected, schools must be extremely careful to provide students with all relevant information, however insignificant it seems, to ensure that courts will not view the school’s decision-making with skepticism. As shown in *Than* and *Ezekwo*, although courts are always aware of academic freedom concerns, when administrators or faculty members make decisions not based on facts or which show evidence of even slight impartiality or bias, courts may scrutinize those failures and potentially dispense with academic deference.

In one final case where a university conducted wrongful independent fact-finding, *Morrison v. University of Oregon Health Sciences Center*,²⁶⁶ an Oregon appeals court reversed and remanded the dismissal of a dental student at the University of Oregon School of Dentistry.²⁶⁷ In *Morrison*, a faculty review committee dismissed a dental student for academic reasons stemming from the student’s alleged lack of professional skills development and lack of adequate clinical performance.²⁶⁸ The dismissed student, John Morrison, contested the findings that his performance was deficient under Oregon statutory law.²⁶⁹ According to the applicable statutes, the dismissal was a “contested case,” entitling Morrison to certain procedural protections.²⁷⁰

an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

263. *Horowitz*, 435 U.S. at 86 n.3 (quoting *Mathews*, 424 U.S. at 335) (alteration in original).

264. *Id.* at 86 n.3 (citing *Goss v. Lopez*, 419 U.S. 78 (1975)).

265. *Id.* at 91–92.

266. 685 P.2d 439 (Or. Ct. App. 1984).

267. *Id.* at 441.

268. *Id.*

269. *Id.*

270. *Id.* at 440–41 (citing OR. REV. STAT. §§ 183.450(2), 183.480(1)). Section 183.480(1) provides:

Any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form. A petition for rehearing or reconsideration need not be filed as a condition of judicial review unless specifically otherwise provided by statute or agency rule.

Id. at 441 n.3. Section 183.450(2) provides that, in contested cases: “All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to . . . no other factual information or evidence shall be considered in the determination of the case.” *Id.* at 441

In the case, the university faculty review committee met in a closed proceeding without the student's knowledge and included non-committee members in the decision-making process.²⁷¹ Much of the meeting involved discussion between various faculty members and "relevant factual information" which was discussed and considered for the first time.²⁷² The student had no opportunity to respond or object to any of the information discussed at the meeting.²⁷³ Because the review committee conducted independent fact-finding and failed to involve the student, the fairness of the hearing may have been impaired, so the appeals court reversed the school's decision and remanded the case.²⁷⁴ The court stated that, under Oregon statutory law,²⁷⁵ students must at least be apprised of facts that are asserted against them and must be made aware of the decision-making process of the university when it considers dismissing them.²⁷⁶

Again, like the decisions in *Than* and *Ezekwo*, the Oregon court's decision in *Morrison* demonstrates that schools should be careful when conducting meetings or fact-finding sessions without apprising the accused student of the existence of those sessions. If the information is relevant to a student's defense, it must be disclosed to the student. All three cases stand for the proposition that students must be afforded the proper level of procedural access, thereby ensuring a fair review of all relevant information. Further, because each case had an academic aptitude component and a non-cognitive disciplinary component, the courts in all three cases recognized the basis for each school's decision was based on a non-cognitive disciplinary component, which in turn requires a slightly higher standard of due process. As such, when both academic aptitude and non-cognitive acts are involved in the fact patterns, the courts will opt for the higher standard of due process.

Furthermore, in both *Than* and *Morrison*, the students likely benefited from state statutes or laws that arguably provided the students with more due process protection.²⁷⁷ Administrators and faculty members, as well as their legal counsel, must always consider the protections afforded to students under state law as well

(alterations in original).

271. *Id.* at 441, 444.

272. *Id.* at 444.

273. *Id.* This case again shows the necessity that colleges and universities have clear, written guidelines that must be followed when considering dismissing a student for academic failure. *See* Berger & Berger, *supra* note 129, at 359–64 (providing a "proposed model guideline" for higher education student dismissals).

274. *Morrison*, 685 P.2d at 443–44. According to the court, state law provided: "The court shall remand the order for further agency action if it finds that either the fairness of the proceeding or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." *Id.* at 443 (quoting OR. REV. STAT. § 183.482(7)).

275. Because the school was bound by the mandates of OR. REV. STAT. § 183.480, the court applied administrative review standards to the university's decision-making. *Id.*

276. *Id.*

277. *See* Bd. of Regents v. Roth, 408 U.S. 564, 576–77 (1972) (discussing the relationship between the federal Constitution and individual state rights). In *Roth*, the United States Supreme Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." *Id.* at 577.

as federal constitutional law. Indeed, as was seen in *Morrison*, Oregon statutory law provided more specified protection to the dismissed student than she would otherwise have received from a traditional Fourteenth Amendment due process analysis. Should the state provide more protection than the federal Constitution, it is much more likely that, combined with professional students' heightened interest in continuing their costly education, a court will grant less deference to an academic dismissal.

C. Students May Have a Protected Right to the Continuation of Their Educational Investment

In *Evans v. West Virginia Board of Regents*,²⁷⁸ the Supreme Court of Appeals of West Virginia found that a medical student who had a physical and mental illness was entitled to reinstatement at the West Virginia University School of Osteopathic Medicine.²⁷⁹ The dismissed student, Eugene Evans, came before the state's highest court because the appellate court had refused to consider his petition seeking reinstatement and a hearing wherein the university would be required to explain its refusal to readmit him.²⁸⁰ The school had dismissed Evans without granting him a hearing,²⁸¹ prompting Evans to bring his case to the West Virginia judiciary.²⁸²

Evans maintained a "B" average during his initial two and one-half years at the medical school.²⁸³ However, due to a serious urological infection which caused him substantial physical pain and mental anguish, Evans was forced to receive medical treatment, causing him to miss one year of school.²⁸⁴ Evans applied for, and was granted, a one-year leave of absence.²⁸⁵ Fourteen months after taking his leave of absence, Evans applied for readmission, but the university denied him.²⁸⁶ Evans was not given any hearing or reasons for the school's decision not to readmit him.²⁸⁷ He exhausted his administrative remedies with the school and was twice denied readmission by the Admissions Committee without its "proffering any explanation whatsoever for the denial."²⁸⁸

The West Virginia Supreme Court found that Evans had a "sufficient property interest" in continuing and completing his education to justify affording him minimal procedural due process protections.²⁸⁹ Furthermore, given his two and one-half years of academic success, the court held that Evans should be able to complete his education "absent a showing that specific conditions and circumstances had developed since his original admission which would prevent him from successfully completing the remainder of his education."²⁹⁰ Like many of the cases discussed previously, the West Virginia Supreme Court was clearly foremost concerned with Evan's ability to fulfill the academic requirements of the school. The court stated that "nothing appears of record even remotely suggesting

278. 271 S.E.2d 778 (W. Va. 1980).

279. *Id.* at 780–81.

280. *Id.* at 779.

281. *Id.* at 780.

282. *Id.* at 779–80.

283. *Id.* at 780.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

his unfitness or inability to complete the remainder of his education.”²⁹¹ The court also noted that Evans had been successful before his leave of absence and, because there was no suggestion of his inability to successfully fulfill the remainder of his education, his case was significantly different from that of the medical student in *Horowitz*.²⁹²

In *Evans*, it appears that the court was concerned with the *procedures* employed and not the *academic record* upon which the school based its decision not to readmit Evans. This is important because, unlike several of the cases discussed previously, here the court protected a student’s right to at least minimal due process—a standard clearly expressed by the United States Supreme Court in *Horowitz*²⁹³—but at times either ignored or forgotten by administrators and faculty members at public colleges and universities. The Supreme Court in *Horowitz* clearly stated that students must be given “oral or written notice of the charges against [them], and if [they] den[y] the charges, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story.”²⁹⁴ By failing to meet this standard, the medical school in *Evans* was found to have violated the student’s due process rights.

