Legal Hot Spots in Nursing Education: High-Stakes Testing, Privacy and Disability Accommodation 2017

Linda Christensen, EdD, JD, MSN, RN, CNE
Chief Administration Officer
National League for Nursing
Washington DC

11/10/2017
Disclaimer

• The information contained within this presentation is intended solely to present an overview of applicable legal principles within nursing education.

• Absolutely no legal advice is being provided from this presentation and no attorney-client relationship has been formed.
• Professional rules regarding the practice of law...

  – Allow lawyers to present legal content within continuing education presentations,

  – BUT

  – Do not allow lawyers to provide specific legal advice for specific individuals or individual matters during the presentation
Program Content

• Present legal aspects associated with very difficult legal areas of practice as a nurse educator

• Based upon experience as lawyer, nurse, speaker, there are many!

• And then I started preparing for this presentation!!
Program Focus

1) Examine the fair and ethical use of standardized testing in nursing education.

2) Explore various aspects of student privacy as it impacts nursing education
Program Focus, Continued

3) Identify current parameters of providing student accommodations in nursing education.
• Objective #1:

Examine the fair and ethical use of standardized testing in nursing education

Problem? No problem?
Area of litigation? (YES)
Typical Situation with High Stakes Testing

• Nursing students enter nursing program without requirements for standardized testing.

• Nursing students pass classes & meet requirements for degree, except . . .

• During their last year, a requirement for “passing” high stakes testing implemented!
What are the issues?

- Students cannot graduate
- Students cannot write NCLEX
- Students cannot start employment
- Parents become involved
- Threaten (or start) legal action
Fair & Ethical Use of Standardized Testing

• What’s the difference between
  – Standardized testing
    • A test administered and scored in a consistent (or “standard”) manner
    • High quality psychometric analytics
  – Low stakes testing
    • Measures academic achievement
  – High stakes testing
    • A test with important consequences for the test taker.
    • Passing/failing the test will have significant consequences.
## Comparison of Uses

<table>
<thead>
<tr>
<th>Low-stakes testing</th>
<th>High-stakes testing</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Identify at risk students</td>
<td>• Student progressing</td>
</tr>
<tr>
<td>• Establish student learning plans</td>
<td>• Graduation</td>
</tr>
<tr>
<td>• Curriculum change</td>
<td>• Licensure</td>
</tr>
<tr>
<td>• Program assessment &amp; revision</td>
<td>• Certification</td>
</tr>
<tr>
<td></td>
<td>• Teacher evaluation</td>
</tr>
<tr>
<td></td>
<td>• Program evaluation</td>
</tr>
</tbody>
</table>
Use of high stakes testing in nursing education

- NCLEX pass score rate for program
- State approval for nursing program (and student/graduate outcomes)
- Professional program accreditation
• What are the current legal and ethical issues with the use of standardized and high stakes testing?
Legal Cases Focused on High-Stakes Testing

• Initial court cases dealing with high stakes testing sided with the students.

• Period of time that courts generally sided with nursing programs regarding high-stakes testing

• Now….. Whether court sides with students or nursing programs depends on various factors
Specific Case Law

Case outcomes depend upon:
- date of case,
- jurisdiction of case,
- applicable regulations &
- any state “laws”
- as well as other specific case facts.....
What factors will the court review?

• What are the consequences associated with the test scores?

• Does the tester have the opportunity to retest? Remediate?

• Is the specific test appropriate for the specific use? Psychometrics?

• What legal & regulatory guidelines apply?
Regulatory Requirements related to Use of High-Stakes Testing

- Examples of regulatory requirements

  - Limits on use of high-stakes testing within course grades & as a requirement for graduation

  - May need to offer remediation for testers who do not pass tests

11/10/2017
Persuasive Standards

- National League for Nursing
  - Fair Testing Guidelines for Nursing Education
- Texas Board of Nursing
  - 2.7.4.a. Education Guidelines using Standardized Examinations
  - Does not recommend the use of standardized examination as “high-stakes tests”
- Minnesota Board of Nursing
  - Endorses NLN Fair Testing Imperative
Typical High-Stakes Issue Outcome

- **Students complain**
  - School may or may not vary requirements OR
  - Provide for remediation and/or retesting
  - No legal action is filed

- **Students file legal action**
  - Outcome variable on many factors
Summary Points to Consider

• What is allowed from a legal perspective in your jurisdiction?
• Does your nursing regulatory board have requirements?
• How is standardized testing implemented in your program?
• Questions?
  – Jot down for the Q & A session after the presentation.
Objective #2:

Explore the various aspects of student privacy as it impacts nursing education
Student Privacy & Nursing Education

• First consideration with privacy is . . .

