WHITE PAPER

What Process Is Due To Protestors: The Constitutional Rights Of Student Protesters To Due Process In Disciplinary Hearings

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Recently, we have heard from a number of students who are facing potential school discipline arising out of their roles in campus protests. Columbia has been in the news the most as we wrote this White Paper. Columbia has started suspending and expelling students who refused to vacate an encampment on campus.[1] Columbia also suspended a student who allegedly posted anti-Semitic videos on line.[2] It's not just Columbia. Consider some other Ivy League schools. At Penn, officials said that they were pursuing possible disciplinary action against protesters who have defied repeated orders to end an encampment.[3] At Princeton, students who were arrested after occupying a campus building are now facing university discipline — including suspension, withheld degrees, and expulsion. Yale declined to pursue school disciplinary charges against student who who slept in the encampments, suggesting only that student who were arrested and those who are under investigation for instigating violence may face school proceedings.[4]

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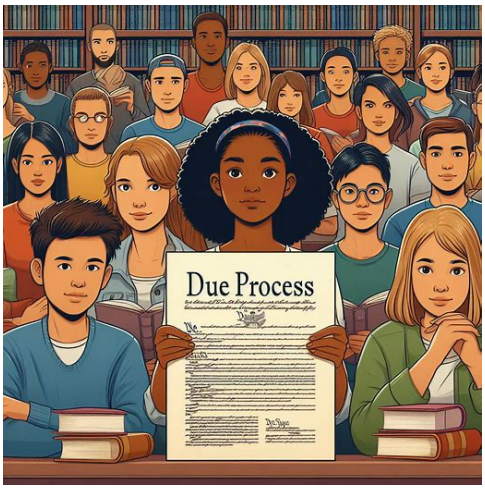
[1] *Columbia begins to suspend students in 'Gaza Solidarity Encampment,' University spokesperson says,* Columbia Spectator, April 29, 2024; *Columbia suspends protesters after negotiations break down*, Politico, April 29, 2024.

[2] *Student Protester Is Suspended After Anti-Zionist Video*, NY Times, April 29, 2024

[3] *Penn says it will pursue disciplinary action against encamped pro-Palestinian protesters*, Phila. Inquirer, April 30, 2024.

[4] *What academic penalties could the 44 arrested student protesters face?* Yale Daily News, April 25, 2024.

This White Paper describes the due process rights of student protesters to procedural due process before they can be suspended or expelled by their college or university.[5] (We will be putting out a separate White Paper on the free speech rights of college and university students, including the right to protest.)



The question we are often asked is: "What process is due to protesters?" The answer, as we describe below, is not simple. The Supreme Court has never issues a clear decision on this topic. As a result, the law is a mosaic. It matters whether the protests occur at a private or public school. Students at private schools have to predominantly rely on school policies and state laws. Students at public schools are protected by the Constitution, but even for these students, the level of due process protections provided to students often depends on the state or federal appellate circuit where the school is located.

Private Schools: Limited Protections

For students in private schools, constitutional protections do not generally apply.[6] In those situations, students wishing to challenge disciplinary decisions must allege that discipline was imposed in violation of various contractual obligations – usually found in student handbooks or codes of conduct. Most commonly, schools promise to to provide fundamentally fair disciplinary proceedings.

What this means is often a school-by-school and state-by-state analysis, and where the school is located can affect the outcome.

Three cases we have been involved in illustrate how the standards can vary by state, In *Doe v. Univ. of the Sciences*, for example, the Third Circuit Court of Appeals found that, under Pennsylvania law, a school's guarantee of fundamental fairness "includes the chance to cross-examine witnesses and the ability to participate in a live, adversarial

[5] Every case is, of course, different. Students are encouraged to contact an attorney to discuss their particular rights and situation. We cannot emphasize one thing enough, however: do so right away. Once discipline has been imposed it is much more difficult for an attorney to help.

