Property Interests and Due Process in Public University and Community College Student Disciplinary Proceedings

by Tonya Robinson

IN NORTH CAROLINA'S PUBLIC UNIVERSITIES AND COMMUNITY COLLEGES, allegations of student misconduct can put in motion a variety of administrative and disciplinary proceedings. In devising procedures to guide those proceedings, college officials must consider two related questions. First, at what point does a student's interest in enrolling or continuing in a course of study or a particular class become "property," triggering the requirements of due process under the Fourteenth Amendment of the United States Constitution? And second, if a student is denied the opportunity to commence or to continue a course of study or a class in a way that infringes upon a protected property interest, what are the elements of due process that must be applied if the student protests the disciplinary action?

This article attempts to answer these two basic questions. In short, commencing with the student's acceptance of an institution's offer of admission, a student has a protected property interest in his or her education at a public university or community college. Upon acceptance of admission, the property interest is only slight. It increases substantially upon matriculation. If the public university or community college infringes on that property interest, it must, at a minimum, afford the student notice of the charge or charges against him or her and some form of a hearing before an impartial arbiter. It is advisable, however, that the university or college, as a matter of course, provide additional procedural protections.

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Defining the Property Interest

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, that "no state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."[1] In applying the Fourteenth Amendment, courts first determine whether "state action" is present. If so, they then examine the nature of the property or liberty interests at stake and the corresponding scope of process due, if any. Public university and community college disciplinary committees are clearly arms of the state and therefore meet the state action requirement of the Due Process Clause.[2] Therefore when courts review student disciplinary hearings for procedural fairness, they typically focus on the two remaining questions: One, does the student interest at stake fall "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment"? And, two, if it does, how much process is due the student?[3]

1. U.S. CONST. amend. XIV, § 1.

2. *See* Duke v. North Texas State Univ., 469 F.2d 829, 837 (5th Cir. 1972) ("[the] Fourteenth Amendment protects the citizen against all the creatures of the state—universities not excepted"), *cert. denied*, 412 U.S. 932 (1973). The constitutional safeguards discussed in this article do not apply to private colleges and universities, since such institutions are not state actors for purposes of the Fourteenth Amendment. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982) (finding no state action where private school was almost entirely supported by state funds).

3. *See* Jaksa v. Regents of the Univ. of Mich., 597 F. Supp. 1245, 1247–48 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Hart v. Ferris State College, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983).

Student Enrollment as "Property"

The Constitution does not define property interests protected by the Fourteenth Amendment. Rather they are defined by independent sources, such as state statutes or rules entitling citizens to certain benefits.[4] In *Board of Regents v. Roth*,[5] the United States Supreme Court explained:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement* to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.[6]

The Court held that reference to "an independent source such as state law" will determine whether a "legitimate claim of entitlement" to the benefit exists.[7]

In *Perry v. Sindermann*,[8] the Supreme Court expanded its notion of property by holding that informal practices or customs (in addition to state law) may be sufficient to create a "legitimate claim of entitlement" to a benefit.[9] In *Perry* the Court looked to both written and implied contract terms for the existence and extent of property interests.[10] Together, *Roth* and *Perry* indicate that property interests can be created by existing rules or by mutually explicit understandings.

The Supreme Court, however, has never directly addressed the question of whether students enrolled in public universities and colleges have a protected property interest in their education. In *Goss v. Lopez*, the Court determined that a high school student, who had been suspended for ten days based on charges of misconduct, had a legitimate entitlement to public secondary education as a property interest. That property interest, the Court held, is protected by the Due Process Clause and "may not be taken away for misconduct without adherence to minimum procedures required by that Clause."[11] The Court noted that Ohio, having chosen to extend the right of education to its citizens,[12] could not withdraw that right based on allegations of misconduct without extending some fair process to determine whether the misconduct had indeed occurred.[13]

Twice the Supreme Court has declined the opportunity to apply the *Goss* principles to public universities.[14] In each case, the Supreme Court assumed, without deciding, the existence of a property or a liberty interest for the purposes of argument.[15] In *Board of Curators of the University of Missouri v. Horowitz*,[16] the Court assumed that a medical student who was dismissed for poor clinical performance and academic progress had a protected interest in pursuing a medical career and continuing her medical education.[17] The Court concluded that "[a]ssuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires."[18] Similarly, in *Regents of the University of Michigan v. Ewing*,[19] the Court assumed the existence of a constitutionally protected property right in the student's continued enrollment in a six-year program culminating in both undergraduate and medical degrees.[20] The Court held that "even if [the student's] assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of the record disclose no such action."[21]

The Court's timidity in *Horowitz* and *Ewing* is surprising given its apparent endorsement in *Goss* of lower federal court decisions holding the Due Process Clause applicable to public higher education. As support for its holding in *Goss*, the Court noted that since *Dixon v. Alabama State Board of Education*[22] (a landmark appellate case which determined that students at a public college could not be expelled for misconduct without certain due process protections), "the lower federal courts have

4. *See* Goss v. Lopez, 419 U.S. 565, 572–73 (1975), *citing* Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also* Hall v. University of Minn., 530 F. Supp. 107 (D. Minn. 1982).

5. 408 U.S. 564 (1972).

6. *Id.* at 576–77 (emphasis added).

7. *Roth*, 408 U.S. at 576–77.

8. 408 U.S. 593 (1972).

