PROCEDURAL AND SUBSTANTIVE STUDENT CHALLENGES TO DISCIPLINARY SANCTIONS AT PRIVATE—AS COMPARED WITH PUBLIC—INSTITUTIONS OF HIGHER EDUCATION: A GLARING GAP?

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INTRODUCTION

When faced with sanctions, including but not limited to dismissals,[1] students at public institutions of higher education

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[1] The use of a broad rubric, such as "sanctions," is purposeful here in light of not only the courts' disinclination to be definitive about the level of adverse action that qualifies as a property or liberty interest under the Fourteenth Amendment but also the focus here on private—as contrasted with—public colleges and universities. For similar wider terminology, see, e.g., Fernand N. Dutile, *Disciplinary Versus Academic*

(IHEs) may obtain judicial review under Fourteenth Amendment due process and other constitutional bases,[2] whereas their counterparts at private IHEs lack this protection. Shook provided this characterization of the gap: "[T]he public university student enters the arena of disciplinary hearings brandishing the sharp sword of constitutional safeguards. At the same time, the private university student, for whom these constitutional safeguards do not exist, carries only the equivalent of a dull stick."[3] Similarly and more broadly advocating for the private IHE student's side, Murphy contended:

> Obviously, a . . . [private IHE] is not the government and without state action, there can be no constitutional claim. Even if certain procedures are promised accused students as a matter of school policy of 'contract,' there is no basis for a claim that such procedures must be followed or the accused student may have the right of redress in civilian court. The simple truth is, there is no right of redress for the accused student . . . .[4]

This Article provides a systematic and comprehensive analysis of the case law within this purportedly glaring gap. After setting forth the framework in terms of the intersecting dimensions of type of IHE (i.e., public or private) and category of conduct (i.e., academic or nonacademic), the Article follows the template of empirical analyses in terms of the method, results, and discussion.

Sanctions in Higher Education: A Doomed Dichotomy, 29 J.C. & U.L. 619, 626 (2003) (referring to "adverse institutional decisions").

[2] The secondary constitutional avenues include the First, Fourth, and Fifth Amendments. *See, e.g.*, Note, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795 (1970). The Fourteenth Amendment's equal protection clause is another example. However, such constitutional protections may not prove robust in challenging sanctions at public IHEs. *See, e.g.*, Jones v. State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969).

[3] Marc H. Shook, Student Article, *The Time is Now: Arguments for the Expansion of Rights for Private University Students in Academic Disciplinary Hearings*, 24 LAW & PSYCHOL. REV. 77 (2000).

[4] Wendy Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1009-10 (2006).

I. FRAMEWORK

Subject to further focusing,[5] Figure 1 provides the overall contextual framework for this gap.

Figure 1. Primary Avenues for Student Challenges to Sanctions of Public and Private IHEs

	Public IHE	Private IHE
Federal Constitution (e.g., 14th Am. procedural and substantive due process)		
State Common Law Torts (e.g., intentional infliction of emotional distress)		
Federal or State Civil Rights Acts (e.g., Titles VI or IX)		

As alternate avenues for judicial redress, Figure 1 shows that students at both types of IHEs generally may obtain judicial review via state common law torts, such as intentional infliction of emotional distress (IIED) and federal civil rights laws, such as Title VI of the Civil Rights Act[6] or Title IX of the Education Amendments.[7] However, these avenues offer only limited protection. The essential elements of common law torts, such as outrageousness for IIED, do not square well with the typical facts of IHE sanctions, and federal civil rights laws are limited to protected groups and face proof problems in terms of the requisite discriminatory nexus. The wider and more fitting avenue of constitutional claims is not open to students at private IHEs based on the "state action" barrier.[8]

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[5] *See infra* Figure 2.

[6] 29 U.S.C. § 794(a)(2) (2006) (prohibiting discrimination on the basis race, ethnicity, or national origin in institutions that receive federal financial assistance).

[7] 20 U.S.C. § 1681(a) (2006) (prohibiting discrimination based on sex at institutions that receive federal financial assistance).

[8] *See, e.g.*, Ralph D. Mawdsley, Commentary, *State Action and Private Educational Institutions*, 117 EDUC. L. REP. 411 (1997).

A. Due Process Protections at Public IHEs

The primary basis for constitutional procedural and substantive protections for challenging student sanctions at public IHEs is the Fourteenth Amendment's due process clause.[9] In two successive decisions, the Supreme Court delineated the extent of Fourteenth Amendment procedural and substantive due process in relation to academic sanctions[10] at public IHEs. However, as these two Court opinions reveal, the limitation to academic matters is not clear-cut as a matter of the rulings or the rationales.

In its 1978 decision in *Board of Curators of University of Missouri v. Horowitz*,[11] the Court held that, in terms of Fourteenth Amendment procedural due process, public IHEs need not provide a hearing for dismissal of a student based on academic, as contrasted with disciplinary, grounds. In the majority's view, "[t]his difference calls for far less stringent procedural requirements in the case of an academic dismissal."[12] Specifically in response to a public IHE's dismissal of a fourth-year medical student for clinical deficiencies, including personal hygiene, peer and patient relations, and timeliness, the Court ruled:

> Assuming [without deciding] the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires. 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.[13]

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[9] *See, e.g.*, Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359 (1987). For the secondary constitutional alternatives, see, for example, *supra* note 2.

[10] Although these decisions were specifically in response to student dismissals, the Court did not determine whether this severe action constituted the requisite liberty or property interest. Thus, the broader rubric of student sanctions is useful to extend to any other adverse IHE actions that may similarly fit within these protected confines.

[11] 435 U.S. 78 (1978).

[12] *Id.* at 86.

[13] *Id.* at 84–85.

In doing so, the *Horowitz* Court reflected the fuzzy boundary between academic evaluations and disciplinary determinations. For example, supporting "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct,"[14] the Court cited its earlier decision that applied Fourteenth Amendment procedural due process to a clearly disciplinary action against a high school student.[15] Similarly, the majority found further support for its ruling in the overall nature of an educational institution,[16] thus subsuming both academic and disciplinary actions.[17] Moreover, Justice Marshall's partial dissent pointedly questioned the reliance on and workability of the distinction between "academic" and "disciplinary" matters.[18]

Although the *Horowitz* Court briefly visited Fourteenth Amendment substantive due process,[19] the subsequent decision in *Regents of University of Michigan v. Ewing*[20] crystallized its application by limiting judicial review to a narrow avenue. More specifically, in rejecting another medical student's dismissal from a public IHE,[21] the *Ewing* Court ruled that Fourteenth Amendment substantive due process only applies to a public IHE's adverse academic action if it is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional

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[14] *Id.* at 86.

[15] *Id.* at 85–86 (citing Goss v. Lopez, 419 U.S. 565 (1975)).

[16] *See, e.g.*, *id.* at 88 ("A school is an academic institution, not a courtroom or administrative hearing room."); *see also id.* at 91 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (supporting judicial deference to public educational institutions)).

[17] On the other hand, the majority used *Goss* to distinguish between the factual determinations and adversary flavor of a disciplinary determination and the more subjective and educational nature of academic evaluations. *Id.* at 89–90.

[18] *Id.* at 104 & n.18, 106 (Marshall, J., partially dissenting).

[19] *Id.* at 91–92 ("In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.' Even assuming that the courts can review under such a standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case.") (internal citations omitted)..

[20] 474 U.S. 214 (1985).

[21] Again, the Court assumed that the student had a constitutionally protected interest without providing any analysis of what exactly constituted this requisite liberty or property right. *Id.* at 223.

judgment."[22] Although the dismissal in this case was unquestionably academic, as it was based on the student's failure of an important examination, the Court also relied in part on broader considerations of judicial deference to legislation and to educational institutions.[23]

For disciplinary sanctions, i.e., those amounting to denials of the requisite property or liberty interest for student violations of valid rules of conduct,[24] the corresponding early lower court decisions established that the Fourteenth Amendment provides more procedural protection, such as an administrative hearing,[25] than the academic-sanction cases,[26] although not entitling the student to the full-blown safeguards of adversarial civil proceedings.[27] Substantive due process has played a relatively negligible role.[28] Reflecting an overall current of judicial

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[22] *Id.* at 225-27.

[23] *Id.* at 225-26.

[24] *See supra* text accompanying note 14.

[25] *See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd mem*., 399 F.2d 638 (4th Cir. 1968); Gardenhire v. Chalmers, 326 F. Supp. 1200 (D. Kan. 1971); Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968); Zanders v. La. State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); Due v. Fla. Agric. & Mech. Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); *cf.* Paine v. Bd. of Regents, 355 F. Supp. 199 (W.D. Tex. 1972), *aff'd mem*., 474 F.2d 1397 (5th Cir. 1973) (relying on Fourteenth Amendment irrebuttable presumption).

[26] For a discussion of this contrasted category, see, for example, Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students*, 41 AM. U. L. REV. 267, 338-61 (1992).

[27] *See, e.g.*, Gorman v. Univ. of R.I., 837 F.2d 7 (1st Cir. 1988); Sill v. Pa. State Univ., 462 F.2d 463 (3d Cir. 1972); Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) (not requiring impartial and independent adjudicator, tape recording, and/or full cross examination); Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); Nash v. Auburn Univ., 621 F. Supp. 948 (M.D. Ala. 1985), *aff'd*, 812 F.2d 655 (11th Cir. 1987); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd mem*., 787 F.2d 590 (6th Cir. 1986); Crowley v. U.S. Merch. Marine Acad., 985 F. Supp. 292 (E.D.N.Y. 1997) (providing for right to counsel only when charges of criminal conduct). *But see* Marin v. Univ. of P.R., 377 F. Supp. 613 (D.P.R. 1974) (providing relatively full panoply).

[28] *See, e.g.*, Crook v. Baker, 813 F.2d 88, 100 (6th Cir. 1987) (applying arbitrary/capricious standard as the alternative without deciding whether the academic standard of *Ewing* applies instead); Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1081 (8th Cir. 1969) (partially relying on vagueness and overbreadth as

deference, which underlies not only procedural and substantive due process but extends beyond the academic area, the outcomes of these disciplinary-conduct cases have continued to be largely in favor of the defendant public IHEs.[29]

B. Academic v. Disciplinary Sanctions at Public and Private IHEs

The division between what one commentator translated as "cognitive" v. "non-cognitive" performance[30] pre-dates *Horowitz*.[31] Yet, despite cogent commentary in favor of a more nuanced

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substantive due process); Haley v. Va. Commonwealth Univ., 948 F. Supp. 573, 583 (E.D. Va. 1996) (summarily applying shocking-the-conscience test).

[29] *Compare* Phat Van Le v. Univ. of Med. & Dentistry of N.J., 379 F. App'x 171 (3d Cir. 2010), Woodis v. Westark Cmty. Coll., 160 F.3d 435 (8th Cir. 1998), Harris v. Blake, 798 F.2d 419 (10th Cir. 1986), Henson v. Honors Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983), Cobb v. Rector & Visitors of Univ. of Va., 84 F. Supp. 2d 740 (W.D. Va. 2000), *aff'd mem*., 229 F.3d 1142 (4th Cir. 2000), Smith v. Va. Military Inst., No. 6:09-CV-00053, 2010 WL 2132240 (W.D. Va. May 27, 2010), Foo v. Trs. of Ind. Univ., 88 F. Supp. 2d 937 (S.D. Ind. 1999), Smith v. Univ. of Va., 78 F. Supp. 2d 533 (W.D. Va. 1999), Haley v. Va. Commonwealth Univ., 948 F. Supp. 573 (E.D. Va. 1996), Henderson State Univ. v. Spadoni, 848 S.W.2d 951 (Ark. Ct. App. 1993), Gagne v. Trs. of Ind. Univ., 692 N.E.2d 489 (Ind. Ct. App. 1998), Jackson v. Ind. Univ. of Pa., 695 A.2d 980 (Pa. Commw. Ct. 1997), and Univ. of Houston v. Sabeti, 676 S.W.2d 685 (Tex. App. 1984) (ruling in favor of the defendant IHE), *with* Barnes v. Zaccari, 757 F. Supp. 2d 1313 (N.D. Ga. 2010), Smith v. Denton, 895 S.W.2d 550 (Ark. 1995), and Alcorn v. Vaksman, 877 S.W.2d 390 (Tex. App. 1994) (ruling in favor of the plaintiff student). Indeed, some of the cases, depending in part on the level of the sanction, failed at the threshold stage of showing the prerequisite property or liberty interest. *See, e.g.*, Mercer v. Bd. of Trs. for Univ. of N. Colo., 17 F. App'x 913 (10th Cir. 2001); Williams v. Wendler, 530 F.3d 584 (7th Cir. 2008); Hill v. Trs. of Ind. Univ., 537 F.2d 248 (7th Cir. 1976); Harris v. Blake, 798 F.2d 419 (10th Cir. 1986); Lee v. Univ. of Mich. Dearborn, No. 5:06-CV-66, 2007 WL 2827828 (W.D. Mich. Sept. 27, 2007).

[30] Joseph M. Flanders, *Academic Student Dismissals at Public Institutions of Higher Education: When is Academic Deference Not an Issue?*, 34 J.C. & U.L. 21, 46 (2007). However, this re-formulation does not provide a semantic solution. *See, e.g.*, Richmond v. Fowlkes, 228 F.3d 854, 858 (8th Cir. 2000) (upholding, in light of *Horowitz* the academic characterization of dismissal of pharmacy student based on the faculty's "non-cognitive evaluation"). Further revealing the semantic difficulties in line-drawing, another commentator, who is a higher education administrator, used "non-academic," in contrast to "academic" to refer to off-campus student activities, but, again, without consistent clarity. John Friedl, *Punishing Students for Non-Academic Conduct*, 26 J.C. & U.L. 701 (2000).

[31] *See* Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975) (citing Brookins v. Bonnell, 362 F. Supp. 379, 382 (E.D. Pa. 1973) ("We are well aware that there has long been a distinction between cases concerning disciplinary dismissals, on the one hand, and academic dismissals, on the other.")).

approach,[32] the courts have continued to recite the academic-nonacademic dichotomy. For example, although Sinson observed, by way of example, that "bizarre and disruptive conduct of graduate students in clinical work may be academic or nonacademic because it 'reflect[s] both on the student's academic performance and the student's deportment,'"[33] the lower courts have followed *Horowitz* consistently in treating clinical cases, including student teaching, as academic.[34] For cheating and plagiarism, the courts have been less consistent, but these issues would appear to be on the non-academic side of the line for several interrelated reasons. First, given the *Horowitz* Court's adoption of the traditional judicial framework of a dichotomy, thus limited to only two options, cheating and plagiarism are more a matter of "misconduct" than "failure to attain a standard of excellence in studies."[35] Second, the model codes of student conduct typically include cheating and plagiarism.[36] Third, while characterizing

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[32] The leading commentary is Dutile, *supra* note 1. He observed, for example, that situations in which higher-education students "face adverse institutional decisions occupy a spectrum ranging from the purely academic through the purely disciplinary." *Id*. at 626. He advocated a unified approach, whereby "the nature of the hearing will vary with the nature of the loss" and courts accord "appropriate deference to the expertise whether academic or disciplinary of college and university decisionmakers." *Id*. at 651-52. Among subsequent commentary following Dutile's lead, see, for example, Flanders, *supra* note 30, at 76 (advocating treating each case as "mixed" with the court parsing the facts into cognitive and non-cognitive issues).

[33] Scott R. Sinson, Note, *Judicial Intervention of Private University Expulsions: Traditional Remedies and A Solution Sounding in Tort*, 46 DRAKE L. REV. 195, 207 (1997) (citing Pflepsen v. Univ. of Osteopathic Med., 519 N.W.2d 390, 391 (Iowa 1994)).

