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COMMENTARY

GRADES: ACHIEVEMENT, ATTENDANCE, OR ATTITUDE*

by
JOHN DAYTON AND ANNE DUPRE**

Grades play a very important role in defining students' lives. Both students and parents see grades as powerful indicators of a student's future potential. Whether the student received an "A" or an "F" no one forgets the potent emotional impact the grade had on both the student and the parent. Grades influence students' self images and parents' perceptions of their child's abilities, and may either expand or limit future options for students. Students' grades are the gateways for placement in K–12 education programs, and grades are a critical part of the admissions process in higher education. Future employers may also look at grades when making hiring decisions.

But one of the ironies associated with grades, is that although there is broad agreement that grades are very important and that they may dramatically affect students' lives and futures, there is much less agreement about what grades should actually represent. Should grades be based exclusively on academic achievement, or should other factors be weighed into the calculation of grades? If factors other than academic achievement are appropriate, what other factors should be considered, and how closely must these factors be related to academic achievement? For example, should the level of participation in class discussions be a significant factor? What about the level of student effort? Should a student's grade be affected by class absences? Should discipline problems such as a negative attitude, disrupting class, or use of alcohol or drugs be considered in assigning grades to students?

Clearly grades are the "currency of the realm" in education, and good grades are the key to good future opportunities for students. It is not surprising, therefore, that parents and students who believe they have been shortchanged by a grade may voice their complaints to a school official and may even file a lawsuit challenging the grade or the grading policy. This article focuses on disputes involving grading policies that allowed non-academic factors in decisions on grades or academic credit. This article includes a brief summary of the history and legal theories related to grading challenges, a review of the relevant case law, and a discussion of judicial treatment of these issues and the lessons these cases teach for establishing and administering a legally sound grading policy.

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 199 Ed.Law Rep. [569] (Sept. 8, 2005).

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The Development of Legal Theories for Challenging Grades and Grading Policies

Teachers have always provided students with assessments of their academic achievement, but formal grading systems are a relatively recent development.[1] As education in the United States was transformed from the informal teacher-student relationship of the private tutor or the one-room school house, to the highly structured industrial model of the modern public school, there was an increased need to standardize and formalize grading policies. While the tutor or one-room school house teacher could readily provide parents with an informal and holistic verbal assessment of the student's progress, by the Twentieth Century, assessments of academic achievement were increasingly reduced to a standardized assignment of a symbolic grade. Larger numbers of students, greater diversity in the student population, and a call for more standardized and efficient means of assessment resulted in substituting symbolic number or letter grades for more holistic, individual evaluations by teachers.[2]

Once standardized grading systems were established, school officials, employers, and others began to make decisions about students' future opportunities based on their grades. But tying these symbolic grades to real consequences made it inevitable that students and parents would begin to contest low grades and the associated negative consequences. In 1913, the Supreme Court of Massachusetts in *Barnard v. Inhabitants of Shelburne,* reviewed a case in which a student had been excluded from the public high school because of low grades.[3] The record showed that the student had failed to attain a sixty percent rating in three subjects, and a "rule adopted by the school committee was put in evidence to the effect that 'pupils standing below 60 per cent, in two or more subjects shall be demoted one grade, and when such deficiency occurs in the freshman class the delinquent shall be dropped from the roll of the school.' "[4] The student's parent did not contest the assigned grades, but argued that "because the school committee did not grant a hearing to the father upon his request, the exclusion was illegal."[5] The court stated that:

> The right of every child to attend the public schools is subject to such reasonable regulations as to qualifications of pupils to be admitted and retained in the respective schools as the school committee shall prescribe

1. *See,* Evelyn Sung, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades,* 78 N.Y.U. L. Rev. 1550, 1560–1561 (2003), describing the history of grading in the U.S. ("It was not until 1783 that grades were first used in this country, at Yale College. At most schools before 1850, grades were not used, since the norm was a one-room schoolhouse where students were grouped by age and background . . . As the number of students increased, teachers began using progress evaluations of students' work . . . After the passage of compulsory attendance laws at the elementary level, and as more students began to enter high school in the late 1800s, schools created more specialized courses and acquired more diverse student populations. Thus the need for a systematized form of evaluation arose . . . Grading . . . was intended to substitute for written evaluations").
2. *Id. See also,* Kurt F. Geisinger, *Marking Systems, in* The Encyclopedia of Educational Research (Harold E. Mitzel, John Hardin Best & William Rabinowitz eds., 1982).
3. 102 N.E. 1095 (Mass. 1913).
4. *Id.* at 1096.
5. *Id.* at 1097.

> ... The school committee have general charge and superintendence over all public schools ... The care and management of schools which is vested in the school committee includes the establishment and maintenance of standards for the promotion of pupils from one grade to another and for their continuance as members of any particular class. So long as the school committee act in good faith their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal.[6]

In *Barnard*, the court adopted a highly deferential approach to reviewing the academic decisions of education officials, and would not intervene as long as academic policies were formulated and applied in good faith. The court noted that the school had sent a written notice to the student's parent when the student first fell below the required academic standards, and that a written notice had been sent informing the parent that the student was being excluded because of continuing to fall below required standards. The court held that when the exclusion was based solely on academic standards, and not misconduct, this was all the notice that was required, stating: "When the real ground of exclusion is not misconduct there is no obligation on the part of the school committee to grant a hearing ... Failure to attain to a given standard of excellence in studies is not misconduct in itself."[7] However, the court determined that:

> Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.[8]

In 1978, in *Board of Curators of the University of Missouri v. Horowitz*,[9] the U.S. Supreme Court quoted the above language from *Barnard*, and adopted the *Barnard* principles of: 1) distinguishing between academic decisions and cases involving allegations of misconduct; 2) granting broad deference to purely academic decisions; and 3) requiring less due process for academic decisions than would be required for disciplinary decisions. The Court stated that: "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal."[10]

The U.S. Supreme Court affirmed these principles of law again in 1985, in *Regents of the University of Michigan v. Ewing*.[11] In *Ewing*, a student challenged a dismissal from a six-year medical program when he failed an

6. *Id.* at 1096.

7. *Id.* at 1097.

8. *Id.*

9. 435 U.S. 78, 87, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In *Barnard*, the U.S. Supreme Court held that a medical student who was fully informed of ongoing faculty dissatisfaction with her clinical progress was not entitled to any further due process when she was later dismissed for these same academic deficiencies.

10. *Id.* at 86, 98 S.Ct. 948.

11. 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985).

exam in the fourth year of the program. In upholding the academic dismissal, that Court stated that:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[12]

Courts continue to extend great deference to academic decisions by school officials, generally only intervening in cases in which there is clear evidence that school officials abused their discretion. Students are unlikely to prevail in challenges against purely academic decisions by school officials absent evidence that school officials abused their discretion by acting in bad faith, rendered decisions that were arbitrary and capricious, or issued decisions in violation of applicable laws. But as noted in *Barnard* and *Horowitz,* cases involving allegations of misconduct may be another matter, as they require greater due process, opening the door a little wider to challenges by plaintiffs in cases involving non-academic factors.

Plaintiffs have used a variety of legal theories in challenging grades and grading policies involving non-academic factors, including suits based on procedural due process, substantive due process, breach of contract, and alleged conflicts with state statutes. In challenges based on procedural due process, plaintiffs claim the assigned grade resulted in a deprivation of a protected property or liberty interest, and that school officials failed to provide required procedural protections, such as adequate notice and a fair opportunity to be heard. In cases based on substantive due process claims, plaintiffs allege that there was too great a disparity between the offense and the grade penalty, and that the sanction was unduly harsh.[13] Allegations based on breach of contract involve a claim by the plaintiff that the grading policy or its application was contrary to the contractual obligations of school officials.[14] And cases based on state statutes generally claim that the grading

12. *Id.* at 225, 106 S.Ct. 507.

13. For a brief summary of due process of law in the public school context, *see* J. Kevin Jenkins and John Dayton, *Students, Weapons, and Due Process: An Analysis of Zero Tolerance Policies in Public Schools*, 171 Ed. Law Rep. [13, 15–17] (2003) ("Modern jurisprudence recognizes both procedural and substantive due process rights. Procedural due process concerns the process government uses in actions that may significantly impinge on life, liberty or property rights, while substantive due process requires that government actions are genuinely fair and reasonable, and serve a legitimate governmental interest. In its most basic form procedural due process guarantees adequate notice of government actions . . . and the right to a fair hearing regarding these issues. To provide adequate notice . . . [regulations] must be openly promulgated and generally comprehensible so that persons of ordinary intelligence can determine what is required or prohibited. There can be no secret regulations or ex post facto laws . . . the hearing process itself must be fundamentally fair, with not only adequate notice of charges, witnesses, and evidence . . . but also an opportunity to be heard and to provide a rebuttal . . . Substantive due process requires that [procedures] must be fundamentally fair and [punishments must be] proportional to the violation").

