

Update for
The Law of Higher Education, 5th edition

William A. Kaplin and Barbara A. Lee

With Neal Hutchens and Jacob Rooksby

Note: *The Law of Higher Education, 5th Edition (LHE5th)* was published in July of 2013, and is current through June of 2012. This website provides new developments and errata subsequent to the submission of the 5th edition for publication. It is current as of 12/31/16. Please note that a new edition (*The Law of Higher Education 6th edition*) has been submitted for publication. It should be available by the spring of 2019, and will be current as of 6/20/18.

Chapter I

Overview of Higher Education Law

Section 1.1 How Far the Law Reaches and How Loud It Speaks

A federal trial court has allowed a lawsuit brought by women students, and their mothers, against a sorority at Howard University to go forward. In *Compton v. Alpha Kappa Alpha Sorority, Inc.*, 2014 U.S. Dist. LEXIS 149214 (D.D.C. Aug. 12, 2014), the plaintiffs claimed that the sorority wrongfully denied the students admission, suing for negligence, breach of contract, ultra vires acts, and intentional infliction of emotional distress. They also sued Howard University for tortious interference with contractual relations. The plaintiffs asked for

compensation for medical bills, emotional harm, mental anguish, and loss of prospective economic advantages, as well as punitive damages. When the mothers, who had been members of that sorority during their college years, filed this lawsuit, the sorority withdrew their membership. The mothers' ultra vires claim stated that their loss of membership was in retaliation for filing the lawsuit.

The court ruled that there was no contract between the sorority and either the mothers or their daughters, and thus dismissed the claims against Howard University. The court also dismissed the breach of contract, negligence and intentional infliction of emotional distress claims against the sorority. Finally, the court dismissed the daughters as plaintiffs, but ruled that the mothers could proceed with their ultra vires claims.

Annotated Bibliography:

Olivas, Michael, *Suing Alma Mater: Higher Education and the Courts* (Johns Hopkins University Press, 2013). Describes and analyzes the trends, from the mid-twentieth century onward, that have contributed, and continue to contribute, to increasingly litigious environments in higher education. Studies over 120 U.S. Supreme Court cases involving higher education, and selects six of these cases for extended "case study" treatment. The work largely focuses on cases that did not make it to the Supreme Court and less-publicized decisions but that involve compelling legal issues confronting higher education.

Section 1.2 *Evolution of Higher Education Law*

P. 17: In the first full paragraph, after phrase "accommodation of students with disabilities;" add this phrase: admission and in-state tuition for undocumented applicants and students (see, e.g., Michael Olivas, *No Undocumented Child Left Behind* (NYU Press, 2012)).

Section 1.3 The Governance of Higher Education

Clarification:

This section addresses the governance of public, as well as private nonprofit, higher education institutions. It does not address for-profit institutions, which generally have governance structures and concerns that differ from those of public and private nonprofit institutions. For discussion of for-profit institutions, with pertinent citations, see LHE 5th Section 1.2, pp. 14, 20-21.

1.3.3. External Governance.

Regarding the Tribally Controlled College or University Assistance Act, see also 20 U.S.C. § 1059c.

The external governance of “tribally controlled” colleges and universities is quite different from that for federal and state colleges and universities. The tribally controlled institutions are established by the tribal governments themselves, via charter, and thus are not federal entities as are the Native American postsecondary institutions operated by the federal government. Nor are the tribally controlled institutions entities of the states, even though they have numerous campuses in various states. In short, tribal institutions are controlled by the respective tribes; federal and state colleges and universities are controlled, respectively, by the federal government and by the states.

There are also “nontribal” colleges and universities that serve Native American students, and for which the federal government provides federal funding. See the Higher Education Opportunity Act of 2008, amending the Higher Education Act, Title III, pt. A, §319.

Annotated Bibliography:

Schoss, Patrick, & Cragg, Kristina, eds., *Organization and Administration in Higher Education* (Routledge, 2013). Part I of this book contains six chapters that focus on the “Structure of Institutions” and emphasize both internal and external governance. In particular, see chapter 3 by Kerry Melear on “The Role of Internal Governance, Committees, and Advisory Groups.”

Section 1.4 Sources of Higher Education Law

1.4.2.2 Statutes. Among the provisions of the 2016 Florida Education Access and Affordability act, the law mandates that maximum undergraduate tuition levels for most state colleges and universities are set by the legislature and not the institutions. The law exempts the University of Florida and Florida State University from this requirement. The law also shifts graduate tuition authority from institutions to the board of governors for the university system. Among its provisions, the law also requires textbooks prices be available to students at least 45 days before the start of class. This action is meant to provide students time to find options for obtaining required textbooks that may be less costly. (Scott Travis, “State Takes Steps to Rein in College Tuition, Textbook Costs.” *Sun Sentinel*, March 18, 2016, available at <http://www.sun-sentinel.com/local/palm-beach/fl-college-affordability-law-20160317-story.html>).

1.4.4. The role of case law.

P. 42: At end of the full paragraph, add this footnote:

[Footnote]. For one exception, in which the court provides a helpful extended discussion of the “difference between the extent that [administrators] may regulate student speech in a public university setting as opposed to that of a public elementary or high school.” *McCauley v. University of the Virgin Islands*, 618 F. 3d 232, 242-247 (3d Cir., 2010).

Section 1.6. Religion and the Public/Private Dichotomy

1.6.2. Religious autonomy rights of religious institutions and their personnel. The U.S. Supreme Court’s decision recognizing the right of same-sex couples to marry, *Obergefell v. Hodges* 576 U.S. ___ (2015), may give rise to various legal and policy issues for religiously affiliated colleges and universities. Suppose, for instance, that a state legislature passes a law prohibiting discrimination against persons in same- sex marriages and that religiously affiliated colleges and universities are within the scope of the law. Several rejected faculty applicants sue an institution that had denied their applications, claiming that the denial was based on an institutional policy prohibiting the hiring of faculty applicants who are in same-sex marriages. If the trial court were to uphold the faculty applicants’ claim, would such an application of the new state law violate the religious liberty of the institution?

Or suppose a city’s human relations commission rules that a local religiously affiliated university’s policy of denying married student housing to same-sex married couples violates the nondiscrimination provisions of the city’s human relations ordinance. Would the enforcement of the ordinance against the institution violate its religious liberty?

See LHE 5th pp. 64-66 for discussion of possible challenges to laws and rulings such as those discussed above.

On the other hand, suppose that a religiously affiliated institution has policies – based on religious belief – that prohibit the hiring of faculty applicants who are in a same-sex marriage or deny married student housing to same-sex couples, or that deny other benefits to faculty members or students on religious grounds. Certain faculty members and students seek to challenge these policies, but there is no state statute, ordinance, or other law that they could rely on. The analysis would then be quite different from that in the examples above. There would be no state action (see LHE 5th Section 1.5.2.1, pp. 45-46) and thus faculty members and students could not assert constitutional rights against the institution. Moreover, the institution’s own policies would likely be protected from many court challenges (e.g. a breach of contract suit) of faculty members or students by the institution’s own religious liberty under the free exercise and establishment clauses of the federal Constitution and state constitutions. (See the examples in LHE 5th section 1.6.2., pp. 63-64.)

Chapter II

Legal Planning and Dispute Resolution

2.2 *Litigation in the courts*

2.2.2 *Access to court.*

2.2.2.2. *Other technical doctrines.* A plaintiff must have “standing” to bring a claim before a court, as explained on page 113 of LHE 5th. Plaintiffs seeking to persuade institutions of higher education to divest from investments in certain products have run into the standing doctrine. For example, in *Harvard Climate Justice Coalition et al. v. President and Fellows of Harvard University*, 60 N.E. 3d 380 (Mass App. 2016), students sought a permanent injunction that would require the university to divest the university’s endowment of its investments in fossil fuels. A trial judge had ruled that the students lacked standing to pursue their claim that such investments constituted mismanagement of the university’s endowment because Massachusetts law allocates to the state’s attorney general the discretion to enforce the requirements that public charities, such as the university, must comply with. The Massachusetts Supreme Court affirmed (2016 Mass. LEXIS 919 (Nov. 30, 2016)).

2.3 *Alternative Dispute Resolution*

2.3.3. *Applications to colleges and universities.* On p. 156 of LHE 5th is a discussion of an arbitrator’s authority to award tenure to a faculty member if the arbitrator determines that the college or university violated the faculty member’s contractual rights. Only if the collective bargaining agreement gives the arbitrator the authority to award tenure will a court enforce such a ruling.

In *Massachusetts Community College Council v. Massachusetts Board of Higher Education/Roxbury Community College*, 991 N.E.2d 646 (Mass. 2013), a professor denied tenure at the community college grieved the decision, which then went before an arbitrator. The arbitrator ruled in favor of the faculty member and ordered the college to reinstate the professor and provide him with a second opportunity to be reviewed for tenure. In reviewing the collective bargaining agreement, the Massachusetts Supreme Court refused to enforce the arbitration award, noting that the language of the collective bargaining agreement made it clear that, although the parties could arbitrate a tenure denial, the outcome of the arbitration was not binding.

As noted in LHE 5th (p. 154), arbitration awards are generally not subject to review by a court unless they meet certain criteria, one of which is a violation of public policy. A Pennsylvania appeals court determined that an arbitration award reinstating a faculty member found responsible for engaging in sexual harassment of students violated public policy and thus refused to enforce it. In *Slippery Rock University of Pennsylvania v. Association of Pennsylvania State College and University Faculty*, 71 A.3d 353 (Pa. Cmwlth. 2013), the university had terminated a tenured faculty member and department chair who had made allegedly inappropriate sexual comments to students while intoxicated on a field trip to Spain that he was leading. Although the arbitrator credited the professor's defense that his comments were "trash talk" and not sexually harassing, the court found that several of the arbitrator's findings were not rationally derived from the collective bargaining agreement, and also that given the alleged conduct, which the professor admitted, and an earlier instance of sexual harassment by that individual, reinstating the professor violated public policy.

And the Supreme Court of New Hampshire vacated an arbitration award that would have reinstated a tenured professor who had lowered evaluations that students had given an instructor. In *University System of New Hampshire Board of Trustees v. Dorfsman*, 2015 N.H. LEXIS 132 (N.H. Dec. 23, 2015), the university had terminated the professor on the grounds of moral turpitude—one of the “just cause” reasons for termination in the collective bargaining agreement. Although the arbitrator found that the misconduct did constitute moral turpitude, he determined that the termination did not comport with the requirements of just cause and ordered the professor reinstated. The court ruled that the arbitrator acted beyond the scope of his authority; his finding that the professor’s misconduct constitute moral turpitude required the arbitrator to uphold the termination.

* * * * *

A private, nonprofit college that required its current employees to sign an arbitration agreement as a condition of continued employment was found to have violated the National Labor Relations Act. In *Everglades College, Inc. v. Fikki*, Case 12-CA-096026 (Aug. 14, 2013), the National Labor Relations Board violated Section 8(a)(1) of the NLRA by dismissing Lisa Fikki, a former graduate admissions counselor, for her failure to agree to the arbitration clause that was required of all employees. The Board concluded that the broad language in the arbitration clause, which required employees to submit to arbitration any claim under federal state, or local laws, to implicitly prohibit employees from filing charges under the NLRA. It ordered the college to either withdraw the arbitration requirement, or to revise it to indicate that employees were not prohibited from filing unfair labor practice charges with the NLRB. It also ordered Fikki to be reinstated.

Annotated Bibliography:

Parker, Craig. *Managing Your Campus Legal Needs: An Essential Guide to Selecting Counsel*, 2016 version (NACUA 2016). This monograph describes the roles and responsibilities of attorneys representing a college or university and breaks these roles and responsibilities into three primary functions: counseling, preventive law and compliance activities, and formal dispute resolution. This work is primarily for officers and administrators and for attorneys relatively new to practice of higher education law.

Weeks, Kent. *Managing Campus Conflict Through Alternative Dispute Resolution* (College Legal Information, rev. ed. 2015). Examines systems of dispute resolution on a spectrum from informal to formal systems and discusses the advantages of various types of ADR. Explains how alternative dispute resolution systems work in academic organizations. Includes sample policies and forms.

2.4 Legal Services.

Annotated Bibliography

Weeks, Kent. *Managing Campus Conflict* (described in bibliography for Chapter 2, section 2.3).

Chapter III

The College and Its Trustees and Officers

Section 3.3 Institutional Tort Liability

3.3.2. Negligence

3.3.2.6. Student suicide.

As discussed in LHE 5th, p. 238, some courts have found that a “special relationship” exists between a suicidal student and college and university staff members, which requires institutional representatives to meet a higher standard than the “ordinary care” standard in negligence claims. In *Connor v. Wright State University*, 2013 Ohio App. LEXIS 5988 (Ct. App. Ohio Dec. 24, 2013), the parents of a student who committed suicide sued the university after their son committed suicide by inhaling a lethal dose of helium. Their son, Nathan, had attempted suicide two months earlier; on the second occasion when the university police received an anonymous call that Nathan was preparing to commit suicide by inhaling helium, the police went to his residence and spoke with him. Nathan assured them that he did not plan to commit suicide and that the helium was intended to blow up balloons for a party. The police determined that Nathan was not at risk and left.

Ohio law (R.C. 2743.02(A)(3)(b)) protects state agencies from tort liability by providing for immunity from liability unless there is a “special relationship” between the agency and its agents on the one hand, and the injured party on the other hand. The court determined that the police were performing a “public duty” and then assessed the evidence using a four-part test for a special relationship, which would subject the university to a higher standard of care. Because the court determined that Nathan did not rely on the university to act on his behalf (presumably by

taking him into custody or removing the helium tank), the court found that no special relationship existed.

In a case involving a student attending Gallaudet University in the District of Columbia, the mother of a son who committed suicide sued the university for wrongful death, negligent infliction of emotional distress, false arrest, as well as an ADA claim for failure to accommodate her son's mental health disabilities. *Sacchetti v. Gallaudet University*, 2016 U.S. Dist. LEXIS 52560 (D.D.C. 4/20/16). Although the university was aware that the student had mental health issues, and had attempted to provide him with mental health treatment, the student had refused treatment. Furthermore, no one at the university was aware that the student might intend to commit suicide. The court, citing *Jain, Schiesler, and Shin* (see this section in the 5th edition of LHE), determined that this lack of knowledge could not support a "special relationship" ruling. The court awarded summary judgment to the university on the wrongful death, ADA and emotional distress claims, but denied the defendant's motion for summary judgment on the false arrest claim.

3.3.4. Defamation. An opinion by a state appellate court provides helpful guidance to faculty and administrators in dealing with student academic misconduct. In *Seitz-Partridge v. Loyola University of Chicago*, 987 N.E.2d 34 (Ill. App. 2013), a PhD student was accused of plagiarizing a portion of a written examination and was given a failing grade. She had used phrases and sentences from several scientific journal articles without using quotation marks and, in some cases, without attribution. When she failed a second examination, she was dismissed from the program. She brought a lawsuit, claiming that faculty who graded her examination had defamed her.

The court first established that the plaintiff had, indeed, committed plagiarism and, because the university's policy prohibiting plagiarism did not require an intent to deceive in order to result in a violation, the plaintiff's argument that she did not intend to deceive was unavailing. The court then turned to the plaintiff's claim that the negative comments made about her performance on the examination were false and defamatory. The court characterized these comments by faculty who had graded her examination as opinions, which are not subject to defamation liability. Because the plaintiff could not meet the state law definition of defamation, the court affirmed summary judgment for the university and the individual defendants.

In *Morrison v. Chatham University*, Civil Action No. 16-476, 2016 U.S. Dist. LEXIS 121227 (W.D. Pa. Sep. 8, 2016), the plaintiff, an African-American woman, graduated from college with distinction and earned a master's degree in counseling psychology. In 2009, she enrolled as a student at Chatham University to obtain a doctoral degree in the subject. After her initial success and progress in the program, the plaintiff allegedly was denied benefits that were given to similarly situated white students and was allegedly disparaged based upon her race. When the plaintiff complained about this treatment, professors and administrators allegedly retaliated against her by falsely accusing her of plagiarizing a draft paper. Without affording the plaintiff a hearing, Chatham University dismissed her from the doctoral program. An email was sent to certain faculty, and a notation made in the plaintiff's official transcript, that the plaintiff had received an F for plagiarism in a course and had been dismissed from the university.

The plaintiff sued the university on April 20, 2016. Her amended complaint asserted three claims against the university: (1) violation of 42 U.S.C. § 1981; (2) breach of contract, and (3) defamation. The university moved to dismiss the defamation claim only, on the basis that the plaintiff *did* receive an F for plagiarism, and *was* dismissed from the university, as the plaintiff's

own amended complaint made clear. The court granted Chatham University's motion to dismiss the defamation claims.

Courts are finding that traditional defamation law may not provide complete relief for individuals who believe they have been defamed via social media. A faculty member sought to uncover the identities of anonymous commentators on an online site known as pubpeer.com. *Sarkar v. Doe*, 2016 WL 7108569, Nos. 326667, 326691 (Mich. Ct. App. Dec. 6, 2016). The faculty member claimed that the forwarding of comments on the site led to the withdrawal of the offer of a faculty position at the University of Mississippi. Following the withdrawal of the position, the individual was able to retain a position at his previous institution, Wayne State University, but as an untenured professor. An incident also occurred at Wayne State in which a flyer was distributed that contained a screenshot from the pubpeer.com site. Reversing the lower court in part, the Michigan Court of Appeals held that the faculty member was not entitled to information regarding the anonymous postings, such as IP addresses. The court discussed that for many of the comments cited by the faculty member, he failed to explain the underlying science in relation to why the statements were defamatory, which he, and not the court, operated under the burden to do so. For other statements, the court decided that the comments in question offered opinions or were otherwise not defamatory in nature. The court also rejected an argument by the professor that the statements should be considered in their totality to establish defamatory meaning. According to the court, the professor was not entitled to information to learn the identity of anonymous commentators simply because they were critical of his work.

Section 3.4 Institutional Contract Liability

A North Carolina state court ruling provides a good reminder of the importance of ensuring compliance with contractual obligations, particularly when dealing with students whose academic programs require a clinical assignment. In *Supplee v. Miller-Motte Business College, Inc.*, 768 S.E.2d 582 (Ct. App. N.C. 2015), a student enrolled in a surgical technology associate degree program. Although he was told, both orally and in writing, that a criminal background check was required for all students in that program, no criminal background check was performed until the student had nearly completed his classroom work and was ready to be assigned to a clinical site. At that point the criminal background check was performed and the plaintiff was informed that he could not be placed because of his criminal record. A jury found for the student on his breach of contract claim and awarded him over \$50,000 for “wasted tuition” and foregone income. The college appealed, and the court ruled that there was sufficient evidence of breach of contract to justify sending the case to the jury.

Section 3.5. Institutional Liability for Violating Federal Constitutional Rights (Section 1983 Liability)

Sec. 3.5.2. Eleventh Amendment immunity. In *Doe v. Ohio State University*, 2016 U.S. Dist. LEXIS 154179 (S.D. Ohio Nov. 7, 2016), the plaintiff John Doe enrolled in the Ohio State University (OSU) College of Medicine in 2011. Doe decided to pursue a joint degree program which included an MBA from the Fisher School of Business. He was scheduled to graduate with both degrees in May 2016.

In July of 2014, Doe and another OSU student, Jane Roe, were involved in a sexual encounter. There is a dispute about whether the interaction was consensual, although Roe did not notify OSU officials at the time. On March 23rd of the following year, Jane Roe received a

letter from OSU telling her that she potentially faced dismissal from the College of Medicine program, due to her academic performance. Roe reported her alleged sexual assault by Doe to OSU officials two days later. On April 21, 2015, OSU notified Roe that she would be permitted to repeat the first year of medical school.

Subsequent disciplinary proceedings arising out of the sexual encounter between Doe and Roe resulted in Doe's dismissal from the university. Throughout the disciplinary hearing, Jane Roe's academic records were not included in the hearing packet of evidence. In his lawsuit against OSU and several individual administrators, Doe claimed that if he had been permitted access to Roe's academic records, he could have used them to impeach Roe's credibility in the following two ways: (1) to refute her statement that she only reported the incident after the university's decision to allow her to repeat her first year of medical school, and (2) to answer a panel member's question about whether Roe had any incentive to fabricate her story. OSU argued, in response, that FERPA prohibited it from providing John Doe or his counsel with copies of Roe's academic records.

Doe made several arguments in support of his position that OSU had to disclose his accuser's academic records to him. First, he argued that established Supreme Court precedent imposes an affirmative duty on criminal prosecutors to disclose evidence favorable to a defense. However, the court declined to extend the proffered precedent to civil matters, much less student disciplinary proceedings. Second, Doe argued that OSU could disclose educational records in the context of university disciplinary hearings without violating FERPA. The court disagreed with this argument, noting that FERPA only permits disclosure of the "final result" of a disciplinary hearing. Third, Doe argued that OSU could have simply redacted the records to eliminate all of Jane Doe's personally identifiable information, thereby allegedly preserving her

anonymity. The court rejected this argument as well, concluding that “releasing Jane Roe’s academic records to Doe—even redacted versions—would violate FERPA,” as Doe obviously would know the identity of the student to whom the redacted records related.

Setting issues of FERPA aside, and given the flexibility of the Due Process Clause, the court agreed with Doe that it is plausible that his right to effectively cross-examine his accuser was effectively denied by OSU’s failure to turn over critical impeachment evidence contained in Roe’s educational record. The court therefore denied OSU’s motion to dismiss, ruling that additional discovery would be required to determine whether four OSU administrators, sued in their personal capacities, were entitled to qualified immunity.

Chapter IV

The College and Its Employees

Section 4.5 Collective Bargaining

4.5.2. The public-private dichotomy in collective bargaining.

4.5.2.3. Bargaining in religiously-affiliated institutions. The National Labor Relations Board has released a decision that has implications for all private sector colleges and universities, although the institution at issue is religiously-affiliated. In *Pacific Lutheran University and Service Employees International Union, Local 925*, Case 19-RC-102521 (December 16, 2014), the Board, in a 3-2 decision, ruled that contingent faculty at Pacific Lutheran University were protected by the NLRA and could unionize. The opinion addressed two issues:

1. What is the standard for determining whether the Board should decline to exercise jurisdiction over a religiously-affiliated university because of the potential for entanglement with the First Amendment's Establishment Clause, and
2. What factors are significant in determining whether faculty have "managerial status" and thus do not have the protections of the NLRA.

With respect to the first issue, the majority created a two-part test, stating that they were following the teaching of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (discussed at pp. 322-23 of LHE 5th). First, the college must show that it "holds itself out as providing a religious educational environment." Should the college make such a showing, then the college must "show that it holds out the petitioned-for faculty members as performing a religious function . . . [that] those faculty perform[] a specific role in creating or maintaining the university's religious educational environment."

In the case of Pacific Lutheran University, the majority found that the university did hold itself out as providing a religious educational environment. But the majority found no evidence that the contingent faculty who were attempting to unionize performed any religious function for the university. Faculty were not required to be Lutheran or be familiar with the tenets of that religion, and with the exception of faculty in the religion department, they did not teach courses with religious content.

With respect to the second issue in the case, the majority reviewed the Supreme Court's ruling in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), which is discussed in Section 6.3.1 of LHE 5th. Please see that section in this Update for discussion of this aspect of the *Pacific Lutheran* case.

4.5.2.4 Bargaining at public colleges. On p. 328 of LHE 5th, there is a brief discussion of legislative attempts in Wisconsin to strip public employees of their collective bargaining rights. Although a state appellate court ruled in 2013 that the law violated portions of the state's constitution, the state's supreme court reversed. In *Madison Teachers v. Scott Walker et al.*, 851 N.W. 2d 337 (Wisc. 2014), the court rejected the plaintiffs' contentions that the law violated both the U.S. and Wisconsin constitutions' freedom of association protections. The court said that "the constitutional right to freedom of association of 'general employees' was not infringed upon by the Act; collective bargaining remained a creation of legislative grace and not constitutional obligation, and the First Amendment could not be used as a vehicle to expand the parameters of a benefit that it did not itself protect."

4.5.3. Organization, recognition, and certification. The U.S. Supreme Court was asked to address a challenge by teachers in California to the agency fee they were required to pay to their labor union. As discussed on pages 331-333 of LHE 5th, the Supreme Court has permitted unions to extract “agency fees” from employees who are members of the bargaining unit. The fees are to be used for the expenses of representing bargaining unit members in collective bargaining, grievance hearings, and so on. Employees can request the return of the portion of the agency fee that the union uses for political activities.

In *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), an evenly divided Court issued a per curiam opinion that, in effect, upheld the decision of the U.S. Court of Appeals for the Ninth Circuit that the Supreme Court jurisprudence in *Abood* (discussed on p. 331) would not be overruled (2041 U.S. App. LEXIS 24935 (9th Cir. 11/18/14)). According to an organization that supported the litigation, the Center for Individual Rights (CIR), the litigation strategy was to move the case quickly to the Supreme Court. According to the CIR, “From the beginning, CIR argued that the lower courts do not have the authority to overturn existing Supreme Court precedent. As a result, we asked the trial court and the Ninth Circuit Court of Appeals to decide against our clients on the basis of the pleadings (without trial or oral argument) so as to send the case on to the Supreme Court as quickly as possible. The Supreme Court is the only forum that can vindicate the First Amendment rights of our clients and other teachers.” But the death of Justice Scalia left the court with only eight members, and, at least for the time being, the law is unchanged.

4.5.6 Students and collective bargaining. A regional director of the National Labor Relations Act has upheld the request of football players at Northwestern University to form a union and bargain with the administration. In *Northwestern University and College Athletes Players Association*, Case 13-RC-121359 (March 26, 2014), the regional director ruled that the players were employees of Northwestern University because they received scholarships from the University as a form of compensation for the services they provided playing football, not simply as financial aid. The regional director noted that the compensation only was given if the football player was a member of the team and was in good standing. He also stressed the amount of control over the players' time and activities exercised by the football coach and staff. He distinguished the *Brown University* case (LHE 5th, p. 348) because the faculty do not supervise the football activities of the players, and they are not required to play football to obtain a college degree, as Brown's graduate students were required to perform teaching or research as part of their graduate program. This ruling was on appeal as of mid-February 2015.

On August 17, 2015, the full Board rejected the decision of the Regional Director and declined to assert jurisdiction over the Northwestern University football players' case, although it refused to extend its decision to all college football players at private colleges and universities (362 NLRB No. 167). The Board explained that "asserting jurisdiction in this case would not serve to promote stability in labor relations" because all of the other football teams in the Big Ten were at public universities, and thus were not subject to the National Labor Relations Act. It distinguished college football players from other students whom had been found to be employees, such as graduate assistants or student cafeteria workers. It cited the "substantial degree of control" exercised by the NCAA over the "operations of individual member teams, including many of the terms and conditions under which the scholarship players (as well as

walk-on players) practice and play the game.” Finally, it noted that the NCAA had already initiated reforms, such as allowing teams to grant four-year scholarships, that improved the financial and educational opportunities for football players.

In late December of 2014, the Michigan legislature enacted and the governor signed a law specifically providing that students “participating in intercollegiate athletics on behalf of a public university” are not public employees for purposes of collective bargaining. 2012 Public Act 349, amending MCL 401 *et seq.* The law also excludes “a graduate student research assistant or [those serving] in an equivalent position”; and “any individual whose position does to have sufficient indicia of an employer-employee relations using the 20-factor test announced by the [I]nternal [R]evenue [S]ervice.”

* * * * *

The National Labor Relations Board may be revisiting its prior ruling in *Brown University* (discussed on p. 348 of LHE 5th). Teaching assistants and other student employees at The New School have petitioned the Board to assert jurisdiction and find that they are employees who are entitled to organize under the NLRA. In the fall of 2015, a majority of the Board rejected a regional director’s order dismissing the students’ petition, agreeing to review the petition. This review could result in a reversal of Board precedent in the *Brown University* decision, in which the Board ruled that the students were not employees, but students. The New School, Employer and Student Employees at The New School-SENS/UAW, Petitioner, Case 02-RC-143009, 2015 NLRB LEXIS 771 (October 21, 2015).

4.6. Other employee protections

4.6.1. Occupational Safety and Health Act. In *Platt v. Kansas State University*, 379 P.3d 362 (Kan. 2016), Platt was hired by Kansas State University as an accounting specialist in September 2011, and placed on an initial 6-month probationary period customary for new hires. Platt soon began to experience health problems that she associated with poor air quality in her workspace on campus. After complaining to her supervisor, she learned that her predecessor also had experienced similar health issues and had complained about the environment of the office.

When the university later determined that problems did indeed exist with the ventilation system in Platt's office, Platt requested that the university fix the problem. A meeting was arranged between Platt and an industrial hygienist to further evaluate the issue. Platt's employment was terminated the same day as the meeting. The university claimed the termination was for excessive absences; Platt countered that any absences were mainly a result of her work-related health issues. Her firing on March 7, 2012, came two weeks before the end of her probationary period.

Platt sued the university and argued that her employment termination was wrongful and in retaliation for her potential claims under the Kansas Workers Compensation Act (KWCA). She asserted she performed her job satisfactorily and that her firing occurred because of the university's discovery that she had an occupational disease connected with the air quality of her office. The university filed a motion to dismiss. It argued the district court did not have subject matter jurisdiction over Platt's suit because her claims were governed by the Kansas Judicial Review Act (KJRA), which required her to exhaust all administrative remedies made available by the university before judicial review could begin. The district court granted the university's

motion to dismiss on the grounds that the administrative process could have accommodated her claim and granted to her the fundamental relief sought, e.g., reinstatement.

A panel of the Court of Appeals reversed the district court. The Court of Appeals held that Platt's petition stated a prima facie claim for retaliatory discharge. She alleged that the university knew she was suffering from ill health as a result of the working conditions it provided. She further alleged that because of this ill health, and in anticipation of her possible worker's compensation claim, the university ended her employment. The Court of Appeals noted that the KJRA does not govern a challenge to an agency action that claims retaliatory discharge from employment, and that the university's motion to dismiss should therefore not have been granted. The Court of Appeals remanded the case for further proceedings.

4.6.2. Fair Labor Standards Act. On May 23, 2016, the U.S. Department of Labor published a revised rule, "Final Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," which significantly changed the calculation of which employees are subject to the overtime provisions of the FLSA. The final rule raised the salary level, below which an employee is entitled to be paid overtime for work beyond 40 hours in one week, from \$455 per week to \$913 per week (which is the equivalent of \$47,476 per year). The new rule was to become effective on December 1, 2016. However, a federal trial court issued a preliminary injunction, preventing the new rule from going into effect. *State of Nevada v. U.S. Department of Labor*, 2016 U.S. Dist. LEXIS 162048 (E.D. Tex. 11/22/16).

The U.S. Department of Labor's Wage and Hour Division has issued "Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act." (<https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>). The Guidance addresses

common questions such as the treatment of postdoctoral fellows and reminds readers that teachers whose primary duty is teaching are not affected by the final rule because they are specifically exempt from the salary level requirement (29 C.F.R. 541.303(d), 600(e)). It also notes that athletics coaches at colleges and universities may qualify for the teacher exemption if their primary duties are “instructing student-athletes in how to perform their sport,” but warns that coaches whose primary duty is recruiting students to play on athletics teams would not be categorized as “teachers.” For additional information on the new FLSA rule and strategies for compliance, see the American Council on Education’s Issue Brief, “U.S. Department of Labor Issues FLSA’s New Overtime Rule,” at <http://www.acenet.edu/news-room/Documents/Issue-Brief-DOL-Overtime-Rule-052516.pdf>. And for specific advice on compliance for athletics department staff, see “Payment of Coaches and Athletic Trainers under Federal Law,” issued by the NCAA and CUPA-HR (the College and University Personnel Association for Human Resources) at https://www.ncaa.org/sites/default/files/AWFIN_White-Paper-Exempt-Status-of-Coaches-and-Trainers_20160520.pdf.

* * * * *

In recent years there has been a flurry of lawsuits brought by interns against companies for which they worked without compensation. In some cases the interns were college students, while in other cases they were college graduates. The interns claimed that they were, in fact, employees as defined in the Fair Labor Standards Act (FLSA), and that they should have received at least the FLSA minimum wage for their work.

In *Glatt et al. v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015), a federal trial court had awarded partial summary judgment to the plaintiffs, ruling that they were employees under the FLSA. In analyzing the plaintiffs’ claims, the court used a six-factor test

that the U.S. Department of Labor created in 1967 specifically to evaluate whether or not interns were employees. Although the test was not a regulation, the Department used it as guidance in reviewing claims by interns. The factors are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

DOL, Wage & Hour Div., Fact Sheet #71, Internship Programs Under The Fair Labor Standards Act (April 2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> .

The DOL guidance states that the internship must meet all six factors in order for the position to be classified as unpaid. The trial court found that the internships at issue did not meet the first four factors, and thus did not exempt the positions from the requirement of being paid. 293 F.R.D. 516 (S.D.N.Y. 2013).

The defendant appealed the award of partial summary judgment, and the appellate court vacated the ruling and remanded the case. The appellate court ruled that the trial court had used the incorrect standard to evaluate whether or not the plaintiffs should be classified as employees. The court did not defer to the Department of Labor's six factor guidelines, stating that they were

derived not from an interpretation of “ambiguous statutory terms,” but from a distillation of a Supreme Court ruling in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), a case involving brakeman-trainees. Finding the DOL’s factors “too rigid,” the appellate court created its own test: “whether the intern or the employer is the primary beneficiary of the relationship.” The appellate court then constructed seven “considerations” to test the “primary beneficiary” theory:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship. (791 F.3d at 384).

