## ACADEMIC DISMISSAL OF STATE MEDICAL STUDENT DOES NOT REQUIRE FORMAL HEARING

*Board of Curators v. Horowitz*, 435 U.S. 78 (1978)

In *Board of Curators v. Horowitz*,[1] the Supreme Court obscured the scope of procedural protection that must be accorded to graduate and professional students subject to academic dismissal from state universities.

The University of Missouri-Kansas City Medical School (UMKC)[2] dismissed respondent during her final year of study for academic deficiency.[3] The dismissal came as a result of recommendations made by student-faculty[4] and faculty committees[5] that periodically evaluate the achievement of all students.[6]

Although she had had an outstanding scholastic record,[7] some

1. 435 U.S. 78 (1978).

2. The University of Missouri-Kansas City Medical School is a state supported, public institution established pursuant to MO. ANN. STAT. § 172.010 (Vernon 1959). Its governing body, the Board of Curators, is authorized to determine the admissibility of students and confer degrees pursuant to *id.* §§ 172.360, .380, and is a duly incorporated body politic created pursuant to *id.* § 172.020 (current version at *id.* § 172.020 (Vernon Supp. 1978)). As such, the Board is an agent of the state performing official state functions and must therefore comply with the fourteenth amendment. U.S. CONST. amend. XIV. *See, e.g.*, Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

3. 435 U.S. at 79.

4. The Council on Evaluation, which is composed of both faculty and students, evaluates students' academic performance. The Council could request that a student make a personal appearance before it, Horowitz v. Board of Curators, 538 F.2d 1317, 1319 (8th Cir. 1976); however student appearances before the Council are rare. 435 U.S. at 80. The Council is also empowered to administer supplementary practical and oral examinations, if necessary, to resolve any question of a student's professional competency. 538 F.2d at 1319. Following these evaluations, the Council could make various recommendations concerning a student's status, such as probation or dismissal, to the Coordinating Committee. 435 U.S. at 80. *See* note 5 *infra*.

5. The Coordinating Committee, which is composed solely of faculty members, reviews and has veto power over recommendations of the Council on Evaluation. Ultimately, the dean must approve any recommendation propounded by the committee, which typically denies students the right to appear before it. 435 U.S. at 80.

6. *Id.* at 80-81.

7. 538 F.2d at 1317-18. UMKC admitted respondent with advanced standing in August 1971. She held a bachelor's degree in chemistry from Barnard College and a master's degree in psychology from Columbia University. Prior to entering medical school, respondent scored in the 99th percentile on the verbal aptitude, quantitative aptitude, advanced psychology, and advanced chemistry sections of the Graduate Record Examination. Her scores on the Medical College Admissions Test ranged from 645 to 735 out of a possible 800. Further, she scored first among UMKC students in basic science and second in clinical studies on the National Board Mini-Test.

faculty members expressed dissatisfaction with respondent's competence, ability to accept criticism, peer and patient rapport, and attendance and personal hygiene at clinical sessions[8] during her first year at UMKC.[9] Pursuant to the committees' recommendations, UMKC advanced respondent to her second and final year on a probationary basis.[10] Dissatisfaction with her clinical performance persisted and the committees recommended that respondent not be permitted to graduate.[11] At respondent's request, seven practicing physicians reevaluated

Respondent's Brief in Opposition of Writ for Certiorari at 2-5, Board of Curators v. Horowitz, 435 U.S. 78 (1978).

Respondent maintained this impressive record while at UMKC. In the fall of 1972 she scored first in her class on Part I of the National Board Examination for medical students and second on Part II. She ranked fourth in her class on quarterly exams given in February 1973 and second on exams in May 1973. *Id.*

8. During the final two years at UMKC, the required curriculum is designed in "rotational units" of various medical disciplines, such as surgery, pediatrics, obstetrics-gynecology, psychiatry, and emergency room practice. Each unit generally includes clinical responsibilities in addition to academic study. 435 U.S. at 80. Course grades for these rotational units are assigned on a credit-no credit basis and are so recorded on student transcripts. Students are not permitted to read rotation evaluations written by the faculty; consequently students learn whether they have passed a rotation satisfactorily by noting whether their transcripts indicate the receipt of credit. Throughout her two years at UMKC, respondent received a grade of "credit" in 20 of the 21 clinical and academic courses recorded on her transcript. The grade of "no credit" suffered in the emergency room rotation was recorded in May 1973 after UMKC denied Horowitz the right to graduate. UMKC, however, draws a distinction between receiving credit and satisfactorily completing a course and claimed that respondent failed to satisfactorily complete other courses. Neither Horowitz nor the other students were aware of this distinction. 538 F.2d at 1318 n.1. To complicate the matter further, UMKC does not state its graduation requirements in terms of the completion of a specific number of courses. *Id.* at 1318.

