

**FILED**

JUN 28 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30321-7-III

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

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HILLARY BUECHLER,

Appellant,

v.

WENATCHEE VALLEY COLLEGE, a Division of the State of  
Washington, and JENNIFER CAPELO, individually,

Respondents.

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**BRIEF OF RESPONDENTS'**

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ROBERT M. MCKENNA  
Attorney General

Catherine Hendricks  
WSBA No. 16311  
Assistant Attorney General  
Attorneys for Respondents  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104  
(206) 464-7352

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Assistant Attorney General  
Attorneys for Respondents  
800 Fifth Ave., Ste. 2000  
Seattle, WA 98104  
(206) 464-7352

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court correctly dismiss Buechler's procedural due process claims where she received the process required under federal law for a college student in an academic disciplinary proceeding?

2. Did the trial court correctly dismiss all of Buechler's state law claims where she admitted to violating ethical provisions of the nursing handbook and knowingly failed to exhaust her administrative remedies?

3. Did the trial court correctly hold that Buechler had no claim for breach of promise for specific treatment under specific circumstances (as articulated by the Washington Supreme Court in *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d. 1104 (1998)) because Buechler was not an employee of WVC?

4. Did the trial court abuse its discretion when it correctly informed counsel for both parties of its prior relationship with WVC and offered to recuse *without* an affidavit of prejudice?

## II. COUNTERSTATEMENT OF THE CASE

### A. Procedural Posture

Hillary Buechler was dismissed from the nursing program at Wenatchee Valley College (WVC) on August 31, 2009. CP at 351-52. She did not appeal her dismissal to the President of WVC or to WVC's

Academic Regulations Committee (ARC), although she was advised, both orally and in writing, of her right do so. CP at 352.

Ms. Buechler filed the summons and complaint in this case on December 22, 2009. CP at 1-10. Ms. Buechler named WVC and WVC Associate Allied Health Dean Jennifer Capelo, individually, as defendants. Ms. Buechler alleged: 1) that she was negligently dismissed from the nursing program in violation of WVC's disciplinary procedures and requirements; 2) that her constitutional rights to due process and equal protection were violated; 3) that WVC breached the terms of its nursing handbook regarding due process and dismissal; and 4) that WVC was estopped from denying her a degree in nursing. CP at 6-9.

On April 25, 2011, Chelan County Superior Court Judge Lesley Allan noted that she had been assigned Ms. Buechler's case and wrote to advise counsel for all parties that between "about 1990 and 1998, I was an Assistant Attorney General assigned to represent Wenatchee Valley College." CP at 204. Judge Allan advised the parties: "I do not know Ms. Buechler and have no personal knowledge about this case. However, I believe that I know Ms. Capelo, as owner of a quilt store that I frequented. I do not recall the year Ms. Capelo closed her business." CP at 204. Judge Allan went on to state she believed she could be "fair to both sides in this matter" but wrote, in the light of the information she had

disclosed, “[i]f any party desires that I recuse from hearing this matter, I will do so without the necessity of filing an affidavit of prejudice.” CP at 204. Ms. Buechler’s counsel responded on May 2, 2011: “In response to your letter of April 25, 2011, I do not feel the need for you to recuse yourself from hearing this matter.” CP at 43. This letter was filed June 3, 2011. CP at 43.

The parties filed cross motions for summary judgment on May 20, 2011. CP at 19-41, 206-60, 283-383. WVC’s motion argued, in part, that it was entitled to judgment as a matter of law on Buechler’s procedural due process claim because she was dismissed from the nursing program by Marco Azurdia, WVC’s vice president for student development. Mr. Azurdia was not a named party in Buechler’s original complaint.

Ms. Buechler moved to amend her complaint on June 9, 2011, at the same time she replied to WVC’s motion for summary judgment. CP at 44-111, 113-22. She requested that Mr. Azurdia be added as a named defendant. On June 13, 2011, WVC moved to amend its answer, requesting the opportunity to add “waiver” as an affirmative defense. CP at 384-95.

The parties cross motions for summary judgment were noted for June 22, 2011, but the trial court conducted more than one hearing.

CP at 439; RP I (8/12/11), and RP II (8/24/11).<sup>1</sup> The trial court affirmed Buechler's stipulated motion to amend the complaint to add Azurdia and WVC's stipulated motion to amend its answer. CP at 152-53, 439, 440-41. The trial court granted summary judgment to WVC on Buechler's claims for violation of her right to equal protection and promissory estoppel on June 22, 2011. CP at 439; RP I at 2. On August 12, 2011, the trial court dismissed Ms. Buechler's remaining claims against WVC. RP I at 10. The trial court entered the dismissal order on August 24, 2011. CP at 163-66; RP II at 1-29.

