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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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DANIEL NELSON,

Appellant,

v.

SPOKANE COMMUNITY COLLEGES,

Respondent.

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**BRIEF OF THE RESPONDENT**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF THE ISSUES.....	2
	1. Where Mr. Nelson had the opportunity to appeal his failing grade through a four-part process applicable to academic matters, did SCC provide Mr. Nelson with a procedure that satisfies due process?.....	2
	2. Because Mr. Nelson was dismissed from the Nursing Program for failing to meet academic standards, do the Administrative Procedure Act's ("APA") procedural requirements apply in the context of academic dismissals?.....	2
	3. Did SCC violate the APA when it took "other agency action" by dismissing Mr. Nelson from the Nursing Program for failing to meet academic standards, without an adjudicatory proceeding? .....	2
	4. Where longstanding case law holds that due process does not require an evidentiary hearing to contest a faculty member's academic decision, is Mr. Nelson entitled to an award of attorney fees on appeal? .....	2
III.	STATEMENT OF THE CASE.....	2
	A. Academic Standards Applicable to SCC Nursing Program.....	2
	1. Nursing Handbook.....	3
	2. Course Syllabus.....	4
	3. Student Code of Conduct.....	5
	B. Mr. Nelson Violated the Academic Standards Established for the Course He Was Taking.....	6
	C. The College Followed Its Grade Appeal Process. ....	10

D. Mr. Nelson Attempted to Pursue a Disciplinary Appeal. ....	12
IV. ARGUMENT .....	13
A. The College Provided Mr. Nelson with the Procedural Due Process That Is Required for an Academic Decision Leading to a Dismissal from an Academic Program. ....	14
1. The Supreme Court has recognized that academic dismissals, unlike disciplinary dismissals, merit deference.....	16
2. Mr. Nelson’s dismissal was academic, not disciplinary. ....	18
3. Due Process for academic matters does not require a fact-finding hearing. ....	23
4. Mr. Nelson received the necessary due process for an academic dismissal. ....	27
B. Academic Dismissals Are Not Governed by the APA’s Adjudicative Proceedings Requirements. ....	30
C. The College Did Not Violate the APA When It Dismissed Mr. Nelson from the Nursing Program for Failing to Meet Academic Standards. ....	32
1. RCW 34.05.570(4)(c)(i): Unconstitutional. ....	34
2. RCW 34.05.570(4)(c)(ii): Outside the authority of the agency. ....	34
3. RCW 34.05.570(4)(c)(iii): Arbitrary or capricious. ....	35
4. RCW 34.05.570(4)(c)(iv): Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action. ....	36

D.	Mr. Nelson Is Not Entitled to Attorney Fees Since the College Was, at a Minimum, Substantially Justified in Its Actions.....	37
V.	CONCLUSION .....	40

## TABLE OF AUTHORITIES

### Cases

<i>Allahverdi v. Regents of the Univ. of New Mexico</i> , 2006 WL 1304874 (D.N.M. 2006) .....	17
<i>Alpha Kappa Lambda Fraternity v. Wash. St. Univ.</i> , 152 Wn. App. 401, 216 P.3d 451 (2009) .....	30, 31
<i>Arishi v. Washington State University</i> , 196 Wn. App. 878, 385 P.3d 251 (2016) .....	23, 25, 26, 30, 31, 34, 35
<i>Beauchene v. Miss. Coll.</i> , 986 F.Supp.2d 755 (S.D. Miss. 2013) .....	18, 22, 25
<i>Becker v. Wash. State Univ.</i> , 165 Wn. App. 235, 266 P.3d 893 (2011) .....	15
<i>Board of Curators of the University of Missouri v. Horowitz</i> , 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed.2d 124 (1976)....	13, 14, 15, 16, 17, 22, 23, 24, 25, 27, 29, 36, 37
<i>Brady v. Portland State University</i> , 2019 WL 4045652 (D. Or. August 23, 2019) .....	15
<i>Brown v. Dep’t of Social and Health Servs.</i> , 190 Wn. App. 572, 360 P.3d 875 (2015) .....	38
<i>Brown v. Li</i> , 308 F.3d 939 (9th Cir. 2002) .....	15, 19, 20
<i>Buechler v. Wenatchee Valley College</i> , 174 Wn. App. 141, 298 P.3d 110 (2013) .....	3
<i>Burke v. Emory Univ.</i> , 177 Ga. App. 30, 338 S.E.2d. 500 (1985) .....	18
<i>Connelly v. Univ. of Vt. and St. Agri. Coll.</i> , 244 F. Supp. 156 (D. Vt. 1965) .....	18

<i>Corso v. Creighton Univ.</i> , 731 F.2d 529 (8th Cir. 1984) .....	25
<i>Darkenwald v. Emp Sec. Dep't</i> , 138 Wn.2d 237, 350 P.3d 647 (2015).....	14
<i>Depperman v. Univ. of Ky.</i> , 371 F. Supp. 73 (1974) .....	21
<i>Fenje v. Feld</i> , 398 F.3d 620 (7th Cir. 2005) .....	17
<i>Fuller v. Schoolcraft Coll.</i> , 909 F. Supp. 2d 862 (E.D. Michigan 2012).....	15, 16, 17
<i>Goss v. Lopez</i> , 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d (1975).....	26, 27, 34
<i>Jansen v. Emory Univ.</i> , 440 F. Supp. 1060 (N.D. Ga. 1977), <i>aff'd</i> 579 F.2d. 45 (5th Cir. 1978).....	17, 21
<i>Kali v. Bowen</i> , 854 F.2d 329 (9th Cir. 1988) .....	38
<i>Keefe v. Adams</i> , 840 F.2d 523 (8th Cir. 2016) .....	25
<i>Keys v. Sawyer</i> , 353 F. Supp. 936 (S.D. Tex. 1973), <i>aff'd</i> 496 F.2d 876 (5th Cir. 1974).....	17, 18
<i>Larsen v. City of Beloit</i> , 130 F. 3d 1278 (7th Cir. 1997) .....	15
<i>Lewin v. Medical College of Hampton Roads</i> , 910 F. Supp. 1161 (E.D. Virginia 1996).....	20
<i>Maas v. Corp. of Gonzaga Univ.</i> , 27 Wn. App. 397, 618 P.2d 106 (1980).....	17, 22

<i>Mahavongsanan v. Hall</i> , 529 F.2d 448 (5th Cir. 1976) .....	16, 17
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	23
<i>Monroe v. Soliz</i> , 132 Wn.2d 414, 39 P.2d 205 (1997) .....	14, 25
<i>Nw. Sportfishing Indus. Ass’n v. Dep’t of Ecology</i> , 172 Wn. App. 72, 288 P.3d 667 (2012).....	33
<i>Olsson v. Bd. of Higher Ed.</i> , 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980).....	18, 22
<i>Pierce v. Underwood</i> , 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d. 490 1988) .....	38
<i>Raven v. Dep’t of Soc. &amp; Health Servs.</i> , 177 Wn.2d 804, 306 P.3d 920 (2013).....	38
<i>Regents of the Univ. of Mich. v. Ewing</i> , 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985).....	14
<i>Richmond v. Fowlkes</i> , 228 F.3d 854 (8th Cir. 2000) .....	25
<i>Silverstreak, Inc. v. Dep’t of Labor &amp; Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	38
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	35

