# Legal Issues in Clinical Education

## Purpose
This session is designed to familiarize participants with basic legal principles applicable to clinical faculty and instruction. This knowledge will empower clinical faculty to exercise professional judgment and reduce legal and professional risks in the clinical environment.

## Time
90 Minutes

## Outline

### Faculty Status
- Academic Abstention
- Sovereign Immunity

### Understanding Risks
- **Tort Law**
  - Duty + Breach \{present causation & damages\} = Liability

- **Constitutional Law**
  - Due Process (procedural and substantive)
  - Academic Dismissal Versus Misconduct
  - Equal Protection
  - Discrimination

### Student Issues
- Know Policies
- FERPA
- Academic Issues

### Exceptional Circumstances
- Americans with Disabilities Act
- HIPAA

### Allocation and Reduction of Risks
- Affiliation Agreements
- Insurance

## Materials Needed
- PowerPoint Slides 3-1 through 3-40
- PowerPoint Quiz. This optional quiz can be used if time permits for review and discussion.
Objectives

- Present essential basic legal concepts
- Reduce risk
  - FERPA
  - HIPAA
  - Faculty role
  - Student policies and practices—exceptions
  - Allocation and management of risks

Faculty Status: Role and Risk; Risk and Role

- Teaching offers personal and professional satisfaction.
- To teach is to learn twice.
  – Joseph Joubert (1754-1824)

Because of its value in our society, the law offers some protections to those who engage in teaching.

- Doctrine of Academic Abstention
- Sovereign Immunity
  – Tort Claims KS/State Legal Defense Fund MO

Opening

PPT 3-1
Introduce yourself briefly and explain your connection to this topic. I usually comment that the purpose of including this session is that litigation is a fact of life and the more one knows the better one’s chance of avoiding having to spend energy defending claims and dealing with litigation. Those who are informed about which facts matter in a situation with legal implications are better able to assess risks and act appropriately.

Objectives

PPT 3-2
To reduce risk by knowing how to perform the faculty role.
To reduce risk through familiarity with restrictions on student records, on terms and concepts related to tort liability.
To reduce risk through increasing understanding of the allocation and management of risks.
To reduce risk by increasing understanding of FERPA.
To reduce risk by increasing understanding of HIPAA.

Faculty Status: Role and Risk; Risk and Role

PPT 3-3 and 3-4
In response to a suit brought by a student who said he had passed the exams and performed his duties, the 1982 case of People ex rel. Jones v. New York Homeopathic Medical College and Hospital, 20 N.Y. Supp. 379, (Sup. Ct. N.Y. City, 1982), the court stated: “These rules, in the nature of things, leave it to certain medical experts to determine whether the examination of the applicant has been satisfactorily passed or not, and these gentlemen have decided adversely to the claim of the relator [Jones].

….The practice of medicine is one in which a person cannot engage unless authorized to do so by a license or diploma from some chartered school, etc…. The purpose of these acts was to protect the public from medical practitioners not possessing the qualifications required in their delicate calling to discharge the duties thereof. Certifying to such qualifications is a responsible duty, cast by the law upon colleges, and it must be performed conscientiously in the interest of the public…. The court cannot re-examine the relator as to
his qualifications to practice medicine, not go over the studies in which he is said to be deficient. If it attempted to do so, the relator’s road would be easy, for, with his experience, imperfect though it may be, he would no doubt pass a better medical examination than any court could be expected to give him. …[the law] leaves the subject where it belongs — with those qualified to master it.”

But see People ex rel Cecil v. Bellevue Hospital Medical College, 14 N.Y. Supp. 490, aff’d 1891, where the court cautioned the school it could not take the student’s money, allow him to remain, and then arbitrarily deny a degree. The rallying cry of educational institutions comes from an oft quoted concurring opinion by J. Frankfurter in Sweezy v. New Hampshire, 354 U.S. 234 (1957), “….It is the business of a university to provide atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

Most states both have statutes that set forth the scope of the protection of sovereign immunity and the limitations on the protections it offers. Clinical instructors will be within this protection because they either have a personal appointment to perform services or they are employed by a hospital or clinic with a written agreement between the public school and the medical facility. Private institutions do not have the protection of sovereign immunity. It derives from British common law; one could not sue the King without the King’s permission. A more modern rationale is that a claim paid by the state is paid by all citizens and this is not the purpose that tuition or taxes are collected. One who is merely negligent is protected. One who intentionally or maliciously acts to deprive a student of a fair academic outcome or breaks a law by engaging in racial, religious or sex discrimination, or disability discrimination may not be protected by sovereign immunity.
Understanding Risks: A parade of horribles
PPT 3-5
Part of the professional role expectation is to exercise judgment about priorities and maintain balance. It may not always be clear that balancing these roles is congruent. We can think of situations that call for judgments between finely divided lines. However, we want to start the analysis with the assumption that what benefits the student’s learning, the patient’s welfare, and fulfills the nurse educator’s professional role will be the same.

