

Amendments to Senate Regulation 10: Fitness to Study Regulations

From: Professor David Bolton, Deputy President & Provost

Status: Final version for approval

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Executive summary

The OIA has raised concerns that our Fitness to Study Regulations do not follow Sector best practice. It has recommended that we review and amend these in light of the concerns raised. We have considered the OIA's concerns and how they can be most effectively remedied in consultation with the Student Cases Management Forum.

This paper highlights the key issues, and proposes suggested changes to the wording in Regulation 10.

- 43 – Add two new grounds for appeal.
- 29- Add information regarding the burden and standard of proof applied at Fitness to Study Panels.
- 44 - Add information about the burden and standard of proof for appeals against the decision of a Fitness to Study Panel.
- 47 – Amend paragraph to improve signposting to the OIA
- 54 – Amend paragraph to improve signposting to the OIA.

Recommendation(s)

1. *Approve the proposed solutions under general observations 1, 3 and 4.*
2. *Approve the proposed response to the OIA under general observation 2.*

Action(s) required from the Committee:

A. Approve the recommendations

The table below outlines which committees/groups have already seen the report and the resulting outcome/action from discussions.

Committee date	Committee title	Outcome/action	Action date	Paper version number
21.04.2019	Student Cases Management Forum	Approved proposal to amend the appeal grounds	n/a	n/a
18.08.2019	Educational Quality Committee	Approved the proposed amendments	18.09.2019	1
18.09.2019	Academic Governance Committee	Approved proposed amendments to the grounds with a request for	25.09.2019	1

Committee date	Committee title	Outcome/action	Action date	Paper version number
		an amendment to the paper to include further detail on what consideration had been given to OIA good practice.		

Introduction

General Observations

The OIA (in relation to case OIA/627835/18) has made the following good practice recommendation:

“We recommend that the University reviews and amends its policies and procedures regarding the grounds for Fitness to Study appeals. The University should report to the OIA the outcome of its review and any changes it has subsequently made to its procedures within six months.”

In its review the OIA raised concerns that:

- i) the grounds for Fitness to Study appeals are currently limited/unreasonably narrow and not in accordance with good practice guidance, as set out in the OIA’s Good Practice Framework.
- ii) the current process affords a student no right to appeal rejection at initial scrutiny.
- iii) the current process does not explain the burden of proof to be applied.

Based on the OIA’s comments and analysis of good practice within the Sector, we have made the observations below which require approval. We have also been mindful of ensuring continuity/consistency with our other processes.

The OIA requires confirmation of the actions taken to comply with its recommendation.

1) Amendment to the grounds for Fitness to Study Appeals

The OIA’s recommendation to review our grounds stated that:

“It is good practice for an academic appeal to include the following grounds: (a) procedural irregularity, (b) new evidence where there is good reason that it could not be provided earlier, and (c) the decision was unreasonable in light of the available evidence. Cases of fitness to study are intended to be supportive as opposed to punitive. Therefore, it is reasonable to allow students to appeal on each of these grounds.”

Senate Regulation 10: Fitness to Study currently stipulates (Paragraph 43) that:

“A student who is subject to a decision by a Fitness to Study Panel is entitled to appeal that decision but only on the ground that the Panel was not conducted in accordance with these regulations. Dissatisfaction with the outcome does not constitute grounds for appeal.”

Proposed solution: Amend the grounds for appeal to ensure they are in accordance with good practice in the Sector. This would require a change to Regulation 10 paragraph 43 only. No changes would need to be made to the supporting policy document.

The proposed amendments are set out in Appendix A (highlighted).

The addition of two new grounds for appeal would satisfy point (i) raised by the OIA. The re-wording of ground a) from the existing ground would ensure consistency with the grounds used in Regulation 20 – Student Appeals.