The appellate court instructed the trial court, on remand, to evaluate the relationship based upon these seven considerations.

A second federal appellate court waded into the student-intern conflict, and ruled that the Department of Labor's traditional test for whether or not an intern was actually an employee was not binding on that court or others. In *Schuman v. Collier Anesthesia and Wolford College*, 803 F.3d 1199 (11th Cir. 2015), 25 nurse-anesthetists who had completed unpaid internships as part of their master's degree professional at Wolford College training sued the internship site and the college, claiming that they should have been paid for their time spent working at the internship site. The trial court, following the U.S. Department of Labor guidelines noted above, entered summary judgment for the internship site and college. The students appealed, and the U.S. Court of Appeals for the Eleventh Circuit vacated the trial court's judgment and remanded the case for trial.

Although the appellate court agreed that the "primary beneficiary" test was the appropriate one in this case, it noted that the DOL's test had been developed from a U.S. Supreme Court case involving railroad workers, whose facts had little relevance to "the primary beneficiary of a modern-day internship for academic credit and professional certification." Referencing with approval the factors developed by the Second Circuit in *Glatt*, discussed above, the court explained the difficulty of determining whether the internship site or the students were the primary beneficiary of the work experience:

[O]ur dilemma arises in determining how to discern the primary beneficiary in a relationship where both the intern and the employer may obtain significant benefits. We think that the best way to do this is to focus on the benefits to the student while still considering whether the manner in which the employer implements the internship

program takes unfair advantage of or is otherwise abusive towards the student. This orientation allows for student internships to accomplish their important goals but still accounts for congressional concerns in enacting the FLSA. [803 F.3d at 1211]

The court declined to determine whether the interns were protected by the FLSA under these circumstances and remanded the case to the trial court for a full analysis.

For a discussion of litigation involving unpaid internships, see David C. Yamada, “The Legal and Social Movement Against Unpaid Internships.” 8 *Northeastern Univ. Law J.* 357 (2016).

4.6.4. Family and Medical Leave Act. The U.S. Department of Labor has issued a final rule to inform employers and employees that same-sex married couples are eligible for the FMLA’s protections. The final rule revises the definition of “spouse” and makes additional changes to clarify an employee’s eligibility for FMLA leave. The final rule may be found at 80 Fed. Reg. no. 37 (February 25, 2015).

4.6.8. Whistleblower protections. A state appellate court has upheld the dismissal of a whistleblowing lawsuit against Johns Hopkins University. In *Yuan v. Johns Hopkins University*, 135 A.3d 519 (Md. Ct. Spec. App. 2016), the plaintiff, a researcher at the university’s medical school, brought a common law claim of wrongful discharge. The plaintiff had accused fellow researchers at the medical school of falsifying data and engaging in research misconduct. When his contract was not renewed, he sued, claiming that a federal regulation, 42 C.F.R. §93.104, defines research misconduct as conduct that “represents a significant departure from accepted

practices of the relevant research community.” The trial court dismissed the claim for failure to state a claim for which relief can be granted, and this appeal ensued.

The appellate court affirmed the lower court’s determination that Yuan, the plaintiff, had not identified a public policy violation by Johns Hopkins. The court, relying on an earlier case involving alleged violations of federal regulations, said that “[t]here is no bright line between falsity and misconduct and between scientific errors and wrongdoing,” noting that courts were not well equipped to make such determinations (135 A.3d at 532).

For a discussion of other recent whistleblower case brought against colleges and universities, see Scott D. Schneider and Gita Bolt, “Once the Whistle’s Blown—Now What?” NACUA Conference paper, July 1, 2015, discussing *Moss v. Kentucky State University*, 465 S.W.3d 457 (Ky. App. 2014); *University of Houston v. Casey*, 439 S.W.3d 463 (Tex. App.-Hous. (1Dist.) 2014); and *Evans v. Thomas Jefferson University*, 81 A.3d 1062 (Pa. Commonwealth Ct. 2013), among others.

Chapter V

Nondiscrimination and Affirmative Action in Employment

Section 5.2. Sources of Law

5.2.1. Title VII. The U.S. Supreme Court, in two 5-4 rulings, issued opinions that refine and limit the way that courts must interpret Title VII of the Civil Rights Act of 1964.¹ In the first case, *Vance v. Ball State University*, (2013 U.S. LEXIS 4703 (June 24, 2013)), the Court was asked to define exactly who is a supervisor for purposes of determining an employer's liability in a case of alleged workplace harassment. In the second, *University of Texas Southwestern Medical School v. Nassar*, 2013 U.S. LEXIS 4707 (June 24, 2013)), the Court was asked to decide what kind of evidence a plaintiff needed to provide in order to prevail in a retaliation claim under Title VII. In both cases, the majority opinions rejected interpretations of Title VII developed by the Equal Employment Opportunity Commission (EEOC).

The Court's clarification of who is a supervisor in *Vance* is important because the standards for liability in harassment cases are different when the harasser is a supervisor than when the harasser is a co-worker. In the 1998 *Faragher* and *Ellerth* cases (LHE 5th, p. 487), the Supreme Court had ruled that if a supervisor takes a "tangible employment action" against an employee in the context of unlawful harassment, the employer has vicarious liability for that action, whether or not the employer was aware of the harassment. If no "tangible employment action" has been taken against the target of harassment, then the employer can assert an affirmative defense (called the *Faragher/Ellerth* defense) that it took reasonable steps to prevent

¹ This section is adapted from Barbara A. Lee and Mark W. Freel, "Who's the Boss: The Supreme Court Decides in Favor of Employers," June 24, 2013, © EdwardsWildmanPalmer LLP.

or respond to the harassment and the employee did not take advantage of those preventive or corrective policies. Under that same doctrine, an employer is not vicariously liable for harassment for the acts of non-supervisory co-workers of which it was unaware, unless the employer was negligent.

In *Vance*, the plaintiff had complained that a co-worker who occasionally directed her work had engaged in racial harassment, and sought to hold the university liable for the allegedly hostile work environment. The lower courts had ruled that the co-worker was not a “supervisor” under the *Faragher/Ellerth* doctrine, and thus the university had prevailed below. The Supreme Court agreed, stating that an individual is a supervisor “if he or she is empowered by the employer to take tangible employment actions against the victim.” The Court, quoting *Ellerth*, stated that supervisory status attaches “when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’” It rejected the argument of the EEOC (and the four dissenting Justices) that any employee who has “the ability to exercise significant direction over another’s daily work” should be considered a supervisor for Title VII purposes.

In *Nassar*, the Court was asked to decide whether, in asserting a claim of retaliation under Title VII, a plaintiff could use a “mixed motive” theory (LHE 5th, p. 439), or whether the plaintiff must prove that an unlawful motive was the “but for” reason for the retaliation. In a “mixed motive” claim, a plaintiff need only demonstrate that an unlawful motive was “a” factor in the negative employment action, rather than the “but-for” reason. This theory has been applied to discrimination claims, but the Court had not yet been asked to decide whether the mixed

motive theory applied to retaliation claims under Title VII. In 2009, the Supreme Court ruled in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), that plaintiffs bringing discrimination or retaliation claims under the Age Discrimination in Employment Act (ADEA) may prevail only if they can demonstrate that age was the “but-for” reason for the challenged employment action. In other words, the Court eliminated the ability of plaintiffs to use a “mixed-motive” theory for claims brought under the ADEA. The defendant in *Nassar* argued that result in *Gross* should be applied to Title VII retaliation claims as well.

The Court explained that the mixed-motive theory, which Congress added to Title VII in the Civil Rights Act of 1991, applies only to status-based discrimination, not to retaliation. Retaliation is prohibited in a different section of Title VII than status-based discrimination, and the Court explained that a plain reading of the statute indicated that the mixed motive theory explicitly applies only to status-based discrimination. With respect to the plaintiff’s argument that the EEOC’s Enforcement Manual requires that retaliation claims be evaluated under the mixed motive theory, the majority responded that the EEOC’s reasoning “lacked persuasive force.”

In defending its reasoning and result in *Nassar*, the majority noted that the number of retaliation claims filed with the EEOC has skyrocketed in recent years, and that employers would now be more likely to win summary judgment awards for “dubious” claims. The dissenters, led by Justice Ginsburg, criticized both the reasoning and the result in *Nassar*, arguing that discrimination and retaliation claims have “traveled together,” are frequently raised together by plaintiffs, and should be evaluated under the same standard of proof. The dissenters were concerned that juries would likely be confused because the standard for determining whether

conduct is “status discrimination” will now be quite different from the standard for determining whether or not the employer engaged in retaliation.

These clarifications of Title VII should make the outcome of workplace discrimination and harassment claims more predictable. *Vance* will make it more difficult for employees to win claims involving non-supervisory co-worker discrimination or harassment unless the employer was aware of the alleged misconduct and chose to tolerate or ignore it. *Nassar* will now require employees attempting to sue for alleged retaliation to prove that a protected characteristic, such as race, was the actual reason for their alleged mistreatment.

Section 5.3 The Protected Classes

5.3.1. Race. In *Cole v. Board of Trustees of Northern Illinois University*, 838 F.3d 888 (7th Cir. 2016), Cole was the only African American foreman at Northern Illinois University’s building services department. He was demoted in 2012, along with another white employee. He filed an ethics complaint against the university in August after his demotion, but did not specify that his grievances were based on alleged race discrimination. Three months later, Cole discovered a hangman’s noose in his new work area. Cole threw the noose away, but inexplicably, the next day he discovered the same or possibly a second noose outside the building. Cole reported these incidents to a supervisor, who reported the incidents to the university police.

Cole sued the university’s board of trustees and eleven individual university employees asserting violations of Title VII and the Equal Protection Clause of the Fourteenth Amendment for hostile work environment, disparate treatment, and retaliation. The district court judge granted summary judgment to the university, which the appellate court affirmed on appeal.

Although the court had no trouble associating the hangman's noose with racial discrimination, the court ruled that the record in the case did not support a reasonable inference that most of the hostility Cole encountered was connected to his race. There was almost no evidence of racial animus in the record: no hostile or ambiguous remarks, no racial slurs, nothing beyond the notable exception of the noose itself and the later secondhand report of a racist sign posted somewhere, at some unknown time by some unknown person. The fact that Cole was the only African American foreman on the staff did not, by itself, raise a genuine factual dispute as to whether those events constituted race-based harassment.

The appellate court also ruled that there was no direct evidence that racial animus motivated Cole's demotion. The demotion of the white employee at the same time as Cole supported the finding that Cole's demotion was not based on discriminatory animus. Cole's retaliation claim also failed, as nothing in his ethics complaint to the university suggested that he was alleging race discrimination. His membership in a protected class, without anything more, was not enough to transform a general complaint about improper workplace practices into a complaint opposing race discrimination.

5.3.3 Sex

5.3.3.3. Sexual harassment. On pp. 487-88 of LHE 5th, the use of the affirmative defense to a claim of sexual harassment under Title VII is discussed. In *Byrd v. Board of Supervisors for the University of Louisiana System*, 2016 U.S. Dist. LEXIS 81537 (W.D. La. 6/22/16), a staff employee alleged that her former supervisor sexually harassed her for several years, and ultimately dismissed her. Byrd filed an EEOC charge and subsequently this lawsuit. The university moved for summary judgment, citing the *Ellerth/Faragher* affirmative defense.

The court summarily rejected that motion, noting that dismissal is a tangible employment action that renders the affirmative defense void.

5.3.4. Disability

Annotated Bibliography entry:

Schur, Lisa, Nishii, Lisa, Adya, Meera, Kruse, Douglas, Bruyere, Susanne, and Blanck, Peter.

Accommodating Employees With and Without Disabilities.” *Human Resource Management*, July-August 2014, Vol. 53, pp. 593-621. Reports results of a study of accommodations requested and provided in case studies of eight companies, based upon data from 5,000 employee and manager surveys. The study found that both employees with and without disabilities requested the same types of accommodations, and that neither high accommodation costs nor co-worker resentment occurred.

5.3.8. Transgender/gender identity or expression. The Occupational Safety and Health Administration (OSHA) published a Guide to Restroom Access for Transgender Workers on June 1, 2015. The Guide is found at <https://www.osha.gov/Publications/OSHA3795.pdf>. The Guide explains the concept of gender identity and states that all workers must be given access to the restroom that conforms with their gender identity, whether or not the individual has taken steps to transition physically to a different gender. The guide includes best practices for providing restrooms to employees. In addition, the EEOC has issued a “Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964.” It is available at <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>.

The courts are beginning to apply Title VII to claims by transgender employees. In *Fabian v. Hospital of Central Connecticut*, 2016 U.S. Dist. LEXIS 34994 (D. Conn. 3/18/16), a federal trial court rejected a defendant’s motion for summary judgment on a transgender

discrimination claim by a male-to-female transgender doctor. The plaintiff had been given a contract which she executed, had been told she would be hired, and had sold her home in reliance on those representations. During an interview, which she had been told was a formality, she disclosed that, although she presented as a man at the interview, she would begin her employment as a transgender woman. She was then informed she would not be hired.

Relying heavily on the decision of the U.S. Supreme Court in *Price Waterhouse v. Hopkins* (discussed on p. 439 of LHE 5th), the trial court ruled that a claim of transgender discrimination is cognizable under Title VII, and that the case would have to be heard by a jury.

Section 5.4 Affirmative Action

5.4.2. Affirmative action under Title VII. In *Rahn v. Board of Trustees of Northern Illinois University*, 803 F.3d 285 (7th Cir. 2015), a federal appellate court affirmed an award of summary judgment for the university, rejecting a race discrimination claim by an applicant for a faculty position. The court noted that the search committee that rejected his candidacy applied factors that were relevant to the job and that had been taken from the job description; it also noted that there was no evidence that Rahn was better qualified than the individual who was hired for the position.

Section 5.5 Application of Nondiscrimination Laws to Religious Institutions

As discussed in LHE 5th, pp. 533-534, the U.S. Supreme Court approved the doctrine of the “ministerial exception” in 2012. The Kentucky Supreme Court enlarged upon and clarified the analysis to be used in determining whether an employee’s discrimination lawsuit may be barred by the ministerial exception in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597

(Kentucky 2014). This case, and a companion case decided the same day, are discussed in this Update at Section 6.2.

Chapter VI

Faculty Employment Issues

Section 6.2 Faculty Contracts

6.2.1 Overview

The wording of an offer letter, and a university's subsequent behavior during the time between the acceptance of an offer and a subsequent repudiation of the offer by the Board of Trustees, were critical to a court's ruling in the celebrated case of Steven Salaita. Professor Salaita was offered a faculty position at the University of Illinois. After accepting the position, resigning his tenured position at Virginia Tech University, and moving to Illinois, Salaita was told that his hiring was not, in fact, approved. Salaita had made controversial comments on social media that infuriated a number of individuals—donors and members of the Board of Trustees among them. The Board voted against hiring him.

In *Salaita v. Kennedy et al.*, 2015 U.S. Dist. LEXIS 102854 (N.D. Ill. Aug. 6, 2015), a federal trial court was required to determine whether Professor Salaita's offer letter constituted a binding contract, or whether the decision of the Board of Trustees not to approve his hiring meant that no contract existed. The court examined the wording of the offer letter from a dean which specified a salary, his title, an offer of tenure, and noted that "This recommendation for appointment is subject to approval by the Board of Trustees of the University of Illinois" (at *3). The university argued that, because the trustees had voted not to approve his hiring, the offer letter was not a binding contract.

In response to the University's motion to dismiss Professor Salaita's complaint, the court ruled that the offer letter was clearly an offer to enter a contract, and that by Professor Salaita's acceptance of that offer, a binding contract was formed. The issue, according to the court, was

not whether there was a contract, but whether the Trustees' action was a refusal to perform its contractual obligation, not an action that was necessary to the formation of a binding contract.

The court explained:

Taking the facts alleged in the Complaint as true, there is no doubt that the parties' actions demonstrated their intent to enter into a contract. The University paid for Dr. Salaita's moving expenses, provided him an office and University email address, assigned him two courses to teach in the fall, and stated to a newspaper that he would in fact join the faculty, despite his unsavory tweets. The University spokesperson went so far as referencing Dr. Salaita as one of "our employees." The University also did not hold a Board vote until after the start of the semester. If the Board vote was truly a condition to contract formation, then the University would have the Board vote on appointments before the start of a semester and before spending money on a new professor or treating the professor as a full-fledged employee. Finally, the University actually held the Board vote despite its claim that it had no agreement whatsoever. If the University truly felt no obligation to Dr. Salaita, the University could have simply not put the appointment to a vote at all. Instead, the University still went ahead with the vote, which is at least some evidence that it felt obligated to hold a vote according to the terms of the offer letter. (at *15-16)

Professor Salaita also alleged violations of his First Amendment free speech rights, denial of procedural due process in his "termination" without the required hearings, and promissory estoppel and conspiracy claims. Because the matter came before the court as a motion to dismiss, the court ruled that these claims could not be dismissed until the parties had engaged in

discovery. The court did, however, dismiss Salaita's intentional interference with contractual and business relations and his intentional infliction of emotional distress claim. In addition, the trial court rejected the university's claims that the defendants were protected by both Eleventh Amendment immunity and qualified immunity under Section 1983.

6.2.5. *Contracts in religious institutions*

In 2012 the U.S. Supreme Court ruled that employees with religious duties cannot sue their employers for employment discrimination (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, discussed on pp. 533-34 of LHE 5th). That doctrine may also be used to shield religious colleges and universities from other claims by employees. In 2014, the Kentucky Supreme issued rulings in two cases that helps clarify the dimensions of the "ministerial exception." In one case, the court found the professor to be a ministerial employee, but allowed his lawsuit to proceed. In the second, the court found that the professor was not a minister, and also allowed his lawsuit to proceed.

In *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014), Jimmy Kirby, a tenured professor at the Seminary, was dismissed after the Seminary encountered serious financial difficulties. Kirby sued, claiming breach of contract, breach of the implied covenant of good faith and fair dealing, and race discrimination. He cited the provisions of the Faculty Handbook, which stated that tenured faculty could only be dismissed for "moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary." The trial court awarded summary judgment to the Seminary, ruling that because his employer was a religious organization, that interpreting the Faculty Handbook

would impermissibly entangle the court in matters of religious doctrine. The state appellate court concurred.

The Kentucky Supreme Court reversed the summary judgment award. Concluding that the “ministerial exception” is an affirmative defense, not an “exemption” from the requirements of law, the court created a two-part test for determining whether in any particular factual setting the ministerial exception should apply. First, a court must decide whether the employer is a religious institution. Second, a court must determine whether the employee who is attempting to sue the religious institution is a “minister.” And the employee’s title is also relevant to answering the question of the application of the ministerial exception.

In order to determine whether the Seminary is a religious institution, the court examined its primary sources of funding, whether its bylaws and governance structure demonstrate a close relationship with a religious organization, and the nature of the degrees offered. The court determined that the Seminary’s primary funding source was the Christian Church (Disciples of Christ), the majority of its trustees were required to be members of that religion, and the degrees offered prepared students for pastoral careers.

With respect to whether plaintiff Kirby was a “ministerial employee,” the court examined the nature of his duties (teaching Christian ethics and preparing students for pastoral responsibilities), his participation in religious activities (preaching, reading Scripture at events, offering prayers at events), and concluded that he was a “ministerial employee,” despite the fact that he was not a member of the Christian Church, but was a Methodist.

The court concluded that Kirby’s discrimination claim was barred by the ministerial exception, but his contract claim was not. The court explained that the discrimination claim rested on federal law created by the government and imposed restrictions on how a religious

institution selected its ministers. The contract claim, however, involved inquiry into an agreement created by the parties, not the government; therefore, there was no Free Exercise Clause problem. Said the court:

Contractual transactions, and the resulting obligations, are assumed voluntarily. Underneath everything, churches are organizations. And, like any other organization, a "church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." Surely, a "church can contract with its own pastors just as it can with outside parties." "Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights" (426 S.W.3d at 615).

Because the language in the Faculty Handbook that limited the Seminary's discretion to dismiss a tenured faculty member to three specified forms of misconduct was agreed to voluntarily by the Seminary, no government intrusion was at issue in a breach of contract lawsuit.

On the same day, the Kentucky Supreme Court ruled in a second case involving the same institution. In *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587 (Ky. 2014), a tenured professor who taught courses on both religious and historical subjects, but was not an ordained minister, was dismissed when the seminary began experiencing financial problems. Kant sued, claiming breach of contract and breach of the implied duty of good faith and fair dealing. Neither of the lower courts found that Kant's religion—Judaism—was relevant to determining whether he should be considered a "minister" under the "ministerial exception" doctrine.

The Kentucky Supreme Court reversed, stating that Professor Kant was not a minister. The court, noting that *Hosanna Tabor* did not provide a set of guidelines for determining which employees were “ministers,” said:

[W]e find it important to emphasize the connection between the religious institution's employee and the doctrine or tenets of the religious institution. A minister, in the commonly understood sense, has a very close relationship with doctrine of the religious institution the minister represents. The members of the congregation or faith community view a minister as one who is, among other things, the face of the religious institution, permitted to speak for the religious institution, the embodiment of the religious institution's tenets, and leader of the religious institution's ritual. Kant did none of these things (426 S.W.3d at 592).

Kant’s title was Associate Professor of the History of Religion. The court accorded some significance to the fact that Kant taught *about* various religions rather than teaching religious doctrine. With respect to the two-part test created in *Kirby*, the answer to the first part had already been established in *Kirby*. With respect to whether Kant was a ministerial employee, the court determined that his work at the Seminary was primarily secular, that any participation in religious activities was due to his position as a faculty member, not a minister, and that work was not closely tied to matters of faith. Therefore, Kant was not a ministerial employee and his contract claim could go forward.

In both *Kirby* and *Kant*, the Seminary had also argued that the court lacked jurisdiction to hear these cases under the “ecclesiastical abstention” doctrine. Under this doctrine, a court would lack jurisdiction to hear a case if doing so would require a secular court to involve itself in the interpretation of church or religious doctrine—an entanglement that would violate the

Establishment Clause of the First Amendment. These two cases could be resolved without reference to church doctrine, according to the court.

A Louisiana appellate court ruled that the ecclesiastical abstention doctrine shielded a religiously-affiliated college from litigation by faculty members. In *Winbery v. Louisiana College*, 124 So. 3d 1212 (La. App. 2013), several faculty members sued the college for breach of contract, defamation, and various other alleged wrongs. The college responded that both the ecclesiastical abstention and the ministerial exception doctrines applied to these employees.

The trial court ruled that the college was not a religious institution and that the plaintiffs were not acting as ministerial employees (even though three of the four were ordained ministers). Although the college is governed by a board of trustees elected by the Louisiana Baptist Convention, its purpose is not to produce ministers; it is a coeducational liberal arts college that requires its students to take “certain religious courses.” On the other hand, because the plaintiffs’ defamation claims involved allegations that the plaintiffs were not teaching the appropriate Baptist theology, resolution of these claims would require the court to delve into the Baptist theology; the court characterized the claims as a dispute “on the nature of Baptist theology and church governance over how theology is taught at Louisiana College,” thus creating impermissible entanglement problems, and triggering the ecclesiastical abstention.

Section 6.3 Faculty Collective Bargaining

6.3.1. Bargaining unit eligibility of faculty. A recent ruling by the full National Labor Relations Board has expanded the criteria used to determine whether faculty who seek to bargain under the NLRA’s protection are “managerial employees” and thus exempt from the act’s coverage. In *Pacific Lutheran University and Service Employees International Union, Local*

925, Case 19-RC-102521 (December 16, 2014), a 3-2 decision, the majority revisited the criteria articulated by the Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (discussed in LHE 5th, pp. 568-572). The Board had sought briefs from interested parties in an effort to clarify which faculty responsibilities should lead to “managerial” status.

The majority determined that it would “give more weight to those areas of policy making that affect the university as a whole, such as the product produced, the terms on which it is offered, and the customers served. . . . we seek to determine whether the faculty actually exercise control or make effective recommendations over those areas of policy. . .” (p. 17).

The majority identified five areas of decision making—three that it determined were “primary” and two that it regarded as “secondary.” Primary areas of decision making are topics such as the institution’s curricular offerings, its research activity, major/minor/certificate offerings, and requirements for successful completion of these programs. Decisions to add or eliminate academic programs would also be in this category. The second primary area is enrollment management—the “size, scope, and makeup of the university’s student body” (p. 17). And the third primary area is financial decisions—on the institution’s income and expenditures. Net tuition is one example of the type of decision that the majority viewed as primary.

The secondary areas of decision making are academic policy (teaching/research methods, grading policy, academic integrity policy, etc.) and personnel policies and decisions (hiring, promotion, tenure, leaves, dismissal). These are areas where faculty in many institutions have significant recommending authority.

These expanded *Yeshiva* criteria suggest that it will be very difficult for a private university to convince the NLRB that its faculty are “managerial employees” and should not be protected by the NLRA. Although some examples may exist, it is most unusual for the

administration of a college or university to delegate to the faculty the responsibility for making effective recommendations or final decisions on adding or removing programs, enrollment management, or how the institution's funds are spent. And in the case of Pacific Lutheran University, its contingent faculty clearly did not have this type of authority.

Section 6.4 Application of Nondiscrimination Laws to Faculty Employment Decisions

6.4.2. Challenges to employment decisions

6.4.2.3 Disability discrimination. Even though adjunct faculty typically work on per-course or annual contracts, and thus do not have the rights enjoyed by tenure-track and tenured faculty, the decision not to renew an adjunct faculty member's appointment may spark litigation. A trial court ruling demonstrates the importance of monitoring faculty classroom performance and documenting those concerns.

In *Silk v. Board of Trustees of Moraine Valley Community College District No. 524*, 2014 U.S. Dist. LEXIS 73647 (N.D. Ill. May 30, 2014), an adjunct professor who had taught for a public community college on an at-will basis for fourteen years was not rehired because the dean and other administrators had serious concerns about his teaching performance. He sued the college for disability and age discrimination, and for retaliation for filing an earlier charge with the EEOC.

The court found it plausible that the college regarded Silk as disabled, since he had recently returned from heart bypass surgery and an administrator allegedly told him that he was being assigned only two instead of four classes to teach after his return because she did not think he was physically capable of handling more than two cases. But the court rejected Silk's claim that the reason he was assigned only two courses, and then not rehired, was based on his

presumed disability. The dean and other administrators had observed Silk's teaching and had received numerous student complaints about the poor quality of his teaching. The reduction in course assignments was done in order to give Silk time to work to improve his teaching, not because of a prior medical condition. Given the specific concerns of the dean (Silk read from the text in class, talked about his personal experiences, gave all students the same grade and comments on a written assignment), the court ruled that the nonrenewal was justified and not based on disability, or age discrimination. It also rejected Silk's retaliation claim.

A federal appellate court has weighed in on whether a required psychiatric "fitness for duty" examination violates the disability discrimination laws. In *Coursey v. University of Maryland Eastern Shore*, 2014 U.S. App. LEXIS 12407 (4th Cir. July 1, 2014), Coursey, a tenured professor of physical education, was suspended with pay and required to submit to a fitness for duty examination after numerous students and faculty complained of his erratic and abusive behavior, both in and out of class. Coursey refused to undergo the mental health examination and filed a disability discrimination charge with the EEOC. Almost a year after telling Coursey to undergo the examination, the president instituted termination proceedings against Coursey on the grounds of professional misconduct, incompetence, and insubordination. Coursey exercised his right to have a faculty hearing panel consider the evidence provided by himself and the administration. The faculty hearing panel recommended termination on the basis of incompetence and professional misconduct. Coursey appealed the hearing panel's recommendation to the president and the system-level board of trustees, both of whom upheld the termination recommendation. Coursey then sued, alleging disability discrimination and retaliation.

The trial court ruled that the requirement of a mental health examination was job-related and consistent with business necessity, as required by the ADA and its regulations (42 U.S.C. §12112(d)(4)(A)(1994); 29 C.F.R. §1630.14(c)(1998)). Furthermore, the court ruled that simply expressing concern about an employee's job performance and attempting to ascertain whether the employee had a mental or physical condition that could be relevant is not evidence that the employer regarded the employee as disabled. And the court rejected Coursey's retaliation claim, pointing to the multiple complaints about his misconduct and his insubordination. For these reasons, the appellate court affirmed the trial court's award of summary judgment on all counts.

Section 6.7 Procedures for Faculty Employment Decisions

6.7.2. The public faculty member's right to constitutional due process

6.7.2.2. Nonrenewal of contracts. A case from a federal appellate court reminds us of the importance of requiring faculty members to comply with behavioral requirements as expressed in institutional policy or faculty handbooks. In *Keating v. University of South Dakota*, 2014 U.S. App. LEXIS 12490 (8th Cir. July 2, 2014), a tenure-track professor's contract was not renewed after he violated a provision of the university's employment policies that required faculty to treat each other in a civil manner. The policy reads:

Faculty members are responsible for discharging their instructional, scholarly and service duties civilly, constructively and in an informed manner. They must treat their colleagues, staff, students and visitors with respect, and they must comport themselves at all times, even when expressing disagreement or when engaging in pedagogical exercises, in ways that will preserve and strengthen the willingness to cooperate and to give or to accept instruction, guidance or assistance (at p. *3).

Keating had had disputes with the program director, Professor Keller. Keating filed a grievance against Keller and she, in turn, filed a sexual harassment charge against him. The department chair, Professor Heaton, found Keating's grievance to be without merit. Keating met with Heaton and warned him not to pursue the harassment charge; he also sent an email to Heaton calling Keller a "lying, back-stabbing sneak." Citing the policy language quoted above, the university did not renew Keating's contract.

Keating sued the university and several administrators, claiming that the "civility clause" was unconstitutionally vague and thus denied him due process. Although the trial court agreed and granted him declaratory relief on the due process claim, the appellate court reversed. The policy was not vague, according to the appellate court; it clearly applied to Keating's intemperate language in a face-to-face meeting with Heaton as well as in the email regarding Keller. Said the court:

While the district court focused exclusively on the policy's use of the term "civility," the civility clause articulates a more comprehensive set of expectations that, taken together, provides employees meaningful notice of the conduct required by the policy. The outer contours of the civility clause perhaps are imprecise, but many instances of faculty misconduct would fall clearly within the clause's proscriptions, thus precluding the conclusion that the policy is facially unconstitutional (at *6).

In another case involving alleged misconduct leading to a decision not to reappoint an untenured faculty member, a federal appellate court has sided with the university. In *Klingner v. University of Southern Mississippi*, 2015 U.S. App. LEXIS 7726 (5th Cir. 2015), Klingner, an assistant professor on a one-year contract, was teaching an online course with a "web chat"

component. During the chat component, Klingner was disappointed at what he perceived to be the students' lack of preparation for the class. He made a comment to a graduate assistant that the assistant interpreted as possibly threatening to "shoot" a student who provided inappropriate feedback about him. The graduate assistant reported the comment, as well as other behavior by Klingner that day that seemed unusual. Campus officials removed Klingner from class immediately, banned him from campus pending an investigation, and instructed him to have no contact with students or staff while he was on paid administrative leave. Klingner did attempt to contact students, and the administration decided to extend the campus ban for the rest of the year and to not renew his contract for the following year.

Klingner sued the provost and president, claiming violations of constitutional due process and breach of contract. The court concluded that, because he was untenured, Klingner had no property interest in further employment at the university, and thus was not entitled to due process. He utilized the university's grievance process, and thus was afforded all of the due process that any potential liberty interest would require. Contract claims were also dismissed because the university's faculty handbook explicitly states that it is not a contract. Therefore, the appellate court affirmed the trial court's grant of summary judgment on all counts.

6.7.2.3. Denial of tenure. A ruling by a federal trial court provides a reminder that statements in faculty handbooks or other policy documents that promise annual evaluations and feedback to untenured faculty members may constitute an implied contract. In *Mawakana v. Board of Trustees*, 2015 U.S. Dist. LEXIS (D.D.C. July 10, 2015), a trial court rejected the University of the District of Columbia's motion to dismiss a breach of implied contract claim brought by an untenured law professor who was denied tenure.

The plaintiff's appointment letter stated that the law school's criteria for retention, promotion and tenure were stated in its "Standards and Procedures for Retention and Tenure."

The court noted that the document included a provision stating that

"[t]he professional development of each member of the full-time faculty who is not tenured will be assessed every year" by a subcommittee of the University's Faculty Evaluation and Retention Committee ("FERC"), which consists of "all tenured members of the faculty other than the Dean." . . . The goal of the annual review is to "provide the non-tenured faculty member with feedback on . . . his progress toward meeting the standards for promotion and tenure . . . and to provide supportive guidance and direction toward the successful completion of the promotion and tenure process." (at *3)

In addition, the court noted, the Faculty Handbook included a provision promising untenured faculty that he or she would "be assigned a three-member review team, appointed by the Faculty Evaluation and Retention Committee. That review team shall visit the candidate's classes, review his or her writings, counsel with him or her on teaching methods and research projects, and in general be available for constructive help in his or her ongoing association with the school." (at *24)

Although the court dismissed the plaintiff's breach of express contract claim, it allowed his implied contract claim to go forward. The court noted, however, that if the university could demonstrate that it does not routinely provide evaluations or feedback to untenured faculty members, the plaintiff's breach of implied contract claim could fail.

6.7.2.4 Termination of tenure. *McKenna v. Bowling Green State University*, 2014 U.S. App. LEXIS 11200 (6th Cir. June 13, 2014) provides an example of procedural issues that can complicate attempts to monitor a faculty member with performance problems and ultimately to dismiss him. The plaintiff, McKenna, a tenured professor of political science, sued the university and several administrators for violations of substantive and procedural process related to his dismissal from the university.