[34] *See, e.g.*, Hennessey v. City of Melrose, 194 F.3d 237, 251 (1st Cir. 1999) ("The appellant's conduct at Horace Mann had academic significance because it spoke volumes about his capacity to function professionally in a public school setting."); Nickerson v. Univ. of Alaska Anchorage, 975 P.2d 46, 53 (Alaska 1999) ("While acknowledging that there is no clearly identifiable line between academic and disciplinary proceedings, we nevertheless recognize that school teachers must possess the ability to interact effectively with their students and colleagues, and, while less than tangible, such a skill may form an academic requirement necessary for satisfactory completion of a teaching program.").

[35] Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 87 (1978) (citing Barnard v. Inhabitants of Sherburne, 102 N.E. 1095, 1097 (Mass. 1913)).

[36] *See, e.g.*, Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 27 (2004); Gary Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137, 142 (1979-1980).

issues such as cheating as having "mixed status,"[37] Lee concluded that "the prevailing view of courts across the federal circuits is that academic misconduct (as opposed to academic failure) should be viewed as disciplinary matter, which entitles the student to procedural due process."[38] For example, in various student-cheating cases at public IHEs courts have rejected the academic label.[39] Fourth, subsuming plagiarism and cheating under the rubric "academic wrongdoing" as compared to "academic failure," Berger and Berger pointed out that despite the ultimate frequent fusion in terms of a course grade of an "F," the "foremost difference lies in the far deeper stigma that adheres to the finding of wrongdoing."[40] Finally, as they also pointed out, "in many

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[37] Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J.C. & U.L. 511, 518 (2013) ("Plagiarism, cheating, and other forms of academic misconduct have a behavioral component, but determining whether academic misconduct occurred also requires professional judgment on the part of faculty or administrators—particularly in the case of plagiarism.").

[38] *Id.* (citing four public IHE cases).

[39] *See, e.g.*, Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 74 (4th Cir. 1983) (concluding that cheating was disciplinary rather than "evaluating the academic fitness of a student"); Slaughter v. Brigham Young Univ., 514 F.2d 622, 624 (10th Cir. 1975) (scholarly dishonesty is "on the conduct or the ethical side rather than an academic deficiency"); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) ("[C]heating, [is] an offense which cannot neatly be characterized as either 'academic' or 'disciplinary'. [sic] The Supreme Court's reasoning in *Horowitz,* however, persuades me that cheating should be treated as a disciplinary matter."), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986); Lightsey v. King, 567 F. Supp. 645, 648 (E.D.N.Y. 1983) ("[D]espite the artful semantics of the defendants, this is not an instance of discretionary grading, and the cases relating to academic standards and sanctions for academic deficiencies are not apposite. This is a disciplinary matter, rather than an academic one . . . ."); Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 931 (Tex. 1995) ("This argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."). *But cf.*Garshman v. Pa. State Univ., 395 F. Supp. 912, 920-21 (M.D. Pa. 1975) (ultimately analogizing cheating to professorial competence, which courts treat as an academic matter). The private IHE cases are less clear and direct in their characterization of cheating. See, e.g., Valente v. Univ. of Dayton, 438 F. App'x 381, 384, 388 (6th Cir. 2011)(referring to disciplinary hearing but separately emphasizing academic standards; Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413, 438 (D.N.J. 1985) (emphasizing judicial deference regardless of whether an academic matter); Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984); Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 273 (N.J. Super. Ct. App. Div. 1982) (deferring to private IHE's characterization of cheating as an academic matter).

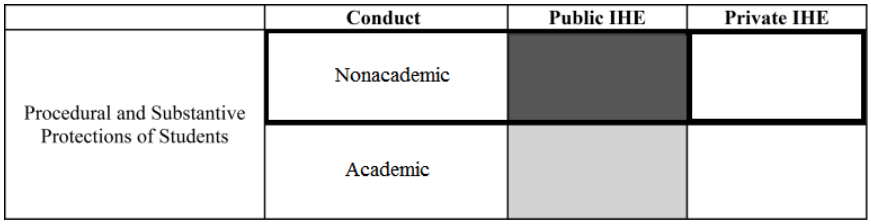
[40] Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 303 (1999); *see also* Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. &

situations proof of academic wrongdoing will not require an instructor's singular expertise."[41]

C. The Specific Scope of the "Gap"

Providing the refined focus of this Article, Figure 2 shows the boundaries of the purported gap at private IHEs. More specifically, Figure 2 magnifies the focus on the gap in the first row of Figure 1 to be converge on student protections at private IHEs analogous to those under the Constitution and specific to nonacademic conduct.

Figure 2. Focusing on the Gap with Magnification



Various sources have advocated that, via contract or another theory, courts need to fill this gap for disciplinary cases in private IHEs.[42] The competing theories that have emerged are: 1) contract

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U.L. 1, 57 (2010) ("[D]isciplinary matters such as plagiarism or cheating, which potentially implicate serious and career-altering penalties, invite greater judicial scrutiny [than academic matters] . . . ."); *cf.* Jennifer N. Buchanan & Joseph C. Beckham, *A Comprehensive Academic Honor Policy for Students: Ensuring Due Process, Promoting Academic Integrity, and Involving Faculty*, 33 J.C. & U.L. 97, 104-05 (2006) ("[A]cademic misconduct implicates the full range of due process protections available to students in public colleges and universities because the stigma associated with dishonesty and the potential loss of academic standing implicate liberty and property interests under the Fourteenth Amendment.").

[41] Berger & Berger, *supra* note 40, at 303.

[42] *See, e.g.*, Berger & Berger, *supra* note 40, at 291 ("Contract law, instead, [via the implied covenant of good faith and fair dealing] becomes the bulwark for the private school student, and there is no reason why that protection should ordinarily be less than a public school student receives under the federal Constitution."); Shook, *supra* note 3, at 97 ("Whether by the expansion of contract law, or the creation of a new tort, courts must supply private university students with fair dueprocess [sic] rights in academic disciplinary [i.e., cheating] hearings[,]" but identifying rights that public IHE students do not have in academic or disciplinary cases.); Johanna Matloff, Note, *The New Star Chamber: The Illusion of Due Process Standards at Private University*

theory,[43] including the implied contractual obligation of good faith and fair dealing,[44] and, to a lesser extent, fiduciary duty[45] and law of association.[46] A 1970 overview in the DUKE LAW JOURNAL

Disciplinary Hearings, 35 SUFFOLK U. L. REV. 169, 185 (2001) ("At the very least, courts should hold private universities strictly accountable to their own disciplinary policies."); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 685 (2001) (advocating contract theory to effectively erase the public-private distinction but specifying some procedural standards beyond those the courts have required at public IHEs); *cf.* AM. ASS'N OF UNIV. PROFESSORS, *Joint Statement on Rights and Freedoms of Students*, *in* POLICY DOCUMENTS AND REPORTS 273, 276-78 (10th ed. 2006) (recommending due process, including a full evidentiary hearing for both academic and social misconduct, without differentiation between private and public IHEs), available at http://www.aaup.org/file/joint-statement-on-rights-and-freedoms-of-students.pdf; Note, *supra* note 2, at 807 ("There is no sound basis for the refusal of the courts to investigate any disciplinary proceeding which results in a student's dismissal from a private university especially since the same courts require procedural fairness for students expelled from a public university."); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974) (proposing right of procedural due process based on common law of association); Sinson, *supra* note 33, at 223–30 (advocating a customized tort remedy that would apply to both private and public IHEs).

[43] *See, e.g.*, Sinson, *supra* note 33, at 208–11. Commentators have long debated the difficulties of applying strict contract theory based on the IHE's catalog and policies. *See, e.g.*, Hazel Glenn Beh, *Student Versus University: The University's Implied Obligation of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 197 n.69 (2000). For its application in higher education including, but extending beyond, discipline case law, see, for example, K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J.C. & U.L. 175 (2003).

[44] Berger & Berger, *supra* note 40, at 334–36 (advocating this approach with stringent application to cases of non-academic sanctions); Beh, *supra* note 43, at 184 (proposing reliance on the "work horses of contract law, the implied obligations of good faith and fair dealing,"—directed at student malpractice-type suits—but seemingly applicable more generically). Depending on one's interpretation of contract theory, this implied duty may be seen as a separable approach.

[45] *See, e.g.*, Sinson, *supra* note 33, at 211–13 (summarizing the application of this theory to the student-IHE relationship); Robert P. Faulkner, Note, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit –The Fiduciary Alternative*, 40 SYRACUSE L. REV. 837 (1989) (advocating it). However, the courts have been resistant to applying this theory to IHEs. *See, e.g.*, Beh, *supra* note 43, at 202-03 (citing various court decisions). For a comprehensive analysis that does not focus on IHE sanctions of students and that instead intersects with the implied obligation of good faith and fair dealing, see Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002).

[46] *See, e.g.*, YALE L.J. Note, *supra* note 42, at 132–45. For arguments against this option, see, for example, Berger & Berger, *supra* note 40, at 314–17. Another alternative is state statutory protections, such as a state administrative procedures act, a mandamus, or other action—as in New York's Article 78 of the Civil Practice Act—established for judicial review of administrative decisions. N.Y. C.P.L.R. 7801–

predicted that courts would close the gap, at least in terms of using such theories to provide equal procedural safeguards to students in private IHEs.[47] Four decades later, Smith asserted that "there is little practical difference between the process required at a private [IHE] and the process required at a state [IHE]," but he based this conclusion on a relatively limited sample of court decisions.[48]

The purpose of this Article is to provide an empirical analysis[49] of the student litigation challenging sanctions for non-academic conduct at private IHEs. The specific questions are as follows:

1. Within the specified scope, what is the total number of the court decisions?

2. In which jurisdictions have these decisions arisen?

3. How far back do these decisions date, and has their frequency changed during the intervening decades?

7806 (MCKINNEY 2012). However, the administrative procedures avenue does not appear to expanding. *See, e.g.*, State *ex rel.* Yarber v. McHenry, 915 S.W.2d 325, 330 n.3 (Mo. 1995) (acknowledging amended limitation to Missouri APA with regard to IHEs); Mary M. v. Clark, 473 N.Y.S.2d 843, 844 (App. Div. 1984) (rejecting applicability of New York APA to IHE disciplinary proceedings).

[47] *See* Note, *supra* note 2, at 796 (citing "virtually unanimous" commentators). Agreeing with the commentators, the author(s) of the note concluded: "It is not at all unlikely that the courts may soon require that private colleges and universities afford their students that degree of procedural due process which the fourteenth amendment requires a public university to provide its students." *Id.* at 806.

[48] Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference between State and Private Educational Institution Disciplinary Legal Requirements*, 9 N.H. L. REV. 443, 451-52 (2011); *see also id.* at 452 ("[C]onstitutional due process for state educational institution discipline is very similar to fundamental fairness for private institution discipline.").

[49] Although a broad, relatively imprecise term, "empirical" in this context refers to a systematic approach that introduces a quantitative dimension to supplement traditional qualitative legal analysis. For examples of the specific version of this approach, see Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. Rev. 353, 368 (2008); Perry A. Zirkel, *Public School Student Bullying and Suicidal Behaviors: A Fatal Combination?*, 42 J.L. & EDUC. 633 (2013); Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175 (2011); Perry A. Zirkel & Caitlyn A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323 (2011).

4. What has been the distribution of these decisions in terms of the a) student's level of education, b) type of conduct,[50] and c) level of sanction?

5. Which theories have the courts used?

6. What have been the outcomes of these decisions?[51]

7. Have these outcomes differed significantly between the conflated two categories for each of the following: a) education level, b) conduct, and c) sanction?[52]

II. METHOD

The successive sources of the case law consisted of 1) a Boolean search of federal and state cases in Westlaw[53]; 2) a review of the higher education chapter of each YEARBOOK OF EDUCATION LAW since 1982[54]; 3) the citations in relevant law review articles[55]; and 4) the cases cited in the court decisions initially determined to fit within the scope of the study.[56] Although the initial scope was

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[50] As a combination of objectivity and simplicity, the references herein are to "conduct" or "alleged misconduct" rather than to the generic use of "misconduct" except where quoting a commentator or summarizing the court's characterization of what are typically allegation assumed for the sake of procedural disposition as fact.

[51] "Outcomes" here refers to whether the final available decisions was in favor of the plaintiff student or in favor of the defendant private IHE. For the specific outcome scale, see *infra* text accompanying notes 78–79.

[52] Due to the small cell sizes arising from more differentiated categories, this statistical comparison was limited to broad dichotomous classifications of each of these three variables. For the conflated and differentiated versions, see *infra* Table 2 and Appendix A, respectively.

[53] The search terms included various combinations of "student," "private," "college," "university," "disciplin!," "suspension," "expulsion," and "sanction."

[54] The Education Law Association (formerly, the National Organization on Legal Problems of Education) publishes these annual compilations of court decisions. The first one that contained a chapter on college and university cases was in 1982. D. Parker Young & Donald D. Ghering, *Higher Education*, *in* THE YEARBOOK OF SCHOOL LAW 252 (Philip K. Piele ed., 1983). The most recent one was the 2012 edition. Neal H. Hutchens, *Students in Higher Education*, *in* THE YEARBOOK OF EDUCATION LAW 207 (Charles J. Russo ed., 2012). For the period since the 2012 yearbook, we reviewed the higher education case blurbs in the Education Law Association's monthly SCHOOL LAW REPORTER.

[55] A corresponding Boolean search of law reviews via Westlaw yielded approximately 25 at least partially pertinent articles.

[56] For example, the New York court decisions, although having relatively short opinions, often contained string citations that included other relevant cases.

student litigation challenging sanctions of private IHEs, the subsequent choices in relation to marginal cases resulted in more refined boundaries in terms of the various sets of exclusions of court decisions that otherwise concerned student sanctions for nonacademic conduct. The first set of exclusions concerned contextual factors specific to the framework in Figures 1 and 2: 1) public IHE cases that included rulings on state law claims also applicable to private IHEs,[57] 2) cases limited to the issue of state action,[58] 3) private IHE cases limited to rulings on federal or state

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[57] *See, e.g.*, Park v. Ind. Univ. Sch. of Dentistry, 692 F.3d 828 (7th Cir. 2012); Coates v. Natale, 409 F. App'x 238 (11th Cir. 2010); Lucey v. Bd. of Regents of Nev. Sys. of Higher Educ., 380 F. App'x 608 (9th Cir. 2010); Bissessur v. Ind. Univ. Bd. of Trs., 581 F.3d 599 (7th Cir. 2009); Yoder v. Univ. of Louisville, 417 F. App'x 529 (6th Cir. 2011); Butler v. Rector & Bd. of Visitors of Coll. of William & Mary, 121 F. App'x 515 (4th Cir. 2005); Hand v. Matchett, 957 F.2d 791 (10th Cir. 1992); Wright v. Tex. S. Univ., 392 F.2d 728 (5th Cir. 1968); Di Lella v. Univ. of D.C. David A. Clarke Sch. of Law, 570 F. Supp. 2d 1 (D.D.C. 2008); Goodreau v. Rector & Visitors of Univ. of Va., 116 F. Supp. 2d 694 (W.D. Va. 2000); People *ex rel.* Bluett v. Bd. of Trs. of Univ. of Ill., 134 N.E.2d 635 (Ill. App. Ct. 1956); Amaya v. Brater, 981 N.E.2d 1235 (Ind. Ct. App. 2013); Chang v. Purdue Univ., 985 N.E.2d 35 (Ind. Ct. App. 2013); Gagne v. Trs. of Ind. Univ., 692 N.E.2d 489 (Ind. Ct. App. 1998); Gleason v. Univ. of Minn., 116 N.W. 650 (Minn. 1908); Knapp v. Junior Coll. Dist., 879 S.W.2d 588 (Mo. Ct. App. 1994); Katz v. Bd. of Regents of Univ. of State, 924 N.Y.S.2d 210 (App. Div. 2011); Idahosa v. Farmingdale State Coll., 948 N.Y.S.2d 104 (App. Div. 2012); Nawaz v. State Univ. of N.Y. Univ. at Buffalo Sch. of Dental Med., 744 N.Y.S.2d 623 (App. Div. 2002); Schuyler v. State Univ. of N.Y. at Albany, 297 N.Y.S.2d 368 (App. Div. 1969); Flaim v. Med. Coll. of Ohio, No. 04AP-1131, 2005 WL 736626 (Ohio Ct. App. Mar. 31, 2005); Bleicher v. Univ. of Cincinnati Coll. of Med., 604 N.E.2d 783 (Ohio Ct. App. 1992); State *ex rel.* Sherman v. Hyman, 171 S.W.2d 822 (Tenn. 1942); Pappachristou v. Univ. of Tenn., 29 S.W.3d 487 (Tenn. Ct. App. 2000); Tatum v. Univ. of Tenn., No. 01A01-9707-CH-00326, I., 1998 WL 426862 (Tenn. Ct. App. July 29, 1998); Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Ct. App. 1966); Univ. of Tex. Health Sci. Ctr. v. Babb, 646 S.W.2d 502 (Tex. Ct. App. 1982); *cf.* Wheeler v. Miller, 168 F.3d 241 (5th Cir. 1999) (defamation dependent on state common law and constitution as opposed to state statutes outlined in the preceding cases of this footnote).

