

**UNIVERSITY OF TORONTO
GOVERNING COUNCIL**

Report # 416 of the Academic Appeals Committee
October 29, 2021

To the Academic Board
University of Toronto.

Your Committee held an electronic hearing, conducted by Zoom on Tuesday, June 22, 2021, at which the following members were present:

Academic Appeals Committee Members:

Ms. Sara Faherty, Chair
Professor Stark Draper, Faculty Governor
Ms. Olivia Batt, Student Governor

Hearing Secretary:

Ms. Carmelle Salomon-Labbé, Associate Director, Office of Appeals, Discipline and Faculty Grievances

For the Student-Appellant:

The Student-Appellant
Mr. Faisal Bhabha, PooranLaw
Ms. Madison Pearlman, PooranLaw

For the Faculty of Medicine:

Ms. Sari Springer, Littler Mendelson

Overview

On March 22, 2021, the Student-Appellant requested a closed hearing because of "the sensitive nature of some of the evidence that may be heard during the hearing." Since the Faculty did not object to this request, the Chair of this Committee granted the request, and the Committee held a closed hearing.

The Student-Appellant appeals the December 10, 2019 decision of the Faculty of Medicine Academic Appeal Committee that affirmed the Board of Examiners' February 26, 2019 decision to dismiss the Student from the General Surgery Residency Program. For the reasons that follow, the appeal is dismissed.

The Student-Appellant's removal from the program was a result of a series of incidents involving four different patients that took place between May 11 and May 13, 2018, at St. Michael's Hospital (cf. "St. Michael's Hospital Report" below). There are several key documents reviewing the incidents that occurred on those three days.

Key Documents

There is a chain of key documents that triggered the Student-Appellant's dismissal. Some are factually intricate and detailed in the explanation of the rationale of the decision-makers, and some are brief. An introduction to these documents follows:

St. Michael's Hospital Report

St. Michael's Hospital conducted an internal investigation of the incidents that occurred between May 16 and June 2, 2018. In the Report, Dr. Marcus Burnstein (Resident Site Coordinator, St. Michael's Hospital), Dr. Najma Ahmed (Division Member, St. Michael's Hospital, Vice Chair Education), and Dr. Nancy Baxter (Division Head, St. Michael's Hospital) concluded there were "serious issues related to patient safety, communication, and professionalism involving [the Student-Appellant]." The investigators interviewed nine medical professionals, including a Staff Intensivist, two Staff Internists, a Staff Surgeon, a Trauma Fellow, a third-year medical resident, a second-year medical resident, a nurse practitioner, and the Student-Appellant himself, whom they interviewed twice.

Residence Program Committee Request

The St. Michael's Hospital Report was presented to the Student's Residence Program Committee ("RPC") in September of 2018. The Residence Program Committee requested the Student's dismissal from the Board of Examiners in a letter from Dr. Fred Brenneman dated November 19, 2018.

Board of Examiners Recommendation

The Board of Examiners met on February 22, 2019 and, in a short letter dated February 26, 2019 and signed by Dr. Jonathan Pirie, accepted the recommendation from the General Surgery Program that the Student-Appellant be dismissed.

Faculty Academic Appeal Committee Decision

The Faculty Academic Appeal Committee met on November 22, 2019. In a letter signed by Dr. Douglas Templeton and dated December 10, 2019, the Faculty Academic Appeal Committee rejected the Student-Appellant's request to be reinstated into the program.

Some of these documents are detailed in their factual analysis and reasoning, others are brief and adopt the reasoning and conclusions of previous decision-makers. The decision under appeal here is the Faculty Academic Appeal Committee's ten-page decision, which accepts and relies on the findings of the St. Michael's Hospital Report.

Proceedings in the Faculty of Medicine and at the Board of Examiners

The Student-Appellant completed his Post-Graduate Year 3 program on May 3, 2018, and was given his rotation schedule seven days later, on May 10, 2018. Three days after that he was taken out of the General Surgery Residency Program, due to a series of incidents involving four different patients that took place between May 11 and May 14, 2018. During this three-day period, there were complaints from several different medical personnel about the care being provided to those patients, and concerns about a verbal exchange between the Student-Appellant and another resident regarding one of those patients.

St. Michael's Hospital conducted an internal investigation of the incidents that took place between May 11 and May 14 promptly: between May 16 and June 2, 2018. Dr. Marcus Burnstein, Dr. Najma Ahmed,

and Dr. Nancy Baxter concluded, “Overall, it is the opinion of the divisional leadership that [the Student-Appellant] i[s] unable to meet competing needs from patients, organize his thinking around various cases, discern urgent from non-urgent, recognize the need for intervention in ill patients, or manage timely, effective, and professional communication about patient care.”

The St. Michael’s Hospital Report was scheduled for presentation to the Student-Appellant’s General Surgery Residency Program Committee in June of 2018. The Student-Appellant requested more time to prepare for that meeting, and it was rescheduled for September of 2018. The Student-Appellant ended up making presentations to that body twice, on September 25, 2018, and again on January 21, 2019. The Residency Program Committee recommended the Student-Appellant’s dismissal to the Board of Examiners. On February 26, 2019, Dr. Pirie informed the Student-Appellant that the Board of Examiners was accepting the General Surgery Residency Program’s recommendation to dismiss him.

Decision

Grounds of Appeal

On November 22, 2019, the Faculty of Medicine’s Academic Appeal Committee heard his appeal of the Board of Examiner’s decision. The Student-Appellant argued his appeal on six grounds.