9. The dissatisfaction surfaced in the spring of 1972 while respondent was participating in the pediatrics rotation. Although she did not see the formal faculty evaluation of her performance, her docent (*i.e.*, her adviser and the faculty member with whom she had the closest contact) told her of the faculty criticisms. 538 F.2d at 1318-19. Ultimately, respondent's transcript showed a grade of "credit" for the pediatrics rotation. *Id.*

10. 435 U.S. at 81. The dean informed respondent of her deficiencies in a letter dated July 5, 1972. The letter read in pertinent part:

> Your acquisition of information is good. Your relationship with others has not been good and represents a major deficiency. You need to improve your relationship with others rapidly and substantially. This involves keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance, including hand washing and grooming; participating appropriately in the activities of the School; and directing criticisms and suggestions maturely to your Docent and to the faculty member who is in charge of a curriculum block as you may have criticisms and suggestions.

538 F.2d at 1319. The dean further wrote that nonconformance to certain standards of conduct "is incompatible with continued progress and graduation." *Id.* After sending this letter, the dean, along with her docent and other faculty, frequently counseled respondent prior to her dismissal. *Id.*

11. 435 U.S. at 81. The Court said that respondent's docent rated her clinical skills as "unsatisfactory." However, this may be inaccurate because in all other categories in which he rated her

her clinical performance as an appeal to this decision.[12] Subsequently, the committees reaffirmed their prior position, the dean approved the recommendation, and respondent was dismissed from UMKC.[13]

When an appeal to the University's Provost for Health Sciences proved unsuccessful,[14] respondent brought an action under section 1983,[15] alleging she had been deprived of liberty without due process of law.[16] The district court concluded UMKC had afforded respondent full procedural protection and dismissed the complaint.[17] The Eighth Circuit Court of Appeals reversed and remanded,[18] and a divided court

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performance, she received a rating of either 4 or 5 on an ascending scale of 1 to 5. This included peer and patient relations, an area in which Horowitz had been told she was especially deficient and needed major improvement. Brief in Opposition of Writ for Certiorari at 5. *See* note 10 *supra*.

12. Although school officials told respondent that she could request an appeal, her request was unprecedented. The University had no established appeal procedure and therefore had to promptly develop one for use in the instant case. 538 F.2d at 1319-20.

The physicians were all well-respected members of the faculty who had had insignificant prior contact with Horowitz. They were to evaluate her clinical abilities in general medicine, pathology-anatomy, obstetrics-gynecology, and pediatrics and make one of three recommendations: (1) graduation on schedule, (2) continued probation and reassessment of her status in May 1973, or (3) immediate dismissal. UMKC did not give the physicians the option of recommending additional study after May 1973, *id.* at 1320, although the school had permitted this kind of deceleration for other medical students. Two of the physicians recommended graduation on schedule, three recommended continued probation and reassessment of her status in May pending further reports on her clinical progress, and the remaining two recommended that respondent be immediately dismissed. 435 U.S. at 81.

13. 435 U.S. at 81. After reviewing the physician's reports, the Council affirmed the decision not to allow respondent to graduate on schedule. At the end of May, the Council met again to consider whether to permit respondent to remain in school beyond June. Relying on the lack of "radical improvement" in her clinical rotations, the Council recommended that respondent not be allowed to re-enroll. *Id.*

Neither the Council on Evaluation, the Coordinating Committee, nor the dean allowed respondent to appear for any kind of hearing during the entire dismissal process. Further, they did not provide her with copies of the formal evaluations or other evidence upon which the Council on Evaluation and the Coordinating Committee relied in making their determinations. 538 F.2d at 1320.

14. 435 U.S. at 82.

15. *Id.* at 80. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

16. 435 U.S. at 80. Respondent also advanced a substantive due process claim, arguing that her dismissal was improper because it was arbitrary and capricious. *See* note 49 *infra*.

17. 435 U.S. at 80.

