

**MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT**

**LAW DOCKET NO: SOM-24-402**

**XINXIU TINA HOGAN**

Appellant

v.

**KENNEBEC VALLEY COMMUNITY COLLEGE**

Appellee

---

**APPEAL  
FROM THE SOMERSET COUNTY SUPERIOR COURT**

---

**REPLY BRIEF OF APPELLANT**

---

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## **INTRODUCTION**

Appellee describes Kennebec Valley Community College's (hereafter "KVCC") dismissal of the Appellant two weeks before her graduation from the Residential Therapy Program as "thoroughly-articulated" and "well-reasoned." (Red Brief at 21). Stripped of its rhetoric, the Appellee's Brief adds nothing to suggest anything approaching an articulate nor reasoned dismissal.

Despite its attempts to neatly present Dean McKenna's dismissal of Appellant as sufficient, this was a *fait accompli* before McKenna even met with Ms. Hogan. Landi Wright, Appellant's educational support specialist and KVCC employee informed Appellant in writing that a decision had been made to dismiss her, and that McKenna would be in touch regarding the appeals process, hours before she received written notice of her suspension and *six days before meeting with her* on April 21, 2022. [AR. 496]. Anything but careful and deliberate, KVCC acted in an arbitrary and capricious manner, and in wanton disregard for Appellant's rights. The Superior Court's decision must not stand.

### **I. THE SUPERIOR COURT ABUSED ITS DISCRETION**

It seems correct that the standard of review for the dismissal of Appellant's independent claims as duplicative of the original 80B claim is for abuse of discretion. As the Undersigned understands the process, if a claim is duplicative of a claim for M.R.Civ.P. 80B, then a party may file a M.R.Civ.P. 12(b)(6) motion

because, as they are duplicative claims, no relief can be sought if that relief is exclusive to 80B. At that time, the Court determines if the independent claim is truly duplicative. *Kane v. Comm'r of the HHS*, 2008 ME 185, 960 A.2d 1196. However, upon review in an appeal, the dismissal is reviewed for an abuse of discretion. *Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 209 A.3d 102 (Me. 2019) (holding that when a claim for purportedly independent relief is joined with an administrative appeal and the court strikes the former as duplicative...it is reviewed for an abuse of discretion.).

The Superior Court abused its discretion here, regardless. An abuse of discretion occurs when there is an error of law or the court makes a serious mistake in weighing the relevant factors. *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013), *See Indep. Oil and Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988). "An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Brown v. Compass Harbor Bill. Condo. Ass'n*, 2020 ME 44. Moreover, "Abuse-of-discretion review is respectful but appellate deference is not unbridled." *Corporate Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013). For one thing, a material error of law is in of itself an abuse of the Court's discretion. *Id.* An abuse of discretion "occurs when a material

factor deserving significant weight is ignored, when an improper factor is relied upon, or when . . . the court makes a serious mistake in weighing [the relevant factors]." *Indep. Oil and Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988).

The lower court abused its discretion by not properly weighing the Appellant's evidence of the discrimination and bias she suffered during her participation in the Respiratory Therapy (hereafter "RT") Program. The lower court indicated it reviewed the record and found "...no evidence of any kind that racial bias played any part in the proceedings below, or the events giving rise to those proceedings," but this ignored the clear evidence in the record. [See AR 12, 60, 232, 290; Blue Brief 19-21]. Here the Court failed to properly weigh and consider the evidence in the record supporting that Mrs. Hogan was in fact, dealing with significant issues of discrimination in an educational setting. [See e.g. AR 12, 60, 232 and 290; Blue Brief 11-14]. This was an abuse of the Court's discretion.

The Court also erred in finding KVCC followed the proper procedures. Specifically, the Court failed to consider that KVCC applied Maine Community College System's (hereinafter "MCCS") Student Code of Conduct (hereafter "COC") COC instead of the RT Handbook and dismissed the Appellant for disciplinary reasons, not academic ones. [App. 63-65, 108, 109]. The Court seemingly applied the considerably lower due process requirements for an

academic dismissal in reaching its conclusion. Even if the Court did review for the necessary due process requirements of a disciplinary dismissal, the Court still erred.

