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An Introduction to Student Affairs and Student Disciplinary Issues: Preventing and Litigating Legal Challenges to the Discipline and Grading of Students

AN INTRODUCTION TO STUDENT AFFAIRS AND STUDENT DISCIPLINARY ISSUES: PREVENTING AND LITIGATING LEGAL CHALLENGES TO THE DISCIPLINE AND GRADING OF STUDENTS[1]

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I. Introduction

For decades, courts have recognized that there are legal principles that apply to the relationships that colleges and universities have with their students. As the last years of the Millennial Generation move across our campuses, we have to consider how those principles apply to a world in which students sue their parents over private school tuition and enrollment decisions[2], and their universities over receiving a C+.[3] Unsurprisingly, colleges and universities are facing a rising tide of claims from students over academic and conduct issues.[4]

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[1] This current version of these materials edited by Madelyn Wessel. Earlier versions of this manuscript were prepared and presented by NACUA presenters Marla Morgan, Amy C. Foerster, Olabisi L. Okubadejo, Kevin D. O'Leary, Jennifer Papillo and Monica Barrett.

[2] *See* Peggy Wright, *High school senior suing parents for college tuition*, USA TODAY (Mar. 3, 2014), https://www.usatoday.com/story/news/nation/2014/03/03/student-sues-parents-college-tuition/5967279/; *see also* Laura Ly & Marina Carver, *New Jersey student drops her lawsuit against parents*, CNN (Mar. 18, 2014), http://www.cnn.com/2014/03/18/justice/new-jersey-parents-lawsuit-dropped/ (see embedded video titled "Judge's hard words for teen suing parents" in which the presiding judge questions whether a ruling in favor of a student suing for tuition would "open the gates to a 12 year old to sue for an X-box, a 13 year old to sue for an iPhone . . . ?").

[3] Peter Hall, *Superior Court affirms rejection of Lehigh student's grading lawsuit*, THE MORNING CALL (Nov. 7, 2014), http://www.mcall.com/news/breaking/mc-megan-thode-ruling-20141107-story.html; *see* Kaye Wiggins, *Oxford Sued Over Grades by Student Who Didn't Get Into Yale*, BLOOMBERG (Nov. 21 2017), https://www.bloomberg.com/news/articles/2017-11-21/oxford-sued-over-grades-by-student-who-couldn-t-get-into-harvard; Sari Lesk, *UWSP student asks court to force poetry professor to give her an A*, STEVENS POINT J. (June 8, 2017), https://www.stevenspointjournal.com/story/news/education/2017/06/07/uwsp-student-asks-court-force-poetry-professor-give-her/357759001/; *see also* Rachael Pells, *Professor Says Students Should Choose Own Grades to Help Reduce Stress*, INDEPENDENT (Aug. 9, 2017), https://www.independent.co.uk/student/news/students-should-choose-own-grades-reduce-stress-school-university-professor-dr-richard-ricky-watson-a7884596.html.

[4] *See, e.g.*, T. Rees Shapiro, *Expelled for sex assault, young men are filing more lawsuits to clear their names*, THE WASHINGTON POST (Apr. 28, 2017), https://www.washingtonpost.com/local/education/expelled-for-sex-assault-young-men-are-filing-more-lawsuits-to-clear-their-names/2017/04/27/c2cfb1d2-0d89-11e7-9b0d-d27c98455440_story.html?utm_term=.6e5178379060 (explaining that "[s]ince 2011, more than 150 lawsuits have been filed against colleges and universities involving claims of due-process violations during the course of Title IX investigations and proceedings related to sex-assault allegations[;]" whereas, only 15 such lawsuits had been filed in the two preceding decades).

Universities have also faced a flood of federal and state regulations in recent decades, particularly in areas such sexual misconduct (Title IX) and disability accommodations, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), including the ADA Amendments Act of 2008. Compliance with required governmental regulations has in turn, generated a wave of complaints and litigation, for example from male students alleging unfairness in how universities have responded to complaints from women, and from disabled students claiming inadequate response to accommodations requests or through institutional responses to threats on campus.

Institutions of higher education are spending more resources than ever -- in the form of time and money -- responding to disgruntled parents and students, and often their lawyers, in an attempt to avoid threatened litigation and, ultimately, in defending against what sometimes feels like inevitable litigation.[5] These cases are proliferating as students (often with parents supporting and financing the litigation, if not spearheading it outright) seem increasingly to believe that the legal system will help them solve a problem they were not able to address to their satisfaction on campus.[6] As courts hear more of these cases -- including in the form of alleged constitutional violations, contract breaches, and intentional torts -- patterns are emerging with regard to the causes of action that students bring and their likelihood of success.

This paper explores the legal theories that students use to challenge decisions by colleges and universities regarding both academic and conduct issues. In doing so, we discuss how courts have viewed such cases and suggest steps to avoid litigation and, when it arises, to best position the institution for success.

II. Constitutional Claims

Students attending public colleges and universities continue to rely on the Constitution to challenge academic and disciplinary decisions, typically asserting a denial of due process. In academic cases, courts are more likely to defer to the academic judgment of the school.[7] However, disciplinary decisions are subject to greater scrutiny.[8] As discussed below, while public institutions are subject

[5] Lawrence White, *Why Do So Many Lawsuits End in Settlement? Check Your E-Mail*, ASS'N OF GOVERNING BOARDS, https://www.agb.org/trusteeship/2011/septemberoctober/why-do-so-many-lawsuits-end-in-settlement-check-your-e-mail (explaining that universities are willing to spend large amounts on settlement in order to avoid litigation that is "an order of magnitude" more expensive").

[6] *See, e.g.*, Shapiro, *supra* note 4.

[7] Kerry Brian Melear, *Academic Grade Appeals: Legally Sound Policies and Procedures*, 237 ED. LAW REP. 557, 558 (2008) (explaining that "decisions concerning academic matters are typically made with a relative degree of insulation from judicial scrutiny . . . except in cases of arbitrary and capricious institutional action or abuse of authority.").

[8] Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN ST. L. REV. 1001, 1002 (2016) (explaining that "public universities' student discipline processes implicate a student's liberty and property interest in an education . . .[;] thus, [p]ublic universities must provide each accused student with due process of law under the Fourteenth Amendment.").

to constitutional requirements, the same general fact pattern will often manifest itself as a claim for breach of contract when brought against a private institution.[9]

A. Academic Performance

Courts have upheld less stringent procedural requirements in cases involving challenges to purely academic decisions, relying on the principles established by the U.S. Supreme Court in *Bd. of Curators of the University of Missouri v. Horowitz*, in 1978. In *Horowitz,* the Court recognized that decisions related to academic performance rely on the subjective judgment of school officials, which is not easily evaluated through judicial or administrative decision-making.[10] The Court held that academic decisions, including the decision to dismiss a student for academic reasons, can be made without a hearing.

The Court similarly deferred to the academic judgment of a faculty member without requiring a formal hearing in *Regents of the University of Michigan v. Ewing*.[11] In *Ewing*, the Court found that the university did not deprive the student of substantive due process rights when it dismissed him from the university, because the decision was made "conscientiously and with careful deliberation."