Ms. Buechler sought reconsideration. CP at 167-69. After deliberation on Buechler's motion, WVC's responsive pleading, and a fourth oral argument, the trial court denied reconsideration. CP at 194-99, 200-01, 469-75; RP III (9/30/11).

Ms. Buechler filed a timely notice of appeal seeking review by this court. CP at 477-86. She has assigned error to three of the trial court's decisions: 1) its determination that Ms. Buechler failed to establish a constitutional violation, pursuant to 42 U.S.C. § 1983, under the federal law defining the due process owed to college students by administrators in disciplinary proceedings; 2) its determination that Ms. Buechler's failure

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<sup>1</sup> The transcripts of the 8/12/11, 8/24/11, and 9/30/11 hearings make it clear that a hearing was held on 6/22/11 (the date of the original note for motion) and the trial court discusses the rulings made on that date (RP I at 2, CP at 439), but the transcript of that hearing was not requested by Ms. Buechler in her Statement of Arrangements.

to exhaust her administrative remedies barred her state law claims; and 3) its determination that WVC did not breach a specific promise for special treatment to Ms. Buechler under the principles articulated in *DePhillips*, 136 Wn.2d 26.<sup>2</sup> Appellant's Am. Br. at 1. Additionally, Ms. Buechler finds error in Judge Allan's failure to recuse herself where Allan informed the parties she had served as counsel for WVC thirteen years prior to her assignment as the trial judge in this case. Appellant's Am. Br. at 1.

**B. Counterstatement Of Facts**

**1. Buechler's Dismissal Was Based Upon Her Own Well-Corroborated Statements**

Hillary Buechler was a nursing student at WVC until she was dismissed from that program on August 31, 2009.

On August 4, 2009, Dean Capelo received a phone call from the parent of a nursing student who advised her that the student was upset because she had just witnessed Ms. Buechler distributing prescription drugs to two of their fellow nursing students. CP at 378. Later the same day, two nursing students came to Capelo—unsolicited—to tell her the

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<sup>2</sup> Ms. Buechler does not appeal the trial court's dismissal of her equal protection claim and her claim for promissory estoppel. Both were dismissed by the trial court at the hearing held on June 22, 2011. RP I at 2; CP at 439. Ms Buechler did not request reconsideration of the trial court's dismissal of these claims at the time she sought reconsideration of the decisions she now appeals. CP at 167-89.

same thing: earlier that day they had witnessed Buechler giving prescription drugs to two of their colleagues.<sup>3</sup> CP at 378.

After Dean Capelo spoke with the students who had been identified as receiving the prescription medications from Buechler, she contacted Ms. Buechler by telephone. CP at 378. At Dean Capelo's request, Buechler prepared a written statement regarding the events of August 4, 2009. CP at 378-79.

In her statement, dated August 5, 2009, Ms. Buechler describes her actions as follows:

On August 4, 2009 I gave a student before class two Flexeril. She had a migraine and I told her that when I get migraines my muscle relaxers help. Although I am not a doctor, nor am I qualified to issue medications she stated that she had taken them before and want to (sic) so I placed them in her hand. After class in the atrium of the Wenatchi Hall, as I was handing another student a 10 mg. Ritalin pill, I had a student advise me that it was not appropriate to do that and I shouldn't. I responded to that student that it was just a Tylenol feeling that it was not an appropriate time or place to discuss the matter. I felt that since we were good friends it would be more appropriate for us to talk while we were walking to our cars. As I was walking away, I told the student I gave the Ritalin to only take half of it and see how he felt and then to take the other half of it if he wanted to. He had asked me a week prior how it felt to take it and I told him I would let him try it. Again I am not a doctor

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<sup>3</sup> These students also reported an additional incident which they described as occurring in July 2009. Ms. Buechler was reported to have offered a nursing student injectable Toradol to relieve a migraine headache. CP at 378. This incident allegedly happened during a clinical rotation at Eastern State Hospital. CP at 378. Ms. Buechler does not describe this incident in her August 5, 2009, statement. CP at 382. In her deposition, Ms. Buechler affirmed that this incident occurred, but described it as a joke. CP at 325-29. The Toradol incident did not serve as a basis for WVC's decisions regarding Ms. Buechler. CP at 345-48, 377-79.

nor qualified to give prescription medications. My actions were undue and inappropriate.

CP at 382.<sup>4</sup>

Dean Capelo sent all of the student statements regarding Ms. Buechler's actions (including Ms. Buechler's) to Marco Azurdia, WVC's vice president of student development. CP at 379. Because Dean Capelo believed Ms Buechler's actions constituted clear violations of the WVC Student Handbook, the WVC Nursing Handbook, the American Nurses Association Code of Ethics, and the National Student Nurses Association Code of Ethics, Dean Capelo (who is a registered nurse) recommended that Ms. Buechler be dismissed from the nursing program. CP at 355-56, 379. Dean Capelo also reported Ms Buechler's actions to the Department of Health because, at that time, Ms. Buechler was a certified nurse assistant (CNA). CP at 379, 410-14.

