The Legal, Professional, and Ethical Dimensions of Education in Nursing
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publishing the second edition that incorporates new and emerging areas of law that
affect higher education.
THE LEGAL, PROFESSIONAL, AND ETHICAL DIMENSIONS OF EDUCATION IN NURSING

SECOND EDITION

Mable H. Smith, BSN, MN, JD, PhD

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This book is dedicated to my daughters, Nakia and Renée and to my grandson, Ajay Watson, who provided a special inspiration during the many hours spent on the revisions.
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Preface

Purpose of the Text

Faculty in higher education environments face many legal, professional, and ethical issues from grade appeal to denial of tenure, to conflicts with faculty and administrators, to sexual harassment, to giving extra points to prevent a student from failing, to dealing with incivility in academic and clinical environments. Legal and ethical issues comprise a significant component of the daily operations of colleges and universities. Content in numerous chapters of this book provides a foundation for understanding the rights of students, professors, and the educational institution. A solid understanding of the legal, professional, and ethical frameworks governing higher education institutions will help educators avoid, minimize, and/or correctly address many of the issues that arise in these institutions.

This book is written to provide graduate students and faculty with an introduction to basic concepts and principles of the legal, professional, and ethical dimensions of higher education. It is designed as a primary textbook for graduate students seeking a certificate or degree in the educator track and can be used as a reference and resource for faculty in higher education who must constantly make effective, defensible decisions in the teaching and administration roles. There are no prerequisites for the use of this book. The materials are presented in a format to facilitate comprehension of legal issues in numerous areas based on firm legal principles.

The foundation of each chapter, with the exception of the chapter on ethics, is based on legal cases from the U.S. Supreme Court, federal courts, and state courts. Landmark cases, usually from the U.S. Supreme Court, are discussed in detail, because they provide the foundation for analysis and decisions on subsequent issues. Although many of these cases are dated, they contain valid and applicable law that provides the foundation for present-day cases. Principles from these cases are presented and analyzed as a basis for decision making in similar scenarios.
ORGANIZATION OF THE TEXT

This book organizes and conceptualizes the range of legal, professional, and ethical considerations pertinent to educators in higher education institutions. It discusses trends in the evolution of law, analyzes legal cases, extrapolates legal principles from case law, and discusses the significance of these legal principles for educators. The professional and ethical dimensions of higher education are also addressed. This book contains nine chapters and is divided into three parts.

Part 1 The Legal Framework of Higher Education Environments

Part I consists of four chapters and addresses the legal framework governing faculty in higher education institutions.

Chapter 1 provides the faculty with information on the legal status of students, which provides the basis for lawsuits against faculty and the educational institution. In the course of teaching, evaluating, and disciplining students, faculty must understand the constitutional protections and contractual rights that students are afforded, so as to not infringe on those protected rights.

Chapter 2 addresses the legal rights of students and faculty related to freedom of speech under the First Amendment. The First Amendment protects freedom of speech, freedom of the press, freedom of religion, and the right to assemble. Administrators, faculty, and students must understand the dividing line between constitutionally afforded protections for speech, organizational affiliations, and so on and behaviors that can result in institutionally imposed discipline or punishment. The Internet has created many legal dilemmas in higher education environments that require sound and reasoned decision making.

Chapter 3 addresses the immunity from lawsuits provided to the institution and its faculty under the Eleventh Amendment of the U.S. Constitution. In some instances, faculty may be afforded immunity from lawsuits. However, faculty must also understand that there are limits to the protections afforded them under the Eleventh Amendment. In addition, the same legal framework that protects them from lawsuits from students also limits their ability to sue the public educational institution for its alleged violations.

Chapter 4 provides faculty with an understanding of their employment status within the institution as it relates to appointment, promotion, and tenure. Rights afforded faculty under the terms of their contract, handbook, policies, and the Fourteenth Amendment of the U.S. Constitution are discussed. Faculty must understand the sweeping coverage provided under the Amendments to the Americans with Disabilities Act; therefore, this edition incorporates these changes. Likewise, this chapter also includes an extensive analysis of the legal principles in the area of discrimination.
Part 2 The Professional Framework Governing the Educator’s Role

Part 2 consists of four chapters and addresses the professional framework governing faculty in higher education institutions. It explores the primary dimensions of the faculty roles as it relates to teaching, scholarly productions, and service.

Chapter 5 establishes the legal foundation of the professional roles and addresses professional competence, faculty-faculty relations, and faculty-student relations. The foundational basis of the faculty-student relationship is addressed in detail. Based on recent trends, this chapter discusses the concept of collegiality, or lack thereof, and its impact on the academic environment.

Chapter 6 addresses the teaching dimension of the educator’s role. The traditional role of educators is explored and used as the basis for understanding the nontraditional classroom of today and the expectations and challenges of teaching in today’s colleges and universities. The various media for teaching and evaluating students are discussed in this chapter.

Chapter 7 discusses the roles and expectations of faculty as they relate to producing and generating knowledge. In the realm of scholarly activities, many legal issues arise related to copyright and patents. This chapter discusses the professional dimension of scholarship, within the auspices of a legal framework.

Chapter 8 addresses the service component of the educator’s role. Service to the university, community, and profession is discussed.

Part 3 Ethical Framework of Higher Education

Part 3 consists of one chapter and addresses the ethical framework governing faculty in higher education institutions. Ethical theories and principles are presented and discussed. Application of these theories and principles as they relate to higher education is presented using numerous case scenarios.

SPECIAL FEATURES OF THE TEXT

Each chapter includes features that help the reader gain a fuller understanding of the content.

- **Chapter Outline.** A chapter outline has been provided to give the reader a clear understanding of the organization of the chapter content.
- **Case Scenarios.** Each chapter begins with a scenario based on legal, ethical, and professional issues to draw the reader into the chapter content.
Critical Thinking Questions with Responses. Critical thinking questions follow each scenario and a full discussion of each question is found at the end of each chapter.

Implications for Educators. This feature highlights pertinent professional concepts that are developed in the chapter. It also summarizes important key legal concepts that are discussed in the chapter.

Strategies to Avoid Legal Problems. This feature provides useful and practical guidelines and suggestions for faculty that operationalize the legal, professional, and ethical principles discussed in the chapter.

Because the fundamental legal, professional, and ethical concepts and principles governing faculty in higher education environments are unlikely to change, students and faculty can use this book as a resource on a variety of issues. Faculty in education environments who understand and are knowledgeable of the professional, legal, and ethical dimensions governing their roles and responsibilities are now fully equipped to address many of the issues they will encounter.

Mable H. Smith
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PART I

THE LEGAL FRAMEWORK OF HIGHER EDUCATION ENVIRONMENTS
CHAPTER ONE

THE LEGAL RIGHTS
OF STUDENTS

INTRODUCTION

Faculty members may have to assign a failing grade to students for poor academic or clinical performance or assist administrators in dismissing students for misconduct. Great caution must be exercised to protect the sanctity of the educational process while balancing the legal rights of students. Faculty members have a legal and an ethical duty to make fair, unbiased, and systematic decisions related to students’ progression toward graduation. An understanding of the legal framework within which these actions must occur is essential to minimize potential negative consequences and protect oneself in the event of a lawsuit. This chapter focuses on the processes and procedures faculty should use to protect the legal rights of students.

SCENARIO

The College of Nursing (CON) had a policy that a student who failed two courses will be dismissed from the program. The passing standard/score was set at 85 percent on each paper, examination, project, or other assignments. Students must have successfully completed all courses before enrolling in the final seminar. The CON allowed students the opportunity to take a remediation examination in each course if he/she did not pass the initial course examination. The remediation examinations tested the same concepts, usually with different questions. A requirement of the final seminar was that students must pass a vendor-purchased multiple-choice comprehensive examination to successfully complete the course and the nursing program of study.
Students had two opportunities to take different versions of the comprehensive examination before failing the course. The comprehensive examinations were designed to mimic the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and were based on the NCLEX-RN test blueprint. These statements were included in the CON’s Student Handbook and in the course syllabus. A student who had not previously failed a course could repeat the final seminar; however, a student who had previously failed a course and both versions of the final comprehensive examinations would be dismissed from the nursing program. The Student Handbook contained language that “the College of Nursing reserves the right to make changes in its policies, procedures, and operations to protect the best interests of the students, the College, and the University. Karenlynn had to take the remediation examinations in 10 of 13 courses. During the final seminar, Karenlynn completed all the course projects, but failed the initial comprehensive examination. Nursing faculty met with Karenlynn on four occasions to review subject areas that were identified as weak areas based on the analysis of her initial examination.

Two weeks before the remediation examination, several anonymous students reported that the blueprints for the vendor’s comprehensive examinations were being circulated among the students. A copy was e-mailed to the Associate Dean for Academic Affairs (AD), with a list of students’ names that had the blueprint. After meeting with the Dean, the decision was made to keep the original date of the remediation examination but to purchase a comprehensive examination from a different vendor, who also offered the same type of examination based on the NCLEX-RN test blueprint and with the same number of questions. The initial vendor indicated that a new examination could be ready in two (2) months. An e-mail was sent to the ten students who had to take the remediation examination notifying them that a different vendor’s comprehensive examination would be administered and requested them to register with the new vendor. Karenlynn and three other students immediately e-mailed and voiced their concern and objection to changing vendors because they were used to the type of questions asked by the previous vendor. In response to the concerns, students were required to complete two vendor-provided practice comprehensive examinations prior to the test date.

On the day of the examination, the students again voiced their concerns, but start taking the examination. After completing 100 of 180 questions, Karenlynn informed that Professor that she would not complete the examination and wanted to withdraw and repeat the course. The Associate Dean informed Karenlynn that her score on the examination would be recorded and the grade would determine her outcome in the course. Although she was encouraged to complete the examination, Karenlynn refused. After receiving a failing grade and being dismissed
from the nursing program, she filed a grievance based on breach of con-
tract, violation of due process, and educational malpractice.

CRITICAL THINKING QUESTIONS

- Discuss under what circumstances Karenlynn’s grievance could be upheld by
  the committee.
- What is the likelihood of a Court ruling in favor of Karenlynn on the violation of due process and breach of contract claims?
- Discuss what other actions the College of Nursing could have taken to address
  this situation, if any.

DUE PROCESS

Students initiate legal action against educational institutions for a number of
reasons, including breach of contract, due process violations, and discrimina-
tion. With few exceptions, courts will not intervene in faculty members’ eval-
uation of the academic or clinical performance of their students. Applying
the principle of judicial deference, courts examining cases concerning facult-
y’s evaluation of students usually uphold the faculty’s decision, if there was
an adherence to standard academic norms and the procedures used were fair
and reasonable.

The Due Process Clause of the Fourteenth Amendment of the United
States Constitution protects students from state actions that infringe on or
deprive them of their property or liberty interest. It reads,

“No person shall make or enforce any law which shall abridge the priv-
ileges or immunities of citizens of the United States; nor shall any State
deprive any person of life, liberty, or property, without due process of
law; nor deny to any person within its jurisdiction the equal protection
of the laws.”

Once the student establishes or the court assumes the existence of a prop-
erty or liberty interest, the student is then entitled to due process as a matter
of law.