Recent cases continue to follow the principles set forth in *Horowitz* and *Ewing*. In *Al-Asbahi v. W. Virginia Univ. Bd. of Governors*,[12] a doctoral student received a D, automatically putting him on academic probation. At first the student complied with the terms of his probation and the university lifted his probationary status. However, the student eventually received two more D's, and the student was dismissed from the doctoral program. The student was conditionally readmitted soon thereafter. After the conditions of his re-admittance were violated on multiple occasions, the Dean offered further remediation efforts, but these efforts failed, and the student was again dismissed from the program. The student had filed multiple intermediary internal appeals up until this point. Ultimately, the student made requests that his grades be changed on his transcript and that the school draft a letter of good standing for transfer purposes, because the student did not intend to seek admittance to the doctoral program again. The university denied his requests. The student subsequently sued under theories of substantive due process and procedural due process violations, Title VII, breach of contract, and promissory estoppel.

The Court rejected the substantive due process claim, relying on *Ewing*, holding that there is no "protected property interest in receiving a particular grade[,]" and upholding the "shocks the conscience standard[,]" a standard whereby an academic decision will not be held to violate

[9] *See NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.").

[10] 435 U.S. 78, 88–89 (1978).

[11] 474 U.S. 214 (1985).

[12] No. 1:15CV144, 2017 WL 402983 (N.D.W. Va. Jan. 30, 2017).

substantive due process unless it shocks the conscience.[13] The Court also rejected the student's procedural due process claim, relying on *Horowitz*, noting that "courts should give significant deference to academic decisions" and that an "informal give-and-take" is sufficient to satisfy procedural due process where academic decisions are concerned, particularly, as here, where the Dean was "intimately familiar" with the student's situation and the student had been made repeatedly aware of his tenuous position in the program.[14]

Similarly, In *Yaldo v. Wayne State Univ.*,[15] a medical student exhibited odd behavior during exams, missed an inordinate number of classes (with doctor's notes written by his mother's gynecologist), and ultimately received dissatisfactory grades. The student made multiple internal grades appeals which were all denied. Ultimately the student was dismissed from the medical program. The student brought suit on procedural due process and substantive due process grounds.

Citing to *Ewing*, the Court rejected the procedural due process claim. Particularly, the Court notes that when a dismissal is based on grades and professionalism, the decision is academic in nature.[16] The Court noted that no hearing is required by law, nor are multiple levels of appeal, which were offered in this case, for an academic decision to comply with procedural due process requirements.[17] Thus, the school provided more than adequate procedural devices to comply with procedural due process requirements.[18] Regarding substantive due process, the Court relies on *Horowitz* and *Ewing* to reject the claim, explaining that "courts are particularly ill-equipped to evaluate academic performance."[19] The Court found that dismissing the student on the grounds that he failed to take exams in a timely fashion, missed make-up exams scheduled specifically for him, and submitted a forged police report to excuse an absence were not arbitrary and capricious reasons; therefore, the substantive due process claim was dismissed on summary judgment.[20]

Furthermore, in *McMahon v. Rutgers, the State University of New Jersey*,[21] a student received four grades of less than a B and, as a result, was dismissed from the university's Certified Registered Nurse Anesthesia Program, as required by the university's policies. Despite failing to meet the academic requirements as set forth in the university's policies, the student sued the university,

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[13] *Id.* at 12–13.

[14] *Id.* at 16–18.

[15] 266 F. Supp. 3d 988 (E.D. Mich. 2017), *appeal dismissed*, No. 17-1784, 2017 WL 6569599 (6th Cir. Dec. 15, 2017).

[16] *Id.* at 1005.

[17] *Id.* at 1006.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1007.

[21] 2013 U.S. Dist. LEXIS 157365 (D.N.J. November 4, 2013).

alleging that it did not provide him with the level of due process required prior to dismissal. The student filed a challenge through the university's grade appeal process for each of the four grades he received that was less than a B. In accordance with the university's policies, the student's challenges were considered by a committee. Each time, the committee upheld the original grades and the student filed an appeal, which was rejected. The student then sued the university, alleging violations of his due process rights and contractual claims.

In granting the university's motion for summary judgment, the court described cases involving academic disputes as "precisely" the types of cases that courts should be hesitant to resolve.[22] The court further cited the Third Circuit's standard for evaluating due process in academic cases, stating that procedural due process is satisfied "when a university conducts 'an informal faculty evaluation with a student' prior to discharging a student for 'academic reasons.'"[23] In finding that the student had been provided with due process, the court noted as evidence of a "careful and deliberate decision" the fact that the student had been given the opportunity to appeal all grades and provide supporting documentation.[24] The court also did not find that the student had shown a constitutionally protected (i.e., substantive due process) interest in continuing his education.

Similarly, in *Seals v. Mississippi,* a graduate of the University of Mississippi sued the university and several faculty members alleging denial of due process, breach of contract and defamation.[25] Although Seals had graduated from Mississippi by the time he filed the suit, he alleged that the grades he received while enrolled prevented him from getting into medical school, and specifically asked the court to review four grades in particular.

Seals had been admitted to the Honors College at Mississippi and to a program that would have provided financial support in medical school in exchange for a commitment to work in a rural area. He was required to maintain a minimum GPA and write a thesis to remain in these programs. Unfortunately for Seals, he was unable to do either. Initially, while still enrolled as a student, Seals challenged a B that his thesis advisor gave him. The challenge was not successful and Seals' advisor thereafter declined to work with him. In a subsequent class, Seals objected to receiving a C, but did not appeal. Seals obtained a new thesis advisor and turned in a draft of his thesis. The committee that reviewed the draft concluded it was largely plagiarized. Rather than report the matter as academic dishonesty, the committee decided to allow Seals to defend the thesis and provide him with constructive criticism, including addressing the plagiarism in a new draft. Seals refused to accept any offers of help from his advisor on the second draft. When it was submitted, his advisor again identified significant plagiarism and assigned him a D for the course, but did not report academic dishonesty. Continuing his downward spiral, Seals cheated on a final exam and was caught. The faculty member gave him an F for the course. Invoking *Horowitz* and *Ewing*, Seals asked the court to review the B, C, D and F, asserting that the assignment of these grades constituted an arbitrary state action. In rejecting his claims, the Court found that to succeed, Seals

[22] *Id*. at 17.

[23] *Citing Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46 (3d Cir. 1986).

[24] *McMahon* at 27.

[25] 998 F. Supp. 2d 509 (N.D. Miss. 2014).

had to prove that the grades "fell beyond the pale of reasoned academic decision making such that the persons or committee responsible did not exercise professional judgment." The Court found that each of the challenged grades reflected reasoned consideration, and that Seals failed to show an exercise of less than professional judgment. Finally, the court held that because all of the decisions were academic, Mississippi was not required to provide a hearing before reaching its decisions.

Courts have also upheld a college's right to change degree requirements after a student has enrolled. In *Burnett v. College of the Mainland*, seven former students in a nursing program alleged that a change in policy improperly resulted in them not being able to complete a program they had enrolled in.[26] When the students enrolled in the program, the student handbook said that students were required to pass a readiness exam as a condition of graduating and that they could retake the exam if they did not pass on the first attempt. After they enrolled, the Texas Board of Nursing issued a position recommending that a "high stakes test not be the only criteria for graduation." In response, the school amended the curriculum and included the test in one course, where it was worth 40% of the grade. The school did not change its handbook or otherwise put the change in writing. The students took the test, but failed and were advised they could not graduate. They were not given the opportunity to retake the test. They appealed to the director of the school and the Board of Trustees. The Board formed an appeals panel to review the matter. The panel concluded that the school had the authority to make the change and that the students had been informed of the change. The students brought suit, alleging violation of their substantive and procedural due process rights.

