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**AVOIDING THE BREACH:
PRACTICAL STEPS AND ETHICAL CONSIDERATIONS**

**Norma M. Goonen, Ed.D.
Dean, Undergraduate Studies
Nova Southeastern University
Ft. Lauderdale, Florida**

Introduction

In addition to the two critical requirements of conforming to the law and applying preventive law, there are ethical and practical considerations that often arise in student grievances and actions. Ethical dilemmas, where both the student and the institution may have legitimate claims, are the most difficult for a decision-maker to reconcile. Adding to these difficulties, practical considerations (e.g., reputational, financial, political) must be examined, and their potential effects weighed before a course of action is pursued.

This paper will focus on the ethical and practical aspects of common academic disputes and on the preventive steps an institution may wish to establish to anticipate and avert them. The issues discussed will be academic rather than student disciplinary actions.¹ Nevertheless, it is important to note that there are cases in which the distinction between what is considered academic versus disciplinary blurs, such as in charges of cheating, or unprofessional behavior in a classroom or internship assignment.

Legal bases for challenges

Most of the challenges to academic decisions by students are brought forth on the bases of **constitutional issues** and **contractual issues**, although cases citing other bases, such as tort claims (e.g., educational malpractice) have been litigated. This paper will focus on practical

¹ For an in-depth description of due process and higher education, see Ed Stevens, *Due Process and Higher Education: A Systemic Approach to Fair Decision Making*. ASHE-ERIC Higher Education Report Vol. 17, No. 2. (Washington DC: The George Washington University, Graduate School of Education and Human Development, 1999). On this point, see pp. 27-34.

considerations an institution can take to prevent student challenges on (1) due process (procedural and substantive) and discrimination at public institutions; and (2) breach of contract issues at both public and private institutions. The following represent important practical steps to create an ethical and reasonable balance between the rights and responsibilities of students and those of the institution, and to avoid an institution's exposure to these challenges.

Practical (preventive) suggestions

- **Greater institutional scrutiny of potentially meritorious student claims should be considered, including an “early warning” system for potentially problematic situations.**

Sometimes institutions make inadvertent mistakes that may negatively affect students, such as: a) inconsistent or inaccurate listings in publications, often resulting from changes that were made in one place, but not throughout the entire publication, or in all external publications, such as the catalog and student handbook; b) inconsistent application of curricula and academic policies and procedures; c) inconsistent advice given by the institution's agent (e.g., advisor, faculty member, admissions officer, registrar's office); and d) inconsistent application by the institution of policies and procedures. Once the mistake has been discovered (often by a student), and the student's claim has been found to have merit, an agent of the institution with appropriate authority will need to handle the individual case as well as implement corrective measures to prevent further problems.

An “early warning” system designed to communicate with students who are potentially at risk (e.g., poor grades, insufficient progress) will go a long way to demonstrate, should a challenge later arise, that the institution was doing all it could to work with the student by providing an avenue for communication and, if appropriate, possible remediation. Also, early notification of potentially problematic situations (such as programmatic or procedural changes) should be instituted. Such early notification of upcoming changes can avert student challenges by giving the students the opportunity to work with the institution's designated agents towards minimizing any negative effects of the changes that will affect their program of study or their ability to complete a degree.

It is ethically questionable to allow students to come to the end of their coursework or program before they are told that their performance, demeanor, or traits are substandard. In fact,

students in graduate and professional schools who are dismissed for failure to successfully perform in clinical settings will engage in vigorous challenges of the institution's decisions because they have 'more to lose.' Therefore, early observation to detect and address students' deficiencies is highly recommended. In fact, upon review of two such cases,² one author has advocated for institutions to institute "clinical boot camps," where "early observation and learning" opportunities may be included, directly related to the competencies and traits that a student must exhibit during their clinical experiences.³

- **Each institution should have a clearly written and widely disseminated policy that also provides a process for student challenges and grievances. It is beneficial to have university counsel review the procedures to make certain they conform with all applicable statutes and due process rules (in the case of public institutions), or fair procedures (for private institutions). These policies and procedures should be consistently applied.**

Student challenges to academic dismissals, suspensions, and denial or revocation of degrees may be based on charges that the institution failed to provide due process, based its decision on discriminatory grounds, applied rules inconsistently, or acted in an arbitrary and capricious manner.

