Students and Due Process in Higher Education: Of Interests and Procedures

Fernand N. Dutile
Notre Dame Law School, fernand.n.dutile.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship
Part of the Education Law Commons

Recommended Citation
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/482

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
I. INTRODUCTION

In the process of enforcing their academic and disciplinary standards, colleges and universities increasingly find themselves confronting the possibility and even the reality of litigation. At public institutions, of course, the strictures of the due process clause of the Fourteenth Amendment\(^1\) loom especially large. Meeting the complex needs of their institutions and students as well as the expectations of American courts presents an ongoing and daunting challenge to higher education personnel.

For both internal and external reasons, institutional dealings with aberrant students in public higher education has, over the years, developed on a dual track. Courts themselves have generally treated disciplinary action against students as subject to significant procedural due process although, in typical due process fashion, the quantum of process has varied according to the student interest threatened by institutional action. Academic sanctions have occasioned greater deference from the courts. In such situations, courts, though acknowledging that even here institutional action might be judicially trumped, have accorded universities great leeway in determining both the need for and the extent of any sanction.

This Article will discuss the (relatively few) building blocks provided by the U.S. Supreme Court for this area of the law. It will then assess the interests that come within the protection of due process and describe the procedures enforceable against state institutions.\(^2\)

---

\(^1\) "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, §1.

\(^2\) Since this Article addresses the requirements of due process, its lessons reflect the minimum that state institutions may provide their students. Of course, colleges and universities should seek to do the wise and the right, in addition to the compelled. For a "document that can serve as a starting point for code revisions at a broad range of campuses," see Gary Pavela, Applying the Power of Association on Campus: A Model Code of Student Conduct, 11 SYNTHESIS: LAW & POLICY IN HIGHER EDUC. 817 (2000) [hereinafter Pavela]. See also Gary Pavela, Applying the Power of Association on Campus: A Model Code of
II. THE SUPREME COURT'S GUIDELINES: GOSS, INGRAHAM, HOROWITZ, AND EWING

A. The Disciplinary Cases: Goss and Ingraham

The U.S. Supreme Court's first major pronouncement on the relationship of due process to institutional dealings with students occurred in "Goss v. Lopez." In Goss, students subjected to short suspensions for a variety of miscreance brought a class action against school officials, arguing that due process guaranteed hearings prior to such suspensions. The U.S. Supreme Court, in a five-to-four decision, agreed.

The Court found both a property interest and a liberty interest implicated by the suspensions. Noting that independent sources such as state statutes and rules usually create and define constitutionally protected property interests, the Court saw such an interest in Ohio's statutorily granted right to a free public education. The Court, observing that due process looks not to the weight of the interest but to its nature, declined to view the students' temporary banishment from school as "de minimis." Any property interest that is not "de minimis," the Court continued, garners due process protection. The liberty interest stemmed from the potential impact of the suspensions on the

---

"Academic Integrity, 24 J.C. & U.L. 97 (1997). Both the student conduct and the academic integrity codes "are designed to facilitate ethical dialogue in an educational setting, and emphasize clear language, informal procedures, and procedural fairness. They also incorporate significant student involvement in the disciplinary process, reflecting the view that the campus community is a contractual association, committed to participatory governance . . . ." Id. at 817.

3 See 419 U.S. 565 (1975).

4 See id. at 572-73 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)), See Tobias v. Univ. of Tex. at Arlington, 824 S.W.2d 201, 208 (Tex. App. 1991). Such an interest presupposes a claim of entitlement, not a mere abstract need or desire, or unilateral expectation. See id.

5 See 419 U.S. at 573 (citing OHIO REV. CODE ANN. § 3313.64 (1972)). In his dissent, Justice Powell argued that since the State of Ohio qualified the grant of a free education with a specific provision for such suspensions, the students had not lost anything beyond the package to which state law entitled them. See id. at 586-87.

6 See id. at 575.

7 The Court stressed that the nature of an interest, not its weight, controls whether constitutional protections under the Fourteenth Amendment apply. See id. at 575 (citing Roth, 408 U.S. at 570-71).

8 See id. at 576.
students’ reputation among teachers and other students and on later educational and employment opportunities.\footnote{See id. at 575.}

Critical to any understanding of the Court’s pronouncement, however, is the simplicity of the hearing required in such cases. Said the Court: “The fundamental requisite of due process is the opportunity to be heard.”\footnote{Id. at 579 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).} Accordingly, the Court loosely added, the students were entitled to “some kind of notice” and “some kind of hearing.”\footnote{Id. at 579 (emphasis in original).} Nonetheless, the requirements of due process are fully met in such cases when the disciplinarian informs the student, even orally, of the charge and, if the student denies the charge, provides an explanation of the evidence supporting it and an opportunity for presentation of the student’s version of the incident.\footnote{See id. at 581.} The Court pointed out that these requirements afford, “if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”\footnote{Id. at 583.} Adding to the simplicity, the Court made clear that there need be no delay between notice and hearing.\footnote{See id. at 582.} Interestingly, in this disciplinary case the Court emphasized a point thematic to academic situations—judicial restraint: “Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities.”\footnote{Id at 578 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).}

The Court, true to its word, focused on “fundamentally fair procedures to determine whether the misconduct has occurred.”\footnote{Id at 574 (citing Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (emphasis added)).} Although the word “hearing” conjures up in the popular mind a complex and lengthy panoply of procedural devices, it is instructive to focus on what \textit{Goss} does not require: the production of the evidence against the student; opportunity for cross-examination; legal or other representation for the student; transcript; or appeal. Some of these, though clearly not all, might become constitutionally requisite in cases threatening more serious consequences, for example suspensions for more than ten days or expulsions.\footnote{Id at 584.}
Curiously, though one might see excessive corporal punishment as one official sanction that might trigger still more due process protections than those outlined in *Goss*, the Court has exempted physical punishment in schools from any requirement of notice or a hearing. In *Ingraham v. Wright*, the Court concluded that the bodily restraint and "appreciable physical pain" entailed by corporal punishment implicated a liberty interest under the Fourteenth Amendment. Nonetheless, despite a record indicating that junior-high-school students had suffered "severe" and "exceptionally harsh" physical beatings, the Court found that the traditional common law constraints and remedies provided by the Florida scheme at issue adequately provided due process.

To assess what process was due, the Court looked through the prism constructed in *Mathews v. Eldridge*. *Mathews* set out three factors for such inquiries: 1) the nature of the private interest; 2) the risk of error and the probable value of additional or substitute procedures; and 3) the burden such procedures would present to the state, both in fiscal and administrative terms. With regard to the first, the students did have a strong interest in procedural safeguards to minimize the chance of wrongful punishment and to resolve disputes concerning justification. With regard to the second, the Court noted that the usual case reflected an insignificant risk of error since the teacher witnessed the conduct subject to punishment. And, in any event, the Florida arrangement at issue, especially in the context of the openness of the school environment, provided substantial protection against wrongfully imposed corporal punishment. With regard to the third, the Court found

---

19 *See* 430 U.S. 651 (1977).
20 *Id.* at 674. Although the record showed that corporal punishment kept one child out of school for several days, *see id.* at 657, the Court found no state created property interest at stake: Corporal punishment is designed to correct without any interruption of the student's education. That the occasional student might in fact be deprived of some educational time in no way supports the conclusion that the "practice" of corporal punishment deprives students of property under the Due Process Clause. *Id.* at 674 n.43.
21 *Id.* at 657.
22 *See id.* at 683. The Court also held that the Eighth Amendment's prohibition against cruel and unusual punishment applied only to those convicted of crime and not, therefore, to schoolchildren. *Id.* at 664.
24 *See Ingraham*, 430 U.S. at 676.
25 *See id.* at 676-78. Under that arrangement, the teacher and principal were required to exercise prudence and restraint in deciding upon corporal punishment. Moreover, should such punishment turn out to be excessive, the possibility of civil damages or criminal penalties arose. *See id.* at 676-77.
that imposing additional significant safeguards would intrude unduly upon the educational responsibility vested primarily in public-school officials.26

B. The Academic Cases: Horowitz and Ewing

The U.S. Supreme Court addressed academic sanctions in two separate cases, both involving medical students. In the first, Board of Curators of the University of Missouri v. Horowitz,27 the Court let stand a dismissal based on failure to meet institutional standards. A Council of Evaluation, a group of faculty members and students charged with assessing academic performance, recommended that Ms. Horowitz be placed on probation for her final year. This action followed expressions of dissatisfaction from several faculty members concerning her clinical performance during a pediatric rotation. After further unhappiness with her clinical achievement, the Council concluded that she should not graduate that year and moreover, absent “radical improvement,” should be dropped from the program.

She was allowed, as an “appeal,” to undergo oral and practical examinations under the supervision of seven practicing physicians. Her results disappointed yet again: Only two of the reviewers recommended timely graduation; three recommended continued probation; the remaining two urged immediate dismissal. As a result, the Council reaffirmed its position. At a subsequent meeting, the Council, noting that she had generated a “low-satisfactory” rating in a recent surgery rotation, concluded that, barring reports of radical improvement, she should not be allowed to re-enroll. At last, when still another negative report on a rotation appeared, the Council unanimously recommended that she be dropped from the program. The coordinating committee, a group of faculty members mandated to review the actions of the Council, affirmed, as did the dean. The student, who had not been allowed to appear before either the Council or the coordinating committee, then appealed to the provost for health services who, after reviewing the matter, sustained the dismissal.28

Alas, as the dissent pointed out, damages or criminal prosecution took place only after the injury and, in any event, provided no remedy for errors made in reasonable good faith. See id. at 694-95 (dissenting opinion).

26 See id. at 680, 682.
28 See id. at 80-82.
Assuming that she asserted a sufficient constitutional interest,29 the U.S. Supreme Court found no violation of her procedural due process rights. Indeed, she received more than the "careful and deliberate" assessment to which she was entitled.30 Her dismissal, the Court said, required no hearing before the institution's decision making body.31

Despite some unqualified statements that academic cases require no hearing,32 however, the Court's opinion is not without ambiguity on this point. At times the Court seems to be saying that Ms. Horowitz did not get, and was not entitled to, a hearing.33 At other times, the Court seems to be distinguishing not between having and not having a hearing, but between a formal hearing and an informal one,34 thus suggesting that she received the latter. Conceivably, the Court meant that she received an informal hearing, but was not entitled to one, thus making the latter statement a dictum.35

29 Ms. Horowitz had argued only a liberty interest, based upon the likely diminution of her educational or employment opportunities in the medical field. See id. at 82.
30 Id. at 85.
31 See id. at 86 n.3.
32 "[C]onsidering all relevant factors ... a hearing is not required by the Due Process Clause of the Fourteenth Amendment." Id. "[W]e decline to ... formalize the academic dismissal process by requiring a hearing." Id. at 90.
33 After noting that Goss required a hearing, though only an "informal give-and-take," the Court distinguished the disciplinary, involved in Goss, from the academic, involved in Horowitz. Id. at 85. The Court concluded that the latter called for "far less stringent procedures," thus suggesting that Ms. Horowitz was not entitled even to an informal hearing. Id. at 85. But why say all this if the Court felt she had gotten such a hearing?
34 "The Court of Appeals apparently read Goss as requiring some type of formal hearing at which respondent could defend her academic ability and performance. 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.'" Id. at 85-86 (quoting Goss, 419 U.S. at 584) (emphasis added). "These prior decisions of state and federal courts ... unanimously holding that formal hearings before decision making bodies need not be held in the case of academic dismissals, cannot be rejected lightly." Id. at 88. "Even in the context of a school disciplinary proceeding, however, the Court stopped short of requiring a formal hearing ...." Id. at 89 (emphasis added). "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact finding proceedings to which we have traditionally attached a full-hearing requirement." Id. at 89 (emphasis added).
35 The Court agreed with the district court that, in providing Ms. Horowitz the chance to be assessed by seven independent physicians, the institution afforded her more procedural due process than constitutionally required. See id. at 85. Justice Marshall, in his separate opinion in Horowitz, stated:

These meetings and letters plainly gave respondent all that Goss requires: several notices and explanations, and at least three opportunities 'to present her side of the story.' I do
Nonetheless, other courts have clearly read *Horowitz* to exempt academic matters from any requirement of a "hearing"—however that term might be understood.