Relying on *Horowitz*, the court rejected their procedural due process claims, holding that when a student challenges a disciplinary decision made by a public institution, the student is entitled to an "informal give and take" between the student and the administrative body. The court found that the students had be given the opportunity to be heard informally and formally and granted the defendants' motion to dismiss. Turning to the substantive due process claim, the court, relying on *Ewing*, noted that "the existence of a substantive due process right to be free from arbitrary grading is even more dubious than the unsettled proposition that public higher education is a property right that gives rise to procedural due process." While following the Supreme Court's lead on not deciding that issue, the court found that the college had exercised its judgment to end the retake policy and did so after the recommendation from the Nursing Board. The court noted that while it was sufficient for the college to show it had exercised judgment, from the court's perspective that judgment appeared to be sound and rationally related to its mission of educating nurses. Accordingly, the court granted the motion to dismiss that claim as well.

Even when the university has afforded appropriate procedural due process before academically dismissing a student, the requirements of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132, and Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794, may further complicate the analysis. In *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178 (2d Cir. 2015), plaintiff Dean was dismissed from the Medical School after he failed to sit for and pass Step 1 of the United States Medical Licensing Exam ("USMLE") by the deadline set by the Medical School. Dean had sat for the USMLE twice before and failed, and then took an approved

[26] 994 F. Supp. 2d 823 (S.D. Tex. 2014).

medical leave of absence as a result of suffering from acute depression. The Medical School granted Dean's request to extend the deadline for him to sit for and pass the exam to allow his anti-depressant medicine to alleviate his symptoms. Since Dean's physician informed the Medical School that the symptoms would be alleviated within six weeks of taking the prescribed medication, the deadline was extended for six weeks. However, Dean's request for additional time to study for the exam was denied. Since he did not take the exam by the deadline, he was dismissed from the Medical School. Following his dismissal, Dean filed suit alleging, inter alia, violations of the ADA and Section 504, as well as 42 U.S.C. §1983.

In reviewing the District Court's grant of defendants' motion for summary judgment on all counts, the Second Circuit, citing *Horowitz*, upheld the dismissal of the procedural due process claims and found that the Medical School's decision "plainly resulted from the exercise of professional judgment." Nevertheless, the Second Circuit held that a reasonable factfinder could find that the Medical School may have violated the ADA and Section 504 by denying Dean's requested modification to the exam schedule beyond the six weeks already granted. In other words, the Second Circuit found that it was possible a jury could find that the additional time Dean may have needed to study for the exam once his symptoms of depression were alleviated was not an unreasonable accommodation. The Second Circuit remanded the case to the District court on the issue of whether the defendants afforded Dean a reasonable accommodation.

B. Discipline/Misconduct

Courts have held that students at state-funded colleges and universities are entitled to procedural due process in disciplinary actions against them.[27] In determining what constitutes due process, Courts take a flexible approach, with the ultimate goal of satisfying the requirement of fundamental fairness. The essential considerations are the nature of the interests at issue and the circumstances of the deprivation.[28] These interests require balancing the student's interests in accessing educational opportunities and benefits, the educational institution's interest in maintaining order and discipline without unduly burdening its resources, and the fairness of existing procedural safeguards and the value of additional safeguards.[29] At a minimum, students should be provided with notice and an opportunity to be heard (e.g. a "hearing"). The nature of the "hearing" may vary depending on the severity of the possible sanction -- students facing a short suspension may only be entitled to an "informal give and take" without the benefit of counsel or the opportunity to call witnesses, whereas longer suspensions or expulsions may require more formal proceedings.[30]

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[27] *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 158–59 (5th Cir. 1961) (holding that due process requires notice and some opportunity for a hearing before a student at a tax-supported college can be expelled for misconduct); *see Goss v. Lopez*, 419 U.S. 565 (1975) (holding that there are due process protections for students in public schools); *Horowitz*, 435 U.S. 78 (assuming liberty or property interest in pursuing a medical career); *but see Doe v. Univ. of Or.,* No. 6:17-CV-01103-AA, 2018 WL 1474531 (D. Or. Mar. 26, 2018) (holding that there are not due process protections for students facing disciplinary actions at public universities because students do not have a protected property right in continuing their education).

[28] *See Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988).

[29] *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1972); *Palmer v. Merluzzi*, 868 F.2d 90 (3d Cir. 1989).

[30] *See Goss*, 419 U.S. 565 at 579-84.

In *Furey v. Temple University*, a student filed a civil suit alleging that he was denied due process during the disciplinary proceedings that resulted in his expulsion from the university.[31] The student was charged with violations of the university's student code of conduct in connection with an off-campus incident involving an alleged aggravated assault of an off-duty police officer. Following his expulsion, the student raised procedural due process claims related to the university's alleged failure to provide adequate notice and a right to cross-examination, among other things. Though the court ultimately held that certain factors resulted in a lack of procedural due process to the student, the court found that the university's code of conduct met the requirements for procedural due process. The court highlighted the following elements of the code as providing due process to students accused of misconduct:

- written notice of charges and the basis for the charges[32];
- an opportunity to be heard by a disciplinary committee;
- for serious cases, a hearing where students can hear testimony against them, testify, and present witnesses and evidence;
- a process for verifying the impartiality of the hearing panel;
- training of panel members on conflicts of interest;
- assistance from the university to the accused in requiring the presence of student witnesses and university members;
- an opportunity for the accused to question witnesses through the chair of the panel;
- an opportunity to be accompanied during the hearing by counsel or an advisor;
- an appeal procedure that allows for the submission of additional evidence; and
- final review by an administrator who gives presumptive weight to the recommendation of the appeal panel.

The elements of due process identified by the *Furey* court also have been relied upon in analyzing other students' due process claims.[33] In *Johnson v. Temple University*, a student who was suspended and lost an athletic scholarship after being found responsible for a sexual assault sued the university, alleging that he was denied due process. The student alleged that he was denied due process because he was not aware of the charges against him, the evidence that would be introduced at the hearing, and did not have an attorney.[34]

The court, however, found that the university provided the plaintiff with appropriate notice of the charges against him by giving him written notice of the charges, reviewing the police report with

[31] *Furey v. Temple University*, 884 F.Supp. 2d 223 (E.D. Pa. 2012).

[32] *See Sterrett v. Cowan*, 85 F. Supp. 3d 916 (E.D. Mich. 2015) (rejecting university's motion to dismiss because an equal opportunity specialist interviewed the accused before the accused had been given notice of the sexual assault charges against him).

[33] *See*, *e.g.*, *I.F. v. Administrators of Tulane Educational Fund*, 131 So. 3d 491 (La. App. 2013); *Johnson v. Temple University*, 2013 U.S. Dist. LEXIS 134640 (E.D. Pa. September 19, 2013), *aff'd*, 2014 U.S. Dist. LEXIS 96997 (E.D. Pa. July 17, 2014).

[34] *Johnson* at 17-18.

him, and sharing evidence and documents with him in advance of the hearing.[35] The court also found that the student's choice to not retain an attorney to assist him during the hearing, although permitted to do so by the university, did not deprive him of due process. The court upheld the university's practice of requiring questioning through the hearing panel chair as providing the accused with an opportunity to cross-examine witnesses. The court noted that the accused and complainant were treated in a similar manner during the hearing, such as being given similar opportunities to provide testimony and question witnesses. The court also found that the accused student's decision to not review documents related to the case against him when given an opportunity to do so prior to the hearing did not deprive him of due process.