18. 538 F.2d at 1321.

en banc denied a petition for rehearing.[19] The Supreme Court reversed and *held*: the due process clause of the fourteenth amendment does not require a hearing before dismissal of a graduate or professional student from a state university for academic deficiency.[20]

The fourteenth amendment to the United States Constitution protects all citizens from deprivation of liberty without due process of law.[21] Although the term "due process of law" eludes precise definition,[22] the phrase draws its meaning from those principles of justice that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental."[23] In its primary sense, though, due process connotes "fairness of procedure"[24] and it is from this goal that its elements are derived.

Functionally, the due process clause has broad applicability; therefore its components vary with the facts of each case.[25] At a minimum, however, due process usually requires notice and an opportunity to be be heard prior to a deprivation.[26] The method,[27] content,[28] and tim-

19. 542 F.2d 1335 (8th Cir. 1976).

20. 435 U.S. at 84-92.

21. U.S. CONST. amend. XIV, § 1 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

22. Hannah v. Larche, 363 U.S. 420, 442 (1960); Rochin v. California, 342 U.S. 165, 173 (1952); Davidson v. New Orleans, 96 U.S. 97, 101-04 (1877).

23. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *see* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

24. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring); *see* Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

25. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[D]ue process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings.").

26. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Roller v. Holly, 176 U.S. 398, 409 (1900); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

In emergency situations or where an overriding governmental interest so justifies, the hearing may take place after the deprivation. Goss v. Lopez, 419 U.S. 565, 582-83 (1975) ("[T]here are recurring situations in which prior notice and hearing cannot be insisted upon. . . . In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . ."); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (due process requires "that an individual be given an

ing[29] of the notice and the character[30] of the hearing are arrived at by a juxtaposition of the relevant interests.[31] According to *Mathews v. Eldridge*,[32] the authoritative Supreme Court pronouncement on the subject, the three principal factors in this balancing process are: first, the private interest at stake, including the extent to which the individual will be "condemned to suffer grievous loss;"[33] second, the interest of the state, including the purpose of the official action involved and any administrative and fiscal burdens that additional or alternative procedural safeguards would impose;[34] and third, the joint interest in maximizing the number of correct decisions by imposing appropriate procedural requirements.[35]

Historically, procedural protection had been completely withheld from students confronted with official school action.[36] In the context of post-secondary schools, whether private or public, students were particularly defenseless because courts considered admission and attendance

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opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"). *See, e.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 898-99 (1961); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950); Bowles v. Willingham, 321 U.S. 503, 520-21 (1944).

27. *See, e.g.*, Covey v. Somers, 351 U.S. 141, 146 (1956); New York v. New York, N.H.&H. R. Co., 344 U.S. 293, 296-97 (1953); Milliken v. Meyer, 311 U.S. 457, 462-63 (1940).

28. *See, e.g.*, *In re* Gault, 387 U.S. 1, 33-34 (1967); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385 (1914).

29. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974); *In re* Gault, 387 U.S. 1, 33-34 (1967); Armstrong v. Manzo, 380 U.S. 545, 550-51 (1965).

30. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); Goldberg v. Kelly, 397 U.S. 254, 266-67, 269-70 (1970).

31. *See* Hannah v. Larche, 363 U.S. 420, 422 (1960).

32. 424 U.S. 319 (1976).

33. *Id.* at 334-35. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). *See also* Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 340-42 (1969); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

34. 424 U.S. at 334-35. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 580-85 (1975); Bell v. Burson, 402 U.S. 535, 540-41 (1971); Goldberg v. Kelly, 397 U.S. 254, 265-68 (1970).

35. 424 U.S. at 334-35.

36. *See, e.g.*, Steinhauer v. Arkins, 18 Colo. App. 49, 69 P. 1075 (1902); North v. Board of Trustees, 137 Ill. 296, 27 N.E. 54 (1891); Pratt v. Wheaton College, 40 Ill. 186 (1866); Russell v. Inhabitants of Lynnfield, 116 Mass. 365 (1874); Hodgkins v. Inhabitants of Rockport, 105 Mass. 475 (1870); O'Sullivan v. New York Law School, 22 N.Y.S. 663 (Sup. Ct. 1893); Jones v. New York Homoeopathic Medical College & Hosp., 20 N.Y.S. 379 (Super. Ct. 1892); Keller & Meskill, *Student Rights and Due Process*, 3 J. LAW & EDUC. 389, 391 (1974); Note, *Due Process in Academic Dismissals from Post Secondary Schools*, 26 CATH. U.L. REV. 111, 115 (1976). *But see* Stallard v. White, 82 Ind. 278 (1882); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); Gleason v. University of Minn., 104 Minn. 359, 116 N.W. 650 (1908).