Recognizing the precedential thrust of *Goss*, the Court labored to distinguish Ms. Horowitz's case as academic, rather than disciplinary; an academic case, the Court stressed, "calls for far less stringent procedural requirements . . . ." Many of the Court's observations on the reduced need for procedure in academic cases seem conclusory. For example, the Court asserts that *Goss*, dealing as it did with allegations of disruptive demonstrations, an attack on a police officer and vandalism, involved "factual conclusions." But clearly *Horowitz* too involved factual conclusions: the student's performance in a variety of contexts and, ultimately, her fitness for the practice of medicine. At another point the Court says, "A school is an academic institution, not a courtroom or administrative hearing room." But of course this obvious point applies as well to disciplinary matters.

At bottom, three rationales seemed to underlie the Court's efforts to distance *Horowitz* from *Goss*: 1) the flexibility needed by educational institutions to deal with a panoply of situations; 2) the supposed greater subjectivity involved in "academic" decisions, a subjectivity not given to.

---

not read the Court's opinion to disagree with this conclusion. Hence I do not understand why the Court indicates that even the 'informal give-and-take' mandated by *Goss* need not have been provided here. See id. at 99 (concurring and dissenting opinion) (citations omitted).

Justice Marshall refers to the Court's dicta "suggesting that respondent was entitled to even less procedural protection than she received," and "to the effect that even the minimum procedures required in *Goss* need not have been provided to respondent." See id. at 97, 99.

36 *See* text accompanying note 300.

37 *Horowitz* 435 U.S. at 86.

38 The Court referred to the "distinct differences between decisions to suspend or dismiss . . . for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter." *Id.* at 87. "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact finding proceedings to which we have traditionally attached a full-hearing requirement." *Id.* at 89.

39 *Id.* at 89.

40 *Id.* at 88.

41 "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Id.* at 86.
effective judicial review;\textsuperscript{42} and 3) the decreased adversariness typifying the teacher-student relationship in "academic" matters.\textsuperscript{43}

Although the issue had not been addressed by the Court of Appeals,\textsuperscript{44} the Court ruled that the student's substantive due process rights, even if applicable to this context, had not been violated; the conduct of the institution was neither arbitrary nor capricious. Here too the "academic" nature of the matter proved persuasive: "Courts are particularly ill-equipped to evaluate academic performance. The factors discussed ... with respect to procedural due process speak \textit{a fortiori} here and warn against any such judicial intrusion into academic decision making."\textsuperscript{45}

The Court made judicial attacks on "academic" decisions still more difficult in the second of the two cases, \textit{Regents of the University of Michigan v. Ewing}.\textsuperscript{46} Mr. Ewing found himself dismissed from Inteflex, a six-year program that allowed students to garner both an undergraduate and a medical degree in six years. In order to qualify for the final two years, students were required to take the NBME-Part I examination. On this examination, he earned the lowest score in the program's brief history. Denied re-admission and the opportunity to re-take the test, he sued, alleging a violation of substantive due process.\textsuperscript{47} Part of his case relied on the assertion that others had routinely been allowed to re-take the NBME.\textsuperscript{48} Echoing its thoughts in \textit{Horowitz}, the Court declined to decide whether Ewing's interest in continued enrollment in the Program constituted a property right entitled to substantive

\begin{itemize}
  \item \textsuperscript{42} Id. at 90 (holding that "academic" decisions are "more subjective and evaluative," and "not readily adapted to the procedural tools of judicial or administrative decision making."). See also \textit{Van de Zilver v. Rutgers Univ.}, 971 F. Supp. 925, 931 (D.N.J. 1997). "In \textit{Goss}, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact finding to call for a 'hearing' before the relevant school authority." \textit{Horowitz} 435 U.S. at 88-89.
  \item \textsuperscript{43} "Influencing this conclusion [in \textit{Goss}] was clearly the belief that disciplinary proceedings . . . may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context." \textit{Horowitz} 435 U.S. at 90.
  \item \textsuperscript{44} See \textit{id.} at 107 (Marshall, J., dissenting in part and concurring in part).
  \item \textsuperscript{45} Id. at 92.
  \item \textsuperscript{46} 474 U.S. 214 (1985).
  \item \textsuperscript{47} See \textit{id.} at 215-17. He also alleged that state law claims are irrelevant here. See \textit{id.} at 217.
  \item \textsuperscript{48} See \textit{id.} Indeed, of thirty-nine students, in both the Inteflex and the standard programs, who had failed the exam, all but Ewing were allowed to re-sit for the exam, many more than once. See \textit{id.} at 219. The Court rejoined that nineteen Inteflex students had been dismissed without any opportunity to take the exam. These data, said the Court, demonstrate the "insusceptibility of promotion decisions . . . to rigorous judicial review." \textit{Id.} at 228 n.14.
\end{itemize}
protection under the Fourteenth Amendment. But assuming such a right, the Court unanimously held that it had not been violated: The institution’s action was not arbitrary, but rather had been taken conscientiously and with careful deliberation. The decision makers had considered his entire record, including his “singularly low score” on the NMBE.

Emphasizing a “narrow avenue” for judicial review of the substance of “academic” decisions, the Court made clear that federal judges should eschew second-guessing the decision makers in such 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.

Two factors add special interest to the Court’s approach in Ewing. First, the Court seemed very mindful that greater willingness to take on such cases could inundate the Court with matters brought to it from America’s educational arena. The judiciary, the Court noted, is ill-suited to “evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.”

Second, and related, the Court stressed its concern for the academic freedom of such institutions. Said the Court: “Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms’ of a university.” Whether a student like Mr. Ewing remained at the medical school thus implicated that institution’s academic freedom, a concept

---

49 All nine members of the promotion and review board voted to dismiss him. At his request, the board reconvened, but reached the same result. The executive committee of the medical school, after providing him an opportunity to appear before it, unanimously denied his appeal for a retake. The following year, and to no avail, he twice appeared before the executive committee. See id. at 216-17.

50 Id. at 225 and 228. Aside from his dismal performance on the NMBE, Ewing’s record revealed marginal grades, seven incompletes, and a number of make-up exams, some occurring even as he carried a reduced course load. See id. at 218-19.

51 Id. at 227.

52 See id. at 225 (citations omitted).

53 Id. at 226 (emphasis added).

54 Id. at 226 n.12 (citing Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting Sweezy v. N.H., 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (internal quotations omitted)).
of "special concern" to the First Amendment, and gave the institution a constitutional interest to pit against the student's. Ironically perhaps, in Ewing, the institution's constitutional interest trumped the student's.

III. THE INTERESTS PROTECTED

Students adversely affected by university decisions have invoked both procedural and substantive due process. With regard to procedural due process, "little theoretical complaint exists about a court's active role in reviewing the fairness of a governmental decision-making process as the judiciary seems uniquely suited for such a task." Substantive challenges, which "strike at the decision itself and not at the procedures afforded," call forth more controversy since, after all, the Due Process Clause itself targets process. Justice White has observed that "[a]lthough the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history. . . ." Professor Tribe has alluded to the "textual gymnastics arguably necessary to find protection of substantive rights in a provision whose words seem most apparently concerned with process." Nonetheless, the words "of law" do follow the phrase "due process" and, in any event, the notion of substantive due process serves a practical purpose in light of the prevailing assumption that some actions transcend "any proper sphere of governmental activity." Despite the occasional suggestion that substantive due process is an oxymoron, substantive due process remains the principal device for enforcing individual rights against state encroachment. Furthermore, within this arena, the Court's ability to assess the

55 Id. at 226.
57 Brown v. Univ. of Tex. Health Ctr. at Tyler, 957 S.W.2d 911, 916 (1997).
59 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, 1317 (3d ed. 2000). See also NOWAK & ROTUNDA, supra note 56, at 347 ("Although the effect of a substantive due process decision is readily apparent, the basis on which a court justifiably can reach such a decision has been a source of continuing controversy.").
60 TRIBE, supra note 59, at 1333.
61 NOWAK & ROTUNDA, supra note 56, at 347. With regard to practicality, Professor Black called substantive due process "an invention that now and then works a little bit in practice, but does not work intellectually." CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED 105-06 (1997), quoted in TRIBE, supra note 59, at 1317.
constitutionality of federal and state legislative and executive action draws greater criticism than does substantive review under specific provisions of, or amendments to, the Constitution.\textsuperscript{63}

In any event, the language of the Clause makes clear that claims under either procedural or substantive due process require that life, liberty or property be at stake.\textsuperscript{64} Clearly, not all interests a citizen might claim fall under these rubrics and, despite a "virtually all-encompassing" interpretation in earlier cases, "\textit{t}oday these concepts are being defined so as to exclude a variety of personal interests from their scope and protection. . . ."\textsuperscript{65}

The Supreme Court made clear in \textit{Goss} that a student attending public school under state entitlement enjoys both a property interest and a liberty interest justifying procedural protection under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{66} The Court made clear in \textit{Ingraham} that a public-school student facing the bodily restraint and pain of corporal punishment enjoys a liberty interest but, since no loss of school time usually depends on the matter, no property right is at stake.\textsuperscript{67} Neither of these cases, of course, provides sure guidance with regard to property or liberty interests in higher education. The nature of the relationship between the student and the college or university differs markedly from that between a K-12 student and the public school, including with regard to the nature of any state guarantee of an education.

Both \textit{Horowitz} and \textit{Ewing}, to be sure, did involve higher education. But in \textit{Horowitz}, in which the student argued only a liberty interest, the Court avoided the issue by assuming she had a constitutionally protectible interest.\textsuperscript{68} With regard to the

\textsuperscript{63} \textit{See} NOWAK \& ROTUNDA, \textit{supra} note 56, at 347.


\textsuperscript{65} NOWAK \& ROTUNDA, \textit{supra} note 56, at 347. "The distinction is now between life, recognized liberty interests and property 'entitlements' as opposed to unprotected interests or 'mere expectations.'" \textit{Id.}

\textsuperscript{66} \textit{See} text accompanying notes 4 and 5.

\textsuperscript{67} \textit{See} note 20 and text accompanying note 20.

\textsuperscript{68} \textit{See} text accompanying note 29.
still trickier notion of a sufficient interest under substantive due process, the Court, in both *Horowitz* and *Ewing*, merely assumed such an interest in deciding that, in any event, the students' rights had not been violated.\(^6\) In the context of college and university disputes, therefore, other courts have been left to speculate with regard to the nature and extent of protectible interests under the Due Process Clause. Not surprisingly, the results have been mixed and unpredictable.

### A. Property Interests

Property interests under the Fourteenth Amendment presume more than an expectancy, an abstract need, or a desire; there must be a claim of entitlement.\(^7\) Such interests arise not from the Constitution itself, but rather from an independent source such as state law.\(^8\) In the context of higher education, the threatened loss of an already-awarded degree presents the best case for procedural protection as “property” under the Due Process Clause.\(^9\) Dismissals and similar adverse determinations, whether academic or disciplinary, also would seem to present strong cases for such protection.\(^10\) Even here, however, certainty proves elusive: “Courts are split on the question whether a graduate level student has a constitutionally protected interest in completing his education.”\(^11\) Still, in *Harris v. Blake*,\(^2\) the Tenth Circuit referred to the graduate student’s “property interest in continued

\(^6\) See text accompanying note 45.


