



Students and Grade Disputes

Happy New Year! This month we are going to talk about students and grade disputes. I am going to break this into two sections. The first section will talk about the legal landscape around grade dispute cases. The second section will look at our Instructional Grievance policy and some best practices in employing the policy. Let's jump on in!

THE LAW

For decades, courts have recognized that there are legal principles that apply to the relationships that colleges and universities have with their students, which, of course, leads to spending a lot of time and money responding to angry parents, students, and sometimes lawyers, defending (in or out of court) grading policies, instructor's judgment, and grading decisions. Litigation around these issues have been increasing as students (and their parents) believe the legal system will solve problems that college policies did not solve to their satisfaction.

These cases often present as constitutional violations, breach of contracts, and intentional torts and there are generally two categories of cases making their way to court. The first are academic performance cases and the second are academic integrity cases.

Let's talk about **constitutional claims** first.

Students attending public colleges and universities continue to rely on the Constitution to challenge academic decisions. This type of a claim is usually more successful when making a due process challenge in student sanction (conduct) cases. In academic cases, however, courts are more likely to defer to the academic judgment of the school, as long as the school is following its policies and making decisions that are not arbitrary or capricious.

Courts have upheld less stringent procedural requirements in cases where the issue is centered in academic decisions. In doing this, they rely on the U.S. Supreme Court case of *Bd. of Curators of the University of Missouri v. Horowitz* (1978). In *Horowitz*, the Court recognized that decisions related to academic performance rely on the subjective judgment of school officials, which is not easily evaluated through judicial or administrative decision-making—basically, the Court did not want to supplant the reasoning of the college and its administrators with its own. The Court also held that dismissing a student for purely academic reasons does not require a hearing.

The Court similarly deferred to the academic judgment of a faculty member in *Regents of the University of Michigan v. Ewing*. In *Ewing*, the Court found that the university did not deprive the student of substantive due process rights when it dismissed him from the university, because the decision was made “conscientiously and with careful deliberation.”

McMahon v. Rutgers, the State University of New Jersey similarly relied on *Horowitz*. In this case, a student received four grades of less than a B and, as a result, was dismissed from the Certified Registered Nurse Anesthesia Program, per university's policies. The student sued the university alleging procedural due process violations. The student had filed a grade appeal for each of the four grades he received that was less than a B.

Following the university's policies, the student's challenges were considered by a committee and each time the grade was upheld and the appeal rejected.

The Court granted the university's motion for summary judgment, saying that cases involving academic disputes as "precisely" the types of cases that courts should be hesitant to resolve, citing that the procedural due process requirements are met when a university conducts 'an informal faculty evaluation with a student prior to discharging a student for 'academic reasons.'" (Citing *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46 (3d Cir. 1986)). The Court found that the careful and deliberate decision made in the grade appeals did meet the due process owed to the student.

Courts have also upheld a college's right to change degree requirements after a student has enrolled. In *Burnett v. College of the Mainland*, seven former students in a nursing program alleged that a change in policy improperly resulted in them not being able to complete their selected program of study. When the students enrolled in the program, the student handbook said that students were required to pass a readiness exam as a condition of graduating and that they could retake the exam if they did not pass on the first attempt. After they enrolled, the Texas Board of Nursing issued a position recommending that a "high stakes test not be the only criteria for graduation." In response, the school amended the curriculum and included the test in one course, where it was worth 40% of the grade. The school did not change its handbook or otherwise put the change in writing. The students took the test but failed and were advised they could not graduate. They were not given the opportunity to retake the test. They appealed to the director of the school and the Board of Trustees. The Board formed an appeals panel to review the matter. The panel subsequently concluded that the school had the authority to make the change and that the students had been informed of the change. The students brought suit, alleging violation of their substantive and procedural due process rights.

Relying on *Horowitz*, the court rejected the procedural due process claims, holding that when a student challenges a disciplinary decision made by a public institution, the student is entitled to an "informal give and take" between the student and the administrative body. The court found that the students had been given the opportunity to be heard informally and formally. The Court also found that the college had exercised its judgment to end the retake policy and did so after the recommendation from the Nursing Board. The court noted that while it was sufficient for the college to show it had exercised judgment, from the court's perspective that judgment appeared to be sound and rationally related to its mission of educating nurses.

Breach of Contract Claims

Students also have sought to have college and university policies, handbooks, and rules treated as binding contracts. These cases have been successful in a lot of courts, but other courts have been reluctant to apply contract theories in the educational context. Courts generally have looked for clear, specific provisions that impose obligations on the student and the institution.