to be a privilege.[37] This theory, in addition to justifying virtually unlimited discretion in controlling school-related matters,[38] indicates the deference given to faculty and administrative expertise.[39] Thus, the courts granted colleges and universities extensive autonomy in devising standards for admissions[40] and dismissals,[41] determining curricula,[42] and establishing rules and regulations pertaining to all aspects of students' conduct.[43]

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37. The privilege doctrine rests on the theory that benefits bestowed by the government are, in effect, gifts and therefore create no right in the recipient. The state retains complete discretion to grant, withdraw, or condition privileges. The Court has discredited the right-privilege distinction, however, by recognizing that when the legislature grants a statutory entitlement, a citizen has the right to be free from arbitrary governmental action. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Slochower v. Board of Educ., 350 U.S. 551, 555 (1956); Keller & Meskill, *supra* note 36, at 389-92; Monaghan, *Of "Liberty & Property,"* 62 CORNELL L. REV. 405, 407 (1977); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1065, 1077-78, 1135 (1968). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

38. *See* Board of Trustees v. Waugh, 105 Miss. 623, 633, 62 So. 827, 831 (1913), *aff'd*, 237 U.S. 589 (1915):

> The right to attend the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right.

39. *See, e.g.*, Pacella v. Bennett Medical College, 205 Ill. App. 324, 325 (1917) ("Courts are not supposed to be learned in medical science and are not qualified to pass an opinion as to the attainments of a student in medical science."); Edde v. Columbia Univ., 8 Misc. 2d 795, 795, 168 N.Y.S.2d 643, 644 (Sup. Ct. 1957) ("The court may not substitute its own opinion as to the merits of a doctoral dissertation for that of the faculty members whom the university has selected to make a determination as to the quality of the dissertation."), *aff'd*, 6 App. Div. 2d 780, 175 N.Y.S.2d 556 (1958), *cert. denied*, 359 U.S. 956 (1959); Jones v. New York Homoeopathic Medical College & Hosp., 20 N.Y.S. 379, 379 (Super. Ct. 1892) ("These rules [those governing the college] leave it to certain medical experts to determine whether the examination of the applicant has been satisfactorily passed or not . . . ."); Keller & Meskill, *supra* note 36, at 389.

40. *E.g.*, Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959) ("the authorities in control of the operation of the [state college] have the primary right and responsibility of fixing and passing upon the qualifications for admission"); Tinkoff v. Northwestern Univ., 333 Ill. App. 224, 77 N.E.2d 345 (1947) (admission rule reserving the right to reject any applicant for any reason was within the power of school to adopt and under such rule school was not required to state reason denying admission to applicant), *cert. denied*, 335 U.S. 829 (1948); Carnes v. Finley, 98 Misc. 390, 164 N.Y.S. 305 (Sup. Ct. 1917) (courts will not examine the wisdom or reasonableness of a rule pertaining to time of applications for college entrance diplomas).

41. *See, e.g.*, Robinson v. University of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958) (atheism); *In re* Johnston, 365 Mich. 509, 114 N.W.2d 255 (1962) (failure of medical board examinations); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932) (failure of major courses).

42. *See, e.g.*, Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934) (suspension for refusal to take prescribed course); Bryant v. Dolan, 61 S.D. 530, 249 N.W. 923 (1933) (elimination of courses).

43. *See, e.g.*, Waugh v. Board of Trustees, 237 U.S. 589 (1915) (prohibition of fraternities);

In addition to the privilege doctrine, the judiciary defended its noninterference on two other theories. The first was based on the common law notion that colleges were *in loco parentis* and could demand obedience from students to the same extent as could a parent.[44] A student, therefore, had virtually no rights and was obliged to submit to the dictates of school authorities.[45] Alternatively, courts reasoned that upon a student's matriculation he entered into a contract with the institution,[46] whereby he agreed to comply with all rules and regulations especially those delineated in the catalogue.[47] Pursuant to either of these formulations of a student's status, the institution essentially had the right to dismiss a student whenever it determined the situation warranted such action.[48] The only ground upon which a student could base an appeal was that the school had acted in an arbitrary or capricious manner.[49]