\(^8\) See Roth, 408 U.S. at 577; Jenkins, 967 F. Supp. at 281; Qyjt v. Lin, 932 F. Supp. 1100, 1108 (N.D. Ill. 1997); Siblerud v. Colo. State Bd. of Agric., 896 F. Supp. 1506, 1512 (D. Colo. 1995) (*dictum*). In *Qyjt*, the court found that Illinois law gave the student a contractual right to a degree. It went on to hold, however, that any random and unauthorized conduct by state actors in this case did not violate due process because Illinois law provided a post-deprivation remedy. *See* 932 F. Supp. at 1108.


\(^11\) Jenkins, 967 F. Supp. at 282.

\(^2\) *See* 798 F.2d 419 (10th Cir. 1986).
enrollment.\textsuperscript{76} In \textit{Herbert v. Reinstein},\textsuperscript{77} a federal district court clothed a suspended law student with such an interest: "Once a state undertakes to provide educational services, students attending the school acquire a constitutionally protected property interest in obtaining an education."\textsuperscript{78} The Ninth Circuit has deemed a medical residency a property interest worthy of constitutional protection.\textsuperscript{79} Indeed, even academic credits, since they constitute the building blocks of academic degrees, may themselves be property under the Fourteenth Amendment.\textsuperscript{80}

A few courts have been willing to find protected interests elsewhere. In \textit{Evans v. West Virginia Board of Regents},\textsuperscript{81} a former student applied for readmission a mere two months following the expiration of the leave of absence he had taken after two-and-a-half years of study. The court found a property interest in the completion of his medical education sufficient to justify imposition of "minimal" due process protection on the review of his application by the Board of Regents.\textsuperscript{82} In 1991 the Second Circuit invested a student with the right to good-faith dealing by looking to New York's recognition of an implied contract between students and their college or university: "Such an implied contract, recognized under state law, provides the basis for a property interest that would be entitled to constitutional protection."\textsuperscript{83} Similarly, in \textit{Ikpeazu v. University of Nebraska},\textsuperscript{84} the Eighth Circuit indicated its openness to bringing fair grading within the category of interests protected under the procedural mantle of the Due Process Clause: Here, the University of Nebraska promulgated a publication setting forth a grievance procedure for student appeals of allegedly capricious or improper grades. This procedure does appear to imply a contractual expectation in students that they will not be graded capriciously, and thus


\textsuperscript{78} \textit{See} Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991).

\textsuperscript{79} \textit{See} Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361 (9th Cir. 1976).

\textsuperscript{80} \textit{See} Merrow v. Goldberg, 672 F. Supp. 766, 771 (D. Vt. 1987) ("It seems clear... that public college and university graduates have protected property interests in their degrees. Since degrees are awarded as the result of accumulated credits, the parties agree that credits should be entitled to protection similar to that afforded degrees.").
to create a cognizable property right in nonarbitrary grading. That the publication only sets forth a procedure for appealing a grade, and not an express promise that grading shall not be arbitrary, arguably should not alter our conclusion.\(^8^5\)

One court brought a student's good standing under the umbrella of the Due Process Clause, though deeming it immaterial whether that interest be labeled "property" or "liberty."\(^8^6\) In 1991, in Ezekwo v. NYC Health & Hospitals Ass'n,\(^8^7\) the Second Circuit confirmed an ophthalmology resident's property interest in the position of "Chief Resident, a prestigious position normally rotated among third-year residents on an alphabetical basis."\(^8^8\) In doing so, however, the court assessed the interest largely from the perspective of an employee–as opposed to a student.\(^8^9\) An athletic scholarship, granted under promises of renewal upon satisfaction of specified conditions, also engenders the type of entitlement protected by due process.\(^9^0\)

Despite such pronouncements, courts have often rejected assertions of property interests in the higher education context. In some courts, even the interest in continued enrollment has failed to garner constitutional protection.\(^9^1\) Still more easily, obviously, can courts resist constitutional protection in connection with

---

\(^8^5\) Id. at 253.
\(^8^7\) 940 F.2d 775 (2d Cir. 1991).
\(^8^8\) See id. at 782, 783. Two weeks before her scheduled time to serve as chief resident, her professors, apparently irked by her complaints, met to discuss her assumption of the position. That very day came the decision to supplant the rotational system with a merit-based system. See id. at 778-79.
\(^8^9\) See id. at 782-83. The court's conclusion occasioned a vigorous disagreement: "The majority points to no court which has yet held that such an interest rises to the level of a protectible property interest." Id. at 789 (concurring and dissenting opinion). Quoting the Supreme Court's pronouncement in Bishop v. Wood, 426 U.S. 341, 349 (1976), that federal courts cannot review "the multitude of personnel decisions that are made daily by public agencies," Judge Timbers argued that employment results short of termination implicate no property rights. Id. Recognizing the academic aspect of the case, he stressed that finding property rights in every change in academic policy would instill timidity in administrators of educational institutions. Id.
probation, a "suspended suspension" or one's interest in a particular program within the institution. Although a student accepted for admission may, prior to matriculation, carry a "slight" property interest, possible admission into the institution, at least for graduate or professional education, presents a mere expectancy not entitled to constitutional protection. In Tobin v. University of Maine, the plaintiff, a law-school applicant, sought to avoid this problem by framing his benefit as an entitlement to professional education at reduced tuition, available to him as a Maine resident. The court would have none of it:

[T]he reduced tuition rates are a benefit enjoyed by in-state residents who have been deemed qualified for admission and have been so admitted. Indeed, several courts have recognized that reduced tuition rates for in-state residents give rise to a property right, but each did so in the context of matriculated students who wished to change their status from nonresident to resident for tuition purposes.

---

92 See Szefner v. Univ. of Alaska, 944 P.2d 481, 486-87 (Alaska 1997) (recognizing, in such cases, therefore, not even minimal procedures required).
94 See Paoli v. Univ. of Del., 695 F. Supp. 171, 173 (D. Del. 1988). See Hennessy v. City of Melrose, 194 F.3d 237, 249-50 (1st Cir. 1999) (holding that a claim to a constitutionally protected property right "especially tenuous because Salem State did not expel the appellant, but merely precluded him from continuing in a particular program."). In "an abundance of caution," however, the court assumed such an interest on its way to denying relief. Id.
96 See Tobin v. Univ. of Me., 59 F. Supp. 2d 87, 90 (D. Me. 1999); Szefner, 944 P.2d at 486. But see Hall v. Univ. of Minn., 530 F. Supp. 104 (D. Minn. 1982). In Hall, the plaintiff, an athlete who aspired to play professionally, was denied admission to a baccalaureate program in the University after completing a non-baccalaureate program. His grades were good and no similarly situated student had been rejected. The court noted that, because the plaintiff had lost a scholarship for a year, the case smacked more of an expulsion case than a non-admission case; accordingly, the plaintiff had a constitutionally protected property interest. See id. at 107-08. Once an application for admission has been accepted, however, revocation of that acceptance might implicate a property interest. See Martin, 699 F.2d at 389.
97 59 F. Supp. 2d at 87.
98 Id. at 91 (emphasis in original).
Interests in readmission have met the same fate.Rejected as well have been assertions of constitutionally protected interests concerning grades. Not surprisingly, one's interest in a proposed theme for an oral examination does not rise to a constitutionally protected level. Imposition upon a student, as the result of a disciplinary proceeding, of a contract whose violation could yield expulsion is not itself an expulsion for these purposes. A graduate student also employed to teach at the university has no property interest in a particular course assignment, at least absent some contractual or other guarantee. Although student-athletes may have a property interest in the scholarship funds promised in their agreement with the college or university, they hold no property interest in actually participating in athletics at the institution—at least unless the agreement so specifies. Finally, courts have disagreed regarding whether the failure of an institution to adhere to its own rules implicates a constitutionally protected interest.

99 See Anderson v. Univ. of Wis., 665 F. Supp. 1372, 1396 (W.D. Wis. 1987). The court in Waller v. Southern Illinois University, 125 F.3d 541 (7th Cir. 1997), strongly doubted that one's interest in being considered for readmission warranted protection under the Due Process Clause, but assumed as much in deciding that in any event the student's rights were not violated. Of course, once the student is granted admission or readmission, a public institution violating the resulting contract might well transgress upon a constitutionally protected interest. See id at 541.


101 See Ndefru v. Sherwood, No. 93-4127-SAC, 1993 U.S. Dist. LEXIS 18621 (D. Kan. Dec. 29, 1993). In Lightsey v. King, 567 F. Supp. 645 (E.D.N.Y. 1983), the court declined to decide whether the student, who had been acquitted of an honor code violation, had a property interest at stake when the institution nonetheless refused to change his grade of "zero" in the course, as the result of which he could not take a promotional examination. The court did conclude he had a liberty interest. See id at 648.


105 Compare Skehan v. Bd. of Trustees, 501 F.2d 31, 38-39 (3d Cir. 1974) (holding the right to have published procedures applied has been deemed a property interest that must be honored) with Bergstrom v. Buettner, 697 F. Supp. 1098, 1101 (D.N.D. 1987) (holding that medical school's regulation stating that written grading criteria would issue on the first day of a rotation did not rise to level of constitutionally protected interest). Cf Carboni v. Meldrum, 949 F. Supp. 427, 437 (W.D. Va. 1996) ("At best, Plaintiff's claims lead to a conclusion that defendants may have violated her procedural rights as guaranteed by state law. Such violations do not give rise to federal constitutional concern.").
B. Liberty Interests

A strong case for asserting a liberty interest arises in connection with an expulsion. In *Donohue v. Baker*, for example, the federal district court observed: "It is well settled that an expulsion from college is a stigmatizing event which implicates a student's protected liberty interest." To be sure, in *Donohue* the institution expelled the plaintiff following his conviction for rape, but the court did not condition its statement on that specific. So too, in *Nickerson v. University of Alaska Anchorage*, a state court deemed sufficiently stigmatizing to trigger a liberty interest the student's dismissal from a graduate program for hostile, intimidating and unprofessional conduct. Suspension too raises a liberty interest. In *Thomas v. Gee*, the Southern District of Ohio concluded that the freedom to pursue one's education free from governmental racial discrimination did constitute a liberty interest within the protection of the Fourteenth Amendment. Since a liberty interest does arise whenever "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," a student charged with cheating may rightfully claim such an interest. A Michigan federal court held that one's interest in continued good standing at the institution also creates a constitutionally protected interest, but refused to characterize that interest more specifically as either "property" or "liberty."

---


108 Id. at 145; accord Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) (finding that expulsion or suspension is protected); Hart v. Ferris State Coll., 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) (holding suspension or expulsion protected); Gagne v. Trustees of Ind. Univ., 692 N.E.2d 489, 493 (Ind. Ct. App. 1998); Univ. of Houston v. Sabeti, 676 S.W.2d 685, 687-88 (Tex. App. 1984) (citing *Goss*). See also Thomas v. Gee, 850 F. Supp. 665, 676 (S.D. Ohio 1994) (stating that student's only liberty interest in continued enrollment was right not to be discriminated against because of her race).


