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Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements

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Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements

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I. INTRODUCTION

The educational process at a college or university, where students often experience new-found freedom, includes adherence to academic and behavioral standards.[1] The institution may impose sanctions on students for breaching these standards.[2] Prior to imposing a sanction, however, an institution must provide the student with a sufficient level of process or risk judicial invalidation of the sanction.[3]

Courts distinguish the process due a student attending a state institution from the process due a student attending a private institu-

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1. *See* Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 979 (N.Y. Sup. Ct. 1975).

2. *See, e.g.*, Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 578 (Pa. Super. Ct. 1990) (stating that schools may impose disciplinary rules on students as a condition of attendance); *see Kwiatkowski*, 368 N.Y.S.2d at 979.

3. *See Boehm*, 573 A.2d at 579.

tion.[4] Related to this distinction is the judicial claim that courts grant discretion to a private institution's judgment regarding discipline for academic, as opposed to behavioral, matters.[5] However, as actually applied, the difference between the process due students at state institutions and those at private institutions is questionable.[6] Furthermore, the actual discretion afforded to private institutions for their academic-violation processes is similarly questionable.[7]

This article will analyze five issues related to the distinction between state and private institution disciplinary proceedings. First, this article will analyze the process due a sanctioned student at a private institution. Second, it will compare the process due a sanctioned student at a private institution with the process due a student at a state institution and assert that the practical differences are small. Third, it will analyze the judicial claim that more discretion is afforded private institutions in academic disciplinary matters and assert that this discretion is applied inconsistently between courts. Fourth, this article will present the judicial doctrines regarding review of a private institution's behavioral disciplinary proceedings. Finally, this article will provide recommendations to private institutions regarding disciplinary policy creation and implementation.

II. PRIVATE EDUCATIONAL INSTITUTION DISCIPLINARY LEGAL REQUIREMENTS

A private institution's relationship with its students is primarily contractual.[8] In return for tuition and fees paid by students, the institution provides students with classes and instruction, usually culminating in a degree.[9] The relationship is not purely contractual, though, because it has elements of a voluntary association.[10] As part

4. *Id.*

5. *See id.* at 578–79 (citing Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158–59 (5th Cir. 1961)).

6. *See infra* Part III.

7. *See infra* Part IV.

8. *Boehm*, 573 A.2d at 579.

9. Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982).

10. *Id.*

of this voluntary association, the students must conduct themselves according to published standards as a condition of graduation.[11] For example, graduation is conditioned on adherence to academic and behavioral standards established by the institution and typically published in a student handbook.[12] Similarly, because the relationship is primarily contractual, the contract must be followed by the private institution during disciplinary proceedings.[13]

In addition to these contractual obligations, a private institution's disciplinary proceedings must also be fundamentally fair.[14] Fundamental fairness resembles the due process required to impose sanctions on students at state institutions.[15] These judicial requirements have been imposed for policy reasons: Courts recognize that higher education is no longer a luxury but, rather, an important requirement of modern society.[16]

A. *The Disciplinary Process at a Private Institution Must Be Fundamentally Fair*

Courts require fundamentally fair disciplinary procedures at private institutions.[17] Several factors determine the fundamental fairness of the process.[18] These factors include: (1) whether the institution's regulations are reasonable; (2) whether the institution's regulations are known or should be known by the student; (3) whether the proceedings are before the appropriate people empowered to act; (4) whether the hearing panel determines cases based on substantial evi-

11. *Id.*
12. *See id.*
13. *Boehm*, 573 A.2d at 579.
14. 2 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION § 9.4.4 (4th ed. 2006).
15. *See Boehm*, 573 A.2d at 580 (stating that recent courts have required private educational institution's disciplinary procedures to be consistent with "basic notions of due process and fundamental fairness").
16. Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 977 (N.Y. Sup. Ct. 1975).
17. *See Boehm*, 573 A.2d at 580.
18. *Id.* at 580–81 (quoting Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975)).

dence;[19] and (5) whether the student has been notified of the charges.[20]

For example, by applying these factors, the court deciding *Boehm v. University of Pennsylvania School of Veterinary Medicine* found a private institution's disciplinary process to be fundamentally fair.[21] Specifically, the disciplinary process was found fundamentally fair because the students were notified of the evidence and charges against them, they were present at the disciplinary hearing, and they were assisted in their defense by a faculty advisor.[22] Finally, the hearing was before an established disciplinary board that, as a result of the hearing, made specific findings of fact, thereby meeting the substantial evidence requirement.[23] Therefore, as illustrated in *Boehm*, a disciplinary process is fundamentally fair if each of the above factors is satisfied.