1. The Faculty of Medicine had not followed its own procedures when it dismissed him for improper conduct.
2. The Faculty did not take into account relevant evidence because it relied on St. Michael’s Hospital Report, which had serious deficiencies and was therefore unreliable.
3. The process in front of the General Surgery Residency Program and the Board of Examiners did not adequately note individual patient records, which the Student believed was necessary in order to determine whether or not he had provided adequate care to his patients. The Student-Appellant also argued that the patient records showed there were other medical professionals involved who made errors in the four cases under review. The Student-Appellant was not satisfied that the patient records and his submissions and analysis of those records were taken into account.
4. The Student-Appellant’s performance was negatively affected by his disability, which was not appropriately accommodated by the Faculty of Medicine. The Student-Appellant had a number of accommodations in place, including that he should be assigned to training sites that offered close mentorship and feedback, test-taking accommodations, and regular follow-up with his treating health care providers.
5. The Student-Appellant’s communication skills were negatively affected by the longer on-call periods and shorter recovery times at the St. Michael’s rotation, and his medications were not optimized.
6. After the St. Michael’s Hospital Report was conducted, the Student-Appellant made requests for a new referral to the Medicine Faculty’s Board of Medical Assessors for an assessment of the optimal medication schedule given the shift schedule at St. Michael’s. This reassessment was not provided.

Appeals to the Academic Appeals Committee of Governing Council focus on whether the division that decided a student’s appeal followed its own policies, and whether it was reasonable. As discussed below, this body also considers the human rights implications as a necessary part of that analysis. The Student-Appellant’s first ground of appeal involves whether the Division followed its policies, the next two arguments involve reasonableness, and the remaining grounds are framed by the Student-Appellant as human rights code violations.

I. Did the Faculty of Medicine Follow its Policies?

The Student-Appellant argues that the Faculty of Medicine did not provide him with its written reasons for dismissing him from the program in a reasonable timeframe. The Student-Appellant cites the “Guidelines for the Assessment of Postgraduate Residents of the Faculty of Medicine at the University of Toronto,” dated March 9, 2017. Section 7.2 of these guidelines establishes that “[t]he recommendation to dismiss a Resident may be made by the Program Director on the Advice of the RPC to the Board of Examiners—PG. The Resident must be informed of the decision in writing. The written statement must include the reason(s) for dismissal.” [Page 429 of Student-Appellant submission.]

The Student-Appellant acknowledges that the guidelines do not include an express deadline for communicating decisions about dismissal to students but argues instead that this implies the decision must be provided within a reasonable amount of time.

The Faculty stressed that this incident is unprecedented. Their efforts to be careful in their review of what took place, and thoughtful consideration about how to treat this extremely unusual set of circumstances, took time. The Faculty of Medicine also points out that some of the delays were a result of the Student-Appellant’s requests for extensions.

The relevant guideline sets forth a requirement for coordinated action by three different actors: the Program Director, the Residents Program Committee, and the Board of Examiners. The need to coordinate with this many people resulted in the timeline for the decision to dismiss the Student-Appellant being crowded.

The incidents that led to the Student-Appellant’s removal from St. Michael’s Hospital happened during the early morning hours of May 12 (case #1), on or about May 11 (case #2), on or about May 12 (case #3) and on or about May 13 and May 14, 2018 (case #4). On the day following the events in case 4, May 15, 2018, Dr. Ahmed and Dr. Marcus Burnstein asked the Student-Appellant to go on a “pause” until an investigation of the four different complaints that had been raised was conducted. The Student-Appellant was placed on a leave of absence on May 16, 2018.

The St. Michael’s Hospital Report was detailed and thorough. The Student-Appellant was interviewed on May 24 and 30, 2018. On June 13th, the written report of investigation was issued to the Student-Appellant.

The Student-Appellant was told that the St. Michael’s Hospital Report would be shared with the General Residency Program Committee on June 26th, and that he had the right to appear at that meeting. The Student-Appellant asked for an extended timeline in which to prepare his response to the Report. There was some discussion about whether the Student-Appellant could receive access to the patient records of the four cases that were the subject of the St. Michael’s Hospital Report, and the Student-Appellant was given access to those patient records in mid-August. He sent his response to the Report to Dr. Brenneman and Dr. Ahmed on September 15, 2018. He appeared before the General Surgery Residency Program Committee and made submissions on the patient records on September 25, 2018. The Committee approved the request for dismissal.

The Student-Appellant met with the Faculty to discuss his status on October 17, 2018. At this meeting, the Student-Appellant was verbally informed of the decision to dismiss him. Dr. Brenneman and Dr. Ahmed told the Student-Appellant, “We discussed your case at length at RPC meetings. We had a vote of the RPC faculty and it was overwhelmingly the majority to recommend to the board of examiners that we submit you for dismissal from the program.” Later in the meeting the Student-Appellant said the decision “was not totally out of left field [.] It was something that I was thinking would be a possibility...” [Page 435 of Student-Appellant submissions.]

The Student-Appellant appeared in front of the RPC on September 25th and was informed of the decision in a meeting on October 17th (22 days after that appearance). He was provided written reasons on November 19, 2018, just over a month from when he was orally informed of the outcome, and 55 days from his appearance in front of the Committee. The Student-Appellant has not indicated that this 55-day delay prejudiced his ability to respond to the decision.

Given the complexity of the case, the need for careful review, and the number of people involved in making this critical decision (all of which safeguarded the Student-Appellant's rights but necessarily complicated scheduling issues) your Committee does not find this time frame to be unreasonable.

We conclude the Faculty of Medicine followed its policies in regard to the decision-making about the dismissal of the Student-Appellant.

II. Was the Faculty of Medicine's Application of its Policies Fair and Reasonable?

The Student-Appellant challenges the fairness and reasonableness of the Faculty of Medicine's decision in two ways. First, he asserts that the Faculty did not take into account relevant evidence because it relied on the St. Michael's Hospital Report, which had serious deficiencies and was therefore unreliable. Second, he is convinced that the process in front of the General Surgery Residency Program and the Board of Examiners did not adequately note individual patient records, which the Student believed were necessary in order to determine whether or not he had provided adequate care to his patients. We will consider each of these grounds in turn.

A. Did the St. Michael's Hospital Report Have Serious Deficiencies?

The Student-Appellant is concerned that his responses and submissions regarding the incidents that occurred between May 11 and May 14, 2018, were not appropriately considered. As noted above, there were several decision-making bodies that considered the Student-Appellant's performance, and they produced several different documents. These documents sometimes rely on, refer to, or incorporate conclusions from each other. Taken as a whole, they are complete and offer a thorough analysis of the incidents that occurred between May 11th and May 14th and the bases of the Faculty's decisions.