110 See id. at 52.


113 See id. at 676.


Other judicial pronouncements have been less generous in finding a liberty interest in continued enrollment or in graduation.\(^{116}\) In 1976, for example, the Ninth Circuit refused to find a liberty interest at stake in the termination of a resident physician in pathology due to charges of an inability to perform satisfactorily.\(^{117}\) *A fortiori*, one threatened with probation has no liberty interest at stake; some interruption of the student’s education must be in play.\(^{118}\) The Second Circuit found no liberty interest implicated when faculty members entered allegedly false, misleading, and stigmatizing “anecdotal records” that did not constitute part of the official record; the student would have to show dissemination to the public.\(^{119}\) In any event, defamation alone, unaccompanied by a change in student status or damage to reputation caused by publicizing the defamation, does not rise (or lower!) to the level of stigma.\(^{120}\)

Applications for admission create no liberty interest. In *Tobin*,\(^{121}\) a sixty-five-year-old applicant was denied admission to law school. Said the court:

Plaintiff’s allegations do not implicate a liberty interest. . . . He does not allege that any conduct on the part of the Law School affected any other applications he may have submitted, or intends to submit, to other law schools. Furthermore, he does not allege that he is foreclosed from pursuing a legal education and career.\(^{122}\)

Of course, one has no liberty interest involved in the rejection of a proposed theme for an oral examination.\(^{123}\) The mere non-renewal of a graduate student’s teaching appointment, unaccompanied by any stigma resulting from charges

---


\(^{117}\) See Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361 (9th Cir. 1976). Plaintiff did have a property interest. See text accompanying note 79.

\(^{118}\) See Szejner v. Univ. of Alaska, 944 P.2d 481, 486-87 (Alaska 1997).

\(^{119}\) Clements v. Nassau County, 835 F.2d 1000, 1006 (2d Cir. 1987).


\(^{121}\) 59 F. Supp. 2d 87 (D. Me. 1999) (memorandum opinion).

\(^{122}\) Id. at 93. Accord *Szejner*, 944 P.2d at 486 (holding no liberty interest in admission absent underlying charges or publicizing reasons for denial of admission).

publicized by the employer, implicates no liberty interest. Nor does one have such an interest in pursuing a career in college football.

Many courts at all levels, however, have avoided deciding the crucial issue of when an adverse academic or disciplinary decision on the part of university officials implicates a property or liberty interest. In both Horowitz and Ewing the Supreme Court itself, whose principal role it is to guide lower courts through the thickets of constitutional law, assumed without deciding that the plaintiffs asserted a sufficient interest to justify a judicial assessment of the decisional processes of the educational institutions involved. This failure of guidance, on a clearly threshold issue, may well have spawned, or at least lengthened, litigation against universities and others. Predictably, lower courts themselves, taking their cues (or more precisely their lack thereof) from the Supreme Court, have often assumed the interest and gone on to review the decision-making process. Several federal courts of appeals have assumed *arguendo* that a public-university student facing dismissal properly asserts a protectible interest. Other courts have assumed that students have such interests in graduating, in continuing their education, in remaining in a particular program within the university, in becoming enrolled once accepted for


123 See Hennessy v. City of Melrose, 194 F.3d 237, 249 (1st Cir. 1999) ("The Supreme Court has not yet decided whether a student at a state university has a constitutionally protected property interest in continued enrollment."); Megenity v. Stenger, 27 F.3d 1120, 1125 (6th Cir. 1994) ("We see no need . . . to rush in where the Supreme Court feared to tread in *Ewing*."); Mauriello v. Univ. of Med. and Dentistry of N.J., 781 F.2d 46, 52 (3d Cir. 1986) ("[F]ollowing the lead of the Supreme Court, we will assume *arguendo* that a constitutional right is implicated."); Schuler v. Univ. of Minn., 788 F.2d 510, 515 (8th Cir. 1986) ("*Horowitz* left open the question of whether a university student subject to academic dismissal may maintain a cause of action for the violation of his or her right to substantive due process."). *See also* Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 73 (4th Cir. 1983).


125 See Disesa v. St. Louis Cmty. Coll., 79 F.3d 92, 95 (8th Cir. 1996); Megenity, 27 F.3d at 1124; Schuler, 788 F.2d at 513 n.6; Mauriello, 781 F.2d at 47; Hines v. Rinker, 667 F.2d 699, 703 (8th Cir. 1981).


128 See Hennessy, 194 F.3d at 250; Van de Zilver v. Rutgers Univ., 971 F. Supp. 925, 932 (D.N.J.)
admission, in receiving passing grades and access to transcripts, and even in being considered for readmission. To be sure, such assumptions get voiced in varying degrees of skepticism, with courts sometimes intimating how they might rule, if pressed, on the issue of protectible interests. Finally, although the point has not been stressed in the cases, the student claiming a liberty interest may have to prove more than the stigma or other disability foreclosing educational or employment opportunities; a showing that the student had no opportunity to clear her name before the appropriate decision maker may be required.

C. Interests under substantive due process

Does substantive due process perchance require a different, or narrower, kind of underlying interest than those qualifying for protection under procedural due process? In Ewing, Justice Powell argued in his concurrence that the "property" sufficient for review procedurally under the clause would not do for substantive review: "While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution." Ewing's interest in continued enrollment, Justice Powell continued, "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." Consistent with this view, a federal district court rejected the
argument that substantive due process protected a student's property interest in continued enrollment at a state medical school:

Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden-variety issues of common law contract. Its concerns are far narrower, but at the same time, far more important. Substantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental.139

The same court, acting within this principle, concluded that the freedom to pursue an education without governmental racial discrimination did constitute a liberty interest within the protection of substantive due process.140

Other courts also have suggested a meaningful distinction between interests protected by substantive due process and those protected by procedural due process.141 Mauriello v. University of Medicine and Dentistry of New Jersey142 involved the dismissal of a doctoral student for, inter alia, doing poor research. After dealing with the procedural due process issue, the court observed: "We share Justice Powell's doubt about the existence of such a substantive due process right in the circumstances here. . . ."143 Still other courts seem to have made little of this distinction. In Hurst v. University of Washington,144 for example, the court noted that the plaintiff "arguably can state a substantive due process claim if his failing grades prevented his graduation or led to his academic dismissal."145 This type of talk, of course, reflects that imbuing procedural due process cases.146

In discussing substantive due process, it is crucial to distinguish the interest required—life, liberty, or property—from the criterion for its violation—arbitrariness or capriciousness. If alleging arbitrary and capricious decision making were itself


140 See id. at 676. This, added the court, presented one of the situations in which the Due Process Clause overlapped the equal protection clause. See id.


142 781 F.2d 46 (3d Cir. 1986).

143 Id. at 52. See also Schuler v. Univ. of Minn., 788 F.2d 510, 515 (8th Cir. 1986); Thomas, 850 F. Supp. at 674 (holding state-created contract right not enough to trigger substantive due process).


145 Id. at *6.

146 See text accompanying note 108 et seq.
enough, then any loss—a three-minute banishment from the recreation room—could form the basis of federal litigation under substantive due process. Thus could substantive due process, contrary to Justice Powell's insistence, become, at least in one sense, more encompassing than procedural due process.

Alas, the Supreme Court has failed to pitch in meaningfully; it has disdained deciding not only whether substantive due process calls for a different or narrower interest in the higher education context, but also whether students in public higher education have either a procedural or a substantive due process interest at stake in their continued enrollment.147

The language and judicial history of the Due Process Clause reflect a dilemma: On the one hand, the Due Process Clause seems so procedurally oriented that one should limit its substantive impact by limiting the interests substantively protected; on the other hand, the clause mentions “liberty and property” but once, with no suggestion that each of these terms has dual meanings, depending on the aspect of due process under consideration.

For purposes of the higher education context, happily, results will not likely turn on any such distinction. Any interest that would fall within Justice Powell's interpretation of liberty or property for purposes of substantive due process a fortiori would qualify for procedural due process. Moreover, as we shall see,148 whenever the criterion for a violation of substantive due process would be met in the higher educational context, almost certainly too would that for a violation of procedural due process.

IV. THE PROCESS REQUIRED

The Supreme Court's “big four” made clear that disciplinary cases warrant an adjudication different from that in academic ones.149 We turn now to consider how lower courts have dealt with this prescription. Of course, the “big four,” while long on generalities, came up quite short on specifics. The two disciplinary cases,

---

147 See text accompanying note 68 et seq. See NOWAK & ROTUNDA, supra note 56, at 541 (making no distinction between the nature of a property interest qualifying for protection under procedural due process and that qualifying for protection under substantive due process). See also id. at 579 n.114 (discussing Ewing). Cf. Akins v. Bd. of Governors of State Coll. and Univ., 840 F.2d 1371, 1376-77 (7th Cir. 1988).

148 See text accompanying note 318.

Goss and Ingraham, dealt with K-12 education and not higher education. Moreover, the short suspension at issue in Goss mandated only the most summary of hearings; the corporal punishment in Ingraham required no hearing whatsoever. These cases, therefore, told us little of the procedures constitutionally requisite when colleges and universities hand down suspensions, especially long ones, or expulsions in disciplinary cases.\(^{150}\)

Both of the academic cases among the "big four" did involve higher education and therefore provided more help, although the criteria of constitutionality emanating from them left many questions. Taken together, the four cases seem to teach that, when liberty or property is at stake, procedural due process requires a hearing for disciplinary cases. Procedural due process requires no hearing for academic cases, though the decision must be "careful and deliberate."\(^{151}\) Substantive due process, even if applicable to the higher education context, largely overlaps the procedural requirement, decreeing that the result in academic matters be reached conscientiously and with careful deliberation; institutional judgments will not be overturned unless they represent "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."\(^{152}\)

A. Disciplinary

Although fundamental fairness remains crucial, the demands of due process with regard to disciplinary procedures are flexible.\(^{153}\) In Ingraham, the U.S. Supreme Court noted that the extent of procedural protection in disciplinary cases depends upon three variables: 1) the nature of the interest protected; 2) the danger of error and the benefit of additional or other procedures; and 3) the burden on the government such procedures would present.\(^{154}\) Lower courts have echoed each

\(^{150}\) See Bleicker v. Bd. of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1387 (S.D. Ohio 1980) (requiring more formal procedures for suspension for several months and perhaps permanently than does a short high school suspension).

\(^{151}\) See Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 85 (1978).


specific of this pronouncement.155 In Donohue v. Baker,156 for example, the court, assessing whether a student charged with rape had the right to cross-examine witnesses against him, said: "The opportunity to make two statements to a disciplinary panel might suffice in the case of alleged misconduct that could result in a short suspension from school. But the plaintiff here faced expulsion and procedures necessarily had to take on a higher level of formality to ensure fairness."157 In Martin v. Helstad,158 an applicant's acceptance to law school was revoked due to his omitting to note on his application a conviction for securities fraud. The Seventh Circuit concluded that notice of the problem and the opportunity to explain the lapse satisfied due process; no oral, personal exchange was needed. The court found negligible both the risk of erroneous determination and any increased reliability that might flow from additional procedures. In Osteen v. Henley,159 an expelled student argued that due process entitled him to representation by counsel at his disciplinary proceeding. The same court, though recognizing the student's large stake in this expulsion case, cited the inordinate cost to the university that would result from "judicializing disciplinary proceedings."160

Nonetheless, elaborating upon the fundamental principles distilled from the "big four" remains difficult. The difficulty is compounded by the fact that in individual cases courts often tell us that the procedures followed by the institution satisfied due process, but do not specify which, singly or in combination, were essential. Many situations reaching the courts involve penalties much more serious than that involved in Goss and, accordingly, become candidates for more extensive protections.161

Process Clause). Such concerns affect academic cases too. See Ezekwo v. NYC Health and Hosp. Corp., 940 F.2d 775, 785 (2d Cir. 1991) (holding that the financial and administrative burden that [notice] imposes would be minimal). See id. at 790 (dissenting opinion) (plaintiff had smaller interest at stake than Horowitz and therefore was due less process); Quyjt v. Lin, 932 F. Supp. 1100, 1106 (N.D. Ill. 1996).


156 976 F. Supp. at 136.

157 Id. at 147.

158 699 F.2d at 387.

159 13 F.3d 221.

160 13 F.3d at 226. The court also found it relatively unlikely that the university would unjustly expel the student. Id.

