



Mini Review

Student Discipline and Fitness to Practise Cases. The Optimal Construction of Allegations – Practical Considerations

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Abstract

Context: Students who exhibit serious behaviour problems may have to face disciplinary or fitness to practise proceedings that may delay progression or result in expulsion. Procedural fairness demands that in advance of the meeting to decide the outcome of the case the student is given a clear list of allegations, which are sufficiently particularized to allow the student to respond and to enable the committee to make findings of fact. This paper explains how allegations should be constructed. **Three basic principles:** (1) The student must be made aware, well in advance, of full details of the allegations that are being made; (2) All findings of fact made by a decision making committee need to relate to specific allegations that have been made in advance of the committee meeting; (3) Allegations must be supported by evidence. **Practical aspects:** Allegations must not be vague. Non-adherence to specific rules, regulations and professional guidance, and persistence of behaviours despite warnings need to be indicated. Allegations of dishonesty or sexual motivation demand special care, as given their seriousness these carry a particular risk of expulsion. It may be helpful to set out allegations in chronological order, as the seriousness of student misbehaviour is influenced by the year of study, and expectations of professional behaviour increase during the course of studies. Chronologically ordered allegations will highlight if there is a pattern of progression, or failure to improve over time. Concerns about lack of insight, failure to remediate or bad attitude should be identified. **Conclusions:** Failure to provide sufficiently particularized allegations will undermine the integrity and potentially the lawfulness of any decisions affecting the future of a student. The amount of detail needed will be case specific, but the important basic requirements for the construction of allegations are set out in this review.

Keywords: Allegations; Procedural fairness; Student discipline; Student fitness to practise; Unprofessional behaviour

Introduction

When faced with serious adverse behaviour by medical and other health and social care students, it may be necessary for the student's case to receive formal consideration by a high-level decision making committee that has the power to terminate studies. Such committees have different names in different education providers and in different countries, and there is much variation in the relevant regulations and the procedures to be followed by the decision makers. But they follow the same steps and the same basic principles. The education programme makes one or more allegations against the student, which are provided to the student in writing, together with the evidence, in advance of any decision making process. When the case is considered, the education programme explains its concerns and sets out its case in support of its allegations, and then the student provides a response. The decision making committee, which can question both parties and any witnesses, evaluates the evidence, decides on whether or not allegations have been proven to the requisite standard of proof, and then a decision is made as to the appropriate outcome including, if necessary, one or more sanctions.

Published general advice has been given about how to ensure that such cases are handled fairly [1-6]. This paper is about just one hitherto neglected aspect of procedural fairness (sometimes referred to as "natural justice"), namely the

optimal construction and formulation of allegations against students. This paper sets out the principles that are involved, and it offers practical advice about the construction of allegations. We recognise that there are many differences in the way educational and regulatory law is written and applied in different professions and different countries, and we have therefore avoided making reference to case law from different countries. Rather the aim of this paper is to focus on the underpinning principles in the use of allegations when dealing with students whose behaviour has been called in to question, principles that are likely to apply generally regardless of the profession or the location of study.

The title of this paper includes the term discipline, which is universally understood. However the term "fitness to practise" is mainly in use in the UK, Ireland, Canada, Australia and New Zealand. Other countries, or particular professions, use other terms to describe decisions regarding the professional suitability of future health or social care professionals, such as, for example "suitability" procedures and "gatekeeping", the latter term being particularly used in relation to social work education [7-8]. In North America, fitness to practise procedures are often outlined in a "due process statement". The due process statement details exactly how breaches of the honour code, unethical or unprofessional behaviour are dealt with fairly and consistently [9-10].

Basic principles regarding the construction of allegations

There are three basic principles to be borne in mind when constructing allegations against a student.

1. A student must be made aware, well in advance, of full details of the allegations that are being made. To enable a student to respond, allegations must be adequately particularised. This principle may sound simple enough, but there are a number of practical difficulties, and these are discussed below.

