



Health and Social Care Student Fitness to Practise Cases. Natural Justice, Due Process, and Procedural Howlers

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Abstract

Clinical and academic staff involved in teaching health and social care students often have a limited appreciation of the basic legal requirements of fairness in relation to fitness to practise proceedings. This paper sets out the components of the key concepts embodied in the term “fairness”, including “due process”, “equality of arms” and what are referred to as “the rules of natural justice”. The paper goes on to provide examples of gross procedural aberrations, with a brief description of the significance of the error involved in each example. The need to understand procedural fairness is one of several important reasons for insisting that all staff dealing with student disciplinary and fitness to practise matters receive training for their roles.

Introduction

Severe behaviour difficulties or health problems in a health and social care student may lead to concerns about the individual's fitness to practise (FTP) their chosen profession. Universities manage the most serious concerns by means of a decision-making FTP committee, in the UK usually described as an FTP committee. Such committees, usually composed of senior staff, have the power, where necessary, to terminate a student's studies [1-4]. Given this power, it is particularly important that student FTP cases, in which students may feel the odds are heavily stacked against them, are impeccably fair.

The guidance on how to ensure procedural fairness in such decision-making processes tends to focus on how cases should be managed [2, 5-8]. In contrast, the aim of this paper is to show how FTP committees can go seriously astray and lose sight of the need to ensure fairness. The first part of the paper briefly sets out the components of the key concepts embodied in the term's “fairness”, “due process”, “equality of arms” and what are often referred to as “the rules of natural justice”. The second part of the paper provides examples of procedural howlers, gross aberrations, with a brief description of the procedural error involved in each example. The examples are fictitious, and composites based on the types of scenarios we have seen or based on published cases dealt with by courts in the UK and overseas.

Fairness

Fairness means fairness to both parties, not just one. A hearing is not fair if the procedural dice are loaded in favour of one party or the other [9]. The accused student must know the case and evidence against them, so that there is an opportunity to correct or contradict the evidence [10]. The

office of the Independent Adjudicator for Students in Higher Education (OIAHE) is an independent body set up to review student complaints about universities in England and Wales. It has published a number of guidelines collectively described as “The Good Practice Framework”, which includes guidance on how to manage disciplinary procedures [11], which includes a helpful list of the components of “procedural fairness”.

Due process

Due process is a requirement that legal matters be resolved in accordance with established rules and principles, and that individuals be treated fairly [12-16]. In the context of this paper, procedural due process requires that an organisation (such as an educational provider) should have, and should follow a set of procedural rules. This is especially important when the organisation is following a process which could deny an individual their chosen career (e.g. termination of studies of a health or social care student). In such cases, the person must be given sufficient notice of a decision-making committee meeting, details of the allegations, sufficient time to prepare, and the opportunity to attend the meeting and be heard, with decisions being made by a committee of impartial decision-makers.

The rules of natural justice as applied to student fitness to practise

There has been an evolving recognition of the relevance of natural justice to student fitness to practise matters [5, 17-22]. Two key aspects of natural justice are independence and impartiality [23]. The difficulty with the rules of natural justice, and the right to a fair hearing, is that what is required in order to comply with their expectations is

not fixed or constant, and will vary according to the situation [5]. Members of a decision-making committee must approach a case with an open mind. The components of natural justice as applied to a student FTP committee hearing have been previously published and need not be repeated here [5].

Prior to the hearing

For there to be a fair hearing, there are a few basic steps that ought to have been completed in advance. They are directed at ensuring the parties receive the information and documentation they need for the hearing and are provided with sufficient time to prepare. Those steps are:

- A student should be notified in reasonable time of the date, time and place of the hearing and any dial-in arrangements for remote hearings. It is usual for procedural rules to require the notice to be in writing and this is good practice in any event.
- Procedural rules should specify the minimum period of notice to be given to students and it is important for this to be observed. However, the test is one of reasonableness. Thus, the amount of notice needed will vary from case to case. It will depend upon the urgency of the matter, the number and complexity of the issues, the volume of evidence to be compiled and considered by the parties, and the proximity of other important events such as examination or graduation dates.
- The issues to be determined by the committee ought to have been clearly established and the student informed a reasonable time in advance.
- The evidence on which a party intends to rely at the hearing should have been supplied to the other party a reasonable time in advance.