Whatever the threatened sanctions, though, college and university disciplinary proceedings, while they require more process than academic cases, are not criminal trials. Students, therefore, are not entitled to all the procedural safeguards accorded criminal defendants. (One court put it starkly: "[P]etitioner’s assignments of error . . . amount only to a complaint that he did not receive the same ‘due process’ during his disciplinary hearing that he would have received in a trial for treason . . . .") This policy finds support not only in the idea that less is at risk in disciplinary matters than in criminal cases, but also in the notion that non-adversarial settings that stress the educational functions of disciplinary procedures best serve the student interest. The Supreme Court itself stated in Goss, "[F]urther formalizing the suspension process and escalating its . . . adversary nature may . . . destroy its effectiveness as part of the teaching process." (One could wonder, however, how much of the educational aspect remains when a student at the college or university level faces expulsion—such situations reek of adversariness). Moreover, the Due Process Clause does not require that disciplinary proceedings be ideal, or even that they be the best possible, but that they be fair. Even in relatively serious disciplinary cases, therefore, an “informal give-and-take” between student and university decision maker may suffice; a “full-dress judicial hearing” is not required.

---


164 North, 332 S.E.2d at 144.


167 See Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988).


169 See Gorman, 837 F.2d at 16 (1st Cir. 1988) (holding that hearings need not mirror common law trials); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987); Lipsett v. Univ. of P. R., 637 F. Supp. 789, 807 (D.P.R. 1986), rev’d on other grounds, 864 F.2d 881 (1st Cir. 1988) (citing Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 75 (4th Cir. 1983)); Gagne, 692 N.E.2d at 494; Henderson State Univ. v. Spadoni, 848 S.W.2d 951, 953 (Ark. Ct. App. 1993). In Henderson, interestingly, the student sought a less formal procedure. He argued that restricting witnesses to answering questions rather than allowing them to say what they wanted violated procedural due process. The court rejected the argument, noting that the question-and-answer format typified judicial proceedings. Id. at 954.
In serious disciplinary cases, at least the basic protections called for in Goss will apply: notice and, in the event of a denial by the student, a statement of the evidence relied upon, and a chance to rebut. Beyond these, courts have been understandably less sure and, accordingly, less consistent.

The very word “notice” implies specificity sufficient to inform the student of the charge, including perhaps any lesser charges that might be substituted, and officials conducting a hearing have the discretion to limit the hearing to relevant issues. See Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993).

Proof of actual notice may be inferred. In Adibi-Sadeh v. Bee County College, 454 F. Supp. 552, 558 (S.D. Tex. 1978), college officials sent notice of disruption charges to ninety-five Iranian students through certified mail. Though some of these letters were returned undelivered, the court found “fair and adequate” notice in light of the fact that copies of the letters were hand-delivered to many of the students, that notices were posted around campus, that the campus was relatively small, and that it was reasonable to assume that the Iranian community on campus was closely knit. Id. at 555-56.

A different but related problem of “notice” arises with regard to the need to inform students beforehand of what conduct is prohibited. Of course, the proscriptions of educational institutions need not manifest the same definiteness as criminal statutes. See Woodis v. Westark Cmty. Coll., 160 F.3d 435, 438 (8th Cir. 1998); Shamloo v. Miss. State Bd. of Trustees, 620 F.2d 516, 522 (5th Cir. 1980). Nonetheless, such proscriptions must avoid both vagueness and overbreadth. See Tigrett v. Rector of Univ. of Va., 97 F. Supp. 2d 752, 761 (W.D. Va. 2000); Reliford v. Univ. of Akron, 610 N.E.2d 521, 522 (Ohio Ct. App. 1991). Such a regulation is unconstitutionally vague if people of common intelligence must guess at its meaning and differ as to its applicability. Predictably, regulations regarding speech require more specificity than do others. See Shamloo, 620 F.2d at 523-24 (holding that “activities of ‘wholesome’ nature” too vague).
the regulations underlying the charge.\textsuperscript{175} Although notice, at least objectively considered,\textsuperscript{176} must be "meaningful,"\textsuperscript{177} it need not include, for example, specific code numbers.\textsuperscript{177} Though oral notice might often suffice,\textsuperscript{178} expulsion cases may require formal written notice.\textsuperscript{179}

In a seminal case regarding due process in disciplinary proceedings, \textit{Dixon v. Alabama State Board of Education},\textsuperscript{180} the Fifth Circuit stated that the threatened expulsion required notice not only of the charges, but also of the names of witnesses and, in oral or written form, their expected testimony.\textsuperscript{181} Later, however, in \textit{Nash v. Auburn University},\textsuperscript{182} the Eleventh Circuit, successor to part of the Fifth Circuit, held that a student in a disciplinary hearing had no right even to a summary of the \textit{expected} adverse testimony. The court distinguished \textit{Dixon}, pointing out that the student in \textit{Nash} attended the hearing at which the witnesses testified.\textsuperscript{183}

Perhaps because the situation arises rarely or because of concerns regarding over-formalization of disciplinary proceedings, virtually no litigation has addressed what would be called, in criminal law, problems of "misjoinder." Presumably there exist some limits, even in college and university proceedings, to the consolidation of charges—perhaps "manifest prejudice," but those limits have remained largely unstated. In \textit{Turof v. Kibbee},\textsuperscript{184} a federal district court provided some guidance in

---


\textsuperscript{177} \textit{Tigrett}, 97 F. Supp. 2d at 759.

\textsuperscript{178} See Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 930 (Tex. 1995) (\textit{dictum}).

\textsuperscript{179} See North v. W. Va. Bd. of Regents, 332 S.E.2d 141, 143 (W. Va. 1985). In Baretta v. State, 533 So. 2d 1037, 1040 (La. Ct. App. 1988), the court, while assuming the necessity of written notice in expulsion cases, found it sufficient that the student's attorney received written notice and student received actual notice of the particulars of the hearing.

\textsuperscript{180} 294 F.2d 150 (5th Cir. 1961).


\textsuperscript{182} 812 F.2d 655 (11th Cir. 1987).

\textsuperscript{183} \textit{Id.} at 662-63 (giving the witnesses' names to the student). \textit{See} Knapp v. Jr. Coll. Dist., 879 S.W.2d 588, 593 (Mo. Ct. App. 1994) (holding there is no denial of due process when student not given copies of statements and other documents pre-hearing).

holding constitutional the joining of three unrelated charges against the student; the student showed no prejudice from the combining of the charges. 185

The concept of notice implies as well sufficient time between it and the hearing to allow the student to prepare a defense. 186 Of course, the student might waive any objection to the timing by insisting upon a particular date for the hearing. 187 Conversely, too much delay, if not occasioned by the student, 188 might deny due process, as well. 189

Although due process allows flexibility regarding disciplinary hearings, 190 courts find crucial the opportunity to be heard 191 "at a meaningful time and in a meaningful manner." 192 As the First Circuit has observed, "The hearing, to be fair in the due process sense, implies that the person adversely affected was afforded the

185 See id. at 886.
186 See North v. W. Va. Bd. of Regents, 332 S.E.2d 141, 143 (W. Va. 1985). In assessing this point, courts will look to the totality of circumstances. In Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984), the court found both sufficient notice of charges and a meaningful opportunity to prepare for the hearing: The student received a copy of the letter to the academic judiciary accusing him of cheating, the dean met twice with him to discuss the charges and the disciplinary process, the dean gave the student a manual setting out those procedures, and the hearing took place about six weeks after notification of the charges.
189 See Marin v. Univ. of P.R., 377 F. Supp. 613 (D.P.R. 1974) (calling for expedited hearing); Cobb v. Rector of Univ. of Va., 84 F. Supp. 2d 740 (W.D. Va. 2000). In Cobb, the student argued, unsuccessfully, that a seven-month delay precluded him from remembering matters crucial to his defense, for example where various people sat during the pertinent examination. See id. at 749-50 (discussing the relationship between delay and due process).
190 See Nash v. Auburn Univ., 812 F.2d 655, 663 (11th Cir. 1987).
opportunity to respond, explain, and defend."

Nonetheless, the Fifth Amendment's privilege against self-incrimination gives the student no right to put off the campus hearing until a criminal trial, based on the same charges, has been held. Nor may the student invoke the privilege at a disciplinary hearing and then complain of a denial of the opportunity to testify there. He may remain silent at the hearing and his silence may not be held against him at the criminal trial; should he choose to testify on campus, his responses will be deemed voluntary and therefore admissible at trial. In the unlikely event that the student is compelled to testify on campus, the privilege will make his answers inadmissible at any subsequent criminal trial.

Important, at least in most cases, is the right to be present for all significant aspects of the hearing. In University of Texas Medical School v. Than, a third-year medical student found himself charged with cheating on a standardized national examination. At one point during the hearing, the hearing officer, accompanied by university counsel, visited the room in which the alleged cheating had occurred in order to assess the layout of the room and to sit where the student allegedly had sat; the student's request to go along was denied. Recognizing that certain circumstances might justify the ex parte receipt of evidence in disciplinary cases, the court nonetheless concluded that the "unrecorded ex parte inspection of the testing site" had violated the student's "due course of law," the Texas constitution's parallel to federal due process: The student was "denied an

199 University of Texas Medical School v. Than, 666 N.E.2d at 444; Gagne, 692 N.E.2d at 493.
192 See A MODEL CODE OF STUDENT CONDUCT § 32, in Pavela, supra note 2, at 823 ("an accused student must respond to inquiries from the presiding officer and the hearing board.").
193 See Nzuve, 335 A.2d at 326.
194 See Martin v. Helstad, 699 F.2d 387 (7th Cir. 1983), discussed at text accompanying note 157. Cf. Donohue v. Baker, 976 F. Supp. 136 (N.D.N.Y. 1997) (turning largely on credibility, accused had right to hear all evidence against him in expulsion case). Of course, one could hear all evidence (for example, through close-circuit television) and still not be physically present.
195 See id. at 932.
196 Id. at 932. See TEX. CONST. art. I, § 19: "No citizen of this State shall be deprived of life, liberty, [or] property . . . except by the due course of the law of the land." Despite the textual differences between this clause and the Due Process Clause of the Fourteenth Amendment, the Texas Supreme Court has found no "meaningful distinction." Id. at 929.
opportunity to respond to a new piece of evidence against him, and the countervailing burden on the state [was] slight . . . "  

Implicit in "presence," as Than itself suggests, is the opportunity to present evidence.  

However elaborate the hearing, its constitutional meaningfulness might still be negated. In *Lightsy v. King*, despite a midshipman’s acquittal on a charge of cheating, the Merchant Marine Academy refused to change his grade of "zero" for the course. Stressed the court: "There is no difference between failing to provide a due process hearing and providing one but ignoring the outcome."  

Predictably, hearings need not be open to the public, formal rules of evidence need not be deployed, witnesses need not be put under oath, and the exclusionary rule need not be applied. Indeed, because the hearing board comprises lay members, one cannot expect it to administer highly technical evidentiary rules.  

