STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. SOM-24-402

XINXIU TINA HOGAN,

Plaintiff – Appellant,

v.

KENNEBEC VALLEY COMMUNITY COLLEGE,

Defendant – Appellee.

APPEAL
FROM THE SOMERSET COUNTY SUPERIOR COURT

BRIEF OF APPELLEE KENNEBEC VALLEY COMMUNITY COLLEGE

Jeana M. McCormick, Bar No. 5230
Oliver Mac Walton, Bar No. 6340

DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, ME 04101
Tel: (207) 772-1941
jmccormick@dwmlaw.com
owalton@dwmlaw.com
Counsel for Appellee

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STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Appellee Kennebec Valley Community College ("KVCC") is one of seven community colleges operating under the authority of the Maine Community College System Board of Trustees. (Administrative Record ("AR") 77.) Appellant was a student at KVCC from the spring of 2017 to the fall of 2023, and she earned an Associate in Arts degree in May 2022. (AR 74-77.) She was a student in the respiratory therapy program, beginning in the fall of 2020. (AR 74.) During the 2021-22 academic year, Appellant was enrolled in clinical practicum courses, through which she performed work at various clinical sites (i.e., third-party medical institutions such as hospitals), and was supervised by employees of the clinical sites. (AR 75; *see also* AR 118-25 (describing nature of clinical practicums).). Danielle Schryver (MS, RRT) is Program Director of the respiratory therapy program at KVCC, and Hannah Leadbetter (BAS, RRT) is Director of Clinical Education and a faculty member of the KVCC respiratory therapy program. (Appendix ("A.") 118; AR 32, 73, 92.)

In November 2021, KVCC faculty began to receive emails from clinical site supervisors expressing concerns with Appellant's clinical performance. (A. 110; AR 33.) On November 2, 2021, Devin Sidell, Director of Respiratory Care at Redington Fairview General Hospital, informed Ms. Leadbetter that Appellant was

struggling with certain tasks at the clinical site. (A. 110; AR 33.)

On February 28, 2022, Laura Price, a respiratory therapist with MaineHealth at Franklin Memorial Hospital, emailed Ms. Leadbetter to inform her that Appellant "was really struggling with her skills in the clinical setting." (A. 111; AR 41.) Ms. Price asked Ms. Leadbetter to call the therapist who worked with Appellant that day, because that therapist "ha[d] some big concerns as [Appellant] is supposed to be graduating soon." (A. 111; AR 41.) Ms. Leadbetter did follow up with that therapist and learned that Appellant was engaging in clinically questionable actions, "including listening for breath sounds in incorrect places." (A. 118; AR 73.) The therapist also told Ms. Leadbetter that she "was not able to fill out an honest evaluation sheet for [Appellant] . . . ," (A. 118; AR 73), as reflected in Ms. Price's email stating that "[a]t the end of the shift [Appellant] was not happy with her score and tried to encourage her to fill out a new form . . . the therapist working didn't feel comfortable giving an honest review because [Appellant] was sitting right there," (A. 111; AR 41).

Just a few weeks after the February 28 report from MaineHealth, KVCC received another report about Appellant endangering patient safety. On March 17, 2022, Casey Bruneau Flanagin, a respiratory care supervisor at MaineGeneral, emailed Ms. Schryver to alert her that MaineGeneral "had many issues with" Appellant that day. (A. 112; AR 44.) Ms. Flanagin wrote that Appellant was "unsafe

with patients and very confrontational with staff," and had argued with her clinical preceptor as well as Ms. Flanagin about her evaluation score, ultimately becoming "very upset and unprofessional." (A. 112; AR 44.) Ms. Leadbetter also happened to be present at MaineGeneral that day, and she observed Appellant "practice[] unsafe needle practices as evidenced by: [an] incorrect angle of [a] needle in [the] skin, not recognizing that [the] needle had withdrawn from [the] skin and attempting to re-stick [the] patient with [the] same needle, and not recognizing when to appropriately cap the needle." (A. 118; AR 73; *see also* A. 114 (Ms. Leadbetter's contemporaneous clinical evaluation).) On March 24, Appellant met with Ms. Leadbetter, Ms. Schryver, and then-Interim Dean of Students CJ McKenna to discuss the March 17 incident. (AR 8, 15.)

Less than a month later, Ms. Leadbetter and Ms. Schryver received another report from yet another third-party clinical site regarding Appellant jeopardizing patient safety. (A. 116-17; AR 66-68.) On April 12, 2022, Marissa Nason, the Assistant Manager of Respiratory Medicine with Northern Light Eastern Maine Medical Center, emailed Ms. Leadbetter and Ms. Schryver to describe "concerns that have come up with" Appellant. (A. 116.) Ms. Nason wrote,

> [Appellant] attempted to obtain an ABG without removing the cap from the needle. The RT mentioned, "Students are often nervous, that's expected but [Appellant] took so long to even set up for the ABG that a 5-minute blood pressure cuff cycled twice. She tried to obtain the gas with the cap on and when the cuff was going off."

(A. 116.) Ms. Nason further explained that, while tending to a cystic fibrosis patient that was

> in respiratory distress, [Appellant] did not recognize the patient was audibly wheezing and in obvious distress. The RT handed the CF patient his nebulizer and [Appellant] kept stopping him from starting his neb so that she could complete a full assessment prior to starting the neb. The patient was desaturating, tachypneic and audibly wheezing but [Appellant] did not seem to pick up on any of these clinical ques [sic]. The RT [tried] to address concerns with [Appellant] as the day progresse[d] but she fe[lt] so frustrated by the lack of knowledge shown by the [Appellant], [the site] sen[t] her with a different Preceptor for the afternoon.

(A. 116; *see also* AR 67-68.) Ms. Nason and another clinician issued a Clinical Incident Report as a result of the foregoing. (AR 68; *see also* AR 123.)

The next day, Ms. Leadbetter recommended that Appellant be dismissed from the Clinical Practicum III course. (AR 73.) In addition to and as a result of the clinical performance issues that had jeopardized patient safety, Ms. Leadbetter noted that three different hospitals had informed her that Appellant "would only be allowed back to clinical as a 1:1 with [Ms. Leadbetter]," which Ms. Leadbetter wrote was "not feasible or appropriate." (A. 118.)