14. Challenges based on a contract theory may be most useful in private schools, where due process of law is not required. *See* Dina Lallo, *Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?*, 18 J.C. & U.L. 577, 584 ("While students at public institutions enjoy the ben-

policy exceeded school board authority under state statutes, or that the actions of school officials were in conflict with applicable state statutes.

Legal Challenges to Non–Academic Factors in Grading Policies

Historically, judges granted great deference to the decisions of educators and were reluctant to interfere with the daily operations of schools.[15] But in the 1960's and 70's, courts became increasingly willing to intervene in what had traditionally been considered decisions within the legitimate authority of school officials.[16] In 1969, in *Tinker v. Des Moines*, the U.S. Supreme Court declared: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[17] acknowledging broad student rights to individual speech in schools, and recognizing constitutional limitations on the authority of school officials to control student speech.[18] And in 1975, the U.S. Supreme Court issued its opinion in *Goss v. Lopez*,[19] holding that students were entitled to adequate notice and a fair hearing when the actions of school officials sufficiently threatened a student's protected liberty or property rights. Following the Court's decision in *Goss*, adequate due process was clearly required when school officials attempted to suspend or expel students from school. But the Court's decision in *Goss* also opened the door for students to challenge other decisions by school officials that may affect their protected liberty or property rights, including decisions on grades and academic credit. How far courts would actually go in protecting students' rights and in limiting the authority of school officials in disputes over grades and grading policies was unclear.

The cases below illustrate how courts have addressed challenges to grade reductions or loss of academic credit in the three decades since *Goss*. These cases are divided into three categories: A) academic sanctions based on lack

efits of both due-process and contract challenges, students at private institutions must rely solely on a contractual theory to attack a university decision. Courts view the student-university relationship as contractual ... The college has a basic contractual obligation with the student not to engage in arbitrary expulsion or denial of a degree").

15. The U.S. Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), was a major intervention in the daily operation of schools in order to end the appalling and unconstitutional practice of racial segregation in public schools. But what the Court said and did continues to be debated a half century later. *See*, Jack M. Balkin, *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (2002).

16. *See* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in Public Schools*, 65 GEO. WASH. 49 (1996) (providing an analysis of how the U.S. Supreme Court's view of the public school as either an institution of social reproduction or reconstruction in *Tinker*, *Goss*, and other public school cases, has affected the powers of school officials in matters of student discipline and order).

17. 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). *See also*, Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate–Students' Rights Thirty Years After Tinker v. Des Moines Independent Community School District*, 48 DRAKE L.REV. 445 (2000) (discussing the continuing legacy of *Tinker* and its impact on the balance of student's civil rights and the authority of school officials in the last three decades).

18. Akhil Reed Amar, *A Tale of Three Wars: Tinker in Constitutional Context*, 48 DRAKE L.REV. 507, 516 (2000) (noting "the Tinker Court's vigorous protection of political expression-in particular, expression that criticized government policies").

19. 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

of attendance; B) academic sanctions where disciplinary suspensions caused the lack of attendance; and C) academic sanctions as disciplinary penalties. The cases under each of these headings are arranged in chronological order, illustrating the development of the law in this area, and the interrelationship of these cases. Although courts have adopted a variety of approaches to these issues, some useful common principles of law emerge from a review of these cases.

A. Academic Sanctions Based on Lack of Attendance

Just one year after the U.S. Supreme Court's decision in *Goss,* a public school student in *Knight v. Board of Education,*[20] challenged a school policy requiring grade reductions for absences as a violation of due process. The student had two absences that school officials designated as unexcused. The school's policy required a one-letter grade reduction for each unexcused absence, which amounted to a two-letter grade reduction under the policy. His teachers thought the policy was too harsh, and reduced his grades by only one-letter for the quarter. In defending the challenged policy, school officials argued that truancy was a serious problem and stated that they believed reductions in grades were more effective in deterring truancy than corporal punishment, suspension, or detention. In reviewing this case, the court noted that *Goss*-type constitutional rights may be substantive as well as procedural.[21] Although expressing reluctance to intervene in grading matters, the court determined that it was appropriate to weigh the severity of the sanction against the severity of the conduct. The student had received three grades that were one grade lower. The court decided that a letter grade reduction for one quarter was not so harsh as to deprive the student of substantive due process. Although the policy was harsh, it had been rescinded, rendering the challenge to the policy moot. Further, the student's damages were unproved, as he was admitted to the only school to which he had applied.[22]

Two years later, in *Gutierrez v. School District,*[23] students challenged a local school policy which denied academic credit for all or most of their classes because of absences, tardiness, or suspensions. Students asked the court to decide whether the policy was within the legitimate scope of the rule-making authority delegated to the school by the State. The court found that a state statute required attendance for 172 days, but the days when a student was ill or suspended counted as part of the required 172 days. According to the court: "The statute thus discloses a legislative policy that

20. 348 N.E.2d 299 (Ill.App.Ct. 1976).

21. *Id.* at 302 ("public school students have both substantive and procedural rights") *citing Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

22. *But see, Id.,* at 305 (Craven, J., dissenting) (stating that the majority opinion persuasively stated a case for the opposite result. According to the dissenting opinion, this was an arbitrary rule and the student was deprived of procedural and substantive due process. The dissenting opinion asserted that what matters in the analysis is if there is an interest that is of a nature that requires protection. Here, the student's grades were reduced, even a quarter grades affects the final grade, final grades purport to measure the student's academic achievement, and employers and higher education officials will judge the student's application based on the assumption that the grade reflects the student's academic achievement).

23. 585 P.2d 935 (Colo.Ct.App. 1978).

non-attendance sanctions not be imposed for these types of absences."[24] The court concluded that the school's policy was void because it was inconsistent with the statute, and exceeded school district authority.

That same year, in *Blackman v. Brown*,[25] a student was suspended from a social studies class for excessive absences and was not permitted to take the course exam. The court held that applicable state statutes did not expressly authorize removing a pupil from a class for truancy. The court refused to imply this authority because the net effect would be that the student who violated the compulsory education law often enough would then be excused from further compliance with it, a result that the legislature surely did not intend.

In 1981, in *Raymon v. Alvord Independent School District*,[26] a high school student's six-week algebra grade was reduced three points for an unexcused absence. The grade reduction was minor and did not change the student's class standing. She remained second in her class. Nonetheless, the student challenged the grade reduction as arbitrary. A federal district court ordered that the three points be restored to her algebra grade. The United States Court of Appeals for the Fifth Circuit reversed this decision, stating:

> It is well settled that a federal court has the power to resolve a pendent state issue only if a substantial federal question is also present ... A complaint that alleges the existence of a frivolous or insubstantial federal question is not sufficient to establish jurisdiction in a federal court ... Ms. Raymon's claim that the insignificant decrease in her overall grade point average, from 95.478 to 95.413, constituted a deprivation of a vested property or liberty interest without due process is patently insubstantial ... Federal courts are proper forums for the resolution of serious and substantial federal claims. They are frequently the last, and sometimes the only, resort for those who are oppressed by the denial of the rights given them by the Constitution and laws of the United States. Fulfilling this mission and the other jurisdiction conferred by acts of Congress has imposed on the federal courts a work load that taxes their capacity. Each litigant who improperly seeks federal judicial relief for a petty claim forces other litigants with more serious claims to await a day in court ... Accordingly, we reverse the judgment and order the district court to dismiss the complaint for want of subject matter jurisdiction.[27]

Two years later, in *R.J.J. v. Shineman*,[28] a student had received a failing grade in music class because he missed a scheduled concert, presented at a church. Instead, the student went on a family trip to Hawaii. All students had been notified the first day of class that no one would be excused from a scheduled performance except for a death in the family or a request to the teacher prior to the concert. Otherwise, attendance at the concert was a requirement for completing the course. The student claimed that the mandatory attendance policy, when applied at a concert presented at a church and oriented to the Christmas season, violated the Establishment Clause. A state court of appeals concluded that there was no Establishment Clause violation

24. *Id.* at 937.
25. 419 N.Y.S.2d 796 (N.Y.Sup.Ct. 1978).
26. 639 F.2d 257 (5th Cir. 1981).
27. *Id.* at 257.
28. 658 S.W.2d 910 [14 Ed.Law Rep. [398]] (Mo.Ct.App. 1983).

and that the trial court's finding that the programs in question were secular was supported by substantial evidence. There were no prayers or other religious exercises in the program. Instead, the program consisted entirely of music, including traditional Christmas carols and seasonal songs such as Jingle Bells. The appellate court determined that the Establishment Clause claim was a pretext to avoid the consequences of violating the attendance policy. The student did not attend the concert because of a family trip, but he could have been excused if he had given prior notice.

