

The Law of Higher Education, 6th edition

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Chapter 1

Overview of Higher Education Law

Section 1.3. The Governance of Higher Education

1.3.2. Internal governance.

Students and employees have initiated lawsuits challenging the authority of higher education institutions to require the COVID-19 vaccine as a condition of employment or enrollment (see, for example, *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592 (7th Cir. 2021) (holding that students did not possess a fundamental right to refuse to receive a vaccination); *Children's Health Def., Inc. v. Rutgers State Univ. of New Jersey*, No. CV2115333ZNQTJB, 2021 WL 4398743 (D.N.J. Sept. 27, 2021) (declining to grant a preliminary injunction to halt Rutgers University's student vaccine mandate); *Harris v. Univ. of Massachusetts, Lowell*, No. 21-CV-11244-DJC, 2021 WL 3848012 (D. Mass. Aug. 27, 2021) (declining to grant preliminary injunction to halt vaccine mandate). Related health requirements, such as mask wearing, have also been challenged, including on religious grounds (see, for example, Kevin McGill, "Settlement Appears Over in Med Students' Vaccine Settlement," Associated Press, Nov. 23, 2021, available at <https://www.usnews.com/news/best-states/louisiana/articles/2021-11-23/settlement-appears-over-in-med-students-vaccine-lawsuit>). Legal challenges, including

appeals of lower court rulings, are likely to persist as colleges and universities continue to impose vaccine mandates or other public health measures, such as mask requirements, on students and employees as institutions continue to respond to COVID-19.

In *Houston Community College System v. Wilson*, 142 S. Ct. 1254 (2022), a unanimous U.S. Supreme Court ruled that a public community college’s public verbal censure of a board member did not suffice to sustain an actionable First Amendment claim. See Section 3.2.1.2 of this update for a fuller description of the case.

Bibliographic Entry:

Louis H. Guard. “Legal and Governance Considerations in a Time of Pandemic and Systematic Crisis: A Primer on Shared Governance and AAUP Guidance for Private Colleges and Universities.” *NACUANotes* Vol. 19 No. 5 (March 17, 2021). Discusses “key legal and governance issues that may resurface in the context of operating an institution during a time of pandemic and systemic crisis.”

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 has, for a second time, addressed the application of the “ministerial exception” to claims of employment discrimination under federal law. In *Our Lady of Guadalupe School v. Morrissey-Beru*, 140 S. Ct. 2049 (2020), a case involving teachers at two Catholic elementary schools, the U.S. Supreme Court ruled that the ministerial exception applied to claims by the teachers, even though their titles did not include the word “minister.” For a discussion of this case, see Sec. 5.5 of this Update).

In *YU Pride Alliance v. Yeshiva University*, 2022 WL 17684269 (N.Y. App. Div. Dec. 15, 2022), the court upheld a permanent injunction in which Yeshiva University was required to recognize an LGBTQ student organization. The court agreed with the lower court that Yeshiva University did not qualify as a religious corporation under New York law so as to be eligible for a religious exemption to be excluded from the state’s public accommodation law. The court ruled that requiring Yeshiva to recognize the student organization did not violate its religious or expressive rights. In rejecting arguments from the university, the court noted that the institution had recognized LGBTQ student organizations in three of its graduate schools for over 25 years. Litigation over the matter continues, however. A majority of the U.S. Supreme Court declined to grant a stay to the university that would have allowed it not to recognize the student organization pending appeals, but four justices would have granted the stay (*Yeshiva University v. Pride Alliance*, 143 S. Ct. 1 (Sept. 14, 2022)). In dissenting from the stay denial, Justice Alito, joined by Justices Thomas, Gorsuch, and Barrett, wrote that the university would likely win the case if it came before the Supreme Court. Thus, litigation in this case may well continue and could potentially reach the U.S. Supreme Court.

The Supreme Judicial Court of Massachusetts has found that an associate professor of social work at Gordon College, a private religiously-affiliated college, was not a ministerial employee under the *Hosanna-Tabor* and *Our Lady of Guadalupe* theories. The case, *DeWeese v. Gordon College*, 163 N.E. 3d 1000 (Mass. 2021) is discussed in Section 5.5 of this Update.

1.6.3. Government support for religious institutions and their students and faculty members.

The U.S. Supreme Court added to its roster of establishment clause decisions in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). At issue in the case was a 32-

foot tall Latin cross that was erected in 1925 to local soldiers who had died in World War I that was located on public property and maintained using public funds. A divided federal appellate court panel agreed with the respondents that displaying the cross on public property was unconstitutional, and a request for an en banc rehearing was denied. Reversing the appeals court, the U.S. Supreme Court held that the display and maintenance of the cross did not violate the establishment clause.

Justice Alito, delivering the Court's judgment, though with several parts of his opinion not joined by a majority of justices, offered four considerations in cases such as the one at hand involving monuments, symbols, or practices: (1) such "cases often concern monuments, symbols, or practices that were first established long ago ... and identifying their original purpose or purposes may be especially difficult;" (2) "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply," (3) the message "conveyed" may evolve over time, with Justice Alito stating that "[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity" and a community may value them "without necessarily embracing their religious roots," and (4) removing a long-standing monument, symbol, or practice that has come to be associated with a community and attained "historical significance ... may no longer appear to be neutral ... [and] will strike many as aggressively hostile to religion."

According to Justice Alito's opinion, World War I monuments such as the one at issue implicated each of these four points. With these considerations in mind, the Court decided that the cross did not violate the establishment clause. The majority concluded that the cross' purposes must be interpreted in light of a historical "background" in which the memorial's design was influenced in large part by the "simple wooden crosses" originally used to mark the

graves of American soldiers killed in World War I. Additionally, noted Justice Alito in a part of his opinion speaking for the majority, the memorial had gained “historical importance” over time.

Despite upholding the constitutionality of the cross display, a majority of the court did not agree on a specific legal rationale for doing so. In a section of the opinion joined by three other justices, Justice Alito stated that the *Lemon* test (see *LHE6th* Sec. 1.6.3) had presented “daunting problems” in cases, such as the one at hand, “that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations.” Instead, he turned to other precedent, including *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 572 U.S. 565 (2014), involving prayer before legislative sessions as instructive. In a concurring opinion, Justice Kavanaugh was also critical of *Lemon*, stating that the Court’s decision in the present case, and in previous cases such as *Marsh*, “demonstrate that the *Lemon* test is not good law and does not apply to Establishment Clause cases in any of the five categories.” Other opinions offered by Justices Thomas and Gorsuch were also deeply critical of *Lemon*. In contrast, in a brief concurring opinion, Justice Kagan stated, “Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test’s focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows.” Justice Ginsburg—joined by Justice Sotomayor—stated in her dissenting opinion that cross was a Christian religious symbol, and the sectarian purposes and symbolism of the cross was not negated by its use as a war memorial. In the *American Legion* case, while a majority of the court agreed with the constitutionality of displaying the cross, the contrasting opinions from the justices reveal ongoing disagreement over application of establishment clause principles.