**Statutes**

RCW 28B.50.140.....	2
RCW 34.05.010 .....	34
RCW 34.05.410 .....	33

RCW 34.05.413 .....	30
RCW 34.05.570 .....	14, 32, 33
RCW 4.84.340 .....	37
RCW 4.84.359 .....	37
WAC 132Q-10 .....	5, 32, 33
WAC 504-26-304.....	31

## I. INTRODUCTION

Daniel Nelson was a nursing student at Spokane Community College (“SCC” or “College”) enrolled in Nursing 200 when he received his second failing grade while enrolled in the Nursing Program. According to programmatic policy, two course failures result in a dismissal from the Nursing Program. Consequently, Mr. Nelson was dismissed from the Nursing Program because he failed to meet the program’s academic standards.

Mr. Nelson appealed his second failing grade through the grade appeal/complaint process. Through that process, the failing grade was upheld, and therefore the dismissal that flowed from the failing grade. In support of this appeal, Mr. Nelson relies on the wrong legal authority, citing cases addressing disciplinary actions rather than cases relevant to the issue at hand: a grading decision that led to a dismissal on academic grounds. Under the standard for academic dismissals, Mr. Nelson had ample due process through the grade appeal/complaint process. The College’s decision to uphold the grading decision and deny his request for an adjudicatory hearing were proper and supported by law. Therefore, the College respectfully asks this Court to affirm the trial court’s decision and to continue to entrust such academic decisions to college faculty and administrators.

## **II. RESTATEMENT OF THE ISSUES**

- 1. Where Mr. Nelson had the opportunity to appeal his failing grade through a four-part process applicable to academic matters, did SCC provide Mr. Nelson with a procedure that satisfies due process?**
- 2. Because Mr. Nelson was dismissed from the Nursing Program for failing to meet academic standards, do the Administrative Procedure Act's ("APA") procedural requirements apply in the context of academic dismissals?**
- 3. Did SCC violate the APA when it took "other agency action" by dismissing Mr. Nelson from the Nursing Program for failing to meet academic standards, without an adjudicatory proceeding?**
- 4. Where longstanding case law holds that due process does not require an evidentiary hearing to contest a faculty member's academic decision, is Mr. Nelson entitled to an award of attorney fees on appeal?**

## **III. STATEMENT OF THE CASE**

### **A. Academic Standards Applicable to SCC Nursing Program**

The Board of Trustees of the Community Colleges of Spokane govern the colleges of the district, including SCC. RCW 28B.50.140. The Board is granted broad discretion to establish, with the assistance of faculty, program and courses of study and to perform all acts and activities not inconsistent with laws or rules of the State Board for Community and Technical Colleges. RCW 28B.50.140. Such acts and activities necessarily encompass establishing academic standards for the programs and courses of study, as prescribed in adopted handbooks and course syllabi.

The Spokane Community College Nursing Handbook (“Nursing Handbook”), course syllabus, and Student Conduct Code all have different authoritative roles within the College. Students enrolled in the Nursing Program are subject to the academic standards and requirements of the Nursing Handbook and syllabus for each Nursing Program course. This Court has previously recognized an institution’s adoption of academic regulations, such as “Nursing Handbooks,” as a valid source of authority for students enrolled in a particular program. *See Buechler v. Wenatchee Valley College*, 174 Wn. App. 141, 152, 298 P.3d 110 (2013). The Student Code of Conduct is a separate source of authority that establishes on and off-campus behavioral standards that are applicable to all students enrolled in the college regardless of their academic program.

### **1. Nursing Handbook**

The Nursing Handbook outlines the policies, procedures, and guidelines applicable to students admitted to the Nursing Program. CP 206. As a student enrolled in the Nursing Program, Mr. Nelson received a copy of the Nursing Handbook. CP 175-302. At the beginning of each quarter, the Nursing Program Handbook requires nursing students to sign and submit the student contract indicating that they have read and understood all aspects of the Handbook, the Student Conduct Code, and the course syllabus for each nursing course in which they enroll. CP 206, 302. The

Handbook lays out the “Program Policies” and includes such pertinent provisions as “Academic Integrity,” “Dismissal Policy,” and “Course Failure Policy.” CP 215-33. The Handbook provides that “Students have a right to disagree with a clinical or lecture grade. The concern is to be addressed using the SCC procedure for Addressing Student Concerns...”<sup>1</sup> CP 218. The College’s grade appeal policy and complaint process provides for a four-part review process: Instructor of the Course, Department Chair, Division Dean, and Chief Academic Officer. CP 195, 277-80. If a student has a concern regarding a particular section of the Handbook, Section 4.14 “Handbook Disagreement Policy” lays out the process for addressing such concerns. CP 33. A student who violates the Nursing Program Handbook may be subject to academic sanctions. CP 213-20.

## **2. Course Syllabus**

As course procedure dictates, Professor Sells circulated a course syllabus for Nursing 200. CP 303-306. The syllabus contained a section entitled, “Academic Integrity.” CP 305. It stated in pertinent part,

Students are expected to review and comply with WAC 132Q-10 “Standards of Conduct for Students” and all associated WAC sections. Plagiarism, cheating, and any other violations of the Standards of Conduct for students will be reported to the SCC Student Conduct Officer.

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<sup>1</sup> The informal/formal complaint process provides for the identical 4-step procedure as the grade appeal process. CP 195, 277-79.

Sanctions for academic integrity violations may include receiving a failing grade for the assignment or examination, or possibly a failing grade for the course. In some cases, the violation may also lead to the student's dismissal from the Nursing program and/or the college.

CP 305. Students who violate the terms of the syllabus may be subject to academic discipline. CP 305.

### **3. Student Code of Conduct**

As a student at the Community Colleges of Spokane, Mr. Nelson received the Standards of Conduct for Students. These standards are adopted in WAC 132Q-10. CP 151-192. All students who matriculate at the Community Colleges of Spokane are subject to its provisions regardless of their academic program. The Code of Conduct sets the standards for the learning environment and the requirements for a student's eligibility to remain part of the College community. CP 151-92. The Code covers a broad range of behaviors such as hazing, theft, or damage to property, use of controlled substances and alcohol, firearms on campus, illegal activity, as well as academic dishonesty. *See generally*, WAC 132Q-10. A student who violates the Standards of Conduct may be subject to disciplinary action issued by the student conduct officer or student conduct board. CP 186-87; WAC 132Q-10-400. Sanctions under the Student Conduct Code range from a warning or reprimand to revocation of admission or degree or expulsion from the Community Colleges of Spokane's two campuses. CP 187-88.