Further Commentary

At the Academic Governance Committee on 18 September 2019 the SU President and SU Advice Manager raised their concerns that, whilst they welcomed changes to the Fitness to Study procedure, the additional grounds for appeal did not take into account all those suggested in the OIA Good Practice Framework (GPF), such as those relating to potential bias or outcomes being disproportionate.

The OIA has not yet written a chapter of the GPF specifically for Fitness to Study procedures and the three grounds that were specified in the OIA's decision come from Paragraph 106 of the GPF: Handling Student Complaints and Academic Appeals. Our request for amendments reflects all of these three grounds.

Paragraph 85 of the GPF: Disciplinary Procedures states that:

*"The appeal stage may involve a review of the formal stage, or a complete rehearing of the case. It is good practice to set out the grounds on which a student may appeal. **Those grounds might include** [our emphasis]:*

- *That the procedures were not followed properly; [covered by ground a]*
- *That the decision maker(s) reached an unreasonable decision; [covered by ground c]*
- *That the student has new material evidence that they were unable, for valid reasons, to provide earlier in the process; [covered by ground b]*
- *That there is bias or reasonable perception of bias during the procedure; [can be covered by ground a]*
- *That the penalty imposed was disproportionate, or not permitted under the procedures." [can be covered by grounds c and a]*

It should be noted that the GPF explains that the document "*sets out principles and good practice but does not include prescriptive detail*" and that "*each provider remains free to draft its own policies and procedures*" to meet its own requirements. Our review of good practice in the Sector showed that the grounds of bias and proportionality are not widely set out as separate grounds by most higher education providers in their policies and procedures. Bias, or prejudice on the part of the Panel, is often rolled in to consideration of procedural irregularity and proportionality is often addressed under consideration of the reasonableness of the decision.

In line with the OIA's guidance on procedural fairness, our process takes steps to ensure that panels are free of a reasonable perception of bias. Students are notified in advance who will be attending the meeting, and in what capacity, and asked to notify us if they wish to raise any conflicts of interest with any of the Panel members. We also ask the Panel members to confirm if they believe there to be a conflict of interest with the student. If a concern were raised, we would ask that a delegate be selected who had no previous involvement in the matter. We would therefore expect any potential for bias to be identified in advance of the hearing. However if for some reason it was not, and this was a fault on our part, we are satisfied that a student would be able to raise this, and it could be appropriately considered, under ground a) material error. We will ensure that this is clearly explained in the supporting guidance document.

If the student believed the outcome to be disproportionate on the basis of the evidence, we are satisfied that the student would be able to raise this, and it could be appropriately considered, under ground c) that the decision was unreasonable. If the student believed that the outcome was not permitted by the Regulations, this could be raised and addressed under ground a) material error. We will ensure that this is also clearly explained in the supporting guidance document.

The amendments to the grounds that have been proposed in this paper are the result of our review of good practice in the Sector; consideration of the grounds the OIA stated in its Complaint Outcome that it considered to be good practice for Fitness to Study Appeals; and our consideration of what was proportionate and necessary to allow students a fair basis for appeal. These were discussed at the Student Cases Management Forum and the group agreed that the new grounds proposed were required and useful. No further grounds were put forward at the meeting for consideration.

2) Right to appeal initial scrutiny

The OIA considers, as set out in its Good Practice Framework, that academic appeals should have a formal stage and a review stage. The intention is that during the formal stage the appeal is investigated and an outcome determined. The review is intended to ensure that, in reaching that decision, the procedures were followed and that the decision was fair and reasonable.

The OIA is correct that Regulation 10 does not give students the right to request a review of the decision to reject their appeal following initial scrutiny (point ii). This is the same for appeals under Regulation 13 against the decision of Disciplinary Panels. This is because an appeal against the decisions of those Panels is not an equivalent situation to an appeal against the decision of an Assessment Board.

Fitness to Study is intended to be a supportive procedure for students. This will normally manage or resolve any concerns via preliminary investigation or Level 1 (School-level) action.