2. Findings of fact made by a decision making committee cannot be plucked out of the air and need to relate to specific allegations that have been made in advance of the committee meeting. So, for example in the UK (because of the application of UK regulatory case law), in a case of a student who has submitted the work of another student pretending it is their own work, it would be regarded as impermissible to make a finding of fact that the student had been dishonest unless the word “dishonest” or “dishonesty” had been included in the allegation. This principle can cause a problem when a serious adverse behaviour such as dishonesty only first comes to light during a decision making committee meeting, such as when it becomes clear that the student has lied to the committee on one or more occasions. In that situation the committee has the choice of either adjourning the meeting, to allow the programme to make one or more additional allegations (specifying that the student’s replies to questions had been dishonest), or of referring to the matter in any decision without using the word “dishonest”, examples of possible permissible alternatives (depending on the circumstances) including words such as “untruthful”, “misleading”, or “lying”, explaining why these terms had been used. Alternatively, or additionally, if the case is not adjourned for additional allegations to be considered, the dishonesty in the hearing may impact on the version of events that is preferred and accepted by the decision makers, with them rejecting the student’s account.

3. Allegations must be supported by evidence. This evidence is not included in the allegation, but it needs to be available to the student and the decision-making committee. It is important that the supporting evidence is cross-referenced, to save the student and the decision-making committee the arduous task of wading through the papers hunting for the evidence.

Advice about specific aspects of allegation construction

Set out below, in no particular order, is a consideration of relevant topics.

Particularisation

It is necessary to sufficiently particularise each culpable act (something which was done, but should not have been done) and culpable omission (something which was not done, but should have been done). An allegation that simply states “your compliance with absence reporting requirements was inadequate” is not sufficiently particularised. It should specify what was inadequate. The compliance was inadequate for

example, “in that despite previous written warnings from the medical school in Year 1 (2014-2015), in Year 2 (2015-2016) and Year 3 (2016-2017), you failed to report your absence or provide medical evidence in support of your absences on 15-27 January 2018, 7-14 February 2018 and 3-19 March 2018.”

Identify any education provider rules or regulations that have not been complied with

Where an alleged behaviour is contrary to education provider regulations, such as the need to attend a minimum number of teaching sessions, or the need to notify certain individuals if one is absent (e.g. due to illness), this should be included in the allegation.

Identify any professional guidance that has not been complied with

Health and social care professions, through their regulator or professional organisation, often provide guidance to students and to qualified staff, including codes of conduct, and where an alleged behaviour appears to be inconsistent with that guidance, this should be explained in the allegation.

Identify episodes where there have been previous warnings

Behaviours that are repeated despite one or more previous warnings are likely to be more concerning than first-time behaviours. Where there appears to have been non-compliance with a previous warning details of those warnings should be included in the allegation.

Avoid vague or imprecise allegations

General descriptors should be avoided. Vague or broadly structured allegations are unfair, because they make it impossible for students to defend themselves. So, for example, allegations of “poor attendance”, “unprofessional behaviour”, “poor communication”, “not responding to emails”, “willingness to spend time doing not very much”, “attempted to cover up mistakes”, “missed, forgot or arrived late for a number of appointments with service users”, “used bad language when speaking to staff”, “breached confidentiality” or “fell asleep in front of patients” without any further details, are unfair, as they give no indication of what happened, when the event(s) occurred, and precisely what the student has done that was wrong.

To illustrate good practise, Instead of just saying “poor attendance”, the concerns should be expressed in as much detail as possible, for example “Poor attendance, namely that in the 8 week Year 4 ‘Mind and Movement’ module from 9.1.12-2.3.12, you failed to attend the mandatory tutorials held on 10.1.12, 25.1.12, 7.2.12, 15.2.12, 21.2.12, 27.2.12, thereby missing 6 of the 10 scheduled tutorials. The regulation for that module required an absolute minimum of 80% attendance”. In this example, it should be pointed out that care is needed to ensure that there is evidence to support the allegation for all 6 dates. If it transpires that non-attendance cannot be proved on (say) one of these dates, the entire

allegation might be found “not proved”. A possible work around to this problem follows.

Creation of schedules

A schedule is a separate document which can be used to provide particulars for an allegation. A schedule can be used to set out repeated incidents of the same type, such as repeated failure to attend. Whilst the allegation will set out the time frame for the allegations one can specify each attendance failure in a schedule. The allegation itself would not specify the date of each event but could state “on more than one occasion”. This reduces the risk of the allegation failing if one cannot prove all of the separate incidents detailed within the schedule. Schedules can also be a valuable tool to annex more confidential information such as the details of a medical diagnosis.