The dean and other administrators responded to complaints that McKenna “frequently cancelled class, refused to hold regular office hours, submitted final grades late, and rarely attended faculty or committee meetings” by suspending him without pay for a semester and adding an addendum to his contract that provided for a faculty committee to review any future allegations of misconduct. After one semester of acceptable conduct, McKenna was again accused of neglect of his teaching duties. The faculty committee that reviewed these allegations concurred that he had been unavailable to students without explanation for 54 days. The university then moved to dismiss McKenna. McKenna requested a hearing before a faculty grievance board. For a variety of reasons, the grievance hearing did not take place until two years after McKenna filed his grievance.

The faculty grievance hearing board upheld the termination, noting McKenna’s history of performance problems and the university’s progressive discipline. McKenna then proceeded with this lawsuit.

The trial court dismissed McKenna’s claims against the university and the board of trustees on sovereign immunity grounds, and awarded summary judgment to the dean on the basis of qualified immunity. The court also dismissed McKenna’s substantive due process claim, stating that tenured employment is not a fundamental right.

Although McKenna claimed that he had not received a pre-termination hearing, the appellate court disagreed. The dean had sent McKenna three letters, outlining the student and faculty complaints against him. McKenna appeared before the faculty committee empaneled to determine whether he had neglected his teaching duties, and he provided written documents to the committee. Said the court, “McKenna was given an opportunity to be heard and that is all the process required at this stage” (citing *Cleveland Board of Education v. Loudermill*, discussed in LHE 5th at pp. 644-645). Furthermore, the court ruled, the post-termination hearing (the grievance hearing panel) provided sufficient procedural process to satisfy Constitutional requirements. The two-year delay in the scheduling of the grievance hearing was not attributable to the dean, and the university was immune from liability under the sovereign immunity doctrine.

Although both the dean and the university escaped liability in this case, the two-year delay in scheduling the hearing is troubling, and an institution that is not shielded by sovereign immunity might have fared differently.

* * * * *

A case decided by a state appellate court addressed the issue of whether a plaintiff who criticizes a university president or other official who is subsequently involved in the decision to dismiss that faculty member can claim a denial of due process on the basis of bias. In *Judweid v. Iowa Board of Regents*, 860 N.W. 2d 341 (Iowa Ct. App. 2014), the plaintiff, a tenured professor of radiology at the University of Iowa, was charged with violating university policy by engaging in “threatening” and “abusive” language in emails to various university administrators, including the university president, as well as committing numerous violations of HIPAA (see section 14.2.14 of LHE 5th). A faculty committee found that he had violated university policy and unanimously recommended dismissal. The president recommended dismissal, and the Board of

Regents dismissed Juweid. To Juweid’s argument that the president was biased because two lawsuits he had filed against her were pending, the Board concluded “[t]he simple fact that two proceedings are pending in two different forums is not, in and of itself, enough to establish bias. To find otherwise would permit an employee to interfere with established University disciplinary procedures simply by filing litigation against the decision-maker.” (860 N.W. 2d at ____, 2014 Iowa App. LEXIS 1143 at *9)

The court rejected Juweid’s claim of bias, ruling that simply being the subject of a lawsuit did not constitute bias. Furthermore, said the court, the final decision rested with the Board of Regents, and the plaintiff had made no showing of bias on their part.

Annotated Bibliography

Rabban, David M. “The Regrettable Underenforcement of Incompetence as Cause To Dismiss Tenured Faculty.” 91 *Indiana Law J.* 39 (2015-16). States that academic freedom does not protect incompetence; proposes guidelines for institutions to follow, including attempts to remediate poor teaching or inadequate research productivity or quality, but suggests that institutions should be less fearful of dismissing tenured faculty for incompetence.

Chapter VII

Faculty Academic Freedom and Freedom of Expression

Section 7.1 General Concepts and Principles

7.1.1. Faculty freedom of expression in general.

The decision of the U.S. Supreme Court in *Garcetti v. Ceballos* (LHE 5th, pp. 696-698) continues to raise questions as to its application to scholarship and teaching (and perhaps to governance as well) of college faculty. In *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014), a panel the U.S. Court of Appeals for the Ninth Circuit held that *Garcetti* does not apply to “speech related to scholarship or teaching,” but that such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968) (also discussed in LHE 5th, Section 7.1.1). Demers, a tenured associate professor, sued various administrators at Washington State University, claiming that they had retaliated against him for distributing certain writings critical of the institution by giving him negative performance reviews. The trial court had awarded summary judgment to the university, ruling that Demers’ writings were part of his employment duties, and also that the content of the writings were not a matter of public concern. The appellate court disagreed, stating that the issues addressed in Demers’ writings *were* a matter of public concern, and that, although the writings were part of Demers’ employment duties, *Garcetti* did not apply to speech related to scholarship and teaching, and that the proper analysis of Demers’ claims must be done under the *Pickering* test. The court remanded the case for a determination as to whether the writings were protected by the First Amendment.

Noting that the facts in *Demers* presented just the kind of problem foreseen by Justice Souter in his dissent in *Garcetti* (LHE 5th, pp. 697-698), the court stated: “We conclude that

Garcetti does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*” (746 F.3d at 412).

In another recent post-*Garcetti* case, a tenured professor was dismissed; he claimed that part of the reason for his dismissal was retaliation for statements that he had made that were critical of various administrators at Texas A&M University at Commerce. In *Kostic v. Texas A&M University at Commerce*, 11 F. Supp. 3d 699 (N.D. Tex. 2014), the magistrate judge distinguished between some of the comments, which were made only to administrators, as unprotected under the *Garcetti* standard, from other comments that were made to the media, stating that they were protected under the First Amendment. Although the court awarded the university a partial summary judgment, it ruled that some of the plaintiff’s claims should be tried.

A trial court ruling raises an interesting Title IX gloss on the *Garcetti* doctrine. In *Hatcher v. Cheng*, 63 F. Supp. 3d 893 (S.D. Ill. Aug. 7, 2014), a female professor denied tenure sued Southern Illinois University, claiming sex discrimination, retaliation, and violation of her First Amendment rights. The First Amendment claim was based on the allegation that the plaintiff’s report to her dean that a fellow male faculty member had sexually harassed a student was the reason that the dean denied her application for tenure. The University asserted a *Garcetti* defense, saying that its harassment policy required faculty to report allegations of sexual harassment brought to them by students, as had been the case here. The court agreed that the plaintiff was acting as an employee rather than as a private citizen when she brought the

student's complaint to the dean's attention, and thus *Garcetti* applied, dooming her First Amendment claim. The court did, however, allow the sex discrimination claim to go forward.

A federal trial court also rejected a professor's first amendment retaliation claim on the basis of the *Garcetti* precedent. In *Hays v. LaForge*, 2015 U.S. Dist. LEXIS 87221 (N.D. Miss. July 6, 2015), Hays, a longtime department chair at Delta State University, was informed that he would not be reappointed as chair. In his lawsuit, Hays claimed that several instances in which he criticized various reports, policies, or individuals were protected by the first amendment. The court disagreed. Each of the examples offered by Hays, such as letters concerning how budget decisions were made, a grievance against the provost, comments made to the student newspaper related to budget issues, and criticisms of alleged policy violations, were made pursuant to his official duties and thus were outside the protection of the first amendment. The court granted the defendants' motion to dismiss the lawsuit.

* * * * *

On June 19, 2014, the U.S. Supreme Court limited its *Garcetti* ruling, but on narrow grounds. In *Lane v. Franks*, a former employee sued the president of Central Alabama Community College, alleging that he had been dismissed in retaliation for testifying truthfully about another former employee of the college, who had been indicted for mail fraud and theft of federal funds. The Court, in a unanimous opinion written by Justice Sotomayor, stated that testifying in court was not part of the plaintiff's official employment duties, and thus his speech did not fall under the *Garcetti* doctrine and was protected by the First Amendment. The Court did not comment upon whether *Garcetti* would apply to an individual, such as a police officer, whose job duties did involve regular testimony in court.

A case involving clinical psychologists employed at Georgia State University raised the issue of official duties in light of the *Lane v. Franks* decision. *Alves v. Bd. of Regents of Univ. of Ga.*, 804 F.3d 1149 (11th Cir. 2015). The psychologists were dismissed from their positions from the university's counseling center following a reduction in force. They claimed the reduction in force was pre-textual, with the real reason for their dismissals stemming from their authorship of a memorandum critical of the leadership and administration of the counseling center. The dismissed employees claimed that the memorandum constituted citizen speech on an issue of public concern.

The U.S. Court of Appeals for the Eleventh Circuit held that the speech encompassed official duties, including when considered in light of *Lane v. Franks*. The court stated that official duties constitute more than formal job descriptions. The dismissed employees had carried out certain supervisory roles and program management, and the issues raised in the memorandum dealt with their ability to carry out these functions effectively, even if writing the memorandum in question was not explicitly a requirement of their formal employment duties. Thus, while the Supreme Court instructed in *Lane v. Franks* that the concept of official duties should be interpreted narrowly, this did not mean that all duties had to reflect an explicit job requirement.

As an alternative basis for deciding against the dismissed employees, the court held that the memorandum failed to address an issue of public concern. The speech, according to the court, represented an internally focused communication meant to raise concerns regarding the leadership and management of the counseling center.

7.1.2. Other constitutional rights supporting faculty freedoms of expression.

A former University of Connecticut professor employed in a non-tenure stream position and as director of a university center argued that his non-renewal constituted violations of his First Amendment rights by the university and his supervisor dean. *Weinstein v. Univ. of Conn.*, 136 F. Supp. 3d 221 (D. Conn. 2016). The professor also raised state law claims based on interference with a business relationship. Previously, the court had dismissed the professor's First Amendment retaliation claims but had allowed the plaintiff to submit a supplemental memorandum on the speech related to allegations of nepotism by the dean.

While determining that professor had not engaged in the speech in question pursuant to his official employment duties (i.e., he spoke as a private citizen) and that the speech at issue constituted a matter of public concern, the court decided that speech was legitimately subject to restriction under the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), for employee speech otherwise eligible for First Amendment protection. In weighing the interests of the employer in restricting the speech, the court discussed that one alleged act of nepotism, while a public concern, affected a small number of individuals and had a limited budgetary impact. Against these considerations, the court discussed that the professor's high level administrative appointment could undermine the dean's administrative authority, adversely affect morale, and hamper the smooth functioning of programs. Based on these considerations, the court determined that the dean possessed sufficient justification not to renew the professor in his administrative position. The case serves as a useful reminder that even when an employee speaks in an individual capacity as a private citizen on a matter of public concern, which qualifies it for First Amendment protection, an institution is potentially able to demonstrate a sufficient countervailing justification to restrict such speech.

7.1.3. Academic freedom: Basic concepts and distinctions.

Bibliographic citation: Scott R. Bauries, “Individual Academic Freedom: An Ordinary Concern of the First Amendment.” 83 *Mississippi Law Journal* 677 (2014). Discusses the progeny of *Garcetti* and concludes that two cases—*Adams* and *Demers* [both discussed above]—are flawed—*Adams* because it ruled that the speech at issue was not work-related, and *Demers* because it is “doctrinally flawed” with respect to First Amendment principles of neutrality.

Bibliographic citation: Robert M. O’Neil, “Second Thoughts on the First Amendment in Higher Education,” 83 *Mississippi Law Journal* 745 (2014). Addresses the historical development and application of first amendment law to hateful and offensive speech and campus speech codes, as well as providing a fascinating account of how the University of Mississippi successfully eliminated Confederate flags from its football stadium.

7.1.4. Professional versus legal concepts of academic freedom.

P. 707:

The AAUP’s most recent revisions of its “Recommended Institutional Regulations on Academic Freedom and Tenure” were in 2006, 2009, and 2013.

7.1.6. External versus internal restraints on academic freedom.

P. 114:

The Sixth Circuit’s decision in *BAMN v. Regents of the University of Michigan, et al.*, now cited as 701 F.3rd 466 (6th Cir. 2012) (*en banc*) was reversed by the U.S. Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1633 (2014). *Schuette* is discussed in Section 8.2.5 of these updates after the discussion of the *Fisher* case.

7.2 Academic Freedom in Teaching

7.2.2 The classroom. A federal appellate court has rejected a professor's claim that he was denied tenure in retaliation for the "free speech" act of extending his third finger, colloquially known as "flipping the bird," to his students. In *Frieder v. Morehead State University*, 770 F.3d 428 (6th Cir. 2014), the professor alleged that this "one-fingered salute," as the court characterized it, was protected by the First Amendment. Although the court was skeptical that this gesture was a form of protected speech, it found that the faculty member's poor student ratings and disorganization fully justified his tenure denial, and thus it was unnecessary to determine whether such a gesture was protected by the First Amendment.

7.3 Academic Freedom in Research and Publication

The Arizona Court of Appeals reviewed a decision by the University of Arizona to withhold certain emails by two professors from a public records request made by an organization seeking to discredit climate change research. *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, No. 2 CA-CV 2015-0086 (Ariz. Ct. App. Dec. 3, 2015). The organization seeking the emails argued that a lower court should have conducted a de novo review of whether the group should have had access to emails rather than on the basis of whether the Arizona Board of Regents abused its discretion or acted arbitrarily or capriciously in denying the group access to the emails.

The organization sought email records from the university through a public records request that sought more than 10 years' worth of the professors' emails. The university provided the group with approximately 1,600 pages of emails and a log describing some 1,700 emails that were withheld. The university stated that it withheld these emails to protect the confidentiality of

information, privacy of individuals, academic freedom, and the need to maintain competitiveness in retaining faculty. Arizona's freedom of information law contains a provision that permits non-disclosure in efforts to protect the best interests of the state.

The Arizona Court of Appeals held that the lower court incorrectly evaluated the university's actions on abuse of discretion or arbitrary and capricious standards. Instead, the court should have conducted a de novo review of the denial of certain emails. The court of appeals remanded the case for de novo evaluation of the university's decision to withhold certain of the emails.

Sec. 7.4. Academic Freedom in Institutional Affairs.

Recent institutional activity in emphasizing issues related to Title IX also has raised issues connected to faculty academic freedom. Some incidents have gained substantial public attention. In an opinion piece for *The Chronicle of Higher Education*, Laura Kipnis, a professor at Northwestern University, related how the university initiated a Title IX retaliation investigation of her following the publication of a piece in which she referenced a sexual harassment lawsuit involving students at the university against another professor. (Laura Kipnis, "My Title IX Inquisition." *The Chronicle of Higher Education*, May 29, 2015, available at <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>).

A high profile incident involving the University of Missouri raised questions related to faculty activism. The university fired faculty member Melissa Click due to her calling for "some muscle" to remove a student journalist from an area containing student protestors during a period of campus unrest. Many faculty members at the institution objected to her dismissal. (For a

discussion of the incident, see Steve Kolowich, Brock Read, & Andy Thomason, 10 Revealing Details in the Melissa Click Investigation. *The Chronicle of Higher Education*, Feb. 26, 2016, available at <http://www.chronicle.com/article/10-Revealing-Details-in-the/235502>).

Chapter VIII

The Student/Institution Relationship

Section 8.1 The Legal Status of Students

8.1.3. The contractual rights of students. Professional schools, such as law and medicine, have both academic and professionalism requirements for their students. In *Al-Dabagh v. Case Western Reserve University*, 777 F.3d 355 (6th Cir. 2015), a medical student sued the medical school for breach of contract when he was denied his degree because, although he had excellent academic performance, he had exhibited problematic behavior that the faculty characterized as unprofessional. The trial court had ruled in the student's favor, apparently believing that the allegedly unprofessional behavior in which the plaintiff had engaged was inconsequential and unrelated to the quality of patient care. The trial court distinguished between "academic" judgments, to which it would defer, and "character" judgments, about which it said: "Although courts should give almost complete deference to university judgments regarding academic issues, the same deference does not follow university character judgments, especially on character judgments only distantly related to medical education. . . . Medical schools have no special expertise regarding judging character for honesty. When the university bases its judgments on a student's character, the university lacks the expertise that warrants deference" (23 F. Supp. 3d 865, 876 (N.D. Ohio 2014)).

The appellate court disagreed. Characterizing judgments about professionalism as academic evaluations entitled to deference, the court reversed the trial court's ruling.

8.1.4. Student academic freedom. A federal trial court has allowed a student's free speech claim against the University of New Mexico to go forward, rejecting the University' motion to

dismiss the claim. In *Pompeo v. Board of Regents of the University of New Mexico*, 58 F. Supp. 3d 1187 (D.N.M. 2014), Pompeo had enrolled in a class that promised “There's controversy built right into the syllabus, and we can't wait to hash out our differences.” Yet when Pompeo turned in a class paper criticizing a film involving lesbians that class had been assigned to watch, and criticizing lesbianism in general, the instructor accused her of “hate speech,” refused to grade the paper, and advised her to drop the course, which she did. According to the plaintiff, the professor’s supervisor, also a defendant in the lawsuit, warned her that her views on lesbianism would result in “consequences” if she persisted in these views.

The court made short work of the university’s defense that, although Pompeo’s speech was protected by the first amendment, a university may impose restrictions on student speech if they are reasonably related to legitimate pedagogical concerns. Citing both *Brown v. Li* and *Axson-Flynn v. Johnson* (LHE 5th, this section), the court rejected the notion that the instructor’s treatment of Pompeo was based upon “legitimate pedagogical concerns.” The court said:

The First Amendment violation in this case arises from the irreconcilable conflict between the all-views-are-welcome description of the forum and Hinkley's only-those-views-with-which-I-personally-agree-are-acceptable implementation of the forum. Plaintiff has made out a case that no reasonable educator could have believed that by criticizing lesbianism, Plaintiff's critique fell outside the parameters of the class, given the description of the class set out in the syllabus. This is not a case like *Brown v. Li* . . . in which a student was given reasonable standards for accomplishing an assignment and consciously disregarded them. Furthermore, the forum as described by the syllabus was designed for older

students, who could be expected to have the emotional and intellectual maturity to deal with controversial or even invidious opinions.

The Court questions whether a university can have a legitimate pedagogical interest in inviting students to engage in "incendiary" and provocative speech on a topic and then punishing a student because he or she did just that. Simply because Plaintiff expressed views about homosexuality that some people may deem offensive does not deprive her views of First Amendment protection. . . .Plaintiff has made out a plausible case that Hinkley ostracized her because of Hinkley's personal disagreement with Plaintiff's ideology, and not for a legitimate pedagogical purpose. (58 F. Supp. 3d at 1189-90)

8.1.5. Students' legal relationships with other students.

8.1.5.1 Sexual harassment and assault by peers [new subsection]. Since this book went to press, the problem of sexual assault of and by college students has become more visible and more urgent. Since then, the U.S. Department of Education has issued multiple guidance documents addressing the legal obligations under Title IX of colleges and universities to prevent and respond to instances of sexual assault against students. A "Dear Colleague" Letter was released on April 4, 2011, and discussed briefly on p. 876 of LHE 5th. A second guidance document, "Questions and Answers on Title IX and Sexual Violence," was issued on April 29, 2014 (<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>). Also on April 29, 2014, the White House Task Force to Protect Students Against Sexual Violence issued a report, *Not Alone: The First Report of the White House Task Force to Protect Students Against Sexual Violence* (http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf). On April 24, 2015, a

“guidance package” was released by the Department of Education, which included a “Dear Colleague “Letter on Title IX Coordinators”

(<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>).

The guidance package also contained a “Title IX Resource Guide”

(<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>) and

a “Letter to Title IX Coordinators” (<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf>).

In addition, Congress may consider additional legislation to impose stricter requirements on colleges and universities with respect to their attempts to prevent and their responses to allegations of sexual assault. Furthermore, the reauthorization of the Violence Against Women Act contains amendments to the Clery Act (discussed in Section 8.6.3 of LHE 5th and this Update) that creates additional reporting requirements and adds four categories of crimes to the existing list of crimes that must be reported each year. Proposed regulations were issued on June 20, 2014 (49 Fed. Reg. No. 119).

The 2011 Dear Colleague Letter (DCL), while it does not have the force of regulation, discusses the expectations of the U.S. Office for Civil Rights with respect to institutional compliance with Title IX. The DCL sets forth guidance on the following issues:

- The requirement that each institution name a Title IX coordinator and widely disseminate that individual’s contact information
- The requirement that each institution have a clear policy forbidding sexual harassment and assault

- The requirement that each institution have a grievance policy that informs individuals who wish to file a complaint of harassment or assault how to make a complaint and what services are available to them
- That institutions may not rely on a police investigation; they have an independent obligation under Title IX to conduct an investigation and provide services to students
- That the institution must provide “interim measures” prior to the resolution of the complaint, such as relocating one or both students in different campus housing, changing the class schedule of the accuser and/or the accused, providing counseling to the accuser, providing an escort around campus if the accuser fears for his or her safety, and prohibiting retaliation by the accuser or the accuser’s friends
- Institutions must provide equal procedural protections for both the accuser and the accused
- Requires that the standard of proof in a campus disciplinary hearing concerning sexual harassment or assault must be “preponderance of the evidence.”
- The OCR expects the investigation and subsequent action (if any) to be completed within sixty days

The release of the 2011DCL generated concern and some confusion on the part of colleges and universities; several colleges and universities were cited by the Office for Civil Rights for alleged violations of Title IX, either because the OCR found their policies inadequate to comply with Title IX, or because the institutions’ responses to student complaints were viewed as flawed. The second OCR document, the “Questions and Answers” document issued

on April 29, 2014, goes into considerable detail about the OCR's expectations for institutions' compliance with Title IX. Among the issues addressed in the 46-page document are the following:

- Prescribes content of policy, notices, grievance procedure
- Discusses responsibilities of employees who must convey reports of alleged sexual assault to Title IX coordinator
- Addresses which employees may respect student confidentiality and which must report details of alleged assaults on students
- Discusses responsibilities of resident assistants concerning the duty to report
- States that off-campus assaults must be investigated
- What the 60-day timeframe means with respect to investigations that extend past the end of a semester
- Interim measures that may be taken, and a statement that the complainant cannot be required to pay for counseling if it is typically done on a fee-for-services basis
- Training requirements for faculty, staff, and students

Although some individuals have questioned whether the Office for Civil Rights has the authority to require such specific actions on the part of institutions without going through the regulatory development process, it appears that this document provides a summary of the OCR's expectations and standards when investigating a complaint that an institution has not complied with the requirements of Title IX.

The report of the White House Task Force to Protect Students From Sexual Assault focuses on four issues:

1. Conducting campus climate surveys. The Task Force strongly recommends—and suggests that the law may soon require—that institutions conduct annual campus climate surveys to ascertain the extent and nature of sexual violence on campus. The Task Force’s website provides suggestions for the development of a campus climate survey.
2. Conducting sexual assault prevention programs that engage men and involve them in bystander intervention skills and strategies.
3. Effective responses by institutions to complaints of sexual assault, which include:
 - a. Identifying and publicizing the names of staff members to whom an assault survivor can talk in confidence and obtain advice and support
 - b. A checklist for the required elements of a sexual misconduct policy, including attention to the definition of consent to sexual activity
 - c. “Trauma-informed” training programs for staff and others who may receive reports of sexual assault
 - d. Improved campus disciplinary systems that are designed to deal with the special circumstances of sexual assault claims and rely on trained and experienced investigators
 - e. Partnership with community services such as rape crisis center.
4. More transparency and information about which institutions have been charged with Title IX violations, how the OCR conducts an investigation, what the rights of accusers are

The April 2015 Dear Colleague Letter (DCL) provided direction regarding OCR’s expectations for Title IX Coordinators and institutional obligations to support this role, including:

- An institution must have at least one person serving as Title IX coordinator at all times. The position may not be left vacant.
- There are no specific requirements for which employees may serve as Title IX Coordinator, but the position requires independence and should report to an institution's senior leadership, such as a college or university's president. Additionally, potential conflicts of interest should be avoided with the appointment, which the DCL noting that appointing a disciplinary board member, general counsel, or dean of students could potentially result in a conflict of interest.
- Appointing a full-time Title IX Coordinator may help to reduce the potential for a conflict of interest and can also help ensure that the individual has sufficient time to carry out all the required responsibilities. If an employee has other responsibilities, the Title IX Coordinator should have sufficient time, training, and qualifications to carry out Title IX related duties.
- While not required, large institutions may find it prudent to designate multiple Title IX Coordinators. If so, it should designate one employee to serve as the lead Title IX Coordinator.
- A Title IX Coordinator's primary responsibility is to coordinate institutional compliance with Title IX requirements. An institution should inform the Title IX Coordinator of all reports and complaints so that the coordinator may carry out these functions.
- Along with knowledge of applicable Title IX requirements, a Title IX Coordinator should also coordinate the collection and analysis of an annual climate survey if the institution conducts such a survey, which is recommended by OCR.

- The role of Title IX Coordinator must be made visible to the campus community, making sure to make available to students and employees the name, office address, telephone number, and email address of the Title IX Coordinator. This information should also be included in an institution’s notice of nondiscrimination. In the case of printed information, but not online information, it is acceptable to identify the Title IX Coordinator through a position title and established email address for the position. For institutions with multiple coordinators, the institution should notify students and employees of the lead coordinator.
- Institutions have a responsibility to ensure that the Title IX Coordinator has appropriate training and knowledge.

Along with the April 2015 DCL, the “guidance package” from the Department of Education included a letter to Title IX coordinators reminding them of the importance of their roles and of the necessity of carrying out their duties with independent authority. Additionally, a “Title IX Resource Guide” was included in the guidance package. The resource guide—arranged topically by “Scope of Title IX,” “Title IX’s Administrative Requirements,” “Application of Title IX to Various Issues,” and “Information Collecting and Reporting”— provides information regarding OCR’s interpretations of the responsibilities under Title IX of institutions and of Title IX Coordinators.

The American Association of University Professors has criticized the enforcement guidance provided by OCR, as well as campus actions taken in conjunction with OCR enforcement guidance and activities. “The History, Uses and Abuses of Title IX,” “identifies tensions between current interpretations of Title IX and the academic freedom essential for campus life to thrive. It finds that questions of free speech and academic freedom have been

ignored in recent positions taken by the Office for Civil Rights (OCR) of the Department of Education, which is charged with implementing Title IX, and by university administrators who are expected to oversee compliance measures” (<https://www.aaup.org/report/history-uses-and-abuses-title-ix>). This report follows an earlier statement by the AAUP, “Campus Sexual Assault: Suggested Policies and Procedures) (February 2013, available at <http://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures>). The Statement reviews recent Office for Civil Rights (OCR) Title IX enforcement documents and suggests how policies related to the reporting of and response to sexual assault should be developed. The statement takes issue with OCR’s requirement that the standard of proof in student and faculty discipline cases involving Title IX violations be “the preponderance of the evidence,” preferring, instead a “clear and convincing evidence” standard “as a necessary safeguard of due process and shared governance.”

State legislators have been active in enacting legislation related to sexual violence. For a review of state laws and other developments at the state level, see Andrew Morse, Brian A. Sponsler, and Mary Fulton, *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* (December 2015), a report issued by NASPA and the Education Commission of the States.

In addition to concerns about compliance with the requirements of Title IX and the enforcement agencies, institutions are now facing lawsuits by students or former students who were disciplined after a finding that they were responsible for a sexual assault. While students at public colleges and universities typically assert due process claims, students at private institutions tend to assert negligence and breach of contract claims. Students have also raised Title IX claims for erroneous outcomes or selective enforcement of Title IX.

Although institutions typically prevailed in early cases brought by male students under title IX, more recently, students have had some success. Some of these successes are summarized in several articles. See, for example, Jake New, “Several Students Win Recent Lawsuits Against Colleges that Punished Them for Sexual Assault,” *Inside HigherEd*, April 14, 2016, available at <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>. See also Jeannie Suk Gersen, “College Students Go to Court Over Sexual Assault,” *The New Yorker*, August 5, 2016, available at <http://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault>.

One such case, *Doe v. Sewanee: The University of the South*, resulted in a jury verdict for the student on the grounds of negligence (Collin Eaton, “Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges.” *Chronicle of Higher Education*, Sept. 2, 2011, available at <http://chronicle.com/article/Jury-Verdict-in-Sex-Assault/128884/>). (See also *Wells v. Xavier University*, 7 F.Supp.3d 746 (S.D. Ohio 2014)). (Court denied college’s motion to dismiss charges of libel and Title IX violations).

Some successful challenges to sanctions brought by alleged assailants indicate that institutional efforts to comply with Title IX must be careful to adhere to policies and procedures and afford fair treatment to accused students. In several cases, courts have questioned whether institutions satisfied the obligations owed to student respondents either on due process or contractual grounds or through state civil rights statutes. These cases indicate that in this rapidly evolving area of law, some courts are taking a more critical look at how colleges and universities handle sexual misconduct allegations in relation to the fair treatment of accused students.

In November of 2016, the California Court of appeal reversed a ruling by a trial court that a hearing in which a student had been found responsible for sexual misconduct had been unfair.

In *Doe v. Regents of Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL (Cal. Sup. Ct. July 10, 2015), a University of California San Diego student had successfully challenged disciplinary actions taken against him under a California law that provided for judicial review of administrative decisions. The trial court had determined that the hearing conducted for the student was unfair, specifically in regard to the right of cross-examination. Under the rules of the conduct panel, the student could submit questions to the hearing officer to be asked of the complainant or witnesses. Of thirty-two questions submitted, the hearing office asked the complainant or witnesses nine of the questions. The court noted in its opinion that the hearing officer solely determined which questions could be asked. It also discussed the decision by the hearing office to omit questions regarding text messages between the complainant and the accused student. The court agreed with the student that this inquiry was potentially relevant to the student's defense.

The court also questioned having the accused student separated from the complainant by a barrier. The court stated that it did not view the screen between the accused and the complainant as needed since the accused student had not demonstrated any hostility toward the complainant since the encounter that was the basis of the proceeding. The court found it concerning as well that the panel relied on evidence contained in a report but the individual cited in the report did not testify before the panel. The accused student was also not provided the names of 14 witnesses who were questioned for the investigative report. The court found fault as well with the fact that the investigative report determined that it was more likely than not that the student had committed a conduct code violation. The court stated it was the panel's duty to make such a determination and not to have one as part of the investigative report. The court additionally determined that the panel appeared to give weight to the fact that the accused

student asserted his Fifth Amendment rights against self-incrimination because the panel reported that it would have liked to have heard more from the student.

Based on its determination that the proceeding was unfair, the court considered whether the evidence supported the panel's findings, despite flaws in the proceedings. The court concluded substantial evidence did not support the findings of non-consensual sexual activity. Because the investigative report was presented without the chance for the accused student to engage in sufficient cross examination, the court withheld the report from its evaluation of substantial evidence. The court also faulted the institution for raising the penalty imposed when the student appealed the decision. The trial court vacated the findings and the sanctions against the student.

In *John Doe v. Regents of the University of California*, 5 Cal. App. 5th 1055 (Cal. Ct. App. 2016), the appellate court rejected the trial court's reasoning. The court found that the university's refusal to allow the student's attorney to participate in the hearing did not make the process unfair, nor was the student's inability to cross-examine the accuser unfair. The court also ruled that the sanctions imposed by the university were within its discretion, and reinstated the original sanctions.

In *John Doe v. University of Southern California*, 200 Cal. Rptr. 3d 851 (Cal. App. 2d Dist. Div. 4, 2016), a state appellate court affirmed a ruling in favor of a student who was suspended after being found responsible for endangering a female student who was sexually assaulted by a group of students. The plaintiff did not assault the female student, but was present during the group assault and did not assist her. He was found responsible for violations of several conduct code provisions; on appeal, the sanction and violations were upheld.

The student moved for a writ of mandate, requesting a stay of the appeals panel's

decision to sanction him. Although the trial court had upheld most of the findings of the appeal panel, the appellate court reversed. The appellate court held that the university had not provided the student with fair notice of the factual basis for the allegations against him, not did the university provide the student an adequate hearing on the allegations against him because the hearing panel relied on information that he had not been given. The court ordered the trial court to grant the student's petition for a writ of mandate, which resulted in the reversal of all findings and sanctions against the student.

A student challenged the disciplinary actions taken against him by Cornell University for violating its sexual assault policy. *Prasad v. Cornell Univ.*, No. 5:15-cv-322 (N.D. N.Y. Feb. 2, 2016). The court refused to dismiss several of the student's claims, including ones based on allegations that the university demonstrated bias against him by, among other things, improperly disregarding eyewitness accounts and favoring the complainant over the student and through reliance on an investigatory model that deprived him of procedural due process and the ability to properly refute allegations. Based on the facts asserted, the court determined that the student had articulated a plausible set of circumstances to support an erroneous outcome claim at the current stage of litigation. Additionally, the court held that the student had presented facts sufficient to sustain a claim under New York's Human Rights Law. It also provided the opportunity for the student to amend several claims based on breach of contract, breach of covenant of good faith and fair dealing claims, and New York's civil rights law.

A student at James Madison University was initially found not responsible for sexual misconduct against a fellow student. The student complainant appealed the decision and a review board reversed the initial determination and suspended the student for five-and-a-half years. *Doe v. Alger*, No. 5:15-cv-00035 (W.D. Va. March 31, 2016). The student claimed that

he was not allowed to appear before the appeals board; was not shown new evidence submitted by his accuser on appeal; was not given the names of the people hearing his appeal; and was not given notice of the appeals board's meeting. The court found all of these allegations indicative of a potential due process violation.