Usually the institution need not allow, let alone provide, active representation by legal counsel. (Some courts have stated that legal counsel’s
participation might be mandated if the college or university proceeds through counsel).\footnote{212} In \textit{Donohue}, a student who had been indicted for rape was expelled. Regarding his complaint that denial of counsel at the hearing violated procedural due process, the court stressed that there was no absolute right to counsel in such situations. To be sure, if the student had needed counsel in order to protect his Fifth Amendment privilege during the hearing, his argument might have succeeded. But here he sought counsel not for that purpose but to prevail at the disciplinary hearing.\footnote{214} Several courts have required that retained counsel be allowed.\footnote{216} 'In any event, allowing retained counsel or appointing a non-attorney advisor for the student may play well with a court, even though due process may not require that such counsel or advisor be allowed to cross-examine witnesses,\footnote{218} otherwise speak at the hearing,\footnote{220} or even attend.'\footnote{221}

\begin{itemize}
\item \textit{Donohue}, 1 a student who had been indicted for rape was expelled.
\item Regarding his complaint that denial of counsel at the hearing violated procedural due process, the court stressed that there was no absolute right to counsel in such situations. To be sure, if the student had needed counsel in order to protect his Fifth Amendment privilege during the hearing, his argument might have succeeded. But here he sought counsel not for that purpose but to prevail at the disciplinary hearing.\footnote{214} Several courts have required that retained counsel be allowed.\footnote{216} 'In any event, allowing retained counsel or appointing a non-attorney advisor for the student may play well with a court, even though due process may not require that such counsel or advisor be allowed to cross-examine witnesses,\footnote{218} otherwise speak at the hearing,\footnote{220} or even attend.'\footnote{221}
\end{itemize}
At least in serious cases, students should have the right to call exculpating witnesses. One hurdle faced by students in disciplinary hearings concerns the inability to compel the attendance of such witnesses. Of course, the institution may have more leverage in this regard, not only with students but especially with employees, such as members of the security department. This situation in itself probably will not violate due process, especially if the student has succeeded in attracting some witnesses to the hearing. One might anticipate more litigation on this rarely raised point, however, especially if the institution makes no effort to enable the student to bring witnesses to the hearing. Institutions might be well advised to require the attendance of students and employees sought as witnesses by accused students in disciplinary hearings.

Although the right to cross-examine opposing witnesses in disciplinary hearings is not constitutionally de rigueur, serious cases, especially when the credibility of a witness looms crucial, may require it. In Donohue v. Baker, a student was expelled for date rape. At his hearing, the chief magistrate, invoking an disciplinary cases assumed by the decisionmaker reduces the role of counsel. Id at § 32 n. 29.

221 See Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (noting that university did not proceed through counsel or other representative, and issues were not "unduly complex").


224 See Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972) (allowing student's admission of presence at site of disruption); Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997); Lipsett v. Univ. of P.R., 637 F. Supp. 789, 813 (D.P.R. 1986), rev'd on other grounds, 864 F.2d 881 (1st Cir. 1988) (finding that right to cross-examine important but not absolute; context important); Jaksa, 597 F. Supp. at 1252; Reilly v. Daly, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996); Knapp, 879 S.W.2d at 592. But see Marin v. Univ. of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974) (requiring right to cross-examine in suspension case); De Prima, 392 N.Y.S.2d at 350 (expulsion); North v. W. Va. Bd. of Regents, 233 S.E.2d 411, 417 (W. Va. 1977) (finding that expulsion case carries right to confront witnesses). Cf. A MODEL CODE OF STUDENT CONDUCT §§ 2(e) & 30 (mm), in Pavela, supra note 2, at 822-23. ("University students and employees are expected to comply with subpoenas issued pursuant to this [code], unless compliance would result in significant and unavoidable personal hardship, or substantial interference with normal University activities . . .").

225 See North v. W. Va. Bd. of Regents, 332 S.E.2d 141, 143 (noting expulsion carries with it right to confront witnesses). Presumably this confrontation includes cross-examination of adverse witnesses, not merely presence during their testimony.

exception in the Student Conduct Code for very sensitive situations, denied the student the opportunity to cross-examine the alleged victim. The federal district court made clear that the distress such cases can cause complaining witnesses does not inevitably trump constitutional concerns:

It is understandable that the panel would wish to alter the proceedings in an effort to protect the alleged victim from additional trauma. However, this concern, and the presence of provisions in the Conduct Code permitting [dispensation with] cross-examination, does not end this Court's inquiry into the fundamental fairness of the hearing. Regardless of how "sensitive" the proceeding was deemed to be, the defendants remained bound to observe the plaintiff's constitutional rights.228

The court stressed that the case turned largely on credibility—the alleged rapist's versus the alleged victim's. Some form of confrontation became indispensable: "At the very least... due process required that the panel permit the [accused] to... direct questions to his accuser through the panel." (The court conceded that the hearing might have sufficed had the resulting penalty been a short suspension). In Gorman v. University of Rhode Island, the First Circuit found no constitutional violation when a student, though allowed to cross-examine adverse witnesses regarding the alleged incident itself, was prohibited from probing their possible bias.232

In any event, institutions clearly may impose reasonable limits on cross-examination. In Abidi-Sadeh v. Bee County College, ninety-five Iranian students were charged with campus disruption. The institution proceeded in two separate stages. The first involved a presentation of the evidence against the entire group. The second involved a series of individualized hearings at which each charged student could present exculpatory evidence. The attorney for the students refused to cross-examine adverse witnesses at the group segment of the hearing, insisting instead on cross-examination of these witnesses at each individualized hearing. The court not

---

227 Id. at 147.
228 Id. at 147.
229 Id. (leaving unclear the extent whether the panel had allowed the accused this opportunity). See also Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (directing questions to witnesses unnecessary; questioning through panel sufficed).
230 See Donohue, 976 F. Supp. at 147.
231 837 F.2d 7 (1st Cir. 1988).
232 See id. at 16.
only found this demand unreasonable, but also concluded that rejection of the opportunity to cross-examine at the group segment constituted a waiver.\textsuperscript{234}

Although one might waive the point by failing to object,\textsuperscript{235} a fair hearing obviously requires a fair decisionmaker.\textsuperscript{236} In this context, however, "fair" does not mean "ultimate." In Smith v. Rector of University of Virginia\textsuperscript{237} a federal court rejected the argument that a sanctioned student had the right to appear before the university president, who had the final word in the matter. The student's "meaningful" hearing before the disciplinary panel satisfied due process. To rule otherwise, the court noted, would preclude all appeals.\textsuperscript{238}

Nor does "fair" mean the absence of every possible conflict of interest. Just as a judge, though paid by the state, may decide controversies between citizens and the state, so too may employees of universities, even if selected by university officials,\textsuperscript{239} sit in judgment when those very universities bring charges against students.\textsuperscript{240}

While an unbiased tribunal remains essential\textsuperscript{241} and those sitting in judgment, therefore, should normally have had no previous involvement in the matter,\textsuperscript{242} not all such involvement will taint the result. In Henderson State University v. Spadoni,\textsuperscript{243} the court found unobjectionable the presence on the disciplinary committee of a student from the same fraternity as the victim of the alleged assault.\textsuperscript{244} A\textit{fortiori}, mere prior knowledge of the incident at issue does not disqualify a decisionmaker.\textsuperscript{245}

In Jackson v. Indiana University of Pennsylvania,\textsuperscript{246} a student unsuccessfully argued the impropriety of her suspension on the ground that the prosecutorial and adjudicatory functions had been wrongly commingled. Said the court: "[T]he mere

\begin{itemize}
  \item \textsuperscript{234} See id. at 556.
  \item \textsuperscript{235} See Tigrett v. Rector of Univ. of Va., 97 F. Supp. 2d 752, 761-62 (W.D. Va. 2000).
  \item \textsuperscript{237} 78 F. Supp. 2d 533 (W.D. Va. 1999).
  \item \textsuperscript{238} See id. at 540-41.
  \item \textsuperscript{240} See Jenkins, 506 F.2d at 1003.
  \item \textsuperscript{241} See Marin v. Univ. of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974); North, 332 S.E.2d at 143 (at least for expulsion cases).
  \item \textsuperscript{242} See Marin, 377 F. Supp. at 623.
  \item \textsuperscript{243} 848 S.W.2d 951 (Ark. Ct. App. 1993).
  \item \textsuperscript{244} See id. at 954.
  \item \textsuperscript{245} See Nash v. Auburn Univ., 812 F.2d 655, 666 (11th Cir. 1987).
  \item \textsuperscript{246} 695 A.2d 980 (Pa. Commw. Ct. 1997).
\end{itemize}
tangential involvement of an adjudicator in the decision to initiate proceeding[s] is not enough to raise the red flag of procedural due process."247 So too may a dean, absent overt bias or previous involvement, conduct a hearing despite his position as a member of the administrative office that formally initiates disciplinary proceedings.218 In Gorman,249 a staff member provided advice to the disciplinary board, participated with the board as a non-voting member, served as a witness in another hearing, prepared records of hearings, and represented the board in internal appeals. The First Circuit concluded that these multiple roles did not compromise the independence of the disciplinary board.250 Nor does holding the hearing in the office of the dean of students, who filed the charge, constitutionally taint the proceeding.251 Of course, one who chaired the hearing committee should not also hear the appeal from that committee’s findings and recommendations.252 In court, students asserting bias may bear the burden of producing evidence sufficient to overcome the presumption of integrity and objectivity with which the judicial process may clothe institutional decisionmakers.253

Judicial opinion varies concerning the extent of the need for—as opposed to the wisdom254 of—a record of the hearing; a complete record of the proceedings may be unnecessary.255 A record becomes especially important, of course, with regard to any portions of the hearing to which the student has not been privy.256 In any event, even courts requiring an “adequate record”257 likely will not insist on a stenographic record; a tape recording will do.258 In fact, even a tape recording may

247 Id. at 982 (quoting Lyness v. State Bd. of Med., 605 A.2d 1204, 1209 (1992)).
248 See Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972).
249 837 F.2d 7 (1st Cir. 1988).
250 See id. at 15.
253 See Gorman, 837 F.2d at 15.
254 See Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (“I am not persuaded that the Due Process Clause requires the University to provide a verbatim transcript of the hearing. While this case illustrates the wisdom of recording such hearings, it is clear that the Constitution does not impose such a requirement.”).
256 See Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926 (Tex. 1995), discussed in text accompanying note 194.
257 North v. W. Va. Bd. of Regents, 332 S.E.2d 141, 143 (W. Va. 1985) (finding that the record was sufficient to support expulsion).
258 See Navato v. Sletten, 560 F.2d 340, 345 (8th Cir. 1977); Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975) (allowing student to tape-record the hearing). Cf. Mary M. v. Clark, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984) (finding that a written record was not required); A MODEL CODE OF STUDENT CONDUCT § 30(g), in Pavela, supra note 2, at 823 (“Hearings shall be tape
not be necessary. The First Circuit found no constitutional infirmity when a university prohibited the charged student from tape recording the hearing himself; the written summary of the testimony, evidence and decision the university provided him sufficed.\(^{259}\) Of course, the Constitution does not mandate a record of any hearing from which the appeal itself is \textit{de novo}.\(^{260}\)

Results adverse to the student should be supported by at least “substantial evidence.” Students should learn in a timely fashion how things turned out. Accordingly, they should receive a record of the decisionmaker’s findings,\(^{262}\) the evidence supporting those findings\(^{263}\) and perhaps the reasoning involved.\(^{264}\) Statements setting out factual findings and the evidence supporting them play a crucial role in assuring a result based on evidence in the record and in allowing the

\(^{259}\) \textit{See} Gorman \textit{v.} Univ. of R.I., 837 F.2d 7, 15-16 (1st Cir. 1988).


\(^{262}\) \textit{See} Marin \textit{v.} Univ. of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974); French \textit{v.} Bashful, 303 F. Supp. 1333, 1339 (E.D. La. 1969); Gruen \textit{v.} Chase, 626 N.Y.S.2d 261, 262 (N.Y. App. Div. 1995). \textit{Cf.} Slaughter, 514 F.2d at 625 (holding due process entitles student to notice of committee’s decision, including its decision to expel student). \textit{Cf.} Kalinsky, 557 N.Y.S.2d at 578; \textit{Mary M.}, 473 N.Y.S.2d at 845 (holding student should be informed of finding and have access to decision and written report of penalty). Findings may have to be relatively specific. \textit{See} Hardison \textit{v.} Fla. Agric. and Mech. Univ., 706 So. 2d 111, 112 (Fla. Dist. Ct. App. 1998) (finding must specify unlawfulness of touching in order to preclude self-defense, since student charged with “assault and battery”). \textit{Cf.} A \textsc{Model Code of Student Conduct} § 30(p), in Pavela, supra note 2, at 823 (entitling the student to “brief written findings,” but not the evidence supporting those findings or the panel’s reasoning).


