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## "Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?

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# ARTICLES

## “ACADEMIC CHALLENGE” CASES: SHOULD JUDICIAL REVIEW EXTEND TO ACADEMIC EVALUATIONS OF STUDENTS?

THOMAS A. SCHWEITZER\*

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## INTRODUCTION

In *Susan M. v. New York Law School*, recently decided by the New York Court of Appeals, a law student dismissed for academic deficiency brought suit seeking a court-ordered reinstatement.<sup>1</sup> The petitioner blamed her inadequate grade point average on allegedly unfair grades of C-minus in constitutional law and D in corporations.<sup>2</sup> She especially challenged the validity of the latter grade.<sup>3</sup> Her corporations professor allegedly acknowledged giving her zero credit on an essay question worth 30% of the exam because the second part of her answer incorrectly analyzed the issue under New York law.<sup>4</sup> The first part of her answer, however, correctly applied Delaware law and would have merited full credit had she only refrained from discussing the application of New York law.<sup>5</sup> The trial court, finding that the petitioner failed to demonstrate that her dismissal was arbitrary, capricious, or made in bad faith, dismissed the claim.<sup>6</sup>

In a remarkable decision, the appellate division reversed and remanded the case for further consideration by the law school on the grounds that the petitioner's exam might have suffered from an irrational reading by her professor.<sup>7</sup> The court concluded that the school owes its students some protection against arbitrary and ca-

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1. *Susan M. v. New York Law School*, 76 N.Y.2d 241, 244, 556 N.E.2d 1104, 1106, 557 N.Y.S.2d 297, 299 (1990). The proceeding was brought under New York article 78. See N.Y. CIV. PRAC. L. & R. 7801 (McKinney 1981) (providing that "relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article").

New York Law School automatically placed petitioner Susan M. on academic probation after she failed to achieve a cumulative grade point average (GPA) of 2.00 at the end of her first year of law school. *Susan M.*, 76 N.Y.2d at 243, 556 N.E.2d at 1105, 557 N.Y.S.2d at 298. After a slight improvement during the fall semester of 1986, her cumulative GPA dropped to 1.89 at the end of the spring semester of 1987. *Id.* In accordance with the procedures set forth in the Student Handbook, her case was referred to the Academic Status Committee. *Id.* After she submitted a written statement and addressed the Committee in person, the Committee voted in July 1987 to dismiss her for failure to meet the school's academic standards. *Id.* In August, after she submitted a second written statement, the Committee voted not to reconsider its decision, and she immediately sued. *Id.* at 244, 556 N.E.2d at 1105, 557 N.Y.S.2d at 298.

2. *Id.* at 244, 556 N.E.2d at 1106, 557 N.Y.S.2d at 299.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 245, 556 N.E.2d at 1106, 557 N.Y.S.2d at 299.

7. *Susan M. v. New York Law School*, 149 A.D.2d 69, 73, 544 N.Y.S.2d 829, 831 (1990).

precious grading.<sup>8</sup> The court of appeals, New York's highest court, reversed the decision and reaffirmed the strong principle that courts should refrain from intervening in schools' judgments of their students' academic performance absent a demonstration of bad faith, arbitrariness, irrationality, or a constitutional or statutory violation.<sup>9</sup>

*Susan M.* is the latest in a series of law suits by students challenging academic dismissals and denials of diplomas.<sup>10</sup> Today, with higher education vital to economic success for most people,<sup>11</sup> and tuition costs at record levels, the ramifications of academic failure have never been greater. Academic dismissal or denial of a diploma does not merely mean forfeited time, money, and effort expended on an education, but also that the student may effectively be fore-

8. *Id.* at 73, 544 N.Y.S.2d at 831-32.

9. *Susan M. v. New York Law School*, 76 N.Y.2d 241, 247, 556 N.E.2d 1104, 1107-08, 557 N.Y.S.2d 297, 300-01 (1990).

10. A large majority of academic challenge cases have been brought by professional and graduate students. *See infra* notes 117, 129, 131, 278-79, 285-89, 298-99, 381-84, 497-507, 511-14, 532-46, 599-609 (discussing challenges by students in masters, Ph.D., and law degree programs). The largest single group of plaintiffs consists of medical students. *See infra* notes 117, 161-62, 199-223, 239-53, 273-85, 300-02, 308-30, 335-57, 359-72, 374-80, 386-447, 449-56, 467-96 (discussing cases brought by medical students). By contrast, very few plaintiffs are high school students. *See infra* notes 134-39, 169-71, 237 (discussing cases brought by high school students).

This Article will refer to cases in which students have challenged adverse academic evaluations and decisions by professors in court as "academic challenge cases." Most of these cases involve dismissals or refusals to award degrees; understandably, very few students have sued merely to challenge an allegedly unfair grade. There are, however, exceptions. *See, e.g., Paoli v. University of Del.*, 695 F. Supp. 171, 174 (D. Del. 1988) (granting summary judgment for university against former student who was denied permission to enroll in course required for special program after having failed prerequisite course); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1556-63 (M.D. Ala. 1987) (granting summary judgment on issues of substantive due process, breach of contract, and equal protection for university that changed its degree requirements and hence, would not allow student to continue in electrical engineering program, but did not dismiss him from university), *aff'd mem.*, 858 F.2d 744 (11th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989); *Moire v. Temple Univ. School of Medicine*, 613 F. Supp. 1360, 1362-65 (E.D. Pa. 1985) (forcing medical student to repeat third year of school for failing to substantiate charges of sexual harassment resulting in grade of F in psychiatric clerkship), *aff'd without opinion*, 800 F.2d 1136 (3d Cir. 1986); *Mucklow v. John Marshall Law School*, 176 Ill. App. 3d 886, 888, 531 N.E.2d 941, 943 (1988) (dismissing 13-count complaint alleging professor intercepted anonymous evaluation of himself, identified author's handwriting as Mucklow's, and retaliated against him by giving him grade of D); *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 252-55, 329 N.W.2d 87, 88-91 (1983) (refusing to issue writ requiring board of regents, which failed to produce two of student's three examination papers, to remove failing grade from student's transcript); *Pfaff v. Columbia-Greene Community College*, 99 A.D.2d 887, 887-88, 472 N.Y.S.2d 480, 480-81 (1984) (memorandum decision) (finding student failed to exhaust administrative remedies before seeking judicial redress, by not pursuing appeal process in place at college); *Horne v. Cox*, 551 S.W.2d 690, 691-92 (Tenn. 1977) (dismissing petition seeking judicial review of law student's grade on research paper on grounds that it was not "contested case" under Tennessee law).

11. *See Reich, The Secession of the Successful*, N.Y. Times, Jan. 20, 1991, § 6 (Magazine), at 16 (describing class of people termed "symbolic analysts," composed predominately of persons with higher education, superior standard of living, and intellectually challenging jobs); *id.* at 42 (observing that high cost of education is one factor in author's primary hypothesis—that wealthy, predominately those with higher education, are "seceding from the rest of the nation").



closed from pursuing the same degree at another institution.<sup>12</sup> Dismissals are typically for failure to maintain a satisfactory grade point average (GPA),<sup>13</sup> and a single low grade can reduce a marginal student's GPA below the minimum acceptable grade point average for retention or graduation.<sup>14</sup> Not surprisingly, students often conclude that the grade or grades which pushed them over the brink were unfairly low.<sup>15</sup> While some of these students complain to the professor and request the chance to review their final examination,

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12. See, e.g., *Horowitz v. Board of Curators of the Univ. of Mo.*, 538 F.2d 1317, 1320 & n.3, 1321 (8th Cir. 1976) (noting expert witness testimony that, in admission process where expert had to choose between two equally qualified candidates, expert would "lean heavily" in favor of person who had never been dismissed from graduate school), *rev'd*, 435 U.S. 78 (1978); *Greenhill v. Bailey*, 519 F.2d 5, 8 n.6 (8th Cir. 1975) (noting concession by defendant educational institution of unlikelihood that student would gain admittance to another school); *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968) (recognizing that expulsion or suspension from institution of higher education constitutes severe penalty, perhaps more severe than monetary fines or brief confinement imposed by courts in criminal proceedings), *aff'd*, 418 F.2d 163 (7th Cir. 1969); Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2136-40 (1987) (noting educational institutions' presumption that, absent academic or behavioral problem, students generally remain at same institution until their graduation). In a real sense, dismissal from an institution is the academic equivalent of capital punishment; as a practical matter it often means the end of a student's hopes of pursuing a particular career. Cf. Picozzi, *supra*, at 2140 (comparing penalty for dismissal from university to suspended sentence in criminal proceeding). Thus, the instinctive reaction of many students is to resist dismissal by any means possible.

13. At most institutions, the minimum GPA necessary for retention or graduation is 2.00 on a four point scale, where A is four-points; B, three points; C, two points; D, one point; and F, zero points. Failing to maintain a 2.00 average usually means being automatically placed on academic probation if not outright dismissal. See *Susan M. v. New York Law School*, 76 N.Y.2d 241, 243, 556 N.E.2d 1104, 1105, 557 N.Y.S.2d 297, 298 (1990) (outlining disciplinary procedures at New York Law School).

14. In *Susan M.*, for example, the plaintiff would not have been subject to dismissal if the D she received in corporations had been a C-plus or higher. *Susan M. v. New York Law School*, 149 A.D.2d 69, 73, 544 N.Y.S.2d 829, 831 (1989). Similarly, the institution at which the author teaches strictly requires a 2.00 cumulative GPA for graduation, and the author knows personally of cases in which students have been denied a law degree after years of study because their GPA's were above 1.98 but below 2.00. In such instances, a single grade can make the difference between graduating and not graduating. Lawsuits in which students claim a legal right to have such averages "rounded upward" have uniformly failed. See, e.g., *McIntosh v. Borough of Manhattan Community College*, 78 A.D.2d 839, 839, 433 N.Y.S.2d 466, 467 (1980) (memorandum decision) (refusing to round petitioner's score of 69.713 to 70.00 on basis that college has no policy supporting such action), *aff'd*, 55 N.Y.2d 913, 433 N.E.2d 1274, 449 N.Y.S.2d 26 (1982); *Lesser v. Board of Educ.*, 18 A.D.2d 388, 390-91, 239 N.Y.S.2d 776, 779 (1963) (finding it beyond court's discretion to round petitioner's son's average grade from 84.3 to 85.0 to facilitate admission into local college); *Marquez v. University of Wash.*, 32 Wash. App. 302, 306-08, 648 P.2d 94, 97-98 (1982) (finding no breach of contract for law school's failure to round petitioner's grade point average from 67.725 to 68.000).

15. See *Moire v. Temple Univ. School of Medicine*, 613 F. Supp. 1360, 1372 (E.D. Pa. 1985) ("Faculty and administrators are accustomed to receiving numerous complaints from students who receive grades lower than they feel they deserve"), *aff'd without opinion*, 800 F.2d 1136 (3d Cir. 1986). In nearly seven years of teaching in law school, the author cannot remember a single semester in which no student questioned a grade in one of his courses. Such complaints, of course, are not limited to students at the lower end of the academic spectrum: students are universally aware of the importance of grades and academic class rank in helping to determine access to attractive jobs after graduation.

most complaints do not proceed beyond the professor's office.<sup>16</sup> As for those that do proceed further, courts have upheld the actions of deans and other administrators in changing grades, sometimes over protests by professors claiming that they have absolute discretion to determine grades and that changing grades violates their academic freedom.<sup>17</sup> Undoubtedly, most grade appeals do not succeed, and in light of the drastic psychological, professional, and economic consequences of academic dismissals and denials of degrees, it is only natural in our litigious society that aggrieved students should seriously consider seeking legal redress.

Unfortunately, those in quest of legal remedies for academic grievances immediately confront a formidable roadblock—the long-standing tradition of judicial deference to educators' academic assessments.<sup>18</sup> This deference has common law

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16. The author believes that most schools permit grade reviews by the professor, and this is strongly recommended as a prudent step for institutions to take in responding to student concerns. In addition, many institutions have formal or informal grade appeal procedures, some of which afford students an automatic right of review of protested grades. See, e.g., *Lyons v. Salve Regina College*, 422 F. Supp. 1354, 1358 (D.R.I. 1976) (describing college's "grade appeal process"), *rev'd*, 565 F.2d 200 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978); *Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 412, 402 N.E.2d 1150, 1152, 426 N.Y.S.2d 248, 250 (1980) (noting existence of "academic appeals committee" at City University of New York); *Horne v. Cox*, 551 S.W.2d 690, 691 (Tenn. 1977) (observing that petitioner first made his appeal to "grade review committee" at Memphis State University Law School before seeking judicial review of research paper grade).

17. See, e.g., *Parate v. Isibor*, 868 F.2d 821, 829-30 (6th Cir. 1989) (finding that professors have first amendment right to award grades as they see fit, but that they have no constitutional interest in grades students ultimately receive, thereby allowing deans and administrators to change students' grades but that they have not permitting them to order professors to do likewise); *Mustell v. Rose*, 211 So. 2d 489, 494-97 (Ala. 1968) (describing process by which medical school administrator reviewed and changed student's grade); *Eureka Teachers Ass'n v. Board of Educ.*, 199 Cal. App. 3d 353, 368, 244 Cal. Rptr. 240, 247-48 (1988) (declaring board of education's procedure for changing grades legal so long as findings are set forth justifying change); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 541, 116 N.W. 294, 297 (1908) (explaining that dean would presumably be person of superior achievements and judicial temperament, more learned than chairperson of any department in college; thus, important questions like grade changes should be submitted to dean for final decision).

18. See *supra* text accompanying note 9 (citing rationale for judicial deference); see also Beaney, *Students, Higher Education and the Law*, 45 DEN. U.L. REV. 511, 514 (1968) (maintaining fact that statutes and charters establishing both public and private universities concerned themselves with trustees and corporate relationships and not with student-university relationships might explain reason behind judicial deference with regard to these relationships); Latourette & King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 200 (1988) (attributing courts' traditional deference to colleges and universities to courts' belief in compelling need for institutional autonomy and recognition of courts' limited expertise); Noredin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 84 J.C. & U.L. 141, 141 (1982) (associating judicial deference with failure of courts to articulate legal concept of students' rights but intimating that this deference, at least where students' rights are at issue, is eroding); Picozzi, *supra* note 12, at 2140 (citing Supreme Court's paternalistic attitude toward secondary schools as one explanation for judicial deference); Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1029 (1969) (asserting several reasons for courts' justification of deference in these types of cases, e.g., that higher education is "a privilege, not a right," that university stands *in loco*

roots.<sup>19</sup> It has been called an integral part of our vital tradition of academic freedom,<sup>20</sup> and it has won unanimous endorsement in recent years from the United States Supreme Court.<sup>21</sup> Judicial deference to professors' academic decisions and evaluations no doubt reflects apprehension arising when judges are called upon to "second-guess" professional judgments resulting from a long process of interaction and observation between teacher and student.<sup>22</sup>

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*parentis* and can, therefore, act as it pleased, or that university catalogue's rules create binding contract between university and student); Note, *Bringing the Vagueness Doctrine on Campus*, 80 YALE L.J. 1261, 1277 (1971) (discussing courts' failure to apply void-for-vagueness to university regulations as example of judicial deference and noting courts' most common justification for this inaction is that "regulatory precision would unduly interfere with the functioning of the university"); Note, *Legal Relationship Between the Student and the Private College*, 7 SAN DIEGO L. REV. 244, 248 (1970) (noting court's reluctance, especially in academic areas, to interfere with discretionary authority of university officials).

19. See *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 21, 102 N.E. 1095, 1096 (Mass. 1913) (holding that as long as school committee acts in good faith, its decisions are not reviewable).

20. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (declaring that free society depends on free universities, and "[t]his means the exclusion of governmental intervention in the intellectual life of a university"). Justice Frankfurter then quoted the four essential freedoms of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (emphasis added). Freedom to determine who may be admitted to study obviously includes freedom to determine who may be permitted to remain a student and necessarily implies the freedom to dismiss students who have failed to measure up in a relevant fashion. Once a student has matriculated, the university's freedom to dismiss him is subject to his property and liberty interests in remaining at the school. See Picozzi, *supra* note 12, at 2136-40 (discussing these interests). Thus, the academic freedom to determine who may be admitted to study is necessarily broader than the university's freedom to determine who may be permitted to remain a student.

21. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 & n.12 (1985) (citing lack of standards, "reluctance to trench on the prerogatives of state and local educational institutions," and responsibility to safeguard academic freedom as considerations counseling restrained judicial review); *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (pronouncing that enlarging judicial presence in educational community would impair faculty-student relationship, around which educational process is centered); see also *University of Cal. Regents v. Bakke*, 438 U.S. 265, 312-15 (1978) (proclaiming "national commitment" to safeguarding academic freedoms within university communities in context of university's right to affirmatively create diverse student body through its dual admission program).

22. Cf. *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (noting that teacher may occupy role of educator, advisor, friend, or even parent-substitute). Even in the unusual event that the judge might have expertise in the academic field at issue, prudence would counsel restraint in intervening for some of the same reasons that appellate judges should not generally reconsider trial courts' findings of fact. In one of the rare instances in which a trial judge did take evidence on the question of what was the proper grade to assign to a student's final examination paper, the Nebraska Supreme Court commented that "[o]ne cannot read the record without concluding, as did the trial judge, that a court could not well fix, from the conflicting testimony, the grade earned by relator in taking the examinations . . . ." *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 539, 116 N.W. 294, 297 (1908). Moreover, judges have a natural reluctance, particularly in this era of crowded dockets, to remove traditional restrictions and to create new causes of action or expand existing ones, thereby encouraging a massive onslaught of new litigation by disgruntled students. See *Johnson v. Cuyahoga County Community College*, 29 Ohio Misc. 2d 33, 34, 489 N.E.2d 1088, 1090 (1986) (citing judicial economy as one reason to leave academic grading determinations to educators).

As a result, student plaintiffs have lost the vast majority of reported cases in which they have challenged adverse academic evaluations by their professors in court.<sup>23</sup> Nevertheless, student plaintiffs have won permanent remedies in a handful of cases.<sup>24</sup> In a much larger group of cases, student plaintiffs have prevailed at trial, only to have these decisions reversed on appeal.<sup>25</sup>

As we shall see, two seminal cases, *Board of Curators of the University*

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23. See *supra* note 10 and accompanying text (citing cases in which students lost their challenges of adverse academic evaluations by their professors).

24. See, e.g., *Miller v. Dailey*, 136 Cal. 212, 221, 68 P. 1029, 1032 (1902) (ordering dismissed state normal school student reinstated); *Baltimore Univ. v. Colton*, 98 Md. 623, 633-36, 57 A. 14, 16-17 (1904) (ordering reinstatement of law student who was dismissed because he was not "known to the faculty"); *Maitland v. Wayne State Univ.*, 76 Mich. App. 631, 638-40, 257 N.W.2d 195, 200 (1977) (ordering dismissed medical student reinstated when trial court found that petitioner's test score was higher than scores of some students who were not dismissed); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 542-45, 116 N.W. 294, 296-97 (1908) (ordering medical school to award student M.D. degree after dean of school determined that student earned degree); *Healy v. Larsson*, 67 Misc. 2d 374, 375, 323 N.Y.S.2d 625, 626-27 (Sup. Ct. 1971) (ordering Schenectady County Community College to award student Associate of Arts degree after judge found that student satisfactorily completed his course of study), *aff'd*, 35 N.Y.2d 653, 318 N.E.2d 608, 360 N.Y.S.2d 419 (1974); *Blank v. Board of Educ.*, 51 Misc. 2d 724, 731, 273 N.Y.S.2d 796, 803 (Sup. Ct. 1966) (ordering Brooklyn College to award student A.B. degree *nunc pro tunc* and holding college estopped from denying diploma on grounds of nonattendance to student whose professors gave him permission to enroll in certain classes without attending them); *New York ex rel. Cecil v. Bellevue Hosp. Medical College*, 67 N.Y. Sup. Ct. 107, 108-09, 14 N.Y.S. 490, 490 (1891) (ordering medical college to readmit student after unjustifiably expelling him before final examinations); *University of Tex. Health Science Center v. Babb*, 646 S.W.2d 502, 506 (Tex. Ct. App. 1982) (finding school's catalogue to constitute written contract and ordering nursing student reinstated under its terms); *Evans v. West Virginia Bd. of Regents*, 271 S.E.2d 778, 780-81 (W. Va. 1980) (*per curiam*) (ordering reinstatement of medical student after finding that his property interest in continuation and completion of his medical education was sufficient to warrant imposition of minimal due process protection).

25. See, e.g., *Mauriello v. University of Medicine & Dentistry*, 781 F.2d 46, 49, 52 (3d Cir.) (vacating judgment of district court that awarded compensatory damages for academic dismissal), *cert. denied*, 479 U.S. 818 (1986); *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 329 N.W.2d 87, 90-91 (1983) (vacating writ ordering university to remove failing grade from transcript because court found no evidence of malice, bad faith, or fraud on part of university); *Beilis v. Albany Medical College*, 136 A.D.2d 42, 43-44, 525 N.Y.S.2d 932, 933-34 (1988) (overturning lower court's order allowing woman to continue her studies because student at private medical college was not allowed to invoke state constitutional rights without requisite state action); *Olsson v. Board of Higher Educ.*, 66 A.D.2d 196, 197-99, 412 N.Y.S.2d 615, 615-17 (1979) (affirming judgment estopping university from claiming student did not meet degree requirements after student relied on professor's oral instructions during final examination), *rev'd*, 49 N.Y.2d 408, 416, 402 N.E.2d 1150, 1152, 426 N.Y.S.2d 248, 252-53 (1990) (reversing appellate division and reserving "diploma by estoppel" doctrine for "the most egregious of circumstances"); *Heisler v. New York Medical College*, 113 Misc. 2d 727, 730-31, 449 N.Y.S.2d 834, 836-37 (N.Y. Sup. Ct.) (finding college's actions arbitrary when it did not follow its own rule for mandatory dismissal and inconsistently applied it to different students), *rev'd*, 88 A.D.2d 296, 300-01, 453 N.Y.S.2d 196, 199 (reversing under doctrine of primary jurisdiction, after finding that proceeding should have been dismissed and petitioner instructed to seek review by Commissioner of Education), *aff'd*, 58 N.Y.2d 734, 735, 445 N.E.2d 203, 204, 459 N.Y.S.2d 27, 28 (1982) (affirming decision of appellate division because dismissal of student was in good faith and on basis of sound academic judgment); *Eiland v. Wolf*, 764 S.W.2d 827, 832-39 (Tex. Ct. App. 1989) (reversing lower court on grounds that student's due process rights were not infringed).

of *Missouri v. Horowitz*<sup>26</sup> and *Regents of the University of Michigan v. Ewing*,<sup>27</sup> dashed the hopes of those who had anticipated an expansion of student due process rights in academic dismissal cases comparable to the historic changes effected by the Supreme Court in other areas of student rights.<sup>28</sup> While *Horowitz* and *Ewing* reversed lower court decisions in favor of student petitioners, their rather equivocal holdings did not render lawsuits challenging academic dismissals hopeless.<sup>29</sup> Rather, the two cases leave the law in an unsettled state where legal openings remain for student plaintiffs.<sup>30</sup> Moreover, given the drastic consequences of dismissal from a college, professional school, or graduate school,<sup>31</sup> it is not surprising that students continue to bring lawsuits challenging such decisions despite the rather dismal prospects for success.

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26. 435 U.S. 78 (1978).

27. 474 U.S. 214 (1985).

28. See *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975) (finding that due process requires hearing before public high school student may be suspended from school for 10 days); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 505-06 (1979) (holding that black armbands worn by high school students to protest Vietnam War are constitutionally protected expression). But see *Ingraham v. Wright*, 430 U.S. 651, 659-63 (1977) (holding that cruel and unusual punishment clause of eighth amendment does not apply to disciplinary corporal punishment in public schools).

29. Both cases assumed, without deciding, that petitioner students had a due process property or liberty interest in their continued enrollment. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985) (assuming without deciding that petitioner's property interest gives rise to substantive right under due process clause); *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84-85 (1978) (noting that respondent was afforded at least as much due process as fourteenth amendment requires).

30. Several courts have explicitly held that college and university students have either a property or liberty interest in continuing their studies and completing their degree. See, e.g., *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986) (recognizing property interest in public education embodied in Colorado statute that opened public colleges to all residents upon payment of reasonable tuition), *cert. denied*, 479 U.S. 1033 (1987); *Ikpeazu v. University of Neb.*, 775 F.2d 250, 253 (8th Cir. 1985) (agreeing that plaintiff may assert property interest in grades he receives); *Stevens v. Hunt*, 646 F.2d 1168, 1169 (6th Cir. 1981) (maintaining that medical students' qualified property right in studying and practicing medicine has long been recognized by State of Tennessee); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (acknowledging nursing student's property interest in continued enrollment in state vocational school); *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (recognizing graduate student's property interest in continuing his studies), *aff'd*, 727 F.2d 1101 (3d Cir. 1984); *Abbariao v. Hamline Univ. School of Law*, 258 N.W.2d 108, 112 (Minn. 1977) (determining that complaint of student at private law school alleging state action and property interest in continued enrollment survived motion to dismiss); *Evans v. West Virginia Bd. of Regents*, 271 S.E.2d 778, 780 (W. Va. 1980) (deciding that medical student had property interest under West Virginia law in continuing and completing his education); see also *Greenhill v. Bailey*, 519 F.2d 5, 6-7 (8th Cir. 1975) (holding school's letter to Association of American Medical Colleges, declaring that student had "lack of intellectual ability," was deprivation of liberty interest because it foreclosed his freedom to take advantage of other opportunities).

31. See *supra* note 12 and accompanying text (citing cases illustrating consequences of dismissal). Interestingly, Scott Ewing, whose dismissal by the University of Michigan Medical School was ultimately upheld by the United States Supreme Court in *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), was subsequently admitted to another medical school, according to his attorney, and was compiling "a superior record" as a second-year medical student in 1986. Letter from Mary K. Butler to editor of J.A.M.A. (Apr. 18, 1986).

The purpose of this Article is to provide a comprehensive inventory of academic challenge cases. It will list, describe, and summarize reported American cases, classifying them not only by legal theory, but also by the type of fact situation they exemplify. Part I of the Article will address the common law tradition of judicial deference to professors' and universities' academic decisions. It will describe the origins of the principle that an implied contractual relationship exists between the student and the university, as well as the "counter-principle" that universities may dismiss students without justification.

Part II of the Article will outline the impact on academic challenge jurisprudence by the due process revolution effected by *Dixon v. Alabama State Board of Education*<sup>32</sup> and *Goss v. Lopez*,<sup>33</sup> two cases that considerably expanded student due process rights in the disciplinary field. Part II will also discuss the unsuccessful efforts to create a similar expansion in the academic challenge field, culminating in defeat for the student plaintiffs in *Board of Curators of the University of Missouri v. Horowitz*<sup>34</sup> and *Regents of the University of Michigan v. Ewing*.<sup>35</sup>

Part III of the Article will survey recent academic challenge cases. The section is divided into the following major categories of cases: A) due process liberty and property interests; B) procedural due process claims; C) substantive due process claims; D) contract claims; and E) estoppel claims based on faculty representations. The Article concludes that, while the tradition of judicial deference to academic institutions in this area remains as strong as ever, courts in extreme cases have intervened and should and probably will continue to intervene to protect student rights in academia.<sup>36</sup>

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32. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

33. 419 U.S. 565 (1975).

34. 435 U.S. 78 (1978).

35. 474 U.S. 214 (1985).

36. Student misconduct, whether involving violent or disruptive behavior or academic violations like plagiarism and cheating on examinations, is beyond the scope of this Article. The Article will only consider court challenges to dismissals and other adverse treatment of students when no misconduct is present and the action taken is based exclusively on academic deficiency. The Article will not examine court challenges of allegedly discriminatory denial of admission to academic institutions. See *Rosenstock v. Board of Governors*, 423 F. Supp. 1321, 1325-26 (M.D.N.C. 1976) (finding that preferential admissions with respect to minority applicants met rational basis test). It will not review court challenges of allegedly discriminatory denial of readmission to a student earlier dismissed for academic deficiency. See *Anderson v. University of Wis.*, 665 F. Supp. 1372, 1391-92 (W.D. Wis. 1987) (stating that, while recovering alcoholic is handicapped under Rehabilitation Act, petitioner was not "otherwise qualified" as also required by Act), *aff'd*, 891 F.2d 737 (7th Cir. 1988). Other topics that will not be discussed include the question of whether sufficient "state action" exists on the part of private universities to subject them to the requirements of the fourteenth amendment. See *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 77-78 (W.D. Pa. 1985) (refusing to find requisite

## I. COMMON LAW APPROACHES TO ACADEMIC CHALLENGE CASES

A. *The Implied Contractual Relationship Between Student and School*

Before the legality of a student's dismissal or other academic

state action on part of private university to justify constitutional scrutiny), *aff'd*, 787 F.2d 583 (3d Cir. 1986); *Ayton v. Bean*, 80 A.D.2d 839, 839-40, 436 N.Y.S.2d 781, 781-82 (1981) (memorandum decision) (declaring that Long Island University is private and, therefore, hearing is not required before expulsion of nursing student). The issue of whether such institutions are exempt from suit because of the eleventh amendment and the doctrine of sovereign immunity is also outside the Article's scope. *See* *Kashani v. Purdue Univ.*, 813 F.2d 843, 848 (7th Cir.) (finding eleventh amendment's protection bars claim against university and damages claim against officials in their official capacities, but not claims against officials in their official capacities for injunctive relief and reinstatement into university), *cert. denied*, 484 U.S. 846 (1987). Nor does the Article address cases in which student plaintiffs have alleged discrimination against them by the faculty on racial, ethnic, sexual, or religious grounds, but where the courts have found the dismissals resulted from academic deficiency. *See, e.g.*, *Al-Zubaidi v. Ijaz*, 917 F.2d 1347, 1350-51 (4th Cir. 1990) (*per curiam*) (affirming trial court's determination that while plaintiff, a Shi'ite Muslim Ph.D. candidate at Virginia Tech. may have been discriminated against on religious grounds by his Sunni Muslim professor, student's poor research abilities justified his termination), *cert. denied*, 111 S. Ct. 1583 (1991); *Kashani v. Purdue Univ.*, 763 F. Supp. 995, 999-1000 (N.D. Ind. 1991) (determining that electrical engineering student was dismissed because of inability to pass Ph.D. examinations, not Iranian ethnicity); *Lipsett v. University of P.R.*, 637 F. Supp. 789, 801-06 (D.P.R. 1986) (concluding that female doctor failed to show that university officials acquiesced to or encouraged alleged sexual discrimination or that she was denied due process when expelled from medical residency after proceedings and appeal); *Sanders v. Ajir*, 555 F. Supp. 240, 243-48 (W.D. Wis. 1983) (granting summary judgment to medical school officials in civil rights action by student dismissed for insufficient GPA, where student failed to substantiate allegations that he was discriminated against because of his race, religion, and sexual orientation); *Sanford v. Howard Univ.*, 415 F. Supp. 23, 27-30 (D.D.C. 1976) (finding "no competent proof" that predominantly black university was guilty of racial prejudice in suspending white student studying for master's degree who had one sixteenth American Indian ancestry), *aff'd*, 549 F.2d 830 (D.C. Cir. 1977); *Wells v. George Peabody College for Teachers*, 377 F. Supp. 1108, 1110 (M.D. Tenn.) (finding that dismissal of minority student from Ph.D. program for failure to pass oral qualifying exam was neither racially motivated nor breach of contract), *aff'd*, 487 F.2d 1403 (6th Cir. 1973).

The Article omits a large number of claims that are not of general interest, such as claims based on state statutes. *See, e.g.*, *Russell v. Salve Regina College*, 649 F. Supp. 391, 403-04 (D.R.I. 1986) (finding nursing student who had been expelled due to her obesity had stated claim of action under Rhode Island Privacy Act, R.I. GEN. LAWS § 9-1-28.1 (1985)), *aff'd*, 890 F.2d 484 (1st Cir. 1989) (holding, however, that student's obesity was too public for her to recover for violation of statutory right), *rev'd on other grounds*, 111 S. Ct. 1217 (1991); *Gold v. University of Bridgeport School of Law*, 19 Conn. App. 379, 380, 562 A.2d 570, 571-72 (1989) (limiting claim under Connecticut Unfair Trade Practices Act to claim for common law fraudulent misrepresentation); *Morrison v. University of Or. Health Sciences Center*, 68 Or. App. 870, 876-77, 685 P.2d 439, 443-44 (1984) (ruling that university rules for academic dismissals complied with Oregon Administrative Procedure Act). *But see infra* text accompanying notes 467-95 (discussing contract claims in *Russell*).

Finally, the Article also omits discussion of various exotic and creative legal claims that have not led to any student victories in litigation. *See, e.g.*, *Samper v. University of Rochester Strong Memorial Hosp.*, 139 Misc. 2d 580, 528 N.Y.S.2d 958 (Sup. Ct. 1987) (rejecting without comment female medical resident's claim of intentional infliction of emotional distress); *Clements v. County of Nassau*, 835 F.2d 1000, 1005 (2d Cir. 1987) (affirming award of summary judgment against nursing student who claimed her professors were motivated by animosity and hostility and committed libel when they gave her negative evaluation); *Easley v. University of Mich. Bd. of Regents*, 632 F. Supp. 1539, 1544 (E.D. Mich. 1986) (granting summary judgment in favor of University of Michigan Law School against expelled student who claimed that professor brought cheating charges against him in retaliation for his exercising his first amendment right to complain to professor), *aff'd in part and remanded*, 853 F.2d

sanction can be assessed, one must first clarify the nature of the legal relationship between the student and the institution. Compulsory education laws make public school enrollment a legal right for those of the appropriate age, but higher education is voluntary and, therefore, different. Courts forced to evaluate the legal nature of the student-university relationship have reached varying conclusions,<sup>37</sup> but there is a general consensus that an implied contract is created by the institution's acceptance of the student and the student's commitment of the tuition money, time, and effort required to complete the course work for a diploma.<sup>38</sup>

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1351 (6th Cir. 1988), *cert. denied*, 111 S. Ct. 1414 (1991); *Ross v. University of Minn.*, 439 N.W.2d 28, 35 (Minn. Ct. App. 1989) (finding letter dismissing doctor from psychiatric residency program, stating that further remedial social skills training would be useful to applicant in preparing to reapply, was not defamatory and rejecting without comment doctor's claim of negligent infliction of emotional distress); *Beckman v. Dunn*, 276 Pa. Super. 527, 535-36, 414 A.2d 583, 587 (1980) (observing that letter from department chairman, intended only for examination by university ombudsman, opposing reopening of case of dismissed doctoral student, was not defamatory); *Lilly v. Smith*, 790 S.W.2d 539, 542-43 (Tenn. Ct. App. 1990) (applying rational basis test to university policy requiring dismissal of nursing students with two grades of D or below and finding no violation of equal protection "as to command extraordinary protection from majoritarian political process"). Many of these latter cases, however, are referred to elsewhere in the Article since the plaintiffs also made other, more conventional, arguments.

37. Courts in an earlier era tended to characterize post-secondary education as a privilege rather than as a right. *See Board of Trustees v. Waugh*, 105 Miss. 623, 631-35, 62 So. 827, 830-31 (1913) (upholding university rule prohibiting membership in Greek fraternities), *aff'd*, 237 U.S. 589 (1915). By the same token, the prevalence of the *in loco parentis* doctrine led to courts' sanctioning intrusive and paternalistic regulation of students which would be universally rejected today. *See Gott v. Berea College*, 156 Ky. 376, 381-83, 161 S.W.2d 204, 207-08 (1913) (upholding private college's rule that students could not patronize off-campus restaurants, stating that colleges have authority to oversee student discipline at their discretion so long as rules are not violative of "divine or human law"); *Pugsley v. Sellmeyer*, 58 Ark. 247, 251-52, 250 S.W. 538, 538-39 (1923) (upholding expulsion of 18-year-old public high school student for putting talcum powder on her face in violation of school district rule against use of cosmetics); *North v. Board of Trustees*, 137 Ill. 296, 297-301, 27 N.E. 54, 54-57 (1891) (upholding expulsion of student who refused to attend mandatory nonsectarian chapel service); *Tanton v. McKenney*, 226 Mich. 245, 246-47, 197 N.W. 510, 511 (1924) (upholding expulsion of freshman student at state normal college who smoked cigarettes on public streets of Ypsilanti, drove around streets of Ypsilanti in automobile seated on lap of young man, and was guilty of other acts of indiscretion); *State ex rel. Ingersoll v. Clapp*, 81 Mont. 200, 208-11, 263 P. 433, 434-37 (1928) (upholding suspension of university student at whose house alcoholic beverages were allegedly consumed by her husband and other student guests, even though plaintiff did not drink alcoholic beverages, had high scholastic standing, and was on honor roll), *cert. denied*, 277 U.S. 591 (1928).

38. *See, e.g., Baltimore Univ. v. Colton*, 98 Md. 623, 634-36, 57 A. 14, 17 (1904) (reinstating law student expelled without notice after he paid tuition and attended classes for several years); *Goldstein v. New York Univ.*, 76 A.D. 80, 82-83, 70 N.Y.S. 739, 740 (1902) (finding contract between law school and student who met and fulfilled all prerequisites listed in university's circular and matriculated thereafter); *People ex rel. Cecil v. Bellevue Hosp. Medical College*, 67 N.Y. Sup. Ct. 107, 108, 14 N.Y.S. 490, 490 (maintaining that university cannot take money from student and allow him to remain at school, only to arbitrarily refuse to confer degree upon him), *aff'd*, 128 N.Y. 621, 28 N.E. 253 (1891).



### 1. *Appropriateness of mandamus as a remedy*

Recognition of a contractual right of the student to continued enrollment upon payment of fees and successful completion of required academic work, however, is of questionable value to a student by itself. The normal remedy for breach of contract is an award of damages, and the vast majority of dismissed students want reinstatement rather than money.<sup>39</sup> In the older cases, the most common means utilized to seek such reinstatement was a petition for a writ of mandamus, and the principal issue was whether mandamus would lie to compel the university to readmit the student or to grant a degree.<sup>40</sup>

What may surprise the modern observer, to whom injunctive relief is commonplace and mandamus is out of the ordinary, is the fact that only a handful of student plaintiffs have sought or received specific injunctive relief ordering reinstatement. The explanation for this appears to be that since mandamus is a *legal* remedy, albeit an extraordinary one, its availability would preclude the traditionally required averment by a petitioner for equitable relief that there is "no remedy at law."<sup>41</sup>

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39. There are, however, exceptions to this generalization. See *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 19, 102 N.E. 1095, 1097 (1913) (discussing suit for damages after town excluded student from high school); see also *Russell v. Salve Regina College*, 649 F. Supp. 391, 406-07 (D.R.I. 1986) (recognizing suit for damages against nursing school by student expelled for obesity, who had already completed another nursing program without incident), *aff'd*, 890 F.2d 484, 489-90 (1st Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1217, 1221, *reinstating prior judgment on remand*, 938 F.2d 315 (1st Cir. 1991); see also *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 99-100, 120 N.W. 589, 591 (1909) (reversing trial court's mandamus reinstating black student dismissed from medical school exclusively on racial grounds but finding implied contract for breach of which student could sue for damages); *Tate v. North Pac. College*, 70 Or. 160, 164, 140 P. 743, 745 (1914) (recognizing that there is some debate whether mandamus or suit in equity for specific performance is appropriate remedy in contract action of this nature).

40. See Harker, *The Use of Mandamus to Compel Educational Institutions to Confer Degrees*, 20 YALE L.J. 341 (1911) (discussing development of use of mandamus to compel educational institutions to confer degrees upon students); Pennypacker, *Mandamus to Restore Academic Privileges*, 12 VA. L. REV. 645, 645 (1926) (discussing availability of writ of mandamus to students seeking redress for "unjust, unreasonable, and arbitrary denial of academic rights or privileges"); see also *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 14, 106 N.W. 116, 118-19 (1906) (concluding that mandamus would not lie to compel medical school, a corporation, to perform its contract to grant plaintiff student a diploma).