In a case involving a student at Brandeis University found guilty of sex misconduct, a federal district court held several claims against the institution could proceed. *Doe v. Brandeis Univ.*, No. 15-11557-FDS (D. Mass. March 31, 2016). The case arose out of the university's determination that the student was responsible for sexual misconduct over the course of a long-term relationship with another student. While dismissing several of the student's claims, the court refused to do so for several others, including allegations that the university failed to provide basic fairness in its treatment of the student. In revising its sexual misconduct proceedings, the university had eliminated hearings and moved to rely, instead, on a special examiner to conduct an investigation and produce a report.

The court noted that as a private entity, the university was not required to afford the student constitutional protections in its disciplinary standards; nevertheless, the university was responsible to make sure that it exercised basic fairness in its treatment of students. In allowing the student's suit to proceed, the court determined that the university failed to provide the student with multiple procedural protections, including: a lack of specific charges; not allowing the student to have a counsel during the investigation when the institution had engaged an outside attorney; not permitting the student to cross-examine witnesses or the accuser; no separation of the prosecutorial, investigatory, and adjudicative functions; and no meaningful right of appeal for the student.

A student at Brown University who was found to have violated the institution's sexual misconduct policy sued the university. *Doe v. Brown Univ.*, No. 15-144 S (D. R.I. Feb. 22, 2016). A federal district court determined that the student had asserted a plausible claim of erroneous outcome under Title IX based on allegations supported by factual claims that the institution demonstrated gender bias in its treatment of male students accused of sexual misconduct. Reasoning that requiring a male student to "conclusively demonstrate, at the pleading stage . . . that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts," the court found that evidence existed to suggest that gender bias was a motivating factor behind the erroneous finding at the current stage of litigation. *Id.* at *8. The student asserted as well that the university had ignored potentially exculpatory evidence. The court also permitted the student's breach of contract and breach of good faith and fair dealing claims to proceed by asserting plausible factual assertions that certain university actions did not conform to the procedures that the institution was supposed to provide to the student under applicable university student conduct standards.

In relation to the issue of external pressure unduly interfering with investigations by institutions, one court discussed that courts were divided on the issue of whether a student found in violation of sexual misconduct could support an erroneous outcome claim under Title IV for purposes of satisfy pleading requirements based on allegations that local and national pressure had tainted the disciplinary process in relation to the student. *Doe v. Regents of the Univ. of Cal.*, No: 2:15-cv-02478-SVW-JEM (C.D. Cal. July 25, 2016) (dismissing a student plaintiff's claims challenging a determination that he violated an institution's sexual misconduct policy).

And in *John Doe v. The Rector and Visitors of George Mason University*, 149 F. Supp. 3d 602 (E.D. Va. 2016), a student who was expelled after being found responsible for sexual misconduct and for making threats alleged that the university's alleged procedural due process violations implicated a liberty interest. He also claimed a violation of his right to free speech. Evaluating the plaintiff's claim under the test created in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (discussed on p. 647 of LHE 5th), the court determined that the plaintiff was not given proper notice of the scope of the charges against him, and that *ex parte* communications between individuals involved in deciding the appeal of the discipline panel's finding exonerating the plaintiff violated his due process rights.

The court emphasized the narrowness of its ruling:

The narrowness of the conclusion reached here warrants emphasis. The procedural inadequacy on this record was not the failure to provide a specific form of notice or the failure to structure proceedings in a particular manner. Rather, the conclusion reached here is simply that due process is violated where a state-run university (i) fails to provide notice of the full scope of the factual allegations in issue in a disciplinary proceeding, (ii) deviates from its own procedures in permitting an appeal of a finding of no responsibility, (iii) conducts a *de novo* administrative review of the charges without affording an adequate opportunity to mount an effective defense, including by holding off-the-record and *ex parte* meetings with the accuser, and (iv) fails to provide a basis for its decision such that meaningful review can occur. (149 F. Supp. 3d at 622-623).

For another recent case in which a court issued an injunction staying the expulsion of a graduate student who was found responsible for violating the university's sexual misconduct

policy, see *Ritter v. State of Oklahoma*, 2016 U.S. Dist. LEXIS 60193 (W.D. Okla. 5/6/16). The court also allowed the student to bring Title IX and due process claims, denying the university's motion to dismiss. 2016 U.S. Dist. LEXIS 95813 (W.D. Okla. 7/22/16). See also *John Doe v. Brown University*, 2016 U.S. Dist. LEXIS 21027 (D. R.I. 2/22/16) (denying university's motion to dismiss male student's Title IX claim for erroneous outcome of the hearing that determined that he was responsible for sexual misconduct, as well as his breach of contract claim) and *Doe v. Columbia University*, 2016 U.S. App. LEXIS 13773 (2d Cir. 7/29/16)(reversing lower court's dismissal of suspended student's Title IX claim and remanding for trial).

In other instances, institutions have successfully countered claims brought by students disciplined for sexual assault (See, e.g., *Doe v. University of South Florida Board of Trustees*, 2015 WL 3453753, M.D. Fla. May 29, 2015) (Court determined that it was unlikely that an accused student who claimed that he inadvertently deleted two emails informing him of allegations of sexual misconduct would be successful in establishing a viable Title IX claim); *Sahm v. Miami University*, 2015 WL 2406065 (S.D. Ohio May 20, 2015) (Student alleged that university violated Title IX in expelling him for sexual assault. The court rejected the student's claims under Title IX based on theories of erroneous enforcement or deliberate indifference); *Marshall v. Ohio University*, 2015 WL 1179955 (S.D. Ohio March 13, 2015) (Student suspended for sexual misconduct unsuccessful in obtaining temporary restraining order against university on grounds of institutional violations of 42 U.S.C. § 1983, First Amendment, and Title IX. In respect to Title IX, the court determined that the student had not demonstrated likely success on the merits on the basis of erroneous outcome or deliberate indifference); *Peloe v. University of Cincinnati*, 2015 WL 728309 (S.D. Ohio Feb. 19, 2015). (Court granted university's motion to dismiss claims challenging its disciplining of student for sexual misconduct, determining that

student's failure to exhaust all available administrative remedies made due process claims premature); and *Bleiler v. College of the Holy Cross*, 2013 WL 4714340 (D. Mass. Aug. 26, 2013) (Student expelled after being found responsible for sexual assault sued private college alleging Title IX violations and breach of contract. Court awarded summary judgment to college on all counts).

* * * * *

A federal appellate court has rejected the Title IX claim of a parent whose daughter, a student at Peru State College, was allegedly murdered by a fellow student with a record of sexual harassment and other disciplinary infractions. In *Thomas v. Board of Trustees of Nebraska State Colleges*, 2016 U.S. App. LEXIS 12125 (8th Cir. 7/1/16), the court affirmed a trial court's determination that the plaintiff had not alleged sufficient facts to demonstrate that the Board showed deliberate indifference to her daughter (an argument similar to that used in the *Williams* case, discussed on pp. 873-875 of LHE 5th).

In *Butters v. James Madison University*, 2016 U.S. Dist. LEXIS 129414 (W.D. Va. Sep. 22, 2016), a federal trial court rejected an assaulted student's Title IX claim. While on spring break, James Madison University (JMU) student Sarah Butters was sexually assaulted by three male JMU students. She later discovered there was video of the incident. JMU learned of the sexual assault on March 27, 2013, when a friend of Butters's contacted Butters's sorority advisor, Paula Polglase. Polglase was employed by JMU at the time as the social media coordinator for university communications and marketing. Polglase notified JMU's Title IX coordinator of the incident on April 1, 2013. Butters turned the video over to JMU's Title IX coordinator, but Butters declined to file a complaint at that time.

On December 17, 2013, Butters told the Title IX coordinator that she was ready to file a complaint. Butters testified at three separate hearings, one for each assailant. All three men were found responsible for sexual assault and harassment by a preponderance of the evidence. However, Butters exercised her right to reject the administrative decision because she felt the proposed sanctions—expulsion after graduation—were too light.

On March 20, 2014, a second level of hearings occurred, with another three hearings occurring on the same day before the Judicial Council. The Judicial Council increased the sanctions and ordered the immediate expulsion of all three men from JMU. All of the men exercised their right to appeal, and on April 2, 2014, JMU again conducted separate appeal hearings. The appeal board reduced the sanction imposed on each of the men, imposing instead the following sanctions: (a) each of the men would be expelled from JMU upon graduation, which would preclude them from returning to the JMU campus after graduation for any reason at all (including taking graduate classes or attending events), and a violation would result in an arrest for criminal trespass; (b) none of the men could walk at their upcoming graduation ceremonies; (c) none of the men could have any contact with Butters; (d) each of the men was prohibited from being present on the JMU campus, except for classes, and none were permitted to participate in any JMU student clubs or organizations; and (e) the men were to create, in conjunction with JMU staff, a 30-minute presentation on sexual assault for possible presentation to student organizations.

Butters brought a claim against JMU under Title IX, and JMU moved for summary judgment, which the court granted to JMU. The court held that no reasonable jury could conclude that JMU was deliberately indifferent in its handling of Butters's claim by requiring that she initiate the formal complaint process before beginning investigation and disciplinary

proceedings. Additionally, Butters’s encounters with her alleged assailants did not cause JMU’s response to her sexual assault to be deliberately indifferent. The court further held that no reasonable jury could conclude that JMU’s response and disciplinary process (effectively requiring Butters to testify multiple times) after Butters filed a complaint was clearly unreasonable.

* * * * *

NACUA has developed a number of resources to aid institutions in complying with this difficult, complex campus problem. Among these helpful resources are the following:

Andrea Stagg, *OCR’s “Dear Colleague” Letter on Title IX and Sexual Violence—Training Obligations*. NACUANote Vol. 10. No. 4 (January 17, 2012).

Amy C. Foerster and James A. Keller, *OCR’s “Dear Colleague” Letter on Title IX and Sexual Violence—First Steps for Compliance*. NACUANote Vol. 10. No. 3 (January 11, 2012).

NACUA Virtual Seminar on *Breaking New Ground in Title IX Sexual Assault and Harassment Investigations and Resolutions? The University of Montana Case and Its Implications*. Materials prepared by Dennis Cariello, Lucy France, Caroline Hendel, Gina Maisto Smith, Kenet Talbert, and Josh Whitlock (June 2013).

NACUA Virtual Seminar on *Conducting Campus Student Sexual Assault Investigations*. Materials prepared by Maya Kobersy and Jody Shipper (July 26, 2012).

Jody Shipper, “Common Pitfalls in Student Sexual Assault Hearings,” Outline for NACUA CLE (February 2014).

Scott W. Roberts, Melissa W. Nelson, Tobias W. Crawford, and Tyler S. Laughinghouse, “Nobody Likes Me, Everybody Hates Me, But At Least I’ll Win in Court? What Recent Title IX

Lawsuits Teach Us About Avoiding and Litigating Claims.” NACUA Conference paper, January 23, 2016 (available from www.nacua.org).

Craig Wood, Josh Whitlock, Melissa Nelson, Tyler Laughinghouse, and Jillian Nyhoff. “Between a Rock and a Hard Place: A Discussion of Issues that Frequently Arise in Sexual Misconduct-Related Litigation Against Colleges and Universities.” *NACUANote* Vol. 14 no. 4 (May 18, 2016).

* * * * *

The NCAA has released a report: *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses* (Sept. 3, 2014), available at <http://www.ncaa.org/about/resources/media-center/ncaa-releases-new-handbook-addressing-sexual-assault>. The report discusses ways that athletics departments can “play a key role in campuswide efforts to fight sexual and interpersonal violence.”

Section 8.2 Admissions

8.2.4. The principle of nondiscrimination.

8.2.4.1. Race. The issue of whether colleges and universities should seek criminal background history from applicants or conduct criminal background checks has gained increasing attention in recent years. The U.S. Department of Education has issued a resource guide suggesting that colleges and universities should strongly consider not inquiring about the criminal history of student applicants. *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals* (2016), available at <http://www2.ed.gov/documents/beyond-the-box/guidance.pdf>.

In the guidance, the Department advises institutions to act carefully in choosing to seek criminal history information from applicants, especially as such practices can have a disproportionate

negative impact on people of color. If institutions decide to seek criminal background information from applicants, the Department counsels colleges and universities to take steps to avoid unfairness in admissions, including: only taking criminal history information into account following an initial assessment of admission; being transparent with applicants about policies and the potential use of information; clearly communicating early in the application process how students are to respond to requests; and making questions about criminal history specific and narrowly focused and limited to a certain time period.

8.2.4.6. *Immigration status.* In the absence of Congressional action to protect Dreamers (see LHE 5th, pp. 906-07, and section 8.3.6.2 of these Updates) President Obama acted, through the U.S. Department of Homeland Security, to ease the plight of the Dreamers – undocumented young persons living in this country who may seek to obtain postsecondary education but are unable to do so because they lack documentation of U.S. residence. The DHS executive action is intended to be a temporary measure that provides some relief to Dreamers until such time as a DREAM Act is passed and implemented.

The executive action is the Memorandum on “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” issued by Janet Napolitano, Secretary of Homeland Security, June 15, 2012 (www.dhs.gov). It establishes criteria for determining when individual young persons will be eligible for a deferral of any deportation proceedings against them. Among the criteria, the individual must have come “to the United States under the age of sixteen”; must have “continuously resided in the United States for at least five years preceding the date of the Secretary’s memorandum; and must be “currently in school,”

or must have “graduated from high school, [or] obtained a general education development certificate, or is an honorably discharged veteran”

The DHS Memorandum does not require colleges and universities to consider undocumented applicants for admission. But it may encourage states and state systems that do not accept undocumented applicants for admission to begin to do so when these applicants have received a deferral of action under the DHS criteria. Similarly, the DHS Memorandum may encourage prospective students who meet the criteria to apply for admission when they would not have done so absent the protection provided by the DHS Memorandum. Moreover, once undocumented students have been admitted to a college or university, they may arguably become eligible for reduced tuition because undocumented students who meet the DHS criteria would be considered to be lawfully present in the U.S. See, e.g., “Arizona Judge: Some Undocumented Students Eligible for In-State Tuition,” *Inside Higher Ed.*, May 6, 2015 (daily ed.). (For another, pre-existing, way in which some undocumented students may become eligible for reduced tuition or similar benefits, see LHE 5th, section 8.3.6.2, pp. 970-72.)

For President Obama’s remarks on – and explanation of -- the DHS Memorandum, see “Remarks by the President on Immigration,” <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>

Subsequently, in 2014, President Obama took additional executive action, on a larger scale, to provide protection for other undocumented immigrants who are parents of children who are U.S. citizens or are otherwise lawfully residing within the United States. This executive action, titled Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), does not focus on students who are Dreamers, as the earlier executive action does, but it would help provide a supportive family structure within the United States for Dreamer students

protected by the earlier executive order as well as for undocumented parents who receive protection under DAPA and subsequently seek to attend college in the U.S.

The DAPA executive action was challenged in *United States v. Texas*, as being beyond the power of the President. The U.S. district court enjoined the operation of DAPA until such time as the courts have issued a final ruling on the merits. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court, and, upon further review, the U.S. Supreme Court divided 4 to 4 (*U.S. v. Texas*, 579 U.S. ____ (June 23, 2016)). The tie vote serves to return the case to the district court for further proceedings on the merits.

8.2. Admissions

8.2.5. Affirmative action programs.

Pp. 921-22 The *Fisher* case

The U.S. Supreme Court reviewed the Fifth Circuit's decision in *Fisher* and, by a vote of 7 to 1, ruled that the lower court had incorrectly applied "strict scrutiny" analysis. The Supreme Court therefore vacated the judgment of the Fifth Circuit and remanded the case to that court for further proceedings. *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013). Justice Kennedy wrote the majority opinion; Justice Scalia and Justice Thomas each wrote a concurring opinion; and Justice Ginsburg wrote a dissenting opinion. Justice Kagan recused herself because she had been tangentially involved in the case at the appellate level when she was the U.S. Solicitor General.

In his majority opinion, Justice Kennedy explained that *Grutter* and *Gratz* (LHE 5th pp. 916-920) required courts reviewing a race-conscious admissions program to apply strict scrutiny analysis (see LHE 5th p. 913). Strict scrutiny of such a government program (here, the University of Texas-Austin admissions policy, discussed at LHE 5th pp. 915, 921-22) requires that the

government prove first that it has a “compelling state interest” in operating the program and, second, that the “means” by which the government attains this compelling state interest are “narrowly tailored” to the accomplishment of the interest. (See *Regents of the University of California v. Bakke* (Justice Powell opinion); *Grutter and Gratz*; and *Parents Involved v. Seattle School District No. 1* – all discussed in Section 8.2.5 of LHE 5th.) According to the majority opinion in *Fisher*, the Fifth Circuit was too deferential to the university in its review of the race-conscious admissions program.

Under *Grutter and Gratz*, reviewing courts may defer to a university’s determination that student body diversity is a compelling interest. As Justice Kennedy wrote in *Fisher*:

According to *Grutter*, a university’s ‘educational judgment that such diversity is essential to its educational mission is one to which we defer.’ 539 U. S. at 328. *Grutter* concluded that the decision to pursue ‘the educational benefits that flow from student body diversity,’ *id.*, at 330, that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*” (133 S.Ct.. at 2419).

The deference that the lower courts gave to UT - Austin under the compelling interest criterion was proper, according to the Court. But under the second strict scrutiny criterion, narrow tailoring, reviewing courts may not defer to the university’s methods for attaining student body diversity. The university’s assertion that the admissions program’s use of race and ethnicity is “narrowly tailored,” according to Justice Kennedy, “receives no deference.” The deference that the lower courts accorded UT under the narrow tailoring criterion was therefore incorrect.

Justice Kennedy explained that narrow tailoring analysis “involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although ‘[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,’ strict scrutiny does require a court to examine with care, and not defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’ See *Grutter*, 539 U. S., at 339–340 (emphasis added)” (133 S.Ct. at 2420). In addition, “The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” In other words, according to the Court, “strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice” (133 S.Ct. at 2420).

Since the lower courts’ review did not conform to this narrow tailoring analysis, the U.S. Supreme Court vacated the Fifth Circuit’s decision and remanded the case to that court. In remanding the case, the Supreme Court directed that further proceedings would be necessary in order for the lower courts to thoroughly review whatever submissions the university provides, to show that its admissions program “is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that ‘encompasses a - - - broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’ *Bakke*, 438 U. S. at 315” (133 S. Ct. at 2421). The lower courts may not give any deference to UT’s determinations on narrow-tailoring.

Justice Ginsburg, the lone dissenter, reasoned that the Top Ten Percent plan was not race-neutral because it relied on racial and ethnic segregation at Texas high schools to achieve racial diversity in college admissions. She also asserted that the university had demonstrated that its

admissions program was narrowly tailored because race was only “a factor of a factor of a factor of a factor” in making admissions decisions (133 S. Ct. at 2434 (dissenting opinion)). She agreed that the Court should not “cast off the equal protection framework settled in *Grutter*” and concluded that UT had satisfied the strict scrutiny test required by the equal protection clause.

Like the Court’s previous decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007) (LHE 5th pp. 920-21), the Court’s decision in *Fisher* did not overrule or undermine the 2003 Supreme Court ruling in *Grutter*, as many proponents of affirmative action had feared. Instead, Justice Kennedy’s majority opinion states that the Court accepted the reasoning and rulings of *Grutter and Gratz* (and also Justice Powell’s opinion in *Bakke*) as a “given for purposes of deciding this case.” But the Court’s insistence in *Fisher* that the courts give no deference to institutions regarding narrow tailoring sets a high bar for a college or university to clear.

After the U.S. Supreme Court remanded *Fisher* to the U.S. Court of Appeals for the Fifth Circuit, a three-judge panel of that court reviewed the University of Texas at Austin admissions program in light of the Supreme Court’s ruling and, by a 2 to 1 vote, again upheld the university’s admissions program (2014 U.S. App. LEXIS 13461, 2014 WL 3442449 (July 15, 2014)). The majority judges first addressed and upheld the university’s compelling interest in a diverse student body (an interest that had been affirmed by the Supreme Court in *Grutter* and reaffirmed in *Fisher*), and then turned to the narrow tailoring prong of strict scrutiny.

The majority opinion notes that 80 percent of UT-Austin’s students are admitted through the Top Ten Percent Plan; the other 20% are admitted through “holistic” review, which includes consideration of race/ethnicity as one factor among various others. The majority rejected Fisher’s argument that the Top Ten Percent Plan resulted in sufficient diversity at UT Austin,

and therefore no further consideration of race was necessary. Fisher's concept of diversity, the majority noted, focused only on race and ethnicity. In contrast, diversity is and must be more broadly defined, as the Supreme Court ruled in *Grutter* and in *Fisher*. The holistic review, said the majority, allows the university to consider a wide array of characteristics pertinent to student body diversity, such as income, first generation status, and special challenges or experiences, as well as race/ethnicity.

Nor could the university use the Top Ten Percent Plan along with holistic review, but then be prohibited by the court from using race/ethnicity as a factor in its holistic review. The court noted that data from 2005 through 2008 showed that white applicants benefitted more from holistic review than did nonwhite applicants in terms of the percentages admitted under that approach. "Given the test score gaps between minority and nonminority applicants, if holistic review was not designed to evaluate each individual's contributions to UT-Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise."

The majority opinion also considers the various race-neutral efforts of UT-Austin to attract more minority students to the university. The university, for example, engaged in extensive recruiting efforts, targeted at low income, first generation college students, many from high schools that historically had sent few or no students to the University. "[T]his record shows that UT-Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program."

One judge dissented from the majority's ruling, writing that the majority had been too deferential to the university's claim of narrow tailoring, and in particular, stating that the university's failure to define "critical mass", as it relates to the goal of student body diversity,

should have resulted in a ruling for Fisher. The majority judges had explained that “Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like spokespersons for their race.” But to the dissenting judge, such an articulation “of ‘critical mass’ . . . is subjective, circular, or tautological.” The dissenting opinion then asserted: “We cannot undertake a rigorous ends-to-means narrow tailoring analysis when the university will not define the ends. We cannot tell whether the admissions program closely ‘fits’ the university’s goal when it fails to objectively articulate its goal. Nor can we determine whether considering race is necessary for the University to achieve ‘critical mass,’ or whether there are effective race-neutral alternatives, when it has not described what ‘critical mass’ requires.” For these reasons, the dissent would have found the program to be insufficiently narrowly tailored and therefore a violation of the equal protection clause.

The essence of the dissent’s argument is that the university had explained critical mass in such a way that the court could not know when a critical mass has been achieved. The court therefore could not determine that the university’s plan is “necessary” as required by strict scrutiny review. The only way the court could make this determination, according to the dissent, is to defer to the university’s judgments about critical mass and when it is reached. Such deference would be impermissible under the Supreme Court’s 2013 decision because critical mass is associated with narrow tailoring analysis, under which no deference may be given to the university’s judgments.

Fisher again petitioned the U.S. Supreme Court for review of the 5th Circuit’s decision. The Court again granted review, and in *Fisher vs. University of Texas at Austin* (called *Fisher II*), 136 S. Ct. 2198 (2016), the Court again affirmed the 5th Circuit’s decision and upheld the

constitutionality of the university's holistic review admissions plan. The Court divided 4 to 3, with Justice Kennedy writing for the majority (Justices Kennedy, Ginsburg, Breyer, and Sotomayor and Just Alito writing the dissent (Justices Alito, Thomas and Roberts). Justice Kagan recused herself, and a 9th vote was unavailable due to the death of Justice Scalia.

The Court in *Fisher II* based its decision on its analysis in *Fisher I*, such that *Fisher II* becomes an extension of *Fisher I* - - the majority opinion in each case being written by Justice Kennedy. *Fisher II* confirms the principles of strict scrutiny review derived from *Fisher I* (and *Grutter* before it), and moves beyond *Fisher I* by applying these principles to the particulars of the U.T. Austin holistic admissions plan in effect at the time Fisher's application for admission was rejected.

As discussed above, the UT-Austin undergraduate admissions plan has two components: the "Top Ten Percent" plan and the holistic review plan. Fisher did not challenge the first component, arguing instead that this component provides adequate opportunity for the university to attain student body diversity and that consideration of race and ethnicity in the holistic review component is therefore unnecessary – an argument that the Court rejected. In doing so, the Court carefully reviewed the particulars of UT- Austin's holistic review process plan and its objectives. The plan includes a mix of stages and factors for the review of applications by various teams of admissions officers. There are two components to the admission process: the Academic Index (AI) and the Personal Achievement Index (PAI). Under the PAI, there are also two components: the essay score and the "full file review" resulting in a personal achievement score (PAS). Under the PAS there is a category of "special circumstances" that could add weight to an application, and under "special circumstances" there is a listing of various such circumstances, one of which is the applicant's race/ethnicity.

The Court concluded that:

The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race. Race enters the admissions process, then, at one stage and one stage only-- calculation of the PAS. Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. [136 S. Ct. at 2207.]

Fisher argued that this admissions plan violated the equal protection clause because UT- Austin did not articulate, with "sufficient clarity" and precision, the compelling interest that supports the plan. In particular, Fisher argued that UT- Austin had not sufficiently explained its use of "critical mass," and the goal it sought to achieve through creating a critical mass of minority students. Without a clear explication of the goal, Fisher asserted, a court could not determine "whether the University's admissions program is narrowly tailored" to accomplishment of the goal, as required by strict scrutiny review.

The Court majority quickly disposed of this argument, which was a focal point of Justice Alito's strenuous dissent and the dissent in the Fifth Circuit's review of the case below.

'[T]he compelling interest that justifies consideration of race in college admissions', Justice Kennedy declared, 'is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of attaining 'the educational benefits that flow from

student body diversity.’ *Fisher I*, 570 U.S. at ____; see also *Grutter*, 539 U.S. at 328’

Increasing minority enrollment may be instrumental to these educational benefits, but it is not . . . a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained. [579 U.S. at ____.]

The U.S. Supreme Court’s reasoning in *Fisher I* and *Fisher II* on narrow tailoring leaves some matters uncertain. Must a college or university identify and study the various race-neutral alternatives put into effect by other colleges and universities, especially in states where use of race and ethnic preferences have been prohibited? What kind of evidence must a university provide to support its determination that a “critical mass” has not yet been achieved? If a university can demonstrate that “critical mass” is dependent on the university’s mission and values, and is determined by relying on the expertise of its faculty, academic officers, and admissions officers, would that be sufficient? Such open questions, along with the height of the bar described by the Court in *Fisher I*, may result in further litigation. This in turn will mean that colleges and universities using race or ethnicity as one of many admissions criteria must periodically examine their rationales and methods - - not only if threatened with litigation but as a regular administrative practice -- to ensure that they can meet *Fisher’s* high bar of strict scrutiny, in particular the narrow tailoring branch of strict scrutiny.

Besides the assistance that the Court in *Fisher II* provides with the analysis of the specific issues at hand, it also provides important guidance with broader issues. Three types of guidance are referenced here.

One. The Court in *Fisher II* confirmed and relied on a synthesis of “controlling principles” of strict scrutiny review that the Court in *Fisher I* had set out. These principles provide a helpful framework for institutions to use in analyzing the validity of race-conscious admission plans under the equal protection clause. The controlling principles are as follows:

First, “because racial characteristics so seldom provide a relevant basis for disparate treatment,” *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989), “[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny,” *Fisher I*, 570 U.S., at ___ (slip op., at 7). Strict scrutiny requires the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.” *Ibid.*

Second, “the decision to pursue ‘the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.” *Id.*, at ___ (slip op., at 9). A university cannot impose a fixed quota or otherwise “define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’” *Ibid.* Once, however, a university gives “a

reasoned, principled explanation” for its decision, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.” *Ibid.* (internal quotation marks and citation omitted).

Third, no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals. *Id.*, at ___ (slip op., at 10). A university, *Fisher I* explained, bears the burden of proving a “nonracial approach” would not promote its interest in the educational benefits of diversity “about as well and at tolerable administrative expense.” *Id.*, at ___ (slip op., at 11) (internal quotation marks omitted). Though “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” or “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,” *Grutter*, 539 U.S. at 339, it does impose “on the university the ultimate burden of demonstrating” that “race-neutral alternatives” that are both “available” and “workable” “do not suffice.” *Fisher I*, 570 U. S. at ___ (slip op., at 11).

Two. The Court in *Fisher II* made clear that the university’s affirmative action plan for admissions “is sui generis.” Colleges and universities with race conscious plans therefore must

carefully compare their plans' provisions with those of the UT plan, seeking to determine not only how their plan is like the UT-Austin's plan but also how it is different. Colleges and universities should also note whether their plan combines a holistic review component with a Top Ten Percent component, or whether their plan encompasses only holistic review. If the plan includes both components, it may complicate a court's review. See *Fisher II* at 579 U.S. at ____.

Three. The Court in *Fisher II* emphasizes and explains “the University’s continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances.” In particular, the University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. Going forward that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University’s examination of the data it has acquired in the years since petitioner’s application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will

have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.

* * * *

The University must continue to [collect and] use . . . data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The court’s affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies. [579 U.S. ____ (2026.)

P. 923 & p. 916 fn. 22. Voter-initiated amendments to state constitutions

The decision of the U.S. Court of Appeals for the Sixth Circuit in *BAMN v. Regents of the University of Michigan* has been reversed by the U.S. Supreme Court. The case is now cited as *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct.1623 (2014). By a vote of 6 to 2, the Court ruled that the voter initiated amendment to the Michigan constitution, prohibiting public colleges and universities from granting “preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin,” did not violate the Fourteenth Amendment’s equal protection clause. But there was no majority opinion. Justice Kennedy, for himself, Chief Justice Roberts, and Justice Alito, wrote a plurality opinion in which they disagreed with the Sixth Circuit’s reading and application of the Supreme Court precedents

pertinent to the case. Justice Scalia, joined by Justice Thomas, wrote an opinion concurring in the plurality's result but not its reasoning, as did Justice Breyer.

The *Schuette* case did not present a challenge to the Court's cases on the validity, under the equal protection clause, of race-conscious admissions programs adopted by universities. (See the *Grutter*, *Gratz*, and *Parents Involved* cases analyzed in Section 8.2.5 of LHE 5th and the *Fisher* case discussed above in these updates for Section 8.2.5.) The issue, rather, is "whether, and in what matters, voters in the States may choose," consistently with the equal protection clause, to prohibit the [use] of race-conscious admissions policies " (*Schuette*, 134 S. Ct. at 1630 (plurality opinion). In determining that voters may choose to do so, the Court has not only upheld the Michigan constitutional amendment that prohibits race preferences in admissions; it apparently has also cleared the path for similar voter-initiated measures in other states - - several of which have already implemented such measures (see LHE 5th Section 8.2.5, p. 916). Thus, although federal equal protection law permits public colleges and universities to implement affirmative action policies for admissions if they adhere to the Supreme Court's guidelines set out in *Grutter*, *Gratz*, *Parents United*, and *Fisher*, voters in states with voter-initiated processes, may choose to utilize these processes to prohibit public colleges and universities from utilizing such affirmative action policies.

Another question raised by the *Schuette* case concerns the phenomenon of a state's voters making decisions concerning the admissions policies (or other internal policies) of the state's colleges and universities. From one perspective, voter initiatives may be said to be the essence of democracy. From another perspective, however, voter initiatives may take power away from universities' officers, administrators, and faculties - the very groups that have expertise in education policy and an understanding of the circumstances of their particular

institution – and lodge that power in the hands of the electorate as a whole. The questions that arise may be more questions of efficacy than of law, but they may become important to higher education in various contexts.

P. 926, Guideline 4:

In addition to the Robert Sternberg article cited at the top of page 926, see John Brittain & Benjamin Landy, “Reducing Reliance on Testing to Promote Diversity, “ in Richard Kahlenberg (ed.), *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas* (Century Foundation Press, 2014).

P. 926, Guideline 5.

For more research on possible racial bias in standardized tests, see Maria Santelices and Mark Wilson, “Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning,” 80 *Harv. Educ. Rev.* 106 (2010). This research, and other research supporting or challenging it, may be pertinent to race-neutral or uniform affirmative action plans (LHE 5th p. 925, guideline 4) as well as to differential or compensatory plans (LHE 5th p. 926, guideline 5).

P. 927. Guideline 6

In its 2013 decision in *Fisher v. University of Texas-Austin* (see update above in this section), a strong majority of the U.S. Supreme Court confirmed that race-preferential affirmative action plans are subject to “strict scrutiny “review by the courts. In contrast, race neutral plans (Guideline 4, LHE 5th p. 925) and compensatory plans (Guideline 5, LHE 5th p. 926), properly constructed and administered, are unlikely to be subject to such strict scrutiny review.

P. 929. Guideline 11

For one empirical study of the benefits of student body diversity, particularly racial and ethnic diversity, see Charles Daye, A.T. Painter, Walter Allen, and Linda Wightman, “Does Race Matter in Educational Diversity? A Legal and Empirical Analysis,” *Rutgers Race and the Law Review* (2012).

P. 930. Guidelines 15 and 16

The focus on “race-neutral” alternatives, evident in the *Grutter* case (LHE 5th, pp. 916-19) and then in *Parents Involved v. Seattle School District No. 1* (LHE 5th pp. 920-21), received additional emphasis in the Court’s 2013 decision in *Fisher v University of Texas-Austin* (see update above in this section). Administrators and counsel should consequently give increased attention to the Court’s teaching on race-neutral alternatives. This concept is a key facet of the “narrow tailoring” requirement that, in conjunction with the compelling state interest requirement, constitutes “strict scrutiny” review. When a race-preferential affirmative action plan is subjected to strict scrutiny review, according to the majority opinion in *Fisher*, courts may give “some, but not complete,” deference to the institution in applying the compelling state interest requirement, but an institution’s determination on narrow tailoring and race-neutral alternatives “receives no deference.”

