

A HIGHER EDUCATION DUE PROCESS PRIMER: RESOLVING PROCEDURAL DUE PROCESS INCONSISTENCIES IN FAVOR OF GREATER PROCEDURAL PROTECTIONS

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Abstract

This article expands on the current landscape of understanding surrounding due process protections for students enrolled at public colleges and universities. The analysis engages with existing due process scholarship and expands on the due process implications of landmark federal appellate court and Supreme Court holdings. The article concludes by offering a model student conduct procedure that attempts to resolve procedural due process inconsistencies across circuits and conduct case types. It elaborates on the positives and negatives associated with such a model procedure as well as highlights how the model procedure exceeds the minimum required constitutional protections with little or no expansion on current university resources.

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INTRODUCTION

Over the last two decades, student enrollment at public colleges and universities across the United States increased more than twenty-six percent from 13.2 million to 16.6 million enrolled students.¹ This increase in student enrollment, coupled with the necessary pervasiveness of remote learning caused by the COVID-19 pandemic, this leads to an increase in academic and behavioral student conduct violations on college campuses around the country.²

How should colleges and universities meet this demand of addressing student conduct code violations? Does federal or state law provide any guidance on what process should be afforded to students who do violate the conduct code? If there is a minimally required procedural process, should public colleges and universities exceed those requirements?

Under the current state of the law, the procedural due process requirements afforded to public college and university students vary from state to state. This indicates that where a student attends a higher education institution ultimately determines their constitutionally protected due process rights in a student conduct proceeding. With the continued increase in the cost of higher education year after year, continued enrollment is more important to students than ever.³ Students are often conscious of their impending time and financial investments when they choose between higher education institutions, but they likely never consider choosing a university based on the constitutional protections afforded in a student conduct proceeding. It should not be the responsibility of a student to choose a college or university based on student conduct codes and procedures; the higher education institutions that opine about student-centered philosophies and student retention should give their students all the procedural protections required by law, and then some.

This article explores the history of procedural due process requirements and the current state of the law regarding a student's right to continued enrollment at a public college or university. After examining the procedural protections currently afforded to students, this article recommends a student conduct procedural process that exceeds minimum constitutional protections and provides a model for how

1 UNDERGRADUATE ENROLLMENT, NATIONAL CENTER FOR EDUCATION STATISTICS, ANNUAL REPORT (2020), https://nces.ed.gov/programs/coe/indicator_cha.asp.

2 Doug Lederman et al., *Transcription for The Key with Inside Higher Ed EP. 38: Combating Cheating in the COVID Era*, Inside Higher Ed. (Feb. 2021), https://www.insidehighered.com/sites/default/server_files/media/The%20Key%20-%20Ep%2038.pdf. (“With academic misconduct, to be frank, we simply saw a significant increase in the number of reports we were seeing. And when we compared our numbers from the past few academic years, those numbers were staggering. So, for example, the academic year of 2018 to 2019 we saw a little less than 300 academic integrity cases. In the academic year of 2019 to 2020, which incorporates some of this pandemic time, we saw about less than 700. And then when we look at, thinking about academic year 2020 to 2021, and we just look at that time from March 2020 to the end of 2020, the majority of cases that we’ve seen over the past four years in where in that concentrated period of time, roughly around 900 cases.”).

3 Briana Boyington et al., *20 Years of Tuition Growth at National Universities*, U.S. NEWS AND WORLD REP. (Sept. 17, 2021), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities>.

to implement such a procedure. Providing procedural protections that surpass the minimum constitutional standard is beneficial for colleges and universities, and the students they serve.⁴

I. The Due Process Clause

Section 1 of the Fourteenth Amendment of the U.S. Constitution defines citizenship in the United States and outlines three important legal provisions: privileges and immunities, due process, and equal protection under the law.⁵ The full text of Section 1 of the Fourteenth Amendment is as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁶

The Due Process Clause of the Fourteenth Amendment prevents states from depriving any person of life, liberty, or property without the due process of law.⁷ There are two different categories of due process: procedural and substantive. Procedural due process “ensures that a state will not deprive a person of life, liberty, or property unless fair procedures are used in making that decision.”⁸ Substantive due process “forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with the rights implicit in the concept of ordered liberty.”⁹

Many challenges to university conduct code procedures stem from a deprivation of procedural due process—alleging that the institution did not provide adequate procedural steps to satisfy procedural due process before removing a student from a college or university. Courts apply a two-step analysis in determining a procedural due process violation: (1) did the individual have a life, liberty, or property interest where due process applies, and (2) was the process afforded constitutionally adequate?¹⁰

4 This article addresses procedural due process protections in its recommended procedural model. This article does not address the contested case requirements of the Administrative Procedures Act (APA). For colleges and universities that must follow state APA contested case requirements, refer to the discussion in Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 334 (1999).

5 U.S. CONST. amend. XIV.

6 *Id.*

7 *Id.*

8 *Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1176 (D. Haw. 2001).

9 *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1072 (D. Ariz. 2012), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013).

10 *Captain Andy's Sailing*, 195 F. Supp. 2d at 1176.

A. *The Property Interest*

In cases involving due process violation claims against public colleges and universities, most allege a deprivation of a property interest, with a few cases claiming a liberty deprivation. Property interests emerge in two ways: (1) through the identification of a source of a property interest and (2) what actually qualifies as a property interest.¹¹ Property interests are commonly called “positive law,” meaning they derive from some other source of law.¹² The U.S. Supreme Court acknowledges that although the federal Constitution does not create property interests, those interests are derived from “independent sources such as state law.”¹³ Independent sources not only include state and local government statutes and regulations but can also be extended to express and implied contracts.¹⁴

Once an independent source of law is identified, courts must then determine if the source of law qualifies as a property interest. Property interests require more than an “adverse effect” when removed; a plaintiff must also have “a legitimate claim of entitlement” to the property interest.¹⁵ Property interests cannot be removed by the state at its discretion; states must adhere to certain standards before removing the benefit.¹⁶ For example, the Supreme Court recognizes property interests in social security benefits, welfare benefits, licenses, and government employment.¹⁷ In sum, a plaintiff must identify an independent source of law that creates a property interest, and this interest must grant a valid entitlement to the plaintiff.

B. *The Liberty Interest*

The Supreme Court does not provide specific parameters for identifying a liberty interest but often finds deprivation of a liberty interest when “the government puts the person’s reputation at risk.”¹⁸ One Supreme Court case found a liberty interest in K-12 education because misconduct resulting in suspension “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”¹⁹ Whether a student chooses to raise a due process violation under the property or liberty interest against a public college or university, courts must then examine whether the conduct process afforded the student comports with procedural due process protections.

11 Dalton Mott, *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*, 65 U. KAN. L. REV. 651, 653 (2017).

12 *Id.* at 653.

13 *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

14 Mott, *supra* note 12, at 654–55.

15 *Id.* at 655.

16 *Id.*

17 *Id.*

18 *Id.* at 660.

19 *Id.* (citing *Goss v. Lopez*, 419 U.S. 562, 575 (1975)).

II. Early Circuit Jurisprudence

Before the Supreme Court examined the question of procedural due process protections for K-12 and higher education students, the Fifth Circuit heard a landmark higher education procedural due process case in *Dixon v. Alabama State Board of Education*.²⁰ The plaintiffs never received notice of their alleged conduct violation, “Conduct Prejudicial to the School ...and Unbecoming a Student,” and also did not receive any type of hearing prior to their expulsion.²¹ The plaintiffs, nine Black college students, brought a procedural due process challenge against the Alabama State Board of Education after they were expelled from Alabama State College for their participation in civil rights movement demonstrations.²²

In its analysis, the Fifth Circuit examined a 1958 annotation of cases, titled “Right of student to hearing on charges before suspension or expulsion from educational institution.”²³ The Fifth Circuit agreed with the annotator’s statement that “[t]he cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. In every instance the sufficiency of the hearing was upheld.”²⁴ The court further noted that all of the cases in the annotation required some type of a hearing.²⁵ The Fifth Circuit then quotes the following passage from Harvard Law Professor Warren A. Seavey:

...when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.²⁶

The Fifth Circuit uses this quote in its holding “that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”²⁷

20 294 F.2d 150 (5th Cir. 1961); see also Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

21 *Dixon*, 294 F.2d at 150–51.

22 *Id.* at 150–52.

23 *Id.* at 158.

24 *Id.* (citing Annot. 58 A.L.R.2d 903 (1958)).

25 *Id.* at 158.

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

27 *Id.* at 158.

The *Dixon* court expanded on its holding by stating specific procedural standards intended for higher education students.²⁸ This process includes

1. notice to the student of the alleged violation that, if proven, would warrant expulsion;
2. an oral or written report given to the student of the facts proposed by witnesses, as well as the names of the witnesses;
3. the opportunity for the student to defend themselves, either through oral or written testimony; and
4. to provide the findings of the hearing to the student.²⁹

The Fifth Circuit further expanded on the hearing requirement, noting that “the nature of the hearing should vary depending upon the circumstances of the particular case.”³⁰ This gives colleges and universities the flexibility to impose varying degrees of hearings, while requiring “something more than an informal interview with an administrative authority” for cases involving expulsion.³¹ The Fifth Circuit concluded its opinion by stating “[i]f these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.”³²

III. Supreme Court Jurisprudence

After the Fifth Circuit examined the procedural due process protections afforded to public college and university students, the Supreme Court heard three seminal cases that shaped the legal landscape for student conduct. Ultimately, the Court has not issued a definitive holding on whether a property or liberty interest exists in higher education. However, the Court indicated its preference toward a basic level of protection for public college and university students through these three cases.