Liberty Interest

A liberty interest is violated when a faculty member’s action damages the
student’s standing in his profession or community or imposes a stigma or
disability that precludes or interferes with other educational or employment
opportunities. The case of *Greenhill v. Bailey* illustrates facts sufficient to establish a liberty interest. In *Greenhill*, a medical school notified the Association of American Medical Colleges that Bailey was dismissed for “lack of intellectual capacity and insufficient course preparation.” This information was available to all other medical schools. Ruling in favor of Bailey, the court found that language pertaining to “alleged deficiency in intellectual ability . . . would potentially stigmatize his future as a medical student elsewhere.” To avoid an infringement on Bailey’s liberty interest, the reason provided for his dismissal should have focused on performance rather than intellectual abilities.

**Property Interest**

State law creates property interests. However, federal constitutional law determines whether the property interest rises to the level of a constitutionally protected interest. Students asserting a violation of property rights must first establish that they have a legitimate claim of entitlement to the property claimed. In higher education, the claim of entitlement is usually the academic degree.

In *Gaspar v. Bruton*, a forty-four-year-old student was pursuing practical nurse training in a vocational-technical program. After completing more than two-thirds of the program, she was dismissed for poor clinical performance. Prior to the dismissal, Gaspar was on probation for two months due to clinical deficiencies. She was informed that she would be dismissed if her performance did not improve. When it did not, she was notified of the dismissal in a conference with some of her instructors and the superintendent. Subsequently, she was offered a second conference and an opportunity to question other faculty members who had participated in the dismissal decision. The dismissal decision was upheld.

Gaspar’s lawsuit against the university alleged that she was unlawfully deprived of an education, which is an infringement of her property right. Based on the infringement, she should have been accorded due process that consisted of the right to confront and cross-examine witnesses, to challenge the evidence supporting her dismissal, and to present evidence in her defense. The court held that Gasper was entitled to due process based on a property interest in her education, especially since she had paid for enrollment and attendance in the program. However, expanding on an earlier decision that high school students’ entitlement to public education is a property interest, the court rejected Gasper’s assertion of the type of due process that applied to her case. The requirement to satisfy academic due process requirements is that the student be made aware, prior to termination, of his or her failure or impending failure to meet the academic standards.
Chapter 1. The Legal Rights of Students

TYPES OF DUE PROCESS

The types of due process that must be afforded students vary depending on whether the matter involves an academic decision or a disciplinary action. In cases involving academic decisions, students are only entitled to notice of their academic deficiencies, the resulting consequences, and suggestions for improvement. In contrast, students facing disciplinary proceeding are entitled to notice of the charges, the nature and type of evidence on which the charges are based, the opportunity to cross-examine witnesses, and to present evidence on his or her behalf.

Academic Due Process

Academic due process relates to decisions and actions regarding students’ academic issues and performance. An evaluation of academic due process looks at the process used to inform students of their academic standing and the basis of the decision. Two cases decided by the U.S. Supreme Court form the basis of the legal framework for analysis of academic due process as applied to higher education institutions in academic matters. The Board of Curators of the University of Missouri v. Horowitz,6 addressed procedural due process, which is the fairness of the procedures used in the academic decision. The case of Regents of the University of Michigan v. Ewing7 addressed substantive due process, which looks at the basis for the academic decision.

Procedural Due Process

Students attending public colleges and universities are entitled to feedback regarding their academic performance before receiving a final failing grade. Faculty should incorporate a process in their curriculum that informs students of the grading criteria, notifies them of their impending failure, and provides recommendations for improvement. Failure to provide this information to students can lead to lawsuits alleging a violation of the student’s procedural due process rights. Best practices require that after notification, the student has time to make improvements based on the feedback and constructive guidance provided.

The following case outlines the factors involved in adhering to procedural due process mandates. In Board of Curators of the University of Missouri v. Horowitz,8 a medical student in her final year of a clinical residency was dismissed from the program. Her overall clinical performance showed patterns of below-average performance in clinical settings. In addition, she had deficiencies in interpersonal relations, attendance, and personal appearance. After the first year, the Council on Evaluation, a committee composed of
faculty and students, recommended that Horowitz advance to the second and final year on probationary status. However, her clinical performance remained unsatisfactory and the council recommended delaying graduation and proposed dismissal from the program unless her performance showed radical improvement. Horowitz appealed the decision and was allowed to spend a substantial amount of time with seven practicing physicians. Of the seven, three recommended probation, delaying her graduation, and continuing her on probationary status; two recommended immediate dismissal; and two recommended graduation. Based on these evaluations, the council upheld its previous decision. Subsequently, Horowitz was dismissed from the program after receiving two more negative evaluations.

Horowitz initiated legal action alleging that the university deprived her of a liberty interest by “substantiating impairing her opportunities to continue her medical education or to return to employment in a medically related field.” Assuming the existence of a liberty or property interest, the U.S. Supreme Court addressed the issue of what due process procedures must be provided to students at a state educational institution whose dismissal may infringe on a property or liberty interest. Horowitz was provided notice of the faculties’ dissatisfaction with her clinical performance and the consequences of her clinical deficiencies. Ruling in favor of the university, the Court held that Horowitz had received more due process than required by the Fourteenth Amendment. The Court further ruled that the school went beyond Constitutional requirements by affording her an evaluation by independent physicians. Although clinical evaluation may be more subjective than the evaluation of classroom performance, due process requirements are the same because they are both academic evaluations. The Court noted:

- It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses.
- Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the “booklearning” portion of the curriculum.
- Evaluation of her performance in the former area is no less an “academic” judgment because it involves observation of her skills and techniques in actual conditions of practice rather than assigning a grade to her written answers on an essay question.

Unlike Horowitz, the student in Zwick v. Regents of the University of Michigan, prevailed in her due process claim. The Court clearly enunciated the principle that continued enrollment in a public university amounts to a property interest and students are given protection from arbitrary dismissal under the Due Process Clause. Zwick presented evidence to establish that she was not fully informed of the faculty’s dissatisfaction with her clinical progress nor the danger that her performance posed to timely graduation and continued enrollment. In addition, the court questioned whether the Academic Review
Board decision was based on “careful deliberation and focused professional judgment.”

Zwick, a dental student, began to experience academic difficulties in her second year of dental school, because she could not concentrate in class. She was performing below acceptable standards on practical exams in her clinical foundation course that was taught by Drs. Stoffer and Jaarda. Based on the recommendations of Dr. Lantz, the associate dean of student affairs, Zwick was evaluated for and diagnosed with Attention Deficit Disorder (ADD). To accommodate her needs, Drs. Stoffer and Jaarda initially allowed Zwick to take her tests by the window or in a separate room. However, Zwick failed the course and was required to remediate it by passing the next clinical foundation course the following semester. This time, however, Drs. Stoffer and Jaarda denied Zwick’s request to take the exam in a separate room because they felt that this did not represent the best practice of dentistry and would give Zwick an unfair advantage. If she failed the examination after taking it with other students, they would allow her to retake it in a separate room. Dr. Lantz erroneously informed Dr. Polverini, the Dean of the Dental School that Drs. Stoffer and Jaarda denied accommodations for Zwick and that she may initiate litigation. Dr. Lantz then listed the needed accommodations and gave Drs. Stoffer and Jaarda the option to sign the list or step down. In response, Drs. Stoffer and Jaarda resigned from their positions, a move that created discontent in the dental school. Because some students blamed Zwick for the controversy, Dr. Lantz recommended that she take the week off and not talk to her peers or faculty about the situation.

Drs. Stoffer and Jaarda were reinstated to their position after talking to Zwick, who indicated that she never considered litigation and was happy with her accommodations. Nevertheless, Zwick failed the remediation course, and Dr. Lantz and the Academic Review Board (ARB) voted to dismiss her; however, this decision was overturned on appeal, due largely to the magnitude of events that had occurred. She later successfully remediated both courses. However, she failed and successfully remediated another clinical course but received a “D” grade in another course. In addition, two different faculty members voiced concern regarding Zwick’s patient management, preparation, and practical ability. Zwick was put on probation after failing another clinic course and receiving two incomplete grades. The ARB met to discuss Zwick’s case and decided to allow her the summer as a “testing ground.” Dr. Lantz was charged with notifying Zwick of the decision in a written letter; however, no letter was mailed to her. In addition, Dr. Lantz and another member of the ARB asked several faculty members to draft evaluation letters of Zwick’s performance, which were basically negative and inferred that Zwick was emotionally unstable and “unfit for the independent practice of dentistry.” Dr. Lantz then called an unscheduled meeting of the ARB who voted to dismiss Zwick. She was notified of the decision by mail and all of her appeals within the university were denied.

In finding a violation of procedural due process, the court noted that the student was not informed of her academic situation and that the decision
was not careful and deliberate. Zwick was not notified of the board’s dissatisfaction with her progress nor of the consequences if no improvements were made. Thus, the ARB’s decision to recommend dismissal based on an unscheduled informal meeting did not provide Zwick with adequate notice, in violation of due process requirements. The court questioned the selection of the faculty members who drafted the letters of evaluation, especially since “the uniformly negative tone of their evaluations suggested that they were not chosen at random.” Likewise, Dr. Lantz’s vivid activities in the dismissal decision created questions as to whether the dismissal decision was the result of careful and deliberate evaluation or whether it was made in bad faith. The chain of events in this case did not represent best practices in making an academic decision that adversely impacts a student’s continued enrollment in her selected course of study.

These cases illustrate several important legal principles that should guide the decision making of faculty teaching in higher education institutions (see Exhibit 1.1).

**Substantive Due Process**

The U.S. Constitution creates substantive due process rights, which examine the ultimate basis for the decision. Faculty members are held to a standard of fairness and impartiality in their relationship with students. They cannot arbitrarily and capriciously deal with students. Therefore, a decision to dismiss a student or limit his or her academic progression must reflect a careful and deliberate evaluation of the student’s overall performance. Courts, in reviewing cases alleging a violation of substantive due process rights, look at the fundamental basis for the adverse academic decision.

**Exhibit 1.1 Important Legal Principles Related to Due Process**

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<th>Courts evaluating due process violations will not engage in an evaluation of a student’s academic performance.</th>
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<td>“University faculty have a wide range of discretion in making judgments as to the academic performance of students and their progression towards graduations.”</td>
</tr>
<tr>
<td></td>
<td>“The determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.”</td>
</tr>
<tr>
<td></td>
<td>Academic evaluations of a student will not be subject to the traditional judicial fact-finding procedures used in court and disciplinary proceedings.</td>
</tr>
<tr>
<td></td>
<td>Although “admission into a college or university is not a guaranteed right, the value of continuing one’s education after one has been granted admission is a reasonable expectation.”</td>
</tr>
<tr>
<td></td>
<td>Courts will provide students with protection from arbitrary dismissal from their academic program of study.</td>
</tr>
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</table>
The following landmark case explores the nature of substantive due process. In *Regents of the University of Michigan v. Ewing*, a medical student was enrolled in a six-year program that offered a joint undergraduate and medical degree. Ewing had academic and personal difficulties during the first four years in the program including marginal passing grades, incomplete assignments, and makeup examinations. After successfully completing the first four years, students had to pass a written test administered by the National Board of Medical Examiners. Ewing failed five of the seven subjects on his examination and received the lowest score in the history of the program. After reviewing Ewing’s entire academic record, the Promotion and Review Committee dismissed him from the program. The committee reaffirmed its decision after Ewing was given the opportunity to explain why his test score was not reflective of his academic abilities. Ewing’s request to retake the exam was denied. He appealed the decision and presented his case to the executive committee, who upheld Ewing’s dismissal from the program.