Another example of a school’s failure to provide both a proper level of process and academic content is presented in the case of *Alcorn v. Vaksman*.²⁹⁵ In *Vaksman*, a case decided only a year before *Than*, a Texas appellate court upheld a trial court’s decision that a professional graduate student had been wrongfully dismissed for alleged academic failures.²⁹⁶ Vaksman, a Russian immigrant, enrolled in the University of Houston’s doctoral program in American History in 1982.²⁹⁷ By 1984, Vaksman had attained “ABD,” or “all but dissertation,” status by completing all necessary requirements, including course work, teaching assignments, and comprehensive oral examinations, which were necessary to receive his doctorate.²⁹⁸ Vaksman was assigned three separate dissertation advisors by the school.²⁹⁹

During his time at the university, Vaksman was outspoken about certain university policies and political issues.³⁰⁰ To express his views, Vaksman utilized an array of media outlets, including newspaper articles and editorials, a radio talk

291. *Id.*

292. *Id.*

293. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 85–86 (1978).

294. *Id.* at 85 (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)). In *Horowitz*, The United States Supreme Court explained that all the *Goss* decision requires is “an ‘informal give-and-take’ between the student and the administrative body dismissing him that would, at least, give the student ‘the opportunity to characterize his conduct and put it in what he deems the proper context.’” *Id.* at 86.

295. 877 S.W.2d 390 (Tex. App. 1994).

296. *Id.* at 406. See generally Steven G. Olswang, *Academic Abstention Stronger Than Ever, Despite Vaksman*, 26 J.L. & EDUC. 91 (1997) (arguing that the Texas appellate court decision in *Vaksman* was perhaps wrongly decided and did not herald a new trend of lower academic deference in academic dismissal cases).

297. *Vaksman*, 877 S.W.2d at 393.

298. *Id.*

299. *Id.*

300. *Id.*

show, lectures, and university seminars.³⁰¹ Much of Vaksman's outspokenness was directed toward communist issues relating to the Soviet Union, as well as issues relating directly to the history department and the athletics department at the University of Houston.³⁰² Specifically, Vaksman was highly critical of the university's alleged political agendas with respect to the Soviet Union and also the university's failure to adequately fund academic departments while significantly increasing funding for athletics.³⁰³

During this time, Vaksman also authored a book, entitled *Ideological Struggle*, which was published by an academic press after it passed the process of peer review.³⁰⁴ However, the book was criticized by faculty members at the University of Houston.³⁰⁵ In 1986, after Vaksman's book was published, he requested the graduate committee allow him to change fields from American History to European history and also allow him to submit *Ideological Struggle* as his dissertation.³⁰⁶ In early October of 1986, the graduate committee met to consider Vaksman's requests.³⁰⁷ Rather than approve or deny his requests, the committee unanimously voted to dismiss Vaksman from the university.³⁰⁸ Vaksman had never been notified that the committee was considering his dismissal.³⁰⁹

After the meeting, the university notified Vaksman by a hand-delivered letter that he would be dismissed from the university.³¹⁰ Despite being asked to meet to consider a department switch and whether he could submit his book as a dissertation, the committee ignored his requests, stating that:

The Graduate Committee (all members present) met on October 28, 1986 to consider your request that you be permitted to change your major field of graduate study from American history to European history, with a concentration on Russian/Soviet history. As you know this was the second time this fall that the Graduate Committee has held a special meeting to consider a request by you, the first meeting occurring earlier this month to review your renewed request for financial assistance.

These two meetings have given the Graduate Committee an opportunity to review your progress and performance to date in the Ph.D. program. We have been deeply troubled by what we have learned from this review, for your graduate record *reveals a pattern of academic problems* that in our judgment cannot be ignored.

I regret to inform you that the Graduate Committee, after discussing your record thoroughly, decided in its meeting yesterday to turn down

301. *Id.*

302. *Id.* at 393–94.

303. *Id.*

304. *Id.* at 399.

305. *Id.* at 394.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

your request for permission to switch fields from American history to European history. In addition, and far more seriously, the Graduate Committee voted unanimously to dismiss you from our graduate program, effective immediately.³¹¹

The letter delivered to Vaksman also outlined three reasons why the committee had unanimously voted to dismiss him.³¹² First, the committee stated that Vaksman had failed to make “satisfactory progress toward completing the requirements of [his] degree” because, although he passed comprehensive examinations two years earlier, he had made no progress on his dissertation.³¹³ Second, the committee informed Vaksman that his teaching did not meet a requisite professional level, and his student evaluations, combined with faculty assessments of his graduate teaching assistantship, indicated he viewed teaching as a combative arena which could be manipulated to further his own ideological agenda.³¹⁴ Third, the committee reasoned that Vaksman’s outspokenness against the history department and refusal to accept academic criticism further justified his dismissal from the program.³¹⁵ The committee wrote, “In our judgment, you are unteachable.”³¹⁶ Finally, the letter informed Vaksman that he was entitled to appeal the committee’s decision to the department chairperson who would “explain your rights.”³¹⁷

In May of 1987, Vaksman followed the university’s administrative appeals process, and produced written documentation, including favorable letters written by twelve of his students praising his teaching.³¹⁸ However, Vaksman’s appeals were denied by the university.³¹⁹ Subsequently, he filed suit in federal court against the school officials who dismissed him, alleging they deprived him of his protected property and liberty interests without affording him due process of the law.³²⁰

At the trial court, three of Vaksman’s professors appeared on his behalf.³²¹ Each professor testified that the university wrongfully dismissed Vaksman, the committee had not made its decision on academic grounds, and the dismissal letter contained false statements about Vaksman’s academic failures.³²² In a tidal wave of persuasive testimony,³²³ the professors further asserted that Vaksman was an

311. *Id.* at 394 (emphasis added).

312. *Id.* at 394–95.

313. *Id.* at 394.

314. *Id.* at 395.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* Vaksman also alleged a violation of his First Amendment right to free speech. *Id.*

321. *Id.* at 397.

322. *Id.* at 397–98.

323. A partial list of the professors’ testimony includes:

[I]t would be a “shock” for a committee to respond to a student’s request to take another exam and enter a different study area by dismissing him from school; and [S]tudents “over and over” take two and one-half years or more to pick a dissertation

effective classroom teacher, and, after he had attained ABD status, there was no reason to expel him.³²⁴ Further, they testified that many students don't complete their dissertations for many years after graduation, and, in one case, they knew of a student who had not completed his dissertation until fourteen years after obtaining ABD.³²⁵ The professors also testified that before Vaksman's dismissal, no faculty member had ever spoken to him about concerns that his progress in the program was not satisfactory.³²⁶ Finally, Vaksman himself testified that one of his professors told him that "the history faculty was 'terrified' of a Texas senator's probe of its spending practices, a probe that had been generated by Vaksman's criticism."³²⁷ Perhaps most damaging to the university's case was that, although Vaksman produced documentary evidence and three professors who supported his case, the university presented no witnesses to rebut Vaksman's evidence.³²⁸ Rather, the university relied solely on documentary evidence, most of which proved only that Vaksman had been outspoken against the school at times and that he had failed to complete his dissertation within two years after achieving ABD.³²⁹

Finding that the university had violated Vaksman's liberty interest and had breached an implied contract with him, the trial court awarded Vaksman \$32,500 in actual damages and \$90,000 in attorney's fees.³³⁰ The court also ordered the university to reinstate Vaksman in the doctoral program.³³¹ On appeal, the Texas Court of Appeals found Vaksman was indeed entitled to due process because the court had determined in an earlier case that "when a student is dismissed from a state university, the requirements of procedural due process apply."³³²

After determining Vaksman was entitled to due process protection, the court found his dismissal was academic in nature,³³³ thus calling for "far less stringent

topic.

....

[S]ome history faculty members espouse Marxist views and believe that those who differ with their views, as Vaksman did openly, are "morally wrong as well as academically wrong;"

....

Vaksman "may have presented an embarrassing challenge to the current academic dogma and, perhaps more crucially, to the posturings of our history department in the academic pecking order-it is clear that an outspoken, anti-Soviet, anti-Marxist Soviet emigree/doctoral candidate is a deficit in the status seeking academic board game

Id. at 398.

324. *Id.* at 398-99.

325. *Id.* at 398.

326. *Id.*

327. *Id.* at 400.

328. *Id.*

329. *Id.*

330. *Id.* at 395.