B. Procedural History

1. Initial Administrative Proceedings

On April 15, 2022, then-Interim Dean of Students CJ McKenna sent a letter to Appellant explaining that Appellant may have violated Section 501(III)(B)(16) of the Maine Community College System Student Code of Conduct ("MCCS Code of

Conduct"). (A. 108; *see also* A. 121-23 (setting forth procedure for investigation and hearing of MCCS Code of Conduct violations).) More specifically, Dean McKenna stated he had received information that "patient safety was at risk under [Appellant's] care," and that if the information was true, Appellant's conduct "would violate [Section 501(III)(B)(16) of the [MCCS Code of Conduct] and sanctions, up to and including expulsion, could be imposed." (A. 108.) In accordance with Section V(B) of the MCCS Code of Conduct, (A. 122), Dean McKenna wrote that he would convene a meeting on April 21 to "hear [Appellant's] response," and that in the meantime, "[b]ecause of the nature of this matter," Appellant was "placed on an interim suspension from the Respiratory Therapy program pending review of this matter," (A. 108).

Appellant met with Dean McKenna on April 21, so that Dean McKenna "could inform [her] further about the information that [he] had received and hear [Appellant's] response." (A. 109.) Landi Wright, an educational support specialist who assisted and supported Appellant throughout this time period (*see, e.g.*, AR 10, 12, 60, 234, 244, 290), also participated in the April 21 meeting (AR 194).

On April 29, Dean McKenna wrote to Appellant that he had "determined it was more probable than not that on or about March 17th, 2022, and April 12, 2022, [Appellant] endangered patient safety." (A. 109.) Dean McKenna concluded that this misconduct violated Section 501(III)(B)(16) of the MCCS Code of Conduct,

and imposed a sanction of dismissal from the respiratory therapy program. (A. 109; *see also* A. 134 ("The Dean . . . may at this stage impose a sanction of dismissal or suspension.").)

Appellant appealed Dean McKenna's decision. (AR 15; *see also* A. 122-23 (setting forth procedure for appeal of Dean's decision under the MCCS Code of Conduct).) A Disciplinary Committee was convened, and on May 16, 2022, after a hearing, it found that Appellant had compromised patient safety in violation of Section 501(III)(B)(16) of the MCCS Code of Conduct, and upheld Dean McKenna's decision to dismiss Appellant from the respiratory therapy program. (AR 170.)

2. Prior Litigation in Docket Number AP-22-03

Appellant filed a Rule 80B appeal of the Disciplinary Committee's May 16 decision, as well as a purportedly independent due process claim under 42 U.S.C. § 1983. *See* Compl., No. AP-22-03 (Me. Super. Ct., Somerset Cty., June 15, 2022).[1] KVCC moved to dismiss the due process claim as duplicative of Appellant's 80B appeal, which the Superior Court (*Cole, C.J.*) granted. *See* Order on Def.'s Mot. to Dismiss and Pl.'s Mot. to Specify the Course of the Proceedings at 5, No. AP-22-03

[1] This Court may, and often does, take judicial notice of "pleadings, dockets, and other court records where the existence or content of such records is germane to an issue in the same or separate proceedings." *Gardner v. Greenlaw*, 2022 ME 53, ¶ 3 n.1, 284 A.3d 93; *see also Wells Fargo Bank, N.A. v. Bump*, 2021 ME 2, ¶¶ 21-23, 244 A.3d 232.

(Me. Super. Ct., Somerset Cty., Sept. 29, 2022). Chief Justice Cole explained that "[u]nlike the petitioner's Section 1983 claims in *Gorham v. Androscoggin County*, [Appellant's] due process claim does not allege a deprivation of property distinct from the deprivation that forms the basis of her Rule 80B claim." *Id.*

As to the Rule 80B appeal, on May 10, 2023, the Superior Court (*Mills, A.R.J.*) issued an order finding that the Disciplinary Committee's May 16 decision and record on appeal were insufficient for judicial review and remanding the matter to the Disciplinary Committee "to conduct a new hearing and to make a final decision that provides findings of fact based on a reviewable record." Decision and Order at 6, No. AP-22-03 (Me. Super. Ct., Somerset Cty., May 10, 2023); (*see also* A. 14-15). The Superior Court also observed that because the Disciplinary Committee "is expressly authorized to conduct a de novo review of the [Dean's] decision" under the MCCS Code of Conduct, the "Disciplinary Committee's decision is the operative decision for review." *Id.* at 5; (*see also* AR 96). The Superior Court in AP-22-03 did not retain jurisdiction over the appeal. *See id.*

3. Administrative Proceedings on Remand

On remand, the Disciplinary Committee held a new hearing on July 31, 2023, at which it received evidence from Dean McKenna and Appellant. (A. 63-65; AR 3-7.) On August 9, 2023, the Disciplinary Committee issued a written decision (the "Dismissal Decision") finding that it was "more probable than not that patient safety

was compromised under [Appellant's] care" and "disregarded the welfare, health and safety of the College community." (A. 64.) The Disciplinary Committee further stated:

> Specifically, the [Disciplinary Committee] concluded that it was more probable than not that your conduct, on several occasions, spanning two semesters, dating November 2021, as well as February, March, and April 2022, disregarded the welfare, health or safety of the College community.
>
> The emails and related incident reports, all written contemporaneously, describe conduct that "threatens or endangers the health or safety of others" such as using aggressive measures to wake a patient; unsafe needle practices; failing to recognize a patient in obvious distress; and arguing with site staff about clinical evaluations and scores. We found the emails and reports to be credible because of the detail provided by hospital staff. We also found the notices – after the fact – from three different hospitals (Central Maine Medical Center; Maine General; and Northern Light Health) that they would not allow you back on site without one-on-one faculty supervision credible and compelling.
>
> The materials and records you supplied did not speak contemporaneously, or at all, to the conduct ascribed to you. The materials that were directly related were either reflective, after the fact, or contradictory to the contemporaneous record. We found the materials you provided in your testimony to be less credible than those supplied by multiple, independent clinical sites.
>
> Despite your contention that these reports were the byproduct of racism, we did not find any evidence of racism, discrimination, or personal animosity in any of the provided documentation. Further, in your evaluations of site preceptors, you did not once mention discrimination as the reason for your scores.