Particularly serious allegations – dishonesty or sexual motivation

Precision is particularly important for very serious allegations where findings of fact carry a high risk of termination of studies or expulsion. The principle is that for such serious matters there should be no doubt in anyone’s mind about the nature of what is being alleged and therefore the possible consequences can be understood.

Responsibility for dishonesty must depend on the actual state of mind. Take for example a student who comes from a country where public transport is free. On the first day in the UK he travels on a bus. He gets off without paying. He never had any intention of paying. Before there can be a finding of dishonesty, the decision-making tribunal should seek to ascertain the actual state of the student’s knowledge or belief through questions and admissible circumstantial evidence. The allegation should clearly set out the conduct alleged to be dishonest (i.e. the acts or omissions of the student). In the UK, the question whether the student’s conduct is honest or dishonest is to be determined by the decision-making committee applying the objective standards of ordinary decent people. There is no additional requirement that students must themselves appreciate that what they have done is, by those standards, dishonest.

Sexual motivation is also a state of mind. It means that the conduct was either done in pursuit of sexual gratification or in pursuit of a sexual relationship. Sexual motivation should be included in the construction of the allegation unless the allegation specifically alleges a sexual relationship, as any engagement in a sexual relationship must necessarily include sexual motivation.

Changing the allegations at the last minute

Changing an allegation at the last minute, perhaps at the beginning of a decision-making committee meeting can occur because of poor preparation of a case by the education provider, or because the education provider wishes to respond to a document recently submitted by a student in response to allegations contained in the case papers. However last minute changes to allegations can be unfair because the student will

not have had a proper chance to prepare a defence. Whether amendments can be made fairly will require the decision makers to explore with the parties their positions. A correction to a date, which is not disputed, is the type of amendment that may be made without injustice.

Allegations concerning matters where the facts have already been established

In some cases the facts have already been established by a formal decision making process. So, for example, an Academic Misconduct Committee may have found as a fact that a student submitted a piece of written work in which it could be shown that 80% of the content had been copied (without attributing to the source) from a published work, concluding that this was plagiarism, and making a decision that the student was to be awarded a mark of zero for the piece of work. If such a case is referred to a committee to decide upon the professional suitability of the student, the task is not to decide again whether or not any work had been copied. The task is to consider the professional implications of such behaviour. Key issues are likely to be whether the student’s error was simply the result of unfamiliarity with how to reference published work, or was dishonest, and to establish contextual matters such as the stage of the programme, the advice on referencing given to students, and whether or not this is a first or a repeat episode.

Another example might be a student who has been convicted of shoplifting some bars of chocolate, or of driving a car whilst intoxicated with alcohol. The task of the committee considering the student’s professional suitability is not to “go behind” the facts of the conviction and reconsider whether or not the student committed the offence, but to consider the implications of such behaviour on a future career as a health or social care professional. The sorts of behaviours described above are likely to be inconsistent with guidance given by the profession concerned. They might also point to a need for further assessment of a health problem (for example referral to an independent psychiatrist specialising in patients with problems involving drugs or alcohol).

Anonymisation

For reasons of confidentiality and to minimise the unnecessary sharing of personal data, it is safest to anonymise the names of other students, members of staff, and patients, and other persons mentioned in the allegations. It is best to avoid initials, and refer to Mr A, Dr B, Patient C and so on, with letters following on regardless of the category of person. It is however essential that the student is provided with a key to enable them to know who is being referred to in allegations. Including other information, such as an individual’s job title, may undermine anonymization, but in certain circumstances, for example where roles or hierarchy may impact on the evaluation of seriousness, such information may be necessary. For example: “On 1 March 2017, during a morning postnatal ward round at the Bristol Maternity Hospital, you were rude towards Sister A in that you called her a lying bitch in the presence of Patient B, her husband, a Consultant Obstetrician Dr C, and two trainee grade doctors Dr D and Dr E”.

It may be helpful to set out allegations in chronological order

The seriousness of student misbehaviour is influenced by the year of study, because expectations increase during the course of studies, so that by the end of the programme the expectations are likely to be similar to those of qualified health professionals. If there is a pattern of progression, or failure to improve over time, arranging allegations in chronological order may be helpful.