In 1984, in *Campbell v. Board of Education,*[29] students filed a class action lawsuit challenging academic sanctions for students who were absent from school. The school policy stated that students would lose course credit for absences of over twenty-four class periods without an administrative waiver and provided for a five point reduction in course grades for any unapproved absence. School officials claimed that the attendance policy was academic rather than disciplinary. A suspension for disciplinary reasons was considered an approved absence for course grade purposes but still counted towards the twenty-four class periods for loss of class credit. Students argued that the policy was *ultra vires* under state statutes, preempted by state statutes, and violated due process and equal protection rights. The Supreme Court of Connecticut determined that the policy was not *ultra vires* under state statutes. The court cited *Gutierrez v. School District,* and *Dorsey v. Bale,* for the principle that: "It may well be improper to reduce a student's grade for nonattendance as an additional punishment for unrelated conduct leading to a suspension from class"[30] *Miller v. McLeod* and *Sageser v. Ledbetter's* reiterated statement that: "It would indubitably be unlawful to apply a nonattendance program in an unreasonable, capricious, arbitrary or inequitable manner"[31] and *Blackman v. Brown's* statement that it would be improper "to bar a truant student from further class attendance and from taking a final examination."[32] Although agreeing with these principles, the court found them inapplicable in this case, as there was no double punishment, no proof that the policy or its application was unreasonable, and there was no removal of students from the school. The court also noted the U.S. Supreme Court's decision in *Horowitz*, holding that there were "far less stringent procedural requirements" for academic decisions in contrast to disciplinary decisions.[33] Concerning the students' state constitutional arguments, because the policy was neither disciplinary nor an infringement on equal educational opportunity, there is no violation of any fundamental right under the Connecticut Constitution. The court concluded that there was no evidence that the school's policy was disciplinary in intent or effect, and it did not conflict with the Connecticut Constitution or state statutes regarding compulsory attendance or school discipline.

29. 475 A.2d 289 [17 Ed.Law Rep. [840]] (Conn. 1984).

30. *Id.* at 293, *citing Gutierrez v. School District*, 585 P.2d 935 (Colo.Ct.App. 1978); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky.Ct.App. 1975).

31. *Id., citing Miller v. McLeod*, 605 S.W.2d 160 (Mo.Ct.App. 1980); *Sageser v. Ledbetter*, 559 S.W.2d 230 (Mo.Ct.App. 1977).

32. *Id., citing Blackman v. Brown*, 419 N.Y.S.2d 796 (N.Y.Sup.Ct. 1978).

33. *Id., citing Board of Curators v. Horowitz*, 435 U.S. 78, 86–87, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

Four years later, in *Slocum v. Holton Board of Education*,[34] a student had been absent for five excused days because she had a concussion. School policy required her to make up any missed days in extra study sessions or receive a grade reduction. She attended only one study session and her grade was reduced by one letter grade. The court concluded that the school board had statutory authority to adopt the attendance policy and that the policy was not arbitrary or unreasonable. The court noted that an attorney general opinion recognized that there was educational value in regular school attendance. The attorney general opinion noted that students' presence in the classroom aids in instilling self-discipline, exposes students to group interactions, enables students to hear and participate in class discussions, and provided other related learning experiences that will not necessarily be fully reflected in test results.[35] Consistent with this reasoning, school boards can decide that attendance and class participation may be legitimately weighed in assessing a student's academic achievement and in assigning a grade.

According to the court in *Slocum*: "[a]n education entails more than just correctly answering questions asked on an examination"[36] and a school's policy to value attendance properly serves to facilitate the education of the state's children. The court stated: "When a student fails to attend classes, that educational experience is lost."[37] This attendance policy created an incentive to attend all classes or have a comparable after-hours educational experience. School officials may properly determine that schools are preparing their students for the world of employment, helping them to become functional members of the society, and that the school attendance policy was a reasonable means of achieving those goals. The student's grade was not automatically reduced. Instead, the student declined to take advantage of an opportunity to make up the missed time. The student did not have a vested property right in any grade higher than the grade she had earned under the school's legitimate rules. The court also found no recognizable liberty interest. The court cited *Paul v. Davis*,[38] holding that mere injury to the student's reputation alone is not enough to invoke due process. Even if the student had a recognizable property or liberty interest, the policy was rationally related to a legitimate governmental purpose, and the student had adequate notice of the policy.

In 1991, in *Oschsner v. Board of Trustees*,[39] the challenged school policy stated that attendance was one-third of the total grade in a community

34. 429 N.W.2d 607 [49 Ed.Law Rep. [740]] (Mich.Ct.App. 1988).

35. *Id.* at 609–610, *citing* 1978 OP. MICH. ATT'Y GEN. 5414 (according to the opinion of the Attorney General: "The compulsory attendance law recognizes an educational value in regular attendance at school. Presence in a classroom aids in instilling concepts of self-discipline and exposes a student to group interactions with teachers and fellow students. These and similar considerations are proper educational values which will not necessarily be fully reflected in test results. School authorities may determine that attendance, class participation and similar factors are proper educational values bearing on a student's academic achievement").

36. *Id.* at 610.

37. *Id.*

38. 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (holding in a 5–3 opinion that reputation alone does not raise a liberty or property interest sufficient to invoke the protections of the due process clause).

39. 811 P.2d 985 [68 Ed.Law Rep. [156]] (Wash.Ct.App. 1991).

college programming controller class. The school's advisory board, made up of industry representatives, insisted on an attendance policy because they believed that absenteeism was the primary problem faced by vocational industry employers. The court determined that when the facts were viewed most favorably to the student in the motion for summary judgment, there was a reasonable inference that the teacher did not apply the attendance policy evenly and there was a genuine question of fact concerning whether the teacher's evaluation was arbitrary and capricious. The court recognized that courts should abstain from interference in the process of academic judgments unless they are arbitrary and capricious, or in bad faith. The court distinguished a review of academic performance, which was beyond judicial authority, and arbitrary and capricious actions that may have violated due process rights, the latter falling within legitimate judicial authority. The court noted that the United States Supreme Court, in both *Ewing* and *Horowitz*, recognized that courts may review whether a school used fair procedures in determining a grade.[40]

Four years later, the Supreme Court of Missouri, sitting *en banc,* decided *Yarber v. McHenry.*[41] In *Yarber* a student lost a semester's worth of credit hours solely because of not meeting the school's attendance policy. The student challenged the attendance policy, and the court found that: "Missouri statutes establish a property interest in an education" no less than that established by Ohio statutes in *Goss v. Lopez.*[42] The penalty imposed here was not *de minimus*, "it is instead a considerable infringement on the student's property interest."[43] Procedural due process in a case where a student may lose a semester's worth of credit requires a hearing with more formal and extensive procedures than that provided in *Goss*, which only involved a suspension for 10 days or less. The court noted that in *Horowitz,* the U.S. Supreme Court held that procedural due process does not require a *Goss*-type hearing when the deprivation was purely for academic rather than disciplinary reasons.[44] Accordingly, in order to determine what due process is required, it is necessary to determine what constitutes an academic judgment and what is a disciplinary action. The court concluded that: "As we understand *Horowitz*, if the sanction relates to the academic evaluation of a student, it is academic rather than disciplinary. Conversely, if the sanction does not bear upon the academic evaluation of the student, it is disciplinary rather than academic."[45] In this case, the court determined: "We hold that the [attendance policy] as written and as applied . . . is disciplinary in nature . . . this provision takes away previously earned credit as punishment for unsatisfactory attendance. While an attendance policy might conceivably be structured to relate to academic performance, the policy in this case does not

40. *Id.* at 987–988, *citing Regents v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985); *Board of Curators v. Horowitz*, 435 U.S. 78, 86–87, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

41. 915 S.W.2d 325 [107 Ed.Law Rep. [361]] (Mo. 1995) (en banc).