In *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2020), the U.S. Supreme Court decided a non-higher education case, but one that adds to its roster of decisions dealing with governmental efforts to deny a financial benefit to a religious organization. In the case, the Supreme Court held that Philadelphia violated the religious rights of foster parents associated with a Catholic affiliated foster agency over the city's refusal to enter into a full contract with the agency because it would not agree to certify same-sex couples as foster parents. The city stated that the agency's refusal to certify same-sex couples violated a nondiscrimination clause in its contract with Philadelphia and a nondiscrimination provision in a citywide fair housing ordinance. Both a federal district court and circuit court denied a preliminary injunction asked for by the foster agency and affiliated foster parents, concluding that the standards at issue were "neutral and generally applicable" as required under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

Petitioners asked the Supreme Court to overturn *Smith*. The Supreme Court did reverse the lower court ruling but on the grounds that the issues presented in the case fell outside of *Smith*, as the city's policies did not "meet the requirement of being neutral and generally applicable" (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532 (1993)). This basis of decision meant that the Supreme Court ruled on much narrower grounds than the ones sought by petitioners. The Court pointed to a provision that gave the commissioner or a designee of the commissioner of the department of human services authority to grant exceptions to a contract denial with a foster agency. This authority, according to the majority opinion written by Chief Justice Roberts, negated arguments that the policies were generally applicable and neutral. The Court also rejected the city's contention that the fair housing policy should apply to the foster agency as a place of public accommodation, with the court stating in

its opinion that foster agencies do not take on this role in performing certifications of foster parents. Applying strict scrutiny, the Supreme Court further held that the city did not establish a compelling interest to deny an exception to the foster agency, with the court rejecting arguments that granting an exception could endanger the city's interests in "maximizing" the number of foster families and limiting the city's exposure to potential litigation. Chief Justice Roberts stated in the majority opinion that granting a contract to the agency seemed to increase the pool of potential foster families and that concerns over potential litigation as a result of the foster agency's refusal to certify same-sex foster parents were speculative.

Section 1.6.4. Religious autonomy rights of individuals in in public postsecondary institutions.

The U.S. Supreme Court ruled that a public school coach's dismissal for praying on the football field after a game violated the coach's free speech and free exercise rights under the Constitution's First Amendment. In *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022), the Court, in a 6-3 decision, concluded that, with respect to the free speech claim, the coach's conduct was personal and unrelated to his employment duties. According to the majority opinion, the coach had not required his students to join him in prayer. (As noted below, the dissent challenges that statement). Under the *Garcetti* analysis, his public employer would have to prove that its interests outweighed the coach's interests in his private expressive conduct (see the discussion of *Garcetti v. Ceballos* in Section 7.1.6 of LHE 6th). With respect to the free exercise claim, the Court, citing *Employment Div., Dept. of Human Resources of Ore. V. Smith*, 494 U.S. 872 (1990), said that the school district's prohibition against private prayer burdened the plaintiff's religious exercise rights in a way that was neither neutral nor generally applicable—characteristics that would have established the constitutionality of the no-prayer rule.

In response to the school district’s defense that allowing religious speech risked the school district engaging in an Establishment Clause violation, the Court insisted that there is no conflict between the Establishment Clause and the Free Exercise Clause, calling that concern a “phantom constitutional violation.” Reversing the rulings of the trial and appellate courts, the majority awarded summary judgment to Kennedy on both claims.

In a sharply-worded dissent, Justice Sotomayor, joined by Justices Breyer and Kagan, stated that the majority’s decision overrules precedent, including *Lemon v. Kurtzman* (discussed in Section 1.6.3 of LHE 6th) and gives “short shrift to the Establishment Clause by elevating the importance of the Free Exercise Clause. The dissent observes that the majority opinion “misstates the facts” of the case and ignores the history of the coach’s conduct that had caused “severe disruption” to the functioning of the school district. That history included numerous instances of the coach praying with his students on the field in front of crowds of spectators. The dissent concluded that this opinion creates “fundamental change” in the relationship between the two religion clauses in the First Amendment, and “elevates one individual’s interest in personal religious exercise, in the exact time and place of that individual’s choosing, over society’s interest in protecting the separation between church and state, eroding the protections for religious liberty for all.”

Chapter 2

Legal Planning and Dispute Resolution

Section 2.2. Litigation in the Courts.

2.2.2 Access to court.

2.2.2.1. Jurisdiction. As explained on p. 119 of *LHE6th*, the federal courts have limited jurisdiction, and the plaintiff must demonstrate that the court has jurisdiction over both the subject matter and the parties to the dispute. When a public university claims that it is protected by sovereign immunity, the court must determine whether or not it can exercise jurisdiction over the defendant. In *Maliandi v. Montclair State University*, 845 F.3d 77 (3d Cir. 2016), for example, the U.S. Court of Appeals for the Third Circuit determined that Montclair State University was protected by sovereign immunity from the plaintiff's claims of FMLA violations. The court based its conclusion on the degree of control over the university by the governor and the state's Secretary of Higher Education, as well as the fact that the university is subject to the state's Administrative Procedure Act and its civil service laws.

A federal trial court in California has dismissed a claim brought against Georgetown University for lack of personal jurisdiction. In *Austin v. Georgetown University*, 2021 WL 2953231, a former Georgetown law student sued the university in California, alleging that the university had used his photograph in a recruiting brochure without his permission. The court ruled that the law school's limited recruiting activities in California did not provide sufficient justification for submitting the university to the jurisdiction of courts in California.

Section 2.3. Alternative Dispute Resolution

2.3.3. Applications to colleges and universities.

p. 168 A Pennsylvania trial court rejected a claim by the state system of higher education that an arbitrator's award violated public policy. In *Pennsylvania State System of Higher Education, Lock Haven University v. Association of Pennsylvania State College and University Faculties*, 193 A.3d 486 (Cmwlth Ct. Pa. 2018), Lock Haven University challenged an arbitration award

reinstating a faculty member. Pennsylvania state law, revised after the Penn State sexual abuse scandals, required that all faculty teaching courses in which minors were allowed to enroll must be free of criminal histories of sexual offenses. Lock Haven had performed a background check on its faculty who taught dual-enrollment classes and had learned that a professor, hired 14 years earlier, had been convicted of a sexual offense 27 years earlier. Lock Haven had dismissed the professor upon learning of the prior conviction because he taught entry-level courses in mathematics in which high school students enrolled. The arbitrator reinstated the professor, but ruled that he could not teach courses in which high school students were enrolled at the college. The arbitrator noted the young age at which the professor engaged in the offending conduct (19), his unblemished performance and strong teaching record at Lock Haven, and ruled that restricting him to courses in which minors were not allowed to enroll did not constrain Lock Haven's managerial rights to assign work to employees. The court agreed and confirmed the arbitration award.

Chapter 3

The College and Its Trustees and Officers

Section 3.2. Sources and Scope of Authority and Liability

3.2.1.2 Trustees of public colleges. In a case brought against the Houston Community College System, an elected member of the System board disagreed publicly with several decisions of the board on which he served, and challenged several of those decisions by filing lawsuits against the board. The board reprimanded the dissenting member publicly in 2016 and reprimanded him publicly in 2018, imposing sanctions for what they viewed as his misconduct. The dissenting member sued the System board alleging violations of his first amendment right to free speech.

In *Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022), the U. S. Supreme Court reversed a ruling by the U.S. Court of Appeals for the Fifth Circuit that Mr. Wilson’s free speech rights had been violated by the reprimands and sanctions. The Court explained that “[e]lected representatives are expected to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes” [Id. at 1261], and noted that the plaintiff had not been expelled, excluded from the board, or punished in any other way.

Section 3.3. Institutional Tort Liability

3.3.1. Overview. For a ruling applying New Jersey’s charitable immunity doctrine, see also *Green v. Monmouth University*, 178 A.3d 83 (N.J. Super. Ct. App. Div. 2018), *aff’d*, 206 A.3d 394 (NJ 2019) (upholding award of summary judgment to defendant university on charitable immunity grounds in slip-and-fall case brought by nonstudent plaintiff injured at concert held on university property but organized by entities not affiliated with the university).