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Webb v. State Univ. of N.Y., 125 F. Supp. 910 (N.D.N.Y.) (same), *appeal dismissed*, 348 U.S. 867 (1954); North v. Board of Trustees, 137 Ill. 296, 27 N.E. 54 (1891) (school may require attendance at nonsectarian religious exercises); Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956) (plagiarism); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913) (school may forbid students from frequenting certain restaurants and places of amusement); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924) (cigarette smoking); Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y.S. 202 (public, reported speech outside of university), *aff'd mem.*, 181 App. Div. 936, 167 N.Y.S. 1125 (Sup. Ct. 1917); Connell v. Gray, 33 Okla. 591, 127 P. 417 (1912) (uniforms). *But see* Knight v. State Bd. of Educ., 200 F. Supp. 174 (1961) (disciplinary rules must be fair on their face and as applied).

44. *See* 1 W. BLACKSTONE, COMMENTARIES *453.

> He [the father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

*Id. See also* Note, *supra* note 36, at 115.

45. *See, e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928).

46. Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928) (relation between a student and a private college that receives no state aid is solely contractual); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923) (same).

47. McClintock v. Lake Forest Univ., 222 Ill. App. 268 (1921). Presumably, a contract theory would also mean the student impliedly agrees to meet the standards of competence that the school requires for a degree. *See* Tate v. North Pac. College, 70 Ore. 160, 140 P. 743 (1914).

48. Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957).

49. Connelly v. University of Vt. & State Agricultural College, 244 F. Supp. 156 (D. Vt. 1965) (intent to fail student regardless of quality of work is arbitrary and capricious).

Some courts have said that schools may not act arbitrarily, but they usually uphold the administrator's action. *See, e.g.*, Woods v. Simpson, 146 Md. 547, 126 A. 882 (1924) (refusal of university to re-enroll student because of friction with authorities held not to be an abuse of discretion); Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433 (action of state university president in suspending student who permitted the use of liquor by students in her home was not arbitrary), *cert. denied*, 277 U.S. 591 (1928); Frank v. Marquette Univ., 209 Wis. 372, 245 N.W. 125 (1932) (use of differ-

The Fifth Circuit dramatically altered this framework in *Dixon v. Alabama State Board of Education*,[50] holding that a publicly-funded institution of higher learning is an arm of the state.[51] As a result, any action taken against a student for misconduct must comply with the requirements of due process, *i.e.*, notice and an opportunity to be heard.[52] The court noted that the privilege doctrine had been rejected by the Supreme Court in other contexts.[53] It then discredited the application of the contract theory to state schools[54] and warned that although a private university may make admission contingent upon a waiver of the right to notice and hearing, a state university cannot.[55] The court further noted that this was true even if a student voluntarily enrolled in a state school whose catalogue or rules purported to reserve the right of summary dismissal because a "[s]tate cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process."[56]

In determining the elements of a proper hearing, the *Dixon* court indicated that the nature of the hearing should vary depending upon the particulars of the individual case.[57] The case there under review

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ent disciplinary measures against different students guilty of substantially similar rule infractions is not arbitrary or capricious).

A student alleging a dismissal was arbitrary and capricious has the burden of proof. *See* Tate v. North Pac. College, 70 Ore. 160, 140 P. 743 (1914).

50. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

51. *See* note 2 *supra*.

52. 294 F.2d at 158; Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894 (1961).

53. 294 F.2d at 156-57.

54. *Id.* at 157-58. The cases in which state schools were parties do not question the necessity of notice and a hearing but rather the adequacy of the proceedings. *See, e.g.*, Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied*, 277 U.S. 591 (1928); Vermillion v. Englehardt, 78 Neb. 107, 110 N.W. 736 (1907); Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943).

55. Private schools that accept state aid are vulnerable to the finding that they are entangled in state action and, therefore, may have to comply with the due process clause. *E.g.*, Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965); Hill v. McCauly, 3 Pa. Co. 77 (1887). *See* Hendrickson, *State Action and Private Higher Education*, 2 J. LAW & EDUC. 53 (1973); Keller & Meskill, *supra* note 36, at 393-96; *Developments in the Law*, *supra* note 37, at 1054-56; Note, *supra* note 36, at 116-19. *But see* Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).