41. See *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 14, 106 N.W. 116, 119 (1906) (reversing grant of writ of mandamus ordering dental school to issue diploma to student plaintiff and noting that specific performance represents available remedy if petitioner is entitled to diploma and damages at law are inadequate); *Strank v. Mercy Hosp.*, 376 Pa. 305, 310-12, 102 A.2d 170, 172-73 (1954) (declaring that writ of mandamus will not issue to enforce right or duty resting wholly on contract); *Strank v. Mercy Hosp.*, 383 Pa. 54, 57-58, 117 A.2d 697, 698 (1955) (granting plaintiff same remedy by way of specific equitable relief that it denied when she earlier sought writ of mandamus); see also *University of Miami v. Militana*, 168 So. 2d 88, 89 (Fla. Dist. Ct. App. 1964) (quashing order *pendente lite* requiring readmittance of medical student pending final hearing and disposition of mandamus because order did not accomplish purpose of preserving status quo, protecting court in exercise of its

For example, the student in *People ex rel. Jones v. New York Homeopathic Medical College and Hospital*<sup>42</sup> claimed to have passed all his examinations and to have fulfilled all other requirements for a medical degree.<sup>43</sup> The faculty of the medical school, however, had not approved his qualifications or recommended him for graduation.<sup>44</sup> The superior court denied the writ, finding that mandamus would not lie where the exercise of judgment or discretion is called for on the part of an officer of the university or the university itself.<sup>45</sup> The court found that a writ of mandamus is a potential remedy only in situations in which the duty is purely administrative and no element of discretion is involved.<sup>46</sup>

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jurisdiction, or effectuating its final judgment); *University of Miami v. Militana*, 184 So. 2d 701, 704-05 (Fla. Dist. Ct. App. 1966) (maintaining that mandamus will not lie where no clear legal duty is shown); *Militana v. University of Miami*, 236 So. 2d 162, 164 (Fla. Dist. Ct. App. 1970) (per curiam) (affirming denial of mandatory injunction to compel medical school to readmit student), *cert. denied*, 401 U.S. 962 (1971).

On the other hand, some trial courts in more recent cases have granted mandatory injunctions to student plaintiffs. *See, e.g., Lyons v. Salve Regina College*, 422 F. Supp. 1354, 1364 (D.R.I. 1976) (ordering change of grade and reinstatement pursuant to college's contractual obligation to student), *rev'd*, 565 F.2d 200, 202-03 (1st Cir. 1977) (holding that commercial law should not be rigidly applied to relationship between student and college), *cert. denied*, 435 U.S. 1971 (1978); *Mahavongsanan v. Hall*, 401 F. Supp. 381, 384 (N.D. Ga. 1975) (ordering granting of master's degree to foreign student who did not meet increased requirements that university applied retroactively), *rev'd*, 529 F.2d 998 (5th Cir. 1976) (declaring that university is entitled to modify its degree requirements to properly exercise its educational responsibilities); *DeMarco v. University of Health Sciences/The Chicago Medical School*, 40 Ill. App. 3d 474, 481, 352 N.E.2d 356, 362-64 (1976) (affirming trial court injunction ordering medical school to issue M.D. to plaintiff); *University of Tex. Health Science Center v. Babb*, 646 S.W.2d 502 (Tex. Ct. App. 1982) (affirming trial court's grant of temporary injunction ordering reinstatement of nursing student after finding injunction did not interfere with University's first amendment right to academic freedom).

42. 20 N.Y.S. 379 (N.Y. Sup. Ct. 1892).

43. *People ex rel. Jones v. New York Homeopathic Medical College and Hosp.*, 20 N.Y.S. 379, 379 (N.Y. Sup. Ct. 1892).

44. *Id.*

45. *See id.* at 379-80 (pronouncing that college officials' failure to approve qualifications of student and their subsequent refusal to recommend him for graduation were enough to deny issuance of writ of mandamus).

46. *Id.* at 380. The court's argument centered on the nature of the duty and the role of the court in enforcing it. *Id.* In passing on the qualifications of its students, a state college exercises the discretion vested in it by the act incorporating it. *Id.* A court, therefore, cannot issue mandamus where the duty is not "purely ministerial," *i.e.*, where judgment and discretion are required on the part of the official who performs the specified act. *Id.* If this were not the case, the court continued, medical students, even with their limited experience, could easily pass any medical examination a judge could give them. *Id.*; *accord People ex rel. Pacella v. Bennett Medical College*, 205 Ill. App. 324, 324-25 (1917) (not reported in full) (refusing to issue mandamus ordering medical college to grant degree to student after finding that court could not pass on his qualifications); *Edde v. Columbia Univ.*, 8 Misc. 2d 795, 795, 168 N.Y.S.2d 643, 644 (Sup. Ct. 1957) (refusing to substitute its own opinion for that of faculty member chosen by university to make determination on quality of student's doctoral dissertation), *aff'd*, 6 A.D.2d 780, 175 N.Y.S.2d 556 (1958), *appeal dismissed*, 5 N.Y.2d 882, 182 N.Y.S.2d 829 (1959); *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 14, 106 N.W. 116, 118-19 (1906) (refusing to issue writ of mandamus, thereby confining plaintiff to remedies of specific performance and damages). *See also Tate v. North Pac. College*, 70 Or. 160, 164, 140 P. 743, 745 (1914) (appearing to assume court has judicial authority to require

Similarly, the student in *State ex rel. Niles v. Orange Training School for Nurses*<sup>47</sup> sought a court order compelling the defendant nursing school to grant her a diploma.<sup>48</sup> Although the school conceded that the student had passed her oral examinations, its committee on nurses reported that they had received "unfavorable reports as to her usefulness in nursing" from patients and attending physicians for whom she worked while in school.<sup>49</sup> The committee concluded that she had not completed her course with credit and denied her a diploma.<sup>50</sup> The New Jersey Supreme Court refused to issue a writ of mandamus, finding that the committee's decision constituted a quasi-judicial function.<sup>51</sup>

The above decisions, and the restrictive application of mandamus which they embody, reflect the principle of judicial deference to university decisions enforcing and applying academic standards. Application of the same principle, however, smacked of an abdication of judicial responsibility in *Booker v. Grand Rapids Medical College*.<sup>52</sup> In this case, the Michigan Supreme Court concluded that it was powerless to redress a breach of contract caused by a medical school's capitulation to naked racial bigotry.<sup>53</sup> Bowing to pressure from its predominantly white student body, the school expelled two black students without cause.<sup>54</sup> Booker and the other student petitioned for a writ of mandamus to order their reinstatement, maintaining

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university to grant diploma whether it be by writ of mandamus or specific performance). Similarly, a Pennsylvania court refused injunctive relief to a medical student who was recommended for a diploma by the faculty but turned down by the board of trustees, because the trustees had absolute discretion, absent bad faith, to issue such a denial. *Addy v. Western Pa. Medical College*, 11 Pa. D. 687, 687-88 (1902).

47. 63 N.J.L. 528, 42 A. 846 (1899).

48. *State ex rel. Niles v. Orange Training School for Nurses*, 63 N.J.L. 528, 529, 42 A. 846, 847 (1899).

49. *Id.*

50. *Id.* at 530, 42 A. at 849.

51. *Id.* The court concluded, "It would be absurd for this court to command the school authorities to certify that the relatrix had completed her course with credit, when, after full and fair consideration, those authorities have reached the conclusion that she has not done so." *Id.*; cf. *People ex rel. Moore v. Lory*, 94 Colo. 595, 597, 31 P.2d 1112, 1113 (1934) (comparing officers and faculty of educational institution to ordinary public officers and determining that former should be afforded same "presumptions of regularity" as latter, i.e., presumption of good faith); *Tate v. North Pac. College*, 70 Or. 160, 167, 140 P. 743, 745-46 (1914) (maintaining that faculties at colleges perform quasi-judicial functions and that their decisions are final if they act within their jurisdiction, in good faith, and not arbitrarily).

52. 156 Mich. 95, 120 N.W. 589 (1909).

53. *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 99-101, 120 N.W. 589, 591 (1909).

54. *Id.* at 99, 120 N.W. at 591. Felix Booker and another student, both of whom were black, enrolled in defendant's department of veterinary medicine and surgery and successfully completed the first year of a three-year degree program. *Id.* at 96, 120 N.W. at 590. After other students threatened to withdraw if Booker and the other student were allowed to continue, Grand Rapids Medical College obliged by expelling the two "for the sole reason that they were negroes." *Id.*

that they had a contract right to continue as students and that the statute under which the school was incorporated imposed a public duty on the school to permit them to continue for their second year.<sup>55</sup> The trial court granted the writ of mandamus ordering reinstatement of Booker and the other student.<sup>56</sup>

On appeal, the Michigan Supreme Court reversed. It rejected the public duty argument because the school had not deprived the students of any federal or state constitutional right.<sup>57</sup> In reversing, however, the court also disagreed with the school's argument that no contract existed between the students and the school.<sup>58</sup> The court freely conceded that the students had contract rights which the school had breached by expelling them.<sup>59</sup> The existence of these rights, the court maintained, derived from the payment of annual fees. Furthermore, catalogues and other documents produced by the university served to demonstrate the mutuality and consideration necessary to form a contract.<sup>60</sup>

After this bold application of the student-college contractual relationship paradigm, the Michigan Supreme Court suffered an attack of timidity. Rather than reversing the trial court based on the contract analysis, the court concluded that its mandamus power could not compel a private school to perform obligations arising from a contract with an individual.<sup>61</sup> Consequently, the race-based dismis-

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55. *Id.*

56. *Id.* at 96, 120 N.W. at 589.

57. *Id.* at 99-100, 120 N.W. at 591.

58. *Id.* at 98, 120 N.W. at 590-91.

59. *Id.* at 99-100, 120 N.W. at 591.

60. *Id.* In determining that a contract existed between the university and its students, the court concluded that only the students had the right to terminate the contract at any time. *Id.* Tuition is paid with the expectation that the student will have the opportunity to pursue the course of study to graduation. *Id.* Further, enrollment at a college creates an "implied understanding" that the student will not be arbitrarily dismissed. *Id.*; see also *Tate v. North Pac. College*, 70 Or. 160, 165, 140 P. 743, 745 (1914) (stating that because college issued catalogue outlining its degree requirements and Tate had knowledge of these requirements upon matriculation, contract was created). But see *Southern Methodist Univ. v. Evans*, 115 S.W.2d 622, 623-24 (Tex. Comm'n App. 1938) (rejecting university student's claim that his payment of tuition and fees and his applying himself to work given, together with acceptance of these by professors, constituted contract to confer degree upon him).

61. *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 100, 120 N.W. 587, 591 (1909) (citing *People ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 12-13, 106 N.W. 116, 118 (1906)); accord *Green v. Lehman*, 544 F. Supp. 260, 261-63 (D. Md. 1982) (finding controversy between expelled midshipman and Naval Academy nonjusticiable and, therefore, holding that neither declaratory, injunctive, nor mandamus relief was available), *aff'd*, 744 F.2d 1049 (4th Cir. 1984); *Goldberg v. Board of Regents*, 43 Colo. App. 340, 342, 603 P.2d 974, 975 (1979) (maintaining that student failed to state claim on which relief could be based because student's academic deficiencies negated any possible claim); *Cieboter v. O'Connell*, 236 So.2d 470, 472-73 (Fla. Dist. Ct. App. 1970) (affirming denial of alternative writ of mandamus to compel university to consider Ph.D. candidate's dissertation and administer final examinations for degree to him because student refused to submit to additional requirement that he undergo personal counseling sessions for one year); *Mariani v. Trustees of Tufts Col-*

sals stood.<sup>62</sup>

## 2. *Rejection of arbitrary decisionmaking and enforcement of the implied contract*

The restrictive interpretation of mandamus was not uniformly adopted. During the same era, some courts held that mandamus *could* lie to enforce the implied contractual right of a student not to be dismissed without justification. The plaintiff in *People ex rel. Cecil v. Bellevue Hospital Medical College*,<sup>63</sup> for example, completed all the course requirements for an M.D. The secretary of the medical school faculty informed him, however, that the school would not permit him to take the final examination and would not grant him a medical degree.<sup>64</sup> He filed a petition in the New York Supreme Court, Special Term, for a writ of mandamus ordering the school to

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lege, 1 Mass. App. Ct. 869, 870, 306 N.E.2d 833, 834 (1974) (refusing to issue writ of mandamus to enforce purely private and contractual rights of dismissed doctoral candidate); *Finkel v. Brooklyn Law School*, 61 Misc. 2d 198, 198, 305 N.Y.S.2d 61, 61-62 (Sup. Ct. 1969) (denying mandamus on failure of petitioner to show "clear legal right" to Juris Doctor degree); *Kaelin v. University of Pittsburgh*, 421 Pa. 220, 225-28, 218 A.2d 798, 800-02 (1966) (comparing defendant to those in *Strank* and *Barker* and determining that university is private institution and, therefore, not subject to mandamus jurisdiction), *cert. denied*, 385 U.S. 837 (1966); *Strank v. Mercy Hosp.*, 376 Pa. 305, 308, 102 A.2d 170, 171-72 (1954) (lacking jurisdiction to issue writ of mandamus to enforce petitioner's contractual rights against nonprofit corporation that receives no state aid); *Barker v. Bryn Mawr College*, 278 Pa. 121, 122, 122 A. 220, 220-21 (1923) (maintaining that court lacks jurisdiction to issue writ of mandamus against private institution that receives no state aid). *But see* *State ex rel. Bartlett v. Pantzer*, 158 Mont. 126, 129-34, 489 P.2d 375, 378-79 (1971) (issuing writ of mandamus directing University of Montana Law School to admit otherwise qualified applicant whose admission was rescinded after he received grade of D in undergraduate course required for admission); *Kantor v. Schmidt*, 73 A.D.2d 670, 670, 423 N.Y.S.2d 208, 209 (1979) (memorandum decision) (issuing order directing State University of New York at Stony Brook to issue plaintiff B.A., *nunc pro tunc*, on grounds that University failed to comply with 4 N.Y. COMP. CODES R. & REGS. tit. 8, § 52.2[b][4], requiring it "to record student progress toward the achievement of requirements, and to inform students periodically of their progress and remaining obligations").

In *Strank v. Mercy Hospital*, the plaintiff was a nursing student who was dismissed by the School of Nursing during her third and final year of training because she had broken a school rule by remaining away overnight without permission. *Strank v. Mercy Hosp.*, 376 Pa. 305, 307, 102 A.2d 170, 171 (1954). Instead of reinstatement, she sought a court order commanding the school to award her transfer credits for the two years she completed so that she could secure advanced standing at another nursing school. *Id.* The Pennsylvania Supreme Court reaffirmed its holding in *Barker v. Bryn Mawr College*, 278 Pa. 121, 122 A. 220 (1923), that mandamus would not lie to enforce a contract right or duty. *Strank*, 376 Pa. at 308, 102 A.2d at 171-72. Two years later, however, the same court upheld *Strank's* right to maintain an action in equity for the same relief. *See Strank v. Mercy Hosp.*, 383 Pa. 54, 57, 117 A.2d 697, 698 (1955) (declaring it peculiar province of equity to afford relief in cases where measurement of damages cannot be formulated and applied in suit at law because such damages are speculative and indeterminate, and thus legal remedy is inadequate and incomplete).

62. *Booker*, 156 Mich. at 101, 120 N.W. at 591. Justice Stevens recently referred to *Booker* as "an antiquated race discrimination decision of the Michigan Supreme Court whose principal holding has since been overtaken by events . . ." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 n.7 (1985).

63. 67 N.Y. Sup. Ct. 107, 14 N.Y.S. 490, *aff'd*, 128 N.Y. 621, 28 N.E. 253 (1891).

64. *People ex rel. Cecil v. Bellevue Hosp. Medical College*, 67 N.Y. Sup. Ct. 107, 108-09, 14 N.Y.S. 490, 490 (1891).

admit him to the final exam.<sup>65</sup> In reply, the medical school offered no justification for its action and asserted its absolute right to determine which students may sit for exams and complete their degrees.<sup>66</sup> The New York trial court denied the writ.<sup>67</sup>

On appeal, the New York Supreme Court, General Term, reversed, decisively rejecting the school's claim of absolute power to deny arbitrarily a degree to a student.<sup>68</sup> The court found that a contract existed between Cecil and the college, the terms of which were set forth and implied from informational documents circulated by the college to its students.<sup>69</sup> While the court noted that it is not permitted to review the discretion colleges exercise when they refuse to confer a degree, it viewed an absolute and arbitrary refusal as subject to judicial review.<sup>70</sup>

The court granted mandamus relief to vindicate a different legal right of a student in *Baltimore University of Baltimore City v. Colton*.<sup>71</sup> After finishing the course of study for his law degree, George S. Colton was barred from taking final examinations and was dismissed by the Baltimore University Law School.<sup>72</sup> When he protested, the school's faculty answered that Colton had been enrolled too long (five years), had attended too few classes, and had not paid the full

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* The court stated:

It may be true that this court will not review the discretion of the corporation in the refusal for any reason or cause to permit a student to be examined and receive a degree; but where there is an absolute and arbitrary refusal there is no exercise of discretion. It is nothing but a willful violation of the duties which they have assumed. Such a position could never receive the sanction of a court in which even the semblance of justice was attempted to be administered.

*Id.* The court did not cite any authority for its conclusion. The decision can be reconciled with decisions holding that mandamus will not lie to review an exercise of a school administration's discretion only if one accepts the court's premise that an absolute denial of a student's rights without the furnishing of any reason "is no exercise of discretion." See *Jackson v. State ex rel. Majors*, 57 Neb. 183, 187, 77 N.W. 662, 665 (1898) (affirming mandamus compelling reinstatement of state normal school student dismissed without explanation). The court in *Majors* found that the school did not show cause, as it was required to do, before expelling the relator's son. *Id.* at 186, 77 N.W. at 665. Thus, there was an arbitrary exercise of authority. No demonstration of judgment or discretion was made; the school made a decision and put it into effect. *Id.* The trial court, therefore, properly issued the writ. *Id.*; see also *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 74-75, 144 N.W. 1039, 1044 (1914) (issuing mandamus ordering readmission to public school of sixth grade student whose father did not permit her to attend required course in "domestic science"); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 542-43, 116 N.W. 294, 297-98 (1908) (finding statutory duty of medical college sufficient to invest court with jurisdiction to issue writ compelling college to graduate student after college's board of directors arbitrarily and capriciously refused to graduate her against recommendation of school's dean).

71. 98 Md. 623, 57 A. 14 (1904).

72. *Baltimore Univ. v. Colton*, 98 Md. 623, 630, 57 A. 14, 15 (1904).

tuition bill.<sup>73</sup> The school, however, conceded that it had dismissed Colton without making any charges or giving him a chance to make any explanation.<sup>74</sup> After a jury trial, the court entered a writ of mandamus ordering Colton's reinstatement. The Maryland Court of Appeals affirmed, holding that the school had wrongfully dismissed Colton.<sup>75</sup>

The California Supreme Court also authorized relief by way of mandamus to compel a county board of education to issue petitioner a teacher's certificate for the county's public schools in *Keller v. Hewitt*.<sup>76</sup> Although the petitioner met all the requirements necessary to receive the certificate,<sup>77</sup> the board "arbitrarily and without cause" refused to issue it.<sup>78</sup> The California Supreme Court reversed the trial court's denial of the writ and held that, once the applicant satisfied the requirements for the certificate, the applicant became legally entitled to receive it.<sup>79</sup> The actual act of issuing the certificate ceased to be discretionary and became ministerial.<sup>80</sup> Hence, a writ of mandamus would lie to compel the performance of such a duty.<sup>81</sup>

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73. *Id.* at 631, 57 A. at 15.

74. *Id.* at 635, 57 A. at 15-16.

75. *Id.* at 636, 57 A. at 17 (finding want of notice prior to expulsion to be sufficient to warrant issuance of mandamus where individual is member of corporation even when that corporation is private). The court pointed out plaintiff's undisputed evidence that he attended as many lectures as possible, that irregular attendance at lectures had not been deemed cause for expulsion by the school, that he had paid the entire sum demanded by defendant and offered to pay any further sum he might owe, and that the anticipated two-year course of study for the law degree had been routinely extended to as many as five years for other students. *Id.* While it was not explicitly stated, the court's rationale for the use of mandamus was apparently that mandamus was available to challenge the expulsion of persons from membership in either profit-making or nonprofit corporations. *See id.* (maintaining that mandamus is proper remedy whether university is organized for profit or not); *cf.* *Gleason v. University of Minn.*, 104 Minn. 359, 362-63, 116 N.W. 650, 651-52 (1908) (issuing preliminary writ of mandamus to compel state board of regents to perform duties enjoined upon it by law, and affirming overruling of defendant state university's demurrer to petition for mandamus to reinstate law student dismissed for "deficiency in his work" and to order defendant to show cause why writ should not issue).

76. 109 Cal. 146, 147, 41 P. 871, 872 (1895).

77. *Keller v. Hewitt*, 109 Cal. 146, 146, 41 P. 871, 872 (1895) (observing that petitioner passed board's examination with score above that required by law and board determined individual was "of good moral character, and in every way fit and competent to receive such certificate").

78. *Id.* at 147, 41 P. at 872.

79. *Id.* (stating that when question of applicant's fitness to receive certificate is determined in applicant's favor under law and board's rules, limit of board's discretionary functions is reached, and only plain legal duty remains).

80. *Id.* at 150, 41 P. at 873.

81. *Id.* at 149, 41 P. at 873; *see also* *Hamlett v. Reid*, 165 Ky. 613, 613-16, 177 S.W. 440, 441-42 (1915) (affirming mandamus directing State Superintendent of Public Instruction to sign diploma of Kentucky Normal Industrial Institute graduate since it was already signed by majority of trustees of school).

The same court reached a similar decision in *Miller v. Dailey*.<sup>82</sup> The state normal school at San Jose dismissed plaintiff Miller "without cause" despite the fact that he had passed all subjects except practice teaching.<sup>83</sup> The faculty apparently based their action on a belief that Miller would never succeed in teaching.<sup>84</sup> The California Supreme Court, however, held that this violated plaintiff's statutory rights.<sup>85</sup> The court affirmed a writ of mandamus issued by the trial court reinstating Miller as a student.<sup>86</sup>

One of the most remarkable victories for a student plaintiff occurred in *State ex rel. Nelson v. Lincoln Medical College*,<sup>87</sup> in which the Nebraska Supreme Court affirmed the issuance by the trial judge of a writ of mandamus compelling the defendant medical school to issue a diploma to the relator.<sup>88</sup> This was a rare instance in which a court held that an academic decision by professors was "arbitrary and capricious."<sup>89</sup> The court reached its decision after hearing testimony from physicians for both sides as to what grades the student's examination papers deserved.<sup>90</sup>

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82. 136 Cal. 212, 68 P. 1029 (1902).

83. *Miller v. Dailey*, 136 Cal. 212, 68 P. 1029, 1030-31 (1902).

84. *Id.* at 219, 68 P. at 1031.

85. *Id.*

86. *Id.* By reinstating Miller, the court disregarded the teachers' judgment, stating that it did not think it was within the power of the teachers to anticipate the result of the final examination, and to exclude a student from the privileges of the school at their discretion simply because, in the teachers' judgment, he would never make a successful teacher. *Id.*

87. 81 Neb. 533, 116 N.W. 294 (1908). A later court cited *Nelson, Booker, Cecil*, and other cases for the proposition that "[t]he law is apparently well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein." *Frank v. Marquette Univ.*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932). As long as a school bases its decision on reasonable grounds and the decision is not arbitrary or capricious, a court will not intervene. *Id.*; accord *Nuttelman v. Case W. Reserve Univ.*, 560 F. Supp. 1, 3 (N.D. Ohio 1981) (concluding that "judicial intervention is not appropriate unless there is a challenge that the action on the part of the educational institution was arbitrary and capricious"), *aff'd*, 708 F.2d 726 (6th Cir. 1982); *Dietz v. American Dental Ass'n*, 479 F. Supp. 554, 559 (E.D. Mich. 1979) (concluding that decision of American Board of Endodontists to deny diplomatic status to licensed practicing dentist who twice failed oral exam would not be disturbed unless Board acted arbitrarily and capriciously); *Cosio v. Medical College of Wis.*, 139 Wis. 2d 241, 244, 407 N.W.2d 302, 305 (Ct. App. 1987) (rejecting student's argument that school acted arbitrarily and capriciously in negligently failing to monitor examinations and tolerating widespread cheating, thus causing skewing of grade curve and his failure on examinations, when undisputed record showed he was dismissed for academic deficiency).

88. *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 545, 116 N.W. 294, 299 (1908).

89. *Id.* at 539, 116 N.W. at 297.

90. *Id.* The physicians called by the student testified, with practical unanimity, that the scores she received were far too low, and the physicians called by the college testified, with practical unanimity, that the grades were about correct. *Id.* For example, defendant Dr. Ramey, one of relator's professors, gave her examination paper a grade of 57%; Dean Keys testified that she was entitled to 77% and Dr. Somers, an eminent Omaha practitioner and member of the state medical board, testified that she was entitled to a maximum grade of 56-1/2%. *Id.* Defendant Dr. Wilmeth gave relator's examination paper in his course a grade of



The relator, Ella May Nelson, and her husband both completed the four-year medical doctor course and took their final examinations.<sup>91</sup> The faculty divided on whether she should be allowed to graduate: the executive board found her unqualified to graduate because she had failed three of her courses, while the outgoing dean and another faculty member thought she was qualified to graduate.<sup>92</sup> After the school's board of directors voted four to one that she should not be allowed to graduate, Nelson asked to see her final examinations.<sup>93</sup> When the board denied the request, she petitioned for a writ of mandamus.<sup>94</sup>

The trial court, after a long hearing, concluded that respondent board of directors had acted without authority in determining that Nelson was not entitled to graduate and ordered Dean Keys to make the evaluation.<sup>95</sup> Dean Keys determined that Nelson *was* entitled to graduate.<sup>96</sup> At a special meeting a day later, however, the school's

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47%; Dean Keys rated it 84% and Dr. Robinson testified that she was entitled to 94%. *Id.* The proper grades of defendant Dr. Wilmeth's other examination papers were not in question at the hearing because he was unable to produce them. *Id.* He had taken the prescient precaution of destroying or at least disposing of them beforehand. *Id.* Not surprisingly, the Nebraska Supreme Court pointed out the "remarkable coincidence" that Dr. Wilmeth reported to the executive board that each of the four dismissed students received a grade of 68%, just 2% below passing. *Id.*

Perhaps fortunately, the wild disparities in the witnesses' grading of the disputed examinations appear to have put a halt to this remarkable venture in judicial fact-finding as to proper grades. The Nebraska Supreme Court observed that "[o]ne cannot read the record without concluding, as did the trial judge, that a court could not well fix, from the conflicting testimony, the grade earned by relator in taking the examinations before Drs. Ramey and Metheny . . . ." *Id.*; see also *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) (stating that courts are particularly ill-equipped to evaluate academic performance). The author knows of no other instance in which a court has taken testimony from expert witnesses for both sides in an apparent attempt to ascertain the objective accuracy of an examination grade.

The predominant, if not uniform, approach of courts when asked to evaluate specific academic performances of students is to decline to exercise their jurisdiction. See *Depperman v. University of Ky.*, 371 F. Supp. 73, 75 (E.D. Ky. 1974) (holding that claim, predicated on preliminary decision by academic appeals committee resulting in probation and affirmance of failing grade, is not judicially cognizable); see also *Connelly v. University of Vt. & State Agricultural College*, 244 F. Supp. 156, 161 (D. Vt. 1965) (maintaining that judgments of academic grades are wholly within jurisdiction of school authorities).

While it is tempting to condemn even this limited judicial incursion onto academic hallowed ground, it should be noted that Lincoln Medical College scarcely seems to have been a reputable professional school whose academic decisions were entitled to a presumption of validity and good faith. The trial record showed that the school passed students who did not take all final examinations and some students who did not take intermediate examinations in various studies. In some instances, the board marked grades up from 40% to 75%, thus raising the students above the required passing grade for graduation. *Nelson*, 81 Neb. at 538, 116 N.W. at 296.

91. *Id.* at 535, 116 N.W. at 295.

92. *Id.*

93. *Id.*

94. *Id.* at 536, 116 N.W. at 296.

95. *Id.*

96. *Id.* at 537, 116 N.W. at 296.

stockholders elected Dr. Wilmeth, one of the professors who Nelson was suing, to be the new dean.<sup>97</sup> Although Keys' term as dean had not yet expired, Wilmeth reviewed Nelson's record, determined that she had failed eight of her final examinations, and recommended that she not be allowed to graduate.<sup>98</sup> Without addressing the validity of Dr. Wilmeth's election, the trial court found Dean Keys' action conclusive and, accordingly, granted a peremptory writ of mandamus commanding the college to issue a diploma to Nelson.<sup>99</sup>

The Supreme Court of Nebraska affirmed the trial court's decision.<sup>100</sup> It held that respondents' action on the Nelson matter was "arbitrary and capricious"<sup>101</sup> and stated that the action of electing Wilmeth dean, after the interlocutory court order directing Keys to pass on Nelson's academic qualifications, indicated that the school's stockholders were biased and prejudiced against Nelson because they clearly were attempting to evade the ruling of the court.<sup>102</sup>

The Supreme Court of Nebraska further rejected respondents' claim that a professor had an absolute right to determine a grade without interference from any other person.<sup>103</sup> If such an absolute right existed, the court posited, a student who paid full tuition, dedicated himself or herself to a course of study, and passed all of the examinations might be unable to graduate, simply because the student incurred the ill will of one professor.<sup>104</sup> The court found this to be neither the law of the state nor the rule of the medical college.<sup>105</sup>

Finally, the Supreme Court of Nebraska rejected the view of the Wisconsin Supreme Court in *State ex rel. Burg v. Milwaukee Medical College*.<sup>106</sup> In *Burg*, the court held that mandamus would not lie to compel a private corporation to perform its contract to give plaintiff

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97. *Id.*

98. *Id.*

99. *Id.* at 537, 116 N.W. at 296. The by-laws passed by the board of directors created the office of dean and provided that "he shall pass on the standing of all students at the time of graduation." *Id.* at 534, 116 N.W. at 294.

100. *Id.* at 545, 116 N.W. at 298.

101. *Id.* at 539, 116 N.W. at 297.

102. *Id.* at 544, 116 N.W. at 298 (finding that professors' actions were indicative of their contempt for legal process and their prejudice toward relator).

103. *Id.* at 540, 116 N.W. at 297.

104. *Id.* The court endorsed the role of the dean as final arbiter of grade disputes as "a man of broad views, of judicial temperament" who would not teach most students, but would have the final decision on important issues. *Id.* The court found that the dean would not be guilty of the prejudice that sometimes arises between individuals; therefore, if a professor was prejudiced against a student and that led him to give the student an unfairly low grade, the dean, being impartial, could pass on that student's standing. *Id.* at 541, 116 N.W. at 297.

105. *Id.* at 541, 116 N.W. at 297.

106. 128 Wis. 7, 106 N.W. 116 (1906).

dental student a diploma.<sup>107</sup> The court in *Nelson* concluded that the respondent had a statutory duty to comply with the student's demand, and respondent's noncompliance vested the court with jurisdiction to issue the writ.<sup>108</sup>

### 3. *Recognition of schools' absolute authority and discretion*

The preceding cases acknowledge an implied contractual right of students enrolled in degree programs to continue their course of study, provided they have paid tuition, completed satisfactory academic work, and adhered to school regulations. Another line of early cases, however, upholds the absolute and arbitrary right of universities to dismiss students.<sup>109</sup> In some cases, the court justified this right by noting the student's agreement at registration to a catalogue provision granting the university absolute power to dismiss a student for any reason. It is difficult to reconcile the two lines of cases.

The leading case justifying a university's absolute and arbitrary power to dismiss a student is *Anthony v. Syracuse University*.<sup>110</sup> Syracuse University dismissed Beatrice Anthony at the beginning of her senior year without any specific justification or explanation.<sup>111</sup> The Syracuse University catalogue provided:

Attendance at the University is a privilege and not a right. In order to safeguard those ideals of scholarship and that moral atmosphere which are in the very purpose of its foundation and maintenance, the University reserves the right, and the student concedes to the University the right, to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given.<sup>112</sup>

107. *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 12, 106 N.W. 116, 119 (1906) (arguing that mandamus only lies in extraordinary cases, not one in which action for breach of contract is possible).

108. *Nelson*, 81 Neb. at 543, 116 N.W. at 298 (holding that trial judge did not commit abuse of discretion by issuing peremptory writ of mandamus).

109. See *infra* notes 110-17 and accompanying text (discussing cases that uphold schools' absolute power to dismiss students).

110. 224 A.D. 487, 231 N.Y.S. 435 (1928).

111. *Anthony v. Syracuse Univ.*, 130 Misc. 249, 252, 223 N.Y.S. 796, 801 (Sup. Ct. 1927), *rev'd*, 224 A.D. 487, 231 N.Y.S. 435 (1928). Anthony was in her fourth year at the college. *Id.* At the time of her dismissal she was told by the authorities that, after talking to several of her sorority sisters, they had "found she had done nothing lately, but that they had learned that she had caused a lot of trouble in the house; and that they did not think her 'a typical Syracuse girl'." *Anthony*, 224 A.D. at 488-89, 231 N.Y.S. at 437.

112. *Anthony*, 130 Misc. at 257, 223 N.Y.S. at 806; see also *Robinson v. University of Miami*, 100 So. 2d 442, 444 (Fla. Dist. Ct. App. 1958) (noting that courts have upheld right of universities to dismiss students without justification to maintain scholarly and moral atmosphere) (quoting 14 C.J.S. *Colleges and Universities* § 26 (1939)). As the court noted in *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961), the C.J.S. text is a paraphrase of the text from *Anthony*.

The New York Supreme Court refused to enforce the provision, holding it unconscionable, "unjust, unrighteous, and intolerable."<sup>113</sup> The court concluded it had the power and the duty, in light of the capricious nature of the dismissal, to reinstate the plaintiff.<sup>114</sup> On appeal, however, the appellate division reversed. In its holding, the court noted that Anthony, upon matriculating, signed a registration card agreement explicitly accepting this university rule.<sup>115</sup> The court acknowledged the general rule that a university student who complies with all reasonable regulations and pays tuition creates a contractual relationship with the university and is entitled to complete the selected courses and receive a degree.<sup>116</sup> In this case, however, the student had voluntarily and knowingly relinquished such rights by signing the registration card. This constituted a valid and enforceable modification of her contractual relationship with the university.<sup>117</sup>

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113. *Anthony*, 130 Misc. at 261, 223 N.Y.S. at 810.

114. *Id.* at 257, 223 N.Y.S. at 806.

115. *Anthony*, 224 A.D. at 490, 231 N.Y.S. at 439. Anthony signed similar cards at the beginning of her sophomore, junior, and senior years. 130 Misc. at 257, 223 N.Y.S. at 806.

116. *Anthony*, 224 A.D. at 489-90, 231 N.Y.S. at 438 (citing *People ex rel. Cecil v. Bellevue Medical College*, 60 N.Y. Sup. Ct. 107, 14 N.Y.S. 490 (1891), and *Baltimore Univ. of Baltimore City v. Colton*, 98 Md. 623, 57 A. 14 (1904)).

117. *Id.* at 490, 231 N.Y.S. at 439. The court in *Anthony* accepted the argument that the express contract between the university and Anthony took this case outside of the general rule established in *Cecil*. *Anthony*, 224 A.D. at 489-90, 231 N.Y.S. at 438. See *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626, 627-28 (D. Mass. 1957) (upholding motion to dismiss and stating that because university catalogue provision "reserve[d] the right to sever the connection of any student with the university for appropriate reason," such language justified withdrawal of financial aid from student and his dismissal without hearing); *Barker v. Trustees of Bryn Mawr College*, 278 Pa. 121, 122-23, 122 A. 220, 221 (1923) (denying, because college is private institution, writ of mandamus for claim challenging catalogue provision stating that "college reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable").

More recently, an Illinois court invoked the same principle in upholding the dismissal of a student who a clinical psychologist diagnosed as suffering from "a pronounced, chronic paranoid condition." *Aronson v. North Park College*, 94 Ill. App. 3d 211, 213, 418 N.E.2d 776, 778 (1981). The court noted and enforced the following catalogue provision:

The institution reserves the right to dismiss at any time a student who in its judgment is undesirable and whose continuation in the school is detrimental to himself or his fellow students. Such dismissal may be made without specific charge. Students who have been suspended or expelled will receive no refund of monies paid to the school.

*Id.* at 216-17, 418 N.E.2d at 781-82 (finding no bad faith, malicious conduct, or arbitrary and capricious action by college); see also *Lexington Theological Seminary v. Vance*, 596 S.W.2d 11, 13 (Ky. Ct. App. 1979) (upholding denial of master of divinity degree to student who informed dean that he was living homosexual lifestyle and had been "married" to another man for six years). But see *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 737, 501 N.E.2d 1380, 1384 (1986) (stating that lower court improperly dismissed claim for breach of contract by student who completed all course work for B.A. but withdrew from defendant college after dean charged that he was homosexual and threatened to dismiss him for this reason and record reason for dismissal on his transcript).

Enforcement of Anthony's "waiver" of her right to continued enrollment seems harsh, to say the least, since it was based on a university catalogue provision which she would have had little reason to read. *Anthony*, 130 Misc. at 252, 223 N.Y.S. at 801. This is somewhat analo-

While the absolute power of an institution to dismiss a student without justification might seem unobjectionable in cases where the student's misconduct is plainly described,<sup>118</sup> the pernicious potential of such a rule becomes most evident in dismissals based on students' race, philosophy, or politics. The respondent law school in *People ex rel. O'Sullivan v. New York Law School*<sup>119</sup> denied petitioner a law degree one week before he was scheduled to graduate because several other students and he protested against the decision to allow a bishop to confer the degrees and conduct a religious ceremony as part of the school's commencement exercises.<sup>120</sup> Without even describing O'Sullivan's objectionable conduct, which the dean labeled "contumacious, and calculated to breed disorder and trouble in the school," the court concluded that refusing him the degree was an appropriate exercise of the school's discretion.<sup>121</sup>

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gous to service by publication in civil litigation—a disfavored mode of service because of the unlikelihood of the defendant's actually reading obscure newspaper legal notices. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (stating that legal notices in small type inserted in back pages of newspaper would rarely come to the attention of even local residents). Denial of readmission was fair, however, in a recent case in which a dismissed student explicitly and voluntarily promised not to seek readmission in return for being allowed to retroactively withdraw from a course which raised his grade point average. See *Beheshtitabar v. Florida State Univ.*, 432 So. 2d 166, 167 (Fla. Dist. Ct. App. 1983) (denying hearing sought under Florida administrative law statute because university's decision is not situation in which substantial interests of party are determined by state agency); see also *Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 807, 159 Cal. Rptr. 856, 860, 602 P.2d 778, 783 (1979) (rejecting argument for declaratory judgment based on contract claim where law school allowed student to take courses after being dismissed on condition that he would not be eligible for law degree).

118. See, e.g., *Steier v. New York State Educ. Comm'r*, 271 F.2d 13, 15-16 (2d Cir. 1959) (holding court lacked jurisdiction over appeal of university dismissal of student who launched abusive attacks on college authorities); *Woods v. Simpson*, 146 Md. 547, 552-53, 126 A. 882, 883 (1924) (dismissing student's appeal of university's refusal to register student for third year after disciplinary problems in first two years at school); *Goldstein v. New York Univ.*, 76 A.D. 80, 83, 78 N.Y.S. 739, 742 (1902) (holding sufficient ground for expulsion existed after school found student to be "deliberately lying" and "willfully making a false charge against an innocent fellow student").

119. 68 Hun. 118, 22 N.Y.S. 663 (App. Div. 1893).

120. *People ex rel. O'Sullivan v. New York Law School*, 68 Hun. 118, 120, 22 N.Y.S. 663, 665 (App. Div. 1893); see also *North v. Board of Trustees of Univ. of Ill.*, 137 Ill. 296, 305, 27 N.E. 54, 57 (1891) (upholding legality of state university rule making attendance at "nonsectarian" chapel service compulsory and denying writ of mandamus to order reinstatement of student dismissed for refusing to comply with rule).

121. *O'Sullivan*, 68 Hun. at 120, 22 N.Y.S. at 665 (stating that case must be extraordinary to justify judicial interference). The court stated that judicial review of disciplinary actions in schools would subvert school discipline and be unwise. *Id.* Somewhat palliating the harshness of the decision is the fact that the court deemed O'Sullivan entitled to a certificate of attendance and a certificate attesting that he had passed a satisfactory examination. *Id.* at 120, 22 N.Y.S. at 666; see also *Woods v. Simpson*, 146 Md. 547, 552-53, 126 A. 882, 883 (1924) (dismissing student appeal of university's refusal to register student for third year after disciplinary problems in first and second years).