The Level 2 Fitness to Study Panel is responsible for investigating concerns that the School has not been able to resolve at Level 1 and to determine the appropriate action to take. Before the Panel reaches its decision, the student is provided with copies of all the supporting documentation; offered the opportunity to submit documentation for the Panel's consideration and invited to attend the Panel's hearing to present their case. Academic appeals require a two-stage process because students do not have the same opportunity to raise any concerns about their case and have them addressed before the Board reaches its decision.

For Fitness to Study and Disciplinary cases, the ability to appeal the Panel's decision is the opportunity to ensure that the procedures were followed and that the decision was reasonable in light of all the available evidence. Initial scrutiny determines whether the appeal demonstrates valid grounds. If it is determined that no grounds have been established, the appeal is rejected. The Student then has the opportunity to take their complaint to the OIA for consideration. We are satisfied that, if new grounds for appeal were introduced, the process would be robust and that it would not be appropriate or necessary to introduce a further stage.

Proposed solution: Amend the grounds for appeal and provide the OIA with an explanation of why our process does not give students the right to appeal rejection at initial scrutiny.

3) Burden of proof

Point (iii) raised by the OIA notes that Regulation 10 does not specify the burden of proof to be applied. The OIA is correct that Regulation 10 does not explain the burden of proof and this could be a cause of ambiguity.

Regulation 10 should be clear that at a Fitness to Study Panel, the “burden of proof” lies with the University for establishing its case that there are valid grounds for concern. The level of proof required is measured using the “balance of probabilities”. If the student appeals the Panel’s decision, the “burden of proof” then shifts to the student to establish the grounds for appeal on the balance of probabilities.

Proposed solution: Amend Regulation 10 Paragraphs 29 and 44 to add this information. No changes would need to be made to the supporting policy document.

The proposed amendments are set out in Appendix A (highlighted).

4) Signposting to the OIA

We have additionally identified that Regulation 10 does not contain adequate signposting to the OIA.

Proposed solution: Amend Regulation 10 Paragraphs 47 and 54 to add this information, in line with other Regulations. No changes would need to be made to the supporting policy document.

The proposed amendments are set out in Appendix A (highlighted).

Appendix A

Fitness to Study Panel

29. The Fitness to Study Panel is responsible for investigating serious concerns about a students' engagement with their studies, and/or their behaviour and/or well-being considered to pose a significant risk to themselves and/or other students, staff or the education and research environment and, is thought to be related to ill-health, disability or learning difference. On completion of its investigation, the Panel will determine appropriate action to take. At a Fitness to Study Panel, the responsibility for proving that there is a valid cause for concern i.e. the "burden of proof" lies with the University and the level of proof required is measured using the "balance of probabilities".

"Burden of Proof:

The "burden of proof" determines whose responsibility it is to prove an issue. In a disciplinary case we would expect the burden of proof to be on the provider, that is, the provider must prove that the student has done what they are accused of doing. The student should not have to disprove the allegation.

Standard of Proof:

The "standard of proof" is the level of proof required. In legal proceedings the standard of proof in criminal cases is normally "beyond reasonable doubt", which is a very high standard. In civil cases it is normally "the balance of probabilities", that is, it is more likely than not that something happened. Although the "balance of probabilities" standard is lower than "beyond reasonable doubt", decisions must still be supported by evidence. The standard is higher than simply believing that something is likely to have happened."

(Office of the Independent Adjudicator (OIA), *The Good Practice Framework, Disciplinary procedures June 2018, Page 23*)

30. The Panel will be scheduled as soon as practically possible following the decision to refer the matter to the Panel.
31. The student will be provided with a brief written notification of the decision to refer the concern to a Fitness to Study Panel normally within 3 working days of the decision.
32. The student will be provided with information normally 14 calendar days in advance of the Panel, including:
- confirmation of the date, time, and location of the Panel;
 - a copy of any supporting documentation (including a copy of the Referral to Fitness to Study Panel Form).
 - who will be attending the Fitness to Study Panel and in what capacity (see Guidance for further details);
 - notice that the student may be accompanied by one other person of their choice and should confirm with the secretary at least 48 hours in advance of the meeting who they will be accompanied by. It is recommended that the student be accompanied by someone other than a City staff member, to avoid the potential for conflict of interest (a representative from the Student Union would be ideal). The student may be accompanied by more than one individual only with the agreement of the Chair.