Existing due process or 'fair procedures' policies should be examined by appropriate administrators, and if at all possible, by legal counsel. If policies are found to be unclear or overbroad, they should be modified to achieve clarity and a "balance between specificity and flexibility in the procedural safeguards to be provided in each case."⁴ The process should be evaluated after each challenge and the policies and procedures should undergo periodic review.

All published and unpublished (internal) procedures for grievances, appeals, or policy challenges should state who the final decision-maker at the academic or administrative level is. This will route the student appeal to the proper administrator, and may prevent the institution

² *Lewin v. Medical College of Hampton Roads*, 910 F.Supp.1161 (E.D. Va. 1996), and *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529 (N.D. Ga. 1996).

³ Gary Pavela , "Disciplinary and Academic Decisions Pertaining to Students: A Review of 1996 Judicial Decisions," *Journal of College and University Law* 24 (1997): 218-222.

⁴ Stevens, 77-79.

from “being bound by the well-intentioned but uninformed representations of someone acting outside the scope of his or her authority.”⁵

Finally, challenges based on other issues, including discrimination in admissions practices, sexual harassment, Title IX claims, and discrimination on the basis of race, gender, or disability, can be successfully defended by the institution if due process was adequately provided and the institution can prove it acted in good faith. A recent and disturbing trend is that students who are not academically successful or who do not exhibit appropriate behavior are using the shield of anti-discrimination laws to claim prejudice on the part of the institution, when their poor performance is really the result of the student’s own irresponsibility or incompetence.⁶

Fortunately for institutions of higher education, however, academic decisions made by institutions in a reasonable manner were not only subject to less scrutiny than disciplinary decisions, but courts have refused to override a faculty member’s academic/professional judgment unless it substantially and radically departed from accepted academic norms in such a manner as to demonstrate a complete lack of academic judgment.⁷

- **University/college catalogs and departmental procedures, grading policies and practices, course syllabi, and other vehicles of dissemination of academic rules and regulations should be made available to students, reviewed for accuracy, and audited periodically.**

The college catalog has been utilized in a variety of ways in the past few decades.⁸ While it has always been generally viewed as an information piece and, more important, as part of the contract between the institution and its students, it also has increasingly been used as a recruiting tool and consumer document. Most catalogs contain policies and procedures regarding admissions, financial aid and registration, academic curricula, and disciplinary rules. They must also include certain federal legislation and regulations regarding federal aid programs, refund

⁵ Margaret J. Barr and Associates, *Student Services and the Law: A Handbook for Practitioners*, (San Francisco: Jossey-Bass, 1988), 96.

⁶ For a review of discrimination cases, see Catherine Pieronek, “Discrimination Against Students in Higher Education,” *Journal of College and University Law*, 26 (1999): 307-349. On this latter point, see p. 349.

⁷ Edward N. Stoner II and Corey A. Detar, “Disciplinary and Academic Decisions Pertaining to Students in Higher Education,” *Journal of College and University Law*, 26 (1999): 273-290. On this point, see p. 280.

⁸ For a historical overview of the growing importance of the catalog in higher education, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*, 3rd ed. (San Francisco: Jossey-Bass, 1995), 469-470; David Davenport, “The Catalog in the Courtroom: From Shield to Sword?” *Journal of College and University Law*, 12 (1985): 201-26; and Leroy L. Sullivan, “Litigation and the College Catalogue: ‘Caveat Emptor’ Reinterpreted,” *NOLPE School Law Journal*, 10 (1982): 128-137.

policies, cost of attendance, provisions for students with disabilities, and information about students' rights and responsibilities. It is therefore extremely important that an institution implement procedures and support systems that ensure that the policies and statements in the catalog and other related publications (such as viewbooks and student handbooks) be accurate and consistently applied. Institutions should guard against misrepresentations of programs and personnel that can be viewed as false advertisement or promising more than the institution can deliver. Failure to produce what the catalog indicates and failure to follow stated procedures can result in legal challenges for breach of contract and potential financial risk in resulting contractual litigation, not to mention a tarnished reputation.