[6] Private conduct does not constitute governmental action. That presumption may be overcome in limited circumstances, such as where the state "has exercised coercive power or has provided such significant encouragement" that the challenged action must be considered that of the state, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). However, receipt of government funds is insufficient to convert a private university into a state actor, even where "virtually all of the school's income [i]s derived from government funding." *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

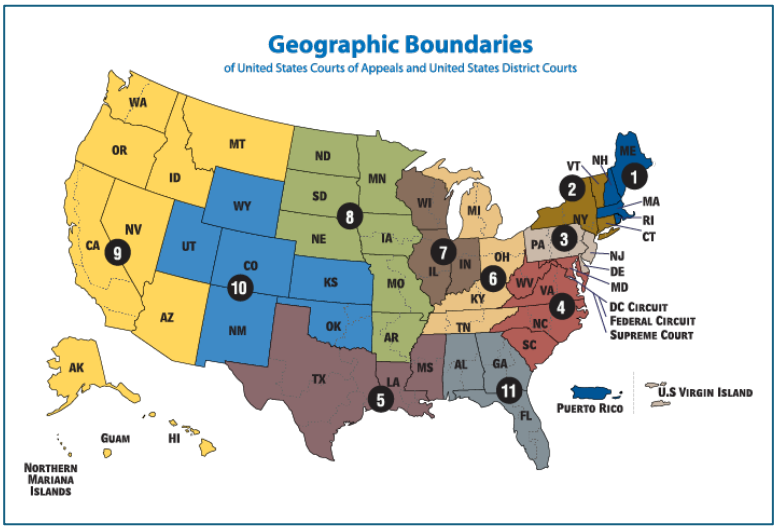
hearing during which the accused may present evidence and a defense."[7] Contrast that decision with the law in Florida we encountered in *Doe v. Rollins College*.[8] In that case, the court did not require the school to have a full hearing, but still found that a student was able to pursue a claim that the school did not provide a "fundamentally fair" process by alleging that the school "didn't treat him fairly or equitably—deciding he was responsible before hearing his side of the story…" Even less favorable to the student is New York law described in *Doe v. Syracuse Univ.*, where a federal court held that a school's guarantees of fundamental fairness in a disciplinary process are merely unenforceable "general statements of policy."[9]

Public Schools: Rights Depend On Where The School Is Located

To succeed on a procedural due process claim, students must show that they had a constitutionally cognizable life, liberty, or property interest and that the procedures employed by the school were constitutionally inadequate.

Do Students Even Have A Right To Due Process?

The answer to the question of whether students at public school have a constitutional right to due process before facing discipline is not as simple as it seems. The answer depends on whether courts in the circuit where the school is located have held that students have a constitutionally protected property or liberty interest in continued class attendance.



The Fourteenth Amendment to the United States Constitution forbids a state from depriving persons of life, liberty, or property without due process of law.[10] The Supreme Court has not squarely held that students have a constitutionally protected interest in continued enrollment at a state college or university.

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[7] 961 F.3d 203, 214-215 (3d Cir. 2020).

[8] M.D.Fla. No. 6:18-cv-1069-Orl-37LRH, 2020 U.S. Dist. LEXIS 249574, at *33 (July 13, 2020),

[9] 341 F. Supp. 3d 125, 140-142 (N.D.N.Y. 2018).

[10] *See e.g. Knudson v. Ellensburg*, 832 F.2d 1142, 1144 (9th Cir. 1987) ("The Fourteenth Amendment's guarantee of procedural due process protects individuals from erroneous or unjustified deprivations of life, liberty, or property, and assures them that the government deals with them fairly.").

The Court first considered such a claim in *Goss v. Lopez*.[11] In *Goss*, the Court held that high school students had a constitutionally protected liberty or property interest in their continued enrollment. The Court held that students could not face suspensions without notice or hearings.[12] A significant basis for the *Goss* Court's reasoning was that discipline could damage the students' academic reputation and "interfere with later opportunities for higher education and employment."[13] Later decisions from the Court simply assumed the existence of a liberty or property interest. For example, in *Board of Curators of the Univ. of Missouri v. Horowitz*,[14] and *Regents of the Univ. of Mich. v. Ewing*,[15] the Court assumed, for the sake of the analysis, that former students who challenged their dismissals from schools had a protected property or liberty interest in their continued enrollment.