In *Thode v. Ladany*, a student sued Lehigh University, raising breach of contract and constitutional claims. The plaintiff alleged that she received a grade of C+ in a master's level counseling course because the judgment of the faculty in her program was not within academic norms, and also for reasons that were not purely academic. The plaintiff was enrolled in the first semester of a mandatory two-semester practicum course that required her to interact with clients and attend class sessions. In those class sessions, the student was cited for cursing, interrupting the instructor, and other inappropriate conduct. She was cautioned about this behavior and ultimately received a zero for class participation. Her overall C+ grade in the course meant that she could not progress. The university policy manual required the plaintiff to remediate these issues prior to moving forward in the program. The student instead challenged her grade and the remediation requirement through the university's internal grievance procedure. She was unsuccessful at all stages in the process, including two appeals.

The court sided with the university, disagreeing that the student was entitled to have her grade changed. The court also held that the university did not depart substantially from academic norms in its handling of the matter. The court noted that credible evidence presented at trial showed that the student's grade resulted from her written work and class participation grade, stating that it was "hard-pressed to upset the Lehigh University

faculty in their professional judgment.” The court also noted that the university was able to establish the student’s unprofessional conduct.

The pattern in the aforementioned cases is to rely on the subjective judgment of school officials as long as policies are being followed and decisions are not made arbitrarily.

Let’s look at the **District’s Instructional Grievance policy**.

The Instructional Grievance policy states, *A student who feels that he/she has been treated unfairly or unjustly by a faculty member (full-time or part-time) with regard to an academic process such as grading, testing or assignments, shall discuss the issue first with the faculty member involved and the student has 15 days in which to have this discussion.*

If the discussion does not resolve the issue, the student can file a written grievance with the Department/Division Chairperson and appropriate administrative officer at the college/center. The student has 10 days from the previous deadline (the meeting deadline) to file this grievance. At this time, the Department/Division Chair or appropriate college administrative officer will work with the parties in an attempt to resolve the conflict.

If the grievance is not resolved at this level within ten working days, the student should forward to vice president of academic affairs or designee, a copy of the original written grievance with an explanation regarding action taken at each prior level. The dean of instruction or appropriate college/ center administrative officer would then meet with the student and faculty member to resolve the concern.

Under the policy, this level will be the final step in any grievance process regarding grades. Any other issue not related to grades can be forwarded to the president for final resolution.

This policy is very prescriptive and in order to enjoy the protection afforded under *Horowitz*, it must be followed in all cases and at all times.

Let’s talk about **best practices**.

1. We should ensure that our policies and procedures are applied in a consistent manner. When working the policy, we need to be able to roadmap how we followed our policy.
2. We should also regularly review our policies for completeness and clarity, especially if we find ourselves often stumbling at a particular step. It may be necessary to revise the policy.
3. We need to make sure our various program of study handbooks reflect the actual processes. Requirements that are going to be enforced should be outlined in written policies, and those "requirements" that are not enforced should be removed, because selective application can create problems.
4. The most important best practice is to manage internal coordination and communication. Much of the specific discussion about a student and their grade dispute will be protected under FERPA and you must be careful how you speak via email about this student and the case itself. We also need to ensure we are maintaining those emails as part of the student’s record.
5. Loop in legal counsel early and often, to ensure that potential issues can be flagged and addressed promptly. We should always work toward message unity by coordinating internally to avoid providing students (or parents) with mixed messages. Receiving inconsistent messages from school officials can be a cause of frustration -- or ammunition -- for students, their attorneys, and families, and can make litigious situations more difficult to manage.
6. Finally, have a general plan as to when the institution's communication professionals, senior administrators, and trustees will be advised of a conduct situation.

Last, I want to let you know what Plaintiff’s attorneys recommend students do when they are preparing to launch a grade appeal.

1. Gather Evidence

It’s important to gather all supporting evidence.

2. Consult with the Professor

Students are advised to always address the issue with the professor to determine whether the grade resulted from a mistake or misunderstanding. This is also a way to put on the record that the student has attempted to resolve the concern with the professor.

3. Research Grade Appeal Procedures

If the issue remains unresolved after discussing it with the professor, the student will need to investigate their options as outlined in policy. This is an important step because courts will look to the policy and whether it was applied consistently and completely.

4. Seek Assistance

Plaintiff's attorneys are recommending that students contact them to identify what the student's legal rights are in the event an appeal fails along with any other potentially viable legal claims the student may have. If you have any questions, please feel free to reach out to Melissa.Flores@domail.maricopa.edu.

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