C.L.E.C.

Legal Questions for Laboratory Programs

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What do I do about……

……difficult admissions decisions

……unprofessional student behavior

……poor academic performance

……grading / testing disputes

……dismissals / readmissions

……foreign / ESL applicants

The discipline of colleges and universities is in general contrived, not for the benefit of students, but for the interest, or more properly speaking, for the ease of the masters. Its object is, in all cases, to maintain the authority of the master, and whether he neglects or performs his duty, to oblige the students in all cases to behave to him as if he performed it with the greatest diligence and ability. It seems to presume perfect wisdom and virtue in the one order, and the greatest weakness and folly in the other.

(Adam Smith, The Wealth of Nations 1776, 720).

Applicable rules, statutes, regs, etc

Federal Law:

- **Constitution 14th Amendment: - Due Process (procedural; substantive)**
  - Equal Protection ("similarly situated")
- **Rehabilitation Act of 1973**
- **FERPA - Family Educational Rights and Privacy Act**
  "The Buckley Amendment" 1974
- **Americans with Disabilities Act 1990**
- **HIPAA Health Insurance Privacy and and Accountability Act 1996**
  NB: Clinical affiliates are requiring certification that students have 'passed' HIPAA, and Lab Safety courses/classes; Health Clearances
- **Title IV Financial Aid programs** (Pell Grants, Perkins Loans, Federal Work Study, Federal Supplemental Educational Opportunity (SEOG) Grants, Family Education Loan Programs)

State Law:

- **Contract:** *(see Ku v State)*
  - **Express**
  - **Implied** *(see Baldridge v State of New York)*
  - ***in loco parentis*** (does it apply to colleges/universities? - At one time, colleges and universities acted *in loco parentis* for their students, but this is no longer true)
- **Negligence - ?Educational Malpractice**

What programs, colleges, universities use:

- **Letter of Acceptance**
- **College Catalog**
- **Student College Handbook - NB: JCHP Student Handbook contains the statement *"…[t]he provisions of this handbook are not and may not be regarded as contractual between the College and its students or employees."*** *see Ku v State*
- **College Student and Faculty Codes of Conduct**
- **Grade Appeals Protocol**
- **Academic Progress Policy**
- **Departmental Academic/Ethics Policies**
- **Departmental/Program Clinical Practicum Handbook**
- **Course Syllabi**
- **University Search Policy: right to investigate any campus facilities or personal belongings if it has information to support reasonable belief that an illicit activity is occurring.**
- **Committee on Student Affairs/University Office of Student Affairs**
- **Judicial Board [faculty and student members]**
- **University EEO Grievance Procedure (HR/Office of Employee Relations)**
- **Professional Standards of Practice / Technical Standards**
- **Professional Codes of Conduct**
- **Institutional and Program Accreditation standards**

Legal Principles/General Rules:

1. **Courts will only review strictly academic decisions that are arbitrary or capricious**
2. **The relationship between students and their institutions is contractual in nature (absent an institutional disclaimer)**
3. **Terms and conditions of the contract are found in Catalogs and other official documents**
4. **Universities may impose conditions on students who reapply after being dismissed (behavioral or academic dismissals)**

FERPA 1974
Family Educational Rights and Privacy Act
"The Buckley Amendment"

Student has right to:

1. **inspect and review student's educational records within 45 days of the day University receives a request for access**

2. **Request the amendment of the student's educational records that the student believes are inaccurate or misleading**

3. **Consent to disclosures of personally identifiable information contained in the student's record, except to the extent that FERPA authorizes disclosure without consent**

4. **File a complaint with the US Department of Education concerning alleged failures by [University] to comply with the requirements of FERPA**

Rehabilitation Act of 1973 - Section 504(E)

Section 504(E) of the Rehabilitation Act of 1973 is a program access statute that is designed to ensure that programs receiving Federal funding be accessible to students with disabilities.

The legislation states that:

"No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance..."