331. *Id.*

332. *Id.* at 396 (quoting *Univ. of Tex. Med. Sch. v. Than*, 834 S.W.2d 425, 432 (Tex. App. 1992), *aff'd*, 901 S.W.2d 926 (Tex. 1995)).

333. *Id.* at 397. Although the facts presented in this case would seem to support a reading that Vaksman's alleged violations were based on conduct and therefore more disciplinary in nature, at the trial court, the University of Houston did not dispute that the dismissal was academic. *See generally id.* This is not surprising given that the school was likely advised to

procedural requirements' than a dismissal for disciplinary reasons."³³⁴ The court relied on an Eighth Circuit opinion that "[a]n actionable deprivation in an academic dismissal case is proved . . . if the decision was motivated by bad faith or ill will unrelated to academic performance."³³⁵ The court then affirmed the trial court's holding that the university officials dismissed Vaksman in bad faith, thus denying him due process.³³⁶ The appellate court explained that the trial court judge had determined Vaksman's dismissal "was in and of itself outrageous and extreme" and was "totally anathema to free academic environs."³³⁷ These statements, according to the appellate court, constituted findings of bad faith.³³⁸ Therefore, "[i]f evidence supports that finding, the appellants are not entitled to the deferential standard of review used in cases of good faith academic dismissals."³³⁹ Stressing that a trial court's holding that a school had made a decision in bad faith was not to be overturned "unless no reasonable minds could have found as the judge or jury did,"³⁴⁰ the appellate court granted no deference to the University of Houston's "prerogatives" because its decision was made in bad faith and was arbitrary and capricious.³⁴¹

The *Vaksman* case is notable because, although the Texas appellate court found it to be an academic dismissal, the facts of the case indicate a convoluted pattern, which a different court may have found as a back-handed strategy to deal with student discipline.³⁴² Clearly, Vaksman's alleged violations of university

argue that Vaksman's dismissal was academic and not disciplinary because lower levels of due process would be required. It does not appear from the appellate court's decision that Vaksman attempted to argue that the case was disciplinary.

334. *Id.* (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978)).

335. *Id.* (quoting *Clements v. County of Nassau*, 835 F.2d 1000, 1005 (2d Cir. 1987)) (alteration in original).

336. *Id.* at 400–01.

337. *Id.* at 397.

338. *Id.*

339. *Id.*

340. *Id.* (citing *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 255 (8th Cir. 1985)). The appellate court also noted that the trial judge found that the university had intentionally harmed Vaksman "solely because of personal disagreements or grievances wholly apart from academic considerations." *Id.*

341. *Id.* The appellate court also stated:

The trial judge, sitting as the trier of fact, found that the defendants "intentionally harm[ed] [Vaksman] solely because of personal disagreements or grievances wholly apart from academic considerations." He found that Vaksman was "summarily expelled for alleged, if not fabricated, academic insufficiencies," and because of "matters of personality and speech," and that his dismissal was "well beyond the limits" proscribed for "learned professionals."

Id. (alterations in original).

342. See *Dutile*, *supra* note 12, at 642 ("In many other cases . . . the manifestly academic finds itself enmeshed, to varying extents, with other aspects such as a failure to pay tuition, irritating outspokenness, or other 'nonacademic' matters." (citing *Vaksman*, 877 S.W.2d 390)); *Nussbaum v. Univ. of Tex. Med. Branch at Galveston*, 2000 WL 1864048, at *3 (Tex. App. 2000) (referring to *Vaksman* as a case in which a student was dismissed for *disciplinary* reasons, and holding that a student who received a failing grade did not have due course of law rights under either the Texas or federal Constitution). In *Nussbaum*, the court stated: "Nussbaum was not dismissed; she was merely given a failing grade. Thus, she would be entitled to even less

regulations appear to be conduct-related issues. For instance, his outspokenness and criticism of the history department's spending practices are most certainly not academic. However, it is also true that Vaksman had failed to pick a thesis topic two years after achieving ABD status and had expressed a wish to change departments only after completing all necessary course work in that department. These issues look less conduct-related and more academic in nature. Moreover, it would appear that the key factor for the appellate court was that the University of Houston specifically called Vaksman's dismissal academic, and no doubt did so with knowledge that academic dismissals carry with them less due process requirements and higher levels of academic deference. In the end, whether the court or the school properly characterized the issues as academic or disciplinary may be irrelevant. In either case, the school acted in an arbitrary manner and clearly provided Vaksman with little procedural due process. In most cases, a failure such as that evidenced in *Vaksman* will ultimately result in courts dispensing with academic deference because students are assumed to have protected interests under the Due Process Clause of the Constitution. Finally, it must be pointed out that the school also failed to defend its case adequately at the trial court level, presenting no witnesses, perhaps because it erroneously relied on the court to defer to its decision and dismiss the case.³⁴³

As *Than*, *Morrison*, and *Vaksman* illustrate, administrators and faculty should be aware that, given the right fact pattern, even a student that takes over a year off from school may have a protected interest in readmission or continued enrollment. Deference will only apply to a college or university's academic decision-making if a student is dismissed purely for academic reasons and in good faith. It would appear that, much like the schools in *Connelly* and *Greenhill*, the schools in *Evans* and *Vaksman* believed that their decisions not to grant adequate levels of due process would be protected by academic deference, and that a court would simply grant the school summary judgment. However, as discussed previously, such blatant disregard of a student's due process rights will not invoke deference, but, instead, provoke a court to apply a higher level of judicial scrutiny.

protection. No court has held that a student has a protected liberty interest in her grades, and we likewise decline to so hold." *Id.*

343. See *supra* Section II(A).

D. Raised or Fixed Grades and Other Students' Ability to Retake Examinations Must be Considered by a School's Dismissal Committee

In *Maitland v. Wayne State University Medical School*,³⁴⁴ the Court of Appeals of Michigan upheld a trial court's ruling that Wayne State University Medical School had acted arbitrarily and capriciously in its decision to dismiss the plaintiff, student Conrad Maitland.³⁴⁵ Maitland was a second year medical student at the university.³⁴⁶ The school's grading and testing system required him to take and pass an exam at the end of each year of medical school in order to move on to the next year of study.³⁴⁷ Maitland passed his first year exam, but twice failed to pass his second year exam.³⁴⁸

Despite Maitland's failure, there were several discrepancies in how the exam was administered and scored the second time Maitland took it.³⁴⁹ At the time of the testing, the proctors of the room where Maitland was taking a portion of the exam had given out the wrong section of the test to many students.³⁵⁰ Those students had approximately five to twenty minutes to look over this portion of the timed exam.³⁵¹ Fortunately, Maitland was not one of the students who received the wrong examination.³⁵² Upon completing the test, Maitland was given a score of 426.³⁵³ A passing score on the exam was 453.³⁵⁴ Due to his failure to earn a passing score, the school's Promotions Review Committee (PRC) voted to dismiss Maitland from the school.³⁵⁵ However, shortly after informing Maitland of his dismissal, the school discovered an error in the exam scoring, and Maitland's score was adjusted to 446.³⁵⁶ Maitland then appealed the PRC's decision to dismiss him, but the PRC again recommended dismissal.³⁵⁷ Finally, despite dismissing Maitland, the PRC allowed several other students to retake the exam.³⁵⁸

Soon after his second appeal to the PRC, Maitland brought an action before a Michigan district court.³⁵⁹ The district court held that the university had acted arbitrary and capriciously and overturned Maitland's dismissal.³⁶⁰ The district court held that "the review committees failed to adequately investigate the possibility that the irregularities in administering the final exam could have

344. 257 N.W.2d 195 (Mich. Ct. App. 1977).

345. *Id.* at 199-200.

346. *Id.* at 197.

347. *Id.*

348. *Id.*

349. *Id.* at 197-98.

350. *Id.* at 197.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 197-98.

356. *Id.* at 198.

357. *Id.*

358. *Id.* at 200.

359. *Id.* at 198.

