

Legal Implications of Dismissing the Impaired Student

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Welcome

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Presentation Outline

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Professional Gatekeeper Responsibility

ACA Code of Ethics (2005)

F.5. Counseling Supervision Evaluation, Remediation, and Endorsement.

- a. **Evaluation.** Supervisors document and provide supervisees with on-going performance appraisal and evaluation feedback and schedule periodic formal evaluative sessions throughout the supervisory relationship.
- b. **Limitations.** Through ongoing evaluation and appraisal, supervisors are aware of the limitations of supervisees that might impede performance. Supervisors assist supervisees in securing remedial assistance when needed. They recommend dismissal from training programs, applied counseling settings, or state or voluntary professional credentialing processes when those supervisees are unable to provide competent professional services. Supervisors seek consultation and document their decisions to dismiss or refer supervisees for assistance. They ensure that supervisees are aware of options available to them to address such decisions.
- d. **Endorsement.** Supervisors endorse supervisees for certification, licensure, employment, or completion of an academic or training program only when they believe supervisees are qualified for the endorsement. Regardless of qualifications, supervisors do not endorse supervisees whom they believe to be impaired in any way that would interfere with the performance of the duties associated with the endorsement.

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Professional Gatekeeper Responsibility

ACA Code of Ethics (2005)

F.8. Student Responsibilities.

- **b. Impairment.** Counselors-in-training refrain from offering or providing counseling services when their physical, mental, or emotional problems are likely to harm a client or others. They are alert to the signs of impairment, seek assistance for problems, and notify their program supervisors when they are aware that they are unable to effectively provide services. In addition, they seek appropriate professional services for themselves to remediate the problems that are interfering with their ability to provide services to others (See A.1., C.2.d., C.2.g.).

F.9. Evaluation and Remediation of Students

- **a. Evaluation.** Counselors clearly state to students, prior to and throughout the training program, the levels of competency expected, appraisal methods, and timing of evaluations for both didactic and clinical competencies. Counselor educators provide students with on-going performance appraisal and evaluation feedback throughout the training program.
- **b. Limitations.** Counselor educators, throughout on-going evaluation and appraisal, are aware of and address the inability of some students to achieve counseling competencies that might impede performance. Counselor educators: (1) assist students in securing remedial assistance when needed, (2) seek professional consultation and document their decision to dismiss or refer students for assistance, (3) ensure that students have recourse in a timely manner to address decisions to require them to seek assistance or to dismiss them, and provide students with due process according to institutional policies and procedures. (see C.2.g.)

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Professional Gatekeeper Responsibility

CACREP Standards (2001)

Section VI. B. EVALUATIONS IN THE PROGRAM

- The program faculty conduct a developmental, systematic assessment of each student's progress throughout the program, including consideration of the student's academic performance, professional development, and personal development.
- **FITNESS** — suitability for being a professional counselor. Fitness implies psychological health, including the following variables: self-awareness, self-acceptance, self-knowledge, self-confidence, courage, resilience, purpose in life, balance, moderation, and emotional stability.

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Program Integrity

- Maintain compliance with ACA Code of Ethics
- Maintain compliance with CACREP standards
- Keep process consistent with the ethical principles of the profession:
 - Beneficence & Nonmaleficence
 - Fidelity & Responsibility
 - Integrity
 - Justice & Fairness
 - Respect for people's rights and dignity
- Create a program known for integrity.
- Live the values we seek to support in trainee development.
- Protect reputation as a program that produces competent counselors.

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The Case of Naomi

Bertram

Clinical Faculty Perspective

Homrich

Faculty Response and Action

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The Case of Naomi

Clinical Faculty Perspective

- **Prior to Clinical Experience**
 - Remain alert/observant to “early warning signs” – including classroom interaction with faculty and peers
 - Communicate a “heads-up” to core faculty – Are other faculty reporting similar concerns?
- **Clinical Placement**
 - What sites/clinical supervisors would be best in terms of ensuring student behavior/progress will be competently observed and communicated to clinical faculty?
- **Documentation**
 - Carefully document incidents that might confirm red flags (be careful to allow for typical “bumps-in-the-road” adjustment)
- **Communicate with Student**
 - Level with student about questionable behaviors, comments, or attitudes
- **Communicate with Site Supervisor**
 - Solicit regular feedback from site supervisor
- **Communicate with Core Faculty**
 - Keep faculty informed all along the way

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The Case of Naomi

Faculty Response and Action:

- Support adjunct’s efforts.
- Work as a team
 - Among core faculty
 - Core faculty with adjunct faculty
- Document everything.
- Communicate in writing.
- Describe expectations in behavioral terms.
- Refer to printed materials and procedures.
- Maintain consistency in holding boundaries.