9. *Id.* at 601–2 ("agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" could be independent sources of property interests).

10. *Id.*

11. *Goss*, 419 U.S. at 574.

12. A state statute directed local authorities to provide free education to all residents between six and twenty-one years of age, and a compulsory attendance law required attendance at school for at least thirty-two weeks of the school year. *Id.* at 573.

13. *Goss*, 419 U.S. at 573–74.

14. *See* Regents of the University of Mich. v. Ewing, 474 U.S. 214 (1985); Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

15. *See Ewing*, 474 U.S. at 222; *Horowitz*, 435 U.S. at 91–92.

16. 435 U.S. 78 (1978).

17. *Id.* at 84.

18. *Id.* at 84–85.

19. 474 U.S. 214 (1985).

20. *See id.* at 223.

21. *Id.*

22. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion."[23] Even though the Court relied on such precedent in *Goss,* it has refused to address more directly the issue of a student's property interest in higher education.

Despite the Supreme Court's hesitance, lower federal courts consistently have held that dismissal from a public institution of higher education implicates property interests.[24] While the rationale of the lower courts has been more conclusory than reasoned, the lower federal courts uniformly have held the Due Process Clause applicable to decisions made by tax-supported universities and colleges to suspend or expel a student.[25] While most courts that address the question simply conclude, with little explanation, that a student's interest in pursuing public higher education is included within the Fourteenth Amendment's protection of property, a few clear methods of establishing such an interest have emerged.

Property Interest Created by State Rule

Since *Roth* established that property interests derive from state law, one obvious way to establish the existence of a property interest is to demonstrate that state law recognizes it.[26] In *Goss*, the Court found that an Ohio statute that provided a free education for all residents between the ages of six and twenty-one had created a property interest in attending high school.[27] Once created, the Court noted, "the right of education cannot be withdrawn on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."[28]

Other states, by statute or some other state rule,[29] have created a similar property interest. In North Carolina, for example, the state constitution mandates that "[t]he General Assembly shall provide that the benefits of the University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense."[30] Arguably North Carolina law guarantees its citizens a free public higher education.[31] As in *Goss*, the state cannot withdraw this property interest without affording the deprived individual certain fundamental procedural protections.

Property Interest Created by Contract

A property interest in public higher education may be created also by contract. The Supreme Court explained in *Ewing* "that 'agreements implied from the promisor's words and conduct in the light of the surrounding circumstances' could be independent sources of property interests."[32] Upon admission to college, students have an implied understanding that administrators there will not arbitrarily dismiss them.[33] As one observer has noted, a "university student in good academic standing has more than a 'unilateral expectation' that, upon completion of the required course work, he will receive his degree. By accepting tuition and providing instruction in return, the university forms a contract with the student and gives substance to his expectation of graduation."[34] The *Ewing* Court acknowledged this

23. *Goss*, 419 U.S. at 576, n.8.

24. *See, e.g.*, Gorman v. University of R.I., 837 F.2d 7, 12 (1st Cir. 1988); Greenhill v. Bailey, 519 F.2d 5, 7 (8th Cir. 1975); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) ("[w]e have no difficulty in concluding that in light of *Goss*, where the Supreme Court recognized a *property right* in public school students that certainly such a right must be recognized to have vested with [the university student], and the more prominently so in that she paid a specific, separate fee for enrollment and attendance . . . "); Lewin v. Medical College of Hampton Rds., 910 F. Supp. 1161, 1164 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th Cir. 1997); Stoller v. College of Med., 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd without opinion*, 727 F.2d 1101 (3d Cir. 1984). The federal courts have also held that dismissal from a public university implicates liberty interests, as discussed briefly on page 14.

25. *See, e.g.*, Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (holding that procedural due process must be afforded in disciplinary proceeding brought against student by college, in the form of adequate notice, definite charge, and hearing with opportunity to present one's side of case); Jones v. Board of Governors of the Univ. of N.C., 557 F. Supp. 263 (W.D.N.C. 1983) (noting that "[i]t is well settled that when a public school or state university takes disciplinary action against a student which, for any substantial length of time, deprives the student of the opportunity to continue his or her education, the school must afford student due process of law"), *aff'd*, 704 F.2d 713 (4th Cir. 1983); Stricklin v. Regents of the Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969) (determining that Due Process Clause applicable to an interim suspension pending expulsion proceedings), *appeal dismissed*, 420 F.2d 1257 (7th Cir. 1970).

26. *See generally Horowitz*, 435 U.S. at 82.

27. *Goss*, 419 U.S. at 573.

28. *Id.* at 573–74.

29. *See, e.g.*, Harris v. Blake, 798 F.2d 419, 422 (10th Cir. 1986) (finding a property interest in state college education where the state legislature had directed that state colleges "'shall be open . . . to all persons resident in this state' upon payment of a reasonable tuition fee"), *cert. denied*, 479 U.S. 1033 (1987).

30. N.C. CONST. art. IX, § 9.

31. Research reveals no cases in North Carolina further clarifying this provision. In *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997), the North Carolina Supreme Court held that the state constitution guarantees to every child the opportunity to receive a sound basic education. In so holding, it was interpreting language no more direct than that cited here in the text regarding university education.

32. *Ewing*, 474 U.S. at 222, n.7.