360. *Id.*

affected the pass/fail point to [Maitland's] detriment,"³⁶¹ and that it was "significant that several students who scored lower than the plaintiff on the original test were allowed to take the retake exam, some without having to appeal."³⁶² The university appealed the district court's ruling to a Michigan appellate court.³⁶³

Agreeing with the district court, the appeals court upheld the district court's findings.³⁶⁴ The appeals court stated: "While we appreciate that many factors beyond bare numerical scores go into the decision to allow a student to retake an exam or year of study, we do not find erroneous the trial court's [ruling]."³⁶⁵ The appeals court was careful to note that courts should generally grant judicial deference to academic decisions; however, the facts of the case at hand showed a clear instance of arbitrary dismissal.³⁶⁶ Maitland was given very little due process, and, unlike other students, was not afforded the chance to retake an examination that appeared faulty.³⁶⁷ Finally, the court noted that the preferred remedy would be to refer this type of case back to the school for a full hearing on the matter.³⁶⁸ However, the court stated it was not "logically or equitably" advisable to remand the case for an administrative hearing by the school because it was clear Maitland was progressing through his medical education without any further problems.³⁶⁹ The court stated that "[t]o now order a belated decision on his qualifications to continue strikes this Court as exalting procedure over substance."³⁷⁰ Instead, the court advised schools to hold a hearing for each student who is involved in an academic dismissal, thereby creating a proper record which may be reviewed by the courts.³⁷¹

The court's conclusion—that the proper remedy for an arbitrarily dismissed student is a hearing—departs from the majority of case law, which holds that in an academic dismissal context no formal hearing is required.³⁷² As the decision indicates, it behooves schools to practice preventative measures which allow students a chance to present evidence and contest their cases. Schools must ask whether the time and cost potentially associated with conducting a full hearing is worth the trouble compared to the possibility of a costly lawsuit by the dismissed student and, perhaps, a reversal of the school's decision. At the very least, schools should consider implementing comprehensive staff-review policies which enable neutral and independent parties to review the academic dismissal decisions made

361. *Id.* at 199.

362. *Id.* at 200.

363. *Id.* at 198.

364. *Id.* at 200.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (stating that no formal hearing is required in academic as opposed to disciplinary dismissal cases); *Greenhill v. Bailey*, 519 F.2d 5, 9 (8th Cir. 1975) (holding for the student, but finding that no full trial-type hearing is required in academic dismissal cases).

by administrators and faculty members. Further, when issues of testing procedures arise, and the student has sufficient evidence to make the issue questionable, an informal hearing is bound to bring those issues to light. As discussed previously, holding a hearing (even if only an informal one) may tend to insulate a school, because the student is thereby afforded more process than is arguably constitutionally due. Furthermore, a full record of the proceedings will be created upon which the school may defend its position before a court.

In *Lightsey v. King*,³⁷³ the United States District Court for the Eastern District of New York discussed issues factually similar to those presented in *Maitland*. *Lightsey* dealt with a naval midshipman, Thomas Lightsey, who was accused of cheating on one of his exams at the American Merchant Marine Academy and whose failing score was not corrected after he was exonerated of the charge.³⁷⁴ Because Lightsey was accused of cheating and received a zero on his exam, he was not eligible to take the Third Mates Licensing Examination to join the Coast Guard.³⁷⁵ Lightsey was allegedly observed by his teacher, Lieutenant J. Dennis Gay, filling in answer blanks on his exam after the allotted test-taking time had expired.³⁷⁶ When Lt. Gay observed Lightsey filling in the answer blanks, he asked Lightsey what he was doing and took the exam away from him.³⁷⁷ Lightsey responded that he was simply transferring his answers from the test sheet to the answer sheet.³⁷⁸ After this encounter, Lt. Gay submitted a petition to the Academy's honor review board alleging that Lightsey had cheated on his exam.³⁷⁹ However, despite Lt. Gay's belief that Lightsey had cheated, the honor review board exonerated him on the charge of cheating and reinstated his score of "75" on the exam.³⁸⁰ Nevertheless, the Academy ignored the review board's ruling and did not change Lightsey's grade.³⁸¹

Lightsey appealed the Academy's decision to the United States District Court for the Eastern District of New York.³⁸² Finding that Lightsey had a protected liberty interest in maintaining his good name, reputation, and honor, the district court held that the Academy must adhere to its own established rules, committing it to abide by the honor review board's decisions.³⁸³ The district court also found the matter to be disciplinary and not academic, despite arguments to the contrary by the Academy.³⁸⁴ By ignoring the honor board's decision, the Academy violated Lightsey's due process rights and acted arbitrarily and capriciously.³⁸⁵

373. 567 F. Supp. 645 (E.D.N.Y. 1983).

374. *Id.* at 645.

375. *Id.*

376. *Id.* at 646.

377. *Id.*

378. *Id.*

379. *Id.* at 647.

380. *Id.* at 646.

381. *Id.* at 647.

382. *Id.* at 645.

383. *Id.* at 648 (citing *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

384. *Id.*

385. *Id.* at 649, 650.

Ultimately, in a similar ruling to that issued by the Michigan appeals court in *Maitland*, the *Lightsey* court stated that remanding the case for a further hearing would be futile, given the Academy's failure to adhere to its own administrative standards.³⁸⁶ Instead, the court instructed the Academy to correct Lightsey's test score and to abide by the honor board's decision.³⁸⁷

Like the court in *Maitland*, the court in *Lightsey* was concerned with a school's failure to act in good faith and not in an arbitrary or capricious manner when considering derailing a student's academic future. Again, both *Maitland* and *Lightsey* present fact patterns where a school would have been better served by conducting an administrative hearing where both the school and the student could present their arguments and a succinct record could be created and used by a court. Although not constitutionally required, formal hearings would also help colleges and universities that are presented with a case where the line between academic and disciplinary matters is unclear. As we have previously seen in *Maitland* and *Than*, courts may not be willing to agree that issues such as cheating are purely academic issues. Indeed, as the Texas Supreme Court stated in *Than*, such an argument "is specious [because] [a]cademic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."³⁸⁸ Finally, as the cases demonstrate, it is important that a school adhere to its own procedures, especially those that are recorded in student handbooks and other university material.³⁸⁹ Whether the initial dispute involves cheating allegations, a failure to allow students to retake an exam, or problems with the testing process itself, administrators and faculty need to be conscious of the school's procedural policy and must be prepared to administer those policies.³⁹⁰

386. *Id.* at 650. Interestingly, the court also held that even if the Academy had not violated the student's constitutional rights (which it did) it also violated the terms of the federal Administrative Procedure Act, 5 U.S.C. §§ 701-06, by failing to follow its own procedures as mandated by the school's own written regulations. *Id.* at 649.

387. *Id.*

388. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

389. See Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 24 (2003) (arguing that public institutions of higher education should draft and abide by student academic conduct codes).

390. *Id.* at 4.

E. Schools Must Know and Carefully Follow Written Constraints in Their Catalogs, Handbooks, Bulletins, and Guidelines

Despite the fact that catalogs, bulletins, and school guidelines do not follow traditional contract principles—such as bargained-for offer and acceptance—courts may enforce these documents as binding contracts between colleges or universities and their students.³⁹¹ As a result, both the school and the student will be held to have knowledge of the document's terms and conditions. Therefore, when a school has clearly not followed the provisions of its own catalog, courts are much more likely to dispense with academic deference and, instead, decide the case on contract principles.³⁹²

One case where a court applied contract principles rather than grant academic deference is *University of Texas Health Science Center at Houston v. Babb*.³⁹³ A case akin to *Lightsey*, where the school failed to adhere to its own written policies, *Babb* involved a student nurse, Joy Ann Babb, who brought an action against the University of Texas Health Science Center after she was dismissed from the school's nursing program for alleged academic failure.³⁹⁴ Babb was admitted under the school's 1979 catalog.³⁹⁵ In the fall of 1979, Babb was notified that she was failing one of her courses.³⁹⁶ Her academic counselor then advised her to withdraw from the semester program and reapply to the school as was standard procedure under the provisions of the 1979 catalog.³⁹⁷ Babb complied with this request and was re-admitted to the nursing program,³⁹⁸ but her readmission was

391. See *Sharick v. Se. Univ. of Health Scis., Inc.*, 780 So. 2d 136 (Fla. Dist. Ct. App. 2000) (involving a student contract claim where the jury found the school had acted arbitrarily by dismissing the student for failing one class in his fourth year of medical school in violation of the implied-in-fact contract between the student and the university); *Babcock v. New Orleans Baptist Theological Seminary*, 554 So. 2d 90 (La. Ct. App. 1989) (overturning a disciplinary dismissal from seminary school, but discussing academic issues as well); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302 (N.Y. 1980) (overturning private school disciplinary dismissal on contract grounds). Many academic scholars have contributed exhaustive coverage of the catalog-as-contract relationship which is most often seen in the case of private colleges and universities. See Beh, *supra* note 1, at 183; David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201 (1985); Bach, *supra* note 389, at 6–10.