The Faculty of Medicine Academic Appeal Committee decision, which is under review here, expressly indicates that it considered the Student-Appellant's written material and the arguments his legal counsel made. The section on the Appeal Committee Findings begins, "The Appeals Committee took into account your Statement of Appeal, the Faculty Response, and the decision of the Board of Examiners." As noted at the outset of this decision, some of the documents in this file are brief and conclusory, others are lengthy and detailed. The St. Michael's Hospital Report, which the Student-Appellant describes as "unreliable," is thirteen pages long. It was prepared by the Resident Site Coordinator of St. Michael's Hospital; the Division Head of St. Michael's Hospital; and the Vice Chair Education, Department of Surgery. They interviewed nine people about the events that took place between May 11 and 14, 2018. Interviewees included a Staff Intensivist from St. Michael's Hospital, two Staff Internists from St. Michael's Hospital, a Staff Surgeon from St. Michael's Hospital, a Trauma Fellow from the University of Toronto; a Year-3 Post Graduate Family Medicine Resident from the University of Toronto; a Year-2 Post Graduate Emergency Medicine Resident from the University of Toronto, a Nurse Practitioner Trauma and Acute Care Surgery team from St. Michael's Hospital, and the Student-Appellant; the Student-Appellant being a Year-3 Post Graduate General Surgery Resident from the University of Toronto.

The Report focuses on four separate episodes that occurred over two shifts that the Student-Appellant worked at St. Michael's Hospital. The Report summarizes, "In each instance, there were significant concerns expressed about the care provided by [the Student-Appellant], and in each case, there were issues extremely pertinent to patient safety including harm that could have come to patients but not for deliberate interventions by others." [page 2 of Report.]

The Resident Program Dismissal Report [pages 138 – 152 of Student-Appellant submission] is made up primarily of the Faculty's request for and documentation of their conclusion that dismissal was warranted. The Student-Appellant is concerned that it references an incomplete set of In Training Evaluation Reports ("ITERS"), however the Report does not claim to include an analysis of every ITERS. Rather, it labels those references as "excerpted comments in ITERS in which relevant weaknesses were identified." It includes quotations from 24 different ITERS. It also includes the Student-Appellant's examination results. There are eight tests listed, three of which were failed, and one of which was not taken. The third section of the Report is the Faculty's Rationale for Dismissal. This section is clearly and unequivocally a summary of the Faculty's perspective on the Student-Appellant's performance.

This document was largely prepared by the Faculty of Medicine. It notes that the Student-Appellant was present at their September 25, 2018, meeting at which they discussed and approved the Faculty of Medicine's request for dismissal, and your Committee notes that there was a second meeting of the RPC which the Student-Appellant attended on January 25, 2019. The Report does not summarize any of the statements that the Student-Appellant made. Rather, it summarizes the reasoning that justified, in its view, the removal of the Student-Appellant. This Committee believes it would be a more complete and better document if it included a section summarizing the Student's counterarguments, but we cannot conclude that the lack of a "dissenting" section means the RPC did not consider the Student-Appellant's points in its deliberations.

The St. Michael's Hospital Report, which the Student-Appellant describes as "unreliable," is 13-pages long. It was prepared by three senior administrators at the Faculty of Medicine: the Resident Site Coordinator of St. Michael's Hospital; the Division Head of St. Michael's Hospital; and the Vice Chair Education, Department of Surgery. The authors of the report interviewed nine people involved in the four incidents. The Report describes the working Trauma and Acute Care Surgery service at St. Michael's as being led by a Year-3 Post Graduate resident (on the days in question that team leader was the Student-Appellant) who directed a team including fellows, junior residents, and nurse practitioners, a service and team that was also supported by a "high level of faculty involvement in patient care."

The Report details the diverse independent sources of the concerns about the four incidents that were raised over these two shifts:

1. An email from a Staff Surgeon about patient #1;
2. An email from the same Staff Surgeon regarding concerns about the Student-Appellant's treatment of patient #2.
3. That email refers to concerns expressed by the Staff Intensivist regarding patient #1;
4. An email from a member of St. Michael's Internal Medicine Staff regarding the Student-Appellant's treatment of patient #3;
5. A senior resident reported to that Internalist that he was upset by his interactions with the Student-Appellant regarding the care of patient #4;
6. A member of St. Michael's Hospital's Internal Medicine Staff regarding the same senior resident's concern about his encounter with the Student-Appellant.

This Report goes into significant detail regarding each of the four separate patient cases. Your Committee is mindful that we do not have the medical expertise to reach conclusions on the medical

appropriateness of the Student-Appellant's actions but are confident that the authors of the report and the medical professionals interviewed have that expertise and defer to their specialized knowledge. We also note the remarks that describe the tension created by the Student-Appellant's performance, and its impact on the learning of others.

The St. Michael's Hospital Report draws on the authors' interviews with the medical professionals who worked with the Student-Appellant on the four patient files; it does not present its analysis in an interview-by-interview organization, but rather breaks into a patient-by-patient analysis, citing different interviewees' remarks and other documents as it discusses each patient. After those summaries, the St. Michael's Hospital Report devotes a separate section of more than two pages to a synopsis of the Report authors' two interviews with the Student-Appellant [pages 11-13 of the St. Michael's Hospital Report]. These pages are broken down into separate sections for each patient, and in each section of the report paraphrases the Student-Appellant's explanations for his behaviour and decisions in each of the four cases. While the summary of the Student-Appellant's responses is not incorporated into the patient summaries drawn from the interviews with the other eight people interviewed, it aligns with them and does not present significant variance on the facts of each case. The Student-Appellant is quoted as saying that one of the cases was "a comedy of errors"; that the follow up communications regarding one patient "went off the rails"; that he did not disagree with the actions ultimately taken by other medical professionals on the team regarding patient care. None of these responses contradict the narrative presented in the earlier summaries. It may have been preferable to incorporate these responses into each separate patient analysis, but it is not accurate to say the Student-Appellant's responses were not included in the St. Michael's Hospital Report.