33. *See id.*

34. James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2136, 2137 (1987);

argument but did not comment on its strength, deciding instead "not to 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[35] Without further guidance from the Court, we can assume that the implied agreement between a university and a student could be the basis of a property interest in education and therefore is entitled to the protections of due process.

Scope of the Protected Property Interest

Lower federal and state courts have recognized a property interest in continuing education once a student has begun a course of study, but the scope of this protected interest is limited.

Admission

In *Roth*, the Supreme Court observed that the Fourteenth Amendment's due process protection of property applies to "interests that a person has already acquired in specific benefits."[36] This observation suggests that unless a person is already enjoying a benefit, that person has no procedural due process rights if the benefit is denied. In *Martin v. Helstad*,[37] the district court explicitly noted that an applicant for admission to an academic program "has no constitutional due process right to a hearing to prove his or her qualifications for admission and no constitutional right to admission."[38]

Postacceptance

Once an applicant has accepted an offer of admission, the prospective student has a sufficient property interest in admission prior to matriculation to require some procedural due process.[39] In *Martin*, a law school applicant's acceptance was revoked after the school determined that the student had failed to disclose fully the circumstances of a criminal conviction. The district court held that the applicant had a property interest in admission to the law school based on the school's offer of admission and the plaintiff's acceptance of the offer.[40]

Minor Offenses

Not every disciplinary action taken by a public university or community college gives rise to a constitutional right to due process.[41] For example, minor offenses (such as those in which the potential penalty would have no permanent effect on the student's academic record) may not implicate property or liberty interests.[42] In *Yench v. Stockmar*,[43] the Tenth Circuit concluded that "[a]ction leading to sanctions of severity less than expulsion do not constitute aggrievements under the Constitution, nor do they invoke the jurisdiction of the federal court regardless of the nature of the incident or the reasons for the disciplinary action."[44] If there is no deprivation of a property or liberty interest, due process protections are not required.

Denial of Enrollment

The denial of enrollment in a particular class or program is less likely to be violative of property interests than is the denial of enrollment altogether.[45] In *Roth*, the Court determined that the teacher-plaintiff had no "legitimate claim of entitlement" to tenure, and therefore the university's refusal to renew the teacher's employment contract did not constitute an infringement of a constitutionally protected property interest.[46] By analogy, a student seemingly would have no "legitimate claim of entitlement" to enrollment in a specialized or honors program within a university or college. Denial of enrollment would not deprive a student of a constitutionally protected property interest and thus would not warrant due process.

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see also Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 292 (1999) (stating that "th[e] contract, formed when an accepted student registers, arises from the mutual understanding that the student who satisfactorily completes a program's academic requirements will receive the appropriate degree").

35. *Ewing*, 474 U.S. at 222, n.7.

36. *Roth*, 408 U.S. at 576.

37. 578 F. Supp. 1473 (W.D. Wis. 1983).

38. *See id*. at 1480; *see also* Tobin v. University of Me. Sys., 59 F. Supp. 2d 87, 90 (D. Me. 1999).

39. *See* Martin v. Halstad, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983).

40. *See id*. at 1475; *but see* Unger v. National Residents Matching Program, 928 F.2d 1392, 1397 (3d Cir. 1991) (holding that student accepted into university residency program that was discontinued prior to her enrollment did not have property interest in pursuit and continuation of medical education). As of this writing, research has revealed no case law indicating whether the courts would find that a property interest had been established where an institution revoked its offer of admission before the student accepted.

41. *See* Yench v. Stockmar, 483 F.2d 820, 823 (10th Cir. 1973).

42. *See* French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969) ("disciplinary proceedings which do not involve expulsion or suspension, but which only deal with lesser penalties such as the loss of certain social privileges, do not have to be protected by the same procedural safeguards which are necessary in expulsion or suspension proceedings"), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941 (1970).

43. 483 F.2d 820 (10th Cir. 1973).

44. *Id.* at 824 (determining that student's probation "was not a deprivation of a right requiring judicial relief").

45. *Compare Roth,* 408 U.S. at 573–74 (suggesting that decision not to hire or rehire a person for one particular government job is much less likely to violate requirements of due process than is a decision that the individual may not hold any government job).

46. 408 U.S. at 578.

By contrast, a federal district court in Minnesota determined that the University of Minnesota's rejection of a student-athlete's application to a particular academic program within the university did constitute a deprivation of a protected property interest. The court reasoned that even though the plaintiff was denied admission,

> the circumstances of this case make it more like an expulsion case than a nonadmission case. The plaintiff lost existing scholarship rights; he cannot enroll in another college without sitting out one year of competition under athletic rules; and although he has attended the defendant University for several years, he may no longer register for day classes at the defendant University.[47]

This case suggests that if denial of enrollment effectively excludes a student from attending school altogether, the denial may infringe upon a protected property interest and so warrant certain procedural protections.