The committee should be both independent and impartial

The following aspects of independence and impartiality should be reviewed in considering the fairness of a hearing:

- the separation of functions so that committee members have not been involved in the investigation or in the presentation or management of an individual case
- the presence of one or more external or lay individuals as opposed to those who could be regarded as linked to or representative of the university holding the hearing.

Equality of arms

One of the elements of the broad concept of a fair hearing is the principle of equality of arms, which requires each party (the university and the student) to be given a reasonable opportunity to present their case under conditions that do not place either party at a substantial disadvantage vis-à-vis the opponent. For example, it would be unfair if one party was allowed unlimited time to present its evidence while the other party was only given very restricted time or if the

student was denied access to the university's records about their performance.

Examples of some procedural howlers

1. The importance of warnings

A health and social care student's exceptionally poor attendance on three out of five eight-week placements in the first year of study resulted in a student receiving a "fail" grade for each of the three placements. This triggered a requirement to repeat the whole year in its entirety, coupled with a referral to the FTP committee. At no point during the three placements was the student's attention drawn to her poor attendance, or that a continuation of the problem would result in a fail grade for each placement and possible referral to the fitness to practise committee.

Comments: Universities have a duty to act in a demonstrably fair manner. This includes producing evidence that adequate steps were taken to warn all students at the outset about their expected behaviour and providing them a reasonable opportunity to rectify the situation when problems arise [24]. In a case considered by the Court of Appeal in 1995, concerning a student in training to be a teacher who was expelled by a university because her behaviour was considered to make her unfit to teach children, the Court made it clear that adequate prior warnings (which had not been given) were a prerequisite to a decision to expel or remove a student [24]. An exception would be where there was compelling evidence that warnings would have had no effect on the student's conduct (i.e. where a mental health disorder may prevent full understanding). In the context of education, when concerns arise regarding a student's behaviour students must be promptly informed of their errors and given a clear warning explaining where they have gone astray, what is expected in the future, and what may happen if the warning is disregarded [26]. As was put by the courts in England in 1973 and again in 1995, "There are many situations in which a man's apparent capabilities may be stretched when he knows what is demanded of him; many do not know that they are capable of jumping the five-barred gate until the bull is close behind them" [25, 26].

2. Lack of notice of hearing

A student was informed late in the day that he was required to attend an FTP committee meeting the following morning. There was no written notice of the meeting, no agenda was provided, no information about the committee membership or its terms of reference were provided, and the student received no documentation concerning the meeting.

Comments: Students must be given adequate notice of an FTP committee meeting to enable time for preparation. An agenda is an important tool for providing essential details such as date, time and location of the meeting, and the allocation of time to the components of the meeting such as presentation of the case by the parties and the conclusion of the meeting. In advance of the meeting the student should be

provided with a full copy of the papers (including the FTP regulations) and details of the committee members.

3. No opportunity for student to respond to allegations

A student FTP committee spent the entire morning of an FTP committee meeting hearing evidence against the student who, it was alleged, had been repeatedly dishonest. The committee heard evidence from a number of witnesses. At 1pm, the presentation of the case against the student having concluded, the committee chair announced that the committee would proceed to discuss the case and decide the outcome. A member of the committee then pointed out that the student had not been given any opportunity to respond to the allegations. The chair responded that there was no time for that, and that members of the committee had to depart to enable them to fulfil their clinical duties that afternoon.

Comment: it should be obvious that a student must be given an opportunity to respond to the allegations and present their case. There can be no justification for depriving a student of the right to put their point of view. An additional argument in favour of giving a student an opportunity to respond to allegations is that the burden of proof of allegations against a student is upon the university that has made the allegations, and as has been pointed out in most cases this burden of proof can only be met if the student is given an opportunity for rebuttal by questioning any witnesses [9].

4. No allegations provided to a student attending an FTP committee

As a result of anonymous complaints of various categories of unprofessional behaviour, a student was obliged to attend an FTP committee. She had been told that she was expressly forbidden from discussing the case with anyone. The student had received a verbal outline of the nature of allegations, but the identities of the complainants were withheld, as were the statements made by the complainants. Her request for the allegations and complaints to be provided in writing was ignored. She repeated this request at the committee meeting itself, to no avail. It was only 10 days after the outcome of the case had been concluded that she was provided with a document setting out the allegations.