In *Keefe v. Adams*,[36] a nursing student was removed from a nursing program after posting violent comments and personal information in violation of HIPAA on social media in violation of the student code of conduct.[37] The college described the posts as transgressing professional boundaries, breaching confidentiality, and behavior unbecoming of the Nursing Profession.[38] The college notified the student of his violations, let him know that he would be removed from the nursing program in accord with the student handbook, and made him aware of an internal appeal procedure.[39] Ultimately, the student was allowed to attend a different school at the college, but was dismissed from the nursing school.[40] The student brought claims for violations of substantive[41] and procedural due process. The Court grappled with the procedural due process claim, recognizing that "due process is flexible and calls for such procedural protections as the particular situation demands."[42] Relying on *Goss, Elridge, Brewer* and *Horowitz*, the procedural due process claim dismissal was affirmed on appeal, because the student had been given notice of the charges against him, an explanation of the evidence, and an opportunity to present his side of the story.[43] The Court notes that there is no formal requirement for a hearing, nor is there any requirement that there be a delay between being given notice and being given time to respond to the charges.[44]

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[35] *Id*. 24-34.

[36] 840 F.3d 523 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448, 197 L. Ed. 2d 650 (2017).

[37] Id. at 526–28.

[38] *Id.* at 528.

[39] *Id.* at 527–28.

[40] *Id.* at 527.

[41] *Id.* at 533 (the Court categorizes the university's actions as academic decisions for purposes of substantive due process and explains that unless the school's response would "shock the contemporary conscience" of federal judges, then the decision will fulfill the requirements of substantive due process. Dismissal was thus affirmed on appeal.).

[42] *Id.* at 535.

[43] *Id.*

[44] *Id.*

In *I.F. v. Administrators of Tulane Educational Fund*, the court found that the due process rights of a student found responsible for sexual misconduct were "ill-defined, ambiguously applied, and, as such, presumptively violated" where the student was not informed of the applicable standard of proof or what the hearing panel would consider in determining responsibility for the conduct violation.[45] The court noted that the student was not given access to the manual used by the hearing panel, which contained more detailed information than the student conduct manual about the applicable legal standards and considerations that the panel would use in assessing responsibility. For example, the court noted that the hearing panel's manual contained a "more fully explained meaning of" the standard of proof, as well as a "three-page single-spaced explanation of sexual misconduct cases and the questions the joint hearing boards must answer in deciding whether to sustain such a charge." The accused student was not shown or given this manual and received only the definition of the standard of review set forth in the student conduct manual. The unevenness of the information available to the student and the hearing panel was cited as part of the court's concern in finding that the student was denied due process.[46]

In *Matter of Boyd v. State University of New York at Cortland,* the court found that a hearing panel had substantially complied with its procedures, but had denied the plaintiff due process by failing to set forth factual findings in support of its decision.[47] The plaintiff had been charged with violating the student code by engaging in harassment and by violating the law as a result of contact he had with a woman at the University of Delaware through phone calls, text messages and other threatening behavior. In response to complaints from the woman, Delaware issued a warrant for his arrest. At the SUNY Cortland disciplinary hearing, a police officer from Delaware provided the young woman's account of the communications. The woman did not appear or testify. Mr. Boyd was found responsible for both charges and the hearing panel recommended that he be dismissed. After reviewing a recording of the hearing, the "Suspension Panel" upheld the findings and recommended sanction. Mr. Boyd filed an internal appeal to the Vice President of Student Affairs, who found no denial of due process, but revised the sanction by reducing the period of his suspension. Mr. Boyd filed a lawsuit, arguing that his due process rights were violated.

The court rejected Boyd's claim that the institution's rules required that the victim testify, noting that they required that the "complainant" testify and that in this case the complainant was the director of judicial affairs, acting based on the information provided. The victim was not the complainant and therefore the failure to have the victim testify was not a violation of the rules. The court found that the panel likewise complied with its rule that the accused would have the opportunity to question all parties. However, the court noted that the hearing panel failed to follow its procedures by setting forth detailed factual findings in its disciplinary determination. Relying on several other New York cases, the court held that "[i]n a disciplinary hearing at a public institution of higher education, due process entitles a student accused of misconduct to 'a statement

[45] *See Administrators of Tulane,* 131 So. 3d at 500.

[46] *See also*, *John Doe v. Alger*, *et. al*, 2016 U.S. Dist. LEXIS 178017 (W.D. Va., December 25, 2016); *Prasad v. Cornell University,* 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. February 24, 2016); and *John Doe v. Rector and Visitors of George Mason University*, 149 F. Supp. 3d 602 (E.D. Va., 2016).

[47] 110 A.D. 3d, 1174 (2013).

detailing the factual finding and the evidence relied upon by the decision-maker in reaching the determination of guilt.'" The court noted that while Boyd was charged with specific violations of the law, the panel's determination only included a conclusory statement that he had "harassed and threatened the victim," and remanded the case to the panel to provide the required statement.

Students also have brought claims based on alleged First Amendment violations. In *Corlett v. Oakland University Board of Trustees*, the court's opinion starts with a quote from a Supreme Court case – a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[48] The opinion goes on to say that when the student wrote in class assignments that his English professor was "tall, blond, stacked," "hot," and "graphically" compared her to a sitcom character, he "brought a pig into the parlor." After reading the student's descriptions of her, the professor made a report to two university administrators who spoke with the student about the professor's concerns. When the student returned to class, the professor called the university police department to escort him out of class. The university informed the student that he would not be allowed to attend the professor's class and offered him a refund, which the student refused. The student enlisted assistance from the Foundation for Individual Rights in Education (FIRE), which sent the university president a letter. The university notified the student that a conduct hearing would be held regarding his alleged violation of a university regulation that states:

> No person shall engage in any activity, individually or in concert with others, which causes or constitutes a disturbance, noise, riot, obstruction or disruption that obstructs or interferes with the free movement of persons about the campus or which interferes with the free, normal, and uninterrupted use of the campus for educational programs, business activities and related residential, food service and recreational activities, nor shall any person in any way intimidate, harass, threaten or assault any person engaged in lawful activities on campus.

Following the hearing, the student was found responsible and suspended for two semesters, placed on probation for the duration of his attendance at the university, and barred from contact with the professor, including from taking any classes that she taught. The student filed an appeal with the university, which was denied. He then filed a civil suit alleging that the university violated his right to free speech. The court noted that the student's expressions, "while possibly appropriate in some settings, need not be tolerated by university officials." The court relied upon a line of First Amendment cases, including *Hazelwood Sch. Dist. v. Kuhlmeier*,[49] and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*[50] The court noted that universities "undoubtedly retain some responsibility to teach students proper professional behavior" though they do not bear the same level of responsibility as elementary and secondary institutions.

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[48] 958 F.Supp. 2d 795, 797 (E.D. Mich. 2013) (*quoting Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

[49] 484 U.S. 260, 266 ("a school need not tolerate student speech that is inconsistent with its basic educational mission.").

[50] 393 U.S. 503, 507-08 (1969) (a school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

The court held that the student's physical descriptions of his professor or "expressions of lust" for her were not entitled to protection under the First Amendment because it was reasonable for the university to find that his writing was inappropriate in the context of a student-teacher relationship. The court dismissed the student's claims related to his expression, upheld the discipline he was given, and also found that the university's regulation, cited above, was not vague and overbroad.