42. *Id.* at 328, *citing Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

43. *Id.*

44. *Id.* at 329, *citing Board of Curators v. Horowitz*, 435 U.S. 78, 89–91, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

45. *Id.* (court recognized that this distinction failed to produce any bright-line test, as: "The distinction, we observe, will often be difficult to make as nearly every aspect of a student's conduct has some potential bearing on academic performance").

do so."[46] The court found the decisions upholding school absence sanctions in *Campbell* and *Slocum* "distinguishable and unpersuasive."[47]

In *Barno v. Crestwood Board of Education*,[48] three years after *Yarber*, a high school senior was denied a diploma solely because of absenteeism. Through the first five grading periods of her senior year, the student had earned a 3.966, out of a possible 4.0. She had also passed all of the proficiency tests required by state law. But to receive academic credit, the school's student handbook required 93% attendance, and no more than thirteen days of absence. The student was absent eighteen days, all but two of which were excused for personal illness and family vacation. In ruling on the school policy, the court reviewed the statutory authority of the board of education to adopt local policies. At a minimum, these policies must be reasonable. To determine whether a policy was reasonable, courts look to "standards of ordinary common sense, tempered with judicial experience, and guided by considerations of public policy manifested in relevant statutory, administrative, and decisional law."[49] The student did not argue that the policy was unconstitutional, but that it was unreasonable.

The court struck down the grading policy on its face as unreasonable and contrary to state law. Under state law, the school's grading policy made attendance a prerequisite for academic credit, which meant that attendance became part of the curriculum. A state statute listed courses that must be included in the curriculum, and they all shared a common characteristic: They were subjects to be studied. Under the statute, boards of education can only add subjects of study to the curriculum. Attendance was not a subject of study. There were no textbooks related to attendance, no lectures, and students could not be tested. Further, the policy counted even excused absences against students. If the attendance policy was intended to teach responsibility and promote achievement, the student was acting responsibly by requesting permission to be absent,[50] and the student's academic success refuted the notion that the absences were inconsistent with achievement.[51] The court also determined that it was unreasonable for the attendance policy to fail to define what the reinstatement committee could consider in determining what constituted extenuating circumstances.[52]

46. *Id.*

47. *Id.* at 330.

48. 731 N.E.2d 701 [145 Ed.Law Rep. [482]] (Ohio Ct. App. 1998).

49. *Id.* at 708.

50. *Id.* at 710 ("Teaching good attendance habits is a specific method of teaching personal responsibility. If the student learns to request permission for an absence, he or she has learned to be responsible. In the work world, no employer would reasonably terminate an employee for taking an authorized vacation. Yet [the attendance policy] punished [the student] for taking a vacation with her family that the school had authorized in accordance with the student handbook. This is patently absurd").

51. *Id.* (student's "transcript refutes the notion that good attendance is absolutely critical to learning high school material").

52. *Id.* at 711 (court was critical of the school policy for failing to specify in the student handbook what constituted extenuating circumstances that would excuse an inadequate attendance rate. The court noted that: "It is our understanding that the principal and the other members of the committee filled this void by inventing their own criteria, which were reduced to writing for the purposes of this litigation, but which have never been revealed to the student body ... without a fixed set of standards, extenuation lies in the eye of the beholder ... It is difficult, if not impossible, for a student to adequately defend himself or herself against a charge of

B. Academic Sanctions Where Disciplinary Suspensions Caused a Lack of Attendance

Just two months after the U.S. Supreme Court's decision in *Goss*, a Kentucky Court of Appeals decided *Dorsey v. Bale*.[53] In *Dorsey*, a local school board had adopted a policy for unexcused absences that stated:

> Absences for any other reason and failure to follow the outlined procedure will constitute an unexcused absence and work will not be allowed to be made up and furthermore five (5) points will be deducted from the total nine-weeks grade for each unexcused absence from each class during the grading period.[54]

Absences due to suspensions were considered unexcused absences under the policy. A student was suspended twice for alcohol possession and consumption at school. The second time his grades were reduced five points a day for four days, and he received a lower grade by one letter in three of five courses. The student challenged the statutory authority of the school board to adopt and enforce this policy. Kentucky legislation gave school boards the authority to suspend students for misconduct, and school officials had the authority to determine the duration of the removal from school, with the provision of appropriate due process. Further, the court agreed with school officials' argument that judges should not simply substitute their own judgments for those of school officials. The court noted, however, that it would intervene where school official's actions were contrary to clear legislative intent. The statute authorizing suspensions "clearly preempts the right of school officials to promulgate disciplinary regulations that impose additional punishment for the conduct that results in suspension."[55] While school officials could lawfully suspend the student for misconduct, the additional grade punishments were not permissible under the statute.

In *Donaldson v. Board of Education*,[56] two students were involved in a minor fight in school. The first student was paddled receiving "two swats." The second student, Donaldson, had a parental request on file asking that he not be paddled. He was instead given a three day suspension. This three day absence was unexcused, and he was not allowed to make up tests, resulting in lowered grades for the term. Although conceding that his actions were punishable, the student challenged the three day suspension and resulting lowering of grades as disproportionate under the circumstances. The court stated:

> School discipline is an area which courts enter with great hesitation and reluctance and rightly so. School officials are trained and paid to

excessive absenteeism if the committee decides the student's fate by an undisclosed formula. Any attendance policy that disregards excessive absences when there are extenuating circumstances without publicly defining those circumstances allows too much room for school officials to arbitrarily punish a student and is, therefore, unreasonable").

53. 521 S.W.2d 76 (Ky.Ct.App. 1975).

54. *Id.* at 77 (school board claimed that this policy was necessary because student misconduct had disrupted the school before this policy was adopted, and suspension, detention, and corporal punishment had not been effective. But according to school officials, since the new grading policy had been adopted, the chaos had abated).

55. *Id.* at 78.

56. 53 Ill.Dec. 946, 424 N.E.2d 737 (Ill.Ct. App. 1981).

> determine what form of punishment best addresses a particular student's transgression. They are in a far better position than is a black-robed judge to decide what to do with a disobedient child at school. They can best determine, for instance, whether a suspension or an after-school detention will be more effective in correcting a student's behavior. Because of their expertise and their closeness to the situation and because we do not want them to fear court challenges to their every act school officials are given wide discretion in their disciplinary actions . . . courts have, therefore, said that a decision to suspend or expel a student will be overturned only if it is arbitrary, unreasonable, capricious, or oppressive.[57]

The court recognized that there could be such a case, but this particular case did not meet this standard. In this case, the timing of the suspension during exams was merely coincidental and was not intended to create a more onerous punishment for the student, the inability to take the exams only resulted in lowered grades and not a loss of credit, and because the student was only a seventh grade student, the lowered grades would not affect future educational and employment prospects as seriously as they would affect a high school student.

In *Smith v. Revere*,[58] a student had been suspended for tardiness. She did not contest the fact that she had been tardy but challenged the school's policy of suspending students for excessive tardiness and administering failing grades for resulting absences. The school's student handbook stated:

> [T]here is a direct, positive correlation between a student's academic success, his/her attendance, and the amount of quality time that is actually spent on instruction and/or learning activities. Frequent absence from school disrupts the continuity of the instruction process. As a result, the benefit of regular classroom instruction is lost and cannot be entirely regained even by make-up work.[59]

In upholding the challenged policy, the court distinguished this case from *Barno v. Crestwood*.[60] The court stated:

> Revere's attendance and administrative failure policy is distinguishable from *Barno* because the policy in *Barno* specified that if a student's

57. *Id.* 53 Ill.Dec. at 947-48, 424 N.E.2d at 738-739.

58. 2001 WL 489980 (Ohio Ct.App. 9 Dist.).

59. *Id.* at *3 (from the Revere Local School District's Student Handbook). Although the court upheld the challenged policy, the policy seems contrary to the school's own rational on attendance. Although the school stated that there was a direct, positive correlation between attendance and academic success, the school's policy punished tardiness with suspensions from school, actually increasing the time that students were removed from classroom instruction. Further, these suspensions were unexcused, so that students were not allowed to make up class work, and more than twelve unexcused absences resulted in an automatic failure for the semester. If school officials believed that there was a direct, positive correlation between attendance and academic success, it might be more rational to require additional make up time in classes, and require the student to make up missed any work, reserving academic failure only for situations in which students willfully refused to make up the missed time and work. Instead, the school's policy in this case actually added to the time out of class through suspensions, prohibited students from doing any make up work, and guaranteed academic failure if unexcused absences exceeded 12 days.