The Court failed to recognize that the Appellant's due process rights were violated when she was suspended, six days before any opportunity to be heard. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 72 (1st Cir. 2019) (finding that failing to provide notice and the opportunity to be heard before suspension was a violation of the students due process rights even when suspension would have been proper). By not properly considering this evidence the Court abused its discretion and erred in its application of the law. *Indep. Oil and Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988). More concerning is the Court failed to properly consider and weigh the fact that the Appellant's disciplinary procedures were performative only, as McKenna had already determined that she would be dismissed from the program before she was ever provided notice of the alleged violations, days before he ever spoke to her and before her suspension began. [AR. 496].

As such, the Court made errors of law which invariably constitutes an abuse of discretion. *Pettinelli v. Yost*, 2007 ME 121, 930 A.2d 1074, 1078, *Corporate Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013).

## **II. THE STUDENT CODE OF CONDUCT SHOULD NOT HAVE BEEN APPLIED**



At bottom, Appellee argues that the COC applies to all conduct, including academic conduct. (Red Brief at 21). At a minimum, the RT Handbook, and the MCCS policy for *Student Issues Arising At Clinical Affiliates* (hereafter “IACA”) set forth a procedural hierarchy which KVCC plainly and repeatedly violated. Appellee relies on the IACA for the proposition that the COC, not the RT Program Handbook, applies. (Red Brief at 23). It misinterprets the IACA in advancing their argument.

*A. The IACA Was Not Followed For Either Incident For Which Appellant Was Disciplined*

As a student in the RT Program, Appellant was allowed to participate in clinical visits at participating hospitals in furtherance of her education. On April 15, 2022, Mckenna emailed Appellant that she violated the Student COC, Section 501, III, B16<sup>1</sup>. [App. at 108; AR 1]. The COC provides that “...other forms of academic misconduct shall first be handled pursuant the MCCS policies on academic misconduct and/or student issues arising at clinical affiliates which provide(s) for specific procedures and sanctions. Once the procedures and sanctions of those policies have been applied, the provisions of this Code shall apply.” [AR 82]. The MCCS policy for IACA must, on its own terms, be applied *before* the COC. [App. at 83].

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<sup>1</sup> Section 501(III)(B16), includes: “Conduct that disregards the welfare, health or safety of the College community, which includes but is not limited to... any other conduct that threatens or endangers the health or safety of one’s self or others.” [AR 81-87].

If there is an issue with a student in a clinical program, there must *first* be an interview with the student. [App. at 82; IACA D.1.c. “provide the student with an opportunity to be interviewed...”]. After the interview, there must be a “...report in writing to the department chair the faculty member's findings and actions, if any, that the faculty member recommends be taken by the department chair.” [App. at 82; IACA D.1.d.]. The Department Chair must then “...notify the student and college's chief academic officer of the department chair's decision in writing, and notify the student of the student's right to appeal to the college's chief academic officer.” [App. at 82; IACA D.2.c.]. It is only *after* that process that the COC applies (“In those instances when the department chair seeks to apply sanctions in addition to the sanctions listed in Section D.2.b above, such as probation, suspension or expulsion, the department chair shall refer the matter to the Dean of Students and/or Disciplinary Officer *for application of the MCCS Student Code of Conduct.*”). [App. at 83; D.2.c. *emphasis added*]. The IACA must be applied, on its terms, *before* the COC is applied.

Moreover, the IACA was not followed by KVCC. Appellant was not given an opportunity to be interviewed concerning the April 12, 2022 incident. She was not even given Hannah Leadbetter’s written recommendation to dismiss her from the RT Clinical Practicum (not the RT Program itself) until May 13th, 2022. [AR 185]. But before then, on April 15, 2022, KVCC Assistant Dean C.J. Mckenna

emailed Appellant that she violated the COC and placed Appellant on interim suspension. [App. at 108; AR 1]. The COC should not have applied unless and until the IACA was first followed.