3.3.2. Negligence

3.3.2.1 Overview. Charitable immunity continues to protect institutions of higher education in those states that still recognize the doctrine. In *Fisher v. Kean University*, 2022 N.J. Super. Unpub. LEXIS 493 (N.J. Super. Ct. App. Div. Mar. 29, 2022), the plaintiff had attended a high school soccer championship game that took place on the campus of Kean University. After the game, she tripped over a raised sidewalk and fell, injuring her cervical spine. She sued the university, claiming that it was negligent in maintaining the sidewalk. The trial court granted the university’s motion for summary judgment, and the appellate court affirmed.

As noted in Section 3.3.2.1, New Jersey’s charitable immunity law exempts public and private colleges and universities from negligence liability if the injury took place in the

furtherance of the institution’s educational purpose. The trial court noted that the university’s mission statement included collaboration with community organizations, and that the university was afforded discretion to determine for itself which collaborations were consistent with that mission.

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A federal trial court has rejected a motion to dismiss a claim that failure to perform a background check on a faculty member was negligent. In *Student Doe et al*, 2022 U.S. Dist. LEXIS 6828 (D. Md. Jan. 13, 2022), a student who attended the Community College of Baltimore and her parents sued the college, its board, and multiple staff members for negligence, other tort claims, and a violation of Title IX, alleging that a professor had sexually harassed the seventeen-year-old by sending her letters, poems, and other correspondence asserting his passion for her. The faculty member in question had a criminal record for stalking several years earlier, but no background check had been done. The court dismissed many of the plaintiffs’ claims, but allowed the negligence claim referencing the background check to go forward.

A federal magistrate judge has rejected motions to dismiss claims of negligent retention, negligent supervision, and gross negligence in a case involving a student athlete who sustained serious injuries as a result of a coach’s requirement that the team participate in a drill that required them to be hit in the head at a high velocity by soccer balls. The case, *Mitchell v. Baylor University*, 2022 U.S. Dist. LEXIS 112732, is discussed in Section 11.4.9.

3.3.2.5. Liability for cocurricular and social activities

Errata:

On p. 251 of *LHE6th*, the discussion of the *Guest* case should read:

Similarly, in *Guest v. Hansen*, 603 F.3d 15 (2d Cir. 2010), a federal appellate court ruled that staff of Paul Smith's College (a private college) did not have a duty to protect a student from injuries sustained in a snowmobile accident. The college was located on a lake, which the college did not own. Students had a practice of building bonfires on the frozen lake and using it as a location for consuming alcohol. A student and his guest went for a snowmobile ride around the lake; the student's blood-alcohol content at the time was over 0.11%. The snowmobile crashed and the two were killed. The guest was twenty years old and not under the influence of alcohol at the time of the accident.

The guest's father sued Paul Smith's College and its director of residence life for negligence, stating that college administrators knew that students were consuming alcohol and partying on the frozen lake and neither attempted to stop the partying nor enforced the college's alcohol policy. The court affirmed the trial court's ruling that neither the college nor the director of residence life owed the decedents a duty of care because they were not on property controlled by the College. Even if the college had the ability to control the off-campus activities of its students and their guests, said the court, it had no obligation to do so.

3.3.4. Defamation. For a comprehensive update on defamation cases in higher education, particularly as they relate to campus sexual misconduct claims, see Adam Jacob Wolkoff, "A Privilege to Speak Without Fear: Defamation Claims in Higher Education," 46(1) *Journal of College and University Law* 121 (2021). The author concludes that defamation cases in higher education seldom result in a ruling for the plaintiff, for reasons related to (1) applicable common law privileges or statutory immunity for higher education officials speaking in their official capacities, and (2) the difficulty of proving actual malice. Following the rationale of courts in

Connecticut, Indiana, Illinois, Ohio, and Pennsylvania, the author recommends establishing a judicial privilege that would shield speakers in sexual misconduct proceedings from defamation claims in order to sufficiently protect participants who may justifiably fear retaliation from making reports and giving statements within those processes.

3.3.5 Other sources of tort liability. A plaintiff claiming to be descended from certain enslaved individuals sued Harvard University for negligent infliction of emotional distress, stating that the University held and publicly displayed daguerreotypes made in 1850 of two enslaved individuals who were unclothed. The daguerreotypes had been made at the request of a Harvard professor who used them to support, in the words of the court, “a pseudoscientific racist theory.” The plaintiff asserted that her attempts to obtain information about Harvard’s use of the daguerreotypes were ignored and then rebuffed, and that Harvard allegedly continued to display the images. In *Lanier v. President and Fellows of Harvard University*, 490 Mass. 37 (Mass. June 23, 2022), the Supreme Judicial Court of Massachusetts reversed a trial court’s dismissal of the plaintiff’s emotional distress claim, returning it to the trial court for resolution. The high court determined that Harvard had a duty to the plaintiff, in part because of the “unscientific” and “racist” nature of the previous use of the daguerreotypes. The court explained:

In light of Harvard’s complicity in the horrific actions surrounding the creation of the daguerreotypes, once Lanier communicated her understanding that the daguerreotypes depicted her ancestors and provided supporting documentation, we discern in both existing social values and customs and appropriate social policy a duty on Harvard’s part to take reasonable care in responding to her [Id at *45].

Chapter 4

The College and Its Employees

Section 4.5. Collective Bargaining

4.5.1. Overview.

Bibliographic Entry: Nicholas DiGiovanni. “Labor Law Primer.” *NACUANote*, Vol. 17 NO. 5, February 15, 2019. Delineates the major elements of labor law in both the public and private sectors; provides practical guidance for administrators when dealing with union activity.

4.5.2.3. Collective bargaining in religiously-affiliated institutions. The U.S. Court of Appeals for the D. C. Circuit has decided, again, that the National Labor Relations Act does not apply to colleges and universities that “hold [themselves] out as providing a religious educational environment.” In *Duquesne University of the Holy Spirit v. National Labor Relations Board*, 947 F.3d 824 (D.C. Cir. 2020), the appellate court rejected the ruling of the National Labor Relations Board that it could assert jurisdiction over the attempts of adjunct faculty at Duquesne to unionize. Citing its decision in *University of Great Falls v. NLRB*, discussed on p. 350 of *LHE6th*, the court determined that Duquesne met all three of the tests created by that decision.

As discussed in *LHE6th*, the National Labor Relations Board created a “new” test for determining whether it could exercise jurisdiction over institutions that claimed to be religiously affiliated. In *Pacific Lutheran and Service Employees International Union, Local 925*, discussed on p. 352 of *LHE6th*, the NLRB modified the result in *Great Falls* by requiring faculty at a college or university to show that faculty were performing a religious function in order for *Great Falls* to apply. The court in *Duquesne University* flatly rejected that requirement, saying that the *Great Falls* test does not permit an inquiry as to whether the faculty perform a religious function, and claimed that the *Pacific Lutheran* decision “impermissibly intrudes into religious

matters” (947 F.3d at 835). One judge dissented, stating that adjunct faculty are in a very different category than full-time faculty and that this distinction should have been considered by the majority. An appeal for rehearing *en banc* failed (975 F.3d 13 (D.C. Cir. 2020)).

Following the ruling in *Duquesne University*, a three-member panel of the NLRB ruled that *Pacific Lutheran* should be overruled, and reinstated the Board’s previous ruling in *University of Great Falls. Bethany College v. NLRB*, 369 N.L.R.B. No. 98, 2020 NLRB LEXIS 165 (N.L.R.B. 6/10/20).