60. 731 N.E.2d 701 [145 Ed.Law Rep. [482]] (Ohio Ct.App. 1998).

attendance was less than 93% for an academic year, he/she would not graduate; while Revere's policy may or may not effect whether a student graduates. Revere's policy promotes attendance for academic performance in the classroom and provides certain repercussions for excessive unexcused absences. Lastly, Revere's policy is different from *Barnio* because it distinguishes between excused and unexcused absences from a class, and there is a list of extenuating circumstances that will result in an excused absence.[61]

C. Academic Sanctions as Disciplinary Penalties

One year after *Goss*, in *Fisher v. Burkburnett Independent School District,*[62] a federal district court decided a case in which a student overdosed at school on the drug Elavil and nearly died. She was initially suspended 10 days, and following a disciplinary hearing for violating the school's drug policy, she was expelled and stripped of all credit for the school term. The student obtained a temporary restraining order from a state court, and passed all her final exams. The federal court addressed whether the school's punishment exceeded statutory authority or violated her due process rights, and whether she should have received credit for the term:

> School administrators have a pressing interest in discouraging drug abuse at school. They may propagandize against such behavior, but the efficacy of strict punishment is surer. This concern with general deterrence explains the harshness of the [policy] on drugs. Stripping the plaintiff of academic credit does not serve any academic purpose, but it does effect school discipline. The school's policy of suspension for a trimester thus furthers a legitimate interest in a rational if severe manner. The school's interest in general deterrence cannot justify any punishment in any circumstance. The disparity between misconduct and punishment would be considerably greater had the plaintiff been caught with a joint of marijuana or a bottle of wine in her purse. A great enough disparity between the offense and the punishment in an individual case might render the punishment an unreasonable means to attain the legitimate end of general deterrence of drug abuse by others. In the present case, however, the harshness of the punishment is tempered by the non-trivial nature of the incident. The plaintiff flirted with death. The punishment meted out to her is severe, but the court does not find it unconstitutionally excessive.[63]

Two years later, in *Hamer v. Board of Education,*[64] a student "left school during the lunch period on an emergency matter without advising any teacher or staff member."[65] Her mother sent school officials a note excusing her absence, but school officials notified the student that because her absence was unauthorized her grades were to be reduced by 3% in each of the courses she missed that day as punishment. Some teachers reduced her grades, but others refused. The grade reductions affected her overall class

61. 2001 WL 489980, *3 (Ohio Ct.App. 9 Dist.).

62. 419 F.Supp. 1200 (N.D.Tex. 1976).

63. *Id.* at 1205.

64. 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct. App. 1978).

65. *Id.*, 22 Ill.Dec. at 756, 383 N.E.2d at 232.

ranking, and she challenged the school's actions as illegal and unconstitutional. The court reversed a prior granting of a motion to dismiss, citing *Knight v. Board of Education* for the principle that "rights incident to a public education are property rights entitled to both substantive and procedural due process protection."[66] In ruling for the student the court concluded:

> We are aware that the majority in *Knight* concluded on the evidence there adduced that a student was not deprived of substantive due process by a grade reduction imposed for an unexcused absence. We have also considered the thoughtful dissent in that case. The limited issue before us on this record, however, is whether a cause of action is asserted affecting the substantive or procedural rights of plaintiff and resulting in damage to her ... it is our view plaintiff is entitled to be heard on the question of whether the grade reduction sanction for unauthorized absence is an approved policy of the Board; what, if any, procedural remedies are available to plaintiff before such a serious sanction may be applied; and whether its application arbitrarily and capriciously result in a grade reduction without a subjective determination of a classroom teacher.[67]

In *New Braunfels Independent School District v. Armke*,[68] two students were suspended for drinking alcohol on a school trip. School officials also assessed a "scholastic penalty" that resulted in zeros on all graded class work missed on the days of suspension, and three grade points deducted for each day of suspension from their six-week grade average. The students challenged the school's actions, and the trial court ruled that the scholastic penalty, reducing grades for non-academic reasons, was constitutionally unreasonable and deprived the students of a protected property right and substantive due process. A Texas Court of Appeals reversed the trial court's decision, citing *Fisher v. Burkburnett*[69] and a Texas Attorney General's opinion.[70] The court emphasized that the school's handbook and oral explanations gave the students adequate notice of the policy. Further, the court determined that oral explanations were sufficient as long as they adequately explained the prohibited conduct and the penalties attached. The students were given adequate notice and there was no evidence that the scholastic penalties had any serious negative impact on the students. The students had been admitted to the university of their choice, and nothing in the record established that they were adversely affected.

In *Katzman v. Cumberland Valley School District*,[71] an eleventh grade girl joined with four other students in ordering and drinking a glass of wine while on a Humanities Class field trip to New York. She was a high achieving

66. *Id.*, 22 Ill.Dec. at 757, 383 N.E.2d at 233, *citing Knight v. Bd. of Educ.*, 348 N.E.2d 299 (Ill.Ct.App. 1976).

67. *Id.*, 22 Ill.Dec. at 758, 383 N.E.2d at 234.

68. 658 S.W.2d 330 [14 Ed.Law Rep. [220]] (Tex.Ct.App. 1983).

69. 419 F.Supp. 1200 (N.D.Tex. 1976).

70. 1974 TEX. ATT'Y GEN. OP. No. H-398 (in which the Attorney General of Texas concluded that: "We are not prepared to say that a school district may not adopt attendance regulations which impose academic penalties for unexcused absences from school ... Regulations of an independent school district which penalize students for unexcused absences by lowering their grades are not invalid on their face").

71. 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984).

student who ranked tenth out of 600 students in her class, had no record of any prior disciplinary violations, and she admitted the incident. School officials suspended her for five days, excluded her from classes, expelled her from the cheer leading squad, prohibited her from taking part in school activities, and permanently expelled her from the National Honor Society. School officials also imposed an additional penalty of reducing her grades by ten points in each subject not just for the five days of suspension but for the entire term. She was also not allowed to participate in an alternative Saturday program to avoid the grade reductions because her conduct involved "alcohol abuse." Asked to review the grade reduction policy as applied to Katzman, the court stated:

> [W]e cannot conclude that the Legislature in authorizing the adoption and enforcement of "reasonable rules and regulations" intended to sanction a grade reduction policy, without an optional make up program, for the kind of infraction involved here ... the assessed penalty downgraded achievement for a full marking period of nine weeks. Of course, for college entrance and other purposes this would result in a clear misrepresentation of the student's scholastic achievement. Misrepresentation of achievement is equally improper and, we think, illegal whether the achievement is misrepresented by upgrading or by downgrading, if either is done for reasons that are irrelevant to the achievement being graded. For example, one would hardly deem acceptable an upgrading in a mathematics course for achievement on the playing fields ... We conclude ... that the Board's policy and the manner in which it was exercised in this case represent an illegal application of the Board's discretion.[72]

In *Smith v. City of Hobart*,[73] a high school senior left the school with two other girls to travel to a Medical Biology class at a medical center. On the way, they stopped by one of the girl's house and drank some beer. Smith admitted drinking the beer, and was suspended for five days. School officials also reduced her grades by twenty percent for the semester. She challenged the grade reductions as arbitrary, capricious, and in violation of substantive due process rights. The court granted her motion for summary judgment, stating:

> It is ... clear that a student's academic record has importance not only as to the student's high school or grade school standing, but also affects the student's ability to enter the college of his choice, obtain postgraduate degrees, and eventually affects the student's chances of obtaining a job. Academic records are routinely examined when applying to the military or other government jobs.[74]

In examining the student's substantive due process claim, the court noted the test for a deprivation of substantive due process rights set forth in *Knight*, which directed a court "to weigh the severity of the punitive effect of the sanction against the severity of the conduct sanctioned."[75] The court also

72. *Id.* at 674–675.

73. 811 F.Supp. 391 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993).

74. *Id.* at 394.