Grouping allegations under sub-headings

It may be helpful to group allegations with features in common. For example, allegations might be grouped under the following headings:

- Allegations suggesting a bad attitude;
- Allegations of communication failures;
- Allegations of failures to comply with portfolio requirements;
- Allegations suggesting a lack of probity and trustworthiness; and
- Allegations relating to health matters (e.g. failure to notify ill health, failure to co-operate with assessment by the education provider's Occupational Health service, failure to co-operate with random testing for drug exposure or excess alcohol use, failure to co-operate with assessment by an independent psychiatrist).

The use of language

We have included a few examples of forms of words to avoid or replace by alternatives.

On one or more occasion: It can be helpful to use the phrase “on one or more occasion” when it is not possible to be certain about the number of times an event occurred. However if the phrase “on more than one occasion” is used there is a risk that the decision makers may find an allegation not proved if they cannot be satisfied that the event occurred on at least two occasions.

Or words to that effect: If one is not absolutely certain as to the precise words that were used, perhaps in a case involving verbal abuse, it is advisable to add a rider of “or words to that effect” when referring to spoken words. This should help to avoid the risk that the decision making committee may find an allegation not proved if they are unable to establish that the exact words were said.

At the material time: This phrase lacks precision and should not be used if it is possible to specify the time frame involved, even if it has to be “on an unknown date between 24 and 28 July 2019”.

You knew or ought to have known: The use of this form of words requires some caution. It seeks to establish that the student failed to take account of relevant facts. It should not be used as a substitute for a direct allegation of an adverse

act or omission. In addition, it should not be used in respect of an allegation of dishonesty, as in cases of alleged dishonesty the decision making committee is required to ascertain the actual state of the student's knowledge and understanding – see “dishonesty” above.

Failed to versus did not: The term “failed to” is more direct than “did not” in identifying responsibility. The drawback is that “failed to” places a higher burden on the education provider, as it requires proof that something did not happen and in addition that it ought to have happened. The advantage is that it is preferable for allegations to specify how the student has fallen short of expected behaviour. However the words “did not” may be useful when particularising what the student “failed to” do. Some prefer to avoid the construct of “failed to”, leaving the issue of fault or failure to the judgment of the decision making committee but this will require the committee (and the allegations to have been clear) to understand why there is concern that the student did “not do” something [11].

A bare denial should not form the basis of an allegation

It is for the education provider to provide proof of an allegation. A bare denial of an allegation – no matter how often repeated or in what context – is unlikely to substantially increase the culpability of the student for the behaviour in question. As such, to amplify the allegation by adding an additional accusation that the allegation has been denied is regarded as unnecessary and oppressive.

To illustrate the point, one might allege that a student has forged the signature of a supervisor. Even if there is clear proof of the forgery, one would not create an additional allegation that the student has denied the forgery. That would be unnecessary. The substantive misconduct is in the forgery and not in the denial.

One would, however, make allegations concerning acts which amount to a dishonest cover up. Any cover up of adverse behaviours is likely to substantially increase the culpability of the student. So, for example, where it has been alleged that a student has failed to attend a teaching session, and has then tampered with the record of attendance, adding their name at a later date in order to try to conceal the failure to attend, a separate allegation of dishonesty would be justified. Indeed the dishonest attempt to cover up the failure to attend may be regarded as more serious than the failure to attend.

Concerns about lack of insight, failure to remediate or attitude

These are all adverse matters that should, if present and supported by evidence, be included in a list of allegations.

Conclusions

It is most important that when a decision is made to refer a student to a decision making committee, whether this is purely a disciplinary matter or is a committee that has the duty to make decisions about the student's suitability to enter a

particular health or social care profession, with the ultimate power to terminate a student's studies, the student and the committee and the student need to be provided with a list of all the allegations that are to be considered. It is essential that these allegations are adequately particularised, to enable the student to consider and respond to the allegations.

Providing sufficiently clear and particularised allegations is an absolutely fundamental component of procedural fairness, yet it is surprising to see how often the construction of allegations is omitted altogether. Disregarding this duty is unfair to the student, and potentially risks fuelling appeals and legal action against the education provider.

The level of detail required when setting out allegations is often the subject of discussion. There are published legal reviews of the UK approaches [12,13]. The simple rule of thumb should be whether sufficient information has been provided to enable the student to understand the allegations and construct a full and adequate response. This article has provided a number of examples of vague or excessively broad allegations; these should be avoided.

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