- require that an institution (public or private) be prepared to make appropriate adjustments and reasonable modifications to policies and practices in order to allow the full participation of students with disabilities in the same programs and activities available to nondisabled students

Rehabilitation Act of 1973 - Section 504(E)

- **Quotas for admission of disabled students not allowed**
- **pre-admission inquiries regarding an applicant's disability are not allowed, unless such inquiry is to determine what auxiliary aids and/or services should be provided to ensure the applicant's equal opportunity .**

- **Tests which the institution uses must not discriminate against students with disabilities.**

- **Tests must be selected and administered so that the results for students with impaired sensory, manual, speaking and/or information processing skills are not distorted and so that the tests accurately measure the student's achievement or knowledge level rather than his/her disability. Thus, academic ability must be the sole basis for participation in postsecondary education.**

Rehabilitation Act of 1973 - Section 504(E)

- **The institution is not required to make all classroom buildings physically accessible. Accessibility can be achieved by rescheduling classes to accessible buildings or by taking other steps to ensure program accessibility.**

- **Modification of academic requirements may be necessary to accommodate qualified students with disabilities. - may include changes in the length of time permitted for degree completion and adaptation of the manner in which courses are conducted or in the manner in which learning is demonstrated or evaluated.**

The modification of requirements essential to program instruction, academic standards and licensing are not required under the law.

Americans with Disabilities Act 1990

By federal law, a person with a disability is any person who:
1) has a physical or mental impairment;
2) has a record of such impairment; or
3) is regarded as having such an impairment which substantially limits one or more major life activities such as self-care, walking, seeing, hearing, speaking, breathing, or learning.

Every student with a documented disability has the following rights:
1. **Equal access to courses, programs, services, jobs, activities, and facilities available through the college or university.**
2. **Reasonable and appropriate accommodations, academic adjustments, and/or auxiliary aids determined on a case-by-case basis.**
3. **Appropriate confidentiality of all information pertaining to his/her disability with the choice of whom to disclose their disability to except as required by law.**
4. **Information reasonably available in accessible formats.**

Compare:

Rehabilitation Act of 1973 (and its accompanying regulations) states that, if you receive federal funds, you may not discriminate on the basis of disability.

The Americans with Disabilities Act of 1990 states that you may not discriminate on the basis of disability regardless of whether you receive federal funding.

For postsecondary institutions, the ADA adds few additional regulatory requirements. The vast majority of postsecondary educational institutions have been (for more than 25 years) and continue to be subject to the Rehabilitation Act in addition to their coverage under the ADA.

STUDENTS WITH DISABILITIES

- **2012: 1 in 10 college freshmen reported having a disability (**1992: 1 in 11; 1978: 1 in 38 *(American Council on Education)*

- **learning disabled adults reportedly are the fastest growing group of college and university students today.**

Studies suggest that "providing longer amounts of time may raise scores beyond the level appropriate to compensate for the disability."

ADA guidelines need to be changed as they pertain to certain "disabilities" that can be corrected, including, but not limited to, Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD), Carpal Tunnel Syndrome (CTS), Disorder of Written Expression (DWE), Dysgraphia, and Dyslogia.

from
DISSING DISABILITIES: A STUDENT'S DUTY TO MITIGATE MALADIES J. J. Knauff
B.Y.U. EDUCATION AND LAW JOURNAL [2001] p85

STUDENTS WITH DISABILITIES, con't

How can schools combat misuse of ADA by students with correctable impairments?
PROPOSED REMEDIES

1. **flagging of scores [Students who receive extra time on their exams should have a notation put on their transcripts indicating that the examination was taken with accommodations.]**
   Eg: LSAT grants accommodations, usually in the form of extra time, to learning disabled takers of the LSAT. Although accommodation of extra time is allowed, candidates are advised that scores will be flagged.
2. **allow professors the opportunity to incorporate a balancing test when grading accommodated scores against non-accommodated scores**
3. **professorial input, and independent testing into their ADA policies so that the potential for abuse will be mimized.**

Should MLS Programs provide/share equivalent exams when there is a question of student performance/disability?

