

An Introduction to the Legal Process

Due Process Issues Involving a Student



CASE STUDY

Due Process for Students

Your Role: You are Dr. Jane Mahoney, Course Coordinator for Nursing of Children. You are responsible for the oversight of two theory/didactic sections of 40 students each as well as the oversight of 10 clinical rotations with 8 students in each clinical group.

You receive an email from a BSN accelerated nursing student, Jeremy Johnson, who is presently in his third semester of study (out of four semesters), contesting his clinical failure. The clinical faculty member, Doris Russert, told you that Mr. Johnson has anger management issues. Professor Russert reports that Mr. Johnson had an outburst at the nurse's station on a busy pediatric floor and that she has awarded Mr. Johnson a clinical grade of unsatisfactory for unprofessional behavior. She also states that he had an anger management issue in clinical conference and left the conference abruptly.

When you meet with Mr. Johnson, you note that he is 6 foot 6 inches tall and is built similarly in stature to a professional football player. Mr. Johnson claims that the clinical faculty member changed the time of the clinical day and did not notify him. He states that he expressed frustration at the nurse's station but did not have an outburst. He also tells you that Professor Russert did not observe him and was not on the unit at the time. He begins to cry and tells you that he is being treated like a monster because of his size.

Questions:

- What questions do you need to ask Professor Russert?
- What documentation do you need to review?
- What is your best course of action?

Due Process: Legal Principles and Review of the Literature

The student would have been dismissed from the program and filed a lawsuit. A judge or jury would have seen just how carelessly Professor Russert had acted, how arbitrarily the university had allowed this to happen, and how summarily the student had his career in nursing ended with such a devastating comment about his character. It is not difficult to predict the outrage that the court would have expressed – and that means the verdict and award of money damages against Professor Russert and the university, compensating the student for the university’s defective and unfair conduct, could well have been very high.

Discussion of Case

The complete absence of any notes in the student’s record made it impossible to fairly impose any remedial action, and confirmed that there had been no evidence that formative evaluations had taken place. As a result, the record demonstrated that due process had not been provided to the student. Dr. Mahoney did decide to require the student to undergo additional training in appropriate behavior.

The two simple words express the notion that whenever a state agency does something that results in harm to an individual, it must first follow a process that is fairly designed to produce a fair result to that person. Exactly what “process” is “due” to the individual varies from case to case, and depends on many different factors.

University Faculty Intellectual Property: Legal Principles and Review of the Literature

As a result, the record demonstrated that due process had not been provided to the student. Dr. Mahoney did decide to require the student to undergo additional training in appropriate behavior. You may have noticed that the record did not include any other “improper outbursts” and this one was only arguably that.

But Dr. Mahoney’s decision was “reasonable” and the “harm” inflicted on the student was slight. For that reason, it is extremely unlikely that any judge or jury would interfere – rather, the law would support the “business judgment” that Dr. Mahoney had made, because she followed a process that was “due”.

Faculty or Colleague Theft of Original Work

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Work-for-Hire

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Relevant Legal Cases

Board of Curators of the University of Missouri v. Horowitz, 435 U. S. 78 (1978)

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Regents of the University of Michigan v. Ewing, 474 U. S. 214 (1985)

It is crucial that clinical faculty understand the student’s right to due process (Whitney, 2009). *Due process* is one of the most complicated subjects in American law: it fills casebooks and is the subject of semesters of study in law schools. The two simple words express the notion that whenever a state agency does something that result in harm to an individual, it must first follow a process that is fairly designed to produce a fair result to that person. Exactly what “process” is “due” to the individual varies from case to case, and depends on many different factors. But in very general terms, the “right of due process” equates to fairness (Johnson, 2009).

The steps are as follows:

1. The college of university must have clear policies regarding the student conduct and appeals processes
2. The student is entitled to written notice of any charges against him/her
3. The student is provided sufficient opportunity to rebut the charges
4. The student has a right to select an advisor (if stipulated in the program or college policy)
5. The student has a right to confront his/her accusers.

Summary

When a student receives feedback and evaluation of clinical misconduct, clinical faculty members will be held to a standard of fairness when investigations are made as to whether a fair process was followed. In this chapter's case study, the clinical faculty member was not reasonable and rushed to quick and unfair judgment of clinical misconduct that should have been avoided, and would have been had the faculty member actually provided the student with an opportunity to be heard. In the appeal process, the course coordinator followed a thoughtful process which resulted in evidence that supported the student's appeal. The complete absence of any notes in the student's record made it impossible to fairly impose any remedial action, and confirmed that there had been no evidence that formative evaluations had taken place. As a result, the record demonstrated that due process had not been provided to the student. Dr. Mahoney did decide to require the student to undergo additional training in appropriate behavior. You may have noticed that the record did not include any other "improper outbursts" and this one was only arguably that. But Dr. Mahoney's decision was "reasonable" and the "harm" inflicted on the student was slight. For that reason, it is extremely unlikely that any judge or jury would interfere – rather, the law would support the "business judgment" that Dr. Mahoney had made, because she followed a process that was "due".