Ewing’s claim against the university was predicated on the loss of a property interest in his continued enrollment and a violation of his substantive due process rights in that the decision to dismiss him was arbitrary and capricious. To establish a substantive due process violation, the student must show that the dismissal decision was arbitrary and capricious, that there was no rational basis for the decision, or that the decision was motivated by ill will or bad faith unrelated to academic performance. Courts look to determine if there was a substantial departure from academic norms to suggest that the faculty did not actually exercise professional judgment. Ewing presented statistical evidence that other students were routinely allowed to retake the exam. The Court ruled that the decision to dismiss Ewing, which was based on an evaluation of Ewing’s entire academic career, was made with conscientious and careful deliberation.

Like *Horowitz*, the Court in *Ewing* enunciated several legal principles applicable to faculty in higher education institutions. First, the need to analyze actions in terms of expense, noting that “admittedly, it may well have been unwise to deny Ewing a second chance to take the examination. It might have saved the University the expense of this litigation and conceivably might have demonstrated that the members of the Promotion and Review Board misjudged Ewing’s fitness for the medical profession.” However, the major principle articulated was 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.”

Legal principles derived from the preceding cases provide the foundation for deciding cases in which students initiate legal action against higher education institutions alleging violation of academic due process. Academic due process requires faculty members to provide students notice of their academic deficiencies and the associated consequences. In many instances, faculty members can provide further protection by providing students with suggestions to improve their performance and a time frame in which to make improvements.
Making careful and deliberate decisions regarding students’ progress or lack thereof is the fundamental basis for establishing substantive due process. The case of Richmond v. Fowlkes,21 illustrates careful and deliberate decisions and extensive due process in addressing a student’s academic difficulties. The process and procedures used by faculty and administrators exceeded the articulated legal requirements. Richmond completed five of an eight-semester pharmacy program. During the spring semester of his junior year, Richmond received two negative noncognitive evaluations for sleeping in class, inappropriate comments during class, failure of basic examinations, and lack of preparation for class. Noncognitive evaluations addressed components of professional role development that are considered relevant for future pharmacists. In response to Richmond’s academic performance, the following sequence of events occurred:

1. The associate dean notified Richmond of the evaluations and requested a letter explaining his behavior.
2. The Scholastic Committee reviewed the response and notified Richmond in writing that he was on probation and that another negative evaluation would result in his dismissal from the program.
3. The associate dean suspended Richmond from further clinical rotations pending committee review after he received another negative noncognitive evaluation for tardiness, unexplained absences, belligerent behavior, argumentative responses, and inadequate preparation.
4. The Scholastic Committee informed Richmond orally and in writing of the committee meeting/hearing and that he could appear in person, answer questions, and submit statements on his behalf.
5. Richmond appeared at the hearing and submitted personal references and answered questions.
6. The committee sent Richmond a letter notifying him of the recommended suspension, with a plan for its removal and his ultimate graduation. The letter requested Richmond to review the proposed plan and submit his own plan with the stipulation that his plan must incorporate selected items the committee considered essential.
7. The committee revised the plan submitted by Richmond and returned it to him for his signature. The committee dismissed Richmond from the program because he refused to sign and return the plan by the deadline date.

Richmond then initiated a lawsuit alleging that the committee’s rejection of his plan was arbitrary and capricious in violation of his substantive due process rights. Finding no violation, the court ruled that the committee’s plan to (1) require Richmond to be evaluated by a psychologist from an approved list as opposed to a self-selected psychologist, (2) limit his geographical practice options, and (3) require him to restart his fourth year of study to ensure professional development reflected careful and deliberate alternatives as opposed to outright dismissal.
Richmond also argued that his due process rights were violated because the associate dean was biased against him. As evidence, Richmond offered only his speculation and his mother’s opinion that the associate dean was biased because he kept a log of his interactions with Richmond, asked faculty members to submit to him any negative evaluation of Richmond, and attended the meetings of the committee that decided the outcome. Rejecting this argument, the court noted that the associate dean kept a computerized log of interactions with all students and their family members who attended meetings with him. His attendance at committee meetings did not establish bias because the associate dean did not vote in the committee’s deliberations and decision. Further, the court noted that the content of evaluations were within the wide discretion of the faculty; therefore, a negative noncognitive evaluation could not be attributed to the associate dean.

The concept of substantive due process involves the issue of fundamental fairness. Courts must balance their involvement in higher education with protecting the rights of students. As a general policy, “a student’s challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student’s academic capabilities is beyond the scope of judicial review.” The quest for knowledge and truth cannot flourish in an environment with rigid oversight by judicial officials. However, as illustrated in the case of Zwick, discussed earlier, courts will provide students with protection again arbitrary and capricious behavior by faculty and administrators.

Cases in which students who are extremely close to graduation are dismissed from the academic program of study evoke allegations of unfairness. Nevertheless, in the absence of wrongdoing by university officials, courts are unwilling to interfere in the academic process. The case of Snyder v. Millersville University illustrates that Courts are not willing to mandate that academic programs award a student a degree based on a percentage completion of the course of study. Students are expected to satisfy all academic requirements of the course of study to receive a degree. Millersville University (MU) required every student seeking a Bachelor of Science in Education (BSE) to successfully complete a student teaching practicum. Snyder experienced several problems during the practicum at Conestoga Valley (CV), based on her intensive involvement with students, incompetent performance, and conflicts with her preceptor. After the midterm evaluation, the precepting agency barred Snyder from returning to their campus, thus, preventing her from completing the practicum. Snyder argued that she only had several days left in the practicum and should be awarded the degree. MU refused to award her the BSE degree and a teaching certification, but instead awarded her Bachelor of Arts in English degree. Snyder sued MU based on a violation of her First Amendment free speech rights (discussed in Chapter 2) and Fourteenth Amendment due process rights. Dismissing the due process claim, the Court noted that Snyder did not complete the practicum because she was barred from CV. MU was required under Pennsylvania law to ensure
that students complete all requirements before awarding the BSE degree. In addition, certifying to the Department of Education that Snyder had completed the certification requirements would require MU to engage in deceitful and dishonor conduct. No court would mandate such action.

Case Evoking Policy Considerations. Student challenges to the academic process should be viewed as a learning opportunity requiring faculty and administrators to review their own policies and procedures. The following case that ponders a student’s academic standing after successfully retaking a previously failed course (or its equivalent) exemplifies this principle.

\textbf{Wright v. Chattahoochee Valley Community College}\(^{(27)}\) (CVCC)

CVCC had a policy that students who failed two nursing courses would be dismissed from the program. Wright received a failing grade of “D” in Adult Nursing II and in Pediatrics. She appealed the grades, with an outcome of no-change in Adult Nursing II and a grade change from “D” to “C” in Pediatrics, because the professor did not respond to the appeal. With only one “D” on her record, Wright was allowed to enroll in NUR 200 to cover the materials that she did not master in Adult Nursing II. She earned a grade of “A,” but received a “D” in NUR 272. This constituted a second failure in the nursing program. Wright unsuccessfully appealed the decision based on the assertion that the “A” in NURS 200 should remove the “D” grade in Adult Nursing II. Wright asserted that she had an agreement with the Dean of Students and the Head of the Nursing department that she could take NUR 200 in place of retaking Adult Nursing II and believed that the “D” grade would not be held against her. She alleged that the failure to expunge the “D” grade violated her due process rights. The court noted that “even if the head of the nursing department made comments to Wright that the “D” she earned in NUR 252 would not be held against her, the facts may support an action in tort for “fraud” but do not serve as a basis for a due process violation.”

A policy indicating that a failing grade would count toward the two-failure policy, regardless if the course is retaken and successfully passed or if another course is substituted for the original course, would have prevented the stress and time-intensive efforts involved in litigation.

\textbf{Disciplinary Due Process}

Issues involving academic dishonesty and the fairness and adherence to the procedural process are within the realm of judicial knowledge. Colleges and
universities have rules and regulations governing students’ conduct and behavior and procedures that will be implemented if students violate the rules and regulations. Academic dishonesty, such as cheating, plagiarism, lying, stealing, and falsification of records, poses great concern for faculty because of the connection between students’ academic integrity and their future professional behaviors. Students who cheat in school are more likely to cover up mistakes in the work environment or breach professional standards. Therefore, faculty must take every breach of academic integrity seriously by holding the student accountable for his or her behavior.

Disciplinary actions are invoked anytime a student violates the law or a school regulation by engaging in a prohibited or an illegal activity. The university’s handbook for students and more specifically college and departmental handbooks should outline the process to be followed in disciplinary actions. The determination of whether a student is guilty of violating policy or the honor code is a question of fact to be decided by the appropriate committee or council. Students facing disciplinary actions must be afforded more due process than required for academic actions. Courts have found that, unlike academic decisions, which require professional judgments and evaluations, disciplinary determinations are more susceptible to traditional fact finding and thus more adaptable to the courts’ fact-finding procedures.

**Handling Disciplinary Issues**

The process used to handle disciplinary issues is usually outlined in the institution’s policies and procedures and varies among institutions. Some institutions require that all breaches of academic integrity be reported to the hearing officers, while others allow the faculty to handle the matter, either internally or through referral to the institution’s disciplinary representative. For example, if a student is caught cheating, the faculty member can make the student repeat the assignment, give the student an “F” on the assignment, assign an “F” for the entire course, or refer the issue to the appropriate college or university committee. The latter is usually preferred when additional information is needed to support the charges, such as when students do not readily admit to cheating and the faculty member did not directly witness the cheating incident. If the student disagrees with the faculty-designated consequence, the faculty member should refer the matter to the appropriate committee and allow someone else to implement the required process. This is time saving for the faculty and allows for an independent review and determination for the student.

Personnel who have knowledge of due process mandates usually handle cases involving disciplinary actions at the college or university level. Once a complaint is received, the hearing officer conducts an investigation and notifies the student of the complaint. “The notice should contain a statement of the specific charges and grounds, which, if proven,
would justify [the disciplinary action] under the appropriate regulations.\textsuperscript{32} The hearing officer may request to meet with the student to discuss the allegations or ask the student to provide a written response. At the meeting or after reviewing the student’s response, the matter may be resolved with both parties agreeing to the disposition. If the student does not agree with the decision, he or she can request a hearing. “A hearing which gives the board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.”\textsuperscript{33} The procedures followed must comply with disciplinary due process requirements. In disciplinary proceedings, the accused student must be informed of the charges against him or her and the evidence on which the charges are based, and be given the opportunity to address the charges and present evidence and witnesses to support his or her case.

Courts are hesitant to intervene in disciplinary matters involving cheating if the appropriate procedures were followed. In Papachristou v. University of Tennessee,\textsuperscript{34} a student opened his test booklet and started reading the examination before the professor gave the class permission to begin. He closed his booklet after realizing that other students had their booklets closed. After time was called, the majority of the class stopped and formed a line to turn in their exams. However, a couple of students, including Papachristou, continued to work on the examination, in violation of the honor code. The hearing officer entered an order dismissing the charges; however, the university chancellor reversed the decision and found that Papachristou had violated the honor code. Specifically, the student was familiar with the honor code, the class was told not to begin the examination until so instructed, and the class was aware of when the examination ended. On appeal, the court upheld the chancellor’s decision.