- The student will be invited to submit documentation for the Panel's considerations – this must normally be submitted no later than seven calendar days prior to the Panel, unless otherwise agreed between the Chair of the Panel and the student.
33. Where the student is not able to attend, or does not notify the Chair that they cannot attend in advance of the meeting of the Panel: at the Chair's discretion the Panel may proceed in the student's absence. If the student cannot attend, refuses to attend, does not respond to invitations to attend or agrees to attend but does not attend without or with very late notice, the meeting may proceed in the student's absence if the staff managing the meeting consider it appropriate to do so. The meeting may be postponed in these circumstances if the staff managing the meeting consider it appropriate. Where a student is unable to attend due to being unable to physically travel to the hearing, but is fit to engage with the meeting, the staff managing the meeting should consider offering alternatives to allow the student to participate in the meeting (for example: telephone conferencing).
34. The Panel will comprise three members of staff:
- Senate nominee, chosen from the list of staff annually approved by Senate to sit on Intuition-level Panels, who will act in the role of Chair;
 - Programme Director of the student's programme (or nominee);
 - Head of Student Counselling and Mental Health (or nominee) or Head of Learning Success (or nominee) or representative of the Student Health Centre (or nominee).
35. The Panel's considerations will include, but not be limited to, the following:
- the Referral to Fitness to Study Panel Form;
 - documentation recording previous actions taken under this Regulation (where relevant);
 - documentation relating to support provided to the student so far (where relevant);
 - representations from appropriate members of staff from the student's host School, and/or another City department – either in person (verbally) or in writing, or both. The Chair will determine whether or not staff are invited to make representations to the Panel;
 - representations from the student – either in person (verbally) or in writing, or both. The student may have another person make representations on their behalf with the agreement of the Chair.
 - Information provided by consultants, where relevant – eg. information provided by experts about the student's mental or physical health condition/disability/learning difference; or staff members with expertise in Tier 4 rules (these consultants do not have a role in the decision-making)
36. The Panel is authorised to agree one or more of the following outcomes:
- i. determine there is no concern that warrants consideration under this Regulation and no further action will be taken under the Fitness to Study Policy;
 - ii. prepare, review or continue an Action Plan with regular monitoring by a member of staff appointed by the Panel;
 - iii. make recommendations for the introduction of, or a change to, agreed reasonable adjustments for a student. Any reasonable adjustments will be agreed and put in place in accordance with the normal reasonable adjustments process;