While a more integrated treatment of each patient case might have better presented the authors' findings, your Committee cannot find that the report did not hear the Student-Appellant's version of what happened.

The Student-Appellant repeatedly points out that another doctor on the floor treating patient #1 made an error in the treatment of patient #1, which the St. Michael's Hospital Report acknowledged. On page six of the report the authors note that the resident who was on call with the Student-Appellant on the night in question indicated that it was her error that patient #1's name did not appear on the sign-out sheet and the Trauma and Acute Care Surgery list.

The report spends much more time focusing on the Student-Appellant's errors, which involves incomplete patient assessment, failure to recognize the life-threatening nature of an illness, lack of documentation in the chart, and lack of clear communication [patient #1]; inadequate response to a post-surgical emergency [patient #2]; misdiagnosis and mismanagement of a life-threatening condition [patient #3], inappropriate management of a patient in the Emergency Department and unprofessional behaviour [patient #4].

While the "lack of documentation" cited in patient #1's case may have been the other resident's responsibility, we know that the three senior medical professionals who prepared this report were aware of this detail, given the note on page six of the report. We can therefore infer that there were other issues regarding documentation, or that the collective severity of all the other errors they described warranted their conclusions despite the error that was duly acknowledged by another member of patient #1's medical team.

The Faculty Appeals Committee decision expressly notes that it "took into account [the Student-Appellant's] statement of appeal." It found that Faculty regulations and procedures were followed in finding the Student-Appellant had engaged in improper conduct. The Faculty Appeals Committee believed the relevant evidence that had been submitted was properly taken into consideration. Finally, it held that the lower decision was supported by evidence, finding that several independent doctors had

concerns with the Student-Appellant's disorganization, knowledge, priorities, and management during his rotation at St. Michael's Hospital. While they acknowledged other professionals may have also made some errors, they pointed out that those errors were not in front of them, and that "there is no evidence that exculpates [the Student-Appellant] from the errors and findings outlined in the SMH report."

Regarding the Student-Appellant's argument that he had not been properly accommodated, the Faculty Appeal Committee determined that there was some evidence that the Student-Appellant may have tried to initiate a change to his accommodations. There is an email to an administrator that was not answered. However, the Faculty Appeal Committee noted that the only evidence of your raising concern is in effort to schedule a meeting while at Michael Garron Hospital." It found that there was good mentorship and feedback at Toronto Western Hospital and at St. Michael's Hospital. The Faculty Appeal Committee especially commented on the frequent contact between the Student-Appellant and the staff surgeon on-call at St. Michael's Hospital during the days between May 11 and May 14, 2018.

Your Committee finds that these decisions adequately considered the arguments made by the Student-Appellant.

B. Did the Faculty of Medicine Unreasonably or Unfairly Refuse to Consider Individual Patient Records as Part of Its Decision to Dismiss the Student-Appellant?

The Student-Appellant has argued that the four medical files that were reviewed by the St. Michael's Hospital Report, stemming from events happening between May 11 and May 14, 2018, are critical evidence that shows his medical decisions were not unsafe for patients, and that they are partly exculpatory because they contain evidence that other medical professionals working on the files made errors on those days. The Faculty has responded that the ultimate positive medical outcomes documented in these files are not relevant to the question of the Student-Appellant's competence, because other medical professionals intervened and were able to change the direction of treatment for those patients. The St. Michael's Hospital Report is the most detailed, close-in-time analysis of the events of May 11 – 14, 2018. It expressly refers to the positive outcomes for patients #1-4, noting "in each case there were issues extremely pertinent to patient safety including harm that could have come to patients *but not for deliberate interventions by others.*"

The Faculty Appeal Committee Letter dated December 10, 2019, found that individual patient records were irrelevant to the analysis, and the fortunate outcomes were a result of other team members intervening to override or correct the Student-Appellant's actions.

The Student-Appellant points out that there were delays in his receiving copies of the records of the four patients who were the subject of the St. Michael's Hospital Report. It seems the Faculty of Medicine was reluctant to provide the detailed private individual medical reports to the Student-Appellant and was unenthusiastic about responding to this line of argument by the Student-Appellant, because it believed these outcomes were irrelevant to the Student-Appellant's case. Nonetheless, in the end the records were provided, and the Student-Appellant was afforded ample opportunity to make his arguments. He appeared before the General Surgery RPC twice, once on September 25, 2018, and again on January 21, 2019. He also met in person with the Program Director and Vice-Dean, Post Graduate Medical Education to present his views, and both of the RPC meetings included the Student-Appellant's submissions on patient records. The Board of Examiners had the patient records in front of them at its February 22, 2019, meeting. Your Committee notes that we, too, were provided with the patient records.

This Committee finds that the Student-Appellant was not barred from presenting his arguments about individual outcomes of the patients he treated as part of his appeal of his dismissal. The decision-makers

in each of these hearings have been free to assign to arguments about ultimate patient outcome as much or as little weight as they deemed appropriate.

III. Did the Faculty of Medicine Discriminate Against the Student in Violation of the Ontario *Human Rights Code*?

The Student-Appellant asserts that your Committee has the jurisdiction to consider the Ontario *Human Rights Code* when considering the Student-Appellant's appeal. The Faculty of Medicine does not disagree. During the hearing the Student-Appellant made the compelling point that "a discriminatory decision can never be reasonable." Your Committee whole-heartedly agrees. For this reason, the University's review of divisional decisions for "reasonableness" rightly aligns with and includes the anti-discrimination mandate of the *Human Rights Code*.

We further note that the University's Policy on Academic Appeals Within Divisions requires divisional processes to be informed by principles of Diversity, Equity, and Accommodation, which also incorporates the view that decisions not discriminate against students on the basis of disability. This Committee's review of the fairness and reasonableness of divisional applications of their policies incorporates the *Human Rights Code*.