\textit{Procedure for Disciplinary Hearings}

A typical hearing for disciplinary matters usually follows a process similar to the one described below:

1. The accuser, often though the hearing officer, presents the charges made against the student.
2. The accuser presents evidence to support the allegation(s). The evidence may include witnesses, documents, reports, and other supporting data.
3. The accused student is allowed to question or cross-examine the witnesses and challenge the evidence presented.
4. After the accuser presents his or her evidence, the accused student can call witnesses and present evidence to rebut the accusations.
5. The accuser is given the opportunity to question and cross-examine witnesses for the accused student and to challenge any evidence.
6. Committee or panel members can ask questions of the witnesses and about the evidence.
7. Both sides can present a summary statement of the evidence and explain why the committee should (or should not) rule in the accused student’s favor.
8. The parties are dismissed and the committee deliberates to render a decision based on the evidence.
9. The decision is presented to the hearing officer, who will notify the accused student of the decision.
10. The accused student may be given the opportunity to appeal an unfavorable decision of the committee to an Appeals Committee or to an authorized and designated administrator. Either may uphold or reverse the original decision.
11. The administrator or the university president is usually empowered to make the final decision.

The consequences of disciplinary actions against a student can have long-term consequences, ranging from the notation of academic dishonesty on his or her transcript to expulsion from the university. Students who have undergone disciplinary actions may encounter difficulty finding quality jobs or transferring to other educational institutions. Therefore, courts will more readily review cases asserting violation of due process rights in disciplinary proceedings.

For example, in Donohue v. Baker, the court found that the university violated a student’s due process rights by not allowing the accused student to cross-examine his accuser, in violation of its own policies. A female student accused Donohue of dating violence. Because of the sensitive nature of the charges and the emotional impact on the alleged victim, Donohue could only address the panel. The court noted that cross-examination was essential in this case because the only evidence in front of the panel were the statements of both parties. Since the case was essentially one of credibility and the consequence of expulsion was severe, Donohue should have been afforded the right to confront his accuser.

Likewise, as illustrated in Coulter v. East Stroudsburg University, courts will intervene to protect students’ constitutional rights. In January 2010, Coulter entered East Stroudsburg University as a freshman and paid her tuition, room, board, and fees. Two months later, the University Police confiscated twelve (12) pills thought to be “ecstasy” from her dormitory. At the disciplinary hearing, Coulter’s counsel was allowed to attend and advise her, but not otherwise participate. The only evidence presented at the hearing was the reading of the arrest report by the Officer. Coulter did not cross examine the Officer nor present any evidence on her behalf, based on the advice of her counsel to remain silent, since the matter was under investigation by the County’s District Attorney for possible criminal charges. The attorney’s advice protected Coulter against self-discrimination based on her Fifth Amendment rights.
Based on the evidence presented, Coulter was immediately suspended from the university until the end of the spring 2011 semester, prohibited from attending her scheduled courses, and could not take her final examinations. Coulter’s attorney filed an injunction, requesting the court to prevent the university from enforcing these actions. Ruling in favor of Coulter, the court noted that she had met the elements for a successful injunction: 1) she would likely prevail on the merits of the case, 2) she would suffer an irreparable harm if the court denied the injunction, 3) the University would not suffer a greater harm, and 4) that granting relief was in the public’s interest. If Coulter was not allowed to sit for her final examinations, she would suffer irreparable injury because she would have wasted an entire semester, a time that she could not get back. This would lead to additional expenses and a delay in her graduation. The harm to the University was viewed as a slight undermining of the disciplinary process but not as great as that to the student in terms of money, time, and effort. Finally, the public interest was served because disciplinary actions against students for offenses of possible possession of drugs cannot override students’ minimum due process rights.

The court noted that the amount of due process in disciplinary hearings for students is relatively low, however, the procedures in place must meet the minimum requirements of due process that included giving the accused the opportunity to respond, explain, and defend. The court distinguished this case from previous cases in which an attorney/advisor cannot take an active role in the disciplinary process because Coulter was simultaneously facing criminal sanctions and academic discipline. “By denying her any type of active representation in this situation, the University was essentially forcing her to choose between exposing herself to criminal liability and the serious consequences associated therewith or protecting herself from possible academic sanctions.”37 In essence, students in these circumstances will not be able to properly defend themselves, present evidence, or cross-examine witnesses that would lead to a one-sided hearing with serious academic consequences.

Unique Cases

Faculty members may encounter cases that are difficult to classify as either academic or disciplinary. Many of these cases involve unique fact patterns that have not been previously addressed or fall outside of articulated policies. For example, a student was dismissed from a nursing program for failing to regularly attend classes, submit a state-required physical examination report, and inform school officials that he had attended another nursing program.38 Although these reasons are nonacademic, they do not fit within the category of misconduct to warrant a disciplinary due process hearing. Academic due process would require the student to be given
notice of an impending failure, informed of its consequences, or provided suggestions for improvement. As indicated in the case facts, this process is not applicable to this situation. Disciplinary due process mandates that students be given details about the charges or allegations, provided the opportunity to cross-examine witnesses, and allowed to present evidence on their behalf. Similarly, this process does not succinctly fit within the case facts. Since this situation involved a unique fact pattern, providing more due process than required would prevent future allegations of due process violations.39

Criminal Background Checks

Criminal background checks is one method of protecting the public from individuals who may pose a danger to the health, safety, and welfare of the general public. The general trend in health care environments is to require criminal background checks and/or fingerprinting for all employees. This trend has impacted nursing programs, as health care facilities mandate that students have criminal background checks prior to clinical rotations. Students with a criminal history involving crimes against persons (assault, battery, sexual misconduct), crimes against property (theft, forgery, destruction of property), and a history of alcohol or substance abuse (driving while intoxicated, drug addiction) may be excluded from entering the health care facility ID. These types of crimes provide insight into a person’s character, propensity for violence, and/or ability to handle stressful situation. Each case is reviewed by personnel in the health care facility on a case-by-case basis, with considerations given to the person’s age at the time the crime was committed, experiences after the crime, and the circumstances involved in the incident.

Although many nursing programs do not use a student’s criminal history to determine admission, the student must be made aware of the impact his/her criminal history may have on the ability to complete the nursing program and to become licensed after graduation. The Nursing Student Handbook should include information that if the student is not allowed into a health care facility, due to his/her background, then he/she will not be able to successfully complete the nursing program and will be required to withdraw. Students should be referred to the state board of nursing to determine potential impact of licensure. Finally, students should be cautioned that in many instances, a prior criminal history will be revealed on a fingerprint or criminal background check, as illustrated in the following case. Price-Crowell40 asserts that she was enrolled at Santa Fe Community College (SFCC) in the Educator Preparation Institute in 2007 to obtain credits for a teaching certificate. Based on a positive criminal background check, she was terminated from the program and issued a “trespassing warning” to stay off the SFCC campus. She had been convicted of shoplifting in 1975.
Price-Crowell sued the Wyoming State Archives and the Wyoming State Criminal Division for violation of her rights by maintaining and disseminating the records to agencies charged with conducting criminal background checks. The court dismissed the case.

Revoked Degrees

When officials in higher education environments initiate actions to revoke or withhold an educational degree, the aggrieved student will likely file a lawsuit. The physical, emotional, and monetary demands associated with earning a degree mandate that such actions are only initiated to truly protect the sanctity of the degree, as illustrated in the following cases. Jaber completed all of her coursework, including her doctoral dissertation and was awarded a Doctor of Education degree. Three months later, Jaber was charged with plagiarizing her dissertation after plagiarism software detected numerous instances of plagiarism. The dissertation also contained numerous instances of correct citations, negating the assertion of error in citation. Jaber was notified and participated in a fact-finding conference in which it was concluded that further action was warranted. She was given the option of a formal hearing or an informal hearing in which the dean would determine the outcome, with no right of appeal. She was aware that the full range of sanctions could be applied and verbally told that her degree could be revoked. Jaber chose the informal hearing and the sanction for plagiarism was to revoke her degree. Jaber initiated a lawsuit alleging that revocation of her degree violated the Fourteenth Amendment Due Process Clause because she had “a constitutionally protected interest in her degree,” challenging the process of an informal versus formal hearing, asserting that the revocation action was inappropriate because it was not one of the written sanctions, and challenging the dean’s authority to revoke her degree.

Rejecting the university’s argument that Jaber did not have a property interest “in a degree obtained by fraud,” the court noted that this assertion “would require a trial on the issue of fraud before the Court could even consider whether [Jaber] is entitled to any due process.” Although Jaber was entitled to due process, the court found that she was provided with the adequate amount of due process, notice, and the opportunity to be heard before her degree was revoked. Given the impact of revocation, such a sanction perhaps should have been in writing; however, the court noted that Jaber was provided with oral notice and even pled with the dean during the conference to not revoke her degree. Thus, she was aware that revocation was a possible outcome.

Jaber accurately noted that only the Board was vested with the authority to revoke degrees. To determine whether Jaber’s due process rights were negatively impacted based on the informal hearing as opposed to a formal hearing that would have been similar to a court hearing and
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by the dean’s revocation of the degree rather than by the action of the Board, the court applied the balancing test established in *Matthews v. Eldridge* by the U.S. Supreme Court to evaluate:

1. “The private interest that will be affected by the official actions;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and
3. The Government’s interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.”

Acknowledging the strong private interest Jaber had in retaining her degree, the court determined that the risk of erroneous deprivation was low based on the following factors:

- She testified that she had presented all of her desired evidence. The opportunity to call witnesses was available to her.
- Two software programs detected the numerous incidences of plagiarism.
- She did not dispute the charges, but focused on minimizing the sanctions.
- Although Jaber did not have the opportunity to present her case to the Board, safeguards were in place to protect her rights.

The Jaber court, as did the court in Rosenthal, ruled in favor of the university. In *Rosenthal v. New York University*, the university refused to grant a degree to a student who had pled guilty to conspiracy to commit security fraud. Rosenthal knew of the criminal investigation but did not inform anyone at the Stern School of Business. After completing all coursework for the Masters of Business Administration (MBA) degree, he received a letter from the Dean indicating that “the Faculty has recommended to the President and Board of Trustees of New York University that your degree be conferred as of January 22, 2007.” Although the degree was never conferred, the Dean learned of Rosenthal’s guilty plea in February, several days after the plea was entered and held up the degree. The faculty voted to send Rosenthal’s case to the Judiciary Committee who brought a disciplinary complaint against him for violation of the Stern MBA Code of Conduct and NYU Code of Ethical Conduct. At the hearing Rosenthal challenged the Committee’s jurisdiction over him and asserted that his plea in the criminal case was different from a customary guilty plea. Nevertheless, the Committee voted to withhold his degree, change his grade in the Professional Responsibility course to “F,” but allowed his coursework and credits to be transferred to another institution. The faculty later approved that Rosenthal’s degree not be conferred.

Rosenthal sued the university alleging breach of contract because the faculty did not have jurisdiction to withhold his degree, failed to follow the
printed disciplinary procedures, and imposed sanctions without any violation of the code of conduct. Rejecting each assertion, the court ruled that:

- University bylaws give faculty the authority to determine standards for academic achievement for the degree and to certify to the President qualified candidates for degrees. Thus the faculty’s decision to withhold the degree “was fully within the faculty’s power and discretion.”

- The MBA Code of Conduct encompasses the School’s philosophy that “its students as future business leaders have an obligation to adhere to principles of personal honesty, integrity, and respect for others in their behaviors.”