4.5.6. Students and collective bargaining. In December of 2019, the U.S. Court of Appeals rejected an attempt by the University of Chicago to deny students who work in its libraries the right to bargain under the National Labor Relations Act. In *University of Chicago v. NLRB*, 944 F.3d 694 (7th Cir. 2019), the university had refused to bargain with a unit certified by the NLRB, arguing that the students were temporary employees and thus ineligible to unionize under the Act. The court rejected the University’s argument that the student employees were ineligible to bargain, citing the NLRB’s 2016 ruling in *Columbia University*, 364 N.L.R.B. No. 90 (2016), in which the Board ruled that graduate students at Columbia who had a common law employment relationship with the University were eligible to bargain under the Act, despite the temporary nature of their jobs. Since the University had not asked the appellate court to overrule the Board’s *Columbia University* decision, the appellate court ruled in favor of the NLRB.

In September of 2019, the NLRB issued a Notice of Proposed Rulemaking that would provide that “students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not ‘employees’ within the meaning of Section 2(3) of the Act.” 84 Fed. Reg. 49691 et seq. The

Board noted that such a regulation would “bring stability to an area of federal labor law in which the Board, through adjudication, has reversed its approach three times since 2000.” If these regulations are adopted by the Board and survive any subsequent legal challenges, they would be contrary to the holding in the *University of Chicago* case, discussed above.

The General Counsel of the NLRB has released a memo declaring that students at private colleges and universities who play certain intercollegiate sports are employees for purposes of the National Labor Relations Act. In Memorandum GC 21-08, dated September 29, 2021, the General Counsel issued “Statutory Rights of Players at Academic Institutions (Student Athletes) under the National Labor Relations Act,” (<https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>). The memo states that “misclassifying such employees as mere “student-athletes”, and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act.

A federal district court has issued two opinions in a case in which certain student athletes have sued the NCAA, their colleges and universities, and certain other institutions of higher education, claiming that they are employees under the Fair Labor Standards Act and that the NCAA is a joint employer with the institutions that these students attended. In *Johnson v. NCAA*, 2021 U.S. Dist. LEXIS 160488 (E.D. Pa. 8/25/21) and 2021 U.S. Dist. LEXIS 180618 (E.D. Pa. 9/22/21), the trial court reject the NCAA’s motion to dismiss the case the claim that the NCAA was a joint employer with the colleges, and also rejected the “attended schools” motion to dismiss the claim that they were the students’ employers. Should a court find that these students are employees under the FLSA, they may be eligible to form unions and bargain collectively with the college they attend.

Section 4.6. Other Employee Protections

4.6.2. Fair Labor Standards Act. The U.S. Department of Labor has updated and revised the regulations pertaining to exempt employees (29 C.F.R. Part 541). Employees who are exempt from entitlement to overtime payments (if they work more than 40 hours in one week) must earn a salary of at least \$684 per week, an increase from the \$455 per week under the previous version of the regulations (an annualized rate of \$35,568.00).

Please see the discussion of *Johnson v. NCAA*, in section 4.5.6 regarding student athletes and possible employment under the FLSA.

Section 4.7. Personal Liability of Employees

4.7.4. Constitutional liability (personal liability under Section 1983)

4.7.4.2. Issues on the merits: State-created dangers. The state-created danger theory continues to be used by plaintiffs, but with limited success. In *Jones v. Pi Kappa Alpha International Fraternity, Inc. et al.*, 765 F. Appx. 802 (3d Cir. 2019), a case in which the plaintiff alleged that the college created the danger that facilitated her rape by several fraternity members, the U.S. Court of Appeals for the Third Circuit ruled that Ramapo State College is an arm of the state and thus the individual defendants (college officials) were protected by Eleventh Amendment immunity. The court concluded that the officials were also protected by qualified immunity because the plaintiff's claim that they failed to act to prevent the assault did not create the danger.

Sec. 4.8. Performance Management Issues

4.8.2. Evaluation. On p. 453 of *LHE6th*, it is suggested that a performance improvement plan is a useful tool to notify the employee the steps the employee needs to take in order to receive a satisfactory evaluation. In *Baylets-Holsinger v. Pennsylvania State University*, 2020 U.S. Dist. LEXIS 121848 (M.D. Pa. 7/10/20), a staff member asserted that placing her on a performance improvement plan was motivated by sex discrimination. The court awarded summary judgment to the university, stating that placing an employee on a performance improvement plan, without more, was not an adverse employee action for purposes of potential Title VII liability. The plaintiff had not demonstrated that the conditions of her employment had changed, and there was evidence that she had several performance problems, including tardiness and failure to meet work deadlines.

Chapter 5

Nondiscrimination and Affirmative Action in Employment

Section 5.2. Sources of Law

5.2.1. Title VII.

In June of 2020, the U.S. Supreme Court issued a landmark ruling in *Bostock v. Clayton County*, which found that the term “sex” in Title VII should be applied to claims of discrimination on the basis of sexual orientation or transgender identity. *Bostock* is discussed in section 5.3.8 of this Update.

A case from the Ninth Circuit addressed a former faculty member’s claim that an otherwise neutral hiring requirement created an illegal disparate impact on individuals on the basis of their national origin. A federal appellate court affirmed the ruling of a district court that rejected a plaintiff faculty member’s attempt to state a claim of disparate impact under Title VII

of the Civil Rights Act of 1964 (Title VII). As in *Scott v. University of Delaware*, discussed on p. 472 of *LHE6th*, (in which the U.S. Court of Appeals for the Third Circuit rejected a claim that a PhD hiring requirement for faculty discriminated against individuals on the basis of race), the plaintiff alleged that Central Washington University's requirement that tenure track faculty members in its business school must have received a PhD from a university accredited by the Association to Advance Collegiate Schools of Business (AACSB) had a disparate impact on candidates on the basis of national origin. *Kucuk v. Central Washington University*, 2018 U.S. Dist. LEXIS 204322 (W.D. Wash., Dec. 3, 2018), *affirmed*, 778 Fed. App'x. 525 (9th Cir. 2019). The trial court noted that the defendant university had hired numerous faculty in its business school who were not born in the United States, but who had received their PhD from an AACSB-accredited university, and that this requirement was common across business schools in the United States. The plaintiff's degree was from a Turkish university that was not accredited by the AACSB. Ruling that the hiring requirement was a neutral practice that was a business necessity for the university because of the importance of maintaining accreditation, the trial court awarded summary judgment to the university. The appellate court summarily affirmed.

5.2.2. Equal Pay Act. This law requires individuals who perform jobs that require the same "skill, effort, and working conditions" be paid equally, unless the reason for the pay disparity is a neutral factor unrelated to the sex of the employee. This "safe harbor" for employers accounted for a female faculty member's loss in *Spencer v. Virginia State University*, 919 F.3d 199 (4th Cir. 2019). Spencer, a professor of sociology, argued that she was paid less than two male faculty members in other departments, and that the pay differential was based upon her gender. The university explained that the two male faculty members with whom she compared herself were

former administrators who had returned to the faculty. The university's practice was to pay former administrators seventy-five percent of their administrative salaries when they returned to the faculty. That practice was a "factor other than sex," and thus the appellate court affirmed the trial court's rejection of Spencer's Equal Pay Act claim.

5.2.3. Title IX.

Some faculty members who are accused of, and found responsible for, sexual harassment are using Title IX to allege that the discipline imposed was based upon their gender. These claims are typically unavailing. See, for example, *Robinson v. Howard University*, 335 F. Supp. 3d 13 (D.D.C. 2018), *aff'd*, 788 Fed. Appx. 738 (D.C. Cir. 2019) (law professor who used graphic, sexually suggestive language in a quiz and lecture on agency law was issued a letter of reprimand. The court dismissed his claim, stating that a reprimand was not an adverse employment action).