A. *Goss v. Lopez*

The Court’s first case in which it examined any property interest in education was the K-12 case, *Goss v. Lopez*.³³ Here, a group of high school students brought a procedural due process claim against their school after receiving a ten-day suspension for alleged behavioral misconduct, without receiving a hearing prior to the suspension.³⁴ The Court began by directly addressing the issue of whether the students had a valid property interest in continued enrollment in K-12

28 *Id.*

29 *Id.*; see also Berger & Berger, *supra* note 21, at 306.

30 *Id.* at 158.

31 *Id.* at 158–59.

32 *Id.* at 159.

33 419 U.S. 565 (1975).

34 *Id.* at 568.

education.³⁵ The Supreme Court examined two Ohio state laws that provided free K-12 education to residents ages five to twenty-one and required compulsory K-12 school attendance.³⁶ The Court noted that, although not required, Ohio provided for the establishment and maintenance of a public school system to which “young people do not shed their constitutional rights at the schoolhouse door.”³⁷ The Court held these two Ohio state laws created a property right in K-12 education, which cannot “be taken away for misconduct without adherence to the minimum protections required” by the Due Process Clause.³⁸

Next, the Court examined whether the suspension without a hearing implicated the liberty interest. The Court stated that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” requires adherence to minimum due process protections.³⁹ The Court noted that, in this case, a ten-day suspension for behavioral misconduct “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”⁴⁰ In holding that the liberty interest applies to continued K-12 enrollment, the Court found it apparent that “the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.”⁴¹ The Court concluded its analysis of the property and liberty interest by refusing the state’s argument that a ten-day suspension didn’t constitute a “severe nor grievous” loss, adding that “a 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause.”⁴²

Once the Supreme Court determined that continued enrollment in K-12 education qualified as a property and liberty interest, the Court then determined what the Due Process Clause required and when those processes are required. After examining other noneducational case law, the Court stated the following:

At the very minimum ...students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afford some kind of hearing. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be first notified.⁴³

35 *Id.* at 572–74.

36 *Id.* at 573.

37 *Id.* at 574 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (internal quotation marks omitted).

38 *Id.* at 574.

39 *Id.* (citing *Wis. v. Constantineau*, 400 U.S. 433, 437 (1971); *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

40 *Id.* at 575.

41 *Id.*

42 *Id.* at 576.

43 *Id.* at 579 (quoting *Baldwin v. Hale*, 17 L. Ed. 531 (1864)) (internal quotation marks omitted).

The Court continued by stating that, even though disciplinary suspension is an educational tool frequently used in K-12 schools, that does not negate the school's requirements to communicate with the student respondent and to let that student tell their version of events.⁴⁴ "We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency."⁴⁵

The Court concluded its decision in *Goss* by articulating the procedural due process rule for K-12 behavioral misconduct allegations:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a *suspension of 10 days or less*, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.⁴⁶

In further elaborating on these requirements, the Court added that a delay between the notice and hearing isn't required and that the hearing will most often occur immediately after informing the student of the alleged misconduct.⁴⁷ The Court specified that "the student first be told what he is accused of doing and what the basis of the accusation is" before that student is given an opportunity to explain.⁴⁸ Because the notice and hearing often occur almost simultaneously, the Court required that, generally, the notice and hearing must occur before the imposed suspension.⁴⁹ The Court did grant an exception to this requirement if the student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process."⁵⁰

While acknowledging this process as the "constitutional minimum," the Court also clarified what it was not requiring:

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.⁵¹

44 *Id.* at 580.

45 *Id.* at 581.

46 *Id.* at 581 (emphasis added).

47 *Id.* at 582.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 583.

The Court concluded by expanding on the constitutional minimum and adds, in dicta, what would be required for cases exceeding a ten-day suspension:

Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedure. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.⁵²

In summary, the Supreme Court in *Goss* found a property and liberty interest in continued K-12 enrollment. This triggers a procedural due process requirement of at least a notice and informal hearing prior to a suspension of ten days or greater due to behavioral misconduct.

B. Board of Curators of University of Missouri v. Horowitz

Three years later, the Supreme Court heard its first of two cases involving the question of due process in higher education student conduct processes. The Court first heard *Board of Curators of University of Missouri v. Horowitz*⁵³ in 1978. The Court intended to determine “what procedures must be afforded to a student at a state educational institution whose dismissal may constitute a deprivation of ‘liberty’ or ‘property’ ...of the Fourteenth Amendment.”⁵⁴

In *Horowitz*, the University of Missouri-Kansas City dismissed the student respondent from medical school for academic deficiencies.⁵⁵ The Court noted that the student respondent did not raise a deprivation of a property interest.⁵⁶ If the student had raised a property deprivation claim, she “would have been required to show at trial that her seat at the Medical School was a ‘property’ interest recognized by Missouri state law.”⁵⁷ Instead of raising a property deprivation claim, the student respondent raised a liberty deprivation claim by “substantially impairing her opportunities to continue her medical education or to return to employment in a medically related field.”⁵⁸

The Court began its analysis by invoking a common constitutional law doctrine: constitutional avoidance. The Court stated that it did not need to decide if the student had a liberty or property interest in continued higher education enrollment.⁵⁹ Instead, the Court “assumed” the student had a liberty or property

52 *Id.* at 584.

53 435 U.S. 78 (1978).

54 *Id.* at 79.

55 *Id.* at 81 (“The faculty members noted that the respondent’s ‘performance was below that of her peers in all clinical patient-oriented settings,’ that she was erratic in her attendance at clinical sessions, and that she lacked a critical concern for personal hygiene.”).

56 *Id.* at 82.

57 *Id.*

58 *Id.*

59 *Id.* at 84.

interest and concluded the student received minimal due process procedural protections before her removal.⁶⁰ The Court elaborated that the student received sufficient notice of the “faculty’s dissatisfaction with her clinical progress” and that this potentially affected her ability to graduate on time.⁶¹ The Supreme Court quoted the District Court for the Western District of Missouri in agreeing that the procedural process afforded comported with due process:

In fact, the Court is of the opinion, and so finds, that the school went beyond constitutionally required procedural due process by affording respondent the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the respondent in her medical skills were correct.⁶²

The Court proceeded to refute the assertion by the Eighth Circuit Court of Appeals that the *Goss* decision required a formal hearing prior to dismissal.⁶³ The Court noted that *Goss* does not require some type of formal hearing prior to dismissal for academic ability and performance.⁶⁴ It elaborated by stating the following:

All that *Goss* 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.⁶⁵

The Court continued by giving deference to the flexibility of due process protections, especially between cases of academic misconduct and behavioral misconduct.⁶⁶ The Court provided that the flexibility between these two types of cases “calls for far less stringent procedural requirements” for academic misconduct dismissals.⁶⁷ Effectively, due process allows for less procedural process requirements for students facing academic dismissals than those facing behavioral dismissals.

The Court further differentiated between behavioral and academic misconduct procedural requirements by holding that academic misconduct cases do not require hearings at all.⁶⁸ The Court reaches this holding because dismissal for academic

60 *Id.*

61 *Id.* at 85.

62 *Id.* (quoting *Horowitz v. Curators of U. of Mo.*, 447 F. Supp. 1102, 1113 (W.D. Mo. 1975)).

63 *Id.*

64 *Id.*

65 *Id.* at 86 (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)) (internal quotation marks omitted).

66 *Id.* at 86. This author uses the phrase “academic misconduct” to encompass commonly understood code violations such as cheating, fabrication, multiple submissions of work, plagiarism, unauthorized recording and/or use, and assisting in the commission of academic misconduct. Additionally, this author uses this to encompass the academic failings described in *Horowitz* and *Ewing*, “which shares characteristics of both academic and disciplinary proceedings.” (See *Ashokkumar v. Elbaum*, 932 F. Supp. 2d 1002, 1008 (D. Neb. 2013).

67 *Id.*

68 *Id.* at 90 (“[w]e decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing.”).

deficiencies is “more subjective and evaluative than typical factual questions presented in the average disciplinary decision.”⁶⁹ The Court then added the following:

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 an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.⁷⁰

The Supreme Court does not explicitly state the exact procedural process to afford to students accused of academic misconduct and facing dismissal, but it does summarize its overall position in the following footnote:

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.⁷¹

C. *Regents of the University of Michigan v. Ewing*

In 1985, eight years after the *Horowitz* decision, the Supreme Court examined its only other case regarding due process protections in higher education student conduct processes. In *Regents of the University of Michigan v. Ewing*, the student respondent was dismissed after failing an examination required for continued progress in the academic program.⁷² The respondent alleged he had a property interest in continued enrollment, and the university’s decision to dismiss him violated his substantive due process rights.⁷³

To begin its analysis, the Court stated that in *Horowitz*, “we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard.”⁷⁴ Just as in *Horowitz*, the *Ewing* Court assumed, without deciding, that the student had a property interest in continued enrollment at the university.⁷⁵ The Court also determined that “even if *Ewing*’s assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.”⁷⁶

69 *Id.*

70 *Id.*

71 *Id.* at 86–87, n. 3.

72 474 U.S. 214, 215 (1985).

73 *Id.* at 217.

74 *Id.* at 222 (citing *Horowitz*, 435 U.S. at 91–2).

75 *Id.* at 223.