The revocation of an academic degree has widespread consequences. Thus, faculty and administrators should develop policies and procedures that identify the circumstances and process of revoking an academic degree. Due process procedures should be incorporated into the policies.

**ACADEMIC DEFERENCE**

The practice of judicial deference to academic decisions (academic deference) is rather extensively applied in cases involving educational institutions. Courts have consistently ruled in favor of the university on academic issues. Courts will likely exercise judicial deference to nursing programs that are requiring students to successfully pass an exit or comprehensive examination to graduate because: 1) the consequences to nursing programs of low board pass rates on NCLEX are significant, 2) it ensures a minimal level of competency of the graduates, and 3) the tests are objective measures of students’ knowledge.

Legal principles derived from cases addressing the concept of academic deference are identified in Exhibit 1.2.

**Exception to the Principle of Academic Deference**

Students are usually protected from arbitrary and capricious behavior by faculty and administrations. The case of *Sylvester v. Texas Southern University,* demonstrates facts sufficient for the court to subject an academic decision to judicial scrutiny because of the major departure from accepted academic norms. Texas Southern University (TSU) had a policy allowing for committee review of students’ grades upon written review. The Dean’s office would then notify the student of the committee’s review. The student could not appeal a grade after graduation. Sylvester ranked first in her law class at TSU. She received a “D” in wills and trust class, which dropped her ranking to third place. The associate dean did not respond to her grade protest. Sylvester
continued to protest her grade throughout her third and final year of law school but did not receive any responses. Before graduation, she approached the wills and trust professor, who informed her that her examination had been lost. She therefore initiated a lawsuit against the law school seeking a temporary restraining order (TRO) to stop the graduation ceremony and a permanent injunction against the university’s imposition of the graduation deadline, claiming that TSU had violated her constitutional rights to due process by denying her review of her examination. The judge denied the motion for the TRO, but scheduled a status conference for a later date to allow the parties the opportunity to correct the problems.

A series of events formed the basis for the court’s decision to override its usual practice of academic deference to college and university officials.

- At the conference, TSU produced the examination but the professor was not present. Therefore, the court ordered the dean to schedule a meeting with the professor so the student could review her examination.
- At the meeting, the professor did not produce an answer key or any comparable evaluation method by which Sylvester could judge her performance. The judge then ruled that the professor was to provide Sylvester with a written explanation of the correct answers to the disputed exam and how her answer deviated from the model answer. In addition, the professor was to attend all future court meetings.
- The professor failed to attend the next meeting. The judge ordered a committee review of Sylvester’s exam, using the other students’ answers as a comparison.
- The committee met, dismissed all student members, conducted a cursory review without an answer key, and generated a report concluding that they found no inconsistencies. One abstaining committee member wrote in a dissent report that the professor still had not furnished a

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**Exhibit 1.2 Legal Principles Related to Academic Deference**

- Courts will show great respect for the faculty’s professional judgment.
- Courts will only override a faculty member’s academic decision when it is a substantial departure from accepted academic norms.
- Every student is different; therefore, courts are reluctant to engage in a student comparison process.
- Courts do not want to become involved in examining the basis of students’ grades and assessing the credibility of faculty.
- Academic due process requires that faculty give students notice of the academic deficiencies and the consequences of failure to correct the deficiencies.
- Academic decisions regarding students’ performance must be careful and deliberate.
complete answer key by which the committee could adequately review
the exam and that the chairperson had reconstituted the committee. In
the answer key, the professor had simply provided a “yes” answer to one
of the questions. The Court issued an order for the professor’s arrest and
chastised the committee for the inadequacy of its review, noting that “no
student could have received a perfect score for answering ‘yes’ to an essay
question.”

The court ordered TSU to change Sylvester’s grade to a “Pass” and to file
a certified corrected copy of her transcript. Consequently, she was named
covaledictorian, sharing the rank with the student who had taken her
place.

Faculty and/or administrators who demonstrate bad faith or arbitrary
and capricious behaviors and violate a student’s constitutionally protected
rights invite court intervention to protect the student.

CONTRACT

In addition to violations of due process, students initiating lawsuits against
colleges and universities often assert a breach of contract claim. This is espe-
cially true of students attending private educational institutions because the
Fourteenth Amendment due process protection does not extend to private
institutions. Numerous courts have ruled that the relationship between the
university and student is contractual in nature.53 A contract is an agreement
between two or more individuals to perform or refrain from performing a
certain thing. Basic contract law contains the elements of competent indi-
viduals, an offer, mutual acceptance, and consideration.54 A legal binding
contract is based on consideration, which involves the payment of money,
performance of some act, or abstention from doing something that one has
a legal right to do. The contract, either written or oral, identifies the actual
agreement between the parties; therefore, the terms must be clear, unam-
biguous, and definite.

A contract is established when students apply for admission, pay
the required consideration or money, and are considered for admission.
The university has an obligation to evaluate the applicant according to
its published standards.55 Once accepted for admission, the university
agrees to provide the student an education that meets a predetermined
program of study and goal (degree, certification, continuing education)
if the student abides by the rules and regulations, pays tuition, main-
tains satisfactory academic grades, and completes the program of study.
The student accepts the offer by attending the university and providing
the necessary consideration, which is usually tuition and fees. Additional
terms of the contract are found in student handbooks, university catalogs,
course syllabi, or other statements of university policy. Once a contract
is established, the university cannot arbitrarily disregard contractually imposed duties. In *People ex rel. Cecil v Bellevue Hospital Medical College,* the college refused to allow a student who had completed all the curriculum requirements to take the examination and receive a medical degree. The college would not provide a reason for its actions but insisted that it had “the right arbitrarily, without any cause, to refuse the [student] his examination and degree.” Rejecting this position, the court refused to allow the college to arbitrarily and without cause withhold the medical degree from the student noting that:

- The circulars of the respondent indicate the terms upon which students will be received and the rights that they were to acquire by reason of their compliance with the rules and regulations of the college in respect to qualifications, conduct, etc.
- When a student matriculates under such circumstances, it is a contract between the college and himself that, if he complies with the terms therein prescribed, he shall have the degree, which is the end to be obtained.
- This corporation cannot take the money of a student, allow him to remain and waste his time (because it would be a waste of time if he cannot get a degree), and then arbitrarily refuse, when he has completed his term of study, to confer upon him that which they have promised.

The court refused to allow such a “a willful violation of the duties that the college had assumed.”

**Academic Modifications**

The terms and conditions of graduations are generally those contained in the Student Handbook at the time the student is admitted. However, a plethora of case law has supported the legal principle that a university may change requirements for graduation if the changes are necessary for professional practice, are not arbitrary and capricious, and the students have been adequately notified.

The following cases exemplify the courts’ continuing validation of academic deference and the ability of educators/administrators to make changes in progression and graduation requirements.

The case of *University of Mississippi v. Hughes* reinforces the ability of a university to modify degree requirements as needed to adhere to changes in the professional environment. Hughes was dismissed from medical school when he failed the United States Medical Licensing Examination (USMLE) Step 1 after three attempts in accordance with university guidelines. The USMLE was not required when Hughes enrolled in the program. When Hughes was beginning his sophomore year, the School of Medicine
adopted the recommendation of the Curriculum Committee to require students to pass the examination for promotion to the junior year. The rationale for the change was to ensure that students who graduated from the medical school would be qualified to enter residency training in Mississippi. The Federation of State Medical Boards and the National Board of Medical Examiners require students to pass the USMLE to be licensed. Similarly, the State Board of Medical Licensure required students to pass Steps 1 and 2 of the USMLE to enter residency training in Mississippi.

The issue was whether changing the standards required to progress in medical school resulted in a breach of contract. Hughes argued that according to his contract with the university, he was to receive his medical degree if he adhered to and satisfied the terms of the catalog at the time of his enrollment. Because the USMLE requirement was not in place when he enrolled, Hughes contended that the university breached the contract by requiring him to pass the USMLE to progress to the next level. He had complied with the conditions outlined by the university when he enrolled and was entitled to pursue his degree. The court rejected the university’s argument that no contractual relationship existed with Hughes. However, the court noted that implicit in this contract was the university’s right to modify its educational requirements, if the changes were not arbitrary and capricious. To rule otherwise would unnecessarily interfere in the university’s discretion to manage its academic affairs. Effecting changes that align with standards in the professional community is not arbitrary nor capricious. Table 1.1 presents two other cases with similar facts and outcomes, based on well-articulated legal principles.

Table 1.1 Breach of Contract Allegations Based on Academic Modifications

<table>
<thead>
<tr>
<th>Morris v. Yale University School of Medicine</th>
<th>Jallali v. Nova Southeastern University</th>
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<tbody>
<tr>
<td>Morris enrolled in Yale University’s School of Medicine in 2003. The Student Handbook states that the medical school allows students until May of their third year to take and pass Step 1 of the U.S. Medical Licensing Examination (USMLE). Students are allowed three opportunities to pass the examination. If the student does not pass after the third attempt, he/she must consult with the Progress Committee who will decide whether the student is dismissed or allowed another chance to test based on extraordinary circumstances. Morris</td>
<td>Jallali matriculated into the Osteopathic Medical Program in 1998 with an anticipated graduation date of May 2002. Students were required to pass the Complex I examination. This date was extended a year because Jallali failed five of the first year classes. The University changed its graduation requirements during the 1999–2000 academic year to require students to pass both the Complex I and II examinations based on changing accreditation standards. The Student Handbook included an excellent disclaimers that read, “The Student Handbook expressly</td>
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</table>
initially demonstrated high performance in the medical program. However, his performance began to decline, and he did not pass the Step 1 examination. Morris was advised to work with a tutor who could provide assistance in improving his clinical performance. Based on his academic performance, the Progress Committee recommended that Morris pass the Step 1 exam by July 31, 2003, to demonstrate that he was ready for his third-year classes. Morris did not take the exam, instead taking and failing it in September 2003. He was dismissed by the Progress Committee; however, the decision was overturned by a Grievance Committee. The Grievance Committee indicated that Morris must take the exam by June 15, 2004. Morris did not take the examination and was dismissed from the medical program. He subsequently passed the exam in March 2005 and requested reinstatement based on the policy in the Student Handbook. The Medical School denied his reinstatement.

Held for the Plaintiff: The District Court refused to grant the University’s Motion to dismiss the case. Morris has presented a claim that the University failed to adhere to its contractual duties as specified in the Handbook to allow each student three opportunities to pass the USMLE exam before being dismissed. The decision was reversed on Appeal.65

Table 1.1 (continued)

| initially demonstrated high performance in the medical program. However, his performance began to decline, and he did not pass the Step 1 examination. Morris was advised to work with a tutor who could provide assistance in improving his clinical performance. Based on his academic performance, the Progress Committee recommended that Morris pass the Step 1 exam by July 31, 2003, to demonstrate that he was ready for his third-year classes. Morris did not take the exam, instead taking and failing it in September 2003. He was dismissed by the Progress Committee; however, the decision was overturned by a Grievance Committee. The Grievance Committee indicated that Morris must take the exam by June 15, 2004. Morris did not take the examination and was dismissed from the medical program. He subsequently passed the exam in March 2005 and requested reinstatement based on the policy in the Student Handbook. The Medical School denied his reinstatement. |

reserved the school’s right to amend, modify, add to, or delete its rules, policies, and procedures.” It further stated that each student is responsible for knowing the “current academic regulations, the general and specific requirements and the operational policies contained in the Handbook and all other official documents or announcements of the College.” Another statement reserved to the Dean the right to “revise or modify any of these policies at any time, if he feels it is in the best interest of a student or the College to do so.”64

Jallali was notified that he would be required to pass both exams within 6 years of matriculation. Jallali failed the Complex 1 examination 5 times and was reminded of the policy. He passed on the 6th attempt, but failed the Complex II exam. A committee extended the time frame for him to pass the exam. After failing the Complex II examination a second time, he was dismissed from the program. Jallali sued alleging that the University breached its contract with him by imposing the 1999–2000 standards instead of the 1998–1999 standards.