Liberty Interests

Although beyond the scope of this article's discussion of property, student disciplinary decisions in public higher education may implicate certain *liberty* interests as well. In *Roth*, the Court determined that "liberty" encompasses "the right . . . to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long-recognized as essential to the orderly pursuit of happiness by free men."[48] Lower federal courts consistently have held that the liberty interests described in *Roth* are present in the context of public education.[49] Commenting on *Roth*, the district court in *Marin v. University of Puerto Rico*,[50] for example, observed that the "right to engage in a chosen occupation is meaningless if one is unable to obtain the training it requires; similarly, the right to acquire useful knowledge implies a right of access to institutions dispensing such knowledge."[51] The *Marin* court continued:

> Due process protection is particularly necessary when the governmental action may damage the individual's standing in the community . . . or may impose "a stigma or other disability that foreclose[s] his freedom to take advantage of other educational or future employment opportunities." Suspension from a public college is a mark on one's record that may well preclude further study at any public and many private institutions and limit the positions one can qualify for after termination of one's studies.[52]

Thus a student's enrollment at a public university or college creates certain liberty interests for which some level of due process protection must be afforded before those interests are denied or otherwise infringed.

The Scope of Required Due Process

While it is clear that the rights of students threatened with suspension or expulsion are not co-extensive with the rights of parties in a civil or criminal trial,[53] as concluded above, some degree of due process is owing to these students. How much process is due has yet to be clearly defined by the Supreme Court. Instead the Court has insisted that "[d]ue process is flexible and calls for such procedural protection as the particular situation demands."[54] As a result, the level of due process afforded in a particular setting varies widely with the substantiality of the property or liberty interests implicated.

To determine what process is due in a student disciplinary proceeding, courts typically employ a balancing test, weighing the costs of requiring a particular set

47. Hall v. University of Minn., 530 F. Supp. 104, 107–8 (D. Minn. 1982).

48. 408 U.S. at 572.

49. *See, e.g.*, *Goss*, 419 U.S. at 575 ("liberty" interests implicated where high school student was suspended for ten days since suspension "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment"); Albert v. Carovano, 824 F.2d 1333, 1339, n.6 (2d Cir. 1987) (noting that ". . . at a minimum, the students' protected liberty interest is at stake because of the 'stigma' attached to suspension from college for disciplinary reasons"); *Jaksa*, 597 F. Supp. at 1247, 1254 (determining that plaintiff's suspension from university involved a sufficient "liberty" interest to entitle him to Fourteenth Amendment guarantees, court noted that "[t]here is no question that plaintiff's interest in uninterrupted education and remaining free from stigma are weighty"); Marin v. University of Puerto Rico, 377 F. Supp. 613, 621–22 (D.P.R. 1974) (describing the nature of liberty interests involved and holding that the Due Process Clause applies to educational suspensions).

50. 377 F. Supp. 613 (D.P.R. 1974).

51. *Id.* at 622.

52. *Id.*, *quoting Roth*, 408 U.S. 573.

53. *See* Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987); *see also* Henson v. Honor Comm. of the Univ. of Va., 719 F.2d 69, 74 (4th Cir. 1983); *Jaksa*, 597 F. Supp. at 1250 ("a school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants"); *Yench*, 483 F.2d at 823 ("[s]tudent disciplinary proceedings are not comparable to criminal proceedings"); *Esteban*, 415 F.2d at 1089–90 ("school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure").

54. *Hall*, 530 F. Supp. at 108, *citing* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also Dixon*, 294 F.2d at 155 ("[t]he minimal procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved"); *Henson*, 719 F.2d at 73 ("[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation").

of procedures against the benefits expected from the use of those procedures. In applying the balancing test, courts usually invoke the factors enumerated by the Supreme Court in *Mathews v. Eldridge*:[55]

- the importance of the private interest that will be affected by the official action;
- the risk of erroneous deprivation of such interest through the procedures used;
- the probable value of additional or substitute procedural safeguards; and
- the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[56]

An additional procedure is required only if the interest at stake for the individual student, combined with the likelihood that error will be reduced by augmenting the process, is greater than the cost to the government of granting the additional safeguard. The sufficiency of any procedural protections will depend on a careful balancing of these competing interests and the possibility of error.

At a minimum, students facing expulsion must be given some kind of notice and afforded some kind of hearing.[57] As a general rule, the notice and hearing should precede removal of the student from the university or college. If a student's presence poses a continuing danger to persons or property or a threat of disrupting the academic process, however, the student may be removed immediately from campus.[58] Under such an extreme circumstance, a preliminary hearing should be held at the first opportunity after the threat disappears.[59]

Beyond these broad requirements of notice and some sort of hearing, the Supreme Court has provided no explication of required protections. As expected, without a ruling by the Supreme Court specifying how much process a student is due, the lower courts have applied limited precedent unevenly.

Notice

There are no clear and definite rules by which to measure meaningful notice.[60] In *Mullane v. Central Hanover Trust Co.*,[61] the Supreme Court observed that a "fundamental requirement of due process is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[62] At the very least, the notice should contain a statement of the specific charges that, if proven, would justify expulsion under the promulgated regulations[63] of the institution.[64]

There is no additional requirement that the student be given notice of the statements of accusing witnesses.[65] In *Nash v. Auburn University*,[66] the Eleventh Circuit determined that the notice given to veterinary students that they were being charged with academic dishonesty in connection with a particular examination and that certain named persons were serving as witnesses was constitutionally sufficient. The *Nash* court determined that the students were not entitled to advance notice of the content of the witnesses' statements.[67]

Some independent authority, however, suggests that students who are not present to hear the evidence

55. 424 U.S. 319, 335 (1976).

56. *See Gorman*, 837 F.2d at 13; *Hall*, 530 F. Supp. at 108.