Understanding Risks
PPT 3-6
Congruent does not mean perfectly matched.

Understanding Risks
PPT 3-7
The duty owed in a particular situation is defined by the profession, may be dictated by custom, and is constantly being refined through court cases. An example is the duty of a faculty member not to evaluate a male nursing student on a higher standard of performance than a female nursing student. If the faculty member not only rates the male student lower but is heard to make comments such as *men don’t belong in nursing*, a breach can probably be established. If the student is unsuccessful in clinical and dismissed from the program (and the student had a job offer upon completion of his education) there is a good chance that liability will be found.
Understanding Risks
PPT 3-8
The duty owed in a particular situation is defined by the profession, may be dictated by custom, and is constantly being refined through court cases. One common way to establish a duty is to define the standard of care that is extended in a particular situation. This is usually established through the use of expert testimony or any standards or guidelines used by a body that regulates a profession such as the Board of Nursing Examiners or ethical standards that have been adopted or imposed by statute. The appropriate standard of care will be adjusted by relevant factors such as the experience and special expertise of the practitioner, the facts known, and other circumstances.

Understanding Risks
PPT 3-9 and 3-10
Public institutions must comply with the U.S. and relevant state constitutions. Private institutions are not subject to constitutions, but when our topic is due process and equal protection they often assume the duty to provide fair procedures before any deprivation of property or possible harm to reputation occurs. They also tend to assume the burden of treating students who are similarly situated in the same manner although they are somewhat less likely to adopt additional categories such as sexual orientation or marital status. These assumed duties are usually expressed in publications that may be interpreted as part of the contract between the student or faculty and the school.

The “contract” adopted by a private institution will be located in the Handbook, recruiting materials, catalog and publicity brochures as well as the departmental procedures and policies. There are some fun cases in this area such as the student who had not paid educational loans and could point to a statement that an education at the relevant institution included ethical instruction. He argued it hadn’t worked since he had not paid the debt, but the court held he owed the money anyway. There is one case about a lake pictured on admission materials that was actually 25 miles or more from campus. It’s hard to imagine someone deciding where to attend college based on the presence of a lake on campus, but there was probably more to that case.
Frequently Asked Questions
PPT 3-11
Page 2 (Tab 3) and this slide list three questions that I plan to cover toward the end of the presentation but they are often raised at this point so it seems like a good time to pause and ask whether anyone has been wondering about these three questions and answer them.

**Liability:** They want to know whether they will be held liable for the actions or omissions of students. I usually state that “liability” ultimately is what the court tells us, but their concern about whether they individually or their employer will be responsible for possible student errors is a serious one. Essentially, the student is responsible for the student’s actions and not the nurse preceptor. This does not mean that if an injury occurs the victim may not sue everyone involved. The primary defending actors will be the school and the hospital, not the student or the nurse preceptor. There is one exception to this which is a situation where the student or nurse acts intentionally or maliciously to harm someone. At that point the interests diverge and it may be necessary to have separate insurance that pays for representation and claims.

**Insurance:** I never tell anyone who asks that they should not procure insurance, but I also do not indicate that it is a must. I think it gives some peace of mind and, if it can be obtained economically, it’s a good idea. It is wise to know what sort of insurance one’s employer provides and whether there are circumstances where it would not be available.

**Initialing Notes in a Chart:** The charting question is usually one where nurse educators present can contribute since they have an understanding of the logistics. My contribution is to say that the nurse’s initials on a student entry does not mean the nurse preceptor could testify to the truth or accuracy of the student’s entry unless the nurse has first hand knowledge based on observation of the facts and circumstances.
Understanding Risks — Due Process
PPT 3-12

Many of our procedures exist to provide guidance so students know what is expected of them and their recourse. They also remind faculty and administrators what we have promised the students.