Mr. Azurdia met with Ms. Buechler and her present counsel, Scott Kane, on August 31, 2009. CP at 346. In that meeting, Ms. Buechler

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<sup>4</sup> In the stipulation to informal disposition Ms. Buechler entered into with the Department of Health in November 2010, both drugs are described as "controlled substances." CP at 410-11. Flexeril (Cyclobenzaprine) is a muscle relaxant available only by prescription. The Physician's Desk Reference (PDR) advises physicians to take a complete medical history before prescribing Flexeril and warns of interaction with antidepressants, barbiturates, and blood pressure drugs. Ritalin (Methylphenidate) is a central nervous system stimulant often prescribed to treat ADHD (attention deficit hyperactivity disorder) in children and narcolepsy in adults. The PDR warns of "serious heart-related and psychiatric problems in people taking Ritalin and other related stimulants" and advises that Ritalin should not be prescribed for anyone experiencing "anxiety, tension, or agitation." As with Flexeril, the PDR advises physicians to take a complete medical history before prescribing Ritalin. Patients are advised not to drive until they know how they are affected by Ritalin.

affirmed the substance of her written statement, admitting the events that were corroborated by other nursing students. Mr. Azurdia determined that Ms. Buechler's admitted conduct warranted her dismissal from the nursing program, though not from WVC. CP at 346, 355-56. Azurdia informed Buechler (and her counsel) that she was entitled to appeal his decision, both orally and in the letter he wrote to her later that day. CP at 346, 351-52, 355-56.

## **2. Statutory And Regulatory Background For Azurdia's Decision**

Wenatchee Valley College is a public institution of higher education under Title 28B of the Revised Code of Washington. RCW 28B.50.040(15). The college is charged with offering "thoroughly comprehensive educational, training, and service programs to meet the needs of both the communities and students served by combining high standards of excellence in academic transfer courses [and] realistic and practical courses in occupational education." RCW 28B.50.020(2). CP at 378. In order to offer a nursing program, WVC must comply with the standards and curriculum requirements issued by the Washington State Nursing Quality Assurance Commission ("Commission"). The Commission has statutory responsibility for approving curriculum and establishing minimum standards for nursing programs and may only approve nursing programs that meet Title 18.79 of the Revised Code of

Washington. RCW 18.79.110, 18.79.150; WAC 246-840-505. The Commission's stated purpose is to "assure preparation for the safe practice of nursing" and to "assure candidates are educationally prepared for licensure at the appropriate level of nursing practice." WAC 246-840-505(1), (3): To that end, each school of nursing is directed to use sound educational and professional principles for the preparation of registered and practical nurses. WAC 246-840-500. The WVC Nursing program is an approved program that comports with the Commission's guidelines. CP at 378.

**3. Ms. Buechler's Admitted Conduct Violated Provisions Of Both The WVC Student Handbook and The Nursing Student Handbook**

Ms. Buechler received a copy of the Nursing Student Handbook and WVC Student Handbook on August 19, 2008. CP at 337. Her admitted conduct violated several provisions, including:

**WVC 2008-2009 Student Handbook Polices and Procedures; Alcohol and Other Drug Abuse (CP at 98)**

The use, distribution and possession of alcohol by students or employees on Wenatchee Valley College property or as part of college activities is prohibited. The unlawful possession, use or distribution of illicit drugs or alcohol by students or employees on Wenatchee Valley College property or as part of college activities is prohibited.

*"Drugs" means a narcotic drug as defined in RCW 69.50.101, a controlled substance as defined in RCW 69.50.201 through 69.50.212, or a legend drug as defined in RCW 69.41.010. (CP at 373).*

**WVC 2008-2009 Student Handbook Polices and Procedures; Code of Conduct (CP at 100)**

Ethics Violation: the breech (sic) of any generally recognized and published code of ethics or standards of professional practice that governs the conduct of a particular trade, skill, craft or profession for which the student is taking courses or is pursuing as his/her educational goal or major. The ethics codes must be distributed to students as part of an educational program, course or sequence of courses and the student must be informed that a violation of such ethics codes may subject the student to disciplinary action by the college.

Nursing students are also bound by the Nursing Handbook which states:

As students are involved in the clinical and academic environments we believe that ethical principles are a necessary guide to professional development. Therefore within these environments we:

3. Take appropriate action to ensure the safety of clients, self, and others.

...

6. Actively promote the highest level of moral and ethical principles and accept responsibility for our actions.

...

13. Refrain from any deliberate action or omission of care in the academic and clinical setting that creates unnecessary risk of injury to the client, self, or others.

...

15. Abstain from the use of alcoholic beverages or any substance in the academic and clinical setting that might impair judgment. (CP at 360-61).