The final three of the Student-Appellant's written grounds touch on allegations that the Faculty of Medicine's dismissal of him violates the *Human Rights Code*, and this section will address those grounds.

A. Was the Student-Appellant's Disability Appropriately Accommodated by the Faculty of Medicine?

The Prescribed Accommodations

The Student-Appellant submitted several documents regarding appropriate academic accommodations to the Faculty of Medicine. They include:

1. A letter dated July 12, 2011, from Dr. Timothy Bilkey.

This four-page letter is addressed to Dr. L. Nickell at the Faculty of Medicine and diagnoses the Student-Appellant as having attention-deficit hyperactivity disorder. The letter indicates that the prognosis for the Student-Appellant is excellent, and that he is responding well to medication. It refers to other, nondrug options, including mindfulness, cognitive behavioral therapy, but indicates that "at this juncture [the Student-Appellant]) is doing very well simply on the medication." It ends with a commitment to ongoing treatment, saying "[the Student-Appellant] will be followed by a family physician through Women's College Hospital, and as an adjunct mentor to the Ontario College of Family Physicians I will facilitate his medical management through a consultation liaison with his doctor."

2. A letter dated June 29, 2015, from Dr. Jonathan Pirie, Chair of the Board of Examiners—Post Graduate Programs, addressed to the Acting Vice Dean of Postgraduate Medical Education.

This letter accepts the recommendation of the General Surgery Program at the Faculty of Medicine that the Student-Appellant should enter a period of remediation. It establishes the start of the remediation period as July 1, 2015, with an anticipated end date of April 30, 2016. The letter outlines several modifications to the Student-Appellant's remediation program, including a mentor from General Surgery, a commitment to providing supervisors who give regular feedback, mid-point evaluations and prompt communication and feedback of outcomes to the resident, and regular inventory and verification of feedback and evaluation by the general surgery program administrator.

3. A letter dated March 21, 2016, from Dr. Timothy Bilkey, addressed to the Director of Resident Wellness for Postgraduate Medical Education at the Faculty of Medicine.

This letter begins with Dr. Bilkey thanking Dr. Edwards for referring the Student-Appellant to him. It notes that the Student-Appellant has benefited from appropriate long-acting medication for his attention-deficit hyperactivity disorder, but that in light of his surgical training and the call schedule he had been combining it with a shorter-acting medication for his on-call hours. The combination was effective but proved to have significant side-effects. Dr. Bilkey noted that the symptoms of attention-deficit hyperactivity disorder are context specific, and that in very demanding and stressful environments patients may not necessarily function optimally. However, the letter does also indicate that the medication is currently at the appropriate dosage and that this change, coupled with the Student-Appellant's placement at Trillium Hospital, where he felt he was well mentored, meant he was having a better experience.

In his letter Dr. Bilkey suggested that continuation of rotations at the hospital that the Student-Appellant preferred, i.e., Trillium, would be beneficial, if such a continuation was possible. He also recommended that the Student-Appellant would benefit from ADHD-coaching. As Dr. Bilkey's letter anticipates, having Trillium Hospital serve as an exclusive training site is not feasible as the Faculty does not use the Trillium training site as often as it does other sites. It is not part of the core training program and does not rely on trainees for operational continuity. It does not provide the breadth of competencies and performance demands that a general surgeon must demonstrate and would not be suitable for extensive training of a student.

4. Letter dated April 12, 2016, from Dr. David Tanenbaum, Post Graduate Board of Medical Assessors, to the Faculty of Medicine, copying the Vice Dean of Post Graduate Medical Education and the Director of the Office of Resident Wellness.

This letter indicates that the Board of Medical Assessors is satisfied that the Student-Appellant has been receiving appropriate treatment for his health and recommending that academic accommodations be put in place, including assignment to training sites that can offer close mentorship and feedback; examination accommodations, and regular follow-up with the Student-Appellant's treating health professionals. It suggests that the non-academic coaching, as recommended by the Student-Appellant's doctor, could be reviewed with the Director of Resident Wellness. The letter echoes Dr. Bilkey's suggestion that the Student-Appellant would be well-served if he could return to his preferred rotation, Trillium Hospital, but it recognizes that this "may or may not be possible" and acknowledges that "decisions around training assignments are to be made by the program."

Mentorship

The Faculty maintains that close mentorship and detailed feedback is provided at all of the training sites to which the Student-Appellant was assigned. The suggestion that the Student-Appellant return to the same hospital for his continued training does not comply with an essential element of medical training, and your Committee accepts Dr. Tannenbaum's, Chair of the Post Graduate Board of Medical Assessors', statement that training assignments were to be made by the program.

The Student-Appellant's academic accommodations consistently stressed his need for close mentorship and detailed feedback. This is the accommodation about which the Student-Appellant and the Faculty of Medicine disagree. The Student-Appellant asserts he did not get this, and the Faculty insists that they provided it to the extent possible. The Faculty indicates that it is an essential element of medical education that students rotate through different medical placements, and that keeping the Student-

Appellant exclusively at his preferred site, Trillium Hospital, was not a viable option. They argue, instead, that the Student-Appellant received mentorship and feedback from all of his placements, including the detailed feedback presented in the ITERs.

The Student-Appellant suggested that if an academic performance problem can be traced back to his disability, then the Faculty cannot act on those problems. He believes that to do so is to discriminate against him on the basis of his disability. That is not this Committee's understanding of the Faculty of Medicine's obligation to accommodate students with disabilities. The University has an obligation to put accommodations in place that allow students to meet academic standards, but it is not obligated to disregard or waive those academic standards for students with disabilities. The Student-Appellant submitted documentation to the Faculty suggesting that his disability was under control with medication. Dr. Bilkey's 2011 letter assured the Faculty that he was optimistic about the efficacy of appropriate treatment. The letter noted that even after having been on it for less than two weeks the Student-Appellant had made "remarkable changes" and was capable of "sustained concentration" and was "much calmer and is much less impulsive" and "able to gauge the appropriateness of comments he might make." His 2016 letter also asserted that the Student-Appellant felt he was now properly medicated.