While not analyzed in *Boehm*, fundamental fairness also requires that a student be notified of all charges with sufficient particularity to prepare a defense.[24] For example, in *Fellheimer v. Middlebury College*, an accused student was notified of a rape charge but not of a "disrespect of persons" charge.[25] Because the accused student was not notified of this second charge, he was unable to prepare an adequate defense.[26] Even though the court did not analyze the other fundamental fairness factors, the court ruled the process unfair because of this lack of notice.[27]

Therefore, based on these cases, an institution's disciplinary process is fundamentally fair when it contains the previously discussed factors.[28] However, fundamental fairness is not the only measurement used by courts to evaluate an institution's disciplinary

19. *Id.*
20. Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 245 (D. Vt. 1994).
21. *Boehm*, 573 A.2d at 582.
22. *Id.*
23. *Id.* at 582–83.
24. *Fellheimer*, 869 F. Supp. at 246.
25. *Id.* at 245.
26. *Id.* at 246.
27. *Id.*
28. *See supra* text accompanying notes 20–21.

procedures.[29] Because the relationship between a student and a private institution is primarily contractual,[30] a court will also examine whether the institution adhered to the contract as evidenced by its published disciplinary procedures.[31]

B. *A Private Institution Must Follow Its Published Disciplinary Procedures*

A private institution must follow its own published disciplinary procedures because these published procedures embody the terms of the contract with the student.[32] These procedures are bargained for when the student decides to attend a particular institution[33] and are evidenced by the student handbook and other institutional publications and practices.[34] Distribution of the handbook constitutes constructive notice of these established disciplinary procedures.[35] For example, in *Kwiatkowski v. Ithaca College*, the plaintiff-student was held to be constructively notified of the disciplinary procedures when he received the college code of conduct during registration.[36] Therefore, in addition to fundamental fairness, a second judicial requirement placed on private educational institutions is that the institution adheres to its published policies, thereby providing actual or constructive notice to the students.[37] However, as important as this requirement is, the institution can deviate from the published procedures under some circumstances.

29. Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 580 (Pa. Super. Ct. 1990).
30. *Id.* at 579.
31. *Id.* at 580.
32. *Id.* at 579.
33. *See* Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 243 (D. Vt. 1994) ("[A] College is nonetheless contractually bound to provide students with the procedural safeguards that it has promised.").
34. *See id.* at 242.
35. Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 979 (N.Y. Sup. Ct. 1975).
36. *Id.*
37. *See Fellheimer*, 869 F. Supp. at 245.

1. *Private Institutions, Disciplinary Process Deviations, and Fundamental Fairness*

While an institution must generally adhere to its published disciplinary procedures, the institution may deviate from the procedures as long as the overall process remains fundamentally fair.[38] For example, even though the established disciplinary process does not expressly provide for it, an imposed sanction may be overruled by a senior administration official as long as the overall process remains fundamentally fair.[39] An institution's ability to deviate from the process may be legally strengthened by reserving the right to deviate from the process in the publications establishing the institution-student contract.

a. *Senior Administrators, Deviations from the Process, and Maintaining Fundamental Fairness*

A disciplinary process remains fundamentally fair even when a senior administration official increases a sanction beyond that imposed by a disciplinary hearing, even when the official does not have express contractual authority to do so.[40] For example, in *Boehm*, two veterinary students were accused of cheating, tried by a disciplinary panel, and sanctioned by the panel with academic probation.[41] However, the Dean of the Veterinary School modified the sanction by imposing, *inter alia*, a one-year suspension.[42] The students sued on the theory that the Dean breached the contract by imposing a more severe sanction than that imposed by the disciplinary panel.[43] The court rejected the students' argument, implying that even if the Dean had deviated from the established disciplinary process, the process remained fundamentally fair, and that a court would not substitute its

38. *Id.* at 244.
39. *Id.*
40. S*ee* Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 577 (Pa. Super. Ct. 1990) (holding that the Dean acted properly by increasing the sanction imposed on the students).
41. *Id.*
42. *Id.*
43. *Id.*

judgment in place of the Dean's.[44] Furthermore, because the sanction imposed by the disciplinary committee was merely a recommendation, and not binding, the Dean did not breach the contract.[45] Therefore, while an institution should abide by its contractually bargained-for disciplinary process, it can deviate from the process as long as the modified process remains fundamentally fair.[46]

b. *Fundamental Fairness and Notice of the Charges*

Failure to notify a student of a disciplinary charge is not a fundamentally fair process deviation because it deprives the student of the opportunity to prepare an adequate defense.[47] For example, in *Fellheimer*, a student accused of rape sued to enjoin his suspension because of, *inter alia*, a breach of contract.[48] This claim was based on the fact that the college did not notify the student of one of the charges brought against him in the disciplinary proceeding.[49] The court found that deviating from the process by omitting notice of a serious charge, thereby depriving the student of an opportunity to prepare an adequate defense, was not fundamentally fair.[50] Therefore, omitting notice of a charge from the disciplinary process is not a permitted process deviation.

2. *The Contractual Right to Deviate from the Published Procedures*

An institution's power to deviate from the disciplinary process is strengthened when the school reserves the right to deviate from the process in the student handbook or another publication.[51] For example, as discussed previously, the student in *Fellheimer* brought a

44. *Id.* at 582.
45. *Id.* at 585.
46. *See Boehm*, 573 A.2d at 577.
47. Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 246–47 (D. Vt. 1994).
48. *Id.* at 242.
49. *Id.* at 246.
50. *Id.* at 244, 246–47 ("The College has agreed to provide students with proceedings that conform to a standard of 'fundamental fairness . . . .'").
51. *Id.* at 244.