Selected Annotated Bibliography for Section 8.2

Richard Kahlenberg (ed.), *The Future of Affirmative Action: New Paths to Higher Education Diversity After Fisher v. University of Texas* (Century Fund 2014). In eighteen chapters, various authors address key questions about the post-Fisher future of affirmative action and student body diversity: “What is the future of affirmative action given the requirements of the *Fisher* court?”

What can be learned from the experiences of states that created race-neutral strategies in response to voter initiatives and other actions banning consideration of race at public universities? What does research by higher education scholars suggest are the most promising new strategies to promoting diversity in a manner that the courts will support? How do public policies need to change in order to tap into the talents of all students in a new legal and political environment?” (questions from the Introduction by Richard Kahlenberg).

Lorelle L. Espinosa, Matthew N. Gaertner, and Gary Orfield, *Race, Class and College Access:*

Achieving Diversity in a Shifting Legal Landscape. American Council on Education, 2015, available at <http://www.acenet.edu/news-room/Documents/Race-Class-and-College-Access-Achieving-Diversity-in-a-Shifting-Legal-Landscape.pdf>. Discusses alternatives to the explicit consideration of race in enhancing student diversity in undergraduate admissions.

Section 8.3. Financial Aid.

8.3.2. Federal Student Aid Programs. On June 26, 2013, in *United States v. Windsor* (2013 U.S. LEXIS 4921 (June 26, 2013)), the U.S. Supreme Court, in a 5-4 decision, struck down a federal law, the Defense of Marriage Act (DOMA), passed by Congress in 1996. Section 3 of DOMA defines marriage as “a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The plaintiff, a woman who had married her female partner in Canada and lived in New York, a state that recognizes same-sex marriage, claimed that this language violated the U.S. Constitution’s equal protection guarantees of the Fifth Amendment. This definition, according to

the Court, affected over 1,000 federal laws, including tax laws, inheritance laws, and laws and regulations involving federal student financial aid.²

Justice Kennedy, writing for the majority, stated that DOMA violated “basic due process and equal protection principles applicable to the Federal Government” (sl. opin. at 20). Noting that the right to marry is regulated by the states, not the federal government, Justice Kennedy wrote that “The avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States” (sl. opin. at 21). Justice Kennedy continued:

DOMA’s principal effect is to identify a subset of state sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect (sl. opin. at 22).

Justice Kennedy’s opinion notes that DOMA’s definition of marriage had relevance for the calculation of a student’s entitlement to federal student financial aid because the income of both spouses is considered in calculating the student’s federal aid budget. In April of 2013, the

² Section 2 of DOMA permits states to refuse to recognize same-sex marriages performed in other states, but this section was not at issue in the litigation.

U.S. Department of Education announced that, beginning with the 2014-15 federal student aid form (the FAFSA), the Department would require both of the student’s “legal parents, regardless of the parents’ marital status or gender,” to provide information on their income and assets “if those parents live together.” The Department published a notice of its intent to change its information collection practices at 78 Fed. Reg. 26334-26336 (May 8, 2013).

The impact of *Windsor* and the nearly simultaneous change in federal student financial aid policy may reduce the amount of federal financial aid available to dependent students whose parents are living together but unmarried, irrespective of their gender. On the other hand, students who are married to a same-sex spouse and whose spouse and/or children are the student’s legal dependents may include those individuals in reporting their household size, which could increase the aid they receive. But if the married student’s spouse is employed, the student will have to report the spouse’s income, which could reduce the amount of aid they receive. Overall, the judicial and regulatory changes mean that gay couples living together (whether or not they are married) and their children, and unmarried couples of any gender who are living together, will be treated the same as heterosexual married couples for the purposes of calculating a student’s eligibility for federal student aid.

Windsor also has implications for employee benefits under several federal laws, such as ERISA (Section 4.6.3), the Family and Medical Leave Act (Section 4.6.4), the Social Security Act, and tax laws (Section 14.3).

* * * * *

In 2011, the U.S. Department of Education issued regulations on “gainful employment” whose purpose was to measure the income earning record and loan repayment performance of students who attended institutions with vocational programs (34 C.F.R. §§

600.10(c), 600.20(d), 668.6(a), and 668.7). A trade association of for-profit vocational institutions challenged those regulations, and they were invalidated in *Ass'n of Private Colleges & Univs. v. Duncan*, 870 F. Supp. 2d 133 (2012) on several grounds, one of which was that the data collected by the Education Department would create a database of personally-identifiable information, which would violate a federal law. That law, 20 U.S.C. § 1015c, enacted in 2008, prohibits the creation of a federal “student unit record system.” Following that ruling, the Department of Education filed a motion with the trial court, asking it to reinstate the data collection requirements. The court refused, stating that collecting these data would constitute the creation of a new database, an act that is prohibited by the 2008 law.

* * * * *

The U.S. Department of Education has issued a Final Rule specifying interest rates for several federal student loan programs, including Perkins Loans, Family Education Loans, and William D. Ford Direct Loans. The final rule, which amends 34 C.F.R. Parts 668, 674, 682, and 685, may be found at 78 Fed. Reg. 65767-65842 (Nov. 1, 2013). The rule became effective on July 1, 2014.

The Department of Education’s “gainful employment” regulations have encountered litigation and media attention. The Department issued a “Gainful Employment User’s Guide” in June of 2016; it is available at <http://ifap.ed.gov/nsldsmaterials/NSLDSGainfulEmploymentUserGuide061016.html>.

8.3.6. Discrimination against aliens.

8.3.6.2 Undocumented aliens.

Pp. 971-72:

For more recent developments, see Michael Olivas, “Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students”, *21 Wm. & Mary Bill of Rts. Journal* 463 (2012), which meticulously explores the status of federal DREAM Act bills, pertinent state legislation and state court decisions regarding undocumented students, and federal administrative agency attempts to use prosecutorial discretion and deferred action to protect undocumented students, culminating in President Obama’s action of June 2012 (see section 8.2.4.6 of these Updates). Professor Olivas’ website, which contains a plethora of resources on immigration and higher education, may be found at <http://www.law.uh.edu/ihelg/>.

* * * * *

A California taxpayer filed a lawsuit seeking to prohibit the University of California from expending taxpayer funds for the benefit of undocumented students. *De Vries v. Regents of Univ. of Cal.*, 6 Cal. App. 5th 574 (Cal. Ct. App. 2016). Federal legislation enacted in 1996 makes undocumented individuals presumptively ineligible for certain benefits, but the law provides that states may affirmatively enact legislation to make such individuals eligible for local and state benefits. Among the taxpayer’s arguments, he contended that the legislature could not confer eligibility in relation to the University of California based on constitutional limits of the legislature’s authority over the university. A California appellate court rejected this position. It stated that the fact that the University of California elected to confer a benefit on undocumented students made possible by state law did not implicate the constitutional considerations raised by the taxpayer.

Section 8.4 Student Housing

8.4.2. Discrimination claims. In late 2011, the U.S. Department of Justice filed a lawsuit against a public university after receiving a complaint from a student who claimed that the university's refusal to allow her to keep a "therapy animal," prescribed for a psychiatric disorder, in her campus-owned apartment violated the Fair Housing Act (FHA). In *United States of America v. University of Nebraska at Kearney*, 2013 U.S. Dist. LEXIS 56009 (D. Neb. Apr. 19, 2013), the trial court denied the university's motion for summary judgment, concluding that the anti-discrimination provisions of the Fair Housing Act apply to university housing. The court examined the definition of "dwelling" promulgated by Department of Housing and Urban Development (HUD) in regulations enforcing the FHA:

a single unit of residence for a family or one or more persons. Examples of dwelling units include: a single family home; an apartment unit within an apartment building; and in other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep. *Examples of the latter include dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons (24 C.F.R. § 100.201 (emphasis supplied)).*

Given the nondiscrimination requirements of the FHA, this ruling, if followed by other courts, could call into question Title IX's exclusion of single-sex housing as a form of sex discrimination (LHE 5th, Section 14.5.3).

In early 2016 the U.S. Department of Justice announced that it had reached a settlement with Kent State University. The DOJ had sued Kent State, alleging violations of the Fair Housing Act because it denied students with psychological disorders permission to keep emotional support animals in on-campus student housing. The settlement agreement may be

found at <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-kent-state-university-resolve-allegations>.

The U.S. Department of Justice has released *Frequently Asked Questions about Service Animals and the ADA*. The publication defines “service animal” and explains under which circumstances a service animal may be excluded from a place of public accommodation. The publication may be found at http://www.ada.gov/regs2010/service_animal_qa.html.

* * * * *

The decision of the U.S. Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015) has implications for colleges and universities that provide housing for married students. Public institutions will not be able to deny married student housing to couples in same-sex marriages. And because the opinion requires states to permit same-sex couples to marry, a private, nonsectarian institution could incur legal liability should it deny married student housing to lawfully-married same sex couples. For a discussion of the implications of *Obergefell* for religiously-affiliated institutions, see Section 5.5 of this Update.

* * * * *

The Office for Civil Rights has determined that transgender students are protected from discrimination by Title IX. For discussion of access to housing, athletic facilities, restrooms, and other facilities, see section 14.5.3 in this Update.

8.4.3. Searches and seizures. The highest court in Massachusetts has rejected the attempt of an alleged murderer to suppress evidence taken as a result of a search of a residence hall room. In *Commonwealth v. Copney*, 11 N.E. 3d 77 (Mass. 2014), the defendant had spent the night on several occasions in the residence hall room of his girlfriend, a student at Harvard University.

The defendant was accused of shooting a drug dealer in the basement of a residence hall. When the body of the victim was discovered, the campus police went to the girlfriend's residence hall room to ensure that she was safe, since her card had been used to access the residence hall shortly before the shooting. She was not in the room but a jacket that witnesses had described as having been worn by one of the suspects was in the room. The police left, stationed an officer outside the residence hall room door, and returned with a search warrant.

Because Harvard policy prohibited students from allowing non-students to stay in their residence hall rooms for more than a "brief stay," the court determined that the defendant had lived in the room, sometimes for several days at a time, without the university's permission. Therefore, according to the court, he did not have an expectation of privacy in the residence hall room. The court also ruled that the police's entry into the room to check on the welfare of the female student was reasonable and not a Fourth Amendment violation.

In *Medlock v. Trustees of Indiana University*, 738 F.3d 867 (7th Cir. 2013), a student challenged his one-year suspension from Indiana University on Fourth Amendment grounds, claiming that the search of his residence hall room and seizure of a large amount of marijuana, and thus his discipline, was unconstitutional. The student was not prosecuted criminally.

The appellate court, in an opinion written by Judge Posner, rejected the student's claim that the search and seizure were unconstitutional. The court explained that the way in which the search was conducted, and the fact that student inspectors, rather than police, conducted the inspection and discovered the marijuana in plain view. The intent to search rooms in that residence hall had been announced a week earlier and also on the morning of the inspection, and the housing policy provided that inspections for "health and safety" reasons, were conducted with advance notice to students. The student inspector noticed what appeared to be a marijuana

plant inside a closet whose door was open. At that point, the student inspector called campus police, who secured the room and obtained a search warrant.

Judge Posner made short work of the plaintiff's legal claims. The contraband was admissible in the disciplinary hearing, he said, because it was not a criminal proceeding. And with respect to the student's claim that the search and seizure were unconstitutional, Judge Posner wrote:

. . . there was no violation. Medlock had consented in advance, as a condition of being allowed to live in the dormitory, to have his room searched for contraband and other evidence of violation of the health and safety code. He could have lived off campus and thus have avoided being governed by the code. He chose to trade some privacy for a dorm room. His expulsion amounted to holding him to his contract. (738 F.3d at 872)

In fact, Medlock was readmitted to Indiana University following a one-year suspension, a fact that Judge Posner found "surprising" and "lenient."

The Kentucky Supreme Court has ruled that a warrantless entry into a breezeway common area of a fraternity house via an unlocked door was illegal, and that the drug-related evidence found as a result of that entry must be suppressed. In *Milam v. Commonwealth*, 2015 Ky. LEXIS 1617 (Ky. 5/14/15), two detectives accessed the fraternity house through an unlocked door and asked a student to show them to Milam's room. They knocked on Milam's door, and he answered it. The detectives smelled marijuana and saw a jar of marijuana in the room. Milam consented to their entry to his room and to a search, which resulted in evidence of drug possession and sale.

The detectives argued that the fraternity house was more like an apartment building than a private residence, and therefore that their warrantless entry into the building was lawful. The state supreme court disagreed; referring to litigation on that issue from other states, the court determined that a fraternity house is a private residence, and that even common areas within the building are private and thus the police require a warrant or consent to enter.

Although the Fourth Amendment does not apply to searches of a fraternity house or residence hall room at a private college by college employees who are not police, it does apply if the search is conducted by public safety personnel such as police or sheriff deputies. In *Wagner v. Hotzapple*, 101 F. Supp. 3d 462 (M.D. Pa. 2015), a county sheriff and several sheriff's deputies and Bucknell University public safety officers conducted a raid on a fraternity house, which yielded drugs, drug paraphernalia, a weapon, and a lock-picking set. The students were not criminally prosecuted, but were found responsible for code of conduct violations and were fined and required to perform community service. The defendants argued that the student handbook provisions regarding the university's reserved right to search a student's room meant that the students had consented to the search. The court rejected the defendants' motion to dismiss the plaintiffs' Fourth Amendment claim, noting that the search exceeded the scope of the university's student handbook guidelines with respect to how a search of a student's room would be conducted.

Section 8.5 Campus Computer Networks

8.5.1. Freedom of speech.

Annotated Bibliography:

Susan DuMont, “Campus Safety v. Freedom of Speech: An Evaluation of University Responses to Problematic Speech on Anonymous Social Media,” 11(2) *Journal of Business & Technology*, 239-264 (2016). This article examines how universities respond to problematic speech on anonymous social media, including hate speech, threats of violence, sexual harassment, and other forms of damaging, anonymous speech. Part I examines the evolution of Internet speech in the collegiate setting. Part II examines legal standards for safety and speech at universities. Part III analyzes the current primary response strategies deployed by institutions, including bans and choosing to ignore the problems. Finally, Part IV proposes a new format for response strategies, including a focus on the harms caused by problematic speech on anonymous social media, prevention efforts, policy development, response strategies and investigations, and concerted efforts to remedy the effect of such speech on the learning environment.

Section 8.6 Campus Security

8.6.1. Security officers. In some states, campus police or security guards at private colleges and universities are compelled, by state law, to comply with the state’s open public records law with respect to crime reports. For example, the Georgia legislature enacted OCGA §20-8-7 in 2006, which requires campus police departments at both private and public colleges and universities to make records involving investigations of criminal conduct or crimes available for public inspection and copying.

And, depending upon the state, campus police engaged in investigating alleged crimes may be found to be “state officers” and thus enjoy the protection of “official immunity.” For example, in *Agnes Scott College v. Hartley*, 741 S.E. 2d 199 (Ga. App. 2013), an individual

arrested for allegedly assaulting a student in her residence hall room sued the college and the arresting officers for false arrest. The trial court had ruled for the plaintiff.

The appellate court reversed, noting that the Georgia Campus Policemen Act, OCGA § 20-8-1 et seq., gives campus police, even those who are employees of a private college, “the same law enforcement powers, including the power of arrest, as a law enforcement officer of the local government with police jurisdiction over such campus.’ OCGA § 20-8-2.” Thus, the police officers were protected by official immunity, and the college was free of *respondeat superior* liability because the police were performing “public duties,” not acting in the interest of the college.

For a discussion of the application of qualified immunity in a case involving the shooting of a student by a public university police officer, see *Collar v. Austin*, 2015 U.S. Dist. LEXIS 122609 (S.D. Ala. 9/15/15). The court awarded summary judgment on both claims brought by the parents of a student killed by a campus police officer when the student physically threatened the officer after ingesting a mind-altering drug. The court found that the police officer was protected from Fourth Amendment liability by sovereign immunity, and from the wrongful death claim by state-agent immunity.

Whether a police officer employed by a private college is subject to constitutional requirements (such as the Fourth Amendment) and protected by sovereign immunity is a matter of state law in those states that have enacted legislation that grants private colleges the power to create campus police agencies. Such is the case in North Carolina, where the Campus Police Act (N.C. Gen. Stat. §§ 74G-1 to 13 (2013)) states, "As part of the Campus Police Program, the Attorney General is given the authority to certify a private, nonprofit institution of higher education . . . as a campus police agency and to commission an individual as a campus police

officer." N.C.G.S. § 74G-2(a). For that reason, the North Carolina Court of Appeals found that two police officers employed by Duke University were entitled to qualified immunity when they were sued individually for shooting a man who was attempting to take one of the officer's gun. *Mills v. Duke University*, 759 S.E.2d 341 (N.C. Ct. App. 2014). However, in *Hartley v. Agnes Scott College*, 759 S.E.2d 857 (Ga. 2014), the Georgia Supreme Court rejected the argument that police officers employed by Agnes Scott College, a private institution, were "state officers" for purpose of immunity under the Georgia Tort Claims Act because they were not acting on behalf of state government when investigating a student's claims that an acquaintance had assaulted her.

8.6.2. Protecting students against violent crime.

Bibliographic Entry:

Sloan, John J. III and Fisher, Bonnie S. (Cambridge University Press, 2010). Discusses how interest groups, including students and their parents, crime victims, and public health experts have raised the profile of campus crime and have involved legislators in their efforts to reduce crime.

8.6.3 Federal statutes and campus security. In March of 2013, Congress reauthorized the Violence Against Women Act (VAWA). Part of that law, called the Campus Sexual Violence Elimination Act (Campus SaVE Act), adds domestic violence, dating violence, and stalking to the list of crimes that must be reported in the institution's Campus Security Report. It also expands the list of hate crimes that must be reported to include violence on the grounds of gender identity or national origin. In addition, the institution's Campus Security Report must now include information about the institution's procedures concerning reports of domestic violence,

dating violence, sexual assault and stalking, as well as descriptions of the institution's training programs with respect to preventing and responding to these crimes.

Furthermore, the law requires institutions to give students who report sexual violence written notice of their right to:

- Be assisted by campus authorities if reporting a crime to law enforcement
 - Change academic, living, transportation, or working situations to avoid a hostile environment
 - Obtain or enforce a no contact directive or restraining order
 - Have a clear description of their institution's disciplinary process and know the range of possible sanctions
 - Receive contact information about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available both on-campus and in the community

The law also imposes requirements on college disciplinary proceedings involving domestic violence, dating violence, sexual assault or stalking:

- Proceedings shall provide a prompt, fair, and impartial investigation and resolution and are conducted by officials receiving annual training on domestic violence, sexual assault, and stalking
- Both parties may have others present during an institutional disciplinary proceeding and any related meeting, including an advisor of their choice

- Both parties will receive written outcomes of all disciplinary proceedings at the same time

In addition, the law requires colleges to provide annual training programs on domestic violence, dating violence, sexual assault, and stalking. These programs must include:

- Primary prevention and awareness programs for all incoming students and new employees
- Safe and positive options for bystander intervention
- Information on risk reduction to recognize warning signs of abusive behavior
- Ongoing prevention and awareness programs for students and faculty

Final regulations for the Campus SaVE Act were published on October 20, 2014 (79 Fed. Reg. No. 202).

The 2016 edition of the *Handbook for Campus Safety and Security Reporting* has been published. It is available at <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

8.7 Other Support Services

8.7.4. Services for international students. Students who have F-1 student visas are permitted to engage in a limited form of employment in the United States during and after completing their degrees at U.S. colleges and universities. The program is called “Optional Practical Training” (OPT). For students earning undergraduate or graduate degrees in many disciplines, the maximum period of OPT employment is twelve months. However, in 2008, the U.S. Department of Homeland Security issued an interim final rule that extended the OPT time

from twelve to 27 months for international students earning degrees in STEM disciplines. The rationale for this extension was the difficulty that non-citizens faced in obtaining H1-B visas that the consequent loss to U.S. employers of their services as employees.

Section 8.8 Student Records

8.8.1. Family Educational Rights and Privacy Act (FERPA). Student medical records that are maintained by a college or university are considered to be “education records” and are thus protected by FERPA. A question arose in litigation between a student and a university as to whether the university could use the student’s medical records without the student’s permission in order to defend itself against her legal claims.

On August 24, 2016, the U.S. Department of Education released a “Dear Colleague Letter,” (DCL) clarifying that student medical records maintained by the institution are protected by FERPA. According to the letter, unless a court has ordered the production of the records, or unless the student has consented to their release, an institution involved in litigation with a student may not share that student’s medical records with the institution’s attorneys or with the court. The DCL makes an exception for litigation involving the quality of the medical treatment of payment for the treatment, and discusses the appropriate reasons for sharing student medical records among school officials with a legitimate educational interest (such as threat assessment teams). Attorneys representing colleges in litigation brought by or against a student are not, in the Department’s opinion, generally do not have a “legitimate educational interest” in medical records without a court order or the student’s consent.

The Dear Colleague Letter may be found at

[http://familypolicy.ed.gov/sites/fpco.ed.gov/files/DCL_Medical% 20Records_Final%20Signed_dated_9-2.pdf](http://familypolicy.ed.gov/sites/fpco.ed.gov/files/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf).

In *Hall v. McRaven*, 2016 Tex. App. LEXIS 10204 (App. Sep. 16, 2016), Francisco Cigarroa, Chancellor of the University of Texas at Austin, commissioned an investigation into the student admissions practices in the University of Texas (UT) System. The purpose of the investigation was to “determine if U.T. Austin admissions decisions are made for any reason other than an applicant’s individual merit as measured by academic achievement and officially established personal holistic attributes.” In particular, the chancellor was concerned with learning whether applicants gain an advantage by being recommended outside the prescribed admissions process by an influential individual “who adds no new substantive information about the applicant’s personal merit.”

To comply with FERPA, the UT System designated an “Authorized Representative,” Kroll Associates, Inc., to conduct the investigation. UT System’s agreement with Kroll specified that Kroll investigators would have access to personally identifiable information in students’ education records. However, the final report generated by Kroll was to be devoid of any personally identifiable student information.

A member of the UT Board of Regents, Wallace Hall, requested that he be allowed to review all information, “confidential and otherwise,” related to the commissioned investigation. The board, under a new chancellor, approved a process for the concerned regent to review documents, but with redactions in them to keep personally identifiable student information confidential. Hall would be able to see specific redacted information only if the board chairman, Paul Foster, was convinced that the redacted information was necessary to satisfy an articulated, specific need related to Hall’s official responsibilities and duties.

Hall sued the new chancellor, William McRaven, in order to have unfettered access to the records in the commissioned report. When McRaven invoked sovereign immunity, Hall asserted

that McRaven's actions in withholding the unredacted records were ultra vires. On McRaven's motion, the district court dismissed the case for lack of jurisdiction.

On appeal, the Court of Appeals of Texas determined that it was the board itself (through majority vote), not McRaven, who denied Hall access to the documents in unredacted form, "having implicitly determined that Hall does not have a legitimate educational interest in the information and that it may be protected by other privacy laws." The court agreed with Chancellor McRaven that he did not have authority to grant Hall's request, as the Board had already determined that McRaven had no legitimate educational interest in receiving the requested information in unredacted form. Because the Court of Appeals found that the ultra vires exception to sovereign immunity did not apply, it affirmed the district court's dismissal of the case for lack of jurisdiction.

In *Krakauer v. State*, 381 P.3d 524 (Mont. 2016), John Krakauer, a journalist and resident of Colorado, was preparing a book chronicling instances of alleged sexual misconduct on or near the University of Montana campus. Krakauer filed a request with the Commissioner of Higher Education's office on January 17, 2014, naming a particular student and asking for "the opportunity to inspect or obtain copies of public records that concern the actions of the Office of the Commissioner of Higher Education in July and August 2012 regarding the ruling by the University Court of the University of Montana in which student . . . was found guilty of rape and was ordered expelled from the University."

Krakauer asserted factual connections between a federal lawsuit initiated under seal (where the John Doe plaintiff sought a preliminary injunction halting the university's disciplinary proceedings against him) and a highly-publicized state criminal proceeding that had been initiated against the starting quarterback of the university's football team. The

Commissioner refused to acknowledge that such records existed, and further refused to permit Krakauer to inspect any documents, asserting that FERPA prevented him from releasing them.

When Krakauer's request for release of certain student records was denied, Krakauer filed suit, citing the "right to know" under the Montana Constitution. The district court granted summary judgment to Krakauer, and ordered the Commissioner to "make available for inspection and/or copying within 21 days" the requested records, with students' names, birthdates, social security numbers, and other identifying information redacted. The Commissioner appealed to the Montana Supreme Court the district court's award of summary judgment to Krakauer.

The Commissioner argued that because Krakauer's records request referenced a student by name, FERPA prohibits his office from releasing any records responsive to Krakauer's request. In response, Krakauer argued that FERPA "simply does not prohibit anything"; rather, it merely conditions federal funding on confidentiality compliance. In addition, Krakauer argued that the requested records must be made available under the exception to disclosure that provides for release of the final results of a disciplinary proceeding "if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense."

The Montana Supreme Court disagreed with Krakauer's characterization of FERPA. It wrote, "Although FERPA has been characterized as 'spending legislation,' we find Krakauer's argument that it 'prohibits nothing' delusive. FERPA is more than mere words in the wind. As outlined above, the University, a unit of the MUS, promised to abide by FERPA's directives in exchange for federal funding. By signing the Program Participation Agreement, the University acknowledged the potential consequence of loss of federal funding in the event that it violated

FERPA.” The court concluded that “had the Commissioner released the documents that Krakauer originally requested, using the specific student’s name, he would have violated the [FERPA] statute.” In short, the court recognized that FERPA prohibits the unilateral release of the documents requested by Krakauer, as Krakauer clearly knew the identity of the student that he named specifically in his request.

The Montana Supreme Court went on to note that FERPA does permit disclosure, but does not require it, if the institution determines as a result of a disciplinary proceeding that a student committed a violation of the institution’s rules or policies regarding sexual assault. In such cases, FERPA permits the disclosure of the student’s name, the violation committed, and the sanction imposed, but the names of any other students, such as victims or witnesses, cannot be disclosed. The Montana Supreme Court remanded the case to the district court so it could conduct *in camera* review of the records to determine if this exception authorized release of limited information related to Krakauer’s request.

8.8.2. State law. The battle for supremacy between FERPA and state open records laws continues. In *Knight News, Inc. v. University of Central Florida*, 2016 Fla. App. LEXIS 5422 (Fla. Dist. Ct. App. 5th Dist. 4/8/16), Knight had requested records of student disciplinary hearings from the University of Central Florida, as well as unredacted documents that contained the names of student government officers who had been accused of malfeasance in office. Although the court agreed with the university that student disciplinary records were “education records” and thus protected by FERPA, it determined that FERPA did not protect officers of student government from disclosure of their names. Said the court:

Section 1004.26(4)(b)[of Florida law] authorizes the removal of student government officers for malfeasance and other enumerated causes by majority vote of students participating in a referendum held pursuant to the requirements set forth in the statute. Accordingly, under this statutory scheme, student government officers know or reasonably should know (given their voluntary decision to seek election or appointment as a student government officer) that they may be disciplined for misconduct in the performance of their student government duties or alleged misconduct related to their election or appointment, either by referendum vote of the university's students or by vote of other student government officers in a public meeting. We hold, therefore, that such information concerning misconduct by student government officers is not protected from disclosure under FERPA. [2016 Fla. App. LEXIS 5422 at *5-6]

And in *Kendrick v. The Advertiser Co.*, 2016 Ala. LEXIS 79 (Ala. 6/24/16), the Supreme Court of Alabama ruled that, despite the provisions of the Alabama Open Records Act, FERPA prohibited the disclosure of financial aid forms related to Alabama State University's football players. The newspaper had requested forms that indicated whether a student-athlete's financial aid had been reduced or cancelled. It argued that redacted forms containing the students' name and sport played would merely contain directory information, but the court disagreed, noting that the forms only applied to athletes whose aid had been modified or withdrawn. The court stated that "FERPA takes precedence over the Open Records Act." [2016 Ala. LEXIS 79 at *11]

Chapter IX

Student Academic Issues

Section 9.2. Grading and Academic Standards

Despite the overwhelming odds against prevailing in a lawsuit challenging a course grade, students continue in their attempts. In *Smith v. Davis*, 2013 U.S. App. LEXIS 687 (5th Cir. Jan. 10, 2013), Smith, a college football player, challenged the failing grade he received from Davis, his instructor for an introductory English course. Smith, a student at the University of New Mexico, needed to pass the course in order to retain his football scholarship and his eligibility to play. Because the instructor determined that Smith had submitted a required course paper after the deadline, she gave him a failing grade in the course. Smith sued the instructor personally for breach of contract and claimed violations of procedural due process. Davis, the instructor, claimed that she was protected by qualified immunity and thus could not be sued.

The court affirmed the lower court's dismissal of the breach of contract claim, and evaluated Davis' claim of qualified immunity under the standard articulated in *Anderson v. Creighton*, 483 U.S. 635 (1987) (see LHE 5th, Section 4.7.4.1). Under that standard, the court must determine whether "the challenged conduct was objectively unreasonable in light of clearly established law at the time of that conduct." The court concluded that Smith had neither a property nor a liberty interest in academic evaluation, commenting that academic judgments were treated differently by the federal courts than judgments about student nonacademic misconduct, where a student at a public college or university could claim a property interest in continued enrollment (see LHE 5th, Section 10.3.2). Thus, for the purpose of determining whether Davis was protected by qualified immunity, the court decided that the law regarding the

potential due process interests of a student in an academic evaluation was not “clearly established” at the time of the alleged violation, and thus Davis was protected by qualified immunity.

Section 9.3. Online Programs.

9.3.3. Student legal claims about online programs. A student in an online program offered by the University of Arkansas sued, alleging that the university discriminated against him on the basis of disability. *Werbach v. Univ. of Ark.*, No. 15-9273-CM (D. Kan. June 28, 2016). The student resided in Kansas and sought to sue in Kansas federal district court. The court considered whether a Kansas federal court represented a proper venue for the action or, as the university argued, that Arkansas provided the appropriate venue. Other than the student’s residence in Kansas, the court stated that decisions by university officials regarding the student and his program all took place in Arkansas. Additionally, it noted that all communications with the student were by phone or email with no face-to-face communications in Kansas. As such, the court ruled that venue was proper in Arkansas, but it ruled that transfer of the case, rather than dismissal, was most appropriate.

Section 9.4 Academic Accommodations for Students with Disabilities

9.4.2. Requests for programmatic or other accommodations.

9.4.2.1. In domestic programs. When students, particularly those in programs preparing them for careers in health professions, are denied accommodations, they have usually lost their disability discrimination lawsuits (see LHE 5th, pp. 1101-1106). But negative assumptions or generalizations about the effect of an applicant’s disorder on the individual’s ability either to

succeed in the program or to be a successful practitioner have been criticized by courts. For example, in *Sjostrand v. Ohio State University*, 2014 U.S. App. LEXIS 7868 (6th Cir. Apr. 28, 2014), a federal appellate court reversed a trial court's award of summary judgment for the university and sent the case back for trial. The applicant had Crohn's disease (a kidney disorder). She asserted that, during an interview that was part of the application process to a doctoral program in school psychology, the two faculty members who conducted the interview focused more on her disease than they did on her qualifications or professional interests; when she called to ask why she had been rejected, she claimed that the reasons she was given were vague. Because her grades and test scores were well above those of individuals who had been admitted, and because the court was skeptical as to whether the "vague" reasons given for her rejection were the true reasons, the court ruled that a jury must decide whether or not she had been discriminated against. Similarly, in *Peters v. University of Cincinnati College of Medicine*, 2012 U.S. Dist. LEXIS 126426 (S.D. Ohio Sept. 6, 2012), a case involving the dismissal rather than the admission of a student with clinical depression, the court found that the dean who made the dismissal decision without referring either to the student's medical records or her evidence of recently improved academic performance appeared to believe that depression would interfere with the ability to be a good doctor. For that reason, the court denied the medical school's motion for summary judgment. An OCR opinion, also involving the University of Cincinnati, concluded that a student who was dismissed for academic failure, and then diagnosed with bipolar disorder, successfully stated a claim of discrimination under Section 504. The agency found that members of the appeals board that ruled on her dismissal asked "generalized questions" about bipolar disorder and its potential impact on the career of a doctor instead of

making an individualized inquiry as to how her disorder, and the medications she was taking, affected her ability to be a successful medical student.