[58] *Compare* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Ryan v. Hofstra Univ., 324 N.Y.S.2d 964 (Sup. Ct. 1971) (yes), and Coleman v. Wagner Coll., 429 F.2d 1120 (2d Cir. 1970) (maybe—remanded re state statute), *with* Missert v. Trs. of Boston Univ., 248 F.3d 1127 (1st Cir. 2000); Imperiale v. Hahnemann Univ., 966 F.2d 125 (3d Cir. 1992); Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988); Berrios v. Inter Am. Univ., 535 F.2d 1330 (1st Cir. 1976); Grafton v. Brooklyn Law Sch., 478 F.2d 1137 (2d Cir. 1973); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Becker v. City Univ. of Seattle, 723 F. Supp. 2d 807 (E.D. Pa. 2010); Ben-Yonatan v. Concordia Coll. Corp., 863 F. Supp. 983 (D. Minn. 1994); Counts v. Voorhees Coll., 312 F. Supp. 598 (D.S.C. 1970); Grossner v. Trs. of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). However, for cases that reached other relevant issues in an ostensibly private IHE, the tabulation only excluded the state action and any

civil rights legislation also applicable to public IHEs,[59] 4) private IHE cases limited to academic conduct,[60] and—much more

directly resulting issue rulings. *See, e.g.*, Cook v. Talladega Coll., 908 F. Supp. 2d 1214 (N.D. Ala. 2012); Tynecki v. Tufts Univ. Sch. of Dental Med., 875 F. Supp. 26 (D. Mass. 1994); Ben-Yonatan v. Concordia Coll. Corp., 863 F. Supp. 983 (D. Minn. 1994); Ryan v. Hofstra Univ., 324 N.Y.S.2d 964 (Sup. Ct. 1971)

[59] *See, e.g.*, Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994) (42 U.S.C. § 1981 and Title IX); Williams v. Lindenwood Univ., 288 F.3d 349 (8th Cir. 20023) (42 U.S.C. § 1981); Doe v. Univ. of the S., 687 F. Supp. 2d 744 (E.D. Tenn. 2009) (Title IX and Clery Act); Hall v. Lee Coll., 932 F. Supp. 1027 (E.D. Tenn. 1996) (Title IX); Dartmouth Rev. v. Dartmouth Coll., 889 F.2d 13 (1st Cir. 1989) (42 U.S.C. § 1981 and Title VI); Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71 (D.D.C. 2003) (Title VI and state civil rights act); Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988) (42 U.S.C. § 1981); Yu v. Univ. of La Verne, 126 Cal. Rptr. 3d 763 (Ct. App. 2011) (state statute for off-campus speech). However, in cases where the court also adjudicated pertinent claims, the tabulation only excluded the civil rights claims. *See, e.g.*, Goodman v. Bowdoin Coll., 380 F.3d 33 (1st Cir. 2004); Key v. Robertson, 626 F. Supp. 2d 566 (E.D. Va. 2009).

[60] *See, e.g.*, Dasrath v. Ross Univ. Sch. of Med., 494 F. App'x 177 (2d Cir. 2012) (disenrollment of medical student for failing required class); Kimberg v. Univ. of Scranton, 411 F. App'x 473 (3d Cir. 2010) (dismissal of nursing student for failing to meet academic standards); Lyons v. Salve Regina Coll., 565 F.2d 200 (1st Cir. 1977) (dismissal of nursing student for failing required clinical course); Doherty v. S. Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988) (dismissal of optometry student for failing clinic proficiency requirement); Miller v. Thomas Jefferson Univ. Hosp., 908 F. Supp. 2d 639 (E.D. Pa. 2012) (dismissal of nursing student for not meeting clinical expectations); Paulin v. George Washington Univ. Sch. of Med. & Health Scis., 878 F. Supp. 2d 241 (D.D.C. 2012) (dismissal of student in a physician assistant program for not successfully completing preceptorship); Kloth-Zanard v. Amridge Univ., No. 3:09cv606, 2012 WL 2397161 (D. Conn. June 25, 2012) (dismissal of M.S.W. student for failing to complete clinical coursework); Moe v. Seton Hall Univ., No. CIVA 2:09-01424, 2010 WL 1609680 (D.N.J. Apr. 20, 2010) (dismissal of physician's assistant student for failure in clinical rotations); Schumacher v. Argosy Educ. Group, Inc., No. 05-531, 2006 WL 3511795 (D. Minn. Dec. 6, 2006) (dismissal of Psy.D. student for failure in practicum—though intermixed with more general behaviors); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234 (D. Mass. 1999) (dismissal of dental student for failure to meet academic standards); Love v. Duke Univ., 776 F. Supp. 1070 (M.D.N.C. 1991), *aff'd mem.*, 959 F.2d 231 (4th Cir. 1992) (dismissal of doctoral student for failed courses); Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd mem.*, 579 F.3d 45 (5th Cir. 1978) (dismissal of medical student for failing clinical coursework); Lai v. Bd. of Trs. of E. Carolina Univ., 330 F. Supp. 904 (E.D.N.C. 1971) (constructive dismissal of undergrad from student teaching program for substance abuse); Banks v. Dominican Coll., 42 Cal. Rptr. 2d 110 (Ct. App. 1995) (including sanctions for frivolous appeal for student teacher dismissed for clinical conduct); Morris v. Yale Univ., 63 A.3d 991 (Conn. App. Ct. 2013); Faigel v. Fairfield Univ., 815 A.2d 140 (Conn. App. Ct. 2003) (dismissal for failure to pass required exam); Alden v. Georgetown Univ., 734 A.2d 1103 (D.C. 1999) (dismissal of medical student for poor academic performance); Sharick v. Southeastern Univ. of Health Scis., Inc., 780 So.2d 136 (Fla. Dist. Ct. App. 2000) (dismissal of medical student for failure in final course); Robinson v. Univ. of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958) (constructive dismissal of student from

remotely—5) private secondary school cases.[61] A second set of exclusions concerned the nature of the action or consequence: 1) private IHE cases limited to extracurricular activities,[62] 2) private

student teaching internship based on religious fanaticism); Raethz v. Aurora Univ., 805 N.E.2d 696 (Ill. App. Ct. 2004) (dismissal of M.S.W. student for not successfully completing required fieldwork course); Harris v. Adler Sch. of Prof'l Psychology, 723 N.E.2d 717 (Ill. App. Ct. 1999); Tanner v. Bd. of Trs. of Univ. of Ill., 459 N.E.2d 324 (Ill. App. Ct. 1984) (dismissal or diploma-denial for failure to pass qualifying exam for grad degree); Bilut v. Northwestern Univ., 645 N.E.2d. 536 (Ill. App. Ct. 1994) (dismissal of doctoral student for lack of acceptable dissertation proposal within required time period); Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382 (Ill. App. Ct. 1993) (dismissal of dental student for failing clinical component); Gordon v. Purdue Univ., 862 N.E.2d 1244 (Ind. App. Ct. 1993) (dismissal of doctoral student for failing thesis); Lekutis v. Univ. of Osteopathic Med. & Health Sci., 524 N.W.2d 410 (Iowa 1994); Pflepsen v. Univ. of Osteopathic Med., 519 N.W.2d 390 (Iowa 1994) (dismissal of medical student for clinical performance); Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108 (Minn. 1977) (expulsion of law student for failure to maintain required GPA); State *ex rel*. Nelson v. Lincoln Med. Coll., 116 N.W. 294 (Neb. 1908) (denial of diploma to medical student for failure on exams); Patti Ann H. v. N.Y. Med. Coll., 445 N.E.2d 203 (N.Y. 1982) (dismissal of medical student for insufficient grades); Susan M. v. N.Y. Law Sch., 556 N.E.2d 1104 (N.Y. 1990) (dismissal of law school student for academic deficiency); Keles v. Trs. of Columbia Univ., 903 N.Y.S.2d 18 (App. Div. 2010) (dismissal of graduate student for failing qualifying exam *inter alia*); McDermott v. N.Y. Med. Coll., 644 N.Y.S.2d 834 (App. Div. 1996) (dismissal of medical student for repeated academic failures); Shields v. Sch. of Law, Hofstra Univ., 431 N.Y.S.2d 60 (App. Div. 1980) (dismissal of law student for insufficient GPA); Elliott v. Univ. of Cincinnati, 730 N.E.2d 996 (Ohio Ct. App. 1999) (dismissal of doctoral student for failure in comprehensive examination); Schoppelrei v. Franklin Univ., 228 N.E.2d 334 (Ohio Ct. App. 1967) (dismissal after retroactive application of revised admission standards); Swartley v. Hoffner, 734 A.2d 915 (Pa. Super. Ct. 1999) (denial of Ph.D. based on failed dissertation defense); Southwell v. Univ. of the Incarnate Word, 974 S.W.2d 351 (Tex. App. 1998) (denial of diploma to nursing student for failing a required course); Maas v. Corp. of Gonzaga Univ., 618 P.2d 106 (Wash. Ct. App. 1980) (dismissal of law student for insufficient GPA); Cosio v. Med. Coll. of Wis., Inc., 407 N.W.2d 302 (Wis. Ct. App. 1987) (dismissal of medical student for insufficient GPA); *cf.* Salve Regina Coll. v. Russell, 499 U.S. 225 (1991) (arguably constructive dismissal of nursing student for not fulfilling contract during clinical coursework to reduce her obesity).

[61] *See, e.g.*, Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22 (1st Cir. 2002); Bass v. Miss Porter's Sch., 738 F. Supp. 2d 307 (D. Conn. 2010); Benedict v. Cent. Catholic High Sch., 511 F. Supp. 2d 854 (N.D. Ohio 2007); Wisch v. Sanford Sch., Inc., 420 F. Supp. 1310 (D. Del. 1976); Blaine v. Savannah Country Day Sch., 491 S.E.2d 446 (Ga. Ct. App. 1997); McClintock v. Lake Forest Univ., 222 Ill. App. 468 (Ill. App. Ct. 1921); Lawrence v. St. Augustine High Sch., 955 So. 2d 183 (La. Ct. App. 2007); Hood v. Tabor Acad., 6 N.E.2d 818 (Mass. 1937); Hernandez v. Don Bosco Preparatory High, 730 A.2d 365 (N.J. Super. Ct. App. Div. 1999); Allen v. Harlem Int'l Cmty. Sch., 862 N.Y.S.2d 696 (App. Term 2008); Gorman v. St. Raphael Acad., 853 A.2d 28 (R.I. 2004).

[62] *See, e.g.*, Knelman v. Middlebury Coll., 898 F. Supp. 2d 697 (D. Vt. 2012) (dismissal from hockey team); Colli v. S. Methodist Univ., No. 3:08-CV-1627-P, 2010 WL 7206216 (N.D. Tex. Aug. 17, 2010) (loss of athletic scholarship); Giuliani v. Duke

IHE cases specific to loss of financial aid,[63] 3) other private IHE payment disputes,[64] or—distinguishable from a sanction—4) denial of admission.[65] A final set of exclusions concerned the nature of the court opinion: 1) cases limited to related but separable issues, such as the implementation of the investigation[66] or the extent of damages[67]; 2) cases limited to the threshold adjudicative issue of jurisdiction[68] or interim jurisdictional issues, such as jury instructions[69]; and 3) cases where the court opinion does not make clear whether the conduct

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Univ., No. 1:08CV502, 2009 WL 1408869 (M.D.N.C. May 19, 2009) (dismissal from golf team). This exclusion extended to disciplinary actions against student clubs. *See*, e.g., Rensselaer Soc'y of Eng'rs v. Rensselaer Polytechnic Inst., 689 N.Y.S.2d 292 (App. Div. 1999) (fraternity); *cf*. Phelps v. President & Trs. of Colby Coll., 595 A.2d 403 (Me. 1991) (group of students' state civil rights act challenge to discipline for fraternity membership).

[63] *See, e.g.*, LoPiccolo v. American Univ., 840 F. Supp. 2d 71 (D.D.C. 2012); Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957).

[64] *See, e.g.*, Burns v. Quinnipiac Univ., 991 A.2d 666 (Conn. App. Ct. 2010); Baltimore Univ. v. Colton, 57 A. 14 (Md. 1904); Eidlisz v. N.Y. Univ., 876 N.Y.S.2d 400 (App. Div. 2009); Sheridan v. Trs. of Columbia Univ., 745 N.Y.S.2d 18 (App. Div. 2002) *aff'd mem.*, 755 N.Y.S.2d 711 (2003); Martin v. Pratt Inst., 717 N.Y.S.2d 356 (App. Div. 2000); Drucker v. N.Y. Univ., 308 N.Y.S.2d 644 (App. Div. 1970).

[65] *See, e.g.*, Mangla v. Brown Univ., 135 F.3d 80 (1st Cir. 1998); Coffelt v. Nicholson, 272 S.W.2d 309 (Ark. 1954); People *ex rel.* Tinkoff v. Northwestern Univ., 77 N.E.2d 345 (Ill. App. Ct. 1947); *cf*. DeMarco v. Univ. of Health Sci., 352 N.E.2d 356 (Ill. App. Ct. 1976) (readmission).

[66] *See, e.g.*, Doe v. Gonzaga Univ., 24 P.3d 390 (Wash. 2001), *rev'd*, 536 U.S. 273 (2002); *cf*. Nehls v. Hillsdale Coll., 65 F. App'x 984 (6th Cir. 2003) (claiming report of expulsion years later was defamation).

[67] *See, e.g.*, Morehouse Coll., Inc. v. McGaha, 627 S.E.2d 39 (Ga. Ct. App. 2005); Verni v. Cleveland Chiropractic Coll., No. WD 62808, 2005 WL 2738919 (Mo. Ct. App. Oct. 25, 2005); *cf*. Cornett v. Miami Univ., 728 N.E.2d 471 (Ohio Ct. Cl. 2000) (concerning remedy of expungement).

[68] *See, e.g.*, Booker v. Grand Rapids Med. Coll., 120 N.W. 589 (Mich. 1909); Barker v. Trs. of Bryn Mawr Coll., 122 A. 220 (Pa. 1923) (denial of mandamus where contractual remedy was adequate); Commonwealth v. McCauley, No. 61, 1887 WL 4879 (Pa. 1886) (allowing writ of mandamus but inconclusive as to subsequent disposition); Grogan v. Saint Bonaventure Univ., 458 N.Y.S.2d 410 (App. Div. 1982) (availability of Art. 78).

