

# GENERAL ADVICE

## *from General Counsel*



Issued: Nov. 3, 2016

## Due Process in Decisions with Serious Consequences

Because NMSU is a public entity, our actions have the potential to violate individual constitutional guarantees. You are acting as an arm of the government in making official decisions for NMSU, and as such, you have the responsibility of honoring individual rights as set forth in the Bill of Rights. Most significantly, if you are making a decision that is likely to have a serious consequence for the individual, remember that your decision should be supported by DUE PROCESS. There are two types of due process.

### ■ Substantive Due Process

Substantive due process means that you must have a reasonable basis for your decision. If your decision is arbitrary or based on discriminatory criteria, that decision will not be defensible. Have you documented (or can you articulate) a non-discriminatory reason for the decision, and is that reasoning consistent with decisions in other similar cases? If not, you are not on a firm footing to make a legally defensible decision. Is there a policy or rule defining the criteria to be considered as such decisions are made? Was it followed? If not, again, it is time to stop, regroup, and obtain counsel on how to proceed.

### ■ Procedural Due Process

Procedural due process requires that the mechanism or process for making the decision is fair. Even if your decision is fully justified on the facts, if you fail to follow the proper procedures in making that decision, or in deciding an appeal from a decision, the unhappy constituent may be able to successfully challenge that decision in court. If your decision is arbitrary or based on discriminatory criteria, that decision will not be defensible.

The elements of legally required procedural fairness are increased commensurate with the degree of impact that the decision will have on the constituent. For example, the law will require a higher degree of procedural protection for a decision to dismiss a student from an academic program mid-semester than it will for an initial decision to admit a student to a program. In general, procedural due process has two components: notification and opportunity to be heard.

**Notification:** Individuals have the right to be well informed of the proposed action to be taken against them. While many variations may be permissible depending upon specific facts, generally these are the requirements for adequate notification:

- The notification should be in advance of the decision OR should provide the individual with a meaningful opportunity to be heard.
- The individual must be given full access to all the information upon which the decision is based.

Consideration of information (eg. a report of cheating from a student who does not wish to be identified) that is not revealed to the affected individual will obviate the due process requirement.

**Opportunity to be Heard: Individuals have a right to provide rebuttal information to an unbiased decision maker.**

- A person who has already participated in making an initial decision, or who has voiced an opinion regarding the proper decision to be made, is NOT considered unbiased.
- The scope of right to provide rebuttal information must be commensurate with the seriousness of the decision under consideration. In some cases, an opportunity to provide a written rebuttal may be adequate. In others, the affected individual may have the right to have an advisor or attorney present and may have the right to call witnesses and to cross-examine adverse witnesses.

For every major decision to be made, the decision maker should consult NMSU Rules, and where appropriate, the Student Code of Conduct and Catalog, to ensure proper procedures are followed. Those involved in developing program handbooks should simply reference the appropriate procedural steps in the relevant university-wide document(s). If you believe there is a need for supplemental or different departmental or program specific procedures, those should be developed in consultation with the Office of General Counsel and reviewed each and every year to ensure that those additional terms remain consistent with university-wide rules.

■ **Correcting Due Process Errors**

In some instances, upon review, we determine that sufficient due process (either substantive or procedural) was not afforded an individual in a particular situation. Substantive due process errors may occur where a non-discriminatory criteria based reason for the decision was not proffered or documented. Procedural due process errors may occur in cases where NMSU procedures were not followed, or the NMSU process is determined to be inadequate, such as where the appeal decision maker is found to have participated in the original decision. While there is no definitive “cure” for a due process violation, we can attempt to overcome the deficiency by offering the individual another opportunity for a fair process. This is never comfortable, requires a new unbiased decision-maker, and still may be considered an insufficient remedy if challenged in court. The better course is providing proper and sufficient due process from the beginning.

## University Decisions Requiring Due Process

**MOST CRITICAL**

Employee Termination  
 Faculty Denial of Tenure Decision  
 Faculty Contract Non-Renewal Decision  
 Student Misconduct Dismissal from Program  
 Title IX Violations (for both parties)

**IMPORTANT**

Employee Disciplinary Action (less than termination)  
 Faculty Denial of Promotion  
 Academic Performance Sanctions (less than dismissal)  
 Less Severe Misconduct Sanctions (less than expulsion or dismissal)  
 FMLA Denial (employee)  
 FERPA Records Correction (statutory requirement )  
 Accommodation Denial - Religious & Disability

Ineligibility for Rehire Designation  
 Ban letters – Student & Visitor

**ROUTINE - CARE REQUIRED**

Performance Evaluation (Employee)  
 Academic Program Admission  
 Hiring Decisions  
 Compensation Decisions – All Types  
 Grade Assignments/Appeals for individual assignments or courses  
 Intellectual Property Allocations/ Decisions  
 Deny Student Housing Application  
 Refuse to Release from Housing Contract