75. *Id.* at 395, *citing Knight v. Bd. of Educ.*, 348 N.E.2d 299 (Ill.Ct.App. 1976). The court also noted that it was persuaded by Justice Craven's dissenting opinion in *Knight*. *Id.* at 396.

reviewed the opinions in *Katzman, Hamer, Campbell, Armke, Fisher,* and *Donaldson*, finally concluding that the school's rule in this case was unreasonable and arbitrary on its face. The court stated:

> By its own admission, the sanctions were imposed on Smith as a disciplinary measure and not imposed due to a lack of effort in academics ... To warrant an academic sanction, a student's misconduct must be directly related to the student's academic performance ... a student's grades should be a reflection of the student's academic performance, which are determined by the teacher based on a number of factors, including test scores, class participation, and attendance. The rule at hand gives the teacher no discretion in whether to deduct a student's grade for their suspension, which may lead to arbitrary results in practice, that is, disproportionate punishment for an incident[76] ... While the issue of reducing a student's grades as punishment for nonacademic conduct is not well-settled in this country ... a general consensus can be reached as to what a student's grades should represent. A student's grade or credit should reflect the student's academic performance or achievement, including participation in class, and presence in class. Reducing grades unrelated to academic conduct results in a skewed and inaccurate reflection of a student's academic performance.[77]

Discussion and Conclusion

Published judicial challenges to grades and grading polices date back nearly a century.[78] But in 1975 the U.S. Supreme Court's decision in *Goss v. Lopez* significantly strengthened the ability of students to challenge school officials' grades and grading policies.[79] In *Goss*, the Court held that when the actions of school officials may significantly impinge on students' protected liberty or property rights, school officials must comply with the minimum requirements of the Due Process Clause.[80] The Court's opinion in *Goss* opened the door for students to challenge not only disciplinary suspensions and expulsions, but also other decisions by school officials that may affect liberty or property rights, including grades and grading policies. Since *Goss*, there have been at least eighteen published opinions reviewing challenges to school grading policies that authorized grade sanctions for non-academic reasons.[81]

76. *Id.* at 399.

77. *Id.* at 397.

78. *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095 (Mass. 1913).

79. 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

80. *Id.*

81. *Smith v. Revere*, 2001 WL 489980 (Ohio Ct.App. 9 Dist.); *Barno v. Crestwood Board of Education*, 731 N.E.2d 701 [145 Ed.Law Rep. [482]] (Ohio Ct.App. 1998); *Yarber v. McHenry*, 915 S.W.2d 325 [107 Ed.Law Rep. [361]] (Mo. 1995) (en banc); *Smith v. City of Hobart*, 811 F.Supp. 391 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993); *Oschsner v. Board of Trustees*, 811 P.2d 985 [68 Ed.Law Rep. [156]] (Wash.Ct.App. 1991); *Slocum v. Holton Board of Education*, 429 N.W.2d 607 [49 Ed.Law Rep. [740]] (Mich.Ct.App. 1988); *Campbell v. Board of Education*, 475 A.2d 289 [17 Ed.Law Rep. [840]] (Conn. 1984); *Katzman v. Cumberland Valley School District*, 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984); *R.J.J. v. Shineman*, 658 S.W.2d 910 [14 Ed.Law Rep. [398]] (Mo.Ct.App. 1983); *New Braunfels Independent School District v. Armke*, 658 S.W.2d 330 [14 Ed.Law Rep. [220]] (Tex.Ct.App. 1983); *Donaldson v. Board of Education*, 53 Ill.Dec. 946, 424 N.E.2d 737 (Ill.Ct.App. 1981); *Raymon v. Alvord Independent School*

In these eighteen published opinions, courts were evenly split, with nine courts upholding these policies,[82] and nine courts ruling in favor of students challenging these policies.[83] In the nine opinions upholding these policies, courts generally expressed a need for judicial deference concerning academic judgments,[84] found the plaintiffs' allegations unproved,[85] or noted that the damages were trivial or non-existent.[86] In the nine cases ruling in favor of the students, the most common basis for overturning a grading policy was that it was contrary to state law, with five of the nine cases ruling for students finding that the policy was inconsistent with state law, or exceeded the statutory authority delegated to the local schools by the state.[87] Courts ruling for students also found that the challenged school policies were arbitrary and capricious,[88] or violated procedural[89] or substantive due process rights.[90]

District, 639 F.2d 257 (5th Cir. 1981); *Hamer v. Board of Education*, 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct.App. 1978); *Blackman v. Brown*, 419 N.Y.S.2d 796 (N.Y.Sup.Ct. 1978); *Gutierrez v. School District*, 585 P.2d 935 (Colo.Ct.App. 1978); *Knight v. Board of Education*, 348 N.E.2d 299 (Ill.Ct.App. 1976); *Fisher v. Burkburnett Independent School District*, 419 F.Supp. 1200 (N.D.Tex. 1976); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky.Ct. App. 1975).

82. *Smith v. Revere*, 2001 WL 489980 (Ohio App. 9 Dist.); *Slocum v. Holton Board of Education*, 429 N.W.2d 607 [49 Ed.Law Rep. [740]] (Mich.Ct.App. 1988); *Campbell v. Board of Education*, 475 A.2d 289 [17 Ed.Law Rep. [840]] (Conn. 1984); *R.J.J. v. Shineman*, 658 S.W.2d 910 [14 Ed.Law Rep. [398]] (Mo.Ct.App. 1983); *New Braunfels Independent School District v. Armke*, 658 S.W.2d 330 [14 Ed.Law Rep. [220]] (Tex.Ct. App. 1983); *Donaldson v. Board of Education*, 53 Ill.Dec. 946, 424 N.E.2d 737 (Ill. Ct.App. 1981); *Raymon v. Alvord Independent School District*, 639 F.2d 257 (5th Cir. 1981); *Knight v. Board of Education*, 348 N.E.2d 299 (Ill.Ct.App. 1976); *Fisher v. Burkburnett Independent School District*, 419 F.Supp. 1200 (N.D.Tex. 1976).

83. *Barno v. Crestwood Board of Education*, 731 N.E.2d 701 [145 Ed.Law Rep. [482]] (Ohio Ct.App. 1998); *Yarber v. McHenry*, 915 S.W.2d 325 [107 Ed.Law Rep. [361]] (Mo. 1995) (en banc); *Smith v. City of Hobart*, 811 F.Supp. 391 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993); *Oschsner v. Board of Trustees*, 811 P.2d 985 [68 Ed.Law Rep. [156]] (Wash.Ct.App. 1991); *Katzman v. Cumberland Valley School District*, 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984); *Hamer v. Board of Education*, 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct.App. 1978); *Blackman v. Brown*, 419 N.Y.S.2d 796 (N.Y.Sup.Ct. 1978); *Gutierrez v. School District*, 585 P.2d 935 (Colo.Ct.App. 1978); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky.Ct.App. 1975).

84. Courts upholding challenged school grading policies frequently cite *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095, 1096 (as long as school officials "act in good faith their conduct in formulating and applying standards and making [academic decisions] is not subject to review by any other tribunal").

85. *Knight v. Board of Education*, 328 N.E.2d 299 (Ill.Ct.App. 1976).

86. *Raymon v. Alvord*, 639 F.2d 257, 257 (5th Cir. 1981) (student's claim that her due process rights had been violated by a reduction in her overall grade point average from 95.478 to 95.413, which did not change her class standing, was "patently insubstantial"); *Knight v. Board of Education*, 348 N.E.2d 299 (Ill.Ct.App. 1976) (despite reduction in grade, student was admitted to the only school to which he applied).

87. *Katzman v. Cumberland Valley School District*, 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984); *Gutierrez v. School District*, 585 P.2d 935 (Colo.Ct.App. 1978); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky.Ct. App. 1975); *Barno v. Crestwood Board of Education*, 731 N.E.2d 701 [145 Ed.Law Rep. [482]] (Ohio Ct.App. 1998); *Blackman v. Brown*, 419 N.Y.S.2d 796 (N.Y.Sup.Ct. 1978).

88. *Smith v. City of Hobart*, 811 F.Supp 391 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993); *Oschsner v. Board of Trustees*, 811 P.2d 985 [68 Ed.Law Rep. [156]] (Wash.Ct.App. 1991); *Katzman v. Cumberland Valley School District*, 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984); *Hamer v. Board of Education*, 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct.App. 1978).