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Practices, Policies, & Procedures

Wheeler

Constitution, Case Law & Statutes

Homrich

Program & Faculty Perspective

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Practices, Policies, and Procedures

Due Process

■ Substantive

- Person's rights to life, liberty and property shall not be taken away without good reason
- Arbitrary and capricious action that "shocks the conscience" results in due process violation
- Courts look at relevance, comparability and intent of remedial action

■ Procedural

- Clearly defined expectations, notice, and opportunity to be heard

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Practices, Policies, and Procedures

Due Process (cont'd)

- Difference between state schools and private schools (state action)
 - Private universities are not bound to provide students with full range of due process protection provided by state universities... which must comply with Due Process Clause of Fourteenth Amendment (*NCAA v. Tarkanian*, 488 U.S. 179 (1988))
 - May be state due process requirements in certain circumstances
- Bottom line:
 - Follow institutional policy regarding due process

Practices, Policies, and Procedures

Discrimination (race, religion, sexual orientation)

- Civil Rights Act of 1964
 - Title VI – racial/ ethnic discrimination
 - IX claims – discrimination based on sex
- State law discrimination claims

Practices, Policies, and Procedures

Contract (Between University & Student)

- Implied contract, in many states, that university will confer degree if student complies with university's rules and regulations
- Contract goes beyond academic performance; includes disciplinary policies, etc.
 - *McCawley v. Universidad Carlos Albizu, Inc.*, 461 F. Supp.2d 1251 (S.D. Fla. 2006)
 - Contract included rules of conduct in catalog (plagiarism, representing self as "Doctor", failure to disclose arrests)
 - *Harwood v. Johns Hopkins University*, 747 A.2d 205 (Md. Ct. Spec. App. 2000)
 - Court upheld University's dismissal of student who murdered fellow student, despite completion of academic coursework
- Terms set forth in university catalogs, manuals, handbooks, etc.
- "Graduate Student Agreement"
 - *McCawley* case
 - Rollins College – ties in with handbook and catalog

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Practices, Policies, and Procedures

Good News: Courts are generally reluctant to interfere with, or substitute their judgment for, decisions of academic institutions

- Exceptions
 - Abuse of discretion
 - Arbitrary and capricious decisions
 - Pretextual reasons (e.g., discrimination or prejudice rather than fact, reason or cause)
 - *Richardson v. Loyola College in Maryland, Inc.*, 167 Fed.Appx. 223 (D.C. Cir. 2005) (not reported in Fed. Rptr.) – Former student failed to establish reasons for dismissal were pretextual (reasons included repeated class monopolization, lack of sensitivity, alienation of fellow students)
 - First Amendment retaliation claim dismissed
 - Students denied accommodations under Americans with Disabilities Act of 1990 for physical or psychiatric disabilities

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Practices, Policies, and Procedures

Potential Liability to public (clients) if incompetent or impaired students are allowed to graduate and public is harmed

- Precedent is scarce but reasoning plausible
- Louisiana case (involving psychiatrist who supervised counselor and Louisiana Tech) (Lumadue/ Duffy article in bibliography)

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Practices, Policies, and Procedures

Program and Faculty Action

- Make expectations known in marketing efforts.
 - Encourages self-screening in advance of applying to program
- Deliver consistent message of expectations in all presentation and printed materials.
 - Information session PowerPoint presentation
 - Graduate Catalog & Student Handbook

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Practices, Policies, and Procedures

Admissions Application Questions

- Have you ever been dismissed from a school or college?
___No ___Yes *If yes, please attach a separate sheet explaining the circumstances.*

- Have you ever been convicted or found guilty or pled nolo contendere to a felony in any jurisdiction, including a military court? OR are you currently charged (are there charges pending) for any felony in any jurisdiction?
___No ___Yes *If yes, please attach an explanation that includes the date, jurisdiction, offense and details of the situation.*

Practices, Policies, and Procedures

- Stay consistent as a program and a faculty.
 - Define clear expectations and evaluation procedures for handling non-academic issues and dismissal.
 - Make expectations known through publications.
 - Consistently enforce behavior that fulfills expectations.

- Require all students to read program's policies:
 - Graduate Catalog
 - Non Academic Dismissal procedures
 - Student Handbook
 - Psychological fitness expectations
 - Student evaluation procedures
 - ACA Code of Ethics

- Sign Verification Form (informed consent) agreeing to abide by all policies and procedures

- Communicate in writing (email or letter)

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Practices, Policies, and Procedures

- Follow ACA Code of Ethics F.9.b.

Counselor educators:

- (1) assist students in securing remedial assistance when needed,
- (2) seek professional consultation and document their decision to dismiss or refer students for assistance,
- (3) ensure that students have recourse in a timely manner to address decisions to require them to seek assistance or to dismiss them, and provide students with due process according to institutional policies and procedures.

Dos & Don'ts

- DO consult with university legal counsel when drafting policies and procedures and before dismissing a particular student
- DO consider drafting a "student agreement" to follow all counseling program rules and regulations (agreement should be signed and dated).
- DO utilize due process procedures of notice and opportunity to respond, which should be drafted by legal counsel in collaboration with the counseling department.
- DO follow applicable CACREP standards in developing policies and procedures.
- DO ask for feedback from all faculty on any students they perceive as impaired.
- DO maintain appropriate professional liability insurance which covers counselor educator decisions regarding student retention and dismissal.
- DON'T assume your decision will be backed by the university; consult with administrators and legal counsel before it's too late.

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Questions

&

Answers

Thank you