

Legal Considerations in the Remediation and Dismissal of Graduate Medical Trainees

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Some percentage of residents and fellows across all specialties require remediation during training. Graduate medical education leaders must navigate remediation steps to optimize resident learning and acquisition of skills, preserve patient safety, and maintain the standards of the specialty.¹⁻³ Standardized approaches to performance management are available for program leaders to achieve favorable remediation results.⁴⁻⁹ In 2015–2016, 1110 of 129 720 (0.86%) residents left or did not successfully complete their training program, including 843 residents who withdrew, 249 who were dismissed, and 18 who did not successfully complete training.¹⁰ The potential legal implications of successful and unsuccessful remediation are often overlooked. An understanding of the legal landscape surrounding the remediation process is important to protecting stakeholders, including trainees.

Taxonomy of Remediation Terms

A systematic approach to remediation with the use of consistent language is important, as is agreement on terminology by all parties. Remediation is any additional training, supervision, or assistance above what is typical for training in the specialty.⁶ Two levels of remediation are widely accepted: informal and formal.⁷ Informal remediation is directed at improving performance and is part of clinical education for a subset of learners. It is generally managed by the program and typically is not reported in future performance reports for the trainee. Formal remediation is based on a decision that the performance or conduct of a learner falls short of program requirements. This may include unsuccessful efforts of informal remediation. Unsuccessful formal remediation has potential long-standing consequences that include further remediation, non-promotion, probation, and even dismissal. Formal remediation may be reported on future reference letters for a trainee, even when completed successfully. Designated Institutional

Official notification should occur in all cases of formal remediation and may be advisable with informal remediation in some cases.

Probation constitutes a kind of last chance for a trainee to correct unacceptable conduct or performance. When making a decision to place a trainee on probation, program leaders should review their institutional policies to confirm their understanding of institutional due process policies for trainees. It is key to note that a program's responsibility to remediate a trainee's performance does not supersede its duty to protect patients from potential harm.¹¹ Therefore, dismissal, nonrenewal of contract, and/or non-reappointment may be necessary if probation fails, or if egregious conduct occurs. Probation status is generally reported on future letters of reference and to licensing boards and employers.

To preserve the standards of a medical specialty, programs must be prepared to withhold credentials from those who are unable to meet minimum acceptable criteria.^{11,12} Annually, a small number of trainees complete their program but are deemed to have not met the criteria of successful entry into unsupervised practice or recommendation for eligibility for the board certification examination in the specialty or subspecialty.

Employee and Learner: A Unique Employment Classification

Residents and fellows are in a unique position as they are hospital employees and learners simultaneously. They are expected to perform day-to-day patient care tasks required of them, and, concurrently, they are expected to demonstrate progression in their educational curriculum. Training programs must prepare learners for unsupervised practice after graduation. Human resources policies often do not adequately address the complexities of this unique employee/learner situation.

When a program identifies that a trainee has deficiencies in knowledge, clinical skills, professionalism, or another competency, it has a responsibility

to intervene and remediate. If remediation is unsuccessful, removal of the trainee from the training program may be indicated. Disciplinary interventions and negative educational assessments during training may affect attainment of professional goals and future employment. Legal questions can arise from both successful and unsuccessful remediation.

A resident's claim to residency training is legally viewed as a "property interest deserving of appropriate due process before it is removed."¹³ To protect trainees from capricious or arbitrary removal, the Accreditation Council for Graduate Medical Education (ACGME) institutional requirements specify that sponsoring institutions must have a policy that provides residents and fellows with due process upon suspension, nonrenewal, non-promotion, or dismissal. The sponsoring institution must provide the resident or fellow with written notice of intent when contract renewal or promotion is withheld.¹⁴ The ACGME Common Program Requirements charge the program director with ensuring compliance with mandates for trainees to raise a grievance and have the benefit of due process.¹⁵

Remediation and disciplinary action should follow institutional due process, and the course of this should be documented in detail.^{12,16} Trainees should be given notice of deficiencies, an opportunity to review the evidence, and a chance to advocate for themselves.^{13,17} Trainees may avail themselves of institutional appeals processes. However, medical education programs are afforded considerable discretion regarding disciplinary intervention, and a formal hearing is not required by law.¹⁷ Courts have long recognized the qualification and discretion of universities to settle academic issues.¹⁸ Collaboration among the resident, program director, Clinical Competency Committee, Designated Institutional Official, human resources, and legal counsel is necessary at the latter stages of performance management (remediation, probation, dismissal).