Imagine what would have happened in this case if Dr. Mahoney had not overturned the clinical failure. The student would have been dismissed from the program and filed a lawsuit. A judge or jury would have seen just how carelessly Professor Russert had acted, how arbitrarily the university had allowed this to happen, and how summarily the student had his career in nursing ended with such a devastating comment about his character. It is not difficult to predict the outrage that the court would have expressed – and that means the verdict and award of money damages against Professor Russert and the university, compensating the student for the university's defective and unfair conduct, could well have been very high.

Due process, in short, protects not just the student. It protects the faculty member and the university as well.



PREVENTION TIPS

- Offer Faculty Development Sessions on Clinical Evaluation and Due Process
- Remember the importance of first finding out all the facts.
- Follow written policies/guidelines outlined in the student handbook.
- Have evidence students have read clinical expectations - such as a signed statement indicating that they have read the handbook.
- When an incident occurs, document deviations from policy and have faculty and student develop a plan with specific follow up date and consequences of failure to satisfactorily complete the plan.
- Have student read the documentation, have a chance to put “their version” in writing and sign the form indicating they are aware of the documentation– they do not have to agree with the documentation; however, there does need to be evidence that they have read it.



WHEN TO CONSULT THE UNIVERSITY ATTORNEY

Consult the university attorney when you are confronted with a new and difficult situation, or if you want to review high stakes policies like clinical misconduct, clinical failure, or clinical dismissal policies.



HELPFUL RESOURCES

The American Nurses Association’s Code of Ethics can be found at www.nursingworld.org. Click on the *Nursing Ethics* header, and then *Code of Ethics for Nurses*.



CRITICAL ELEMENTS TO CONSIDER

- As a faculty member, you must provide the student with an opportunity to be heard before rushing to summary judgment.
- Consult academic policies related to clinical failure prior to informing the student verbally or in writing
- If you are a novice faculty member, consult an experienced faculty member to review your documentation
- If you are an experienced faculty member or academic administrator, educate new faculty about student’s due process rights
- Provide the student advanced notice of a clinical failure

Table 17.1 Examples of Specific IOM Standards of Practice

IOM'S STANDARDS OF PRACTICE			
Independence	Neutrality/Impartiality	Confidentiality	Informality
The Ombudsman Office and the Ombudsman are independent from other organizational entities.	The Ombudsman is neutral, impartial, and unaligned.	Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.	The Ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at Ombudsman discretion – engaging in informal third-party intervention. When possible, the Ombudsman helps people develop new ways to solve problems themselves.
The Ombudsman holds no other position within the organization which might compromise independence.	2.2: The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization.	The Ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization regarding a visitor's contact with the Ombudsman or confidential information communicated to the Ombudsman, even if given permission or requested to do so. The Ombudsman may, however, provide general, nonconfidential information about the Ombudsman Office or the Ombudsman profession.	The Ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.

Adapted from International Ombudsman Association Standards of Practice (2009)

³ In *New York Times v. Sullivan* (1964) a constitutional prohibition was announced where for the first time it was codified that a public official could not recover damages for a defamatory falsehood relating to his official conduct unless the public official could prove that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Defamation or libel, while both serious, remain difficult to ultimately prove.

Table 17.2 General Job Description Requirements for Position of Ombudsman

<p>Critical Skills and Characteristics</p> <hr/> <ol style="list-style-type: none">1. Communication and problem-solving skills2. Decision-making/strategic thinking skills3. Conflict resolution skills4. Organizational knowledge and networking skills5. Sensitivity to diversity issues6. Composure and presentation skills7. Integrity <p>Accountabilities</p> <hr/> <ol style="list-style-type: none">1. Dispute resolution/consultation and referral2. Policy analysis and feedback3. Community outreach and education4. Establish//maintain Office of the Ombudsperson <p>Education and Work Experience</p> <hr/> <ol style="list-style-type: none">1. Varies, usually mostly a Bachelor’s degree, but an advanced degree is often desired and based on the setting of the Ombudsperson2. A work history that indicates the above characteristics and function of this job have been previously demonstrated
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