Additionally, the WVC Nursing Handbook (CP at 352, 364) specifies that “Student Nurses of WVC will be expected to observe and adhere to the American Nurses Association Code of Ethics which provides, *inter alia*:

- The nurse acts to safeguard the client and the public when health care and safety are affected by the incompetent, unethical, or illegal practice of any person.
- The nurse participates in the professional efforts to protect the public from misinformation and misrepresentation and to maintain the integrity of nursing.” (CP at 364).

**4. Ms. Buechler Chose Not To Appeal Azurdia’s Decision Or Contest The Allegations Made By The Executive Director Of The Health Care Assistant Program**

As the WVC Student Handbook provides, Ms. Buechler had the right to appeal Azurdia’s decision to dismiss her from the nursing program. CP at 373-75. Specifically, if Ms. Buechler thought her dismissal from the program was inappropriate, she was entitled to file a written appeal to the Academic Regulations Committee (ARC) outlining the reasons she thought the dismissal was inappropriate. CP at 373-75. Following receipt of the appeal, ARC would have held a formal hearing

and recommended sanctions. WAC 132W-115-130 (quoted in Appellant's Am. Br. at 14). In the alternative, Ms Buechler could also have directly appealed Azurdia's dismissal to the WVC President. CP at 374. The Nursing Handbook describes an appeal process for non-clinical issues which specifically provides that "[s]tudents may appeal any decision they perceive was an unjust action or denied their rights." CP at 355. The handbook specifies that this process be initiated as soon as possible after an incident occurs. CP at 340.

In her deposition, Ms. Buechler stated that she was aware of her right to appeal her dismissal from the nursing program (CP at 334-35) but chose not to appeal:

**Q.** Well, was it your understanding that you could appeal the decision to dismiss you?

**A.** Yes.

**Q.** And did you ever do that?

**A.** No.

**Q.** And why is that?

**MR. KANE:** Objection, calls for a legal conclusion. You may answer.

**A.** That was --

**MR. KANE:** And don't answer it to the extent it calls for attorney/client privilege --

**A.** Right.

**MR. KANE:** Which it probably does, Counsel.

**A.** That was discussed between Mr. Kane and I and we both concluded not to appeal.

**BY MS. PARIEN:**

**Q.** Not to appeal. Okay. Didn't my clients -- and by my clients, I mean Jenny Capelo or Marco Azurdia or anyone else at WVC, tell you, either verbally or in writing, that you had the right to appeal your dismissal?

**A.** Yes, they did.

CP at 434-35.

In November 2010, Ms. Buechler entered into a stipulation to an informal disposition with the Department of Health regarding the allegation that she distributed "controlled substances" in "on at least two occasions" in August 2009. CP at 410-14. She was also represented by her present counsel, Scott Kane, in the Board of Health proceeding. CP at 413. In the stipulation, Ms. Buechler did not admit any of the allegations in the statement of allegations and summary of evidence, but did acknowledge that, "a finding of unprofessional conduct. . .if proven, would constitute grounds for discipline under RCW 18.130.180(4) and (12)." CP at 411. The informal disposition placed Ms. Buechler's credentials to practice as a CNA on probation for twelve months, required her to complete ten hours of pre-approved ethics coursework and pay a \$1,000 fine, and required her supervisor to make quarterly reports "on her practice and professional skills."

### III. ARGUMENT

#### A. Standard Of Review

WVC concurs with Ms. Buechler, in part, regarding the standard of review applicable to this case. This court's review of a case where the facts are "essentially undisputed and the trial court's decision involved only questions of law" is de novo. *Morales v. Westinghouse Hanford Co.*, 73 Wn. App. 367, 370, 869 P.2d 120 (1994). A trial judge's decision to recuse or not is reviewed for abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840, 14 P.3d 877 (2000).

#### B. The Trial Court Correctly Dismissed Buechler's Procedural Due Process Claim Because She Received All Of The Process Required Under Federal Law For A Student Being Disciplined

##### 1. Buechler's Procedural Due Process Claim

Ms. Buechler alleges that WVC and its administrators violated her right to procedural due process when they dismissed her from the WVC nursing program as discipline for violating the ethical tenets of her college and her profession. CP at 120-21, 346, 379. Such a civil rights claim is based upon the Fourteenth Amendment to the United States Constitution and is actionable under 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. . . .

A state, state agency, or individual acting in his or her official capacity is not a “person” for purposes of this statute. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Ms. Buechler’s civil rights claim is, therefore, only cognizable against Jennifer Capelo and Marco Azurdia as individuals.