**B. Mr. Nelson Violated the Academic Standards Established for the Course He Was Taking**

In January 2018, Mr. Nelson, a nursing student at SCC, enrolled in Professor Marty Sells' course, Nursing 200, Care of the Developing Family, Theory Content. CP 303. Mr. Nelson had previously failed a nursing course in 2017, but was allowed by policy to retake the course and remain in the Nursing Program so long as he did not fail a second course. CP 35, 219, 223.

As part of Nursing 200, Professor Sells assigned the students to complete "Medication Worksheet #2." CP 307. The assignment stated, "please complete the attached worksheet. Use your own words for patient education points." CP 307.

On January 28, 2018, Professor Sells was grading the Medication Worksheet #2 assignments when she discovered two nearly identical homework assignments. CP 30, 59. Mr. Nelson's assignment was one of the two nearly identical assignments. CP 59. The two assignments utilized an individualized format instead of the faculty provided template, and were the only assignments that contained unique and incorrect abbreviations. CP 30, 59. Out of 40 answer boxes on the worksheet, only three were different with some information deleted; all other answers were identical. CP 59. The first assignment was uploaded on January 24, 2018, at 4:53 p.m., the second,

which was Mr. Nelson's, was uploaded on January 26, 2019, at 6:46 p.m. CP 59.

The following day, January 29, 2018, Professor Sells and the Associate Dean of Nursing, Dr. Cheri Osler, met with Mr. Nelson to discuss the Medication Worksheet #2 assignment. CP 30, 59. During the meeting, Mr. Nelson claimed that he and another student had collaborated on the assignment. CP 30, 59. He reported that while he read from the book, the other student typed. CP 30. Professor Sells and Dr. Osler explained to Mr. Nelson that the assignment was not a group project and that turning in the same work was plagiarism, a form of academic dishonesty, and a violation of the academic integrity policy. CP 60.

Professor Sells and Dr. Osler next met with the other student in question, Jane Doe.<sup>2</sup> CP 30, 60. Ms. Doe provided a nearly verbatim recitation of the facts as Mr. Nelson. CP 30, 60. Ms. Doe was also informed that the Medication Worksheet #2 was not a group project and turning in identical work was plagiarism. CP 30, 60.

Immediately after Ms. Doe left the office, Mr. Nelson returned to speak with Professor Sells to discuss an unrelated test. CP 30, 60. During the course of the meeting, Professor Sells again addressed the Medication

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<sup>2</sup> The other student discussed in this matter will be referred to as Ms. Doe.

Worksheet #2 incident and told Mr. Nelson that as a result he would be suspended from class for one day, Tuesday January 30, 2018, and would receive a zero for the assignment. CP 30, 60. Mr. Nelson became visibly agitated and the meeting was terminated. CP 30, 60.

Thereafter, Ms. Doe returned and told both Professor Sells and Dr. Osler that she had lied during her earlier meeting. CP 30, 60. She stated that she and Mr. Nelson did not complete the assignment together, but that Mr. Nelson verbally asked that she email him the completed assignment. CP 30. She also disclosed that Mr. Nelson met with her prior to their meetings with Professor Sells and Dr. Osler to coordinate what they should do if they were caught. CP 60. Ms. Doe provided documents corroborating her version of events, including a screen shot photo and email with attachments. CP 60, 63-64. Professor Sells noted that Ms. Doe had previously used the individualized template for the prior assignment, whereas Mr. Nelson had used the faculty issued template in the previous assignment. CP 30.

Professor Sells advised the Nursing faculty of the situation and the Nursing faculty held a vote and determined that Mr. Nelson should receive a failing grade in the course. CP 30, 120. The Nursing faculty as a group makes this decision so “all facts are considered and reviewed by more than just the grade assigning faculty member.” CP 60. This decision was based

on Mr. Nelson's violation of the course syllabus and the Nursing Program Handbook's Academic Integrity Policy. CP 30, 218-19. On February 1, 2018, Professor Sells and Dr. Olser advised Mr. Nelson of the Faculty's decision during a meeting. CP 30. As this was the second course in which Mr. Nelson received a failing grade, Mr. Nelson was notified that he was dismissed from the Nursing Program. CP 30, 60. In response, Mr. Nelson responded that the assignments were not identical because he had changed some of Ms. Doe's answers in his worksheet. CP 61. When he was asked why he would do this when he had already failed a course, Mr. Nelson admitted the original report of working together was false stating, "If I had known this was going to happen, I would not have done it." CP 30, 61.

At the conclusion of this meeting, Mr. Nelson was provided with a Nursing Division – Course Failure Withdrawal Form that indicated "Failure – Violation of course/program academic integrity policy." CP 31. The form went on to state, "Second failure, cannot return to program." CP 31. Mr. Nelson refused to sign the form or take a copy. CP 31. Mr. Nelson's dismissal from the Nursing Program was not an expulsion from campus. CP 4, 219. Mr. Nelson was free to explore enrolling in different academic programs offered by the College. CP 4.

Thereafter, on February 2, 2018, the incident was reported to the SCC Student Conduct Officer as required by Nursing Student Handbook Policy. CP 61, 218.

**C. The College Followed Its Grade Appeal Process.**

On February 8, 2018, Mr. Connan Campbell, Student Conduct Officer, wrote to Mr. Nelson to inform him that student conduct received an incident report indicating that Mr. Nelson had copied another student's work and turned it in as his own. CP 45. Mr. Campbell's letter went on to state,

**IMPORTANT NOTE**

Given the nature of this alleged violation, academic dishonesty, and information we have received that this matter involves a grade, no further action will be taken at this time. Please be advised, though, that future violations of this nature may invoke progressive discipline.

Should you wish to appeal the grade decision of the faculty member, you are encouraged to communicate with them directly and/or review the college's policies concerning grade appeals and the Student Concerns Process. Links to these policies are included here: ...."

CP 45 (emphasis in original). The letter continued that if Mr. Nelson had any questions, or wished to meet, he should contact Mr. Campbell by phone or email. CP 45.

On February 9, 2018, the SCC student conduct office received an appeal of disciplinary action from Mr. Nelson contesting his dismissal from

the Nursing Program. CP 47. In it, Mr. Nelson complained that he was not provided written notice of the complaint against him, was not allowed to bring an advisor to assist him during the disciplinary process, and was not granted a formal disciplinary hearing. CP 32, 44, 47. Because the student conduct officer was taking no action pursuant to his authority under WAC 132Q-10 and there was no disciplinary action pending, the notice was sent to the nursing department for an academic review. CP 47.

Pursuant to the College's grade appeal policy and complaint process that provides for a four-part review process, (CP 195), Mr. Nelson initially met with Ms. Sells on two occasions and additionally met with Dr. Osler, Division Dean. CP 30, 60. On March 28, 2018, Mr. Nelson wrote to the College indicating that all three steps of the informal complaint process had been completed and therefore he was submitting a formal complaint. CP 67-68, 123. On April 5, 2018, as the fourth and final step in the process, Mr. Nelson met with Ms. Jenni Martin, Vice President of Instruction and Chief Academic Officer at SCC. CP 141. Prior to this meeting, Mr. Nelson supplied Ms. Martin with extensive documentation including declarations and exhibits. CP 69-122. Subsequently, Ms. Martin sent Mr. Nelson a letter dated April 12, 2018 in which she upheld Mr. Nelson's class failure. CP 141.