As discussed in LHE 6th at pages 483-484, federal courts in some jurisdictions have dismissed employment discrimination claims brought under Title IX, ruling that they must be brought under Title VII instead. However, the U.S. Court of Appeals for the Second Circuit issued a ruling that may have consequences beyond that Circuit. The court allowed a professor to state a Title IX claim of sex discrimination against Cornell University, reversing the trial court's dismissal of his claim on the basis that Title IX does not provide for a private right of action alleging sex discrimination in employment.

In *Vengalattore v. Cornell University*, 36 F.4th 87 (2d Cir. 2022), a male professor of physics claimed that the university had engaged in sex discrimination in the manner in which it conducted a Title IX investigation concerning him. A former research assistant of the plaintiff's

had accused him of sexual harassment and sexual assault. An investigation by the university concluded that the plaintiff and the research assistant had engaged in a consensual relationship, although the plaintiff denied that any such relationship or activity had occurred. He was disciplined, and in an apparently unrelated action, was also denied tenure.

The appellate court reversed the trial court's dismissal of the plaintiff's Title IX claim, holding that the law permits a private right of action under Title IX, citing *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982) (both of which found the Title IX's prohibitions on sex discrimination in educational programs applied to employment). The court compared the language of Title IX to that of Title VI of the Civil Rights Act, which had been found to provide a private right of action for alleged employment discrimination. The court further found that the plaintiff's allegations of procedural violations by the individuals investigating the Title IX complaint were sufficient to avoid dismissal of his sex discrimination claims.

The ruling of the U.S. Supreme Court in *Bostock v. Clayton County* (2020), discussed in Section 5.3.8 of this Update, may encourage employees to attempt to sue for discrimination on the basis of sexual orientation or transgender identity using Title IX. However, because *Bostock* interpreted Title VII, not Title IX, it is not clear whether those federal circuits that have rejected employment discrimination claims under Title IX will change their reasoning, given the remedies now available under Title VII for these forms of discrimination.

5.2.5. Americans With Disabilities Act and Rehabilitation Act of 1973.

Bibliographic Entry: Sarah Johns and Anne Wilder. "Applying the Americans With Disabilities Act to Faculty and Staff with Chemical Sensitivities." *NACUANotes*, Vol. 17, no. 6, May 14,

2019. Addresses whether courts address multiple chemical sensitivity syndrome to be a disability under the ADA and what accommodations courts have considered reasonable; outlines practical considerations for institutions facing requests for accommodations for chemical sensitivities.

5.2.8. Constitutional prohibitions against employment discrimination. The U.S. Supreme Court has ruled that a public high school cannot forbid a coach from silently praying on the football field after the conclusion of the game. The coach was dismissed for engaging in this conduct. He sued, claiming that the school district violated his First Amendment free speech and free exercise rights, and the Court agreed. The case, *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (U.S. 2022), is discussed in Section 1.6.4.

5.2.10. Laws prohibiting sexual orientation discrimination.

P. 505. The U.S. Supreme Court has ruled in three cases that Title VII prohibits discrimination on the basis of sexual orientation and gender identity. The case, *Bostock v. Clayton County*, is discussed in Section 5.3.8 below.

Section 5.3. The Protected Classes

5.3.8. Transgender/gender identity or expression.

p. 552. After *LHE6th* went to press, the creators of the *Diagnostic and Statistical Manual V* of the American Psychological Association removed gender identity disorder from its list of mental illnesses and replaced it with gender dysphoria. And in May of 2019, the World Health Organization's International Classification of Disorders 11 (ICD-11) removed gender dysphoria from its list of mental illnesses.

* * * * *

pp. 553-554. In June of 2020, the U.S. Supreme Court upheld the appellate court's ruling in the *R.G. and G.R. Harris Funeral Homes* case, which it combined with two other lower court rulings involving the interpretation of Title VII, holding that Title VII's definition of "sex" includes gender identity and sexual orientation. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), a 6-3 ruling, Justice Gorsuch's opinion for the majority ruled broadly that "When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex" (140 S. Ct. at 1744). The opinion flatly rejected the arguments of the employers in these cases that Congress had not intended the term "sex" in Title VII to refer to any other characteristic than biological sex. "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids" (Id. at 1737). The majority opinion focused on the literal meaning of the word "sex" in Title VII, not on what Congress may have meant by that word, stating:

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no

reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision (Id. at 1741-42).

Justice Alito wrote a blistering dissent, joined by Justice Thomas. Justice Kavanaugh also dissented. Both dissenting opinions focus, among other issues, on the "original intent" theory followed by the late Justice Scalia.

* * * * *

For a case involving a transgender faculty member who alleged that she was denied tenure, harassed, and retaliated against because she was transitioning from male to female, see *Tudor v. Southeastern Oklahoma State University*, 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. 10/26/17); 2018 U.S. Dist. LEXIS 96884 (6/6/18) (jury verdict for plaintiff on discrimination, harassment and retaliation claim). The university appealed, and the federal appellate court upheld the verdict for the plaintiff and ordered the university to reinstate her with tenure. 13 F.4th 1019 (10th Cir. 2021). As noted in LHE6th, Section 6.4.3, a judicial award of tenure is very unusual. The court noted that reinstatement may not be appropriate if there is "extreme hostility" between the parties. In this case, the court found that, although reactions to the idea of her return were

“split at best,” her position as a tenured faculty member who worked somewhat independently “insulated” her from “adverse sentiments of colleagues.”

5.5. Application of Nondiscrimination Laws to Religious Institutions

As discussed in *LHE6th*, the U.S. Supreme Court amplified the application of the “ministerial exception” to the nondiscrimination laws in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (pp. 574-576). In 2020, the high Court relied on the *Hosanna-Tabor* precedent in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), ruling that two elementary school teachers who worked at Catholic schools could not maintain discrimination actions against those schools. Although the teachers were not called “ministers” and did not have religious training, they taught religion to students and prayed with them daily.

One teacher claimed that the school had violated the Age Discrimination in Employment Act in demoting her and then not renewing her contract to replace her with a younger teacher. The other teacher claimed that she was fired after requesting leave following a diagnosis of breast cancer. Delivering the opinion of the Court, Justice Alito noted that, in comparison to the claimant in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the teachers had similar religious duties but did not have the title minister or engage in the same level of religious training of students.

Elaborating on the factors announced in *Hosanna-Tabor*, Justice Alito wrote that whether or not the employee was called a minister, standing alone, was insufficient to determine whether the ministerial exception should apply. According to the Court, “What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their

faith are responsibilities that lie at the very core of the mission of a private religious school” (140 S. Ct. at 2064). With this framing in mind, the Court ruled that the ministerial exception applied to the positions held by each of the teachers:

There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich’s [claimant in *Hosanna-Tabor*]. Their titles did not include the term “minister,” and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same [140 S. Ct. at 2066].

In overturning the U.S. Court of Appeals for the Ninth Circuit, which had held that the ministerial exception did not apply to the teachers’ positions, Justice Alito wrote that courts should not employ a “rigid formula” in determining whether the ministerial exception should

apply. Instead, courts should “take all relevant circumstances into account to determine whether each particular position implicated the fundamental purpose of the exception” (140 S. Ct. at 2067). Justice Alito wrote that the Ninth Circuit had placed too much emphasis on the teachers not having the title of minister and less religious training than the claimant in *Hosanna-Tabor*. He also stated that it was not necessary for the employee to be of the same faith tradition as the employer institution for the ministerial exception to apply.

Rejecting the approach of the appellate courts in these cases as a “checklist,” Justice Alito said that courts should examine the duties of the teacher, not the title of the teacher.

Broadening the category of the “ministerial exception,” Justice Alito said:

The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate. . . . When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow (140 S. Ct. at 2055, 2069).