In order to be entitled to the procedural protections of the Fourteenth Amendment, Ms. Buechler is required to demonstrate that her dismissal from the WVC nursing program deprived her of either a liberty or a property interest. *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 82, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). Protected interests in property are not normally created by the Constitution, rather they are created (and their dimensions are defined) by an independent source such as a state statute or rule.<sup>5</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Procedural due process ensures that the state will not deprive a person of life, liberty, or property unless fair procedures are used in

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<sup>5</sup> In *Goss v. Lopez*, 419 U.S. 565, 574, , 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), the Supreme Court held that state statutes providing a free public education through high school and compelling a student to attend school confer a property interest that may not be taken away without at least minimum due process procedures. As discussed below, those minimum procedures were provided by Capelo and Azurdia. Of course, no Washington statute compels nursing education.

making that decision, while substantive due process guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures are that are used in making the decision. *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998). Both, however, require that there have been a demonstrable deprivation of life, liberty, or property. Ms. Buechler bears the burden of proving that she had an interest (life, liberty, or property) that entitled her to the Fourteenth Amendment's procedural protections. *Larsen v. City of Beloit*, 130 F.3d 1278, 1282 (7th Cir. 1997).

**2. Capelo And Azurdia Provided Buechler With The Procedural Due Process Required In A Disciplinary Proceeding**

Assuming, solely for purposes of argument, that Ms. Buechler had a property interest<sup>6</sup> in her continued education as a nursing student at WVC, her claim against Capelo and Azurdia fails, as a matter of law,

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<sup>6</sup> In *Horowitz*, 435 U.S. at 84, a case concerned with the dismissal of a medical student during her final clinical year, the Supreme Court assumed, without deciding, that the student had either a liberty or property interest in her medical career and then concluded that the student "has been awarded as much due process as the Fourteenth Amendment requires." In this case, the trial court followed the same careful procedure. It assumed Ms. Buechler had a property interest in her nursing career and then evaluated the decision to dismiss her from the nursing program against federal procedural due process standards.

It is less likely Ms. Buechler could establish she had a liberty interest in her nursing career since any stigma that may have attached to her dismissal by WVC did not, ultimately, bar her from a nursing program. See generally, *Horowitz* at 83-85; *Roth*, 408 U.S. at 575. Capelo and Azurdia's actions did not completely foreclose Buechler's freedom to take advantage of other Washington nursing education opportunities.

because the WVC administrators provided Buechler with all of the process they were required to provide when disciplining a student.

Procedural due process does not require WVC or its administrators to provide Buechler with a formal hearing. *Brown v. Li*, 308 F.3d 939, 954-55 (9th Cir. 2002). Capelo and Azurdia satisfied the due process requirements applicable to disciplining a student where they provided Ms. Buechler with notice of the nature of the allegations and their basis, two informal hearings, and the opportunity for give and take; they also gave her the opportunity to characterize her own conduct. *Goss*, 419 U.S. at 581, 584; *Horowitz*, 435 U.S. at 85-86. Stated differently, due process in the student disciplinary context requires “*some* kind of notice and *some* kind of hearing.”<sup>7</sup> *Goss*, 419 U.S. at 579. Even without a formal hearing, so long as the process was careful and deliberate, a student has been provided with sufficient due process to satisfy the Fourteenth Amendment.

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<sup>7</sup> In *Matthews v. Eldridge*, 424 U.S. 319, 349, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1975), the Supreme Court found that procedural due process did not require an evidentiary hearing before the Secretary of Health, Education, and Welfare terminated an individual’s Social Security disability benefits. In its opinion, the Court discussed the numerous cases in which it had considered the extent to which due process required an evidentiary hearing “prior to the deprivation of some kind of property interest,” noting only one case in which the Court held that a “hearing closely approximating a judicial trial is necessary.” *Eldridge*, 424 U.S. at 333-34. The *Eldridge* Court concluded: “These decisions underscore the truism that ‘(d)ue process’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.” 424 U.S. at 334. In the present case, Ms. Buechler drafted a statement in which she admitted the major allegations that had been made against her on August 4, 2009. She knew the students who received the prescription drugs. She knew the students who complained. Under the circumstances, absent a request for the proceeding described in WAC 132W, the federal standards for deprivation of a property interest articulated in *Goss* and *Eldridge* would not have required a formal hearing.

*Brown*, 308 F.3d at 955. Here, it is undisputed that Ms. Buechler received notice of the allegations made against her, an opportunity for informal give and take, and an opportunity to characterize her actions.