In a more recent case, the Second Circuit dismissed a suit brought by a student who made a nuisance of himself by repeated abusive attacks on the college authorities. See *Steier v. New York State Educ. Comm'r*, 271 F.2d 13, 15-16 (2d Cir. 1959) (holding that federal court lacked jurisdiction over due process claim for dismissal from college because privilege of at-

Perhaps even more offensive than the *O'Sullivan* case<sup>122</sup> are two World War I era cases, *Samson v. Trustees of Columbia University*<sup>123</sup> and *People ex rel. Goldenkoff v. Albany Law School*.<sup>124</sup> City College suspended the plaintiff in *Samson* in 1916 for creating a disturbance at a general meeting of students on the occasion of an address by a visiting general.<sup>125</sup> The plaintiff thereupon applied to and was admitted by Columbia University where, in June 1917, he made an antiwar speech describing the Russian Workmen's and Soldiers' Council and proposing such a council to run things in the United States.<sup>126</sup> Two days later, Columbia University dismissed Samson. He sued, seeking a court order that he be retained.<sup>127</sup>

The New York Supreme Court assumed that there was a contractual relationship between Samson and the university but quoted *Goldstein v. New York University* to the effect that an implied term of such an agreement is that the student shall not engage in misconduct so as to undermine the school's discipline.<sup>128</sup> Concluding that Samson obviously was guilty of misconduct, the appellate division upheld his dismissal.<sup>129</sup>

Similarly, in *Goldenkoff*, the law school expelled the petitioner after

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tending college came from state and education is issue reserved to states). The court in *Steier* stated that "[t]he only restriction the Federal Government imposes is that, in an educational program, no state may discriminate against an individual because of race, color or creed." *Steier*, 271 F.2d at 18; see also *Keys v. Sawyer*, 353 F. Supp. 936, 939-40 (S.D. Tex. 1973) (stating that federal judiciary should not adjudicate soundness of professor's grading system, nor make factual determination of fairness of individual grades).

122. O'Sullivan's unmentioned conduct, after all, may have been abusive and deserving of the administration's harsh response. The court's unexplained reticence in stating that his interview with the dean "need not here be repeated" but discloses conduct "justifying the refusal of the faculty" to confer a degree on him, however, cannot be justified and appears to give *carte blanche* to the faculty to refuse an earned diploma without justification. See *O'Sullivan*, 68 Hun. at 120, 22 N.Y.S. at 665 (discussing statement made by O'Sullivan that led to his dismissal).

123. 101 Misc. 146, 167 N.Y.S. 202 (Sup. Ct.), *aff'd*, 167 N.Y.S. 1125 (App. Div. 1917).

124. 198 A.D. 460, 191 N.Y.S. 349 (1921).

125. *Samson v. Trustees of Columbia Univ.*, 101 Misc. 146, 167 N.Y.S. 202, 202-03 (Sup. Ct.), *aff'd*, 167 N.Y.S. 1125 (App. Div. 1917).

126. *Id.* at 147-48, 167 N.Y.S. at 202-03 (quoting N.Y. Times, June 12, 1917, at 1, col. 4).

127. *Id.* at 147, 167 N.Y.S. at 203.

128. *Samson v. Trustees of Columbia Univ.*, 101 Misc. 146, 151-52, 167 N.Y.S. 202, 205-06 (Sup. Ct. 1917).

129. *Id.* The appellate division further hinted that Samson's antiwar sentiments were treasonous and undermined the war effort. *Id.* Despite the "tolerance" of the American people, there must be limits to the forbearance shown those, like him, who "hide behind the dishonestly assumed mask of the constitutional right of free speech." *Id.* at 151-52, 167 N.Y.S. at 205-06 (stating that university was well within its rights in refusing privileges and opportunities to student who could sway minds of young men with unpatriotic statements); see *Robinson v. University of Miami*, 100 So. 2d 442, 444 (Fla. Ct. App. 1958) (upholding exclusion from internship program of graduate student who was "fanatical" atheist and who Committee on Student Teaching thought would seek to express his views and to impose them on students he taught). The court in *Robinson* found that the university had a duty not to graduate potential teacher with fanatical ideas that would be harmful to impressionable minds of young. *Id.*

the faculty investigated charges that he made unpatriotic statements and possessed revolutionary views, making him an unfit classmate for the other students.<sup>130</sup> In view of Goldenkoff's "unpatriotic, revolutionary, and anarchistic" views, the court held that the discretionary action taken by the faculty was within the scope of its powers and further concluded that it had no jurisdiction to review the decision.<sup>131</sup>

One of the most significant early cases embodying the rule of judicial deference to schools' academic decisions, *Barnard v. Inhabitants of Shelburne*,<sup>132</sup> had a marked influence on the development of the law on academic dismissal challenges.<sup>133</sup> Unlike most of the earlier

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130. *People ex rel. Goldenkoff v. Albany Law School*, 198 A.D. 460, 465, 191 N.Y.S. 349, 353 (1921). Although Goldenkoff told the dean that "he was 100 percent American, and an enrolled Republican," he verbally attacked the United States government and called for overthrow of the government and its replacement with one modeled on Soviet Russia. *Id.* at 463-66, 191 N.Y.S. at 351-53.

131. *Id.* at 466-67, 191 N.Y.S. at 353-54; see also *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 265 (1934) (upholding exclusion of antiwar Methodist students who refused to take mandatory course in military science and tactics in Reserve Officer Training Corps at University of California); *Pearson v. Coale*, 165 Md. 224, 238-39, 167 A. 54, 59-60 (1933) (upholding mandatory military training course at University of Maryland). In *Pearson*, the court authorized the suspension of a Methodist student who refused to enroll in a military training course because of "his belief that war was against Christ's teachings and was therefore wrong." *Pearson*, 165 Md. at 225, 167 A. at 54.

The New York Appellate Division later adopted essentially the same test in upholding the right of St. John's University, a Roman Catholic institution, to expel two students for the sole reason that they had been married in a civil ceremony, contrary to Catholic doctrine. See *In re Carr v. St. John's Univ.*, 17 A.D.2d 632, 634, 231 N.Y.S.2d 410, 414 (stating university's exercise of "honest discretion" based on facts within its knowledge was not reviewable by court), *aff'd*, 12 N.Y.2d 802, 802-03, 235 N.Y.S. 834, 834-35 (1962); see also *Matter of Lesser v. Board of Educ. of N.Y.*, 18 A.D.2d 388, 391, 239 N.Y.S.2d 776, 780 (1963) (maintaining that courts should not interfere with public college's discretion in admissions process, so long as applicants receive uniform treatment); *Sofair v. State Univ. of N.Y.*, 54 A.D.2d 287, 295, 388 N.Y.S.2d 453, 458 (1976) (stating that medical student denied sufficient time to prepare for hearing on his impending dismissal should receive new hearing), *rev'd*, 44 N.Y.2d 475, 478, 377 N.E.2d 730, 730, 406 N.Y.S.2d 276, 277 (1978) (reversing lower court and holding that expedited first hearing did not deny student due process); *Balogun v. Cornell Univ.*, 70 Misc. 2d 474, 477-78, 333 N.Y.S.2d 838, 841-42 (Sup. Ct. 1971) (granting summary judgment for university because there was no showing that denial of degree in veterinary medicine to foreign student who ranked 54th in class of 54 and had final semester GPA of 1.352 was "arbitrary, malicious, capricious, or in any way discriminatory"); *Bower v. O'Reilly*, 65 Misc. 2d 578, 580, 318 N.Y.S.2d 242, 244 (Sup. Ct. 1971) (denying petition for reinstatement of social work student dismissed for unsatisfactory field work); *Edde v. Columbia Univ.*, 8 Misc. 2d 795, 796, 168 N.Y.S.2d 643, 644 (Sup. Ct.) (denying application for review of dismissal of Ph.D. candidate at Columbia University whose dissertation was disapproved and who refused to revise dissertation, where rejection of dissertation was not shown to be "arbitrary, capricious or unreasonable"), *aff'd*, 6 A.D.2d 780, 175 N.Y.S.2d 556 (1958).

132. 216 Mass. 19, 102 N.E. 1095 (1913).

133. See generally Tooms & DiBiase, *College Rules and Court Decisions: Notes on Student Dismissal*, 2 J. C. & U. L. 355 (1975) (analyzing Federal courts' treatment of academic dismissal cases in 1960s and 1970s). Justice Rehnquist quoted and followed the holding in *Barnard* in his opinion in *Board of Curators of the University of Missouri v. Horowitz*. See *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (stating that judicial hearing may be "useless or harmful in finding out the truth as to scholarship") (quoting *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 23, 102 N.E. 1095, 1097 (1913)).

cases in which a college or university student with at least a colorable claim of academic competence sought a writ of mandamus to reverse a dismissal, Clinton Barnard was a public high school student who sought damages in tort for his "wrongful exclusion" from a public high school at which he conceded that he had earned "deficient" grades of below 60% in three courses.<sup>134</sup> The jury was not satisfied by the evidence submitted by the defendant school and, accordingly, entered a verdict for the plaintiff.<sup>135</sup>

The Supreme Judicial Court of Massachusetts reversed.<sup>136</sup> The court found that Barnard's dismissal was purely for academic deficiency, that there was no evidence of bad faith on the part of the school committee, and that the plaintiff was eligible to attend the next lower grade in another school.<sup>137</sup> The court therefore concluded, in light of the importance of such dismissals to "efficiency of instruction,"<sup>138</sup> that the dismissal was legal and "not subject to review by any other tribunal."<sup>139</sup> In response to plaintiff's argument that he was entitled to a hearing, the court made a distinction between dismissals for academic deficiency and dismissals for misconduct, stating that academic deficiency does not represent misconduct in itself.<sup>140</sup>

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134. *Barnard*, 216 Mass. at 20, 102 N.E. at 1096. Barnard argued that the school's failure to grant his father a hearing concerning his exclusion made it illegal. *Id.* at 22, 102 N.E. at 1097.

135. *Id.* at 19-20, 102 N.E. at 1095.

136. *Id.* at 21, 102 N.E. at 1097.

137. *Id.*

138. *Id.* at 21, 102 N.E. at 1096 (stating that the efficiency of instruction depends on discretionary ability of school officials to large degree).

139. *Id.* (stating that power of school committee is broad so as to promote best interests of students). The court added that the questions involved are educational questions and are vested by law in the public officers responsible for making discretionary decisions. *Id.* In other words, academic dismissals serve important educational goals and are essential if the schools are to function properly. Courts should generally not interfere in this area but should instead defer to those officials with expertise to whom this responsibility has been entrusted.

In a similar case decided recently, a New York court upheld the dismissal for academic deficiency of a full-time student at Hunter College High School, an academically elite public school in New York City. *See Spencer v. New York City Bd. of Higher Educ.*, 131 Misc. 2d 847, 848, 502 N.Y.S.2d 358, 359 (Sup. Ct. 1986) (concluding that full hearing was not required by due process and that meeting between student's mother and school officials was sufficient). Emphasizing the appropriateness of "[a] high degree of deference to the professional expertise . . . in matters of academic discharge," the court observed that while Ms. Spencer had been dismissed by a particular public high school, she would not be deprived of her right under state law to a free public education elsewhere through the high school level. *See id.* (stating that student is free to attend local high school).

140. *See Barnard*, 216 Mass. at 22, 102 N.E. at 1097 (concluding that public hearing may be helpful in fact-finding necessary to ascertain misconduct, but not in discovering truth as to scholarship); *see also Dehaan v. Brandeis Univ.*, 150 F. Supp. 626, 627 (D. Mass. 1957) (stating that private colleges should be given at least same freedom of choice to deny public hearing as is available to Massachusetts high schools); *Carr v. Inhabitants of Dighton*, 229 Mass. 304, 305, 118 N.E. 525, 526 (1918) (stating that cases of contagious disease constitute exception to Massachusetts statute requiring hearing before most pupils' expulsions from school). On re-



*Barnard* stands for three important propositions: (1) dismissal for academic insufficiency ("flunking out") is legal and legitimate; (2) public hearings are useless in ascertaining the quality of a dismissed student's scholarship; and (3) courts should defer to the determinations of school boards, so long as the boards act in good faith.<sup>141</sup> The first proposition seems so obvious that it is rarely stated. In light of his concededly dismal academic record, one wonders why Barnard sued in the first place—unless he believed in a student's absolute right to attend a taxpayer-supported public school regardless of academic performance. Similarly, university students who made no effort to question the poor grades they received have asserted an absolute right to attend a state university.<sup>142</sup> Not surpris-

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mand, there was a second trial of Barnard's claim, at which the court directed a verdict for defendant school which the Supreme Judicial Court of Massachusetts later affirmed. *See Barnard v. Inhabitants of Shelburne*, 222 Mass. 76, 80, 109 N.E. 818, 820 (1915) (finding no evidence of bad faith on part of school committee). The court concluded that Barnard was delinquent in his studies and that the school had the right to dismiss a student with such a poor academic record. *Id.* at 79-80, 109 N.E. at 819. Also, the court noted that there was another school open to the plaintiff at no extra cost. *Id.* Interestingly, *Barnard* did not attract much attention until it was "resurrected" fifty years later. *See Connelly v. University of Vt. & State Agricultural College*, 244 F. Supp. 156, 159 (D. Vt. 1965) (stating that effect of *Barnard* and decisions that followed its logic was to give school authorities absolute discretion in determining whether student has been delinquent in his studies).

141. *Barnard*, 216 Mass. at 22, 102 N.E. at 1097. The *Barnard* "bad faith" standard is restated by other courts in different ways. *See, e.g., Coffelt v. Nicholson*, 224 Ark. 176, 181, 272 S.W.2d 309, 312 (1954) (stating that there must be abuse of discretion before court may grant review); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 113, 171 S.W.2d 822, 827-28 (stating that abuse of discretion or arbitrary or unlawful action is required for judicial review), *cert. denied*, 319 U.S. 748 (1942); *Frank v. Marquette Univ.*, 209 Wis. 372, 374, 245 N.W. 125, 127 (1932) (stating that arbitrary or capricious action is required for judicial intervention); *see also Sweitzer v. Fisher*, 172 Iowa 266, 276-77, 154 N.W. 465, 468 (1915) (denying petition for writ of mandamus to order public high school authorities to grant petitioner diploma in absence of any claim that school board acted in bad faith). *But see Cross v. Board of Trustees of Walton Graded Common School Dist.*, 121 Ky. 469, 476-77, 89 S.W. 506, 508 (1905) (authorizing mandatory injunction to reinstate public school student dismissed without any explanation of reasons by board of education).

142. *See West v. Board of Trustees of Miami Univ.*, 41 Ohio App. 367, 373-81, 181 N.E. 144, 147-49 (1931) (noting student's claimed right to attend school despite failure to maintain adequate GPA because state university should remain open to all citizens so long as their conduct does not offend reasonable rules requiring "order, decency and decorum"); *see also Brown v. Board of Educ.*, 6 Ohio N.P. 411, 414 (1899) (citing *State ex rel. Stallard v. White*, 82 Ind. 278, 284 (1882)) (stating that every inhabitant of state of suitable age not afflicted by contagious disease or mental or physical infirmity is entitled to admission as student in university, it being public educational institution).

In a similar case, the University of Texas dismissed a student with a barely passing academic record at the end of his second year. *Foley v. Benedict*, 55 S.W.2d 805, 807 (Tex. Ct. App. 1932) (stating that court should not interfere in school's decision to dismiss student unless school acts arbitrarily or abuses power). The University of Texas Bulletin provided that a student failing two major courses with a general average of less than 70% would be dismissed. *Id.* at 806. In his second year, Foley failed Biological Chemistry and Applied Anatomy and received other grades of 72, 71 and 70. *Id.* at 807. Foley sued, seeking a writ of mandamus to order his reinstatement and arguing that the rule as applied to him was unreasonable and arbitrary. *Id.* at 808. The court held that the right to attend state educational institutions is not a natural right but is rather "a gift of civilization, a benefaction of the law." *Id.* at 809 (stating that only 100 students are admitted annually out of 300 who apply). The court stated

ingly, courts have given short shrift to such claims.<sup>143</sup>

To summarize, while the decisions are not all consistent, the most salient feature of case law on student academic challenges up through the 1960s is the overwhelming deference shown by the courts to university professors and administrators who make disputed academic judgments.<sup>144</sup> The nominal exception for "arbitrary and capricious" actions in this area was of little practical importance since it remained almost completely a theoretical possibility and courts rarely found that the defendant universities acted in this fashion.<sup>145</sup> Recognition of the considerable amount of time, effort, and capital that students invest in university degree-granting programs, however, led the courts to imply a contract between the university and its students. The contract obliged the institution to ensure that the student who paid tuition, maintained satisfactory grades, and obeyed the institution's rules would have the opportunity to continue as a student, take final examinations, and qualify for a diploma, although a successful outcome of course could not be guaranteed.<sup>146</sup>

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that a student who cannot meet the required academic level of performance is not entitled to continue to attend a state-supported institution, provided that the standard of academic performance is not unreasonable. *Id.* For courts that reached the same result on similar facts, see *Keys v. Sawyer*, 353 F. Supp. 936, 940-41 (S.D. Tex. 1973) (holding that law student who received four F's and voluntarily withdrew from school after hearing on his alleged libel of two faculty members is not entitled to have federal court reconsider two allegedly unfair grades and that there is no federal constitutional right to public education); *Morpurgo v. United States*, 437 F. Supp. 1135, 1137 (S.D.N.Y. 1977) (granting summary judgment and denying judicial review to student dropped from doctoral program); *Coffelt v. Nicholson*, 272 S.W.2d 309, 312 (Ark. 1954) (holding that third-year medical student with poor academic record who was likely to fail four courses and who was permitted by dean to withdraw from medical school without prejudice did not have contract right to be readmitted one-half year later); *Mewshaw v. Brooklyn Law School*, 53 A.D.2d 604, 604, 383 N.Y.S.2d 648, 648 (1976) (upholding denial of readmission of law student and stating no abuse of discretion was proven).

143. See *supra* note 142 (listing courts' analyses regarding students' claims to absolute right to attend university). The trial court in *West* agreed with this reasoning, stating that West had been unlawfully excluded from attendance and denied a legal right to attend school. See *West*, 41 Ohio App. at 376, 181 N.E. at 148 (quoting unreported trial court opinion). The trial court enjoined the faculty from ordering West's dismissal and ordered the university to reinstate West as a student. *Id.* at 377, 181 N.E. at 148. The Ohio Court of Appeals, however, reversed this decision, observing that the progress of the majority of students might be set back if the school retained students lagging in intellectual development. *Id.* at 384, 181 N.E. at 150 (stating that faculty must be tribunal to sit in judgment of students).

Similarly, the Supreme Court has rejected the argument that public elementary and secondary education is a fundamental right under the United States Constitution whose denial is subject to strict scrutiny in equal protection clause analysis. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (reversing district court decision that Texas state school finance system violated fourteenth amendment's equal protection clause).

144. See *supra* note 139 (discussing courts' argument that oversight of education issues is realm of school officials rather than realm of courts).

145. See *supra* note 141 (citing various standards applied by courts to determine that schools did not act arbitrarily or capriciously).

146. See *supra* note 142 (discussing citizens' right to attend public university).

Thus, courts rejected the assertions by some institutions of an absolute right to dismiss students or deny degrees without reason at any time, including the eve of final examinations.<sup>147</sup> On the other hand, almost no court attempted to evaluate for itself whether grades or other academic evaluations of students were accurate, objective, and fair. Even the implied contract right not to be dismissed arbitrarily was undermined by the holding that this right could be forfeited so long as the institution required the student, as a condition of registration, to sign a form agreeing that the institution could dismiss the student without any reason.<sup>148</sup> Finally, courts did not in any way require private institutions to respect student freedom of expression, thus giving institutions a free hand to dismiss students with unpopular or subversive political and ideological views.<sup>149</sup>

### B. *The Due Process Revolution and the Modern Era*

The early cases included no discussion of the fourteenth amendment due process clause, although some courts required schools to give the students notice of the reason for dismissal.<sup>150</sup> A revolutionary expansion of due process protections in the 1970s threatened to transform the law of student academic challenges. The Supreme Court's decisions in *Board of Curators of the University of Missouri v. Horowitz*<sup>151</sup> and *Regents of the University of Michigan v. Ew-*

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147. See *infra* note 186 (discussing seriousness of withholding degree from student who completes course requirements).

148. See *supra* text accompanying note 117 (discussing effect of student's signature on card stating conditions under which school may dismiss student).

149. See *supra* note 129 (discussing courts' perception that impressionable students need protection from provocative ideas).

150. See, e.g., *Baltimore Univ. v. Colton*, 57 A. 14, 17 (Md. 1904) (holding mandamus is proper remedy for student expelled without notice, regardless of whether university is for profit organization); *Gleason v. University of Minn.*, 104 Minn. 359, 362, 116 N.W. 650, 653 (1908) (ordering school to show cause why student dismissed because of "deficiency in his work" should not be registered, when school did not explain nature of deficiency); *Hill v. McCauley*, 3 Pa. 77, 79 (1886) (holding college that received pecuniary aid from state could not dismiss student on charge of disorderly conduct without hearing).

151. 435 U.S. 78, 84-91 (1978). For pre-1978 cases expanding due process protection, see *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (holding due process requires student be given at least informal notice of charges, explanation of evidence against him, and opportunity to reply before public school principal could issue a ten-day suspension); *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (holding due process requires notice and hearing before state can seize property under state replevin laws); *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) (holding university denied nontenured professor due process when it failed to renew professor's contract and based dismissal on his exercise of free speech); *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (finding pre-termination evidentiary hearing is necessary to provide due process to welfare recipient); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339-42 (1969) (concluding that prejudgment garnishment of wages without notice or prior hearing violates procedural due process). But see *Bishop v. Wood*, 426 U.S. 341, 343-47 (1976) (holding termination of police officer without hearing did not violate right to due process); *Mathews v. Eldridge*, 424 U.S. 319, 332-49 (1976) (noting that evidentiary hearing is not

ing,<sup>152</sup> however, threw cold water on this trend.

1. *Extension of student due process rights to academic challenge cases*

The Fifth Circuit was the first court to explicitly extend due process protections to students expelled from a public institution of higher education in the 1961 case of *Dixon v. Alabama State Board of Education*.<sup>153</sup> The Alabama State College for Negroes in Montgomery expelled six students without a hearing for unspecified charges.<sup>154</sup> Observing that the right to attend a public college or university is not a constitutional right, the district court upheld the expulsion.<sup>155</sup>

The Fifth Circuit, however, reversed, holding that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."<sup>156</sup> The court pointed out that the holdings of the earlier cases involving suspensions or expulsions from public universities did not require a hearing before a university could take action.<sup>157</sup> Instead, prior cases appeared to assume that a hearing *was* required and, in each case, went on to find that the hearing had been sufficient.<sup>158</sup>

While the court in *Dixon* explicitly limited its holdings to dismissals for misconduct, the question immediately arose as to whether its principles were applicable to academic dismissals as well.<sup>159</sup> The first case to apply *Dixon* to academic dismissals was the landmark decision in *Connelly v. University of Vermont and State Agricultural Col-*

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required prior to termination of social security disability payments); *Paul v. Davis*, 424 U.S. 693, 701-10 (1976) (finding no due process right to reputation absent some property interest such as employment); *Board of Regents v. Roth*, 408 U.S. 564, 569-79 (1972) (holding that due process does not require opportunity for hearing before nonrenewal of nontenured teacher's employment contract absent showing of property interest in employment).

152. 474 U.S. 214 (1985).

153. 294 F.2d 150 (5th Cir. 1961).

154. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961). Plaintiffs held a "sit-in" at a lunch grill located in the county courthouse and later engaged in mass protest demonstrations and meetings, one of which occurred on the steps of the state capitol. *Id.* Alabama Governor John Patterson, who was also Chairman of the State Board of Education, spoke to the president of the college and recommended that he consider expulsion and/or other appropriate disciplinary action against the students. *Id.* at 152 n.3.

155. *See Dixon v. Alabama State Bd. of Educ.*, 186 F. Supp. 945, 952 (M.D. Ala. 1961) (stating that dismissal of students was in good faith and not arbitrary and therefore did not deprive students of their due process rights). The court added that courts generally recognize the validity of regulations permitting a college to dismiss a student without divulging its reasons for dismissal. *Id.* at 951.

156. *Dixon*, 294 F.2d at 158.

157. *Id.*

158. *Id.* (citing *Hill v. McCauley*, 3 Pa. C. 77 (1886) and *Gleason v. University of Minn.*, 104 Minn. 359, 116 N.W. 650 (1908)).

159. *See supra* note 140 (discussing distinction between dismissals for misconduct and for academic deficiency).

*lege*,<sup>160</sup> in which a third-year medical student, dismissed after he received an F in pediatrics-obstetrics, sued for reinstatement.<sup>161</sup>

While acknowledging that a dismissal based on arbitrariness, capriciousness, or bad faith was actionable, the district court endorsed "absolute discretion" for school authorities in determining whether Connelly was delinquent in his studies and whether he should have passed the course.<sup>162</sup> The court explained that because teachers are uniquely qualified to judge the qualifications of students, courts must afford them absolute discretion to preserve their freedom and efficiency of instruction.<sup>163</sup> Thus, as to Connelly's claim that he should have received a passing grade in pediatrics-obstetrics and that his work in the course was comparable to that of other students, the court held that this was not a subject for judicial review. The court concluded that Connelly failed to state a claim for which relief could be granted.<sup>164</sup> The court held, however, that Connelly's claim of bad faith on the part of his professor did state a cause of action, and it accordingly denied summary judgment on this claim.<sup>165</sup> The court stated that if Connelly was able to demonstrate at trial that the defendant had acted arbitrarily, capriciously, or in bad faith, the court would then order the defendant university to provide a fair and impartial hearing.<sup>166</sup> Courts in subsequent cases involving dismissed medical students have endorsed and applied the court's holding in *Connelly*.<sup>167</sup>

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160. 244 F. Supp. 156 (D. Vt. 1965).

161. *Connelly v. University of Vt. & State Agricultural College*, 244 F. Supp. 156, 158 (D. Vt. 1965). Connelly alleged that the instructor had decided to give him a failing grade at the beginning of the course. *Id.*

162. *Id.* at 159-60 (indicating reluctance to interfere in management of school's internal affairs).

163. *Id.* at 160.

164. *Id.* at 161 (stating that issue concerning whether student should pass can only be determined by appropriate college department or committee).

165. *Id.* (holding that genuine dispute existed as to whether instructor had made up his mind to fail student before student completed course).

166. *Id.*; see also *LaPolla v. University of Akron*, No. 7464, slip op. at 10 (Ohio Ct. App. Dec. 18, 1974) (upholding dismissal of student where no evidence of bias or prejudice against student was presented); *Tooms & DiBiase, supra* note 133, at 360-61 (stating that once due process rights have been violated, unconditional reinstatement is considered only just recourse). The court in *Connelly* also held that the defendant state university was not immune to suit under the eleventh amendment. *Connelly*, 244 F. Supp. at 159. This issue, however, is beyond the scope of this Article.

167. See *Depperman v. University of Ky.*, 371 F. Supp. 73, 77-78 (E.D. Ky. 1974) (upholding dismissal and university regulation that allowed for dismissal if faculty member thinks "student's character or mental or physical fitness cast grave doubts upon his capabilities as . . . a physician"); *Mustell v. Rose*, 282 Ala. 358, 367, 211 So. 2d 489, 497-98 (1968) (stating that student's absence from hearing did not affect adequacy of hearing because dismissal was for academic deficiency, not misconduct). The court in *Mustell* narrowed the question in the case to whether the Junior Promotion Committee arbitrarily and capriciously conspired to dismiss Mustell and altered his grades without just cause and in bad faith to promote that result. *Mustell*, 282 Ala. at 363, 211 So. 2d at 494. After examining the testimony at trial in the

The Supreme Court soon afterward affirmed the rights of teachers, with or without tenure, to hearings before being discharged.<sup>168</sup> Those decisions preceded the landmark decision, *Goss v. Lopez*,<sup>169</sup> in which the Court held that public school students suspended for periods of less than ten days for disciplinary reasons must be notified of the alleged reasons and be afforded the chance to respond.<sup>170</sup> Consequently, it was easy to argue that if due process protections were mandated for a high school suspension of less than ten days, they should be required *a fortiori* for academic dismissals by universities.<sup>171</sup>

Shortly after the Supreme Court decided *Goss*, the Tenth Circuit held, in *Gaspar v. Bruton*,<sup>172</sup> that a nursing student challenging her dismissal for academic reasons had a property right because of the fee she paid for enrollment and attendance at the school.<sup>173</sup> The school afforded the plaintiff in *Gaspar* guidance counseling concerning her nursing deficiencies and three hearings on the issue of her dismissal.<sup>174</sup> The court concluded that this amounted to more than sufficient due process protection.<sup>175</sup>

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record, the Alabama Supreme Court determined that the evidence supported the two F's Mustell received. *Id.* at 364, 211 So. 2d at 495-97.

In *Depperman*, the plaintiff resigned rather than await a probable academic dismissal, and he was subsequently denied readmission. *Depperman*, 371 F. Supp. at 75. The court held that the decisions of the Promotions and Appeals Committee to place Depperman on probation and to affirm an F he received were "not judicially cognizable," but that plaintiff's claim of denial of due process rights was justiciable. *Id.* But see *Brookins v. Bonnell*, 362 F. Supp. 379, 382 (E.D. Pa. 1973) (citing *Connelly v. University of Vt. & State Agricultural College*, 244 F. Supp. 156, 160 (D. Vt. 1965) and *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913)) (stating that due process does not require notice and hearing for student expelled for academic failure); see also *Dessem, Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J. OF L. & EDUC. 277, 305 (1976) (concluding that although courts may not be knowledgeable about education, they do know about fact-finding, decisionmaking, fairness, and procedure).

168. See *Board of Regents v. Roth*, 408 U.S. 564, 569-79 (1972) (holding that nontenured teacher must show liberty or property interest in continued employment to raise due process question, whereas tenured teacher has property interest in tenure); *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) (holding college's de facto tenure policy, arising from regulations and understandings, entitled untenured professor opportunity to prove claim to tenure).

169. 419 U.S. 565 (1975).

170. *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975). The Court stated that to suspend a student from school for ten days is not a *de minimis* activity and requires adequate due process. *Id.* at 574. Among the series of dire consequences of *Goss* which Justice Powell predicted in his dissent were lawsuits by students who were given failing grades or were not promoted. *Id.* at 584-600 (Powell, J., dissenting).

171. *Id.*

172. 513 F.2d 843 (10th Cir. 1975).

173. *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975). The school was publicly owned and tax supported. *Id.* at 849. *Gaspar* also alleged that the school deprived her of a significant right of liberty when it dismissed her without a hearing, but the court did not reach this claim. *Id.*

174. *Id.* at 849.

175. *Id.* at 850-51.

Two months later, the Eighth Circuit held, in *Greenhill v. Bailey*,<sup>176</sup> that a dismissed medical student had been deprived of a liberty right and was thus entitled to procedural due process.<sup>177</sup> The school dismissed Greenhill because of poor clinical performance.<sup>178</sup> Greenhill formally appealed, but the university did not give him a hearing before its decisionmaking body.<sup>179</sup> The assistant dean of the medical school reported to the Association of American Medical Colleges that the dismissal resulted from a "lack of intellectual ability or insufficient preparation."<sup>180</sup> The Eighth Circuit held that by denigrating his intellectual ability, and not merely his academic performance, the school had thereby deprived him of "a significant interest in liberty" that foreclosed his freedom to take advantage of other opportunities.<sup>181</sup>

Meanwhile, the Fifth Circuit, which had upheld a student's right to due process in *Dixon*,<sup>182</sup> made clear that its holding applied only to cases of misconduct. In *Mahavongsanan v. Hall*,<sup>183</sup> the Fifth Circuit specifically declined to extend due process rights to a student in an academic dismissal case.<sup>184</sup> The Georgia State University School of Education denied the plaintiff, a graduate student from Thailand, a master's degree after she finished the course work but twice failed a comprehensive examination.<sup>185</sup> Since the university first instituted the comprehensive examination requirement more than eight months after the plaintiff enrolled, she brought suit to force the School of Education to grant her the degree.<sup>186</sup> Distinguishing its

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176. 519 F.2d 5 (8th Cir. 1975).

177. *Greenhill v. Bailey*, 519 F.2d 5, 9-10 (8th Cir. 1975) (stating that student is entitled to written notice of alleged academic deficiency and informal hearing before administrative body that dismissed him). The Eighth Circuit reversed the holding of the district court, which dismissed the student's claim because the evidence did not show prejudicial treatment. See *Greenhill v. Bailey*, 378 F. Supp. 632, 634 (S.D. Iowa 1974) (setting forth findings of district court).

178. *Greenhill*, 519 F.2d at 6.

179. *Id.* at 7.

180. *Id.* at 7 (noting that information provided on Greenhill's "change of status form" would be available to all accredited medical schools in country, effectively preventing him from pursuing medical education anywhere).

181. *Id.* at 8 (citing *Board of Regents v. Roth*, 408 U.S. 563, 578 (1962)). The court in *Greenhill* commented that, in view of its decision finding a liberty interest to be present, it was unnecessary to determine whether a property interest also existed. *Id.* at 8 n.9.

182. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); see *supra* notes 153-58 and accompanying text (discussing *Dixon* decision).

183. 529 F.2d 448 (5th Cir. 1976).

184. *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (stating that misconduct and failure to attain standard of scholarship cannot be equated and that hearing is not helpful in case of failure to attain standard of scholarship, but may be helpful in misconduct case).

185. *Mahavongsanan*, 529 F.2d at 382.

186. *Mahavongsanan v. Hall*, 401 F. Supp. 381, 382-83 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976). The district court held that the School of Education breached its contract with Mahavongsanan by withholding her degree after she completed the course requirements

prior decision in *Dixon*, the Fifth Circuit concluded that Mahavongsanan had received timely notice of the new comprehensive examination requirement and that the new requirements did not violate her contract rights.<sup>187</sup> The court reasoned that a student, upon matriculation, implicitly agrees to comply with the university's rules and regulations, "which the university clearly is entitled to modify so as to properly exercise its educational responsibility."<sup>188</sup>

2. *The Supreme Court's weakening of student due process rights*

The stage was thus set for Supreme Court review: the Eighth Circuit in *Greenhill* and the Tenth Circuit in *Gaspar* held that an academic dismissal implicated a protected due process interest, while the Fifth Circuit in *Mahavongsanan* disagreed. The issue was ripe for the Supreme Court due to this conflict in the circuits, and a new Eighth Circuit case presented the Supreme Court with an appropriate opportunity for review.<sup>189</sup>

a. Board of Curators of the University of Missouri v. Horowitz

Charlotte Horowitz was typical of a large group of plaintiffs in academic challenge lawsuits: she was a medical student, and she was dismissed for inadequate performance in her clinical courses.<sup>190</sup> Despite her excellent academic test scores, faculty members in her pediatrics course criticized Horowitz for lack of patient rapport, lack of "expertise in coming to the fundamentals of the clinical problem," erratic attendance, and poor personal hygiene.<sup>191</sup> At the end

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and denied her procedural due process by not giving her notice of the change in requirements. *Id.* at 384. The district court permanently enjoined the school from withholding her degree. *Id.*

187. *Mahavongsanan*, 529 F.2d at 450. Reversing the trial court decision, the Fifth Circuit stated that the *Dixon* holding applied to disciplinary decisions but not to academic situations as in the case before it. *Id.* at 449-50. The court stated that the due process requirements established in the *Dixon* line of cases were carefully limited to disciplinary decisions and that there was a clear dichotomy between students' rights in disciplinary dismissals and academic dismissals. *Id.*

188. *Id.* at 449-50; see also *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1562 (M.D. Ala. 1987) (holding university did not deny due process because plaintiff presented no evidence of discriminatory treatment).

189. See *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 80 (1978) (stating that Court granted certiorari to consider procedures which must be accorded dismissed student).

190. *Id.* at 81-82.

191. *Horowitz v. Board of Curators of the Univ. of Mo.*, 538 F.2d 1317, 1318 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978). With respect to Horowitz' academic performance, she scored above the 99th percentile on the Graduate Record Examination (GRE) in verbal aptitude, quantitative aptitude, advanced psychology, and advanced chemistry and in the 99th percentile on the Medical College Admissions Test (MCAT) general information and science categories. *Id.* at 1318. She scored first in the University of Missouri-Kansas City School of



of her first year, the school's Council on Evaluation, composed of both students and faculty, recommended that she not be promoted.<sup>192</sup> The dean overrode this recommendation in July 1972 but admonished her in writing that her "relationship with others" needed to be rapidly and substantially improved.<sup>193</sup> The dean's letter placed Horowitz on probation.<sup>194</sup> In July 1973, the Council on Evaluation, the Coordinating Committee, and the dean concurred in dismissing Horowitz from the school.<sup>195</sup> Horowitz' dismissal precluded her from qualifying for a position as a research associate in the University of North Carolina Department of Psychiatry, which she had been offered six months earlier.<sup>196</sup>

Horowitz thereupon brought a federal civil rights action against the Curators of the University of Missouri and the medical school dean in federal district court, seeking an injunction enjoining her dismissal and, in the alternative, reinstating her and granting compensatory and punitive damages.<sup>197</sup> Her complaint alleged that the defendants had arbitrarily, capriciously, and in bad faith deprived her of the right to practice medicine and in doing so had violated both the due process and equal protection clauses of the fourteenth amendment.<sup>198</sup> The complaint further alleged that defendants had breached their contract with her to provide instruction and a degree, provided that she remained in good standing academically and

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Medicine on Part I of the National Board of Medical Examiners (NBME) examination for medical students and second on Part II. *Id.* She also ranked fourth in her class in the February 1973 quarterly exams and second in the May 1973 exams. *Id.*

Horowitz' "docent," a sort of personal adviser or ombudsman, thought her performance was outstanding throughout her first year. *Id.* at 1318-19. He later testified at trial, however, that she would never admit to making an error, always blamed others and never herself, and was unkempt in her personal appearance. *Horowitz v. Curators of the Univ. of Mo.*, 447 F. Supp. 1102, 1107 (W.D. Mo. 1975). Her docent further stated that he cautioned her about the need for personal neatness and a clean white coat as many as one hundred times. *Id.* He also stated that she constantly criticized the school's curriculum, that she could not perform any of the basic skills required of a practicing physician, and that her problem was that she thought she could learn to be a medical doctor by reading books. *Id.* at 1107-08.

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

193. *Horowitz*, 447 F. Supp. at 1107-08.

194. *Id.* In February 1973, the Council on Evaluation again reviewed Horowitz, continued her on probation, and refused to let her graduate in May as scheduled. *Id.* at 1105. The coordinating committee concurred, and the dean notified her that she "must make a very marked and very substantial improvement" in clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism. *Id.* Horowitz thereupon exercised a special appeal procedure, and the coordinating committee in March 1973 appointed seven outside physicians to examine and evaluate her mastery of relevant concepts, knowledge, and skills. *Id.* In their written reports of this review, only two of the physicians recommended that Horowitz should graduate on schedule. *Id.* at 1109-10. Of the five who opposed timely graduation, two recommended that she remain in school on probation. *Id.*

195. *Id.* at 1110.

196. *Id.* at 1105.

197. *Id.* at 1106.

198. *Id.*

paid tuition and fees.<sup>199</sup>

In a two-day bench trial, the district court found for the defendants, concluding that the evidence showed that the university had expelled her only because of the lack of quality in her work.<sup>200</sup> The court found that Horowitz had been fairly and reasonably evaluated and that she was not qualified to be a medical doctor.<sup>201</sup> The court concluded that the university had afforded Horowitz more procedural due process than the law required.<sup>202</sup>

The Eighth Circuit reversed on procedural due process grounds.<sup>203</sup> The court cited uncontroverted evidence by Dr. Cohen, one of the seven physicians who reviewed Horowitz' skills and knowledge, that her dismissal from medical school would make it difficult or impossible for her to obtain employment in a medically-related field or to enter another medical school, and that this "stigmatized" her and therefore triggered due process protection.<sup>204</sup> The court of appeals concluded that due process required a hearing before dismissal.<sup>205</sup>

The Eighth Circuit subsequently denied, by a vote of five to three,

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199. *Id.* Horowitz was outspokenly critical of various doctors and staff in the outpatient clinics. *Id.* at 1110. She accused Dr. Katherine W. Smith, whom she labeled "a bitch and a bigot," and other doctors of being biased against her because of her religion. *Id.*

200. *Id.* at 1112.