In *Murakowski v. University of Delaware*, the plaintiff created a website using the university's server, on which he published essays that he wrote on topics including violence and sexual abuse.[51] Some of the topics he covered included an explanation of how to skin a cat, with pictures of a kitten in various stages of the process; detailed references to kidnap, rape, and murder; and instructions on how to dispose of one's murdered partner. A female student who lived in the same residence hall as the plaintiff read his blog, began to experience anxiety, and sought counseling as a result. The university charged the plaintiff with disruptive conduct and violations of its Responsible Computing Policy, removed him from his residence hall, required that he obtain a psychiatric assessment, and did not permit him to attend classes. The plaintiff was found responsible for disruptive conduct but not for violating the Responsible Computing Policy. He was suspended from the university, banned from campus temporarily, and placed on deferred expulsion through graduation. The plaintiff appealed the decision unsuccessfully. He then filed a civil suit claiming that the university denied him due process and violated his First Amendment rights.

The court found that the university did not deny him due process as it provided him sufficient notice of the charges and a meaningful opportunity to prepare for the hearing. The university gave him a copy of the charges and letters explaining the factual bases for the charges. The university also held a pre-hearing meeting with the plaintiff in which he could obtain additional information about the charges, ask questions, and review the judicial file. The plaintiff was told how to access applicable university policies and the judicial affairs' website. Additionally, the university changed the date of the hearing to give the student additional time to prepare. The court also held that the hearing comported with due process requirements -- though the complaining students were not present, the plaintiff was able to present witnesses and documents, as well as testify and challenge the hearing officer's questions.

With regard to the First Amendment claim, the court noted that "a university has the right to exclude First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity for other students to obtain an education." The court further noted that "true threats" are not protected by the First Amendment.[52] The court explained that the plaintiff's postings were directed to groups (African American and Asian women, gay individuals, people with disabilities) and not particular individuals, and held that though the plaintiff's statements were highly offensive, they did not "evidence a serious expression of intent to inflict harm." Further, there was not a showing that the plaintiff's statement caused, or was likely to cause, material

[51] 575 F. Supp. 2d 571 (D. Del. 2008).

[52] *Id*. (*citing Lovell By and Through Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 372, *cert. denied*, 518 U.S. 1048 (1996) (to establish a true threat, a reasonable person would foresee that the student's statements constitute a serious expression of intent to harm or assault).

disruption, though complaints were received from two female students. Despite this, the court deferred to the university's discretion under its policies to discipline the plaintiff because in addition to the First Amendment concerns, the student also was disciplined for entering his residence hall during the time that he was banned from it. The court awarded the plaintiff nominal damages in the amount of ten dollars for his First Amendment claim, denied his request for attorneys' fees, and granted his request for costs.

III. Breach of Contract Claims

In litigation against their institutions, particularly private institutions not subject to constitutional due process claims, students also have sought to have college and university policies, handbooks, and rules treated as binding contracts.[53] While often these attempts have been successful[54], some courts have been reluctant to apply contract theories in the educational context.[55] Courts generally have looked for clear, specific provisions that impose obligations on the student and the institution. However, enforceable commitments need not be anchored in formal policies or handbooks; counsel should be concerned if application or acceptance materials or other formal communications from campus officials offer promises that are not kept.

A. Academic Performance

In *Beauchene v. Mississippi College*, a law student filed a breach of contract claim against the college when he was expelled following a finding that he committed multiple acts of plagiarism.[56] The college found that the first "25% [of the student's paper was] taken line-by-line and footnote-by-footnote from a single source," without citing to that source. The student admitted to plagiarism, stating that his actions were "improper." He was suspended from the law school with the right to petition to re-enter at a later date. A few months later, the student met the conditions for readmission and resumed classes at the law school. Undeterred by the prior disciplinary action against him, the student again simply copied large portions of text from uncited sources and pasted them into a paper. He was expelled from the school and filed a civil suit shortly thereafter.

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[53] Interestingly, others have sought – unsuccessfully – to have the code nullified as an adhesion contract. *See Wagner v. Holtzapple*, 101 F. Supp. 3d 462 (M.D. Pa. April 23, 2015).

[54] *Morehouse College v. McGaha, 627 S.E. 2d 39 (Ga. Ct App. 2005); Fellheimer v. Middlebury College, 869 F. Supp 238 (D.Vt. 1994); see also* cases cited throughout Section III.

[55] *See Satell v. Temple Univ.*, No. CV 17-2774, 2017 WL 3158761, at *2 (E.D. Pa. July 25, 2017) (holding that student handbooks do not create a contract between a university and its students under Pennsylvania contract law); *see also Al-Asbahi*, No. 1:15CV144, 2017 WL 402983 at *11 (holding that federal district court did not have subject matter jurisdiction to entertain state law breach of contract claim).

[56] 986 F. Supp. 2d 755 (S.D. Miss. November 8, 2013).

In his suit, the student claimed that the Student Honor Code was a contract that guaranteed him due process rights. He asserted that the law school breached this contract when it failed to provide him notice of the Honor Code violations or a reasonable opportunity to respond to the charges, provided him with false information about the availability of a witness, and denied him the right to appeal as provided in the Honor Code.

The court noted that Mississippi recognizes an implied contractual relationship between a university and its students. The court found that though the student did not receive notice of the allegation prior to his initial meeting with the law school to discuss the issue, he was made aware of the charges in subsequent emails and meetings, and had an opportunity to present information and respond to the charges during these email exchanges and meetings. The court further found that the school did not prevent the student from presenting witnesses – the Code permitted the student to present witnesses, though the student did not avail himself of that opportunity. The court also noted that even if the student had been prevented from presenting witnesses, it was "inconsequential" because his plagiarism was "blatant and pervasive."[57] Finally, the court held that the student was provided an opportunity for review after the first violation, and it was not arbitrary and capricious for the school to deny the student an opportunity to appeal following repeated violations involving the same offense. The court referred to the student as a "serial plagiarist" and noted that the student, rather than the law school, breached the contract as the student failed to comply with the Honor Code as required.

In *Thode v. Ladany*, a student sued Lehigh University, raising breach of contract and constitutional claims.[58] The plaintiff alleged that she received a grade of C+ in a Master's level counseling course because the judgment of the faculty in her program was not within academic norms, and also for reasons that were not purely academic. The plaintiff was enrolled in the first semester of a mandatory two-semester practicum course that required her to interact with clients and attend class sessions. In those class sessions, the student was cited for cursing, interrupting the instructor, and other inappropriate conduct. She was cautioned about this behavior and ultimately received a zero for class participation. Her overall C+ grade in the course meant that she could not progress to the second half of the practicum. The university, consistent with the program's policy manual, required the plaintiff to remediate these issues prior to moving forward in the program. The student instead challenged her grade and the remediation requirement through the university's internal grievance procedure. She was unsuccessful at all stages in the process, including two appeals.

Following a four-day trial, the court sided with the university, disagreeing that the student was entitled to have her grade changed. In ruling on the student's post-trial motions, the court held that the university did not depart substantially from academic norms in its handling of the matter. The court noted that credible evidence presented at trial showed that the student's grade resulted from her written work and class participation grade, stating that it was "hard-pressed to upset the Lehigh University faculty in their professional judgment." The court also noted that the university was able to establish the student's unprofessional conduct. The court further held that any delays in the grievance process were caused by the student and that the university did not deviate from academic

[57] *Id*. at 773.