Comments: students must be provided with a list of all the allegations in writing, well in advance of the FTP committee meeting, and the allegations must be adequately particularised [27]. It is impossible for a student to mount any sort of defence if the allegations are vague. See also the comments below about anonymous complaints.

5. Anonymous complaints

The example above illustrated two potential problems with anonymous complaints, namely withholding of the name of the complainant, and withholding of the content of the complaints. It is important to have considered how to handle requests by those reporting concerns who say that they wish to remain anonymous.

Comments: The central concern is that it can be difficult or impossible to defend oneself against a complaint without knowing the identity of the complainant and the full details of the complaint(s). On the rare occasion that there is evidence that identifying a complainant may put that person in danger, there may be some justification for anonymity, but in general it is best to avoid anonymous complaints, and it should be noted that several healthcare regulators will not accept a complaint against a registrant unless the complainant is willing to disclose their identity. One sometimes encounters cases where one or more anonymous complainants have been reassured by a university that they will definitely not need to attend a FTP committee hearing to give evidence, a form of reassurance best avoided as it is not in the gift of the university to provide a guarantee of this sort. Such guarantees would cut across the right of the student to require a complainant to attend to give evidence and be asked questions by the student or their representatives.

6. Student prevented from seeking legal advice or legal representation

A health and social care student required to attend an FTP committee had been told that the university regulations did not permit FTP students to seek legal advice or be legally represented at the committee meeting. This was despite the fact that many UK health and social care students can receive free membership, legal advice and representation through the UK defence organisations for health professionals.

Comments: No university has the power to prevent a student from seeking legal advice about their case.

The FTP regulations of a number of universities do not permit students to be represented or accompanied by a lawyer, and there is no absolute right for students to be legally represented at an FTP committee hearing [28]. The General Medical Council (GMC) has provided guidance on legal representation for students [29]. The GMC guidance to students [2] encourages students to have a supporter or legal representative, but it concedes that this guidance is no more than advisory and it is up to universities to decide on their own policies about whether to permit legal representation. Even if the regulations do not permit students to be accompanied by a legal representative, there is nevertheless scope for a defence organisation or lawyer to look at the case papers (supplied by the student) and help a student prepare for an FTP committee hearing. If the lawyer formed the view that the student was being treated unfairly, or that the procedure was unfair, there is nothing to stop the lawyer to make written legal submissions to the university.

Legal advice to students may assist an FTP committee because some students are refractory to advice from a university but will respond to advice from a lawyer who is independent of the university.

Legal representation is an important form of support. Students attending an FTP committee are in a uniquely difficult position, a time when there is a maximum need for support, and it can be hard to comprehend why students should be deprived of every means of support possible.

The OIAHE has advised “Fitness to practise procedures are internal to a provider and should not be unduly formal. It will not normally be necessary for a student or the provider to be legally represented at a fitness to practise hearing, but it is good practice for the procedures to permit this where there are good reasons” [11]. It appears that the OIAHE feels that legal representation is only needed when the case involves particular legal issues. However, if a student is not allowed legal representation, it is unlikely that they will be aware of what, if any, are the legal issues.

7. Student not permitted to attend FTP committee meeting or FTP appeal committee

The FTP procedure of a university did not permit students to attend FTP committee meetings or FTP appeal committee meetings. The university argued that the decision was a purely academic matter and the FTP decision was akin to an examination board meeting.

Comments: It is unfair to prevent students from hearing evidence presented against them and to prevent students responding to what is being said. In addition, consideration of the FTP of a student is likely to involve the committee asking the student questions to establish the facts, and other matters such as the level of insight and the degree of remediation (if any).

8. Head of the school as an FTP committee member

A healthcare student was required to attend an FTP committee comprising Professor A (the head of the school, the committee chair), Professor B (the previous head of the school), both of whom had had previous extensive involvement in the case, and two other members of staff, Dr C and Dr D. The outcome letter included the words:

“Professors A and B took no part in deciding the outcome of the case”.

