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Introduction

The dismissal of a duly enrolled student from a state supported institution of higher education for purely academic reasons continues to tantalize the plaintiffs' bar who, in turn, agitates the courts. No institution should be caught unaware, but the better course of action would seem to be active preparation against the eventuality of suits. From such a thought, the following material is presented.

An analysis of any procedural rights which students may have to a tax-supported postsecondary education ultimately depends on the United States Constitution. The due process clause of the fourteenth amendment to the Constitution is the foundation for the decisions which express or define the access that students have to public education. That clause provides that no state shall "deprive any person of life, liberty, or property without due process of law."[1] The United States Supreme Court has only once addressed the precise question of the applicability of this clause to university students dismissed as a result of academic failure. A 1978 case of a dismissed medical student provided the vehicle for the Court to hold that students in tax-supported institutions of higher education are entitled to minimal due process prior to dismissal as a result of academic deficiencies.[2] The decision is not clear and is subject to different interpretations.[3] However, the Court has addressed the rudiments of fair play embodied in the concept of due process many times, and lower courts have applied these precepts to the university setting. These interpretations and applications provide the clarity lacking in the *Horowitz* decision.

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[1] U.S. CONST. amend. XIV, § 1.

[2] Board of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978).

[3] Debra P. v. Turlington, 654 F.2d 1079 (5th Cir. 1981).

Method of Determination

The Supreme Court has outlined the method to be used in making the determination that due process of law applies in any given case. Golden tracked this outline as he found it applicable to cases of academic dismissal.[4] The tests are derived from different cases. A teacher employment case indicated the first step to be taken.

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.[5]

The second step comes from a case in which a convict alleged a deprivation of due process rights in arriving at the decision to revoke his parole. There, the Court said ". . . once it is determined that due process applies, the question remains what process is due."[6]

The determination of what process is due in academic dismissal cases requires a three-step process, established by the Supreme Court in *Mathews v. Eldridge*.[7] The steps include a balancing of (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation with the procedures used, and the probable value of new procedures; and (3) the government's interest, including the function involved, and the fiscal and administrative impact of any forced change.[8]

Justice Marshall argued in his dissent that the Court in *Horowitz* had ignored its own balancing test to determine how much process was due.[9] He concluded that more than the informal give and take required by *Goss v. Lopez*[10] would be required to dismiss Horowitz. This conclusion was reached through reliance upon an article by Judge Friendly which postulated that when a person has been deprived by the state of a way of life to which he devoted years in preparation and on which he has come to rely, then a high level of procedural protection is necessary.[11] Notwithstanding, Justice Marshall found the procedural protection given to Horowitz sufficient.[12] This was done in spite of his rejection of the

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[4] Golden, Procedural Due Process for Academic and Disciplinary Dismissals at Tax-Supported Postsecondary Institutions: After *Goss* and *Horowitz* 134-35 (Ph.D. Dissertation, University of Virginia, 1981).

[5] Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

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

[7] 424 U.S. 319 (1976).

[8] *Id.* at 335.

[9] 435 U.S. at 99.

[10] 419 U.S. 565 (1975). This case reviewed the disciplinary suspension of high school students; the Court required at least an informal presuspension hearing.

[11] Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296-97 (1975).

[12] 435 U.S. at 101-02.

characterization of Horowitz's dismissal as being for academic reasons.[13]

Justice Marshall's opinion, concurring and dissenting in *Horowitz*, is singled out here because of the methodology employed in reaching his decision. All nine Justices agreed that Horowitz had been afforded due process before her dismissal from medical school.

What Process is Due

The United States Court of Appeals for the Eighth Circuit ruled that Horowitz was entitled to a hearing before the decision-making body of the medical school, at which she was to have an opportunity to rebut the evidence being relied upon for her dismissal.[14] This ruling was reversed by the Supreme Court.[15] Because of this sequence, courts have held,[16] and commentators have written,[17] that no hearing is required for the dismissal of a college student because of academic deficiencies.