It is important to note that a strict legal interpretation is not always applied by courts in this area. A student is never assured admission or success in school effort and to qualify as a property interest (requiring due process before one can be deprived of it) it must be reasonably clear that one is entitled to the property, a mere hope or expectation is not enough to support a property interest. Still, courts will usually not indicate that there is no property interest and skip over this analysis to whether due process was provided.

Caution is warranted in this area. The courts often state that there is no property interest in a decision to admit a student and no guarantee of success. Then they proceed to question whether the student was given notice of the students’ deficits in performance and analyze whether due process was provided. The longer the student has been in a program and the more tuition and fees paid, the more likely a court is to gloss over the property interest question, which should be viewed as a threshold question, and analyze the due process protections.

Another caution is what information is shared with a licensing or accrediting body. A student who has failed can be reported as having failed. More detailed information could lead to an action for defamation. Thinking as a purist, a student who is unsuccessful should not be viewed negatively. The student lacked the ability or skills or potential and that is not derogatory to the student. A student who fails due to an ethical breach or some character flaw would prefer to be reported as having failed, rather than as having failed due to an ethical problem.
Understanding Risks — Due Process
PPT 3-13 through 3-16

Whether the decision is based on academic performance or misconduct affects the level of process which is due before removing a student from an academic program. A student who lacks significant abilities or qualifications is not going to be able to remain in the program no matter how many times he or she is confronted with the deficiencies they have. As educators we want to provide a high level of feedback and repeated opportunities to learn, but not every student can be successful. However, dismissal based on academic performance should not require the level of due process that is required in a dismissal for misconduct, because the student who lacks the skills has no protected expectation to obtain the degree (property). As indicated above, courts will usually not invalidate an academic decision for inadequate due process, but they will comment on whether it was provided. It should be viewed as a professional educational standard though and not a requirement prior to an academic dismissal.

This distinction is important because a student dismissed for academic reasons has been evaluated not to be capable by educational professionals exercising their professional judgment. Due process would not make sense, because a deficiency exists in the minds of the faculty that cannot be adequately improved. A student accused of misconduct must be given due process before his or her educational opportunity can be taken away. A good case to look at is Gaspar v. Bruton, 513 F.2d 851 (1975). This nursing student who was academically dismissed from an Oklahoma nursing program charged that she was unlawfully deprived of an education — under a valid property right in contract and she was deprived of a significant right of liberty by denial of a proper hearing prior to her dismissal. The court specifically stated that her dismissal was on academic grounds rather than disciplinary conduct, and that the public officials charged with evaluating academic performance had to be allowed to decide. They then proceeded to state that all that was required was that the student be made aware prior to her termination of her failure, or impending failure to meet the standards. This sounds like due process.
Essentially the rule of proportion governs. The greater the investment, the greater the risk to reputation, the more certain or clearer the entitlement the more extensive the procedures will be to assure that the right decision has been made before depriving anyone of liberty or property.

The evidence in a case like this will sometimes point to a clear conflict of interest on personal or financial grounds. There may be familial or other loyalties or rivalries that could prejudice a decision. Review the procedure to be sure that the person who originally made the decision is reviewed by an unbiased supervisor or mentor or by a group of professionals. Look for opportunities to get all the facts and speculation by the student out in the open. Now and then a decision that you would have defended is influenced by a factor that should not be taken into account. It’s best to find this out during our due process instead of during the discovery process in litigation.

**Understanding Risks — Equal Protection**

PPT 3-17

In a public institution the Constitution guarantees each person equal protection of the law. This means that no one will be treated differently under the same law or procedure than someone else who is similarly situated. Different treatment may be afforded if a rational basis exists. Different treatment based on race, religion or national origin must meet a higher standard than rational basis. It must serve a “compelling governmental interest” and be narrowly tailored.