As we have noted, this interim suspension was based on the April 12, 2022 incident and no mention of the March 17, 2022 incident was included. By April 29, 2022, McKenna informed the Appellant that she violated the COC and dismissed her from the program. McKenna then added the March 17, 2022 incident as grounds for her suspension in his April 29, 2022 letter. *Id.*

Plainly, the IACA was not followed. The COC *only* applies once the procedures of the IACA have been applied. [AR 82; see also App. 83]. Yet, despite having not been interviewed nor notified in writing of either the faculty or Department Chair discipline—as the IACA requires—McKenna dismissed Appellant based on the COC. [App. at 108; AR 1].

Additionally, the IACA could not have been followed related to the March 17, 2022 incident. There, Leadbetter, claimed to have observed Appellant failing to perform an allen's test, incorrectly drawing blood, and not properly capping a needle. [AR 46]. Concurrently, the supervisor at the hospital of the clinical setting accused Appellant of arguing with staff members. [AR 47]. While this was and is contested, it bears on the issue of whether the IACA was followed to allow the COC to apply.

On March 24, 2022, Appellant emailed her advisor for help regarding the March 17, 2022 incident. [AR 219]. Following that meeting, which included Mckenna, Schryver, Leadbetter, and Appellant, there was agreement that Ms. Hogan would move forward with the RT Program, provided she passed tests given to her by Leadbetter. On March 25, 2022 with an email from Leadbetter emailed Appellant: “Just wondering how you are feeling about going back to MGMC for clinical for the rest of the semester? I would like to be with you when you go back there next, I know you have some anxiety about going there, but I think it is the best clinical environment for you.” [AR 628]. Not only had KVCC determined that Appellant was safe around patients, they plainly also determined that there would be no discipline. Appellant took and passed her tests. [AR 381; 383-384].

In other words, neither the department chair nor any other faculty member sought sanctions related to the March 17, 2022 incident. As a result, there was no “...report in writing to the department chair the faculty member's findings and actions, if any, that the faculty member recommends be taken by the department chair,” and the Department Chair did not “...notify the student and college's chief academic officer of the department chair's decision in writing, and notify the student of the student's right to appeal to the college's chief academic officer” based on the March 17, 2022 incident. [App. at 82; IACA D.1.d. and D.2.c]. The IACA must be followed *before* the COC is applied and the matter referred to the

Dean [App. at 83; IACA D.2.c.]. At a minimum, the Dean disciplined the Appellant for the March 17, 2022 incident *before* applying the IACA standards and without any notice to her that she was being disciplined. The Student COC should not apply.

KVCC also argues that the IACA and the COC can be used concurrently to discipline a student. This is their familiar rejoinder that the school can pick and choose from whichever code it wants as long as it fits their result.

In support of this notion, KVCC argues (and even underlines in their brief) that under the IACA “[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.” (Red Brief at 23).

That leaves out the important bit, however. The provision KVCC cites leaves out the antecedent phrase “As noted in Sections D.2 and D.4 above, students whose misconduct at a clinical affiliate violates the MCCS Student Code of Conduct may, in addition to the above procedures, also be subject to procedures and sanctions of that Code...” [App. at 84, E, *emphasis added*]. What is “noted” in D.2 of the IACA undermines the Appellee’s argument:

In those instances when the department chair seeks to apply sanctions in addition to the sanctions listed in Section D.2.b above, such as probation, suspension or expulsion, the department chair shall refer the matter to the Dean of Students and/or Disciplinary Officer **for application of the MCCS Student Code of Conduct.**

[App at 84, IACA D.2.c, *emphasis added*].

Likewise, D.4 indicates the following:

In those instances where the student's misconduct at a clinical affiliate appears to violate the MCCS Student Code of Conduct, and/or where the chief academic officer seeks to apply sanctions in addition to the sanctions listed in Section D.4.b above, such as probation, suspension or expulsion, the chief academic officer shall refer the matter to the Dean of Students and/or Disciplinary Officer **for application of the MCCS Student Code of Conduct.**

[App at 84, IACA D.4.d, *emphasis added*].

Appellee's argument misapprehends this construction. Plainly, the IACA applies *before* the COC does when there is a clinical issue. KVCC's failure to follow their own procedures requires reversal.