To determine whether a grade should be flagged, the professor should consider some of the following questions:

1) **Will test score of the accommodated student have a different interpretation from that of other students tested without the accommodations? Are the scores comparable?**
2) **Are the format of the test questions or the conditions being altered a part of the skill or knowledge being tested?**
3) **Would allowing accommodations for all students help them achieve higher scores and alter the inference made from their test scores?**
4) **Can valid and reliable procedures and appeals be established for determining which students will be given the requested accommodation?**
5) **Should the disabled student be given any responsibility for adaptation to existing testing conditions?**

Higher Education Act 1996 - "Ability to Benefit" - ATB

[as part of the Higher Education Act] the US Congress decided to address the issue of the staggering number of people who signed contracts for guaranteed student loans and later defaulted on those loans. The result of this decision was implementation of the 'Ability-to-Benefit' (ATB) legislation. Intent of the ATB legislation was to significantly reduce the number of defaulted student loans.

Definition
Use of a standardized test approved by U.S. Department of Education to determine ability of a student to benefit from the instruction available from an institution and commensurate with the expectations of a given institution. Test must be independently administered in accordance with U.S. Department of Education regulations Tests used must meet the criteria of the U.S. Department of Education.

- Applicable predominantly for students entering community colleges, but could apply to students in "career pathway" programs (eg: transfer from AS to BS degree program)

Example: "Ability to Benefit" - ATB

1998 Cytotech Standards
Section I. C. Students 1. Admission Policies and Procedures
If the program admits any students on the basis of ***ability to benefit***, then it must employ appropriate methods, such as a preadmission test or evaluation, for determining that such students are, in fact, capable of benefiting from the training or education offered. Policies regarding advanced placement, transfer of credit, and credit for experiential learning shall be readily accessible to prospective students. Requirements for previous education or work experience shall be provided and readily accessible.

2014 Cytotech Standards
Section V. B. Lawful and Non-discriminatory Practices
All activities associated with the program, including student and faculty recruitment, student admission, and faculty employment practices, must be non-discriminatory and in accord with federal and state statutes, rules, and regulations……
Specific academic and technical standards (i.e., intellectual and physical capabilities) required for completion of the program should be clearly defined and published and readily accessible to prospective students.

NOTE: On December 18, 2015, the Consolidated Appropriations Act of 2016 (Pub. L. 114-113) revised the definition of an eligible career pathway program and eliminated the career pathway alternative Pell Grant disbursement schedules.

Is it legal to not admit an applicant based on lack of communication skills / inability to speak English?

I recently attended [a Health Educators meeting] and they had a lawyer speak on some legal issues. All attendees were shocked that language was not a basis for not admitting an applicant. I though the group might find this interesting since many of us are receiving more and more applications for foreign graduates, many who cannot communicate effectively. - [

Short answer: ***YES, if***

- use standardized test - eg, TOEFL, with set pass score *(ABT)*

- apply to all students within classification,
eg: all ESL, all foreign applicants

- in general, ***NO*****, when student is educated in a U.S., accredited school system/institution, unless a standardized test is required of** ***ALL*** **applicants/students**

A student is rejected in the admissions process for the current academic year. He/she would like to re-apply the following academic year but the admissions committee/program faculty does not think this applicant is a strong candidate for their program and is not sure what a year's difference may make in terms of improving the applicant's chances.
How should a program handle such a scenario?

Questions: ***What are the initial admissions criteria?***

- What are criteria for "second-chance admission? - eg:

- evidence of additional coursework &/or lab experience, additional recommendations, available class seats, etc

- **ABT may apply.**
  Program must be able to document review process and have re-application criteria available. Criteria for subsequent admission need not be published. Program is not obligated to accept student; only obligation is <u>fair review</u> of application.