In making admissions decisions for programs with a clinical component, the key issue that the courts consider appears to be the close relationship between the program's academic and technical standards and the learning outcomes that will enable the student to be a competent practitioner. The courts usually defer to the college's judgment in creating and applying these standards, particularly for those standards that are clearly linked to the safety of patients, school children, or other clients of the future practitioner. A good example of the careful creation of technical standards, and judicial deference to those standards, appears in *McCully v. University of Kansas School of Medicine*, 2013 U.S. Dist. LEXIS 156233 (D. Kan. Oct. 31, 2013). Ms. McCully applied to the University of Kansas School of Medicine. She had spinal muscular atrophy, resulting in weak upper body strength and inability to walk. In order to meet the accreditation requirements of the Liaison Committee on Medical Education (a unit of the Association of American Medical Schools that accredits medical schools), the School of Medicine was required to develop technical standards which all medical students must meet. The School of Medicine's technical standards included a requirement that students "have sufficient motor function to elicit information from patients by palpation, auscultation, percussion, and other diagnostic maneuvers" and be able to perform cardio pulmonary resuscitation (CPR) on a patient (*Id.* at *15). The plaintiff could not perform CPR or the Heimlich Maneuver, intubate a patient, or insert a chest tube—all of which require some upper body strength. Furthermore, in her application, the plaintiff requested as an accommodation that a staff member serve as her "assistant" during clinical rotations, presumably to perform the functions she could not perform herself. The admissions committee decided that the plaintiff

was unable to meet the technical standards, and denied admission. The court agreed, saying “Motor skills are essential to the learning process for medical students and are skills necessary to becoming a competent, successful clinical practitioner” (Id. at *16). Additionally, the court noted that the accommodations that the plaintiff had requested would fundamentally alter the academic program, which the law does not require. Other cases involving applicants for health-related programs whose physical disorders disqualified them from admission include *Letter to College of the Sequoias*, OCR Case No. 09-09-2022 (May 8, 2006) (nursing student who couldn’t lift) and *Letter to University of Texas Medical Branch*, OCR Case No. 06-04-2067, NDLR (LRP) LEXIS 253 (March 21, 2005) (medical school applicant with dystonia who could not perform manual tasks and had difficulty walking and speaking). In both cases, OCR found these applicants not qualified because they could not meet appropriate technical standards. See also *Cunningham v. University of New Mexico Board of Regents*, 531 Fed. Appx. 909 (10th Cir. Aug. 23, 2013) (noting in dicta that a medical student whose visual impairment made his vision “fragmented” had requested accommodations that would have fundamentally altered the nature of the medical school program, and thus were not required by law). In other words, courts reject students’ attempts to pick and choose which portions of the clinical curriculum they will master and which they would like to bypass.

In an opinion demonstrating an unusual lack of deference to an institution’s specification of technical standards, the Iowa Supreme Court ruled in favor of a student with a visual disability who challenged a chiropractic school’s denial of an accommodation (*Palmer College of Chiropractic v. Davenport Civil Rights Com’n*, 2014 Iowa Sup. LEXIS 75 (Iowa June 27, 2014)). Cannon, who was blind, applied to the Palmer College of Chiropractic and requested accommodations, such as a reader for examinations. The college had adopted technical

standards that required students to be able to demonstrate “sufficient use of vision, hearing, and somatic sensation necessary to perform chiropractic and general physical examination, including the procedures of inspection, palpation, auscultations, and the review of radiographs as taught in the curriculum.” Although Cannon performed well academically in the undergraduate courses that were required for admission to the graduate program in chiropractic, the college’s Disability Steering Committee rejected his proposed accommodations, saying that because he could not see, Cannon could meet the technical standards that were required by the college’s accreditor, the Council on Chiropractic Education. Cannon had suggested the use of a seeing assistant to describe x-rays and other diagnostic tools to him verbally. The Committee concluded that Cannon’s requested accommodations would fundamentally alter the nature of the academic program, and were thus not required by the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973. Cannon requested a meeting between college staff and a representative of the Iowa Department for the Blind, which ended with the college insisting that its students must meet all technical standards and that no accommodations were possible.

Cannon filed a complaint of discrimination with the Davenport Commission on Civil Rights, which found that the college had not complied with relevant state and federal disability discrimination laws. The Commission ruled that the college had not engaged in the interactive process, and had not considered waiving some of the technical requirements, as its sister campus in California had done under California law. The Commission also noted that the college had not provide evidence that its accreditation would be threatened if it waived some of the technical standards. The college appealed to an Iowa district court, which reversed the Commission’s ruling, saying that the Commission had given insufficient deference to the college’s

determinations concerning its curricular requirements. This appeal to the state supreme court followed.

The Iowa Supreme Court reversed the trial court, upholding the Commission's findings of fact. In particular, the supreme court noted the lack of "individualized assessment" the ADA and Section 504 require. The court stated that the college apparently made no attempt to ascertain whether Cannon could meet most or all of the technical standards; it merely stated that a person who could not see could not meet the technical standards, and that all of them must be met. According to the court, it rested its conclusion that the college did not engage in the interactive process on these findings:

Palmer engaged in minimal interaction with Cannon; Palmer failed to investigate, with or without Cannon, how he might actually use a reader given a specific task; Palmer failed to investigate with the requisite depth how other former blind students had performed specific tasks in the past; Palmer failed to investigate reports of successful blind students at other schools and successful blind chiropractic practitioners; Palmer failed to investigate reports of technologies used successfully elsewhere in school and professional settings; and Palmer failed to engage individuals with experience teaching Cannon or other blind individuals, among other failures (at p. *39).

The court rejected the college's assertions that chiropractors must be able to read radiology results (such as x-rays), noting that Cannon submitted evidence that many chiropractors do not; that state licensing boards do not require chiropractors to be sighted, and that other medical schools had made accommodations for blind students. Therefore, it rejected the college's argument that the accommodations requested by Cannon required a fundamental alteration of the

curriculum, and rejected as well the college's argument that its curricular determinations should be given deference.

Two judges dissented, calling the lack of deference “unprecedented.” The dissenters commented: “Our court and the local commission comprised of laypersons have no business second-guessing the professional academic judgment of our nation's leading college of chiropractic. Palmer [College] has reasonably concluded that its graduates personally must be able to see and interpret X-rays. A student who has never seen a spine cannot reliably interpret spinal X-rays based on what someone else tells him the films show.”

A student at the University Tennessee Health Sciences Center claimed that the university failed to provide appropriate accommodations for a mental health disability under Title II of the Americans with Disabilities Act. The student—who had not previously notified the university of a mental health disability related to post traumatic stress disorder and attention deficit hyperactivity disorder—suffered a mental health crisis during the second semester of a one-year masters program. Once the crisis began, the student informed a university official of her disability. Following a voluntary two-week leave of absence, the student attempted to resume her studies. The student, however, was prohibited from competing academic requirements that semester and placed on mandatory leave. Following re-admission, the student alleged that she was not granted an extension to complete course work. The student also claimed that she was treated in a hostile and intimidating manner for lodging a complaint with the university's office of equity and diversity.

In a settlement agreement with the U.S. Department of Justice, the university agreed to adjust the student's academic records to show her in good academic standing and that no grade assigned for withdrawal from courses would be used in calculating the student's grade point

average (<https://www.justice.gov/crt/case-document/university-tennessee-health-science-center-settlement-agreement>). The university also agreed to modify several institutional policies. Among these, the university stipulated that except in the case of emergency circumstances, it would conduct an individualized assessment in determining whether reasonable modifications could be made to allow a student to continue taking classes or otherwise participate in an education program when recovering from a mental health condition or other medical condition. In making such an assessment, the university stated that it would give careful consideration to the student's treating physician or mental health professional.

In another case, a former medical school student claimed that she was denied accommodations while pregnant that should have been provided under Section 504 of the Rehabilitation Act. *Khan v. Midwestern Univ.*, 147 F. Supp. 3d 718 (N.D. Ill. 2015). The student who was of American Indian descent had also claimed that she was discriminated on the basis of her race in violation of Title VI. A federal district court dismissed the Title VI claim, but it refused to dismiss the student's Section 504 claim. The university argued that pregnancy did not constitute a disability because it was temporary or, alternatively, that the student was not sufficiently limited in her ability to learn because the condition was temporary. The court—looking to the same standards as those followed under the Americans with Disabilities Act (ADA) in deciding the 504 claim—rejected these arguments. It discussed that previous precedent had established that a disability of less than six months could qualify under Section 504 and the ADA. Furthermore, the court determined that the student had alleged sufficient facts at this stage of the litigation to support a claim that her “pregnancy related impairments” had substantially limited her ability to “learn and participate in her education.” *Id.* at 723.

A former student who had suffered from a disability that impaired his ability to retain and

process information sued a public technical school and individual officials under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act after he was denied a requested accommodation. *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375 (5th Cir. 2016). The student requested that he be able to take two exams, one at the same time as other students and another two weeks later. Alternatively, the student requested he be allowed to take exams two weeks after other students had completed the test, which would have required instructors to create a second exam to curtail the potential for cheating. After the student filed a lawsuit, the school allowed the requested accommodation, but the student continued with the litigation.

While upholding the dismissal of the suit, the U.S. Court of Appeals for the Fifth Circuit held that the district court decided incorrectly on the issue of sovereign immunity, noting that states agreed to waive their sovereign immunity under the Rehabilitation Act in exchange for federal funds. Additionally, the court held that the student's claims were not moot to the extent that he sought compensatory damages applicable to the period in which the school denied the requested accommodation. However, the court determined that the student could not establish that the school intentionally discriminated against him, a requirement for compensatory damages under the Rehabilitation Act. In terms of standing for declaratory or injunctive relief, the court held that the student lacked standing because any allegation of prospective injury was too speculative, especially as the student had withdrawn from the school and stated an intention not to re-enroll.

A student dismissed from the University of Minnesota Medical School claimed that her academic difficulties stemmed from a misdiagnosis of depression. The university agreed to readmit the student but her academic difficulties continued, culminating in a dismissal hearing.

Rajpal v. Regents of Univ. of Minn., 2016 WL 1619305, No. A15-1207 (Minn. Ct. App. Aug. 9, 2016). Prior to the hearing, the student received a diagnosis of performance anxiety, information which the student communicated to the hearing committee. In deciding to dismiss her, the committee initially had incorrect information that the student had failed a clinical course. When this error was brought to light, the hearing committee still recommended the student's dismissal. The student claimed that the dismissal violated the Federal Rehabilitation Act and the Minnesota Human Rights Act. She also contended that the dismissal violated her constitutional due process rights. A state trial court granted summary judgment against the student and the Minnesota Court of Appeals reviewed.

In relation to the Rehabilitation Act, the court determined that the hearing panel did not violate the act in concluding that it was not reasonable to place her in an alternative clinical site as a requested accommodation, as the school expected students to be able to function in a variety of clinical settings. Additionally, the court stated that the student's failure in the clinic related to a failure to learn material rather than from the stated disability. The court also rejected the student's arguments that other students had been permitted to repeat clinical courses served to indicate a violation. Along with declining to second guess the educational judgment of faculty, the court discussed that the student had failed to highlight anything in the record that indicated other students' failures arose from the same inability to learn as took place with the student.

The court also upheld the dismissal of her procedural and substantive due process claims. In relation to the grade error, the court discussed that nothing in the record indicated that the final expulsion decision was based on incorrect information. Similarly, the court stated that she could point to nothing in the record to sustain a claim of substantive due process violation on the basis of arbitrary actions by officials or a substantial departure from academic norms.

A student with Crohn's disease in an osteopathic medicine program claimed that the school violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act in dismissing her. *Redding v. Nova Southeastern Univ.*, 165 F. Supp. 3d 1274 (S.D. Fla. 2016). The court held that the school permissibly dismissed the student on the basis of her failure to follow procedures for obtaining authorizations for absences during a clinical phase of the program. The court discussed that the student was aware of notification procedures that needed to be followed for absences and was not precluded by her disability from doing so. As such, the school dismissed her from the program for a permissible reason, which meant that she failed to establish that she was otherwise qualified for the program.

The court did refuse to dismiss claims based on allegations that the school failed to provide requested accommodations in an earlier part of the program, as the student was a qualified individual when she made such requests. The court discussed that a failure to provide accommodations is a distinct, actionable basis of discrimination under the ADA and the Rehabilitation Act. The court held, however, that she lacked standing on the accommodation claim under the ADA, as the act did not provide for monetary damages and prospective relief in the form of readmission was not available since the school had permissibly dismissed the student. Unlike the ADA, the Rehabilitation Act does allow for monetary damages. While the school denied the student's version of facts, the court determined that the institution was not entitled to summary judgment on the accommodations claims under the Rehabilitation Act.

A dismissed medical student argued that her institution failed to provide a reasonable accommodation under Title II of the ADA, the Rehabilitation Act, and a New Jersey anti-discrimination law in not permitting her to retake a failed national exam and not providing an extension of time to retake the exam. *Chin v. Rutgers Univ.*, 2016 WL 2653908, No. 14-1332

(JLL) (D. N.J. May 9, 2016). The student began suffering from severe depression in her first year of medical school. The institution had previously provided the opportunity on multiple occasions for the student to repeat courses and to retake a previous national exam that she had failed. Granting summary judgment in favor of the university, the court stated that the student had not made clear how the requested accommodations would have ensured her passage of the exam in question. Additionally, even assuming that the accommodation would have allowed her to pass the exam, the court held that the institution was not required to dilute its academic standards in providing an accommodation. Specifically, it discussed that the institution would have had to waive its six-year graduation policy and that the institution would have engaged in waiving policies additional policies in a manner unprecedented for the medical degree program.

9.4.2.3. Online programs. While LHE 5th, p. 1108, noted a limited number of cases involving students with disabilities and online programs, there has been an increase in this area in litigation and enforcement activity by the U.S. Department of Education. Along with access to online course materials, legal challenges have also dealt more broadly with access to institutional materials appearing online.

In December 2014, Youngstown State University entered into a resolution agreement with the U.S. Department of Education's Office for Civil Rights, agreeing to enhance the accessibility of its webpages and online learning materials (<http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-youngstown-state-university-ensure-equal-access-its-websites-individuals-disabilities>). OCR had conducted an investigation in which it concluded that a lack of accessibility to online materials existed as required by Section 504 and Title II of the ADA. Under the "Resolution Agreement" with OCR, the university agreed to take steps that included: (1) adopting and publishing a nondiscrimination statement, (2) ensuring that

individuals with disabilities could access information contained in institutional webpages, online course materials, or course management systems such as Blackboard, (3) designating at least one individual to coordinate and implement accessibility standards and providing that individual with sufficient resources, and (4) making campus computer labs accessible for individuals with disabilities (<http://www2.ed.gov/documents/press-releases/youngstown-state-university-agreement.pdf>). OCR has entered into other similar agreements with other institutions (See, e.g., “University of Cincinnati Resolution Agreement,” available at <http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf>; “University of Montana Resolution Agreement,” available at <http://www.umt.edu/accessibility/docs/FinalResolutionAgreement.pdf>); and “South Carolina Technical College System Resolution Agreement,” available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf>).

In April 2015, OCR reached a settlement agreement with edX Inc. in the offering of massive open online courses (MOOCs) in which edX Inc. agreed to make online content that it offered or facilitated accessible to individuals with disabilities (http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf).

The National Federation of the Blind (NFB), which was part of a suit in 2009 against the Law School Admissions Council discussed in LHE 5th, p. 1110, has continued to press legal action against colleges and universities in the area of online accessibility. In June 2015, Atlantic Cape Community College entered into a consent decree with NFB and two students who were blind (http://www.nacua.org/documents/Lanzilotti_v_AtlanticCapeCommunityCollege.pdf). Under the consent decree, the college agreed to hire a third party consultant to evaluate and make

recommendations regarding the accessibility of technology, including web content. Other actions agreed to by the college included reviewing and revising, as needed, accessibility policies, providing staff with training, making the institution's website pages accessible to blind students, ensuring the accessibility of the college's library website, and making instructional materials accessible to blind students. The NFB has been involved in actions against other institutions that resulted in settlement or resolution agreements, including Florida State University and Pennsylvania State University (Marc Perry, "\$150,000 Settlement Reached in Blind Florida State Student's E-Learning Suit." *Chronicle of Higher Education*, March 6, 2012, available at <http://chronicle.com/blogs/wiredcampus/150000-settlement-reached-in-blind-florida-state-students-e-learning-suit/35659>; See also the "Resolution Agreement" for Penn State, available at <http://accessibility.psu.edu/nfbpsusettlement/>).

Section 9.6. Academic Dismissals and Other Sanctions

9.6.1. Overview. For analysis of litigation involving discipline or expulsion for academic misconduct (plagiarism, cheating), see Barbara A. Lee, "Judicial Review of Student Challenges to Academic Misconduct Sanctions," 39 *J. Coll. & Univ. Law* 511 (2013).

9.6.2 Contract issue and fiduciary duty issues. As discussed in LHE 5th, students often claim breach of contract when a degree is withheld on academic grounds. *Al-Dabagh v. Case Western Reserve University*, 777 F.3d 355 (6th Cir. 2015), shows the interplay that can exist between contract-based interpretations of the student-institutional relationship and the issue of judicial deference to academic decision-making. In the case, the Sixth Circuit, reversing a federal district court, held that considerations of judicial deference to academic judgment meant that a

university's decision to deny a student a medical degree on professionalism grounds should be upheld.

The case involved a medical student in Ohio who had performed well overall academically, but his behavior had raised professionalism concerns on multiple occasions. Schools officials asserted, for instance, that he had consistently arrived late to required discussion sessions for students and exacerbated this professional lapse by requesting the instructor on these occasions not to mark him as late. He was also accused of inappropriate conduct toward two women students at a dance hosted by the school and, on that same evening, of attempting to avoid paying a taxi fare. These events led to the student's appearance before a committee charged with enforcing professionalism standards. Additionally, the student had received rebukes for behavior deemed inappropriate to supervisors, patients, nurses, and staff. As a result of these various incidents, the student was not dismissed from the residency program, but he was required to repeat internship requirements and to undergo gender specific training.

After the completion of academic requirements but before the awarding of a diploma to the student, the school became aware that the student had been convicted of driving while intoxicated in another state. While the student had already received an invitation to graduate, the information regarding the conviction resulted in the school refusing to let him graduate and, initially, his dismissal from the university. After an appeal by the student, the institution permitted him to resign from the program, which left him able to apply to other institutions without having to explain a formal dismissal.

As a result of the actions taken against him, the student claimed that the university breached state law duties of good faith and fair dealing. The federal district court held in favor of the student, determining that he had satisfied required degree requirements and should be

allowed to graduate. Following the lower court decision, the university awarded the degree but expressed its intention to revoke the degree if it prevailed on appeal.

In its opinion reversing the lower court, the U.S. Court of Appeals for the Sixth Circuit discussed that Ohio law treated the student-institutional relationship as contractual in nature, with the university's student handbook providing the applicable terms. Additionally, the court noted that under Ohio law academic judgments are to receive judicial deference unless arbitrary or capricious, noting that similar deference existed under federal due process standards. With these standards in mind, the court discussed that the handbook specifically referred to professionalism standards as a part of the overall curriculum at least four times. It also noted that professionalism standards are inherently accepted as a part of the fitness required to be a doctor. The court rejected the student's contentions that even if professionalism issues constituted academic concerns, these should be limited to academic performance. The court discussed that academic judgments extend beyond grades and objective grading criteria. The court rejected as well the student's arguments that the action taken against him was disciplinary rather than academic in nature. Furthermore, nothing in the record indicated that the university had acted in bad faith in its treatment of the student or arbitrarily or capriciously.

Issues of professionalism and dismissals on academic grounds can also extend to the question of whether a student or an employee relationship is at issue. In *Abdel-Raouf v. Yale University*, 2015 WL 687440 (D. Conn. Feb. 17, 2015), a resident physician challenged his dismissal from a four-year psychiatric residency program, claiming the dismissal was on the basis of race and religious discrimination. While noting that a resident position consists of both student and employee components, the court discussed that it is primarily an educational appointment. Further, it stated that courts should show deference to academic decisions made

regarding the fitness of medical residents. Granting summary judgment to the defendants, the court determined that the resident physician failed to offer evidence that he was qualified to advance to the third year of residency or to support his allegations of discrimination based on race or religion.

9.6.3. Constitutional issues. As noted in LHE 5th, students have been unsuccessful when attempting to state constitutional claims when challenging academic dismissals, as opposed to dismissals for social misconduct. In this era of social media, questions have arisen as to whether an institution may discipline or dismiss a student for speech on a social media site or in a blog that is created off campus. An important issue in resolving these questions is whether the alleged misconduct is related to academic requirements or professional codes of ethics. For further discussion of this issue, see LHE 5th, Section 8.1.4.

A federal appellate court has ruled that a student dismissed from the University of Louisville School of Nursing could not maintain constitutional claims for alleged violations of free speech and due process related to her dismissal for a blog post that the school said violated its academic standards. In *Yoder v. University of Louisville*, 2013 U.S. App. LEXIS 9863 (6th Cir. May 15, 2013), the appellate court affirmed a trial court's award of summary judgment to the university.

The school of nursing required students to sign the "Honor Code," a pledge to "adhere to the highest standards of honesty, integrity, accountability, confidentiality, and professionalism" in "all my written work, spoken words, action and interactions with patients, families, peers and faculty." She also signed a confidentiality agreement with respect to working with individual patients. After being assigned to a pregnant patient, Yoder began writing a blog that used

sarcasm to describe pregnancy, her patient (although unnamed) and her experience as a student nurse. She was confronted with the blog by her course instructor and an associate dean, and was dismissed from the nursing program for violating the Honor Code and patient confidentiality. Yoder petitioned for reinstatement, which was denied. She pursued no further internal appeals, but filed a lawsuit, claiming violations of her rights to free speech and due process through Section 1983 (see LHE 5th, Section 3.5).

The trial court awarded summary judgment to Yoder, finding that the school had breached its contract with her, and ordered her reinstated. She was reinstated, and has since graduated, but her claim for monetary damages was not rendered moot by the reinstatement. The university appealed, noting that 1) the trial court had not addressed the constitutional issues in Yoder's claim and 2) that Yoder had not included a breach of contract claim in her lawsuit. The appellate court vacated the trial court's ruling (417 F. App'x 529 (6th Cir. 2011)) and remanded. On remand, the trial court entered summary judgment for the university and the individual defendants, ruling that they were protected by sovereign immunity in their official capacity, and that the claims against the faculty in their individual capacity were barred by qualified immunity. The plaintiff appealed.

The court examined whether the plaintiff had a "clearly established" right under the first amendment to discuss private patient information on her blog. Examining lawsuits from other circuits, the court concluded that the law with respect to Yoder's first amendment claim was not "clearly established," either at the time that she was dismissed or at the time the court was ruling in this case. The court noted that the Honor Code and confidentiality agreement that Yoder had signed could operate as a waiver of any first amendment right to write about matters involving patient confidentiality, and rejected Yoder's claim that these policies were unconstitutionally

overbroad or vague. The court also rejected Yoder's claim that her dismissal was for disciplinary, rather than academic reasons, and therefore she was denied procedural due process. Again the court disagreed, saying that the Honor Code and confidentiality agreement were a central component of the nursing curriculum, and were not part of a general student conduct code. By its own terms, the confidentiality agreement stated that a breach of confidentiality was grounds for dismissal from the nursing program. The appellate court upheld the trial court's award of summary judgment to the university and the individual defendants on all claims.

In another case involving professionalism standards, a secondary education student, Oyama, sued the University of Hawaii for violating his First Amendment rights and his procedural due process rights. *Oyama v. Univ. of Haw.*, 813 F.3d 850 (9th Cir. 2015). The action stemmed from the refusal of the university to endorse Oyama, who was enrolled in a post-baccalaureate program, for teacher certification. In a reflection paper for a class on educational psychology, Oyama wrote that he felt child predation and consensual sex with a minor should be legal. In a follow-up discussion with the professor, Oyama stated that he would report such a relationship pursuant to state law, but he felt such a relationship was not wrong. Oyama also expressed the belief that severely disabled students should not be included in a classroom environment, a view that was not in alignment with the Hawaii Department of Education. Based on such views, educators in the teacher preparation program decided that Oyama was not fit for recommendation for teacher certification, a decision that was upheld internally by the university by a three-person committee.

The U.S. Court of Appeals for the Ninth Circuit affirmed a summary judgment in favor of the university, stating that the university based its decision "directly on defined and established professional standards." *Id.* at 855. In analyzing Oyama's First Amendment claims,

the court discussed that his presented a hybrid situation, one that “combined characteristics of both a student and a public employee.” *Id.* at 860. This stemmed from the fact that while a student, the issue of professional certification implicated considerations akin to those in the public employee speech context. As such, the court drew from both the public employee and student speech cases in evaluating Oyama’s First Amendment claims. Additionally, it looked to decisions involving professional certification.

The federal district court had ruled against Oyama’s First Amendment claims on the basis of *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (discussed in LHE 5th, pp. 754-55) and other student speech cases applicable to elementary and secondary education students. In *Hazelwood*, the U.S. Supreme Court held that elementary and secondary educators could exercise control over student speech that was school-sponsored in nature as long as done for a legitimate pedagogical reason. While *Hazelwood* and related cases were pertinent to its analysis, the Tenth Circuit in *Oyama* discussed that the Supreme Court had not yet extended *Hazelwood* and its progeny to a higher education context and noted that circuit courts are split on the issue.

With regard to *Hazelwood*, the court discussed that the rationales for its application to student speech involved the need not to expose students to materials inappropriate for their level of maturity and to ensure that students gain the curricular and pedagogical aims of instruction or other assignments. According to the court, neither reason was at play in relation to Oyama and his speech. The student was an adult and, rather than any pedagogical aim to teach Oyama, the goal of the university was to block Oyama from receiving teacher certification. Thus, the institutional gatekeeping responsibility is what drove the university’s effort to refuse to endorse Oyama for teacher certification. The court also discussed that the student speech doctrine failed to account for the academic freedom concerns present in higher education.

The student argued that the university's actions were akin to an employer regulating employee speech. Thus, he argued that the standards associated with public employee speech and governed by cases such as *Pickering v. Board of Education*, 391 U.S. 563 (1968), should apply. The court discussed that the rationale for the university to deny the student certification (i.e., furthering its institutional interest in appropriately carrying out its duty to limit certification to qualified individuals) was akin to the kind of employee interests at stake in the public employee speech cases. Under the public employee speech framework, an employee speaking as a private citizen on a matter of public concern is entitled to First Amendment protection for the speech absent a legitimate countervailing justification by the governmental employer to restrict the speech. In the instant case, the university was interested in regulating the student's speech in the fulfillment of its legal obligations related to teacher certification.

Despite these reasons in favor of applying the public employee speech standards, the court pointed out the fundamental shortcoming was that Oyama was not a governmental employee. As such, extending the public employee speech standards to him would mean applying the standards to individuals who might work for a governmental employer but did not yet do so. The court also discussed that the public employee speech cases failed to take into account the academic freedom concerns present in higher education. According to the court, a public university student possessed greater First Amendment speech rights than a public employee.

Finding both the public employee and student speech cases as inadequate, the court next turned to cases involving professional certification. Noting that these cases largely drew from the student speech and public employee speech cases, the Tenth Circuit stated that the cases reflected the "common themes . . . [of] some deference to the certifying institution, but with

significant limitations.” *Id.* at 867. These cases revealed, according to the Tenth Circuit, that courts were more apt to defer to institutional restrictions on student speech on the basis of defined professional standards. In contrast, when courts deemed actions taken predominately on the basis of “officials' personal disagreement with a student's views,” they were more likely to reject the regulation or restriction of the speech at issue. *Id.*

Because the university’s decision was directly tied to defined standards, the Tenth Circuit found that the university did not violate Oyama’s First Amendment rights. The court also decided that the decision was narrowly tailored to serve the goal of employing educators who are knowledgeable, effective, and caring professionals, and the decision was not based on speech unrelated to teaching. The court held that Oyama’s procedural due process rights were not violated because the University fully informed him of the faculty’s dissatisfaction and provided him with a “robust process for appealing its initial decision.” *Id.* at 875.

Another case with a procedural due process component involved claims by a former Ph.D. student that speaking out against alleged misconduct by a faculty mentor had resulted in her dismissal. The student argued that her dismissal from a neuroscience program at the University of Utah violated her procedural and substantive due process rights. *Rossi v. Univ. of Utah*, No. 2:15-cv-00767 (D. Utah June 24, 2016). She brought claims against the institution and individual university employees. Because the university had not waived its sovereign immunity, the court dismissed all claims against the university and officials in their official capacities, but it sustained several claims against defendants in their individual capacities.

The student alleged that her dismissal from the program stemmed from allegations that her faculty mentor had committed research misconduct and had also engaged in conduct that resulted in a financial conflict of interest. The defendants argued that the student had been

provided sufficient procedural process prior to her dismissal for academic reasons, which meant that her claims of conflict of interest and research misconduct should not be a basis to sustain a procedural due process claim. The court disagreed, stating that the presence of procedures alone was insufficient to rebut a procedural due process claim. It discussed that procedural due process would not be satisfied if the decision to dismiss the student for inadequate academic performance was not based on careful and deliberate professional judgment.

Similarly, at this stage of the litigation, where the court accepted the student's allegations concerning the faculty member as true, the court ruled that the student's substantive due process claim should not be dismissed, as the student had alleged sufficient factual allegations that dismissals was not based on genuine academic grounds. Furthermore, because the court determined that clearly established law existed at the time of the alleged violations, the defendants were denied qualified immunity in their individual capacities.

The issue of state action in the context of a student's dismissal from an academic program arose in *Borrell v. Bloomsburg University*, 63 F. Supp. 3d 418 (M.D. Pa. Oct. 21, 2014). The case also involved the issue of a dismissal from a program based on conduct versus academic grounds. A student enrolled in a nurse anesthesia program, one jointly administered by a public university and a private healthcare provider, was suspected of possible drug use and was instructed to submit to a drug test. Students in the joint program were subject to the standards and requirements placed on employees of the healthcare provider in addition to the academic standards required for enrollment.

The student refused to take the drug test and was subsequently dismissed from the joint program, though she was informed that she could apply to enroll in other academic programs at the university. The student contended that she had not been initially notified that the refusal to

take the drug test would result in her dismissal. The student alleged due process, equal protection, and breach of contract claims. A federal district court held that both the private healthcare provider and its employees constituted state actors in relation to the administration of the joint program and the actions taken against the student.

In relation to the student's due process claim, the case reflects the tensions that can exist between issues of academic judgment versus those involving student conduct rules. In this case, the court decided that the action was a disciplinary as opposed to an academic dismissal, noting that the potential drug use by the student represented an objective matter rather than a subjective one. Furthermore, the court held that the student's due process rights were violated because she was not adequately provided an opportunity to be heard prior to her dismissal from the program.

Another case involving drug testing dealt with whether a mandatory suspicionless drug-testing program at a state technical college violated students' Fourth Amendment rights. *Kittle-Aikeley v. Claycomb*, 807 F.3d. 913 (8th Cir. 2015). Initially, a federal district court issued a preliminary injunction to bar implementation of the policy, which subjected all students at the college to drug screening.

After the U.S. Court of Appeals for the Eighth Circuit lifted the preliminary injunction, the district court approved testing for students enrolled in programs that presented special safety risks, such as aviation maintenance and programs dealing with training in electrical work. The district court determined, however, a lack of evidence supported the implementation of mandatory suspicionless drug testing in several programs. The court required more than speculation on the part instructors that a danger might be present absent a testing regime. It held the college bore the burden to provide persuasive evidence that an exception to the usual standards of the Fourth Amendment and a prohibition on suspicionless searches was warranted.

Reversing the district court, the U.S. Court of Appeals for the Eighth Circuit held that the college could engage in mandatory suspicionless drug testing of students in all programs. The court, rejecting the students' Fourth Amendment arguments, determined that the technical nature of many of the programs offered by the college presented unique circumstances and safety risks that made the blanket testing program permissible under the Fourth Amendment.

9.6.4. Discrimination issues. After the appellate court remanded *Emeldi v. University of Oregon*, (LHE5th pp. 1139-1140), a trial was held. After two days of testimony, the judge dismissed the case, saying that there was no evidence of a Title IX violation. Stacey Patton, "Former Graduate Student's Gender Discrimination Case is Dismissed." *Chron. Higher Educ.* Dec. 6, 2013, available at <http://chronicle.com/article/Former-Graduate-Students/143463>.

For a case with similar facts and a similar outcome, see *Tryboski v. The Pennsylvania State University*, 2015 Pa. Super. Unpub. LEXIS 4088 (Pa. Sup. Ct. Nov. 9, 2015).

9.6.5. Procedures for academic sanctions.

9.6.5.1. Public institutions. The U.S. Court of Appeals for the Eighth Circuit reviewed the dismissal of a student from a nursing program based on online comments available to the general public made on Facebook. *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016). Program officials determined that the comments, which made several students uncomfortable and even fearful, demonstrated conduct that was unbecoming to the nursing profession and that violated professional boundaries. The court upheld the authority, both on First Amendment and due process grounds, of college officials to take action against the student on the basis of professionalism rules modeled on nationally established standards. The court discussed, however, that such standards could not be used to encroach upon First Amendment speech

protections. As long as not doing so, professionalism standards constituted a permissible academic requirement that educators may impose on students. The court also discussed, rejecting arguments from the student, that officials could impose sanctions on students on professionalism grounds for off-campus, online speech. The court stated that nursing program officials possessed authority over such speech implicating professionalism concerns on the basis of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The Court of Appeals of Texas considered whether Texas Tech University denied required procedural due process protections to a medical resident determined to have failed the third year of residency but offered the opportunity to repeat the year. *Texas Tech Univ. Health Sci. Ctr. v. Enoh*, 2016 WL 7230397, no. 08-15-00257 (Tex. App. Dec. 14, 2016). Texas Tech contended that the medical resident possessed no liberty or property interest in the residency program. It also argued that any recognized interest was diminished because the dispute centered on academic and professional performance rather than a disciplinary matter. Furthermore, the institution argued that the opportunity for the individual to repeat the failed residency year made the interest at stake different from instances involving expulsion. The Texas Court of Appeals discussed a split among courts regarding the existence of a property interest in residency programs. The court assumed for purposes of its decision that the medical student enjoyed either a property or liberty interest in the residency program. Considering the issue of the process entitled to the student, the court classified a medical residency as subject to standards for an educational setting versus an employment context. Additionally, the court determined that the issues involving the resident dealt with academic versus disciplinary issues. The court noted that the facts in the case did not “fit neatly as a dismissal for academic reasons or misconduct.” *Id.* at *10. Namely, the individual failed the residency year for reasons that

included misuse of a credit card. But, the court discussed that academic dismissals may include reasons other than grades, such as professionalism considerations. Additionally, the decision to fail the student included other reasons, such as unprofessional communications, failing to demonstrate appropriate concern for patients, and gaps in knowledge. Having determined that the dismissal was academic in nature, the court held that Texas Tech had provided sufficient notice and opportunities for the student to respond to the decision to fail the resident for the third year.