76 *Id.*

In addition to its holding that the student received sufficient due process prior to his removal for academic misconduct, the Court elaborated, in dicta, about the role of judicial interference in these types of cases:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.⁷⁷

The Court concluded its opinion by refusing to intervene in the academic decision and did not elaborate any further on the procedural protections required for academic dismissal.⁷⁸

IV. Subsequent Lower Court Approaches

As a result of the Supreme Court decisions in *Goss*, *Horowitz*, and *Ewing*, lower federal courts are split on how to approach the issue of property interest in due process cases. Circuits apply one of the follow three approaches in deciding the property interest issue: (1) the state-specific approach, (2) the generalized approach, and (3) the assumption approach.⁷⁹

A. *The State-Specific Approach*

The state-specific approach is by far the most popular approach, followed by the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits.⁸⁰ This approach derives from Supreme Court precedent not specifically related to a student's property interest in continued enrollment at a public college or university; it relies on the more broadly applicable standard of deriving a property interest from an independent source of state law, thus creating a valid entitlement.⁸¹ To state a deprivation of procedural due process claim, student plaintiffs must direct these circuits to examine state or municipal law to find an explicit grant of a property interest. This includes an express or implied contractual relationship between the institution and the student, or a statute that provides for continued enrollment at colleges or universities.⁸²

In the case *Leone v. Whitford*, the District Court for the District of Connecticut utilized the state-specific approach in determining whether a property interest existed for a student who was denied her teacher certification and dismissed from

77 *Id.* (citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

78 *Id.* at 227–28.

79 *See Mott*, *supra* note 12, at 658, 660, 664.

80 *Id.* at 658.

81 *Id.*

82 *Id.*

her academic program.⁸³ The district court examined the student's procedural due process claims by examining whether she had an implied contractual agreement in continued enrollment in her program.⁸⁴ In beginning its analysis, the district court stated that both the Supreme Court and Second Circuit identify a property or liberty interest through a source "independent of the Constitution," including state law.⁸⁵ After noting that a contract could constitute the establishment of an independent source, the district court added the following:

Although not every contractual benefit rises to the level of a constitutionally protected property interest, the Supreme Court has recognized that every term of a contract need not be reduced in writing in order to form a constitutionally protected property interest. Rather, an implied contract may result from a course of dealings between the parties that creates a protected interest.⁸⁶

Though the district court stated that an implied contract could create a property interest, it did not find such a contract between the student and Central Connecticut State University.⁸⁷ Even though the student may have relied on assurances made to her by a staff member at her school, the dean, and the university itself "retained the authority to override whatever agreement the School's subordinate officers were making with Leone."⁸⁸ The district court stated that the dean informed the student that she was at risk for removal from her program prior to her removal and that this promise, "was fully realized when Whitford expelled Leone from the Program."⁸⁹ The district court concluded that the student unreasonably relied on promises from a staff member at her school, and that this situation did not create a contractual right "that rose to the level of a significant property interest."⁹⁰ The court subsequently held that the university did not violate the student's procedural due process rights.⁹¹

Because the Second Circuit utilized the state-specific approach, the district court in *Leone* was not required to examine the procedural protections afforded to the student prior to her removal from her academic program. Once the court reached the determination that there was no implied contractual relationship that created a property interest under state law, the court ended the inquiry. The district court did not determine if Central Connecticut State University was required to give the student the minimal constitutional protections for academic

83 *Leone v. Whitford*, 2007 WL 1191347, at *4 (D. Conn. Apr. 19, 2007), *aff'd*, 300 Fed. App' 99 (2d Cir. 2008) (unpublished).

84 *Id.* at 8.

85 *Id.*

86 *Id.* (citing *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) (a simple contract dispute does not give rise to a cause of action under section 1983); and *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

87 *Id.* at 8–9.

88 *Id.* at 8.

89 *Id.* at 8–9.

90 *Id.* at 9.

91 *Id.*

misconduct before removing her from her program. In fact, this determination by the district court that the student did not have a property interest in continued enrollment effectively communicated that procedural due process protections are not required for students prior to their removal. Under the state-specific approach, the distinction in process requirements for academic and behavioral removals is irrelevant; if no property interest is identified by courts using the state-specific approach, procedural due process requirements do not apply.⁹²

The Ninth Circuit Court of Appeals followed a similar judicial framework in its decision of *Austin v. University of Oregon*. In *Austin*, the District Court of the District of Oregon examined whether an independent source of state law granted a property interest in continued enrollment at the University of Oregon.⁹³ The district court stated that “there must be a legitimate claim of entitlement” to the asserted property interest and that this requires “an existing law, rule, or understanding” that makes this entitlement mandatory.⁹⁴ The district court then stated the following regarding the precedent of procedural due process protections:

...the answer is clear: there is no Supreme Court, Ninth Circuit, or Oregon District Court case that, at the time of the events giving rise to this case, clearly establishes the property rights Plaintiffs assert, nor is there any apposite statute establishing the same.⁹⁵

The plaintiffs in this case asserted that *Goss v. Lopez* provided for a property interest in continued enrollment in higher education.⁹⁶ The district court did not find that *Goss* established this right “given that it involved middle school public education under a relatively broad Ohio state statute.”⁹⁷ The court continued by confirming that “[t]here is no analogous Oregon law applicable to college education that would create a corollary to *Goss* in this case.”⁹⁸ Thus, the district court distinguished between K-12 and higher education when determining that a property right to continued enrollment in higher education did not exist in Oregon.

In a footnote, the district court elaborated that *Goss* mentions *Dixon v. Alabama* and numerous lower federal court cases that provide for procedural due process protections prior to student removal.⁹⁹ None of these cited cases in *Goss* implicated the District of Oregon nor the Ninth Circuit, prompting the district court to state “[t]his does not create a right, beyond debate, in this district or circuit, in the higher education and student athlete property rights that plaintiffs now assert here.”¹⁰⁰

92 For more conversation regarding express or implied contract analysis for procedural due process protections, see *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016).

93 *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1221 (D. Or. 2016), *aff'd*, 925 F.3d 1133 (9th Cir. 2019).

94 *Id.* at 1221.

95 *Id.* at 1221–22.

96 *Id.* at 1222.

97 *Id.*

98 *Id.*

99 *Id.* at n. 3.

100 *Id.*

In a departure from the typical jurisprudence of state-specific circuits, the district court analyzed the process afforded to the student respondents after finding that no property interest existed. In another footnote, the court stated the following:

While I need not reach the merits of the due process claims, I note that significant information offered at this state undercuts allegations that Plaintiffs were summarily deprived of process, including timely notice of the Student Conduct Code violations against them, the choice of resolution format provided to them, the fact that Plaintiffs were allowed to consult counsel in choosing their preferred format, and the number of rights conferred by each of those choices. Plaintiffs' conclusory allegations that the process to which they were entitled were flawed need not be taken as true.¹⁰¹

Essentially, the district court was not required to evaluate the process provided by the University of Oregon because the student respondents were not entitled to procedural due process protections as a matter of state law. The district court's elaboration that, even though not required, the university provided sufficient procedural protections prior to their removal, is somewhat immaterial. If the student conduct process offered by the University of Oregon did not meet procedural due process protections, it is unlikely the court would have found a property deprivation because the property interest does not exist. In conclusion, *Leone* and *Austin* both illustrate the application of the state-specific's approach to determining the issue of a property interest in continued higher education enrollment.

B. The Generalized Approach

The next popular approach to determining a property interest in continued enrollment at a public college or university is the generalized approach. This approach is followed in the First, Sixth, and Tenth Circuits and simply expands the Supreme Court's holding in *Goss* to higher education institutions.¹⁰² Unlike the state-specific approach, these circuits bypass an independent source of law granting a property interest.¹⁰³ Instead, these circuits generally expand *Goss* and rely on circuit precedent to find a property interest in continued higher education enrollment.¹⁰⁴ Once courts apply the generalized approach that a property interest exists in continued higher education enrollment, they then look to the sufficiency of the process afforded by the college or university.

The Sixth Circuit took the generalized approach when deciding the case of *Flaim v. Medical College of Ohio*. In this case, a third-year medical student was arrested and convicted of an off-campus felony drug offense and was later expelled from the

101 *Id.* at 1223, n. 4.

102 *Mott, supra* note 12, at 659.

103 *Id.*

104 *Id.*

college as a result.¹⁰⁵ The student raised the following deprivations of procedural due process on appeal with the Sixth Circuit:

- a. inadequacy of notice;
- b. denial of a right to counsel;
- c. denial of a right to cross-examine adverse witnesses;
- d. denial of a right to receive written findings of facts and recommendations;
- and
- e. denial of a right to appeal the school's decision to expel him.¹⁰⁶

The Sixth Circuit began by confirming its application of the generalized approach in noting that circuit precedent implicates the Due Process Clause in higher education conduct decisions and cites *Goss* as support for this extension.¹⁰⁷ The Sixth Circuit referred to *Goss* in stating that "the Supreme Court has made clear that there are two basic due process requirements: (1) notice, and (2) an opportunity to be heard."¹⁰⁸

In addition to its procedural due process analysis, the Sixth Circuit also examines the student's claims under the three-prong test of *Mathews v. Eldridge*.¹⁰⁹ This test helps courts determine that when due process applies, the amount of process required is largely a fact-based analysis.¹¹⁰ Because the Sixth Circuit's decision on the alleged procedural deprivations did not change as a result of either analysis, the following illustration of the Court's decision only includes details on the procedural due process analysis.

