

**ACADEMIC DISMISSALS OF STUDENTS INVOLVED  
IN CLINICAL, INTERNSHIP OR EXTERNSHIP  
ACTIVITIES**

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**I. Academic v. Disciplinary Dismissals**

A. Courts have long recognized significant differences in the procedural requirements for dismissing students who violate student conduct codes versus dismissals for failure to meet academic standards.

1. Disciplinary Dismissals - These are usually based on determinations of fact not requiring any particular expertise; requires at a minimum notice and informal hearing.

a. "[A] charge of misconduct, as opposed to a failure to meet the scholastic standards of a college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses." Dixon v. Alabama State Bd. of Educ., 294 F.2d. 150, 158-59 (5th Cir.), cert. denied, 368 U.S. 930 (1961). The Dixon court held that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct. Id. at 158. Notice should include a statement of the specific charges and grounds which, if proven, would justify expulsion. The nature of the hearing should vary depending upon the circumstances of each particular case. Although the Dixon court did not require a full adversarial hearing with the right to cross-examine witnesses, it required that a student be given the names of witnesses against him/her and an oral or written report of their testimony. A student should also be provided an opportunity to present a defense against the charges and witnesses' testimony on his/her behalf. The results and findings of the hearing should be presented to the student. Id. at 158-59.

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b. In Goss v. Lopez, 419 U.S. 565, 581 (1975), the Supreme Court held that in the case of a suspension of a pupil from a public school for ten days or less, "the student must be given oral or written notice of the charges against him and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Goss requires that "students facing suspension and the consequent interference with a protected property interest" be given "some kind of notice and afforded some kind of hearing." Id. at 579 (original emphasis). The Court did not require that an institution afford the student a right to have counsel present, to cross-examine witnesses or to call his/her own witnesses, but required that there be at least an informal "give-and-take." Id. at 584.

2. Academic Dismissals - Academic dismissals differ from disciplinary dismissals because the former are based on expert and subjective evaluations of academic performance and/or professional skill.

a. In the landmark case of Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978), the Supreme Court found that "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct . . . calls for far less stringent procedural requirements in the case of an academic dismissal . . . . [T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making." Id. at 90. Therefore, the Court declined to require a hearing so as not to create an adversarial process and also to preserve the beneficial aspects of the student/teacher relationship. In his concurrence, Justice White suggested that in a case of academic expulsion, a student is at a minimum entitled to be informed of the reasons for dismissal and to an opportunity to personally state his/her side of the story. Id. at 96.

b. In Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985), the Supreme Court reaffirmed its reluctance to review academic decisions and held that judges should "show great respect for the faculty's professional judgment" and "not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise

professional judgment." In his concurrence, Justice Powell stated that "[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students is rarely appropriate, particularly where orderly administrative procedures are followed." Id. at 230.

B. Distinctions between-academic and disciplinary-dismissals are sometimes blurred by the courts.

1. Courts generally consider academic dishonesty such as cheating or plagiarism to be student misconduct subject to a disciplinary dismissal. Under this view, students are entitled to the higher level of due process afforded in disciplinary proceedings. See Jaska v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248-49 (E.D. Mich. 1984), aff'd per curiam, 787 F.2d 590 (6th Cir. 1986).

2. In Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984), the court classified a student's cheating on an exam, then lying about it, as an academic offense rather than misconduct. However, because the student/university relationship was contractual in nature and the student handbook which governed that relationship required a hearing in all cases involving "serious penalties," the court found that the university's contention that academic-related incidents did not require a hearing were unfounded. Id. at 531-33.

3. In Lightsey v. King, 568 F. Supp. 645 (E.D.N.Y. 1983), a Merchant Marine Academy student was accused of cheating on an examination. After being found not guilty by the school's honor board, Lightsey sought to have his exam grade reinstated. The professor refused and the school contended that the assignment of a zero grade was purely academic and thus within the purview of its faculty. The federal district court disagreed, holding that the reinstatement of the computed grade was "not an instance of discretionary grading" and that the matter was disciplinary, not academic, in nature. Id. at 648. The court took the unusual step of ordering the school to credit Lightsey with the computed exam grade.