(A. 64.)

4. Current Litigation

On September 7, 2023, Appellant filed a new Complaint seeking review of the Dismissal Decision under Rule 80B (Count I) and asserting a due process claim under section 1983 (Count II), along with a motion to specify the course of proceedings. (A. 4, 23-28, 37-39.) On October 27, 2023, Appellant filed a First Amended Complaint ("FAC") to add a claim for unlawful education discrimination under 5 M.R.S. § 4601 (Count III). (A. 4, 29-36.) On November 20, 2023, Appellant filed an amended motion to specify the course of proceedings. (A. 4, 40-42.)

KVCC moved to dismiss Appellant's purportedly independent claims (Counts II and III) as duplicative of her Rule 80B appeal. (A. 44-54.) On January 22, 2024, the Superior Court (*Stokes, A.R.J.*) granted KVCC's motion as to Count II. (A. 7-9.) As to Count III, the Superior Court observed that it was "not as certain" about the duplicative nature of the discrimination claim. (A. 8.) The Superior Court noted that the FAC "seems to be using [the factual allegations in Count III] to support the claim that the [dismissal decision] was based on or influenced by bias and/or discrimination against her, a claim that would be encompassed within the Rule 80B appeal." (A. 8.) The Superior Court wrote further:

> It is at least arguable at this stage of proceedings that [Appellant] is asserting a claim of discrimination while she was in the respiratory therapy program independent of and separate from the appeal of the

> dismissal decision. At this time, the court will deny the motion to dismiss Count III.

(A. 8.)

In her Rule 80B brief, Appellant argued primarily that KVCC acted arbitrarily or capriciously in sanctioning her under the MCCS Code of Conduct rather than the respiratory therapy program handbook ("RT Handbook"). (A. 68-79.) She also argued that Dean McKenna's "choice of a disciplinary process rather than an academic one was not subject to review by the Disciplinary Committee and therefore should be reviewed de novo by the [Superior Court]," (A. 74), and that the evidence from the clinical sites should be discredited because of her clinical supervisors' "frustration with and dislike of" Appellant, making no mention of racial or national origin bias, (A. 73).

On August 12, 2024, the Superior Court denied Appellant's Rule 80B appeal. The Superior Court further observed that "[i]n her Rule 80[B] brief, [Appellant] made no mention" of any racial discrimination or bias claim, even though "[a]ny claim of racial bias on the part of the decisionmaker or that the decision was based on racially biased information . . . would provide [Appellant] with the precise relief she is seeking." (A. 20.) The Superior Court further noted that it had "reviewed the Administrative Record in detail and can find no evidence of any kind that racial bias played any part in the proceedings below, or the events giving rise to those proceedings." (A. 20.) The Superior Court reiterated that,

based on its January 22, 2024, order, "it should have been clear that the court was uncertain as to what to do with Count III," because the FAC "uses the same factual allegations in Counts I and III." (A. 21.) The Superior Court concluded, "[b]ased on [its] comprehensive review of the Administrative Record, it concludes that Count III is duplicative of Count I," and ordered Count III dismissed. (A. 21.)

Appellant timely appealed. (A. 5.)

SUMMARY OF ARGUMENT

KVCC dismissed Appellant from the respiratory therapy program based on the Disciplinary Committee's findings that, over the course of multiple semesters of clinical practice, (i) Appellant used "aggressive measures to wake a patient," engaged in "unsafe needle practices," failed to recognize a patient in "obvious distress," and argued with site staff about clinical evaluations; (ii) Appellant's misconduct was corroborated by contemporaneous, independent reports from multiple clinical sites; and (iii) the circumstances suggested "negligent behavior that is not simply an artifact of a student learning to perform clinical duties." (A. 64.)

In the Superior Court, Appellant argued, as she had at the administrative level, that the Superior Court should discredit witnesses due to alleged discrimination and that KVCC should apply only the RT Handbook, not the MCCS Code of Conduct, to address any misconduct. In this Court, with new counsel, Appellant has shifted gears almost entirely. She has largely abandoned her Rule 80B appeal, now arguing

primarily that the Superior Court erred in dismissing her purportedly "independent" claims as duplicative of her Rule 80B appeal. But Appellant's presentation of the case throughout the Superior Court proceedings, in all respects, was aimed solely at the Dismissal Decision – including her description of her due process and discrimination claims. Despite the Superior Court's express warning to Appellant that it understood Appellant's discrimination and due process claims to be merely alternative bases to disturb the Dismissal Decision (and thus fully cognizable in the Rule 80B context), Appellant made no attempt to correct the Superior Court's understanding. The Superior Court did not abuse its discretion in dismissing Appellant's independent claims, and this Court should not condone Appellant's bait-and-switch strategy.

As to the Rule 80B aspect of the case, Appellant has now abandoned any challenge to the Disciplinary Committee's factual findings described above. She argues only that the procedures followed by KVCC in investigating and sanctioning her misconduct violated due process. Her arguments are legally erroneous. In the medical education context, sanctions imposed for clinical shortcomings and behavioral issues are considered "academic" for due process purposes, requiring nothing more than notice and a "careful and deliberate" decision, which Appellant indisputably received. Moreover, Appellant's Brief is misleading regarding the process that she did receive, because it completely omits any mention of the April

21 hearing before Dean McKenna, just six days after the initial suspension was imposed. The decision to dismiss Appellant from the respiratory therapy program did not violate due process.

Finally, Appellant's paeans to the virtues of higher education are badly misplaced. The Disciplinary Committee found, and Appellant no longer disputes, that her misconduct included "unsafe needle practices" and arguing with clinical supervisors about her evaluations, which the Disciplinary Committee described as "negligent behavior that is not simply an artifact of a student learning to perform clinical duties." (A. 64.) The practice of respiratory therapy occurs in medical clinics and hospitals, not books and libraries – clinical errors endanger patients, regardless of whether the error is the result of a scholarly failure, negligent personality, or something in between. The decision to dismiss Appellant from the respiratory therapy program should not be disturbed.