After confirming that procedural due process is applicable to disciplinary decisions in higher education, the Sixth Circuit began examining each of the student's alleged deprivations.¹¹¹ Regarding the sufficiency of notice, the Sixth Circuit cited its own precedent in stating "[a]ll that is required by the Due Process Clause ...is sufficient notice of the charges...and a meaningful opportunity to prepare for the hearing."¹¹² The court also acknowledged that *Goss* provides for a more formal notice in more serious cases, while the Fifth Circuit in *Dixon* requires a written explanation of the charges that, if proven, justify expulsion.¹¹³ Because the student received a written notice identifying the alleged policy violations, a right to an internal investigation, and notice of an interim suspension until the completion

105 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 632 (6th Cir. 2005).

106 *Id.* at 634.

107 *Id.* at 633 (citing *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984) (internal quotation marks omitted), *aff'd*, 787 F.2d 590 (6th Cir. 1986)); *see also* *Goss v. Lopez*, 419 U.S. 562, 575 (1975).

108 *Id.* at 634 (citing *Goss*, 419 U.S. at 579).

109 *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

110 *Id.*

111 *Id.* at 637.

112 *Id.* at 639.

113 *Id.* at 637 (citing *Goss*, 419 U.S. at 584; and *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961)).

of the investigation, the Sixth Circuit found this notice more than adequate.¹¹⁴

Regarding the student's right to legal counsel, the Sixth Circuit "assumed without deciding that there is a right to counsel in some academic disciplinary proceedings" and found sufficiency in the process used in *Flaim*.¹¹⁵ The court elaborated in a footnote that "[w]e need not consider here all the circumstances under which an accused may have a right to counsel."¹¹⁶ Sixth Circuit precedent further allows for the right to counsel if "an attorney presented the University's case or the hearing was subject to complex rules of evidence or procedure."¹¹⁷ Because the college's policy allowed respondent attorney involvement if the student faced off-campus criminal charges, and the college's case was not presented by an attorney, the Sixth Circuit again ruled against the student on this claim.¹¹⁸

The Sixth Circuit also held that the student was not denied due process for his inability to cross-examine the arresting officer who testified against him in his on-campus proceeding.¹¹⁹ After acknowledging that circuit precedent and the Constitution do not afford the right to cross-examine in campus conduct cases, the Sixth Circuit cited a Second Circuit case that stated "if the case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."¹²⁰ Because the student admitted to his felony drug conviction, there was no critical fact issue that required cross-examination, and therefore, no due process deprivation occurred.¹²¹

The Sixth Circuit continued to affirm the District Court of the Northern District of Ohio's analysis as it found no due process violation for the written findings claim.¹²² In stating that the Due Process Clause's flexibility may require written findings of fact in some proceedings, circuit precedent identifies no constitutional right to written findings of fact.¹²³

The Court ends its analysis in *Flaim* by holding that the right to appeal is not a constitutional due process protection. "Courts have consistently held that there is no right to an appeal from an academic disciplinary hearing that satisfies due process."¹²⁴ Even though the student claimed that the college's policy, past practices, and policy requirements from the accrediting body for medical schools

114 *Id.* at 638–39.

115 *Id.* at 640.

116 *Id.* at 644, n. 4.

117 *Id.* at 640 (citing *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984)).

118 *Id.* at 640–41.

119 *Id.* at 641.

120 *Id.* (citing *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); and *Jaksa*, 579 F. Supp. at 1252)).

121 *Id.*

122 *Id.* at 642.

123 *Id.*

124 *Id.* (citing *Smith on Behalf of Smith v. Severn*, 129 F.3d 419, 428–29 (7th Cir. 1996); *Winnick*, 460 F.2d at 549; and *Foo v. Tr., Ind. Univ.*, 88 F. Supp. 2d 937, 952 (S.D. Ind. 1999)).

provided a right to appeal, the Sixth Circuit found “[Flaim] fails to tie any of these points to a constitutional right to appeal the decision of an academic institution.”¹²⁵ The Sixth Circuit then concluded its opinion by upholding the district court’s decision to deny the student’s procedural due process claims.¹²⁶

C. *The Assumption Approach*

The least common approach, used in only the Fifth and Eighth Circuits, is the assumption approach. As its name implies, courts that follow the assumption approach simply assume that a property interest exists for students enrolled at public colleges and universities.¹²⁷ Unlike the state-specific or generalized approach, the Fifth and Eighth Circuits do not decide the issue of the property interest; “[i]nstead, the assumption approach serves as a gap-filler for courts to avoid the property interest question, unless the particular facts of a case require that it does so.”¹²⁸ The Fifth and Eighth Circuits look at the sufficiency of the process provided to students and skip the issue of whether or not a property interest exists.¹²⁹

In a case upheld by the Fifth Circuit, the District Court for the Eastern District of Louisiana implemented the assumption approach in a case involving a student dismissed from Louisiana State University’s medical school.¹³⁰ In *Mathai*, the district court examined the dismissal of a student for “polysubstance dependence and narcissistic traits,” both of which violated the school’s continued enrollment contract and fitness for duty policy.¹³¹ The student claimed her dismissal violated her due process rights because she was dismissed without notice and an opportunity to be heard.¹³²

The district court began its analysis by directly implicating the assumption approach. The court described this approach in the following manner:

The Court assumes without deciding that plaintiff has a property or liberty interest in her continued education at LSU. Defendant does not argue against the existence of such an interest, and both the United States Supreme Court and the Fifth Circuit have addressed due process claims by postsecondary students without expressly stating that students have a property interest in their studies.¹³³

125 *Id.* at 642.

126 *Id.* at 644.

127 Mott, *supra* note 12, at 663.

128 *Id.* at 664.

129 *Id.*

130 *Mathai v. Bd. of Supervisors of La. State Univ. and Agricultural and Mech. Coll.*, 959 F. Supp. 2d 951 (E.D. La. 2013), *aff’d*, 551 Fed. App’x 101 (5th Cir. 2013) (unpublished).

131 *Id.* at 955.

132 *Id.* at 958.

133 *Id.* (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978); *Ekmark v. Matthews*, 2013 WL 1363545, at *1 (5th Cir. Apr. 5, 2013)).

The district court then stated, “even assuming that plaintiff has an interest protected by the Due Process Clause, her claim cannot succeed because she was not denied due process.”¹³⁴

After assuming that the property interest existed and that the student was not denied due process protections, the district court highlighted the difference between the procedural requirements afforded to academic misconduct and behavioral misconduct violations.¹³⁵ The court identified *Horowitz* and *Goss* to support the conclusion that academic dismissals do not require a hearing as required in behavioral dismissals.¹³⁶

In determining whether the student’s dismissal for “polysubstance dependence and narcissistic traits” qualified as an academic or behavioral dismissal, the district court turned to Fifth Circuit precedent, *Shaboon v. Duncan*.¹³⁷ Here, the Fifth Circuit determined the dismissal of a student who “exhibited signs of mental illness, refused to cooperate fully with psychiatrists, and stopped taking her medication” constituted a dismissal for academic reasons.¹³⁸ The Fifth Circuit in *Shaboon* found this to be an academic dismissal because “it implicated her fitness to perform as a doctor.”¹³⁹ After citing *Shaboon*, the district court in *Mathai* added the following:

Evaluation of plaintiff’s progress, or lack thereof, in the area of emotional health and judgment “is no less an academic judgment because it involves observation of her skills ... in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.”¹⁴⁰

The district court then concluded that *Mathai* clearly “could not be deemed fit to engage in her professional duties unless she complied with the treatment recommendations” and that her refusal “furnished a sound academic basis for dismissal.”¹⁴¹ After deciding that the student’s dismissal was academic in nature, the district court cited cases in other circuits that also created a procedural distinction between academic misconduct and behavioral misconduct.¹⁴² The court noted that

Surveying cases from the First, Sixth, and Seventh Circuits, the District Court for the District of New Mexico has distilled the principle that an academic dismissal will be found where a student’s scholarship or conduct reflects on the personal qualities necessary to succeed in the field in which he or she is studying and is based on an at least partially subjective appraisal

134 *Id.*

135 *See id.* at 959.

136 *Id.*

137 *Id.* at 955 and 959.

138 *Id.* at 959 (citing *Shaboon v. Duncan*, 252 F.3d 722, 725-26 (5th Cir. 2001))

139 *Id.*

140 *Id.* at 960 (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 95 (1978)) (Powell, J., concurring).

141 *Id.* at 960 (quoting *Shaboon*, 252 F.3d at 731) (internal quotation marks omitted).

142 *Id.*

of those qualities.¹⁴³

The district court provided another example from a Seventh Circuit case where a medical resident received an academic dismissal for failing “to disclose on his application an earlier dismissal from another residency program” because this affected his credibility in the care of patients.¹⁴⁴ The district court again stated that Mathai’s inability to abide by the program’s requirements to seek treatment “is a basis for defendants to conclude that plaintiff was academically unfit to continue in her medical training.”¹⁴⁵

Because the district court created a sound argument that the student’s dismissal is academic in nature, the court reiterated the procedural requirements for such a dismissal.¹⁴⁶ “[T]he only procedural safeguards required were ample notice of the conditions upon which her continued enrollment was predicated and warning of the consequences that would follow her failure to abide by those conditions.”¹⁴⁷ Under this standard, the district court ultimately held that no procedural due process violation occurred and the student “certainly received adequate process.”¹⁴⁸ The district court supported this holding with the following:

She received written notice on two occasions that her failure to comply with the school’s treatment requirements could result in expulsion. The Fitness of Duty contracts clearly stated that if plaintiff did not abide by their terms, she was subject to immediate dismissal from the LSU School of Medicine. Under *Shaboon* and *Horowitz*, no more is required.¹⁴⁹

D. Comparing the Three Approaches

Though the assumption approach to the question of a property interest in continued enrollment in higher education is recognized in published legal scholarship, the question remains of how courts would use this approach if the procedural protections afforded to a student did not meet due process requirements. Based on the district court’s application in *Mathai*, it appears that, at least in the Fifth Circuit, courts would likely use the generalized approach. Because the *Mathai* court focused on the distinctions between academic misconduct and behavioral misconduct requirements highlighted in *Goss* and *Horowitz*, the Fifth Circuit could generalize the holding in *Goss* to extend procedural due process requirements to higher education. If the Fifth Circuit cited Supreme Court precedent to illustrate

143 *Id.* (quoting *Allahverdi v. Regents of Univ. of N.M.*, 2006 WL 1313807, at *12–13 (D.N.M. Apr. 25, 2006) (quotation marks omitted)).