[69] *See, e.g.*, Morris v. Brandeis Univ., No. CIV. A. 99-2642, 1999 WL 817723 (E.D. Pa. Oct. 8, 1999) (removal); Gupta v. Stanford Univ., 21 Cal. Rptr. 3d 192 (Ct. App. 2004); Silverman v. N.Y. Univ. Sch. of Law, 597 N.Y.S.2d 314 (App. Div. 1993) (exhaustion); Vernon v. Univ. of Chicago, 2011 IL App (1st) 100107-U (jury instructions); Frank v. Marquette Univ., 245 N.W. 125 (Wis. 1932) (inspection of records).

was academic or nonacademic.[70] Some of these exclusions were close calls, reflecting the inevitably blurry boundaries at the margins.[71] After determining the cases for inclusion, the first step was Shephardizing to identify the most recent relevant citation. The next step was summarizing selected information from these cases chronologically in a table[72] starting with the case name and the remainder of the citation and ending with clarifying comments and endnotes. In between, the table contains the following columns: 1) the state where the case arose; 2) a descriptor that includes the sanction level (e.g., suspension or expulsion), the student's educational level (e.g., undergraduate or medical), and the alleged misconduct (e.g., sexual harassment or exam cheating)[73]; 3) the legal theory, or claim, that the court ruled on,[74] including only as an ancillary matter[75] any directly related tort claims (e.g., IIED)[76]; and 4) the judicial outcome of each claim[77] according to this four-category nominal scale[78]:

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[70] *See, e.g.*, Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd mem.*, 114 F.3d 1172 (3d Cir. 1997); People *ex rel.* Cecil v. Bellevue Hosp. Med. Coll., 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct.), *aff'd mem.*, 128 N.Y. 621, 28 N.E. 253 (1891); Barker v. Trs. of Bryn Mawr Coll., 122 A. 220 (Pa. 1923); *cf.* Towner v. Vanderbilt Univ., 708 F.2d 728 (6th Cir. 1982) (no court opinion); Baltimore Univ. v. Colton, 57 A. 14 (Md. 1904) (constructive dismissal for insufficient attendance).

[71] For example, the cases based on mixed misconduct (*supra* note 60—*Schumacher*, *Lai*, and *Robinson*) and jurisdictional avenues (*supra* note 68) were particularly difficult to resolve. The table designates as "marginal" those close calls that, on balance, resulted in inclusion, rather than exclusion.

[72] *See infra* Appendix B.

[73] The specificity of these entries largely depended on the amount of detail in the court's opinion, although the descriptor was deliberately concise.

[74] In some cases, the ruling was a rejection of a particular legal theory, in which case the entry was listed in brackets.

[75] The only exception was *Tynecki v. Tufts Univ. Sch. of Dental Med.,* 875 F. Supp. 26 (D. Mass. 1994), which was limited to tort claims and, thus, was marginal.

[76] The determination of direct relationship was only approximate, and the tabulation of these claims was only incidental to the primary focus, which was on legal theories emerging, although not exclusive, in private IHEs to fill the purported gap.

[77] For the use of claims ruling as the unit of analysis, see, for example, Zirkel, *supra* note 49, at 639; Zirkel & Lyons, *supra* note 49, at 335.

[78] "Nominal" in this context refers to the scale being separate categories without any ranking, or ordinality. Thus, whether an outcome of P is better or higher than an outcome of U depends on the opposing perspectives of the parties but is not answerable from an objective, or neutral, perspective. The four-category scale was a slight modification of the five-category scale in Zirkel & Lyons, *id. supra* note 49, at 336; it does not include an evenly split outcome, because there was none.

U = conclusively in favor of the defendant university

(U) = inconclusively in favor of the defendant university (i.e., preserved for further proceedings based, e.g., on preliminary injunction granted or plaintiff's motion for summary judgment denied)

(P) = inconclusively in favor of the plaintiff student (i.e., preserved for further proceedings based, e.g., defendant's motion for summary judgment or dismissal denied)

P = conclusively in favor of the plaintiff student[79]

III. RESULTS

This part reports the findings in relation to the aforementioned[80] questions. The interpretation of these findings is reserved for Part IV (Discussion). The tabulation of the cases is in Appendix B.

In response to the first two questions, the total number of cases within the specified scope of the gap is ninety-five, representing twenty-six states and the District of Columbia. The leading states have been New York (n=32), Massachusetts (n=11), and Pennsylvania (n=7).[81]

As for question #3, these court decisions date back to the turn of the century, with the first one in 1893 and the next two in 1901 and 1902. Figure 3 portrays the longitudinal trend, by decade, from these early cases to September 15, 2013, when the tabulation was finalized. The grey segment of the bar representing the current decade, 2010–19, is a straight-line projection based on continuation of the present rate for the remaining two thirds of the decade.

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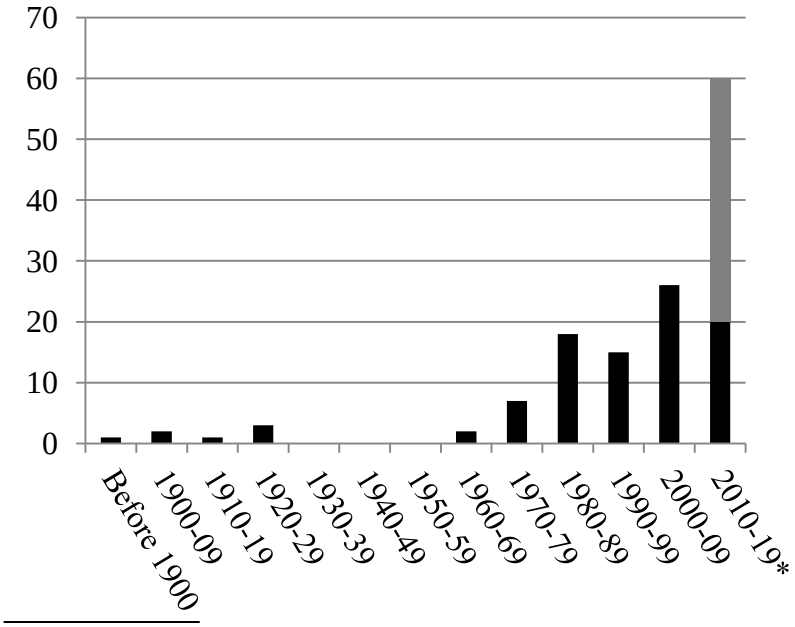
[79] This category included a subcategory, designated as "P*," which was marginal with "(P)," for decisions in favor of the plaintiff student that were conditional or otherwise notably limited in terms of the remedy (e.g., orders of reinstatement subject to reinstituted proceeding with the procedural violation cured) or remands to the defendant IHE's disciplinary proceedings for repetition with correction.

[80] *See supra* text accompanying notes 50-52.

[81] An additional twenty-four jurisdictions each have less than five cases: Florida - 4; Illinois, Louisiana, Ohio, and Tennessee - 3 each; Connecticut, Delaware, District of Columbia, Georgia, Iowa, Kentucky, Maine, Minnesota, New Jersey, and Rhode Island - 2 each; Alabama, Arkansas, Maryland, Nebraska, North Carolina, Oklahoma, Utah, Virginia, and Vermont - 1 each.

Fig. 3. Frequency of Private IHE Nonacademic Sanction Cases per Decade



* Projected estimate extrapolated from 20 (no. as of 9/15/13) x 3 (based on one third a of a decade including time lag of approx. 6 mos.) = 60

Figure 1 shows that the totals for each decade were negligible until the 1970s and that the trend has been largely upward since then.[82]

In response to question #4, the distribution of the ninety-five cases were as follows for the selected factual features:

Student's Educational Level:

undergraduate[83] - 63 (66%)

[82] The largely upward trend since the 1970s included a slight dip in the 1990s and is based on a projection for the current decade. The specific numbers for each decade since the first one were as follows: 1890–99 - 1; 1900–10 - 2; 1900–09 - 2; 1910–19 - 1; 1920–29 - 3; 1930–39 - 0; 1940–49 - 0; 1950–59 - 0; 1960–69 - 2; 1970–79 - 7; 1980–89 - 18; 1990–99 - 15; 2000–09 - 26; 2010–19 - 20 as of 9/15/2013, end of data-collection period.

law	- 9 (9%)
medical/dental[84]	- 6 (6%)
other graduate - professional[85]	- 6 (6%)
other graduate - general[86]	- 10 (11%)
miscellaneous[87]	- 1 (1%)

Types of Conduct:[88]

academic dishonesty[89]	- 32 (34%)
sexual harassment or assault	- 15 (16%)
other disruption[90]	- 37 (39%)
political incorrectness[91]	- 3 (3%)
religious incorrectness[92]	- 4 (4%)
miscellaneous other[93]	- 4 (4%)

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[83] This category broadly included postsecondary proprietary schools and seminaries, although the ninety-five cases included only a few such institutions.

[84] In only one of these cases was the plaintiff a dental student. Tynecki v. Tufts Univ. Sch. of Dental Med., 875 F. Supp. 26 (D. Mass. 1994).

[85] This category included students in chiropractic, MBA, and MPA programs.

[86] This category included students in master's and doctoral programs in arts, sciences, and divinity.

[87] The single, marginal case in this category was a high school student in a college summer program. Stone v. Cornell Univ., 510 N.Y.S.2d 313 (App. Div. 1987).

[88] This taxonomy was rather ad hoc, with only academic dishonesty being well-established as a subcategory in the related law review articles (although disputed as to whether it belongs in the academic or nonacademic domain). Moreover, the recitation of the facts, including the characterization of the charges, in the court opinions ranged widely in terms of specificity and terminology, making the entries only approximate.

[89] The leading examples in the category were cheating on an examination and plagiarism.

[90] Due to the overlap and ambiguity of smaller subcategories, this subcategory was a very broad catchall that ranged from clearly criminal to rather minor social behavior, such as an off-campus party.

[91] This odd category included cases in the 1920s of perceived unpatriotic expression or unlady-like behavior. *See, e.g.*, Anthony v. Syracuse Univ., 231 N.Y.S. 435, 437 (App. Div. 1928) (unlady-like behavior); People *ex rel.* Goldenkoff v. Albany Law Sch., 191 N.Y.S. 349, 351 (App. Div. 1921) (unpatriotic expression).

[92] This other odd category consisted of conduct that religiously controlled institutions treated as immoral, such as homosexuality or divorce, in largely old cases. *See, e.g.*, Johnson v. Lincoln Christian Coll., 501 N.E.2d 1380, 1382 (Ill. App. Ct. 1986) (homosexuality); Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11, 12 (Ky. Ct. App. 1979) (homosexuality); Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90, 91 (La. Ct. App. 1989) (divorce).

[93] The cases in this category were diagnosis of paranoia (n=1), improper behavior (n=1), and unspecified (n=2).

Level of Sanction:[94]

expulsion/dismissal	- 49 (52%)
diploma denial[95]	- 9 (9%)
suspension	- 31 (33%)
other, less than suspension[96]	- 6 (6%)

Thus, the majority of the plaintiff students were undergraduates, and their challenges were largely to expulsions or suspension for various forms of disruptive conduct or academic dishonesty.

To respond to question #5, the canvassing of the theories warranted more careful analysis to identify the categories. In the first decision in the table, which arose in New York before the turn of the twentieth century and which marginally bordered with the jurisdictional exclusions,[97] the court rejected a law student's mandamus action challenging the denial of his diploma for alleged misconduct concerning the graduation exercises.[98] However, while recognizing the "broad discretion" of the private IHE, the court also acknowledged an exception for "extraordinary [circumstances that] justify judicial interference."[99] Thus, the court at least

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[94] This taxonomy was largely sequential in level of severity, although it is arguable whether expulsion, or dismissal, is at a higher level than denial of diploma. For cases when the student received more than one sanction, the coding entry was for the highest of these subcategories.

[95] This category included one revocation of diploma case. Yoo v. Mass. Inst. of Tech., 801 N.E.2d 324 (Mass. App. Ct. 2004).

[96] These six cases consisted of reprimand (n=1), permanent probation (n=1), failing grade (n=3); and removal from cohort group (n=1).

[97] *See supra* note 68.

[98] People *ex rel.* O'Sullivan v. N.Y. Law Sch., 22 N.Y.S. 663 (1893). *See infra* Appendix B. The misconduct, characterized by the court as at least "contumacious," was in protest to the institutional decision to include religious ceremonies at graduation, specifically amounting to a demonstration with 8-10 other students followed by the plaintiff accusing the dean of underhandedness, the group's threatened boycott commencement, and the plaintiff's "interview with the dean, which is described by him in his answering affidavits, but need not here be repeated, for it is sufficient to say that it discloses conduct on the part of the relator justifying the refusal of the faculty to recommend him as a student upon whom a degree should be conferred." People *ex rel.* O'Sullivan, 22 N.Y.S. at 665.

[99] *Id.* at 665.

planted the seeds for judicial review with an arbitrary and capricious standard.

As a transitional phrase, the seeds took further root in a 1971 New York trial court decision after a series of cases in New York and elsewhere within the first seven decades of the twentieth century that vacillated between contract theory and this broad discretionary standard.[100] First, the court set forth alternate theories why a private IHE's disciplinary actions are subject to this standard rather than being beyond judicial review: contract theory, New York's statutory avenue,[101] and—if state action[102]—constitutional claims.[103] After finding no applicable express contractual provision and inveighing against an implied contractual provision of non-arbitrary discipline as a "legal fiction of the ilk favored in less enlightened times," the court alternatively relied on a questionable finding of state action[104] and—specifically pertinent here—the arbitrary and capricious

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[100] Ryan v. Hofstra Univ., 324 N.Y.S.2d 964 (Sup. Ct. 1971). *See infra* Appendix B. The New York cases that applied this broad discretionary theory included not only mandamus actions but also Article 78 proceedings. Article 78 is a broad avenue for judicial review of administrative actions encompassing writs of certiorari, mandamus, and prohibition. N.Y. C.P.L.R. 7801–7806 (MCKINNEY 2012). Its standard is whether the administrative action "was made in violation of lawful procedure, was affected by an error of law *or was arbitrary and capricious* or an abuse of discretion, *including abuse of discretion as to the measure or mode of penalty or discipline imposed*." *Id.* at 7803(3) (emphasis added). For an explanatory analysis, see, for example, NEW YORK STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, AN OVERVIEW OF ARTICLE 78 PRACTICE AND PROCEDURE (2009), *available at* www.http://onlineresources.wnylc.net/fairhearingresources/docs/an_overview_of_article_78_practice_and_procedure__05-21-09_.pdf.

[101] For this jurisdictional basis, which is an extension of mandamus, see *id.*

[102] *See supra* notes 4, 8, 58, and accompanying text.

[103] More specifically, the court listed "three possibilities" why either type of IHE may not discipline a student arbitrarily:

> (1) A contract between the university and the student for fair discipline; (2) Statutory Article 78 proceedings in New York, the counterpart of the historic common law writ of mandamus, in which private citizens can compel a 'body or officer' acting arbitrarily or in abuse of discretion to do its administrative duty properly; and (3) The federal and state constitutions requiring equal protection of the laws and due process of law.

Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 973 (Sup. Ct. 1971).

[104] *Id.* at 982-83. However, in addition to the prevailing case law cited *supra* note 58, New York's highest court subsequently concluded for a comparable IHE that "the right to a due process hearing based on claimed 'state action' was properly dismissed." Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1307 (N.Y. 1980).

standard under state law.[105] The transition continued with another partial or inconclusive student victory, this time in a New York appellate court decision that cited its trial court predecessor.[106]

However, the landmark or at least turning point decision for this general arbitrary and capricious theory appears to be the 1980 decision by New York's highest court in *Tedeschi v. Wagner College*.[107] First, citing the aforementioned[108] transitional trial court ruling but providing a much more detailed analysis, the high court drew its boundary at private IHE sanctions "for causes unrelated to academic achievement,"[109] thus paralleling the distinction that *Horowitz* had established for public IHEs[110] and squaring with the specific scope of this study.[111] Next, the court cited the case law and commentary for and against the two competing theories within this specific context—implied contractual provision[112] and "the law of associations."[113] Then,

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[105] Specifically, as the subheading for the relevant part of its opinion stated, the court concluded that "Hofstra Acted Arbitrarily And Abused Its Discretion By Proceeding Beyond Its Own Rules." *Ryan*, 324 N.Y.S.2d at 974. This ruling was the first one in favor of the plaintiff student, but it was a conditional victory. More specifically, in ordering reinstatement of the student, the judge added **"**Hofstra may reinstitute disciplinary proceedings against Robert for the offenses previously charged, but, in view of the circumstances to date, may not further discipline him on that account except for such finding as may result from the renewed discipline procedure.**"** *Id.* at 988. Moreover, in a supplemental judgment three months later, the court approved, over the student**'**s objection, Hofstra**'**s proposed procedures for reinstituting its discipline of him. Ryan v. Hofstra Univ., 328 N.Y.S.2d 339, 340 (Sup. Ct. 1972).

