

Healey, Jeremy

From: Giddens, Beth
Sent: Thursday, February 16, 2017 8:56 AM
To: Healey, Jeremy
Subject: FW: Graduate School policy re students w/out adviser/committee

GradSchool/Committee

From: Reeves, Meg On Behalf Of Gose, Rebecca
Sent: Tuesday, December 10, 2013 1:46 PM
To: McComb, Brenda <Brenda.McComb@oregonstate.edu>
Cc: Reeves, Meg <Meg.Reeves@oregonstate.edu>; Gose, Rebecca <Rebecca.Gose@oregonstate.edu>
Subject: Graduate School policy re students w/out adviser/committee

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Brenda:

Meg asked me to follow up on the work that Charles Fletcher and our outside consultant had done regarding whether OSU should place the responsibility to find a committee and advisor on the graduate student or on the institution, in cases where the student is in good academic and conduct standing. As I think you had discussed with Charles and Meg in the past, there is not a hard and fast rule dictating this and institutions' policies online seem to be silent on this issue or, if they address it, they do not seem to overwhelmingly favor one or the other approach. (From a quick scan online, Cornell, UW-Madison and University of South Florida all place the responsibility on the student and allow for dismissal when the student is unsuccessful, whereas UC Davis, UW and Virginia Commonwealth obligate the University to put together a committee.)

It is in OSU's best interest to decide one way or the other on this issue, to avoid *ad hoc* and inconsistent treatment of students in similar situations. As described below, I believe that there is less legal risk involved in placing the responsibility on OSU to find a committee. If you decide, however, that there are more persuasive policy or resource reasons to choose the opposite path, let's talk about the ways in which we can make that work with the least exposure to the University.

A. Themes in the Case Law

I have reviewed cases involving graduate students' allegations against universities resulting from the university's failure to provide a replacement advisor or committee after the original resigned. The causes of action that were alleged in these cases included breach of contract, race/sex discrimination, failure to accommodate a disability, retaliation, intentional infliction of emotional distress, denial of due process, denial of equal protection, first amendment and fraud. Without getting into too much detail, clear themes emerged from my reading of these cases.

In general, courts will defer to a university's academic judgment that a student is not sufficiently progressing towards a degree, and they seem to include in that deference cases in which advisors resign from a student's committee as a result of fundamental academic concerns – *i.e.*, that the student is not following the advice, is not doing the work, is doing such substandard work that the advisor believes the student will not be able to meet PhD standards, etc... Note that some courts have treated cases in this way even if the student is in good academic standing regarding grades, and in which the student has not been *formally* determined to be failing to make academic progress, so long as the fundamental reasons for wanting to resign from the committee involve academic concerns about the work or approach.

Courts are not deferring, however, where the reasons for the advisor's resignation are not seen as academic and there is some evidence that they may have been impermissible discrimination or retaliation. (Similarly, courts are not deferring where the resignation is seen to be arbitrary or capricious.) Note that these cases in which courts are *not* deferring to the university include those in which the student may be doing fine work, but has a very difficult personality or communication style with the faculty member.

B. Recommendation: Placing the Responsibility With the University

At first blush, one might read the "themes" above and conclude that a University could just stay on the right side of the line by ensuring that advisors or committee members only resign for reasons related to the work of the student, not for discriminatory, retaliatory or arbitrary/capricious reasons. This can get very tricky, however.

First, it would be very difficult to ensure particular faculty motives as a practical matter, especially where personality conflicts and other interpersonal tensions are so often present in these cases (whether or not an academic-type reason for resignation could also be found). We could build in an appeal process for grad students who believe that their advisors' resignations were for impermissible reasons, but we will likely get a lot of those appeals and it would be difficult to determine in particular cases whether the reason for resignation was academic/work-related or not (and how to separate those from personality conflicts or other tensions).

Second, just defending these cases has become a very costly endeavor. Even where the university has strong evidence that the reasons for resignation were not impermissible and there was no policy requiring the university to create a committee for the student, more cases are surviving dismissal-type motions and resulting in very expensive and drawn-out litigation. (This happened with our neighbors down the road earlier this year in Emeldi v. University of Oregon.)

Third, there will simply be fewer plaintiffs to sue the University about this if they are not dismissed for failure to constitute a committee.

These reasons lead me to recommend that the University ultimately take on the responsibility in situations where students cannot constitute a committee and are in good academic and conduct standing. (From what I have seen over the last few years, this has been OSU's practice also.) Note that we can still place the initial burden on the student, but leave open an avenue for them to work first with their department chairs, then their deans and then the Graduate School if they are unsuccessful in this endeavor. It probably makes the most sense to have the ultimate responsibility for enforcement and application of this policy to rest with the Graduate School Dean, but we can chat about other process options if that doesn't make sense to you.

If we go this route, it will be very important that we live up to our responsibility in constituting a committee for difficult students. Not following the policy on this point would open us up to more liability than any other option and it would be riskier even than remaining silent on this issue. Following through on this obligation may be easier, however, if OSU has a written policy to which all faculty and administrators must adhere.

In sum, OSU is likely on safer legal ground if it takes responsibility for constituting a committee for a grad student in good academic and conduct standing. If that is the policy OSU decides to pursue, it should develop a policy to spell that out. If, however, OSU has a strong policy preference to place the responsibility for finding a committee on the student, let's talk about the ways to do that and avoid the stickiest legal situations.

I have tried not to give too much detail in this email, but would be happy to sit down and TALK through the pros/cons in more detail at your convenience. Please just let me know how I can help.

Thanks! -Becca