144 *Id.* (*Fenje v. Feld*, 398 F.3d 620, 625 (7th Cir. 2005)).

145 *Id.*

146 *Id.* at 961.

147 *Id.* (quoting *Shaboon v. Duncan*, 252 F.3d 722, 730 (5th Cir. 2001)(internal quotation marks omitted); *see also* *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978)).

148 *Id.*

149 *Id.*

the required procedures afforded in the instances where due process applies, it logically follows that they may choose to extend *Goss*, and potentially apply other circuit precedent, to definitively hold that there is a property or liberty interest in continued higher education enrollment.

Alternatively, it can be argued that the Fifth and Eighth Circuits could nevertheless assume a property or liberty interest exists and still find a university conduct procedure inadequate. It is certainly established in the Supreme Court precedent of *Horowitz* and *Ewing* that making an assumption about the application of due process is a valid application of constitutional avoidance. The Fifth and Eighth Circuits could hypothetically assume that a student has a property and/or liberty interest in continued higher education enrollment *and* conclude that a conduct procedure utilized to remove a student from a college or university is inadequate under the Due Process Clause.

The circuits that utilize the generalized approach could find themselves in a similar situation. The First, Sixth, and Tenth Circuits could extend *Goss* and circuit precedent and find that the procedural protections offered in student conduct cases do not comport with due process requirements. That does not negate the legitimacy of the generalized approach as a method for determining a property or liberty interest in continued higher education enrollment. The same is true for the assumption approach—it is no less a legitimate application of legal theory because a college or university offered an inadequate student conduct process. Deciding the issue of whether or not procedural due process applies to a factual situation has no bearing on the sufficiency of the process afforded. That decision is independent of the identification of the protected interest itself.

V. Navigating the Current Law and Benefits of Procedural Due Process Protections

If anything is apparent from Supreme Court and circuit court precedent, it is that the concept of property rights in higher education is a largely inconsistent application of constitutional protections. The geographical jurisdiction in which a public college or university exists ultimately decides the constitutional protections afforded to its students. For instance, there are twenty-seven states in the six circuits that use the state-specific approach to identifying a property interest in continued enrollment in higher education. Unless these twenty-seven states provide a property or liberty interest in higher education under state law, the courts in these states may reasonably deny basic procedural protections in student conduct removals.

In addition to the inconsistent application of procedural due process protections in higher education across circuits, federal courts have not reached a consensus on what definitively qualifies as academic misconduct and how to identify such misconduct. The District Court of Nebraska and Eighth Circuit recognize that “[d]ismissals have been considered ‘academic’ when the student’s deficiencies, while arguably warranting disciplinary action, also bear on academic performance”¹⁵⁰

¹⁵⁰ Ashokkumar v. Elbaum, 932 F. Supp. 2d 1002, 1008 (D. Neb. 2013) (citing *Monroe v. Ark. State Univ.*, 495 F.3d 591, 592 and 595 (8th Cir. 2007) (student dismissed from academic program after

In contrast, the District Court of Nevada ruled that the procedural due process provided to a student reached the level of behavioral misconduct protections, so the court declined to conclude if the alleged conduct was behavioral or academic in nature.¹⁵¹ There are very few available cases that provide insight into what conduct qualifies as academic misconduct, so it is difficult to predict how courts would decide the issue.

Though some scholarly reviews of property interests in higher education tend to focus on which of the three approaches is better or which is the more consistent application of Supreme Court precedent, this discussion can be avoided entirely if colleges and universities simply provide constitutionally adequate procedural due process requirements for *all* cases of behavioral and academic misconduct. As illustrated in the cases above, the general consensus among federal circuits requires different procedural processes for removals based on academic misconduct or behavioral misconduct and provide incomplete guidance on how to decide if the conduct is behavioral or academic. The required procedural protections can be summarized from the prior case illustrations as requiring a notice and some opportunity to be heard in behavioral misconduct removals and notice that the alleged conduct may result in removal for academic misconduct cases. This broad summarization of these procedural requirements does not account for the implied flexibility of the Due Process Clause that is highlighted and applied in different ways, depending on circuit precedent.

The inconsistent application of procedural due process protections across circuits and within the two main categories of student conduct cases provides potential compliance problems for colleges and universities across the United States. Not only do compliance issues arise in the application of procedural due process protections, but these protections are only afforded in cases of *removal* from public colleges and universities. There is no case law mandating minimum constitutional protections for students who are found in violation of student conduct charges who do not face sanctions such as suspension or expulsion. Based on this author's observation in the field of student conduct, sanctions resulting in removal from campus are far less common than educational and restorative sanctions.¹⁵² Not only is the field of student conduct less likely to remove students from campus for

receiving an incomplete grade due to a leave of absence for drug treatment. "Although we recognize that Monroe's conduct in this case might have permitted a disciplinary dismissal, it is undisputed that the University dismissed Monroe for failure to complete his course work, not his drug use. Monroe admitted his drug use to the University. Had he denied the allegations of drug use, then the University's decision to dismiss him for his alleged, but not conceded drug use, might constitute a disciplinary dismissal. Moreover, courts have considered dismissals 'academic' in similar scenarios when the student's deficiencies, while arguably warranting disciplinary action, also bear on academic performance.").

151 *Gamage v. Nev. ex rel. Bd. of Regents of Nev.*, 2014 WL250245, at *2 and *9 (D. Nev. Jan. 21, 2014) (Ph.D. student accused of plagiarizing parts of her dissertation. "Without reaching the conclusion whether Plaintiff's removal from the Program was for an academic reason or a disciplinary reason, the Court finds the Defendants provided Gamage more than the procedural due process she was entitled to if she had been removed from the Program solely for disciplinary reasons. Gamage does not dispute the fact that she received notice of the allegations of plagiarism or notice of any of the hearings.").

152 *See also* Northwestern University, Overall Sanctions Assigned, <https://www.northwestern.edu/communitystandards/data-statistics/overall-sanctions-assigned.html> (last visited Feb 18, 2022) (FY 19: 313 cases, 8 removals. FY 20: 282 cases, 9 removals. FY 21: 714 cases, 3 removals).

conduct code violations, but there are also professional organizational standards for student conduct programs that include “a moral and ethical duty to ensure [student conduct] processes are inclusive, socially just, and multipartial.”¹⁵³

Many public colleges and universities likely already afford a process that comports with the notice and opportunity to be heard requirements of procedural due process. However, based on the lack of concrete guidance from the Supreme Court and the circuit split on additional requirements, it is wise for all public institutions to reexamine their processes. Most importantly, this author recommends offering procedural protections that exceed the constitutional minimums for all cases of student misconduct, regardless of the potential for removal from campus. By offering a uniform conduct system that exceeds constitutional minimums, public colleges and universities further insulate themselves from impending changes in the legal landscape and abide by the professional expectations of the field. In a system designed to educate and retain students, a conduct process that exceeds procedural due process requirements illustrates to students that colleges and universities value the constitutional rights of the students, even when they may not be required to do so under the law.

VI. The University of Oregon Model

A. *Summary and Application of the University of Oregon Model*

As a model for how public colleges and universities should extend additional due process protections in their conduct process, the University of Oregon provides such a framework. The University of Oregon Model exceeds the minimum constitutional due process protections required for academic and behavioral misconduct removals. The Oregon Model also provides the same robust procedural protections for all student conduct cases, regardless of the potential sanction outcome. All nonremoval cases receive the same procedural protections that go far beyond the minimum requirements outlined in *Goss*, *Horowitz*, and *Ewing*.

B. *Preliminary Considerations*

The University of Oregon provides for various preliminary considerations before beginning the student conduct process.¹⁵⁴ These considerations include many important elements, but specifically include instructions for disability access

153 Council for the Advancement of Standards in Higher Education, Student Conduct Programs, <http://standards.cas.edu/getpdf.cfm?PDF=E86F0FB4-D022-13D9-03E2DE3AD5532DBF> (last visited Feb 17, 2022) (see document for additional citations).

154 Standard Operating Procedures for General Misconduct/Substance Use Misconduct Allegations, (2020), <https://dos.uoregon.edu/files/substance-use-and-general-misconduct-procedures-2020.pdf> (The Academic Misconduct Procedures include the same procedural protections as the General Misconduct/Substance Use Misconduct procedures) [hereinafter collectively referred to as Procedures].

accommodations and define the role of support persons.¹⁵⁵ The incorporation of accessible accommodations is a critical consideration prior to the start of the conduct process; offering these accommodations is not a constitutionally protected procedural due process element, but it is a commitment to “ensuring an inclusive, accessible, and equitable process for all participants.”¹⁵⁶ This is the first of many examples of the University of Oregon providing procedures that exceed those required by constitutional law.