A student was dismissed based on failure to keep up with the academic standards of our program. He later files an appeal that claims that he was treated unfairly, and would like to be re-instated in the program. Furthermore, he thinks he has a right to stay in the program until the end of the academic year, since he paid the full-tuition. He also claims it is the responsibility of the program to train him successfully.

What kind of legal stand does he have in such a scenario?

How can a program protect itself in regard to student dismissals in terms of the wording of their policies and procedures?

Similarly, how can a program protect itself from student dismissals based on unprofessional conduct – something that may be less concrete than academic performance?

Sample Policy 1:

The following academic and diagnostic standards must be met by each student in order to continue and successfully complete the program. Failure to do so may result in academic probation and/or dismissal from the program.

Academic Performance
Quizzes and final examinations are administered for every unit. Each practical and theoretical examination has an absolute standard of performance set before the test is administered, thus eliminating the relative pass score based on the performance of people taking the examination.

The passing score for written exams is 80% .
The passing score for laboratory examinations is 85% .

Students who fail to maintain a "B" average by the end of the first unit will be placed on academic probation until they can demonstrate proficiency via oral, written or practical examination. Students who are unable to maintain a "B" average despite remediation efforts will be dismissed from the program.

Sample Policy 2:

Students must pass a "final" examination for each academic unit.

Students who fail these exams will be given a make-up and may be put on academic probation until they can demonstrate proficiency via oral, written or practical examination given by the education coordinator.

Students are also expected to pass the comprehensive final examination administered at the end of the year. Students who fail the comprehensive final may delay their graduation until they can demonstrate an acceptable level of competence at the satisfaction of the Education Coordinator and Program Director.

Sample Policy 3:

Clinical Practicum Performance

Students will be given a weekly grade for their daily technical. **Students need to maintain the following minimum passing grades**:

Weeks 9 -19	**85%**
Weeks 20-29	88%
Weeks 30-39	90%
Weeks 40-50	93%

Failure to meet these minimum passing grades, despite remediation efforts, may result in dismissal from the program.

What kind of legal stand does he have in such a scenario?

Basic: Any student can file a grievance, whether legitimate or frivolous
***See*: Grade Appeals Protocol, Academic Progress Policy**

Review Standard: Arbitrary/Capricious
It is generally up to student to provide documentation

How can a program protect itself in regard to student dismissals in terms of the wording of their policies and procedures?

- **judicious use of warning v. disciplinary words, eg: will, must, can, should, may**
- **if you really mean *must, shall, will* - then say so**
- **grievance policy and procedure - consistent with due process requirements**

Similarly, how can a program protect itself from student dismissals based on unprofessional conduct – something I think that is less concrete than academic performance?

- **rely on Technical Standards; Professional practice standards**
- **may need institutional "Review Board"**
- **eg: institution/program Academic & Clinical Ethics Policies and Procedures**
  - students sign

STUDENT GRADING CODES:

Instructor has an obligation to grade accurately, to give to each student a grade that reflects the student's competence with respect to the subject matter of the course rather than any other factor. She should do so in accordance with what I call the *principle of academic exclusivity* (PAE), which requires that, as far as possible, all nonacademic factors be excluded from consideration when instructors determine grades.

[However….] Student challenges to institutional grading decisions have consistently been unsuccessful.

from
TRUTH-TELLING, INCOMMENSURABILITY, AND THE ETHICS OF GRADING
Gary Chartier
B.Y.U. EDUCATION AND LAW JOURNAL [2003]

- **Recommendation: Use separate grading policies and instruments for cognitive, affective and psychomotor evaluations.**

- **Assure that expected behaviors (professional and unprofessional conduct) are clearly described in course syllabi and/or professional standards**

An applicant with all prereqs and a decent gpa has been working in a lab doing phlebotomy. His interview is ok, maybe slightly anxious.
One recommendation is positive but the recommendation from his current employer, the lab manager, is a simple "do not recommend".
We are confused and feel he is otherwise a good candidate, so we call the lab manager. She is hesitant but finally "off the record" states that he is very capable and dependable "as long as he takes his meds".
We end up not accepting him, he reapplies the next year, having taken more courses and with a current recommendation from a professor that is very positive.