A college or university has the duty to inform the students of major changes in the school's programs. Inaccuracies should be immediately corrected, and unwritten important policies should be reduced to writing and disseminated. The catalog, student handbook, and other such documents should be written at a level that is understandable to all potential and current students.

Some institutions have developed electronic degree audit systems to automatically monitor the students according to the year of entry into the university or matriculation into a specific program, if the institution will honor the curriculum of the entering year's catalog. This helps in preventing costly curricular mistakes that would result in students wasting time, money, and effort, while preserving the institution's educational integrity and responsibility.

- **'Reservation of Rights' clauses in the catalog can be utilized to afford the institution needed flexibility in its educational responsibility.**

The purpose of a "Reservation of Rights" clause is to reserve to the institution the right to change policies, procedures, and programs without further notice to its students. An institution's unilateral decision to make such changes, for a number of good and valid reasons (e.g., changes in accreditation/certification rules, strengthening of the curriculum) has generally been upheld in court, providing the modifications are not exercised in bad faith or with intent to harm.

Institutions (especially private institutions) should be cautioned, however, that courts have viewed the relationship between the institution and its students as contractual, even when a university had a broad loophole statement in its catalog that stated that the catalog did not constitute a contract and that the university did not intend to be bound by its terms.⁹ A specific

⁹ *Southwell v. University of the Incarnate Word*, 974 S.W.2d 351 (Tex. App. 1998).

clause reserving the right of the university to change or cancel programs may contain some of the common reasons for changes (e.g., financial exigency, changes in program, accreditation, or certification requirements).

- **Orientation and training of full time and adjunct faculty and/or professional advisors regarding issues of advisement and enforcement of the rules are critical. Many potential problems are prevented by having a process and by the effective communication of the rules (what is and is not shared).**

The relationship between a student and the university is a partnership and no longer considered a custodial relationship ('in loco parentis').¹⁰ Whereas the courts tend to find the institution accountable for its academic duty, they have also held the students responsible for their own learning and for their responsibility to know and abide by the rules. However, even in cases where the written documents are accurate, the actions of the institution's agents (faculty, advisors, administrators) and statements made by those in a position of apparent authority may bind the school to contradictory or conflicting statements of policy or procedure from what is written in the official documents.¹¹ If a student relies upon the advice of an institution's agent to the student's detriment, the institution may be involved in a losing battle in trying to enforce the original rule and the student may be awarded appropriate relief.

College and university personnel should be informed and trained in the following: 1) the content of policies and procedures in the catalog and other publications, their binding nature, and the employee's responsibility to uphold those policies; 2) the fact that these employees' verbal or written statements could be construed as a representation that is potentially binding and alters the original 'contract' inherent in the institution's publications; 3) identifying/recognizing situations when the principles of due process are appropriate and becoming familiar with the institution's grievance and appeal processes;¹² and 4) background information on laws relevant to the issues.¹³ The special relationship between students and their academic advisors is a system of

¹⁰ See Robert D. Bickel and P.F. Lake, *The Rights and Responsibilities of the Modern University*, (Durham, NC: Carolina Academic Press, 1999).

¹¹ Sullivan, 135.

¹² Stevens, 78.

¹³ Id. at 79.

shared responsibility, but students do trust that the advisor is speaking for the institution, and that the institution will be responsible for the promises made by its agents.¹⁴

- **It is necessary to anticipate the steps to take in changing course requirements, offerings, residency, and other curricular changes.**

Institutions should develop, revise, and eliminate programs thoughtfully, recognizing the obligations that an institution has to its students, and anticipating the possible consequences of the changes. Whenever possible, it would be preferable for the college or university to make changes effective in time for the printing of the ‘next’ catalog. However, in this electronic age, many catalogs are available online; therefore, changes can be made anytime, as there is no “publishing deadline” and modifications can be added every day. This poses an interesting challenge and may even call into question under “what catalog” the student entered, as there may not be a published hardcopy containing effective dates. Therefore, policies and procedures in online catalogs should have effective dates, or notations as to when changes were made.