The university also defines the designation and role of support persons in the conduct process. The Student Conduct Code defines a support person as

...any person who accompanies a Respondent or Complainant for the purpose of providing support, advice, or guidance. Any limitations on the scope of a support person are defined in written procedures or other relevant University policy. Witnesses or other Respondents are not allowed to serve as Support Persons.¹⁵⁷

The Standard Operating Procedures for academic and behavioral misconduct provide the following restrictions on support persons engaged in the conduct process:

Support persons may attend meetings, be copied on formal case communications, and ask the Director reasonable clarifying questions regarding the process. A support person is not permitted to act or speak on behalf of the Respondent, serve as a witness in the same matter, or disrupt any meetings. The Director may require a support person to leave a meeting, including the Administrative Conference, if the support person engages in unreasonable, disruptive, harassing, or retaliatory behavior.¹⁵⁸

Even with this limiting instruction on support person involvement in the student conduct process, the University of Oregon is exceeding the due process right to counsel. As noted previously in *Goss*, the Supreme Court declined to extend the right to counsel to “hearings in connection with short suspensions.”¹⁵⁹ The Sixth Circuit in *Flaim* “assumed without deciding” a right to counsel in academic misconduct cases, while declining to consider “all the circumstances” where student respondents may be afforded the right to counsel.¹⁶⁰ *Flaim* also provided for the right to counsel if the university’s case is presented by an attorney or if the rules of evidence or procedure apply.¹⁶¹ Because the University of Oregon does not use counsel to bring conduct charges against a student and does not utilize

155 *Id.* at 2.

156 *Id.*

157 UNIVERSITY OF OREGON POLICY LIBRARY, STUDENT CONDUCT CODE, § II (10) (2021), <https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> [hereinafter Code].

158 Procedures, *supra* note 155, at 2–3.

159 *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

160 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 n. 4 (6th Cir. 2005).

161 *Id.* at 640.

complicated rules of ethics or procedure, the Oregon Model complies with the requirements of *Flaim*. Though not bound by Sixth Circuit precedent and with no Supreme Court guidance on the issue, the University of Oregon drastically exceeds the right to counsel by allowing involvement of counsel in all cases of academic and behavioral misconduct.

While the University of Oregon provides expanded procedural protections for the right to counsel, the support person limitations provided by the Oregon Model provide intentional constraints on attorney involvement in the student conduct process. Support persons can work with the student respondent through their entire case but cannot directly represent the student respondent during the conduct hearing. This allows for students to retain autonomy in the decision-making process of their case, while also creating the greatest opportunity for students to learn and grow from the alleged behavior. Allowing a support person to speak for a student and justify their behavior is not restorative and does not impose responsibility on the student respondent.

Moreover, by allowing a support person, especially legal counsel, to speak for students, the student conduct process begins to mirror a criminal court proceeding. Although it is important to provide procedural due process protections to the extent that they benefit the student and the university, there must be limitations on these protections to prevent a largely restorative and educational process from becoming a full-scale adversarial proceeding. Allowing support persons to counsel the student respondent as they navigate the student conduct process, while also restricting the role of the support person, strikes an appropriate balance between providing broad procedural due process protections that benefit the student from those that do not.

C. *The Notice of Allegation*

As required by *Goss*, *Horowitz*, and *Ewing*, student respondents facing dismissal from a K-12 school or higher education entity for behavioral misconduct must receive notice of the alleged conduct violation that, if proven, would justify removal from the educational setting. Consistent with university policy, the University of Oregon sends a Notice of Allegation (NOA) to a student respondent's university email address, containing the following information:

- A brief description of the alleged misconduct,
- The alleged violations of the Code,
- The name and contact information for the assigned case manager,
- Whether the respondent may be subject to suspension, expulsion, or negative transcript notation,
- A direct link to the Student Conduct Code and procedures, and
- The date, time, and location (or access information) for the informational meeting.¹⁶²

162 Procedures, *supra* note 155, at 2.

The contents of the NOA do not change, regardless of whether the alleged misconduct is academic or behavioral; all student respondents receive the same level of information, even though cases like *Horowitz* and *Ewing* do not require such a notice for academic violations. This notice also remains the same for students who are not facing removal from campus, even though there is no Supreme Court precedent requiring sufficient notice for nonremoval cases. The NOA is explicit in its reference to potential sanctions and informs students whether or not they face suspension, expulsion, or a negative transcript notation. This is considered more than adequate notice required under the Due Process Clause for both academic and behavioral misconduct.

Although not required, the NOA provides direct links to the Student Conduct Code and applicable procedure. This notice allows student respondents the opportunity to fully understand the alleged code violation, details of the adjudication process, and time to consult with a support person prior to their first conversation with a student conduct adjudicator. Though notice of where to find the code and the applicable procedure seems fairly insignificant in the grand scheme of procedural due process protections, it is a simple addition that ensures the university is not withholding any information to keep an advantage over the student respondent. Its inclusion encourages active student involvement in the conduct process, with no negative impact on university resources.

D. The Informational Meeting and Resolution by Agreement

Implemented in August 2020, the Informational Meeting is relatively new to the University of Oregon Student Conduct Procedures. The Informational Meeting allows student respondents the opportunity to meet with their case manager and review the report and evidence against them.¹⁶³ This meeting also allows the case manager to explain the entire student conduct process to the students and discuss possible resolution options.¹⁶⁴ The case manager cannot ask the students any investigative questions during this meeting—it is strictly a time for student respondents to ask any questions regarding the conduct process or resolution options, and to examine the evidence against them.¹⁶⁵ Support persons are invited to attend this meeting with the student respondent as well.¹⁶⁶

In cases that do not involve suspension, expulsion, or negative transcript notations, and if deemed appropriate by the case manager, the student respondents may agree to take responsibility for the alleged conduct violation at the Informational Meeting in the form of a Resolution by Agreement.¹⁶⁷ This agreement is a voluntary agreement in which the student respondents accept responsibility for the alleged conduct violation, accept the imposed Action Plan,

163 *Id.* at 4.

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

waive their right to the Administrative Conference (AC), and waive their right to appeal.¹⁶⁸ Once drafted by the case manager, the student respondents have three business days to consult with a support person in deciding to accept or decline the agreement.¹⁶⁹ If the students accept the agreement, the conduct process is over and the students begin the process of completing the Action Plan.¹⁷⁰ If the students decline the agreement, the conduct process continues to the AC with no inference made against the students as to their involvement in the alleged conduct.¹⁷¹

Both the Informational Meeting and Resolution by Agreement are not constitutionally mandated procedural due process protections. These options are additional protections afforded to student respondents that ultimately serve two purposes: (1) to allow the students the opportunity to review all evidence against them and ask questions about the student conduct process before attending a formal hearing; or (2) to allow the students to knowingly waive some of their procedural rights in favor of an expedited resolution process. For many low-level violations in which the students knows they violated the conduct code and wish to accept the consequences as a result, Resolutions by Agreement allow student respondents to avoid proceeding through the formal adjudication process. They can accept responsibility, complete sanctions in the Action Plan, and move on with their academic pursuits. Otherwise, student respondents may receive all the information presented against them, gain a clear understanding of the formal hearing process, and take the time to prepare their responses to the alleged violations in the AC. Regardless of how the Informational Meeting and Resolution by Agreement are categorized, they are additional procedural protections outside of due process requirements that entirely benefit the student respondent with low impact on university resources.

E. The Administrative Conference

Per *Goss*, *Horowitz*, and *Ewing*, students facing removal from campus for behavioral misconduct allegations are entitled to some kind of hearing, while students facing academic misconduct removal do not require any type of hearing. At the University of Oregon, the AC serves as the formal hearing for academic and behavioral misconduct cases, regardless of if removal is a potential sanction. The AC is a private meeting between the student respondents, potential support person, and the case manager.¹⁷² In the AC, the case manager may ask the student respondents questions and gather information regarding the alleged conduct violation.¹⁷³ During the AC, student respondents may name any witnesses they wish the case manager to speak to regarding the incident.¹⁷⁴ Although the

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 5.

173 *Id.*

174 *Id.*

case manager cannot compel a named witness to answer questions or provide information regarding the alleged misconduct, the case manager takes reasonable actions to contact and consult with relevant witnesses.¹⁷⁵ The support person may accompany the students but must allow the students to speak for themselves when presenting their defense to the case manager.¹⁷⁶ Student respondents are not required to answer any questions from the case manager, but student respondents must at least attend the AC in order to preserve their right to appeal.¹⁷⁷ If student respondents do not attend the scheduled AC, the hearing proceeds without the students.¹⁷⁸

Based on the case illustrations previously mentioned, the general consensus for hearing requirements under the Due Process Clause requires an opportunity to be heard and to defend oneself. At the AC hearing phase, the University of Oregon once again exceeds procedural due process protections. As consistent with other areas of the conduct procedural process, the university allows a support person to attend the hearing with the student respondents and may ask questions on the students' behalf. The offered hearing is a private, oral hearing where student respondents may present their own evidence, provide their account of the situation, and propose relevant witnesses, regardless of whether or not they face removal from the university. Further, the case manager serves as an independent tribunal whose entire focus is to determine if the student respondents are or are not in violation of the conduct code. This is opposed to the aggrieved party, whether that be a professor or university administrator, from serving as the decision-maker in a case in which they are closely connected. None of the cases cited above, but especially *Goss*, *Horowitz*, and *Ewing*, provide any guidance on who can and cannot serve as a decision maker in higher education student conduct cases.