[106] Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 980 (Sup. Ct. 1975) (citing Ryan v. Hofstra Univ., 324 N.Y.S. 964 (Sup. Ct. 1971)). In finding that the defendant IHE violated its own rules, the court remanded the matter to the IHE's internal appeal board to cure the deficiency, here allowing the student or his representative "an opportunity to be heard on the excessiveness of the penalty . . . ." *Id.*

[107] 404 N.E.2d 1302 (N.Y. 1980).

[108] *See supra* note 104 and accompanying text. Although the *Tedeschi* court attributed the arbitrary/capricious, or abuse of discretion to academic matter, its cited predecessor used this broader standard to encompass the substantial procedural compliance test. See *supra* note 105 and accompanying text.

[109] *Tedeschi*, 404 N.E.2d at 1304 (citing Olsson v. Bd. of Higher Educ., 402 N.E.2d 1150 (N.Y. 1980)).

[110] Missouri v. Horowitz, 435 U.S. 78, 86 (1978); *see supra* text accompanying note 11.

[111] *See supra* Figure 2.

[112] *Tedeschi*, 404 N.E.2d at 1305. Specifically, the court referred to "an implied term of the contract that [the private IHE's] rules . . . will be adhered to by the [IHE]." *Id.*

[113] *Id.*

adding a third, more general and encompassing option, the court ruled as follows:

> We do not find it necessary in the present case to resolve such problems as may arise out of the different theoretical predicates. Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.[114]

Applying this holding, the court concluded that although the defendant IHE's efforts to arrange a meeting with the student's parent constituted the requisite "substantial compliance" with the IHE's guideline for parental notification,[115] the informal meetings with the dean did not meet this standard in relation to the guideline for student review by the faculty-student hearing board.[116] Finally, as a conditional remedy, the court ordered the student's reinstatement "unless prior to the opening of that term she has been accorded a hearing by the Student-Faculty Hearing Board."[117]

For the subsequent cases in New York and elsewhere that cited such overlapping standards of arbitrary and capricious or substantial noncompliance[118]—often with citation to *Tedeschi*—in

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[114] *Id.* at 1306.

[115] *Id.*

[116] *Id.* at 1307. The IHE rules also provided for review by the president, but the president's assistant had participated in the informal meetings and the court's focus was on the tandem review mechanism. *Id.* Specifically, referring to this faculty-student hearing board, the court reasoned that "[t]he apparent purpose of that review is the different viewpoint that may be taken by a hearing board composed of faculty and students than will be taken by a dean." *Id.*

[117] *Id.* The court's vote was 4-to-3. However, the dissent did not disagree with the holding as a general matter. *Id.* at 1309 ("There can be no disagreement with this concept as a general principle of law"). Instead, the dissent pointed to the unusual circumstances in this case, including the arguably academic underpinning of the IHEs action and the timing of the "ritualistic" remedy. *Id.* at 1310.

[118] The primary variants were the additional alternative of bad faith to arbitrary and capricious or the more general abuse of discretion standard. Other variants are fair and /reasonable and fundamental fairness.

the absence of express reliance on contract or association theory,[119] the case tabulation uses the default category of "general" for the long and flexible line of cases starting with the aforementioned[120] 1893 decision as the alternative for the theories that previous commentaries have discussed.[121] Most of these decisions focused on the procedural side of this general theory, but some of them alternatively or additionally addressed the substantive dimension in terms of sufficiency of the evidence[122] or excessiveness of the penalty.[123]

The distribution of the ninety-three cases that were identifiable in terms of the three alternative approaches was as follows:[124]

contract theory[125] - 59 (63%)

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[119] Conversely, an occasional decision relied on one of these two specific theories while citing *Tedeschi*. *See, e.g.*, Clayton v. Princeton Univ., 608 F. Supp. 413, 435 (D.N.J. 1985) (association theory); Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90, 95 (La. Ct. App. 1989) (contract theory).

[120] *See supra* text accompanying notes 97–99.

[121] *See supra* notes 43–46 and accompanying text. The only two cases that identified the fiduciary-duty theory did not rely on it. *See* Valente v. Univ. of Dayton, 438 F. App'x 381 (6th Cir. 2011); Morris v. Brandeis Univ., 2004 WL 369106 (Mass. App. Ct. Feb. 27, 2004) (sidestepping it by finding it inapplicable). The only decision that did not fit any of the theory categories was *Schulman v. Franklin & Marshall Coll.*, 538 A.2d 49 (Pa. Super. Ct. 1988). The trial court opinion that granted the preliminary injunction was unavailable, and the appellate decision focused solely on the element of irreparable harm. *Schulman,* 538 A.2d 49. Additionally, the *Tynecki* decision sidestepped the three theories altogether, relying only on tort claims. *See supra* note 84.

[122] *See, e.g.*, Warner v. Elmira Coll., 873 N.Y.S.2d 381, 383 (App. Div. 2009); Basile v. Albany Coll. of Pharmacy of Union Univ., 719 N.Y.S.2d 199, 201 (App. Div. 2001).

[123] *See, e.g.*, Beilis v. Albany Med. Coll. of Union Univ., 525 N.Y.S.2d 932, 934 (App. Div. 1988); Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973 (Sup. Ct. 1975).

[124] Of the ninety-five cases, two—*Schulman v. Franklin & Marshall College* and *Tynecki v. Tufts University School of Dental Medicine*—did not fit in this distribution. *See supra* note 121. Thus, the percentages are based on the ninety-three, not ninety-five, cases. By counting each case in terms of its theory within these three classifications, including slight rounding (*infra* note 126) and similar approximation (*infra* note 127), the special unit of analysis of "claim ruling" (*supra* note 77) amounts to the same overall result for the typical unit of analysis of the case.

[125] This category broadly included the five decisions where the court found the contract theory inapplicable or applied it on an assumed *arguendo* basis. *See infra* Appendix B and note 186. It also included the four cases where the court used the contract theory only in part: Rosenthal v. N.Y. Univ., 482 F. App'x 609, 611 (2d Cir. 2012); Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975) (in

law of associations[126] - 1 (1%)

general[127] - 33 (35%)

Thus, although the contract theory was the basis for almost two-thirds of the cases, the general category, which is not necessarily tied to the adoption of one of the previously recognized competing theories, accounted for the remaining third. The other, non-contractual theories that law commentators had proposed, such as the law of associations,[128] only negligibly gained judicial traction.[129]

In response to question #6,[130] the overall distribution of the outcomes for the ninety-five cases was as follows[131]:

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combination with analogy to public IHEs); Morris v. Brandeis Univ., No. 01-P-1573, 2004 WL 369106 (Mass. App. Ct. Feb. 27, 2004) (applied alternatively with implied covenant of good faith and fair dealing); Jones v. Trs. of Union Coll., 937 N.Y.S.2d 475, 477 (App. Div. 2012) (alternatively with general theory).

[126] Akin to the rounding of a decimal, the tabulation of *Morris v. Brandeis University* in the contract category, due to the similar standard and identical outcome, removed the implied covenant of good faith and fair dealing from this count. *Morris*, 2004 WL 369106. Alternatively, this theory could have received this same frequency count of one as attributed here to the law of associations. For its other, negligible appearances see *infra* note 129.

[127] The number and percentage for this category are underestimates to the extent that the two cases that relied alternatively on this theory are counted instead (due to the default characterization of the designated general category) in the contract theory category. *See infra* note 129.

[128] *See supra* notes 43–46 and accompanying text.

[129] For the minimal appearances of the fiduciary-duty theory, see *supra* note 121. For a separate duty of good faith and fair dealing, see *Valente v. University of Dayton*, 438 F. App'x 381 (6th Cir. 2011), which concluded that the duty of good faith and fair dealing was inapplicable, and *Morris*, 2004 WL 369106, which applied the implied covenant of good faith and fair dealing *alternatively* with contract theory. Both cases resulted in the same outcome. In comparison, *Napolitano v. Trustees of Princeton University* applied the implied covenant of good faith and fair dealing *within* contract theory. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982).

[130] *See supra* text accompanying note 51.

[131] Keeping with the aforementioned focus on cases as the unit of analysis, see *supra* note 124 for the fifteen cases with multiple rulings (i.e., those that had ancillary rulings based on state tort law). The conflation method would have limited the outcome of the cases to the ruling that was most favorable to the student. However, because all of these tort claim rulings (sixteen plus the two for *Tynecki*) were categorized as "U" rulings, the outcomes for the cases were the same even if those for the tort claim rulings were not counted. Because *Tynecki* was an outlier, see *supra* note 84, the technical total was ninety-five cases, which would reduce the number for the U category by one case.

U (conclusively for the IHE) - 74 (78%)

(U) (inconclusively for the IHE) - 3 (3%)

(P) (inconclusively for the student) - 8 (8%)

P (conclusively for the student) - 10 (11%)[132]

Thus, the judicial outcome was in favor of the defendant private IHE in the overwhelming majority of the ninety-five "gap" cases, with the trend moving increasingly in their favor.[133] Conflating the relatively small segments of inconclusive outcomes with the respective conclusive outcomes on each side results in an overall distribution of 81% on the IHE side versus 19% on the student side, or slightly more than 4:1 in favor of IHEs.

Even for the 19% of the decisions with an outcome on the plaintiff student's side of the balance (i.e., either inconclusive or conclusive), the victory was largely limited for several reasons. First, the "(P)" decisions were inconclusive, offering the student only the right to further judicial proceedings. Second, the "P*" subset, which accounted for half of the ten cases,[134] correspondingly provided the student only with further due process at the IHE level. Finally, in the remaining five "P" cases, which represented only 5% of the ninety-five decisions, the court annulled the IHE's sanction in four of them; the one in which the plaintiff won money damages was only marginally an IHE case because the defendant was a proprietary business school where the student was studying to be a legal secretary.[135]

In response to the final question, Table 1 presents the outcomes distribution for the aforementioned[136] three demographic features on a conflated basis[137] for the purpose of

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[132] Of these ten cases with a "P" outcome, five fit in the aforementioned marginal subcategory of "P*." *See supra* note 79 and *infra* Appendix B.

[133] During the past ten years, the defendant IHEs won outright, i.e., conclusively, 89% of the thirty-seven cases. Indeed, they won outright the last twelve cases in a row.

[134] *See supra* note 132.

[135] Fussell v. La. Bus. Coll., 519 So. 2d 384 (La. Ct. App. 1988).

[136] *See supra* text accompanying notes 83–96.

[137] Chi-square analysis is not appropriate when cell sizes are smaller than five. Appendix A provides the outcomes distribution without conflation, revealing many cells with cell sizes below this minimum.

inferential statistical analysis.[138] More specifically, the two columns represent the combination of each pair of outcomes on the IHE and student sides,[139] respectively, and the rows represent the following combinations: (a) for educational level,[140] combining all of the graduate levels into one; (b) for alleged misconduct, broadly combining all of the non-academic subcategories except academic dishonesty into one catchall category; (c) for sanction, combining expulsion with dismissal as one category and all the lesser sanctions into the other category.[141]

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[138] Simply speaking, inferential analysis determines whether the results obtained for the sample, here court decisions reported in Westlaw, are generalizable to the population of all court decisions, including those that are not reported in Westlaw, or, instead are due to chance alone. More specifically, if differences are statistically significant, the high probability is that they are different in the general population. Conversely, if the differences are not statistically significant, they are most probably due to errors of measurement or sampling. For an exploratory analysis of the relationship between reported court decisions and those that do not appear in Westlaw, *see, e.g.*, Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483 (2012).

[139] More specifically, the "For IHE" column is a combination of "U" and "(U)," whereas the "For Student" column is a combination of "P" and "(P)."

[140] This analysis of educational level does not include the one marginal case of the student in a summer IHE program. *See supra* note 87. Thus, the total number of cases for this analysis is ninety-four.

[141] For the specific composition of this conflated group, see *supra* notes 94–96 and accompanying text.

Table 1. Comparison of Outcome Distribution for Selected Case Features

	For IHE i.e., U or (U)	For Student i.e., P or (P)	Chi-Square Value[142]
Educational Level			
Undergraduate (n=63)	79% (n=50)	21% (n=13)	$\chi^2 = .272$
Graduate (n=31)	84% (n=26)	16% (n=5)	ns
Alleged Misconduct			
Academic Dishonesty (n=32)	84% (n=27)	16% (n=5)	$\chi^2 = .169$ ns
Other Nonacademic (n=63)	81% (n=51)	19% (n=12)	
Highest Sanction			
Expulsion or Diploma Denial (n=58)	81% (n=47)	19% (n=11)	$\chi^2 = .000$
Suspension or Less (n=37)	81% (n=30)	19% (n=7)	*ns

*ns = not statistically significant

A review of Table 1 reveals that the overall outcome distribution—which is approximately a 4:1 ratio in favor of IHEs—is not statistically significant for educational level (here, undergraduates versus the conflation of the various subcategories

[142] The results in this column are for the Pearson chi-square analyses. The alternative approach of Yates correction for continuity similarly yielded statistical nonsignificance, with the respective values being .059, .016, and .000—all far from the requisite level for statistical significance at the customary and not most stringent .05 level of probability.

of graduate students), alleged misconduct (here, academic dishonesty versus the conflation of the other subcategories of nonacademic misconduct), or level of sanction (here, the combination of expulsion and diploma denial versus suspensions and lesser forms of discipline).

IV. DISCUSSION

The characterization of students who are accused of and sanctioned for misconduct at private IHEs as having no "right of redress"[143] in court simply does not square with an empirical analysis of the case law. Instead of a glaring gap in contrast to the Fourteenth Amendment due process rights of their counterparts at public IHEs, students sanctioned for nonacademic conduct have in many jurisdictions a viable right of action, largely based on either contract theory or a more general, eclectic theory,[144] that pierces the jurisdictional barrier of judicial nonintervention. The total number of almost 100 court decisions[145] and their increasing frequency,[146] especially since the crystallization of the encompassing general theory in New York's highest court's decision in *Tedeschi* and its spread to other jurisdictions,[147] changes the black and white stereotypical picture in Figure 2 to gray on the private IHE side.

Although the outcomes of these court decisions have been largely in favor of the defendant private IHEs,[148] it may be that

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[143] *See* Murphy, *supra* note 4 and accompanying text.

[144] A review of the case entries in Appendix B reveals that this general category is a mixed bag of substantive and procedural variants that overlap with the prevailing standards of contract theory. These variants include abuse of discretion, arbitrary or capricious, good faith, and substantial procedural compliance. Moreover, although the *Tedeschi* holding is limited to the last of these variants, the subsequent cases rely on it as a precedent for these various versions.

[145] *See supra* note 81 and accompanying text .

[146] *See supra* Figure 3.

[147] *See supra* notes 107–23 and accompanying text. This turning point may be the indirect result of what Pavela and Pavela termed "the due process revolution" at IHEs during the turbulent 1960s and 1970s. Gary Pavela & Greg Pavela, *The Ethical and Educational Imperative of Due Process*, 38 J.C. & U.L. 567, 589, 595 (2012).