9.6.5.2. *Private institutions.* In *Walker v. President and Fellows of Harvard College*, 840 F.3d 57 (1st Cir. 2016), a law school graduate sought the removal of a notation from her academic transcript that indicated that she had committed plagiarism in the submission of a draft article to a student-run journal. Asserting claims based on breach of contract and defamation, the former student argued that she had submitted only a draft of the article and not a final, completed work. Hence, she contended that the law school's plagiarism policy did not apply to the manuscript that resulted in a finding of plagiarism. Upholding the dismissal of the student's claims, the U.S. Court of Appeals for the Eighth Circuit discussed that the policy clearly stated it applied to all work submitted by a student for academic or non-academic work. As such, according to the court, no reasonable student should have expected that the policy did not apply to a non-final draft.

Chapter X

Student Disciplinary Issues

10.1 Disciplinary and Grievance Systems

10.1.1. Overview

Annotated Bibliography:

Perry A. Zirkel. “Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—as Compared with Public—Institutions of Higher Education: A Glaring Gap?” 83 *Mississippi Law Journal* 863 (2014). Reviews 95 reported court opinions involving student litigation challenging discipline for non-academic misconduct at private colleges and universities; concludes that institutions typically prevail in these cases and students who do prevail tend to do so using breach of contract theories.

10.1.3. Codes of student conduct. Student use of social media—and its misuse to bully or harass others—may violate provisions of a code of student conduct. Questions concerning the application of free speech principles to off-campus speech, particularly at public colleges and universities, are addressed in LHE 5th, Section 8.5.1.

Whether or not an institution may invoke its code of student conduct for bullying or harassing speech on social media was addressed in *Zimmerman v. Board of Trustees of Ball State University*, 2013 U.S. Dist. LEXIS 54368 (S.D. Ind. Apr. 15, 2013). In *Zimmerman*, two roommates allegedly harassed a third in their off-campus apartment, both physically and via Facebook and YouTube postings that were intended to humiliate him. The two alleged perpetrators were charged with two conduct code violations: harassment and invasion of

privacy. The students accepted responsibility for their conduct, and a sanction of a one-year suspension and disciplinary probation upon their return to campus was imposed.

This lawsuit followed, in which the students sued the university and its president, vice president for student affairs, and the administrator chiefly responsible for enforcing the university's student conduct code. The students claimed due process and free speech violations, and argued that Ball State did not have the authority, under Ind. Code Ann. § 21-39-2-3, to impose discipline for off-campus conduct. The court characterized this claim as a claim that their substantive due process rights had been violated. Because the state statute gives Indiana public institutions the authority to "[G]overn, by lawful means, the conduct of the state educational institution's students... wherever the conduct might occur," the court rejected the students' claim that the university could not apply its student conduct code to off-campus misconduct. The same law gives public institutions the authority to regulate conduct that is "unlawful or objectionable." Having reviewed the details of the "catfishing" prank that the students played on their former roommate, the court concluded that no reasonable jury could find that the students' conduct was not objectionable. Finding no substantive or procedural due process violations, the court entered summary judgment for the university and the individual defendants.

(The court also suggested that the students' "speech" on the phony Facebook page was not protected free expression, but found it unnecessary to rule on that claim because it concluded that the administrators were protected by qualified immunity and therefore faced no liability).

In another case involving the reach of a university student code of conduct, the Kansas Court of Appeals decided that the University of Kansas could not extend its conduct code to expel a student for making "puerile and sexually harassing tweets" about another student at the

university that were made off campus. *Yeasin v. Univ. of Kansas*, 360 P.3d 423 (Kan. Ct. App. 2015). Affirming a state trial court decision, the appellate court held that the university's student code of conduct only applied to on-campus conduct or off-campus events sponsored or supervised by the institution based on the language specifically contained in the code of conduct.

Along with the social media threats and harassment against another student, the student engaged in threatening and harassing behavior toward the other student, which resulted in multiple criminal charges. As a result of these charges, the student entered into a diversion program and a protective order was also issued directing the student to have no contact with the student victim.

In addition to reporting the incidents to police, the student victim reported the threats and harassment to the University of Kansas' Office of Institutional Opportunity and Access (IOA). During its investigation, the IOA issued a no-contact order to the accused student. Despite the no-contact order, the student engaged in multiple Twitter exchanges with another individual about the student victim.

Following its investigation, the IOA recommended that disciplinary action be taken against the student. While noting that some of the student's conduct had occurred off campus, the IOA determined that the student's conduct affected the on-campus environment for the student being harassed and threatened. The IOA also concluded that the student had purposefully violated the no-contact order through the tweets made about the student victim. A hearing panel determined that the student had violated the university's sexual harassment policy and also had violated the no-contact order. It recommended the expulsion of the student, a sanction that was upheld in an internal appeal.

Of potential interest to many institutions is the fact that that the university sought to rely

on language in a portion of the code that referred to institutional authority over student conduct as "otherwise required by federal, state or local law" as a basis to discipline the student. This was because much of the conduct at issue had occurred off campus and independent of any kind of off-campus university-sponsored event.

In its legal arguments, the University of Kansas pointed out that inaction on its part in relation to the off-campus conduct in question could violate its obligations under Title IX. While not unsympathetic to this issue, the court stated that it did not need to decide the extent to which universities could impose their authority over students' off-campus conduct in order to comply with Title IX. Instead, according to the court, the determinative issue was that the University of Kansas had not made it explicit enough in the code of conduct that the institution's jurisdiction could ostensibly extend to the kind off-campus conduct at issue in the case.

The issue of speech and an institution's student conduct code also arose in a case in which a student challenged his expulsion from a public university for sexual misconduct. *Doe v. Rector and Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855 (E.D. Va. Sept. 16, 2015). Among the legal challenges to his expulsion, the student argued that his text message to another student that he would shoot himself if she did not respond to his messages failed to constitute a true threat. The court agreed with the student and decided that the speech did not constitute a true threat that would exclude the speech at issue from potential First Amendment protection. According to the court, the student did not threaten harm to others but only to himself. A threat directed only at oneself failed to constitute a true threat for purposes of First Amendment analysis.

10.2.4. Disciplining students with mental disorders. A federal trial court has issued a ruling in a case involving an alleged “direct threat” to the safety of others (LHE 5th, p. 1177). In *Stebbins v. University of Arkansas*, 2012 U.S. Dist. LEXIS 182620 (W.D. Ark. Dec. 8, 2012), a student with several diagnosed psychiatric disorders was placed on involuntary leave by the university after engaging in several episodes of angry and threatening behavior, and after making threats of violence against various administrators and family members. When the university would not allow the student to return to campus (after the student continued to make threats and could not document any improvement in his psychiatric condition), the student sued, claiming that the university had violated Section 504 of the Rehabilitation Act (LHE 5th, Section 14.5.4). The court reviewed the university’s attempts to work with the student when he had been on campus, evaluated the possibility that the student might act on his threats, and determined that the administrators’ assessment that the student was a “direct threat” to the safety of others was well supported by the evidence. The court dismissed the student’s claims.

As noted on p. 1177 of LHE 5th, the Department of Justice and OCR both have limited the definition of “direct threat” to individuals who are a threat to others. This limitation has complicated institutions’ attempts to deal with students who engage in risky behavior—most specifically, those who attempt suicide. For analysis of recent OCR letter rulings responding to student complaints under Section 504, the ADA, or both, as well as recommendations for working with students who engage in behavior that places them at risk, see Barbara A. Lee, *Dealing with Students With Psychiatric Disorders on Campus: Legal Compliance and Prevention Strategies*. 40 *Journal of College & University Law* 425 (2014).

Section 10.3 Procedures for Suspension, Dismissal, and Other Disciplinary Sanctions

10.3.2. Public institutions.

10.3.2.1. Overview. A student sued a University of Kansas administrator, alleging violations of his First Amendment and due process rights after a state court decided that the university erroneously interpreted its student code of conduct as applicable to off-campus conduct and expelled the student. *Yeasin v. Durham*, 2016 WL 7014027, No. 2:16-CV-02010-JAR (D. Kan. Dec. 1, 2016). In relation to the First Amendment claim, the court held that the administrator was entitled to qualified immunity, as it was not clearly established law regarding students' First Amendment rights to post off-campus, online content. It noted that federal circuit courts had reached "conflicting conclusions" over the issue of whether institutions could regulate student speech in such instances. The court also determined the due process claims were without merit. Even though the university erroneously expelled the student, institutional officials, including the defendant, had provided adequate process to the student and had not acted in an arbitrary manner. Alternatively, the court held that even if the student could demonstrate a due process violation, the law was not clearly established so that the administrator should have known that the student's expulsion violated his due process rights.

10.3.2.3. Hearing. The General Assembly of North Carolina has amended Chapter 116 of the General Statutes by adding a new section that states:

Any student enrolled at a constituent institution who is accused of a violation of the disciplinary or conduct rules of the constituent institution shall have the right to be represented, at the student's expense, by a licensed attorney or nonattorney advocate who may fully participate during any disciplinary procedure or other

procedure adopted and used by the constituent institution regarding the alleged violation. [G.S. § 116.40.11 (a) and (b).

The new law does not extend this protection to student honor courts fully staffed by students, or to proceedings involving allegations of academic dishonesty. The right to an attorney is also given to student organizations that are accused of violations of the code of student conduct.

The issue of the procedures required to expel a doctoral student on conduct grounds arose in a case heard by the Washington Court of Appeals. In *Arishi v. Washington State University*, 385 P.3d 251 (Wash. Ct. App. 2016), the court considered the expulsion of a forty-year-old Ph.D. student, Arishi, from Washington State University (WSU) after officials learned of criminal charges pending against him for having a sexual relationship with a fifteen-year-old. Public agencies in Washington, including WSU, must abide by the state's Administrative Procedure Act (APA), which is based on the model act by the National Conference of Commissioners on Uniform State Laws. The APA specifies instances in which agencies may rely on more simplified procedures in making adjudicative decisions versus when more formal procedures are required. At issue in the case involved the university's reliance on the more streamlined procedures under the state's APA in conducting the hearing to dismiss the student.

Under the institutional rules for the hearing, only members of the hearing board could ask questions. Proposed questions from the student were submitted to the hearing officer, who determined which student submitted questions could be asked. The student could not subpoena witnesses or documents. The lawyer representing Arishi in his criminal case was able to act as the student's advisor in the hearing but could not address witnesses or members of the conduct board. The conduct board determined that the student had violated university rules related to sexual misconduct and recommended his expulsion. Arishi appealed the decision and also

requested that his case should be subject to a full adjudication per the standards of the Washington APA. The university appeals board uphold the decision to expel the student and denied the request for a full adjudication.

The Washington Court of Appeals determined that the university had failed to satisfy the requirements of the APA. For analytical context, the court discussed that the U.S. Supreme Court's decisions on constitutional due process provided an important baseline regarding protections under the Washington APA (i.e., the state could provide greater protections required under the Constitution but not less). Among these cases, the court discussed that in *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the U.S. Supreme Court noted that student dismissals based on academic reasons require less stringent procedure protections than those based on misconduct. In rejecting the university's position that it provided sufficient process to Arishi, the court discussed that the institution erroneously sought to justify its actions on concepts related to constitutional due process. But, the court stated that Arishi had, instead, argued that the university failed to provide him the procedural protections afforded under the APA.

The court agreed with the student, determining that the interests at stake to Arishi, including losing his financial and personal investment in the academic program and potential risk that the university's failures could have led to a flawed outcome, sufficed to trigger a full adjudication under the Washington APA. The court also rejected the university's arguments that providing a full adjudication could have conflicted with its obligations under Title IX. The court pointed out that the fifteen-year-old was not enrolled at WSU and was also homeschooled, which meant that she was not enrolled in any federally-funded education program.

Section 10.4 Student Protests and Freedom of Speech

10.4.4. Prior approval of protest activities. A federal trial court has found that a college's requirement that students act with civility or risk violating the student code of conduct violates the U.S. Constitution. In *Lela and McCartney v. Board of Trustees of Community College District No. 516*, 2015 U.S. Dist. LEXIS 7146 (N.D. Ill. 2015), the plaintiffs, who were not students at the college, had asked permission to hand out flyers on a community college campus. The flyers contained anti-gay messages. A vice president denied permission to distribute the flyers, saying that the campus was not an open public forum, the college had a no-solicitation policy, and that college policy forbade the use of its campus for activities that were not "consistent with the philosophy, goals and mission of the college." The college's nondiscrimination policy includes sexual orientation.

The court granted the plaintiffs' request for a preliminary injunction, noting that the college had allowed other outside groups to engage in speech activities on campus. Thus, said the court, the refusal to allow these individuals to hand out leaflets was viewpoint discrimination it was based on the plaintiffs' views about homosexuality.

10.4.7. Protests in the classroom. Students enrolled in a training program in sonography alleged that they were retaliated against for objecting to voluntarily submitting to a transvaginal ultrasound administered by other students in the program. *Doe I v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207 (11th Cir. 2016). The student also contended that such ultrasounds constituted a search under the Fourth Amendment. A federal district, rejecting the First Amendment claim, held that the students' speech was "school sponsored" in nature and, thus, subject to a standard of whether the educators' acted pursuant to achieving a legitimate pedagogical purpose, as

announced in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The court also held that no search occurred because a search for Fourth Amendment purposes must be undertaken for investigative or administrative reasons but the actions under review involved an educational motivation. Reversing the district court, the Eleventh Circuit held that rather than *Hazelwood*, the students' speech, which it described as voicing private complaints, constituted independent student speech subject to the standards from *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). The court also held that the ultrasounds comprised a search under the Fourth Amendment. According to the court, the rationale for conducting a search is not determinative as to whether the Fourth Amendment is implicated, but, rather the nature and invasiveness of the search in question. It noted that some circuits did require an investigate or administrative purpose to trigger Fourth Amendment protections but stated that the Eleventh Circuit had rejected this requirement.

Chapter XI

Rights and Responsibilities of Student Organizations and their Members

Section 11.1 Student Organizations

11.1.4. Principle of Nondiscrimination. The Virginia Assembly has enacted a law in response to the Supreme Court's *Martinez* ruling (LHE 5th, pp. 1260-1265) that an institution with an "all comers" policy with respect to student organization membership may deny student activity fees to student organizations that discriminate in their membership or leadership policies. The General Assembly amended the Virginia Code by adding in Chapter 1 of Title 23 a new section 23-9.2:12, which states:

To the extent allowed by state and federal law:

1. A religious or political student organization may determine that ordering the organization's internal affairs, selecting the organization's leaders and members, defining the organization's doctrines, and resolving the organization's disputes are in furtherance of the organization's religious or political mission and that only persons committed to that mission should conduct such activities; and
2. No public institution of higher education that has granted recognition of and access to any student organization or group shall discriminate against any such student organization or group that exercises its rights pursuant to subdivision 1.

Section 11.3 The Student Press

11.3.4. Advertising in student publications

Pp. 1317-18:

After the Fourth Circuit’s 2010 decision in *Educational Media Co. at Virginia Tech v. Swecker*, that court remanded the case to the district court, which allowed the two student newspapers to assert an “as applied” challenge to the Alcohol Beverage Control Board regulation. The district court ruled for the Board, however, and the student newspapers again appealed to the Fourth Circuit. In *Educational Media Co. at Virginia Tech v. Insley*, 731 F.3d 291 (4th Cir. 2013), the appellate court ruled, 2 to 1, for the students. The difference between the first appeal and the second appeal is instructive.

In the first appeal, the student newspapers challenged the Board’s regulation *on its face*; they asserted, in other words, that the Board’s prohibition of alcohol ads in student newspapers is unconstitutional in all of its applications. In the second appeal, the two student newspapers challenged the board’s regulation as *applied* to them; in other words, they asserted that the Board’s regulation, even though constitutional *on its face*, is nevertheless unconstitutional in its application specifically to the plaintiffs, the two newspapers. (For further explanation of the distinction between “facial” and “as-applied” challenges to the constitutionality of a government regulation, see the second appeal in *Educational Media Co.*, 731 F. 3d at 298, fn. 5.; and for another example of an as-applied challenge, see the *Pitt News* case, discussed in LHE 5th, section 11.3.4, and in the majority opinion in the second appeal (731 F.3d at 301).)

In the second appeal, the court again relied on the *Central Hudson* test (see LHE 5th, Section 11.3.4) in analyzing the student newspapers’ challenge:

Central Hudson applies to both facial and as-applied challenges
. However, the type of challenge dictates the state’s burden of proof.
In an as-applied challenge which we address here, the state must
justify the challenged regulation with regard to its impact on the
plaintiffs. [731 F.3d at 301.]

Regarding this impact, the student newspapers emphasized that the majority of their readers are at least 21 years of age and may thus legally purchase alcoholic beverages.

Applying each of the four prongs of the *Central Hudson* test, and taking account of the student newspapers’ readership, the appellate court held that the Board regulation failed to satisfy *Central Hudson’s* fourth prong, which requires that the regulation at issue be “appropriately tailored to achieve its objective.” Specifically:

[T]he challenged regulation fails under the fourth *Central Hudson* prong because it prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume.

* * * *

Here, a majority of the College Newspapers’ readers are age 21 or older. Specifically, roughly 60% of the Collegiate Time’s readership is age 21 or older and the Cavalier Daily reaches approximately 10,000 students, nearly 64% of whom are age 21 or older. Thus, the College Newspapers have a protected [First Amendment] interest in printing non-misleading alcohol advertisements, just as a majority of the College Newspapers’

readers have a protected interest in receiving that information.

Accordingly, the challenged regulation is [unconstitutional as applied]. [731 F. 3d at 301.]

Section 11.4 Athletics Teams and Clubs

11.4.3. Athletes' freedom of speech. A regional director for the National Labor Relations Board (NLRB) issued an advice memorandum in which he determined that certain prohibitions on social media activity in a handbook for football players at Northwestern University violated protected activities under the National Labor Relations Act (NLRA). NLRB Advice Memorandum, Northwestern University Case 13-CA-157467 (Sept. 22, 2016). During the course of reviewing the policies, the university amended the handbook, actions which the regional director determined brought the institution's standards in compliance with the NLRA. Before being revised, the handbook included provisions for the monitoring of football players social network activities, prohibitions on discussing medical issues with individuals not part of the football team, and requiring all interviews to be arranged by the athletics communications office. Previously, the NLRB had decided not to assert jurisdiction under the NLRA in a case involving scholarship football players at Northwestern University. *Northwestern University*, 362 NLRB No. 167 (2015).

11.4.4. Pertinent statutory law. The U.S. Court of Appeals for the Seventh Circuit held that former college athletes did not qualify as employees under the Fair Labor Standards Act (FLSA). *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016). The former athletes contended that they were entitled to a minimum wage under the act for the period in which they participated on a

university's athletic team. The court discussed that multifactor tests often used to determine employee status under the FLSA were not appropriate to apply to college athletes, even if athletes seemed to satisfy the factors under such tests for purposes of the FLSA. Instead, stated the court, such multifactor tests properly failed to account for a "tradition of amateurism" in college athletics and did not appropriately capture the relationship between college athletes and their institutions. *Id.* at 291. The court discussed as well that the Department of Labor did not consider college athletes to be employees under the FLSA, as expressed in the agency's Field Operations Handbook. The court also held that the individuals only had standing to sue their former institution and not the NCAA or other NCAA Division I member schools.

11.4.6. Sex discrimination. The National Collegiate Athletic Association (NCAA) has published a report on the participation of LGBTQ students in college athletics programs. Entitled *Champions of Respect: Inclusion of LGBTQ Student-Athletes and Staff in NCAA Programs*, it is available at <http://www.ncaapublications.com/productdownloads/CRLGBTQ.pdf>.

11.4.7. Discrimination on the basis of disability. On January 25, 2013, the U.S. Department of Education issued a "Dear Colleague Letter" (DCL) addressing the participation of students with disabilities in athletics in education programs. The DCL first reviews the requirements of Section 504 of the Rehabilitation Act of 1973 (LHE 5th Section 14.5.4). It then discusses the application of stereotypes to students with disabilities, provides examples of situations in which students who are capable of participating in athletic events have been denied such an opportunity, and recommends that schools create additional opportunities for students with disabilities to participate in athletics activities if they are not able to participate in the school's

regular athletics program. Although the DCL appears targeted at K-12 schools, it specifically states that “students with disabilities at the postsecondary level must also be provided an equal opportunity to participate in athletics, including intercollegiate, club, and intramural athletics.” The DCL may be found at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>.

* * * * *

A football player at Towson University suffered a near fatal heatstroke during team drills. The incident necessitated a liver transplant for the player, as the result of multiple organ failures caused by the heatstroke. After recovery, the student sought to return to active participation on the football team. The team’s physician determined that allowing the player to participate posed an unacceptable risk of serious injury or death to the player. The player sued under Title II of the Americans with Disabilities Act (ADA) to be able to participate in the football program. *Class v. Towson Univ.*, 806 F.3d 236 (4th Cir. 2015). He argued that he suffered from a disability related to a propensity to suffer from heatstroke and argued that the university had denied him a reasonable accommodation under the ADA. A federal district court agreed with the player that he suffered from a disability for purposes of the ADA and had offered a reasonable accommodation plan to allow him to participate in the football program.

On appeal, the university argued that the player did not suffer from a disability for purposes of the ADA or, alternatively, that a reasonable accommodation had not been proposed. The proposed accommodation included a system to monitor the player’s core body temperature during practices. The court determined that it did not need to decide the novel issue of whether disability for purposes of the ADA extended to conditions that only arose under extreme conditions.

The university argued that two accommodations were unreasonable, namely the close monitoring of the player's internal body temperature during football program activities and that all exercise be done under the direct observation by a medical profession. The institution contended that the accommodations created unreasonable financial and administrative burdens, did not effectively reduce the potential for the player to suffer heatstroke, and required fundamental changes to the football program. The court focused on the last two reasons raised by the university. The court determined that sufficient evidence supported the decision by the football team's physician that the risk of heatstroke was too substantial to permit the player to participate in the football program and that monitoring of the player's internal temperature was insufficient to alleviate this risk. The standard was not whether the court agreed with the determination or that other doctors might come to a different conclusion. Rather, the issue turned on whether the doctor's decision was reasonable based on the available evidence, which the court determined it was. The court also agreed that ordering the player's participation fundamentally altered the important role played by the team's physician and would interfere with the important discretion exercised by the physician in clearing players for participation in football program activities.

11.4.8. Drug testing. Current and incoming students at a public two-year technical college in Missouri challenged a school policy that required all incoming students to submit to a drug test in the form of a urinalysis. *Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016). The school operated several vocational programs in which students faced potential safety risks from working with machinery or live electricity, but it also offered programs in which students engaged in academic studies that did not pose such concerns. The drug testing policy in question applied to all incoming students no matter the program in which they enrolled. The college

president enacted the policy after a survey of members of the institution's advisory council indicated their support for drug testing all incoming students. The policy was not started in response to the identification of any kind of systematic problems involving drugs or alcohol use by students. Absent a waiver from the college, students who refused to participate in drug testing could not enroll.

A federal district court upheld the drug-testing requirement for students enrolled in certain programs that presented particular safety risks, but it held that suspicionless testing of other students constituted an impermissible search under the Fourth Amendment. Reversing in part, a panel for the U.S. Court of Appeals for the Eighth Circuit decided that the school could implement the drug testing program for all incoming students without regard to program enrollment. Agreeing to review the case *en banc*, the full court determined that the policy could not be applied to students in programs that did not raise particularized safety risks.

In its opinion, the Eight Circuit explained that while searches under the Fourth Amendment typically require individualized suspicion, the existence of "special needs," such as safety considerations, may warrant the use of suspicionless drug testing. Along with safety issues, the school argued that the testing policy satisfied the special needs requirement in seeking to achieve the overall benefits of a drug-free environment for members of the campus community. It also contended that the policy helped prepare students for drug testing regimes common in workplace environments. The court rejected these various arguments in relation to students enrolled in programs involving no heightened safety risks. In disallowing the policy under such circumstances, the court discussed that the school had identified no crisis or seeming epidemic of drug use among students. Looking to a case in which the Supreme Court analyzed the permissibility of suspicionless drug testing of federal employees on the basis of job duties,

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), the Eighth Circuit stated that the districted court appropriately engaged in a program-by-program analysis and the exclusion from testing of students enrolled in programs not raising special safety concerns.

Chapter XII

The College, Local Governments, and the Local Community

Section 12.6 Community Access to the College's Campus

Section 12.6.3. Trespass statutes and ordinances, and related campus regulations. A state appellate court has upheld the right of the University of North Carolina at Chapel Hill to ban a sports fan from athletic facilities. In *Donnelly v. University of North Carolina*, 763 S.E.2d 154 (N.C. App. 2014), the University, after a series of incidents, determined that the “enthusiastic” fan had behaved inappropriately toward and verbally harassed certain athletes and athletics department staff, and imposed a lifetime ban from the University’s athletic facilities. The fan sued, claiming that the University had violated his First Amendment free speech rights and that the ban was arbitrary and capricious.

The trial held, and the appellate court agreed, that verbal harassment is not speech that is protected by the First Amendment. With respect to the claim that the ban was arbitrary and capricious, the court stated:

UNC's decision was based on a series of incidents over a number of years where petitioner engaged in inappropriate behavior toward UNC athletes, the family members of athletes, athletic staff members, and fans. This was not the first time that petitioner was reprimanded for this type of behavior. The Final University Decision summarizes a long series of events which led to the indefinite ban. It is clear that UNC's decision was not an "unreasonable action without consideration or in disregard of facts," nor did the decision lack "relevant evidence a reasonable mind might accept as adequate to support a conclusion." (763 S.E. 2d at 158)

Chapter XIII

The College and the State Government

Section 13.4. State Regulation of Out-of-State Institutions and Programs

State regulation of online distance education (see p. 1502 of LHE 5th) continues to be an increasingly important issue for state licensing and regulatory agencies – and also for accrediting agencies (see LHE 5th, Section 15.3.1 at 1819-20) and the U.S. Department of Education (see LHE 5th, Section 15.3.3, at 1844). For a helpful report on these matters, see Presidents’ Forum Task Force, *Aligning State Approval and Regional Accreditation for Online Postsecondary Institutions: A National Strategy* (2009), <http://www.presidentsforum.excelsior.edu>. Appendix B of this report contains a listing of other reports, studies, and bibliographic sources on the subject.

* * * * *

Debate has continued on the responsibilities of the states to oversee online educational programs that in-state colleges and universities offer to students in other states. The current focus of this debate is now the U.S. Department of Education, which is about to issue new proposed regulations regarding the States’ responsibilities. See Carl Straumsheim, Education Department Releases Latest Draft of State Authorization Rule, *Inside Higher Ed* (July 25, 2016).

Section 13.5 Other State Regulatory Laws Affecting Postsecondary Education Programs

13.5.1. Overview. North Carolina has enacted a law whose effect, and perhaps its intent, will make it more difficult for college students in that state to vote. In July of 2013, the North Carolina General Assembly enacted the “Voter Information Verification Act,” which requires any individual who attempt to vote to present a photo identification, which could be a driver’s license, a U.S. passport, a military identification card, or other enumerated forms of

identification. A college-issued identification card is not on the list of acceptable forms of identification for voting purposes.

13.5.3. Open records laws.

A Minnesota appellate court rejected the attempt of the Minnesota state college and university system to protect course syllabi of its education professors from disclosure under the Minnesota Government Data Practices Act. In *National Council on Teacher Quality v. Minnesota State Colleges & Universities*, 837 N.W. 2d 314 (Minn. App. 2013), the NCTQ had requested copies of syllabi. The system refused, saying that such disclosure would violate the intellectual property rights of faculty and could expose the system to liability under federal copyright law. The NCTQ argued that its use of the syllabi fell under the “fair use” doctrine, which is an exception to copyright law. The trial and appellate courts agreed that fair use applied to this set of facts, and noted that there was no exception in the state’s open records law for material that was protected by copyright. The appellate court affirmed the trial court’s award of summary judgment to the NCTQ.

The Ohio Supreme Court, interpreting the Ohio Public Records Act, has ruled that the records of police departments at private colleges in the state are subject to that law. In *State ex rel. Schiffbauer v. Banaszak*, 2015 Ohio 1854 (Ohio, May 21, 2015), a student newspaper editor sought access to police records of Otterbein University, a private institution. In a 4-3 ruling, the Court concluded that, because the university’s police department performed a government function and was established under Ohio law (R.C. 1713.50(B)). Under this law, a campus police officer has the same authority as a municipal or county police officer, according to the

Court. Noting that the Otterbein police department had the power to “search and confiscate property, to detain, search, and arrest persons, and to carry deadly weapons,” it was a public office and thus was subject to the public records law.

13.5.5. Laws regulating medical services and medical research.

On p. 1522, after *Planned Parenthood v. Casey*, add:

And in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ____ (2016), the Court invalidated an “admission privilege requirement” and a “surgical-center requirement” because they placed a substantial obstacle in the path of a woman seeking a pre-viability abortion.

13.5.6. Laws on gun possession.

The National Conference of State Legislatures (NCSL) tracks state legislation related to guns on campus (<http://www.ncsl.org/research/education/guns-on-campus-overview.aspx>).

According to the NCSL, as of the end of 2013, at least 19 state legislatures introduced some form of legislation related to guns on campus. Two such bills passed: one in Kansas that permits individuals to carry a concealed weapon generally, and a second in Arkansas that allows faculty to carry concealed weapons. The Kansas law provides that colleges cannot prohibit weapons in buildings unless that building has “adequate security measures;” a watchdog website, “Armed Campuses” (<http://www.armedcampuses.org/>) reports that as of August 21, 2013, no colleges in Kansas have changed their policies to permit concealed weapons on campus. And according to the same organization, the Arkansas law, Act 226, permits colleges to opt out of the “faculty carry” provision annually. The organization reports that, as of August 21, 2013, “every single 2

and 4 year college has exercised their ‘opt out’ right, effectively keeping concealed weapons off all campuses in Arkansas.

In March, 2014, the Idaho legislature passed, and the governor signed, S. 1254, a bill that permits concealed guns to be carried on public college and university campuses. The law had previously specifically allowed boards of trustees of public colleges to prohibit weapons on campus; the new law amends Section 18-3302J, Idaho Code, to remove that exception to the broadly permissive concealed or open carry law.

According to the NCSL, 21 states ban concealed weapons on campus: California, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming, while in 22 states, each institution has the right to develop its own policy on the presence of weapons on campus: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia. Seven states require public colleges to permit weapons on campus: Colorado, Idaho, Kansas, Mississippi, Oregon, Utah, and Wisconsin (<http://www.ncsl.org/research/education/guns-on-campus-overview.aspx>).

* * * * *

A Florida appellate court has ruled that the University of North Florida cannot prohibit a student from storing a firearm in a locked vehicle parked on campus. The University’s policies prohibited storage of any weapon located on campus, and its code of student conduct provided for sanctions if that policy were violated. The Florida court ruled that the state legislature had not delegated its authority under the Florida Constitution to state colleges and universities to

regulate where and how weapons might be carried or stored, *Florida Carry, Inc. v. University of North Florida*, 133 So.3d 966 (Fla. Dist. Ct. App. 2013), and thus the policy could not be enforced.

Another Florida court has upheld the University of Florida's prohibition of guns in residence halls. In *Florida Carry, Inc. v. University of Florida and Bernie Machen*, 2015 Fla. App. LEXIS 16115 (Fla. Ct. App. Oct. 30, 2015), the court ruled on the University of North Florida opinion to uphold the ban. The court explained that Florida law, §790.115(2)(a), Fla. Stat. bans the possession of firearms on postsecondary school property. The plaintiffs had cited a Florida law, §790.25(3)(n), Fla. Stat., which allows an individual to possess a firearm in his or her home. The court determined that a "crowded dormitory room" was not a home, and ruled for the university.

Texas enacted a law that provided for the carrying of handguns on higher education campuses in the state, including in classrooms. A group of faculty members initiated a suit that, among its arguments, contended that the state law violated their First Amendment academic freedom rights. *Lynn v. Paxton*, No. 1:16-cv-00845-LY (W.D. Tex. Aug. 22, 2016). Without directly assessing the extent of any individual faculty academic freedom rights under the First Amendment, a federal district court described the state law as not implicating any type of content-based restrictions on speech. For support that academic freedom rights, at most, extend to restrictions on speech or expression, the court looked to *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). In that case, the Supreme Court held that EEOC subpoenas of faculty peer evaluations did not infringe on any First Amendment academic freedom rights of the institution. In relation to the Texas campus carry law, the Texas court discussed the absence of any precedent that would suggest authority under the First Amendment for faculty to ban firearms

from their classrooms in contravention of the state law. According to the court, any First Amendment academic freedom rights of the faculty “must be bottomed on their right to speak and teach freely.” *Id.* at *8.

* * * * *

Bibliographic citation for text:

Brandi La Banc, Kerry Melear, and Brian Hemphill, “The Debate Over Campus-Based Gun Control Legislation,” 40 *Journal of College and Univ. Law* 319 (2014).

Andrew Morse, Lauren Sisneros, Zeke Perez and Brian A. Sponsler. *Guns on Campus: The Architecture and Momentum of State Policy Action*. January 2016. Published by NASPA Research and Policy Institute and the Education Commission of the States, and available at http://www.ecs.org/ec-content/uploads/01252016_ECS_NASPA_report.pdf.