Ultimately, Mr. Nelson was dismissed from the Nursing Program because he had failed two courses. However, his dismissal from the Nursing Program did not equate to expulsion and did not affect his ability to remain a student at the College and take other courses.

**D. Mr. Nelson Attempted to Pursue a Disciplinary Appeal.**

After Chief Academic Officer Ms. Martin upheld Mr. Nelson's failing grade in Step 4 of the grade appeal process, counsel for Mr. Nelson reached out to Ms. Martin and Dr. Glen Cosby, the College's Vice President of Student Affairs,<sup>3</sup> requesting that Mr. Nelson be provided with "due process." CP 145, 147-48. Dr. Cosby and Ms. Martin responded in a letter denying Mr. Nelson's request for an adjudicative proceeding under the Student Conduct Code. CP 146. The letter explained that an adjudicative proceeding under the Student Conduct Code was unwarranted because no sanction was imposed by the student conduct officer, the matter was dealt with as a violation of the academic integrity policy; and that Mr. Nelson had appealed the failing grade through the appropriate means, the grade appeal process. CP 146.

Counsel for Mr. Nelson then petitioned Spokane Superior Court for Judicial Review asserting, "SCC denied Petitioner a hearing on a student

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<sup>3</sup> The Vice President of Student Affairs responsibilities include in part, student admissions, overseeing Student Conduct, and Student Title IX Coordination.

conduct violation (plagiarism). The sanction issued by the school had the practical effect of expelling Petitioner from the nursing program.” CP 1-5. On December 21, 2018, the Superior Court denied Mr. Nelson’s Petition for Review. CP 628. The court found Mr. Nelson’s arguments that the matter should have been resolved under the Student Conduct Code unpersuasive. RP 26-27 (“I can’t underlying say this was a student conduct. That is not why the school kicked him out. The school kicked him out because he flunked the class... it was the F that got him kicked out, not the student conduct.”) Relying on the decision *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed.2d 124 (1976), the superior court concluded that Mr. Nelson’s dismissal was academic in nature. CP 628; RP 25-28. In reaching its conclusion, the court noted the process that Mr. Nelson was provided to challenge his grade - meeting in Step 3 with Dr. Osler and Step 4 with Vice President of Instruction and Chief Academic Officer Jenni Martin. RP 27. This appeal then followed. CP 626.

#### **IV. ARGUMENT**

The ultimate issue in this case is what process is due to a student who disregards instructions to do his own work, receives a failing grade as a consequence, and thereafter is dismissed from the program for violating course academic standards as this was his second failing grade. This legal

issue is reviewed de novo.<sup>4</sup> *Darkenwald v. Emp Sec. Dep't*, 138 Wn.2d 237, 244, 350 P.3d 647 (2015); *Monroe v. Soliz*, 132 Wn.2d 414, 418, 939 P.2d 205 (1997).

Section A of this brief establishes that long standing interpretations of the due process clause hold that an adversarial evidentiary hearing is not required when a student appeals an academic decision by college faculty, and that the process provided to Mr. Nelson satisfies due process. Next, as demonstrated in sections B and C of this brief, the Administrative Procedure Act (APA) does not require a college to provide an adjudicative proceeding when a student seeks to appeal a failing grade.

**A. The College Provided Mr. Nelson with the Procedural Due Process That Is Required for an Academic Decision Leading to a Dismissal from an Academic Program.**

As a preliminary matter, it bears noting that the Supreme Court has never explicitly ruled whether a student enrolled in a particular higher education program has a liberty or property interest in their continued enrollment. *See Horowitz*, 435 U.S. at 84-85; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). Most courts have assumed, without deciding, that a student has such a property right. *See Horowitz*, 435 U.S. at 84; *Brown v. Li*, 308 F.3d 939, 954 (9th Cir.

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<sup>4</sup> As set out in Section B of this argument, appellate review of “other agency action” must be under subsection (4) of RCW 34.05.570.

2002); *Fuller v. Schoolcraft Coll.*, 909 F. Supp. 2d 862, 874 (E.D. Michigan 2012). However, to be entitled to the procedural protections of the Fourteenth Amendment, Mr. Nelson must first demonstrate that his dismissal from the Nursing Program deprived him of a liberty or property interest. *Horowitz*, 435 U.S. at 82; *Becker v. Wash. State Univ.*, 165 Wn. App. 235, 255, 266 P.3d 893 (2011).

Mr. Nelson bears the burden of proving he had an interest (life, liberty, or property) that entitled him to the Fourteenth Amendment's procedural protections. *Larsen v. City of Beloit*, 130 F. 3d 1278 (7th Cir. 1997). In *Brady v. University of Portland*, the Court explicitly found there is no binding authority stating that a student dismissed from an institute of higher education has a protected liberty interest in continued enrollment and further found that there is no clearly established property interest in a student's continued enrollment. *Brady*, 2019 WL 4045652 at \*4-6 (D. Or. August 23, 2019). Mr. Nelson offers no applicable authority to support his assertion that the College's decision to dismiss him from the Nursing Program deprives him of either liberty or property interest. Br. of Appellant at 32-35.

Nonetheless, even if Mr. Nelson was able to demonstrate that he has a protected liberty interest or property interest, he was provided with all the due process required. The arguments below clearly demonstrate that

Mr. Nelson received the “careful and deliberate” process the Supreme Court found he is entitled to in the context of an academic dismissal.

**1. The Supreme Court has recognized that academic dismissals, unlike disciplinary dismissals, merit deference.**

The College and the trial court correctly recognized the distinction between student conduct discipline and Mr. Nelson’s dismissal from the Nursing Program upon receiving his second failing grade in a Nursing course. The amount of procedural due process owed, is determined by whether the dismissal was academic or disciplinary in nature because there is “a clear dichotomy between a student’s due process rights in disciplinary dismissals and in academic dismissals.” *Horowitz*, 435 U.S. at 86 (quoting *Mahavongsanan v. Hall*, 529 F.2d 448, 449-50 (5th Cir. 1976)). How procedural due process factors are analyzed depends on the nature of the termination. *Fuller*, 909 F.Supp.2d at 874.

There is a “significant difference between the failure of the student to meet academic standards and the violation by a student of valid rules of conduct.” *Horowitz*, 435 U.S. at 86. The determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making. *Horowitz*, 435 U.S. at 90. Issues of scholarship and those of personal conduct can provide the basis for an

academic dismissal. *Id.* at 91. On the other hand, “Disciplinary dismissals, being more objective in nature and not dependent upon the analytical expertise of professional academicians, will bear a ‘resemblance to traditional judicial and administrative factfinding.’” *Fenje v. Feld*, 398 F.3d 620, 625 (7th Cir. 2005).