Ms. Buechler alleges that WVC failed to follow its own policies when Azurdia disciplined her. WVC does not accept that allegation, but whether or not WVC followed its own published policies is irrelevant to a constitutional analysis of procedural due process. Not every violation of its own rules by an agency violates due process. *Garrett v. Mathews*, 625 F.2d 658, 660 (5th Cir. 1980) (holding that a college could impose a lesser sanction than one mentioned in its handbook). A violation of a published policy results in a constitutional violation only where the procedure used actually violates the constitution. *Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976) (“it is only when agency’s disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions”). Thus, whether or not Buechler was disciplined by Azurdia or WVC’s Academic Regulations Committee is not relevant to the constitutional analysis. The only question before this court is whether the procedures actually followed by Capelo and Azurdia met the basic protections of due process with respect to disciplinary decisions. Under *Horowitz* and *Goss*, Capelo and Azurdia provided Buechler with the

procedural due process required in a disciplinary action. They provided her with notice, two informal hearings, two opportunities for give and take, and an opportunity to characterize her own conduct. Ms. Buechler even had counsel present when she met with Azurdia, clear evidence that she understood the seriousness of the allegations and the meeting. The trial court correctly dismissed Ms. Buechler's procedural due process claim because she received all of the process administrators are required to provide when disciplining a student. *Goss*, 419 U.S. at 581, 584.

Ms. Buechler errs in relying on *Stone v. Prosser*, 94 Wn. App. 73, 971 P.2d 125 (1999), in her discussion of her federal claim. *Stone* specifically states that "federal law, unlike Washington law, does not provide students the right to confront and question adverse witnesses at the expulsion hearing."<sup>8</sup> 94 Wn. App. at 78.

### **3. In The Alternative, Capelo And Azurdia Are Entitled To Qualified Immunity For Buechler's Procedural Due Process Claim**

Because the trial court ruled that Capelo and Azurdia provided Ms. Buechler with the due process required for student discipline under

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<sup>8</sup> Also, as the trial court correctly noted, *Stone* is distinguishable because it is concerned with the right to confront witnesses in a formal expulsion hearing under WAC 180-40-305(2)(c). RP III at 9. Had Ms. Buechler appealed Mr. Azurdia's decision, ARC procedure--and the sections of the Washington Administrative Code applicable to WVC—would have required that the college produce witnesses for cross examination. WAC 132W-115-130 (quoted in Appellant's Am. Br. at 14). Buechler chose not to appeal Azurdia's decision. As discussed below, any state law claim that might have been governed by *Stone* is barred by her failure to exhaust this administrative remedy.

the Fourteenth Amendment, it did not reach the question of whether or not Buechler's claim should be dismissed because the WVC administrators were entitled to qualified immunity. Should this court conclude that Capelo or Azurdia should have taken this matter directly to WVC's Academic Regulations Committee, they request, in the alternative, that this court grant them qualified immunity for Ms. Buechler's procedural due process claim.

Public officers are shielded from liability unless their conduct violates clearly established statutory or constitutional rights and a reasonable official would have known their conduct was not lawful. *Moran v. State*, 147 F.3d 839, 844 (9th Cir. 1998). The qualified immunity doctrine balances the interest in holding public officials accountable and the need to protect public officials from liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The protection is particularly designed to prevent parties from bearing the burden of suit. *Pearson*, 555 U.S. at 237.

The Supreme Court has mandated a two-step process for resolving qualified immunity claims. The court must determine if 1) Ms. Buechler has established the violation of a constitutional right and 2) that the constitutional right was clearly established. *Saucier v. Katz*, 533 U.S. 194,

201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Courts are free to use their discretion in deciding which of the two prongs should be addressed first. *Pearson*, 555 U.S. at 236.

Here, Ms. Buechler fails both prongs of the qualified immunity analysis. As discussed in the preceding sections, she has failed to establish the violation of a constitutional right. But, even if this court were to find Ms. Buechler's right to procedural due process right was violated, she cannot show that right was so clearly established that Capelo and Azurdia would know their conduct violated it. Ms. Buechler bears the burden of showing the alleged violated right was "clearly established" at the time of the violation. *Moran*, 147 F.3d at 844. In fact, the Supreme Court has thus far declined to define the contours of a student's right to higher education. *Horowitz*, 435 U.S. at 84-84 ("We need not decide, however, whether respondent's dismissal deprived her of a liberty interest in pursuing a medical career. Nor need we decide whether respondent's dismissal infringed any other interest constitutionally protected against deprivation without procedural due process."), *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 222-23, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985) ("We therefore accept the University's invitation to 'assume

the existence of a constitutionally protectable property right in [Ewing's] continued enrollment'.")<sup>9</sup>

In this context, where even the U.S. Supreme Court has been unable to articulate the contours of a constitutional right, reasonable state officials like Capelo and Azurdia could not be held to know that their conduct may be violating a constitutional right.