[148] This finding applies not only to the overall ratio of conclusive rulings in favor of private IHEs (78%) but also the remedies obtained by the relatively few conclusively successful plaintiff students (11%). *See supra* notes 130–35 and accompanying text. Although a limited and perhaps only symbolic remedy such as a new hearing may well be typical of a counterpart case on the public IHE side under Fourteenth Amendment

the coloration of the corresponding public IHE side is a rather weak and indistinguishable shade of gray rather than a potent black protection for the plaintiff students.[149] Indeed, as illustrated by a careful examination of the purported stark distinction between academic and nonacademic matters in *Horowitz* and *Ewing*,[150] the membranes between such traditional categories have become increasingly permeable and porous. Indeed, in the case perhaps most oft-cited in support of the doctrine of judicial nonintervention in higher education, which arose in the context of an academic dismissal at a public IHE, the outcome was inconclusively in favor of the plaintiff medical student.[151] More specifically, the court denied the defendant-IHE's motion for summary judgment for further proceedings based on the standard of "whether the defendant's conduct was arbitrary, capricious or in bad faith."[152] This standard is eerily similar to the general

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procedural due process, which is the most likely constitutional claim, the student would have a connected claim for attorneys' fees, which not only increases the ability to sue but also provides leverage for settlement. Finally, although only collected and analyzed on an incidental basis, see *supra* text accompanying notes 74–75, the outcomes for the ancillary state tort claims, such as IIED, were to no avail to the plaintiffs, see *supra* note 131, thus serving at most as makeweight filler for the probable residual purpose of settlement leverage. Yet, for the inconclusive decisions, which accounted for 11% of the total (eight decisions on P's side and three on D's side), the potential for settlement should not be underestimated, thus offering leverage for at least partial remedial relief. *See, e.g.*, Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization?: Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–87 (2010) ("In the 14 percent of cases that remain active after the disposition of the motion for summary judgment, more than one-half . . . settle before a trial outcome"); *see also* Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 306 (2005).

[149] *See supra* notes 27–29 and accompanying text.

[150] *See supra* text accompanying notes 14–18, 23.

[151] Connelly v. Univ. of Vt. & State Agric. Coll., 244 F. Supp. 156 (D. Vt. 1965).

[152] *Id.* at 161. Interestingly, in describing this standard in the context of Fourteenth Amendment due process, prior to the *Ewing* Court's raising the bar for academic cases, the Eighth Circuit observed that "[the arbitrary and capricious] standard is a narrow one, to be applied only where administrative action 'is not supportable on any rational basis' or where it is 'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.'" Greenhill v. Bailey, 519 F.2d 5, 10 n.12 (8th Cir. 1975) (citing First Nat'l Bank v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974) (a private sector administrative case)). Conversely, in light of the Sixth Circuit's

approach that has emerged in tandem with contract theory in the private IHE nonacademic sanction cases—an approach that also approximates the abuse of discretion standard generally applicable for judicial review of administrative agencies.[153]

The specific shade of protection for sanctioned students at private IHEs requires more nuanced analysis that extends to the academic and public IHE sectors.[154] Such analysis, from both the empirical and more traditional perspectives of legal scholarship,[155] will help inform not only policymakers and practitioners but also commentators. For example, Berger and Berger have prescribed a much more stringent standard than this "general" approach, specifically proposing—under the implied contractual duty of good faith and fair dealing—more robust procedural protection for both private and public IHE students in challenges to nonacademic sanctions, than the courts have established under the Fourteenth Amendment.[156] Yet, it is not sufficiently clear what their baseline was for these sectors and why the asserted protection did not extend to the substantive dimension.[157]

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use of the arbitrary and capricious standard under the Fourteenth Amendment, one commentator speculated:

Since the *Ewing* holding added virtually nothing to *Horowitz*, one must ask why the Court wished to take the case and decide it. The probable answer is that the Court wanted to nip in the bud any trend, which the Sixth Circuit decision might have started, to apply substantive due process protection to the extremely wide array of potential state-created property rights of students and others.

Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 AM. U. L. REV. 267, 313 (1992).

[153] The derivation may, at least in part, be the general scope of New York's Article 78, which is not limited to governmental administrative agencies, including public IHEs. N.Y. C.P.L.R. 7801-7806 (McKinney 2012); *see supra* note 100. Nevertheless, the result blurs the distinction for private IHEs.

[154] "Sectors" in this context refers to the cells in Figure 2 rather than the more general meaning of this term.

[155] One of the limitations of traditional legal scholarship alone, illustrated by the law review articles on this subject, is that most of the authors are partisan to the student or institutional side, thus, advancing prescriptions largely or entirely in the absence of impartial systematic diagnostic data. Conversely, whether for a judge, a policymaker, or a potential party (i.e., student or IHE), objective descriptions alone are the bones without the flesh or blood.

[156] Berger & Berger, *supra* note 40, at 337-56.

[157] Earlier in their same analysis, they did advocate a more extensive standard of judicial review, although it is not clearly more rigorous than the Fourteenth Amendment at least for procedural due process as applied to nonacademic matters: "The courts' role . . . is to assure that the proceedings were fairly conducted, that the

In any event, there are at least two likely explanations for the highly defendant-favorable outcomes in these cases. The first is that the court's traditional deference doctrine toward academia makes the theoretical differences among the various standards, whether the broad variants of "good faith and fair dealing,"[158] "fundamental fairness,"[159] or "arbitrary and capricious"[160] or even the *Tedeschi* standard of substantial compliance with institutional procedures,[161] practically meaningless; the pro-institutional slope is so steep that only the most flagrant cases survive IHE motions for dismissal disposition, much less succeed in a conclusive ruling for the sanctioned student.

The second explanation is that private IHEs have improved their policies and practices–in terms of both the process and the results–for sanctioning students for nonacademic conduct such that, upon judicial challenge, they meet the prevailing judicial standards, which are variations on the themes of fairness and reasonableness. Under this view, the institutions have filled the proverbial gap, whether as a matter of preventive law or educational ethics/best practice.[162] Berger and Berger conducted a national survey of public and private IHEs in the late 1990s that provides some support for this second explanation; specifically, they found that "most institutions afford their students procedural safeguards that current law does not require"[163] and that the

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findings are firmly grounded, and that the penalty is roughly proportionate to the offense." *Id.* at 301.

158 *See supra* text accompanying note 42.

159 *See supra* text accompanying note 42.

160 *See supra* text accompanying note 118 and Appendix B.

161 *See supra* text accompanying note 114.

162 *See, e.g.*, Pavela & Pavela, *supra* note 147, at 569 (arguing, as a matter of private and public IHEs' ethical and educational missions, in favor of "the importance of defending core due process protections for students . . . .").

163 Berger & Berger, *supra* note 40 at 297. Earlier data are not useful here for verification or trend analysis specific to our focus. A survey in the late 1970s was limited to public IHEs. Edward J. Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & EDUC. 337 (1980). A survey in the late 1960s included both private and public IHEs. Project: *Procedural Due Process and Campus Disorder: Comparison of Law and Practice*, 1970 DUKE L.J. 763, 811. However, the Duke project results were only reported for the responding IHEs (which only amounted to 25% of the survey population) as overall percentages without differentiation of the public and private IHEs, and the items—focused on the wave of campus disturbances at the time—are not amenable to direct comparison with those in

private IHEs, in various respects, did not differ notably from their public counterparts.[164]

Although on first impression these two explanations may appear to be competing, they are most likely complementary and combined contributors to the overall trend. More specifically, it is likely that both the deference doctrine and institutional improvement have helped account for the outcome trends reported in the Results section. For example, the improvement in the fairness and reasonableness of private IHE sanctioning cases would have the tendency to reduce the number of flagrant cases, and the deference doctrine would resolve the closer cases in favor of the defendant institution, thus combining to account for a relatively low plaintiff win rate. Obviously, however, upon closer study other considerations will emerge to show a more complex, multi-factored picture.[165]

Beyond the overall frequency and outcome results, the demographic findings for the ninety-five cases—students' educational level, type of alleged misconduct, and level of sanction[166]—are not particularly surprising.[167] The distribution for students' educational level (66% undergraduate and 33% graduate) reflects a limited and understandable skew toward the graduate group in comparison to the national enrollment pattern

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the Berger & Berger survey. More recent empirical snapshots corresponding to the last fifteen or so years in our case law tabulation are not available.

[164] Berger & Berger, *supra* note 40 at 294, 298. Examples where they reported identical percentages for both public and private IHEs include the rights to written notice (90%), an impartial hearing (90%), silence without an inference of guilt (90%), an advisor (90%), legal counsel (58%), and appeal (92%). *Id.* The exceptions, in terms of less procedural protection, at private IHEs were: 1) presumption of innocence (80% v. 90% for public IHEs); 2) right of cross-examination (80% v. 90% for public private IHEs); 3) prerogative to present evidence (60% v. 90% for public IHEs); and 4) right to written decision with reasons (70% v. 85% for public IHEs). *Id.* Conversely, 64% of the private IHEs provide the student with the right to a verbatim record compared to 50% of the public IHEs. *Id.* at 297-99.

[165] Such research is worthwhile but warrants a sophisticated multi-method approach.

[166] *See supra* notes 83–97 and accompanying text.

[167] The additional demographic finding was the originating state. *See supra* note 81 and accompanying text. Other than the notable proportion of cases in New York (32%), which appears to be primarily attributable to its heavy population, general litigiousness, and Article 78 avenue, the diversity of states does not seem to reflect a particular pattern other than the aforementioned, *see supra* text accompanying note 147, spread and doctrinal development across various jurisdictions.

in private IHEs,[168] led by professional and doctoral programs, in light of the extra time, tuition, and potential benefits at issue for these students. Similarly, the types of alleged misconduct reflect a notable proportion of academic dishonesty (34%) and, to a lesser extent, sexual harassment (16%) cases, fitting with the increased awareness and concern with these issues in recent decades, both in higher education specifically as well as society more generally.[169] Finally, for the levels of sanction, the predominant proportion of expulsion/dismissal cases (52%) is in line with the higher stakes at issue for the student, although the notable segment of cases where the student is challenging a suspension (33%) shows that the social stigma and financial consequences are far from trivial in terms of the student's resort to court action.[170]

Instead, what is remarkable about these demographic variables is that they do not seem to make a significant difference in the overall outcomes of these cases.[171] Due to the small numbers for the various subcategories of these three variables and the outcome scale, the statistical analysis required conflation. Nevertheless, the strikingly similar pattern of a 4-to-1 ratio in

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[168] The ratio of undergraduate to graduate students in private IHEs has been approximately 3:1 for the modern period of these cases. *See, e.g.*, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 295 (2012) (Table 203: 74% undergraduates and 26% graduates for total private enrollments in 2010) *available at* http://nces.ed.gov/programs/digest/; NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 213 (2003) (Table 177: 73% and 27% in 2000) *available at* http://nces.ed.gov/programs/digest/; NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 179 (1994) (Table 173: 76% and 24% in 1990) https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94115; NATIONAL CENTER FOR STATISTICS, DIGEST OF EDUCATION STATISTICS 91 (1983) (Table 79: 71% and 21% in 2000). This overall approximation suffices here because the metrics vary within and across these reports (for example, part-time v. full-time and not-for-profit v. for-profit in 2010 and graduate v. professional v. unclassified in 1982), and this comparison is not intended here for specific statistical analysis.

[169] *See, e .g.*, Murphy, *supra* note 4; Buchanan & Beckham, *supra* note 40. In contrast, the "other disruption" category accounted for the highest proportion (39%), does not merit separate discussion in light of its broad, catchall nature (*supra* note 90).

[170] The lower proportion for diploma denial (9%) would seem to be likely attributable, respectively, to the relatively infrequent incidence of this sanction. The even lower proportion for challenges limited to sanctions at a lesser level than suspension (6%), including such actions as a failing grade, a reprimand, or removal from a cohort group (*supra* note 96) is a bit surprising, perhaps reflecting a penchant to resort to lawsuits but, in any event, unlikely to pass muster on the contrasting constitutional side of Figure 2.

[171] *See supra* text accompanying notes 136–41 and Table 2.

favor of the defendant IHEs between (a) undergraduate and graduate students, (b) academic dishonesty and other nonacademic misconduct, and (c) expulsion/dismissal or diploma denial and lesser sanctions seems to show that the weak gray level of protection in the "gap" persists regardless of such demographic differences. Particularly noteworthy is the lack of statistical difference for the outcomes of the academic dishonesty cases, regardless of which side of the academic-nonacademic dichotomy the commentators or the courts put this arguably hybrid category.[172] Even if these cases were excluded from the analysis, the outcomes distribution would not be generalizably different. This lack of distinction indirectly calls into question whether the other structural differences in Figure 2—e.g., public IHE versus private IHE for nonacademic conduct or academic versus nonacademic conduct for private IHEs—really amount to a distinction in terms of the odds of judicial success for either side. The margins between the various sectors are blurry,[173] but whether for the main contents of each sector the results follow rationales is a more open question inviting further research than expected.

In conclusion, this analysis of case law concerning private IHE sanctions for student nonacademic alleged misconduct is intended not only as an objective database for commentators, policy makers, and practitioners, but also—in the immediate

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[172] *See supra* notes 35–41 and accompanying text.

[173] For example, even the basic boundary between private and public IHEs is not all that clear-cut. *See, e.g.,* Robert M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729, 744 (2010) ("[T]he contrast between public and private college and university campuses, which also turns out to be more complex than it may appear to the untrained eye."). Thus, the selection for tabulation of some, albeit a minority, of the IHEs required double-checking various institutional websites to ascertain the general understanding of the institution's categorization at the time of the court decision, unless courts had resolved the matter in a "state action" decision, for example, *supra* notes 8 and 58. Further contributing to this blurring at the margin of Appendix B, an occasional court in this private IHE sector case law imported, without distinction, constitutional concepts from the public sector, for example, *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), or an excluded public IHE case relied, without distinction, on case law from this private IHE sector, for example, *Bonwitt v. Albany Medical Center School of Nursing*, 353 N.Y.S.2d 82, 86 (Sup. Ct. 1973) (citing *Matter of Carr v. Saint John's University*, 231 N.Y.S.2d 410, *aff'd. mem*, 235 N.Y.S.2d 834 (1962) and *Matter of Schuyler v. State University*, 297 N.Y.S.2d 368 (1969)).

future—as a solid springboard for follow up research along both the lines of empirical and traditional scholarship. Elaborating and extending the previously identified examples,[174] the recommended empirical research includes empirically comparing the findings herein with (a) the frequency and outcomes of the corresponding private IHE case law concerning student sanctions for nonacademic conduct on the basis of federal or state civil rights legislation[175] and state and federal challenges to student sanctions for academic conduct,[176] and/or (b) the counterpart case law on the public IHE side of Figure 2, such as the public IHE cases that applied the same theories or claims of these private IHE cases to academic, and separately, nonacademic conduct,[177] or that applied constitutional claims to each of these two categories of conduct.[178] On an interrelated basis, the recommended traditional legal scholarship follow-up includes examining, on a more in-depth and nuanced basis, the analysis in these cases of the three theories, especially those under the placeholder label of "general" to examine their more differentiated basis and standards.[179]

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[174] *See supra* text accompanying notes 165 and 173.

[175] For a starter sample, see *supra* note 59.

[176] For a corresponding starter sampling, see *supra* note 60.

[177] *See supra* note 57 and accompanying text.

[178] *See supra* notes 25-29 and accompanying text. Such systematic comparisons will help resolve whether the differences between private and public IHE discipline cases are illusory or inconsistent. *See, e.g.*, Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U.N.H. L. REV. 443, 451-52, 467 (2010) (asserting that for private IHE discipline cases "[w]hile many court cases state that [ample] discretion exists, it is granted inconsistently between courts."). Another example of recommended empirical research is comparing the articulated degree of deference in these court opinions with the actual extent of deference in the case outcomes. *See, e.g.*, James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999); Perry A. Zirkel, *Judicial Appeals for Hearing/Review Officer Decisions Under IDEA: An Empirical Analysis*, 78 EXCEPTIONAL CHILD. 375 (2012) (finding high actual deference—in terms of outcomes analysis—by courts to hearing and review officer decisions under the Individuals with Disabilities Education Act regardless of the courts' express articulation of the degree of deference).

[179] As another example, legal scholars need to examine more closely the case law at the margins to determine whether the treatment should be a sliding scale, a three-category approach (with a hybrid category as the intermediate buffer zone), or simply a more refined and objectively defensible boundary line separating the classic dichotomies.