B. *KVCC Inappropriately Applied the Stiffer Disciplinary Rules For A Plainly Academic Issue*

KVCC argues that "...in the clinical medical context, any distinction between 'academic' discipline and 'health or safety'-related discipline is illusory." (Red Brief at 24). KVCC argues that the Appellant's alleged misconduct was both academic and a threat to health and safety, concluding that her dismissal was academic and not disciplinary. *Id.* In support, KVCC cites *Al-Dabagh v. Case W. Res. Univ.*, 777 F.3d 355, 360 (6th Cir. 2015), a Sixth Circuit case. But KVCC ignores that it failed to apply the academic discipline procedures and instead applied the ordinary disciplinary procedures of the COC.

In *Al-Dabagh*, the appellant was denied a diploma by a vote of the

university's Committee of Students for failing to meet their professionalism requirements (due to a litany of allegations and charges against Al-Dabagh for bad conduct in and out of the academic environment, including being charged with two drunk driving offenses and multiple allegations of sexual harassment). *Id.* After a successful lawsuit, the school appealed. *Id.* The Sixth Circuit found that the vote by the Committee was not a disciplinary action, but an academic one despite it being unrelated to his academic conduct.<sup>2</sup> *Id.*

The case at bar is quite different. Appellant's alleged issues all arise as a result of her academic conduct. Despite this clearly being the issue at hand, KVCC determined to inappropriately apply the disciplinary processes outlined in the KVCC's COC.<sup>3, 4</sup> As a result, the Appellant was permanently removed from the Respiratory Therapy Program with no opportunity to re-apply. Most importantly to the matter at hand, as a result of dismissing the Appellant in a disciplinary action, KVCC subjected itself to a more rigorous due process standard owed to the Appellant. *Hennessey v. City of Melrose*, 194 F.3d 237, 250 (1st Cir. 1999), *see Goss v. Lopez*, 419 U.S. 565, 579, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975); *see also*

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<sup>2</sup> The Sixth Circuit specifically noted that 'professionalism' and a vote from the Student Committee were the academic requirements of the university necessary for graduating. *Al-Dabagh*, 777 F.3d 355, 357 (6th Cir. 2015). Here, the RT Handbook specifically defines the academic standards of the program. [App. at 149-155]. Nowhere in the RT Handbook does it say that, as an academic requirement, a student must act in accordance with the COC or any other conduct related rules. *Id.* As such, Appellant's dismissal for violations of the COC is clearly a disciplinary dismissal requiring a higher standard of due process protections.

<sup>3</sup> The RT Handbook clearly defines what is an Academic Dismissal and the ability to appeal such dismissals. [App. 150].

<sup>4</sup> In *Al-Dabagh*, the Court specifically noted in determining the dismissal being academic that "...the Committee's refusal to approve Al-Dabagh for graduation took place outside the disciplinary process." *Al-Dabagh*, 777 F.3d 355, 360 (6th Cir. 2015).

*Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90; *see generally* *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961) (contrasting dismissal for misconduct, which requires a hearing, with academic dismissal, which does not). As detailed here and in the Appellant’s initial Brief, KVCC failed to apply the appropriate academic disciplinary procedures which was compounded by failing to provide the necessary due process requirements for a disciplinary dismissal.

C. *There Is No Evidence To Suggest That The Appellant Would Be Dismissed Under the RT Handbook.*

KVCC further argues that Appellant would have been dismissed under the RT Handbook alone. (Red Brief at 25). KVCC attempts to suggest that the *Clinical* Incident/Accident Reports issued on April 12, 2022, by two of EMMC clinicians are in fact, or should at least be treated as, *Critical* Incident/Accident Reports. (Red Brief at 25). These are two different things, as far as the Undersigned can tell.

The RT Handbook clearly and unambiguously differentiates these reports. (App. 161, AR. 123). Only a KVCC “Critical Incident Report” is reviewed by the program faculty and, following that review, *may* result in suspension for the remainder of the semester or dismissal from the program. *Id.* The Appellant never received any *Critical* Incident/Accidental Reports during her clinical studies at KVCC. Simply put, there is no evidence in the record that the Appellant could



have been dismissed under the RT Handbook's Incident/Accident Report process.