Held for the University: Applying current legal principles, “implicit in the university’s general contract with its students is a right to change the university’s academic degree requirements if such changes are not arbitrary or capricious.”66 The disclaimer in the Handbook was clearly stated, which allowed for program modifications; however, the issue is whether the change was done in good faith. The reasons for the change in requirements were to ensure student competency and to comply with accreditation guidelines. Jallali received adequate notice of the change. Thus, the change was neither arbitrary nor capricious.

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Table 1.1 (continued)
Contract of Adhesions

Although courts have been very pro-university in terms of giving deference to the disclaimer and reservation of rights language contained in catalogs, students asserting a breach of contract claim may have a valid theory. The doctrine of “contract of adhesions” recognizes that certain parties to a contract may not be on equal footing and therefore unable to effectively negotiate the terms or modify the contract. Contracts of adhesion are usually void or made invalid based on public policy. The handbook can be construed as a contract of adhesions because “the student was not a party to the formation of the contract and the relative bargaining position of the parties is unequal.”

In Russell v. Salve Regina College, the college dismissed Russell from the nursing program because of her obesity. After admission to the nursing program, Russell began to encounter problems based on her weight. She became the model for procedures involving obese patients and had to endure lectures and discussions regarding the need to lose weight. The faculty related these comments to expressions of concerns regarding Russell’s health. The college handbook required each student to inform the clinical coordinator of health problems and reserved to the coordinator the discretion to determine whether a student’s participation in clinical practice was contraindicated based on health reasons. Russell’s academic performance was satisfactory except for one failing clinical grade that was attributed to her weight. In her junior year, Russell entered into a contract with the college agreeing to base her continued enrollment on losing an average of two pounds per week. Russell attended diet programs but was not successful in losing weight. Consequently, the coordinator dismissed Russell from the nursing program. She eventually obtained her degree from another nursing program.

A jury found in favor of Russell in her breach of contract claim against the college. Upholding the award of $44,000, the court noted that the college’s actions were based on the belief that Russell’s weight was inappropriate, which is outside the realm of academic judgment. The weight-loss contract between Russell and the nursing program raised several issues of concern related to duress, coercion, her state of mind, and no ascertainable consideration for her promise. Russell could only be barred from clinical practice if her obesity hindered satisfactory clinical performance. However, three days before her dismissal from the nursing program, the clinical supervisor gave Russell a very positive evaluation, writing that she looked and acted in a very professional manner and had good attendance and clinical performance. In addition, the supervisor wrote that she intended to offer her a position as a nurse. Russell had maintained the terms of the general academic contract, namely maintenance of good academic standing, payment of tuition and fees, and adherence to the rules and regulations. Thus, having fully performed her part of the contract, Russell was entitled to her degree and to damages that resulted from the arbitrary denial of her degree.
Breach of Contract

Modifications to admission, progression, and/or graduation requirements usually evoke breach of contract allegations by students against university officials. To prevail on a breach of contract claim, a student must establish the existence of a legally binding contract, that he or she fulfilled all the contractual obligations, that the college or university failed to perform its contractual obligations without legal cause, and that the student suffered a detriment or damages as a result of the contractual breach. An aggrieved student can be judicially awarded a degree, seek an injunction against the breaching party’s actions, obtain monetary damages, or seek specific performance of the contractual terms. In University of Texas Health Science Center at Houston v. Babb, the court granted a temporary injunction to a nursing student that allowed her to resume classes and complete the degree requirements. Babb entered the nursing program under the admission, progression, and graduation requirements outlined in the 1978–1979 catalog, which indicated that students who fall below a 2.0 GPA would be placed on scholastic probation. Another catalog provision read as follows: “A student may obtain a degree from the School of Nursing according to the requirements in the catalog under which he enters the School, or the catalog governing any subsequent year in which he is registered in the School, provided that he completes the work for the degree within six years of the date of the catalog.” Based on the advice of her counselor, Babb withdrew from the program because she was failing a twelve-hour course and reentered the program under a different catalog. The new catalog terms related to progression in the nursing program had a “no more than two Ds requirement” that was not included in the initial catalog under which Babb entered the program. Babb was dismissed from the program after making two Ds. Upholding the injunction, the court noted the expressed promise in the 1978–1979 Catalog to allow the student to continue under the entrance catalog.

Many institutions have inserted “disclaimer” language in their catalogs. This language reads that the information contained in catalogs, bulletins, and other printed materials is not intended to create a contract between the student and the university. Courts have generally ruled that expressed disclaimers are effective in avoiding a binding contract. Likewise, a reservation of rights clause, which acknowledges the university’s right to make changes in its policies, procedures, catalogs, handbooks, and academic curricula, allows the institution to make changes whenever needed to fulfill and properly exercise its educational responsibilities and objectives.

Disclaimer language should contain terms and phrases such as those described in Jallali v. Nova Southeastern University:

- “The school reserves the right to amend, modify, add to, or delete is rules, policies, and procedures.”
Each student is responsible for knowing the ‘current academic regulations, the general and specific requirements and the operational policies contained’ in the College Handbook, University Catalog and all other official documents or announcements of the College.”

“University administrators reserves the right to ‘revise of modify any of these policies at any time’ based on the best interest of students, college, or university.”

In addition to reservation of rights language, notification language should be incorporated into the policy. For example, the language can read, “Students will be notified via e-mail of changes to the student handbook or university catalog and thus are expected to check their e-mails daily.”

**Oral Statements as Contracts**

Students have brought lawsuits alleging breach of contract based on oral statements made by professors, advisors, and other university personnel. Courts will refrain from intervening when students have not met the academic requirements and the professors acted in good faith and with reasonable conduct. These principles are clearly enunciated in *Olsson v. Board of Higher Education of the City of New York.*

The professor erroneously told students taking the comprehensive examination that they must pass three of five questions when in actuality students must score three out of a possible five points on four of the five questions. Olsson achieved the former but not the required score. However, over 50 percent of the students passed the exam despite the professor’s erroneous statement.

Olsson sued the institution based on the contract principle of estoppel, which prevents one party from reneging on a statement or promise if the other party has relied on it to his or her detriment. Specifically, Olsson asserted that the university should award him the degree because he relied on the professor’s statement in budgeting his time and had achieved the stated grade. Rejecting this argument, the court refused to apply the “diploma by estoppel” doctrine and grant Olsson a degree on the premise that the university breached its contractual obligation; therefore, the court should judicially award him a degree. This remedy is reserved for the most egregious of circumstances and will not be imposed where a less academically intrusive remedy is available. Olsson had been offered, but refused, an opportunity to retake the examination. Noting that Olsson was not academically qualified, the court emphasized the meaning of an academic degree.

When an educational institution issues a diploma to one of its students, it is, in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline.
In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis.

Indeed, the value of these credentials from the point of view of society would be seriously undermined if the courts were to abandon their longstanding practice of restraint in this area and instead began to utilize traditional equitable estoppel principles as a basis for requiring institutions to confer diplomas upon those who have been deemed to be unqualified.75

Although courts continue to maintain a judicial “hands-off” on cases involving academic decisions, where the issue involves students’ academic qualifications and progression, faculty must continue to deal with students in good faith.

PROFESSIONAL DIMENSION

Faculty have significant discretion in evaluating the academic performance of students and making decisions regarding their progression toward meeting the requirements necessary for graduation. On issues involving students’ academic performance, courts will usually defer to the professional judgment of the professors, unless the student can demonstrate that the professor was motivated by ill will or substantially deviated from accepted academic norms. Grievance and appeal procedures have been established to protect the legal rights of students. Faculty should respect the process and deal with students in a fair and professional manner to protect the integrity of the academic environment.

Faculty establish the tone for the academic environment and thus are charged with creating an academic environment that is conducive to teaching and student learning. As illustrated in these cases, students will not hesitate to challenge the academic process, regulations, rules, and procedures; however, adherence to well-written handbooks, admission requirements, progression policies, and graduation requirements offers a tremendous defense in litigation situations.

Faculty have a professional responsibility to ensure that patients receive safe, quality, and competent care from students. Many faculty members feel reluctant to address the emotional, psychological, or affective domain of student behavior or actions. “Allowing students to graduate . . . unable to function adequately in the interpersonal realm or in our global society is a disservice to all involved.”76 A students with a “character dysfunction” has “a deficiency in social skills necessary for
successful professional relationships—often leads to communication disruptions and unsatisfactory interactions between students,"77 faculty, staff, and even patients. In Obukhoff v. Case Western Reserve University,78 the court upheld the dismissal of a medical student who had both academic and a personality disorder. Obukhoff barely passed his first year of medical school and failed four exams during his second year. He requested a leave to deal with personal issues. While on leave, he accepted a paid research position but exhibited inappropriate behavior in the lab. The Committee on Students referred him for a fitness for duty evaluation. The results revealed that Obukhoff had “an unspecified personality disorder with strong narcissistic traits and an inability to perceive or admit to his own mistakes . . . he perceived himself as superior, was unable to self-evaluate and self-criticize and is interpersonally exploitative and lacks sympathy.”79 Based on the above information combined with receiving new information regarding Obukhoff poor patient interviewing skills, the committee voted to dismiss him from the medical program.

Likewise, in Kimberg v. University of Scranton,80 the court upheld the dismissal of a student from a Nurse Anesthesia program who posed a threat to patients. Faculty indicated that Kimberg “did not appear to get the whole anesthetic process and priorities” and other CRNAs did not feel comfortable allowing him to administer anesthesia. In addition he did not adhere to “core values such as integrity, teamwork, accountability, compassion and courtesy.”81 The department chairperson indicated that Kimberg “was insubordinate. He gave medication that he was told not to give. He was dangerous. This is life and death.”82

Educators are preparing students for addressing the needs of patients. Just as the medical profession is not for all students, the profession of nursing requires students who can problem solve, think critically, and therapeutically interact with a diverse population. Students should be evaluated on all essential components required of a nurse: affective, cognitive, and psychomotor domains and understand that all components are essential to successfully complete a nursing program of study.

**ETHICAL DIMENSION**

Faculty should remain objective in their interactions with and evaluation of students. Subjective grading is unfair to students who have studied the materials in hopes of receiving a good grade. Bias, prejudice, and ill will must remain strangers to the academic environment. Students should be treated fairly and recognized as individuals with goals, values, and beliefs. It is not the educator’s role to create a clone of him or herself. In situations involving appeals and grievances, faculty should remain objective, neutral, and fair. Justice requires that
students be allowed to protect their interests in the educational arena. Faculty should not become defensive but view it as a welcomed process with procedures to address students’ issues, concerns, or conduct. Information presented to support a faculty members’ action should be factual and never fabricated.