* * * * *

The Supreme Judicial Court of Massachusetts took up the application of the ministerial exception to a faculty member’s retaliation claims brought under Massachusetts’ civil rights laws. In *DeWeese-Boyd v. Gordon College*, 163 N.E. 3d 1000 (Mass. 2021), the plaintiff, a

tenured associate professor of social work, was denied promotion to full professor. She sued, claiming sex discrimination, discrimination based upon her association with LGBTQ+ persons and retaliation. Gordon College asserted that because it is a religious college, the court lacked jurisdiction because DeWeese-Boyd was a ministerial employee under the *Hosanna-Tabor* and *Our Lady of Guadalupe* doctrines discussed above. Although the Supreme Judicial Court of Massachusetts agreed that Gordon College was religious institution, but found that DeWeese-Boyd was not a ministerial employee. The court said:

we conclude that a faculty member with DeWeese-Boyd's responsibilities at Gordon is significantly different from the ordained ministers or teachers of religion at primary or secondary schools in the cases that have come before the Supreme Court. DeWeese-Boyd was not ordained or commissioned; she was not held out as a minister and did not view herself as a minister; and she was not required to undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum. Her responsibility to integrate the Christian faith into her teaching, scholarship, and advising was different in kind, and not degree, from the religious instruction and guidance at issue in *Our Lady of Guadalupe* and *Hosanna-Tabor*. [Id at 1016-17]

A federal trial court relied on the analysis in the Supreme Court's *Our Lady of Guadalupe* opinion to determine that a plaintiff's sex discrimination claim against Brigham Young University must fail. In *Markowski v. Brigham Young University*, 2022 U.S. Dist. LEXIS 25031 (D. Utah Feb. 10, 2022), the plaintiff was dismissed because her supervisor believed her very short haircut was not sufficiently feminine. She filed a sex discrimination lawsuit under Title VII. The University's defense was that the plaintiff was a ministerial employee. The court

agreed, awarding summary judgment to the University. The plaintiff's job was to train the young people who served as missionaries for the Mormon faith; she also directly taught religious doctrine to potential members of the Mormon faith and prayed with them. These duties, said the court, were religious duties, and thus met the Supreme Court's definition of a ministerial employee.

In *Crisitello v. St. Theresa School*, 242 A.3d 292 (N.J. App. Div. 2020), a New Jersey appellate court ruled that a teacher at a Catholic school did not fall under the category of minister despite an employee requirement not to engage in immoral conduct. As such, the teacher's legal claim challenging her dismissal was not prohibited by the ministerial exception. The Supreme Court of New Jersey has agreed to review the appellate ruling. 250 A.3d 1129 (N.J. 2021).

Chapter 6

Faculty Employment Issues

Section 6.2. Faculty Contracts

A state appellate court has issued an important ruling regarding the meaning of tenure in a faculty handbook. In *Monaco v. New York Univ.*, 164 N.Y.S. 3d 87 (N.Y. App. Div. 2022), two tenured professors at the university's medical school challenged a policy that permitted their salaries to be reduced if they did not obtain external funding to at support at least 20 percent of their salary. The plaintiffs argued that the faculty handbook's language, which incorporated the AAUP 1940 Statement of Principles on Academic Freedom and Tenure, promised them that their salary would never be reduced. The language at issue said "Academic tenure is a means to certain ends, specifically: (1) freedom of teaching and research; and (2) a sufficient degree of

economic security to make the profession of teaching attractive to men and women of ability" (164 N.Y.S. 3d 87, 90 (N.Y. App. Div. 2022)). The court explained that the "economic security" language in the faculty handbook was "prefatory" and that another section of the handbook discussed the criteria and process for awarding tenure, without mentioning salary protections. And furthermore, said the court, the handbook provided a grievance process for challenging salary decisions on two grounds only: violations of due process and denial of academic freedom, neither of which involved the term "economic security" or references to salary reductions. The court also rejected the plaintiffs' allegation that the salary reduction policy was disciplinary, stating that any salary reductions were not based on misconduct on the part of faculty, and also provided for salary increases if faculty did obtain external funding.

Section 6.3. Faculty Collective Bargaining

6.3.2. Coexistence of collective bargaining and traditional academic practices. After the U.S. Supreme Court released its decision in the *Janus* case (*LHE6th*, pp. 359-361), faculty members at several public universities challenged the constitutionality of their state's public sector employee bargaining law. For example, in *Reisman v. Associated Faculties of the University of Maine et al.*, 939 F.3d 409 (1st Cir. 2019), a professor at the University of Maine at Machias challenged Maine's law, Me. Stat. tit. 26, §§ 1021-1037, that provides for collective bargaining by faculty at Maine's public colleges and universities. The plaintiff alleged that the law violated his First Amendment right not to associate with an organization whose views he opposes and compelled his speech by forcing him to associate with that organization because the organization acted as his personal representative. The plaintiff was not a member of the union, nor, after *Janus*, was he required to pay an agency fee to the union.

Reading the language of the statute, the court rejected the plaintiff's claim that the union was his personal representative; the union was the representative of the bargaining unit, according to several parts of the statute. Furthermore, said the court, *Janus* dealt with the forced payment of agency fees and did not address the issue of "forced" association with the union more generally. Citing a previous First Circuit case, *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016), which held that "[E]xclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit," the appellate court affirmed the trial court's dismissal of the plaintiff's lawsuit.

For a similar argument by plaintiffs and similar outcomes, see *Grossman v. Hawaii Government Employees Association AFSCME et al.*, 382 F. Supp. 3d 1088 (D. Haw. 5/21/19), *affirmed*, 854 Fed. Appx. 911 (9th Cir. 2021) and *Uradnik v. Inter Faculty Association et al.*, 2019 U.S. Dist. LEXIS 209957 (D. Minn. 12/5/19), *affirmed*, 2021 U.S. App. LEXIS 17885 (8th Cir. 6/16/21). All three court opinions cited the ruling of the U.S. Supreme Court in *Knight* (discussed in Section 6.3.2 of *LHE6th*) to reject plaintiffs' claims that laws permitting a union selected by majority vote of the bargaining unit to be the exclusive representative of those bargaining unit members violated their freedom of association.

Section 6.4. Application of Nondiscrimination Laws to Faculty Employment Decisions

6.4.2. Challenges to employment decisions.

6.4.2.1. Race and national origin discrimination claims. Although most challenges to tenure denials result in a ruling for the institution, some courts are rejecting defendant institutions' arguments that courts should defer to the academic judgments of the faculty and administrators. In *Mawakana v. Board of Trustees of the University of the District of Columbia*, 926 F.3d 859

(D.C. Cir. 6/14/19), an African-American professor of law at the University of the District of Columbia was denied tenure. Believing that the denial was based on his race, he sued, alleging race discrimination and breach of contract claims.

The trial court awarded summary judgment to the university, deferring to the academic judgment of those who made the tenure denial decision. The appellate court reversed. Referring to the caution of the U.S. Supreme Court in the *Ewing* case (discussed in *LHE6th*, section 2.2.5), the court said:

We believe that *Ewing* and the concept of academic freedom do not entitle a university to special deference in Title VII tenure cases. Indeed, the first premise of the deference afforded the university in *Ewing* was that the university had “acted in good faith.” . . . That premise cannot be assumed in a Title VII case, where the question is *whether* the employer acted in good faith. The second premise of the Court’s deference in *Ewing* was that the Court was being asked to review “the substance of a genuinely academic decision.” . . . That premise also cannot be assumed in a Title VII case, where a court is asked to evaluate the reason for—as opposed to the substance of—the University’s decision and thus *whether* the employer’s decision was “genuinely academic.” In sum, *Ewing* dictates that a court cannot second-guess a university’s decision to deny tenure *if* that decision was made in good faith (i.e., for genuinely academic reasons, rather than for an impermissible reason such as the candidate’s race). But a Title VII claim requires a court to evaluate *whether* a university’s decision to deny tenure was made in good faith (i.e., for academic reasons rather than for an impermissible reason such as the applicant’s race). [926 F.3d at 864-865]

6.4.2.2. Sex discrimination. As noted on p. 473 of *LHE6th*, most plaintiffs claiming discrimination under Title VII must use circumstantial evidence to prove that some negative employment action was infected with discrimination, since direct evidence of discrimination is unusual. Deviations from procedures or more favorable treatment of comparable candidates for tenure may be used to demonstrate that the decision was motivated by discrimination.