C. Personal conduct as a component of academic evaluations.

1. Personal conduct can be considered a part of an academic evaluation. For example, conduct such as poor interpersonal skills

probably can be considered part of an academic requirement in programs of study where such skills are important (e.g. medicine). Less clear is the extent to which conduct giving rise to discipline under a conduct code can be considered in academic determinations (e.g. compromising expected ethical standards of a program) without a hearing.

a. In Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa. 1973), a first year nursing student was summarily expelled from a state college after failing to submit a required physical exam report, failing to inform the college of her previous attendance at another nursing school, and failing to attend classes regularly. The student sued, alleging a violation of due process for not having been given a prior hearing. The court found that the facts did not fit neatly into either academic or disciplinary category, but that the reasons for dismissal were more nonconformance with school regulations than academic deficiencies. Scholastic standards were not involved in the court's view but, rather, disputed facts which adapted themselves readily to determination in a due process hearing.

b. Compare Horowitz where the U.S. Supreme Court found matters of interpersonal skills, attendance and personal hygiene relevant to academic evaluation. See also Depperman v. University of Kentucky, 371 F. Supp. 73 (E.D. Ky. 1974), where the court upheld a medical school's refusal to readmit a student who had resigned in lieu of termination for interpersonal deficiencies.

c. In Cieboter v. O'Connell, 236 So.2d 470 (Fla. Dist. Ct. App. 1970), a Ph.D. candidate in education withdrew from employment as a teacher at a junior college in order to avoid an investigation concerning charges of misconduct. His supervisory committee at the university indicated that the matter would not be pursued, but refused to consider his dissertation or administer his final examination. A specially appointed committee advised him that in order to pursue his degree, he was required to participate in a program of personal counseling to assist in increasing his "openness" and to participate in a supervised practicum in counseling. Asserting that the committee had judged him guilty of misconduct without due process, the doctoral candidate sought a writ of mandamus compelling the university to follow its normal procedure. The court found that the alleged misconduct

was only one of a number of factors relating to his interpersonal relationships which the university had considered in concluding that he had not demonstrated satisfactory development in that aspect of his education. Noting that university authorities are uniquely qualified to judge such academic matters, the court affirmed the lower court's denial of the writ as a matter of law.

d. Sohmer v. Kinnard, 535 F. Supp. 50 (E.D. Md. 1982), involved a pharmacy student who, during his externship at a pharmacy, was observed working in an impaired condition as a result of his improperly taking two prescription drugs. The student also pleaded guilty to criminal charges of possession of cocaine in an unrelated incident. The student was provided a disciplinary hearing on the above acts and was found guilty and dismissed, but was informed that he could reapply when he could demonstrate that he did not have a drug problem and could act in accordance with his profession's code of ethics. He sued for injunctive relief ordering reinstatement. The court found that the student would not suffer irreparable harm but that the university would suffer significant harm to its reputation and externship program if an injunction was issued. Id. at 53. It also determined that the process accorded the student more than met the requirements of Dixon, and thus the student was unlikely to succeed on the merits at trial. Id. at 54. Finally, the court found that the university's rule providing that "when the actions of a student are judged...to be detrimental to the interests of the University community, that person may be required to withdraw from the University" was not vague, as a senior pharmacy student would undoubtedly be aware that the "illegal use and possession of narcotic drugs would violate the law and the Code of Ethics of his profession and would therefore be detrimental to the interests of the University." Id. The motion for injunction was denied.

**II. Due process protections are derived from two sources: the Fourteenth Amendment of the United States Constitution and general principles of contract law.**

A. For public institutions, challenges to academic or disciplinary dismissals are generally based on allegations that an institution has

deprived a student of a liberty or property interest in violation of the Fourteenth Amendment. See Horowitz, Goss, Ewing.

1. The following factors must be considered in identifying the specific dictates of due process. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

- a. the private interest that will be affected
- b. the risk of an erroneous deprivation of such interest through the procedure used and the probable value of additional or substitute procedural safeguards
- c. the government's interest, including the burden that additional procedural requirements would entail

2. In the case of an academic dismissal, deprivation of a liberty interest requires some publicizing of the reasons for the action which imposes a stigma or other disability that forecloses the freedom to take advantage of other opportunities. Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)).