This Court should affirm.

ARGUMENT

I. STANDARD OF REVIEW.

A. Standard of Review for Dismissal of Independent Claims as Duplicative of Administrative Appeal

Appellant's Brief incorrectly states the standard of review in connection with the Superior Court's dismissal of her purportedly independent claims. (*See* Blue Br. at 18.) This Court does not review such a dismissal de novo. Rather, "[w]hen a

claim for purportedly independent relief is joined with an administrative appeal and the court strikes the former as duplicative . . . [this Court] review[s] the judgment for an abuse of discretion." *Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 2019 ME 86, ¶ 7, 209 A.3d 102; *accord Kane v. Comm'r of Dep't of Health & Human Servs.*, 2008 ME 185, ¶ 32, 960 A.2d 1196; *Adelman v. Town of Baldwin*, 2000 ME 91, ¶¶ 6-7, 750 A.2d 577. Indeed, in *Kane*, this Court affirmatively noted that the plaintiff's complaint "sufficiently alleged a cognizable section 1983 cause of action," but reviewed for abuse of discretion the trial court's dismissal of the section 1983 claim on the ground that it was duplicative of the Rule 80B appeal. 2008 ME 185, ¶¶ 30, 32, 960 A.2d 1196.

Here, the Superior Court did not dismiss Appellant's due process and discrimination claims for failure to state a claim. Rather, the Superior Court dismissed those claims because they were impermissibly duplicative of her Rule 80B appeal. (A. 6-8, 20-21.) This Court reviews that aspect of the Superior Court's judgment for an abuse of discretion.

B. Rule 80B Standard of Review

Appellant also appears to challenge the Superior Court's rejection of her due process challenge within the Rule 80B review.[2] (A. 20; Blue Br. 29-40.) As to that

[2] Although no provision of the MCCS Code of Conduct explicitly provides a right of judicial review, judicial review of KVCC's decision is "otherwise available by law" under the common-law writ of certiorari. M.R. Civ. P. 80B(a). Certiorari "function[s] as the vehicle for judicial review of governmental

issue, although not stated in Appellant's Brief, this Court's review of administrative decision-making under Rule 80B "is deferential and limited." *Wolfram v. Town of N. Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835 (quotation marks omitted). The Court reviews the operative administrative decision directly for "abuse of discretion, errors of law, or findings not supported by the substantial evidence in the record." *Grant v. Town of Belgrade*, 2019 ME 160, ¶ 8, 221 A.3d 112 (quotation marks omitted). "The party seeking to overturn the decision bears the burden of persuasion." *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024.

II. THE SUPERIOR COURT PROPERLY REJECTED APPELLANT'S RULE 80B APPEAL AND CONCLUDED THAT KVCC DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS.

In her Brief to this Court, Appellant does not challenge the Disciplinary Committee's thoroughly-articulated, well-reasoned findings regarding her misconduct – presumably because the administrative record is replete with evidence to support them, including the emails and clinical reports from the preceptors for each incident, which the Disciplinary Committee found "credible and compelling."[3]

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decisions involving a discretionary and quasi-judicial adjudication of rights," *15 Langsford Owner, LLC v. Town of Kennebunkport*, 2024 ME 79, ¶ 17, --- A.3d ---, and there is no real question that the Disciplinary Committee acted in a "quasi-judicial" capacity in this matter.

[3] Appellant briefly suggests that the Disciplinary Committee should not have considered the March 17, 2022 incident because she subsequently passed an Allen's test competency test, as well as another competency test that required her to demonstrate safe needle practices. (Blue Br. 4 n.3.) This suggestion ignores the bulk of the evidence regarding the March 17 incident, which is that Appellant engaged in multiple unsafe practices, had to "be prompted on all her treatments and inhalers," and – most importantly – was "very confrontational with staff" and acted so "unprofessional[ly]" that the hospital supervisor told

(A. 64.) Instead, she attempts to upset the Dismissal Decision on purely procedural grounds. None of her arguments are persuasive, and the Dismissal Decision should be affirmed.

A. KVCC Did Not Violate Appellant's Due Process Rights by Applying the MCCS Code of Conduct

Throughout this litigation, albeit in different guises, Appellant's principal contention has been that KVCC erred by applying the MCCS Code of Conduct rather than the Respiratory Therapy program handbook. In the Superior Court, she framed this argument as whether the Dismissal Decision was arbitrary or capricious. (See A. 68-73.) In her Brief to this Court, she now contends that the application of the MCCS Code of Conduct was "fundamentally unfair" and a violation of her due process rights. (Blue Br. 32-37.) Whatever the clothing in which it is dressed, this argument should be rejected for numerous reasons.

First, by its plain terms, the MCCS Code of Conduct applies to all student conduct that involves a "College or College-related activity," and sets a baseline standard for conduct in those activities, wherever they occur. (AR 82.) Appellant's work at the clinical sites was clearly a "College or College-related activity" that fell within the scope of the MCCS Code of Conduct.

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her that she "needed to leave." (A. 112.) The Disciplinary Committee did not err in considering the evidence relating to this incident. (*See also* A. 111; AR 41 (email from a different hospital that Appellant "was not happy with her score and tried to encourage [a clinical supervisor] to fill out a new form").)

Appellant argues that her clinical misconduct was a purely "academic" matter, and was subject only to the RT Handbook's policies. Appellant is wrong. The MCCS Code of Conduct expressly states that it "applies in addition to other College and System policies and regulations." (AR 81 (emphasis in original).) Moreover, the MCCS Code of Conduct specifically exempts some activities that it might otherwise regulate from strict application of the Code, such as athletic playing time and traffic violations; but even those exempt activities can be regulated under the Code in the administration's discretion. (AR 86.) In short, if student conduct in a medical clinical setting were not intended to be subject to the MCCS Code of Conduct, the Code would so provide.