[58] No. CV-2010-11525 (Pa. Ct. of Common Pleas February 14, 2014).

norms in following its grievance process. The Superior Court of Pennsylvania subsequently upheld the trial court's decision.[59]

The Sixth Circuit in Al-Dabagh v. Case Western Reserve Univ., 777 F.3d 355, *aff'd*, 2015 U.S., App. LEXIS 4283, *cert. denied, 135 S. Cto. 2817 (2015), articulated* strong support for the principle of deference to academic judgment. Al-Dabagh was a medical student who had received excellent grades but was dismissed from the school after the faculty had determined he lacked the professionalism required to become a medical doctor. The incidents that led to this decision included: tardiness for 30% of the class meetings for his first-year discussion section course; asking a faculty member to lie about his attendance; inappropriate behavior at a formal dance sponsored by the school, and; a conviction for driving while intoxicated. Al-Dabagh sued the University alleging breach of state law duties of good faith and fair dealing when the Medical School declined to award him a degree. After the District Court agreed with the plaintiff, and ordered that a medical degree be granted, the University appealed.

In reversing the District Court's decision, the Sixth Circuit noted that the Medical School had set certain expectations of professionalism as part of the "core competencies" of a Medical School graduate. Those standards of professionalism were enunciated in at least four different sections of the Medical School's handbooks; and the School had a Committee comprised of faculty and administrators that conducted a detailed review of students' professional attitudes and behavior. Since the Medical School's Committee had determined that Al-Dabagh did not possess the competency of professionalism required to become a medical doctor, they were exercising their academic judgment and the Court had no basis to intervene.[60]

B. Discipline/Misconduct

In *Routh v. University of Rochester,* the plaintiff brought a breach of contract claim following his discipline for sexual assault.[61] Mr. Routh contended that the university breached its contract by failing to give him notice of the charges against him, as required by university policy. The court held that:

> an implied contract is formed when a university accepts a student for enrollment: if the student complies with the terms prescribed by the university and completes the required courses, the university must award [the student] a degree. The terms of the implied contract are contained in the university's bulletins, circulars and regulations made available to the student. Implicit in the contract is the requirement that the institution act in good faith in its dealing with its students. At the same time, the student must fulfill [his or her] end of

[59] 2014 Pa. Super. Unpub. LEXIS 386 (Pa. Super. Ct. November 6, 2014).

[60] *See also,* Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 463 (4th Cir. 2012), *aff'd,* 2012 U.S. App. LEXIS 5287 (4th Cir. Feb. 28, 2012) (dismissing a medical student for lack of professionalism is "academic"); Brown v. Li, 308 F.3d 939, 943, 952 (9th Cir. 2002), *cert. denied,* 538 U.S. 908 (2003) (refusing to approve a Ph.D. thesis because its acknowledgment section was unprofessional is "academic").

[61] 981 F. Supp. 2d 184 (W.D.N.Y. 2013).

> the bargain by satisfying the university's academic requirements and complying with its procedures.[62]

The student cited as an example of noncompliance with its policies a statement by a university official that the university could improve the manner in which it wrote up disciplinary charges. The court found, however, that the university's policies only required "reasonably specific" notice of the charges, which the student received when the university sent a letter to him providing the month that the violation began, a description of the actions at issue, and inviting the student to review the case file. The court noted that the student was also able to ask questions of a university official as part of the process. The court therefore dismissed the student's breach of contract claim.

A Massachusetts court reached a similar conclusion in granting a college's motion for summary judgment on a breach of contract claim filed by a former student found responsible for sexual assault.[63] In *Bleiler v. College of the Holy Cross*, the student claimed that the college breached provisions of the student handbook by, for example, allowing panel members with conflicts to serve on the panel; failing to sequester witnesses during the investigation; not allowing him to cross-examine two witnesses who submitted written statements but did not testify at the hearing; and failing to make a record of the hearing panel's deliberations. There, the court assumed, without deciding, that a contract existed and found that the college did not breach any contract that may have been embodied in its student handbook or other college materials.

Specifically, the court found that student handbook did not contain some of the requirements cited by the student -- for instance, the handbook did not require the college to sequester witnesses. For other alleged breaches, the court found that the college complied with the terms of its handbook. The student sought to have two panel members disqualified because they were Facebook friends with the complainant, but the college informed the student that this did not automatically disqualify the panel members and the panel members indicated that they did not know the complainant well. The court found that this did not breach the reasonable expectations conveyed by the handbook and ruled in favor of the college. With regard to the claim related to cross-examination, the court found that the handbook did not preclude the use of testimony from non-appearing witnesses and found that the accused student himself had submitted such testimony from a witness who was unable to attend the hearing.

Similarly rejecting a breach of contract claim, in *Doe v. Univ. of Dayton*,[64] the Court refused to interfere with a private university's "right to make regulations, establish requirements, set scholastic standards, and enforce disciplinary rules absent a clear abuse of discretion."[65] Ultimately, the question before the Court was whether a hearing board abused its discretion in disciplining a student, and not whether the procedure employed by the hearing board could have

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[62] *Id*. at 207.

[63] *See Bleiler v. College of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775 (D. Mass. August 26, 2013).

[64] No. 3:17-CV-134, 2018 WL 1393894 (S.D. Ohio Mar. 20, 2018).

[65] *Id.* at *6.

been improved.[66] The Court held that in order to constitute an abuse of discretion, a hearing board would have to have acted unreasonably, arbitrarily, or unconscionably.[67] The Court took issue that the plaintiff in this case did not cite to any portion of the student handbook that the university might have violated.[68] Despite the student not indicating a specific section of the student handbook that had been violated, the Court recognizes that the procedure the University engaged in likely could have been improved, but notice, explanation of evidence, and an opportunity to respond had been provided to the student, which was sufficient to comply with the unreasonable, arbitrary, or unconscionable standard.[69] The Court refused to read anything else into the student handbook, and thus dismissed the student's breach of contract claim.[70]

IV. Tort Claims

Students also have brought tort claims against colleges and universities, such as negligence, defamation, and intentional infliction of emotional distress. These claims largely have been unsuccessful; however, some students have succeeded in moving forward under tort theories.[71]

In *Yost v. Wabash College*, the plaintiff alleged that Wabash was negligent because it did not protect him from hazing. The plaintiff had been injured in a fraternity hazing activity and had sued the fraternity, a fraternity member and Wabash, which was the owner of the fraternity house. The plaintiff alleged that Wabash caused his injuries through its negligence both as a college and as the fraternity's landlord. Wabash sought summary judgment, asserting that it did not have a duty to protect him from the criminal conduct of others. Yost claimed that a duty to protect him from hazing arose from Wabash's enforcement of a strict policy against hazing and its "use of the 'the Gentlemen's Rule' to guide student behavior." The "Gentleman's Rule" is: "The student is expected to conduct himself at all times, both on and off campus, as a gentleman and a responsible citizen." The court rejected these claims, finding that Wabash's conduct reflected a general intent to elicit good behavior and maintain good order. The court found that this intent was not sufficient to establish a duty to protect Yost from the misconduct of others.

In *Wells v. Xavier University*, the court denied the university's motion to dismiss a student's claims of libel, intentional infliction of emotional distress, and negligence where the student was found

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[66] *Id.*

[67] *Id.*

[68] *Id.* at *7.