breach of contract claim against the college.[52] This claim was based on the college's failure to provide "procedural protections equivalent to those required under Federal and State constitutions."[53] While ultimately ruling for the student on the grounds discussed previously, the court dismissed the breach of contract claim for two reasons.[54] First, the published conduct code expressly disclaimed institutional procedural protections coextensive with constitutional protections.[55] Second, the published conduct code reserved the right for the college to modify the disciplinary procedures from those published as long as the proceedings remained fundamentally fair.[56] The court acknowledged that this second provision was sufficient to protect the college from claims for breach of contract.[57]

Therefore, a private institution's disciplinary process must meet two judicially imposed requirements for a sanction to withstand judicial review.[58] First, the disciplinary procedures must be fundamentally fair, and, second, they must be consistent with the published procedures that establish the contract between the institution and the student.[59] This second requirement is less rigid than the first because senior administration officials can deviate from the process as long as the deviation preserves fundamental fairness.[60]

Courts routinely distinguish these two requirements from constitutional due process granted to students at state educational institutions.[61] However, in spite of these routine judicial distinctions, there

52. *Id.* at 242.

53. *Fellheimer*, 869 F. Supp. at 243.

54. *Id.* at 243–44.

55. *Id.* at 243.

56. *Id.* at 244. The handbook stated: "The following procedures are designed to promote fairness, and will be adhered to *as faithfully as possible.* If exceptional circumstances dictate variation from these procedures, the variation will not invalidate a decision unless it prevented a fair hearing or abrogated the rights of a student." *Id.*

57. *See id.* (stating that the "provision negates any argument that the College has contractually guaranteed that the specific procedures it has outlined will always be scrupulously adhered to").

58. *See supra* Part II.A–B.

59. *See supra* Part II.A–B.

60. *See supra* Part II.B.1.

61. *See, e.g.*, Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 977 (N.Y. Sup. Ct. 1975).

is little practical difference between the process required at a private educational institution and the process required at a state educational institution.

III. PRIVATE INSTITUTION FUNDAMENTAL FAIRNESS REQUIREMENT COMPARED TO PUBLIC INSTITUTION CONSTITUTIONAL DUE PROCESS REQUIREMENT

Because only public institutions must provide students with constitutional due process, courts routinely emphasize that a student at a private institution subjected to a disciplinary proceeding is not entitled to constitutional due process.[62] Rather, the private institution's student is entitled to a fundamentally fair proceeding.[63] While courts consistently reject the attempts of students at private institutions to claim due process rights, constitutional due process for state educational institution discipline is very similar to fundamental fairness for private institution discipline.[64]

A. *Constitutional Due Process at a State Educational Institution Requires Notice of the Charges and an Opportunity to Be Heard*

As established in the foundational case of *Goss v. Lopez*,[65] state educational institutions must provide students with constitutional due process before imposing a sanction.[66] Due process for a disciplinary charge at a state institution requires notice to the student of the charges against him and an opportunity to be heard.[67] For example, in *Goss*, a number of students were suspended from a state educational institution without a hearing, without an opportunity to present

62. *Id.*

63. Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 580 (Pa. Super. Ct. 1990) (distinguishing discipline imposed by state institutions compared to private institutions).

64. *See, e.g.*, Fellheimer v. Middlebury Coll., 869 F. Supp. 238 (D. Vt. 1994); *Kwiatkowski*, 368 N.Y.S.2d at 973; *Boehm*, 573 A.2d at 575.

65. 419 U.S. 565 (1975).

66. *Id.* at 573–74.

67. *Id.* at 581. Even less due process is required for failing to meet academic standards; in these cases, no hearing is required to satisfy due process. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 87–88 (1978).

their version of the facts, and, in some cases, without notice.[68] Because the suspensions were imposed by Ohio state schools, and because the suspended students possessed a property interest in their educations,[69] the Supreme Court found that constitutional due process applied.[70] The Court also found that the process due required notice and an opportunity to be heard.[71] Therefore, *Goss* resolves the question of the process due a student before a state institution may impose a sanction.[72]

B. *The Similarity Between Constitutional Due Process and Fundamental Fairness*

Even though courts regularly state that fundamental fairness does not require disciplinary procedures to be consistent with constitutionally required due process,[73] these two doctrines lack significant practical distinctions when they are applied.[74] For example, fundamental fairness is analyzed using the factors discussed previously: notice of the charge and evidence asserted against the student, presence of the student at the disciplinary hearing, assistance with preparation of the defense, and a hearing before an established disciplinary board.[75] These factors are similar to the constitutional due process requirements established by the Court in *Goss*.[76] These due process requirements are notice of the charges, evidence against the student, and opportunity for the student to be heard.[77] The only

68. *Goss*, 419 U.S. at 570–71.
69. *Id.* at 574.
70. *Id.* at 576.
71. *Id.* at 579.
72. *Id.* at 581.
73. Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 273 (N.J. Super. Ct. App. Div. 1982) (citing State v. Schmid, 423 A.2d 615, 619 (N.J. 1980)); *see* Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 580 (Pa. Super. Ct. 1990) (distinguishing standards for imposing discipline in state institutions from private institutions).
74. *Compare Goss*, 419 U.S. at 572, 574, 579, *with Boehm*, 573 A.2d at 581–82 (both stating that notice, an opportunity to be heard, and a non-arbitrary decision are sufficient to meet their respective standards).
75. *Boehm*, 573 A.2d at 582.
76. *See Goss*, 419 U.S. at 572, 579.
77. *Id.*

possible substantive difference between fundamental fairness and constitutional due process is that *Goss* does not require that a student be assisted with his defense, as fundamental fairness may.[78] Because this difference is only a single factor within the fundamental fairness analysis and the remaining elements, including notice of charges and an opportunity to be heard, are the same between the two doctrines, they are more similar than courts acknowledge.[79]