3. To establish a property interest in a benefit, a student must show more than an abstract need or desire for it. Rather, she must have a legitimate claim of entitlement to it. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

4. Examples of recognized liberty and property interests.

a. In Greenhill, 519 F.2d at 8, the court found that a medical student was deprived of a significant liberty interest in future medical education when the school that dismissed him for academic reasons also notified the American Association of Medical Colleges that he lacked "intellectual ability."

b. The Dixon court found that the "private" interest involved in the case was "the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing." Dixon, 294 F.2d at 157.

c. In Goss, the Court stated that "the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." Goss,

419 U.S. at 574. The Court also found that charges of misconduct could seriously damage the students' reputations and interfere with later opportunities for higher education and employment, therefore infringing a liberty interest. Id. at 575-76.

5. However, the U.S. Supreme Court has not yet determined whether the dismissal of a student from a public college or university for academic reasons involves a property or liberty interest.

a. Horowitz found it was not necessary to determine if the medical resident's academic dismissal deprived her of a liberty interest or a property interest (although no property interest was claimed) because it found that the resident was awarded at least as much procedural due process as is required by the Fourteenth Amendment when such deprivation takes place. Horowitz, 435 U.S. at 84-85. The Court assumed without deciding that it could rule on a substantive due process claim under an "arbitrary and capricious" standard, and found no evidence that such actions had taken place. Id. at 91-92.

b. Ewing assumed the existence of a constitutionally-protected property right in the student's continued enrollment and held that even if the assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state actions, there was no evidence of such action. Ewing, 474 U.S. at 223.

6. A number of lower courts have recognized a property interest in continued enrollment at a college or university. See, e.g., Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (recognizing a property interest in a nursing student's continued enrollment in a state vocational school); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1978) (recognizing that a graduate student has a property interest in the continuation of his studies); Stevens v. Hunt, 646 F.2d 1168, 1169 (6th Cir. 1981) (stating that a qualified property right in studying medicine has long been recognized in Tennessee); See also Schweitzer, 41 Am. U.L. Rev. 267, 274 n.30, 314-16 (1992).

7. Failure of an institution to comply with its own procedures does not in itself violate a constitutional right to due process if the process a student receives meets the minimum due process requirements of



the constitution. Schular v. University of Minn., 788 F.2d 510 (8th Cir.), cert. denied, 479 U.S. 1056 (1987).

B. Due process issues in private institutions arise in the context of allegations of breach of contract.

1. The relationship between a private university and a student is contractual in nature. In Corso v. Creighton Univ., 731 F.2d 529, 531 (8th Cir. 1984), a medical student expelled for cheating was required to prove that the university breached a contractual right in the procedures it used to expel him. The court required that the student be provided the procedural safeguard of a fair hearing and the right to appeal, pursuant to the university's handbook. Id. at 533.

2. The source of such contract rights are university catalogs, student handbooks, other published guidelines and oral representations by teachers and administrators. See Schweitzer (1992), p. 339.

3. Generally, courts hold that a private institution is bound by its own published guidelines or rules. See Tedeschi v. Wagner College, 404 N.E.2d 1302 (N.Y. 1980). "[W]hen a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed." Id. at 1306.

4. In Napolitano v. Princeton Univ. Trustees, 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982), the court noted that the relationship between a private institution and its students cannot be described in purely contractual terms, but acknowledged the role that contract principles play. The court also found that the principles set forth in Horowitz accurately stated New Jersey's law in this arena. Id. at 275.

5. However, because the student-university relationship is unique, courts have cautioned against the rigid application of contract law to the relationship between student and university. Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir.), cert. denied, 423 U.S. 898 (1975).

6. Public institutions also recognize the existence of a contractual relationship between students and universities with the result

that students may sue for breach of contract. See Ross, 445 F. Supp. at 152.

C. Educational institutions must also comply with requirements of state administrative or statutory law regarding due process. See, e.g., Morrison v. University of Or. Health Sciences Ctr., 685 P.2d 439 (Or. Ct. App. 1984).

