

## NACADA Journal

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## Legal Issues Regarding Academic Advising: An Update

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We live in a very litigious society today which makes it imperative that all educators keep abreast of the current legal parameters within which they may make decisions and take actions. Academic advisors are not exempt from this necessity. Frequent updating of legal parameters is a must for academic advisors since they are on the "front line" of the college or university in dealing with students. It is a critical position, and the success or failure of the student's education and growth is influenced greatly by the advising function. In today's litigious atmosphere, the advising function is more critical than ever.

The legal relationship between students and the public institution is a constitutional one. Students are citizens and do not shed their rights when they enter the campus gates. The Fourteenth Amendment to the United States Constitution prohibits the state from depriving its citizens of life, liberty, or property without due process of law. It also mandates that states treat people equally under the law. Since the public college or university is an extension of the state, the institution must abide by constitutional parameters.

In a private institution, however, the legal relationship between the student and the college or university is contractual, because the Constitution has no prohibition against private action. If the private institution becomes entwined with the state to a great degree, such as involvement with the governance of the institution or a contractual relationship with the state (there are also many other factors to be considered such as receipt of public funds, tax exemptions, etc.) it may be declared to be engaged in "state action" which would trigger constitutional guarantees for its students. However, it is rare that private institutions are found to be engaged in "state action."

In the area of academic affairs, the legal relationship is contractual. This is true in both the public and the private college or university.

Academic advising occurs under the umbrella of academic affairs. The courts have always hesitated to enter the academic arena and substitute their judgment for that of the academician. In doing so, they have recognized the academic freedom which protects academic decisions, including advising decisions. They have recognized also that their repeated presence in

the academic community could possibly cause deterioration in an otherwise beneficial student-faculty relationship. Thus, if academicians do not abuse their discretion in dealing with students, they need not fear judicial intervention. The courts will intervene, however, if evidence exists of arbitrary or negligent treatment of students or a denial of their protected rights. The increasing number of court decisions dealing with classroom and academic matters attests to the growing judicial sensitivity to students' rights in academic affairs. The advisors' job falls within this academic affairs arena, and they must understand the legal issues involving such major areas as:

- (1) the contractual relationship between student and institution;
- (2) the statutory relationships;
- (3) the guidelines governing privacy of student records;
- (4) the concept of privileged communications;
- (5) the academic due process; and
- (6) the need for grievance procedures.

### *Contractual Relationship*

It was stated above that in academic affairs a contractual relationship exists between the student and the institution. The basic provisions of the college catalog, recruiting brochures, various bulletins, and the student handbook become part of the contract. The institution sets forth certain requirements for passing courses and for successful completion of programs and subsequent graduation. If students fail to meet the required standards they can be penalized through such actions as dismissal, suspension, or failure to graduate on schedule; if the institution fails to respect its own regulations, then the student may seek judicial relief.

An institution may create certain contractual obligations through statements in its publications. Under normal circumstances the requirements outlined in the catalog in effect when the student enters the institution are controlling until the student graduates. However, the institution may make modifications and some changes if conditions warrant. In general, the greater the change, the less sympathy the courts will have for the institution in any case alleging a breach of contract. An institution may allow a student the option of meeting the requirements of the catalog in effect at the time of admission or to adhere to the new requirements.

Institutions should not promise more than they are prepared to actually give to the student. There are court cases where students have been awarded monetary damages where the institution violated the contract with the student by not affording certain promised services such as job placement, or proper preparation for finding a job.

Advisor's obligations and responsibilities usually appear in an advisor's handbook and often in publications readily available to the student. An increasing emphasis on quality advising to enhance retention brings added responsibilities to the advisor. More and more advisors not only are expected to understand such things as scheduling and registration procedures and degree and program requirements, but also they may be expected to function as a referral service or possibly as career counselors. Thus, if institutions promise such services from their advising system, they should ensure their advisors can deliver these services.

Where an advisor did not, or could not, perform his contractual obligation, then liability could be present. Therefore, institutions should be conscious of an advisor's obligations which might be created by unequivocal statements regarding advisor's responsibilities.

Most institutions' catalogs state that the ultimate responsibility for knowing degree requirements rests with the student. This type of statement normally would protect advisors if they commit an advising error. Generally, the advisor is not going to be held personally liable for erroneous advising in the absence of gross negligence, irresponsible behavior, or arbitrary or capricious treatment of the student. Advisors should keep notes of their discussions with students during advising sessions. An accurate record of advising sessions would help solve any disputes over the content of previous advising and also serve as a legitimate protection against claims of erroneous advising.