An example of private institution fundamental fairness being practically equivalent to public institution constitutional due process can be seen in *Kwiatkowski*. In *Kwiatkowski*, a student was accused of throwing his mattress out of a tenth-story dormitory window.[80] After being sanctioned by a disciplinary panel, the student sued to enjoin his suspension on the theory that he was denied constitutional due process.[81] The court rejected the student's claim because the private institution followed its published disciplinary process and the disciplinary process was fundamentally fair.[82] However, even though the court rejected the student's due process argument, the student received protections practically equivalent to those required by due process.[83] For example, as part of fundamental fairness, the student was notified of the charges against him and had an opportunity to be heard by a disciplinary panel.[84] These two elements of

78. *Compare id.* at 583 (stating that assistance of counsel is not required at the hearing), *with Boehm*, 573 A.2d at 582 (stating that assistance of counsel at the hearing is a factor contributing to fundamental fairness).

79. Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 273 (N.J. Super. Ct. App. Div. 1982) (citing State v. Schmid, 423 A.2d 615, 619 (N.J. 1980)); *see Boehm*, 573 A.2d 575, 580 (Pa. Super. Ct. 1990) (distinguishing standards for imposing discipline in state institutions from private institutions).

80. Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 976 (N.Y. Sup. Ct. 1975).

81. *Id.* at 977. In this case, the court rejected the student's attempt to claim constitutional due process of a criminal defendant, including the right to remain silent, assistance of counsel, and the right to confront witnesses. *Id.* at 978. These rights far exceed constitutional due process requirements in educational matters. *Goss*, 419 U.S. at 572.

82. *See Kwiatkowski*, 368 N.Y.S.2d at 977 (citing the requirement for a fundamentally fair process and ruling for the defendant college).

83. *Id.* at 976.

84. *Id.*

fundamental fairness are practically equivalent to elements of constitutional due process for state educational institutions.[85]

As discussed, courts claim a distinction between the process due students at state educational institutions versus private educational institutions. However, this distinction is often made in response to a student attempting to claim the process due a criminal defendant.[86] This is exemplified in *Kwiatkowski*, in which the student attempted to claim all aspects of criminal due process.[87] Also, the actual differences between educational due process requirements and private institution fundamental fairness, as they are applied, are debatable.

Similar to this previously discussed distinction without a difference, courts often claim to give private educational institutions additional deference when reviewing academic, as opposed to behavioral, disciplinary cases.[88] Similar to the previous discussion, this judicially claimed distinction is often also illusory.

IV. THE DOCTRINE OF JUDICIAL DISCRETION FOR PRIVATE INSTITUTIONS

Courts regularly assert a distinction between the judicial review of academic disciplinary proceedings and behavioral disciplinary proceedings conducted by private educational institutions.[89] Specifically, courts claim to grant discretion to private institutions regarding their review of academic disciplinary proceedings, which they do not grant when reviewing behavioral disciplinary proceedings.[90] Even

85. *Goss*, 419 U.S. at 572.

86. *See Kwiatkowski*, 368 N.Y.S.2d at 978 (claiming due process violations for lack of assistance of counsel, "inability to remain silent," and lack of ability to confront witnesses). None of these rights comprise due process in state educational institution cases but are included in criminal due process. *Goss*, 419 U.S. at 572.

87. *Kwiatkowski*, 368 N.Y.S.2d at 978.

88. *See* Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 274 (N.J. Super. Ct. App. Div. 1982).

89. *See, e.g.*, KAPLIN & LEE, *supra* note 14, § 9.4.4 (stating this proposition and citing cases to support it).

90. *See, e.g.*, *Napolitano*, 453 A.2d at 274–75 (stating the distinction between academic and behavioral disciplinary proceedings).

though the accuracy of this claim is dubious, there are two reasons cited for it.[91]

The first reason is the claim that private educational institutions occupy a special place in both academia and society that courts are reluctant to disturb.[92] Specifically, private educational institutions are "unique in their insulation from state taxation controls and their self government," and have intellectual freedom unfettered by state interference.[93] The second reason is that academic disciplinary proceedings involve facts that, for proper judgment, are more likely to require specialized knowledge particular to an educational institution setting.[94] Less discretion is afforded to behavioral disciplinary proceedings because a behavioral proceeding's facts are more familiar to the judiciary and do not require any specialized knowledge.[95] Therefore, courts justify granting more discretion for judicial review of academic sanctions than for behavioral sanctions.[96] Courts are, however, inconsistent in their actual application of this claimed discretion.[97]

A. *The Variation Between Courts in the Degree of Discretion Granted*

Different courts grant private institutions varying degrees of discretion when reviewing academic discipline cases (*e.g.*, cheating, plagiarism) compared to behavioral discipline cases (*e.g.*, battery, unlawful alcohol use, sexual assault).[98] This variation can be ana-

91. *See* Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 582 (Pa. Super. Ct. 1990).