392. See Beh, *supra* note 1, at 215–24 (discussing the duty of universities to bargain with students in good faith and to practice contractual principles of fair dealing). Beh observes:

Increasingly, higher education is viewed and views itself as a business with education as its product. For many years, postsecondary schools regarded themselves as above the marketplace, serving lofty and important societal interests, unconcerned with competition for students or pandering to student interests. As a result of the institution's elevated societal status, courts traditionally have accorded postsecondary schools broad discretion and latitude to educate and to treat students as they deem appropriate.

Id. at 185–86.

393. 646 S.W.2d 502 (Tex. App. 1982).

394. *Id.* at 504.

395. *Id.* at 503–04.

396. *Id.* at 504.

397. *Id.*

398. *Id.*

under the school's new academic catalog, which stated that any student with more than two "D"s would be required to withdraw from the institution.³⁹⁹

Over the following two year period, Babb completed a total of six three-hour courses.⁴⁰⁰ However, she received two "D"s in her courses and still had a "WF" (withdrew failing) grade for her Fall 1979 grades.⁴⁰¹ Subsequently, she received notification from the school that she was again to be terminated from the program because of the school's policy that any student with a total of three "D"s, "F"s, or "WF"s must withdraw from the program.⁴⁰² Babb attempted to appeal her case to the dean of the school, but was repeatedly denied an interview.⁴⁰³ As a result, she brought suit in a Texas district court.⁴⁰⁴

Babb asked the district court for a temporary injunction to permit her to resume classes so that she could complete her degree.⁴⁰⁵ She argued that the catalog creating the degree requirements was a contract.⁴⁰⁶ The district court granted the injunction,⁴⁰⁷ and the university appealed.⁴⁰⁸

The Texas Court of Appeals upheld the district court's ruling.⁴⁰⁹ The court found that Babb could maintain a suit against the university for injunctive relief based on contract law principles.⁴¹⁰ Although the school maintained that the injunction was "overly broad and exaggerated," because it would prevent the university from exercising its own discretion in deciding whether to dismiss a student for academic reasons, the court found that the injunction was "clear and precise and adequately inform[ed] the appellants of acts they are restrained from doing."⁴¹¹ More importantly, the court found that a contract existed between the nursing school and Babb.⁴¹² The contract was created under the 1979 catalog and not the 1981 catalog because the 1979 catalog was in force when Babb first enrolled in the school.⁴¹³ Therefore, the school could not dismiss her for her two "D"s under the second catalog, but was required to follow its dismissal procedures as mandated by the 1979 contract.⁴¹⁴

Finally, the school argued that in order for Babb to have an action for improper dismissal, she would have to allege and show arbitrary and capricious conduct in the school's decision to dismiss her.⁴¹⁵ The court disagreed because Babb never

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* at 505–06.

407. *Id.* at 504.

408. *Id.*

409. *Id.* at 506.

410. *Id.* at 505.

411. *Id.*

412. *Id.* at 506 (citing *Tex. Military Coll. v. Taylor*, 275 S.W. 1089 (Tex. Civ. App. 1925)).

413. *Id.*

414. *Id.*

415. *Id.*

claimed the university's standards were unreasonable, but only that her grades should be reviewed under the earlier catalog.⁴¹⁶ Accordingly, she was not required to prove that the school acted arbitrarily or capriciously.⁴¹⁷

The court's decision is notable because it sheds light on the interesting, if not often combative, relationship between Fourteenth Amendment due process issues and contract law issues as related to higher education. As shown in *Babb*, if a student demonstrates he or she had a contract with a school that explicitly or inferentially provides certain procedural rights, the student may not have to bear the burden of proving that the school's decision was arbitrary or capricious.⁴¹⁸ If a student can demonstrate a college or university did not comply with its own contractual procedures—a subject that is within a court's area of expertise—then courts will likely never reach the issue of academic deference. Indeed, at times courts have held institutions to a stricter standard of judicial scrutiny in disputes over issues that require little or no academic judgment, such as fees.⁴¹⁹

However, applying contract law to academic student dismissal cases can be frustrating because most courts do not assign any consistent contract principles to suits brought by students against public higher education institutions.⁴²⁰ Instead, the area of law around student contract claims has been largely a subject of private college and university cases and has been described by at least one court as a “patchwork” of holdings.⁴²¹ In disputes over academic matters such as grades, test-taking, or cheating, courts are much more likely to utilize due process principles and will not entertain contract-related arguments as long as the public institution has followed its own institutional procedural requirements.⁴²² Although the literature on contract claims between students and institutions is certainly large and often perplexing, *Babb* suggests that a school may be liable to students if it

416. *Id.*

417. *Id.*

418. *See Beh, supra* note 1, *passim* (providing exhaustive coverage of student contract cases in the higher education realm). Beh notes:

Courts have only reluctantly and begrudgingly employed contract principles to adjudicate claims by disappointed students when institutions of higher education fail to abide by their promises or to meet student expectations; courts often complain that contract law is too inflexible either to capture the complexity of the student-university relationship or to provide sufficient latitude to institutional decision making.

Id. at 184 (citing *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626–27 (10th Cir. 1975); *Marquez v. Univ. of Wash.*, 648 P.2d 94, 96 (Wash. Ct. App. 1982)).

419. *See Davenport, supra* note 391, at 216 n.136 (citation omitted):

Courts apply varying degrees of scrutiny to different categories of contract terms. In litigation over fees, the rule is that courts will enforce whatever the university published statements prescribe. In disputes over grading or curricula, courts have usually avoided any action on their part which might be construed as judicial interference with academic judgments, unless arbitrary or unreasonable conduct can be shown.

420. *See id.* at 204–25.

421. *Neel v. Ind. Univ. Bd. of Trs.*, 435 N.E.2d 607, 611 (Ind. Ct. App. 1982) (cited in *Davenport, supra* note 391, at 207 n.55).

422. *Davenport, supra* note 391, at 216. *But see Mangla v. Brown Univ.*, 135 F.3d 80, 84 (1st Cir. 1998) (considering numerous contractual claims raised by the plaintiff but finding that Brown had no contractual obligation to admit him into its Master's program).

fails to adhere to its written agreements. Effectively, a court may invoke a promissory estoppel claim rather than the *Horowitz* due process analysis. Should a school advertise in its catalog or bulletins that it will follow certain procedures when dismissing a student, and the student reads and relies on those procedures, a court may apply contract-related principles rather than traditional academic deference.

F. Schools May be Held Responsible for the Fiduciary Actions Taken by Administrators and Faculty Members Whose Apparent Authority Causes Students to Detrimentially Rely on Those Actions

The final issue that colleges and universities should keep in mind when considering dismissing a student for academic reasons is the ability of the school's administrators and faculty members to bind the school by making promises to students.⁴²³ For example, should an academic advisor or other administrator tell a student that taking a certain amount or type of classes will ultimately lead to the student being assured of graduation, and, if that student is later denied graduation despite reliance upon that advice, the student may have a claim against the school based on the advisor's apparent authority to bind the school.⁴²⁴ In two illustrative cases, *Healy v. Larsson*⁴²⁵ and *Blank v. Board of Higher Education of the City of New York*,⁴²⁶ the courts were presented with similar fact patterns where administrators and faculty members acted under apparent authority and advised the students involved that completing certain course work would lead to graduation.