The legal story starts with a famous 1961 Fifth Circuit case, *Dixon v. Alabama State Bd. of Edn*., a case brought by a number of famed civil rights attorneys, including future Justice Thurgood Marshall,[16] In that case, a court first recognized that students have a liberty interest in their higher education. The court did not engage in an in-depth analysis of state contract law or parse the precise damage to a student's reputation from disciplinary action. Instead, the court plainly stated the obvious about students and higher education:

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.[17]

The Supreme Court in *Goss* referred to *Dixon*, as a "landmark decision" and observed that since Dixon "the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." 419 U.S. at 576 n.8 (collecting cases). The *Dixon* holding was reaffirmed by the Fifth Circuit in *Plummer v. Univ. of Houston*.[18] In that case, Judge Jones, dissenting in *Plummer* on other grounds, observed, "Other federal courts have relied on *Dixon* for the

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[11] 419 U.S. 565 (1975).

[12] 419 U.S. at 579.

[13] 419 U.S. at 574-75.

[14] 435 U.S. 78, 84-85 (1978)

[15] 474 U.S. 214, 223 (1985)

[16] 294 F.2d 150 (5th Cir.1961)

[17] 294 F.2d at 157.

[18] , 860 F.3d 767, 773 (5th Cir. 2017).

proposition that protected interests are implicated by university suspensions and expulsions."[19]

Dixon and *Goss* have been sufficient for courts to conclude, for decades, that college and university students have a constitutionally protected property or liberty interest in continued enrollment. In 1988, for example, the First Circuit, citing to *Goss* and *Dixon*, reached such a conclusion in unequivocal language:

> There is no doubt that due process is required when a decision of the state implicates an interest protected by the fourteenth amendment. It is also not questioned that a student's interest in pursuing an education is included within the Fourteenth Amendment's protection of liberty and property. Hence, a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process.[20]

The First Circuit, in a panel that included Justice (Ret.) Souter sitting by designation, later cited to *Goss* in holding that, for a college student "As a general rule, both notice and a hearing should precede a suspension."[21]

The Eleventh Circuit cited *Dixon* for the proposition that a student's continued enrollment at a college or university is a protected liberty or property interest under the Due Process Clause, noting further that "The Supreme Court's decision in Goss further reinforces our conclusion."[22] The Eleventh Circuit's decision relied in, part, on an entitlement of the student to remain enrolled established by the school's policy manual and student code of conduct.[23] The court proceeded to describe this interest as clearly established: "no tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment."[24]

The Second Circuit has not directly addressed the issue of whether college or university students have a constitutionally protected liberty or property interest in continued enrollment. In a 1972 decision, however, the Second Circuit cited *Dixon* favorably and appeared to assume the existence of such an interest, noting that there are "many vexing questions as to what due process requires in school disciplinary proceedings…" [25] Similarly, the Third Circuit has not addressed this issue in detail, but observed that a

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[19] 860 F.3d at 781 n. 8 (collecting cases from 1st, 2d, 3d, 4th, 6th, 7th, 8th, 10th, and 11th Circuits).

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

[21] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 72 (1st Cir. 2019), *citing, inter alia*, *Gorman*, 837 F.2d at 12.

[22] *Barnes v. Zaccari*, 669 F.3d 1295, 1306 (11th Cir.2012)

[23] 669 F.3d at 1304.

[24] 669 F.3d 1295 at 1305.

[25] *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972)

district court had appropriately relied upon *Dixon*.[26] The court said, "The Due Process Clause protects students during disciplinary hearings at public institutions."[27]

The Fourth Circuit and the Ninth Circuits have assumed without questioning that college and university students have a constitutionally protected interest in continued enrollment that is protected by the Due Process Clause.[28]