### *Statutory Relationship*

In addition to the contractual relationship between the student and the institution, a statutory relationship is also created by virtue of laws passed by Congress or the state legislature. These laws create statutory rights. These rights created by Congress are applicable to students enrolled in any institution, public or private, which is subject to the legislation — usually by the receipt of federal funds. The primary statutory rights of college and university students are those found in Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Family Educational Rights and Privacy Act of 1974. Title IX prohibits discrimination on the basis of sex while Section 504 parallels Title IX and guarantees that no handicapped individual will be discriminated against on the basis of his or her handicap. The Family Educational Rights and Privacy Act warrants special treatment and is discussed in the following section.

### *The Buckley Amendment: Advisor's Responsibilities and Students' Rights to Privacy*

Since advisors maintain educational records, (records of advisee's grades and other academic information) they must understand the provisions of the Family Educational Rights and Privacy Act of 1974, commonly referred to as *The Buckley Amendment*. Basically, this act provides students with access to information placed in their official files, and the advising file is an official file. The act ensures that only school officials with a legitimate educational interest may see the student's file, and the student's permission must be obtained before any other party may have access to the file. Thus, advisors, upon request, must allow students access to their advising file, but may exclude their right of access to personal notes the advisor may have made during the advising sessions. Under this Act the notes constitute records made by educational personnel and kept solely in their possession. Advisors may allow someone who temporarily performs their advising duty to see the notes; if the advisor is to be replaced permanently, however, she/he should remove any personal notes from the student's file before transferring the file to the replacement.

Under the legislation, the student has the right to an informal hearing regarding material in her/his record. If, at this hearing, the student does not receive satisfaction then she/he may insert explanatory material in the file. The Act specifically denies a student the right to a hearing regarding grades received, but the student may challenge the accuracy of transferring grades to the student's record.

Information in the file may be sent to parents of financially dependent students without their written consent. The registrar's office usually maintains information regarding a student's status as a financial dependent. Institutional policy, however, will determine whether or not information *must* be sent to parents without the student's consent.

According to the Buckley Amendment, a record also must be kept of requests received from school officials to obtain information from the student's file. The record should not only identify the official making the request, but also the official's legitimate educational reasons for requesting the information. This record should remain in the student's file. Each institution is individually responsible for determining which parties qualify as "school officials" and what constitutes a "legitimate educational interest." Advisors should familiarize themselves with their institution's policy governing this matter, as well as other institutional policies regarding implementation of the Buckley Amendment.

#### *Privileged Communications*

Although the law recognizes the student's right to privacy of her/his educational records, it also recognizes the advisor's right to privileged communications. For example, in an effort to help a student, advisors can discuss confidential information regarding that student with other appropriate individuals. The courts generally will respect the right to such communications and will not hold the advisor liable for statements considered as privileged communications. This right is not an absolute one, and advisors must exercise good judgment in making confidential statements. To determine the appropriateness of confidential discussions, an advisor should simply ask: "Would such a discussion serve the student's best interest?"

Sometimes, students will come to advisors with personal problems; normally these problems should remain confidential. In some instances, however, a student may tell the advisor of certain intentions that would prove harmful to the student or possibly to others, such as the intention to commit suicide or the desire to harm another person. Although the statements are made in confidence, an obligation rests with the advisor to disclose such information to an appropriate party, such as parents, an intended victim, a school psychologist, or police.

#### *Academic Due Process\**

The courts have mandates that students receive due process guarantees of notice and hearing in disciplinary cases, but students with grievances concerning academic affairs, such as situations involving erroneous advising, disputed grades, or alleged arbitrary course requirements, generally find themselves without absolute due process guarantees. But remember that the specific facts of a particular situation may be sufficient to require that due process be afforded the aggrieved student.

\*A course of legal proceedings established by a legal system to protect the rights and liberties of an individual. It gives a person the right to be heard in a court of law.

FIGURE 1

## THE COLLEGE STUDENT AND THE COURTS

*A Basic Casebook with Quarterly Updating Supplements, Prepared Expressly for the College Administrator, Containing Concise Briefings of Higher Court Decisions Involving Student/Institutional Relationships in Higher Education*

Published by COLLEGE ADMINISTRATION

PUBLICATIONS, Inc.  
Post Office Box 8492, Asheville, North Carolina 28814 —  
phone (704) 252-0883.