Critical Legal Questions Around Performance Management

Can a Trainee Pursue Successful Legal Action Against a Program for Negative Language in Its Evaluation of That Trainee?

If evaluative comments are made without malice and are restricted to objective appraisals of performance, legal action will likely be unsuccessful. Case law supports educators' critical evaluation of a trainee's performance and abilities. Such negative comments are protected from libel action because they are a recognized component of academic evaluation, and the learner gives implied consent to be evaluated

BOX Summary Points

- Sponsoring institutions and their training programs must provide residents and fellows with due process in cases of contract nonrenewal, nonpromotion, suspension, or dismissal.
- Adherence to remediation policy, use of consistent remediation language, and documentation of all phases of remediation are important to optimize outcomes and to limit legal liability when dismissal occurs.
- Programs are generally on solid legal ground when they exercise due process for the remediated resident or fellow, when they take actions based on educational standards and patient safety, and when they only disclose educational records to inquiring parties in good faith.
- Courts have consistently declined to consider the tort of educational malpractice.

when enrolling in an educational program. Furthermore, the *Kraft v William* decision upholds the dissemination of this information within an educational institution. When faculty share evaluative comments with institutional stakeholders, such intra-school publication is protected from defamation claims by the common interest privilege of faculty and by the implied consent of the learner.¹⁹ This privilege was later qualified to include only communications made without malice.²⁰

Is Recovery of Damages Likely if a Trainee Sues a Program (or Its Sponsoring Institution) for Disclosing Disciplinary Action Sustained During the Trainee's Tenure to Outside Parties?

It is unlikely for a trainee to recover damages after an educational record containing negative reports is shared with outside parties in good faith. Unprofessional conduct and other problematic behaviors in medical school are associated with subsequent disciplinary action by state medical boards.^{21–23} State licensing boards and hospital credentialing departments issue increasingly detailed inquiries about graduates' disciplinary histories.²⁴ Educators are bound by an ethical obligation and professional duty to truthfully report formal remediation and/or probation (when solicited) on future letters of reference, licensing forms, and credentialing documents. Such reporting can affect a trainee's future career and employment eligibility. Legal action could potentially be sought by the trainee if he or she believes the probation status was unwarranted and/or inaccurate, or the disclosure of his or her status was improper. To defend a claim of unwarranted probation, the use of clear and consistent language is important during performance management. Written notification by the program and acknowledgment by the trainee that

future reporting will occur, as well as contemporaneous documentation of such, are also crucial.²⁴ There is no legal precedent to date that restricts a program's good faith disclosure of disciplinary action on a licensing or credentialing inquiry. When disclosing negative disciplinary events about a trainee to inquiring parties, it is prudent to seek legal counsel to confirm appropriate scope and phrasing of such disclosures. State medical boards often require institutions to report adverse actions that result in changes to a physician's staff privileges. Program leaders should consult their state licensing boards to ensure compliance with mandatory reporting. Unsolicited disclosure of a resident's disciplinary history to outside parties without a legitimate interest is not protected and should be avoided.¹² When a medical school issued negative statements about a student to the Association of American Medical Colleges, a US Court of Appeals considered them to be stigmatizing and potentially restricting to the student's freedom to pursue other medical education opportunities.¹⁷

What Legal Risks Do Institutions Incur by Dismissing a Trainee?