The Sixth Circuit, relying in part on Dixon, noted the existence of a student's interest in continued enrollment as early as 1970.[29] In that decision, the Sixth Circuit held that school officials were "required to accord plaintiffs procedural due process throughout the disciplinary proceedings which resulted in their dismissal from the University."[30] The Sixth Circuit reaffirmed this view over a decade later, suggesting that "the posture of the law" since the mid-19070s, "was such that some kind of formal hearing was apparently required before a student could be expelled for disciplinary causes."[31] In a 1986 unpublished *per curiam* opinion, the Sixth Circuit affirmed a decision of district court finding that a higher education student had "asserted a constitutionally protected interest" in continued enrollment.[32] Nineteen years later, the Sixth Circuit, *citing, inter alia, Goss*, simply said, "in this Circuit we have held that the Due Process Clause is implicated by higher education disciplinary decisions."[33] The Sixth Circuit reaffirmed this holding in recent years. The Sixth Circuit has noted on a number of occasions the existence of a constitutionally protected interest by college and university students in continued enrollment on the basis of both a property rights and stigma-plus approach. In *Doe v. Cummins*,[34] for example,

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[26] *Van Le v. University of Medicine & Dentistry*, 379 F.App'x 171(3d Cir. 2010),

[27] 379 F.App'x at 174.

[28] Butler v. Rector & Bd. of Visitors of the College of William & Mary, 121 F.App'x 515, 518 (4th Cir. 2005); *Tigrett v. Rector & Visitors of the Univ. of Va*., 290 F.3d 620, 627 (4th Cir. 2002); *Oyama v. Univ. of Hawaii*, 813 F.3d 850, 875 (9th Cir. 2015) (noting that disciplinary dismissals from an academic institution "may require more formal procedures"); *Krainski v. State ex rel. Bd. of Regents*, 616 F.3d 963, 971 (9th Cir. 2010) (acknowledging the possibility that suspension or expulsion from a public university might trigger the protections of procedural due process).

[29] *Brown v. Strickler*, 422 F.2d 1000 (6th Cir. 1970).

[30] 422 F.2d at 1002, *citing, inter alia, Dixon*.

[31] *Hall v. Med. College of Ohio*, 742 F.2d 299, 308 (6th Cir. 1984), *citing, inter alia, Goss*, 419 U.S. at 577.

[32] *Jaksa v. Regents of Univ. of Michigan*, 787 F.2d 590 (6th Cir. 1986).

[33] *Flaim v. Med. College of Ohio*, 418 F.3d 629, 633 (6th Cir.2005)

[34] , 662 F.App'x 437, 445 (6th Cir. 2016).

the Sixth Circuit considered discipline imposed on two students; one student was suspended and one placed on probation. The Sixth Circuit found that the suspension "clearly implicates a property interest" and that discipline short of a suspension "implicat[ed] a protected liberty interest" because "the adverse disciplinary decision did, and continues to, impugn his reputation and integrity."[35]

The Eighth Circuit has also for decades suggested that students have a constitutionally protected interest in continued enrollment at colleges and universities: "procedural due process must be afforded a student on the college campus '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.'"[36] In 1975, in a case involving academic concerns, the Eighth Circuit held that because dismissal carried a stigma, schools must comply with "the dictates of due process, long recognized as applicable to disciplinary expulsion…."[37] And, in 1986, the Eighth Circuit found that a school's grievance appeal procedures were constitutionally adequate "to protect [a student's] interest in continued enrollment at that institution."[38]

The Tenth Circuit, in 1975, first held that an individual's place in a graduate program constitutes a protected property interest.[39] The Tenth Circuit court relied in part upon *Goss* and noted that such a right existed under a contract-type theory, observing that an student had "paid a specific, separate fee for enrollment and attendance at the [school]."[40] The Tenth Circuit has reaffirmed this holding on a number of occasions.[41]

The Seventh Circuit has taken a different approach to end up in the same place. Previously, the Seventh Circuit had declined to extend Goss from high school students to students at public universities. In *Williams v. Wendler*,[42] the Seventh Circuit expressed a

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[35] 662 F.App'x at 445. *See also Doe v. Miami Univ*., 882 F.3d 579, 599 (6th Cir. 2018) (college student's "suspension implicates a constitutionally protected interest"); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) ("State universities must afford students minimum due process protections before issuing significant disciplinary decisions.").