Another interpretation of the decision in *Horowitz* is that although no formal, trial-type or adversary hearing is required in academic dismissals, there is a requirement to provide opportunity for an informal hearing. The several opinions in this case each referred to the informal hearings held prior to her dismissal. Reading *Horowitz* in harmony with *Goss*, it can be said that the due process clause requires an opportunity for an informal hearing prior to the dismissal of a student for academic reasons from a tax-supported college or university. Such a reading would allay the doubts of the dissenters in *Horowitz*. It would also diminish the criticisms leveled at the Court for its *Horowitz* decision.[18]

Although addressed to disciplinary dismissals, the argument put forward by Professor Seavey in his article would be met if institutional officers provided informal hearings for students subject to academic dismissal. He argued that the function of the professor was "to act for the benefit of [the student] as to matters relevant to the relation between them."[19] An informal hearing would allow all facts pertinent to his dismissal to be made known to the student and it would give support to

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[13] *Id.* at 103-07.

[14] Horowitz v. Board of Curators of the Univ. of Missouri, 538 F.2d 1317 (8th Cir. 1976).

[15] 435 U.S. 78 (1978).

[16] Hubbard v. John Tyler Community College, 455 F. Supp. 753 (E.D. Va. 1978); Aubuchon v. Olsen, 467 F. Supp. 568 (E.D. Mo. 1979); Bleicker v. Board of Trustees of the Ohio State Univ., 485 F. Supp. 1381 (S.D. Ohio 1980).

[17] Comment, *Academic Dismissals from State-Supported Universities: A Study in Policy*, 13 VAL. U. L. REV. 175 (1978); Calogero, *Constitutional Law—Procedural Due Process—University Hearings Regarding Academic Dismissal*, 25 N.Y.L. SCH. L. REV. 134 (1979).

[18] Jennings, *Academic Dismissals: A Due Process Anomaly*, 58 NEB. L. REV. 519 (1979); Gee, *Constitutional Law—Procedural Due Process for Academic Dismissals*, 22 HOW. L.J. 713 (1979).

[19] Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407, n. 3. (1957).

the professor-student relationship without creating the conflict implied by a formal hearing.

An informal hearing requirement is consonant with the line of reasoning which holds that a college education is a career necessity. Similar reasoning undergirds case law beginning with *Dixon v. Alabama State Board of Education*,[20] which introduced constitutional safeguards into the area of student discipline. In *Goss v. Lopez*, the Supreme Court approved the *Dixon* holding and referred to it as the landmark decision in the area of disciplinary dismissals.[21] In *Horowitz*, the Court cited with approval the view of the Fifth Circuit concerning what it had done in *Dixon*.[22] It thus appears that the Supreme Court has accepted the intangible property value of higher education.

Golden found a student property interest to exist in the "legitimate expectation that such term [semester] contracts will be sequentially renewed so long as academic requirements are met and institutional rules and regulations are followed."[23] He based this finding upon *Perry v. Sinderman*,[24] a teacher employment case in which the Court held the college to have created, by its rules and regulations, a *de facto* tenure system. The contract rationale for a property interest is supported by other cases.[25] Golden's treatment of the liberty interest aspect of an academic dismissal is inconclusive and the effects of such a claim are, by his reasoning, "unclear."[26]

In a post-*Dixon* article, the private interest question was addressed in the following manner:

> If it is agreed that a person has an inherent freedom to pursue knowledge and that a formal education, while not essential to this objective, is intimately associated with its effective accomplishment, then the revocation of the privilege of acquiring an education may be regarded as an interference with the student's liberty in his pursuit of knowledge.[27]

The logic of this argument would require court scrutiny of a student's dismissal without minimal due process, albeit for academic reasons.

Justice Rehnquist, writing for the majority in *Horowitz*, was careful to differentiate between formal and informal hearings, just as he also dif-

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[20] 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[21] 419 U.S. at 576 n. 8.

[22] 435 U.S. at 87 n. 4.