Although the split in these cases may seem incongruous at first blush, a thorough review of these cases reveals the emergence of some clear principles of law in this area. At least since 1913 and the Supreme Court of Massachusetts' decision in *Barnard v. Inhabitants of Shelburne*,[91] federal and state courts have attempted to distinguish between academic and disciplinary issues, granting broad deference to purely academic judgments, and requiring less due process for academic decisions than would be required for disciplinary decisions.[92] In *Yarber v. McHenry*, the Supreme Court of Missouri stated that the test for whether an action is academic or disciplinary is "if the sanction relates to the academic evaluation of a student, it is academic rather than disciplinary. Conversely, if the sanction does not bear upon the academic evaluation of the student, it is disciplinary rather than academic."[93] The obvious problem with this test is that while this distinction may be clear at the extremes, when the facts bring a case towards the middle of this continuum, the distinction is much less clear.[94] For example, grading an essay requires an academic evaluation, and judges generally should defer to educator's academic judgments on these issues. In contrast, punishments for possessing alcohol, drugs, etc., are disciplinary matters, and although appropriate judicial deference is still called for, school officials have a greater duty to provide due process, and courts may properly intervene to protect the rights of students when school officials' actions intrude on protected rights. But many of the cases reviewed above involved less clear-cut issues that often fell between the purely academic and purely disciplinary ends of this continuum and were not surprisingly characterized as academic matters by school officials and disciplinary matters by plaintiffs challenging the school's policies. When judges viewed these issues as primarily academic in nature, the deference they afforded to school officials was generally fatal to students' cases.[95]

89. *Yarber v. McHenry*, 915 S.W.2d 325, 329 [107 Ed.Law Rep. [361]] (Mo. 1995) (en banc) (holding that loss of a semester's worth of credit "requires a hearing with more formal and extensive procedures than that provided in *Goss*, which only involved a suspension for 10 days or less"); *Hamer v. Board of Education*, 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct.App. 1978).

90. *Smith v. City of Hobart*, 811 F.Supp 391 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993); *Katzman v. Cumberland Valley School District*, 479 A.2d 671 (Pa.Commw.Ct. 1984); *Hamer v. Board of Education*, 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct.App. 1978).

91. 102 N.E. 1095 (Mass. 1913).

92. The U.S. Supreme Court endorsed this approach in both *Horowitz* and *Ewing*, and state and lower federal courts have consistently recognized this distinction and the accompanying principles of law. *See Regents v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985); *Board v. Horowitz*, 435 U.S. 78, 87, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) ("Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter").

93. *Yarber v. McHenry*, 915 S.W.2d 325, 329 [107 Ed.Law Rep. [369]] (Mo. 1995), *citing Board of Curators v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

94. *See supra* note 45.

95. *Regents v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from the accepted academic norms as to demonstrate that the person or committee respon-

In contrast, courts were generally not inclined to be so deferential to the decisions of school officials when they ventured beyond the limits of academic discretion or otherwise exceeded reasonable parameters in the establishment or application of their local policies. Local school officials are generally authorized by state statutes to adopt and implement local policies. But these policies must be reasonable and within the bounds of delegated authority, both facially and as applied. As one court noted, to determine whether a policy was reasonable, courts look to "standards of ordinary common sense, tempered with judicial experience, and guided by considerations of public policy manifested in relevant statutory, administrative, and decisional law."[96] Policies that exceeded the reasonable bounds of delegated state authority on their face were struck down.[97] And if the applied sanctions were grossly disproportionate to the student's actions, these were also rejected by courts, holding that: "The test is to weigh the severity of the punitive effect of the sanction against the severity of the conduct sanctioned."[98] If there was a gross disparity between the conduct and the severity of the sanction, the court was likely to rule in favor of the plaintiff, finding a substantive due process violation.[99]

Based on a review of the case law, it appears that a key to avoiding successful challenges to grading policies appears to be staying close to a safe harbor where grading policies focus primarily on academic evaluations, respect students' due process rights, and comply with applicable state and federal laws. The further school policies stray from these boundaries, the more likely they are to invite litigation and the possibility of judicial intervention. Judges will generally defer to the academic and disciplinary decisions of educators as long as they remain in the realm of educational expertise and reasonable conduct. They will not hesitate, however, to intervene in a case that intrudes into the realm of judicial expertise by raising legitimate legal issues including violations of due process or conflicts with state or federal law. To avoid successful legal challenges, a review of the case law suggests:

1) Grading policies, as written and as applied, must be consistent with applicable state and federal laws;[100]

sible did not actually exercise professional judgment").

96. *Barno v. Crestwood*, 731 N.E.2d 701, 708 [145 Ed.Law Rep. [482]] (Ohio Ct.App. 1998).

97. *Gutierrez v. School Dist.*, 585 P.2d 935 (Colo.Ct.App. 1978).

98. *Knight v. Board of Education*, 348 N.E.2d 299, 303 (Ill.Ct.App. 1976). *See also Smith v. City of Hobart*, 811 F.Supp. 391, 395 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993) (*citing Knight*).

99. *Smith v. City of Hobart*, 811 F.Supp 391 [80 Ed.Law Rep. [839]] (N.D. Ind. 1993); *Katzman v. Cumberland Valley School District*, 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984); *Hamer v. Board of Education*, 22 Ill.Dec. 755, 383 N.E.2d 231 (Ill.Ct.App. 1978).

100. In addition to checking compliance with applicable state laws, also check for compliance with applicable federal laws including the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (1988) (governing access to student records including recorded grades); federal laws governing the free exercise of religion (which may require reasonable accommodations for the free exercise of religion, including excused absences on religious holidays), and federal laws concerning persons with disabilities, including the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 (2004); Section 504 of the Rehabilitation Act, 34 C.F.R. § 104.4 (1997); and the

2) Grading policies should be rooted in academic judgments as much as possible;[101]

3) Students must be provided with appropriate procedural due process, including adequate notice, a fair hearing, and an opportunity for appeals to fair and objective parties;[102]

4) When in doubt, err towards providing more rather than less due process;[103]

5) Grading policies should be fundamentally fair as written and as applied, and any sanctions should be fair and proportional to the offenses;[104]

6) When appropriate, consider providing an opportunity to students for constructive make-up work and attendance;[105]

Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (1997) (which may require reasonable accommodations for qualifying disabilities under certain circumstances).

101. At least since *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095 (Mass. 1913), courts have consistently granted broad deference to the academic judgments of educators. *See also Regents v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they may not override it unless it is such a substantial departure from the accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment").

102. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

103. *See, Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the due process clause must be satisfied"). Falling below the minimal requirements of the due process clause results in a violation of due process, while meeting or exceeding minimal requirements satisfies the due process clause. When due process requirements are unclear, the safer option is to err towards providing more rather than less due process, to assure that the minimum requirements are met or exceeded. However, limited resources require school officials to use common sense in deciding how much due process is appropriate under the circumstances.

104. Substantive due process requires fundamental fairness in actions that may significantly impinge on protected liberty or property rights. A fair policy must provide for both consistent treatment of similar cases, and allow for discretion in exceptional cases. For example, all absences are not the same, and should not be treated the same. There is a legitimate difference between absences for health or family reasons, and simple truancy. Similarly, all misconduct and all perpetrators are not the same. A behavior that may justify sanctions for one child may be a manifestation of another child's disability, making sanctions inappropriate and unlawful. *See* 34 C.F.R. § 300.523(2) (1999) (setting out guidelines for determining whether a special education student's misbehavior is a manifestation of the student's disability). Further, sanctions should be proportional to offenses. *See, Smith v. City of Hobart*, 811 F.Supp. 391, 395 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993) (noting that the test for whether a sanction violates substantive due process requirements is "to weigh the severity of the punitive effect of the sanction against the severity of the conduct sanctioned").