Appellant identifies nothing that undermines this clear statement that the MCCS Code of Conduct supplements, and is not subordinate to, the policies of any particular academic or clinical program within MCCS. To the contrary, Appellant's own extra-record evidence refutes her argument. Appellant submitted, to the Superior Court, a document that she represented to be MCCS guidance regarding clinical placements. (A. 77-78, 81-84.) But even this policy guidance explicitly provides that it is supplemented by the MCCS Code of Conduct: Section (E) of the policy guidance provides, "[S]tudents whose misconduct at a clinical affiliate violates the [MCCS Code of Conduct] may, in addition to the above procedures, also be subject to the procedures and sanctions of that Code." (A. 84 (emphasis added).)

KVCC and MCCS policy could hardly be clearer.

Second, in the clinical medical context, any distinction between "academic" discipline and "health or safety"-related discipline is illusory.[4] *See Al-Dabagh v. Case W. Res. Univ.*, 777 F.3d 355, 360 (6th Cir. 2015) (noting that "[d]ismissing a medical student for lack of professionalism is 'academic,'" collecting cases for that proposition, and finding that medical student's DUI and sexual harassment incidents were "academic" grounds for dismissal). The clinical work of a respiratory therapy student requires direct physical contact with patients; the "learning process" in this program, as Appellant puts it, (Blue Br. 36), includes extensive "needle practice" with patients' bodies, A. 118. With visceral clarity, the administrative record establishes that Appellant's misconduct was both academic and a threat to health and safety.[5] In this academic context, due process at most required that KVCC

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[4] As Justice Powell stated in his concurrence in *Board of Curators of University of Missouri v. Horowitz*:

> It is well to bear in mind that respondent was attending a medical school where competence in clinical courses is as much of a prerequisite to graduation as satisfactory grades in other courses. Respondent was dismissed because she was as deficient in her clinical work as she was proficient in the "book-learning" portion of the curriculum. Evaluation of her performance in the former area is no less an "academic" judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.

435 U.S. 78, 95 (1978) (Powell, J., concurring).

[5] Appellant repeatedly notes that she was nearing graduation from the respiratory therapy program. That is not a reason to overlook or condone Appellant's lack of professionalism and her misconduct, but just the opposite. The closer a student is to graduation, the more critical it is that they demonstrate competence and professionalism – indeed, as the Disciplinary Committee noted, the fact that Appellant was so far into the program suggested that her negligence was more than a mere learning failure. (A. 64.)

provide Appellant with notice and a "careful and deliberate" decision. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84-85 (1978); *see also Hennessy v. City of Melrose*, 194 F.3d 237, 252 (1st Cir. 1999) (holding that "the appellant was not constitutionally entitled to a hearing regarding his removal, for academic reasons, from the teacher certification program"). Appellant received considerably more.

Third, even setting aside Appellant's false dichotomy between the MCCS Code of Conduct and the RT Handbook, KVCC might well have dismissed Appellant from the Program under the RT Handbook alone based on her misconduct. The RT Handbook provides, "Any action or inaction by a student which jeopardizes the physical and/or emotional safety of a patient will result in a critical incident report." (A. 161.) All critical incident reports are reviewed by faculty, and "[t]his review process may result in . . . dismissal from the program." (A. 161.)

Following the April 12 incident, two clinicians at EMMC issued a "clinical incident/accident report" which states, "[a]ny action or inaction by a student which jeopardizes the physical and/or emotional safety of a patient will result in a clinical [sic] incident report." (A. 117.) This April 12 report could have initiated the faculty review process described in the RT Handbook, which, given the nature and extent of Appellant's misconduct, could easily have resulted in "dismissal from the program." (AR 123.) While that is not the procedural path that KVCC chose, the

record does not support Appellant's suggestion that the result would have been different if KVCC had applied the RT Handbook.

Bluntly stated, it is not arbitrary or capricious, an abuse of discretion, or a violation of due process for educators to conclude that a student who "us[es] aggressive measures to wake a patient; [uses] unsafe needle practices; fail[s] to recognize a patient in obvious distress; and argu[es] with site staff about clinical evaluations and scores," (A. 64), should be dismissed from a medical program.

B. Appellant's Other Due Process Arguments Are Both Forfeited and Unsupported by the Administrative Record

Appellant also makes more conventional due process arguments regarding the procedures followed by KVCC. (Blue Br. 38-40.) These arguments are doubly forfeited, because Appellant failed to raise them not only at the administrative level, but even in the Superior Court (where her due process argument was based solely on the decision to apply the RT Handbook rather than the MCCS Code of Conduct, (*see* A. 68-79)). *See Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 9, 60 A.3d 1248 ("[A]n argument, even one of constitutional dimension, that is not raised before an administrative agency may not be raised for the first time on appeal."); *Farley v. Town of Washburn*, 1997 ME 218, ¶ 5, 704 A.2d 347 ("We decline to review an issue if the trial court lacked the opportunity to make a final disposition of that issue.").

Even if these arguments could be considered, they should be rejected. For one thing, as noted above, in this context, due process at most required that KVCC provide Appellant with notice and a "careful and deliberate" decision – even a hearing is not constitutionally required. *Horowitz*, 435 U.S. at 84-85; *see Hennessy*, 194 F.3d at 252. Appellant plainly received notice and a careful and deliberate decision by the Disciplinary Committee.

Moreover, as a factual matter, Appellant's descriptions of the process that she received are belied by the administrative record. For starters, for all of its discussion of the administrative history, Appellant's Brief does not even mention the April 21, 2022, meeting with Dean McKenna, (Blue Br. 9, 23-26, 38-39), which occurred just six days after the initial letter suspending Appellant, (A. 109). At that April 21 meeting, Dean McKenna "inform[ed] [Appellant] further about the information that [he] had received and hear[d] [her] response." (AR 3.) Appellant was not alone at that meeting – she was joined by Ms. Wright, an education support specialist paid for by KVCC, who had assisted Appellant with various previous academic issues and continued to support her throughout the investigation and dismissal proceedings.[6] (*See, e.g.*, AR 10, 12, 18-19, 60, 234, 244, 290.)

[6] Dean McKenna was aware of Ms. Wright's role – indeed, even before he sent the April 15, 2022 notice to Appellant, he spoke with Ms. Wright about the situation; Ms. Wright then notified Appellant that Dean McKenna would be "sending [her] an official letter of dismissal" and information about the "next step[s] in the official process." (AR 496.)