Based on these assurances, even as tempered by the point in the April 2016 letter that indicated context could impair the Student-Appellant, the Faculty provided the prescribed academic accommodations that were intended to allow the Student-Appellant to perform up to the standards of the Post Graduate Medical Education program. It was never the Faculty's obligation nor their intention to jeopardize patient safety by tolerating or ignoring student performance issues that might be related to a disability. Rather, the Faculty continues to believe it was and continues to appropriately accommodate students so they can meet performance standards and safeguard patient safety.

Collaboration

The Student-Appellant argued that the development of his accommodations should have been more collaborative. The Faculty responded that their reliance on, and compliance with, the Student-Appellant's doctor's suggestions to the extent feasible demonstrated the collaborative nature of their accommodation process. The Faculty emphasized that it directed the Office of Health Professions Student Affairs to refer the Student-Appellant to Accessibility Services and the Board of Medical Assessors for an educational and medical assessment. It was the Office of Health Professions Student Affairs that made the medical and educational referrals for the Student-Appellant. It also funded the July 2011 diagnosis of attention-deficit hyperactivity disorder. The Faculty points out that it was the Faculty's Director of Post Graduate Medical Education Wellness's suggestion that the Student-Appellant consult with Dr. Bilkey a second time. They point out that the remediation plan was developed in close consultation with the Student-Appellant.

Your Committee agrees that an ongoing collaboration with students is preferable to occasional points of connection outlined by the Faculty. The continued communication with Dr. Susan Edwards, the Director of the Office of Resident Wellness indicates that her office was involved in the Student-Appellant's accommodations. Dr. Najma Ahmed, Vice Chair of Education, Department of Surgery indicated that she met with the Student-Appellant, which also suggests that he was given opportunities to communicate with the Faculty of Medicine regarding his accommodations. These ongoing relationships are a two-way street. While the evidence presented by the Student-Appellant and the Faculty do not present a closely collaborative, interactive narrative, it is not possible for your Committee to determine whether that was a possibility during the years the Student-Appellant was at the Faculty.

Quantity and Quality of Feedback

The quantity and quality of feedback the Student-Appellant received is copious. The Post Graduate Medical program is essentially apprenticeship learning, and residents receive ongoing verbal and written feedback while they are on the hospital floor. The Faculty of Medicine acknowledged that some ITERs were delayed or missing but asserted that this was often the result of the Student-Appellant not completing his part of the process for generating them.

The pages and pages of completed ITERs that have been submitted document the detailed written feedback the Student-Appellant, and many of the comments refer to oral feedback as well. The Student-Appellant told Dr. Bilkey that he was discouraged by some of the negative feedback he received, especially when it came at the end of a rotation, and he could not incorporate the mentor's comments and adjust his performance during the rotation. This is understandable, of course, but receiving negative feedback and becoming demoralized by it is a different problem from not receiving feedback. The recommendation for more immediate feedback would have been met orally, in real time during shifts. Some of the issues with feedback may have been caused by the Student-Appellant's difficulty in responding to it. Dr. Bilkey's 2016 letter indicates that the Student-Appellant told him he was "not able to benefit from ongoing critique to help him shape his learning." One of the ITERs noted that the author wished to mentor the Student-Appellant, but that he found him to be resistant: "All staff raised many concerns about his overall competency and performance. The general surgical knowledge he applied to clinical situations was disorganized and often incomplete. He at times avoided scheduled one-on-one teaching, often seemed to have an excuse."

The comments in the ITERs create the impression that there was ongoing communication with the Student-Appellant about his performance. The ITERs routinely include affirmations such as the following:

"Were the goals and objectives provided to the trainee?"

"Was mid-rotation feedback provided?"

"The evaluation was completed with input from multiple faculty members?"

"Was 360 degree feedback incorporated into the evaluation?"

And they were signed by multiple teachers/supervisors.

Several specific comments make it clear that the authors of these evaluation reports were sharing their thoughts with the Student-Appellant during shifts:

"We were quite frank and honest with [the Student-Appellant] that we have strong reservation that one day he will be an independent surgeon." [p. 000185]

"I have talked to him at length about this." [p. 000195]

The Student-Appellant acknowledged "I received detailed verbal feedback on my performance at or near the end of this rotation." [p. 000186]

In one instance the Student-Appellant denied having received appropriate verbal feedback. At the end of the ITER from University Health Network-Toronto Western Hospital, for the Block including March and April of 2018, the Student-Appellant wrote:

“I have not received my accommodations as per the BMA recommendations. There was no mid term or end of rotation evaluation meeting. Dr. Penner was not included in the evaluation, despite working the most with him during the rotation. I have already requested a BMA referral for reassessment and optimization on-call, which depends on the RPC decision.” [p. 000204]

This is a serious criticism. We note, however, that this criticism is dated much later than the March and April 2018 block that the Report covers. The Student-Appellant’s comments are dated October 17, 2018, which is months after his removal from the program. There is no evidence that the Student-Appellant pointed these issues out during his rotation or requested a change to his accommodation regime with appropriate documentation when the Student-Appellant asserts the need arose. The Faculty points out that the Student-Appellant requested a new assessment but did not provide any documentation suggesting it was warranted. They also note that the point about medication-related heightened irritability was relevant only to one of the four patient cases under review. Their implicit conclusion is that the first three cases alone justify the Faculty’s actions.

It is your Committee’s view that the Faculty met the accommodations set forth in the Student-Appellant’s letters. It should respond to comments like the October 2018 remark on his ITER when they are made by students currently enrolled in the program and when they have provided sufficient evidence that the request is warranted. When such requests are made after a student has been put on leave, and is no longer currently enrolled, then it may be reasonable to wait to see what the ultimate outcome of the student’s enrollment status will be.

This argument that the Student-Appellant has requested a new assessment and the Faculty failed to accommodate him appropriately by not providing it is addressed further below.