Comments: It is essential that investigators and decision makers should not have had previous significant involvement with the student, thus excluding, for example, those who have supervised or supported a student for a significant period, or the head or programme director of a school. Despite these basic principles, it is a startling fact that one still encounters universities that permit staff who are familiar and have been involved with the case of a problem student to serve on a FTP committee. Some universities believe that this problem can be sidestepped and overcome by simply inserting into the outcome letter words (as in the example above) to the effect that the staff on the committee who were familiar and previously involved with the student took no part in making the decision about the student’s FTP, a claim that is inherently unlikely. The concern is that there is a real possibility of influence of the committee’s considerations and decision by the participation of previously involved staff in their deliberations. Justice must also be ‘seen to be done’

and a student may not feel they have been treated fairly in such a situation.

9. Failure to hold an FTP committee meeting

One day, a health and social care student was summoned to meet the Head of School later that day, and informed at the meeting that because of unprofessional behaviour (attendance failures and forging the signature of a mentor) their studies had been terminated. The student received no notice of the reasons for the meeting, was not advised that they could be accompanied by someone of their choosing, and was given no opportunity to respond to the allegations. There was no formal letter documenting the decision, which came to light when the student enrolled in the same programme at another university and because of repeated misconduct was fully investigated and referred to that university’s FTP Committee.

Comments: It is unfair to make major decisions and apply sanctions such as expulsion without any form of due process. Some universities will have a temporary suspension process that allows for suspension of a student pending investigation (see below) but most require that the decision and its reasons are communicated in writing and allow the student to request a review of the suspension. This process should not be confused or conflated with the full FTP procedures.

10. Temporary suspension

Following an alleged assault on another student on hospital premises to which the police had been summoned, a health and social care student was unexpectedly refused entry to a hospital to attend clinical teaching. Hospital security staff were called, and the student was informed (to his surprise) that his studies had been suspended, and he was advised to seek a meeting with the Dean.

Comments: Temporary suspension may be needed prior to a formal fitness to practise committee meeting. Such situations should be rare, but suspension may be needed if there is evidence that patients, staff, other students or members of the public may be at risk. Examples of such cases include a student who repeatedly set hospitals on fire, a student who was found to be involved in the design and construction of a bomb, a psychotic student who was found to be in possession of a firearm and was using it to threaten patients and staff, and a student with the autistic spectrum disorder who was in the habit of making distressing remarks to patients and staff.

The fitness to practise regulations and procedures should set out:

- Which staff have the power to suspend a student;
- The type of reasons that would justify suspension;
- How a student should be notified (if at all possible before the suspension takes effect);

- The duration of suspension and the arrangements for all suspensions to be regularly reviewed to establish whether continuing suspension remains necessary;
- The nature of the limitations that are being imposed and what is or is not permissible.

11. Request for postponement of an FTP committee meeting

A few weeks before the FTP committee meeting, the student indicated (to the FTP committee secretary) that she would not be well enough to attend the FTP committee meeting because of ill health (severe anxiety). The committee secretary took the view that all students attending a FTP committee meeting are anxious, and the request for postponement was declined.

Comments: 1. Decisions about postponement or cancellation of an FTP committee are best discussed between the committee secretary and chair.

2. The key issue was whether the student was medically well enough to participate in the hearing, and understand what was going on. The question raised is a medical one, and the task for deciding whether or not a student is well enough is one for the occupational health service to advise upon. There may be a need to obtain medical evidence, for example from a treating doctor such as the student's family doctor or treating specialist, and obtaining and assessing such evidence are matters from the occupational health service. The committee chair may be medically qualified but their role is not to provide medical advice about an FTP student.

3. Long standing mental health issues often have to be regarded as a disability, and it desirable to refer such students to the university's Disability Service to identify any special support or reasonable adjustments that could or should be provided to the student when attending the FTP committee meeting.

12. Student allowed to nominate a member of an FTP committee

The FTP regulations of a university permitted the student to nominate a member of an FTP committee to consider the case. This could be a member of staff or a fellow student.

Comments: It is not appropriate for either party to nominate one of more decision-making members of an FTP committee, which would cut across the basic principles of the rules of natural justice which as explained above require independence and impartiality.

13. Discussing the appropriate outcome before hearing any evidence

At a pre-meeting immediately before the beginning of a student FTP committee hearing, before the student or the staff member presenting the case had joined the proceedings, the committee chair invited each member of the committee to

indicate, based on having read the papers, what each committee member thought should be the outcome. One committee member expressed their forthright views that the outcome of the meeting should undoubtedly be expulsion of the student, adding that on the basis of their great experience of healthcare education their views should be preferred.