In other words, Appellant's various assertions that "it was not until May 13, 2022 that Appellant received even any scant evidence of the allegations against her," (Blue Br. 39), are simply false. Appellant was very well aware of what the issues were, in part because Dean McKenna "inform[ed]" her during the April 21 meeting, (A. 108), but also because the evidence on which the Disciplinary Committee ultimately relied consisted largely of evaluations and reports from clinical site supervisors that had been provided to Appellant as part of her educational experience, (*see* A. 160-61; AR 48-49).

Note, too, that Appellant's complaints about the procedure and receipt of evidence are focused on the May/June 2022 period. The operative hearing in this case occurred more than a year later. Appellant did not lack the opportunity to prepare her defense or attempt to discredit the reports on which the Disciplinary Committee ultimately relied. She took full advantage of that opportunity, submitting over 500 pages of documents to the Disciplinary Committee, which consisted largely of her typewritten commentary on the very evidence that she is now complaining about. The Disciplinary Committee rejected these arguments, finding "the materials [Appellant] provided in [her] testimony to be less credible than those supplied by multiple independent clinical sites." (A. 64.)Ultimately, Appellant received a thoughtful, thoroughly reasoned explanation of the Disciplinary Committee's factual findings and decision. (A. 63-65.) Thus, even though Appellant was entitled to no

more than notice and a careful and deliberate decision in connection with her dismissal from a medical program based on "using aggressive measures to wake a patient; unsafe needle practices; failing to recognize a patient in obvious distress; and arguing with site staff about clinical evaluations and scores," (A. 64, 118), KVCC fully respected her due process rights and gave her more than the requisite process.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANT'S PURPORTEDLY "INDEPENDENT" CLAIMS AS DUPLICATIVE OF HER RULE 80B APPEAL.

Appellant also contends that the Superior Court erred in dismissing her purportedly independent due process and discrimination claims (Counts II and III, respectively) as duplicative of her Rule 80B appeal. (Blue Br. 18-28.) She primarily argues that both of her independent claims were sufficiently pled to survive a Rule 12(b)(6) motion to dismiss, and that each of them were based on at least some conduct or events that were separate from the dismissal decision.

As noted above, Appellant's first argument is foreclosed by this Court's Rule 80B exclusivity precedent. The dismissal of duplicative claims is not a Rule 12(b)(6) issue, but rather a prudential limitation on the presentation of collateral challenges to administrative action when Rule 80B review is fundamentally adequate to redress those grievances. *See Fisher v. Dame*, 433 A.2d 366, 372 (Me. 1981). After all, as the Superior Court correctly noted, any due process violation or discrimination that

played a role in the Disciplinary Committee's decision "would most certainly be grounds for a reviewing court to vacate that decision, and would provide the [Appellant] with the precise relief she is seeking." (A. 20.) As this Court stated in *Fisher*:

> [W]hen a legislative body has made provision, by the terms of a statute or ordinance, for a direct means by which the decision of an administrative body can be reviewed in a manner to afford adequate remedy, such direct avenue is intended to be exclusive. Resort to the courts by alternative routes will not be tolerated, subject only to an exception for those circumstances in which the course of "direct appeal" review by a court is inadequate and court action restricting a party to it will cause that party irreparable injury.

433 A.2d at 372; *see also Cape Shore*, 2019 ME 86, ¶ 9, 209 A.3d 102 (trial court did not abuse its discretion in dismissing independent declaratory judgment claim as duplicative, where independent claim sought relief that "in effect was the same relief that [the plaintiff] requested in its Rule 80B appeal").

Thus, the issue is not whether the independent claims might, standing alone, survive a motion to dismiss; the issue is whether the Superior Court abused its discretion in concluding that Appellant's purportedly independent claims were really just collateral attacks on the Disciplinary Committee's decision. Here, based on Appellant's presentation of the entire case – including her FAC, motions to specify, opposition to KVCC's motion to dismiss, and Rule 80B briefing, not to mention her voluminous submissions to the Disciplinary Committee contained in the administrative record – the Superior Court reasonably concluded that Appellant was

pursuing her "independent" claims with the single-minded, manifest goal of undoing her dismissal from the respiratory therapy program. But as the Superior Court made clear to Appellant, and she now appears to concede, the Dismissal Decision was subject to plenary review (and potential reversal) under Rule 80B. Accordingly, the Superior Court did not abuse its discretion in dismissing the independent claims as duplicative, and this Court should reject Appellant's request for a second bite at the apple with a different strategy.

A. Appellant's Litigation Strategy Invited the Superior Court to Consider Her Due Process and Discrimination Claims Solely in the Rule 80B Appeal

Begin with Appellant's complaints. Count II of the FAC, her due process claim, is focused primarily on KVCC's and Dean McKenna's decision to proceed under the MCCS Code of Conduct, as well as some procedural aspects of the Disciplinary Committee's May 2022 hearing.[7] (A. 32-33.) Count III, her discrimination claim, alleges variously that KVCC "chose to apply a harsh penalty of dismissal" and apply the MCCS Code of Conduct "while other non-Asian, non-Chinese students were disciplined under the appropriate policies"; that KVCC "ignored [Appellant's] reports of harassment at clinical sites and instead faulted

[7] Appellant's Complaint in AP-22-03 took a similar approach, stating conclusorily that KVCC "deprived [Appellant] of her constitutionally protected property interest in its education program without procedural due process . . . by virtue of its failure to provide [her] with notice of the charges and evidence to be presented against her, and its failure to provide her with a fundamentally fair hearing procedure." Compl. ¶ 16, Docket No. AP-22-03 (June 15, 2022).

[Appellant] and disciplined her by dismissing her from the Respiratory Therapy program," and that "non-Asian[] and non-Chinese students did not experience dismissal when they reported similar clinical site issues"; and that "KVCC acted with malice." (A. 34-35.) Viewing her FAC as a whole, the gravamen of both of Appellant's independent claims is that the dismissal decision should be vacated, even if some of the factual predicates for those claims predate that decision.