201. *Id.* at 1113.

202. *Id.* The district court found *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975), on which Horowitz relied, distinguishable from her case on the facts. *Id.* at 1111. While the court did not specify which facts were distinguishable, *Greenhill* ranked near the bottom of his class, *Greenhill*, 519 F.2d at 6, whereas Horowitz was at the top academically. *Horowitz*, 447 F. Supp. at 1105. *Greenhill* only passed Part I of the National Board of Medical Examiners exam on the second try, *Greenhill*, 519 F.2d at 6, while Horowitz achieved the highest score in her class on both Parts I and II. *Horowitz*, 447 F. Supp. at 1105. The crux of the holding in *Greenhill* was that he had been stigmatized and his hopes of admission to other medical schools had effectively been destroyed by the assistant dean's statement that he had been dismissed because of poor academic standing apparently due to "lack of intellectual ability or insufficient preparation." *Greenhill*, 519 F.2d at 7. In light of Horowitz' excellent academic record, it would be impossible to make such a claim about her. *Horowitz*, 447 F. Supp. at 1105-06.

203. See *Horowitz v. Board of Curators of the Univ. of Mo.*, 538 F.2d 1317, 1318 (8th Cir. 1976) (stating that due process, long recognized as applicable to disciplinary expulsions, may apply in other areas as well), *rev'd*, 435 U.S. 78 (1978).

204. *Id.* at 1320. Dr. Cohen, a Veterans Administration Hospital pathologist, was the only one of the seven to give Horowitz an unqualifiedly positive rating. *Horowitz*, 467 F. Supp. at 1109. Dr. Dodge recommended that she be awarded the M.D. degree, but thought her unqualified to intern at the hospital where he practiced. *Id.* Dr. Cohen, who had thirty years of experience in hiring M.D.'s, Ph.D.'s, and other personnel for medical research positions, testified that a medical school dismissal would seriously undermine an individual's chances of being admitted to another medical school. *Horowitz*, 538 F.2d at 1320-21 n.3.

205. *Horowitz*, 538 F.2d at 1321. The court noted that the parties agreed that the tests administered by the seven doctors "related only to the decision not to graduate Horowitz, and not to the decision to expel her." *Id.* at 1321 n.4. It expressed doubt that this procedure would satisfy due process because the panel only had the power to examine and make recommendations to another body whose powers were only advisory. *Id.*

the university's petition for rehearing en banc.<sup>206</sup> The dissenting opinion of Chief Judge Gibson appears to indicate why the Supreme Court later granted certiorari. The Chief Judge was apprehensive about the court's starting down a slippery slope.<sup>207</sup> He was concerned that courts would become involved in the academic field to an unacceptable degree and would not give sufficient deference to the perspective and informed judgments of school administrators.<sup>208</sup>

Agreeing with the district court, Chief Judge Gibson stated that *Greenhill v. Bailey* was distinguishable on the facts and, therefore, was not controlling.<sup>209</sup> Chief Judge Gibson suggested that Horowitz' dismissal did not give rise to any liberty interest protected by procedural due process.<sup>210</sup> He concluded further that, even if due process rights were involved, the university's procedure sufficiently satisfied constitutional scrutiny.<sup>211</sup>

The Supreme Court granted certiorari to address the applicability of due process protection to a student dismissed for academic reasons from a state educational institution.<sup>212</sup> Justice Rehnquist, writing for the majority, noted that Horowitz claimed only the deprivation of a "liberty" interest, not a "property" interest.<sup>213</sup> Without deciding whether her dismissal deprived her of a liberty interest in pursuing a medical career, however, the Court held that she had been afforded the required amount of due process under the fourteenth amendment.<sup>214</sup>

The Court acknowledged that dismissal from a medical school was a more severe deprivation than the ten-day suspension for mis-

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206. *Horowitz v. Board of Curators of the Univ. of Mo.*, 542 F.2d 1335, 1335 (8th Cir. 1976).

207. *See Horowitz*, 542 F.2d at 1335 (Gibson, C.J., dissenting) (stating that ruling in present case will require schools to provide formal notification of students' deficiencies in all cases, no matter how egregious). Chief Judge Gibson was joined by Judges Henley and Webster. *Id.*

208. *Id.* (stating that educational institutions are more qualified and better positioned to regulate and judge academic performance).

209. *Id.* (noting that school in *Greenhill* publicly disclosed disparaging information on dismissed student's intellectual abilities, whereas Horowitz' dismissal for deficiency in clinical program was not made public). Significantly, Judge Webster, who joined Judge Gibson's dissenting opinion, also wrote the opinion in *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975).

210. *Horowitz*, 542 F.2d at 1335 (Gibson, C.J., dissenting) (noting no stigmatization of Horowitz since there was no public disclosure of her reasons for dismissal).

211. *Id.* at 1335-36 (noting that Horowitz was informed of her inadequacies and given one year to correct them).

212. *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 80 (1978).

213. *See id.* at 82 (noting that to show property interest, Horowitz would have had to prove that her place at medical school was recognized by Missouri state law).

214. *Id.* at 85. The other opinions in the case agreed with this point. *Id.* at 96 (White, J., concurring); *id.* at 97 (Marshall, J., concurring in part and dissenting in part); *id.* at 108-09 (Blackmun, J., concurring in part and dissenting in part).

conduct which justified a due process hearing in *Goss*.<sup>215</sup> The Court, nevertheless, stated that in the context of academic dismissal, the flexibility requisite to due process called for "less stringent procedural requirements."<sup>216</sup> The Court concluded that the due process clause did not require a hearing in Horowitz' case.<sup>217</sup> According to the Court, the determination of whether to dismiss a student for academic reasons is not readily adapted to the procedural tools of judicial and administrative decisionmaking.<sup>218</sup> The negative academic judgment made by the school officials of Horowitz' clinical abilities was inherently more subjective<sup>219</sup> than the factual questions presented by the average disciplinary case.

In reaching its decision, the Court noted that the educational process is not adversarial by nature.<sup>220</sup> The Court was concerned that further enlargement of the judicial presence in the academic community might destroy the beneficial aspects of the faculty-student relationship.<sup>221</sup>

In his opinion, dissenting in part, Justice Marshall, while agreeing that Horowitz had received as much due process as the fourteenth amendment required, disagreed with the Court's view that characterizing the reasons for dismissal as "academic" or "disciplinary" was relevant to the question of what the due process clause required.<sup>222</sup> He also rejected the dictum in which the Court concluded that an academic dismissal deserves less due process

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215. *Id.* at 86 n.3.

216. *Id.* at 86.

217. *Id.*

218. *Id.* at 90. Significantly, Justice Marshall endorsed the medical school's *ad hoc* procedure used to handle Horowitz' appeal. *See id.* at 102 (Marshall, J., concurring in part and dissenting in part) (commenting that use of seven outside physicians to evaluate Horowitz was better than formal hearing). Under the procedure, seven physicians who had little or no previous contact with Horowitz spent approximately one-half day observing her perform various clinical duties, and then submitted individual reports on her performance to the dean of the medical school. *Id.* Justice Marshall stated that this procedure demonstrated that the medical school sought a fair and neutral assessment of Horowitz. *Id.*

219. *See id.* at 90 (explaining that determination of academic dismissal requires expert evaluation by professors and school officials).

220. *See id.* (commenting that educational process centers around student-faculty relationship).

221. *See id.* (concluding that hearings are useless in finding truth about scholarship but are beneficial in disciplinary proceedings).

222. *See id.* at 103-04 (Marshall, J., concurring in part and dissenting in part) (stating that relevant point is dismissal of student because of her conduct); *accord* *Sofair v. State Univ. of N.Y. Upstate Medical Center College of Medicine*, 44 N.Y.2d 475, 481, 377 N.E.2d 730, 732, 406 N.Y.S.2d 276, 279 (1978) (Fuchsberg, J., dissenting) (citing Justice Marshall's dissent in *Horowitz*) (arguing that rigid dichotomy between due process accorded students dismissed for academic reasons and those dismissed for nonacademic reasons is inappropriate, particularly where personality conflicts influenced negative academic evaluations of dismissed medical student).

protection than a disciplinary dismissal.<sup>223</sup>

Whether or not Horowitz' alleged deficiencies in personal hygiene, peer and patient relations, and timeliness were deemed purely academic, Justice Marshall maintained that the dismissal resulted largely because of her conduct, just like the students in *Goss v. Lopez*.<sup>224</sup> Thus, Justice Marshall argued that the university was obligated to provide Horowitz with at least the minimum procedures required in *Goss*.<sup>225</sup>

As for Horowitz' substantive due process claim, the Court appeared to equate it with the question of arbitrary and capricious action, which had not been shown in the case.<sup>226</sup> Justice Marshall, however, maintained that since the court of appeals had not reached the issue of whether the university deprived Horowitz of substantive due process, the Court had no basis to decide, on its own, that the record would not support the claim.<sup>227</sup>

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223. *Horowitz*, 435 U.S. at 105-06 (Marshall, J., concurring in part and dissenting in part). Justice Marshall rejected the Court's statement that "far less stringent procedural requirements" are called for in the case of an academic dismissal than when a student is accused of violating valid rules of conduct. *Id.* at 86.

224. *Id.* at 97 (Marshall, J., concurring in part and dissenting in part) (emphasizing that Horowitz' dismissal was based on conduct-related matters, not failing grades, and she therefore had a right to procedural protection at least equivalent to dismissals based on misconduct). Justice Powell strongly contested this assertion, insisting that the school dismissed Horowitz not for her behavior, but instead for her "failure to meet the academic standards of the medical school." *Id.* at 93-94 (Powell, J., concurring).

225. *See id.* at 106 (Marshall, J., concurring in part and dissenting in part) (stating that there may be good reason to provide Horowitz with more protection than required by *Goss*). In Part II of his opinion, Justice Marshall conducted an analysis of what process was due utilizing the three factors in *Mathews v. Eldridge*: (1) effect on private interest; (2) risk of erroneous deprivation of the private interest; and (3) the government's interest, including the burdens that additional procedural requirements would create. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that evidentiary hearing is not required prior to termination of social security benefits and that administrative procedures in Social Security Act comport with due process). Justice Marshall concluded that all three factors in this case argued against moving from a high level of protection to the low level involved in *Goss*. *Horowitz*, 435 U.S. at 101 (Marshall, J., concurring in part and dissenting in part). Justice Marshall stressed that both the majority of the Court and the Eighth Circuit found that Horowitz' claim involved a weighty private interest, since she would be unable to continue her medical education and thus, her chances for medically-related employment were damaged. *Id.* As Judge Friendly has written, in situations when the state seeks to deprive a person of a way of life to which she has devoted years of preparation and on which she has come to rely, it should be required to provide a high level of procedural protection. *See Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296-97 (1975) (suggesting revocation of probation and revocation of professional license as examples where high procedural protection is due).

226. *Horowitz*, 435 U.S. at 91 (Rehnquist, J.). Justice Rehnquist stated that lower courts have implied in dictum that academic dismissals from public institutions can be enjoined if "shown to be clearly arbitrary or capricious." *Id.* (quoting *Mahavongsanan v. Hall*, 529 F.2d 448, 449 (5th Cir. 1979)). The Court "assum[ed] that the courts can review under such a standard an academic decision of a public educational institution" and found no showing of arbitrariness or capriciousness. *Id.* at 91-92 (emphasis added) (footnote omitted).

227. *See id.* at 108 (Marshall, J., concurring in part and dissenting in part) (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Marshall argued, and Justices Blackmun and Brennan, in a separate opinion, agreed, that the case should be remanded

The Supreme Court's decision in *Horowitz* provides an equivocal and uncertain guide for the resolution of academic challenge cases. The Court failed to resolve the due process issues in the case. Instead, it assumed the existence of a due process liberty or property interest,<sup>228</sup> and decided to address the substantive due process claim by recognizing the right not to be treated arbitrarily or capriciously.<sup>229</sup> The Court went on to find that none of these putative rights had been violated.<sup>230</sup>

A further problem in applying the *Horowitz* decision to other academic challenge cases is the peculiar nature of the plaintiff's alleged flaws—they were "academic" only in the broad sense and might more accurately be characterized as failings in "professional" or "practical" skills. As noted earlier, medical students have comprised the largest single group of plaintiffs in academic challenge cases, and many of them, like *Horowitz*, have challenged adverse clinical evaluations.<sup>231</sup> The professional or practical failings in-

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to the Eighth Circuit for the first level of appellate review of this question. *Id.* at 107; *id.* at 109 (Blackmun, J., and Brennan, J., dissenting).

228. *Horowitz*, 435 U.S. at 84-85 (Rehnquist, C.J.). Since, as Chief Justice Rehnquist noted, the respondent never alleged that she was deprived of a property interest, that issue was not properly before the Court. *Id.* at 82. Not surprisingly, lower courts tended in subsequent cases to follow the same course as the Supreme Court regarding procedural due process claims, assuming without deciding the existence of a protected liberty or property interest. See *Schuler v. University of Minn.*, 788 F.2d 510, 513 n.6 (8th Cir. 1986) (involving student in doctoral program of psychology); *Amelunxen v. University of P.R.*, 637 F. Supp. 426, 430 (D.P.R. 1986) (involving graduate student in chemistry), *aff'd without opinion*, 815 F.2d 691 (1st Cir. 1987). The Supreme Court repeated its equivocal holding regarding due process rights under somewhat different circumstances in *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). See *infra* notes 263-67 and accompanying text (discussing Court's holding in *Ewing*). Some courts, of course, have explicitly held that college and university students have either a property or liberty interest in continuing their studies and completing their degree. See *infra* notes 271-306 and accompanying text (discussing facts and holding of property and liberty interest cases). Other courts, however, have explicitly held to the contrary. See *infra* notes 308-14 and accompanying text (discussing facts and holdings of cases that do not find students to have liberty or property interest in their education). Thus, confusion continues to reign in this field.

229. *Horowitz*, 435 U.S. at 91. Subsequent courts recognized that the decision in *Horowitz* still leaves open whether a cause of action for violation of substantive due process exists in the case of academic dismissal. See *Hines v. Rinker*, 667 F.2d 669, 703 (8th Cir. 1981) (finding that it is not appropriate for court to decide whether failure to change student's grade was arbitrary or capricious); *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981) (holding that medical students' dismissals were not arbitrary and capricious).

230. *Horowitz*, 435 U.S. at 85, 92.

231. The author has found numerous cases brought by medical, nursing, veterinary, and other similar students to challenge adverse clinical evaluations. See, e.g., *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 939-40 (6th Cir. 1990) (challenging academic dismissal based on low clinical evaluations); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 577-79 (6th Cir. 1988) (discussing breach of contract claims when optometry student was denied degree because eye disease prevented him from satisfying program's clinical proficiency requirements), *cert. denied*, 493 U.S. 810 (1989); *Clements v. County of Nassau*, 835 F.2d 1000, 1001 (2d Cir. 1987) (involving nursing student who failed clinical courses because she did not maintain cleanliness); *Hankins v. Temple Univ.*, 829 F.2d 437, 438 (3d Cir. 1987) (involving sex and race discrimination allegations made by physician dismissed

volved in these cases are factually quite distinct from the low exam grades which typify most academic challenge cases.<sup>232</sup> The *Horowitz* holding is often applied to the latter, more conventionally "academic," body of cases.<sup>233</sup>

In retrospect, it seems that the reason for the Supreme Court's review and reversal of *Horowitz* was to thwart any unwelcome further development of the line of due process cases which had begun with *Greenhill v. Bailey*. As noted, Chief Judge Gibson of the Eighth Circuit feared that his court's decision in *Horowitz* would unduly inject the judiciary into the academic environment, causing an increase in future litigation.<sup>234</sup> The Supreme Court stepped in to halt any such trend.<sup>235</sup> While the Court's "assuming without deciding" posture might seem to leave the door open to future expansion of due process rights of students, in reality it merely undermines or limits *Greenhill*, while leaving such putative rights in limbo.

It is noteworthy, moreover, that the Court appeared to question

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from hospital's clinical fellowship program for tardiness, inappropriate dress and demeanor, abandoning patients, and other failings); *Harris v. Blake*, 798 F.2d 419, 420-22 (10th Cir. 1986) (involving psychology graduate student dismissed from masters program because of poor performance in counseling practicum), *cert. denied*, 479 U.S. 1033 (1987); *Davis v. Mann*, 721 F. Supp. 796 (S.D. Miss. 1988), *aff'd*, 882 F.2d 967, 971 (5th Cir. 1989) (involving dentist dismissed from residency program for various clinical deficiencies); *Bergstrom v. Buettner*, 697 F. Supp. 1098, 1100 (D.N.D. 1987) (involving medical student dismissed for failing several clinical rotations); *Russell v. Salve Regina College*, 649 F. Supp. 391, 398-99 (D.R.I. 1986), *aff'd*, 890 F.2d 484, 486 (1st Cir. 1989), *rev'd*, 111 S. Ct. 1217, 1219-20 (1991) (involving breach of implied agreement when nursing student was asked to withdraw for failure to meet weight loss requirements); *Banerjee v. Roberts*, 641 F. Supp. 1093, 1097 (D. Conn. 1986) (involving neurosurgery resident dismissed for alleged clinical deficiencies); *Mohammed v. Mathog*, 635 F. Supp. 748, 749-50 (E.D. Mich. 1986) (involving dismissal of otolaryngology resident due to poor performance); *Brookins v. Bonnell*, 362 F. Supp. 379, 384 (E.D. Pa. 1973) (holding that nursing student dismissed for poor attendance and failure to submit required records had due process right to hearing); *Chusid v. Albany Medical College*, 157 A.D.2d 1019, 1020-21, 550 N.Y.S.2d 507, 508 (1990) (involving medical student dismissed because of low grades in several clinical rotations); *Samper v. University of Rochester Strong Memorial Hosp.*, 139 Misc. 2d 580, 581, 528 N.Y.S.2d 958, 959 (Sup. Ct. 1987) (involving anesthesiology resident physician who blamed negative clinical evaluations on sex discrimination), *aff'd as modified*, 144 A.D.2d 940, 535 N.Y.S.2d 281 (1988); *Morin v. Cleveland Metro. Gen. Hosp. of Nursing*, 34 Ohio App. 3d 19, 22-23, 516 N.E.2d 1257, 1260 (1986) (holding that nursing student's dismissal for unsafe practices including use of incorrect syringe and mistaken information about drugs' properties was not arbitrary).

232. See, e.g., *Miller v. Hamline Univ. School of Law*, 601 F.2d 970, 971 (8th Cir. 1979) (involving law student who sought reinstatement after being expelled for failing grades); *Paulsen v. Golden Gate Law School*, 25 Cal. 3d 803, 806, 602 P.2d 778, 780, 159 Cal. Rptr. 858, 860 (1979) (declining to award law degree when student did not maintain requisite academic standards); *Balogun v. Cornell Univ.*, 70 Misc. 2d 474, 477-78, 333 N.Y.S.2d 838, 842 (1971) (agreeing with university's decision to withhold degree from veterinary student who did not maintain necessary grade point average); see also *supra* notes 10 and 14 (discussing cases of academic dismissals and refusals to award degrees because of low grades).

233. See *supra* note 228 and accompanying text (describing lower court decisions which have followed holding in *Horowitz*).

234. See *supra* note 207 and accompanying text (quoting Chief Judge Gibson).

235. See *Horowitz*, 435 U.S. at 91 (finding no reason to intrude on historic control of state and local authorities over schools).

even the right of students to challenge arbitrary and capricious actions by educational institutions.<sup>236</sup> Virtually all lower courts since *Barnard v. Inhabitants of Shelburne* have endorsed this right.<sup>237</sup> The "arbitrary and capricious" standard is, as a practical matter, nearly impossible to meet and has only been successfully invoked by a handful of students.<sup>238</sup> The fact that the Court would question the existence of even this rather weak protection for student plaintiffs throws the entire enterprise of student academic challenges into doubt.

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

Interestingly, the other Supreme Court decision in this field, *Regents of the University of Michigan v. Ewing*,<sup>239</sup> also involved a medical student plaintiff, albeit from the opposite end of the academic spectrum.<sup>240</sup> Scott Ewing, a student in the University of Michigan's six-year "Inteflex" program leading to both B.A. and M.D. degrees, was dismissed because he had failed Part I of the National Board of Medical Examiners (NBME) exam.<sup>241</sup> The NBME was a prerequisite

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236. See *id.* (assuming arbitrary or capricious standard was implied in lower courts' dictum); *supra* note 226 and accompanying text (discussing standard for challenging arbitrary and capricious actions by educational institutions).

237. *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 22-23, 102 N.E. 1095, 1096 (1913) (implying that if student could demonstrate bad faith on part of school committee in dismissing him, court would hear his claim).

238. See, e.g., *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 218, 136 Cal. Rptr. 527, 533-35 (1977) (remanding case so student has opportunity to show that university officials were arbitrary and capricious when denying student's master's degree because he did not complete necessary requirements); *Wong v. Regents of Univ. of Cal.*, 15 Cal. App. 3d 823, 829, 93 Cal. Rptr. 502, 506 (1971) (remanding case to determine whether university officials were arbitrary and capricious when they dismissed student for not meeting standards of medical school); *Keller v. Hewitt*, 109 Cal. 146, 147-48, 41 P. 871, 872 (1895) (finding that board of education acted arbitrarily and went beyond their discretionary powers when they denied teaching certificate to applicant who satisfied all requirements); *Maitland v. Wayne State Univ. Medical School*, 76 Mich. App. 631, 638-39, 257 N.W.2d 195, 199-200 (1977) (finding that university officials' behavior was arbitrary because they failed to investigate fully test-taking conditions when student's test was administered and they allowed other students, with lower grades than plaintiff's, to retake exam but denied plaintiff another chance to retake exam); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 539, 116 N.W. 294, 297-98 (1908) (holding that university's board of directors acted arbitrarily and capriciously when they denied medical student her diploma although dean recommended she receive diploma); see also *Haskell, The University as Trustee*, 17 GA. L. REV. 1, 17 (1982) (commenting that reversing academic judgments for arbitrariness is rare); Note, *Testing the Tests: The Due Process Implications of Minimum Competency Testing*, 59 N.Y.U. L. REV. 577, 627 (1984) (noting that courts have suggested that arbitrary and capricious behavior in academic dismissal cases would violate substantive due process, but these courts have not found such behavior in academic dismissal cases).

239. 474 U.S. 214 (1985).

240. *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985). Ewing had a rather dismal academic record, replete with C and C-minus grades, seven Incompletes, and several terms during which he was on a reduced or irregular course load. *Id.* at 218-19 & n.4 (1985).

241. *Id.* at 216. Ewing's score of 235 was the lowest ever recorded by a University of



for admission to the final two years of clinical work culminating in conferral of the M.D. degree.<sup>242</sup> Ewing was the only student who, having failed the exam, was not permitted to retake it.<sup>243</sup>

Because of poor prior academic performance, however, the university had already warned Ewing that any further deficiency would lead to dismissal.<sup>244</sup> Accordingly, after he failed the NBME, the Promotion and Review Board dismissed him from the school.<sup>245</sup> After the Executive Committee of the school rejected his appeal,<sup>246</sup> Ewing brought a civil rights action in federal district court alleging a violation of his substantive due process rights and seeking an order to compel the university to permit him to retake Part I of the NBME and to readmit him as a student if he passed.<sup>247</sup> Following a four-day bench trial, the court entered judgment for the defendants.<sup>248</sup>

The Sixth Circuit, however, reversed on appeal.<sup>249</sup> The court of appeals, citing a seventy-five-year-old Michigan decision, held that there was an implied "understanding" that a student admitted to a college shall not be arbitrarily dismissed.<sup>250</sup> The court held that this understanding was a property interest, arising from the contractual relationship between the parties, which could give rise to constitutional protections.<sup>251</sup> The court noted that a University of Michigan

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Michigan student on Part I of the NBME. *Ewing*, 559 F. Supp. at 794. A passing grade was 345, while 380 was required for state licensure, and the national mean was 500. *Id.*

Other courts have dealt with cases of medical students who, after failing the NBME, sued to compel the college to permit them to retake the exam. *See Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981) (holding no deprivation of property rights occurred when dean denied medical students permission to retake NBME even though college's Progress and Promotions Committee granted permission); *In re Johnston*, 365 Mich. 509, 510, 114 N.W.2d 255, 255-56 (1962) (holding no breach of contract occurred when school denied medical student permission to retake NBME and then did not award him medical degree); *cf. Bergstrom v. Buettner*, 697 F. Supp. 1098, 1099 (D.N.D. 1987) (involving student who failed NBME, retook test, passed it, but was later dismissed after poor academic performance).

242. *Ewing*, 474 U.S. at 215-16.

243. *Ewing*, 559 F. Supp. at 794. Since the NBME program was instituted, 32 University of Michigan students failed the exam and each student was given a second chance to take the test; 10 of those students took the test a third time; and 1 took it a fourth time. *Id.* Also, 7 students in the university's Inteflex program took the test twice, and one took it three times. *Id.*

244. *Id.*

245. *See id.* (noting unanimous vote by Review Board to dismiss Ewing).

246. *See id.* (noting committee's denial of Ewing's request for leave of absence to retake Part I of NBME exam).

247. *See Ewing*, 559 F. Supp. at 797 (alleging additional claims of breach of contract and promissory estoppel).

248. *See id.* at 800 (finding no arbitrary or capricious activity on part of university and rejecting contract and promissory estoppel claims).

249. *Ewing v. Board of Regents of the Univ. of Mich.*, 742 F.2d 913 (6th Cir. 1984).

250. *See id.* at 914 (citing *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909)); *id.* at 914-15 (recognizing that holding in *Booker* was discredited, but relying on court's discussion of contractual relationships); *see supra* notes 52-62 and accompanying text (discussing *Booker*).

251. *Id.* at 915; *see also Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) (recog-

promotional pamphlet, "On Becoming a Doctor," memorialized the medical school's consistent practice of allowing qualified students to take the NBME twice.<sup>252</sup> Since the evidence demonstrated that Ewing was a qualified student<sup>253</sup> and that he was the only such Michigan student in seven years who had failed the NBME and was not allowed to retake the test, the court concluded that the university had treated Ewing "in an arbitrary and capricious manner" by denying him a second chance.<sup>254</sup>

The Supreme Court granted certiorari to determine whether the Sixth Circuit had misapplied the doctrine of substantive due process.<sup>255</sup> The Court construed the Sixth Circuit's decision to mean that it based its decision on the medical school's consistent pattern of conduct in allowing students to retake the NBME exam after failing it the first time.<sup>256</sup> The district court, however, held that this pattern did not give rise to a state law entitlement to retake the NBME.<sup>257</sup> The Court stated that a consistent practice without some basis in state law did not confer a property interest in having a second chance to take the exam.<sup>258</sup> Thus, the Court concluded that the medical school's refusal to permit Ewing to retake the exam was "not actionable in itself."<sup>259</sup>

The Court, assuming a property interest in Ewing's continued enrollment, stated that the issue in the case was to determine whether the university acted arbitrarily in dismissing Ewing without permitting him to retake the NBME.<sup>260</sup> The Court held that the applicable test to review the substance of academic decisions is to show great

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nizing that contractual relationship can exist between university and student); *Williams v. Howard Univ.*, 528 F.2d 658, 660 (D.C. Cir.) (stating that contractual relationship between college and students exists under particular circumstances), *cert. denied*, 429 U.S. 850 (1976).

252. *See Ewing*, 742 F.2d at 916 (noting that it was irrelevant whether Ewing saw this pamphlet).

253. *See id.* (addressing University of Michigan's definition of "qualified").

254. *See id.* (holding further that Ewing must be reinstated if he passed Part I of NBME).

255. *Ewing*, 474 U.S. at 221.

256. *See id.* at 223 n.9 (stressing that Sixth Circuit found no rule entitling medical students to retake exam).

257. *Id.* (referring to *Ewing v. Board of Regents of the Univ. of Mich.*, 559 F. Supp. 791, 797-99 (E.D. Mich. 1983)).

258. *Id.*

259. *Id.* at 224.

260. *Id.* at 223. Ewing employed Supreme Court decisions to support his claim of a protectable property interest in continued enrollment in the Inteflex program. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (concluding that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law"); *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (holding that agreements, either formalized in writing or implied could be independent sources of property interests); *see also Bishop v. Wood*, 426 U.S. 341, 344 (1976) (holding that property interest in employment can be created by implied contract); *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 99-100, 120 N.W. 589, 591 (1909) (holding there is implied understanding that one who is admitted to college shall not be arbitrarily dismissed from it).

respect for the faculty's professional judgment and override that judgment only when it constitutes a substantial departure from accepted academic norms.<sup>261</sup> Invoking the need to exercise restraint in the substantive due process area and the need to respect the prerogatives and safeguard the academic freedom of state and local educational institutions, the Court stated that a federal court is not the appropriate forum in which to evaluate the substance of academic decisions made by educators.<sup>262</sup>

Given this narrow scope of judicial review of academic decisions, the conclusion in *Ewing* is clear: while it might have been unwise for the medical school to deny Ewing a second chance to take the NBME examination, his poor academic record supported the district court's conclusion that the school had good reason to dismiss him.<sup>263</sup> The Supreme Court concluded that the university did not act arbitrarily because the faculty made its decision after conscientious and careful deliberation on Ewing's entire career at the university.<sup>264</sup>

The *Ewing* decision was unanimous.<sup>265</sup> Justice Powell's brief concurring opinion was the only other opinion in the case.<sup>266</sup> Given Ewing's poor academic record, it is hard to quarrel with the Court's refusal to hold that the medical school's failure to comply with the tradition of affording students a second chance to take the NBME examination was arbitrary or capricious or a violation of Ewing's substantive due process rights.<sup>267</sup>

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261. *Ewing*, 474 U.S. at 225.

262. *Id.* at 226. The Court reasoned that academic decisions require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* (quoting *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978)).

263. *See id.* at 227 (emphasizing that Ewing's failure of the NBME was one of his numerous academic deficiencies).

264. *Id.* at 225. The Court refused to conclude from Ewing's exhibits, showing that some students with more incomplete or low grades than Ewing were permitted to retake the examination after failing it the first time, that he had been treated unfairly. *Id.* at 228. The Court cautioned that the Promotion and Review Board was privy to many other kinds of information about Ewing which it could take into account in reaching its decision. *Id.* Moreover, it pointed out that 19 other students, some with records arguably better than Ewing's, had been dismissed from the Inteflex program without being allowed to take the NBME examination at all. *Id.* at 228 n.14; *see Watson v. University of S. Ala. College of Medicine*, 463 F. Supp. 720, 725-27 (S.D. Ala. 1979) (rejecting similar argument by dismissed medical student that medical school discriminated against him by giving classmates with similar weak academic records more lenient treatment).

265. *See Ewing*, 474 U.S. 214, 214 (1985) (noting that all nine justices agreed with judgment in case).

266. *Id.* at 228 (Powell, J., concurring). Justice Powell emphasized that Ewing's claim to a property right was "dubious at best." *Id.* at 229. He stressed that not every property right derived from state law deserves the protection of substantive due process. *Id.*

267. Both the Sixth Circuit and the Supreme Court appeared to equate the two standards, but neither court made a precise statement about the relationship between the standards. *See*

Since the *Ewing* holding added virtually nothing to *Horowitz*, one must ask why the Court wished to take the case and decide it. The probable answer is that the Court wanted to nip in the bud any trend, which the Sixth Circuit decision might have started, to apply substantive due process protection to the extremely wide array of potential state-created property rights of students and others.

## II. SURVEY OF RECENT ACADEMIC CHALLENGE CASES

The interesting thing about *Horowitz* and *Ewing* is that while they definitely put a damper on both procedural and substantive due process arguments in academic challenge cases, their equivocal "assuming without deciding" holdings did not completely rule out such claims in extreme cases.<sup>268</sup> Nor, of course, could the Court properly exclude the availability of claims based on breach of contract and other state theories. Thus, while *Horowitz* and *Ewing* have certainly made it harder for academic challenge plaintiffs to succeed, they have not completely closed off a single legal approach in academic challenge cases. Academic challenge claims have continued to arise in recent years, and they have continued to raise all the traditional arguments as well as some new and creative ones.<sup>269</sup> It is to a de-

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*Ewing*, 474 U.S. at 223 (holding that *Ewing's* assumed property interest gave rise to substantive right under due process clause to continued enrollment free from arbitrary state action); *Ewing*, 742 F.2d at 915 (holding that arbitrary and capricious deprivation of constitutionally recognized right does state valid cause of action for violation of substantive due process).

268. See *infra* note 307 and accompanying text (discussing academic dismissal cases which apply holdings of *Ewing* and *Horowitz*).

269. See Picozzi, *supra* note 12, at 2134-37 (noting that despite Supreme Court's hesitancy to implicate property and liberty interests in academic dismissal cases, lower federal courts have consistently held that these interests exist); see also *infra* note 307 (discussing academic dismissal cases which refer to holdings of *Ewing* and *Horowitz*). The author's favorite case, for sheer brazen creativity, is a cause of action for supposed negligent failure to warn a student of probable failure in law school, for which she sought money damages. *Maas v. Corporation of Gonzaga Univ.*, 27 Wash. App. 397, 398, 618 P.2d 106, 107 (1980). Ms. Maas left her tenured teaching position in Alaska to attend Gonzaga Law School. *Id.* at 399, 618 P.2d at 107. Her undergraduate GPA in the late 1940s was 1.84, her graduate school GPA was 3.1 and her law school admission test score was 438 (on a scale of 200 to 800). *Id.* The law school dismissed her after the first year for failure to maintain the required 2.2 GPA, but she successfully petitioned for readmission. *Id.* In her second year of law school, she again failed to maintain a 2.2 GPA and was again dismissed. *Id.*, 618 P.2d at 107-08. After taking law courses in Africa under the auspices of a Temple University Law School summer program, she appealed again and was again reinstated by Gonzaga with support from the Gonzaga Women's Law Caucus, on the condition that she attain a 2.2 GPA at the end of that semester. *Id.*, 618 P.2d at 108. This she failed to do, and Gonzaga finally dismissed her a third time with prejudice. *Id.*

Ms. Maas thereupon enrolled in the University of Washington summer school to take law courses. She completed sufficient credits to graduate, but Gonzaga refused to accept those credits and to award her a degree. *Id.* at 399-400, 618 P.2d at 108. She sued the law school, seeking damages for its failure to warn her of her probable failure in law school, for an order of specific performance directing Gonzaga to award her a law degree, and for damages for violation of her equal protection rights. *Id.* at 400, 618 P.2d at 108. Maas also sought money damages for the loss of her tenured teaching position. *Id.* at 400, 618 P.2d at 108. The court

scription of the major groups of such cases that we now turn.

### A. *Due Process Liberty and Property Interests*

In order for the fourteenth amendment due process clause to apply, there must be a threatened deprivation of life, liberty, or property.<sup>270</sup> As noted above, the court in *Greenhill v. Bailey*<sup>271</sup> held that a medical college deprived one of its students of "a significant interest in liberty" when it dismissed the student for academic reasons and disparaged his intellectual ability.<sup>272</sup> The student persuaded the court that this stigmatization would effectively exclude him from gaining admittance to other medical schools.<sup>273</sup> The author has found no other case involving institutions of higher education which recognize a similar liberty interest.<sup>274</sup> Accordingly, some property interest must be found before due process protection can attach. Property interests normally are not created by the Constitution, but instead are derived from state law.<sup>275</sup>

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of appeals affirmed the trial court's dismissal, holding that the university did not have a duty to warn applicants of prospective failure in law school. *Id.* at 402, 618 P.2d at 109.

270. See *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972) (holding that requirements of procedural due process apply only to deprivation of interests encompassed by fourteenth amendment's protection of liberty and property). The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

271. 519 F.2d 5 (8th Cir. 1975).

272. *Greenhill v. Bailey*, 519 F.2d 5, 7-8 (8th Cir. 1975); see also *supra* note 209 (discussing facts in *Greenhill*).

273. *Greenhill*, 519 F.2d at 8. Having concluded that the medical school deprived *Greenhill* of a liberty interest, it was unnecessary for the court to pass on *Greenhill's* alternative claim that, once admitted, he had a property interest in continuing and completing his medical education. *Id.* at 8 n.9.

274. The few other cases in which a court has recognized a "liberty interest" in education are clearly distinguishable. In *Brookhart v. Illinois State Board of Education*, fourteen handicapped elementary and secondary students challenged a new school district requirement that they pass a "Minimal Competency Test" in order to receive a high school diploma. *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179, 181 (7th Cir. 1983). The Seventh Circuit held that students had a right under state law to a diploma if they met the prior requirements. *Id.* at 185. In changing the requirements, the school district deprived the students of a right or interest previously held under state law. The students, therefore, had a liberty interest sufficient to invoke the procedural protections of the due process clause. *Id.* The court, in *Brookhart*, went on to conclude that the notification of the change in requirements, which the school had given to the students eighteen months earlier, was constitutionally inadequate notice. *Id.* at 186. The court of appeals ordered the school district to award diplomas to the eleven plaintiffs who satisfied the remaining graduation requirements. *Id.* at 188; see *Debra P. v. Turlington*, 474 F. Supp. 244, 266 (M.D. Fla. 1979) (holding that students have liberty interest to be free from stigma of inferior graduation credential), *aff'd in part and vacated in part*, 644 F.2d 397 (5th Cir. 1981); *Board of Educ. v. Ambach*, 107 Misc. 2d 830, 841-42, 436 N.Y.S.2d 564, 572-73 (Sup. Ct. 1981) (holding that awarding certificate inferior to diploma is deprivation of liberty), *modified*, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982), *aff'd*, 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 669, *cert. denied*, 465 U.S. 1101 (1984).

275. See *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)) (identifying relevant state law as those statutes or rules giving certain benefits to citizens).

Thus, the Tenth Circuit held in *Gaspar v. Bruton*<sup>276</sup> that a practical nurse in an Oklahoma public vocational school had a property right in her continued enrollment, especially because she had paid her tuition.<sup>277</sup> The Tenth Circuit also found a property interest in a student's continued enrollment in *Harris v. Blake*.<sup>278</sup> In that case, a graduate student in psychology at a state university had such a property interest because the State of Colorado entitled its residents to an education in its state college system so long as they continued to pay tuition.<sup>279</sup>

Other courts have similarly held that students in higher education possess a property interest in their continued enrollment. The West Virginia Supreme Court of Appeals, in *Evans v. Virginia Board of Regents*,<sup>280</sup> held that a student who took a leave of absence for medical reasons had a sufficient property interest in the continuation and completion of his medical education.<sup>281</sup> The court reasoned that after completing two and one-half years of the program, the student had a reasonable expectation that he would be permitted to graduate.<sup>282</sup> Similarly, the Sixth Circuit noted in *Stevens v. Hunt*<sup>283</sup> that

276. 513 F.2d 842 (10th Cir. 1976).

277. See *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1976) (emphasizing public school student's entitlement to public education as property interest); accord *Abbariao v. Hamline Univ. School of Law*, 258 N.W.2d 108, 112 (Minn. 1977) (stating that law student who alleged that professors singled out his examinations for discriminatory grading due to his "probationary" status stated claim for which relief may be granted, but court would not regrade student's exams because academic deficiencies per se are not subject to judicial review). The court in *Abbariao* stated that the student's charge of arbitrary conduct in grading on the part of the law school leading to his expulsion stated a cognizable claim. *Abbariao*, 258 N.W.2d at 113.

278. 798 F.2d 419 (10th Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

279. *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986), cert. denied, 479 U.S. 1033 (1987). The Colorado Legislature directed that its state colleges "shall be open . . . to all persons resident in this state" upon payment of reasonable tuition. *Id.* at 422 (citing COLO. REV. STAT. § 23-50-109 (1973)). The court, however, rejected Harris' claim that the university violated his substantive due process rights when, for reasons not made public, the appeal board upheld his low grades, forcing his withdrawal. *Id.* at 424-25. Harris also asserted that the university had deprived him of liberty interests in his good name and reputation and in his ability to pursue a career in psychology. *Id.* at 422 n.2. Since the Tenth Circuit concluded that he had received both procedural and substantive due process, it did not decide this issue. *Id.*

280. 165 W. Va. 780, 271 S.E.2d 778 (1980).