In *Horowitz*, the Court articulated its intent to not further enlarge the presence of the judiciary in academia. *Horowitz*, 435 U.S. at 90. The courts have since consistently emphasized the importance of judicial deference to academic decisions. In analyzing student dismissals, courts have cited the Supreme Court’s cautious position that “A broad definition of academic dismissal was necessary to ‘protect what the Supreme Court has stated is the ‘historic judgment of educators’ to evaluate their students’ academic abilities.’” *Fuller*, 909 F. Supp. 2d at 875 (quoting *Allahverdi v. Regents of the Univ. of New Mexico*, 2006 WL 1304874 \* 13 (D.N.M. 2006)).

“As a general rule, the courts will not interfere with the purely academic decisions of a university.” *Maas v. Corp. of Gonzaga Univ.*, 27 Wn. App. 397, 402, 618 P.2d 106 (1980) (citing *Mahavongsanan*, 529 F.2d 448; *Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff’d* 579 F.2d. 45 (5th Cir. 1978); *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Tex. 1973), *aff’d* 496 F.2d 876 (5th Cir. 1974)). The “judicial reluctance to intervene” is based upon “sound considerations of public policy.” *Olsson v. Bd. of*

*Higher Ed.*, 49 N.Y.2d 408, 413, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980). “Universities have the highest obligation to ferret out such academic misconduct because when an academic institution confers a degree, it is certifying to other academic institutions, the private and public sector and the world at large that a student has met the academic standards of the institution.” *Beauchene v. Miss. Coll.*, 986 F.Supp.2d 755, 767 (S.D. Miss. 2013); *see also Olsson* at 1153. Thus to ensure society’s confidence in the qualifications of individuals who have graduated from a particular educational institution, “it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgement of the professional educators who monitor the progress of their students on a regular basis.” *Id.* This principle of judicial nonintervention is “particularly appropriate in the health care field” where the students who receive degrees will provide care to the public. *Burke v. Emory Univ.*, 177 Ga. App. 30, 338 S.E.2d. 500, 501 (1985); *Connelly v. Univ. of Vt. and St. Agri. Coll.*, 244 F. Supp. 156 (D. Vt. 1965); *Keys*, 353 F. Supp. at 940.

**2. Mr. Nelson’s dismissal was academic, not disciplinary.**

The court should reject Mr. Nelson’s attempt to conflate an academic decision for student misconduct. The College consistently applied the academic grade appeal procedure to Mr. Nelson. After discovering that Mr. Nelson turned in an assignment that was not his own work, and then

falsely claimed it was “collaborative,” his instructor gave him a failing grade for violating the course/academic integrity policy articulated in both the Nursing 200 syllabus and Nursing Student Handbook. CP 219, 305. Both the Nursing 200 syllabus and Nursing Handbook state that course failure is a potential academic sanction for violating the academic integrity policy. CP 219, 305. The Student Conduct Officer took no action to investigate or discipline Mr. Nelson because the Nursing faculty determined that a course failure was appropriate under the circumstances, therefore the Student Conduct Officer referred Mr. Nelson to the grade appeal process. CP 45.

Cases where courts have characterized a dismissal as academic, rather than disciplinary, help to illustrate why Mr. Nelson’s dismissal is properly characterized as academic. In *Brown v. Li*, the university withdrew approval of Mr. Brown’s thesis after he surreptitiously inserted a “disacknowledgements” preamble profanely thanking his advisors following its approval. *Brown*, 308 F.3d at 943. Mr. Brown refused to remove the disacknowledgements preamble and appealed the school’s decision. *Id.* at 944. During the several years of appeals, Mr. Brown exceeded the time limit for completing his master’s degree, was placed on probation, and ultimately did not earn his degree. *Brown*, 308 F. 3d at 945. On appeal, Mr. Brown contended that the withholding of his degree was

“punitive or disciplinary.” *Id.* The court found that Mr. Brown was not prevented from receiving the degree as a result of his profane disacknowledgement but rather because he had not met the requirements to receive his degree. *Id.* at 954-55. Even though Mr. Brown’s actions contained elements of discipline, the court found that the decision not to approve the thesis was properly characterized as academic rather than disciplinary. *Id.* at 955.

Likewise, in *Lewin v. Medical College of Hampton Roads*, 910 F. Supp. 1161, 1165 (E.D. Virginia 1996), a student asserted that the introduction of evidence from an Honor Code proceeding, similar to the College’s Student Conduct Code proceedings, automatically triggered the higher standard of due process applicable in disciplinary dismissals. *Lewin*, 910 F. Supp. at 1165. To the contrary, the court determined that the introduction of disciplinary information was not “significant enough to require procedures consistent with a disciplinary proceedings.” *Lewin*, 910 F. Supp. at 1165.

This Court should look broadly at Mr. Nelson’s academic performance as a nursing student and should not merely examine the plagiarism incident in isolation, as Mr. Nelson’s dismissal was based on cumulative performance issues. Courts will not dissect on a per-course or incident basis actions or inabilities which “in aggregate lead to the

conclusion of an academic incompetence.” *Jansen*, 440 F. Supp. at 1063. “The fact that the total of all infractions may aggravate the ultimate penalty does not require the courts to go back into the prior events and proceedings....” *Janson*, 440 F. Supp. at 1063 (quoting *Depperman v. Univ. of Ky.*, 371 F. Supp. 73, 75 (1974)).

Mr. Nelson asserts that because the Nursing Handbook references the Student Code of Conduct they are somehow one and the same and any academic violation is tantamount to discipline requiring a full adjudicatory proceeding. Just because one’s actions may also be subject to disciplinary action does not mean a failing grade is disciplinary. The college did not issue Mr. Nelson a college-wide disciplinary sanction nor was it required to do so. The conduct, for which Mr. Nelson was actually dismissed for was not plagiarism, but the failure to meet academic standards, squarely within the realm of academic decision making as articulated in both the Nursing Handbook and syllabus. CP 215-33. The Nursing Program faculty and two additional academic administrators applied their judgment and issued a failing grade which, when added to Mr. Nelson’s cumulative performance issues, led to his dismissal from the Nursing Program.

Case law is clear that academic dismissals are not only limited to failure to obtain scholarly standards, but that behaviors can also serve as a basis for academic dismissal. Mr. Nelson’s dismissal not only involved his

inability to maintain the academic standards required by the program, but his behavior calls into question whether he possesses the qualities necessary for a student to succeed in the nursing profession. The Nursing Handbook provides that “integrity and accountability are integral components to safe patient care....” CP 209. The College’s Nursing Program faculty has a strong interest in ensuring that the integrity and ethical standards of the nursing profession are maintained. *See Olsson*, N.Y.2d at 413 (“When an educational institution issues a diploma to one of its students, it is, in effect certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline.”)

The decision to dismiss Mr. Nelson from the Nursing Program required a professional evaluation of academics and consideration of the cumulative information and knowledge held by Nursing Program instructors and administrators. *See Horowitz*, 435 U.S. at 90. Accordingly, this Court should defer to the decisions of the Nursing Program faculty and the reviewing administrators. *See Maas*, 27 Wn. App. at 402. These individuals are well suited to evaluate and review the academic decisions they face on a daily basis. *See Beauchene*, 986 F. Supp.2d at 773. The decision regarding Mr. Nelson’s academic dismissal is better suited for the campus than the courthouse.