**Understanding Risks — Discrimination**

PPT 3-18

There is no state or national law prohibiting discrimination on the basis of sexual orientation, being a transgendered individual or one who supports others who are. However, many institutions of higher education and some communities have adopted ordinances requiring that decisions are not based on these factors. In general, they are not seen as relevant to the academic pursuit or professional performance.
Understanding Risks — Harassment
PPT 3-19
Harassment is an area of great concern because of the human aspect, we want our students to be treated appropriately; and because of growing legal liability concerns for failing to address known harassers or retaliating against a person who complains of harassment. It is not unusual for someone who engages in this behavior to select a victim who is not likely to have developed the skills to stand up for herself or himself or is, in casual vernacular, a flake, not likely to be believed. Each concern must be taken seriously and evaluated. Our most successful interventions occur at an informal level when a supervisor says to the faculty member, You said or did X which made a student uncomfortable, here is why that is inappropriate and here are the boundaries we expect to be followed. This is not disciplinary action; it is an educational opportunity. Legally, harassment requires unwanted attention directed at a person because of his or her status as a member of a protected class. The actions or statements must be severe and pervasive enough to alter the work (or educational) environment. Confronting the person engaging in these unwanted approaches, actions, or statements is not required before the officials can intervene. It’s easier for supervisors to intervene when they know an accused harasser has been put on notice that their conduct is not desired, but if officials know about the conduct (any level of supervisory authority), the entity knows and must take steps to stop the conduct.

Student Issues: Policies
PPT 3-20
Review the slide.
The Family Educational Rights and Privacy Act (20 U.S.C. Sec.1232g; with the regulations found at 34 C.F.R. Part 99) is also known as FERPA or the Buckley Amendment.

This Act protects the privacy of student records enrolled in K–12, requiring schools to give parents access to their child’s school records and creating a way for them to challenge school records. Once a student is in attendance at an institution of post-secondary education those rights go to the student. Not even the parent can see or obtain copies of student records without the student’s written consent. (Even though they do pay the bills!) Students can appeal to have the record corrected and obtain a review of whether it should be corrected. This is not a way to challenge a faculty member’s judgment in assigning a grade, but to correct a clerical or mathematical error that has occurred. The FERPA record challenge is not a substantive review but a review for error in the mechanical process.

Student records include video tapes, tape recordings, photographs, grade information, and incident reports. Even data that does not provide names is covered when the number of students in the summary/aggregate data is five or fewer students, since one could identify an individual student from within a small group. The U.S. Supreme Court decided two FERPA cases in 2002. The first involved an education student enrolled at Gonzaga University who was not recommended for licensure in Washington state based on allegations of misconduct that were not shared with the student. The case raised several issues but held that FERPA does not create an independent right of action for a student whose information has been released, Gonzaga v. Doe, 536 U.S. 273 (2002). The remedy for a FERPA violation is administrative sanction by the U.S. Department of Education Family Compliance Office. Also in 2002 the U.S. Supreme Court held that a teacher who allowed students to grade one another’s work and call out the scores did not violate FERPA because those papers were not “regularly maintained” by the institution. A daily paper would not be kept as a permanent record and was therefore not “ripe” for protection under FERPA. The
U.S. Supreme Court stated: “Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow students. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on. We do not think FERPA prohibits these educational techniques.…

Respondent’s construction of the term ‘educational records’ to cover student homework or classroom work would impose substantial burdens on teachers across the country. It would force all instructors to take time, which otherwise would be spent teaching and in preparation, to correct an assortment of daily student assignments. Respondent’s view would make it much more difficult for teachers to give students immediate guidance. The interpretation respondent urges would force teachers to abandon other customary practices, such as group grading of team assignments. Indeed, the logical consequences of respondent’s view are all but unbounded.…

We doubt Congress meant to intervene in this drastic fashion with traditional state functions.”


When it is determined that records must be disclosed in compliance with a subpoena, the school must notify the student prior to the release and keep a record of the request and the disposition.

Access to the institution’s student records is required to assure that directory information is not released about a student who has filed the annual request that their directory information not be released. We maintain this list electronically now and it is important to check for the hold before releasing. Once these students tended to be avoiding bill collectors; more recently there have been a number avoiding stalking ex-spouses or overly intrusive parents.
Student Issues: Policies
PPT 3-25 through 3-30
Review the student issues and highlight examples on pages 4 and 5 of the participant notebook (Tab 3).

Grading
- Due process and developmental instruction favor frequent evaluation and feedback. A failing grade should not be a surprise to the student.
- Learning is not compulsory... neither is survival. – W. Edwards Deming

Syllabi
- Evidence of our contract with our students.

Academic Assessment Issues
- Measurement of performance
- Ability to perform

Misconduct
- Academic integrity (cheating)
- Ethics
Student Issues: Practices

- Assumptions are the termites of relationships.
  Henry Winkler, actor (1945- )
- Be familiar with customs, expectations and actual practices regarding confidentiality, fair (or due process) procedures, and professional and academic integrity.