[36] *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir.1970), *quoting Esteban v. Central Missouri State Coll*., 415 F.2d 1077, 1089 (8th Cir. 1969).

[37] *Greenhill v. Bailey*, 519 F.2d 5, 9 (8th Cir. 1975).

[38] *Schuler v. Univ. of Minnesota*, 788 F.2d 510, 515 (8th Cir. 1986). *See also Woodis v. Westark Community College*, 160 F.3d 435, 440 (8th Cir. 1998) ("the expulsion proceedings entitled [the student] to some level of due process").

[39] *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir.1975)

[40] 513 F.2d at 573.

[41] *See, e.g., Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986) (Colorado graduate student had a property interest in his graduate education which entitled him to due process); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ*., 245 F.3d 1172 (10th Cir. 2001) (nursing student had a property right in his nursing education and was entitled to due process under the U.S. Constitution).

[42] 530 F.3d 584, 589 (7th Cir. 2008),

concern that "a student who flunked out would have a right to a trial-type hearing on whether his tests and papers were graded correctly…" But the *Williams* decision suffered from two flaws. First, the Seventh Circuit failed to distinguish, as the Supreme Court did in *Horowitz*, between disciplinary and academic decisions. Second, the plaintiff in *Williams* had not alleged any actual injury from the deprivation, relying instead on "the bald assertion" that the right to continued enrollment existed.[43]

The Seventh Circuit, however, reached the opposite conclusion – essentially limiting the holdings of Williams and Charleston to their particular facts – in *Doe v. Purdue Univ*.[44] In *Purdue Univ*., the student successfully claimed a constitutionally protected interest under the stigma-plus theory. The student, who was planning to join the Navy following school, alleged that the school "inflicted reputational harm by wrongfully branding him as a sex offender" and that, as a result, "these actions impaired his right to occupational liberty by making it virtually impossible for him to seek employment in his field of choice."[45]

What Due Process Protections Are Required?

A state-university student facing a significant disciplinary decision, such as expulsion, is entitled to due process protections. At a minimum, the Constitution requires notice and some opportunity to be heard. [46] Above that threshold, due process is "flexible and calls for such procedural protections as the particular situation demands."[47]

The amount of process due will vary according to the facts of each case and is evaluated largely within the framework laid out by the Supreme Court in *Mathews v. Eldridge*.[48] Under the *Mathews* framework, courts consider (1) the nature of the private interest subject to official action; (2) the risk of erroneous deprivation under the current procedures used, and the value of any additional or substitute safeguards; and (3) the governmental interest, including the burden any additional or substitute procedures might entail. 424 U.S. at 335.

Student disciplinary proceedings do not need to resemble common law trials, with juries, rules of evidence, and other formal procedures. This statement, while true, has been referred to by courts as a "generalized, though unhelpful observation."[49] Instead, the key elements of due process that courts most commonly find must be provided include:

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[43] 530 F.3d at 589. The Seventh Circuit reaffirmed *Williams* in *Charleston v. Bd. of Trustees of the Univ. of Illinois at Chicago*, 741 F.3d 769, 773 (7th Cir.2013). The *Charleston* court declined to recognize a constitutionally protected property interest based on a state-law contract theory. 741 F.3d at 773-774. Notably, both *Williams* and *Charleston* fail to address *Dixon*.

[44] 928 F.3d 652 (7th Cir. 2019)

[45] 928 F.3d at 661.

[46] *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951).

[47] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[48] 424 U.S. 319, 333 (1976).

[49] *Flaim* 418 F.3d at 635.

- Students must receive a hearing and be permitted to present evidence and explain their conduct before discipline can be imposed. The Supreme Court in *Goss* required, unhelpfully, that students be "given some kind of notice and afforded some kind of hearing."[50] *Goss*, thus, establishes only a generalized bare minimum; the decision is the starting point for analyzing alleged violations of students' procedural due process rights.