56. 294 F.2d at 156. *Cf.* Soglin v. Kauffman, 295 F. Supp. 978, 990 (W.D. Wis. 1968) (one cannot, in order to attend a state university, be "obliged to consent that he may be expelled without specification of charges, notice, or hearing or to consent to remain silent on the political and social issues of his time"), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

57. 294 F.2d at 158.

required "something more than an informal interview with an administrative authority of the college."[58] The court further noted that the "rudiments of an adversary proceeding" are well-suited to the factual determination that must be made in conjunction with a finding of misconduct.[59] In 1969 the Eighth Circuit developed its own procedural guidelines for a dismissal based on charges of misconduct.[60] "[P]rocedural due process must be afforded . . . by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures . . . ."[61] Precisely what those protective measures entail has been frequently litigated.[62]

A partial answer came in *Goss v. Lopez*,[63] when the Supreme Court held that prior to the imposition of a ten-day disciplinary suspension, a high school student must be given notice of the charges and an opportunity to present informally his version of the situation.[64] The Court specifically left open the question of due process requirements for weightier deprivations, *e.g.*, longer suspensions or permanent expulsions.[65]

Although courts have entered the educational domain to ensure fairness in disciplinary actions,[66] they have steadfastly held that academic

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58. *Id.* In the instant case the court determined that the student should be given:

> the names of the witnesses against him and an oral or written report on the facts to which each witness testifies . . . , the opportunity to present to the Board, or . . . an administrative official . . . , his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.

*Id.* at 159.

59. *Id.*

60. Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

61. *Id.* at 1089.

62. *See, e.g.*, Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir.) (impartial decisionmaker), *cert. denied*, 414 U.S. 1032 (1973); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972) (same); French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969) (same); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va.) (same), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 904 (1969); Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968) (formal charges), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970); Due v. Florida A.&M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963) (record of proceedings); Tibbs v. Board of Educ., 114 N.J. Super. 287, 276 A.2d 165 (cross-examination), *aff'd per curiam*, 59 N.J. 506, 284 A.2d 179 (1971); R.R. v. Board of Educ., 109 N.J. Super. 337, 263 A.2d 180 (1970) (prior hearing). *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969).

63. 419 U.S. 565 (1975).

64. *Id.* at 581.

65. *Id.* at 584.

66. *Cf.* Brookins v. Bonnell, 362 F. Supp. 379, 384 (E.D. Pa. 1973) (nursing student, dis-

decisions are completely without the field of judicial expertise and should be left to the good faith discretion of school officials.[67]

In *Board of Curators v. Horowitz*,[68] the Supreme Court perpetuated the distinction between academic and disciplinary dismissals and the requisite due process safeguards attaching to each. The Court began with a cursory examination of the elements of a liberty interest, but failed to resolve the issue of whether a liberty interest was in fact implicated.[69] Instead, it assumed the existence of a protectible liberty interest,[70] labeled respondent's expulsion an "academic dismissal,"[71] and

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missed for alleged academic failure, claimed an arbitrary dismissal for actions unrelated to academics, *i.e.*, alleged failure to submit physical examination report, to submit transcript and records from prior school, and to attend class regularly); Soglin v. Kauffman, 295 F. Supp. 978, 991 (W.D. Wis. 1968) (standard of "misconduct," without more, may not serve as the sole foundation for an expulsion or suspension), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

67. *See* note 49 *supra* and accompanying text; Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975); Depperman v. University of Ky., 371 F. Supp. 73 (E.D. Ky. 1974); Connelly v. University of Vt. & State Agricultural College, 244 F. Supp. 156 (D. Vt. 1965); Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 393 U.S. 936 (1968); Militana v. University of Miami, 236 So. 2d 162 (Fla. Dist. Ct. App.), *cert. denied*, 401 U.S. 962 (1971); Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932).

68. 435 U.S. 78 (1978).

69. *Id.* at 82-84.