57. *See Gorman*, 837 F.2d at 12 (observing that notice and opportunity to be heard traditionally and consistently have been held to be the essential requisites of procedural due process); *Dixon*, 294 F.2d at 158 (determining that due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct); *Stricklin*, 297 F. Supp. at 419 (determining that suspension of thirteen days imposed as a sanction for misconduct, without prior specification of charges, notice of hearing or hearing, would violate due process).

58. *See* Perez v. University of Puerto Rico, 575 F.2d 21, 23 (1st Cir. 1978) (noting that chancellor of university should have known that summarily suspending students would violate their constitutional rights); *Dixon*, 294 F.2d at 157 ("[i]n disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense"); *Marin*, 377 F. Supp. at 623 ("[p]rompt, though temporary, suspension in advance of a full hearing must be permissible when the university has reasonable cause to believe that imminent danger to persons or property will exist if the student is permitted to remain on the campus pending full hearing"); *Stricklin*, 297 F. Supp. at 420 ("[u]nless the element of danger to persons or property is present, suspension should not occur without specification of charges, notice of hearing, and hearing").

59. *See Marin*, 377 F. Supp. at 624.

60. *See Nash*, 812 F.2d at 661.

61. 339 U.S. 306 (1950).

62. *Id.* at 314; *see also Nash*, 812 F.2d at 661.

63. Rules embodying standards of discipline for state university students must be contained in properly promulgated regulations. *See* Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) (finding that expulsion and prolonged suspension could not be imposed on students simply on basis of alleged misconduct without reference to pre-existing rule supplying adequate guide); *see also Marin*, 377 F. Supp. at 627 (determining that a provision that merely prohibited "[i]mproper or disrespectful conduct in the classroom or campus" was impermissibly vague).

64. *See Dixon*, 294 F.2d 158 (determining that notice that failed to specify grounds for expulsion violated due process).

65. Obviously, if a hearing has been scheduled, the student must also receive notice of the time and place of the pending hearing.

66. 812 F.2d 655 (11th Cir. 1987).

67. *See id.* (assuming, without expressing an opinion, that the students had property and liberty interests in their continued enrollment at the university and that those interests enjoyed certain due process protections).

against them should be given the names of the accusing witnesses and a report of their testimony to ensure the students' ability to respond at a later forum.[68] Nevertheless, there is no indication that students have a right to such information at the time of notice.

Furthermore there is no requirement that a university or college adopt a specific method of notification (whether verbal or written) or that it give notice within a specific time period after the date of the alleged infraction or before a scheduled hearing. Indeed, the courts have approved different notice requirements depending on the facts of the particular case. Illustratively, in *Jones v. Tennessee State Board of Education*,[69] the student facing disciplinary charges was given two days of notice, which the court considered sufficient.[70] Similarly, in *French v. Bashful*,[71] the court indicated that the notice of the allegations provided to the accused students the day before the scheduled hearing did not violate procedural due process.[72]

Hearing

While due process requires that students threatened with suspension or expulsion have the right to respond,[73] the nature of the hearing requirement will vary according to the circumstances of the particular case. In *Goss*, the Court required only an "informal give-and-take" between the student and the high school administrative body that would, at least, give the student "the opportunity to characterize his conduct and put it in what he deems the proper context."[74] A dismissal from a public university or community college for misconduct, however, may warrant a more formal meeting.[75] In *Gorman v. University of Rhode Island*,[76] the First Circuit suggested that "[a] charge of misconduct, which may easily be colored by the point of view of the witness, 'requires something more than an informal interview with an administrative authority of the college.'"[77] The hearing, the court explained, must afford the student "the opportunity to respond, explain, and defend."[78] Such an opportunity does not imply, however, "that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."[79]

Although the nature and substance of the hearing will vary depending on the particular circumstances, at least a preliminary hearing must take place prior to the deprivation of the protected interest, that is, before the expulsion or suspension of a student from school.[80] Not even an interim suspension can be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to hold a hearing prior to the suspension. In such a case, due process requires that the student be provided a preliminary hearing at the earliest practical time.[81]

Impartial Arbiter

Generally an impartial decision maker is an essential guarantee of due process.[82] In the educational context, however, lower federal courts have upheld the decisions of university disciplinary board members who would not satisfy the classic requirements of neutrality.[83] For example, the courts have permitted administrators or others who have had prior contact with the

68. *See Dixon*, 294 F.2d at 155, 159.

69. 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 397 U.S. 31 (1970).

70. *Id.* at 835.

71. 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941 (1970).

72. *Id.* at 1336 (finding due process violation on other grounds).

73. There is no accompanying right to respond *in person*. In *Martin v. Helstad*, the court determined that where the factual question was sharply focused and extremely narrow and the university administrators had before them all the pertinent information, the university was not required to provide the plaintiff-student an opportunity to appear in person. 578 F. Supp. 1473, 1482 (W.D. Wis. 1983). The court observed, however, that "[u]nder different circumstances, such as those in which the prospective student disputed the facts underlying the school's determination that the application was incomplete or untruthful, the school might be constitutionally required to provide a hearing at which the prospective student could appear in person." *Id.* at 1485.

74. *Goss*, 419 U.S. at 581; *see also Horowitz*, 435 U.S. at 85–86.

75. *But see* Rosenfeld v. Ketter, 820 F.2d 38 (2d Cir. 1987) (determining that since law student was afforded all of the process required by *Goss*, a more formal hearing would have been redundant).