**Implications for Educators**

- Courts are extremely reluctant to override the grade faculty assign to students; thus, a fair process should be used.
- Students must be afforded due process in academic and disciplinary issues that negatively impede their progression and graduation.
- More due process is required in disciplinary proceedings. For cases that do not clearly fall under either the academic or disciplinary category, faculty should err on the side of providing more due process.
- Courts are more willing to review cases involving disciplinary due process than those involving academic due process.
- Faculty should follow the policy of their respective schools or colleges to address issues of cheating and other instances of academic dishonesty.
- Academic due process mandates that students are given notice of academic deficiencies, the consequences if improvements are not made, suggestions for improvement, and re-evaluation to identify improvements or the lack thereof.
- Faculty should remain objective and avoid negatively labeling students.
- When challenged by students, faculty should focus on the issue(s) and not respond with emotions.
- View challenges by students as an opportunity to strengthen processes and policies.

**Strategies to Avoid Legal Problems**

- Prepare a course syllabus that outlines course requirements and grading policies. Students should understand the course objectives and evaluation methods.
- Include a reservation of rights clause in the syllabus.
- Review the syllabus with students to prevent and clarify any misconceptions.
- Correct errors on the syllabus, both orally and in writing as soon as detected.
- Provide criteria for how each assignment will be graded.
- Clearly articulate the basis for a failing grade and for failing the course.
- Follow the guidelines provided in the course syllabus.
- Notify students throughout the course, or at least by midterm, of their potential for failing the course and provide suggestions for improvement.
- Avoid making “exceptions” for one or a few students. Treat all students equally.
Inform students of the procedure for a grade appeal or refer them to the college handbook or university catalog for information on grade appeals.

Be objective in evaluating students. Avoid grading based on personal values and beliefs.

Provide a factual basis for a student’s failure or dismissal. Avoid subjective comments that negatively label a student.

Provide immediate and frequent feedback on the students’ clinical performance. This feedback should be based on daily clinical records of anecdotal notes of the student’s clinical performance.

Follow established policies and procedures for handling students’ academic and disciplinary issues.

In cases involving disciplinary issues, provide students with the appropriate due process, which consists of notice of the allegations, the opportunity to be heard, and the ability to cross-examine witnesses and present evidence in their defense.

Ensure that students are aware of all requirements by having them sign a receipt that they received the handbook and the graduation requirements were outlined.

If a Comprehensive Predictor or some other form of comprehensive test must be passed for students to graduate, ensure that students are aware of this requirement during orientation and have them sign and acknowledge this requirement.

Establish clearly defined expectations for social interactions, appropriate behaviors, and handling emotions. The handbook and syllabus should clearly identify the consequences associated with noncompliance with established expectations.

RESPONSES TO CRITICAL THINKING QUESTIONS

Discuss under what circumstances Karenlynn’s grievance could be upheld by the committee.

Karenlynn’s grievance could be upheld by a grievance committee, if it believed that the argument made by the students was accurate and the Dean’s decision was unfair and disadvantaged the students. Students had used the initial vendor’s products throughout their course of study and were familiar with the style of questions and their application of principles to the vendor developed scenarios. The committee could conclude that a better course of action would be to purchase another comprehensive assessment from the vendor, and if needed, delay the date of the remediation examination. In addition, the committee could question why the students were not given an option of either of taking an alternate examination or taking the initial’s vendor’s examination once it was received.
What is the likelihood of a Court ruling in favor of Karenlynn on the violation of due process and breach of contract claims?

A breach of contract analysis requires the court to examine the contractual relationship between the students and the nursing program. The basic elements of a contract are present: an offer, mutual acceptance, consideration, and action. When Karenlynn accepted the University’s offer of admission, paid her tuition, and began the program of study taught by qualified faculty, a contractual relationship was created. Karenlynn agreed to adhere to the published guidelines and meet the requirements of the program of study and the nursing program agreed to provide a quality education and provide a degree, if the student successfully completed the requirements of the program. The nursing program required students to take a vendor purchased examination to successfully complete the program of study. Due to unforeseen circumstances beyond the control of nursing administration and faculty, security of the testing process was breached by dissemination of the test blueprint. To adhere to its contractual obligation, administrators were required to find other least restrictive methods to fulfill its obligations. This was done via the selection of an alternative examination from a different vendor but based on the same question type and NCLEX format. To minimize any disadvantage to the students, they were provided with practice assessments from the new vendor. This action negated any argument by the students based on “major differences” and “unfamiliarity.” In addition, a reservation of rights clause in the students’ handbook allowed administrators to make changes in its operations. The circumstances mandated that the scheduled examination could not be used; thus, the dean had discretion to implement an alternate course of action. Thus, the court will most likely rule in favor of the nursing program on the breach of contract allegation.

Karenlynn will also probably not prevail on her allegation of a due process violation. She was provided notice that she did not pass the initial comprehensive examination, would be allowed a second opportunity to retest, and the date of the new test. In addition, students were notified of the change, provided with new materials to acquaint them with the new vendor, provided sample examinations and allowed to retest. Students exercised their option to notify nursing administration of their concerns, which were promptly addressed. In _Yarcheski v. University_ of Medicine and Dentistry of New Jersey, the court ruled in favor of the university when a nursing student refused to repeat a course and was dismissed from the nursing program.

Discuss what other actions the College of Nursing could have taken to address this situation, if any.

Nursing administration handled the situation appropriately. The process that allowed students to obtain the initial vendor’s secured test blueprint indicated problems with the vendor’s system. Although, a new comprehensive
examination could be constructed, there was a two-month timeframe and the uncertainty of another breach of test security. The use of a different vendor and keeping the same test date minimized major changes. The possible option to address the alleged cheating would have created unnecessary delay, while nursing administration tried to investigate the validity of the accusation. Although certain of the test security breach, the students’ names that appeared on the list were anonymously reported and thus could not be immediately validated. If questioned, some of the students may admit possession of the blueprint, while others would not. Students who admitted to possession of the blueprint could argue that the nursing program did not have specific policies regarding the blueprint and thought it was an acceptable study aid, since it was not the test itself. Those students who denied having possession of the blueprint would still need to complete a comprehensive assessment. Thus, the most expedient and practical approach was the selection of an alternate comprehensive examination. Any student who relied on the blueprint as the basis to pass the initial examination would have to study to pass the new examination.

ANNOTATED BIBLIOGRAPHY

A student accused of sexually assaulting another student was prevented from providing information on the financial and personal impact that a suspension would have on him. The Provost Appeals Committee (PAC) found that the initial committee had violated Berge’s due process rights because the evidentiary hearing phase did not allow for a separate penalty phase; therefore, any information regarding penalties must be included in the evidentiary hearing phase. They recommended that Berge be given a new hearing with a new committee. The Provost overturned the PAC’s decision and reinstated the decision of the initial committee. The court held that Berge’s evidence on the effect of the sanction (suspension) was “relevant to assist the [initial committee] in making a reasoned decision, and as such it should have been admitted into evidence by the committee and considered in reaching its decision. In student disciplinary matters, the welfare of the student and the interests of the university are both important, and the effect of a sanction upon a student is a proper factor for consideration.”

In the Matter of Joseph Gilbert v. State University of New York at Stony Brook, 73 A.S 3d 774 (2010).
A third-year medical student failed a clerkship while on academic probation. The Court upheld the decision because “the student’s academic performance
was deficient as measured by the medical school’s standards. The determination to dismiss him was properly based upon academic considerations, and was not arbitrary and capricious.”

**Leone v. Central Connecticut State University, 2006 U.S. Dist. LEXIS 96094.**
Court refused to dismiss a lawsuit for defamation where the complaint stated that university officials made false oral and written statements that referred to the plaintiff as dangerous and unsuitable to serve as a teacher.

**McConnell v. LeMoyne College, 25 A.D. 3d 1066 (2006).**
An applicant received a conditional acceptance letter from the Interim Chair in which plaintiff had to earn a grade of “B” or better in his first four courses and complete all admissions requirements to become fully matriculated. The new Chair later sent him a letter stating her concern regarding the mismatch between his personal beliefs related to teaching and learning and the program’s goals. McConnell was withdrawn from the program. Held: for Plaintiff. The college was directed to reinstate the plaintiff.

**Comer v. Meyers, 2007 U.S. Dist. LEXIS 44571.**
A student, whose transcripts were being withheld because he owed money to the university, could not prevail on a claim of due process (property right) violation. The college owned the transcript, which will be released when the debt is paid.

A private university is not bounded by the full arena of due process rights provided by the U.S. Constitution. Therefore, students attending private colleges and universities are entitled only to those safeguards provided by the institution. These safeguards are the basis of the contract between the education institution and the students.

**Tran v. West Chester University, 986 A.2d 179 (2009).**
A student enrolled in a Bachelor of Science in Nursing program was dismissed from clinical practicum rotation based on allegations of unsafe clinical behaviors. The court indicated that the student handbook of a public university is not a contract between the public university and the student. There is a contractual relationship between a private university and students.

**Steinberg v. Chicago Medical School, 354 NE2d 586 (1976).**
A student applied for admission to a private medical school and submitted the $15 application fee. The student sued the school, alleging it evaluated students for admission on standards other than those published in the bulletin. Specifically, applicants were evaluated according to their relationship to the school’s faculty members and board of trustees or based on their ability to make money pledges to the school. Held for the applicant: Steinberg and
the school had an enforceable contract; therefore, the school had an obligation to judge his application according to the stated criteria. The school’s obligation was stated in the bulletin and by accepting his application fee, the school had to fulfill its promises.

A student enrolled in a private college was dismissed after she refused to comply with psychological counseling for a chronic paranoid condition that was considered a serious detriment to herself and others. Held for college: No breach of contract exists where a student signed an admission form that read: “if my application for admission is accepted, I agree to abide by all regulations of the institution and respect its tradition” and the college catalog contained a provision that read, “The institution reserves the right to dismiss at any time a student who in its judgment is undesirable and whose continuation in the school is detrimental to himself or his fellow students.”

DeMarco v. University of Health Science Chicago Medical School, 352 NE2d 356 (1976).
A student enrolled in a private college had completed all but the last six weeks of medical school. After learning that the student had failed to acknowledge that he had attended another medical school, the college recommended that if the student entered and was honorably discharged from the military, he could be allowed to complete the program. The school later refused to readmit him unless he pledged a contribution to the college. Held for the student: The school breached its contract with the student because the student did not have an obligation to pledge a contribution.

Morfit v. University of South Florida, 794So 2d 655 (Fla App 2 Dist 2001).
Subjects in a research project accused Morfit of misconduct. The dean of student judicial services sent Morfit a letter detailing the charges and placed him on immediate suspension. At the hearing, the only evidence present was a report filed by a security officer who had interviewed one witness. Held for the student: Morfit’s due process rights were violated, because he was deprived of the opportunity to confront and cross-examine his accusers, which is an essential component in disciplinary judicial hearings. The university must follow its own policies and procedures.

Powell v. Cooper, 622 NW2d 265 (Wis. 2001).
A student was prevented from enrolling in the practicum component of her program of study because she refused to disclose her manic-depressive condition to the site supervisor. Consequently, she was unable to complete the program. Her academic advisor was aware of her condition on admission and assured her that the condition would not interfere with completing the program. Held for student: The faculty’s action violated the student’s due
process rights and was arbitrary and capricious. The student had a constitutionally protected property interest in continuing her graduate studies.