Respondent argued that UMKC's actions infringed a liberty interest because she was: (1) practically foreclosed from continuing her medical education, 538 F.2d at 1320-21 n.3; *see* Goss v. Lopez, 419 U.S. 565, 574-75 (1975), and (2) denied the right to pursue her chosen career. 538 F.2d at 1320; *see* Board of Regents v. Roth, 408 U.S. 564 (1972); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

The validity of respondent's claim that UMKC's actions infringed a liberty interest is questionable in light of Bishop v. Wood, 426 U.S. 341 (1976). In *Bishop*, the Court upheld the dismissal of a policeman without a hearing. In so doing, it rejected the theory that dismissal alone, absent publication of the reasons for the action, could amount to an infringement of liberty. In respondent's case, although UMKC did not literally publish the reasons for her dismissal, it became part of her permanent transcript. The school, in effect, publicized the reasons for the action, because the transcript would be required for admission to any other medical school or for employment in her chosen profession. *Cf.* Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) (medical student's dismissal was accompanied by actual publication of statement that he lacked "intellectual ability").

70. 435 U.S. at 84-85. The Court assumed the existence of a protectible liberty or property interest, though respondent had only argued the existence of the former. *Id.*

71. *Id.* at 86. Justices White, Marshall, Blackmun, and Brennan found it unnecessary to characterize respondent's dismissal as either academic or disciplinary. *Id.* at 96-97. (White, J., concurring); *id.* at 97 (Marshall, J., concurring in part and dissenting in part); *id.* at 109 (Blackmun & Brennan, JJ., concurring in part and dissenting in part). The Council on Evaluation noted: "This issue is not one of academic achievement, but of performance, relationship to people, and ability to communicate." Brief for Amici Curiae at 9.

found that UMKC had accorded her ample procedural protection to satisfy due process.[72]

The Court relied heavily on the sixty years of precedent established in the state and lower federal courts, which decreed that academic affairs should be handled exclusively by educators.[73] By recognizing a clear-cut difference between academic and disciplinary dismissals, the Court was able to distinguish *Goss*.[74] It explained that the decision to suspend the students in *Goss* was based on the factual conclusion that the students had engaged in impermissible conduct. An objective determination of this nature lends itself well to a traditional factfinding hearing because the essential questions are similar to those frequently adjudicated in other contexts, *i.e.*, did the student in fact engage in a particular act, and if so, is that act prohibited by a school rule? The Court asserted that the decision in the instant case required a more subjective evaluation because the dismissal was based on cumulative negative assessments of respondent's past conduct and the opinion that her future conduct would not be satisfactory. A factfinding hearing, therefore, would serve no purpose.[75]

Emphasizing that flexible procedures are inherent in the notion of due process, the Court found that the procedures used provided respondent with adequate protection. Respondent had been informed of the faculty's evaluation of her clinical performance and the threat this posed to her timely graduation. This notice, combined with the "careful and deliberate" way the school rendered its decision, validated the procedure.[76] The Court reasoned that since respondent was not entitled to a hearing,[77] the appeal procedure using the seven physicians exceeded the minimum constitutional requirements and was further ev-

72. 435 U.S. at 85.

73. *Id.* at 84-91.

74. Goss v. Lopez, 419 U.S. 565 (1975). *See* notes 63-65 *supra* and accompanying text.

75. 435 U.S. at 84-91. In finding that the judiciary is ill-equipped to review academic decisions, the Court summarily dismissed respondent's substantive due process claim even though the court of appeals had failed to reach the issue. *Id.* at 91-92. Justices Marshall, Blackmun, and Brennan felt that the case should have been remanded to the court of appeals for resolution of this issue. *Id.* at 107-08 (Marshall, J., concurring in part and dissenting in part); *id.* at 109 (Blackmun & Brennan, JJ., concurring in part and dissenting in part).

76. *Id.* at 85-86.

77. *Id.* The majority did not require a hearing of any kind. *Id.* at 86 n.3. Justice White disagreed and concluded that, at minimum, respondent be "informed of the reasons for her dismissal and [be given] an opportunity personally to state her side of the story." *Id.* at 97 (White, J., concurring). Justice Marshall also disagreed with the conclusion that the due process clause did not require a hearing. *Id.* at 97-103 (Marshall, J., concurring in part and dissenting in part). *See* notes 79-83 *infra* and accompanying text. Justices Blackmun and Brennan, finding that respondent received at least as much protection as she was entitled to (assuming a liberty interest), re-

idence of the school's diligence in reaching a just decision.[78]

Justice Marshall agreed with the majority that a formal adversary hearing is not required,[79] but disagreed with the conclusion that respondent was entitled to even less protection than she received.[80] He found it useless to attempt to label respondent's dismissal as either academic or disciplinary,[81] but rather based his determination upon a balancing of the three factors outlined in *Mathews*[82] and a comparison of *Goss* to the present case.[83] Justice Marshall characterized the meetings with the dean as an informal give-and-take affording respondent the opportunity to present her version of the controversy.[84] These meetings, together with the appeal procedure, satisfied him that UMKC had accorded her due process.[85]