### III. Students Involved in Clinical or Internship/Externship Activities

#### A. Medical Students

1. Horowitz, the seminal case which set forth the procedural due process requirements for a case of academic dismissal, involved a medical student who had received negative evaluations in her final year of study. Her negative evaluations were based on her poor performance in all clinical patient-oriented settings, her erratic attendance at clinical sessions, and her lack of concern for personal hygiene. After continued negative reports and several reviews, she was dismissed. She sued, claiming her right to procedural due process had been violated. Assuming a liberty and property interest, the U.S. Supreme Court held that because academic dismissals require expert evaluation and judgment, it would decline to enlarge the judicial presence in the academic community. It further held that no hearing is required in such cases. On the substantive due process claims, it held that assuming review of a decision under an "arbitrary and capricious" standard were appropriate, no showing of arbitrariness or capriciousness had been made.

2. In Stoller v. College of Medicine, 562 F. Supp. 403 (M.D. Pa.), aff'd, 727 F.2d 1101 (3d Cir. 1984), a medical student was placed on academic probation for academic difficulties and an inappropriate attitude reflected in unprofessional exam responses. After he failed major clerkships and received further negative evaluations the promotions committee voted to dismiss him. The student was afforded an opportunity to explain his poor performance before the committee and the dean, but the dismissal was upheld. Upon hearing the student's claim that his procedural and substantive due process rights had been violated, the court found that the student had received notice and an informal hearing at which he was given an opportunity to respond and after which he was

informed of the outcome. This was held to be adequate due process. The court further found that because there was a rational factual basis in his receiving a failing grade and the faculty member was not motivated by bad faith or ill will, no finding of arbitrary or capricious action was warranted.

#### B. Nursing students

1. In Clements v. Nassau County, 835 F.2d 1000 (2d Cir. 1987), a nursing student alleged that faculty members' bad faith grading and evaluation of her clinical performance resulted in her inability to graduate. She had repeatedly demonstrated unsafe clinical behavior but was given several opportunities to improve her record. Although an academic committee recommended that she be allowed to take a final course for a third time in order to achieve a passing grade, a faculty member refused to change her prior failing grade. The court found that in cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance. Because there existed no such evidence and the college's four-step grievance procedure met the minimum standards of due process, the court affirmed the grant of summary judgment.

2. In Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975), the school's student manual provided that "the faculty reserves the right to dismiss at any time a student whose health, work or conduct demonstrates any lack of fitness to continue the program." After unsatisfactorily performing her clinical training program, the nursing student was placed on probation and later dismissed by the school board. She alleged a deprivation of her right to due process in that the dismissal was unreasonable, arbitrary and capricious, and a deprivation of a property right. The court recognized a property right had vested in the student, especially in light of the fact that she had paid a tuition fee. However, because all that is required by due process is that the student be made aware prior to termination of failure or impending failure, there was no due process violation in this case. Absent evidence of ill will, the court would not review her academic record.

### C. Law Students

1. In Miller v. Hamline Univ. Sch. of Law, 601 F.2d 970 (8th Cir. 1979), a law student who was dismissed for deficient grades was denied readmission to the law school. The student brought suit, seeking readmission and claiming denial of due process because he was not allowed to appear before the admissions committee at a formal hearing. Because he was informed of his impending dismissal, was permitted to submit a written presentation to the admissions committee and was given the opportunity to privately contact the committee members, the court held that he was not denied due process.

2. In Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987), aff'd, 841 F.2d 737 (7th Cir. 1988), a law student who suffered from alcoholism and had previously withdrawn from school due to poor grades was informed that he could not return to school because of his academic deficiency. He petitioned the retentions committee for permission to continue his law studies several times, but was rejected because the committee concluded that he had not made sufficient progress toward overcoming his alcoholism to enable him to undertake the intensive work necessary to complete a legal education. Appeals to the school's higher authorities resulted in continued denial of readmission. The student brought a handicap discrimination claim against the school under § 504 of the Rehabilitation Act of 1973. Because he was unable to prove that he was excluded from the school solely by reason of his handicap, nor was he able to prove he was "otherwise qualified" to continue in school since he was unable to meet the required academic standards, this claim failed. He further alleged violations of substantive and procedural due process. The court concluded that he had submitted no evidence of a property right in being readmitted nor any evidence of arbitrariness or capriciousness in the school's decision. Furthermore, the court found that the procedure he was afforded exceeded those which were constitutionally required.