  – Federal Rights and Privacy Act (FERPA)
FERPA

• A federal law
• Protects the privacy of student educational records

• Aspects for K-12 (with parents and students)
• Aspects for college & adult students
FERPA

- Student right to review education records.
- Right to request amendment to record, if students believes it is inaccurate
- Right to file a complaint with US DOE
- Specifies what types of education records need student consent for release
FERPA – Types of information release not requiring student consent

- In connection with financial aid requirements
- Accreditation requirements/functions
- Health or safety emergencies
- Lawfully issue subpoena
- To other school officials (inc. teachers) who have a legitimate educational interest.
Faculty Access to Student Information

• What student information does the faculty
  – Have access to?
  – Have a right to have access to?

• How can student information bias the faculty and hurt the student?
Who has a “legitimate educational interest?”

- Faculty within a course?
- Faculty from course to course?
- Faculty to Director/Dean?
- Faculty to Student Health?
Additional Faculty Privacy Concerns

• What type of communication method is the faculty using?

• What is appropriate? Secure?

• How can objective v. subjective student data be harmful?
Student Issues with Privacy

• Student Use of Social Media
  – Breach of client privacy with social media
  – Libelous statements made by students with social media

• Student Use of “Public Media” such as “Rate my Professor”
  – Issues?
Legal Aspects of Privacy Violations

• Violation of FERPA

• Violation of Client Data

• Slander/liable

• Social Media Issues
Best Practices related to Privacy in Nursing Education

• Be aware of legal requirements

• Have clear privacy policies

• Maintain adherence to policies
• Questions?
  – Jot down for the Q & A session after the presentation.
Objective #3

Identify current parameters of providing student accommodations in nursing education.
ADA and Nursing Education

• What is ADA?

• What is considered a disability according to ADA?

• What is not considered a disability according to the ADA?
ADA Requirements

• Americans with Disabilities Act
  – Prohibits discrimination for those that are otherwise qualified
  – Applies to employment, public services, public accommodations, education, etc.
ADA and Nursing

• ADA (1990)
  – Nursing initially focused on functional abilities/core performance standards
  
  – E.g.
    • Ability to hear, see, smell, touch
    • Ability to stand on feet for 8-12 hours

11/10/2017
What is a disability?

• Physical disabilities
  – E.g. Missing limbs; mobility problems; impaired sense; presence of disease/disorder (e.g. AIDS)

• Mental disabilities
  – E.g. ADD, Learning disabilities
  – E.g. Stress (?) (Service animals for anxiety)
What is not a disability?

• English as a second language

• Psychoactive substance use disorders resulting from current illegal use of drugs

• Normal pregnancy

• Right/left handedness
What are the requirements for accommodations?

- Requires reasonable accommodations for those who are otherwise qualified

  • Limitation for hardship (employer/school can clearly demonstrate that reasonable accommodations would impose an undue hardship)

  • Reasonable accommodations is a Key Element!
What are reasonable accommodations?

• Colleges are NOT required to lower or effect substantial modifications to essential requirements

• Colleges are NOT required to provide personal care attendant services, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature
ADA and Nursing Education

• Essential functions
  – An employment term
  – Initially used in nursing education to address disabilities

• Technical standards
  – Detect a heart murmur (versus hear a heart murmur)
ADA Requirements

• Must make reasonable accommodations for those that are otherwise qualified.

• Questions to ask:
  1. What are the essential requirements of the program?
  2. What constitutes a direct thread?
  3. What would be unduly burdensome?
Student Disabilities

• What does A.D.A. mean to nursing programs?
  – Any otherwise qualified individual should receive reasonable accommodation with the educational program & any physical barriers must be removed (architectural, communication, or transportation)

  – Key: otherwise qualified (is the issue a qualified disability?)
    • Deaf applicant?
    • Auditory schizophrenic applicant?

  – Key: reasonable accommodation (according to resources & skills required)
    • Interpreter for every class?
    • Audiotape books?
Examples of Reasonable Accommodations

• Individual born without a left hand applies to nursing school.
  – Can she meet the essential requirements of the program?
  – Is this “disability” a direct threat to anyone (e.g. patients)?
  – Is the proposed accommodation unduly burdensome?
Examples of A.D.A. Accommodations in Nursing Education

• BSN Student totally “wheelchair bound”
  – Admitted, accommodations made
  – Student successfully completed BSN program & obtained employment

• BSN Student totally “deaf”
  – Admitted, accommodations made
  – Student successfully completed BSN program & obtained employment

• Key: What accommodations were reasonable?
ADA & Health Care Education

- Dental school applicants with hepatitis B virus infection not allowed into school. Student files complaint regarding Mental health disability and leave policy of university that was restrictive.

- Blind med school applicant accepted with disability.
Best Practices in ADA Accommodations in Nursing Education

• Remember the questions to ask.
  1. What are the essential requirements of the program?
  2. What constitutes a direct threat?
  3. What would be unduly burdensome?
Questions?