While all the Justices agreed that UMKC had accorded respondent sufficient procedural protection, the specific requirements of due process in academic settings remain unclear. The Court avoided its traditional due process investigation[86] and its analytic framework, which had been set forth in *Mathews*.[87] Instead, the Court concluded that the school's decision to dismiss respondent was "careful and deliberate,"[88] but never defined these terms for the benefit of educators facing the

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fused to concur in the discussion of what would constitute minimum due process protection. *Id.* at 108-09 (Blackmun & Brennan, JJ., concurring in part and dissenting in part).

78. *Id.* at 85. As noted by the court of appeals, the parties agreed that the physician appeal procedure affected only the decision not to graduate respondent on schedule and not the decision to dismiss her. The court also pointed out that the panel of physicians only had power to make recommendations to the Council on Evaluation, which only had power to make further recommendations to yet another body. 538 F.2d at 1321 n.4.

79. 435 U.S. at 96, 101-02 (Marshall, J., concurring in part and dissenting in part).

80. *Id.* at 97.

81. *Id.*

82. *Id.* at 99-103. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); notes 32-33 *supra* and accompanying text.

83. Goss v. Lopez, 419 U.S. 565 (1975). *See* notes 63-65 *supra* and accompanying text. Justice Marshall reasoned that the deprivation to which respondent was subjected was more severe than the ten-day suspension in *Goss*, that the university had no greater interest in summary proceedings here than did the school in *Goss*, and that as in *Goss* the ultimate decisionmaker acted on the reports and advice of others so that "the risk of error was not at all trivial." His conclusion was that respondent deserved more than informal give-and-take. 435 U.S. at 100-01 (Marshall, J., concurring in part and dissenting in part).

84. 435 U.S. at 98-99. *See* notes 9-11 *supra* and accompanying text.

85. 435 U.S. at 102-03.

86. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

87. The majority did mention *Mathews*, but relegated discussion of the case to a footnote. 435 U.S. at 86 n.3.

88. *Id.* at 85.

burden of comparable determinations in the future. The Court admittedly was reluctant to promulgate guidelines in an area where it had seldom ventured;[89] however the methods of reaching "careful and deliberate" decisions are open to wide variation.

Characterizing the dismissal as academic does little to resolve procedural due process questions since that initial determination is difficult without a clear sense of the scope of the term, "academic." Respondent's deficiencies, primarily her failure to relate well to peers, to attend to personal appearance, and to meet clinical responsibilities with grace, unlike poor exam performance (clearly academic) or violation of dress codes (clearly disciplinary), were not *clearly* either academic or disciplinary, and the assigning of a label would not make them so.[90] By designating respondent's dismissal as academic, the Court was able to rely on precedent and to generalize about academic dismissals without confronting the distinctive facts of the case. The Court limited due process in this sphere to require only notice because it viewed the appeal procedure as relevant only to providing some content to the "careful and deliberate" way the school officials made their decision. The Court noted that factfinding hearings are not only constitutionally unnecessary but practically useless. The former conclusion may be unwise, the latter in many circumstances may be incorrect.

Perhaps the Court could have avoided much of the confusion engendered by the opinion had it adopted Justice Marshall's approach and undertaken a *Mathews*-type analysis. Justice Marshall, however, did not consider all the relevant factors in balancing the interests at stake. A university has a significant interest in its reputation, which to a large extent is based on the competency of its graduates. Professional schools should be particularly concerned with allowing only competent students to graduate. The majority opinion, by emphasizing the expertise and historic discretion of educators in awarding degrees, indirectly recognized an institution's compelling interest in upholding its reputation. Had the majority recognized that it could determine the extent and nature of the minimum due process hearing by balancing an indi-

89. *Id.* at 90-91.

90. The Court said that "the record . . . leaves no doubt that respondent was dismissed for pure academic reasons." *Id.* at 91 n.6. However, the specific allegations against respondent were that her peer and patient rapport, attendance, and personal hygiene were unsatisfactory. *See* notes 10 & 71 *supra*.

vidual liberty interest against UMKC's reputational interest, the decision would have been more consistent with the Court's prior due process analyses.