92. *Id.* (citing Schulman v. Franklin & Marshall Coll., 538 A.2d 49, 52 (Pa. Super. Ct. 1988)).

93. *Id.*

94. *See, e.g.*, *Napolitano*, 453 A.2d at 275 (explaining that academic sanctions are beyond the expertise of a court (citing Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 88–89 (1978))).

95. Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1304 (N.Y. 1980).

96. *See id.*; *Napolitano*, 453 A.2d at 274.

97. *See infra* Part IV.A.1–4. *Compare, e.g.*, Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977), *with Boehm*, 573 A.2d at 582 (illustrating the differing levels of discretion afforded private institutions for academic disciplinary proceedings).

98. *See infra* Parts IV.A.1–4.

lyzed by grouping cases into four classes of the judicial discretion actually granted. An institution receives the most discretion when a court refuses to analyze the case beyond an initial determination that the matter involves only academic discipline.[99] The institution receives less discretion when a court conducts an analysis of the institution's adherence to its contract with the student and the fundamental fairness of the process.[100] Even less discretion is afforded to the institution when a court conducts a thorough factual analysis of all aspects of the case.[101] This thorough analysis allows the court to review the institution's handling of its disciplinary proceeding, thereby denying the institution the discretion purportedly granted.[102] Finally, a court affords the least discretion when it conducts a de novo review of the factual record and declines to grant any discretion.[103]

1. *The Greatest Amount of Discretion Is Granted When a Court Declines to Review Any Aspect of the Academic Disciplinary Proceeding*

A court grants a private institution the most discretion for academic disciplinary proceedings when the court declines to review any aspect of the case beyond determining that the proceeding is genuinely an academic matter and not a behavioral one.[104] Academic matters are those requiring the specialized knowledge of an educator to judge appropriately, like plagiarism, while behavioral matters do not require specialized knowledge because they involve facts courts regularly deal with, like sexual assault.[105] By declining to review a case beyond this threshold, the court grants the institution the most discretion possible because it permits the institution to administer the academic disciplinary proceeding in any way the institu-

99. *See infra* Part IV.A.1.
100. *See infra* Part IV.A.2.
101. *See infra* Part IV.A.3.
102. *See infra* Part IV.A.3.
103. *See infra* Part IV.A.4.
104. *See* Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977).
105. *See* Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1304 (N.Y. 1980).

tion sees fit.[106] Additional judicial analysis only reduces the amount of discretion available to the institution.

For example, the court in *Jansen v. Emory University* declined to analyze the case after determining that the issue was genuinely academic.[107] Specifically, the appellate court held that neither it nor the trial court had the legal authority to interfere with the academic disciplinary proceedings at a private institution.[108] The court reasoned that it would not interfere because of the strong policy reasons supporting the self-governance of medical (and dental) schools, including the freedom to determine appropriate academic standards.[109]

In *Jansen*, the student enrolled in a dentistry program.[110] Over the course of the student's education, he consistently violated academic standards: He was among the worst academic performers in his class, he cheated on an assignment, he improperly assigned his assignment to a hygienist, he worked on a class project outside of class, and he injured a patient.[111] Finally, over sixty-six percent of the faculty voted to expel the student.[112] The student sued the institution for breach of contract, claiming that the student handbook guaranteed an accused student constitutional due process.[113] The court rejected this claim, even though the handbook stated that students would receive "due process," and held that the student's at-

106. *See Jansen*, 440 F. Supp at 1063.
107. *See id.*
108. *Id.*
109. *Id.*
110. *Id.* at 1061.
111. *Id.*
112. *Jansen*, 440 F. Supp. at 1061.
113. *Id.* at 1062. The handbook stated: "Attendance at Emory is a privilege and not a right; however, no student will be dismissed without due process." *Id.* The court responded:

> Over these bare bones the plaintiff attempts to drape the entire panoply of due process rights developed by the Supreme Court in cases such as *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1971), and *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). Based on the assumption that the Emory contract meant to define 'due process' in such a manner, the plaintiff argues that the process he received was deficient and thus constituted a breach. The underlying assumption is extravagant.

Jansen, 440 F. Supp. at 1062.

tempt to invoke constitutional due process as defined by *Goss* while attending a private institution was "extravagant."[114]

The *Jansen* court granted this private institution the most discretion possible because it refused to second-guess the decision of the faculty regarding its academic disciplinary action.[115] The court merely determined that the institutional proceeding was academic.[116] Beyond this threshold determination, the court declined to consider any factual disputes alleged by the student because the student conduct at issue was academic, not behavioral.[117] In fact, the court made only a perfunctory examination of the student's claim that the institution had acted arbitrarily and capriciously.[118] Therefore, because the *Jansen* court relied almost exclusively on academic disciplinary discretion in its decision by refusing to review other facts, it afforded the private institution the greatest amount of discretion possible.