Next, consider Appellant's motions to specify the future course of proceedings, which were, after all, her first attempt to identify or articulate any differences between her Rule 80B appeal and her independent claims. In her original motion to specify, Appellant wrote that her due process claim "represents an 'independent claim for relief' . . . because whether [Appellant] was deprived of her property interest in her education without due process can be resolved only after an evidentiary hearing." (A. 37.) She did not even hint at the "pre-hearing deprivation" theory that she now asserts on appeal. She took the very same approach in her amended motion to specify, writing that her due process and discrimination claims were independent "because whether [Appellant] was deprived of her property interest in her education without due process and whether [KVCC] engaged in unlawful education discrimination can be resolved only after an evidentiary hearing." (A. 40-41.)

KVCC then filed its motion to dismiss Appellant's independent claims, shining a spotlight on the scope of relief sought for those claims and questioning their independence from her Rule 80B appeal. (A. 44-53.) As to the due process claim, KVCC observed that Appellant "d[id] not allege that she was deprived of a protected liberty or property interest before KVCC dismissed her from the program." (A. 49.) As to the discrimination claim, KVCC acknowledged that the FAC contained some allegations that Appellant "experienced racial discrimination while attending" the program, but argued that those allegations "appear[ed] to be intended as the factual predicates for her claim that the Dismissal Decision was retaliatory, rather than as the basis of a separate, standalone discrimination claim." (A. 51.) In opposing KVCC's motion, Appellant did not dispute these points regarding the scope of relief that she sought. Instead, she argued that her due process and discrimination claims were "independent" because (i) the Rule 80B review could not redress "the actions of Dean McKenna when he chose to discipline [Appellant] under only the [MCCS Code of Conduct] rather than any of the numerous applicable academic policies," and (ii) the discrimination claim was not "reviewable as part of [the] 80B appeal because it stems primarily from the allegations of Count 2 rather than Count 1." (A. 56-57.)

In its January 22, 2024 Order, the Superior Court agreed with KVCC's analysis almost entirely. As to the discrimination claim, the Superior Court

acknowledged the FAC's allegations relating to discrimination while attending the program, but still agreed with KVCC that the FAC "seem[ed] to be using those factual allegations to support the claim that the disciplinary committee's most recent decision to dismiss [Appellant] from the respiratory therapy program was based on or influenced by bias and/or discrimination against her." (A. 8.) The Superior Court went on:

> It is at least arguable at this stage of proceedings that [Appellant] is asserting a claim of discrimination while she was in the respiratory therapy program independent of and separate from the appeal of the dismissal decision. At this time, the court will deny the motion to dismiss Count III.

(A. 8 (emphasis added).) The Superior Court was aware that it was possible that Appellant was asserting a truly independent claim, but was clearly indicating to Appellant that it was concerned with the viability and separateness of Appellant's discrimination claim.

Then, in her Rule 80B brief, Appellant said not a word about any procedural issues or discrimination – even though, again, it had been a major focus of her presentation at the administrative level. Appellant's only reference to any "bias or animus" came on page 8 of her brief, where she argued that the Disciplinary Committee erred in finding "that there is no bias or animus evident from the record," which she linked solely to her contention that a particular "preceptor was frustrated with [Appellant]." (A. 73.) Appellant said nothing about racial bias or animus.

In KVCC's opposition brief, it noted that "there is no evidence that KVCC has treated similarly situated students differently," and went on to write:

> For these and similar reasons, the record does not support Plaintiff's assertion, in her Complaint, that the Disciplinary Committee's decision is the result of racial or national origin bias or discrimination against her. Indeed, Plaintiff also appears to have abandoned this argument – it does not appear in her Brief – and the Court should deem it waived.

(A. 95.) In her reply brief, Appellant did not dispute this characterization. (A. 100.)

Appellant makes no argument that the Superior Court misapprehended any of her submissions. Despite multiple opportunities, Appellant never told the Superior Court that she was seeking different relief for her "independent" claims than she was seeking under Rule 80B review. Rather, Appellant's contention was that her due process and discrimination claims were "independent" solely because (i) those claims required "an evidentiary hearing,"[8] and (ii) the Rule 80B review did not address Dean McKenna's decision to invoke the MCCS Code of Conduct. (A. 40-41, 56-57.) But those arguments do not change the fact that Appellant's overarching goal, in all three of her claims, was to undo her dismissal from the program – and the Superior Court even warned her, in the January 22, 2024 Order, that such a theory would be impermissibly duplicative of her Rule 80B appeal. *Cf. Bayview Loan*

[8] As this Court made clear in *Adelman*, even though Rule 80B review is primarily appellate in nature, it nevertheless "provides a specific mechanism for augmenting the record if necessary to show bias" or another independent basis for vacatur: a motion for trial of the facts under Rule 80B(d). 2000 ME 91, ¶ 7, 750 A.2d 577.

Servicing, LLC v. Bartlett, 2014 ME 37, ¶ 14, 87 A.3d 741 ("Parties are not entitled to a warning that the trial court may dismiss a case based on noncompliance with pretrial procedures. . . . We have, however, considered the presence of a warning as a factor supporting dismissal with prejudice.").

In short, Appellant repeatedly indicated to the Superior Court that her assertions about procedural infirmities and discrimination were simply alternative bases to vacate the Disciplinary Committee's decision. Appellant may now wish that her prior counsel had made a different strategic decision, but a party "is held to the strategic decisions and omissions of her attorney." *Coppersmith v. Coppersmith*, 2001 ME 165, ¶ 6, 786 A.2d 602; *see also Rinehart v. Schubel*, 2002 ME 53, ¶ 6, 794 A.2d 73.

B. The Superior Court Properly Dismissed the Discrimination Claim as Duplicative

Turning to Appellant's specific arguments as to each of her independent claims, in her Brief to this Court, Appellant argues that Count III of her FAC alleged discrimination "during the entirety of her time in the [respiratory therapy program], not just during the disciplinary proceedings." (Blue Br. 23.) But as both KVCC and the Superior Court repeatedly observed, the FAC appeared to make those allegations for the purpose of undermining the dismissal decision, by casting doubt on the accuracy of the clinical reports and other evidence on which the Committee relied. (A. 8, 51, 60-61.) In her two motions to specify, her opposition to KVCC's motion

to dismiss, nor her Rule 80B brief, Appellant never disputed this characterization; to the contrary, Appellant's presentation of the case invited the Superior Court to scour the administrative record for evidence of discrimination during the disciplinary proceedings.