281. *Evans v. West Va. Bd. of Regents*, 165 W. Va. 780, 782, 271 S.E.2d 778, 780 (1980) (citing *State ex rel. McLendon v. Morton*, 162 W. Va. 431, 249 S.E.2d 919 (1978) and *North v. West Va. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977), cert. denied, 475 U.S. 1020 (1986)). Evans completed two and one-half years of the osteopathic program before he took a one-year leave of absence to recuperate from a serious urological infection. *Id.* at 781, 271 S.E.2d at 780. When he attempted to return to school two months after his leave expired, he was told that he was no longer a student in good standing and would have to apply for readmission. *Id.* His application was rejected without explanation. *Id.* After diligently but unsuccessfully pursuing administrative remedies, Evans sought a writ of certiorari ordering his reinstatement. *Id.* The trial court ruled against him but the West Virginia Supreme Court of Appeals reversed. *Id.* at 782-83, 271 S.E.2d at 780. It granted the writ and ordered his immediate reinstatement. *Id.* at 783, 271 S.E.2d at 781.

282. *Id.* at 782, 271 S.E.2d at 780.

283. 646 F.2d 1168 (6th Cir. 1981).

Tennessee had long recognized the existence of a qualified property right in the study of medicine.<sup>284</sup> The court, however, rejected the dismissed medical students' claim that they were vested with a property right to take the National Board of Medical Examiners (NBME) examination a third time when one of two academic committees voted to permit them to do so.<sup>285</sup>

The United States District Court for the Middle District of Pennsylvania, in *Ross v. Pennsylvania State University*,<sup>286</sup> recognized a similar property interest in continued enrollment.<sup>287</sup> The court directed the defendant state university to grant a hearing to plaintiff Ross, a graduate student dismissed before the end of his second semester, at which he could explain reasons for his poor scholarship.<sup>288</sup> The university dismissed Ross for poor scholarship and also terminated his position as a half-time graduate assistant.<sup>289</sup> The court noted that, since the ruling in *Barker v. Bryn Mawr College*,<sup>290</sup> Pennsylvania courts have recognized the existence of a contractual relationship between a student and a private college.<sup>291</sup> Thus, students are entitled to sue educational institutions for breach of that contract.<sup>292</sup>

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284. *Stevens v. Hunt*, 646 F.2d 1168, 1169 (6th Cir. 1981) (citing *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943)).

285. *Id.* at 1170. The medical school in *Stevens* adopted a policy requiring that all medical students pass Part I of the NBME examination at the end of their second year of course work. *Id.* Each of the plaintiffs failed the examination twice, but the Progress and Promotions Committee voted to sponsor each of them for a third attempt. *Id.* Instead of granting the students a third attempt, however, the dean heeded the recommendation of the Academic Affairs Committee, thereby overriding the Progress and Promotions Committee, and dismissed the students for poor academic standing and failing the NBME exam. *Id.* The Sixth Circuit held that the action by the Academic Affairs Committee was not arbitrary or capricious, and therefore plaintiffs could not prevail. *Id.*; see *supra* notes 241 and 256-64 and accompanying text (discussing whether students have property interest in retaking NBME exam).

286. 445 F. Supp. 147 (M.D. Pa. 1978).

287. See *Ross v. Pennsylvania State Univ.*, 445 F. Supp. 147, 152 (M.D. Pa. 1978) (noting that students enrolled at *public* institutions have property interest in continued enrollment).

288. See *id.* at 153 (reasoning that hearing should be held because it would cause minimal administrative burden and decision of dismissal was partly subjective, not based on mathematical criteria alone).

289. *Id.* at 151, 154. Ross matriculated at Penn State in the 1976 summer term as an M.S. candidate in ceramic science and continued his studies into the fall term. *Id.* at 151. On November 24, 1976, the school notified Ross of his dismissal beginning with the winter term. *Id.* University regulations required a cumulative GPA of 3.00 for an M.S. candidate to graduate, but the record contained no indication of any university regulation that required expulsion of a graduate student for failing to maintain a particular GPA. *Id.* at 153. The letter dismissing Ross indicated that, regardless of the final exam scores he might receive, he could not achieve a GPA for the summer and fall terms higher than 2.55. *Id.* However, there was no indication as to whether he could achieve a GPA of 3.00 by the time of his graduation. *Id.*

290. 278 Pa. 121, 122 A. 220 (1923).

291. See *Ross*, 445 F. Supp. at 152 (explaining contractual relationship as student receiving degree in exchange for performing required work in satisfactory manner and paying required fees).

292. *Id.*; see *Strank v. Mercy Hosp.*, 383 Pa. 54, 57-58, 117 A.2d 697, 698 (1955) (holding that court may enforce contract between nursing school and student by giving dismissed student transfer credits for work completed at school).

The court concluded that, based on statements of policy by the university and the experiences of other students, a student in Ross' position had a reasonable expectation that he would receive his degree if he performed the required work satisfactorily and paid his fees.<sup>293</sup> The court held that Ross possessed a property interest in the continuation of his studies pursuant to state law.<sup>294</sup> The court, therefore, concluded that a hearing was required in these circumstances to allow Ross to explain the reasons for his poor scholarship.<sup>295</sup> The court cautioned, however, that its opinion did not require a due process hearing for every student dismissed because of poor scholarship.<sup>296</sup> The court, moreover, rejected Ross' claim that he had either a property or a liberty interest under the due process clause in his graduate assistantship.<sup>297</sup>

The Eighth Circuit recognized a slightly more unusual property interest on the part of a pharmacy student in *Ikpeazu v. University of Nebraska*.<sup>298</sup> During the third year of his studies for a doctorate in pharmacy, the University of Nebraska dismissed Ikpeazu, a foreign national, after he failed two required clerkships a total of five times.<sup>299</sup> Previously, the Eighth Circuit had held in *Corso v. Creighton University*<sup>300</sup> that the relationship between a private university and a

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293. *Ross*, 445 F. Supp. at 152; see also *Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. 1981) (holding that by making school attendance mandatory, state of Florida vested its students with property interest since it created expectation that if students attended school and passed required courses, students would receive diplomas).

294. *Ross*, 445 F. Supp. at 152; accord *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (finding that medical student has constitutionally protected interest in continuing education), *aff'd without opinion*, 727 F.2d 1101 (3d Cir. 1984).

295. *Ross*, 445 F. Supp. at 153 (rejecting constitutional requirement of full adversarial hearing).

296. *Id.* at 154 (stating that hearing would serve no purpose when dismissal is based on failure to achieve stated GPA and it is university policy to dismiss students for this reason, regardless of mitigating circumstances). The court decided the case after the Eighth Circuit decision in *Horowitz*, but before the Supreme Court reversal. The district court in *Ross* rejected the Eighth Circuit's finding that dismissal of a graduate student implicated a liberty interest because such an action is likely to bar access to other graduate schools and related employment. *Id.* at 155. It held that Ross had no fourteenth amendment liberty interest in continuing as a graduate student. *Id.*

297. *Id.* at 154-55. The court reasoned that Ross had to show that his property interest stemmed from state law. *Id.* at 154. The court found no such showing since the state legislature had not granted state colleges and universities the authority to enter into employment contracts with graduate assistants. *Id.*

298. 775 F.2d 250 (8th Cir. 1985).

299. *Ikpeazu v. University of Neb.*, 775 F.2d 250, 252 (8th Cir. 1985). Ikpeazu was allowed to retake the "ambulatory clerkship" after failing it the first time, but he failed it again. *Id.* He was also allowed to retake the psychiatric pharmacy clerkship after failing it the first time. *Id.* When he failed it the second time, the dean changed his grade to withdraw-passing and permitted him to take it a third time, which led to yet another failing grade. *Id.*

300. 731 F.2d 529 (8th Cir. 1984). In *Corso*, a medical student sued for breach of contract when the private university he attended expelled him for collaborating on a first-year final examination. *Corso v. Creighton Univ.*, 731 F.2d 529, 530 (8th Cir. 1984).



student is contractual in nature.<sup>301</sup> The court found that the university's student handbook was the primary source of the terms governing the parties' contractual relationship.<sup>302</sup>

The Eighth Circuit in *Ikpeazu* applied these same principles to the University of Nebraska, a public university.<sup>303</sup> The court noted a university publication that set forth its grievance procedure for appeals of allegedly capricious or improper grades.<sup>304</sup> The court concluded that this procedure implied a contractual guarantee against capricious grading and created a corresponding property right in nonarbitrary grading.<sup>305</sup> In light of the ample evidence of *Ikpeazu*'s academic shortcomings, such as misprescribing drugs and providing incorrect dosages, the court held that his failing grades and subsequent dismissal from the pharmacy program did not constitute arbitrary actions as a matter of law.<sup>306</sup>

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301. See *id.* at 531 (stating that student must prove breach of contract in order to establish actionable claim).

302. See *id.* at 533 (interpreting terms of student handbook and holding that school denied student his contractual right to hearing before expulsion).

303. *Ikpeazu*, 775 F.2d at 253 (citing *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984)).

304. See *id.* (stating that terms of contractual relationship are not altered by fact that handbook does not expressly promise that grading shall not be arbitrary).

305. See *id.* (holding that *Ikpeazu* had property interest in grades received but no deprivation of that interest occurred when he received failing grades and was dismissed); see also *Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981) (citing *Greenhill v. Bailey*, 519 F.2d 5, 10 n.12 (8th Cir. 1975)) (holding that in order to establish arbitrary and capricious action, plaintiff must show that there was no rational basis for university's decision or that decision was motivated by bad faith or ill will unrelated to academic performance).

306. See *Ikpeazu*, 775 F.2d at 254 (finding that student's proffered evidence of bias and discrimination by department instructors was meager). This case contains one of the more remarkable allegations of due process violation this author has encountered. *Ikpeazu* alleged that the due process violation occurred when the dean changed his grade in the psychiatric pharmacy clerkship from F to withdraw-passing. *Id.* at 254 n.2. The court rejected this claim because they found that the dean was clearly attempting to aid *Ikpeazu*. *Id.*

Another rather frivolous claim of protected property interest was rejected by a federal court in *Paoli v. University of Delaware*. The plaintiff graduated in June 1985 with a B.S. in education, *cum laude*. *Paoli v. University of Del.*, 695 F. Supp. 171, 172 (D. Del. 1988). She did not, however, complete an optional program for which she enrolled entitled "Bachelor of Science in Education Degree Program in Elementary Teacher Education" because she had not been able to take "EDD 400," a practice teaching course. *Id.* at 171. Paoli had previously failed "EDD 322," which was a prerequisite for EDD 400. *Id.* She was free to retake EDD 322 in the spring semester of 1985 and then to reapply to take EDD 400 in the fall of 1985. *Id.* at 172. This would have meant, however, that she would have graduated from the special program one semester later than scheduled. *Id.* at 174 n.5. Plaintiff did not contest her failing grade in EDD 322, nor did she rebut the university's claim that it neither dismissed her from the special program nor took any action that precluded her from completing the special program. *Id.* at 173. Thus, her claim in essence was not that she had been deprived of anything, but rather that she had a protected property right to complete the special program at the time of her choosing, before her scheduled graduation. *Id.* at 173. Paoli cited a number of cases, none of which addressed dismissal from an optional scholastic program. *Id.* at 173 n.3. Rather, they all involved permanent dismissals from the institutions concerned. See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215-16 (1985) (involving academic dismissal of medical student from combined B.S.-M.D. program); *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 79 (1978) (involving academic dismissal of medical student from med-

As expected, recent decisions following *Horowitz* and *Ewing* "assume" the existence of a protected property or liberty interest in a student's continued enrollment.<sup>307</sup> Other courts, however, have rejected claims of protected property or liberty interests. For example, in *Bergstrom v. Buettner*,<sup>308</sup> another medical student was automatically dismissed because she received three "unsatisfactories" in third-year clinical rotations.<sup>309</sup> She asserted a property interest in continued enrollment and a further protected interest created by the medical school's grading regulations.<sup>310</sup> The court rejected her claims, and found that the school's regulation requiring the issuance of pre-rotation grading criteria did not create a constitutionally protected property interest.<sup>311</sup> The court therefore concluded that the medical school's failure to distribute the written criteria did not violate the student's substantive due process rights.<sup>312</sup>

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ical school); *Hankins v. Temple Univ.*, 829 F.2d 437, 438-39 (3d Cir. 1987) (involving dismissal of physician from fellowship program at university hospital); *Mauriello v. University of Medicine & Dentistry*, 781 F.2d 46, 47-48 (3d Cir. 1986) (involving academic dismissal of graduate student from doctoral program in microbiology), *cert. denied*, 479 U.S. 818 (1986). Thus, the court in *Paoli* granted summary judgment to the university, concluding that "completion of an optional scholastic program, at the time that a student desires, is not a protected property interest." *Id.* at 173 (emphasis in original); *accord* *Vought v. Teachers College, Columbia Univ.*, 127 A.D.2d 654, 654-55, 511 N.Y.S.2d 880, 881 (1987) (holding no breach of implied contract between university and student when it granted only M.A. degree to student who was aware that school accepted him to single degree program, not combined B.S.-M.A. program).

307. See, e.g., *Davis v. Mann*, 882 F.2d 967, 973 (5th Cir. 1989) (citing *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978)) (involving dismissal of dental student from residency program); *Schuler v. University of Minn.*, 788 F.2d 510, 513 n.6 (8th Cir. 1986) (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 and *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978)) (involving academic dismissal of graduate student in psychology after failure of oral exam), *cert. denied*, 479 U.S. 1056 (1987); *Haberle v. University of Ala.*, 803 F.2d 1536, 1539 n.1 (11th Cir. 1986) (involving academic dismissal of graduate student in chemistry doctoral program after failure of oral qualifying exam); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1561 (M.D. Ala. 1987) (citing *Haberle v. University of Ala.*, 803 F.2d 1536, 1539 n.1 (11th Cir. 1986)) (commenting that court had same doubts as Supreme Court in *Ewing* as to whether student could demonstrate "constitutionally protected property or liberty interest in his post-secondary education"); *Amelunxen v. University of P.R.*, 637 F. Supp. 426, 430 (D.P.R. 1986) (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) and *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978)) (involving suspension of graduate student after failure of oral thesis exam), *aff'd*, 815 F.2d 691 (1st Cir. 1987).

308. 697 F. Supp. 1098 (D.N.D. 1987).

309. See *Bergstrom v. Buettner*, 697 F. Supp. 1098, 1099 (D.N.D. 1987) (noting that student received poor grades in internal medicine, surgery, and radiology).

310. *Id.* at 1101. Plaintiff claimed that the medical school's regulations created a protected interest "in receiving written grading criteria on the first day of class," thereby forming a property right in continued enrollment. *Id.* (emphasis in original). The plaintiff further contended that the medical school's failure to issue written grading criteria was a deprivation of her protected interest. *Id.*

311. See *id.* (finding that medical school regulation did not create property interest since plaintiff had no state-law-based entitlement to it).

312. *Id.* at 1102. The court granted defendant's motion for summary judgment on all

In *Cowan v. University of Louisville School of Medicine*,<sup>313</sup> a case whose facts are similar to those of *Horowitz*, the Sixth Circuit rejected a dismissed medical student's claim of a protected liberty interest.<sup>314</sup> Like *Horowitz*, *Cowan* had an impressive academic record, but also had glaring clinical deficiencies.<sup>315</sup> Unlike *Horowitz*, however, the school advised *Cowan* to see one of its psychiatrists about his personal difficulties.<sup>316</sup> Dr. Franks, the psychiatrist who examined *Cowan*, wrote an alarming letter about him to the associate dean, questioning *Cowan's* mental state.<sup>317</sup> The associate dean shared the

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issues except the claim that the defendants acted arbitrarily and capriciously in giving her an unsatisfactory grade in her surgery rotation. *Id.* The court preserved the claim of arbitrary and capricious activity for trial or further disposition by motion to determine issues of material fact as to the grading criteria. *Id.*

Similarly, in *Samper v. University of Rochester Strong Memorial Hospital*, a New York state court rejected a medical resident's claim that the employer hospital deprived her of procedural due process at a meeting at which the Clinical Competency Committee evaluated her performance in the anesthesiology residency program as unsatisfactory. *Samper v. University of Rochester Strong Memorial Hosp.*, 139 Misc. 2d 580, 585-87, 528 N.Y.S.2d 958, 961-62 (Sup. Ct. 1987), *aff'd as modified*, 144 A.D.2d 940, 535 N.Y.S.2d 281 (1988). Ms. Samper alleged that the hospital did not provide adequate notice of the meeting and that it denied her right to have an attorney present and her request to review certain documents relating to her files before the meeting. *Samper*, 139 Misc. 2d at 585-86, 528 N.Y.S.2d at 959, 961. The court emphasized that the purpose of the meeting was to explain an educational evaluation; it was not a disciplinary proceeding. *Id.* at 585, 528 N.Y.S.2d at 961. Since, in a previous case, the New York Court of Appeals had not attached a full hearing requirement to academic evaluations, the court concluded that there was no deprivation of a liberty or property interest that would trigger due process protection. *Id.* at 586, 528 N.Y.S.2d at 962; *see also* *Sofair v. State Univ. of N.Y. Upstate Medical Center College of Medicine*, 44 N.Y.2d 475, 479-80, 377 N.E.2d 730, 731, 406 N.Y.S.2d 276, 277-78 (1978) (holding that hearing is not needed when dismissal is based on academic evaluation and parties do not present factual issues to be resolved by evidentiary proof).

313. 900 F.2d 936 (6th Cir. 1990).

314. *See* *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 942 (6th Cir. 1990) (holding that *Cowan's* allegation of damage to his reputation caused by school officials failed to state claim of deprivation of liberty interest).

315. *Id.* at 937. *Cowan* received B.S. and B.A. degrees from Brown University, held Danforth and Woodrow Wilson Fellowships while earning a Ph.D. in comparative pharmacology from the University of California Medical Center, and ranked in the top quarter of his class during the first few semesters of his enrollment in the University of Louisville School of Medicine. *Id.* *Cowan's* clinical performance, however, was problematic. For example, during *Cowan's* psychiatric rotation, his clinical supervisor reported to the associate dean that *Cowan* devoted "[i]nadequate attention to, detail in, and performance of histories and physicals" and had "difficulty maintaining productive patient, staff and peer relationships." *Id.* Another doctor reported that *Cowan* incorrectly informed the parents of a child with a malignant brain tumor that the child was receiving improper treatment for the tumor, thereby causing the parents a great deal of distress. *Id.* A third doctor, a resident in psychiatry, wrote to the associate dean that the plaintiff had seen patients after being advised not to, and that *Cowan* followed improper procedures leading to incorrect diagnoses. *Id.*

316. *Id.*

317. *Id.* The letter from Dr. Franks stated in part:

I have serious doubts, in my professional opinion, as [to] the ability of this person to conform his conduct to that required by either the University o[r] the greater medical profession. In my opinion, he is a seriously disturbed person, and potentially dangerous to patients. I have serious reservations regarding his continuing in medical education.

*Id.*

letter with the dean, who arranged for Cowan to take a leave of absence.<sup>318</sup>

During the next academic year, Cowan failed two two-month rotations in core courses required for graduation, junior medicine and junior surgery.<sup>319</sup> The clinical evaluations of him in junior surgery were particularly negative.<sup>320</sup> Cowan appealed both grades unsuccessfully to the Committee on Student Promotions, which recommended that he be dismissed from the school.<sup>321</sup> Meanwhile, in a procedure perhaps suggested by the facts of *Horowitz*, the Committee on Student Promotions sought and received an independent evaluation of Cowan's junior surgery charts and notes from the Chief of Surgery at the Louisville Veteran's Administration Hospital, who reported that, "[i]n clarity, content, and assessment of the problems his notes are below average."<sup>322</sup> Largely because of Cowan's very poor record in clinical courses, the dean subsequently affirmed the recommendation of dismissal.<sup>323</sup> Cowan filed both federal and state actions, alleging that the dismissal violated his civil rights, "constitutionally vested student rights," and his rights to procedural and substantive due process.<sup>324</sup>

In support of his due process claims, Cowan argued that the associate dean and dean deprived him of a liberty interest in his reputation when they disclosed Dr. Franks' letter to the Student Advisory Committee.<sup>325</sup> He further asserted that he was deprived of a "property interest in his continuing enrollment in medical school."<sup>326</sup> The United States Supreme Court had already considered and rejected a similar claim of harm to reputation under Kentucky law in *Paul v. Davis*.<sup>327</sup> In that case, the Supreme Court stated that an in-

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318. *Id.* The dean forwarded the letter to the Student Affairs Committee for further action. *Id.* After a second psychiatrist and a psychologist examined Cowan and reported that he had no "serious pathology," the Student Affairs Committee decided to take no further action against him, never discussed his matter again, and never disciplined him. *Id.* at 938.

319. *Id.*

320. *See id.* at 938-39 (noting that Cowan received failing grade for lack of improvement after being warned that he needed to improve in order to receive passing grade).

321. *Id.* at 939.

322. *Id.*

323. *Id.* After his dismissal, Cowan filed eight grievances with the Student Academic Grievance Committee of the medical school. *Id.* The Committee held two hearings to receive testimony on Cowan's complaints and then held two closed sessions to discuss the evidence. *Id.* It found insufficient evidence to conclude that Cowan's dismissal was unwarranted, and the dean reaffirmed his decision to dismiss Cowan from the school. *Id.*

324. *See id.* at 939-40 (demanding \$10.5 million in punitive and compensatory damages). The state action was later removed to federal court and consolidated with the federal action. *Id.* at 940.

325. *Id.* at 942.

326. *See id.* (alleging that defendants carried on personal vendetta that resulted in plaintiff's dismissal).

327. 424 U.S. 693 (1976).

terest in one's reputation that has been affected by one's own actions is better protected by state tort law than by a due process analysis.<sup>328</sup> Even if there has been a harm to one's reputation, no state or federal law recognizes this as a deprivation of a property or liberty interest. Furthermore, unless this harm has significantly affected the individual's status, there can be no due process claim.<sup>329</sup> The Sixth Circuit found the holding in *Paul* dispositive of Cowan's claim and affirmed the district court's order granting summary judgment to the University of Louisville School of Medicine.<sup>330</sup>

### B. Procedural Due Process

Procedural due process is likely to be a losing argument for a student plaintiff in an academic challenge case for two major reasons: (1) the Supreme Court in *Horowitz* and *Ewing* plainly declined to apply due process protections to academic challenge cases,<sup>331</sup> and (2) most institutions provide ample procedural due process before dismissing students.<sup>332</sup> In addition, a high proportion of student plain-

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328. See *Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (finding that one's interest in reputation, as asserted in this case, is neither property nor liberty interest to be protected by due process).

329. *Id.*

330. See *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 943 (6th Cir. 1990) (remanding case to district court for clarification as to state law claims). In addition, the Sixth Circuit affirmed the district court's holding that the eleventh amendment barred Cowan's claims against the University of Louisville, a state institution. *Id.* at 940-41. Cowan argued that the dean and associate dean had engaged in a conspiracy to engineer his dismissal from the medical school in violation of his property interest in continued enrollment. *Id.* at 942. The Sixth Circuit refused to review the process accorded Cowan in his dismissal from the medical school, deeming that to review the action of the deans acting in their official capacities would in fact be to entertain Cowan's claim against the University of Louisville, which the eleventh amendment forbids. *Id.* at 942.

331. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (restating judicial reluctance against infringing on institution's academic freedom); *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) (warning against judicial intrusion into academic decisionmaking). Apart from notice, which is always given when a student is being dismissed, a right to a hearing is obviously the most important component of due process protection. See *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (stating that effective notice and some form of hearing will ensure that action taken is appropriate). As previously noted, Justice Rehnquist's opinion in *Horowitz* was quite deferential to the historic role of educators in the academic dismissal process and declined to require a hearing in all cases. *Horowitz*, 435 U.S. at 90. Two federal district courts took the position that Justice Rehnquist's statement in *Horowitz* was mere dictum. See *Moire v. Temple Univ. School of Medicine*, 613 F. Supp. 1360, 1374-75 (E.D. Pa. 1985) (noting that while due process may apply, plaintiff received all due process she was entitled to receive); *Ross v. Pennsylvania State Univ.*, No. 77-257, slip op. at 3-4 (M.D. Pa. 1983) (stating that Justice Rehnquist's view in *Horowitz* that due process does not require hearing is not law of land). The position taken by the courts in *Moire* and *Ross*, to the author's knowledge, has not been adopted by other courts.

332. See generally LaMorte & Meadows, *Educationally Sound Due Process in Academic Affairs*, 8 J.L. & EDUC. 197, 198-207 (1979) (discussing due process in academic setting); see also *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (finding student was treated fairly and reasonably); *Gaspar v. Bruton*, 513 F.2d 843, 850-51 (10th Cir. 1975) (noting due process satisfied where student is informed of reasons for dismissal prior to termination); *Horne v.*

tiffs, as we have already seen, have such weak academic records that it is highly doubtful that additional procedures would alter the outcome of their cases.<sup>333</sup> Thus, in the vast majority of cases where courts have followed the lead of the Supreme Court in assuming, *arguendo*, the existence of a protectable property or liberty interest on the part of the student plaintiff, the courts have concluded that plaintiffs have received ample due process.<sup>334</sup>

A rare exception to this generalization was the decision of the New York Appellate Division in *Sofair v. State University of New York Upstate Medical Center*.<sup>335</sup> Sofair, dismissed by a state medical school after four and one-half years of study, brought an article 78 proceeding to compel the school to reinstate him as a student in good standing.<sup>336</sup> He had encountered academic difficulties from the beginning of his studies and had failed at least one major course every year.<sup>337</sup> The school did not allow him to graduate after four years

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Cox, 551 S.W.2d 690, 691-92 (Tenn. 1977) (upholding chancellor's decision not to allow further appeal concerning grade on research paper).

333. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 216 (1985) (noting plaintiff in *Ewing* received lowest scores ever in history of program); *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 937 (6th Cir. 1990) (observing that although medical student had impressive academic record, he maintained substandard performance in clinical assignments); *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 19, 102 N.E. 1096, 1096 (1913) (noting plaintiff failed three courses); *Heisler v. New York Medical College*, 449 N.Y.S.2d 834, 835 (N.Y. Sup. 1982) (stating that after one year of medical studies plaintiff failed four courses).

334. It is important to remember that the fourteenth amendment due process requirements apply only to state action and, in the academic field, to state institutions. See *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062 (N.D. Ga. 1977) (stating that private universities are not subject to the same constitutional constraints as state institutions), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Burke v. Emory Univ.*, 177 Ga. App. 30, 32, 338 S.E.2d 500, 501 (1985) (holding that constitutional due process is not required in dismissal action that takes place at private university). But cf. *Coleman v. Wagner College*, 429 F.2d 1120, 1126 (2d Cir. 1970) (Friendly, J., concurring) (maintaining that state action occurred when, in response to well-publicized student occupations during Vietnam War era, New York Legislature enacted N.Y. EDUC. LAW § 6450 (McKinney 1985), compelling private colleges to promulgate rules for maintaining public order). As noted earlier, the question of the applicability of the state action concept to private institutions is beyond the scope of this Article.

335. 54 A.D.2d 287, 295-96, 388 N.Y.S.2d 453, 458-59 (1976), *rev'd*, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 (1978). Interestingly, the progress of the case was contemporaneous with and shares similarities with *Horowitz*. Both plaintiffs were medical students dismissed for academic insufficiency after having been required to repeat their last year of study and both sued for reinstatement. *Board of Curators of the Univ. of Mo. v. Horowitz*, 447 F. Supp. 1102, 1113 (W.D. Mo. 1976), *rev'd*, 538 F.2d 1317 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978); *Sofair v. State Univ. of N.Y. Upstate Medical Center*, 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), *rev'd*, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 (1978).

336. *Sofair v. State Univ. of N.Y. Upstate Medical College*, 54 A.D.2d 287, 288, 388 N.Y.S.2d 453, 454 (1976), *rev'd*, 44 N.Y.2d 475, 377 N.E.2d 730, 406 N.Y.S.2d 276 (1978).

In the academic setting, an article 78 proceeding is the vehicle whereby a court can issue a writ of mandamus compelling a university to either reinstate a dismissed student or award an academic degree. *Sofair*, 54 A.D.2d at 288, 388 N.Y.S.2d at 454; see also *supra* notes 39-51 and accompanying text (discussing appropriateness of mandamus for individuals seeking judicial review of academic controversies).

337. *Sofair*, 54 A.D.2d at 288-89, 388 N.Y.S.2d at 454.

but did permit him to repeat the fourth year under close supervision by the Committee on Academic Promotions.<sup>338</sup>

When Sofair failed a six-week surgery internship during his second "fourth year," the Fourth-Year Medical Grades Committee notified him of its recommendation that he be dismissed from the medical school.<sup>339</sup> Matters proceeded rapidly: the Grades Committee letter notified Sofair of his right to appeal to the Committee on Academic Promotions and held out the possibility that he could be readmitted.<sup>340</sup> On the same day he received the letter dismissing him, Sofair appeared before the Committee on Academic Promotions.<sup>341</sup> In a second letter bearing the same date, the Committee notified Sofair that he had been given "an opportunity to present personally any pertinent information," that the Committee on Academic Promotions had decided to accept the dismissal recommendation of the Fourth-Year Medical Grades Committee, and that its decision was final.<sup>342</sup>

The New York Supreme Court, Special Term, relied on the traditional New York rule in dismissing Sofair's article 78 petition, holding that if a university dismissed a student in the exercise of its honest discretion, a court will not review such a decision.<sup>343</sup> On appeal, Sofair alleged, *inter alia*, a violation of his due process rights.<sup>344</sup> He first argued the Committee on Academic Promotions was biased because it had a nearly identical membership to the Grades Committee, whose recommendation it was reviewing.<sup>345</sup> Sofair's second argument was that the committee did not give him adequate time to prepare his response to the recommendation because the hearing was held the very day he was notified of his dismissal.<sup>346</sup> Invoking *Goss v. Lopez*<sup>347</sup> and *Greenhill v. Bailey*,<sup>348</sup> the appellate division concluded that equity required a fair hearing.<sup>349</sup> The court directed the

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338. *Id.* at 289, 388 N.Y.S.2d at 454.

339. *Id.*, 388 N.Y.S.2d at 455.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 290, 388 N.Y.S.2d at 455 (quoting *Carr v. St. John's Univ.*, 17 A.D.2d 632, 634, 231 N.Y.S.2d 403, 414, *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962)); *accord supra* note 131 (discussing New York cases).

344. *Id.* at 295-96, 388 N.Y.S.2d at 459.

345. *Id.* at 294, 388 N.Y.S.2d at 458. The medical school responded that only two of the nine voting members of the Committee on Academic Promotions were also members of the Grades Committee. *Id.* In any event, the court held that even with a greater overlap, this would not violate due process because the complex issues in an academic dismissal were best decided by persons familiar with the case. *Id.*

346. *Id.* at 294-95, 388 N.Y.S.2d at 458.

347. 419 U.S. 565 (1975).

348. 519 F.2d 5 (8th Cir. 1975).

349. *See Sofair*, 54 A.D.2d at 295, 388 N.Y.S.2d at 458 (noting that court is not substituting

university to give the plaintiff notice of when a hearing would be held.<sup>350</sup> The court specified that the notice should include a statement of the evidence relied on to assess the plaintiff's performance and should afford the plaintiff time to prepare for the hearing.<sup>351</sup> The court felt this procedure would allow for the school to make an informed decision as to the petitioner's ability and right to continue his medical studies.<sup>352</sup>

The Court of Appeals reversed, concluding that the university had not denied petitioner Sofair due process.<sup>353</sup> Relying on the Supreme Court decision in *Horowitz* issued only three months earlier, the court emphasized that Sofair's dismissal was for academic and not disciplinary reasons, and that the medical school warned Sofair earlier about its dissatisfaction with his academic progress.<sup>354</sup> Moreover, the court noted that academic evaluations conducted to determine whether a student should be dismissed are better left to academic experts who can evaluate cumulative information and make a decision based on the facts before them and their experience in handling like matters.<sup>355</sup> The court further stated that the medical school did not create a constitutional right to question the school's evaluation of his academic performance just because it gave Sofair further time to demonstrate improvement.<sup>356</sup> The court concluded that the school's position should not be prejudiced because Sofair chose to continue his studies after the school alerted him to his academic predicament.<sup>357</sup>

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its judgment for medical college determination, but only ensuring that student receives fair hearing).

350. *Id.* at 295, 388 N.Y.S.2d at 458.

351. *Id.*

352. *Id.*

353. *Sofair*, 44 N.Y.2d 475, 480, 377 N.E.2d 730, 731-32, 406 N.Y.S.2d 276, 278 (1978).

354. *Id.* at 479, 377 N.E.2d at 731, 406 N.Y.S.2d at 277.

355. *Id.* at 480, 377 N.E.2d at 731, 406 N.Y.S.2d at 278; *accord* Hubbard v. John Tyler Community College, 455 F. Supp. 753, 755 (E.D. Va. 1978) (stating that grades and basis on which they are given are not reviewable by courts); *see also* Mohammed v. Mathog, 635 F. Supp. 748, 752 (E.D. Mich. 1986) (holding that school did not violate procedural due process rights of medical student dismissed from residency program where student was unable to attend final faculty meetings at which crucial decision to dismiss him for unsatisfactory academic performance was reached).

356. *Sofair*, 44 N.Y.2d at 480, 377 N.E.2d at 731, 406 N.Y.S.2d at 278.

357. *Id.* at 480, 377 N.E.2d at 731, 406 N.Y.S.2d at 278. In his dissenting opinion, Judge Fuchsberg vigorously argued that the hearing afforded Sofair bordered on a sham, denying him even minimal due process. *See id.* at 480-81, 377 N.E.2d at 732, 406 N.Y.S.2d at 276 (Fuchsberg, J., dissenting) (noting that notice of no more than a few minutes in matter as important as dismissal from college was worse than no notice at all). With respect to the supposed "personality conflicts" that Sofair experienced in clinical settings, Judge Fuchsberg characterized these as just the kind of mixture of subjective and objective elements which warranted the limited due process procedure ordered by the appellate division. *Id.* at 480-81, 377 N.E.2d at 732, 406 N.Y.S.2d at 278. In such cases, Judge Fuchsberg agreed with Justice Marshall's concurring opinion in *Horowitz* that a strict dividing line between dismissals for



A somewhat more promising procedural due process argument arises when the defendant university fails to follow its own rules and regulations.<sup>358</sup> Only two years after it decided *Sofair*, the New York Court of Appeals endorsed this principle in *Tedeschi v. Wagner College*.<sup>359</sup> Wagner College, a private institution, suspended Nancy Tedeschi at the end of her first semester as an undergraduate.<sup>360</sup> As a student, Tedeschi was abusive toward her professors and herself, and this led to her suspension.<sup>361</sup> Wagner College notified her that she could apply for readmission in the fall, but her mother's efforts to arrange a hearing on the matter were unsuccessful.<sup>362</sup>

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nonacademic reasons and those for academic reasons seems inappropriate. *Id.* at 481, 377 N.E.2d at 732, 406 N.Y.S.2d at 278-79 (Fuchsberg, J., dissenting); see Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 107 (1978) (Marshall, J., concurring) (noting that reasons for student's dismissal should not determine whether due process applies but, rather, establishing procedures that are fair to student and school should be goal).

358. See *Lightsey v. King*, 567 F. Supp. 645, 650 (E.D.N.Y. 1983) (finding that Merchant Marine Academy's decision not to adhere to its Honor Board's ruling was arbitrary and capricious agency action); see also *Hill v. Trustees of Ind. Univ.*, 537 F.2d 248, 252 (7th Cir. 1976) (discussing whether student's receipt of failing grade for plagiarism, without prior hearing, violated due process where school failed to follow procedures established by Student Code of Council regarding grievance hearing). In *Hill*, the plaintiff, a graduate student, received two F's from Professor Garnier after the latter determined that Hill was guilty of plagiarism. *Hill*, 537 F.2d at 250. The newly-adopted Student Code of Conduct at Indiana University, however, provided that if a faculty member believed a student was guilty of plagiarism, the faculty member should initiate a review process to determine the student's guilt or innocence. *Id.* at 250 n.1 (quoting from Student Code of Conduct). Until the student was notified of the charge, presented with the evidence on which it is based, and provided with an opportunity to present a defense to the faculty member, the faculty member was not authorized to impose a penalty. *Id.* Although the university suspended further disciplinary proceedings against Hill until Professor Garnier's return for the fall term, Hill did not utilize the university's grievance procedure to defend against the charge. *Id.* at 257. Instead, he withdrew from the university and sued. *Id.* Both the trial court and the appellate court rejected Hill's claim of deprivation of due process. See *id.* at 250-52 (finding student's due process claim mitigated by his failure to utilize university-adopted grievance procedure). The Seventh Circuit held that neither the fact that the professor failed to comply with the student code nor the fact that the university did not require a hearing before a penalty is imposed for plagiarism mandates a finding that the school violated Hill's due process rights. *Id.* at 252; accord *Wilkenfield v. Powell*, 577 F. Supp. 579, 583 (W.D. Tex. 1983) (noting that mere noncompliance with university procedures does not require court to find per se violation of due process). The court pointed out that the dean assured Hill that any further consequence of the plagiarism charge and the failing grades would be stayed until the professor returned in the fall. *Id.* Based on the fact that the dean delayed further action, the court concluded that even if the failing grades given for suspected plagiarism gave rise to a property or liberty interest protected by due process considerations, the university protected those interests by delaying the consequences until fall. *Id.*

359. 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (1980).

360. *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 656, 404 N.E.2d 1302, 1303, 427 N.Y.S.2d 760, 762 (1980). Judge Gabrielli, in his dissenting opinion, described Tedeschi as an emotionally disturbed young woman who could not control her aggression and was not capable of performing her academic duties in an institution of higher learning. *Id.* at 663, 404 N.E.2d at 1308, 427 N.Y.S.2d at 766-67 (Gabrielli, J., dissenting).

361. See *id.* at 656, 404 N.E.2d at 1303, 427 N.Y.S.2d at 761-62 (noting that Tedeschi exhibited odd behavior such as tearing up bluebook at end of Latin exam, and then launching harassment campaign against professor in which she made threatening phone calls to professor's house and threatened suicide).

362. *Id.*, 404 N.E.2d at 1304, 427 N.Y.S.2d at 762.

Tedeschi sued the college in state court, alleging due process violations stemming from the school's denial of a hearing and seeking reinstatement and damages.<sup>363</sup> The 1976-77 "Guidelines" of Wagner College provided that a student expelled or suspended for non-academic reasons had the right to a hearing before the Student-Faculty Hearing Board.<sup>364</sup>

The trial court entered judgment for the college, noting that the school had acted with fairness and honest discretion, neither violating the student's due process rights nor breaching any implied contract.<sup>365</sup> The appellate division affirmed.<sup>366</sup> The New York Court of Appeals, however, reversed and directed that Tedeschi be reinstated for the next school term unless, prior to the opening of the next term, the Student-Faculty Hearing Board granted her a hearing.<sup>367</sup> The court considered contract law and the law of associations and determined that neither applied exactly to her situation.<sup>368</sup> It concluded, however, that when a university adopts a procedural rule or guideline, due process requires that the university follow the procedure.<sup>369</sup>

In reaching this conclusion, the court endorsed the traditional distinction between suspension or expulsion for academic failure and suspension or expulsion for nonacademic causes.<sup>370</sup> It noted

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363. *Id.* at 656-57, 404 N.E.2d at 1304, 427 N.Y.S.2d at 762.

364. *Id.* at 657, 404 N.E.2d at 1304, 427 N.Y.S.2d at 762-63 (quoting 1976-77 Guidelines of Wagner College).

365. *Tedeschi v. Wagner College*, 93 Misc. 2d 510, 515, 402 N.Y.S.2d 967, 970-71 (Sup. Ct. 1978).

366. *Tedeschi v. Wagner College*, 70 A.D.2d 934, 935, 417 N.Y.S.2d 521, 523 (1979).

367. *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 662-63, 404 N.E.2d 1302, 1307, 427 N.Y.S.2d 760, 765-66 (1980).

368. *See id.* at 660, 404 N.E.2d at 1306, 427 N.Y.S.2d at 764 (stating that judicial finding that university treated student in fair manner may be as determinative as contract law or law of associations in deciding whether due process was violated). *But see* *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975) (noting that some elements of contract law should be used to analyze relationship between school and student).