76. 837 F.2d 7 (1st Cir. 1988).

77. *Id.* at 13–14, *quoting Dixon*, 294 F.2d 158; *see also* Wright v. Texas S. Univ., 392 F.2d 728, 729 (5th Cir. 1968) (noting that while student is not entitled to the formality of a trial, "he must be given a fair and reasonable opportunity to make his defense to the charges and to receive such a hearing as meets the requirements of justice").

78. *Gorman*, 837 F.2d at 13; *see also Martin*, 578 F. Supp. at 1482–83 ("[b]ecause disciplinary dismissals resemble traditional judicial and administrative fact-finding, a student facing dismissal from a public institution is entitled to a hearing permitting him or her to rebut the evidence of allegedly wrongful conduct or put it into context").

79. *Dixon*, 294 F.2d at 159; *see also* Tellefsen v. University of N.C. at Greensboro, 877 F.2d 60 (4th Cir. 1989) (unpublished) (noting that due process requires only "an opportunity to respond, explain, and defend").

80. *See Gorman*, 837 F.2d at 12–13.

81. *See Stricklin*, 297 F. Supp. at 420.

82. *See Nash*, 812 F.2d at 665; Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972) (indicating that fundamental requirement of due process in school disciplinary proceedings is that a hearing must be accorded before an impartial decision maker).

83. *See Winnick*, 460 F.2d at 548–49; Blanton v. State Univ. of N.Y., 489 F.2d 377, 386 (2d Cir. 1973) (finding no due process violation where dean allowed to participate in student disciplinary hearing even though he had witnessed the student violation at issue); *compare Duke*, 469 F.2d at 834 (finding no due process violation where members of hearing panel were not

accused student or the matter at issue to serve in a decision-making capacity at the disciplinary hearing. In *Wasson v. Trowbridge*,[84] the Second Circuit held that officials who had had some previous contact with the incident in question were not absolutely barred from participating on the hearing panel. The court noted, however, that the plaintiff, a merchant marine cadet, "was entitled to show that members of the panel had had such prior contact with his case that they could be presumed to have been biased."[85] Similarly in *Nash*,[86] the Eleventh Circuit determined that prior knowledge and discussion of the charge against the student did not disqualify one of the disciplinary board members from performing his duties on the board.[87] The court explained: "The record must support actual partiality of the body or its individual members . . . . [J]ust any prior knowledge of the incident does not disqualify the decision maker."[88]

Lower federal courts have also found that the commingling of administrative functions does not necessarily constitute a due process violation. In *Winnick v. Manning*,[89] the court determined that the student was not prejudiced by the involvement of a school administrator who was both the chief complaining witness and the initial reviewing authority at a preliminary hearing: "While such commingling of functions is certainly not to be encouraged, we fail to see how it prejudiced [the complainant]."[90] The court noted that the subsequent full disciplinary hearing cured any procedural irregularities that may have occurred during the preliminary suspension hearing.[91]

Finally, lower courts have determined that disciplinary boards either partly or wholly composed of students do not constitute a per se violation of the Due Process Clause. The Fourth Circuit in *Henson v. Honor Committee of the University of Virginia*[92] determined that the fact that the disciplinary process, including administrative appeals, was entirely student-operated did not constitute an unconstitutional denial of due process.[93] Presumably students challenging an institution's procedural safeguards should be given the opportunity to demonstrate that they have been harmed by the composition of the decision-making body, but the mere presence of other students as adjudicators will not violate due process.

Counsel

Although there is some disagreement regarding the right to legal representation in student disciplinary proceedings,[94] the weight of authority is against a student's right to have an actively participating attorney in a college disciplinary hearing. In *Gorman*, for example, the court determined that the university's refusal to allow the accused student to have legal counsel at the disciplinary hearing did not violate due process.[95] Similarly in *Barker v. Hardaway*,[96] the Fourth Circuit held that it was not a violation of due process to limit the role of the student's attorney to that of advisor. As advisor, the attorney could not address the hearing committee, cross-examine witnesses, or speak on behalf of the student.[97]

Other lower courts have been willing to impose a requirement of counsel, however, upon a showing by the student that the lack of counsel prejudiced him or her. Such a showing can be made if, for example, the student is also facing criminal charges arising from the same events that triggered the university disciplinary proceeding.[98] In *Gabrilowitz v. Newman*,[99] the local police department charged the student with assault with intent to rape another student. As a result of the incident, the accused student was suspended from the University of Rhode Island and barred from entering the campus. After the university denied the student's request for legal counsel at his disciplinary hearing, the student sought injunctive relief restraining the univer-

disqualified even though they were involved in the investigation that led up to the hearing).

84. 382 F.2d 807 (2d Cir. 1967).

85. *Id.* at 813; *see also Blanton*, 489 F.2d at 386.

86. 812 F.2d 655.

87. *See id.* at 666.

88. *Id.*

89. 460 F.2d 545 (2d Cir. 1972).

90. *Id.* at 549.

91. *See id.*; *see also Gorman*, 837 F.2d at 15 (concluding that there must be more than assertions that a "multiple-hats" problem violated due process).

92. 719 F.2d 69 (4th Cir. 1983).

93. *See id.* at 73.

94. *See Jaksa*, 597 F. Supp. at 1252, n.8 (and cases cited therein).