Now what?

- rely on Technical Standards; Professional practice standards
- may need institutional "Review Board", "Drug/Alcohol" Policies. If situation arises, fall back to Conduct Code(s),

- eg: Academic & Clinical Ethics Policies and Procedures - students sign

STUDENT CONDUCT CODES:

Purpose:
(1) to guide student behavior and
(2) to establish procedural mechanisms that safeguard the rights of students accused of conduct that violates a campus code.

from
STUDENTS HAVE RIGHTS, TOO: THE DRAFTING OF STUDENT CONDUCT CODES
Jason J. Bach
B.Y.U. EDUCATION AND LAW JOURNAL
[2003] 9/12/2003

"EDUCATIONAL MALPRACTICE"

To date, malpractice in education has failed as a theory of recovery.

Currently, public policy dictates that educational malpractice not be recognized as a tort.

When standards are formulated for teaching and learning, expectations for practice are articulated.

from
STATUTES AND STANDARDS: HAS THE DOOR TO EDUCATIONAL MALPRACTICE BEEN OPENED?
Todd A. DeMitchell Terri A. DeMitchell*
B.Y.U. EDUCATION AND LAW JOURNAL [2003] p 485

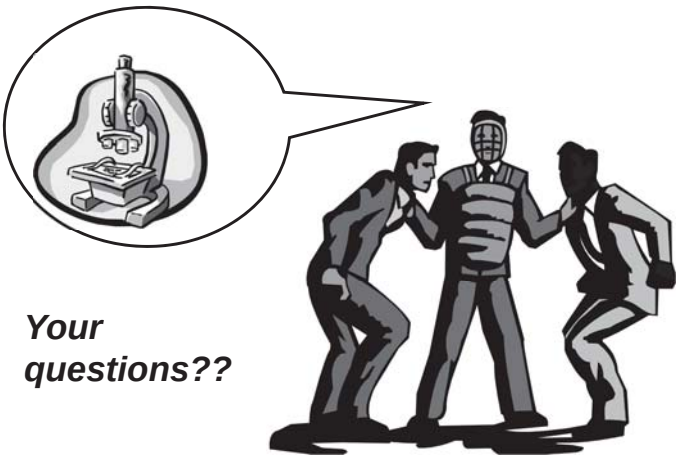
INTERNATIONAL STUDENTS
WHAT FOREIGN STUDENTS FEAR: HOMELAND SECURITY MEASURES AND CLOSED DEPORTATION HEARINGS
Mantle, B.Y.U. EDUCATION AND LAW JOURNAL [2003] p815

Student Exchange Visitor Information System (SEVIS)

Newly introduced regulations have placed added burdens on educational institutions that sponsor foreign students and exchange visitors.

Provisions of the **US Patriot Act of 2001** establish undisputed Congressional intent that implementation of integrated tracking systems for ports of entry and a foreign student visa monitoring system be expedited and expanded. In the area of foreign student monitoring, the Act requires "full implementation and expansion of . . . the program established by . . . the **Illegal Immigration Reform and Immigrant Responsibility Act** [IIRIRA]"

Homeland Security Act of 2002
B. Special Registration
Students already in the United States who meet the following criteria had until December 16, 2002 to appear before INS and provide certain information under oath: (1) "males, born on or before November 15, 1986;" (2) nationals or citizens of Iran, Iraq, Libya, Sudan or Syria who entered the United States prior to September 11, 2002 (for those entering after September 10, 2002, individual notices were given by the inspecting officer); and (3) "will remain in the United States at least until December 16, 2002." Those exempted from the registration requirement are aliens with current A or G visa status, lawful permanent residents, and asylees or potential asylees with applications pending before November 6, 2002.



Your questions??