### D. Dental Students

1. In Davis v. Mann, 882 F.2d 967 (5th Cir. 1989), a dental student had received satisfactory evaluations in other areas of practice but was determined to be unsatisfactory in the family practice rotation.

A faculty committee voted to dismiss him for academic reasons and afforded him an ad hoc hearing which he attended with counsel. After the hearing his dismissal was reaffirmed. The resident filed a procedural due process claim against the school's Board of Trustees and the dean. Without deciding what type of interest the student had in continuing the program, the court held that he had received all the process he was entitled to under the Fourteenth Amendment.

#### E. Optometry Students

1. In Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir.), cert. denied, 493 U.S. 810 (1989), an optometry student who suffered from retinitis pigmentosa and an associated neurological condition was unable to pass a newly implemented pathology clinic proficiency requirement because he could not perform certain instrumental techniques due to his physical affliction. The student appealed to the admissions committee requesting that the requirement be waived since it had not been in effect at the time of his admission. The committee and the Board of Trustees denied his appeal but granted him additional time to perfect the techniques, which he failed to do. When the school refused to grant him a degree, he filed suit, alleging a violation of § 504 of the Rehabilitation Act of 1973 and breach of contract. The court found that § 504 does not require a school to lower reasonably necessary standards to accommodate an individual whose handicap prevents him from meeting them. The court further held that implicit in the university's general "contract" with its students is a right to change its academic requirements if such changes are not arbitrary or capricious.

#### F. Graduate Students

1. In Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985), a graduate student in the last phase of a Ph.D. program held the position of assistant instructor ("AI") at the same university. After receiving complaints about the method and content of her teaching, the chair of the department met with the AI. The AI objected to a request that she use a Texas government text and to any review of her syllabus. Consequently, the chair reassigned her to an AI position without teaching responsibility. Although a grievance committee ruled that she was denied due process,

the president rejected that finding. She filed suit, claiming that her reassignment to a non-teaching position without a prior hearing amounted to a violation of procedural due process. The court did not determine whether the AI had a property interest in her position because she remained an AI, albeit with different duties. The contract to teach that particular course had expired, and thus she had no property right in those duties. The reassignment did not constitute a constructive discharge. No liberty interest was infringed upon as no stigmatizing charges were made public.

2. Wilkenfield v. Powell, 577 F. Supp. 579 (W.D. Tex. 1083), involved a psychology graduate student. The case briefly mentioned an internship at the university's counseling center, but really focused on the fact that the student repeatedly missed deadlines for passing his preliminary oral examinations and was dismissed. He argued that because the university did not completely comply with established procedures, its actions were "per se" arbitrary and capricious. He also claimed a property right in a degree and alleged that his dismissal was based on nonacademic grounds. The court found that the dismissal was based on academic grounds and that the student received more than enough due process. It thus denied his motion for preliminary injunction.

3. Harris v. Blake, 798 F.2d 419 (10th Cir. 1986), cert. denied, 479 U.S. 1033 (1987), also involved a psychology graduate student enrolled in a counseling course. The course was an in-class practicum rather than an internship/externship. He withdrew from the course after missing a number of classes and client appointments. His professor wrote a letter about his behavior which stated that he had "exhibited specific behaviors of being incompetent and unethical" in the practicum and placed it in his file. Id. at 420. A later counseling instructor received a copy of the letter. Poor grades resulted in his withdrawal from the program. He learned of the letter and claimed that he had been denied of a property and liberty interest, contending that the placement of the letter in his file was disciplinary. The court found that although there were factual issues regarding whether the placement of the letter in his file was appropriate and whether the letter affected the grades he received in later courses, the case was academic and the procedures provided his were more than adequate (note that he was given

the opportunity to challenge the letter and the grades before an appeal board). Id. at 424-25.

