
Trainees with Competence Problems and Psychology Training Programs: The Legal Framework

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Disclaimer:

The following materials are intended to provide general information regarding legal issues involving trainees. This information does not represent legal advice and should not be relied on as such. This presentation is not intended to be a comprehensive statement on the subject but, rather, an overview that provides practical information for the reader. For further information on this subject, it is suggested that participants contact their university or corporate counsel or seek individual legal representation.

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Presentation Overview

- Traditional Judicial Deference to Academic Decision-Making
- Constraints on Deference
 - Constitutional Constraints
 - Contract Issues
 - Promissory Estoppel
 - Defamation Americans with Disabilities Act
 - Confidentiality Laws
- Remediation
- Risk of Liability for Failure to Address Performance Problems
- 10 Risk Management Commandments

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Traditional Deference to Academic Decision-Making

- Universities can best perform their missions when they are free from governmental or judicial interference. *Trs. Of Dartmouth Coll. v. Woodward*, 17 US (Wheaton) 518 (1819)
- Courts reluctant to second-guess professional educational judgment:
 - Don't want to decide whether requirements of a program are appropriate or interfere with the evaluations of student work
- Fear that larger judicial presence would impair faculty-student relationship
- Reluctance to trench on the prerogatives of state and local educational institutions

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Constitutional Constraints

- **Constitutional Issues**

- Due Process clause of the 14th Amendment gives students at least minimal protections against dismissal
 - constitutionally protected property and possibly liberty interests in government run education *Goss v. Lopez*, 419 US 565 (1975)
- Two types of protection: substantive protections, and procedural protections
- Constitutional protections generally apply only to public universities. (Students in private colleges have protections through common law and contract.)

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Constitutional Constraints

- **Substantive Due Process Required for Academic Dismissals**

- Court has shown great reluctance to second-guess the decisions of school administrators.
- “[T]he determination [of] 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.” *Board of Curators v. Horowitz*, 435 US 78, (1978)

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Take Away Point

- Courts defer to professional judgment based on standards and established professional academic norms

- Where possible, link evaluations, warnings and decisions about behavioral problems to substantive skills and training goals and objectives
 - Receives greater deference than conduct codes
 - Treat students similarly so as not to be found “arbitrary and capricious”

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Constitutional Constraints

- **Procedural Due Process Required for Academic Dismissals**
 - Determined by the Issue Involved
 - Discipline: punishment for misconduct or violation of rules --procedural protections are much greater, involving such elements as formal notice, hearings and appeals.
 - Failure to meet academic standards -- procedural protections are less rigorous. *Schuler v. University of Minnesota*, 788 F.2d 510 (8th Cir. 1986)

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Take Away Point

- Best Defense is a Good Process
 - Procedure should provide notice, opportunity to respond, appeal.
 - Keep good records.
 - Put it in writing

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Contract Issues

- Relationship between a private university and a student is contractual.
 - Tuition + satisfactory grades = degree.
- Terms of contract derived from:
 - university catalogues, student handbooks, “guidelines,” and other published text, and
 - oral representations by teachers and administrators on the other. *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 330, 371 N.E.

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Take Away Point

- Spell out all standards and processes in writing
- Think of standards as contract or agreement between institution and student
- Admissions:
 - If you knew it going into the contract, hard to say an action is breach of contract
 - Are problems evident? Are they material?
 - Don't assume resolution will occur once admitted.

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Promissory Estoppel

- Legal doctrine of fairness: “Stopped” from relying on contract if have made promises to the contrary.
- EG: Professor or university administrator makes a representation about graduation requirements, testing criteria, etc. that is inconsistent with the university's rules;
- Student acts in detrimental reliance on the accuracy of the professor's or administrator's statement, university is bound by the substance of such representation.
 - Estopped from requiring that the student comply with the actual rules.

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Take Away Points

- Once you have established procedures and given public notice, follow them and apply them consistently.
- Remind faculty not to “freelance”
- Differing treatment of students can also lead to discrimination or unfairness claims from other students.
- Can't rely on policies and procedures as unchallengeable basis for your action if you have treated students differently under them.

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Defamation Issues

- Defamation: Statement (oral or written) of false facts damaging to a person's reputation.
 - Each “publisher” can be sued
 - Generally qualified privilege for those engaged in purpose of evaluation
- *Kraft v. The William Alanson White Psychiatric Foundation (dba The Washington School of Psychiatry)*, 498 A.2d 1145 (D.C. 1985)
 - Kraft was a licensed PhD psychologist enrolled in a continuing education program.
 - School decided not to award him a certificate of successful completion of two-year training program
 - Alleged faculty made defamatory statements about him in written materials evaluating his work where they described his weakness in clinical component of training program.

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Defamation Issues

- Analysis of the Successful Defense of Implied Consent
 - 1) On notice that his supervisors would evaluate his work and communicate their evaluations to the chairman of the training program.
 - 2) Each statement went directly to Dr. Kraft's handling of his clinical patients and none went further than to state possible reasons for the supervisor's dissatisfaction with his performance.
 - 3) Broadcast of the communications was confined to the faculty of WSP who had responsibility for decisions regarding award of the training program certificate.