Flaim and the Sixth Circuit expand the hearing requirements slightly by indicating a student "might" require cross-examination of a witness in a hearing in order to make a credibility finding.¹⁷⁹ This ability to cross-examine witnesses is currently only concretely required in cases involving Title IX offenses.¹⁸⁰ While the Oregon Model typically provides procedural protections that far exceed the requirements set out by the Supreme Court and nonbinding circuit precedent, implementing a process where respondents and complainants may cross-examine each other begins to remove the educational and nonadversarial nature from conduct hearings. From this author's perspective, cross-examination is detrimental to respondents and complainants in Title IX proceedings and would prove equally as harmful in the non-Title IX student conduct process. Though the Oregon Model

175 *Id.* at 4–5.

176 *Id.* at 5.

177 *Id.*

178 *Id.*

179 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)..

180 Final Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026 § 106.45(b)(6) (2020) ("Section 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties' advisors at postsecondary institutions.").

advocates for expanded protections, cross-examination for credibility findings do not allow for a restorative and supportive learning environment for respondents. It also requires complainants to unnecessarily reiterate information from the reporting phase and necessitates the right to counsel due to complex procedural requirements for such an adversarial legal process. Further, cross-examination is a drain on university resources by prolonging cases in which a credibility finding may not be necessary to reach an outcome, especially in cases where respondents take responsibility and acknowledge the harm caused.

Though the Oregon Model does not allow for cross-examination, it does allow student respondents to present a robust defense in a private hearing with an impartial decision-maker. This, again, illustrates the University of Oregon's commitment to exceeding procedural due process requirements in the conduct process to the benefit of the students involved and without unnecessarily burdening university resources.

E. The Action Plan and Decision Letter

After the completion of the AC, the case manager makes a finding, based on the preponderance of the evidence standard, as to whether the student respondents are responsible for the alleged Student Conduct Code violation.¹⁸¹ The preponderance of the evidence standard requires the case manager to determine if it is more likely than not that the alleged violation occurred as reported.¹⁸² Then, the case manager sends a decision letter to students either outlining that the students are in violation or not in violation of the conduct charge.¹⁸³ If the students are found in violation, they receive the following information in their emailed Decision Letter: (1) the in violation finding with a rationale for how the case manager reached this decision, (2) the Action Plan containing the assigned sanctions, and (3) information regarding how to file an appeal.¹⁸⁴ The Action Plan "consists of outcomes and administrative sanctions intended to promote personal reflection and growth, repair any harm caused, and help the student realign with institutional values."¹⁸⁵ If notified in their initial NOA, the Action Plan may include suspension, expulsion, or a negative transcript notation.¹⁸⁶

The Supreme Court does not provide any specifics for notifying students of a finding and decision. The Fifth Circuit required in *Dixon* that the university

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.* See also Office of the Dean of Students, Student Conduct and Community Standards, <https://dos.uoregon.edu/conduct> (last visited Mar 14, 2021) ("Students are provided opportunities for personal reflection about decisions and how to make better choices in the future. We encourage students to consider the impact of their actions on themselves, their peers, and the greater community. Sanctions are individually developed with the goal of promoting critical thinking, repairing potential harms, and assisting students to become productive, global citizens.").

186 Procedures, *supra* note 155, at 5.

provide the student respondent with the results and findings of the hearing for their inspection in order to satisfy due process protections.¹⁸⁷ The Sixth Circuit acknowledged in *Flaim* that the Due Process Clause's flexibly may require written findings of fact, but no Sixth Circuit precedent identifies the constitutional right to these written findings.¹⁸⁸ At this final stage of the conduct process, under the Oregon Model, the university again exceeds procedural due process requirements by always providing a written decision rationale to all students, regardless of case type or potential outcome. The Decision Letter allows the university to articulate exactly how the case manager reached their decision in a particular case and provides that rationale to students. By sharing this information with the students, they can fully understand the findings against them and if they chose to do so, prepare to appeal their decision. This process does not unreasonably burden university resources or staff because it is information the Office of Student Conduct would likely retain for each case, even if not publicly shared with students, as a part of the university's Record Retention Schedule.¹⁸⁹ Therefore, providing this written rationale to students allows for students to meaningfully prepare their case for appeal or fully learn from the behavior, with no additional expense placed on the university.

G. The Appeals Process

One final procedural protection afforded to student respondents by the University of Oregon is the opportunity to file a formal appeal. If found in violation, student respondents receive instructions and parameters for filing an appeal.¹⁹⁰ The students may, in writing, appeal the case manager's decision based on at least one of four criteria:

- To determine whether there was any procedural irregularity that affected the outcome of the matter;
- To determine whether the action plan imposed was appropriate for the violation(s);
- To determine whether the finding is not supported by the preponderance of the evidence; and/or
- To consider new information that could alter a decision, only if such information could not have been known to the appealing party at the time of the administrative conference.¹⁹¹

187 *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961); *see also* Berger & Berger, *supra* note 21, at 306.

188 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 642 (6th Cir. 2005)..

189 Univ. of Or., Office of the Dean of Students, Individual Student Conduct Records and Release Information, <https://dos.uoregon.edu/resources#:~:text=What%20are%20student%20conduct%20records,related%20documentation%2C%20and%20official%20correspondence> (last visited Feb. 17, 2022) ("In accordance with the University of Oregon Records Retention Schedule, student conduct records are retained for a minimum of seven (7) years after graduation, final date of enrollment, date of final resolution, or completion of sanctions, whichever is later. All Academic Misconduct records and records for student conduct matters which result in suspension, expulsion, or degree revocation will be retained indefinitely.").

190 *Id.*

191 *Id.* at 6.

If the student respondents meet one of these appeal standards, the University Appeals Board (UAB), consisting of students, faculty, and staff members, individually review the case manager’s decision in accordance with the bases for appeal.¹⁹² The UAB possesses broad authority to uphold decisions, remand for additional fact finding, dismiss the case entirely, or suggest an alternative resolution process.¹⁹³ Unless student appellants are permitted to submit new information to the UAB, the board simply reviews the information within the case file.¹⁹⁴ UAB hearings are closed to the public, including to the appellants.¹⁹⁵ After the UAB reaches a decision, the students receive the written results and the rationale in an Appeals Board Decision email.¹⁹⁶

The opportunity to appeal a conduct decision is not outlined as a procedural due process requirement afforded to public college and university students. Even the court in *Flaim*, which provided additional guidance that exceeded the requirements of *Goss*, *Horowitz*, and *Ewing*, stated that “[c]ourts have consistently held that there is no right to an appeal from an academic disciplinary hearing.”¹⁹⁷ The University of Oregon’s decision to create such an opportunity to appeal in almost every circumstance serves a singular purpose: it continues to allow expanded procedural due process protections to students as a measure of best practice in a student-centered conduct process, which does not unreasonably burden itself as a higher education institution.

VII. Background of the University of Oregon Model

This recommended model is currently implemented at the University of Oregon in Eugene, Oregon. The University of Oregon is unique in terms of its categorization under Oregon state law. Under Oregon Revised Statute section 352.033, the University of Oregon is a “public university as [a] governmental entity.”¹⁹⁸ This statute provides the university with a unique status by specifically noting that public universities are “not considered a unit of local or municipal government or a state agency, board, commission or institution for purposes of state statutes or constitutional provisions.”¹⁹⁹ This broad statutory language creates certain exemptions for Oregon’s public universities, including exemption from adhering to contested case requirements of the Administrative Procedures Act and preventing the state attorney general from representing the university in any civil litigation.²⁰⁰ Oregon Revised Statute section 352.039, grants broad legislative

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 642 (6th Cir. 2005)..

198 OR. REV. STAT. ANN. § 352.033 (West).

199 *Id.*

200 *See id.*

self-governance powers to public universities, similar to home rule power granted to municipalities and local government entities.²⁰¹ This broad governance power allows the university's Board of Trustees to adopt its own Student Conduct Code, without state approval or guidance. Between both Oregon statutes, the University of Oregon is an entity of self-governance exempt from many state administrative procedural requirements.

Oregon is also unique because there is no state statute that provides a property interest in higher education. As noted previously, the federal district court in *Austin v. University of Oregon* made this determination, while also holding that the Supreme Court and Ninth Circuit did not provide for a property interest in higher education.²⁰² According to circuit precedent, the Ninth Circuit should apply the state-specific approach to determining a property interest, and Oregon law does not provide such a statute.²⁰³ Therefore, neither Oregon state statutes nor the Ninth Circuit find a property interest in higher education for students that attend Oregon's public universities, including the University of Oregon.

The University of Oregon also does not create a property interest through an implied or express contractual relationship. The University's Student Conduct Code specifically states that "[t]his Code is not a contract, express or implied, between any applicant, student, staff or faculty member."²⁰⁴ While this statement alone may not persuade a court that a contractual relationship does not inherently exist between students and the university, the question is largely irrelevant. In theory, a court could decide that the Student Conduct Code does create a contractual relationship between the University of Oregon and its students, thus establishing a property interest in continued enrollment. If such a determination is made and the court in question requires the University of Oregon to provide procedural due process protections in accordance with Supreme Court precedent, the court could easily see the university exceeds the necessary protections afforded by the Due Process Clause. So, the addition of this clause ultimately has no merit on the recommended Oregon Model conduct procedure; the model still exceeds the minimum procedural protections required under the federal Constitution.