Publishers of *The College Administrator and the Courts* and *The Schools and the Courts*.



FIGURE 2

## THE COLLEGE ADMINISTRATOR AND THE COURTS

*A Basic Casebook with Quarterly Updating Supplements, Prepared Expressly for the College Administrator, Containing Concise Briefings of Higher Court Decisions Affecting the Administration of Institutions of Higher Education.*

Published by COLLEGE ADMINISTRATION  
PUBLICATIONS, Inc.

Post Office Box 8492, Asheville, North Carolina 28814 —  
phone (704) 252-0883.

Publishers of *The College Student and the Courts*, *The College Administrator and the Courts*, and *The Schools and the Courts*.



It is imperative that advisors understand and keep abreast of the basic legal parameters regarding the student/institutional relationship and the advising function. Figure 1 and Figure 2 present two most valuable sources of current legal information appropriate for academic advisors. Every advisor should have ready access to these publications. Each advising center or group should have them available for reference and for assistance in shaping policies involving advising.

Advisors need not be attorneys but they must be able to recognize the basic rights of students and have some understanding of the legal boundaries which the courts have outlined in dealing with student-institutional relationships. When an advisor is in doubt, the institution's attorney or some other appropriate authority should be contacted.

Finally, advisors should always act as reasonable, prudent persons at all times and act in the best interest of the student. By knowing the current legal parameters and by practicing the "Golden Rule," advisors will create and maintain those policies and practices which respect the worth and dignity of each person. By doing so, they will help create a better climate for reducing the incentives for legalism and respecting the rights, freedoms, and responsibilities of all.

The federal courts are increasingly viewing alleged cheating and plagiarism in the same light as disciplinary situations and are beginning to require that students be afforded due process in these cases. This is so because alleged cheating and plagiarism reflects upon the student's good name, reputation, and integrity. Therefore, the student has a liberty interest, in addition to a possible property interest, which would trigger due process guarantees.

Courts generally will respect the institution's procedures for handling academic affairs cases, and their decisions resolving these cases. As previously indicated, the courts will intervene in cases involving seemingly arbitrary or capricious treatment of a student.

The voluntary application of the spirit and principles of due process to academic affairs can reduce the incentives for legalism and reliance upon the courts by students when they feel grieved. With clearly-defined grievance procedures in place, courts will decline to intervene until a student exhausts this administrative remedy. Individual departments or divisions of the institution should outline procedures that students must follow in registering grievances resulting from erroneous advising or any other action taken by the advisor. The following suggested procedures should not be construed as specific prescriptions to cover every case, but rather as a guideline:

1. Institutions should define clearly and publish the responsibilities of advisors and students in the advisor-advisee relationship.
2. Information the student is expected to know, such as academic requirements for continuance and graduation, should be clearly specified and publicized.
3. A well-documented and orderly procedure of appeal should be established and promulgated. A committee should be appointed in each department or division, or one committee for the entire institution if appropriate, which would hear complaints by students against advisors for alleged advising errors or negligent and irresponsible advising. The individual or advisor against whom the allegations have been made should receive all due process rights in defending her/his actions.

Implementation and promulgation of these recommendations would not open a Pandora's box with a proliferation of student complaints against advisors. Rather, advisors would develop and maintain a responsible attitude toward students, and students would understand more clearly their responsibilities in the advising process. The channeling of complaints through an appointed committee would formalize a fair and reasonable procedure which does not exist on many campuses today.

Arrival of consumerism to the campus and the lowered age of majority have probably been major factors in the increase of cases involving academic affairs. Consumerism on campus today considers whether or not an institution delivers to the student the product it claims in its various publications, as well as in oral presentations. As legal adults, students must accept more responsibility for their actions on campus and thus also may have a greater inclination to press charges against the institution when they believe they have received arbitrary or capricious treatment. This does not mean that all students might file a court suit when they reach the age of majority, but since they must accept the responsibilities of that status they will most likely be more zealous of their rights. With these prevailing conditions and the fact that quality advising is fast becoming a criterion for promotion, tenure, and salary increases, advisors should seek to understand the legal issues related to advising. This understanding will ensure a responsible attitude toward students and protect their rights as well as those of the advisor.