The qualified immunity defense is broad and should afford protection to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Under any interpretation of the facts in this case, Capelo and Azurdia were neither incompetent nor knowingly violating Ms. Buechler's rights. They merely acted upon her own voluntary description of her actions. Accordingly, even if this court were to find that

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<sup>9</sup> Although the major U.S. Supreme Court cases (*Horowitz* and *Ewing*) have "assumed without deciding" that college students have a property right in their education, some courts have specifically refused to find that a college student has a liberty or property right in her college education that would require due process under the Fourteenth Amendment. *Soong v. Univ. of Hawaii*, 825 P.2d 1060 (1992) (Nursing student has no *constitutionally protected right* in continuing enrollment.); *Akins v. Bd. of Governors of State Colleges and Univ.*, 840 F.2d 1371, 1376 (7th Cir. 1988) *cert. granted, judgment vacated on unrelated procedural grounds by Bd. of Governors of State Colleges and Univ. v. Akins*, 488 U.S. 920 (1988), *original decision affirmed as to named plaintiff by Akins v. Bd. of Governors of State Colleges and Univ.*, 867 F.2d 972 (7th Cir. 1988) (State nursing college officials were protected by the doctrine of qualified immunity because they had violated no clearly established constitutional right; after the Supreme Court's decisions in *Horowitz* and *Ewing* a reasonable university administrator would have concluded that a due process right to continued enrollment in a state-sponsored academic program was not clearly established.)

the process in this case was not all that was required under *Goss*, this court should grant Capelo and Azurdia qualified immunity.

Ms. Buechler also cannot complain she failed to receive due process where she failed to request any additional review. WVC's policies provide that Ms. Buechler *could have* appealed any decision she perceived was an unjust action or denial of her rights. CP at 346-47. Ms. Buechler decided not to appeal. It was Ms. Buechler's failure to request further review that led to any possible violation of due process, not any action of Capelo, Azurdia, or the college.

This court should affirm the trial court's dismissal of Ms. Buechler's procedural due process claim, either on substantive grounds or, in the alternative, on qualified immunity grounds.

**C. The Trial Court Correctly Dismissed Buechler's State Law Claims Because She Admitted To Violating Ethical Provisions Of The Nursing Handbook And Knowingly Failed To Exhaust Her Administrative Remedies**

Ms. Buechler chose not to file a written petition with the Academic Regulation Committee to request a formal hearing, although she was advised of her opportunity to appeal by Mr. Azurdia in person and in writing on August 31, 2009. CP at 346-48, 352. Such an appeal was provided for in the outline of the student appeal process for non-clinical issues included in the nursing handbook. CP at 355. Ms. Buechler also did not file a direct appeal of her dismissal to the WVC President.

Ms. Buechler fully understood that she had the right to appeal and chose not to do so. CP at 434-35. The trial court correctly found Ms. Buechler's failure to exhaust her administrative remedies to be a bar to her state law claims. RP I at 8-9.

Exhaustion of administrative remedies is a well founded and long established judicial doctrine barring suits in superior court until a litigant has exhausted their administrative appeals. *S. Hollywood Hills Citizens Ass'n v. King Cnty.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). The principle is founded on the belief that the judiciary should defer to a body with expertise in an area outside the conventional experience of judges. *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). The policy supports several important judicial goals such as protecting the agency's autonomy by allowing it to correct its own errors, ensuring parties use administrative process, allowing the agency to develop a complete record, allowing the agency to apply its expertise, and to provide for a more efficient process to potential litigants and to the agency. *Mt. Vernon*, 133 Wn.2d at 866 (citing *McKart v. United States*, 395 U.S. 185, 193-94, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). The exhaustion of remedies is mandatory where: 1) a claim is cognizable in the first instance by the agency alone; 2) the agency has a mechanism for resolution

of complaints; and 3) the relief sought can be obtained by resort to an adequate administrative remedy. *S. Hollywood Hills*, 101 Wn.2d at 73.

The use of this doctrine is particularly appropriate in the context of a student's challenge to the disciplinary decision of a higher education institution charged with assuring "the preparation for the safe practice of nursing." WAC 246-840-505(1).

In this case, the exhaustion of remedies was mandatory as all three elements of that doctrine are irrefutably present. Ms. Buechler's failure to avail herself of the administrative process is fatal to her suit. Ms. Buechler's litigation against the college is premised on the notion that WVC promised her administrative processes, a promise upon which she relied. But, she cannot dispute the second element of the doctrine—that WVC had a process for resolving disputes. Ms. Buechler could have appealed directly to the President, or she could have filed a written petition directly to the Academic Regulation Committee requesting a formal hearing. CP at 345-48. Ms. Buechler could have obtained full relief through the administrative process. The appeal process could have overturned Azurdia's decision. The administrative process at WVC has been used successfully by many students challenging both academic and disciplinary sanctions up to and including dismissal from the nursing (and other) programs. CP at 345-48. For instance, had she pursued

administrative remedies, she *may* have been placed on probation (in lieu of dismissal), or her dismissal *may* have been for a limited time only. Similarly, had she filed a timely appeal she could have avoided incurring damages. Moreover, even if she had been unable to avoid damages, the administrative process could have provided her with the equivalent to her reliance contract remedy; the ARC has the authority to recommend tuition and fee refunds. CP at 345-48. Accordingly, the doctrine of administrative exhaustion applied in this case and this court should grant summary judgment.