Comments: The purposes of a pre-meeting are to discuss practicalities such as the timetable for the meeting, to ensure that all members of the committee understand the procedure to be followed, to divide up tasks, to ensure that mobile telephones are turned off, and to permit members to raise any questions they may have. Discussion of a case and its possible outcome before evidence has been given, and before the parties are in attendance, is potentially prejudicial. There is no basis for the argument that the opinion of one member of a committee should outweigh the views of others.

14. Student being questioned about papers not seen by the student

A member of an FTP committee made their own enquiries about a student and uncovered some adverse reports by supervisors that had not been included in the case papers, and confronted the student with questions about these matters. Neither the student nor the committee had been aware of these adverse reports. Upon persistent questioning the student left the room in great distress. These facts came to light soon after the hearing, and upon legal advice the whole meeting was voided and had to be re-run using a fresh committee.

Comments: Members of an FTP committee, the school representative and the student should all be provided with identical papers. Committee members should not conduct their own investigations, whether using the internet or using privileged access to student records.

15. Tampering with an FTP investigation report

The behaviour of a health and social care student was causing concern. It was decided by the university that an FTP investigation, to be performed by a senior member of academic staff, was required. The investigation report was received by the FTP committee secretary, who considered that the case against the student required some strengthening and tightening, and changes to the report were made by the secretary without discussion with the investigator. The matter came to light at the FTP committee hearing, when the author of the investigation report was required to give evidence. The investigator noted with obvious surprise that unauthorised alterations had been made.

Comments: The content of a FTP investigation report is the sole responsibility of the investigator. It is not open to anyone else to change the content of the report. If either party disagrees with the content of an FTP investigation report it should be open to either party to question the investigator at the FTP committee meeting. There are important procedural aspects to FTP investigations [30], which should be governed by regulations setting out the university's procedure for conducting FTP investigations.

16. Inappropriate contact between committee and school staff

Shortly before an FTP committee meeting, an external member of the FTP committee was invited to lunch to meet senior staff who were due to give evidence against the student, and concerns about the student were discussed. Neither the student or their representative was present.

Comments: Members of a decision-making committee should studiously avoid contact with either party except in the presence of the full committee and both parties, to avoid the perception of bias. In breaks in a FTP committee meeting it is important that both parties and their representatives leave the room.

17. A committee member who has not read the case papers

This usually comes to light:

- when a committee member arrives with a large but unopened bundle of papers;
- when checking if all the committee members have all the papers, it is found that a committee member has not received all the papers; or
- when a committee member keeps asking questions which had the papers been read would have been unnecessary.

Comments: Possible courses of action include delaying the start of the meeting to allow the Committee member to read the papers, if the available time permits, or adjourning and reconvening the meeting. One of the purposes of training for committee members is to ensure they understand the importance of careful study of the papers prior to FTP committee meetings. One would think this should always be self-evident, but experience has shown that this is not always the case.

18. Failure to consider sanctions in the ascending order of seriousness

Guidance from health professional regulators such as the GMC [2] requires that FTP committees should consider all the available options for sanctions in the ascending order of seriousness, starting with the least severe and moving to the next outcome only if satisfied that a lesser sanction is not appropriate.

Comments: There is a legal requirement to give reasons for important decisions in FTP cases, and this means that an FTP committee decision letter needs to explain why each of the available sanctions would or would not meet the needs of the case, along with an explanation as to why the selected sanction was chosen. The need to consider sanctions in the ascending order of seriousness is supported by UK case law, details of which are set out in a textbook of the law relating to the regulation of health professionals [31].

Discussion and conclusions

Universities that disregard procedural fairness and abuse their disciplinary powers put themselves at risk of legal

challenge. Details of references to some illustrative noteworthy examples of legal cases and commentaries to illustrate the hazards and problems resulting from procedural unfairness, drawn from experience in the UK and around the world, are provided [32-41].

The possession of clinical and/or academic qualifications are no guarantee that staff dealing with health and social care student behaviour or health problems have an adequate understanding of procedural fairness. Indeed experience has shown that such understanding is commonly incomplete. This is one of several important reasons for recommending that all staff dealing with student disciplinary and FTP matters should receive training for their roles [2].

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