- Students are entitled to sufficient notice of the alleged misconduct. This notice must include the specific factual circumstances underlying the alleged violation and should not just re-hash the language of a policy. In *Doe v. Brandeis Univ.*,[51] for example, a federal court warned that a student should not be "expected to defend himself against [a] vague and open-ended charge." The court observed, "There is little practical difference between a school failing to inform the accused of the charge against him or… having informed him of the formal charge, refusing to provide him with the specific factual conduct alleged to have given rise to the charge."[52]

- Students are entitled to a timely process. The investigation and adjudication of the allegations must not be unduly delayed.[53] Delayed reporting, investigations and adjudications may limit the school's and the students' abilities to gather relevant evidence and to effectively address the conduct at issue. In one case, an appeals court described similar actions by a school, including, waiting over months to notify the student and then another four months to convene a disciplinary hearing," as "troubling."[54] The Sixth Circuit even noted that the school's policy at the time noted, that delay may limit the University's ability to conduct an investigation, yet the "time-sensitive factors [that] may 'impair an investigation'… did not motivate the University."[55]

- Students are entitled to unbiased decision-makers. Examples of allegations that may establish a plausible claim of actual bias include not only a personal or financial stake in the outcome, but also ideological convictions. In certain circumstances, courts have found that procedural irregularities may also provide strong support for claim of bias.[56]

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[50] 419 U.S. at 579.

[51] 177 F. Supp. 3d 561 (D.Mass. 2016)

[52] 177 F. Supp. 3d at 603.

[53] Compliance with deadlines in a policy is not the same as compliance with constitutional mandates. *Cf. Univ. of the Sciences*, 961 F.3d at 212 (rejecting argument that simply because school complied with its policy, the student "was treated fairly").

[54] *Univ. of Cincinnati*, 872 F.3d at 403.

[55] *Id*. at fn. 2

[56] *Doe v. Oberlin College*, 963 F.3d 580, 587 (6th Cir. 2020).

- Students have the right to be present for all significant portions of the hearing and to review all of the evidence offered against them. In one case, for example, a court found a due process violation where a school relied on a "statistical analysis" that was not provided to a student prior to a disciplinary hearing.[57] Similarly, in *Purdue Univ.*, the schools' "withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair."[58]

- Students generally have the right to cross-examine adverse witnesses, particularly where a school's determination turns on the credibility of witnesses.[59] This includes the opportunity to question or confront – either directly or through an advisor -- witnesses on whose statements the hearing officers chose to rely. One exception applies, however: even where a right to a cross-examination is recognized, a cross-examination is not required where the accused admits to enough of the underlying accusations to sustain the result.[60]

This is not an exhaustive list. The touchstone of procedural due process is that a school's disciplinary proceedings must be fundamentally fair. One court has said, "a public university student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing."[61] A hearing may be fundamentally unfair where, for example, students accused of misconduct are treated like suspects in criminal case and school investigators use law enforcement tactics like ambushing them with unexpected questions and asking them to prepare a written statement without even knowing the exact charges they face.

The Professionalism Loophole

Schools have, in certain circumstances, sought to provide less due process by describing misconduct as "academic," not "disciplinary." Schools have done this because the United States Supreme Court has "recognized that there are distinct differences between

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[57] *Endres v. Northeast Ohio Med. Univ.*, 938 F.3d 281 (6th Cir. 2019).

[58] 928 F.3d at 663,

[59] Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018). *See also* Haidak, 933 F.3d at 69 (with the caveat that the accused may not be allowed to do the confronting).

[60] *Doe v. Fairfax Cty. Sch. Bd.*, 832 F.App'x 802, 806 (4th Cir. 2020).

[61] *Flaim*, 418 F.3d at 635 fn.1 *See also* Univ. of Cincinnati, 872 F.3d at 396 ("The Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process.").

decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons."[62] A disciplinary dismissal is one in response to charges of misconduct; in such circumstances, a hearing at which a student can present his side of a factual issue could "provide a meaningful hedge against erroneous action."[63]