[23] Golden, *supra* note 4, at 140-41.

[24] 408 U.S. 593 (1972).

[25] Ross v. Pennsylvania State Univ., 445 F. Supp. 147 (M.D. Pa. 1977); North v. West Virginia Bd. of Regents, 233 S.E. 2d 411 (W.Va. 1977); Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976).

[26] Golden, *supra* note 4, at 145.

[27] McDermott, *Constitutional Law—Due Process—Expulsion of Student from State-Operated College Without Notice or Hearing*, 60 MICH. L. REV. 499, 501 (1962).

ferentiated between academic and disciplinary dismissals. Without regard for the type of interest a student might have, either property or liberty, the Court found Horowitz to have been awarded "at least as much" due process as was required.

> The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment.[28]

An informal hearing would accomplish these requirements and avoid, just as the Court did in *Horowitz*, the necessity of litigating the private interest question. It would also satisfy the remaining two *Eldridge* steps, giving due consideration to any risk of erroneous deprivations and the fiscal and administrative impact on the institutions.

Notice

Accepting the premise that the "fundamental requisite of due process of law is the opportunity to be heard,"[29] the next logical step is that the student "is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[30] Golden described the notice requirement as having a substantive dimension and a procedural dimension.[31] The substantive dimension is found in the requirement that the student be informed of degree and grade requirements and be advised as to the manner of meeting them.[32] The procedural dimension includes the notice which must be given to the student regarding the prospect of his dismissal.[33]

It is a fundamental consideration that any notice given be timely, and that it clearly inform the student of the proposed action and the grounds for it.[34] Judge Friendly identified notice as a key element in due process questions. He suggested that, "the more forthcoming the agency has been in disclosing its grounds, the stronger should be its position in asking curtailment of other procedures."[35] Stated another way, more of one

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[28] 435 U.S. at 85.

[29] Grannis v. Ordean, 234 U.S. 385 (1914).

[30] Mullane v. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[31] Golden, *supra* note 4, at 87-88.

[32] Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Morpurgo v. United States, 437 F. Supp. 1135 (S.D.N.Y. 1977); Olson v. Board of Educ. of City of New York, 412 N.Y.S.2d 615 (1979).

[33] Millington, *The Right to Adequate Notice*, in THE LAW AND THE COLLEGE STUDENT 116-19 (1979).

[34] Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

[35] Friendly, *supra* note 10, at 1281.

procedural safeguard may justify less of another. Therefore, the more notice a student has of the academic performance expected of him, and the more notice a student has of his impending failure while there is yet time to meet the expectations, the less formal any subsequent hearing on the consequences of a failure needs to be.

Hearing

Procedural due process does not require that in every instance an individual actually be provided a hearing on the merits of the claim.[36] What is required is the *opportunity* for a hearing "appropriate to the nature of the case."[37] The formality and procedural requisites for a hearing may vary, depending upon the importance of the interests involved and the nature of any subsequent consequences.[38] The Supreme Court has also recognized that the manner in which parties customarily deal with one another and the volume of potential cases are considerations in determining the type and extent of any hearing.[39] In short, there "are not rights universally applicable to all hearings."[40]

With these premises for a foundation, consideration also needs to be given to the further refinement made by the Court, that there is a distinct difference between losing what one has and not getting what one expects.[41] In an academic setting, failure comes to its fruition at the end of a term. Thus, the academically unsuccessful student is not deprived of something already possessed but rather, if academically dismissed, is denied an expectation—the ability to begin the next term. This distinction is drawn because of the relative weights of the interests of the student and those of the institution. If a student is dismissed during a term for which registration has been completed and fees paid, then more formal procedure is required. The interests of the institution could be considered paramount in a question of admission, especially in terms of space allocation.

While *Dixon* required the rudiments of an adversary proceeding, it recognized the need to preserve the interests of the institution.[42] In this light, the right to confrontation, cross-examination, and the unlimited participation by counsel are seen as harmful to the academic atmosphere

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[36] 401 U.S. at 378.