This court should affirm the trial court's dismissal of Ms. Buechler's state law claims on grounds that she failed to exhaust her administrative remedies.

Although it is not necessary to reach the issue, the same result would occur under contract analysis. If the student handbooks constituted an equitable contract, then the resolution procedures in the handbooks must be followed before a court can provide relief. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 146, 890 P.2d 1071 (1995) ("Where an agreement provides for a method of resolving disputes between the parties, that method must be pursued before either party can resort to the courts for relief."). Failure to follow the specified procedures constitutes waiver. *Absher*, 77 Wn. App. at 146 (indicating plaintiff

waived its claim by failing to follow the contract). Here, it is anticipated that Ms. Buechler will claim that she relied on the handbook promises of process, but she failed to follow that promised process. Her request for an appeal is a condition precedent to WVC's obligation to provide additional review. Thus, even under a contract theory, her failure to follow the appellate procedures was fatal to her claim, and dismissal is appropriate.

**D. The Trial Court Correctly Held That Breach Of Promise For Specific Treatment Under Specific Circumstances Was A Claim Limited To Employment Cases**

In *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d at 34-6, following its discussion in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984), the Washington Supreme Court examined the question of whether the promises of special treatment in specific situations, particularly the promises made in employee handbooks, might serve as basis for a justifiable reliance theory, independent of any contractual analysis.

In this case, Ms. Buechler wished to extend the theory—and specifically the concept of “specific treatment in specific situations” to WVC and to the atmosphere created by the WVC student and nursing handbook. Appellant’s Am. Br. at 38-39. The trial court correctly limited *DePhillips* to the employment context, finding no reason to extend the concept of “specific treatment in specific situations” to education because

Ms. Buechler gave no example of such an extension or why it would be warranted. RP I at 9-10.

But, even if this court were to apply *DePhillips* to the circumstances of this case, it is clear that the due process “promise” made in the nursing handbook (CP at 355) does accurately describe the treatment that Ms. Buechler received. The only stage of the process not used (the Academic Regulations Committee) was not requested by Ms. Buechler.

**E. The Trial Court Did Not Abuse Its Discretion When It Offered Recusal At The Request Of Either Party Without An Affidavit Of Prejudice**

Ms. Buechler asserts that Judge Allan erred when she failed to recuse herself because she had previously represented WVC. Appellant’s Am. Br. at 39-40. Buechler accurately describes the substance of Judge Allan’s letter to counsel. Appellant’s Am. Br. at 39-40; CP at 204. And she quotes Judge Allan’s key statement: “[i]f any party desires that I recuse from hearing this matter, I will do so without the necessity of filing an affidavit of prejudice.” CP at 204. She also accurately states the legal standard applicable to recusal: A trial judge’s decision to recuse or not is reviewed for abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840, 14 P.3d 877 (2000).

Ms. Buechler's counsel responded on May 2, 2011: "In response to your letter of April 25, 2011, I do not feel the need for you to recuse yourself from hearing this matter." CP at 43.

Ms. Buechler now characterizes Judge Allan's "statement that she would recuse if requested" as "tantamount to requiring a de facto filing of an affidavit of prejudice by trial counsel, putting Plaintiff's counsel in a Catch-22 set of circumstances." Appellant's Am. Br. at 40.

Ms. Buechler's argument makes no sense. Judge Allan represented WVC thirteen years prior to the decisions she made in this case. If Ms. Buechler's counsel had requested recusal, she would have done so without requiring an affidavit of prejudice under RCW 4.12.050, and with no requirement that counsel demonstrate prejudice.

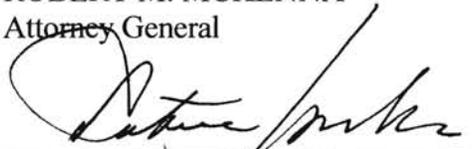
The trial court's request of counsel was not manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). There is no basis for a determination in Ms. Buechler's favor on this claim.

**IV. CONCLUSION**

WVC requests that this court affirm the trial court's well reasoned dismissal of Ms. Buechler's claims.

RESPECTFULLY SUBMITTED this 26th day of June 2012.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Catherine Hendricks", written over a horizontal line.

Catherine Hendricks, WSBA #16311  
Senior Counsel  
Attorney for Respondents  
800 Fifth Ave., Ste. 2000  
Seattle, Wa 98104  
(206) 464-7352

**DECLARATION OF SERVICE**

I declare that I sent for service a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid to:

Scott Kane  
Lacy Kane, P.S.  
PO Box 7132  
East Wenatchee, WA 98802

Email to [jana@lacykane.com](mailto:jana@lacykane.com)

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

DATED this 26th day of June 2012, at SEATTLE, WA.



JENNIFER GARLAND  
Legal Assistant