### **III. APPELLANT HAS NOT ABANDONED NOR FORFEITED HER 80B ARGUMENTS**

KVCC's argument that the Appellant's due process arguments are forfeited for failing to preserve them in the Superior Court is another conspicuous misrepresentation of the factual record. (Red Brief at 26). KVCC's belief is that the arguments before the administrative body are also meritless. (Red Brief at 26). First, as there is no transcript of the hearings, nor are there significant findings of facts detailing what occurred during KVCC's 'hearings', it cannot be said that the matter of Appellant's due process rights was not discussed. [AR. 78-80, 106]. In *Antler's Inn & Rest., LLC v. Dep't of Pub. Safety* (relied upon by KVCC in support of their argument), the Court found that the appellant had failed to preserve their due process arguments after the appellant admitted that it never raised the issue at the administrative level or at the District Court. 2012 ME 143, 9, 60 A.3d 1248. Here, there is no evidence that the issue was not raised. [App. at 78-80, 106].

At the Superior Court, the Appellant clearly stated her due process rights were violated. First, in the *Complaint For Review of Final Governmental Action and For Violation of Due Process Rights* and again in the *First Amended Complaint*. [App. at 23-28, 29-33]. The Appellant continued to make the argument that KVCC violated her due process for failing to apply the necessary and appropriate standards. [App. at 66-79]. The Appellant has firmly preserved their

arguments that KVCC's procedure in dismissing her violated her due process Rights. While KVCC sings the same tune that an academic dismissal requires only careful and deliberate decision-making, it ignores that it applied the COC, and, in doing so, the Appellant's dismissal was disciplinary, not academic.

Finally, KVCC surmises that the April 21, 2022, meeting with Dean McKenna somehow insulates KVCC from any due process violations. (Red Brief at 38-39). This argument fails to recognize the notice and hearing, or the minimum right to be provided notice and to provide their side of the events that must occur *prior to the suspension* unless exigencies require the student be removed immediately and the hearing to follow as soon as possible. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 72 (1st Cir. 2019). In *Hadak*, the Court found that while it did allow Haidak to respond to the allegations, the process came too late as the suspension had started two days prior. *Id.* at 72. Here, KVCC suspended the Appellant six days before providing her the opportunity to respond to or hear the allegations against her. [App. 108]. The Appellant was then dismissed eight days after the April 21, 2022 meeting and 14 days after being suspended, without ever having any hearing on the matter. [App. 109]. This delay in procedure violated the Appellant's due process rights.

## **CONCLUSION**

KVCC knows that students practicing medicine in a clinical setting will

make errors, and they account for the same in the RT Handbook. App. 162. “If a student does something or fails to do something which is or could be injurious to the patient ... (the) evaluation will be terminated and the evaluator will complete the procedure...(and)...the student will not pass the evaluation attempt.” App. 163. After remediation, the student can try again two or three times for each procedure. App. 163. “Any action or inaction which threatens the patient’s physical and/or emotional well-being will result in the termination of the evaluation.” App. 163.

KVCC knows that students will not always perform their clinical skills proficiently, and in many cases that will threaten the patient’s physical and/or emotional well-being. On the other hand, the COC is clearly constructed to apply to those actions which are against civility, not an anticipated failure to proficiently perform technical skills. [App. 120]. Yet, inexplicably, KVCC applied the COC where the proscribed student actions are plainly disciplinary and not academic. KVCC’s disciplinary dismissal of Appellant without adequate process, based on academic standards it anticipates of students in the clinical setting, must not stand.

Dated this 14th, day of February 2025 in Portland Maine.

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## CERTIFICATE OF SERVICE

I, Timothy E. Zerillo, Esq., attorney for Appellant, hereby certify that I forwarded a copy of the within Reply Brief of the Appellant to the counsel of the Appellee, by email, at the following addresses:

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Dated this 14th day of February 2025 in Portland, Maine.

Respectfully Submitted,  
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