**3. Due Process for academic matters does not require a fact-finding hearing.**

As Mr. Nelson’s dismissal was academic in nature, the question remains what due process protections apply to his academic dismissal? “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). As noted above, in a public university or college setting, the level of procedural protection varies according to whether students are dismissed for disciplinary or academic reasons. *See Horowitz*, 435 U.S. at 86. Academic dismissals “call for far less stringent procedural requirements” than student dismissals due to disciplinary misconduct. *Horowitz*, 435 U.S. at 86; *Arishi v. Washington State University*, 196 Wn. App. 878, 900-01, 385 P.3d 251 (2016) (noting that *Horowitz*, when balancing the risk of an erroneous decision against the value of additional procedural safeguards in the higher education context, made a distinction between academic and disciplinary decisions).

In *Horowitz*, the Court established that where dismissals are considered academic in nature, procedural due process does not require a hearing before a decision making body, either before or after the dismissal decision is made. *Horowitz*, 435 U.S. at 87-91. Instead, the decision to dismiss a student on academic grounds must be “careful and deliberate” in

order to comport with the Due Process clause. *Id.* at 85. At a minimum, a student is entitled to be informed of the reasons of her dismissal and to be allowed an opportunity to personally state her side of the story. *Id.* at 97 (White, J. concurring in part and concurring in judgment.)

In *Horowitz*, the Plaintiff, a medical student at the University of Missouri-Kansas City Medical School, was dismissed by an academic council for academic reasons, including poor attendance, personal hygiene, and poor bedside manner. *Horowitz* at 79-80. The University's process provided that each student's academic performance was reviewed on a periodic basis by the "Council on Evaluation." *Id.* at 80. The Council was made up of both faculty and students and can recommend various actions including probation and dismissal. *Id.* The Council's recommendations were reviewed by the "Coordinating Committee," a body composed solely of faculty members, and approved by the Dean. *Id.* Students were not typically allowed to appear before either the Council or the Coordinating Committee during their reviews. *Id.*

The Court ultimately held that when academic decisions are involved, including dismissing a student from a program, courts should not impose formal procedural requirements, because the academic process provides sufficient procedural protections. *Horowitz*, 435 U.S. at 85. The Court found that a university meets the requirements of procedural due

process so long as the dismissal decision is “careful and deliberate.” *Id.* The *Horowitz* court upheld the University’s decision to dismiss the student from the medical school because the process the school provided was both careful and deliberate. *Id.*

Multiple cases have addressed what constitutes an academic dismissal. A court found that cheating on an exam and then lying about it was an academic dismissal. *Corso v. Creighton Univ.*, 731 F.2d 529, 532 (8th Cir. 1984). In *Beuachene*, the court stated that plagiarism was an academic dismissal. *See Beauchene*, 986 F.Supp.2d at 768. It was an academic dismissal when a student was dismissed for failing to complete coursework, *Monroe*, 495 F. 3d at 592-93, and an academic dismissal when failing exams, lack of preparation, and absenteeism were the basis for dismissal. *Richmond v. Fowlkes*, 228 F.3d 854, 858 (8th Cir. 2000). These cases are consistent with *Horowitz*, as an academic dismissal is one based on “failure to attain a standard of scholarship.” *Keefe v. Adams*, 840 F.2d 523, 538 (8th Cir. 2016) (quoting *Horowitz*, 435 U.S. 87 n.4).

This Court previously looked at a student disciplinary dismissal in *Arishi*, 196 Wn. App. 878. Mr. Nelson’s case is in stark contrast to the facts presented there. Mr. Arishi was a Ph.D. graduate student who was charged with third degree rape and molestation of a 15-year-old girl. *Arishi*, 196 Wn. App. at 889. Upon learning of Arishi’s arrest, the University notified him it

was charging him with violating the University's standards of student conduct and its Policy Prohibiting Discrimination, Sexual Harassment and Sexual Misconduct. *Id.* at 891. The student conduct officer conducted a one-hour adjudicative process for Mr. Arishi under the student conduct code. *Id.*

Mr. Arishi's behavior had nothing to do with academics. The behavior which the school sanctioned Arishi for occurred off-campus. *Arishi* did not involve an academic department or faculty making a decision about academic performance. In fact, the behavior alleged in *Arishi* was completely outside the scope of the academic setting and had nothing to do with academic performance. Mr. Nelson's dismissal on the other hand was based entirely upon his failure to meet academic standards after he failed two courses. One of those failures was the result copying another student's work and turning it in as his own, after which the nursing faculty voted to give him a failing grade. Unlike the facts presented in *Arishi*, Mr. Nelson's behavior was squarely within the academic realm, and the decision leading to his dismissal from the academic program was made by academic professionals.

Mr. Nelson argues that the disciplinary due process case *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d (1975), controls the analysis in this case. It does not. *Goss* involved high school students who were suspended for 10 days after participating in a large altercation

involving physical assaults, campus disruption, and property destruction. *Goss*, 419 U.S. at 569-70. Such facts are not analogous to those presented here. Here, the final precipitating event leading to Mr. Nelson's dismissal from an institution of higher education's Nursing Program was failing a class after copying another student's work, turning it in as his own, and responding dishonestly when he was discovered. Mr. Nelson is academically ineligible for the Nursing Program, but can remain part of the College's broader campus community. The College's student conduct officer took no action in this matter but referred Mr. Nelson to the grade appeal process and academic decision makers. Mr. Nelson did not receive any disciplinary sanctions against him that prohibit him from enrolling in other programs on either community college campus. Therefore, *Horowitz*, not *Goss* is the controlling on-point authority. Mr. Nelson was not entitled to an adjudicatory fact-finding hearing.

**4. Mr. Nelson received the necessary due process for an academic dismissal.**

As permitted by both the Nursing Handbook as well as the Nursing 200 syllabus, Professor Sells gave Mr. Nelson a failing grade for violating the academic integrity policy when he copied a classmate's assignment and turned it in as his own. CP 218-219, 305. The Nursing faculty concluded Mr. Nelson's academic performance and lack of honesty to Professor Sells

warranted a course failure. CP 31. Thereafter, Mr. Nelson engaged in the four part academic appeal process articulated in Procedure 4.40.01-A, 7.0 and the complaint process, after which the decision to fail him was upheld. CP 141, 193-95.

The College provided Mr. Nelson with procedural due process through a careful and deliberate process that involved many layers. Mr. Nelson was provided with significantly more opportunity to be heard than simply being informed of the reasons of his dismissal and allowed one opportunity to state his side of the story. Mr. Nelson had two opportunities to explain his actions to Professor Sells. CP 30, 60. Professor Sells conferred with other Nursing faculty before issuing Mr. Nelson a failing grade. CP 30, 60. Thereafter, Mr. Nelson met with the Dean, Dr. Osler, and finally with the Chief Academic Officer and Vice President for Instruction, Ms. Jenni Martin.<sup>5</sup> CP 30, 60, 141. Mr. Nelson submitted and Chief Academic Officer Martin reviewed significant documentation relating to Mr. Nelson's position. CP 69-122. Professor Sells did not make this decision alone. Rather, the decision was based upon the sound professional judgment of many, the Nursing Faculty as a whole, the administrator overseeing the Nursing Faculty, and ultimately the Chief Academic Officer.