2. *Less Discretion Is Granted When a Court Analyzes Fundamental Fairness and Contract Compliance*

A court grants less discretion when it performs a factual analysis regarding the fundamental fairness of the institution's procedures and its adherence to the contract with students. This factual analysis erodes the doctrine of discretion by providing an opportunity for a court to interfere with a private institution's academic disciplinary process. For example, the discretion granted in the academic disciplinary case of *Boehm* was not as broad as the discretion granted in *Jansen* because the *Boehm* court factually analyzed whether the institution adhered to its contract and whether the process was fundamentally fair.[119] Ultimately, because the appellate court ruled for the

114. *Id.*
115. *Id.* at 1063.
116. *Id.*
117. *Id.* at 1063. The court quoted another case stating: "The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades." *Id.* (quoting Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973)).
118. *Jansen*, 440 F. Supp. at 1063.
119. *See id.*; Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 582 (Pa. Super. Ct. 1990).

institution and chided the lower court for interfering with the academic disciplinary process of a private institution, the appellate court granted greater discretion to the institution than the lower court.[120]

In *Boehm*, two students were accused of cheating, tried according to the published disciplinary procedures, found guilty, and sanctioned with, *inter alia*, one-year suspensions.[121] The students sued to enjoin the sanctions, asserting that the school deviated from its published disciplinary process and that the process lacked fundamental fairness.[122] The trial court granted a preliminary injunction, and the institution appealed.[123] The appellate court then granted the institution discretion by overturning the trial court's preliminary injunction.[124]

As in *Jansen*, the appellate court, acknowledging academic disciplinary discretion, determined that the trial court had abused its discretion by granting the preliminary injunction.[125] However, unlike *Jansen*, the *Boehm* court reduced the discretion granted by engaging in a factual analysis of the case.[126] Before reaching its decision, the *Boehm* court thoroughly analyzed the facts relating to the academic disciplinary process for adherence to published procedures and for fundamental fairness.[127] This is in contrast to *Jansen*, where the court declined to factually review the case because the doctrine granting discretion to private institutions for academic disciplinary matters prevented judicial interference.[128] This distinction between *Jansen* and *Boehm* illustrates that, even where a court grants discretion to a private institution, the degree of discretion granted can vary from court to court.

120. *Boehm*, 573 A.2d at 586.
121. *Id.* at 577.
122. *Id.*
123. *Id.*
124. *Id.* at 586.
125. Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977); *Boehm*, 573 A.2d at 586.
126. *Boehm*, 573 A.2d at 582–85.
127. *Id.*
128. *See Jansen*, 440 F. Supp. at 1063.

3. *Even Less Discretion Is Granted When a Court Conducts a Complete Factual Review of the Case*

Unlike the two previously discussed judicial approaches granting discretion to private institutions for academic disciplinary matters where a court declines, either in whole or in part, to review the case factually, even less discretion is granted when a court undertakes a thorough factual analysis of the matter. In this role, the court does not afford discretion to the private institution because the court is acting as a "super-trier"[129] of fact.[130] The following case provides an example of this third approach to judicial review of academic disciplinary cases.[131]

In *Napolitano v. Trustees of Princeton University*, a Princeton student was accused of an academic offense (plagiarism), tried by the disciplinary committee, and sanctioned with a one-year delay in degree conferral.[132] After a failed appeal to the university president, the institution denied the student an injunction staying her sanction.[133] The student then sued under a breach of contract theory, alleging that the institution failed to adhere to its published disciplinary procedures.[134] The appellate court upheld the trial court, reasoning that a court may not substitute its own judgment for that of a private institution in academic disciplinary matters.[135] The appellate court reasoned that substitution was improper because the decision to impose a sanction for an academic violation is the province of the expert educator and not a court.[136] However, the appellate court's own conduct in this case was inconsistent with its hollow recitation

129. Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982).
130. *Id.* at 276. The appellate court agreed that the trial court properly did not become a "super-trier," but then stated: "Our independent examination of the record satisfies us that the [Committee on Discipline] properly concluded that the plaintiff had plagiarized," thereby itself improperly assuming the role of a super-trier and weakening the discretion afforded to the private institution. *Id.*
131. *See id.* at 275.
132. *Id.* at 267–68.
133. *Id.* at 268.
134. *Id.* at 267.
135. *Napolitano*, 453 A.2d at 275.
136. *Id.*

of this principle: It stated that becoming a "super-trier" was inappropriate but then proceeded to examine the entire trial record.[137]

While the *Napolitano* court discussed affording discretion to the institution, the court undermined this discretion by conducting an independent, de novo factual analysis of the trial record.[138] By conducting this factual analysis, the appellate court became a "super-trier."[139] For example, in its lengthy opinion, the appellate court conducted its own examination of whether the student had actually plagiarized.[140] Because the appellate court second-guessed both the institution and the trial court by conducting an independent factual review, the actual discretion afforded was negligible, regardless of the court's genuflection toward the discretion doctrine.

4. *No Discretion Is Afforded When a Court Ignores the Discretion Doctrine Entirely*

Completing the range of inconsistency in the judicial approaches to granting discretion, some courts fail to even acknowledge the role of discretion in academic disciplinary cases at all.[141] In fact, by deciding a case without acknowledging the role of discretion, courts weaken the discretion doctrine further by creating a precedent in which discretion is ignored.