In *Blank*, the New York Supreme Court overturned, based on a fiduciary duty analysis, a decision by Brooklyn College to dismiss the petitioning student, Errol Blank, for academic reasons.⁴²⁷ Blank was accepted and enrolled in the school's Bachelor of Arts program.⁴²⁸ Brooklyn College's bulletin required all students to complete a total of 128 credits which consisted of a minimum of 56 credits in

423. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as: "[T]he fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); see also Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 176-80 (2002) (discussing academic freedom and the fiduciary relationship between administrators and faculty members and their students at public institutions of higher education). Weeks and Haglund observe: "Fiduciary relationships may also be created informally, when, for example, one party places trust in another party, obligating the recipient of trust to act in the best interests of the party reposing the trust." *Id.* at 155.

424. See RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (defining apparent authority as: "[T]he power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."); see also *id.* § 1.03 ("A person manifests assent or intention through written or spoken words or other conduct.").

425. 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971), *aff'd*, 348 N.Y.S.2d 971 (N.Y. App. Div. 1974), *aff'd*, 318 N.E.2d 608 (N.Y. 1974).

426. 273 N.Y.S.2d 796 (N.Y. Sup. Ct. 1966).

427. *Id.* at 803.

428. *Id.* at 798.

prescribed courses and 36 credits in the student's major.⁴²⁹ In addition to the bulletin's prescriptions, the school had issued a three-page bulletin entitled "Information for Pre-Law Students" which was authored by the school's Office of Pre-Law Counseling.⁴³⁰ Within this second bulletin, the college offered a "Professional Option Plan" where a student who:

[L]acks not more than 32 credits in free electives, and who has, in addition, completed one year's work, full time, in an approved law school, is "eligible" for the degree "*provided that the courses offered in fulfillment of the requirements for the degree, including courses completed in the law school, constitute, in the opinion of the Dean of Faculty, an acceptable program for the AB degree.*"⁴³¹

In light of the language contained within the pre-law bulletin, Blank alleged he twice discussed his intention to enter law school with Professor Georgia Wilson, a pre-law advisor at the school, and that he was advised by Professor Wilson that he could complete his Associate of Arts degree through the Professional Option Plan.⁴³²

After receiving this advice, Blank completed another year's worth of credit at Brooklyn College and prepared to enter Syracuse Law School.⁴³³ However, he again consulted with a school administrator, Mr. Brent, at the Office of Counseling and Guidance in regard to his completing four psychology courses which he lacked.⁴³⁴ Blank needed to take the classes in order to complete the thirty-six credits of his major under the Professional Option Plan.⁴³⁵ Mr. Brent referred Blank to Dr. Evelyn Raskin who was head of the Department of Psychology at Brooklyn College.⁴³⁶ Dr. Raskin advised him that he would have to complete the classes at Brooklyn College.⁴³⁷ However, after completing two psychology classes, Dr. Raskin advised Blank that he could complete the remaining two psychology classes without attending any actual class sessions if he obtained approval from the professors teaching the courses.⁴³⁸ Relying on Dr. Raskin's advice, Blank obtained permission from the professors of both courses to complete the classes without attending them.⁴³⁹ Thereafter, Blank registered for the courses, arranged for the professors to provide him with all reading assignments and other necessary material, and, after taking the final examinations, passed each of the courses with a "B."⁴⁴⁰ After completing the courses, a total of three credits for each course were entered on his official transcript.⁴⁴¹

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 798-99.

439. *Id.* at 799.

440. *Id.*

441. *Id.*

Two years later, after satisfactorily completing his first two years at Syracuse Law School, Blank received a written notice from Brooklyn College that he was to attend the school's summer commencement to obtain his undergraduate degree.⁴⁴² He was also advised to obtain his cap and gown, told he was required to and did undergo a pre-graduation physical examination, and received official tickets for the graduation exercises.⁴⁴³ Finally, in anticipation of receiving his undergraduate degree, he applied for and received a position with the City of New York, contingent on his receiving his degree from Brooklyn College.⁴⁴⁴ On the day of graduation, Blank attended the ceremonies with his parents, his grandmother, his brother, and several friends.⁴⁴⁵ Despite being invited to and completing all pre-graduation exercises, Blank was unable to find his name on the list of graduates in the commencement program.⁴⁴⁶ Several days after graduation day, he learned that Brooklyn College had denied him his Bachelor of Arts degree because he had not taken the two psychology courses while "in attendance."⁴⁴⁷ Subsequently, Blank appealed through the necessary administrative channels at the school.⁴⁴⁸ However, his attempts were unsuccessful.⁴⁴⁹ Thereafter, he appealed to the Supreme Court of New York.⁴⁵⁰

The court was quick to note that Brooklyn College did not deny any of Blank's factual allegations.⁴⁵¹ However, the school objected to his failing to obtain the necessary permission from the Dean of Faculty to complete the two courses without attending them.⁴⁵² Brooklyn College argued that none of the administrators and faculty members that Blank spoke to had authority to advise him that he could meet the requirements of the Professional Option Plan by completing two courses without attending them.⁴⁵³ Notably, Blank alleged that he had indeed attempted to contact the Dean of the Faculty's office but was referred to Mr. Brent in the Office of Guidance and Counseling.⁴⁵⁴ The court found this fact compelling, stating that it "has no reason to doubt the petitioner . . . , as what he says occurred would appear to be standard procedure in an academic institution with more than 10,000 students."⁴⁵⁵ The court also noted that although Brooklyn

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 797-98.

451. *Id.* at 799.

452. *Id.*

453. *Id.* at 800. Brooklyn College also attempted to argue that the school's most current bulletin required all students to complete all courses "*in residence*," therefore making attendance an absolute requirement. *Id.* The court found this argument was not compelling for several reasons: First, the new bulletin was not in effect when the student initially enrolled in the school, and, second, the new bulletin would not be workable with students enrolled in the Professional Option Plan because the plan's very nature dictates students will not be "*in residence*." *Id.*

454. *Id.* at 801.

455. *Id.*

College objected to Blank's taking but not attending the two courses, it could not argue *after the fact* that it had no knowledge of the wrongful advice given to Blank because it was the school's responsibility, not Blank's, to monitor official records and transcripts.⁴⁵⁶

Ultimately, the court applied equitable measures and a fiduciary duty analysis to find that the administrators and faculty members who advised Blank were agents of the university and could thereby bind the school.⁴⁵⁷ Because the administrators and faculty members were agents of the university, and because Blank detrimentally relied on their apparent authority to advise him that he could complete the two psychology classes while not in attendance, Brooklyn College was bound by their actions.⁴⁵⁸ The court explained: "The authority of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority."⁴⁵⁹ Therefore, the court found the Dean of the Faculty was estopped from arguing that Brooklyn College was not bound by the actions of its administrators and faculty members.⁴⁶⁰ Explaining, the court noted that "[i]t is called an estoppel", said Lord Coke, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."⁴⁶¹ Because Blank relied on the manifestations of the administrators and faculty members under their apparent authority to bind Brooklyn College, the court ordered the school to "approve, authorize and confer" upon him the degree of Bachelor of Arts.⁴⁶²

Four years after the decision in *Blank, Healy v. Larsson*⁴⁶³ afforded another lower court in New York the opportunity to review the *Blank* analysis and ruling. In *Healy*, the student involved, Richard Healy, was enrolled in Schenectady County Community College as a full-time student attempting to obtain an Associate of Arts degree.⁴⁶⁴ Before entering the community college, Healy was enrolled in two other schools and had credits from the schools transferred to Schenectady County Community College.⁴⁶⁵ He met with the dean, the director of admissions, the acting president, his guidance counselor, and the chairman of the mathematics department of the school to try to establish a course of study that would enable him to meet the school's degree requirements and to graduate.⁴⁶⁶ At

456. *Id.* at 802. The court stated that Blank "expended money, time and effort in taking the courses to satisfactory completion, without fair warning that it would later be the sense of the Dean of Faculty to deny him his degree solely because he was not in attendance at the said courses." *Id.* at 802.

457. *Id.* at 802-03.

458. *Id.* at 803.

459. *Id.* at 802-03 (citing *Walsh v. Hartford Fire Ins. Co.*, 73 N.Y. 5, 10 (1878)).

460. *Id.* at 803.

461. *Id.* (quoting *White v. La Due & Fitch, Inc.*, 100 N.E.2d 167, 169 (N.Y. 1951)).