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<sup>5</sup> Prior to meeting with Ms. Jenni Martin, Mr. Nelson acknowledged that he had completed the first three steps of the process. CP 67-68, 123.

This multi-layered process led to a final decision to uphold the course failure. CP 141. Because the decision to dismiss Mr. Nelson was academic, no evidentiary or adversarial hearing was required. Nonetheless, the procedure followed by the College provides just the sort of careful and deliberate decision making process approved in *Horowitz*, as appropriate for the context of academic program dismissals.

Mr. Nelson does not contend that he was not provided with process. Nor does he contend the College's academic appeal process set forth in school policy was not followed. RP 8. Prior to enrolling in Nursing 200, Mr. Nelson was aware that he was on academic probation because he had previously failed a course and was allowed to retake it. CP 35, 219, 223. Mr. Nelson was aware that if he should fail another course, he would be dismissed from the program. CP 219. Additionally, Mr. Nelson was provided with sufficient notice of the potential consequences of academic integrity violations, as Mr. Nelson received both the academic integrity policy in the Nursing Handbook as well as the Nursing 200 syllabus. CP 302-06. Both documents clearly address the standards and possible implications regarding a violation of the academic integrity, including the potential for receiving a failing grade in the course. CP 218-19, 305.

The decision to dismiss Mr. Nelson from the Nursing Program was an academic decision that did not require the College to hold a formal

hearing. Instead, it was sufficient for the College to make a “careful and deliberate” decision. The College’s policy/procedure regarding grade appeals provided Mr. Nelson just that. Mr. Nelson was provided with the due process required for an academic dismissal.

**B. Academic Dismissals Are Not Governed by the APA’s Adjudicative Proceedings Requirements.**

The APA does not require that the College provide Mr. Nelson an adjudicative proceeding prior to making an academic decision. The APA requires that an agency provide an adjudicative proceeding when required by law or constitutional right. RCW 34.05.413. Here, it is not required by either. Mr. Nelson identifies no statute that requires an adjudicative proceeding prior to a dismissal from an academic program. As demonstrated in Argument section A, *supra*, the constitutional right to due process does not require a college to provide a fact-finding hearing when deciding whether to dismiss a student from an academic program for reasons related to the student’s academic performance. Mr. Nelson was not entitled to a full adjudicatory proceeding by law or constitutional right, and therefore the college actions were consistent with the APA.

Mr. Nelson relies upon the decisions of *Arishi*, 196 Wn. App. 878, and *Alpha Kappa Lambda Fraternity v. Wash. St. Univ.*, 152 Wn. App. 401, 216 P.3d 451 (2009), as a basis for his argument that the College violated

the APA. Br. of Appellant at 19, 29. These cases are not controlling because neither case involved an academic decision. In *Arishi*, discussed in Section *A supra*, after a student was charged with third degree rape and molestation of a 15 year old girl, the University expelled him for off-campus sexual misconduct. *Arishi*, 196 Wn. App. at 889, 894. In *Alpha Kappa Lambda*, the University found that the Fraternity had violated drug and alcohol policies in violation of the student conduct code, WAC 504-26-304. *Alpha Kappa Lambda*, 152 Wn. App. at 406. The University revoked recognition of the Fraternity for five years for illegal drug and alcohol use and disregard of university policies by fraternity members. *Alpha Kappa Lambda*, 152 Wn. App. at 404. The facts presented in both *Alpha Kappa Lambda* and *Arishi* clearly fall with the disciplinary framework articulated in *Goss* which trigger a disciplinary adjudicatory proceeding.

*Arishi* and *Alpha Kappa Lambda* are distinguishable from this case because, Mr. Nelson was dismissed in an academic process for an academic matter – plagiarizing an assignment after previously failing a course, as authorized by the Nursing Handbook and College policies. And as set forth above, due process does not require that the College provide the formal adversarial fact-finding hearing Mr. Nelson is demanding, and the APA does not require that the College grant Mr. Nelson such a hearing where as here, due process does not require more than what Mr. Nelson received.

Mr. Nelson inaccurately asserts that it is undisputed that he received disciplinary sanctions based on an alleged violation of WAC 132Q-10. Br. of Appellant at 16. At no point during the grade appeal process did the College rely on the Student Code of Conduct as a basis for dismissal. Rather, the College relied on the provisions of the Nursing Handbook and the syllabus when responding to Mr. Nelson's academic performance. Consequently, as Mr. Nelson's dismissal was purely academic in nature, not disciplinary, the APA's adjudicative proceeding requirements do not apply.

**C. The College Did Not Violate the APA When It Dismissed Mr. Nelson from the Nursing Program for Failing to Meet Academic Standards.**

The APA sets forth the procedures that state agencies must provide and the standards for judicial review when agencies engage in two of their key functions: promulgating rules and presiding over adjudicatory proceedings. *See* RCW 34.05.570(2) and (3). RCW 34.05.570(4) provides for review of all other agency action that is not reviewable under subsection (2) or (3). As Mr. Nelson's appeal does not involve a review of the rules or review an agency order in an adjudicative proceeding, it is reviewed as other agency action. RCW 34.05.570(4).

Contrary to Mr. Nelson's arguments (Br. of Appellant at 20-29) RCW 34.05.570(3) does not apply to this analysis as subsection (3) is applicable only when an agency has issued an order in an adjudicative

proceeding pursuant to RCW 34.05.410-.494. Here, the College did not conduct an adjudicative proceeding or issue such an order because this matter was not related to violations of the Student Conduct Code, WAC 132Q-10. Accordingly, subsection (4), review of other agency action, is the only basis in RCW 34.05.570 for a court to review the College's decision not to grant a full adjudicatory proceeding. Because this is an "other agency action" review, the court should reject Mr. Nelson's arguments<sup>6</sup> related to RCW 34.05.570(3)(a)-(i) because these arguments are not within the scope of "other agency action" judicial review.

RCW 34.05.570(4) provides four possible bases to overturn other agency action: unconstitutional, outside the agency's authority, arbitrary or capricious, or taken by unauthorized persons. *Nw. Sportfishing Indus. Ass'n v. Dep't of Ecology*, 172 Wn. App. 72, 90, 288 P.3d 667 (2012) (citing RCW 34.05.570(4)). The burden to show the invalidity of the agency's action is on the party challenging the agency's action. RCW 34.05.570(1)(a). Furthermore, "A court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

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<sup>6</sup> The Court should specifically decline to review RCW 34.05.570(3)(c) "unlawful procedure or decision making process"; RCW 34.05.570(3)(f) "not decided all issues requiring resolution"; RCW 34.05.570(3)(h) "inconsistent with a rule of the agency"; RCW 34.05.570(3)(i) "arbitrary and capricious" as Mr. Nelson's arguments are beyond the scope of court's "other agency action" judicial review. Br. at Appellant at 20-29.