95. *See Gorman*, 837 F.2d at 16; *see also Goss*, 419 U.S. at 583 (declining to construe the Due Process Clause to require that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident); Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) (finding no due process violation where student at his expulsion hearing was denied the right to have an attorney argue his case and cross-examine witnesses).

96. 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

97. *See id.*

98. *See Gorman*, 837 F.2d at 16; Gabrilowitz v. Newman, 582 F.2d 100, 104, 107 (1st Cir. 1978) (holding that when disciplinary proceeding concerns a pending criminal case, student has a right to the advice of counsel).

99. 582 F.2d 100 (1st Cir. 1978).

sity from conducting the hearing unless he was allowed representation by an attorney of his choice. The First Circuit held that because related criminal charges were pending, the denial of the student's right to have a lawyer of his choosing during a university disciplinary hearing constituted a due process violation.[100] The court explained the student's difficult dilemma: the student "must decide whether or not to testify at the hearing with the knowledge that, if he does, his statements may be used against him in the criminal case. . . .[F]urther complicat[ing] the choice is an awareness of his own inability to evaluate the effect his statements may have in the criminal case."[101] Under such a circumstance, the presence of counsel to advise the student is required.

In addition, courts more readily have allowed attorneys to participate at a hearing on a student's behalf when the university itself is represented by an attorney[102] or in cases where the proceedings are unusually complex.[103] In *Jaksa v. Regents of the University of Michigan*,[104] for example, the court noted that "[h]ad an attorney presented the university's case, or had the hearing been subject to complex rules of evidence or procedure, plaintiff may have had a constitutional right to representation."[105] Similarly in *French*,[106] the court held that where a senior law student conducted the prosecution of the students before a disciplinary committee, the university's refusal to allow the participation of the students' retained counsel at the hearing constituted a due process violation.[107] Thus in a case where the university is represented by counsel, the student would be prejudiced by not having a legal representative.

Confrontation

Federal courts are divided over whether students have a right to confront their accusers or witnesses at a disciplinary hearing.[108] Some courts have held, however, that concerns over anonymity for student witnesses may prevail over confrontation concerns. In *Jaksa*,[109] a student was suspended for cheating on a final examination. The student challenged his suspension, arguing, in part, that he was deprived of his due process right to confront and cross-examine his accuser. The *Jaksa* court determined that the plaintiff did not have a due process right to confront the anonymous student who reported the cheating.[110] Relying on *Dillon v. Pulaski County Special School District*[111] (a lower court case that decided a similar matter in the context of secondary education), the court in *Jaksa* noted that "the need for anonymity of student accusers, who might otherwise be the victim of reprisals from fellow students, could prevail over the right to confrontation."[112]

Cross-Examination

Federal courts have held consistently that due process does not require that a student subject to disciplinary action be entitled to cross-examine witnesses.[113] For example, in *Nash*,[114] two students at the university's school of veterinary medicine were charged with academic dishonesty and subsequently suspended from the school. The students challenged the constitutionality of their hearing on the ground that they were not allowed to cross-examine the accusing witnesses. The Eleventh Circuit rejected the students' claim, determining that since the accused students were present when the witnesses testified and had the opportunity to present statements and witnesses on their own behalf, the right to cross-examine was not a constitutional requirement.[115]

If, however, a disciplinary matter turns on the credibility of either the accused or the accuser, cross-examination of witnesses may be required.[116] Al-

100. *See id.* at 104–5.

101. *Id.* at 104.

102. *See French*, 303 F. Supp. at 1337; *see also* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (holding that there is no right to representation as long as "the government does not proceed through counsel").

103. *See Jaksa*, 597 F. Supp. at 1252.

104. 597 F. Supp. 1245 (E.D. Mich. 1984).

105. *Id.* at 1252.

106. 303 F. Supp. 1333.

107. *Id.* at 1338.

108. *Compare Dixon*, 294 F.2d at 159 (requiring a university to inform students of who made accusations against them), and *Jaksa*, 597 F. Supp. at 1252 (determining that student had no right to confront his anonymous accuser).

109. 597 F. Supp. 1245.

110. *See id.* at 1252.

111. 468 F. Supp. 54 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979).

112. *Jaksa*, 597 F. Supp at 1253.

113. *See Dixon*, 294 F.2d 159 (explicitly noting that decision is not intended "to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required"); *Gorman*, 837 F.2d 16; *Winnick*, 460 F.2d 549; *Jaksa*, 594 F. Supp. at 1252–53 ("Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding"); *Nash*, 812 F.2d 664; *see also* Reilly v. Daly, 666 N.E.2d 439, 444 (Ind. App. 1996).

114. 812 F.2d 655.

115. *See id.* at 664; *see also Tellefsen*, 877 F.2d 60.