462. *Id.*

463. *Healy v. Larsson*, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971), *aff'd*, 348 N.Y.S.2d 971 (N.Y. App. Div. 1974), *aff'd*, 318 N.E.2d 608 (N.Y. 1974).

464. *Id.* at 626.

465. *Id.*

466. *Id.*

the time of Healy's initial enrollment, the school was in its first year of operation and, as a result, he was unable to take courses in many of the subjects required for his degree.⁴⁶⁷ He completed as many courses as he could in light of the subject availability.⁴⁶⁸ However, after Healy took as many classes as he could, he was denied graduation by the school because it believed that he had failed to take the proper credits to achieve an Associate of Arts degree.⁴⁶⁹

In a sparse opinion, the trial court held that the school's administrators who advised Healy about his course of study were authorized representatives of the college, so the school was bound by their actions.⁴⁷⁰ Therefore, like Brooklyn College in *Blank*, the community college in *Healy* was "estopped from denying the acts of [its] agents."⁴⁷¹ The court found that the facts here were similar to those in *Blank*, so it was appropriate to apply the *Blank* analysis again.⁴⁷² The court reiterated that "the authority of an agent is not only that conferred upon him by his principal, but also as to third persons, that authority which he is held out as possessing."⁴⁷³ Because the administrators at the community college bound the institution through their apparent authority upon which Healy relied, the court found that he had satisfactorily completed his course of study at the community college and was entitled to receive his Associate of Arts degree.⁴⁷⁴

Both *Healy* and *Blank* provide clear factual scenarios where students relied on the advice and manifestations of faculty and administrators at their respective public college or university. It is important to keep in mind that courts will find that colleges and universities have a fiduciary obligation to students when the school's employees make representations to students that taking and passing certain courses will ultimately lead to obtaining a degree.⁴⁷⁵ Therefore, colleges and universities should set out clear guidelines in their student handbooks and bulletins, communicate all information clearly with both the students and the chain-of-command in the administration, and be prepared to be bound by advice given by guidance counseling, admissions, and enrollment administrators. As seen in *Babb*, catalogs and bulletins may also create fiduciary obligations on the part of a school and failure to meet those obligations may result in a court overturning a school's dismissal decision based on a combination of contractual and fiduciary duty grounds.

467. *Id.*

468. *Id.*

469. *Id.* The facts of the case as contained in the Supreme Court's opinion leave something to be desired. The court's opinion leads one to wonder whether the school's lack of sufficient funding essentially prevented the school from granting sufficient degrees.

470. *Id.* at 627.

471. *Id.* Interestingly, the court appeared to apply some contract law theory to the case, stating that "when a student is duly admitted by a private university, there is an implied contract between the student and the university that if he complies with the terms prescribed by the university he will obtain the degree which is sought. . . . There is no reason why this principle should not apply to a public university or community college." *Id.* at 626 (citing *Carr v. St. John's Univ.*, N.Y., 231 N.Y.S.2d 410 (N.Y. App. Div. 1962), *aff'd*, 187 N.E.2d 18 (N.Y. 1962)).

472. *Id.* at 626–27.

473. *Id.* at 627.

474. *Id.*

475. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

The trial courts' holdings in both *Blank* and *Healy* are indicative of many of the cases previously discussed where the judiciary refused to apply traditional academic deference principles due to arbitrary and capricious decisions made by school administrators and faculty members. The fiduciary responsibilities to students taken on by faculty and administrators have long been a hallmark of higher education legal scholarship.⁴⁷⁶ As Harvard Professor Warren A. Seavey noted in 1957, “[s]ince schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students. One of the duties of the fiduciary is to make full disclosure of all relevant facts in any transaction between them.”⁴⁷⁷ Indeed, courts may be more willing to dispense with the norm of academic deference if they believe an education official has somehow breached his or her fiduciary duties to a student.⁴⁷⁸ Certainly, if the situation is egregious—as was the situation in *Blank*—academic deference is much less likely to appear in a court opinion. Arguably, since the fiduciary relationship between administrators or faculty members and students will often be one based on conjectural facts, courts may be more likely to hear the case on its merits and let a jury decide the parameters of the fiduciary relationship.⁴⁷⁹ Additionally, it has been argued that imposing the legal obligations of fiduciaries on college and university administrators does not hinder academic freedom issues. Instead, some argue that academic freedom “pertains mainly to the content of faculty members’ work, in written material as well as classroom presentation[s]. Fiduciary obligations, on the other hand, provide standards by which conduct toward the fiduciary is measured by the law.”⁴⁸⁰ Therefore, it is important for administrators and faculty members to remember that, given the proper fact pattern, their actions may create a fiduciary relationship with a student, and failing to adhere to the special bounds of that relationship in an academic dismissal context may result in a court not granting academic deference.

Finally, whether it is for summary judgment, admissions or readmissions, independent fact-finding, contract, insufficient hearings, or fiduciary duty violations, it is clear that there are situations where courts are willing to review academic decisions made by public higher education institutions. While the general standard is “arbitrary” or “capricious” behavior, or absence of “good faith” on the part of the public institution of higher education, given the proper fact scenario, courts are sometimes willing to find alternative routes leading to less academic deference. Ultimately, although most courts will apply the *Horowitz* and *Ewing* decisions to decide that courts should not substitute their judgments in place

476. See Seavey, *supra* note 225, at 1407–10 (serving as an early example (1957) of legal scholarship analyzing fiduciary relationships and student academic dismissals).

477. *Id.* at 1407 n.3.

478. See Weeks & Haglund, *supra* note 423, at 159–76 (analyzing cases where courts have found or have refused to find fiduciary relationships between institutions and their students). *But see* *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 506 (Cal. Ct. App. 1972) (“The mere placing of a trust in another person does not create a fiduciary relationship. . . . [A]n agreement to communicate one’s knowledge, exercising his special knowledge and skill in the area of learning concerned, does not create a trust but only a contractual obligation.”).

479. *Lash v. Cheshire County Sav. Bank, Inc.*, 474 A.2d 980, 981 (N.H. 1984).

480. Weeks & Haglund, *supra* note 423, at 176.

of a school's, these cases demonstrate that academic deference to college and university decision-making is not an absolute or incontrovertible rule.

CONCLUSION

As public higher education institutions consider dismissing students for alleged academic failure, they must be aware of the latent risks involved and have procedures in place to decrease those risks or, at the very least, to deal with the consequences.⁴⁸¹ As the *Horowitz* and *Ewing* cases illustrate, and the large majority of academic dismissal cases support,⁴⁸² judicial deference to academic decision-making is the current norm in the American judiciary.⁴⁸³ Courts will respect the academic freedom of public colleges and universities to decide when to dismiss a student for academic failures.⁴⁸⁴ If colleges and universities proceed in a professional manner while adhering to the proper level of due process, they should have little problem having their dismissal decisions upheld. However, as the case law discussed in this article demonstrates, should colleges and universities behave in an arbitrary or capricious manner when deciding to dismiss a student for alleged academic failures, courts may entertain legal arguments that a student was wrongfully dismissed.⁴⁸⁵

Perhaps one contributing factor to a college or university's (or a court's) confusion is that it is difficult for administrators and faculty members to know the proper legal distinction between an academic dismissal and a disciplinary

481. See Scott D. Makar, *Litigious Students and Academic Disputes*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 8, 2002, at A1.

482. See, e.g., *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 51 (3d Cir. 1986) (“[A] student bears a heavy burden in persuading the courts to set aside a faculty’s judgment of academic performance.”); *Harris v. Blake*, 798 F.2d 419, 424–25 (10th Cir. 1986) (upholding dismissal of a graduate student who was dismissed for insufficient performance on the student’s medical practicum); *Steere v. George Washington Univ. Sch. of Med. & Health Scis.*, 439 F. Supp. 2d 17, 25–26 (D.D.C. 2006) (granting summary judgment for medical school after student failed to show he was disabled, so as to explain his long history of academic failure); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 337 (E.D. Va. 2005) (dismissing student’s case, finding that he had no property interest in continued enrollment at a public university and that the university Catalog did not create a binding legal contract), *aff’d*, 193 F. App’x 248 (4th Cir. 2006); *State ex rel. Mercurio v. Bd. of Regents of Univ. of Neb.*, 329 N.W.2d 87, 92 (Neb. 1983) (vacating lower court’s ruling for student because the court found no evidence of arbitrary or capricious behavior); *Chusid v. Albany Med. Coll. of Union Univ.*, 550 N.Y.S.2d 507, 507 (N.Y. App. Div. 1990) (upholding dismissal of a medical student due to the student’s low grades).