In conclusion, partisan characterizations of sanctioned students at private IHEs being without a right of action[180] or with only a "dull stick" as compared with the "sharp sword of constitutional safeguards"[181] merit reexamination under the lenses of objective systematic analysis. The scope and sharpness of the protection, even in the nonacademic zone outside the relatively insulated zone demarcated in *Horowitz* and *Ewing*, warrants similar empirical study of the public IHE case law. It may be that students' litigative cudgels are similarly soft, which would warrant a different prescription. Conversely, from an internal IHE perspective, it is all well and good for advocating the ethical importance of providing all students, including those at private IHEs, with "core due process protections for students."[182] The more difficult issue to resolve is the specific level of procedural and substantive protection to which students are legally entitled if they subsequently resort to judicial challenge.[183]

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[180] *See* Murphy, *supra* note 4 and accompanying text.

[181] Shook, *supra* note 3.

[182] Pavela & Pavela, *supra* note 147, at 569.

[183] Interestingly, the level Pavela and Pavela specify seems to be limited to the procedural side of *Tedeschi*'s general standard:

> It is untenable for colleges and universities to proclaim these ethical aims in theory while seeking "discretion" to wiggle out of them in practice. *Significant* procedural protections identified in college and university policies should be followed (unless waived by the parties) until properly changed in accordance with structures of the institution's governance.

Id. at 602 (emphasis added).

APPENDIX A: OUTCOMES DISTRIBUTION WITHOUT CONFLATION[184]

Category and Subcategory[185]	**Subtotal**	**U**	**(U)**	**(P)**	**P**
Educational Level					
undergraduate	n=63	47	3	5	8
medical/dental	n=6	5	0	0	1
law	n=9	8	0	1	0
other graduate - professional	n=6	8	0	1	0
other graduate – general	n=10	5	0	1	0
miscellaneous	n=1	1	0	0	0
Types of Alleged Misconduct					
academic dishonesty	n=32	26	1	2	3
sexual harassment or assault	n=15	12	2	1	0
other disruption	n=37	29	0	3	5
political incorrectness	n=3	2	0	1	0
religious incorrectness	n=4	2	0	1	1
miscellaneous other	n=4	4	0	0	0
Type of Sanction					
expulsion/dismissal	n=49	40	0	4	5
diploma denial	n=9	7	0	1	1
suspension	n=31	21	3	3	4
less than suspension	n=6	6	0	0	0

[184] For an analysis of the conflated results, *see supra* Table 2.

[185] For information about these categories and subcategories, see *supra* notes 83-96 and accompanying text.

APPENDIX B: TABULATION OF COURT DECISIONS WITHIN SPECIFIED SCOPE

Case Name	Citation	State	Disciplinary Action	Theory[186]	Out-Come	Comments
People *ex rel.* O'Sullivan v. N.Y. Law Sch.	22 N.Y.S. 663 (1893)	NY	denial of diploma to undergrad for contumacious conduct	(general—discretionary)	U	marginal with jurisdictional issue
Koblitz v. Western Reserve Univ.	21 Ohio C.C. 144 (1901)	OH	expulsion of law student for threatening and disorderly conduct	contract theory	U	
Goldstein v. N.Y. Univ.	78 N.Y.S. 739 (App. Div. 1902)	NY	expulsion of law student for sexual harassment	contract theory	U	
Samson v. Trs. of Columbia Univ.	167 N.Y.S. 202 (Sup. Ct. 1917), *aff'd mem.*, 167 N.Y.S. 1125 (App. Div. 1917)	NY	dismissal of undergrad for disruptive conduct	contract theory*	U	assuming, arguendo, no breach
People *ex rel.* Goldenkoff v. Albany Law Sch.	191 N.Y.S. 349 (App. Div. 1921)	NY	expulsion of law student for unpatriotic expression	(general—within discretion)	U	not arbitrary
John B. Stetson Univ. v. Hunt	102 So. 637 (Fla. 1924)	FL	suspension of undergrad for disorderly conduct in dorm[187]	contract theory	U	notably deferential approach

[186] The entries for the "Theory" column are primarily the three categories of contract theory, association law, and—in parentheses to indicate its default status—general. Brackets designate the rejection of a theory. Asterisks in this column indicate use of the identified theory on an assuming *arguendo*, rather than definitively accepted, basis. For example, the asterisked designation "contract theory*" represents the use, via this sidestepping mechanism, of contract theory. Finally, "IIED" refers to intentional infliction of emotional distress, and "+" indicates additional ancillary claims.

[187] The court did not specify the length of the suspension, although finding that the sanction was a suspension, not—contrary to the plaintiff student's contention—an expulsion. Here is the alleged misconduct:

> [N]umerous disorders . . . in the girls' dormitory where Miss Hunt resided, some of which were described as hazing the normals, ringing cow bells and parading in the halls of the dormitory at forbidden hours, cutting the lights, and such other events as were subversive of the discipline and rules of the

Anthony v. Syracuse Univ.	231 N.Y.S. 435 (App. Div. 1928)	NY	expulsion of undergrad for rumored behavior not typical of female students	contract theory	U	reversed trial court's reinstatement
Carr v. St. John's Univ.	231 N.Y.S.2d 410 (App. Div. 1962), *aff'd mem.*, 235 N.Y.S.2d 834 (1962)	NY	expulsion of undergrads for religious sin	contract theory	U	within good faith discretion
Greene v. Howard Univ.	271 F. Supp. 609 (D.D.C. 1967)	DC	expulsion of undergrads for disturbance	contract theory* [otherwise entirely discretionary]	U	assuming arguendo contract theory, no breach—but marginal with jurisdiction
Mitchell v. Long Island Univ.	309 N.Y.S.2d 538 (Sup. Ct.), *aff'd mem.*, 314 N.Y.S.2d 328 (App. Div. 1970)	NY	expulsion of undergrad for armed assault	(general)	U	not arbitrary
Ryan v. Hofstra Univ.	324 N.Y.S.2d 964 (Sup. Ct. 1971)	NY	expulsion of undergrad for vandalism (throwing rocks through campus bookstore window)	(general—arbitrary or abuse of discretion std. based on statutory mandamus > contract theory[188])	P*	*conditional—the court subsequently approved, in a supplemental judgment, the IHE's proposed procedures for reinstituting discipline[189]
Kwiatkowski v. Ithaca Coll.	368 N.Y.S.2d 973 (Sup. Ct. 1975)	NY	suspension (1 sem.) of undergrad for dorm	(general—"fair and reasonable")	P*	*only for one issue and remanded to IHE appeal

University. Some of the witnesses spoke of these disorders as bordering on insurrection.

Hunt, 102 So. at 639.

[188] The court alternatively relied on Fourteenth Amendment equal protection and due process based on a questionable finding of state action. *Ryan*, 324 N.Y.S.2d at 984-87.

[189] Ryan v. Hofstra Univ., 328 N.Y.S.2d 339 (Sup. Ct. 1972).

			misconduct			bd. to consider whether penalty was excessive[190]
Slaughter v. Brigham Young Univ.	514 F.2d 622 (10th Cir. 1975)	UT	expulsion of doctoral student for academic dishonesty	analogy to public IHE's + partial contract theory[191]	U	reversal of $88k verdict
Pride v. Howard Univ.	384 A.2d 31 (D.C. 1978)	DC	suspension of medical student for cheating on an exam	contract theory	U	
Lexington Theological Seminary, Inc. v. Vance	596 S.W.2d 11 (Ky. Ct. App. 1979)	KY	denial of diploma to divinity student for immoral conduct (homosexuality)	contract theory	U	
Swanson v. Wesley Coll., Inc.	402 A.2d 401 (Del. Super. Ct. 1979)	DE	expulsion of undergrad for threatening others	contract theory	U	
Tedeschi v. Wagner Coll.	404 N.E.2d 1302	NY	suspension (1 sem.) of part-time undergrad	(general—any of 2 or 3 theories w/o	P*	reinstatement or hearing (4-3 vote) due to

[190] "This matter is therefore remanded to the appeal board, where the petitioner or his representative is to be permitted an opportunity to be heard on the excessiveness of the penalty, that being the principal issue he sought to raise on the appeal." *Kwiatkowski*, 368 N.Y.S.2d at 980.

[191] First, the court reasoned as follows with regard to the procedures:

> We hold that these proceedings met the requirements of the constitutional procedural due process doctrine as it is presently applied to public universities. It is not necessary under these circumstances to draw any distinction, if there be any, between the requirements in this regard for private and for public institutions.

Slaughter, 514 F.2d at 626. Next, the court addressed the arbitrary and capricious standard with the university's inherent right to discipline students. *Id.* at 625-26 (citing two public IHE court decisions). Finally, the court rejected the complete adoption or sole reliance on contract theory. *Id.* at 626-27. However, it reasoned: "It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons." *Id.* at 626.

	(N.Y. 1980)		partially for disruptive conduct	determining which one)[192]		lack of compliance with the IHE's own procedures
Aronson v. N. Park Coll.	418 N.E.2d 776 (Ill. App. Ct. 1981)	IL	dismissal of undergrad for diagnosis of paranoia	contract theory	U	reversal of $22k verdict—express right of institution
Napolitano v. Trs. of Princeton Univ.	453 A.2d 263 (N.J. Super. Ct. App. Div. 1982)	NJ	denial of diploma (1 yr.) to undergrad for plagiarism	contract theory[193]	U	implied covenant of good faith and fair dealing
Coveney v. President & Trs. of Coll. of Holy Cross	445 N.E.2d 136 (Mass. 1983)	MA	expulsion of undergrad for dorm misconduct	(general)	U	not arbitrary, capricious, or in bad faith
Cloud v. Trs. of Boston Univ.	720 F.2d 721 (1st Cir. 1983)	MA	expulsion of law student for sexual misconduct	contract theory	U	
Corso v. Creighton Univ.	731 F.2d 529 (8th Cir. 1984)	NE	expulsion of medical student for cheating on an exam	contract theory	P*	remedy of pre-expulsion hearing
Harvey v.	363	IA	expulsion of	(general—	(P)[194]	possibly

[192] The court concluded:

> We do not find it necessary in the present case to resolve such problems as may arise out of the different theoretical predicates. Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.

Tedeschi, 404 N.E.2d at 1306.

[193] In seeming to accord academic status to plagiarism in this case, the reasoning included: "Courts have been virtually unanimous in rejecting students' claims for due process in the constitutional sense where academic suspensions or dismissal are involved." *Napolitano*, 453 A.2d at 273. However, the opinion cited cases that were not at all consistently in the public sector or based on academic issues (for example, *Tedeschi*). *Id.*

[194] "We conclude there were sufficient irregularities in the way the case was initiated and the appointment and composition of the SJC and Appeals Committee to generate a jury question on whether the school substantially complied with the letter

Palmer Coll. of Chiropractic	N.W.2d 443 (Iowa Ct. App. 1984)		chiropractic student for distributing lewd cartoon on campus	including *Tedeschi*)		arbitrary, capricious, or in bad faith
Harris v. Trs. of Columbia Univ.	468 N.E.2d 54 (N.Y. 1984)	NY	expulsion of MPA student for dishonesty/ deceit	(general—including *Tedeschi*)	U	not arbitrary or capricious
Clayton v. Trs. of Princeton Univ.	608 F. Supp. 413 (D.N.J. 1985)	NJ	expulsion of undergrad for cheating on an exam	law of association (*Tedeschi*)	U	substantial compliance
Life Chiropractic Coll., Inc. v. Fuchs	337 S.E.2d 45 (Ga. Ct. App. 1985)	GA	suspension (3 qtrs.) of chiropractic student for plagiarism	Contract theory	U	not arbitrary or capricious[195]
Johnson v. Lincoln Christian Coll.	501 N.E.2d 1380 (Ill. App. Ct. 1986)	IL	denial of diploma to undergrad for religiously sinful conduct	contract theory[196]	(P)	inconclusive
Galiani v. Hofstra Univ.	499 N.Y.S.2d 182 (App. Div. 1986)	NY	suspension of undergrad for unspecified misconduct	(general—*Tedeschi*)	U	
Stone v. Cornell Univ.	510 N.Y.S.2d 313 (App. Div. 1987)	NY	suspension of high school student in summer program for drug/alcohol use	(general—*Tedeschi*)	U	marginal case due to level of student
Fussell v. La. Bus. Coll.	519 So. 2d 384 (La. Ct. App. 1988)	LA	expulsion of legal secretary student for disruptive conduct	contract theory	P	awarded $2k in tuition and $1.5k in general damages,[197]

and the spirit of its written regulations when dismissing plaintiff." *Harvey*, 363 N.W.2d at 446.

[195] The court cited, without distinction for its academic context, *Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd,* 579 F.2d 45 (5th Cir. 1978), which involved the dismissal of a medical student for failing clinical coursework. *Fuchs*, 337 S.E.2d at 48.

[196] The court reached the same outcome for the state confidentiality act and granted dismissal for other claims due to the applicable statute of limitations. *Johnson*, 501 N.E.2d 1380.

[197] However, the court refused damages for mental anguish. *Fussell*, 519 So. 2d 384.

						but marginally, if at all, an IHE
Beilis v. Albany Med. Coll. of Union Univ.	525 N.Y.S.2d 932 (App. Div. 1988)	NY	suspension ("compulsory leave" - 1 yr.) of medical student for cheating on an exam	(general—*Tedeschi*)	U	not arbitrary/ capricious (substantial procedural compliance and not excessive)
Schulman v. Franklin & Marshall Coll.	538 A.2d 49 (Pa. Super. Ct. 1988)	PA	suspension (1 yr.) of undergrad for sexual harassment	(indirect—lack of irreparable harm, thus marginal)	(U)	upheld denial of preliminary injunction—deference doctrine
Warren v. Drake Univ.	886 F.2d 200 (8th Cir 1989)	IA	expulsion of law student for theft	contract theory	U	affirmed in light of jury verdict ruling no breach
Babcock v. New Orleans Baptist Theological Seminary	554 So. 2d 90 (La. Ct. App. 1989)	LA	diploma denial (and dismissal)[198] of graduate divinity student for alleged divorce	contract theory	P[199]	violation of IHE procedures (citing, inter alia, *Tedeschi*)
Holert v. Univ. of Chicago	751 F. Supp. 1294 (N.D. Ill. 1990)	IL	expulsion of MBA student for sexual harassment	contract theory	U	not arbitrary, capricious, or in bad faith
Boehm v. Univ. of Pa. Sch. of Veterinary Med.	573 A.2d 575 (Pa. Super. Ct. 1990)	PA	suspension (1 yr.) of 2 grad students for cheating	contract theory	U	abuse of discretion approach—fundamental fairness[200]
Ahlum v. Adm'rs of Tulane Educ. Fund	617 So. 2d 96 (La. Ct. App. 1993)	LA	suspension (1 sem.) of undergrad for sexual assault of another student	(general—*Tedeschi*)	U	not arbitrary or capricious

[198] The court focused on the jurisdictional issue for the student's dismissal, whereas it proceeded to the merits of the diploma denial.*Babcock*, 554 So. 2d 90.

[199] Although theoretically only a (P), because it only affirmed a preliminary injunction, the tone of the court's brief ruling on the merits, the IHE's reliance—based on its religious character—on its jurisdictional defense, and the remedy of issuing the diploma cumulatively weighed in favor of designating the outcome as practically conclusive, i.e., P.

[200] The court allowed deviation from the IHE's procedures just as long as the student received fundamental fairness. The court also provided a thorough discussion of the evolution of prior pertinent case law. *Boehm*, 573 A.2d 575.