\(^{264}\) \textit{Compare} Morale, 422 F. Supp. at 1004; and Marin, 377 F. Supp. at 623 (stating that student should receive decisionmaker’s reasoning \textit{with} Jaksa \textit{v.} Regents of Univ. of Mich., 597 F. Supp. 1245, 1253-54 (E.D. Mich. 1984) (denying student the right to detailed statement of reasons supporting guilt since in this case such a statement would add little to student’s knowledge).
student effectively to challenge that result both within the institution and in the courts.265

In conducting disciplinary proceedings, colleges and universities are well advised to follow whatever internal rules have been established, even if those rules do not themselves reflect constitutional requisites. Conceivably, significant deviations may constitute a violation of procedural due process, at least if the lapses induced the student’s reasonable and detrimental reliance.266 To be sure, courts generally find no constitutional problem in the failure itself to honor such rules.267 In Carboni v. Meldrum,268 for example, departure from its own rules by a state veterinary college gave rise to no federal concern. The federal district court stressed that alleged due process violations must be measured against federal requirements; requirements that cannot be defined by state-created procedures.269

Nonetheless, state courts may deem fatal to the institution’s case significant variance from internal constraints.270 New York’s courts have been especially vigilant in enforcing regulations appearing in the handbooks of in-state institutions.271

---

265 See Kalinsky, 557 N.Y.S.2d at 578.
266 See Cobb v. Rector of Univ. of Va., 69 F. Supp. 2d 815, 830 (W.D. Va. 1999). As it turns out, the court found no deviations, significant or otherwise. 84 F. Supp. 2d 740, 748 (W.D. Va. 2000). Cf. A MODEL CODE OF STUDENT CONDUCT §19, in Pavela, supra note 2, at 820 (providing that deviation from the code’s provisions “necessarily” invalidate a decision absent the possibility of “significant prejudice to the student or to the University”).
269 Id. at 437.
Tedeschi v. Wagner College,\(^{272}\) the institution expelled the plaintiff without adhering to its own procedural edicts.\(^{273}\) The New York court needed no federal constitutional proclamations to void the college’s action:

Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual . . . when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.\(^{274}\)

Moreover, all courts, state and federal, will likely be less inclined to credit the institution’s efforts when it fails to live up to its own procedures.\(^{275}\) Of course, failure to follow local rules that themselves enshrine due process requirements will violate the federal Constitution.\(^{276}\)

Finally, due process does not require institutions to provide internal appeals from adverse determinations reached through a constitutionally acceptable hearing.\(^{277}\) Nonetheless, most colleges and universities wisely provide for such recourse.

Courts seem more willing to interpose their judgments in disciplinary cases than in academic ones, presumably on the grounds that the former “involve determinations quite closely akin to the day-to-day work of the judiciary.”\(^{278}\) Even

\(^{272}\) 404 N.E.2d 1302 (N.Y. 1980).

\(^{273}\) See id. at 1306.

\(^{274}\) Id. One state court concluded that due process requires adherence to such internal rules if they affect individual rights. Armesto v. Weidner, 615 So. 2d 707, 709 (Fla. Dist. Ct. App. 1992).

\(^{275}\) See Lightsey v. King, 567 F. Supp. 645, 650 (E.D.N.Y. 1983) (“[Submission . . . of a charge of cheating to the Honor Board, followed by [a] refusal to abide by their verdict, prompts the Court to question the [institution’s] good faith as to this entire affair.”).

\(^{276}\) See id. at 648.


in disciplinary cases, however, courts remain sensitive to excessive interference with the decisions of educational officials and will not void such decisions merely because they lack wisdom or compassion.\textsuperscript{279} Such sensitivity pervades not only the assessment of whether a violation occurred, but also the determination of any remedy.\textsuperscript{280} One federal district court has urged that judicial intervention be sought, if possible, when equitable remedies could preclude the irreparable injury that might otherwise occasion damage claims; equitable relief, said the court, better protects both the student and the functioning of the institution.\textsuperscript{281}

After all is said and done, then, what process should an institution prescribe for dealing with student miscreance? In his unusual memorandum order in the mysteriously named \textit{A. v. C. College},\textsuperscript{282} Judge Vincent Broderick, after informing the reader that the case had been settled, offered his advice. For cases threatening a permanent record entry, suspension, or expulsion, colleges and universities should consider the following procedures: 1) an impartial decisionmaker—the person may be an employee of the institution so long as not previously involved in the case; 2) notice to the accused student of the substance of the allegations and of the possible penalties; 3) provision to the student of an opportunity to appear at the hearing and to provide, reasonably in advance of the hearing, evidence the student intends to offer at the hearing; 4) an opportunity on the part of the student to suggest witnesses whom the decisionmaker might interview and possible questions that might be


\textsuperscript{280} See \textit{A. v. C. Coll.}, 863 F. Supp. 156 (S.D.N.Y. 1994); Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 931 (Tex. 1995) (finding that the case was disciplinary, not academic, the federal district court noted, "The courts should tread lightly in fashioning remedies for due process violations that affect the academic decisions of state-supported universities.") \textit{Id.} at 934;); Harris v. Trustees of Columbia Univ., 470 N.Y.S.2d 368, 375 (N.Y. App. Div. 1983) (dissenting opinion, adopted by court of appeals in 468 N.E.2d 54 (N.Y. 1984)). \textit{Cf.} Olsson v. Bd. of Higher Educ., 402 N.E.2d 1150, 1154 (1980). In this academic case, the court inveighed against "diploma by estoppel," at least when a less drastic remedy like re-testing might be employed without seriously disrupting the student's academic or professional development. "[T]he judicial awarding of an academic diploma is an extreme remedy which should be reserved for the most egregious of circumstances." \textit{Id.}

\textsuperscript{281} See \textit{C. Coll.}, 863 F. Supp. at 158 (noting that damage suits might intimidate academic decisionmakers).

\textsuperscript{282} See \textit{id.} at 156.
addressed to them; 5) avoidance of sanctions against witnesses merely because of the implausibility of, or inconsistency in, their testimony—such discipline may deter "unpopular" though "truthful" testimony; and 6) an option for the accused student to accept discipline voluntarily or, after sufficient time to secure pertinent advice, to request a ruling from the decisionmaker. Judge Broderick wielded a nice mix of carrot and stick in concluding:

It is not intended to be suggested here that these possible aspects of fair procedure should be mandated by judicial decision in public or private sector institutions, but rather [that] their adoption might be relevant to judicial willingness to accept institutional decisions if found subject to challenge notwithstanding the drawbacks of judicial intervention.

In our litigious society, institutions too often think only of what the law requires them to do. But the law sets only the minimal standard of human behavior, not the preferred. Institutions, acting in this context through their lawyers and student-affairs personnel, should focus as well on doing what is right, whether or not specifically mandated by law. Students, after all, are decidedly not the enemy, but rather the core of the institution.

B. Academic

As indicated earlier, the U.S. Supreme Court seems to have dispensed with the requirement of a hearing for academic cases, though the decision involved must be "careful and deliberate." Substantive due process, even if applicable to the higher education context, largely overlaps the procedural requirement, decreeing that the result in academic matters be reached conscientiously and with careful deliberation; institutional judgments will not be overturned unless they represent "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

---

283 See id. at 158-59.
284 Id. at 159.
285 Cf. Hennessey v. City of Melrose, 194 F.3d 237, 252 n.5 (1st Cir. 1999). After noting that the Constitution does not require a hearing in academic cases, the court added: "This is not to say that a hearing of some sort might not have provided [the institution] with a slightly different gloss on what exactly had transpired at Horace Mann. Our concern, however, is with constitutional imperatives, not with best practices."
286 Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 (1978).
How have the lower courts implemented these sentiments? They in turn have consistently set a rather low threshold for institutions in such cases.288 As the Fourth Circuit has said, "The limit of judicial inquiry into academic administration is early reached."289 Another federal court, noting that procedural requirements for academic cases remain "so minimal," concluded that in "only extremely rare situations" would an institution's actions violate procedural due process under the Fourteenth Amendment.290 Referring to academic controversies, the Georgia Supreme Court has said, "Absent plain necessity impelled by a deprivation of major proportion, the hand of the judicial branch . . . must be withheld."291 Such pronouncements, echoing the U.S. Supreme Court, have stressed that the institution's academic judgment yields only if not "careful and deliberate,"292 or if "arbitrary or capricious,"293 irrational,294 motivated by bad faith or ill will,295 "beyond


289 Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 72 (4th Cir. 1983).

290 Amelunxen v. Univ. of P.R., 637 F. Supp. 426, 431 (D.P.R. 1986). The court continued that any reversal in such cases would come under the aegis of substantive due process. See id. See also Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986) (requiring only "minimal procedures" due); Qvyjt v. Lin, 932 F. Supp. 1100, 1106 (N.D. Ill. 1997) (only "minimal" process required); Lewin v. Med. Coll. of Hampton Roads, 910 F. Supp. 1161, 1165 (E.D. Va. 1996) (noting that procedures in academic cases far less stringent than in disciplinary ones); Reilly v. Daly, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (holding that only the "barest procedural protections" needed for academic dismissal); Frabotta v. Meridia Huron Hosp. Sch. of Nursing, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995) (holding less process required in academic cases than in disciplinary); Cf: Alcorn v. Vaksmann, 877 S.W.2d 390, 397 (Tex. App. 1994) (noting that less stringent procedures in academic matter) (applying Texas parallel to Due Process Clause). In Alcorn, the court noted that if evidence supports the trial court's finding of institutional bad faith or ill will, the deferential standard for academic dismissals does not apply on appeal. See id.


the pale of reasoned academic decisionmaking, \textsuperscript{296} "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment," \textsuperscript{297} or in violation of a statute or the Constitution. \textsuperscript{298} Moreover, the burden of proof in such cases normally lies with the student. \textsuperscript{299} (One layer of deference may get superimposed on another: In close cases a court may accede even to the institution's determination that a matter is academic rather than disciplinary! \textsuperscript{300}) Nonetheless, as the Second Circuit reminds


\textsuperscript{295} See \textit{Disessa}, 79 F.3d at 95; \textit{Haberle} v. Univ. of Ala., 803 F.2d 1536, 1540 (11th Cir. 1986); \textit{Schuler}, 788 F.2d at 515; \textit{Rossomando}, 2 F. Supp. 2d at 1229; \textit{Doe}, 780 F. Supp. at 631; \textit{Moukarzel}, 662 N.Y.S.2d at 282; \textit{Illickal}, 653 N.Y.S.2d at 563; \textit{Rafman}, 623 N.Y.S.2d at 282; \textit{Alanis}, 843 S.W.2d at 784. Cf. \textit{Williams}, 674 N.Y.S.2d 702; \textit{Alanis}, 877 S.W.2d at 412-13 (holding that expulsion motivated by bad faith and ill will violated Texas Constitution's parallel to federal Due Process Clause).

\textsuperscript{296} Hennessy v. City of Melrose, 194 F.3d 237, 252 (1st Cir. 1999) (citing \textit{Ewing}, 474 U.S. at 227-28); \textit{Cobb} v. Rector of Univ. of Va., 84 F. Supp. 2d 740, 748-49 (W.D. Va. 2000).