Student Issues: Exceptional Circumstances

- Ignorance more frequently begets confidence than does knowledge.
  – Charles Darwin, naturalist and author (1809-1882)

Student Issues: Americans with Disabilities Act

The institution has the obligation to review a request for accommodation made by a student. It must require appropriate documentation of the disabling condition and exercise professional expertise and a high level of communication skills to calibrate the accommodation such that “the playing field is leveled” for the student. It guarantees equal opportunity not equal achievement. The school must designate someone to evaluate documentation and approve accommodation, and faculty should not provide accommodations without the participation of the school’s disability access coordinator.
Student Issues: Americans with Disabilities Act

- Faculty are not to make accommodation decisions without consultation.
- Accommodations cannot fundamentally alter the nature of the program, lower standards or cause an undue burden.

An early landmark case in trying to strike the right balance between the demands of an educational program and the student’s needs was *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979) where the court upheld the school’s decision that a deaf student could not complete the nursing program because she could not read lips or hear if an emergency occurred during surgery where masks would cover mouths. [This case was brought under the Rehabilitation Act which preceded the ADA by nearly twenty years.] In higher education the ADA seemed less revolutionary since we had been providing equal access to educational programs under the Rehabilitation Act for persons with disabilities. There is now a lot of speculation about whether *Davis* would be decided the same way today. The issue was originally phrased as whether a student with a disabling condition had to meet the same standards as other students. The Court said they must. In the early 90’s the case of *Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991) was decided. It provides the rule that accommodations cannot fundamentally alter the nature of the program or lower standards. This principle is perfect and agreeable to everyone but hard to apply to specific facts.

Currently, institutions may articulate essential skills and requirements for admission. The national Council of State Boards of Nursing no longer supports a list of essential skills and functional abilities as a requirement for admission. Individual state boards of nursing will determine whether essential skills/abilities will be included in their minimum standards for approving nursing programs. We will see whether eliminating specific essential qualifications and abilities opens the admissions door wider and whether that will have good results.
Health Insurance Portability and Accountability Act (HIPAA)

- Protects medical record information from release without consent and one’s ability to challenge one’s records for accuracy.
- There are financial and criminal penalties for violations.

Health Insurance Portability and Accountability Act (HIPAA) started out as a means of assuring through enactment of law that an employee could move to another job and employer without losing health insurance. It was forward thinking in some respects, because people tend to underestimate the vulnerability of information they think of as private and protected. The act requires covered entities, those involved in medical treatment and electronic transactions, to take certain steps to protect personal medical information, “pmi.” A FAX is not considered electronic transmission. So if a clinic does not submit bills electronically, it may not be a covered entity.

Allocation and Reduction of Risks

PPT 3-34 and 3-35
Point out that nursing schools and clinical agencies negotiate written agreements to allocate and reduce risks.

Affiliation Agreements — Insurance

PPT 3-36
Note that the different affiliation agreements used to define duty and allocate risk on page 7 (Tab 3) include insurance.

Allocating and reducing risks

- Affiliation Agreements: Define Duty and Allocate Risk
- Specify which party is responsible for activities and who makes decisions.

Allocation and Reduction of Risks

- Affiliation Agreements: Define Duty and Allocate Risk
  - Role Distinction (by duty and expertise)
  - Indemnification language
  - Realistic commitments, i.e. training and criminal clearance v. promise to perform
  - Responsibility for Student Conduct

Insurance

- Different types of insurance include professional liability, general liability and medical/health.
Affiliation Agreements — Risk Management Through…
PPT 3-37 and 3-38
Emphasize the ways nursing schools can manage risk.

Summary
PPT 3-39 and 3-40
Emphasize that effective risk management is based upon good communication, appropriate documentation, reliance on the techniques and resources to protect against risk (insurance, sovereign immunity, academic abstention and the importance of thoughtfully exercising professional judgment), watchfulness, awareness of what matters, and luck!

Quiz: Legal Issues
If time permits, use the Legal Issues Quiz on PPT slides to review the key topics of this presentation. Each pair of slides contains a slide with a single question followed by a slide with the correct answer. A printed version of the Quiz questions and answers begins on the next page of this Instructor Guide.