369. *Tedeschi*, 49 N.Y.S.2d at 662, 404 N.E.2d at 1307, 427 N.Y.S.2d at 763-66; *accord* *Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443, 446 (Iowa Ct. App. 1984) (agreeing with courts that hold that once private school voluntarily adopts dismissal procedure, student is entitled to rely on that procedure while pursuing studies). In *Harvey*, the defendant college expelled the plaintiff after he distributed a newspaper on campus with a cartoon critical of two chiropractic groups, which implied but did not portray an act of oral sex. *Id.* at 443. The court of appeals reversed the trial court's directed verdict for defendant. *Id.* The court found that the process for selecting members of the council that suspended Harvey involved sufficient irregularities to generate a question for the jury as to whether the school had complied with its written regulations when dismissing Harvey. *Id.* at 446; *accord* *Olsson v. Board of Higher Educ.*, 66 A.D.2d 196, 200, 412 N.Y.S.2d 615, 616 (1979) (stating that public or private colleges must afford all degree candidates equal treatment by assuring that rules and regulations are administered consistently and reasonably), *rev'd on other grounds*, 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980). For cases with similar fact patterns in which courts have addressed arguments that a university's failure to follow its rules constituted a breach of its contract with a student, see *infra* notes 464-552.

370. *Tedeschi*, 49 N.Y.2d at 658, 404 N.E.2d at 1304-05, 427 N.Y.S.2d at 763.

that Tedeschi's suspension was at least in part for a nonacademic reason.<sup>371</sup> If unsatisfactory academic performance was the sole justification for expulsion, the relevant guidelines would have imposed no further obligation on the college than the requirement that it act in good faith.<sup>372</sup>

In academic challenge cases, the argument that the university failed to follow its own rules or procedures has often failed. Although Justice Rehnquist rejected the argument in *Horowitz* that the University of Missouri failed to obey its own rules, he also expressed doubt that such a failure would represent a due process violation.<sup>373</sup> The argument that a university failed to follow its own rules also arose in *Moire v. Temple University School of Medicine*.<sup>374</sup> The school required a physician who received a failing grade in her psychiatric clerkship to repeat her third year of medical school.<sup>375</sup> She brought a federal civil rights action alleging violations of substantive due process and breach of contract.<sup>376</sup> She also argued that defendant medical school failed to follow its own Promotional Guidelines regarding procedure, thus violating her procedural due process rights.<sup>377</sup> The court found that Temple followed its own guide-

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371. *Id.* at 660-61, 404 N.E.2d at 1304-05, 427 N.Y.S.2d at 764-65.

372. *Id.* at 658, 404 N.E.2d at 1034, 427 N.Y.S.2d at 763-64. Mentally disturbed students present special legal problems for educational institutions. In *Aronson v. North Park College*, a private school dismissed a student after a clinical psychologist diagnosed her as having a recurring paranoid condition that posed a threat of harm to herself and those around her. She sued and was awarded \$22,361.60 in damages in a bench trial. *Aronson v. North Park College*, 94 Ill. App. 3d 211, 211, 418 N.E.2d 776, 777 (1981). The college had denied Aronson readmission the next year, but offered to readmit her two years later. She chose to attend another school. *Id.* at 213, 418 N.E.2d at 779. The Appellate Court of Illinois reversed the judgment, holding that the college was obliged by her mental state to dismiss Aronson and that the decision did not constitute arbitrary, capricious, or improper conduct. *Id.* at 218, 418 N.E.2d at 782; *see also Doe v. New York Univ.*, 666 F.2d 761, 779 (2d Cir. 1981) (finding that medical student with long history of suicide attempts and violent outbursts against others and claiming to be "otherwise qualified" handicapped person under Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973), was not entitled to preliminary injunctive relief to force university to admit her); *North v. State of Iowa*, 400 N.W.2d 566, 569, 571 (Iowa 1987) (finding no merit in action brought for breach of contract, tortious interference with business opportunity, and violation of civil rights where schizophrenic medical student voluntarily took one-year leave of absence and was subsequently denied readmission by medical school).

373. *Board of Regents of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 n.8 (1978); *accord Picozzi v. Sandalow*, 623 F. Supp. 1571, 1579-80 (E.D. Mich. 1986) (stating that due process is matter of federal constitutional law and that failure to adhere to state procedures, alone, does not violate due process).

374. 613 F. Supp. 1360 (E.D. Pa. 1985).

375. *See Moire v. Temple Univ. School of Medicine*, 613 F. Supp. 1360, 1370-73 (E.D. Pa. 1985) (holding that failing grade was not arbitrary or capricious and university's affirmance of grade did not violate plaintiffs' substantive due process rights).

376. *Id.* at 1376 (finding that university did not breach its contract with student where it had acted in accordance with academic requirements outlined in its Promotional Guidelines).

377. *Id.* (noting that deviation from procedure does not automatically create due process violation).

lines.<sup>378</sup> Moreover, even if the university had not complied with its own procedures for filing grievances, the court concluded that such a failure did not automatically violate the plaintiff's due process rights, especially in light of the hearings she was afforded.<sup>379</sup> The university might have deviated from its prescribed proceedings, but the deviation was not enough to show that the university's proceedings were fundamentally unfair, or violative of due process.<sup>380</sup>

The plaintiff in *Schuler v. University of Minnesota*<sup>381</sup> was a Ph.D. candidate in psychology with a 3.96 GPA. The school dismissed her from the program after she failed two oral examinations following more than eight years of graduate study. She made virtually the same argument as the plaintiff in *Moire* and elicited the same response.<sup>382</sup> The court reasoned that a *per se* due process violation does not arise simply because a university fails to comply with its own grievance procedures.<sup>383</sup> The court found the plaintiff's argument particularly unconvincing because she had received a department-level hearing that exceeded any constitutionally based hearing requirement.<sup>384</sup>

In summary, procedural due process has turned out to be an ineffective argument for academic challenge plaintiffs—even when universities fail to follow their own prescribed procedures. New York's decision in *Tedeschi* stands virtually alone in requiring colleges to comply with their own rules. Even in that case, the court of appeals acknowledged that the gravamen of its holding was that *Tedeschi*'s suspension resulted in part from nonacademic considerations.

### C. Substantive Due Process

Student plaintiffs in academic challenge cases seem to have no better prospects of success in arguing that the institution violated

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378. *Id.*

379. *Id.* (finding that plaintiff received hearings beyond constitutional requirement).

380. *Id.*

381. 788 F.2d 510 (8th Cir. 1986).

382. *Schuler v. University of Minn.*, 788 F.2d 510, 514 (8th Cir. 1986).

383. *Id.*

384. *Id.* at 515; accord *Anderson v. University of Wis.*, 665 F. Supp. 1372, 1397-98 (W.D. Wis. 1987) (holding that university did not refuse plaintiff readmittance on basis of his handicap (alcoholism), but rather because of substandard performance), *aff'd*, 841 F.2d 1372 (7th Cir. 1988); see also *Enns v. Board of Regents of Univ. of Wash.*, 32 Wash. App. 898, 904, 650 P.2d 1113, 1117 (1982) (holding that defendant university complied with its procedural rules and regulations when it dismissed doctoral student for failing 23 of 24 preliminary examinations in four years); cf. *Sterman v. Florida State Univ. Bd. of Regents*, 414 So. 2d 1102, 1104 (Fla. Dist. Ct. App. 1982) (holding that failure to grant plaintiff's petition for administrative hearing to review university's decision to withdraw its offer to award him an Ed.D degree after he failed courses for his Ph.D. and failed his dissertation defense was a violation of FLA. ADMIN. CODE ANN. r. 28-5.111 (1980)).

their substantive due process rights or acted in an arbitrary or capricious manner. The two concepts are functionally equivalent, as the Supreme Court implied in *Horowitz*.<sup>385</sup>

A rare instance in which a court ordered a student's reinstatement on substantive due process grounds occurred in *Maitland v. Wayne State University Medical School*.<sup>386</sup> At Wayne State University Medical School, a faculty committee creates the final examination and recommends a pass/fail score.<sup>387</sup> The Promotions Review Committee, consisting of both faculty and student members, reviews recommendations and hears individual appeals.<sup>388</sup> During plaintiff Maitland's second attempt to pass the second-year final examination, the school administered the test in two classrooms.<sup>389</sup> Proctors in one classroom mistakenly distributed the wrong part of the test for five to twenty minutes, while in Maitland's classroom this part was not distributed.<sup>390</sup> The faculty committee set the passing grade at 453, graded Maitland's test at 426, and recommended his dismissal, which the Promotions Review Committee approved.<sup>391</sup> After discovering "an error . . . in the grading process," however, the faculty committee raised Maitland's score to 446 but again recommended that he be dropped.<sup>392</sup> Maitland appealed to the Promotions Review Committee. The Committee denied him permission to retake the final examination and informed him that he had been dismissed.<sup>393</sup>

Two weeks later, Maitland sued the medical school in Wayne County Circuit Court.<sup>394</sup> Since the court was unlikely to rule on the case before the scheduled date of the make-up examination, the parties agreed that Maitland would be allowed to retake the final exami-

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385. See *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978) (citing *Mahavongsanan v. Hall*, 529 F.2d 448, 449 (5th Cir. 1976)) (stating that many lower courts have implied that if arbitrary or capricious action occurs, court may reinstate student); *Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981) (finding that medical school's decision not to change plaintiff's grade causing his dismissal after complete review of his record was not arbitrary or capricious action); accord *Stoller v. College of Medicine*, 562 F. Supp. 403, 413, 414 (M.D. Pa. 1983) (holding that assignment of failing grade, absent arbitrary or capricious action or bad faith motive, does not violate substantive due process), *aff'd*, 727 F.2d 1101 (3d Cir. 1984). Conversely, of course, state action is not required for an institution to be subject to the arbitrary and capricious standard; thus, the arbitrary and capricious standard has a broader scope than substantive due process.

386. 76 Mich. App. 631, 257 N.W.2d 195 (1977).

387. *Maitland v. Wayne State Univ. Medical School*, 76 Mich. App. 631, 633, 257 N.W.2d 195, 197 (1977).

388. *Id.*

389. *Id.*

390. *Id.* at 634, 257 N.W.2d at 197.

391. *Id.*, 257 N.W.2d at 197-98.

392. *Id.*, 257 N.W.2d at 198.

393. *Id.*

394. *Id.*

nation and have his grade sealed pending the court decision.<sup>395</sup>

The trial court found that the medical school had acted arbitrarily and capriciously in deciding to dismiss Maitland.<sup>396</sup> When opened, the test results revealed Maitland had achieved an overall passing grade on the final examination when the new score was included.<sup>397</sup> The court ordered the school to promote Maitland to the third year.<sup>398</sup>

On appeal, the Michigan Court of Appeals affirmed.<sup>399</sup> It observed that its review of the trial court's decision was "limited by the traditional deference given by the appellate court to the factual decisions of trial judges."<sup>400</sup> Having rejected the defendant's argument that the plaintiff was seeking essentially mandamus relief outside the trial court's jurisdiction, the appellate court found no Michigan cases on point on the arbitrary and capricious standard and, therefore, looked to other jurisdictions for guidance.<sup>401</sup>

Invoking *Connelly v. University of Vermont*,<sup>402</sup> *Greenhill v. Bailey*,<sup>403</sup> and *Barnard v. Inhabitants of Shelburne*,<sup>404</sup> the court held that the trial court had applied the "appropriate standard" to the facts of the case.<sup>405</sup> The issue in *Maitland* was whether the university had reacted to irregularities in the administration of the exam in an arbitrary and capricious manner such that the university's actions warranted the intervention of the court.<sup>406</sup> The trial court concluded that the university's reaction was arbitrary and that every decision based on that original decision was tainted.<sup>407</sup>

One reason the trial court ruled against the medical school concerned the results of a statistical analysis of the test ordered by the Promotions Review Committee chairman to ascertain whether the

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395. *Id.*

396. *See id.* at 635, 257 N.W.2d at 198 (noting trial court's decision).

397. *Id.*

398. *Id.*

399. *Id.* at 640, 257 N.W.2d at 200.

400. *Id.* at 638, 257 N.W.2d at 199.

401. *Id.* at 637, 257 N.W.2d at 198.

402. 244 F. Supp. 156 (D. Vt. 1965). The court in *Connelly* ordered a hearing to determine whether the school had acted arbitrarily, capriciously, or in bad faith. *Connelly v. University of Vt.*, 244 F. Supp. 156, 161 (D. Vt. 1965).

403. 519 F.2d 5 (8th Cir. 1975). The court in *Greenhill* held that the school had denied the student procedural due process because it acted arbitrarily and capriciously in regard to his dismissal. *Greenhill v. Bailey*, 519 F.2d 5, 9-10 (8th Cir. 1975).

404. 216 Mass. 19, 102 N.E. 1095 (1913). The court in *Barnard* held that the school committee had the right to establish and maintain academic standards and the duty to act in good faith in administering them. *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 23, 102 N.E. 1095, 1097 (1913).

405. *Maitland*, 76 Mich. App. at 637, 257 N.W.2d at 199.

406. *Id.* at 637, 257 N.W.2d at 199.

407. *Id.* at 637-38, 257 N.W.2d at 199 (quoting opinion of trial court).

error in administration might have caused discrepancies in scores.<sup>408</sup> While the analysis apparently revealed no discrepancies, the trial court found fault with the fact that the Promotions Review Committee did not receive the results until it had twice ruled on the plaintiff's appeals.<sup>409</sup>

The second reason for the trial court's decision concerned fairness and equal treatment.<sup>410</sup> The court found that the university did not fairly respond to Maitland's situation because it allowed some students, who scored lower than Maitland on the original test, to retake the exam without filing an appeal and because the university established a passing grade on the retake exam that was lower than Maitland's score on the original exam.<sup>411</sup>

Finally, the medical school argued that the trial court had engaged in "unwarranted judicial interference with the school's academic process" when it allowed the plaintiff to retake only Part II of the examination and then ordered him promoted on the basis of his amended score.<sup>412</sup> The appellate court acknowledged that it would have been preferable for the trial court to have required a fair hearing by the medical school.<sup>413</sup> Nevertheless, while admonishing the trial court to refer such matters to the academic or administrative body for a proper hearing in future cases, the court noted that Maitland was continuing to progress without incident and to allow a belated hearing would be unfair.<sup>414</sup> Thus, the court, concluding it was not advisable "either logically or equitably" to reverse the trial court, affirmed the decision.<sup>415</sup>

The *Maitland* decision is noteworthy because it embodies a rare confluence of circumstances that make its unique result possible. In the first place, as in *State ex. rel. Nelson v. Lincoln Medical College*,<sup>416</sup> there was a question in *Maitland* about the objectivity of the test results.<sup>417</sup> A further inequity arising from the case was that the school

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408. *Id.*

409. *Id.* at 638, 257 N.W.2d at 199.

410. *Id.*

411. *See id.* at 638-39, 257 N.W.2d at 200 (stating that trial court's consideration of such facts surrounding university's decision to prohibit Maitland from retaking exam was not erroneous).

412. *Id.* at 639, 257 N.W.2d at 200.

413. *Id.* (quoting *Connolly v. University of Vt.*, 244 F. Supp. 156, 160-61 (D. Vt. 1965)).

414. *Id.* at 640, 257 N.W.2d at 200.

415. *Id.*

416. 81 Neb. 533, 539, 116 N.W. 294, 296-97 (1908). *See supra* notes 87-108 and accompanying text (discussing facts and holding of *Nelson*).

417. *See Maitland*, 76 Mich. App. at 638, 257 N.W.2d at 199 (refusing to disturb trial court's findings that substantial irregularities existed).

Other courts have addressed the issue of errors by university personnel in the administration of exams. An error by university employees *after* a test—the loss of test answer sheets—

allowed students who scored lower than Maitland on the original examination to retake the examination, some without appealing, and that the passing grade for the retake was set at a lower point than Maitland's score on the original test.<sup>418</sup> This is a delicate matter, and it is risky for a court to conclude from an isolated set of facts of this sort that a party has been treated unfairly.<sup>419</sup>

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led a trial court to grant a writ of mandamus to order a grade of F expunged. *See State ex rel. Mercurio v. Board of Regents of Univ. of Neb.*, 213 Neb. 251, 259, 329 N.W.2d 87, 92 (1983) (reversing trial court's mandamus order to expunge student's failing grade). The grade in Mercurio's graduate course in biochemistry was based on three multiple choice tests, and students recorded their answers by blackening circles on computer answer sheets. *Id.* at 252, 329 N.W.2d at 89. The biochemistry department informed Mercurio that his scores on the three tests were "42-F," "56-F," and "69.3-C," respectively; that his average was 56; and that he had therefore failed the course since his grade was lower than 60. *Id.* at 253, 329 N.W.2d at 89. Alleging that he had made a transposition error in filling out his answers for the second examination, Mercurio asked for a review of his answer sheets. *Id.* A faculty member reviewed the second answer sheet, verified the 56 grade, and informed Mercurio that no grade adjustment could be made for transposition errors. *Id.* at 253-54, 329 N.W.2d at 89. Mercurio then commenced a grade appeals procedure within the university. *Id.* at 254, 329 N.W.2d at 89. In the course of this appeal, the answer sheet for the second test was found to be missing. *Id.*, 329 N.W.2d at 90. Mercurio thereupon filed a petition for a writ of mandamus in Nebraska district court. *Id.* At the court's behest, the parties agreed on a grade appeal hearing by the grade appeals committee. *Id.* At the hearing, it was discovered that the first answer sheet was also missing. *Id.* Accordingly, Mercurio amended his petition for mandamus to request that the university remove the F from his transcript. *Id.* at 255, 329 N.W.2d at 90. The trial court found that the university had a duty to produce Mercurio's records and that federal regulations prohibited destruction of such records while a request for review was outstanding. *Id.* at 256, 329 N.W.2d at 90-91. The trial court concluded that there was no satisfactory explanation for the failure of the university to produce the documents and therefore entered a peremptory writ of mandamus requiring the university to expunge the grade of F which Mercurio had received in biochemistry. *Id.*, 329 N.W.2d at 91.

On appeal, the Nebraska Supreme Court reversed. *Id.* It held that, under state law, "secondary evidence" was admissible where an original writing had been lost. *Id.* Since the record contained uncontradicted testimony by faculty and administrative personnel of the university that they had graded the missing tests and directly transferred the results to the grade record sheet and there was no evidence of arbitrary behavior or bad faith, the court concluded that petitioner had failed to show that he was entitled to the relief requested and, therefore, the trial court had improperly granted the writ of mandamus. *Id.* at 259, 329 N.W.2d at 92. The Nebraska Supreme Court reversed the trial court decision and remanded the case. *Id.* For precedent relied on by the court, see generally *Depperman v. University of Ky.*, 371 F. Supp. 73, 76 (E.D. Ky. 1974) (noting that where bad faith is proven to have occurred in university's determination of student's academic fitness, student has legitimate cause of action); *Greenhill v. Bailey*, 378 F. Supp. 632, 633 (S.D. Iowa 1974) (stating that arbitrary or bad faith dismissal for academic deficiencies creates cause of action), *rev'd on other grounds*, 519 F.2d 5 (8th Cir. 1975); *Connelly v. University of Vt. & State Agricultural School*, 244 F. Supp. 156, 161 (D. Vt. 1965) (finding that student had cause of action in order for court to determine whether university acted arbitrarily, capriciously, or in bad faith); see also *In re Levy*, 88 A.D.2d 915, 917, 450 N.Y.S.2d 574, 576 (finding that university exercised good faith in changing "F" grade to "W" and allowing student to retake neurobiology course and examination, after discovering page of student's first exam was missing and had not been graded, although professor contended student would have failed exam even if given full credit for missing page), *aff'd*, 57 N.Y.2d 925, 442 N.E.2d 1276, 456 N.Y.S.2d 765 (1982).

418. *See Maitland v. Wayne State Univ.*, 76 Mich. App. 631, 640, 257 N.W.2d 195, 200 (1977) (noting that similar actions should be referred to university for proper hearing).

419. As noted previously, *supra* note 264, the Supreme Court in *Ewing* explicitly rejected the student's argument that he was discriminated against because the school permitted other students with more incomplete or lower grades to retake Part I of the NBME examination



In *Heisler v. New York Medical College*,<sup>420</sup> a medical student's argument that the Promotions Committee treated her more severely than classmates with weaker academic records led a New York court to annul her dismissal and order her reinstatement. Heisler was dismissed by the medical school's Promotions Committee after she failed four courses during her first year of study.<sup>421</sup> Her application to the Appeals Committee to repeat the year was rejected, unlike those of "the only three members of petitioner's academic class who had equally bad or worse records."<sup>422</sup> The medical school's guidelines provided for the automatic dismissal of students who failed any four courses in their first year.<sup>423</sup> Despite this rule, however, the committee permitted one of Heisler's classmates who failed four courses and two who failed five courses to repeat the first year.<sup>424</sup> The court found that the school had "breached" the guideline, that the breach constituted an arbitrary and capricious act, and that the school abused its discretion when the Promotions Committee failed to appoint a subcommittee to investigate Heisler's claim that family problems interfered with her studies.<sup>425</sup>

Accordingly, the trial court ordered her readmitted for her second year of study.<sup>426</sup> The appellate division reversed under the doctrine of "primary jurisdiction," holding that Heisler should first have sought review of her dismissal by the State Commissioner of Education.<sup>427</sup> The appellate decision also stated that the trial court erred in finding that Heisler's dismissal entailed an abuse of discretion, a lack of good faith, and arbitrariness.<sup>428</sup> This decision was in turn affirmed by the Court of Appeals which found the dismissal to have been made "in good faith and on the basis of the exercise of sound academic judgment."<sup>429</sup>

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while he was denied an opportunity. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 228 n.14 (noting that other students with academic records arguably better than Ewing's were dismissed without even getting chance to take NBME Part I examination); *supra* note 264 and accompanying text (discussing holding of *Ewing*).

420. 113 Misc. 2d 727, 449 N.Y.S.2d 834 (Sup. Ct.), *rev'd*, 88 A.D.2d 296, 453 N.Y.S.2d 196, *aff'd*, 58 N.Y.2d 734, 445 N.E.2d 203, 459 N.Y.S.2d 27 (1982).

421. *Heisler v. New York Medical College*, 113 Misc. 2d 727, 728, 449 N.Y.S.2d 834, 835 (Sup. Ct.), *rev'd*, 88 A.D.2d 296, 453 N.Y.S.2d 196, *aff'd*, 58 N.Y.2d 734, 445, N.E.2d 203, 459 N.Y.S.2d 27 (1982).

422. 113 Misc. 2d at 728, 449 N.Y.S.2d at 835.

423. *Id.* at 730, 449 N.Y.S.2d at 835.

424. *Id.* at 729, 449 N.Y.S.2d at 836.

425. *Id.*, 449 N.Y.S.2d at 837.

426. *Id.*

427. See *Heisler v. New York Medical College*, 88 A.D.2d 296, 300-01, 453 N.Y.S.2d 196, 199-200 (noting that court should defer review to those with special competence), *aff'd*, 58 N.Y.2d 734, 445 N.E.2d 203, 459 N.Y.S.2d 27 (1982).

428. *Id.* at 300-01, 453 N.Y.S.2d at 199-200.

429. See *Heisler v. New York Medical College*, 58 N.Y.2d 734, 735, 455 N.E.2d 203, 204,

In another recent case, a Texas trial court ordered the reinstatement of a medical student who was dismissed after he failed his final course, received five F's, failed an NBME examination in internal medicine, and consistently ranked near the bottom of his class.<sup>430</sup> The trial court concluded that the university violated the student's due process rights by proceeding in a manner that was arbitrary and capricious when it dismissed the student.<sup>431</sup> The trial court further held that the university breached both an implied and an express contract with the student.<sup>432</sup>

Applying the narrow standard of judicial review of academic decisions mandated by *Horowitz* and *Ewing*, the Texas Court of Appeals reversed.<sup>433</sup> The court found that the university afforded the student plaintiff adequate procedural due process.<sup>434</sup> Further, in light of the plaintiff's dismal academic record, the court found that the trial court erred in finding his dismissal arbitrary and capricious and in violation of substantive due process.<sup>435</sup>

The majority of student plaintiffs raising "arbitrary and capricious" claims lose their cases even at the trial court level. In *Stoller v. College of Medicine*,<sup>436</sup> another medical student who was on academic probation because of years of poor grades was dismissed at the end of his third year when he failed his pediatrics clerkship.<sup>437</sup> The student brought a civil rights action, challenging the grade as arbitrary and capricious.<sup>438</sup> Dr. Nelson, the chairman of the pediatrics department, had assigned the grade after receiving six evaluation forms from physicians with whom Stoller worked in pediatrics.<sup>439</sup> The forms contained three "Pass" evaluations and three "Low Pass" evaluations.<sup>440</sup> Because of this marginal record, it was agreed that three other members of the department would ad-

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459 N.Y.S.2d 27, 28 (1982) (finding trial court should have dismissed petition under primary jurisdiction doctrine).

430. *Eiland v. Wolf*, 764 S.W.2d 827, 836 (Tex. Ct. App. 1989).

431. *See id.* at 828-30 (discussing trial court's decision).

432. *Id.* at 820. The trial court decision is apparently unpublished and the court of appeals did not explain how the trial court reached its decision.

433. *See id.* at 832-37 (concluding that standard of review under *Ewing* and *Horowitz* denies relief).

434. *Id.* at 836.

435. *See id.* at 834, 836 (holding that, under circumstances presented, trial court was unjustified in overriding school official's judgment).

436. 562 F. Supp. 403 (M.D. Pa. 1983), *aff'd*, 727 F.2d 1101 (3d Cir. 1984).

437. *See Stoller v. College of Medicine*, 562 F. Supp. 403, 413 (M.D. Pa. 1983) (finding credible evidence in record to support plaintiff being awarded failing grade), *aff'd*, 727 F.2d 1101 (3d Cir. 1984).

438. *Id.* at 404.

439. *Id.* at 409.

440. *Id.*

minister a special ninety-minute oral examination to Stoller.<sup>441</sup> When they reported rather negative results to Dr. Nelson, he assigned Stoller a failing grade, thus leading the Promotions Committee to recommend his dismissal.<sup>442</sup>

In court, Stoller argued that the failing grade in pediatrics was arbitrary and capricious because the grade was intended to be a composite of all the evaluations from doctors with whom he had worked, all of which were either "Pass" or "Low Pass," with no failures.<sup>443</sup> After reviewing the evidence, however, the court concluded that "there was a rational factual basis in the record" for the failing grade.<sup>444</sup> It also rejected Stoller's claim that bad faith or ill will unrelated to Stoller's performance in the clerkship motivated Dr. Nelson, finding credible Dr. Nelson's testimony that he did not consider matters outside the pediatrics clerkship in assigning the failing grade.<sup>445</sup> The court concluded that Dr. Nelson "did not act in an arbitrary or capricious manner."<sup>446</sup> The court also rejected Stoller's frivolous procedural due process argument based on lack of notice and entered judgment for the defendants.<sup>447</sup>

In *Hines v. Rinker*,<sup>448</sup> the court held that a medical student's failing grade in internal medicine that led to his automatic dismissal was not arbitrary and capricious.<sup>449</sup> Hines failed the written examination and did not receive credit for "chart audits" and "presentations" that he turned in late.<sup>450</sup>

The internal medicine course outline stated that a student who failed to submit the required work on time would receive an incomplete grade in medicine and would have to make up the work before completing the clerkship.<sup>451</sup> Hines interpreted this to mean that he had a right to receive an Incomplete instead of an F, but the course

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441. *Id.* at 410.

442. *Id.*

443. *Id.* at 412.

444. *Id.* at 413.

445. *Id.*

446. *Id.*

447. *See id.* at 415 (finding that plaintiff was involved in every stage of proceedings).

448. 667 F.2d 699 (8th Cir. 1981).

449. *Hines v. Rinker*, 667 F.2d 699, 704 (8th Cir. 1981) (noting that faculty's decision not to change failing grade was not abuse of discretion). This was Hines' second dismissal from the University of South Dakota School of Medicine. *Id.* at 701 n.2. In his freshman year, he received D's in anatomy and histology which led to his automatic dismissal under the faculty's existing rules. *Id.* He appealed this dismissal to the Circuit Court in Clay County, which enjoined the medical school from dismissing him on the grounds that the rules had not been promulgated pursuant to the South Dakota Administrative Procedure Act. *Id.*

450. *Id.* at 700 (noting that plaintiff scored 55.3% on examination for which 61% was passing score).

451. *Id.* at 702 (quoting course outline).

instructor disagreed with this interpretation.<sup>452</sup> Hines obtained administrative review of his dismissal on nine occasions, at every level up through the board of regents of the University.<sup>453</sup> He appealed the Regents' decision to the South Dakota Circuit Court, which dismissed his appeal pursuant to the Supreme Court's decision in *Horowitz*.<sup>454</sup> Finally, he sought injunctive relief in federal district court, which granted summary judgment in favor of the defendants.<sup>455</sup> The Eighth Circuit affirmed the trial court's finding that the medical school's failure to change the grade was neither arbitrary nor capricious.<sup>456</sup>

Courts also have held that it was not arbitrary and capricious to dismiss students with weak academic records from Ph.D. and master's programs.<sup>457</sup> Dismissed Ph.D. candidates have unsuccessful

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452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 702-03.

456. *Id.* at 704. In affirming the district court's grant of summary judgment, the Eighth Circuit declared that when the record clearly indicates a student's inability to perform, allegations of misconduct by the university do not raise a genuine issue of material fact that would preclude summary judgment. *Id.* at 703-04 (quoting *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1063 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978)); *see also* *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981) (upholding medical students' dismissal by University of Tennessee as result of low grades, low class standing, and failure to pass medical board examinations); *Mohammed v. Mathog*, 635 F. Supp. 748, 750-51 (E.D. Mich. 1986) (finding doctor's dismissal from Wayne State University School of Medicine residency program was warranted because his performance did not satisfy requirements for continuance in program); *Chusid v. Albany Medical College of Union Univ.*, 157 A.D.2d 1019, 1021, 550 N.Y.S.2d 507, 509 (1990) (upholding academic dismissal of medical student who ranked 125th in class of 130). For other cases in which courts found that the awarding of poor grades by an educational institution was not an arbitrary or capricious act, *see* *Petock v. Thomas Jefferson Univ.*, 630 F. Supp. 187, 191 (E.D. Pa. 1986) (finding failure on part of plaintiff to show that academic evaluations were arbitrary); *Moire v. Temple Univ. School of Medicine*, 613 F. Supp. 1360, 1373 (E.D. Pa. 1985) (stating that where there is no indication of arbitrariness within grading process, university's ratification of contested grade is not violation of due process), *aff'd*, 800 F.2d 1136 (1986); *Johnson v. Cuyahoga County Community College*, 29 Ohio Misc. 2d 33, 489 N.E.2d 1088 (1985) (deciding that, unless plaintiff can show substantial evidence of arbitrary or capricious action in grading process, there is no cause of action that court can address); *In re Dunmore*, N.Y.L.J., Aug. 19, 1976, at 5, col. 1 (N.Y. Sup. Ct. Aug. 18, 1976) (finding no evidence to support student's claim that two D's received in the same course were result of arbitrary or capricious college action); *see also* *McIntosh v. Borough of Manhattan Community College*, 78 A.D.2d 839, 839, 433 N.Y.S.2d 446, 447 (1980) (holding that it was not arbitrary and capricious for college to refuse to round off petitioner's 69.713 grade to passing grade of 70), *aff'd*, 55 N.Y.2d 26, 433 N.E.2d 1274, 449 N.Y.S.2d 26 (1982); *Shields v. School of Law, Hofstra Univ.*, 77 A.D.2d 867, 431 N.Y.S.2d 60, 63 (1980) (holding that law school's refusal to transfer credit from summer law classes taken by student at another law school was not arbitrary or capricious).

457. *See* *Mauriello v. University of Medicine & Dentistry of N.J.*, 781 F.2d 46, 52 (3d Cir. 1986) (finding professional evaluations of student in microbiology Ph.D. program warranted academic dismissal); *Schuler v. University of Minn.*, 788 F.2d 510, 515-16 (8th Cir. 1986) (concluding that decision to dismiss graduate psychology student was careful and deliberate); *Amelunxen v. University of P.R.*, 637 F. Supp. 426, 432 (D.P.R. 1986) (applying standard from *Ewing* and holding that evaluation of student in chemistry master's program, while faulty, was not arbitrary or capricious); *Schnapper v. Trustees of Columbia Univ.*, N.Y.L.J.,

fully attacked as arbitrary and capricious the administration of oral examinations<sup>458</sup> and the rejection of a Ph.D. dissertation by the faculty committee.<sup>459</sup>

In summary, it is clear that courts are even less inclined to intervene in academic matters on the basis of substantive due process or an arbitrary and capricious standard than they are in procedural due process claims. Where the merits of an individual grade are concerned, this deference is most pronounced. The only exceptions seem to be in medical school cases, like *Stoller v. College of Medicine*,<sup>460</sup> which involved a single composite grade derived from the evaluations of more than six doctors who worked with the student in his clerkship.<sup>461</sup> In such instances, courts are willing to look at the individual evaluations and determine whether the composite grade is a fair sum of the parts. Courts are not willing, however, to scrutinize the process by which an individual professor arrives at an evaluation or a grade. Thus, *Maitland v. Wayne State University*,<sup>462</sup> because of its unusual facts and the fact that the appellate court disapproved of, but refused to reverse, what the trial court had done,<sup>463</sup> is likely to remain a unique example of judicial intervention under the "arbitrary and capricious" rubric for some time to come.

#### D. Contract Claims

Perhaps the most promising area of legal claims for academic challenge plaintiffs at present is contract law. Venerable authority holds that there is a contractual relationship between the student

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Jan. 8, 1979 at 11, col. 6 (N.Y. Sup. Ct. Jan. 7, 1979) (holding that decision to terminate student in doctoral art program was not abuse of university's discretion).

458. See *Schuler v. University of Minn.*, 788 F.2d 510, 516-17 (8th Cir. 1986) (upholding trial court's determination that university did not administer oral exams in arbitrary or capricious manner); *Stevenson v. Board of Regents of Univ. of Tex.*, 393 F. Supp. 812, 817 (W.D. Tex. 1975) (finding no due process violation arising from hearing before Graduate Council which allowed student to demonstrate that examination was neither unfair nor impartial); *Tanner v. Board of Trustees of Univ. of Ill.*, 121 Ill. App. 3d 139, 144, 459 N.E.2d 324, 328 (1984) (denying that university acted arbitrarily in enforcing its oral examination policy).

459. See *Edde v. Columbia Univ.*, 8 Misc. 795, 796, 168 N.Y.S.2d 643, 645 (Sup. Ct. 1957) (finding no abuse of discretion where university terminated petitioner's candidacy for doctoral degree after determination that plaintiff's submitted dissertation was unsatisfactory and that plaintiff refused to revise it), *aff'd*, 6 A.D.2d 780, 175 N.Y.S.2d 556, *aff'd*, 5 N.Y.2d 881, 182 N.Y.S.2d (1959).

460. 562 F. Supp. 403 (M.D. Pa. 1983).

461. See *Stoller v. College of Medicine*, 562 F. Supp. 403, 412-15 (M.D. Pa. 1983) (finding that negative evaluations submitted by numerous professors gave rational basis for decision to fail student); see also *Moire v. Temple Univ. School of Medicine*, 613 F. Supp. 1360, 1371-73 (E.D. Pa. 1985) (considering whether decision to fail student based on composite evaluations was rational and reasonable); *Mustell v. Rose*, 211 So. 2d 489, 495-97 (Ala. 1968) (finding sufficient evidence in record to justify failure in surgery course where grade was composite of three evaluations).

462. 76 Mich. App. 631, 257 N.W.2d 195 (1977).

463. See *supra* notes 386-415 and accompanying text (discussing facts of *Maitland*).

and the university and that, if the student pays tuition and achieves satisfactory results in the course of study, the student will eventually receive a degree.<sup>464</sup> The obvious sources of such putative contract rights are university catalogues, student handbooks, "guidelines," and other published texts on the one hand, and oral representations by teachers and administrators on the other.<sup>465</sup> Courts, however, have hesitated to apply commercial contract law wholesale to the

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464. See, e.g., *DeMarco v. University of Health Sciences*, 40 Ill. App. 3d 474, 480, 352 N.E.2d 356, 366 (1976) (ordering medical school to issue doctor of medicine degree to plaintiff in recognition of student's fulfillment of contract between university and student); *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 100-01, 120 N.W. 589, 591 (1909) (finding student has contractual right not to be arbitrarily dismissed from college); *People ex rel. Cecil v. Bellevue Hosp. Medical College*, 67 N.Y. Sup. Ct. 107, 108-09, 14 N.Y. 490, 490 (holding that medical college's announcement in its circulars specifying fees to be paid, course of study, and necessary qualifications for degree are terms of offer that, once accepted by student, must be fulfilled by college), *aff'd*, 128 N.Y. 621, 28 N.E. 253 (1891); *Barker v. Bryn Mawr College*, 278 Pa. 121, 122-23, 122 A. 220, 221 (1923) (stating that private college's relationship with students is contractual); *Dodd, The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 702-09 (1985) (tracing development of student-university contractual relationship); see also *Ross v. Pennsylvania State Univ.*, 454 F. Supp. 147, 150 (M.D. Pa. 1978) (finding no malicious interference with plaintiff's contract when university terminated employment as graduate student due to plaintiff's poor grades).

Another case in which a student sued to enforce his contractual rights is *Johnson v. Lincoln Christian College*. The court in *Johnson* held that a candidate for an undergraduate degree in sacred music who completed the required five years of course work and paid tuition for five years stated a valid cause of action for breach of an implied contract with the defendant college. *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 739-40, 501 N.E.2d 1380, 1384 (1986). The plaintiff withdrew from the school after the dean of students reported a rumor that he was a homosexual, indicated that the plaintiff would be dismissed from the college because of his alleged homosexuality, and further indicated that the reason for his dismissal would be stamped across his transcript. *Id.* at 737, 501 N.E.2d at 1382. After the college refused to grant him a diploma, Johnson sued, alleging contract, tort, breach of privacy, and statutory claims. *Id.* The trial court dismissed his complaint, but the appellate court reversed. See *id.* at 733, 501 N.E.2d at 1380 (discussing holding of trial court). The appellate court noted that the relationship between a student and a university is based on elements of contract law. *Id.* at 739, 501 N.E.2d at 1384. The court also noted that the offer comes when the student submits his application to the school and, by offering the student a seat at the college, the college accepts the offer. *Id.* If the student completes the necessary requirements for degree completion, the college must fulfill its obligation by issuing the student a diploma. See *id.* at 739, 501 N.E.2d at 1384 (quoting *Tanner v. Board of Trustees of Univ. of Ill.*, 48 Ill. App. 3d 680, 682-83, 363 N.E.2d 208, 209-10 (1977)). But see *Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 811-12, 602 P.2d 778, 783, 159 Cal. Rptr. 858, 862 (1979) (holding that dismissed law student, allowed to enroll in additional courses only on express condition that he would not be eligible for degree, had no contractual right to law degree); *Lexington Theological Seminary v. Vance*, 596 S.W.2d 11 (Ky. Ct. App. 1979) (upholding denial of Master of Divinity degree to plaintiff who told dean that he lived homosexual lifestyle and had been "married" to another man for six years).