#### G. Education Students

1. In Bower v. O'Reilly, 318 N.Y.S.2d 242 (N.Y. App. Div. 1971), the university suspended a student pursuing a Master of Social Work degree after he received a grade of "U" (unsatisfactory) in the "field work" portion of his studies, although he carried a "B" average in his academic courses. A university rule reserved the right to terminate the registration of any student who did not meet the university's standards. The student claimed the suspension was arbitrary and in violation of his constitutional and contractual rights. The court noted that it could not interfere with the administrative decision of an educational institution unless an abuse of discretion were found. Finding no such abuse, the court dismissed the petition as a matter of law. Id. at 244.

2. In Aubuchon v. Olsen, 467 F. Supp. 568 (E.D. Mo. 1979), a student fulfilling his student teaching requirement exhibited unacceptable behavior such as joking with students during class, deviation from lesson plans, lecturing at inappropriate times, and asking students to consider the statement "I have seen the ghost" when they were to be taking an examination. At a meeting held to discuss this behavior, the student was completely uncooperative. The high school then refused to permit him to continue teaching and a university faculty member wrote a note to the dean advising him that the student's bizarre behavior indicated he may be suffering from an emotional illness. The letter was apparently placed in the student's file. The student was administratively dropped from the student teaching course but was permitted to apply for readmission. The student brought suit, alleging that his right to due process had been violated. The court noted that absent a stigma to the student's reputation, it could not disturb a decision to dismiss a student for academic failures unless there were evidence of bad faith or arbitrary action. Id. at 572. The court found that because the note was not the basis of the dean's decision to drop the student from the course and there was no evidence that its contents would be revealed to others, it created no stigma to the student. The

court further found that the decision was clearly supported by the facts and thus was not arbitrary or made in bad faith. Finally, the court concluded that assuming that the student was entitled to a hearing, the meeting provided sufficient due process. Id. at 572-73.

3. In Hoffman v. Grove, 301 S.E.2d 810 (W. Va. 1983), a student dismissed from a college student teaching program for such problems as the improper grading of papers and the misspelling of words on the blackboard brought a mandamus action, alleging that he was not given prior notice or an opportunity to be heard before his dismissal and requesting reinstatement in the program. The court declined to address the procedural due process question because the student did not avail himself of the college's established grievance procedure for contesting academic evaluations. Id. The court further noted that the student was dismissed only from the student teaching program and not from the college.

#### F. Pharmacy Students

1. Ikpeazu v. University of Nebraska, 775 F.2d 250 (8th Cir. 1985) involved a pharmacy student who repeatedly failed his "clerkships" because he made errors of observation, analysis and labelling which could have had serious medical consequences for patients. After failing in his appeals of his grades, he was suspended and he sued, alleging violations of due process and racial bias. The court found that the student was provided more than adequate process under the less stringent procedural requirements in academic situations, and that there was insufficient evidence to show unlawful bias.

#### IV. Tandem Proceedings -- Consideration of Disciplinary Actions in Academic Dismissals.

A. Courts have consistently held that an institution may discipline students for off-campus misconduct. See, e.g., Krasnow v. Virginia Polytechnic Instit. & State Univ., 414 F. Supp. 55, 57 (W.D. Va. 1976), aff'd, 551 F.2d 591 (4th Cir. 1977) (holding that a university may discipline students for unlawful use or possession of drugs); Kusnir v. Leach, 439 A.2d 223 (Pa. Commw. Ct. 1982) ("a college has a vital interest in the character of its students, and may regard off-campus



behavior as a reflection of a student's character and his fitness to be a member of the student body").

B. Consideration of academic dishonesty or other forms of unethical student misconduct that result in disciplinary actions during academic dismissal proceedings is an issue yet to be fully addressed by the courts.

1. Gehring et al., National Association of Student Personnel Administrators, Inc. (1986), have discussed the issue of double jeopardy in cases of academic dishonesty/academic dismissals. They state that graduate and professional schools may argue that they have a higher standard of moral and ethical behavior. Thus, they may choose to initiate charges against a student for violating professional standards or ethics as a separate issue growing out of the same act of academic dishonesty. They further argue that double jeopardy would not be involved since the student is accountable to two separate jurisdictions -- institutional standards of academic dishonesty and the ethical standards of a particular profession. Gehring et al. (1986), p. 16-17.