483. Schweitzer, *supra* note 8, at 364. Professor Schweitzer argues:

Justice Rehnquist in *Horowitz* was on solid ground when he stated that a professor’s decision as to “the proper grade for a student in his course” requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. Needless to say, a third party without knowledge or expertise in the subject matter of the course is generally incapable of assessing a student’s performance on an examination in that course.

Id. (citing *Bd. of Regents of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978)).

484. See generally *Dutile*, *supra* note 73, at 283 (explaining that courts have “consistently set a rather low threshold for institutions” in academic dismissal cases).

485. See *Trs. of Columbia Univ. v. Jacobsen*, 148 A.2d 63 (N.J. Super. Ct. App. Div. 1959) (arguing that statements made on a building’s facades by university officials should be included as part of the school’s contract with the student).

dismissal. They may be confused on how much process is due to the student and may wrongly classify the issues behind the dismissal as more academic when, to a legally trained mind, the issues appear more disciplinary, or vice versa. Creating a workable distinction between academic and disciplinary dismissals may be a losing battle. As Professor Dutile argues, academic deference can be equally unhelpful in either dismissal situation:

[T]he deference point as it relates to the academic seems overstated. The fact of the matter is that courts have deferred to educational officials in disciplinary cases as well. . . . Even the academic notion that universities, through their diplomas, vouch for their graduates applies as well to the disciplinary side. Very few American universities would suggest that their credential implies nothing regarding the conduct of the student.⁴⁸⁶

As this passage illustrates, the academic versus disciplinary distinction may create unnecessary confusion and, as we have seen, courts may be better served by declaring the distinction moot. It has been argued that a more logical solution would be to require the same levels of due process in both the academic and disciplinary dismissal context.⁴⁸⁷

Whether or not one accepts this argument, perhaps the most prudent route would be for the courts carefully to consider the “mixed” nature of the facts of each case, where academic (cognitive) and disciplinary (non-cognitive) issues are intertwined. Once a court considers these “mixed” facts, it should parse them and duly consider the disciplinary (non-cognitive) issues that are more suitable to the court’s area of expertise. Then, the court may defer to the academic decision-making of the college or university on the academic (cognitive) issues. As to the potential defendants in student dismissal cases, faculty and administrators at public colleges and universities should review their own judgments carefully to ensure that they do not open themselves up to judicial scrutiny. Further, faculty committees or deans who have been involved with many aspects of a student’s case should not be the final arbiters on an academic dismissal dispute; instead, a neutral and independent entity—one who is far removed from the controversy—should review all decisions in an objective manner.

Providing additional support for these recommendations, it has been observed that public and private colleges and universities are becoming more business-like, and, therefore, the traditional deference granted to academic decision-making may wane. Consequently, courts may be more receptive to students’ arguments that much of their financial and spiritual well-being is at stake and, as a result, courts may be more willing to dispense with academic deference.⁴⁸⁸ As Hazel Beh, an

486. Dutile, *supra* note 12, at 651.

487. *Id.*

488. See Seavey, *supra* note 225, at 1407. Professor Seavey discusses the adverse effect a dismissal would likely have on a professional student:

[T]he harm to the student may be far greater than that resulting from the prison sentence given to a professional criminal. A student thus dismissed from a medical school not only is defamed without the opportunity to demonstrate his innocence but is probably barred from becoming a physician. A law-school student dismissed for cheating will not be admitted to practice even if he is able to complete his legal

assistant professor at the University of Hawaii, notes, “The deeply rooted hostility toward student claims and judicial deference to university conduct toward students becomes increasingly less defensible as bottom-line, commercial concerns motivate university actions and students seek a more consumer friendly product.”⁴⁸⁹ A question then arises as to whether courts, as neutral party independent fact-finders, would be more suitable to review dismissal decisions with “mixed” facts in light of increasingly commercial colleges and universities. As one administrator recently pointed out, many students at both public and private universities have become “consumers and not students.”⁴⁹⁰ However, students might argue that many college and university professors feel their schools have become too market driven. A professor recently lamented that “[t]he only agenda around here seems to be enrollment and how to increase it It has tainted a lot of things at the school.”⁴⁹¹ While the increasingly commercial nature of higher education is certainly not the best reason for courts not to grant academic deference, it does shed light on the changing nature of academic institutions. “Regardless of how courts choose to analyze students’ claims—as purely contractual or as including an element of fiduciary duty [or due process]—universities should be ‘much more scrupulous about their self-interested behavior than mere contracting parties.’”⁴⁹²

Unfortunately, the answers to every academic dismissal case are often unclear and the best that may be hoped for is a combination of conscientious college and university administrators and well-informed students. Professors and administrators must decide issues rationally and in good faith, and their actions toward students certainly should not be arbitrary or capricious. In *Horowitz*, the Supreme Court described the minimal standard that all schools must meet, holding that students are entitled to “oral or written notice of the charges against [them] and, if [they] deny the charges], an explanation of the evidence the authorities have and an opportunity to present [their] side of the story.”⁴⁹³ Failing to meet

education.

Id.

489. Beh, *supra* note 1, at 196.

490. *Id.* at 213 (quoting *Andre’ v. Pace Univ.*, 618 N.Y.S.2d 975, 979 (N.Y. City Ct. 1994)). See generally Berger & Berger, *supra* note 129, at 322 (discussing contract theory in the higher education context, and the adhesion problems in this kind of contract formation). Berger and Berger note:

Although contract theory presupposes that the student reads all that she receives, . . . in reality she does not. She barely glances at much of the bulletin Moreover, the school would rather the applicant read the promotional matter . . . than pore over the requirements for graduation or the Rules of University Conduct.

Id.

491. Stephanie Banchemo, *Governors State Lacked Approval to Give Degree*, CHI. TRIB., Apr. 3, 1999, § 1, at 2 (quoting Bob Leftwich, a 22-year veteran nursing professor). See generally Davenport, *supra* note 391, at 223 (“In addition, the age of consumerism may bring greater challenges to the accuracy of university catalogs. Although the risk of litigation based upon errors and oversights has been minimal, future challenges to inaccurate course and faculty listings, program descriptions and schedules may be expected to increase.”).

492. Weeks & Haglund, *supra* note 423, at 186 (quoting D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1410 (2002)).

493. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978) (quoting *Goss v.*

this threshold standard in either a disciplinary or academic context will undoubtedly result in courts dispensing with academic deference. As many of the cases discussed in this article illustrate, college and university administrators and faculty are encouraged to implement more extensive academic dismissal policies where conscientious fact-finding and reliance on expert judgment are the norm.⁴⁹⁴ Further, as several of the cases show, courts may not be willing to acquiesce to a college or university's arguments that certain issues, such as cheating, are purely academic issues. Situations involving mixed fact patterns such as fabrication of research, plagiarism, or failure to attend classes may be ripe for courts to find them more disciplinary and less academic.⁴⁹⁵ Without extensive policies in place, and administrators and faculty members who carefully follow these policies, courts are more likely to dispense with academic deference to college and university decision-making.

Lopez, 419 U.S. 565, 581 (1975)).

494. See Beh, *supra* note 1, at 218 (arguing that using the "good faith and fair dealing" standard can provide "a bridge between institutional autonomy and flexibility and student vulnerability"); see also Weeks & Haglund, *supra* note 423, at 181 ("Good faith and fair dealing can provide a framework to adjudicate student claims that is not unduly intrusive in that gray area where student claims are less specific but reasonable expectations seem clear.").

495. See Berger & Berger, *supra* note 129, at 334 (discussing the difference between "academic failure" cases where academic decision-making ought to be respected, and cases involving "academic crime[s]," such as fraud or copyright infringement, where courts should not grant schools the same level of deference).