465. See *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924) (noting that implied condition of contract between student and institution is that student will follow rules and regulations of school and that such terms and conditions are those set forth by publications of institution at time of student's enrollment); *University of Miami v. Militana*, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966) (accepting that conditions and terms for graduation are to be found in college's publications which are available to student at time of enrollment); *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1148 (D.C. 1985) (stating court must interpret terms in Washington School of Psychiatry catalogue creating contract using reasonableness standard); see also *infra* notes 553-98 and accompanying text (discussing oral representations by university faculty and estoppel claims).

university-student relationship.<sup>466</sup>

In *Russell v. Salve Regina College*,<sup>467</sup> a prominent federal case, the trial court and the court of appeals upheld a jury award of \$30,513.40 plus interest in favor of a nursing student dismissed by her college solely because of her extreme obesity.<sup>468</sup> Sharon Russell had an adequate academic record and respectable grades.<sup>469</sup> She was, however, grossly overweight: her weight varied between 306 and 315 pounds and she was five feet, six inches tall.<sup>470</sup> Her weight, moreover, was a constant subject of discussion in school.<sup>471</sup> Not only did her nursing supervisors regularly urge her to lose weight and lecture her and her class about its importance, but an instructor also required her to serve as the "patient" in a demonstration of how to make beds with fat people in them.<sup>472</sup> After informal pressure on her to lose weight did not produce the desired result, Salve Regina College forced her, at the end of the first semester of her junior year, to sign a "contract" to lose two pounds

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466. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975) (reversing trial court's rigid application of commercial contract doctrine in case where university expelled student for falsely naming one of his advisors and professors as co-author of article he submitted to technical journal for publication). The court explained that there are many instances where some elements of the contract are properly used to analyze relationships between parties. *Id.* Membership in professional organizations, church groups, and trade unions has been legally analyzed under a combination of theories, with resistance to the notion that one particular doctrine must be rigidly applied. *Id.* In the university-student relationship, contract laws may provide a suitable framework. To adopt commercial contract law as a whole and apply it to the university-student relationship, however, is inappropriate and unworkable. *Id.*; accord *Doherty v. Southern College of Optometry*, 862 F.2d 570, 579 (6th Cir. 1988) (holding change of degree requirement while plaintiff was in school was not made in bad faith and did not constitute breach of contract); *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062-63 (N.D. Ga. 1977) (stating that as long as dismissal is academic and not disciplinary in nature, court will not review breach of contract claim), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Ross v. University of Minn.*, 439 N.W.2d 28, 34 (Minn. Ct. App. 1989) (finding that defendant university did not breach contract when it terminated resident student in psychiatry); *Abbariao v. Hamline Univ. School of Law*, 258 N.W.2d 108, 113 (Minn. 1977) (agreeing that while elements of contract law are present in student-university relationship, rigid use of contract doctrine is inappropriate); *Essigmann v. Western New England College*, 11 Mass. App. 1013, 1013, 419 N.E.2d 1047, 1049 (1981) (assuming contractual relationship exists between law school and student but holding that dismissal of law student does not breach contract where grading policy is described either expressly or in implied terms in both school catalogue and semester grade reports); cf. *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 659-60, 404 N.E.2d 1302, 1306, 427 N.Y.S.2d 760, 764 (1980) (holding that whether by analogy to contract law or law of associations, or as matter of fundamental fairness, fact that university adopts procedures requires that it follow them).

467. 649 F. Supp. 391 (D.R.I. 1986), *aff'd*, 890 F.2d 484 (1st Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1217 (1991).

468. *Russell v. Salve Regina College*, 890 F.2d 484, 489-90, (1st Cir. 1989) (affirming award for breach of contract where college forced student into withdrawing from school), *rev'd on other grounds*, 111 S. Ct. 1217 (1991), *reinstating damages on remand*, 938 F.2d 315 (1st Cir. 1991).

469. *Russell*, 649 F. Supp. at 395.

470. *Id.*

471. *Id.*

472. *Id.*

per week, starting immediately.<sup>473</sup>

Russell failed to lose weight as required.<sup>474</sup> After a series of further exchanges between Russell and her academic supervisors, the coordinator of the college's nursing program notified Russell by letter in August 1985 of her dismissal from the nursing program and from the college.<sup>475</sup> After her dismissal, Russell was promptly admitted to the nursing program at St. Joseph's College and she completed the program there without incident.<sup>476</sup>

Russell subsequently brought a diversity action in federal court against Salve Regina College and seven faculty members, seeking damages for nonperformance of an agreement to educate, breach of an implied covenant of good faith and fair dealing, and a series of other legal claims.<sup>477</sup> The jury found that Salve Regina breached its contract with Russell by expelling her and granted damages of \$43,903.45 including interest.<sup>478</sup> The court entered judgment on the verdict and denied defendant's motion for a remittitur.<sup>479</sup>

While the college argued that Russell had failed one of the required courses for the nursing degree, the instructor admitted that her obesity was "directly related" to deficiencies in the course.<sup>480</sup> Further, while the college's handbook concededly emphasized the importance of a nurse's good health to her patients and required each student to inform the clinical coordinator of particular health problems, both courts concluded that this referred to contagious diseases and not to obesity.<sup>481</sup> Thus, the district court concluded that the only potentially legitimate reasons for barring Russell from the clinical training program with regard to her weight included interference with performance, as well as her poor appearance serving

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473. See *Russell*, 649 F. Supp. at 407-08 (quoting provisions of contract). The college argued that Russell, having contractually agreed to lose two pounds per week and failing to do so, was justifiably dismissed because of this failure. *Id.* at 407. The district court observed that there was no apparent consideration for this "contract," that issues of material fact existed as to duress, coercion, and her state of mind, and that the "oxymoronic concept" of Russell making a "voluntary withdrawal" against her will stirred doubts about the agreement's validity. *Id.*

474. *Id.* at 395.

475. *Id.*

476. *Id.* at 406.

477. *Id.* at 396. The other claims included intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, wrongful dismissal, denial of due process, and discrimination against a handicapped person in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988). *Id.*

478. *Id.* at 406.

479. *Id.*

480. *Id.*

481. *Id.* at 405; *Russell*, 890 F.2d at 488 n.10. It is noteworthy that on her application for admission, Russell stated her weight as 280 pounds. *Russell*, 890 F.2d at 486. The First Circuit commented that "[t]he College apparently did not consider her condition a problem at that time, as it accepted her under an early admissions plan." *Id.*



as a bad example to patients.<sup>482</sup> In light of the fact that Russell openly stated on her application for admission that she weighed 280 pounds, and Salve Regina admitted her and accepted her tuition for two years before dismissing her, it was obviously difficult for the college to credibly make these arguments.<sup>483</sup>

In denying summary judgment on the contract claim, the district court upheld the existence of an implied contract between the student and the school.<sup>484</sup> While acknowledging that the contractual nature of the student-university relationship is not entirely clear, the court adopted a "reasonable expectation" standard in defining the terms of the contract.<sup>485</sup>

On appeal, Salve Regina did not contest the existence of a contractual relationship between the student and the college; it did, however, challenge the judge's charge to the jury regarding the terms of the contract and the duties of the parties.<sup>486</sup> The trial court's jury instructions on Russell's contract claim counseled that substantial performance, in addition to good faith, was all that was required of Russell to satisfy her contractual obligations.<sup>487</sup>

The college challenged this characterization, claiming that the lower court was ignoring the nursing department requirement that, in addition to performing competently, nurses should be models of health for their patients.<sup>488</sup> The court of appeals rejected this argu-

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482. *Russell*, 649 F. Supp. at 405-06.

483. *See Russell*, 890 F.2d at 486 (reviewing Russell's disclosures on her application).

484. *Russell*, 649 F. Supp. at 405; *see also* *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) (stating that provisions in student handbook are primary source of terms governing student-university contractual relationship); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977) (stating that, while university-student relationship is contractual in nature, it is not amenable to strict application of commercial contract doctrine), *cert. denied*, 435 U.S. 971 (1978).

485. *See Russell*, 649 F. Supp. at 405 (quoting *Giles v. Howard Univ.*, 428 F. Supp. 603, 605 (D.D.C. 1977)) (affirming that contract terms established under reasonable expectation standard are defined by what meaning party making manifestation, the university, should reasonably expect other party to give it); *see also* *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975) ("The student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category."), *cert. denied*, 423 U.S. 898 (1975); *Napolitano v. Princeton Univ. Trustees*, 186 N.J. Super. 548, 566, 453 A.2d 263, 272-73 (1982) (positing that university-student relationship cannot be described either in purely contractual or associational terms).

486. *Russell*, 890 F.2d at 488.

487. *See Salve Regina College v. Russell*, 111 S. Ct. 1217, 1220 (1991) (noting that jury instructions made clear that it was not necessary for plaintiff to perform fully all items specified in contract). The First Circuit characterized the contracting parties' obligations as follows: the student is required to pay tuition, obey disciplinary rules, and to remain in good academic standing, while the educational institution must furnish an education until graduation. *Russell*, 890 F.2d at 488. The court counseled further that while the "contract" signed by the parties during Russell's junior year may have modified their earlier agreement, if Russell "substantially performed" her contractual duties, then dismissal by the college would constitute a breach. *Id.* at 489.

488. *Id.*

ment, holding that the provisions on health "are not a license for administrators to decide late in the game that an obese student is not a positive model of health."<sup>489</sup> Moreover, the First Circuit concluded the fact that Russell was forced out of the school solely because of her obesity made less applicable the general rule that the court will exercise deference regarding the student-college relationship, particularly when curriculum and discipline are at issue.<sup>490</sup>

Russell successfully completed 124 out of 128 credits, and her only failing grade, in a clinical course, was related to her weight.<sup>491</sup> Accordingly, the First Circuit held that it was appropriate to apply the substantial performance standard to the contract and intervene in the academic context "where, as here, full performance by the student has been hindered by some form of impermissible action."<sup>492</sup> The court also affirmed the measure of damages, which was based on one year's salary for the year of employment Russell lost because of her dismissal by Salve Regina (\$25,000) plus the cost of her additional year in college (\$5,513.40).<sup>493</sup>

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489. *Id.* The equities were quite similar in an 1899 Ohio case, in which a student dismissed from her last year of studies by a state normal school, in part because she was over 21, won an injunction for reinstatement. The court stated:

I think it is a well established fact that school authorities have, without objection, for nearly a quarter of a century admitted the young women graduates of our high schools, regardless of age. They admitted this plaintiff, knowing she would be twenty-one years of age before the first year's work in the normal school was finished. The defendants cannot now be heard to say that these school authorities never prescribed a rule for admitting persons residents of the district over twenty-one years of age.

*Brown v. Board of Educ.*, 6 Ohio N.P. 411, 415-16, 8 Ohio Dec. 378, 385 (1899).

490. *See Russell*, 890 F.2d at 489 (citing *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 627 (1975)) (noting that this is particularly true because college admitted Russell to college and later to nursing program with full knowledge of her weight problem).

491. *See Russell*, 649 F. Supp. at 406 (noting cause of failure in course could only be attributed to obesity impeding performance of duties or appearance serving as poor example to patients). The district court found that the Rhode Island Supreme Court would apply standard commercial principles, including the doctrine of substantial performance, to the case. *See Russell*, 111 S. Ct. at 1217 (noting that district court interpreted Rhode Island law to allow Russell to win even if she did not fully comply with terms of contract). *But see infra* note 493 (explaining why First Circuit erred in relying on district court determination).

492. *Russell*, 890 F.2d at 489 (citing *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (1975)). Russell performed satisfactorily in all her other courses, and all her other clinical instructors considered her performance outstanding. *Id.* at 486 n.3.

493. *Id.* at 489-90 n.12. The Supreme Court granted certiorari and reversed the decision, holding solely that the First Circuit erred in deferring to the district court's determination of Rhode Island law, which was made pursuant to the mandate of the *Erie* doctrine. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 65-66 (1938) (holding in case where jurisdiction is founded on diversity of citizenship and issue not governed by Federal Constitution or by Acts of Congress, federal courts must apply substantive law of state in which federal court is located). The Court held 6-3 that in diversity cases, the federal court of appeals should determine for itself *de novo* what the applicable state law is, rather than rely on the district court's findings on this matter. *Russell*, 111 S. Ct. at 1225. In light of the Court's decisions reversing student victories in *Horowitz* and *Ewing*, one is tempted to speculate that one reason the Court might have had in selecting this case to review an outstanding federal civil procedure issue was to

*Russell* bears an interesting resemblance to *Horowitz* in that both students were dismissed because of poor clinical performance related to physical characteristics.<sup>494</sup> But while Charlotte Horowitz could have improved her grooming and hygiene, Sharon Russell's weight was, if not an immutable characteristic, at least one which was much harder to control. Russell's outstanding ratings from other clinical instructors, moreover, reinforce one's commonsense impression that being overweight does not in itself make it impossible to be an effective nurse.<sup>495</sup> What is perhaps most important is the plain element of unfairness in admitting a grossly obese student, taking her tuition for two full years, and then suddenly launching a campaign to pressure her to reduce her weight. Thus, even those who support the result in *Horowitz*, with its deference to academic decisions made by educators,<sup>496</sup> might agree that the decision to dismiss Russell was more arbitrary than academic, and that the peculiar circumstances of the case justified judicial intervention.

The most common type of contract claim asserted in academic challenge cases suggests that both university and student are bound by the requirements of the catalogue and other official texts at the time of matriculation, and that the university cannot impose further obligations on the student thereafter. As noted above, the plaintiff in *Mahavongsanan v. Hall*,<sup>497</sup> a foreign graduate student, contended that she should not be required to comply with the requirement of passing a comprehensive examination, which she had taken twice and failed, because the school instituted the requirement some eight months after she had enrolled in the master's program.<sup>498</sup> The trial court held that the requirements at the time of her matriculation constituted a binding contract between Mahavongsanan and the

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wipe out a significant and legally unprecedented victory by a student plaintiff on a contract claim. But in any event, the First Circuit on remand reinstated Russell's damages award after making its own determination regarding Rhode Island contract law. *Russell v. Salve Regina College*, 938 F.2d 315 (1st Cir. 1991).

494. *Horowitz*, 435 U.S. at 81 (citing plaintiff's erratic attendance, poor performance in clinical setting, and lack of "critical concern for personal hygiene.").

495. *Russell*, 649 F. Supp. at 406 (noting Russell's supervisor at Hartford Hospital wrote that Russell "looked and acted in a very professional manner," "[h]er attendance was excellent and her performance very good," and she "would be most pleased to hire her as a professional nurse.").

496. See *Horowitz*, 435 U.S. at 90-92 (holding that dismissal of student on grounds of academic deficiency, without hearing, did not violate student's due process rights).

497. 401 F. Supp. 381 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976).

498. *Mahavongsanan v. Hall*, 401 F. Supp. 381, 382 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976). The general catalogue stated as follows:

Academic regulations, other than degree requirements, are subject to change at the end of any quarter. A student will normally have to satisfy the degree requirements of the catalog in effect at the time of entrance.

*Id.* at 383.

university and ordered the university to confer the master's degree on her.<sup>499</sup>

Reversing the trial court, the Fifth Circuit held that the wide latitude afforded universities in shaping academic degree requirements extended to imposing new requirements on students already enrolled.<sup>500</sup> The court of appeals explained that implicit in a student's contractual obligations to the university is an agreement to abide by the university's rules and regulations, which may rightfully be modified by the university to fulfill its educational responsibilities.<sup>501</sup> The court noted that this was particularly true in the context of a student working toward a post-graduate level degree.<sup>502</sup>

An Illinois court rejected a claim similar to that of *Mahavongsanan* in *Tanner v. Board of Trustees of University of Illinois*,<sup>503</sup> in which the central dispute was whether Tanner had to undergo an oral examination to be awarded a Ph.D. in business.<sup>504</sup> Relying on the rule that the catalogue of a university forms the basis of the contract between the student and the university, Tanner argued that the failure of any catalogue in effect when he matriculated to mention an oral examination requirement for the Ph.D. degree meant that he was exempted from such a requirement.<sup>505</sup> Tanner admitted, however, that the faculty explained to him before he started his preliminary examination that part of it would be oral.<sup>506</sup> The court concluded that Tanner thereby tacitly agreed to modify his contractual relationship with the University.<sup>507</sup>

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499. *Id.* at 383-84.

500. *See Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (stating that requirement of comprehensive examination was reasonable academic regulation particularly when university provided ample notice to prepare for exam as well as opportunity to complete additional course work in place of comprehensive exam).

501. *Id.* (citing *Foley v. Benedict*, 122 Tex. 193, 203, 55 S.W.2d 805, 809-10 (1932)); *accord Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1562 (M.D. Ala. 1987) (stating courts will show deference to modification of rules and regulations absent clear showing of abuse of authority or arbitrariness), *cert. denied*, 489 U.S. 1017 (1989).

502. *Mahavongsanan*, 529 F.2d at 450; *see Militana v. University of Miami*, 236 So. 2d 162, 164 (Fla. Dist. Ct. App. 1970) (stating that courts afford wide discretion to school authorities in determination as to whether student has met academic requirements of school), *cert. denied*, 401 U.S. 962 (1971).

503. 121 Ill. App. 3d 139, 459 N.E.2d 324 (1984).

504. *Tanner v. Board of Trustees of Univ. of Ill.*, 121 Ill. App. 3d 139, 142, 459 N.E.2d 324, 326 (1984).

505. *Id.* at 143, 459 N.E.2d at 327.

506. *Id.*

507. *Id.*; *see also Doherty v. Southern College of Optometry*, 862 F.2d 570, 578 (6th Cir. 1988) (upholding defendant school's adoption of additional clinical proficiency requirement and its application to plaintiff who matriculated earlier, against plaintiff's contract claim), *cert. denied*, 110 S. Ct. 53 (1989); *Abrams v. New School for Social Research*, 50 A.D.2d 778, 779, 377 N.Y.S.2d 74, 74 (1975) (rejecting claim by Ph.D. candidate that defendant school wrongly conducted his oral examinations, which he failed for third time), *aff'd*, 40 N.Y.2d 961, 359 N.E.2d 329, 390 N.Y.S.2d 818 (1976).

In *Hammond v. Auburn University*,<sup>508</sup> a student who had a GPA of 0.94 in his major, electrical engineering, argued that he should not be held to new graduation requirements adopted two years after he enrolled, which required a 2.00 GPA in all courses in the student's major, as opposed to the former rule in effect which merely required a 2.00 overall GPA.<sup>509</sup> The court rejected the plaintiff's contract claim, relying on *Mahavongsanan* and the university bulletin in effect when he matriculated, which reserved the right to modify rules and regulations applicable to all currently enrolled students.<sup>510</sup>

The Sixth Circuit reached a similar result in *Easley v. University of Michigan Board of Regents*.<sup>511</sup> Easley brought a civil rights action against the regents and the dean of the University of Michigan Law School to secure a J.D. degree.<sup>512</sup> Among other claims, Easley contended that he was entitled to graduate with eighty credits, the number of credits required by the law school bulletin when he matriculated, even though the school raised this to eighty-one during his first term.<sup>513</sup> Noting that the bulletin stated that the number was subject to change and did not represent a contract term, the court rejected Easley's contract claim.<sup>514</sup>

In *University of Texas Health Science Center at Houston v. Babb*,<sup>515</sup> a Texas court ruled differently on the same type of claim in permitting a nurse with two D's to graduate despite a rule in the new nursing school catalogue mandating automatic dismissal of any student who received two D's.<sup>516</sup> Joy Ann Babb, a nursing student who entered

508. 669 F. Supp. 1555 (M.D. Ala. 1987), *aff'd*, 858 F.2d 744 (11th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989).

509. *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1557 (M.D. Ala. 1987), *aff'd*, 858 F.2d 744 (11th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989); *see also* *Watson v. University of S. Ala. College of Medicine*, 463 F. Supp. 720, 723-26 (S.D. Ala. 1979) (rejecting claim by student that he did not fail first year of medical school because he had cumulative average of 65.13% when school bulletin deemed less than 65% to be failing grade level and student received failing grades (under 65%) in four of ten classes).

510. *Hammond*, 669 F. Supp. at 1562. The university bulletin provided:

The University reserves the right to make changes as required in course offerings, curricula, academic policies and other rules and regulations affecting students, to be effective whenever determined by the University. These changes will govern current and formerly enrolled students. Enrollment of all students is subject to these conditions.

*Id.*

511. 627 F. Supp. 580 (E.D. Mich. 1986).

512. *Easley v. University of Mich. Bd. of Regents*, 627 F. Supp. 580, 581 (E.D. Mich. 1986).

513. *See id.* at 585 (stating basis for Easley's claim was statement made in law school bulletin (1978-80) that "no less than eighty hours are required for graduation").

514. *Id.* at 586.

515. 646 S.W.2d 502 (Tex. Ct. App. 1982).

516. *See* *University of Tex. Health Science Center at Houston v. Babb*, 646 S.W.2d 502, 506 (Tex. Ct. App. 1982) (holding school catalogue constitutes written contract). Courts have upheld "two-D" rules in other cases. *See In re Dunmore* (Sup. Ct.), N.Y.L.J., Aug. 19, 1976, at

the school in January 1979, experienced academic difficulties in the fall of 1979 and withdrew but was later allowed to re-enter.<sup>517</sup> At that time, a new catalogue was in effect with a new provision stating that any student receiving two D's or more would not be permitted to continue.<sup>518</sup> The catalogue in effect when Babb first enrolled, however, specifically provided that a student could satisfy the requisites for a degree according to the terms of the catalogue in effect at matriculation or that in effect in any subsequent year during which the student was registered.<sup>519</sup> She subsequently received two D's and was notified by the school that she was being dismissed pursuant to the two-D provision.<sup>520</sup>

After attempts to see the dean proved unavailing, Babb sued, contending that the earlier catalogue, which did not contain the two-D provision, should be applied to her since it was in effect when she

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5, col. 1 (upholding dismissal of student pursuant to "two-D" policy even though rule did not appear in college catalogue); *Lilly v. Smith*, 790 S.W.2d 539, 541 (Tenn. Ct. App. 1990) (upholding school's dismissal of student pursuant to "two-D" policy, reasoning policy violated neither federal substantive due process nor rights protected by equal protection clause of Tennessee Constitution).

In *Dunmore*, a student in the Physical Therapy Program at Hunter College was dismissed pursuant to the program's rule after she received two D's in the course "Therapeutic Exercise II." *In re Dunmore*, N.Y.L.J., Aug. 19, 1976, at 5, col. 1. The court rejected her argument that the requirement of receiving a grade of D or better did not appear in the Hunter College catalogue, noting that all students in the Physical Therapy Program, including petitioner, had been notified of the requirement in various ways

in writing on the program's bulletin board, and orally at orientation meetings. Indeed, petitioner was made specifically aware of the requirement after she first received a "D" in this course. At that time, the program's instructors explained the rule, and at first determined to drop petitioner from the program. She appealed to the College authorities, however, who granted her permission to take the course again to attempt to meet the requirement. She was dropped from the program only after again receiving a "D" in the course.

*Id.*

*Lilly* involved the "two-D" policy which prevailed at all public colleges, community colleges, and universities of the State of Tennessee. *Lilly v. Smith*, 790 S.W.2d 539, 546 (Tenn. Ct. App. 1990). Under the policy, any student who receives two D's or lower grades in the nursing program is not only automatically dismissed, but is also never eligible for readmission into the nursing programs of any Tennessee public school of nursing. *Id.* Under the policy, Dyersburg State Community College dismissed Beverly Lilly and her subsequent applications for admission to two other state institutions were denied. *Id.* at 540-41. The trial court granted the motion of the defendant state university to dismiss for failure to state a claim for constitutional violations. The court of appeals affirmed, holding that the "two-D" policy did not violate Lilly's federal substantive due process or equal protection rights or the equal protection clause of the Tennessee Constitution. *Id.* at 541; *see also* *Hines v. Rinker*, 667 F.2d 669, 703-04 (8th Cir. 1981) (holding that absent showing of arbitrary and capricious conduct by medical students, academic dismissals did not constitute violations of substantive due process).

517. *See Babb*, 646 S.W.2d at 504 (explaining Babb's counselor advised her to withdraw from semester program and re-enter in following January under newly organized quarter program because she was failing one of her 12-hour courses).

518. *Id.*

519. *Id.*

520. *Id.*

first entered the school.<sup>521</sup> The trial court issued a temporary injunction ordering the university to readmit her, and the Texas Court of Appeals affirmed.<sup>522</sup> The court held that the school's 1978-79 catalogue established a written contract between the university and the student.<sup>523</sup> Because Babb first entered the nursing school in the 1978-79 catalogue year, she had the right to rely on the terms of that year's catalogue. The court also pointed out that the 1978-79 catalogue did not provide for dismissal of a student because of the number of low grades received, but rather based dismissal on dropping below an overall grade point average of 2.00.<sup>524</sup>

The First Circuit rejected a different sort of contract claim in *Lyons v. Salve Regina College*.<sup>525</sup> Pursuant to information and registration materials, Lyons, an undergraduate, appealed a failing grade, which resulted from absences incurred while accompanying an ill friend to a hospital in Boston.<sup>526</sup> Believing herself entitled to an "Incomplete," she appealed the grade to the three-member grade appeals committee, which voted two to one to change the F to Incomplete.<sup>527</sup> The associate dean nevertheless overrode this recommendation, and, as a result, Lyons was dropped from the nursing

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521. *Id.*

522. *Id.*

523. *Id.* at 506; see *Texas Military College v. Taylor*, 275 S.W. 1089, 1091 (Tex. Civ. App. 1925) (holding conditional verbal contract between student and school is binding despite unquestioned validity of legal proposition that catalogue constitutes written contract between educational institution and patron when entrance is under its terms); *Vidor v. Peacock*, 145 S.W. 672, 674 (Tex. Civ. App. 1912) (stating act of enrolling student in school constituted acceptance of contract under terms prescribed by school catalogue); see also *Bindrim v. University of Mont.*, 235 Mont. 199, 202, 766 P.2d 861, 863 (1988) (stating that university did not abuse its discretion in explicitly reserving right to change school rules and regulations and to make changes applicable to currently enrolled as well as future students). *But cf.* *Eiland v. Wolf*, 764 S.W.2d 827, 838 (Tex. Ct. App. 1989) (holding that contract based on school catalogue did not exist between medical school and student because of express disclaimer in school catalogue expressing intent not to be contractually bound).

In *Eiland*, the applicable catalogue of the medical school at Galveston contained the following disclaimer: "The provisions of this catalogue are subject to change without notice and do not constitute an irrevocable contract between any student . . . and the University of Texas Medical School at Galveston . . ." *Eiland*, 764 S.W.2d at 838. The catalogue further reserved for the faculty the right to request at any time the withdrawal of a student whose academic performance was inadequate. *Id.* The court concluded that it did not have to decide, as a general rule, whether the catalogue of a state university constitutes a contract between the student and the university. *Id.* The court found that, given the express disclaimers in the document alleged to be a contract, it is clear that no enforceable "contract" existed in the present case. *Id.*

524. *Babb*, 646 S.W.2d at 506. The court rejected a number of the arguments of the University of Texas, including the claim that the trial court erred in issuing a temporary injunction because "appellant's First Amendment right to academic freedom allows it to set academic standards as it will, unimpeded by the continuing oversight of the courts." *Id.*

525. 565 F.2d 200 (1st Cir. 1977), *rev'd* 422 F. Supp. 1354 (D.R.I. 1976), *cert. denied*, 435 U.S. 971 (1978).

526. *Lyons v. Salve Regina College*, 422 F. Supp. 1354, 1358 (D.R.I. 1976), *rev'd*, 565 F.2d 200 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

527. *Id.* at 1358.

program, although she was allowed to change her major to psychology and remain in the college.<sup>528</sup>

Lyons brought a diversity action for breach of contract in federal district court. The court held that the committee's "recommendation" gave rise to an enforceable contract claim and that the college had breached its contract by refusing to change the grade.<sup>529</sup> On appeal, however, the First Circuit reversed. Citing *Slaughter v. Brigham Young University*,<sup>530</sup> it concluded that the trial court erred in disregarding the "normal everyday meaning" of "recommendation" and converting it into a "mandatory order" from the committee to the dean.<sup>531</sup>

Other students have unsuccessfully argued that a university's failure to provide promised tutorial assistance constitutes a breach of contract. In *Marquez v. University of Washington*,<sup>532</sup> a Mexican-American law student dismissed for academic insufficiency sought readmission and \$250,000 in damages for breach of contract, denial of his equal protection rights, and violations of the Washington state law against discrimination.<sup>533</sup> The Association of American Law Schools' pre-law handbook provided the following description of the University of Washington Law School at the time the University admitted Marquez: "Special programs—including recruitment, admission, and financial and academic aid—are available for students of minority ethnic groups."<sup>534</sup> Marquez interpreted this statement

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528. *Id.* (noting that Lyons could have withdrawn from course without receiving "F" if she had done so before last day of class).

529. *Id.*

530. 514 F.2d 622, 626 (10th Cir. 1975), *cert. denied*, 423 U.S. 898 (1975); *see supra* note 485 (positing that strict application of commercial contract principles to university-student relationship is in error). In *Slaughter*, a graduate student was expelled for violating the Student Code of Conduct. The student used the name of a professor, one of his advisors, as a coauthor with him on two articles published in a technical journal despite the fact that the professor neither participated in the writing of the articles nor gave consent to his name being used. *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 624 (10th Cir. 1975). In reviewing the trial court's conclusion that the university breached the "contract" by dismissing the student, the court stated "[t]he rigid application of commercial contract doctrine . . . was in error . . . ." *Id.* at 626. The court noted that while some elements of contract law may provide a framework to analyze the student-university relationship, there are numerous other doctrines that may also aid in providing such a framework. *Id.* The court thus set aside the judgment of the trial court and reversed with instructions to enter judgment for the university. *Id.* at 627.

531. *Lyons*, 565 F.2d at 202-03; *see also* *Johnson v. Santa Monica-Malibu Unified School Dist. Bd. of Educ.*, 179 Cal. App. 3d 593, 599-60 & n.2, 224 Cal. Rptr. 885, 889-90 & n.2 (1986) (upholding board of education's rescission of superintendent's order that plaintiff's grade in high school French class be changed from D to W (Withdrawal) on grounds that superintendent's order did not comply with California statute governing grade changes).

532. 32 Wash. App. 302, 648 P.2d 94 (1982), *cert. denied*, 460 U.S. 1013 (1983).

533. *Marquez v. University of Wash.*, 32 Wash. App. 302, 304, 648 P.2d 94, 95 (1982), *cert. denied*, 460 U.S. 1013 (1983).

534. *Id.* at 305, 648 P.2d at 96. During the 1972-73 and 1973-74 school years, the law school maintained an informal and unstructured academic assistance program available to those students who asked for it. *Id.* at 303, 648 P.2d at 95.



as part of the contract that he entered into with the law school when he matriculated. He argued that the school breached the "academic aid" term by not providing him with "a formal structurized tutorial assistance program."<sup>535</sup>

The trial court and the Washington Court of Appeals rejected Marquez' claim.<sup>536</sup> While conceding that the relationship between a student and a university is primarily contractual in nature,<sup>537</sup> the court stated that a university is entitled to reasonable modifications of its programs so as to properly exercise its educational responsibility.<sup>538</sup> Moreover, although the University of Washington Law School did not at the time have a structured or mandatory tutorial assistance program, it did provide students with an unusual range of academic assistance opportunities.<sup>539</sup> Accordingly, the court held that the pre-law handbook only announced the availability of certain programs of assistance to students, but did not specify a particular type of "academic aid."<sup>540</sup> The court noted that no right to a law degree was created in the applicant without first meeting reasonable standards established by the school.<sup>541</sup>

Courts rejected similar contract claims by students alleging failure to provide promised tutorial assistance in *Abbariao v. Hamline University School of Law*<sup>542</sup> and *Miller v. Hamline University School of Law*.<sup>543</sup> The Minnesota Supreme Court in *Abbariao* endorsed the doctrine from *Slaughter v. Brigham Young University*<sup>544</sup> that contract law should not be rigidly imported into the student-university relationship.<sup>545</sup>

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535. *Id.* at 305, 648 P.2d at 96. The court noted that Marquez did not "take full advantage of the opportunities afforded him" to obtain extra help. *Id.* at 303, 648 P.2d at 95.

536. *Id.* at 305, 648 P.2d at 96.

537. *Id.* (citing *Maas v. Corporation of Gonzaga Univ.*, 27 Wash. App. 397, 400, 618 P.2d 106, 108 (1980)).

538. *Id.* at 306, 648 P.2d at 96-97 (citing *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976)).

539. *Id.* at 307, 648 P.2d at 97 (noting that school offered faculty assistance to specially admitted students upon request, small class sections for first-year students, structured legal research and writing program staffed by faculty members, and possibility of taking lighter course loads).

540. *Id.*

541. *Id.* Marquez' case was weakened further by the uncontroverted fact that he had not taken full advantage of the opportunities for assistance that were available in the law school. *Id.*; see *Maas v. Corporation of Gonzaga Univ.*, 27 Wash. App. 397, 401, 618 P.2d 106, 108 (1980) (stating that possibility of academic failure is implicit in nature of educational contract between student and university).

542. 258 N.W.2d 108 (Minn. 1977).

543. 601 F.2d 970 (8th Cir. 1979); see *Watson v. University of S. Ala. College of Medicine*, 463 F. Supp. 720, 724-25 (S.D. Ala. 1979) (rejecting claim by black medical student that faculty denied him tutorial assistance because of his race).

544. 514 F.2d 622 (10th Cir. 1975), *cert. denied*, 423 U.S. 898 (1975); see *supra* note 530 (positing that student-university relationship is unique and is not amenable to strict application of commercial contract principles).

545. See *Abbariao v. Hamline Univ. School of Law*, 258 N.W.2d 108, 113 (Minn. 1977)

The court also held that, even if the contract is valid, it would not bind the law school because of the note in the bulletin that "[a]ll provisions within this bulletin are subject to change without notice."<sup>546</sup>

In summary, it is "black letter law" that a university catalogue, bulletin, or other such formal document helps to define the nature of the contractual relationship that exists between the university and a student.<sup>547</sup> Courts have sometimes been willing to hold both institutions and students to the terms of such publications.<sup>548</sup> On the other hand, an institution can retain a largely free hand if it takes the precaution of inserting a disclaimer in the catalogue<sup>549</sup> stating that the institution reserves the discretion to make changes in academic regulations, course requirements, and so forth from time to time.<sup>550</sup> In such instances, the courts will not conclude that a student has an entitlement to be governed by the precise terms of the rules and regulations in effect at the time of matriculation at the institution.<sup>551</sup>

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(noting that law school promised tutorial seminar three years earlier when law school was new and yet to be affiliated with Hamline University).

546. *Id.* at 114; see *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (citing *Foley v. Benedict*, 122 Tex. 193, 204, 55 S.W.2d 805, 810 (1932)) (stating that students are legitimately subject to change in rules and regulations made by university as it seeks to fulfill its educational responsibilities).

An Illinois court rejected an analogous claim brought by a learning-disabled podiatry student. *Abrams v. Illinois College of Podiatric Medicine*, 77 Ill. App. 3d 471, 395 N.E.2d 1061 (1979). Plaintiff claimed to have a "minor neurological disturbance" that resulted in a slow reading speed. *Id.* at 473 n.1, 395 N.E.2d at 1062 n.1. *Abrams* alleged that the college informed him, after he had trouble following the first year curriculum, that he "should not worry, . . . that everything would be done to assist [him], including figuring out some way to help him." *Id.* at 476, 395 N.E.2d at 1064. The court rejected *Abrams*' claim that this statement gave rise to a binding and enforceable oral contract that the school later breached because the statement was too vague and indefinite. See *id.*, 395 N.E.2d at 1065 (stating that binding contract requires terms such that parties are reasonably certain as to promises and performances to be rendered).

547. See *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) (stating that provisions in student handbook are primary source of terms governing contractual relationship between student and university); *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330, 371 N.E.2d 634, 639 (1977) (finding acceptance of fee and application by school constitutes acceptance of offer to apply under terms established by school's brochure); *University of Tex. Health Science Center at Houston v. Babb*, 646 S.W.2d 502, 506 (Tex. Ct. App. 1982) (holding school catalogue is written contract with patron once student is accepted and enrolls under its terms); *Vidor v. Peacock*, 145 S.W. 672, 674 (Tex. Civ. App. 1912) (stating that act of enrolling student in school constitutes acceptance of contract governed by terms embodied in school catalogue); see also *supra* notes 300-02 and accompanying text (discussing student handbook as primary source of contractual terms); *supra* notes 513-16 (discussing school catalogue as written contract between student and university).

548. See *supra* note 523 (discussing cases holding school is contractually bound by terms of catalogue).

549. See *id.* (discussing disclaimer as means to reserve right to make changes in university rules and regulations).

550. See *supra* notes 497-502 and accompanying text (discussing discretion of university to change rules and regulations and make them applicable to students already enrolled).

551. See *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977) (stating that while university-student relationship is contractual in nature, it is not amenable to strict appli-

Moreover, in an effort to safeguard academic freedom and discretion, the courts are reluctant to apply commercial contract principles across the board to the university-student relationship.<sup>552</sup>

### *E. Estoppel Claims*

Another area in which student plaintiffs have scored a few impressive victories is estoppel claims. In these cases, the student plaintiff argues that a professor or university administrator made a representation about graduation requirements, testing criteria, or the like that was inconsistent with the university's actual rules. But because the student acted in detrimental reliance on the accuracy of the professor's or administrator's statement, the university is bound by the substance of such representation and is estopped from requiring that the student comply with the actual rules.

The most notable success of a student academic challenge plaintiff based on estoppel is *Blank v. Board of Higher Education*.<sup>553</sup> The pre-law advisor at Brooklyn College advised Errol Blank, an undergraduate, that he was eligible for the "Professional Option Plan," under which a student who completed three years of undergraduate study could enter law school, and at the end of his first year, receive credit from the college for his first year law courses in addition to a B.A. degree.<sup>554</sup> Blank's major required four more psychology courses, two of which he took during the 1963 summer session at Brooklyn College.<sup>555</sup> Meanwhile, Syracuse University Law School had accepted Blank, and he made plans to matriculate there in the fall of 1963.<sup>556</sup> The chairman of the psychology department twice advised Blank that he could take the two remaining psychology courses he needed at Brooklyn College without attending classes, as

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cation of commercial contract doctrine), *cert. denied*, 435 U.S. 971 (1978); *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (holding that university may make new rules and regulations applicable to student who matriculated before creation of rule or regulation); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975) ("The student-university relationship is unique and it should not be and cannot be stuffed into one doctrinal category."), *cert. denied*, 423 U.S. 898 (1975); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1562 (M.D. Ala. 1987) (concluding that courts will show deference to university's modification of rules and regulations absent clear showing of abuse of authority or arbitrariness), *cert. denied*, 489 U.S. 1017 (1989); *Napolitano v. Princeton Univ. Trustees*, 186 N.J. Super. 548, 566, 453 A.2d 263, 272-73 (1982) (positing that university-student relationship cannot be discussed in either purely contractual or associational terms).

552. See *supra* notes 542-45 and accompanying text (substantiating courts' reluctance to apply strictly commercial contract principles to university-student relationship).

553. 51 Misc. 2d 724, 273 N.Y.S.2d 796 (Sup. Ct. 1966).

554. *Blank v. Board of Higher Educ.*, 51 Misc. 2d 724, 725, 273 N.Y.S.2d 796, 798 (Sup. Ct. 1966).

555. *Id.*

556. *Id.*

long as the teachers of the two courses agreed.<sup>557</sup> He registered for the two courses, completed the assigned reading, took the examinations, received a B in each, and had three credits for each entered on his official record.<sup>558</sup>

Two years later, in May 1965, having completed two years of law school and (he thought) having met the requirements of the Professional Option Plan, Blank was invited to attend the Brooklyn College commencement ceremonies.<sup>559</sup> On the day of the ceremony, however, Blank learned that the college would deny him a B.A. degree on the grounds that he had not attended classes for the two psychology courses he took in the fall of 1963.<sup>560</sup> When administrative appeals proved fruitless, Blank brought a proceeding in New York Supreme Court against the City Board of Higher Education.<sup>561</sup>

In his affidavit, the president of Brooklyn College insisted that the college strictly enforced residence requirements and did not grant credit for courses taken without attendance in class.<sup>562</sup> The court noted, however, that the president based these statements on a Brooklyn College schedule of classes which became effective in Spring 1966, and on the 1966-68 college bulletin, both of which were issued after the year Blank enrolled for the two psychology courses.<sup>563</sup> The court commented that if there was a policy of strictly enforcing residency requirements existing at the time Blank enrolled, then the head of the psychology department and the two professors should have known this.<sup>564</sup> Consequently, Blank should have been informed about it.<sup>565</sup> Moreover, two provisions of an earlier Brooklyn College bulletin in effect when Blank was a student contradicted the alleged attendance policy.<sup>566</sup>

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557. *Id.* at 725-26, 273 N.Y.S.2d at 798-99.

558. *Id.* at 726, 273 N.Y.S.2d at 799.

559. *Id.*

560. *Id.* While the court does not mention this fact, it would have been difficult and probably impossible for Blank to attend both the law school classes and the two psychology classes because of the distance between Syracuse and New York City, the expense of commuting, and the likelihood of conflicts between the two sets of courses.

561. *Id.* at 725, 273 N.Y.S.2d at 797-98 (describing Blank's article 78 action to obtain order directing school to issue and deliver B.A. degree).

562. *Id.* at 727, 273 N.Y.S.2d at 800.

563. *Id.* at 728, 273 N.Y.S.2d at 800.