2. Courts and institutions may consider unethical behavior or other inappropriate conduct while citing academic shortcomings as the primary reason for academic dismissals, thus avoiding the double jeopardy issue. Anderson (see III. C. above) involved a law student with poor grades and suffering from alcoholism who was dismissed from school. The school recognized that the alcoholism was a major cause of his academic difficulties, and further cited his conduct while enrolled in law school (harassment of his legal writing partner, the need to be escorted from a class he was attending while intoxicated and reports that other students felt threatened by his behavior, to the detriment of their own education) as reasons for believing that more than the beginning stages of rehabilitation were needed before he would be readmitted. Anderson, 665 F. Supp. at 1375, 1381. Although no disciplinary actions were taken in response to his behavior, the school in fact considered it apart from his academic underachievements. The court upheld his dismissal, finding no substantive or procedural due process violation.

## V. Avoiding Academic Dismissal Challenges.

A. Milam and Marshall, 13 J.C. & U.L. 335 (1987), suggested the following guidelines to reduce or eliminate prospective claims.

1. Identify academically inadequate students early.

a. A substantial portion of academic dismissal cases in medicine and other graduate and professional programs are characterized by a history of "repeated shortcomings, academic deficiencies, and irregular progress." Milam and Marshall (1987), p. 346 (quoting Petition for Writ of Certiorari, Ewing).

b. Students who have invested substantial time and money in graduate or professional programs are most likely to sue when they are dismissed because the universities have allowed them to continue their educations in the belief that they will receive a degree. Id., p. 347.

c. Consequently, an academically inadequate student who is dismissed early from a program does not have the same financial and personal investment; therefore, such a student may be less likely to initiate a lawsuit. Id.

d. It appears that early dismissals do not result in additional legal risk to institutions. Id. See Watson v. University of S. Ala. College of Medicine, 463 F. Supp. 720 (S.D. Ala. 1979) (court upheld the academic dismissal of a first year medical student even though the evidence showed that students with similar records were given the opportunity to repeat their first year).

2. Notify the student of deficiencies in performance.

a. Students who receive regular evaluations that are negative may be less surprised by an eventual dismissal and less likely to sue than students who receive no evaluations. Programs should consider providing students with individual evaluations from residents and faculty rather than condensing them into a single report. Milam and Marshall (1987), p. 348.

b. Although faculty are required to evaluate behavior, personality and other personal characteristics of students in a clinical setting, there is little risk of liability for defamation if such evaluations are honest and made in a good faith exercise of professional judgment. Id., p. 348-50.

3. Establish criteria for minimum performance and enforce them consistently through a system of central control.

a. Problems arise when institutions fail to consistently enforce their criteria for minimum academic performance. Students who perceive that they are treated more harshly are more likely to seek legal redress. Id.

b. Professors should generally not alter or adjust these standards, but rather should leave appeals of grades or evaluations to the body established for that purpose. Id., p. 351.

c. An individual improvement plan can be developed to aid a student who has been identified as academically deficient. Such treatment is legal and beneficial to both the student and the institution. Id., p. 352.

B. Irby et al., 8 J.C. & U.L. 102, 111 (1981-82), recommend the following basic components for faculty review of academic proficiency.

1. Faculty assessment of student cognitive and noncognitive performance at the course level.

2. Review of student progress throughout medical school by a standing committee. The committee determines whether remedial work is needed or the student should be dismissed.

3. Student appeal of the committee's decision to the dean. Rules should stipulate that the dean's decision is final.

C. Schweitzer suggests basing the law of academic dismissals for both private and public institutions on contract principles. Schweitzer (1992), p. 361.

1. Advantages to this approach include the following. Id., p. 361 n.5.

a. Produces a uniform standard applicable to both public and private institutions.

b. Reduces doctrinal ambiguity.

c. Establishes the principal that all students in higher education have basic expectations and entitlements contingent on the successful completion of their studies.