[69] *Id.*

[70] *Id.* at *8.

[71] *See, e.g., Gomes v. Univ. of Maine Sys*., 304 F. Supp. 2d 117, 132–34 (D. Me. 2004) (holding that the Maine Tort Claims Act did not bar suit against a university for negligent hiring of employees involved in the discipline of students; however, also holding that students did not have a claim against a university for negligent hiring or supervision that allegedly violated students' federal and state constitution rights in the process of disciplining students; *see also Doe v. Brandeis Univ.,* 177 F. Supp. 3d 561, 617 (D. Mass. 2016) (rejecting university's motion to dismiss a student's claim for negligent infliction of emotional distress; however, dismissing student's claim for intentional infliction of emotional distress because university action were not targeted, deliberate, and malicious).

responsible for sexual assault following a disciplinary hearing.[72] Though this case ultimately settled out-of-court, prior to the settlement the court found that it was a "close call" whether the university's announcement to its campus of the discipline the accused student received stated a claim of libel. The court reasoned that the university's disciplinary board may have been ill-equipped to handle a sexual assault allegation and "in over its head," that the prosecutor's office recommended that the university drop the case due to an alleged lack of evidence, and that the university's reaction appeared to have been influenced by an on-going investigation by the U.S. Department of Education's Office for Civil Rights.[73]

Other courts have declined to find schools liable for similar tort claims in cases that did not involve allegations of sexual violence.[74] In *Milo v. University of Vermont*,[75] for example, the court granted the university's motion for summary judgment, including with respect to a defamation claim. A student had been a member of the university's men's ice hockey team and claimed that the head coach defamed him in connection with his dismissal from the team. The head coach told the press that the dismissal decision was made after spending "a lot of time as a staff and support staff and with the leadership."[76] The court found that this statement was not defamatory because it was true.

V. Best Practices

On today's campuses, colleges and universities must increasingly defend against litigation brought by current or former students. Even if the institution is ultimately successful, such litigation is costly and can be disruptive to the day-to-day operations of the institution, often requiring the time and attention of senior administrators. Institutions can also suffer both in the press and in their constituencies' court of public opinion (i.e., among parents, students, donors and trustees). Institutions must be strategic in attempting to avoid such litigation and, when cases are filed, handling them in a manner that mitigates against these harmful effects. The following are some suggestions that may aid in these efforts.

A. Policies and Procedures

As noted, many courts have held that an institution's policies and procedures – handbooks, manuals, etc. – constitute contracts between the institution and its students. As such, colleges and universities should ensure that their policies and procedures are not only drafted with appropriate legal review but also that they are applied in a consistent manner. Often, in the stress of dealing

[72] 7 F. Supp. 3d 746 (S.D. Ohio March 12, 2014).

[73] *But see*, *Doe v. Univ. of Cincinnat*i, 2016 U.S. Dist. LEXIS 37924 (S.D. Ohio March 23, 2016) where the District Court specifically declined to follow the reasoning in *Wells v. Xavier*. In *Doe*, the District Court found that it was unreasonable to infer, without direct evidence, that the University had a practice of "railroading students accused of sexual misconduct simply to appease the [U.S.] Department of Education …"

[74] *E.g.*, *Kuritzky v. Emory University*, 669 S.E.2d 179 (2008); *Harvard University v. Goldstein*, 2000 WL 282537 (Mass. Super. 2000).

[75] 2013 U.S. Dist. LEXIS 123682 (D. Vt. August 29, 2013).

[76] *Id*. at 10, 31.

with a call from a trustee or the umpteenth call from a parent regarding an ongoing investigation, there is a risk of a conduct administrator reacting in the moment, without consulting the relevant student code or handbook provision. Just as lawyers involved in litigation can often find the answer to their questions in the rules of court, conduct administrators can often find a roadmap to appropriate next steps in their institution's policies and procedures. Because courts appear to provide deference to the decisions of institutions that have followed their own policies, sticking to these provisions is an important step toward avoiding -- or at least defending against -- litigation.

Educational institutions also should regularly review policies for completeness and clarity. If it is an important procedural or substantive step, ensure it is included in your institution's policies and procedures. And, if your institution finds itself often stumbling at a particular step, revise it. Finally, make sure your institution's handbook reflects your actual processes. For example, if you use hearing panels but do not permit the parties to directly question one-another, make sure your policies say that. If elaborate process steps in academic dismissal hearings have been simplified in actual practice, make sure the written procedures comport to the new realities. In short, requirements that are going to be enforced should be outlined in written policies, and those "requirements" that are not enforced should be removed, because selective application can create problems. Finally, if there are circumstances in your procedures that call for exercise of discretion, be sure they say it! For example, if a hearing board chair has the ability to decide which questions from a party will be allowed to be directed towards the opposing party in a hearing, or that requested questions are only asked in the chair's discretion based on relevance, the procedures should make this clear.

Courts have cited favorably the availability of an appeal procedure that students can use to challenge decisions that they perceive to be unfair. This provides an opportunity for institutions to verify the appropriateness of the initial decision and correct any potential flaws in the process prior to judicial review. The existence of an appeal procedure can be an opportunity for institutions to show care and deliberation in the decision-making process and is likely to be interpreted as an example of due process given to students.

Additionally, in drafting policies and procedures, institutions should ensure that language is included to allow for reasonable postponements and delays. Policies that require information to be provided within strict timeframes without any leniency can be held against institutions when a complex case causes those timeframes to be unrealistic. On the other hand, some referencing to timing can be used to support an argument that procedures are prompt and equitable. In instances where timeframes are not able to be adhered to, complainants and respondents should be provided with updates regarding the status of the case and the reason for the delay.

B. "Jurisdiction"

It is important for administrators to have a clear understanding of what conduct – and by whom – is covered by an institution's policies. In recent years, colleges and universities have increasingly been in the position of disciplining not only individual students, but entire student organizations (e.g. athletic teams and Greek organizations). An institution's policies and procedures should specifically define terms such as "student," and address the extent to which recognized student

organizations may also be subject to the code, including the sanctions that are available with regard to violations committed by the organizations. It is wise to specifically note that an institution may pursue conduct against an organization and its individual members – the two are not mutually exclusive.

Prior to having to deal with misconduct in the heat of the moment, it is also wise to examine whether an institution's policies and procedures govern conduct that occurs off-campus. With the proliferation of various social media forums, this evaluation should also include whether the policies apply to conduct that occurs electronically.

Finally, jurisdictional terms need to address the reach of campus policies towards individuals who are not members of the campus community, e.g. not students, faculty or staff. For example, are campus visitors or vendors expected to comply with certain policies? If your student sexually assaults an unaffiliated individual, does your policy apply, giving the institution the capacity to address the misconduct? Should there be limits to that jurisdictional reach?

C. Hearing Officers/Panels

Colleges and universities use a wide variety of models when it comes to identifying those who will dispose of misconduct cases. Some institutions use a single hearing officer/administrator model, while others rely on a panel model comprised of faculty, staff or students, or a combination thereof. At some schools, the decision-maker will depend on the potential sanction associated with the violation charged. For example, a single hearing officer may hear more "low-level" charges, while a panel may hear those with the potential of suspension or expulsion. Note that some recent cases arising in the Title IX/sexual misconduct context have been skeptical of procedures that fail to afford at least some level of hearings process, including opportunities for the parties to testify and for panel-based fact-finding. While reliance on a thorough investigative report to determine culpability can be viable, the investigative process should afford ample opportunities for the parties to review the evidence being relied on and to counter such evidence or request additional investigation.