Another related issue is that of dissemination to each student of the catalog and other ‘contractual’ documents. This is so important that many institutions require that students sign a statement stating that they acknowledge receipt of the catalog and have read, understood, and will abide by the information therein. This can still be accomplished with an online catalog.

Institutions usually have more latitude regarding changes in the curriculum, especially when they are minor, whereas major changes in admissions criteria, tuition structures, or academic policies will have a greater impact and result in more student challenges. A reservation of rights statement can state that the courses listed are subject to change through normal academic channels. An internal procedure should state who can initiate new courses and changes in existing coursework, and who renders the final decision. However, when implementing any changes, it is important to review the legality and feasibility of these modifications, revise all documents so they will be consistent, inform students and appropriate employees, and re-train personnel.

¹⁴ For a thorough analysis of academic advising, see Susan H. Frost, *Academic Advising for Student Success: A System of Shared Responsibility*. ASHE-ERIC Higher Education Report No. 3. (Washington DC: The George Washington University, School of Education and Human Development, 1991).

- **Ethical and practical principles to be taken by the institution in the elimination of programs include steps to protect students who will bear the burden of the changes.**

Elimination of programs, majors, and closing of campuses or even the institution can be devastating to current and prospective students who are relying upon the university to complete their course of study. This is particularly true when programs are unique or not transferable. However, under certain adverse conditions, such as financial exigency or insolvency of programs or site operations, an institution will survive student challenges on the institution's action. The same careful planning as described in the preceding bullet should be implemented by the institution.

- **Use of the “grandfather” policy and its helpful relatives may be an appropriate compromise to meet the institution's as well as the student's needs.**

When eliminating programs or majors after the student has been admitted, the use by the institution of the “grandfather/grandmother” policy can provide relief to students by allowing them to complete their programs under the original requirements of the catalog year in which they were admitted and/or matriculated, or giving students a choice of the old or new major requirements. Although changing rules in midstream may be legal, it may not always be fair, just, or ethical.¹⁵ For example, an institution that is closing a particular satellite campus or discontinuing a major will often commit to “teaching-out” the students in that site, program, or major – that is, the institution will provide instruction to those already in the ‘pipeline’, but the university will not admit any new students.

Provided the change is not required by law, federal/state regulations, or accreditation/certification rules, the ‘grandfather/grandmother clause’ is an attempt by the institution to keep its promise to the student, while proceeding with the change for entering students. It is helpful, when students are offered an option, to have each student sign a document to indicate his or her choice. As is true in all of the situations described in this paper, clear, proper and substantial documentation will help the institution defend its position upon a challenge by a student. Staff training should therefore include proper documentation techniques.

¹⁵ For a more extensive treatment of ethical issues regarding student disputes on academic matters, see Norma M. Goonen and Rachel S. Blechman, *Higher Education Administration: A Guide to Legal, Ethical and Practical Issues*. (Westport, CT: Greenwood Press, 1999).

- **Consulting pertinent codes of ethics will help make decisions that mirror the values of the institution.**

In addition to performing legal audits of their publications, policies, and procedures, it would be helpful for an institution to perform a values audit, effecting a comparison of institutional statements with institutional actions. Does the institution actually live by its own values and ethical precepts? Institutions should therefore “develop or reaffirm an institutional code of ethics which recognizes the student as a full partner in the educational endeavor with special emphasis on the principle of fair practice.”¹⁶ Several associations, such as the National Academic Advising Association (NACADA) and the American Association of University Professors (AAUP), have developed codes of ethics or statements of professional standards, and institutions may wish to refer to them as well.

Conclusions

Institutions would be wise to base their actions not only on legal imperatives, but also on ethical and practical considerations. A reasonable balance between the rights and responsibilities of the college/university and those of its students may be achieved after careful and thoughtful review of institutional actions that can affect the educational and professional future of those it serves.

¹⁶ Sullivan, 136.