Moreover, when the Superior Court warned Appellant that it viewed the discrimination claim as likely duplicative of her Rule 80B appeal, the court had not yet reviewed the administrative record. The administrative record makes clear that Appellant had made the very same discrimination arguments to the Disciplinary Committee, in an attempt to discredit the extensive evidence about her misconduct. Appellant's principal submission to the Disciplinary Committee had been that "several preceptors at clinical sites" had treated her with "subtle racism," and that the Disciplinary Committee "think about things through the lens of [her] experience as a student of color." (AR 126-27.) Indeed, Appellant had been so focused on this issue at the administrative level that the Disciplinary Committee felt compelled, in its written decision, to explicitly address and reject her discrimination argument. (A. 64.) Upon finally seeing the full context, the Superior Court was vindicated in the suspicion that it had articulated in the January 22, 2024 Order – that Appellant's discrimination claim was simply a collateral attack on the Dismissal Decision.

Appellant's only other assertion that her discrimination claim might be independent came in her Rule 80B reply brief. After KVCC noted that Appellant

had not identified any evidence of racial or national origin discrimination in the administrative record, (A. 95), she suggested that by dropping the discrimination argument from her Rule 80B appeal, she might somehow save her independent discrimination claim, (A. 100). Appellant did not even attempt, however, to explain why her discrimination claim had previously been so squarely aimed at the Dismissal Decision. The Superior Court did not abuse its discretion in rejecting this eleventh-hour reversal, relying on Appellant's framing of the case, and dismissing Appellant's discrimination claim as duplicative of her Rule 80B appeal.

B. The Superior Court Properly Dismissed the Due Process Claim as Duplicative

Finally, Appellant argues that the Superior Court erred in dismissing her "independent" due process claim to the extent that it is based on the interim suspension imposed by Dean McKenna prior to a formal hearing. She writes that during this period, she was "deprived of her right to continue to participate in clinical visits without any hearing." (Blue Br. 26.) Of course, because she ignores the April 21 hearing, she omits the fact that this period spans only the six days from April 15-21, 2022 (which included a weekend).

As noted, Appellant never made this argument to the Superior Court, and it should be rejected for that reason alone. But even if Appellant had preserved this argument, it nevertheless fails. As an initial matter, there is no suggestion in the FAC, nor in anywhere else in her briefing (in the Superior Court or to this Court),

that Appellant is seeking any relief specifically relating to this six-day suspension. It is entirely clear from Appellant's FAC that her process-related grievances revolve around her dismissal from the program. Based on how Appellant presented her due process claim below, the Superior Court did not abuse its discretion in dismissing that claim as duplicative of her Rule 80B appeal.

Appellant cites *Gorham v. Androscoggin County* like a mantra, but the distinction between that case and this one is glaring. 2011 ME 63, 21 A.3d 115. The plaintiff in *Gorham* was deprived of wages during his pre-hearing suspension. Money is one of the clearest property rights that the law recognizes, which is why this Court held that even if his ultimate termination was proper, he might still be entitled to those few days' pay. In this case, in contrast, Appellant cites no authority for the proposition that she had a protected property right in four days of clinical visits that is distinct from whatever property right she had to complete the program on the whole. (This lack of authority is presumably due to the fact that, if the ultimate dismissal decision is upheld, Appellant has no use for a discrete four days of clinical visits – which may be why she also does not identify any distinct relief that she seeks for her pre-hearing suspension.)

Moreover, the Superior Court in *Gorham* had not actually adjudicated the plaintiff's Rule 80B appeal addressing his post-hearing termination, because it had dismissed the Rule 80B appeal as untimely, which this Court also reversed. *See id.*

¶ 6. Thus, this Court's assessment of the relationship between the Rule 80B appeal and the section 1983 claim in *Gorham* was necessarily preliminary – indeed, this Court noted that it could not, "on this record, conclude that direct review pursuant to Rule 80B" would be adequate. *Id.* ¶ 25 (emphasis added). Here, by contrast, Appellant forewent multiple opportunities to clarify any aspect of her due process claim that might not be duplicative of her Rule 80B appeal, the Rule 80B appeal has been fully adjudicated, and the administrative record reflects that Appellant's rights were respected during the initial six-day suspension. As noted above, in the context of academic sanctions, Appellant was entitled to nothing more than notice and a "careful and deliberate" decision. The interim suspension was not slapdash or reflexive. Dean McKenna did not issue the interim suspension until April 15, three days after the April 12 incident, and two days after Ms. Leadbetter sent her April 13 letter. In the meantime, Appellant continued to work with her KVCC-provided educational support specialist (Ms. Wright), with whom Dean McKenna was in regular correspondence about Appellant's situation. (*See* AR 496.)

For all of these reasons, the Superior Court did not err in dismissing Appellant's purportedly independent due process claim as duplicative of her Rule 80B appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's

judgment.

Dated: January 28, 2025

/s/ Oliver Mac Walton

Jeana M. McCormick, Bar No. 5230
Oliver Mac Walton, Bar No. 6340
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101
Tel: (207) 772-1941
jmccormick@dwmlaw.com
owalton@dwmlaw.com
Counsel for Appellee Kennebec Valley Community College

CERTIFICATE OF SERVICE

I, Oliver M. Walton, hereby certify that on this 28th day of January, 2025, I caused electronic copies of the foregoing Brief of Appellee to be served on counsel to the other party to this appeal as follows:

Timothy E. Zerillo, Esq.
Seth T. Russell, Esq.
Zerillo Law Firm
1250 Forest Ave., Suite 3A
Portland, ME 04103
Tim@zerillolaw.com
seth@zerillolaw.com

Dated: January 28, 2025

/s/ Oliver Mac Walton

Jeana M. McCormick, Bar No. 5230
Oliver Mac Walton, Bar No. 6340
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101
Tel: (207) 772-1941
jmccormick@dwmlaw.com
owalton@dwmlaw.com
Counsel for Appellee Kennebec Valley Community College