\textsuperscript{300} See \textit{Nickerson} v. Univ. of Alaska Anchorage, 975 F.2d 46, 53 (Alaska 1999).
us, Horowitz did not put even academic cases beyond the reach of judicial intervention; “at least some modicum of process” is due.301

The ultimate judgment in these cases may really reflect whether the reviewing court feels that, all things considered, the institution treated the student fairly.302 In fact, perhaps because in so many cases the institution’s treatment of the student has seemed fundamentally fair, the courts have not had to wrestle with the slender but real differences among the standards used. To consider just two of those standards, “careful and deliberate” does not mean the same as “not arbitrary and capricious.” To be sure, in most situations, including many that have reached the courts, treatment of the student is both or neither. Nonetheless, some level of attention paid by a professor to the student’s bluebook or research paper, for example, might fall short of being “careful and deliberate” without being “arbitrary and capricious;” these do not seem to be contiguous on the spectrum of concern manifested by the institutional decisionmaker. “Careful and deliberate” conveys a significantly higher level of consideration than does any of the other standards referred to in the academic due process cases.

Not surprisingly, in cases labeled academic, virtually all courts have found a hearing unnecessary303—if not useless and harmful304—although some courts have

301 Ezekwo v. NYC Health and Hosp. Corp., 940 F.2d 775, 784 (2d Cir. 1991). Of course, even a courtroom victory does not guarantee the student academic success. One federal court, though denying the institution summary judgment, candidly acknowledged the daunting challenge students may face in such cases: “Ms. Bergstrom is engaged in a war which cannot be won. If the medical school faculty has in fact determined that she should not be a graduate of the school, no performance level on the remaining courses will prove to be satisfactory. No coerced unilateral resolution appears possible.” Bergstrom v. Buettner, 697 F. Supp. 1098, 1102 (D.N.D. 1987).

302 See Harris, 798 F.2d at 424; Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 72 (4th Cir. 1983).

303 See Hennessy v. City of Melrose, 194 F.3d 237, 250 (1st Cir. 1999); Hankins v. Temple Univ. Health Sciences Ctr., 829 F.2d 437, 445 (3d Cir. 1987) (finding that informal faculty evaluation suffices); Mauriello, 781 F.2d at 51 (informal faculty evaluation suffices); Habeke v. Univ. of Ala., 803 F.2d 1536, 1539 (11th Cir. 1986) (“The fact that the procedures used were ad hoc does not violate the Horowitz standard; no formal hearing is required.”); Cobb v. Rector of Univ. of Va., 84 F. Supp. 2d 740, 749 (W.D. Va. 2000) (dictum); Van de Ziber, 971 F. Supp. at 931 (dictum); Levin, 910 F. Supp. at 1165 (holding that since no hearing was needed, neither was counsel); Seville, 852 F. Supp. at 1537 (no formal hearing required); Alexander v. Kennedy-King Coll., No. 88 C 2117, 1990 U.S. Dist. LEXIS 14997 (N.D. Ill., Nov. 2, 1990); Mohammed v. Mathog, 635 F. Supp. 748, 752 (E.D. Mich. 1986) (holding that student need not have attended meeting at which his dismissal for academic reasons was decided upon); Rajman, 623 N.Y.S.2d at 283 (no “full hearing” needed); Lucas v. Hahn, 648 A.2d 839, 842 (Vt. 1994) (requiring no formal hearing); Dillingham, 790 P.2d at 854 (requiring no formal hearing); Ross, 439 N.W.2d at 34. Cf. Davis v. Mann, 882 F.2d 967, 974 (5th Cir. 1989) (holding that full procedural protections of Fourteenth Amendment unnecessary even though dismissal from residency
alluded approvingly to the fact that a hearing, however unnecessary, had taken place in the case at bar.Obviously, even though constitutionally superfluous, a hearing, and other forms of administrative review, make it still more likely that the institution will overcome the low hurdle represented by the criteria cited above. Since a hearing need not be provided in academic cases, it would be, as the Eighth Circuit has pointed out, anomalous to require institutions to preserve a record of the oral exam whose failure occasioned the graduate student’s dismissal. The lack of any need for a hearing equally precludes the student’s right to be present when others testify before the grade-appeals committee. Just as in disciplinary cases, courts, in dealing with academic matters, may shield decisionmakers with a presumption of integrity. The fact that the dean selected the members of a committee called upon to deal with such matters raises no constitutional problem.

---

program also amounted to dismissal from employment; primary purpose of program was academic training and academic certification; Miller v. Hamline Univ. Sch. of Law, 601 F.2d 970, 972 (8th Cir. 1979); Dietz v. Am. Dental Ass’n, 479 F. Supp. 554, 558 (E.D. Mich. 1979); Ho v. Univ. of Tex. at Arlington, 984 S.W.2d 672, 684 (Tex. App. 1998). Hernandez v. Overlook Hosp., 692 A.2d 971, 976 (N.J. 1997) (holding that contract between private hospital and resident required only a “fair procedure”); Tobias, 824 S.W.2d at 209-10.

304 See Antlounxen, 637 F. Supp. at 431 ("[A] hearing may be helpful to ascertain a student’s misconduct but is useless or harmful to find out the truth as to scholarship.").


307 See Schuler v. Univ. of Minn., 788 F.2d 510, 514 (8th Cir. 1986) (noting that the university did in fact provide a hearing, though not required).


309 See Ikpeazu, 775 F.2d at 254; Kashani v. Purdue Univ., 763 F. Supp. 995, 999 (N.D. Ind. 1991) (holding that absent establishment of actual bias, school officials in highly sophisticated academic discipline entitled to presumption of honesty and integrity).

310 See Ikpeazu, 775 F.2d at 254.
The concept of notice has played a prominent role in these cases. In *Schuler v. University of Minnesota,* the Eighth Circuit required that the student have prior notice of both the institutional unhappiness with her performance and the threat of dismissal. This requirement has been tied to the very notion of the academic: "If the university's interests are truly academic rather than disciplinary in nature, its emphasis should be on correcting behavior through faculty suggestion, coercion, and forewarning rather than punishing behavior after the fact." Such an approach requires that notice come early enough to give the student a "reasonable opportunity" to correct any deficient performance before dismissal becomes inevitable. That notice might come from the receipt of unsatisfactory grades during the course.

Most institutions give students second, and even further, chances to redress their academic performances. In so doing, these institutions convey the very kind of notice—the rehabilitative notice—discussed by the courts. Nonetheless, there presumably remain cases where notice—preliminary and final—comes before any performance by the student. May not a law school, for example, set out in its bulletin a rule requiring immediate dismissal of anyone falling short of a 1.0 grade point average at the end of the first semester (with probation, say, for those between 1.0 and 2.0)? Surely the clear warning in the rule—together with the assessment occurring through the four or five end-of-semester examinations—provides enough protection to meet the "careful and deliberate" criterion and, a fortiori, the other due process standards as well. The chance to reform talk, though, suggests that even students running afoul of the 1.0 minimum constitutionally merit another chance.

---


312 788 F.2d 510 (8th Cir. 1986).

313 *See* id. at 514. *Antwod* Wilde v. Komar, 185 F.3d 872 (9th Cir. 1999) (unreported); Rossomando v. Bd. of Regents of Univ. of Neb., 2 F. Supp. 2d 1223, 1229 (D. Neb. 1998); Nickerson v. Alaska Anchorage, 975 P.2d 46, 53 (Alaska 1999) (holding that Horowitz requires "more than mere perfunctory notice rendered with or after the decision to dismiss").

314 Id.

315 *Id.* *See also* Wilkenfield v. Powell, 577 F. Supp. 579, 584 (W.D. Tex. 1983) (noting that student learned of faculty's dissatisfaction well before decision to drop him from doctoral psychology program).

316 *See* Disesa v. St. Louis Cmty. Coll., 79 F.3d 92, 95 (8th Cir. 1996) (holding that notice of deficient performance provided the student by five quizzes making up seventy-five percent of her grade, combined with administrative review of that grade, more than satisfied procedural due process).
Horowitz and Ewing, it is submitted, anticipate no such straitjacketing of the institution. Indeed, to deny that option may well, under the law of unintended consequences, cause the institution to reduce its number of risky admissions—so some applicants who would have had one chance under the 1.0 rule would get none. It may be that cases setting out a requirement that students be given an opportunity to reform academically arose in a context that anticipates such second opportunities, or that the fact of a second chance proved helpful in buttressing the court's conclusion that the institution had been careful and deliberate. The Supreme Court of South Dakota put the point well, concluding that the student in academic-sanction cases need only be given notice, in any form, of his failure or pending failure.

As in disciplinary cases, courts in academic situations have been constitutionally unmoved by the failure of a college or university to follow its internal rules. In Rossomando v. Board of Regents of University of Nebraska, for example, a student dismissed from a postgraduate dental program complained that her hearing, in violation of the university's internal rules, had not been recorded. The court replied: "The failure to record was an oversight... In any event, she was given more process than she was due and the failure to follow the internal rules is not itself actionable as a federal constitutional claim."

V. CONCLUSION

The Supreme Court has done a disservice to both lower courts and higher education in failing to specify, at least in broad strokes, the nature of the interest that qualifies for due process protection. This lapse, as we have seen, has led many courts to assume such an interest and, in the bargain, to decide the constitutional adequacy of the process applied to the student. Perhaps the Court should clearly and finally


320 Id. at 1229.
hold that the liberty or property triggering protection under procedural due process also prompts protection under substantive due process; this would seem to reflect most clearly the specific language of the clause. The Court could then limit liberty or property to substantial invasions of state protected interests—long suspensions, dismissals, loss of significant financial aid, serious stigma, and the like.

If disinclined toward this resolution, the Court should adopt the position set out by Justice Powell, concurring in *Ewing*, that substantive due process rights are created only by the federal Constitution, not by state law. Such an approach would remove substantive due process formally from the typical academic or disciplinary case, even when serious sanctions such as suspension and dismissal are in play. Such a change would have little significant impact on such cases, of course. As we have seen, violations of substantive due process require, besides a suitable interest, a decision reflecting such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Though the Court has made clear that procedural due process does not require “hearings” regarding adverse academic decisions, it is difficult—at least without edging into fantasy—to hypothesize an institutional decision that would violate substantive due process even as it satisfies procedural due process. Perhaps an obviously arbitrary rule—for example, only those students of a certain height may graduate—attended by elaborate procedures to determine that the student comes within the rule, might be such a situation. In the real world, even rules easily disagreed with will inevitably fall short of reflecting such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Telling is the rarity with which substantive due process challenges succeed independently of procedural due process. Ironically, then, the distinction itself turns out to be... academic. The modification would cleanse the constitutional law in this area of a lingering uncertainty that has caused confusion, needless briefing, argument and judicial decision making, and perhaps even additional federal litigation. (In *Ewing*, for example, the student’s federal claim relied only on an alleged violation of substantive due process).

With regard to the procedures institutions deploy for aberrant students, contested disciplinary cases that threaten serious sanctions warrant appropriate notice of the charged misconduct and of the rules allegedly violated; a hearing, conducted by unbiased decisionmakers and allowing the student to confront adverse evidence and present favorable evidence; and formal findings and conclusions. The

---

322 See id.
opportunity for at least one appeal challenging the conduct of the hearing should be required. Such a process, though rudimentary, meets the constitutional requirements specified or implied by the courts. Of course, nothing prevents an institution from employing more sophisticated procedures.

With regard to academic cases, the courts have taken an essentially hands-off approach, deferring to the academic expertise of campus officials. Given the rules typically controlling academic probation, suspension, and dismissal at American colleges and universities, and the large number of judgments that normally must concur in such cases, the judicial overturning of campus decisions will rarely occur. The overwhelming number of such matters will easily clear the “careful and deliberate” bar, let alone the other, still less demanding criteria of due process.