This least amount of discretion that can be granted to a private institution is evident in the case of *Lyons v. Salve Regina College*.[142] In *Lyons*, the appellate court contemplated construing the terms of the published disciplinary procedures against the institution.[143] While it did not actually construe the procedures against the institu-

137. *See id.* at 275–78.
138. *See id.*
139. *Id.*
140. *Id.*
141. *See, e.g.*, Lyons v. Salve Regina Coll., 565 F.2d 200, 202 (1st Cir. 1997) (stating that the language of the student handbook should be construed against the college as the author thereof).
142. *See generally id.*
143. *Id.* at 202. The court stated, "[w]hile arguably the language should be construed against the College as the author thereof, nevertheless . . . ." *Id.*

tion, neither did the court refer to the discretion typically granted to private institutions.[144]

In *Lyons*, a student failed a course required for a nursing degree.[145] Upon review of the student's case by an academic review board, the board voted 2–1 to give the student an "Incomplete" instead of an "F."[146] However, the Dean overruled the board's majority and failed the student.[147] As a result, the student was not awarded a nursing degree.[148] The student sought to compel the school to change her grade from an "F" to an "Incomplete," alleging that the Dean's intervention constituted a breach of contract.[149] The trial court ignored the discretion doctrine by substituting its own judgment for that of the Dean and determined that the recommendation from the disciplinary panel was binding on the Dean.[150] As a result, the student prevailed and the trial court awarded the student a grade of "Incomplete."[151] The appellate court reversed the trial court by finding that the term "recommendation," as used in the disciplinary handbook, was not binding on the Dean.[152]

While the student ultimately lost her case and failed the course, neither the trial court[153] nor the appellate court afforded the private institution any discretion for this academic matter.[154] For example, the trial court deviated from the common understanding of the word "recommendation" in order to overrule the Dean's academic disciplinary decision.[155] Similarly, while it ultimately chose otherwise, the appellate court considered construing the contract language "against

144. *Id.*
145. *Id.* at 201.
146. *Id.* at 201–02.
147. *Lyons*, 565 F.2d at 202.
148. *Id.* at 201.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 203.
153. *Lyons*, 565 F.2d at 201 (construing the term "recommendation" to mean an order binding the Dean to the disciplinary panel's sanction).
154. *See id.* at 202 (stating the court's interest in construing the terms of the handbook against the institution).
155. *Id.*

the College as the author thereof."[156] Therefore, based on the actual and contemplated intervention with the institution's academic disciplinary process, *Lyons* shows the extent to which a court may improperly substitute its own judgment for that of a private educational institution.

Another example of a court failing to grant discretion to a private educational institution is evident in *Melvin v. Union College*.[157] In *Melvin*, a student was accused of "academic dishonesty," tried by a disciplinary panel, given a failing grade, and suspended for a year.[158] The student sued for breach of contract and sought a preliminary injunction.[159] While the trial court denied the preliminary injunction, the appellate court overruled the trial court and granted relief.[160]

In its analysis, the appellate court referred only to the traditional test needed to grant an injunction and did not refer to the need to afford a private institution discretion in academic disciplinary matters.[161] This holding is in contrast to *Boehm*, where the appellate court reversed the trial court's preliminary injunction, citing the lack of authority to interfere with the academic disciplinary process of a private institution.[162] As with *Lyons*, *Melvin* is also an example of a court's failure to grant discretion to a private educational institution in an academic disciplinary matter.

Comparing *Lyons* and *Melvin* to *Boehm* highlights the judicial inconsistency in affording discretion to private educational institutions. While all factually similar, the reasoning in *Boehm* differs from that in both *Lyons* and *Melvin*. As in *Boehm*, the student in *Lyons* sued for breach of contract because the Dean imposed a more severe sanction than that recommended by a majority of the disciplinary panel.[163] Unlike *Lyons* and *Melvin*, however, the *Boehm* court stated that the trial court had no authority to interfere with a private

156. *Id.*
157. 600 N.Y.S.2d 141 (N.Y. App. Div. 1993).
158. *Id.* at 142.
159. *Id.*
160. *Id.*
161. *See id.*
162. *See* Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 578 (Pa. Super. Ct. 1990).
163. Lyons v. Salve Regina Coll., 565 F.2d 200, 202 (1st Cir. 1997); *Boehm*, 573 A.2d at 577.

institution's decision to impose a sanction for an academic disciplinary matter by granting a preliminary injunction.[164] This difference highlights the inconsistency in the amount of discretion granted to private institutions in academic disciplinary matters.

The scope of judicial discretion granted to a private institution during a court's review of an academic disciplinary proceeding is broad. While some courts decline to substitute their judgment for that of the institution, thereby granting the institution a broad range of discretion, other courts conduct an independent factual review of some, or all, of the facts in the case, thereby limiting the institution's discretion. Because of this court-to-court variation, private institutions, when drafting academic misconduct policies, should not rely on the judicial doctrine granting discretion to private educational institutions when reviewing academic disciplinary matters. However, unlike the judicial review of academic disciplinary matters, courts are consistent in their approach to behavioral disciplinary matters.