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Take Away Points

- Faculty statements about students, written or oral, should be limited to opinions and facts related directly to the evaluation of competence.
 - Knowledge, skills, relevant personal attributes
- Assure evaluative statements are disseminated no further than to others with official responsibility for evaluations and related actions.

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Disabled Students: The Rehabilitation Act / Americans With Disabilities Act (ADA)

- Statutes protect “otherwise qualified” disabled students against discrimination
- *A student is covered under Section 504 of the ADA if s/he has a disability that substantially limits a major life activity, such as learning or working **and** if s/he can complete the requirements of the academic program, with reasonable accommodation if necessary.*
- Generally the obligation of the individual with the disability to make his/her condition known to the program and to provide appropriate documentation to get accommodations

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Disabled Students: The Rehabilitation Act / Americans With Disabilities Act (ADA)

Threshold Issue:

- “Impairment” may not be “disability” for legal purposes
 - Broad use of term in psychology (unethical, incompetent, diminished functioning, etc.)
 - Doesn’t mean student is disabled: be careful
 - Must “substantially limit a life activity” on an ongoing basis

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Disabled Students: The Rehabilitation Act / Americans With Disabilities Act (ADA)

Restrictions under ADA provide protection for programs:

- Don't have to accommodate if the student cannot, even with reasonable accommodation, meet the essential requirements of the program in spite of the disability.
- Don't have to alter the nature of the program or lower standards
- No obligation to keep a student if providing needed accommodations would be unduly burdensome, either administratively or financially.

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Disabled Students: The Rehabilitation Act / Americans With Disabilities Act (ADA)

Not Covered:

- Student will not be considered "otherwise qualified" if s/he poses a direct threat to themselves or others.
- Substance Abuse: Individuals who are currently using illegal drugs and individuals presenting a danger to themselves as a result of alcohol use are not protected.
42 USC § 12114

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Take Away Points

- Focus on behavior.
- Focus on professional requirements.
- Keep roles straight (teacher vs. therapist).
- Avoid diagnosing and treating.
- Focus on evaluating professional qualifications and taking action within program.

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Confidentiality Laws

Health Insurance Portability and Accountability Act (HIPAA)

- Federal law providing primarily for the portability of insurance (Regulations address the privacy of health information).
- Applies to Health Care Providers and protects health information
- **Most academic institutions' functions are NOT covered unless you are specifically acting as treating individual**

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Confidentiality Laws

Family Educational Rights and Privacy Act (FERPA):

- Prevents an educational institution from having a policy or practice of disclosing the education records of students (current or former), or personally identifiable information contained in education records, without the written consent of the student.
- Covers only the policies or practices of an institution
- An accidental, unique or unusual disclosure is not a “practice” or “policy”
- Includes: Virtually ALL written records
- Personal observations/concerns/oral discussions about a student are not “records”

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Confidentiality Laws: Exceptions

Disclosure is allowed without consent to:

- Another Educational Agency or Institution in which the student is enrolled or receives services
 - Allows sharing of student records regarding students in joint degree programs, internship programs, or other dual educational arrangements (with notice)
- Other School Officials with “legitimate educational interest”
 - The individual needs to see the record in order to fulfill his or her professional responsibilities for the University
- Parents of a dependent student
- Appropriate persons in Emergency Situations

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Confidentiality Laws: Take Home

- HIPAA not really an issue in academic setting
- FERPA covers records, not all information
- Many exceptions to FERPA that allow the disclosure you need to evaluate, discipline and engage in remediation with a student
- Consent: Often easiest and safest way to deal with concerns

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Remediation

- **Legal Parameters**
 - Link requirements to concrete relevant, required professional skills and attributes identified as training goals and objectives.
 - Provide specific guidance regarding how to meet goals, and conditions where appropriate (e.g., repeat coursework, repeat practicum, increased advising and mentoring, extra work, leave of absence.)
 - Use of therapy as remediation tool: caution
 - Set a deadline; evaluate; take action.
 - Know when to call it quits.

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Liability Issues that Might Arise for Failure to Address Problem Interns

- 1) Malpractice – Relatively few cases arising from the failure to supervise; even fewer addressing therapy by interns in psychology programs.
- 2) State Licensing Laws - routinely address who is qualified to be a supervisor.
- 3) Basic Common Law Negligence Theories
 - Vicarious liability for the actions of the supervisee, regardless of any fault by the supervisor;
 - Direct liability, in which the supervisor is held directly liable for his own negligence, such as negligent supervision
 - Respondeat superior-liability for employees
 - Enterprise liability-liability for other entities

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Ten Tools for Legal Risk Management

- 1) Develop procedures that satisfy essential due process
 - In writing, notice, opportunity to respond, appeal
- 2) Provide written notice of standards against which student performance will be measured
- 3) Follow your Procedures and Standards!
- 4) Be Consistent in interpretation
- 5) Establish internal evaluation procedures
 - Confidentiality, “need to know”
 - Tie evaluations to opinions and facts regarding clinical training goals and objectives.

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Ten Tools for Legal Risk Management

- 6) Focus on behavior, not diagnosis
- 7) Design remediation plans to synch up with program criteria, training goals and objectives
- 8) Consider safety issues: clients, co-workers, student
- 9) Put it in writing (anything you write is part of the record)
- 10) Don't delay in addressing problems!