This was the case for the plaintiff in *Theidon v. Harvard University*, 948 F.3d 477 (1st Cir. 2020). Professor Kimberly Theidon, a professor of anthropology, was denied tenure by Harvard's President Faust in 2013, who found that Theidon's scholarly productivity and the quality of her work did not meet Harvard's criteria for awarding tenure. Although the recommendations of Theidon's departmental peers and others involved in the internal process were positive overall, the university decided to empanel an ad hoc committee of external experts in Theidon's specialty in order to advise the President. That ad hoc committee's recommendation was negative.

Theidon filed an internal grievance, which was denied. Her claim of sex discrimination, filed with the state civil rights agency, was also denied. She then filed claims of sex discrimination and retaliation under Title VII in federal court. The trial court awarded summary judgment to Harvard, and Theidon appealed.

Theidon claimed that Harvard's determination that her scholarship was inadequate was a pretext for sex discrimination. She relied on four instances of alleged procedural irregularities. First, Harvard did not send all of her publications to external reviewers, although the Handbook that describes the tenure review process states that a "sample" of the candidate's publications should be sent, and the external reviewers had access to Theidon's website, which contained

copies of several of the publications that had not been sent. The appellate court found no evidence that this claim had merit.

Second, Theidon claimed that Harvard circulated an earlier draft of the case statement for her tenure, rather than the final draft which was slightly more positive. The court noted that both versions were positive, and that the external ad hoc committee that made the final negative recommendation on tenure had not relied on the statement, but on the professional judgments of the committee members.

Third, Theidon claimed that complaints she had made about gender inequities in the Anthropology Department were held against her during the tenure review. Again, the court rejected her argument, stating that there was no evidence that the ad hoc committee, whose recommendation to the President was dispositive, knew about any of her complaints.

And fourth, Theidon claimed that Harvard imposed a requirement of a second book prior to tenure, a requirement that male candidates in her department tenured recently had not been required to meet. Again, the court rejected that claim, explaining that the ad hoc committee (and some internal peers as well) had concluded that the second, unpublished book covered much of the same ground and the same research as Theidon's earlier book, and thus did not provide evidence that she had made substantial progress on a second, entirely different research project.

Although Theidon had also claimed that the tenure denial was in retaliation for her activism on behalf of women survivors of sexual violence and criticism of Harvard's allegedly insufficient responsiveness to those individuals, the court rejected those assertions, saying that there was no evidence that the external ad hoc committee members were aware of her activism.

Although the university was ultimately successful in defending this tenure denial in court, the lengthy facts and discussion of alleged procedural violations demonstrates once again the

importance of close adherence to institutional policy and procedures when making employment decisions.

* * * * *

A case decided by the U.S Court of Appeals for the Eighth Circuit reinforces the importance of written annual reviews of untenured faculty and careful adherence to procedures when a later tenure decision is negative. In *Maras v. Curators of the University of Missouri*, 983 F.3d 1023 (8th Cir. 2020), a tenure-track assistant professor had been evaluated annually, in writing, but a variety of groups and individuals, including her department chair, and warned that her scholarly productivity did not meet the standards for tenure. Criteria for tenure were very clear: 10-12 high quality publications in high quality refereed journals, books, or textbooks, first authorship in at least some of these, and more empirical than theoretical work. When the tenure review was done, six letters solicited from external scholars were “mixed,” containing both positive and negative comments. Votes at the department level and the college level were negative, even after the plaintiff had provided rebuttal information. Although a university-wide committee vote was positive, the provost recommended against tenure, again after the plaintiff was given an opportunity to provide rebuttal information. The chancellor also recommended against tenure.

Maras sued under state and federal sex discrimination laws, claiming that three male faculty comparators had scholarly records inferior to hers but were awarded tenure. The court disagreed that these faculty members were similarly situated to Maras and thus were not appropriate comparators. One was in a different department, others had positive recommendations along the way that Maras did not, and the chancellor, who made the ultimate

decision, had not participated in the review of the three comparators' tenure files. The court affirmed the trial court's award of summary judgment to the University.

6.4.4. Challenges to salary decisions. A particularly troubling issue in salary discrimination claims is the determination of whether pay differentials are, in fact, caused by sex or race discrimination or by legitimate factors such as performance differences, market factors, or educational background. These issues have been debated fiercely in the courts and in the literature. For example, in *Summy-Long v. Pennsylvania State University*, 715 F. Appx. 179 (3d Cir. 2017), a federal appellate court found that the lower salary paid to a female medical school professor was explained by the fact that her publication record was weaker than those of comparable male faculty and that she had not obtained required grant funding. Claims brought under Title VII and Title IX were equally unavailing.

In *Freyd v. University of Oregon et al.*, 384 F. Supp. 3d 1284 (D. Ore. 2019) a federal trial court plunged into the complexities of the academic workplace, and concluded that faculty, even those working in the same department, may have jobs that are insufficiently similar to qualify as "the same job" for Equal Pay Act purposes. Jennifer Freyd, a professor of psychology at the University of Oregon for over thirty years, sued the University, claiming that the fact that her salary was lower than that of four male faculty in her department was a result of sex discrimination by the University.

The court disagreed, explaining

[T]he notion of academic freedom spawns an environment where those working in the same discipline may choose to follow different paths of knowledge and pursue endeavors that create unique value to the institution. . . Individual professors are given broad latitude to pursue research, obtain and manage grants, publish written work, and take on

leadership roles in the university. . . A second hurdle facing pay equity. . . is the need for universities to offer competitive salaries in order to attract top faculty. . . the academic job market is made up of those who are in demand (and can command more money during contract or retention negotiations) and those who are not. (384 F. Supp. 3d at 1288)

The male professors with whom Professor Freyd compared herself had obtained external offers of employment, which the university had met, and/or had served in administrative roles, such as department head or center director, director of clinical training, or principal investigator on large federal grants. All of these activities, said the court, were a legitimate reason for a salary differential.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed in part and affirmed in part (990 F.3d 1211 (9th Cir. 2021)). Because the plaintiff had included claims under Oregon’s equal pay law, which provides a broader definition, “comparable work” than the Equal Pay Act’s definition of “equal work,” the court ruled that she had raised a genuine issue of material fact on that claim, and summary judgment for the university was inappropriate. The court also reversed the trial court’s award of summary judgment on the plaintiff’s Title VII disparate impact claim, ruling that the University’s practice of making retention increases but not making similar salary adjustments for faculty of comparable merit and seniority without external offers could be shown to have a disparate impact on women faculty, and the university had not carried its burden to demonstrate that such a practice was a business necessity. The court affirmed the trial court’s award of summary judgment to the university on the plaintiff’s Title VII disparate treatment, Title IX, and her claims under state nondiscrimination laws.