V. JUDICIAL REVIEW OF BEHAVIORAL DISCIPLINARY PROCEEDINGS

As discussed previously, courts generally do not afford discretion in behavioral disciplinary matters because these matters are within the experience of the courts.[165] While academic matters may require the expertise of a professional educator to judge properly, courts routinely hear cases involving bad behavior and, therefore, are capable of judging them without deferring to an expert educator.[166] When reviewing a private institution disciplinary proceeding for a behavioral charge, courts apply the two previously discussed procedural requirements: fundamental fairness and the institution's adherence to its contract with the student.[167]

An example of a behavioral disciplinary case where the court strictly applied these two judicial requirements is *Kwiatkowski*.[168] In that case, the student was charged with behavioral misconduct for

164. *Boehm*, 573 A.2d at 578.
165. *See* Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1304 (N.Y. 1980).
166. *See id.*
167. *See supra* Part II.
168. 368 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975).

pushing a mattress through a tenth-story dormitory window.[169] Upon suspension by a college disciplinary committee, the student sued for breach of contract, alleging that the college's process was arbitrary and unfair.[170]

The court ruled that the college's process was fair and consistent with the contract, even though the process provided was not co-extensive with constitutional due process.[171] The court made no reference to the discretion afforded private institutions or to a different standard of review from academic disciplinary cases.[172] Rather, the court limited its analysis to the process provided to the student using the judicially required elements: fundamental fairness and adherence to the institution's contract with students.[173] Because this was a behavioral disciplinary case, no discretion was granted.[174]

Similarly, in *Schaer v. Brandeis University*,[175] the court properly reviewed the case only based on whether the college met the two judicial requirements of fundamental fairness and adherence to the contract with students.[176] In that behavioral disciplinary case, a student was accused of rape, tried by a college disciplinary panel, and suspended for four months.[177] The student sued to enjoin his sanction on the theory that the institution breached its contract by conducting a process inconsistent with established disciplinary procedures.[178] Because the court determined that the college adhered to its published procedures, the student's claim for breach of contract failed.[179] The court expanded its analysis beyond the complaint and proceeded to examine the disciplinary process for fundamental fairness.[180] While the institution prevailed, the court made no mention of discretion. In addition, as with nearly all other disciplinary cases,

169. *Id.* at 976.
170. *Id.* at 976–77.
171. *Id.* at 979.
172. *Id.*
173. *Id.* at 977.
174. *See* Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1306 (N.Y. 1980).
175. 735 N.E.2d 373 (Mass. 2000).
176. *Id.* at 378, 380.
177. *Id.* at 376.
178. *Id.* at 376–77.
179. *Id.* at 378–80.
180. *Id.* at 380.

the court expanded its analysis to include both elements of the two-part judicial test, even though the student-plaintiff sued only on a contract theory.[181]

Because no discretion is afforded a private institution for behavioral disciplinary matters, institutions must be particularly careful to administer a process that meets the two-part judicial test. Unlike *Kwiatkowski* and *Schaer*, in *Fellheimer*, the sanction imposed on the student was enjoined because the process lacked fundamental fairness.[182] The alleged breach was the failure to notify the student of one charge against him, thereby depriving him of a fundamentally fair process.[183] The court ruled that the institution had breached its contract with the student because failure to notify the accused of a charge lacked fundamental fairness.[184] Therefore, institutions must abide by the two judicial requirements in behavioral disciplinary matters because no discretion is afforded to the institution in these cases.

VI. CONCLUSION AND RECOMMENDATIONS

The process due a student at a private educational institution has two judicial requirements. The first requirement is that the institution's process be fundamentally fair. The second requirement is that the institution meets its contractual obligations to its students.

While courts routinely recite these requirements as the law governing the disciplinary process at a private educational institution, courts also allege to grant private institutions discretion when reviewing academic disciplinary matters. While many court cases state that this discretion exists, it is granted inconsistently between courts.[185]

Some courts have granted a great deal of discretion by declining to review academic disciplinary cases. At the other extreme, some

181. *Schaer*, 735 N.E.2d at 378, 380.
182. Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 244 (D. Vt. 1994).
183. *Id.* at 242–43.
184. *Id.* at 247.
185. *See* Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 578–79 (Pa. Super. Ct. 1990) (stating that such discretion exists and performing a brief analysis of relevant cases).

courts have conducted a de novo factual review of academic disciplinary cases. Courts, however, are quite consistent in their analysis of behavioral disciplinary proceedings. These cases are properly determined without any reference to discretion because courts are more familiar with the facts relating to behavioral discipline.

Private academic institutions should not expect to be granted discretion by a court at a trial concerning an academic disciplinary proceeding. Rather, the institution should adopt policies and procedures that ensure a fundamentally fair process and are consistent with the published disciplinary policy. For example, to insure a fundamentally fair process: (1) the disciplinary procedures should be published and distributed to students; (2) the accused student must be notified of all charges and evidence relevant to the proceeding; (3) the accused student should be permitted assistance in defense by either a faculty member or another student; and (4) a standing disciplinary committee having sanction authority should be established with an ability to record proceeding transcripts.

To ensure institutional compliance with published disciplinary procedures, the procedures should be kept simple and vague. Furthermore, the published procedures should reserve the right to deviate from the disciplinary process as long as fundamental fairness is maintained. This reservation of right prevents the terms of the contract from being interpreted "against the college as the author thereof," as contemplated in *Lyons*.[186]

186. Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977).