564. *Id.* at 728-29, 273 N.Y.S.2d at 801.

565. *Id.* The school bulletins did not address general or particular "in attendance" requirements or regulations regarding the Professional Option Plan. *Id.* at 728, 273 N.Y.S.2d at 801.

566. *Id.* at 729, 273 N.Y.S.2d at 801. The provision entitled "Scholarship Requirements and Academic Standing" in the earlier bulletin stated: "Attendance — Students matriculated for the Bachelor's or Associate in Arts degree who are above freshman standing will not be denied credit in a course solely for reasons of attendance." The other provision stated:

The privilege of exemption from any course except the freshman sequence courses and the physical activity courses, on the basis of independent study and special exam-

The court observed that Blank acted in obvious reliance on the counsel and advice of administrators and staff members authorized by the college to give him such counsel and advice.<sup>567</sup> He spent time, money, and effort taking the recommended courses and satisfactorily completed them.<sup>568</sup> Because the principal is often bound by the act of an agent in excess of his actual authority, the court concluded that the dean of faculty could not escape the consequences that arose from the acts of his agents, given that they were acting within the scope of their official duties as professors at the school.<sup>569</sup> Because the claim satisfied all the elements of an estoppel and Blank satisfied all the requirements for a Brooklyn College degree, the court granted his petition and directed the college to confer upon Blank his B.A. degree.<sup>570</sup>

The court in *Healy v. Larsson*,<sup>571</sup> following the holding of the court in *Blank*, ordered respondent Schenectady County Community College to grant an associate of arts degree to petitioner Healy.<sup>572</sup> Having earlier attended two other institutions, Healy enrolled as a full-time student in Schenectady Community College.<sup>573</sup> He consulted with the dean, the director of admissions, the acting president, a guidance counselor, and the mathematics department chairman to establish a course of study leading to graduation.<sup>574</sup> Healy claimed

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inations, is available to all matriculated students in the College of Liberal Arts and Sciences and in the School of General Studies. A grade of A or B means that the student will receive credit for the course and the grade is counted in the scholastic index.

*Id.*

567. *Id.* at 729, 273 N.Y.S.2d at 802.

568. *Id.* at 730, 273 N.Y.S.2d at 802.

569. *Id.*, 273 N.Y.S.2d at 803.

570. *Id.* at 731, 273 N.Y.S.2d at 803. *But see* Sweitzer v. Fisher, 172 Iowa 266, 273, 154 N.W. 465, 467 (1915) (stating degree by estoppel is unheard of, and student cannot compel issuance of degree based on claim of estoppel in pais).

In other cases, courts have upheld the dismissal of students based in large part on excessive absences. *See* Neel v. Indiana Univ. Bd. of Trustees, 435 N.E.2d 607, 612-13 (Ind. Ct. App. 1982) (affirming dismissal of student from dental school because of three unexcused absences where bulletin explicitly prescribed dismissal from school for three unexcused absences); Bonwitt v. Albany Medical Center School of Nursing, 77 Misc. 2d 269, 272, 353 N.Y.S.2d 82, 86 (Sup. Ct. 1973) (holding that suspension of student because of lack of responsibility and punctuality where adequate notice and hearing are provided is valid exercise of school's discretion). For a summary of cases involving grade reductions and other sanctions imposed by schools for excessive absences from class, see generally Bartlett, *Academic Evaluation and Student Discipline Don't Mix: A Critical Review*, 16 J.L. & Educ. 155 (1987).

571. 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971), *aff'd*, 42 A.D.2d 1051, 348 N.Y.S.2d 971 (1973), *aff'd*, 35 N.Y.2d 653, 318 N.E.2d 608, 360 N.Y.S.2d 419 (1974).

572. *See* Healy v. Larsson, 67 Misc. 2d 374, 375, 323 N.Y.S.2d 625, 626-27 (Sup. Ct. 1971) (citing Blank v. Board of Higher Educ., 51 Misc. 2d 724, 730, 273 N.Y.S.2d 796, 803 (N.Y. Sup. Ct. 1966)) (stating that authority of agent is not only that which is given by principal but, as to third parties, that which agent is held out by principal to have).

573. *Id.* at 374-75, 323 N.Y.S.2d at 626.

574. *See id.* at 375, 323 N.Y.S.2d at 626 (noting copies of statements from these officials

that although he successfully completed the subjects recommended to him, the school denied the A.A. degree; respondent college officials claimed that Healy failed to take proper credits in his area of concentration.<sup>575</sup> Without describing more precisely the particulars of the disagreement, the court noted that the facts in the case were similar to those in *Blank*.<sup>576</sup> The court found that Healy "satisfactorily completed a course of study at the community college as prescribed by authorized representatives of the college" and ordered the college to grant him the A.A. degree.<sup>577</sup>

The court in *Olsson v. Board of Higher Education of City of New York*,<sup>578</sup> another leading New York case involving an estoppel claim, reached the opposite result. Having completed the course requirements for the Master of Public Administration degree at John Jay College, Olsson chose the option of taking a comprehensive examination instead of writing a master's thesis.<sup>579</sup> It is undisputed that one of the professors, at a review session for the examination, misinformed the students that they would have to pass three out of five questions on the test, when in fact the college required students to receive a grade of three or higher on at least four questions.<sup>580</sup> Olsson's examination score was sufficient to pass under the erroneous criteria the professor stated but was insufficient under the correct criteria for passing, which were not embodied in any written regulations.<sup>581</sup> Because of the erroneous statement made by the professor, the academic appeals committee offered Olsson the chance to retake the comprehensive examination, but he declined.<sup>582</sup> Olsson

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lent support to Healy's claim that he consulted them regarding degree requirements at Schenectady Community College).

575. *Id.*, 323 N.Y.S.2d at 626.

576. *See id.*, 323 N.Y.S.2d at 626-27 (explaining that in *Blank*, court found that petitioner was entitled to degree because after consultation with agents of university, he took certain courses in manner consistent with what university officials prescribed).

577. *Id.*, 323 N.Y.S.2d at 627; *see also* *Eden v. Board of Trustees of the State Univ. of N.Y.*, 49 A.D.2d 277, 284, 374 N.Y.S.2d 686, 692 (1975) (issuing article 78 order on estoppel grounds and directing defendant to open promised new School of Podiatric Medicine and to enroll petitioners). The court noted that petitioners had declined offers of admission to other schools of podiatry in reliance upon assurance that school would open. *Id.* If petitioners were now denied the opportunity to attend the School of Podiatric Medicine, they would lose a year in the furtherance of their careers and possibly the chance ever to be admitted to a school of podiatry. *Id.* The court thus concluded that "there cannot be a clearer case for estoppel" and ordered the school to open. *Id.*

578. 66 A.D.2d 196, 412 N.Y.S.2d 615 (1979), *rev'd*, 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980).

579. *See Olsson v. Board of Higher Educ.*, 66 A.D. 196, 197, 412 N.Y.S.2d 615, 616 (1979) (stating that student enrolled in review class in preparation for exam), *rev'd*, 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980).

580. *Id.*, 412 N.Y.S.2d at 616.

581. *Id.* at 197-98, 412 N.Y.S.2d at 616.

582. *See id.* at 199, 412 N.Y.S.2d at 617 (noting that because of time elapsed since Olsson

argued that he had concentrated his efforts on three of the questions in reliance on the professor's misstatement and would have allocated his time differently and passed the examination if the misstatement had not been made.<sup>583</sup>

The supreme court granted Olsson's petition and the appellate division affirmed, holding that the school should be estopped from denying Olsson his degree.<sup>584</sup> The court found that the oral statements of the professors who conducted the review class bound the respondents, and that Olsson's situation resembled that of petitioners in *Blank* and *Healy*.<sup>585</sup> It concluded that the school and its officials engaged in "arbitrary and capricious conduct" in failing to confer a degree on him after he satisfied "the degree requirements established and publicized at the time."<sup>586</sup>

The court of appeals reversed.<sup>587</sup> While conceding that a principal must normally answer for the misstatements of an agent when the agent possesses apparent authority, the court declared that when the "principal" is an educational institution, rules cannot be mechanically applied if the result is to substitute the court's evaluation concerning a student's academic qualifications for that of the school.<sup>588</sup> In support of judicial deference, the court cited public policy considerations.<sup>589</sup> The granting of a degree by an educational institution certifies to society that a student is knowledgeable and competent within a particular field. If the credentials granted are to remain credible, the decision to grant them must be left to professional educators.<sup>590</sup>

The court found that John Jay College satisfied the central requirement of the implied contract between university and student—

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first took examination, as practical matter, opportunity to retake exam provided no real remedy).

583. *Id.* at 197, 412 N.Y.S.2d at 616.

584. *Id.*, 412 N.Y.S.2d at 615.

585. *See id.* at 198, 412 N.Y.S.2d at 616 (noting that Olsson, like Blank and Healy, was denied degree after adhering to manner of conduct prescribed by university officials).

586. *Id.* at 199, 412 N.Y.S.2d at 617; *see id.* at 197, 412 N.Y.S.2d at 615 (noting Olsson had respectable GPA of 3.54/4.00).

587. *Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 416, 402 N.E.2d 1150, 1155, 426 N.Y.S.2d 248, 252.

588. *Id.* at 413, 402 N.E.2d at 1152, 426 N.Y.S.2d at 251 (citing Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 (1978) and *Sofair v. State Univ. of N.Y.*, 54 A.D.2d 287, 292, 388 N.Y.S.2d 453, 456 (1976)); *see also* *Holloway v. University of Mont.*, 178 Mont. 198, 204, 582 P.2d 1265, 1269 (1978) (rejecting student plaintiff's argument that his faculty advisor's alleged erroneous advice constituted waiver of business school's degree requirements).

589. *See Olsson*, 49 N.Y.2d at 413, 402 N.E.2d at 1152, 426 N.Y.S.2d at 251 (stating judgments involving academic standards must be made by professional educators monitoring progress of students on regular basis).

590. *See id.* (noting that policy of judicial restraint in controversies regarding academic standards has been longstanding practice).

it acted "in good faith" in its dealings with students.<sup>591</sup> The college manifested its "good faith" when it offered Olsson the opportunity to retake his comprehensive examination.<sup>592</sup> It was pure speculation to argue that Olsson might have passed the examination if he had not heard the professor's "slip of the tongue" remark.<sup>593</sup> Thus, the court concluded that if the court awarded Olsson a diploma on equitable estoppel grounds, such actions would not reflect the considered judgment of the school that Olsson possessed the necessary skills to achieve the degree.<sup>594</sup>

The court distinguished Olsson's situation from that in *Blank* in which the student fulfilled all the academic requirements for graduation but merely "neglected some technical prerequisite in reliance upon the assurance of a faculty member."<sup>595</sup> While there was no question about Blank's academic competence, the same could not necessarily be said about Olsson, who might have failed the comprehensive examination even if he had not heard the professor's misstatement.<sup>596</sup> In closing, the court emphasized that an academic diploma awarded judicially should be reserved for extreme circumstances and should be considered only when there is no question as to whether a student has satisfied academic standards promulgated by school authorities.<sup>597</sup> The court concluded that Olsson's case was not egregious, that the opportunity to retake the test was a completely adequate remedy even if Olsson suffered some injury because of the professor's misstatement, and that the article 78 order should therefore be reversed.<sup>598</sup>

Another estoppel claim failed in *Shields v. School of Law, Hofstra University*.<sup>599</sup> Candia Shields, a first-year law student, failed a moot

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591. *Id.* at 414, 402 N.E.2d at 1153, 426 N.Y.S.2d at 251.

592. *Id.*

593. *See id.*, 402 N.E.2d at 1153, 426 N.Y.S.2d at 251-52 (noting that 23 of 35 students in class passed professor's exam despite his "slip of the tongue," thus indicating no necessary connection between professor's misstatement and passing exam).

594. *Id.*, 402 N.E.2d at 1153, 426 N.Y.S.2d at 252.

595. *Id.*; *see also id.* at 415, 402 N.E.2d at 1153, 426 N.Y.S.2d at 252 (citing *Blank v. Board of Higher Educ.*, 51 Misc. 2d 724, 273 N.Y.S.2d 796 (Sup. Ct. 1966)) (noting that unlike Olsson, Blank unquestionably fulfilled academic requirements for degree sought and sufficiently demonstrated competence to his professors).

596. *Id.* at 414, 402 N.E.2d at 1153, 426 N.Y.S.2d at 251-52. *But see id.* at 411, 402 N.E.2d at 1151, 426 N.Y.S.2d at 249 (noting that Olsson completed majority of his courses with honors average).

597. *See id.* at 416, 402 N.E.2d at 1154, 426 N.Y.S.2d at 252-53 (noting that judicial deference is particularly relevant where less drastic remedy is available that would not affect student's academic or professional career).

598. *See id.*, 402 N.E.2d at 1154, 426 N.Y.S.2d at 253.

599. 77 A.D.2d 867, 431 N.Y.S.2d 60 (1980).



court course.<sup>600</sup> She alleged that the assistant dean assured her that she could rewrite the brief and that if she did so satisfactorily, the F would not count in computing her cumulative GPA.<sup>601</sup> Even though Shields did satisfactorily rewrite the brief, the school continued to count the F in her GPA and she failed to attain a 2.00 GPA at the end of her third semester.<sup>602</sup> The school granted her petition for retention on probation, but when Shields failed again to attain a 2.00 GPA at the end of her second year, the law school dismissed her.<sup>603</sup>

Shields brought a proceeding seeking reinstatement, asserting estoppel, contract, and common law "arbitrary and capricious" claims.<sup>604</sup> She argued that the assistant dean's assurance caused her to refrain from appealing her F in moot court, but the court concluded that she failed to show any resulting prejudice.<sup>605</sup> First, she failed to allege that any appeal procedure even existed.<sup>606</sup> Second, even if there was a procedure, she did not allege that rewriting the brief and appealing the grade of F were mutually exclusive alternatives.<sup>607</sup> Thus, Shields failed to show that she abandoned a meaningful right because of the dean's assurances, or that she suffered any prejudice resulting from the dean's actions.<sup>608</sup> The court concluded that Shields did not meet the requirements for estoppel.<sup>609</sup>

An estoppel argument also failed in *Wilson v. Illinois Benedictine College*.<sup>610</sup> Wilson, an accounting major, received D grades in two economics courses, which he took during his fourth and fifth semesters of college study.<sup>611</sup> At the beginning of his eighth and final semester, the college informed him that he would not be allowed to graduate because he had failed to achieve grades of C or better in the two courses.<sup>612</sup> Wilson concededly would have qualified for graduation if it had not been for the two D's.<sup>613</sup> He sued. The county

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600. *Shields v. School of Law, Hofstra Univ.*, 77 A.D.2d 867, 867, 431 N.Y.S.2d 60, 61 (1980).

601. *Id.*, 431 N.Y.S.2d at 61.

602. *Id.*

603. *Id.*

604. *Id.* at 868, 431 N.Y.S.2d at 62-63.

605. *See id.*, 431 N.Y.S.2d at 62 (characterizing prejudice as essential element of estoppel).

606. *See id.* (noting absence of showing that instructor or other party had authority to change grade or that paper was deserving of higher grade).

607. *See id.* (noting that rewriting brief was condition for advancement to fall 1978 semester and did not necessarily preclude appeal of earlier grade).

608. *Id.*

609. *Id.*

610. 112 Ill. App. 3d 932, 445 N.E.2d 901 (1983).

611. *Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, 933, 445 N.E.2d 901, 904 (1983).

612. *Id.* at 934, 445 N.E.2d at 904.

613. *Id.*

circuit court issued an injunction in May 1982, ordering the college to award him a B.A. degree provided that he received grades of D or better in each of his spring 1982 courses.<sup>614</sup> It was undisputed that Wilson's faculty advisor, who met with him every semester and knew he wanted to graduate in 1982, did not warn him about the effect the D's would have on his right to graduate.<sup>615</sup>

On appeal, the Illinois Appellate Court reversed the injunction.<sup>616</sup> It rejected Wilson's claim that the college was estopped from refusing to graduate him because his advisor, an agent of the college, never informed him that his D grades would keep him from graduating on time.<sup>617</sup> The court found that because the bulletin provisions were unambiguous, it was not reasonable for Wilson to rely on his advisor to warn him of the consequences of the D grades.<sup>618</sup> While the bulletin recommended that students meet with their advisors for counseling at least once a semester, the court found that this was "an unenforceable expression of intention, hope, or desire,"<sup>619</sup> from which one could not infer any obligation of the advisor to notify Wilson of his academic deficiency.<sup>620</sup>

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614. *Id.* at 933, 445 N.E.2d at 903.

615. *Id.* at 934, 445 N.E.2d at 904. The advisor testified that he did not know about the two D's and, if he had, he would have discussed the grades with Wilson. *Id.*

616. *Id.* at 940, 445 N.E.2d at 908.

617. *Id.*

618. *See id.* (citing testimony by Wilson that after receiving deficient grades, he never inquired as to their effect or consulted school bulletin); *see also* *Hershman v. University of Toledo*, 35 Ohio Misc. 2d 11, 16, 519 N.E.2d 871, 876-77 (1984) (rejecting student's claims of fraud and misrepresentation by university official where student "did nothing to avail herself of University rules, requirements or regulations"). In deciding *Hershman*, the court made reference to its decision in *Walker v. Ohio Univ.*, No. 83-01395 (Ohio Ct. Cl. 1984). *Hershman*, 35 Ohio Misc. at 16, 519 N.E.2d at 877. In *Walker*, the court allowed plain catalogue language to prevail over a claim of reliance by the plaintiff Ph.D. candidate on a professor's statements. *Id.* Walker's adviser, Dr. Worrell, did not merely fail to inform him of the Ph.D. degree requirements; he actively misinformed him. Dr. Worrell told Walker that he could earn a Ph.D. degree without taking comprehensive examinations. *Id.* The court commented that Walker should have known better than to rely on such a statement. *Id.* First, Walker was not an uneducated teenager at the time the question of comprehensive exams arose. *Id.* The plaintiff was in his mid-twenties, had an undergraduate college degree, and had been involved in the graduate degree program for four years. *Id.* Second, the plaintiff knew that the catalogue for the graduate degree program required a student to take comprehensive examinations as a prerequisite for a Ph.D. degree. *Id.* In fact, the plaintiff brought up the matter with Dr. Worrell in 1978 when he decided to work on a Ph.D. *Id.* Third, the plaintiff's grounds for relying on what Dr. Worrell told him were weak in light of the positive language contained in the catalogue. *Id.*

619. *See Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, 940, 445 N.E.2d 901, 908 (1983) (noting statement in bulletin created no obligation for advisor to meet with student).

620. *See id.* (stating that there was no ambiguity in school's bulletin and thus refusing to graduate student was neither arbitrary nor capricious); *see also* *Banerjee v. Roberts*, 641 F. Supp. 1093, 1108-09 (D. Conn. 1986) (rejecting claim by neurosurgery resident that program director should be "estopped" from dismissing him because of his alleged reliance on representations by program director that he would be eligible for board certification if he completed residency program); *Cuddihy v. Wayne State Univ.*, 163 Mich. App. 153, 157-58, 413

While estoppel claims are rarer than due process or contract claims in academic challenge cases, *Blank* and *Healy* represent two of the most significant victories for academic challenge case plaintiffs.<sup>621</sup> In both cases, however, the academic record of the petitioner student was strong and unquestioned. Further, the dispute over whether a diploma was due did not relate to the quality of the student's work, but only to whether the school should be bound by the erroneous representations of a faculty advisor concerning the rules on such discretionary matters as class attendance policy and courses required for graduation.<sup>622</sup> Courts have been less willing to extend the estoppel doctrine to benefit students, like Olsson, Shields, and Wilson, whose academic performance was poor.<sup>623</sup> Where strict issues of academic standards are not at stake, however, *Blank* and *Healy* demonstrate that courts are ready to hold universities accountable for the representations of their faculty agents.<sup>624</sup> Thus, where faculty advisors misinform students about critical academic requirements, their misstatements may in some cases create both estoppel and contract claims against the university.

### CONCLUSION

The following represents an effort to summarize the author's views and to develop a "restatement" or model of what the law of student academic challenge cases should be. The author believes that the general state of the law in this area is sound, and that a substantial majority, but not all, of the cases were correctly decided. There are very good reasons for maintaining the strong tradition of

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N.W.2d 692, 695 (1987) (upholding dismissal of master's candidate because statement by academic advisor that student would be able to graduate and begin work by September was only opinion and did not constitute enforceable promise); *Bindrim v. University of Mont.*, 235 Mont. 199, 203, 766 P.2d 861, 864 (1988) (affirming that student was not entitled to degree based on promissory estoppel theory because he did not satisfy requirements found in university catalogue even if contractually modified as he alleged).

621. See *supra* notes 553-70 and accompanying text (holding that Blank proved elements of estoppel and directing university to confer B.A. degree on him); *supra* notes 571-77 and accompanying text (finding Healy satisfactorily completed program of study prescribed by agents of college and ordering college to grant him A.A. degree).

622. See *supra* notes 553-70 and accompanying text (discussing grades Blank received regarding courses in question and representations by faculty on class attendance policy); *supra* notes 571-77 and accompanying text (discussing representations of faculty members and grounds on which university denied degree to Healy).

623. See *supra* note 595 and accompanying text (distinguishing *Olsson* from *Blank* by noting that *Blank* unquestionably fulfilled academic requirements for degree); *supra* notes 599-603 and accompanying text (establishing that Shields could not maintain minimum GPA required by school); *supra* note 611 and accompanying text (explaining that Wilson received D's in classes where school required minimum grade of C).

624. See *supra* notes 567-70 and accompanying text (discussing Blank's estoppel claim); *supra* notes 573-77 and accompanying text (discussing Healy's consultation with university officials and his reliance on their advice).

judicial deference to universities' academic evaluations of students, and for distinguishing between academic and nonacademic misconduct.

Before one can identify precisely the rights of student plaintiffs in academic challenge cases, one must first clarify the precise nature of the university-student relationship. Apart from the fourteenth amendment, I see no intrinsic reason why public universities should be treated differently from private ones in this matter. Accordingly, without rejecting the extensive due process jurisprudence in this field, my preference is to base the law of all of these cases squarely on contract principles.<sup>625</sup> Thus, by virtue of matriculating, paying tuition and fees, and expending time and effort on the course of study, the student has a contractual right to be judged fairly, accurately, and consistently by the university in compliance with the institution's own rules. Under such a standard, arbitrary dismissals without any statement of reason, as in *Anthony v. Syracuse University*,<sup>626</sup> and dismissals for political or ideological reasons, as in *Samson v. Trustees of Columbia University*,<sup>627</sup> are a breach of contract.<sup>628</sup>

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625. Among the advantages of this approach would be to produce a uniform standard applicable to both public and private institutions, to reduce doctrinal ambiguity, and to establish unequivocally the principle that all students in higher education, including those in private institutions, have certain basic expectations and entitlements contingent on successful completion of their studies. One disadvantage is the hesitancy of many courts to apply strict commercial contract principles to the academic arena. Cf. *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626-27 (10th Cir. 1975) (positing that some elements of contract law may be used in defining rights in student-university relationship but rigid application of commercial contract law is not appropriate), *cert. denied*, 423 U.S. 898 (1975). There is, however, no reason why a modified "academic contract law" which safeguards institutions' ability to maintain academic standards should not be possible, and, indeed, as the contract cases discussed above demonstrate, it is in the process of development.

By the same token, one could, if desired, articulate the holding in the *Blank* case, which the author believes was correctly decided, in terms of quasi-contract or oral contract instead of the estoppel theory utilized therein.

626. 130 Misc. 249, 223 N.Y.S. 796 (1927), *rev'd*, 224 A.D. 487, 231 N.Y.S. 435 (1928). Statements that give the university the right to require a student's withdrawal at any time without mentioning any reason should be deemed unenforceable as a matter of contract law because they are unconscionable, against public policy, and part of a contract of adhesion. *Anthony v. Syracuse Univ.*, 130 Misc. 249, 257, 223 N.Y.S. 796, 806 (1927), *rev'd*, 224 A.D. 487, 231 N.Y.S. 435 (1928); see *supra* notes 110-17 and accompanying text (upholding dismissal of student for no stated reason because student voluntarily and knowingly relinquished her contractual right to be informed of reason for dismissal by signing registration card that contained waiver).

627. 101 Misc. 146, 167 N.Y.S. 202 (Sup. Ct.), *aff'd*, 181 App. Div. 936, 167 N.Y.S. 1125 (1917); see also *supra* notes 123-29 and accompanying text (upholding dismissal of student on grounds that antiwar speech was subversive of discipline of school and that student breached implied term of university-student contract).

628. An exception should exist for institutions such as seminaries, which should have the right to require some degree of religious conformity, for instance, of candidates for divinity degrees. See *Lexington Theological Seminary v. Vance*, 596 S.W.2d 11, 12 (Ky. Ct. App. 1979) (reversing trial court contract judgment ordering defendant to confer master of divinity degree on male homosexual student who had been "married" to another man for six years and now "desired to come out of the closet").

A contract right, however, does not imply an absolute right to continued enrollment regardless of academic performance.<sup>629</sup> Rather, the explicit and implicit rules and academic standards of the university comprise part of the "offer" extended by the university which the student accepts and agrees to upon matriculation. Moreover, the principle of "substantial performance" should apply: minor divergences from established university rules which do not violate the spirit of the rules should not confer a right of action on disgruntled students, nor should students at state institutions be able to contend that such divergences constitute a violation of their constitutional right of due process.<sup>630</sup> Significant or egregious departures from established rules by the institution, however, would give rise to a breach of contract claim by the student. The "arbitrary or capricious" standard would merge into contract law so that any action by the university deemed to be "arbitrary or capricious" would constitute a breach of contract.<sup>631</sup>

Next, we must consider what the student's contract right of continued enrollment entails insofar as academic evaluations and assessments are concerned. It does not mean a democratic right of students to collaborate in setting academic standards. This power must be retained by the faculty if academic freedom is to be safeguarded.<sup>632</sup> Everyone knows that there are students whose academic achievement is totally inadequate, whether because of

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629. See *Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir. 1977) (upholding dean's rejection of appeal committee's recommendation to change student's failing grade to "Incomplete"); *West v. Board of Trustees of Miami Univ.*, 41 Ohio App. 367, 383, 181 N.E. 144, 150 (1931) (stating absolute right to continued enrollment would be harmful to student, institution, and student body); *Foley v. Benedict*, 122 Tex. 193, 199, 55 S.W.2d 805, 808 (Ct. App. 1932) (denying writ of mandamus to student who argued that even though his grades fell below prescribed minimum mandating dismissal, as applied to him rule was unreasonable and arbitrary); *Marquez v. University of Wash.*, 32 Wash. App. 302, 306-07, 648 P.2d 94, 96-97 (1982) (affirming dismissal of student who failed to meet minimum academic standards despite breach of contract claim asserting that school failed to provide structured or mandatory tutorial assistance program), *cert. denied*, 460 U.S. 1013 (1983).

630. The contrary rule would be perverse in that it would penalize those institutions providing the fullest protections for students, and this might discourage other institutions from adopting such rules. See 3A CORBIN, CONTRACTS § 700, at 309 (1960 & Supp.) ("When a contract has been made for an agreed exchange of two performances, one of which is to be rendered first, the rendition of this one substantially in full is a constructive condition precedent to the duty of the other party to render his part of the exchange.").

631. The classic case of such "arbitrary and capricious" breach would be the bias and bad faith on the part of his instructor alleged by the plaintiff in *Connelly v. University of Vt. & State Agricultural College*, 244 F. Supp. 156, 161 (D. Vt. 1965). In *Connelly*, a professor at the College of Medicine who taught Connelly for several weeks in a summer make-up class allegedly decided from the start to fail him regardless of his prior work in the past semester and regardless of the quality of his work in the make-up class. *Id.* Indeed, the author has trouble imagining any other kind of behavior by the university serious enough to constitute an "arbitrary and capricious" breach of contract.

632. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) ("The four essential freedoms of a university [are] to determine for itself on academic

insufficient aptitude, lack of application, or nonacademic personal problems. To maintain the university's academic standards, such students must be dismissed. An obligation to retain them indefinitely despite their poor performance would undermine and eventually destroy the institution's academic standards and, in the case of professional schools, would vitiate the institution's obligation to protect society by requiring that a diploma certify achievement of a certain level of competence and skill.

Nevertheless, despite the general soundness of judicial deference to such academic evaluations by universities, the latter must not be permitted to immunize all their actions from judicial review merely by sweeping them under the broad rubric "academic."<sup>633</sup> Instead of thus giving carte blanche to the universities, courts must adopt a more discriminating approach.

I begin with three assumptions: (a) the vast majority of academic evaluations of students by professors are made in good faith and are reasonably objective and accurate;<sup>634</sup> (b) a small number of evaluations are inaccurate and thus unfair because of either the bias or carelessness of the professors involved; and (c) it is generally, but not always, impossible for a third party, such as a judge, to determine whether a given academic evaluation falls into group (a) or group (b) and, if group (b), what would constitute an accurate evaluation. If these assumptions are accurate, a presumption that academic evaluation decisions are objective and fair is reasonable and indeed unavoidable. By the same token, the long-standing tradition of judicial deference to universities' academic decisions is fundamentally sound.

As applied to student evaluations, however, the term "academic" encompasses a broad range of factors. It can be used to describe virtually any report or evaluation of a student that does not involve misconduct,<sup>635</sup> violation of disciplinary rules, or such other unre-

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grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

633. Justice Rehnquist's opinion in *Horowitz* illustrates the dangers of interpreting the term "academic" in too global a fashion. For example, Justice Rehnquist accepted without question the medical school's treatment of faulty personal hygiene as an "academic" trait. See *Horowitz*, 435 U.S. at 81 (reviewing medical school's argument that lack of personal hygiene was indication of student's ability to practice medicine).

634. This author does not believe that grading is capable of being entirely objective. On the margins between grades, moreover, this author often has no more than a "more likely than not" belief that an examination being graded deserves a C-plus rather than a B-minus, for instance. If greater assurance of precision and accuracy is demanded, a much higher proportion of the grades given would be questionable.

635. Such offenses as plagiarism and cheating on examinations, of course, are often referred to as "academic misconduct" but this is irrelevant here, since as noted previously, they are beyond the scope of this Article. See *supra* note 36 (discussing bounds of this Article).

lated matters as failure to pay tuition, excessive absence from classes, and failure to comply with administrative rules. But not all "academic" decisions and "academic" evaluations of students by professors are equally deserving of judicial deference, and courts have both the competence and responsibility to intervene to promote fairness in some cases. Accordingly, it is necessary to break down the broad "academic" category into its component parts and to analyze where and to what degree judicial intervention is warranted.

The purest example of the professor's academic role is the grading of student examinations, papers, and class performance. Justice Rehnquist in *Horowitz* was on solid ground when he stated that a professor's decision as to "the proper grade for a student in his course" requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.<sup>636</sup> Needless to say, a third party without knowledge or expertise in the subject matter of the course is generally incapable of assessing a student's performance on an examination in that course.

Even if a semester grade is totally dependent on the student's performance on a final examination, fair and accurate evaluation of the performance requires knowledge of assigned readings, what students were told to be responsible for, and what material was covered in class. In cases where class participation is a partial basis for a grade, the only qualified evaluator of class performance is the professor who was present at those classes, asked the questions, and listened to and evaluated the students' answers. The same holds true for what may be frequent interaction between the professor and the student outside of class. Thus, not only an outside jurist but even a colleague of the professor teaching the same course and using the same textbook is not completely qualified to evaluate such a student's performance.<sup>637</sup>

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636. *Horowitz*, 435 U.S. at 90. Justice Rehnquist included "the determination whether to dismiss a student for academic reasons" in the same generalization. *Id.*; see *supra* notes 216-21 and accompanying text (discussing dismissal of student for academic deficiencies).

637. The comment of Judge McAdam in *People ex rel. Jones v. New York Homeopathic Medical College & Hosp.* rings as true today as it did a century ago:

The court cannot re-examine the relator as to his qualifications to practice medicine, nor go over the studies in which he is said to be deficient. If it attempted to do so, the relator's road would be easy, for with his experience, imperfect though it may be, he would no doubt pass a better medical examination than any court could be expected to give him. The law wisely intended no such result. It leaves the subject where it belongs—with those qualified to master it.

*People ex rel. Jones v. New York Homeopathic Medical College & Hosp.*, 20 N.Y.S. 379, 380 (Sup. Ct. 1892).

Consequently, courts have refrained in all cases from second-guessing the grade assigned by a professor to a student and from endeavoring to determine the proper grade. In the sole instance in which the court heard expert testimony concerning the proper grade for a student's examination papers, the judge ended by throwing up his hands and disclaiming his ability to decide which testimony was more persuasive.<sup>638</sup> In this area, the need for judicial deference to academic evaluations and decisions is at its maximum.

Slightly less deference is due to those instances in which professors or administrators aggregate the evidence constituted by grades and other academic impressions concerning students to determine whether they should be promoted or graduated. Those making such decisions may be registrars, department chairs, or other professors who have not even had the student in class; such decisions sometimes consist largely of numerical data averaging.<sup>639</sup> Similar questions arise when aggrieved students contend that they have been denied equal protection or due process because they were denied graduation or the right to take an examination while other students with even weaker examination scores or academic records were not similarly penalized.<sup>640</sup> Such decisions are rarely

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638. *Nebraska ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 539, 116 N.W. 294, 297 (1908). As noted above, the only reason the court moved to enter this thicket was the unseemly spectacle of various members of a medical school faculty publicly disagreeing about the correct grades for a student's examinations and whether she was qualified to graduate. *Id.*

639. For instance, the court in *Stoller v. College of Medicine* scrutinized the process by which Dr. Nelson, Chairman of the Department of Pediatrics, aggregated six evaluation forms from physicians with whom Stoller worked (three "Pass" evaluations and three "Low Pass" evaluations), as well as the negative results of a ninety-minute special oral examination administered to Stoller, and concluded that the composite failing grade for the pediatrics clerkship was appropriate. *Stoller v. College of Medicine*, 562 F. Supp. 403, 413 (M.D. Pa. 1983), *aff'd mem.*, 727 F.2d 1101 (3d Cir. 1984).

640. See *Heisler v. New York Medical College*, 113 Misc. 2d 727, 731, 449 N.Y.S.2d 834, 837 (Sup. Ct. 1982) (granting injunction annulling plaintiff's academic dismissal as "arbitrary and capricious" and ordering her reinstated on grounds that school did not enforce mandatory dismissal rule against three classmates who failed same number of courses or even one more course), *rev'd*, 88 A.D.2d 296, 301, 453 N.Y.S.2d 196, 199-200 (1982) (holding dismissal of medical student because of low grades did not constitute abuse of discretion or lack of good faith, but rather decision was "based on a proper and legitimate, though subjective, judgement rendered within professional and academic milieu"); *aff'd*, 58 N.Y.2d 734, 459 N.Y.S.2d 27, 445 N.E.2d 203 (1982). Most courts have properly rejected contentions that courts should review such allegedly discriminatory academic dismissals. See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227-28 (1985) (holding decision by Promotion and Review Board barring student from taking NBME Part I second time was reasonable despite general school practice allowing students to retake exam); *Anderson v. University of Wis.*, 665 F. Supp. 1372, 1390-94 (W.D. Wis. 1987) (rejecting argument by law student dismissed because of low GPA that dismissal was discriminatory because other students with lower GPA's were allowed to continue because of extenuating circumstances including personal nonacademic problems); *Watson v. University of S. Ala. College of Medicine*, 463 F. Supp. 720, 727 n.3 (S.D. Ala. 1979) (holding that dismissal of student for academic deficiency was not arbitrary or capricious even though students with slightly higher grades were not dismissed); *Maas v. Corporation of Gonzaga Univ.*, 27 Wash. App. 397, 403 n.4, 618 P.2d 106, 109 n.4



pure arithmetical calculations, and courts should thus exercise great caution before concluding that the denial of a benefit to a student with seemingly better credentials than another student receiving the benefit constitutes illegal discrimination.<sup>641</sup> Despite this caution, however, if extreme and egregious disparate treatment of a student should occur which cannot be explained on the basis of any other relevant data, a court should have the power to conclude that such treatment violates the implied contract rights of a student who challenges it in court.<sup>642</sup>

Less judicial deference, although still a considerable amount, is due those "academic" decisions concerning academic and pedagogical policies of the university as to which reasonable educators can and do differ.<sup>643</sup> Among such questions are the following: (a) Should credit be denied for an excessive number of class absences, even if the student performs well on the final examination? (b) What grade point average should be required for retention at each state of the student's studies? (c) What grade point average and how many credits should be required for graduation? (d) Should D grades be given credit toward graduation and toward satisfaction of

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(1980) (affirming dismissal of Maas for academic deficiency although before law school accepted Maas, another student with lower GPA than Maas graduated, noting "[w]hat may have been one mistake, is not justification for a second").

641. An analogy can be made here with the admissions process, with respect to which the Supreme Court has acknowledged that fair decisionmaking need not be limited to mechanical numerical ranking by grade point averages and test scores, but that other factors such as promoting diversity within the student body can legitimately be taken into account. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (reviewing constitutionality of university's established affirmative action program when challenged by white student who was not admitted). By the same reasoning, universities deciding whether to retain a student or not should not be limited solely to mere numerical grades and test scores.

642. An instance in which I believe a court went too far was in permitting the plaintiff in *Maitland v. Wayne State Univ. Medical School* to retake only the contested part of a disputed examination over the medical school's opposition. *Maitland v. Wayne State Univ. Medical School*, 76 Mich. App. 631, 634, 257 N.W.2d 195, 198 (1977). While this might have seemed like a nonacademic issue to the trial court, the institution may have had a compelling academic reason for treating the examination, and a student's performance on it, as an indivisible whole.

643. *See Susan M. v. New York Law School*, 149 A.D.2d 69, 72, 544 N.Y.S.2d 829, 831-32 (1989), *aff'd as modified*, 76 N.Y.2d 241, 556 N.E.2d 1104, 557 N.Y.S.2d 297 (1990) (reversing trial court decision on grounds that grading of student's paper may have been irrational and that school owes student some degree of protection against possibility of arbitrary and capricious grading). The appellate division may have justified its remarkable intervention in the grading dispute because a harsh and seemingly arbitrary pedagogical policy was at issue. *Id.* at 73, 544 N.Y.S.2d at 831-32. As noted, the professor apparently assigned the petitioner zero credit for a 30-point essay answer because she discussed how New York law would apply and New York law was totally irrelevant. She would have received a good grade on the first part of her answer, discussing how Delaware law would apply, had she only refrained from writing further. *Id.* at 72, 544 N.Y.S.2d at 830-31. Nevertheless, while the pedagogical issue can be articulated in terms having nothing to do with the nature of the subject matter (corporate law), the court's intervention was inappropriate because it encroached on the heart of the academic evaluation area, where judicial deference should be at its height.

requirements in the student's major? (e) Can and should students who score only marginally above the grade point average levels for automatic dismissal be dismissed?

While such questions have no correct answers, normally courts defer to each institution to decide the answers for itself in the exercise of its institutional self-government and autonomy. Because such policies are somewhat arbitrary and debatable, however, courts should be less reluctant to intervene in order to ensure fair treatment of students where, for example, an otherwise compelling estoppel claim can be made by the student.<sup>644</sup>

Adoption of the foregoing model would not change the results in the great majority of reported cases, including the cases discussed above, indicating that the expansion of judicial intervention in the academic process would be extremely limited. It would, however, promote doctrinal uniformity by removing the distinctions between treatment of private and public university students. Moreover, it would establish a firm contractual basis for all the rights to fair treatment which should inure to the student because of the time, money, and effort that she expends on university education.

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

Thus, the long-standing tradition of deference to academic evaluations seems likely to remain strong for some time to come. Both procedural and substantive due process are likely to remain frail reeds for student plaintiffs, and contract and estoppel theories of recovery are also likely to afford little hope of relief. In a small minority of cases, however, where circumstances are so egregious that even the lay observer is left with an overwhelming conviction that the university has taken unfair action, courts can intervene positively. In all other instances where professors and universities act fairly and objectively, the living presence of the law in the background can exert a positive pressure in promoting these ends.

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644. See *Blank v. Board of Higher Educ.*, 51 Misc. 2d 724, 726, 731, 273 N.Y.S.2d 796, 798-99, 803 (Sup. Ct. 1966) (directing university to confer B.A. degree on student who relied on advice of head of psychology department and two professors that degree credit would be granted for two psychology classes taken without attendance).