- iv. endorse the student's decision to interrupt their studies. The student will be referred to the Interruption of Studies procedure;
 - v. determine that a temporary suspension will be applied to the student's registration. The Panel will agree an initial period of time for the suspension, who the contact should be for the student during the interruption, and what the student's registration status is whilst their studies are suspended, and when the suspension will be reviewed and who is responsible for the review and decision as to whether or not the student will be permitted to return and when;
 - vi. determine that the student must be excluded (permanently or temporarily) from a specific aspect of their programme study or City-related activity (e.g. sport team, placement, or other). The Panel will take into account any impact of an exclusion before confirming this decision. This decision will be reported to the relevant School/Service for action;
 - ix. Refer the student to the Occupational Health Service for assessment of their fitness to study (this could be immediately following the Panel meeting, or any time during the student's suspension/exclusion or Interruption of Studies). Where a decision is made that a student should be referred for an OH Assessment, staff responsible for this decision will need to discuss this decision with the student and obtain their consent to make the referral. The student has the right to refuse a referral to the OHS but if this is the case, it should be made clear to the student that a decision about fitness to study will have to be made without full knowledge of what might be genuine mitigating circumstances. The OHS will advise on what (if any) other services should be involved. The OHS may request medical evidence from the student's GP/specialist. The Panel will ensure recommendations for support from OHS are followed up.
 - vii. Determine that there is no appropriate action that can be taken under this Regulation, but refer the concerns regarding the student's behaviour for consideration under Regulation 13 (Student Discipline);
 - viii. Determine that the student must be permanently withdrawn from their programme of study. This decision will be reported to the relevant Assessment Board for noting.
37. The Panel is encouraged to consider potential impact on resources of affected services or individual staff members as a result of its decision, and agree with affected services or individuals that its decision is practical and acceptable.
38. The Panel is responsible for ensuring that follow up actions are clearly defined in the record of the proceedings of the hearing; responsibilities for actions are clearly agreed and recorded; and, where the Panel want to review information/progress of actions at some point in the future, this is clearly decided and recorded and responsibility for this is clearly allocated.
39. Where the outcome means the student will be withdrawn, suspended or excluded, the Fitness to Study Panel is encouraged to note any potential in-direct impacts on the student. The Panel should identify any potential impacts on the student in relation to maximum registration periods, the student's fees (and any fee refunds), student loans, bursaries, grants, visa-related issues (for International students with a Tier 4 visa) and the student's accommodation. The student should be referred to appropriate support services (within City or externally) for guidance and advice in relation to any potential impacts.

40. Where the Panel decision means a change to the student's registration this will be referred to the student's School for action.
41. The Secretary will produce a record of the proceedings of the Panel, including its decision and the rationale for the decision. The meeting of the Panel will normally be recorded in writing and in audio format (audio format held on record only for a period of 21 calendar days - should it be required for an appeal - after which it is destroyed). This will be shared with the student normally within 14 calendar days of the date of the Panel meeting. A student may suggest amendments to this record, but it is at the Chair's discretion whether any amendments to the record will be made. A note of the student's suggestions may be attached to the note as an addendum, at the Chair's discretion.
42. The formal record of the Panel's decision will normally be circulated to the student and relevant staff members, within 14 calendar days of the record being agreed. The Panel may make recommendations for the format in which the note is circulated to the student (and others) to best support the student.

Appeal

43. A student who is subject to a decision by a Fitness to Study Panel is entitled to appeal that decision ~~but only on the ground that the Panel was not conducted in accordance with these regulations.~~ on one or more of the following grounds:
- a) that there was a material error in the proceedings associated with the Panel's decision, which affected that decision;
 - b) that new information has become available, which is material to the Panel's decision, and which could not have been made known to the Panel for a demonstrated, valid and over-riding reason.
 - c) that the decision was not one which the Panel could have reasonably reached on the basis of the evidence presented.
- This is not a re-hearing of the case. Dissatisfaction with the outcome does not constitute grounds for appeal.
44. A written statement setting out the appeal, accompanied by any appropriate evidence, should be submitted to Student & Academic Services within 21 calendar days of the date of the correspondence confirming the Panel's decision. The responsibility for proving that there are valid grounds for appeal against the Panel's decision i.e. the "burden of proof" lies with the student. The level of proof required is measured using the "balance of probabilities".

"Burden of Proof:

The "burden of proof" determines whose responsibility it is to prove an issue. In a disciplinary case we would expect the burden of proof to be on the provider, that is, the provider must prove that the student has done what they are accused of doing. The student should not have to disprove the allegation.