While unsuccessful remediation resulting in dismissal poses possible liability, institutions are generally on solid legal ground. Courts have determined that no distinction exists between postgraduate continuing education programs and degree-granting institutions requiring successful achievement of program goals before granting a certificate.¹⁹ A sponsoring institution, therefore, is not in breach of contract if it withholds a certificate from a trainee who does not complete work satisfactorily. Courts have also recognized educators' ability to determine eligibility of trainees for credentials, as well as their prerogative to withhold certificates when performance criteria are not met.^{16,19} When dismissal decisions are made with just cause, and in accordance with institutional policy, programs and institutions may reasonably expect them to be upheld.^{11,12,16}

A resident contract may require the capitulation of the institutional appeals process upon resignation. A trainee may be tempted to resign in an effort to avoid formal dismissal or disciplinary action. While this option may be attractive to both the trainee and the program because it expedites closure of the matter, programs should be wary of allowing resignations when unethical or egregious conduct has occurred. The purpose of providing truthful information to outside parties is to protect future employers' patients. Allowing resignation before a disciplinary record is established impedes that purpose. In instances of personal hardship or changes of career

interest, resignation is often the most appropriate action.

Do Programs and Sponsoring Institutions Bear Legal Liability for Injuries Caused by a Current Resident?

Faculty and the sponsoring institution have an obligation to supervise trainees and ensure patient safety, and they can be held liable in cases of negligent injury caused by a resident or fellow during training.^{11,12,25} The ethical and legal obligation to prevent harm to patients may necessitate dismissal of poorly performing trainees. However, delivery of standard medical care is not required for dismissal, and it is not necessary for a program to wait until injury occurs before terminating the clinical privileges of a trainee.²⁶

Can a Program or Sponsoring Institution Be Held Liable for Injuries Caused by a Graduate Who Demonstrated Deficiencies During Matriculation but Ultimately Received a Certificate of Completion?

Successful completion of a training program implies that the graduate is competent to practice in that field of medicine, and to our knowledge there is no published case law to suggest that a program can be held liable for injuries caused by a graduate who ultimately completed the program. Courts have upheld educational institutions' authority in determining certification eligibility, and they have been reluctant to recognize a complaint of educational malpractice in the litigation of medical malpractice claims.^{27,28}

Can a Graduate Whose Adverse Patient Outcomes Suggest Incompetence Sue a Training Program for Insufficient Education or Educational Malpractice?

Courts have refused to recognize the tort of educational malpractice, and current case law does not provide sufficient grounds for legal action against training programs or sponsoring institutions for educational malpractice.^{12,25,29-44}

Special Circumstances: Personal Issues in Trainees

If a trainee exhibits concerning behavior stemming from a personal matter or a medical condition, deliberate steps must be taken to protect the individual and his or her patients. Generally, program directors and faculty should limit their evaluations to objective clinical performance and should not attempt to diagnose a medical condition. However, if a direct

threat is perceived, based on medical knowledge or objective evidence, the trainee should be relieved of clinical responsibilities. An administrative leave of absence may be helpful to collect information and strategize appropriate next steps.

According to the US Equal Employment Opportunity Commission, if an employer has a reasonable belief that an employee's ability to perform essential job-related duties is impaired, or that the employee poses a direct threat due to a medical condition, the employer may make disability-related inquiries and/or require the employee to submit to a medical examination.⁴⁵ While a resident cannot be forced to seek treatment, securing appropriate treatment to maintain fitness for duty is that individual's responsibility.²⁴ A program may require a trainee to be determined fit for duty by a medical professional before returning to clinical duty.

When a disability is discovered during training, programs should protect the resident by collaborating with institutional officials familiar with the Americans with Disabilities Act. The trainee (employee) usually initiates the request for accommodation; however, if the disability is obvious or apparent, the employer has a duty to explore reasonable accommodations. If a trainee discloses a disability and requests accommodation, the program should initiate an interactive process to identify a reasonable accommodation.

Job restructuring, modified scheduling, and reassignment are considered reasonable accommodations in many work environments.⁴⁵ However, these alterations can present considerable challenges in residency training settings. An employer does not need to provide accommodation if this causes undue hardship. Factors that determine hardship include the cost and nature of the accommodation, as well as the type, structure, and function of the employer's operation.⁴⁵ Program leadership must determine if the requested accommodation is compatible with the educational requirements of that program, which often reflect the demands of that medical specialty. Institutional officials should be consulted when a trainee's circumstances require consideration of the Americans with Disabilities Act.

Conclusion

Standardized, effective performance management is important to optimize medical trainee success and maximize patient safety. Familiarity with the legal implications of remediation and adherence to institutional due process enable training programs and sponsoring institutions to protect programs, trainees,

and their current and future patients (see summary BOX).

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