2. Schweitzer believes that a modified "academic contract law" (as opposed to strict contract principles) which safeguards institutions'

ability to maintain academic standards is currently in the process of development. Id., p. 361.

3. The explicit and implicit rules and academic standards of the university comprise part of the "offer" which the student accepts and agrees to upon matriculation. Id., p. 362.

4. The principal of "substantial performance" should apply: minor divergences from established university rules should not confer a right of action nor constitute a violation of due process. Id.

5. Any university action deemed to be "arbitrary or capricious" would constitute breach of contract. Id.

6. The long-standing deference by courts to academic evaluations should generally remain. Id., p. 364-67.

a. The most judicial deference is due in cases of determining the proper grade for a course.

b. Slightly less deference is due in cases where academic impressions are used to determine whether students should be promoted or graduated.

c. Less deference is due in decisions concerning academic and pedagogical policies of the university, such as what grade point average and number of credits are required for graduation, or whether credit should be denied for excessive absence from classes.

#### D. Additional recommendations

1. Schools should develop the best possible means to identify candidates during the admissions process who are most likely to succeed in the program of study.

2. Once admitted, students' academic deficiencies should be well documented. In addition, faculty should not provide contradictory evaluations (e.g., good letter of recommendation notwithstanding poor performance).

3. Students should not be given too many opportunities to improve performance. These can create heightened expectations by students and inconsistent application of standards.

4. Too many layers of review of academic performance may not provide significantly greater protection from allegations of due process violations. Instead, such reviews can create procedural errors,

waste institutional resources, and may open the door for allegations of due process violations from the school attorney advising multiple review bodies (and may give rise to professional responsibility issues).

5. Educate faculty about the need to define and apply academic standards as consistently as possible, to identify problems early, to document poor performance, and to be honest in their evaluations.

## VI. The Future of Due Process in Academic Dismissals

A. The above cases indicate that courts have continued to follow the due process requirements in cases of academic dismissals as outlined by the U.S. Supreme Court in Horowitz. Although the Supreme Court has not yet determined whether a property interest exists in these cases, many lower courts continue to recognize such rights and it is likely the Supreme Court would do the same if it addressed the question. Some courts "assume" such rights because, in most cases, more than the required due process has been provided the student. Recent cases indicate that the courts will continue to defer to the expert and professional subjective judgments of school officials in cases of academic dismissals.

### B. Recent Cases

1. Ezekwo v. NYC Health and Hosp. Corp., 940 F.2d 775 (2d Cir.), cert. denied, 112 S. Ct. 657 (1991). A brochure given to prospective medical residents stated that each resident would serve as Chief Resident for four months during the third year. During her second year, a female resident wrote several memoranda complaining of shortcomings in the attending physicians' management and teaching skills. She soon received poor evaluations which she claimed were in retaliation for her opinions. Faculty members then decided to change from a rotational system to a merit system for selecting a Chief Resident and chose not to appoint the plaintiff Chief Resident. The resident brought suit alleging a property interest in the position of "Chief Resident" which she claimed she was denied without due process. She further alleged that the hospital interfered with a protected liberty interest. The court held that the "policies and practices" of the institution were such that a property interest existed in the position of Chief Resident. Because the

decision to pass over the resident resulted from the hospital's decision to adopt entirely new selection criteria and these criteria were not made known to residents in the program until after the decision to bypass had been made, the court found that insufficient due process had been provided. Damages were awarded in the amount of the pay difference that accompanied the designation of Chief Resident.

2. Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991). A third year dental student at Washington University was disenrolled by a university committee due to his positive HIV status because of the risk of transmission of the disease to patients. The committee explored ways in which the student's career objectives might still be accommodated and even reviewed opportunities for admission to a dental school which operated a clinic solely for HIV-infected patients. When the student did not respond to an offer of an indefinite leave of absence, he was dismissed. He filed an action alleging discrimination in violation of § 504 of the Rehabilitation Act of 1973. The court found that the decision to disenroll the student was wholly academic, but held that he had not established that he was "otherwise qualified" for participation in the program due to the significant risk of communicating the disease that he posed. The court further found that the university had not acted arbitrarily in its dismissal of the student, thus not violating his substantive due process rights.

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