116. *See Winnick*, 460 F.2d at 550; *Blanton*, 489 F.2d at 385, n.11 ("if the case resolves itself into a problem of credibility, and the tribunal must choose to believe either the accused or his accuser, cross-examination is the condition of enlightened action and is therefore required in the interest of fairness and reasonableness").

though the court ultimately determined that no due process right was infringed, the Second Circuit in *Winnick*[117] noted that "if this case had resolved into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."[118]

Written Record

Although the absence of a written transcript has not been a ground for reversing disciplinary action, several courts have required some form of record of the proceedings.[119] In *Gorman*,[120] the court found that, since university disciplinary procedures allowed the student access to written records of the proceedings, the university must provide them. However, the court also noted that due process does not require that students receive written or tape-recorded transcripts of university disciplinary proceedings.[121] While many courts have ruled that this practice is advisable, it is not required.[122]

Review of the Decision

While the right to review is an important element of due process protection, lower federal courts have not recognized a student's absolute right to appeal disciplinary hearings to higher review bodies or to a higher-ranking university official.[123] As long as the disciplinary hearing satisfies the basic requirements of due process, there is no constitutional right to appellate review.[124]

Disciplinary Dismissal versus Academic Dismissal

The discussion thus far has been limited to the due process requirements of disciplinary decisions. There is a significant legal difference, however, between a student's alleged violation of an institution's rules of conduct and a student's failure to meet academic standards. Unlike their evaluation of disciplinary decisions, courts rarely review measures taken by an educational institution to address inadequate academic performance.[125] Instead courts ordinarily defer to the broad discretion vested in public school officials, resolving that academicians, given their "particular knowledge, experience and expertise," are best equipped to review and evaluate academic records.[126] In *Ewing*, the Court explained: "When judges are asked to review the substance of a genuinely academic decision, they should show great respect for the faculty's professional judgment."[127] As a result, courts require far less stringent procedural requirements in the case of academic dismissals.[128]

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to judicial fact-finding proceedings, which typically require a full hearing.[129] With this in mind, the Court in *Horowitz* concluded that "considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment."[130] In order to satisfy due process prior to expulsion or suspension of a student for academic reasons, school

117. 460 F.2d 545.

118. *Id.* at 550. Some universities may permit students to cross-examine witnesses, but neither the student nor the university has subpoena power to compel a witness to appear before the hearing committee. *See Hart*, 557 F. Supp. at 1389 ("[i]t is not clear how the College could be required to compel the attendance of witnesses over whom it has no power of subpoena or otherwise").

119. *See. e.g.*, *Gorman*, 837 F.2d at 15; *Marin*, 377 F. Supp. at 623 (seeing no reason why the state's goals need be vindicated without, among other protections, a "written decision by the presiding official encompassing (1) findings of fact, (2) the substantial evidence on which the findings rest, and (3) reasons for one conclusion").

120. 837 F.2d 7.

121. *See id.* at 15–16.

122. *See Jaksa*, 597 F. Supp. at 1252 (observing that "[w]hile [the] case illustrates the wisdom of recording such hearings, it is clear that the Constitution does not impose such a requirement").

123. *See Nash*, 812 F.2d at 666–67 (holding that the Due Process Clause does not grant students the right of appeal to a dean or to the president of the university); *Winnick*, 460 F.2d at 549, n.5 (noting that student "had no constitutional right to review or appeal after the disciplinary hearing which satisfied the essential requirements of due process").

124. *See Winnick*, 460 F.2d at 549, n.5.

125. *See* Greenhill v. Bailey, 519 F.2d 5, 7 (8th Cir. 1975).

126. *Gaspar*, 513 F.2d at 851.

127. *Ewing*, 474 U.S. at 225; *see also Horowitz*, 435 U.S. at 96, n.6 ("[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation").

128. *See Horowitz*, 435 U.S. at 86.

129. *Id.* at 89.

130. *Id.* at 87, n.3; *see also* Davis v. Mann, 882 F.2d 967, 974 (5th Cir. 1989). At least one court disagrees with the Supreme Court's conclusion that no hearing is required for academic dismissals. *See* Stoller v. College of Med., 562 F. Supp. 403, 414 (M.D. Pa. 1983) (evaluating concurring and dissenting opinions of other justices in *Horowitz*, court concluded that "Justice Rehnquist's belief that the due process clause does not require a hearing for dismissal for academic reasons is not the view at this time of the majority of the Supreme Court and therefore is not the law of the land. Justice Rehnquist's statement is not necessary to his decision and is dicta"), *aff'd*, 727 F.2d 1101 (3d Cir. 1984).

authorities need only advise the student with respect to such deficiencies.[131]

School officials' decisions are conclusive, provided that their actions have been reasonable and made in good faith.[132] A court may grant relief, however, if it determines that the "administrative action 'is not supportable on any rational basis or where it is willful and unreasoning action, without consideration and in disregard of facts or circumstances of case.'"[133]

131. *See Gaspar*, 513 F.2d at 851; *see also Lewin*, 910 F. Supp. at 1167 (determining that "'[d]ismissal of student for academic reasons comports with the requirement of procedural due process if the student had prior notice of faculty dissatisfaction with his or her performance and of the possibility of dismissal, and if the decision to dismiss the student was careful and deliberate'").

132. *Gaspar*, 513 F.2d at 850.

133. *Greenhill*, 519 F.2d at 10, n.12; *see also Gaspar*, 513 F.2d at 851 (requiring positive evidence of ill will or bad motive).

Conclusion: Advisable Due Process Protections

In conclusion, lower federal courts uniformly have recognized that students enrolled at public universities or colleges have a protected property interest in their education. The courts have been less clear, however, as to the amount of due process an institution must afford a student if that interest is infringed. At a minimum, universities and colleges must provide notice and some form of a hearing before an impartial arbiter. In light of the *Mathews* balancing test, however, it is advisable that institutions adopt additional procedures since, under certain circumstances, relatively inexpensive procedural safeguards will protect important student interests and forestall potential lawsuits. ■

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