[37] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950); Armstrong v. Manzo, 380 U.S. 545 (1965).

[38] 401 U.S. at 378.

[39] 397 U.S. at 268.

[40] Wolff v. McDonnell, 418 U.S. 539, 567 (1974).

[41] Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972).

[42] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961).

and not required, even in disciplinary cases.[43] So too, a court reporter's transcript is not necessary for adequate due process. All that is required is an adequate record to "demonstrate that the academic tribunal based its decision on matters adduced before it."[44]

The neutral and detached fact finder of the criminal justice system is not required, again because this is not an adversary proceeding. The touchstones of the hearing are reasonableness and fairness in view of the facts and circumstances of the particular case, and each case begins with a presumption of the impartiality of college officials:

> [I]t may be noted in passing that the law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been activated by proper motives.[45]

Procedural due process is also not denied because a hearing is not open to other students, the press, or the public.[46]

All nine Justices of the Supreme Court agreed that Horowitz was the recipient of adequate due process in her dismissal from medical school because of her academic deficiencies. Horowitz met informally with her advisor and the dean on more than one occasion and was notified that she would be dismissed unless radical improvement was shown in several problem areas. In those meetings she was given an opportunity to present her side.[47] Therefore, due process requires no more than an informal hearing before academic authorities with notice and an opportunity for the student to present reasons why the proposed academic dismissal should not be imposed.

Guidelines for Procedural Due Process

In drafting procedural guidelines to be applied in the academic dismissal of a student, the truth of the observation of Justice Harlan in his dissent to *Sanders v. United States* must be reckoned with:

> I seriously doubt the wisdom of these "guideline" decisions. They suffer the danger of pitfalls that usually go with judging in a vacuum. However carefully written, they are apt in their application to carry unintended consequences which once accomplished are not always easy to repair.[48]

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[43] Boykins v. Fairfield County Bd. of Educ., 492 F.2d 697 (5th Cir. 1974).

[44] Sindermann v. Perry, 430 F.2d 939, 944 (5th Cir. 1970).

[45] Barker v. Hardway, 283 F. Supp. 228, 237, *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

[46] Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968).

[47] 435 U.S. at 98.

[48] 373 U.S. 1, 32 (1963).

Notwithstanding the admonition of Justice Harlan, it appears from the case law that has been developed in recent years that several guidelines can be observed without doing violence to academic autonomy. If observed, these guidelines should provide university administrators with an adequate defense to any legal challenge stemming from the academic dismissal of a student. They consist of the following:

1. In order to put the student body and any individual student on notice as to what is expected, every institution of higher education should have its scholastic standards published and available for the inspection of any interested party.

2. During the first semester of enrollment, every student should be required to participate in an orientation session where scholastic requirements are thoroughly delineated.

3. The student should be made aware of faculty dissatisfaction with his or her academic progress and impending failure while the student has time to redirect his or her efforts and avoid the consequences of a failing grade.

4. Every student should be afforded the opportunity to have a hearing prior to his dismissal from that program because of academic failure.

5. Because students are accustomed to dealing informally with faculty and administrators, and because the coldness of formal hearings suggests an adversary procedure, any hearing held to consider the dismissal of a student as a result of academic deficiencies should be informal and in the nature of counseling.

6. The purpose of the informal hearing should be to allow the student to present his reasons, consistent with the mutual expectations formed by the educational contract, why the proposed action to dismiss should not be taken.

7. In order to avoid even an appearance of impropriety, the student's opportunity to be heard should be before the dean of the college or school of his enrollment or the dean's designee, excluding any individual responsible for the determination of the failing grades.

8. The student should be furnished with a copy of a writing which includes the subject of the hearing, the foundation for any decision, and the actual decision reached.

9. The student should have the option to appeal the decision from the hearing to the executive head of the institution or his designee, whose action would be final.

10. Records should be made of the accomplishment of the preceding nine guidelines in order to facilitate their proof in the event of a legal challenge.