**Smith v. Rector and Visitors of University of Virginia, 115 F Supp 2d 680 (WD Va. 2000).**

Smith, a student at the University of Virginia, was convicted of assault and battery for punching another student in the face, causing him severe facial injuries. He served twenty-one days in jail, attended anger management, served 400 hours of community service, and paid all related medical expenses. The student initiated disciplinary charges against Smith with the University's Judicial Committee (UJC), a student-run disciplinary body charged with handling complaints about student violations of the university's standard of conduct. The initial hearing was scheduled for February 1998 but was rescheduled until November 1998 pending resolution of the criminal matters. The day before the scheduled hearing, Smith and his father met with Mr. Harmon, vice-president for student affairs, to request a continuance. Smith alleged that his request was granted and contacted the student defense representative to inform the UJC chairperson that the hearing had been continued. Harmon alleges that he did not agree to a continuance. The hearing was conducted as planned, without Smith and against the protests of the defense representative. The UJC found Smith guilty and recommended his expulsion from the university. Smith appealed the decision, and the university’s Judicial Review Board (JRB) set aside the UJC’s decision and remanded the case for a new hearing. A new panel hearing was scheduled for February 1999, but was postponed when the UJC’s chairperson recused herself. The UJC then determined that it could not timely hear the case and referred it to Harmon, who appointed a committee composed of faculty, administrators, and students. At the hearing, after hearing Smith’s evidence and witnesses, the committee recommended two semesters of suspension and community service. The recommendation was forwarded to the university president, who modified the sentence to two years of suspension, community service, and participation in an anger and alcohol abuse program. He then deferred final judgment pending an appeal of his decision to the JRB. However, the JRB denied Smith’s appeal. Held for Smith: Smith had been deprived of notice and an opportunity to be heard at the November 1998 hearing, and thus his due process rights had been violated. A student facing disciplinary action that could result in suspension or expulsion is entitled to some type of notice. The court rejected the university’s argument that any alleged violation of Smith’s constitutional rights was irrelevant since the panel’s decision was set aside, and Smith was not harmed.

**Archived Scenario**

Randy Byrd was a third-semester nursing student with a grade point average (GPA) of 3.6 on a 4.0 scale. He received an “A” grade in all
first-year nursing courses. At the beginning of the third semester, students are required to meet with their faculty advisor to plan future learning experienced based on the student goals. During the interview, Randy told his advisor, Dr. Terrell, that he did not plan to practice nursing but wanted the degree to become a nurse-attorney. He also indicated that he was getting a dual degree in nursing and biology in case he decided to go to medical school. Dr. Terrell told Randy that he was wasting the faculty’s time and taking a seat away from a student who wished to practice as a registered nurse. She strongly encouraged him to drop nursing and pursue another major. Surprised by the remark, Randy refused to withdraw from the program. He stated that he was learning a lot in the program and would use the information in a nonclinical way. Dr. Terrell then stated the advising process was useless because it was based on the student’s career goals in clinical practice.

During the second half of the third semester, Randy rotated to geriatrics didactic and clinical practice taught by Dr. Terrell. He received 96 on test 1, a 97 on test 2, a 50 on test 3, and an 84 in clinical practice. The tests and clinical grades each counted 25 percent toward the final grade. The first two tests contained 100 four-item multiple-choice questions. The third test contained five essay questions. Students must pass each test and clinical with a grade of 80. For test security purposes, Dr. Terrell did not review the tests nor provide students with their test scores until the end of the rotation. Randy was advised that he could not progress to the next level and must wait a year until the course was offered again.

Randy protested his grade orally and in writing to the undergraduate program director (UGD) and asked to review the third test. Dr. Terrell denied his request. In his protest papers, Randy provided evidence that during her eight-year tenure at the university, Dr. Terrell had never given an essay test. In addition, the course syllabus indicated that there would be three multiple-choice tests, and Dr. Terrell did not tell any of the students that the third test would be in an essay format. Fifteen percent of the students failed the essay test. A committee appointed by the UGD to review the test, the test grid with answers, and Randy’s test upheld the grade of 50. He unsuccessfully appealed to the dean and the University Student Grievance Committee. Randy initiated legal action alleging violation of procedural and substantive due process and breach of contract.

**CRITICAL THINKING QUESTIONS**

- Discuss whether Randy’s due process rights were violated.
- What is the likelihood of the court ruling in favor of Randy?
- Does Randy have a valid argument for breach of contract? Support your answer.
- What reasons, if any, would necessitate a professor changing the format of an exam?
RESOURCES TO CRITICAL THINKING QUESTIONS

Discuss whether Randy’s due process rights were violated.
Randy probably cannot establish violations of his due process rights. To fulfill due process requirements, faculty members are required to give students notice of their academic deficiencies and the consequences thereof. Dr. Terrell’s practice of not providing students with their progression status until the end of the course is not academically strong. Students should be given timely notice that they are failing, suggestions on how to improve, and the consequences of failing the course at midterm or earlier to allow the opportunity for improvement. However, since Randy had passed the first two examinations and the clinical rotation, a midterm status report would have been satisfactory. In addition, since Randy’s failure of the course was based on a single test score, counseling him would not change the outcome. Finally, a committee appointed by the chair to review the test, the test grid, and Randy’s answers upheld the failing grade. Randy will probably raise the following questions: Should students fail a course based on one failing test grade? Why was the format of the third test different from the first two tests? Why did Dr. Terrell give an essay test this semester? Was this a policy in all nursing courses? Why was he precluded from reviewing the test?

Courts are unlikely to examine the contents, comment on the format, or decide whether an examination has been fairly graded. The appropriate weight given to course assignments is outside the realm of judicial intervention. Faculty members decide how much weight to give each project, examination, or other assignment. Faculty can give unscheduled quizzes to test students’ knowledge of course content, ascertain their preparedness for class, and monitor the class’s performance. In *Bindrim v. University of Montana,* a student alleged that the university breached its contract by adding a function examination as a component of the course and by requiring additional courses after he was advised that no additional courses were needed. Ruling for the university, the court held that Bindrim had not completed the conditions precedent to obtaining his degree. He failed the course by not taking the function examination and did not complete his program of study. In addition, the university catalog contained a reservation of rights clause that allowed them to change instruction and alter course content. Thus, Randy’s concern regarding the weight given to one examination is not a judicially strong argument, especially since 85 percent of the students in the class successfully passed the examination.

What is the likelihood of the court ruling in favor of Randy?
To prevail in this case, Randy must show that his assigned failing grade was motivated by bad faith or ill will unrelated to academic decisions.
or that the grading process used was such a substantial departure from accepted academic norms as to demonstrate that Dr. Terrell did not exercise professional judgment. Randy will probably rely heavily on the statement that Dr. Terrell made during his advising encounter to show bias and ill will. Although courts will probably view this as speculation and insufficient to show bias, the belief that Randy was wasting the faculty’s time and taking a seat away from a student who wished to practice as a registered nurse represented Dr. Terrell’s personal belief and should have never been stated to Randy. However, the statement, combined with her strongly encouraging Randy to withdraw from the nursing program, is probably not enough to show bias. There is no evidence that Dr. Terrell treated Randy any differently from other students. As stated in the Richmond case, bias must be based on evidence and not speculation and conjecture.

■ Does Randy have a valid argument for breach of contract? Support your answer.
Randy will assert a breach of contract claim based on language contained in the syllabus that identified three multiple-choice examinations and because the professor did not notify the class of any changes in the examination format. Courts will not examine projects and examination formats. In *Harris v. Alder School of Professional Psychology*, two doctoral students who failed their qualifying examination initiated a lawsuit alleging that the examination was invalid to assess their knowledge of basic foundation courses in psychology. Rejecting this argument, the Court refused to engage in a judicial determination of course content and subject matter. The determination of whether to assign a passing grade is made by school officials. Randy’s claim is premised on a court ruling that the professor could not change a test format or that the test was invalid. Courts will not review the adequacy of examinations to determine validity. The essay examination was given to the entire class. Regardless of the format, students were required to demonstrate knowledge of the subject matter—geriatric nursing. Courts will not intervene to make the professor give a multiple-choice examination or assign Randy a passing grade.

■ What reasons, if any, would necessitate a professor changing the format of an exam?
A strong reason for changing the format of an exam is when a breach of test security has occurred. One possible scenario is presented next. Dr. Terrell indicated she changed the test format because the evening before the examination, she received a call from an anonymous source informing her that several students had a copy of her examination. The source correctly identified the questions on the examination but refused to divulge any additional information. Because of the tight time schedule, Dr. Terrell could not develop another multiple-choice test nor could she
cancel the exam. Using lecture notes and the assigned readings, Dr. Terrell developed an essay test, which essentially measured the students’ knowledge of the content. The dean of nursing was aware and approved of the change.

The Office of Student Services was notified and initiated an investigation into the breach of the honor code. Dr. Terrell was asked not to discuss the matter until the investigation was completed. After several students were disciplined for their role in taking and distributing the exam, the class was notified of the reason for the change in the exam format. Requests from students for another multiple-choice test were denied. Grievances filed by students were dismissed as having “no merit.”

NOTES

4. 513 F3d 843 (10th Cir. 1975).
8. Board of Curators of the University of Missouri v. Horowitz.
9. Ibid. at 82.
10. Ibid. at 95.
12. Ibid.
14. Board of Curators of the University of Missouri v. Horowitz.
15. Regents of the University of Michigan v. Ewing.
17. Ibid.
19. Ibid.
22. Ibid.
23. Ibid.
28. Ibid.
29. Ibid.
33. Dixon at 159.
35. 976 F. Supp 136 (NDNY 1997).
37. Ibid.
39. Ibid.
42. Ibid.
43. Jaber v. Wayne State University Board of Governors.
44. Quoting Flaim v. Medical College of Ohio, 418 F.3d 629, 635 (6th Cir. 2005), “the stronger the private interest . . . the more likely a formal written notice-informing the accused of the charge, the policies or regulations the accused is charged with violating, and a list of possible penalties-is constitutionally required.”
46. Ibid. at 332.
49. Id.
50. Ibid.
51. Ibid.
55. Steinberg v. Chicago Medical School, 354 NE2d 586 (1976).
56. People ex rel –Cecil v. Bellevue Hospital Medical College, 14 NYS 490 (NY Sup Ct), aff’d 28 NE 253 (1891).
57. Ibid. at 490.
58. Ibid. at 490.
59. University of Mississippi v. Hughes, 765 So.2d 528 (Miss 2000).
60. Ibid.
61. Ibid.
63. Jallali v. Nova Southeastern University, 992 So.2d 338 (Fl. 2008).
64. Ibid. at 340.
65. Morris v. Yale University School of Medicine, 477 F. Supp. 2d 450 (D. Conn. 2007).
66. Ibid. at 344.
67. Cherry and Geary, “The College Catalog as a Contract.”
70. 646 S.W. 2d 502 (1982).
71. University of Texas Health Science Center at Houston v. Babb at 503.
74. Ibid.
75. Olsson v. Board of Higher Education of the City of New York at 1153.
77. Ibid.
78. 2010 Ohio App. LEXIS (Apr 2010).
79. Ibid.
80. 411 F. Appx. 473 (3rd Cir. 2010).
81. Ibid.
82. Ibid.
83. 966 A.2d 1080 (N.J. 2009).
84. 766 P.2d 861 (Mont. 1988).