In *Horowitz*, the Supreme Court upheld against a due process challenge the dismissal of a medical school student whose performance of duties was rated inadequate by the school staff. The Court emphasized a reluctance to "ignore the historical judgment of educators and thereby formalize the academic dismissal process by requiring a hearing."[64] The Court recognized that the complexity of the student-faculty relationship increases "as one advances through the varying regimes of the educational system" and concluded that, "in the academic context," the cost of imposing a hearing requirement is more likely to be detrimental in postgraduate courses than in cases, like Goss, involving behavioral discipline.[65] The *Horowitz* Court explained that such hearings are not required in cases of academic dismissal:

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement…. [An academic decision] is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.[66]

The *Horowitz* Court did not provide a bright-line test for determining whether a dismissal is academic or disciplinary in nature. The Sixth Circuit attempted to draw such a line in *Endres*.[67] In that case, a medical student was dismissed for violating the medical school's professionalism standards after he was accused of cheating on an examination. Following an investigation, the student appeared before the school's professionalism committee and a subsequent promotions committee. A number of problems with the school's hearing process were identified by the student: he was not permitted to view the presentation of the investigator; he was not permitted to cross-examine the investigator; and the committees allegedly relied on evidence that was not disclosed to the student

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[62] *Horowitz*, 435 U.S. at 87

[63] *Goss*, 419 U.S. at 583 (classifying as disciplinary students' suspension for participating in demonstrations that had disrupted classes, attacking a police officer, and damaging school property).

[64] 435 U.S. at 90.

[65] 435 U.S. at 90.

[66] 435 U.S. at 89-90.

[67] *supra.*

(including statistical evidence). The medical student sued, alleging, *inter alia*, that his constitutional due process rights were violated.

The court rejected a broad standard that a dismissal is "academic in nature if there is a nexus between the… conduct and the prospects of success in a student's field of study." Instead, the court focused on whether the underlying substance of the alleged allegation, not the label chosen by the school, determines whether alleged misconduct is academic or disciplinary. "Whether the university describes conduct as academic or disciplinary does not dictate what process the Constitution demands."[68] The Court also warned against efforts by medical schools to define "professionalism" so broadly as to include almost every conceivable form of misconduct:

> [I]t cannot be the case that because the alleged misconduct somehow relates to a professional trait, the medical school need only treat the matter as academic and provide the student with minimal process. If that were so, the medical school could reasonably construe all types of misconduct as a sign of the student's lack-of-professionalism and thus avoid providing the student with the heighted procedures that the Due Process Clause may demand.[69]

The Court in *Endres* proceeded to establish a test to determine whether misconduct was "disciplinary" or "academic." The court explained that the "critical difference" between academic and disciplinary matters is whether the school engaged in "first-level factfinding" or, instead, drawing "subjective conclusions from established facts." Applying this test to the medical student in *Endres*, this Court concluded even though a cheating allegation involved an academic matter, in order to resolve that issue the school first had to determine whether, in fact, the student had engaged in misconduct. Since that inquiry involved "a disputed, objective question," the Court found that the "basis for [the student's] dismissal was disciplinary, calling for more rigorous procedures under the Due Process Clause."[70]

How might this apply to student protesters? Schools – an in particular professional schools like law schools and medical schools – may attempt to describe the conduct of protesters as academic, and not disciplinary, violations. They would do so by suggesting that protesters did not break any schools rules, *per se*. Instead, the schools would suggest that the protesters violated a broad prohibition against "unprofessional" conduct. These schools would suggest that violations show that a student lacks the necessary integrity, honesty, or empathy to graduate. If successful, these schools could then impose disciplinary – including the suspension or expulsion of students – without providing formal hearings or investigations.

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[68] 938 F.3d at 300.

[69] 938 F.3d at 299. *See also Slaughter v. Brigham Young University*, 514 F.2d 622, 623-24 (10th Cir.) ("academic matter appears somewhat as an afterthought or perhaps an additional factor developed at the disciplinary hearing").

[70] 938 F.3d at 301.

Conclusion

Student protesters are generally entitled to fundamentally fair disciplinary processes prior to the imposition of significant discipline such as suspension or expulsion. What that process includes depends on a number of factors, including:

- Whether the student is at a private or public school;
- Where the school is located; and
- Whether the school categorizes the alleged misconduct as “academic” or “disciplinary.”