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lower than “beyond reasonable doubt”, decisions must still be supported by evidence. The standard is higher than simply believing that something is likely to have happened.”
(Office of the Independent Adjudicator (OIA), The Good Practice Framework, Disciplinary procedures June 2018, Page 23)

45. The appeal will undergo an initial scrutiny by two members of City staff nominated by the President. This scrutiny will seek to confirm that:
 - i. the statement sets out clearly the basis for the appeal demonstrating potential grounds for appeal; and
 - ii. the claim includes sufficient evidence to support the appeal which can justify further consideration.
46. The student will normally be provided with the outcome of the initial scrutiny within 21 calendar days of the receipt of the appeal.
47. Where the appeal is not considered to include sufficient evidence to support the appeal or provide sufficient justification for further consideration, the appeal will be rejected. The student will be informed of this decision, with reasons, via in a Completion of Procedures (“COP”) letter, as required by the Office of the Independent Adjudicator for Higher Education. Following this, a student who is dissatisfied with the final decision on their case may be able to apply to the Office of the Independent Adjudicator (OIA) for Higher Education. Information and eligibility rules are available at: <http://www.oiahe.org.uk>.
48. Where there is sufficient evidence to merit consideration of the appeal on the grounds set out above, the appeal will be referred to an institutional-level Appeal Panel for further consideration.
49. Where a student’s appeal is referred to an institutional-level Appeal Panel, the student will normally be provided with the following information at least 14 calendar days in advance of date of the Appeal Panel:
 - The date, time and venue of the Appeal hearing. The hearing will be convened within 28 days of the outcome of the initial scrutiny, unless it would be unreasonable or impractical to do so within this period of time;
 - Who will be attending the Panel, and in what capacity;
 - The student will be invited to attend this hearing. It is not required that the student attend – it is for the student to decide if they wish to attend or not. The student may be represented by another individual in their absence only by agreement of the Chair. Where the student declines to attend, cannot attend, does not respond to invitations to attend, fails to attend the hearing without advance notice, the Panel may meet in the student’s absence (under which circumstances, the Panel’s considerations will be based on the student’s written statement of appeal). Where a student is unable to attend due to being unable to physically travel to the hearing, but is fit to engage with the Panel, the Panel should consider alternatives to allow the student to participate in the hearing (eg. telephone conferencing). The student is welcome to be accompanied by one other person of their choice, but they should give at least five working days’ notice of who they will be accompanied by.
50. The Appeal Panel will consist of three members of staff selected from the list of staff approved annually by Senate to sit on institutional-level Panels.

51. A representative of the Fitness to Study Panel will be invited to attend or provide representations to assist the Appeal Panel with its considerations of the appeal. This representative does not form part of the Appeal Panel and will not be present during the Panel's deliberations.
52. The Panel will exhaust its enquiries before coming to a conclusion on the merits of the appeal. The Panel does not need to come to a conclusion on the day of the hearing, and where the Panel do not come to a conclusion on the day, the Appeal Panel will inform the student of the reasons for any additional time required, and an estimate of when a decision may be issued. The follow outcomes are available to the Appeal Panel:
- a. To reject the appeal;
 - b. To refer the matter to a freshly convened Fitness to Study Panel (that is, a Panel with no prior involvement in the matter) for reconsideration.
53. A record of the proceedings of the Appeal Panel, including the decision and the rationale for the decision, will be drawn up. This will be shared with the student normally within 14 calendar days of the date of the Panel. A student may suggest amendments to this record, but it is at the Chair's discretion whether any amendments to the record will be made. A note of the student's suggestions may be attached to the note as an addendum, at the Chair's discretion. The agreed record will be circulated to the student and appropriate staff members, normally within 14 calendar days of the record being agreed.
54. The outcome of this Panel hearing, with reasons, will normally be conveyed to the student within 14 days of the hearing. This decision will be conveyed via **in** a Completion of Procedures ("**COP**") letter ~~(as required by the Office of the Independent Adjudicator for Higher Education)~~. **Following this, a student who is dissatisfied with the final decision on their case may be able to apply to the Office of the Independent Adjudicator (OIA) for Higher Education. Information and eligibility rules are available at:** <http://www.oiahe.org.uk>.
55. An anonymised report of the outcome of the hearing will be reported to Senate.