105. In every reviewed case in which a student was given a constructive opportunity to avoid negative consequence through make-up work or attendance, but declined to exercise that option, the school prevailed. *See Slocum v. Holton Bd. of Educ.*, 429 N.W.2d 607 [49 Ed.Law Rep. [740]] (Mich.Ct.App. 1988) (student declined to take advantage of an opportunity for make up attendance); *R.J.J. v. Shineman*, 658 S.W.2d 910 [14 Ed.Law Rep. [398]] (Mo.Ct. App. 1983) (student declined to request prior permission for absence). In contrast, in *Katzman v. Cumberland Valley School District*, 479 A.2d 671 [19 Ed.Law Rep. [318]] (Pa.Commw.Ct. 1984) the court ruled in favor of the student, faulting school officials, in part, for failing to offer a make up program. *See, Id.* at 674 ("we

7) Know and follow your own policies,[106] and assure that all persons responsible for administering these policies know and follow the current policies;

8) Adequately document the administration of grading policies, from notice to students through any challenges by students or parents.[107]

Conclusion and Comments on the Future of the Law in this Area

Mixed rulings in these cases are likely to continue because of the significant factual differences in these types of disputes, the varied willingness of judges to intervene in these matters, and significant differences in states' statutes on local authority, grading, discipline, and school attendance. Further, there is a deep and persistent philosophical divide among both educators and judges about what grades should represent. Some argue that grades should reflect more than just a student's performance on an examination, that attendance and positive participation are important elements in the learning process, and that because the education process is aimed at least in part at preparing students to be responsible citizens and employees, educators may legitimately use grades to encourage positive behaviors in students, and to discourage the use of alcohol, drugs, etc.[108] In contrast, others

cannot conclude that the legislature in authorizing the adoption and enforcement of 'reasonable rules and regulations' intended to sanction a grade reduction policy, without an optional make up program, for the kind of infraction involved here."). The cases demonstrate that it is advantageous to give students control of their own destinies in these matters, by given them constructive alternatives to grade sanctions, placing the burden on the student to compensate for the missed work or classes, and holding the student responsible for failing to take advantage of these reasonable options to grade sanctions. Placing the remedial burden on the student has many benefits. If the student's remedial efforts are satisfactory, everyone wins. But if the student declines the additional opportunity, the student had an opportunity to control his or her own fate, and waived the opportunity for a more positive outcome, and subsequent complaints are much less likely to win sympathetic treatment from a reviewing judge. Note though, that it should be a *constructive* option. *See, Yarber v. McHenry*, 915 S.W.2d 325, 327 [107 Ed.Law Rep. [361]] (Mo. 1995) (ruling for student although student declined to complete make-up days "when his mother allegedly saw students in the make-up classes eating pizza and watching a movie" rather than engaging in constructive learning activities).

106. It is difficult or impossible for school officials to persuasively argue that students should have known about school policies school officials were unaware of, or that students should have followed school policies that school officials did not follow.

107. A good system of documentation promotes adequate due process by encouraging systematic and rational treatment of all students and all disputes. Further, it provides subsequent evidence of adequate due process if it is later needed. In any subsequent litigation, good documentation often wins or loses cases.

108. *See, Fisher v. Burkburnett Independent School District*, 419 F.Supp. 1200 (N.D.Tex 1976) ("School administrators have a pressing interest in discouraging drug abuse at school. They may propagandize against such behavior, but the efficacy of strict punishment is surer. This concern with general deterrence explains the harshness of the [school policy] on drugs. Stripping the plaintiff of academic credit does not serve any academic purpose, but it does effect school discipline. The school's policy of suspension for a trimester thus furthers a legitimate interest in a rational if severe manner"); *Slocum v. Holton Board of Education*, 429 N.W.2d 607, 610 [49 Ed.Law Rep. [740]] (Mich.Ct.App. 1988) (citing a Michigan Attorney General opinion holding that attendance requirements instill self-discipline and that "These and similar considerations are proper educational values which will not necessarily be fully reflected in test results. School authorities may determine that attendance, class participation and similar fac-

insist that grades must represent academic achievement, and that allowing non-academic factors to affect academic grades distorts the truth about students' academic achievement, results in a misrepresentation of academic records, and opens the door to arbitrariness and abuse of discretion by school officials.[109]

Given the continuing debate over what grades should represent, and some emerging trends, it would not be surprising to see an increase in legal challenges to grades and grading policies. This increase may be driven by several factors, including a growing willingness by students and their parents to challenge and litigate the decisions of school officials,[110] and recent changes in state and federal laws governing public schools. Recent state legislation indicates that state officials are increasingly willing to blur the lines between academic and disciplinary actions, by using attendance requirements, grades, and graduation as levers to influence students' behavior beyond academics.[111] States are also likely to increase pressure on students for better attendance because of changes in federal law, specifically the No Child Left Behind (NCLB) Act, which is creating significant pressure on local

tors are proper educational values bearing on a student's academic achievement").

109. *See, Smith v. City of Hobart*, 811 F.Supp. 391, 397–398 [80 Ed.Law Rep. [839]] (N.D. Ind. 1993) ("Reducing grades unrelated to academic conduct results in a skewed and inaccurate reflection of a student's academic performance ... Misrepresentation of achievement is ... improper and, we think, illegal whether the achievement is misrepresented by upgrading or by downgrading, if either is done for reasons that are irrelevant to the achievement being graded. For example, one would hardly deem acceptable an upgrading in a mathematics course for achievement on the playing field") *See also,* Gary Chartier, *Truth-Telling, Incommensurability, and the Ethics of Grading,* 2003 B.Y.U. EDUC. & L.J. 37, 79 (2003) (calling for "instructors to grade with the goal of telling the truth to potential transcript readers and to take seriously the incommensurability of [subject-matter competence] and other characteristics of students that become apparent in the course of teaching and evaluating them" and suggesting that educators "should not use a grade as a means of expressing moral disapproval").

110. *See* Seth Stern, *Never Far From School Halls: The Lawsuit,* CHRISTIAN SCIENCE MONITOR, Oct. 9, 2001, at 15 ("educators say the volume of suits is on the rise, forcing them to siphon time and money away from learning. One-quarter of elementary school principals surveyed by the American Tort Reform Association in 1999 had faced a lawsuit or out-of-court settlement in the previous two years"). *But see also, Id.* (in which other commentators suggest that it may also be an increase in suits involving students with disabilities and challenges to harsher "zero-tolerance" policies that may be fueling an increase in litigation, and not just more litigious students and parents).

111. *See* Vicky Eckenrode, *State Ties School Attendance to Driving,* SAVANNAH MORNING NEWS, Aug. 24, 2004, *available at www.savannahnow.com/stories/082404/2391781.shtml* ("There are 22 states that have tied school performance or behavior some way into teens' ability to hold driver's licenses"). Under these statutes students may lose their drivers licenses for absences from school, discipline problems, or if they fail to maintain the required grade point averages. *See, e.g.,* N.C. GEN. STAT. § 20–11(n) (2004) ("A person who desires to obtain a permit or license issued under this section must have a high school diploma or its equivalent or must have a driving eligibility certificate. A driving eligibility certificate must meet the following conditions ... (a) The person is currently enrolled in school and is making progress toward obtaining a high school diploma or its equivalent"). The North Carolina Administrative Code defines "making progress toward obtaining a high school diploma" as meaning "that the student must pass at least seventy percent (70%)" of the student's courses each semester. N.C. ADMIN. CODE tit. 16, r. 6E.0301 (a)(10)(c)(2) (2004).

schools to improve student attendance.[112] Many of the previous legal challenges to grading policies involved disputes over attendance requirements tied to grades. Given these recent developments, and the serious potential consequences attached, an increase in litigation involving these issues is very possible.

School officials would be wise to take potential legal challenges to their grading policies seriously. Although the cases in the last thirty years were evenly split, with half ruling for students, and half upholding challenged school policies, students have prevailed in four out of five of the cases since 1990.[113] But school officials can take preventive measures to help assure that their grading policies are legally sound. A review of the case law provides some clear guidance on how to craft and administer a legally sound grading policy. Reasonable and proportional school grading policies that focus primarily on academic evaluations, respect students' due process rights, and comply with applicable laws, are likely to survive these challenges, while policies that drift too far from these safe harbors may not. A review of the above cases should provide useful guidance in crafting and administering a legally sound grading policy.

112. 20 U.S.C. § 1111(b)(2)(C)(vi) (as a condition of receiving federal funding, states are required to demonstrate measures of "Adequate Yearly Progress" (AYP) which include "graduation rates for public secondary schools ... and at least one other academic indicator, as determined by the State." Many states are using attendance as an indicator of AYP, dramatically increasing the pressure of school officials to assure high student attendance rates, or face serious sanctions for failing to meet AYP standards).

113. *See Barno v. Crestwood*, 731 N.E.2d 701 [145 Ed.Law Rep. [482]] (Ohio Ct.App. 1998); *Yarber v. McHenry*, 915 S.W.2d 325 [107 Ed.Law Rep. [361]] (Mo. 1995); *Smith v. Hobart*, 811 F.Supp. 391 [80 Ed.Law Rep. [839]] (N.D.Ind. 1993); *Ochsner v. Board of Trustees*, 811 P.2d 985 [68 Ed.Law Rep. [156]] (Wash.Ct.App. 1991) (ruling for plaintiff students). *But see Smith v. Revere*, 2001 WL 489980 (Ohio Ct.App. 9 Dist.) (upholding challenged grading policy).