B. Should the Faculty of Medicine have Provided Shorter On-Call Periods to the Student-Appellant? Was his Medication Regime Optimized?

The Student-Appellant has asserted that many of the problems identified in his performance were related to his disability. The attention-deficit hyperactivity disorder diagnosis includes some features that could be related to how a student is judged in terms of professionalism and organisation. Dr. Bilkey’s first letter refers to distractibility, forgetfulness, a tendency to make careless mistakes, and verbal impulsivity. The two parties disagree about the nexus between the Student-Appellant’s disability and his academic performance problems. The Student-Appellant suggests the Faculty Academic Appeal Board’s concerns about his professionalism, his organisation, and his communication skills are veiled references to his disability. The Faculty responds that Student-Appellant’s disability was being treated with medication. There was a question raised about whether the medication was optimized, but the Faculty was told by the Student-Appellant’s doctor that the problem was resolved. The Faculty of Medicine also noted that it has successfully worked with and graduated many students with attention-deficit hyperactivity disorders who did not exhibit the significant performance problems the Student-Appellant had.

Your Committee is not able to rule on whether the Student-Appellant’s medication regime was optimized. It can only be the responsibility of the Student-Appellant to monitor his personal well-being and take steps to optimize his medications. The same issues that led to the Student-Appellant’s removal from the program were identified for years and pointed out in multiple ITERs. If the Student-Appellant believed these issues were related to his disability and could have been improved by adjustments to his treatment, then he was obligated to make those changes. It could not have been the duty of the Faculty of Medicine to optimize his medical treatment. Raising the issue of inappropriate medication after his removal as an explanation for performance that put patients’ safety at risk could justify an application for re-admission, but it does not invalidate the decisions made by the RPC, the Board of Examiners, or the Faculty of Medicine Appeal Committee.

The Student-Appellant asserts that the demanding shift schedule negatively affected his performance. He asserts that irritability and lack of sleep due to the shift schedule at St. Michael's Hospital, which had longer on-call shifts and shorter recovery periods than he was used to, were related to his disability and therefore should have been accommodated.

The Student-Appellant did not have an accommodation regarding shortened shifts or requiring longer breaks between shifts. The Faculty complied with relevant regulations regarding residents' shifts, and it pointed out that this argument, even if there were evidence to support it, would apply to only one of the four incidents that occurred between May 11 and May 14, 2018. The Student-Appellant's irritability was a factor in his treatment of patient #4, but not the other three patients.

Your Committee finds the shift argument was not developed or documented by the Student-Appellant, and it is not possible to find that he should have been given shorter on-call periods. We also believe that the first three of the incidents, even without the final one, could have supported the Faculty's decision.

C. Is the Faculty of Medicine Obligated to Provide the Student-Appellant with a New Referral to the Board of Medical Assessors?

The Student-Appellant raised questions about whether his medication regime was optimized, and this affected his performance. The Faculty of Medicine had documentation, provided by the Student-Appellant, that he was appropriately medicated, and that he was following up with his health care providers.

After the St. Michael's Hospital Report was conducted, the Student made requests for a new referral to the Faculty of Medicine's Board of Medical Assessors for an assessment of the optimal medication schedule given the shift schedule at St. Michael's Hospital. This reassessment was not provided. The Faculty asserted that the Student had not provided any evidence that a new assessment was required, and that new assessments are provided only when there is reason to believe that such an assessment is necessary. It is clear that there was not any ongoing dialogue concerning the Student-Appellant's medication at the time of the incidents that precipitated the Student-Appellant's dismissal. The *post hoc* assertion that the Student-Appellant was not properly medicated is not persuasive to your Committee. The Student-Appellant was consistently under-performing in his rotations and receiving feedback about his failure to meet expectations. Many of his ITERs, or conversations he had with supervising medical professionals, could have made him wonder if there was a nexus between his performance problems and his disability. Your Committee does not have the expertise to come to a conclusion about whether or not that is the case. However, we are of the view that requesting appropriate accommodations is the responsibility of the Student-Appellant and adhering to an appropriate health-care regime is also something that only the Student-Appellant can do. The Faculty's obligation to connect students with appropriate resources was met by the Faculty when it referred him to Accessibility Services and Dr. Bilkey, and it could not have been responsible for monitoring the Student-Appellant's medication regime and coming to conclusions about his medical needs.

The Student-Appellant argues that he repeatedly asked for the Board of Medical Assessors to re-evaluate his accommodation regime, but this was done after the dismissal, and there would be no reason for the Faculty of Medicine to provide this unless he were readmitted to the program.

D. Was the Manner and Timing of the Student-Appellant's Dismissal Appropriate?

During the hearing the Student-Appellant raised several points about the manner in which he was removed from the Post Graduate Medical Education's General Surgery program. The Student-Appellant

correctly argued that the accommodation process should treat students with dignity and respect. Your Committee agrees with this point and will address the issues raised by the student in this section.

The Student-Appellant characterized his removal from the program as a hurried process for which he was not sufficiently prepared. He referred to the decision as a “rush to judgement” and suggested since the dismissal came so early in his rotation (after just a few days) that the treatment could not have been justified.

The Faculty pointed out that the Student-Appellant had been struggling with failed rotations and negative feedback from mentors for years. He was repeatedly informed of his performance lapses. His July 2015 to April 2016 Remediation period was a consequence of his inability to meet program expectations.

During the hearing Dr. Bandiera said the escalation of responsibilities means the stakes get higher as a student progresses through the residency, and there are fewer and fewer personnel above them in the organization, and more and more people below them in the organization. Early on, first year residents are surrounded by more senior residents and doctors who support the newer residents to ensure patients are still safe. As that balance shifts, there are fewer protections in place. In May of 2018 there were a series of near misses that showed it was no longer reasonable to support the Student-Appellant’s ongoing practice.