Finally, the University of Oregon underwent a total student conduct code and procedural overhaul during the 2019–20 academic year. As a part of this process, the university enlisted the assistance of a professional consulting firm for help in identifying best practices and addressing areas of weakness in the Student Conduct Code and procedures.²⁰⁵ As a result of the report's findings,

201 OR. REV. STAT. ANN. § 352.039(2) (West) ("A public university listed in ORS 352.002 is an independent public body with statewide purposes and missions and without territorial boundaries. A public university shall exercise and carry out all of the powers, rights and privileges, within and outside this state, that are expressly conferred upon the public university, or that are implied by law or are incident to such powers, rights and duties.").

202 *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1221 (D. Or. 2016), *aff'd*, 925 F.3d 1133 (9th Cir. 2019).

203 *Id.*

204 Code, *supra* note 158, at § IX(4).

205 Catherine Cocks & Dr. Michael DeBowes, *The Student Conduct Code and Process Review of the University of Oregon* (2019).

the University of Oregon drafted an entirely new Student Conduct Code and conduct procedures, discarding the previous code derived from former Oregon Administrative Rule chapter 571, division 21.²⁰⁶ The departure from the former administrative rule allowed for a more streamlined, comprehensible, and practical code, free of legal jargon and citations to various outdated administrative rules and statutes. The use of an outside consulting firm, as well as a significant investment of time and resources by university officials, uniquely situates the University of Oregon's Student Conduct Code—but the policies and procedures implemented by the university can be seamlessly applied to existing student conduct codes and procedures at any public college or university.

VIII. Implementation of the University of Oregon Model at Other Colleges and Universities

As a whole, the University of Oregon's Student Conduct Code procedures for academic and behavioral misconduct far exceed the minimum procedural due process protections for students at public colleges and universities. The university goes above and beyond its current constitutional requirements with procedures that benefit students and the university alike. Thus, public colleges and universities should consider implementing a similar conduct procedure, as it provides robust protections for students, with relatively low expense on institutional resources.

With colleges and universities already federally required to designate at least one employee as a Title IX coordinator, many schools also have some kind of formal student conduct staff that enforces the Student Conduct Code.²⁰⁷ While these offices vary in size and staffing, many public universities already have student conduct procedures for disciplinary actions that provide notice of allegations and hearings before an independent tribunal.²⁰⁸ Because of the baseline staffing and existing conduct procedures, implementing many of the procedural protections offered by the University of Oregon is reasonably seamless. Informational Meetings, Resolutions by Agreement, and support persons can likely be added to existing conduct procedures, without altering the current procedural steps. The addition of these procedural protections typically does not generate additional workloads for current staff—Informational Meetings and Resolutions by Agreement will be used most often in place of formal hearing for students accepting responsibility for low-level misconduct violations. Allowing support persons to advise students outside of the conduct process, while minimizing their involvement during Informational Meetings or ACs, does not add any work for current staff members.

Though the creation of an appeals process does involve collaboration and outreach to students, faculty, and staff members, for public colleges and universities

206 Code, *supra* note 158, at Enactment & Revision History.

207 The U.S. Dept. of Justice, Federal Coordination and Compliance Section, (2020), <https://www.justice.gov/crt/federal-coordination-and-compliance-section-152#:~:text=Under%20the%20Title%20IX%20regulations%2C%20a%20recipient%20must%20designate%20at,as%20its%20Title%20IX%20coordinator.&text=The%20recipient%20must%20notify%20all,as%20the%20Title%20IX%20coordinator.>

208 Berger & Berger, *supra* note 21, at 297.

that already utilize this type of hearing board for the initial student hearings, they may use these same channels to build an appeals board. The appeals board merely requires limited access to a student appellants' case file, minimal guidance from conduct staff during the appeals board hearings, and a designated staff member that sends the appeals decision correspondence to the student appellants after the conclusion of the appeals hearing. For staff that already follow a hearing model similar to the University of Oregon AC, the implementation of an appeals board might prove too strenuous on current staffing and resources. However, these offices can implement many of the other procedural recommendations utilized at the University of Oregon in furtherance of a student-centered, fair-dealing student conduct process. For instance, the addition of an Informational Meeting and Resolution by Agreement may reduce the need for an appeals board as both protections provide for more optimal outcomes for both students and institutions, and require the student to waive any right to appeal.

While this author recommends public colleges and universities reexamine their existing student conduct processes and attempt to implement as much of the Oregon Model as feasible, the model is still vulnerable to critiques. For instance, the University of Oregon requires students be notified if they are facing suspension, expulsion, or negative transcript notation in their initial NOA. This is the only language change that occurs between notices, as students typically all receive the same information, regardless of whether the case is for an academic or behavioral misconduct violation. The university puts itself in an unfortunate position by including this suspension, expulsion, or negative transcript notation in the initial notice to students. It does not allow the case managers to consider suspension, expulsion, or negative transcript notation in a case in which the students *were not* initially notified of these potential sanctions in their NOA. If, during the course of an investigation and fact finding, the case manager determines the students should face any of the previously mentioned sanctions if they are found in violation of the charge, the case manager must renotice the case. The case manager must send a new NOA to students outlining the potential for suspension, expulsion, or negative transcript notation, and then must complete every procedural element required in the Student Conduct Code. Essentially, the case starts over again just so the student respondents are on notice that they may face removal from campus or a negative transcript notation as a potential sanction. This can certainly be viewed as a waste of university resources, and a waste of time for all involved.

Another downside to the Oregon Model is the nature of staff members in the Office of Student Conduct serving as neutral decision-makers. While this typically does not pose an issue with cases of behavioral misconduct, it can cause issues with academic misconduct cases. On occasion, this author observed that when cheating and plagiarism were reported in high-level courses, it was difficult for case managers to make factual findings. However, in most cases, professors often provided clear evidence of the alleged academic misconduct in their initial report to student conduct. If the case involves more ambiguous evidence, case managers follow up with reporters to gather additional information to make a well-informed factual finding that satisfies a preponderance of the evidence. This amount of investigation sometimes causes certain academic misconduct cases to take longer than the typical low-level behavioral violation. While this is often frustrating for

students and faculty alike, the preservation of neutrality in the decision-making process, more often than not, justifies the amount of work required to reach an academic misconduct decision.

In addition to the case manager serving as a neutral decision-maker in cases of academic misconduct, the procedural process afforded in the Oregon Model may also create its own set of disadvantages. As noted extensively, Supreme Court precedent provides for less stringent procedural protections for students facing dismissal for academic misconduct. It can be effectively argued that by granting students facing any cheating or plagiarism allegations the opportunity to formally defend themselves to a decision-maker who is not the academic content expert, puts unnecessary strain on the academic system and interferes with academic freedom. Further, this formalized system of evaluating academic misconduct may create confusion for academic faculty who wish to remove students for purely academic reasons. For instance, in cases in which a student's dissertation is rejected by an academic committee, subsequently resulting in an academic dismissal, is a purely academic decision. This kind of academic failure is distinct from the broad definition of academic misconduct, and faculty members should not be required to give the student full procedural due process protections. As the Court said in *Horowitz*, academic dismissals require "expert evaluation of cumulative information...not readily adapted to the procedural tools of judicial or administrative decision making."²⁰⁹ While this author believes this cumulative evaluation of academic misconduct cases can meaningfully occur through the lens of a student conduct professional, it is a valid point of contention and potential confusion.

A final drawback to the University of Oregon uniform procedural model is simply that it does too much when, sometimes, much less is acceptable. By providing the same robust procedural protections for all academic and behavioral misconduct cases that do not involve removal from campus, the university is putting itself in an unnecessary situation. In this author's experience adjudicating student conduct cases, the large majority of cases involve low-level violations where removal from campus would be too egregious for the alleged conduct violation. Often, if a student is engaged in a behavior that violates the conduct code, that code violation is relatively minor. Further, if it's the student's first case involving student conduct intervention, the resulting sanction is a very minor educational activity. These educational activities range from completing online modules to short reflection papers. Is it necessary to offer that student an overly descriptive notice of allegation, an informational meeting, an AC/formal hearing, a written rationale for the decision reached by the case manager, and an opportunity to appeal? There is no Supreme Court guidance requiring public colleges and universities to offer this for nonremoval cases, so potentially, students could be told they were found in violation of a minor code violation, without receiving prior notice and an opportunity to be heard. This, however, is not the best practice in the field of higher education or, more specifically, within student conduct. The arguments this author makes throughout this section clearly negate the drawback of offering robust procedural protections for low-level violations: if it does not

209 Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978).

unduly burden the university in providing such protections, the university should feel obligated to give those protections and should implement any recommended changes from the Oregon Model as necessary to achieve such a process.

IX. Conclusion

The jurisprudence of procedural due process protections afforded by the Fourteenth Amendment of the U.S. Constitution lacks any legal certainty. From the Supreme Court avoiding the question of property rights in continued higher education enrollment, to circuit splits on whether to define or assume the rights, it is understandable that colleges and universities might not know what protections to provide to their students. Even though the discernable standard only requires sufficient notice and a hearing in behavioral misconduct cases, it is advantageous for public colleges and universities to anticipate changes in case law and to provide additional procedural protections to their students, especially in the area of academic misconduct. This forward-looking planning helps institutions avoid the costly litigation of procedural due process claims from students, while also ensuring fundamental fairness for all students who encounter academic or behavior misconduct violations and their applicable procedures. The University of Oregon Model not only provides procedural protections far beyond constitutional due process protections, but it is also a model easily adaptable to any public college or university, regardless of staffing and funding limitations. In conclusion, students deserve robust procedural due process protections beyond the current standard, and public colleges and universities should look to the standards established at the University of Oregon as the model for how to implement such protections.