**1. RCW 34.05.570(4)(c)(i): Unconstitutional.**

As discussed in section A, *supra*, the actions of the College were constitutional in that Mr. Nelson was provided with due process through the careful and deliberate grade appeal process. As an academic matter, the more stringent due process requirements articulated in *Goss* and *Arishi* are inapplicable here. Accordingly, a full adjudicatory fact finding was not required. This court should affirm the College's action as constitutional.

**2. RCW 34.05.570(4)(c)(ii): Outside the authority of the agency.**

Mr. Nelson's dismissal from the Nursing Program for failure to meet academic standards was not "unauthorized" as Mr. Nelson contends. Br. of Appellant at 19. Both the course syllabus for Nursing 200 and the Nursing Handbook, which Mr. Nelson was required to review and sign for on a quarterly basis, provide that violations of the academic integrity policy could result in a failing grade for the course. CP 218-19; 305.

Furthermore, institutions of higher education are not required to adopt through APA rulemaking their institutional standards for academic advancement and credit. RCW 34.05.010(16)(iv) (the APA definition of "rule" excludes "rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation, and the granting of degrees"). Mr. Nelson assumes without

citation to legal authority that the College lacks authority to have separate and distinct academic standards established in College policy, the Nursing Handbook, and the course syllabus.<sup>7</sup> Br. of Appellant at 18. The College did not act outside its statutory authority when it declined to give Mr. Nelson a full adjudicatory proceeding following a dismissal from the program on academic grounds.

**3. RCW 34.05.570(4)(c)(iii): Arbitrary or capricious.**

The actions of the College were not arbitrary and capricious as the action taken was with significant regard to the facts and circumstances surrounding the actions. *See State v. Wittenbarger*, 124 Wn.2d 467, 486, 880 P.2d 517 (1994) (“Administrative action is arbitrary and capricious only when it is willful and unreasoning or taken without consideration and in disregard of the facts.”) As discussed previously, Mr. Nelson’s dismissal was academic in nature and the dismissal was guided by the Nursing Handbook and course syllabus. Both the Handbook and the syllabus provide that for violations of the academic integrity policy, a student may potentially receive a course failure. CP 219, 305. Mr. Nelson in turn did receive a course failure. Mr. Nelson, however, was not dismissed due to the underlying conduct, but was dismissed from the Nursing Program based

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<sup>7</sup> In *Arishi*, this Court clearly recognized the distinction between academic and disciplinary issues. *Arishi* at 900-01.

upon his violation of the course failure policy, after he failed two courses. Mr. Nelson knew or should have known that such a potential outcome was possible as he had previously failed a course and was required to review and sign the Nursing Handbook on a quarterly basis.

**4. RCW 34.05.570(4)(c)(iv): Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.**

Professor Sells did not act unlawfully in issuing an academic sanction provided for by the Nursing Handbook. Had Professor Sells issued a sanction under the Student Conduct Code, such action would have been unauthorized. However, the Nursing Handbook and course syllabus contemplates that faculty may issue academic sanctions pursuant to violations of the Handbook and Course Syllabus. CP 193, 279. Furthermore, Professor Sells did not act in isolation as Mr. Nelson contends. Professor Sells reached the decision in coordination with the entire Nursing Faculty. CP 30, 120. Professor Sells' initial decision was ultimately upheld by Nursing Administration and ultimately the College's Chief Academic Advisor. CP 141. As discussed in Section A, *supra*, this Court should grant significant deference and not interfere with academic decisions. *See Horowitz*, 435 U.S. at 90. This Court should decline to establish a burdensome requirement that a college must conduct a fact-finding hearing in order to determine whether a student, such as Mr. Nelson, who first failed

a course, turned in work not his own and then responded dishonestly, is suitable for a nursing degree.

The APA does not require an adjudicative proceeding for academic decisions regarding dismissals. Mr. Nelson's dismissal was academic in nature, and he was provided with a "careful and deliberate" process through the grade appeal, thereby satisfying due process. Consistent with the longstanding holding of *Horowitz*, this Court should continue to grant significant deference to the College's academic decision to issue a grade as well as its decision to dismiss Mr. Nelson from the Nursing Program, and affirm the trial court.

**D. Mr. Nelson Is Not Entitled to Attorney Fees Since the College Was, at a Minimum, Substantially Justified in Its Actions.**

The College should prevail on the merits, and therefore this Court need not address the issue of attorney fees. Even if this Court were to find that Mr. Nelson is entitled to a full adjudicative hearing, the actions of the College are substantially justified and therefore do not warrant an award of fees under the EAJA.

Mr. Nelson request for costs and reasonable attorney fees is based on the Equal Access to Justice Act ("EAJA"), RCW 4.84.340-.360. But EAJA does not permit an award where, as here, the agency action was substantially justified. RCW 4.84.359 ("a court shall award a qualified party

that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees, *unless the court finds that the agency action was substantially justified* or that circumstances make an award unjust”) (emphasis added).

“Substantially justified” means, “justified to a degree that would satisfy a reasonable person.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). An action is substantially justified if it had a reasonable basis in law and fact. *Raven v. Dep’t of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013). It need not be correct, only reasonable. *Id.* (citing *Pierce v. Underwood*, 487 U.S. 552, 566 n.2, 108 S. Ct. 2541, 101 L. Ed. 2d. 490 1988)). Under the EAJA, the agency’s failure to prevail does not create a presumption that its position was not substantially justified. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988); *see also Raven*, 177 Wn.2d at 832.

This Court found that the trial court, not the Court of Appeals, should initially exercise discretion when determining if an action is substantially justified and what, if any fees should be awarded. *Brown v. Dep’t of Social and Health Servs.*, 190 Wn. App. 572, 598, 360 P.3d 875 (2015). Accordingly, this court should not address Mr. Nelson’s request for fees under the EAJA.

If this Court finds Mr. Nelson to be the prevailing party and takes up the issue of attorney fees, no attorney's fees should be awarded, as the College's actions were substantially justified. The College's action to provide an academic appeal process rather than a disciplinary adjudicatory hearing was substantially justified under the case law regarding academic versus disciplinary dismissals when Mr. Nelson's dismissal pertained to his failure to meet academic standards in the classroom. Accordingly, this Court should deny Mr. Nelson's request for attorney's fees if it addresses Mr. Nelson's request under the EAJA.

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## V. CONCLUSION

Mr. Daniel Nelson was dismissed from the SCC Nursing Program for failure to adhere to the academic standards of the Nursing Program. Through the academic appeal and complaint processes provided by the College, Mr. Nelson was provided with a careful and deliberate process that comports with due process requirements. This Court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2019.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I filed the foregoing BRIEF OF THE RESPONDENT with the Clerk of the Court using the electronic filing system and I hereby certify that I have I arranged for hand-delivery the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of September, 2019, at Spokane, Washington.

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