Section 13.5. Other State Regulatory Laws Affecting Postsecondary Education Programs

13.5.7. Laws on possession and use of controlled substances [new section]. Legislative developments concerning possession, use, and sale of marijuana have spawned various questions concerning the states’ role in regulating controlled substances. See, e.g., Linda Schutjer, “Update: Marijuana on Campus – Yes, It is Still Illegal,” NACUANOTES, v. 12, no. 3 (Nat’l Ass’n of College and Univ. Attys, Apr. 15, 2014). In recent years various states have passed laws that permit the possession and use of marijuana for medical purposes. (See, e.g., Cal. Health and Safety Code, secs. 11362.5, 11362.7-83.) More recently, several states have passed laws that legalize (or at least decriminalize) the possession and use of marijuana for personal recreational purposes (See, e.g., Colo. Const., Art. 18, Section 16 (Dec. 10, 2012); 2014 Laws of Md., chap. 158 (Senate bill 364) (April 14, 2014); Initiative Measure No. 502 (July 8, 2011),

amending and adding new sections to the Revised Code of Washington.) In the November 2016 elections, voters in eight more states approved the use of marijuana for medical purposes and/or recreational purposes. College and university officials now face this question: Are the students and employees of colleges and universities in states having such laws now free to possess and use marijuana within the state for recreational or medical purposes?

For many years, under the Controlled Substances Act (CSA), 21 U.S.C. Section 801 et.seq., the federal government has criminalized the possession and use of controlled substances, including marijuana. This law remains in effect and is enforced by the U.S. Department of Justice. In *Gonzales v. Raich*, 545 U. S. 1 (2005), the U.S. Supreme Court upheld the constitutionality of the CSA's application to possession and use of marijuana and ruled that, if state law on possession and use of marijuana is in conflict with the federal CSA, the state law must give way to the federal statute. (See SV, Section 11.3.1, regarding "preemption.") Thus, in states that have enacted a medical marijuana law or a recreational marijuana use law, the federal CSA nevertheless continues in effect, and students and employees of colleges and universities continue to be subject to the criminal penalties that the federal law imposes on the possession and use (and sale) of marijuana.

In practice, however, the U.S. Department of Justice (DOJ) likely could use its prosecutorial discretion to limit its enforcement activities in states that permit medical or recreational use of marijuana. Congress also could likely prohibit DOJ from using its appropriated funds to enforce the CSA as applied to possession and use of marijuana. In December 2014 Congress did in fact impose such a restriction on DOJ with respect to medical marijuana. Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015 (Dec. 9, 2014) provides that "None of the funds made available in this Act to the Department of

Justice may be used, with respect to [states with their own medical marijuana laws], to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”

In addition to the federal CSA, the federal Drug-Free Workplace Act (see LHE 5th Section 14.4.4.2) and the Safe and Drug-Free Schools and Communities Act (see LHE 5th Section 14.4.4.3) also limit the effect of state laws permitting marijuana use. These two federal laws, which apply to institutions that receive certain types of federal financial assistance, require colleges and universities to impose sanctions on employees and students who possess or use a controlled substance on campus.

Chapter XIV

The College and the Federal Government

Section 14.2. Federal Regulation of Postsecondary Education

14.2.5. Copyright.

Bibliographic Entry:

Herrington, TyAnna K. *Intellectual Property on Campus: Students' Rights and Responsibilities*. (Southern Illinois University Press, 2010). Reviews issues involving student creation and use of intellectual property; addresses authorship issues, particularly with respect to collaborative work, and the limits on faculty use of student work.

14.2.5.4.6 The interplay between fair use and other copyright exceptions.

A federal circuit court of appeals has reversed the ruling of the district court in *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014). Scholars and librarians hoping for judicial clarity regarding how much and which kinds of copyrighted works may be placed on electronic reserve without obtaining a license from the copyright holder suffered a setback in the Eleventh Circuit's October 2014 ruling in this case involving Georgia State University (GSU). The decision reverses a district court determination that fair use proponents had lauded for its provision of bright-line guidance concerning how much copyrighted material from books institutions may place on restricted-access e-reserves without infringing copyright. The district court had held that (1) when a book is not divided into chapters, or contains fewer than ten chapters, unpaid copying of no more than 10% of the pages of the book is permissible;

and (2) where a book contains ten or more chapters, unpaid copying of up to but no more than one chapter (or its equivalent) is permissible.

The appellate court conducted its own analysis of the four-factor fair use test, as provided in Section 107 of the Copyright Act, which led it to reverse the district court's decision on fair use and remand the case for further proceedings. The appellate court faulted the district court for mechanically tallying its decision on each of the four factors, instead of performing "holistic analysis" and engaging in careful balancing. *Id.* at 1283.

As to the actual factor-by-factor evaluation, the appellate court agreed with the district court's analysis only with respect to the first factor. Under the first factor of the fair use analysis—which examines the purpose of the alleged infringer's use—the appellate court agreed that GSU's unlicensed use of copyrighted material constituted a nonprofit educational purpose, which favors a finding of fair use. The appellate court reached this conclusion even though GSU's use of the copyrighted material was not "transformative," i.e., it did not imbue the original works with new meaning, message, or expression.

The appellate court disagreed with the district court's analysis of the second, third, and fourth factors in the fair use analysis. The second factor considers the nature of the copyrighted works at issue, with highly original or creative works (e.g., works of fiction) receiving presumptively higher protection from unlicensed copying. The district court had found that this factor favored GSU in all instances of alleged infringement, as the works at issue consisted of academic non-fiction. The appellate court disagreed, noting that many of the works at issue were just as creative as they were factual, and that "Where the excerpts . . . contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions, the District

Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material.” *Id.* at 1270.

The third fair use factor considers the amount of the copyrighted work taken, which includes both a qualitative and quantitative component. Here the appellate court rejected the district court’s 10% rule as improper, noting that “The fair use analysis must be performed on a case-by-case/work-by-work basis.” *Id.* at 1273-1274. The appellate court emphasized that the district court must carefully analyze the quality of the material taken, too, including whether such material constitutes the “heart of the work,” or its qualitatively most important elements. *Id.* at 1275.

The fourth and final fair use factor considers the effect of the unlicensed use on the potential market for the copyrighted work. Key to this inquiry in the case are factual questions concerning the availability of digital licenses to the works in question, as well as the substantiality of the market harm to the plaintiffs if unlicensed uses are deemed fair uses. While the appellate court approved the district court’s handling of these nuanced factual questions (which it resolved in GSU’s favor), it ruled that the district court erred by not affording the fourth factor additional weight in the overall fair use calculus, given the non-transformative nature of the uses and the threat of market substitution, which it called “severe.” *Id.* at 1283.

Scholars and practitioners have expressed varying opinions on the impact this decision will have on copying practices in higher education, and indeed parties on both sides of the case have cited to language within the opinion that they view as being favorable to their position on remand. However, one judge on the three-judge appellate panel wrote a concurring opinion that may give GSU some reason for concern, should his reasoning be adopted going forward. The concurring judge argued that the district court, and even the appellate court, may be missing the

proverbial forest for the trees—i.e., ignoring the reality of GSU’s actions by focusing too intently on each of the fair use factors. He noted that “GSU went from paper coursepacks [for which it paid to obtain licenses from the copyright holders] to digital coursepacks [for which it did not], and they [sic] did this not because there was any real difference in the actual use but, rather, in large part to save money.” *Id.* at 1285. In the concurring judge’s opinion, nothing about GSU’s shift from physical copies to digital copies indicates that the unlicensed uses ought to be considered fair.

14.2.6. Patent.

In a highly anticipated decision, the U.S. Supreme Court ruled in June of 2013 that naturally occurring human genes cannot be patented. The case—*Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 1747 (2013)—pitted several individual plaintiffs and public interest organizations against the University of Utah Research Foundation and the exclusive licensee of several of its patents, Myriad Genetics. The disputed patents involved claims covering two genes (BRCA1 and BRCA2), mutations in which are linked to an increased risk of breast and ovarian cancer. The patents effectively provided Myriad with a monopoly on genetic testing for the gene mutations. Plaintiffs in the case asserted that certain of the claims in the disputed patents were not patent eligible subject matter, as they simply constituted “products of nature,” which are ineligible for protection.

The Court analyzed two different types of claims in the disputed patents: those that covered isolated genomic DNA (that is, DNA fragments removed from the human genome), and those that were directed to complementary DNA (cDNA), which are synthetically made and do not exist in nature. In a unanimous decision, the Court held that isolated DNA is ineligible for

patent protection because it is a product of nature. It declared that “separating [a] gene from its surrounding genetic material is not an act of invention,” and that isolated DNA does not have any “markedly different characteristics from any found in nature.” It did, however, find that claims directed to cDNA are patent eligible; even though nature dictates the sequencing of cDNA, a lab technician creates something new when she creates cDNA, the Court unanimously held. Importantly, the Court was careful to note that even though patent eligible, a given claim for cDNA may not be patentable due to its failure to meet other statutory requirements.

The *Myriad* decision is an important one for the biotechnology industry and universities that are active in commercializing research. The outcome is consistent with the Supreme Court’s penchant for moderate decision-making—particularly in technical areas—and allows litigants and supporters on both sides of the issue to claim victory. The defendants reasoned that surviving cDNA claims in the disputed patents allow Myriad to continue to claim exclusivity in providing genetic testing for the BRCA genes. Indeed, in the wake of the Supreme Court ruling, Myriad and the University of Utah Research Foundation sued two companies for patent infringement because they had decided to offer their own diagnostic tests for the BRCA genes. The plaintiffs, on the other hand, declared that the ruling ultimately will help patients, as it allegedly allows researchers greater freedom to develop testing and products for discoveries related to the human genome without the fear of provoking infringement lawsuits predicated on patents that claim isolated DNA.

While it is too early to tell which side has it right, the ruling almost surely portends increased involvement in patent challenges for universities that own patents on isolated DNA. Indeed, citing the *Myriad* decision, two watchdog groups asked the Federal Circuit in July of 2013 to reopen a case that they had earlier brought and lost against the Wisconsin Alumni

Research Foundation (the technology transfer organization affiliated with the University of Wisconsin). The university owns patents for human embryonic stem cells that the watchdog groups claim are invalid because they encompass “products of nature.”

14.2.8. Antitrust. A federal appellate court has vacated a jury verdict against a captive organization linked to the University of Colorado-Denver with respect to its housing policies. In *Auraria Student Housing at the Regency v. Campus Village Apartments*, 843 F.3d 1225 (10th Cir. 2016), owners of a private apartment complex sued Campus Village Apartments, a private corporation which was operated by the Colorado Real Estate Foundation. The plaintiff asserted that the university’s requirement that “a significant proportion of students” live at Campus Village Apartments. The trial judge did not require the plaintiffs to define the relevant market for housing for the university’s students. The appellate court reversed and remanded the case to the trial court, instructing it to allow the plaintiffs to define the relevant market.

14.2.11. The Americans With Disabilities Act. Several deaf spectators sued the University of Maryland under Title II of the ADA and the Rehabilitation Act, stating that the university’s failure to provide captions at sporting events constituted disability discrimination. The plaintiffs cited the football stadium and basketball arena as examples of denial of access to announcements, play-by-play commentary, or other communications that individuals who can hear benefit from. They also stated that games that could be viewed on the university’s website did not contain captioning that was the equivalent of the information that a hearing person would have access to. Although the university explained that it began providing captioning in 2013 on handheld devices such as smartphones and tablets, the plaintiffs said that these captions are difficult to read in the bright sunshine, and work sporadically at best. The university filed a

motion to dismiss the lawsuit as untimely, using the argument that a claim that an architectural barrier limits access to campus facilities accrues when the architectural barrier is constructed.

The court rejected that defense, noting that providing captioning was a service, not a facility, and stated that every time the plaintiffs were denied effective access to the athletic events, a new violation occurred—thus, their claim constituted a continuing violation. The court also refused to dismiss either the ADA or the Rehabilitation Act claim, and stated that the plaintiffs could be entitled to compensatory damages for intentional discrimination, should such be established at trial.

Section 14.2. Federal Regulation of Postsecondary Education

14.2.12. Laws regulating computer network communications.

14.2.12.3. General statutes. A case concerning the interpretation and application on 18 U.S.C. §875(c) (LHE 5th p.1672 bottom) has reached the U.S. Supreme Court. In *Elonis v. United States*, 575 U.S. _____ S. Ct. ____ (2015), the defendant had posted messages on the Facebook website that allegedly threatened his wife and his co-workers. The Supreme Court, like the appellate courts in *Baker* and *Morales* (LHE 5th pp. 1672-74), focused on the interpretation of Section 875(c) rather than on the First Amendment’s application to the case. The basic issue concerned the type of proof that the statute requires government to submit to support a conviction for communicating a threat to injure another individual. The U.S. District Court ruled that the government must prove that “a reasonable person” would have understood the defendant’s communication to be a threat to injure another person. The appellate court affirmed, but the U. S. Supreme Court reversed. According to the Court, the government must prove that the defendant intentionally transmitted a communication that he knew to be a threat - - in effect, a “criminal intent” requirement common to criminal law. The Court, by Chief Justice

Roberts, determined that this requirement is satisfied “if the defendant transmits a communication for the purpose of issuing a threat, or with the knowledge that the communication will be viewed as a threat.” The Court’s narrow decision does clarify section 875 (c)’s proof requirements, but it also leaves various questions open, as demonstrated by Justice Alito’s separate opinion concurring in part and dissenting in part. Both the questions answered in *Elonis* and those left unanswered are likely to arise in future cases involving federal (as well as state) criminal laws covering threats communicated via the Internet.

Section 14.3. Federal Taxation of Postsecondary Education.

14.3.2. Tax-exempt status. New guidance for 501 (c) (3) institutions is available regarding restrictions on activities related to political campaigns. See Hogan Lovells US LLP, *Political Campaign-Related Activities of and at Colleges and Universities* (American Council on Education, Sept. 2014), www.acenet.edu . The guidance is in the form of a memorandum setting out basic “do’s and don’ts,” primarily for administrators.

Section 14.5 Civil Rights Compliance

14.5.1. General considerations. On April 24, 2013, the U.S. Department of Education issued a “Dear Colleague Letter” (DCL) addressing the problem of retaliation. The Department’s Office for Civil Rights enforces Titles VI and IX, Section 504, and the Age Discrimination Act, as well as Title II of the Americans With Disabilities Act. Retaliation for pursuing claims under these laws is also a violation of federal law. The DCL suggests how institutions may avoid retaliatory actions, and discusses potential enforcement actions against those institutions that are found to

have engaged in retaliation.

14.5.3. Title IX. On June 25, 2013, the U.S. Department of Education issued a “Dear Colleague Letter” (DCL) and pamphlet, *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972*. The pamphlet, which is addressed to both K-12 schools and institutions of higher education, focuses on Title IX’s requirement that pregnant students not be excluded from any kind of educational program, including both academic and extracurricular activities. It addresses squarely the issue of class attendance requirements and automatic grade reduction for absences, as well as potentially discriminatory requirements for make-up exams and other work. The pamphlet is available at <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>.

* * * * *

The U.S. Office for Civil Rights (OCR) has declared that transgender students at institutions receiving federal funds are protected by Title IX of the Education Amendments of 1972. In a “Dear Colleague” Letter issued October 26, 2010 that discussed schools’ responsibilities with respect to bullying as a form of discrimination, OCR stated “Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.” And in guidance released April 29, 2014, entitled “Questions and Answers on Title IX and Sexual Violence,” OCR states that all students, including transgender students, are protected against sexual violence by Title IX (p. 5) (<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>).

The U.S. Department of Justice and Department of Education issued a joint Dear Colleague Letter (DCL) on Transgender Students in May 2016 outlining the responsibilities of educational entities under Title IX in relation to transgender students

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

The DCL states that institutional legal obligations to transgender students include the following:

- When notified that a student will assert a gender identify that differs from previous records, an institution should begin treating the student in a way consistent with the new expressed gender identity. There is no medical diagnosis or treatment requirement. Given that transgender students may have difficulty obtaining documents that reflect their gender identity (e.g., a revised birth certificate), an institution requiring such documentation could effectively be limiting a student's rights under Title IX.
- Harassment on the basis of a student's gender identify, transgender status, or gender transition constitutes harassment based on sex for purposes of Title IX.
- Restrooms and locker rooms should be made available to students consistent with their gender identity, though schools may make single-user facilities available to all students seeking more privacy.
- Social fraternities and sororities are permitted to establish policies regarding sex and gender identity, as Title IX does not apply to the membership practices of such organizations.
- Institutions should seek to protect a student's privacy in relation to educational records and gender status. Schools are not permitted under FERPA to disclose a student's sex or transgender status under the category of Directory Information.

But Title IX contains language that permits OCR to make an exception for institutions controlled by religious organizations if the institution asserts that the tenets of the religious organization conflict with the requirements of the law. In July of 2014, OCR granted an exemption from Title IX's prohibition on sex discrimination against transgender students to George Fox University, an institution that is affiliated with the Society of Friends. In so doing, OCR rejected a complaint brought by a transgender student who identifies as male, and who wanted to live with other male students in campus housing. Instead, the university required him to live in a single apartment.

In a case brought under California's nondiscrimination law, a former student sued California Baptist University for expelling her for "fraud" and banned her from campus when it discovered that she was a transgender individual who identified as female and who stated on her college application that she was female. California's nondiscrimination bars discrimination on the basis of gender identity. Although a state court judge ruled that the law did not apply to the university because it was an organization whose primary mission is the inculcation of moral values, it did rule that the total ban from campus was unlawful, and that barring the student from online courses or from the use of the library, art museum, and other campus facilities that had no "moral inculcation" role had no relationship to moral values and thus was unlawful. Brian Rokos, "Cal. Baptist Wins on Most Claims in Suit by Transgender Student." *The Press Enterprise*, July 11, 2014, available at <http://www.pe.com/articles/javier-697433-baptist-university.html>.

In *Johnson v. University of Pittsburgh*, 2015 U.S. Dist. LEXIS 41832 (W.D. Pa. March 31, 2015), a transgender male challenged his expulsion from the University of Pittsburgh after a dispute involving his use of men's bathrooms and locker rooms. The plaintiff had enrolled at the

University as a female but presented as a male and had obtained a court order changing his name to a male name. He did not, however, obtain a new birth certificate that listed his gender as male—a prerequisite to using sex-segregated facilities for male students under University rules. The student used the men’s restrooms and locker rooms for some time, but after complaints from students, was told that he must use a unisex locker room. The student persisted, however, in using the men’s locker room and restrooms, and eventually was expelled for violating University rules.

A federal trial court dismissed the plaintiff’s Title IX and equal protection claims. With respect to the equal protection claim, the judge concluded that neither the Supreme Court nor the Third Circuit Court of Appeals had recognized transgender status as a suspect class, and the trial court declined to do so. The court focused on the privacy interests of students in sex-segregated restrooms and locker rooms, concluding that the University’s interest in protecting student privacy passed the rational basis test—the test used when the status at issue is not a suspect class. And with respect to the plaintiff’s Title IX claim, the trial court stated that a “plain reading” of the statute did not imply that transgendered status was protected by Title IX. No mention was made of OCR’s interpretation of Title IX as protecting transgender students from discrimination on that basis.

Questions involving the legal rights of transgender students can also arise in relation to the use of institutional facilities that are designated for use by one sex, representing an issue that more colleges and universities are likely to have to address. In *Johnston v. University of Pittsburg*, 2015 WL 1497753 (W.D. Pa. March 31, 2015), a student who identifies as a transgendered male claimed that the university violated his Title IX and equal protection rights

when it failed to permit him to use sex-segregated locker rooms and restrooms that were designated for men.

The student had begun using facilities designated for men but was informed by university officials that he was to refrain from continuing to do so absent providing the institution with a court order or new birth certificate designating him as male. The student had selected “female” on materials in originally applying to the university. While enrolled at the university, the student had changed his status on various government documents such as his license and passport. In contravention of the directive from the university, the student continued to use facilities designated for use by men, resulting in multiple citations from university police and escalating student conduct action on the part of the institution. Eventually, the university expelled the student. The student challenged the actions taken against him in court, advancing a federally based equal protection claim and a Title IX claim, in addition to state law claims that included breach of contract and violation of Pennsylvania civil rights laws.

In relation to the equal protection claim, the court, while acknowledging that societal concepts of gender and sexual identity have evolved in recent years, stated that the U.S. Supreme Court and the Third Circuit Court of Appeals had not recognized transgender status as a suspect classification. As such, the court analyzed the student’s claims of discrimination on the basis of equal protection under a rational basis scrutiny. In finding for the institution on this claim, the court stated that the university’s policy also satisfied an even a higher level of scrutiny. According to the court, the university’s designation of sex-segregated facilities to ensure the privacy of students not to have to disrobe in front of members of the opposite sex constituted a justification that had been upheld by multiple courts. In rejecting the student’s arguments, the court made a distinction, for equal protection purposes, between the biological attributes of sex

as opposed to gender, which it described as primarily concerned with identity. The court stated that while the student had argued that he was medically a male, he had provided no additional basis, such as asserting that he had undergone sex reassignment surgery, to support this assertion in regard to his biological sex. Based on this differentiation between sex and gender, the court rejected the student's equal protection claim.

Largely relying on the distinction between gender and sex, the court also dismissed the student's Title IX claim. It stated that the student had not established that the university had discriminated against him on the basis of sex, as opposed to gender identity. The court discussed that whether discrimination on the basis of sex applies to transgender students presented an issue of first impression in the Third Circuit. Based on the absence of precedent, the parties in the case had each sought to rely on Title VII to support their respective Title IX arguments. The court discussed that some courts had held that transgender individuals could assert a Title VII claim under a sex stereotyping theory, but not on transgender status alone. It stated that in previous cases courts had rejected arguments that discrimination solely on the basis of transgender status could constitute a discrimination claim under Title VII. Just as the weight of authority had not recognized that transgender status alone would support a Title VII claim, the court stated that similar reasoning supported a determination that transgender status by itself could also not provide a basis to advance a Title IX claim. Based on its dismissal of the federal claims, the court declined to exercise supplemental jurisdiction over the student's state law claims.

* * * * *

Issues related to Title IX enforcement and compliance by colleges and universities continue as an active area of judicial and regulatory action. In one case of interest, two former players on Pepperdine University's women's basketball team claimed that they were subjected to

retaliation by team officials because they were engaged in a same-sex relationship. *Videckis v. Pepperdine Univ.*, No. CV 15-00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015). A federal district court held that the claims fell under Title IX’s prohibition on discrimination on the basis of gender or sex. This determination meant that the former players’ lawsuit against the university could proceed.

* * * * *

At the same time as some courts are more willing to scrutinize whether institutions are providing fair treatment for students accused of sexual misconduct, colleges and universities continue to navigate an environment pressing them to comply with the requirements of Title IX in upholding the rights of student victims. For example, in a recent case, a student claimed that university police and other officials failed to respond appropriately to her claims of sexual violence so as to constitute deliberate indifference under Title IX. *Tubbs v. Stony Brook Univ.*, No. 15 Civ. 0517 (NSR) (S.D. N.Y. March 4, 2016). These claims included campus police failing to take photographs of bruising sustained by the student and adequately failing to explain the options available to her in responding to the incident. Among her allegations, she also claimed that the university violated its obligations under Title IX in requiring her to present her case during final exams and prohibiting her from having her therapist present during the hearing to provide emotional and mental support.

In addition to alleging these specific actions or inactions on the part of the university directly in relation to her, the student also claimed that the university’s actions prior to the assault, i.e., a failure to respond to known sexual assault issues, helped to establish deliberate indifference under Title IX. The court agreed that such prior actions could sustain a deliberate indifference claim, but the university was required to possess “actual knowledge of a heightened

risk that is specific enough to allow it to remedy such a policy.” The student sought to rely on previous OCR investigations of Title IX violations at Stony Brook. The court agreed with the university that the student had to allege additional facts beyond past incidents to sustain the deliberate indifference claim. But, the court held that the existence of an OCR agreement to remedy policies voluntarily but that were not yet implemented before the incidents involving the student meant that it would not dismiss the student’s pre-assault Title IX claim.

Annotated Bibliography:

Levasseur, M. Dru, Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights, 39 *Vermont Law Review* 943 (2015). As issues involving transgender rights continue to evolve and play out in society, the courts, and on college campuses, this article, written by a transgender rights activist, argues against a strict differentiation between sex and gender. The article is informative for those seeking to understand more fully the emerging legal issues involving transgender individuals.

Stacey Michel, “Not Quite a First Place Finish: An Argument That Recent Title IX Policy Clarification from the United States Department of Education Does Not Adequately Protect Transgender Interscholastic Athletes,” 25 *Tulane Journal of Law & Sexuality* 145 (2016). This Comment argues that although the United States Department of Education has made recent clarifications regarding Title IX’s protection of transgender students, the department has not addressed student-athlete protection. As a result, policies regarding the interscholastic participation of transgender athletes vary among the states. The Comment argues that even with such important clarifications from the U.S. Department

of Education, more explicit policies, and even statutory changes, are needed to fully protect transgender interscholastic athletes.

Part II of the Comment discusses the history of Title IX and transgender inclusion in Title IX protections. Next, Part III explores the varying state policies relating to transgender athletes, namely inclusive policies and discriminatory policies. Part IV discusses the importance of transgender inclusion in interscholastic athletics according to gender identity and critiques arguments to the contrary. Part V introduces proposed policy changes to better protect transgender interscholastic athletes, as well as outlines the importance of such changes. The Comment's proposed changes include a significant guidance document from the U.S. Department of Education expressing that Title IX requires an inclusive transgender policy among interscholastic athletic programs in every state, and the addition of "gender identity" into the statutory language of Title IX. The Comment concludes by addressing why the author feels these particular changes are necessary.

Chapter XV

The College and the Education Associations

Section 15.3. The College and Accrediting Agencies

15.3.1. Overview of accrediting agencies. There are now seven regional accrediting agencies, the Western Association having been split in two: the Accrediting Commission for Community and Junior Colleges, and the Senior Colleges and University Commission. There is also now a third type of accreditation recognized by the U.S. Department of Education: National Institutional Accreditation. This category is for accrediting agencies that accredit institutions that emphasize certain types of specialized programs (*e.g.*, occupational programs, non-degree programs, distance education programs). The Secretary of Education currently recognizes five such agencies.

In recent years, the regional accrediting agencies have been a particular focus of the debate on potential changes to the accrediting system. The regionals' participation in this debate, and their adoption of changes, has been led by the Council on Regional Accrediting Commissions (C-RAC), the coordinating body for the regional agencies.

Section 15.3.2. Accreditation and the Courts

Section 15.3.2.2. State common law and "federal common law."

On p. 1829, after the Wilfred Academy case, add this new case:

In *Professional Massage Training Center (PMTTC) v. Accreditation Alliance of Career Schools and Colleges, d/b/a Accrediting Commission of Career Schools and Colleges (ACCSC)*. ____ F. 3rd ____ (4th Cir. 2015), the appellate court considered at length the plaintiff school's claim that the defendant accrediting agency (ACCSC) had violated its "due process rights" when it denied

the plaintiff school's application to renew its accreditation. In a lengthy opinion that reviewed most of the prior published opinions on the topic, the court focused on the proper standard of judicial review applicable to denials or withdrawals of accreditation, and particularly focused on the role that the concept of "deference" plays in constructing the standard of review.

All the opinions since *North Central* (see LHE 5th sec. 15.3.2.1) appear to agree that de novo review – that is, a review that accords no deference to either party – is inappropriate, and that courts should accord some deference to the decisions of accrediting agencies. "[E]lementary principles of administrative law call for significant, though not total, deference to decisionmaking by accreditation agencies." According to the court, "We . . . recognize, along with our sister circuits, that there exists a 'common law duty on the part of 'quasi-public' private . . . accreditation associations to employ fair procedures when making decisions affecting their members" (citing cases). "The duty was meant to operate as a 'check on organizations that exercise significant authority in areas of public concern such as accreditation'"

The question, then, is what this "common law duty" requires of accrediting agencies. The court in the PMTC case, synthesizing prior cases discussing the common-law duty, articulated this standard:

The most familiar standard of review is one in which the court is authorized to consider "only whether the decision of an accrediting agency such as [ACCSC] is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence." *Cooley*, 459 F.3d at 712. Under this standard, courts are "not free to conduct a de novo review or to substitute their judgment for the professional judgment of the educators involved in the accreditation process." *Wilfred*, 957 F.2d at 214. [____F.3d at ____.]

In the court's view, this synthesis determines how much deference courts are to accord to the decisions of accrediting agencies, and thus provides the standard of review that courts are to use in accreditation cases.

The focal point of this standard of review is "common law due process," which in turn is derived from administrative law. "When adjudicating common law due process claims against accreditation agencies, courts should "focus primarily on whether the accrediting body's internal rules provide[d] a fair and impartial procedure and whether it [followed] its rules in reaching its decision." In addition, common law due process includes the requirement that the agency's decision is supported by "substantial evidence," which is another administrative law concept. The due process that the PMTC court refers to is "federal common law due process," since the suit was brought in federal court as apparently required by the *Chicago School* case (see LHE 5th pp. 1824-25).

Completing its delineation of the applicable standards of review, the court considered how an allegation of accrediting agency bias against a school should be treated. PMTC asserted that , in the proceedings at issue, ACCSC staff members had been biased against the school, and that such bias would necessitate "a less deferential inquiry into the agency's decisionmaking" that would result in the court's ruling that due process had been violated.

The court confirmed "that an 'impartial decisionmaker is an essential element of due process'" and that a "fair [proceeding] in a fair tribunal'" remains a basic requirement of due process." On the other hand, an "administrative decisionmaker is "entitled to a "presumption of honesty and integrity'" (citing *Morris*, 744 F.2d at 1044 " "A federal court may be justified in conducting a more searching inquiry into the motivations of administrative decisionmakers in the case of 'a strong showing of bad faith or improper behavior.'" However, "" expressions of

impatience, dissatisfaction, annoyance, and even anger . . . are not sufficient to “establish bias or partiality.”

Having exhaustively considered the various aspects of the standard of judicial review applicable to denials, renewals, or revocations of accreditation, the PMTC court then applied its standard to the extensive body of claims and responses, facts and opinions, collected in the court record of the case. Briefly stated, the court determined that, judged under the proper standard of review, “the accreditation decision here was well-supported” Moreover, “there was not sufficient evidence that ACCSC was motivated by bias to justify departure from the deferential standard ordinarily due to the accreditation agency under a common law due process claim.” The appellate court therefore ruled that ACCSC did not deprive PMTC of common law due process and reversed the judgment of the district court that had ruled in favor of PMTC.

Bibliography:

Gaston, Paul, *Higher Education Accreditation: How It’s Changing and Why It Must* (Stylus, Dec. 2013). This timely book provides a comprehensive and thoughtful exploration of the United States’ unique system for higher education oversight. Assesses the current state of higher education accreditation; examines how the accreditation system is evolving; identifies and analyzes the challenges that the system faces; and evaluates various proposals for change.

Section 15.4 Athletics Associations and Conferences

15.4.4 Antitrust laws. On August 8, 2014, a federal trial judge ruled that the NCAA’s rules limiting the amount of funds that institutions can give to college athletes violate federal antitrust

law. In *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), the judge enjoined the NCAA from enforcing its rules that prohibited student athletes from receiving any compensation for the use of their names, images, and likenesses. The judge rejected the NCAA's claim that these rules protected the amateurism of the game and were necessary to protect the educational mission of the schools and the popularity of college sports.

The judge's ruling made it clear that the NCAA could still limit the ways that athletes were compensated and how the funds were paid:

The Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws.

The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Although the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete. The NCAA's witnesses stated that their

concerns about student-athlete compensation would be minimized or negated if compensation was capped at a few thousand dollars per year. This is also comparable to the amount of money that the NCAA permits student-athletes to receive if they qualify for a Pell grant and the amount that tennis players may receive prior to enrollment. None of the other evidence presented at trial suggests that the NCAA's legitimate procompetitive goals will be undermined by allowing such a modest payment. Schools may offer lower amounts of deferred compensation if they choose but may not unlawfully conspire with each another in setting these amounts. To ensure that the NCAA may achieve its goal of integrating academics and athletics, the injunction will not preclude the NCAA from enforcing its existing rules -- or enacting new rules -- to prevent student-athletes from using the money held in trust for their benefit to obtain other financial benefits while they are still in school. Furthermore, consistent with Plaintiffs' representation that they are only seeking to enjoin restrictions on the sharing of group licensing revenue, the NCAA may enact and enforce rules ensuring that no school may offer a recruit a greater share of licensing revenue than it offers any other recruit in the same class on the same team. The amount of compensation schools decide to place in trust may vary from year to year. Nothing in the injunction will preclude the NCAA from continuing to enforce all of its other existing rules which are designed to achieve its legitimate procompetitive goals. This includes its rules prohibiting student-athletes from endorsing commercial products, setting academic eligibility requirements, prohibiting schools from creating athlete-only dorms, and setting limits on

practice hours. Nor shall anything in this injunction preclude the NCAA from enforcing its current rules limiting the total number of football and basketball scholarships each school may award, which are not challenged here. [7 F. Supp. 3d at 1008]

The case has been appealed by the NCAA, but the trial judge specifically declined to stay her ruling, so these changes will take place for the fall, 2016 season unless the appellate court rules prior to that time and reverses the trial court's decision.

For a discussion of the implications of *O'Bannon*, see Mike Glazier and Paul Avery, *O'Bannon v. NCAA: The District Court Decision*. *NACUANotes*, Vol. 13 No. 1 (October 6, 2014).