Melvin v. Union Coll.	600 N.Y.S.2d 141 (App. Div. 1993)	NY	suspension (2 sem.) of undergrad for cheating on an exam	(general—various citations)[201]	(P)	preliminary injunction—factual issue whether IHE followed its rules
Buckholz v. Mass. Inst. of Tech.	1993 WL 818618 (Mass. Super. Ct. July 6, 1993)	MA	expulsion of grad student for fighting	(general—fundamental fairness)	(P)	indefinite, while rejecting contract theory
Ben-Yonatan v. Concordia Coll. Corp.	863 F. Supp. 983 (D. Minn. 1994)	MN	suspension (1 yr.) of undergrad for sexual harassment	contract theory	(U)	basic compliance—denial of prelim. injunction
Fellheimer v. Middlebury Coll.	869 F. Supp. 238 (D. Vt. 1994)	VT	suspension (1 yr.) of undergrad for "disrespect of persons"[202]	contract theory	P*	only insufficient notice — possible re-charging[203]
				IIED	U	
Tynecki v. Tufts Univ. Sch. of Dental Med.	875 F. Supp. 26 (D. Mass. 1994)	MA	expulsion of dental student for desecrating cadaver	IIED	U	
				defamation	U[204]	
Anderson v. Mass. Inst. of Tech.	No. 940348, 1995 WL 813188 (Mass. Super. Ct. Jan. 31, 1995)	MA	expulsion of undergrad for theft	(general—*Tedeschi*)[205]	(P)	indefinite, merely establishing the applicable theory, which is not contractual
Ray v. Wilmington Coll.	667 N.E.2d 39 (Ohio Ct. App. 1995)	OH	expulsion of undergrad for sexual harassment	contract theory	U	not abuse of discretion
Fraad-Wolfe v. Vassar Coll.	932 F. Supp. 88 (S.D.N.Y.	NY	constructive expulsion of undergrad for	(general—*Tedeschi*)	U	
				IIED	U	

[201] The court characterized the plaintiff's claim as breach of contract, but it relied on case law, including *Tedeschi*, that established the "general" theory. *Melvin*, 600 N.Y.S.2d 141.

[202] *Fellheimer,* 869 F. Supp. at 241.

[203] "However, because the inadequate notice provided [the student] was the only breach of the student-college contract there is no reason why his case could not be reheard after proper notice has been given." *Fellheimer*, 869 F. Supp. at 247.

[204] The court separately ruled inconclusively in the student's favor for the defamation claim against an individual faculty member upon the allegation of malice.

[205] The court cited extensively Note, *supra* note 42. *Anderson*, 1995 WL 813188.

	1996)		sexual harassment			
Trahms v. Columbia Univ.	666 N.Y.S.2d 150 (App. Div. 1997)	NY	expulsion of undergrad for plagiarism	(general—including *Harris*)	U	substantial compliance
Geraldo v. Vanderbilt Univ.	No. 01A01-9610-CH-00467, 1997 WL 718422 (Tenn. Ct. App. Nov. 19, 1997)	TN	expulsion of undergrad for cheating on exam	contract theory*	U	no breach without deciding whether contract theory applied
Dinu v. President and Fellows of Harvard Coll.	56 F. Supp. 2d 129 (D. Mass. 1999)	MA	denial of diploma[206] to undergrad for criminal conduct	contract theory	U	
Lyon Coll. v. Gray	999 S.W.2d 213 (Ark. Ct. App. 1999)	AR	suspension (1 sem.) of undergrad for cheating on take-home test	(general)	U	not abuse of discretion
Harwood v. Johns Hopkins Univ.	747 A.2d 205 (Md. Ct. Spec. App. 2000)	MD	denial of diploma to undergrad for criminal conduct	contract theory	U	
Bhandari v. Trs. of Columbia Univ.	No. 00 Civ.1735JGK, 2000 WL 310344 (S.D.N.Y. Mar. 27, 2000)	NY	suspension (2 yrs.) of undergrad for dishonesty/deceit	(general—including *Tedeschi*)	(U)	denial of preliminary injunction—substantial compliance with IHE's own procedures
Vandereerden v. Yale Sch. of Mgmt.	No. 0438876, 2000 WL 727515 (Conn. Super. Ct. May 18, 2000)	CT	suspension (1 sem.) of MBA student for sexual harassment	contract theory	U	
Schaer v. Brandeis	735 N.E.2d	MA	suspension (1 sem.) of	contract theory	U	3-2 vote

[206] More precisely, the sanction was a requirement to withdraw, which usually required two or more semesters of conduct requisite for readmission. *Dinu*, 56 F. Supp. 2d at 131.

Univ.	373 (Mass. 2000)		undergrad for sexual harassment			
Rollins v. Cardinal Stritch Univ.	626 N.W.2d 464 (Minn. Ct. App. 2001)	MN	removal of undergrad from "cohort group" for harassing e-mails	(general)	U	not arbitrary, capricious, or in bad faith[207]
Basile v. Albany Coll. of Pharmacy of Union Univ.	719 N.Y.S.2d 199 (App. Div. 2001)	NY	expulsion of 2 undergrads and F grade for 3rd undergrad for cheating on various exams	(general)	P	annulled—arbitrary/capricious: lack of rational evidentiary basis for cheating
Al-Khadra v. Syracuse Univ.	737 N.Y.S.2d 491 (App. Div. 2002)	NY	suspension (indef.) of undergrad for unspecified disciplinary conduct	(general—*Tedeschi*)	U	
Ackerman v. President of Coll. of Holy Cross	2003 WL 1962482 (Mass. Super. Ct. Apr. 1, 2003)	MA	suspension (1 yr.) of undergrad for verbal sexual harassment	contract theory	(P)	preliminary injunction—reinstatement pending trial
Centre Coll. v. Trzop	127 S.W.3d 562 (Ky. 2003)	KY	expulsion of undergrad for possession of a weapon	contract theory	U	distinguished due process at public IHEs (same for state statute)
Morris v. Brandeis Univ.	2004 WL 369106 (Mass. App. Ct. Feb. 27, 2004)	MA	suspension (1 sem.) of undergrad for plagiarism	contract theory	U	deferential application
				implied covenant of good faith/fair dealing	U	(treated separately from contract claim)
				fiduciary duty*	U	inapplicable
				negligent misrepresen-tation	U	
Yoo v. Mass.	801	MA	revocation of	contract	U	basic fairness,

[207] More specifically, the court concluded that, corresponding to the due process clause applicable to public IHEs, "common law imposes a duty on the part of private universities not to expel students in an arbitrary manner." *Rollins*, 626 N.W.2d at 471.

Inst. of Tech.	N.E.2d 324 (Mass. App. Ct. 2004)[208]		undergrad degree for hazing	theory[209]		citing
				IIED+[210]	U	
Goodman v. Bowdoin Coll.	380 F.3d 33 (1st Cir. 2004)	ME	expulsion of undergrad for fighting	contract theory	U	marginal—untimely appeal after losing jury verdict
Jarzynka v. Saint Thomas Univ. Sch. of Law	310 F. Supp. 2d 1256 (S.D. Fla. 2004)	FL	expulsion of law student for threatening others	contract theory	(P)	inconclusive—denied motion to dismiss
				negligence	U	
				tortious interference with contract	U	
				defamation	U	
Millien v. Colby Coll.	874 A.2d 397 (Me. 2005)	ME	permanent probation of undergrad for sexual assault	contract theory	U	flexible due to reservation clause
Fernandez v. Columbia Univ.	790 N.Y.S.2d 603 (App. Div. 2005)	NY	suspension (1 yr.) of undergrad for harassing communica-tions	(general—*Tedeschi*)	U	
Kiani v. Tr. of Boston Univ.	No. 04-CV-11838-PBS, 2005 WL 6489754 (D. Mass. Nov. 10, 2005)	MA	F grade for law student for plagiarism[211]	contract theory	U	
Atria v. Vanderbilt	142 F. App'x 246	TN	suspension (1 summer) of	contract theory[212]	(P)	inconclusive but not rigid

[208] This decision was a summary affirmance of 2001 WL 35820018 (Mass. Super. Ct. May 2, 2001).

[209] Seemingly indicating the general theory, the lower court also dismissed his claim of "some common law right to avoid dismissal or other academic penalty, absent substantial adherence to [the institution's] rules for the imposition of discipline." *Yoo*, 801 N.E.2d at 67.

[210] The lower court also summarily disposed of his claim of intentional interference with contractual relations. *Yoo*, 801 N.E.2d 324.

[211] This grade led, via her GPA, to academic dismissal. *Kiani*, 2005 WL 6489754.

Univ.	(6th Cir. 2005)		undergrad and course F for cheating on an exam			application
Ebert v. Yeshiva Univ.	813 N.Y.S.2d 408 (App. Div. 2006)	NY	expulsion of undergrad for fighting	(general—various citations w/o *Tedeschi* directly)	U	IHE "substantially observed" its rules after new hearing ordered by earlier lower court decision (which declined other remedies per "restricted role")[213]
Saliture v. Quinnipiac Coll.	2006 WL 1668772 (D. Conn. June 6, 2006)	CT	immediate suspension of 4 undergrads for hosting keg party	contract theory*	U	no breach w/o determining whether handbook was contract
McCawley v. Univ. Carlos Albizu, Inc.	461 F. Supp. 2d 1251 (S.D. Fla. 2006)	FL	dismissal of Psy. D. student for misrepresen-tation	contract theory	U	not arbitrary, capricious, or in bad faith
Havlik v. Johnson & Wales Univ.	509 F.3d 25 (1st Cir. 2007)	RI	expulsion of undergrad for assault	contract theory	U	implied covenant of good faith and fair dealing
				defamation	U	qualified privilege—Clery Act
Reardon v. Allegheny Coll.	926 A.2d 477 (Pa. Super. Ct. 2007)	PA	F grade and other sanctions less than suspension of undergrad for plagiarism	contract theory	U	
				negligence + IIED	U	
Kuritsky v. Emory Univ.	669 S.E.2d 179 (Ga. Ct. App. 2008)	GA	expulsion of medical student for plagiarism (+ other unspecified "unprofession-alism")	contract theory	U	
				IIED	U	

[212] The student also brought a negligence claim, but it was against an individual faculty member in relation to the circumstances leading to the alleged misconduct. *Atria*, 142 F. App'x 246.

[213] For the earlier decision in this case, which had an outcome of (P), see 780 N.Y.S.2d 283 (Sup. Ct. 2004).

Key v. Robertson	626 F. Supp. 2d 566 (E.D. Va. 2009)	VA	suspension (1 yr.) of law student for weapons violation	contract theory	U	no contract due to disclaimer in handbook and policies
				IIED	U	
Warner v. Elmira Coll.	873 N.Y.S.2d 381 (App. Div. 2009)	NY	expulsion of undergrad for drug possession	(general—*Tedeschi*)	P	annulled—arbitrary/ capricious in terms of evidence
Dequito v. New Sch. for Gen. Studies	890 N.Y.S.2d 56 (App. Div. 2009)	NY	expulsion of Master's student for plagiarism	(general—*Trahms*)	U	not arbitrary, capricious, or in bad faith
Zartoshti v. Columbia Univ.	911 N.Y.S.2d 623 (App. Div. 2010)	NY	suspension (2 yrs.) and F grade of undergrad for cheating on an exam	(general—*Tedeschi*)	U	IHE substantially complied with its procedures
Fawra v. Wilmington Coll.	2011 WL 3654389 (Del. C.P. July 8, 2011)	DE	denial of undergrad diploma for felony arrest	(general—various citations)	U	not arbitrary or in bad faith
Hyman v. Cornell Univ.	918 N.Y.S.2d 226 (App. Div. 2011)	NY	reprimand (and no-contact order) of grad student for harassing a professor	(general—*Tedeschi*)	U	
Valente v. Univ. of Dayton	438 F. App'x 381 (6th Cir. 2011)	OH	suspension (3 sem.) of law student for cheating on an exam	contract theory	U	not abuse of discretion
				duty of good faith and fair dealing and various torts, incl. breach of fiduciary duty*	U	inapplicable
Seitz-Partridge v. Loyola Univ. of Chicago	948 N.E.2d 219 (Ill. App. Ct. 2011)	IL	dismissal of doctoral student for plagiarism (+ failed qualifying exams)	contract theory[214]	U	
				defamation	U	
Anderson v. Vanderbilt Univ.	450 F. App'x 500 (6th Cir. 2011)	TN	expulsion of undergrad for cheating on an exam	contract theory	U	
Hart v. Univ. of Scranton	838 F. Supp. 2d 324 (M.D. Pa. 2011)	PA	expulsion of undergrad for plagiarism	contract theory	U	insufficient pleading of specific terms or breach

[214] The court ruled that her contract claim subsumed her fraudulent misrepresentation claim. *Seitz-Partridge*, 948 N.E.2d 219.

Kallini v. N.Y. Inst. of Tech.	2012 WL 119837 (Sup. Ct. Jan. 4, 2012)[215]	NY	suspension (2 yrs.) of undergrad for cheating on an exam	(general—including *Tedeschi*)	P	annulled—lack of substantial compliance with IHE's procedures
Hart v. Univ. of Scranton	2012 WL 1057383 (M.D. Pa. Mar. 28, 2012)	PA	expulsion of undergrad for plagiarism	contract theory	U	insufficient pleading of specific terms or breach
Jones v. Trs. of Union Coll.	937 N.Y.S.2d 475 (App. Div. 2012)	NY	expulsion of undergrad for criminal conduct (arson)	contract theory (and/or general—including *Tedeschi*)[216]	U	not arbitrary or capricious
North v. Widener Univ.	869 F. Supp. 2d 630 (E.D. Pa. 2012)	PA	dismissal of doctoral student for improper behavior (+ failed exam)	contract theory	U	possible interaction with academic basis and § 504 claim
Shah v. Union Coll.	948 N.Y.S.2d 456 (App. Div. 2012)	NY	suspension (1 sem. and F course grade) of undergrad for plagiarism	(general—various citations w/o *Tedeschi* directly)	U	substantial compliance (own rules) and
Rosenthal v. N.Y. Univ.	482 F. App'x 609 (2d Cir. 2012)	NY	expulsion of MBA student for criminal conduct	contract theory (and/or general—arbitrary/capricious or in bad faith)	U	academic deference despite IHE's confused and confusing governing provisions (p. 614)
Alexiadis v. N.Y. Coll. of Health Professions	891 F. Supp. 2d 418 (E.D.N.Y. 2012)	NY	expulsion of undergrad for theft	contract theory	U	no contract or breach thereof
				IIED+[217]	U	
Katz v. N.Y. Univ.	943 N.Y.S.2d 518 (App. Div. 2012)	NY	F course grade for undergrad for plagiarism	(general—including *Dequito)*	U	substantially complied w. its procedures and not shocking sanction
Cook v. Talladega Coll.	908 F. Supp.2d 1214 (N.D. Ala. 2012)	AL	expulsion of undergrad for threatening letters to IHE vice president	contract theory	U	handbook not binding and, even is so, not breached

[215] The case is designated as an "unreported disposition," with a table-only citation of 943 N.Y.S.2d 792.

[216] The court interweaved and arguably combined contract theory, but it ultimately appeared to rely on contract theory. *Jones*, 937 N.Y.S.2d at 477.

[217] The student also unsuccessfully claimed negligent infliction of emotional distress. *Alexiadis*, 891 F. Supp. 2d 418.

Ye Li v. Univ. of Tulsa	No. 12-CV-641-TCK-FHM, 2013 WL 352116 (N.D. Okla. Jan. 29, 2013)	OK	dismissal of undergrad for cheating on homework and exam	contract theory	U	*Slaughter* limited approach
Sirpal v. Univ. of Miami	509 F. App'x 924 (11th Cir. 2013)	FL	dismissal of M.D./Ph.D. student for misconduct and unethical behavior in lab	contract theory	U	not arbitrary/capricious
Samost v. Duke Univ.	742 S.E.2d 257 (N.C. Ct. App. 2013)	NC	remanded (for new hearing) suspension (2 sem.) of two undergrads for off-campus party	contract theory*	U	*no breach assuming w/o deciding handbook established contract
Klunder v. Trs. and Fellows of Brown Univ.	No. 10-410 ML, 2013 WL 1947121 (D.R.I. May 9, 2013)	RI	suspension (3 sem.) of undergrad for assault	contract theory	U	
				IIED+[218]	U	

[218] The student also brought a variety of other claims that the court resolved short of the merits, e.g., breach of covenant of good faith and fair dealing (waiver) and civil conspiracy (statute of limitations). *Klunder*, 2013 WL 1947121.