No matter what model is used, institutions also should ensure that conduct administrators and hearing officers/panels are properly trained on the requirements of the code of conduct and any internal judicial processes. Additionally, panel members should be trained on assessing relevant information, weighing credibility (e.g., through body language and facial expressions), and the application of the appropriate standard of review.

Judicial administrators and panels should stick to the process outlined in internal procedures and should avoid making exceptions, as this may lead to challenges of the integrity of the process and also may fuel claims of disparate treatment on a protected basis.

D. Focus on the Conduct, Not Underlying Conditions

As a general matter, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), including the ADA Amendments Act of 2008,[77] prohibit institutions of higher education from discriminating against students on the basis of disability. Mental health issues commonly contribute to students' behavior of concern, and therefore are often raised, sometimes for the first time[78], by students during campus conduct processes in an effort to either eliminate or mitigate potential disciplinary measures imposed. However, disability laws do not require institutions to lower institutional standards or fundamentally alter educational programs.[79] Disciplinary action under a student code of conduct is generally appropriate so long as it is imposed for legitimate, nondiscriminatory reasons. However, in recent years, both the U.S. Department of Justice and the Office for Civil Rights in the U.S. Department of Education have taken stringent enforcement actions against campus suspensions of students manifesting suicidal behavior as a result of mental health problems, in the belief that such actions reflect institutional bias. In 2010, the U.S. Department of Justice issued new regulations implementing Title II of the ADA which did not include the concept of "direct threat to self." The DOJ as well as the U.S. Department of Education Office of Civil Rights, soon embarked on a series of enforcement actions against universities in which self-harming students alleged they faced discrimination when institutions imposed involuntary leaves of absences or took other actions deemed to be adverse in order to protect the students or others on campus.[80] It is very important that such institution actions, including those driven by enforcement of campus codes of conduct, are truly focused on behavior, not mental health status. Further, these federal agencies expect institutions to engage in considerable efforts towards accommodations before removing students from campus based on

[77] Institutions receiving federal funding are subject to Section 504 of the Rehabilitation Act pursuant to 29 U.S.C. § 794(b)(2)(A); 34 C.F.R. §§ 104.3(h), 104.41–.47. 42 U.S.C. §§ 12131–12134. Title II of the ADA addresses public services that may include those provided by public colleges and universities. *See* 42 U.S.C. §§ 12181–12189. Title III of the ADA covers places of public accommodation, which often extends to private higher educational institutions. *See also* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[78] *See Rosenthal v. Webster University*, 2000 U.S. App. LEXIS 23733 (8th Cir. Sept. 25, 2000) (finding that a student's suspension for carrying a gun on campus and threatening to use it did not constitute discrimination given that the student had not disclosed his diagnosis of bipolar disorder until after the institution suspended him).

[79] *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 88 (2d Cir.), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004) (holding that allowing a student to bypass part of the required curriculum of a medical program "would have changed the nature and substance of [the] . . . program"); 28 C.F.R. § 35.130 ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"); *see Johnson v. Washington County Career Center*, 982 F. Supp. 2d 779, 789 (S.D. Ohio 2013) (holding that a court should give deference to academic judgments concerning reasonable accommodations); *Shurb v. University of Texas Health Science Center at Houston-School of Medicine*, 63 F. Supp. 3d 700, 710 (S.D. Tex. 2014) (also holding that "reasonable deference must be accorded to an educational institution's academic decisions" regarding reasonable accommodations); *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998) (finding that complying with the institution's honor code was an essential function of being a student); *Bhatt v. University of Vermont*, 958 A.2d 637 (Vt. 2008) (finding that UVM's dismissal of a medical student who falsified rotation records and prior credentials need not be held to a lesser standard of conduct than any other prospective medical doctor due to his later claim of Tourette's Syndrome).

[80] *See* Direct Threat and Caring for Students at Risk for Self Harm: Where We Stand Now; Paul Lannon, NACUANOTE Vol 12, No. 8 (2015)

self-harming behavior. [81] Threat assessment teams (for threat to others determination under Title II of the ADA), mental and physical health support, and other student success resources are also critical partners in addressing these complicated issues.

E. Internal Coordination and Communication

Schools should spot cases that could become problematic early on in the process and manage them accordingly. "Manage" does not mean treating them differently than others or deviating from established policies and procedures. Rather, it often simply means girding oneself for push back from parents and attorneys, and the inevitable demands on a conduct administrator's time that will be imposed. College and university employees involved in the process should be encouraged to loop in counsel early and often, to ensure that potential issues can be flagged and addressed promptly. Likewise, counsel should bear in mind that these situations can quickly become very demanding for the administrators on the "front line," and try to help them manage that stress in a way that keeps them focused on implementing existing policies and procedures.

Institutions also should work toward message unity by coordinating internally to avoid providing students (or parents) with mixed messages. Receiving inconsistent messages from school officials can be a cause of frustration -- or ammunition -- for students, their attorneys, and families, and can make litigious situations more difficult to manage. It is important to have a general plan as to when the institution's communication professionals, senior administrators, and trustees will be advised of a conduct situation.

Finally, students (and others) increasingly use social media to communicate negative views about university actions to a vast audience. While institution media specialists will typically guide institutional responses to such behavior, legal counsel are often asked for guidance in when, how, or if an institution can or should respond to protect its name and reputation online.

While student conduct litigation can seem as unavoidable as death and taxes, preparation, coordination and consistency are often the keys to managing these difficult situations and their consequences.

Additional NACUA Resources

Amy Foerster, Brittany Schoepp-Wong, Gerard St. Ours, and Christina D. Riggs, "Hot Topics in Student Conduct: There is More Than Title IX," (NACUA Annual Conference 2017).

[81] Yet, the stakes for universities are high when students with known mental health problems are allowed to remain on campus and commit crimes that courts later believe should have been anticipated and prevented. In a much-watched decision, the Supreme Court of California recently found U.C.L.A was subject to suit by a student injured during class time by another student who had been seen by campus student health and was known to have significant mental health problems. "Considering the unique features of the collegiate environment, we hold that universities have a special relationship with their students and a duty to protect them from foreseeable violence during curricular activities." *The Regents of the University of California v. The Superior Court of Los Angeles County, Ct.App2/7 B259424 filed 3/22/18.*

Barbara A. Lee, "Judicial Review of Student Challenges to Academic Misconduct Sanctions," (JCUL 2013).

NACUA Student Conduct Resource Page

Mike Pfahl, "Student Conduct Issues During Study Abroad Programming" (NACUANOTE 2013).

Ed Stoner, "Navigating Past the 'Spirit of Insubordination': A Twenty-First Century Model Student Conduct Code With a Model Hearing Script," (NACUA Annual Conference 2014).

Perry A. Zirkel, "Are Procedural and Substantive Challenges to Student Challenges to Disciplinary Sanctions at Public Institutions of Higher Education Judicially More Successful than Those at Private Institutions?" (JCUL 2015).

Amy Foerster, Olabisi Okubadejo, and Kevin D. O'Leary, "Dealing with the 'Entitlement Generation': Preventing and Litigating Legal Challenges to the Discipline and Grading of Students," (NACUA Annual Conference 2014) (updated by Monica Barrett and Marla Morgen in materials for the 2017 Lawyers New to Higher Education Workshop).