Importantly, as students move through the Post Graduate program, they are given increasing levels of responsibility. The Associate Dean of the Post Graduate program explained that during his earlier Post Graduate years, the Student-Appellant was a junior member of medical teams. He could observe medical professionals with more experience making decisions and taking actions and he could expect to be quickly overridden or corrected when he made mistakes. In May of 2018, however, this was no longer the case. The Associate Dean suggested that after years of significant performance problems and failures to meet expectations, the Student-Appellant’s level of responsibility had been ratcheted up to a level at which he could not safely function. This escalation of responsibilities meant there were fewer and fewer personnel directing the Student-Appellant, and more and more people that he was responsible for directing.

On one level the Student-Appellant’s removal from the Program may appear to be abrupt, but upon extended consideration of the evidence, we find that it was years in the making. Once the need to remove the Student-Appellant became apparent, it happened quickly because so many patients were put at risk. The doctors on site took quick action early in the Student-Appellant’s rotation in May 2018 due to the escalation of the Student-Appellant’s degree of responsibility and because so quickly so many patients were put at risk.

The Student-Appellant has suggested that prejudice against him due to his disability has led the Faculty of Medicine to pretend to have patient safety concerns, but that those concerns are not real, or not severe enough to warrant his dismissal. The Student-Appellant correctly points out that a decision based on discrimination will never acknowledge that in its phrasing or reasoning. He asked this Committee to infer the discrimination. While your Committee is mindful of the insidiousness of discrimination, it is not willing to make such an inference in these circumstances. Your Committee can only make judgements based on evidence and clearly articulated standards. The Student-Appellant has not marshalled any evidence of prejudice or ill will against him. Instead, there is a detailed and well documented narrative that supports the Faculty’s arguments that the Student-Appellant’s actions and decisions were putting patient safety at risk. The evidence in the ITERs establishes that for years the Student-Appellant was under-performing in this program, failing rotations and receiving feedback that his knowledge, skills, and communication abilities were significantly below where they needed to be.

The written comments in the ITERs, and those made by advisors during the conversations the Student-Appellant had during his time in the General Surgery program often contained suggestions that he consider changing medical fields. The Student-Appellant has argued that these remarks are evidence of prejudice against him. Your Committee is aware that arguing that a candidate for a role is “not a good fit” can be a strategy to cover up bias. It can be a veiled suggestion that the person is different from the current members of a group (in an unspecified way) and should therefore be excluded. This is an insidious practice, and your Committee does not endorse it. However, the evidence in this case supports a different interpretation. First, the remarks were never that the Student-Appellant should leave the Faculty of Medicine, but that given his skill sets he might perform better in a different practice area. These comments are frequently made by mentors who are trying to guide students to successful matches for their talents.

One Faculty comment in an ITER, which was signed by eight teacher/supervisors concludes with:

“Overall, though he is well liked as a person, and he definitely did try his best, based on our experience at TEGH, we did not feel comfortable passing him in all aspects on this rotation and feel he does not meet the expectations of a resident at his level in the major core competencies. We feel he should strongly consider altering his career plan.”

The Student-Appellant argued that the criticism he received from other members of the medical team was a result of negative stereotyping of him due to his disability. The Faculty of Medicine responded that the various medical staff who voice concerns about the Student-Appellant were not aware of his disability. The Student-Appellant then pivoted to a different point, arguing that his colleagues should have been made aware of his circumstances.

This highlights an important issue for people with disabilities—if they disclose their disability, they may be subject to negative stereotyping. If they do not disclose their disability, then they may not have access to heightened understanding. Your Committee believes that this is a troubling conundrum, and that it can only be resolved by individual students, who determine when, whether, and to whom they disclose their private medical information. We conclude that the argument that the medical professionals who voiced concerns about the Student-Appellant’s decisions and behaviour during the shifts in question cannot all have been motivated by stereotypical thinking, since the complainants were not aware of the Student-Appellant’s disability.

This was not a sudden or peremptory dismissal. There were multiple failed rotations in first year; another failed rotation in second year; three failed exams, and more failed rotations in third year. There was an abundance of specific negative feedback, often outlining the same issues.

The Faculty has argued that the Student-Appellant’s lack of insight into the severity of his mistakes, and his continuing insistence that the patients’ ultimate successful outcomes are exonerating are evidence of his irremediability. Your Committee does not endorse this characterization and would hold open the possibility that the Student-Appellant can learn from his experiences and have a successful career in the medical field of his choice. However, the Student-Appellant’s dismissal from the Faculty of Medicine was a reasonable outcome of Faculty policies and was not discriminatory.

Remedies

The Student-Appellant has requested eight remedies:

The first two ask this Committee to find that the Board of Examiners' decision was unreasonable, breached procedural fairness, and was discriminatory. This Committee, in reviewing the Faculty of Medicine's Appeal Committee decision, does not find it to be any of those.

The next three requests are for this Committee to expunge records of the reports that recommended the Student-Appellant's dismissal, expunge the St. Michael's Hospital Report, and expunge any negative evaluations of the Student-Appellant. This Committee does not have the authority to expunge those reports and evaluations.

The sixth request is for monetary damages, which this Committee cannot grant.

The seventh request is for this Committee to direct members of the Faculty of Medicine to undergo disability sensitivity training, including specific training on how to adapt residency requirements to meet the needs of residents with disabilities. Your Committee agrees that ongoing sensitivity training on these issues is important for all divisions of the University, and while we cannot "direct" such training, we would support it.

Finally, the Student-Appellant asks this Committee to order an external review to investigate and report on systemic barriers for persons with disabilities within the Faculty of Medicine. We do not have the authority to order such a review, and do not find evidence to support the argument that such a review would need to be external in order to be valid. Nonetheless, we would support a review of the Faculty's standards, administrative, and communication policies with a view toward improving the experience of students with disabilities.

Conclusion

For the reasons outlined above, your Committee affirms the decision of the Faculty of Medicine's Faculty Council Appeals Committee dated December 10, 2019. The Committee's decision was a reasonable application of policies designed to safeguard patient safety, and there is no evidence of discrimination or bias in the application of these policies to the Student.

The appeal is dismissed.