Section 6.6. Standards and Criteria for Faculty Personnel Decisions

6.6.3 Denial of tenure. A federal trial court has rejected a plaintiff’s claim that relying on negative student course evaluations in making a tenure decision is impermissible race discrimination. In *Moini v. Wrighton*, 2022 U.S. Dist. LEXIS 86537 (D.D.C. May 13, 2022), the plaintiff who identifies himself as a “Middle Eastern man” alleged that the university’s reliance on below-average teaching evaluations to deny him tenure was a form of race discrimination. The plaintiff’s research had been judged to be strong, and letters from external reviewers were also strongly positive, but his scores on student evaluations of his teaching were problematic, according to the University. The University was able to show that the plaintiff had been counselled about his teaching, but it had not improved sufficiently to justify tenure in the judgment of the dean, provost, and president.

In upholding the University’s decision, the court noted the importance of deference to the academic judgment of faculty and academic administrators. It said, “Courts are especially wary of second-guessing personnel decisions in the academic context (at *26), and “the University, like all employers, has wide latitude in how it evaluates and promotes its employees” (at *42). For further discussion on judicial deference to academic judgment, see LHE6th, Section 2.2.5.

Section 6.7. Procedures for Faculty Employment Decisions

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

6.7.2.4. Termination of tenure. James Tracy, a tenured professor at Florida Atlantic University, was dismissed for insubordination by the university after refusing on several occasions to file a required report on his outside activities. Tracy, who authored a blog questioning whether the murders of children and adults at Sandy Hook Elementary School in 2012, refused to report his blogging activities as required by the faculty collective bargaining agreement. The university dismissed him, and Tracy sued, alleging breach of contract and constitutional claims that the

provisions of the collective bargaining agreement were vague, and alleged that his dismissal was in retaliation for exercising his First Amendment rights. A federal trial court awarded summary judgment to the university on his breach of contract and constitutional claims, but ruled that his retaliation claim must be tried. A jury found in favor of the university on that claim.

In *Tracy v. Florida Atlantic University Board of Trustees*, 980 F.3d 799 (11th Cir. 2020), the appellate court affirmed the trial court's rulings and the jury verdict. Because Tracy did not utilize the grievance procedure contained in the collective bargaining agreement, his breach of contract claim was appropriately dismissed because he was required to exhaust his contractual remedies prior to bringing a breach of contract claim. With respect to the constitutional claims, the appellate court ruled that the language in the collective bargaining agreement that required Tracy to report outside activities was not vague and was not a restriction on the content of his speech or writing.

A federal appellate court has upheld the termination of a tenured professor at the University of Louisville, rejecting his claims that the university violated his due process rights. In *Kaplan v. University of Louisville*, 10 F.4th 569 (6th Cir. 2021), the court affirmed the trial court's dismissal of Kaplan's due process, violation of liberty interest, and academic freedom claims.

Kaplan, a tenured professor, was chair of the Department of Ophthalmology and Visual Sciences at the University of Louisville. He was notified that the university was investigating him for signing a lease and attempting to obtain private financing for the department, neither of which had been authorized by the university. As the investigation progressed, the dean placed Kaplan on paid leave and banned him from campus, which prevented him from working on his

grants or seeing patients. Subsequently, the university terminated his position as chair and a tenured professor, citing six charges of misconduct.

Kaplan appealed his termination to a faculty grievance panel, which upheld four of the six charges brought by the dean. Although the panel declined to make a recommendation about sanctions for this misconduct, the dean recommended his termination to the Board of Trustees, which concurred.

The trial court dismissed all of Kaplan's claims, and the appellate court affirmed. It found that the University itself was protected by sovereign immunity, that Kaplan had no property interest in his position as department chair, and that the dean and other administrators had provided sufficient due process in the termination proceeding (the appellate court called his due process protections "the Cadillac plan of due process") and noted that the faculty grievance committee had upheld four of the six charges, finding that Kaplan had attempted to undermine the university's budget reduction plans, violated university rules and regulations, and was not truthful about his actions when asked to account for them. The court rejected Kaplan's liberty interest claim because he had not requested a name-clearing hearing. It also rejected his academic freedom claim, noting that it was his "attempt to circumvent" the university's cost control measures that was the reason for his dismissal, not any of the ideas he advocated or research he conducted.

* * * * *

A federal trial court has ruled that, a public university must provide due process protections in dismissing a tenured professor; the use of the university's Title IX investigation and determination process is inadequate, particularly when the university has a process for

determining whether or not a tenured faculty member should be dismissed. *Carlock v. Wayne State University*, 2020 U.S. Dist. LEXIS 112660 (E.D. Mich. 6/25/20).

6.7.2.5. Other personnel decisions. In *Renken v. Board of Regents of the University of Wisconsin System*, 2019 U.S. Dist. LEXIS 185831 (E.D. Wisc. 10/28/19), faculty in the mechanical engineering department of the University of Wisconsin-Milwaukee filed a complaint against the plaintiff, a tenured professor, alleging “abusive, disruptive and bullying behavior” by the professor. A faculty committee was asked to review the charges, found them to be sustained, and recommended discipline. After additional charges were made against the plaintiff, the chancellor placed the plaintiff on unpaid suspension for a year, rescinded his sabbatical, and banned him from campus.

Renken alleged due process violations in how the decisions were investigated and made, and also requested a preliminary injunction. The trial court dismissed the lawsuit, stating that the University had adequate remedies to protect the plaintiff’s due process rights, which he had failed to utilize.

6.7.3. The private faculty member’s procedural rights. In *Fagal v. Marywood University*, 786 Fed. Appx. 353 (3d Cir. 2019), a federal appellate court considered whether a private university’s decision to terminate a tenured faculty member without following its progressive discipline policy breached the professor’s contract. Marywood is a Catholic institution founded by an order of nuns, whose president is a member of that order. Fagal engaged in a dispute with the president and other university administrators over their decision to remove flyers he had posted. The flyers advertised an upcoming event. Fagal had created and released to the faculty

two videos in which he compared the president and several administrators to Hitler and other Nazi leaders. The president asked Fagal to meet with her and informed him that he was placed on leave and that she was considering his termination. Fagal requested a hearing before a faculty hearing panel, which upheld the president's termination decision.

Fagal sued for breach of contract, claiming that the Faculty Handbook, whose terms were incorporated into his employment contract, contained a provision providing for progressive discipline for two categories of misconduct: "personal and professional problems that may be rectified by an informal educational process" and "serious violations of professional responsibilities implicating possible recommendation for suspension or termination." Fagal argued that the progressive discipline policy applied to both types of misconduct while the university stated that it was not necessary to use progressive discipline for serious violations. The trial court ruled for the university, holding that the language in the policy was permissive, not mandatory. The appellate court agreed, although one judge dissented, and would have found that the progressive discipline policy was mandatory and that the university's failure to follow that policy breached Fagal's contract.

Despite the ruling in the university's favor, it is important for both public and private institutions to clarify which policies and procedures are intended to be binding on the institution and which are optional. In many cases, following one's policy takes less time and is less costly than bypassing those policies and facing litigation.

Section 6.8 Closure, Merger, and Reduction in Force

6.8.2. Contractual considerations. A case decided under Massachusetts law has important implications for private colleges that face decisions to close, merge, or otherwise eliminate

programs. In *Squeri v. Mount Ida College*, 954 F.3d 56 (1st Cir. 2020), the U.S. Court of Appeals for the First Circuit upheld the ruling of a federal trial court that Mount Ida College, which announced six weeks prior to the end of the academic year, that it would close, did not have a fiduciary duty to its students. Former students had challenged the college's decision as violating an alleged fiduciary duty to them, various tort and contract claims, as well as claims that the college had violated their privacy because the college had made arrangements for the students to transfer to the University of Massachusetts at Dartmouth to complete their degrees, and had transferred their academic and financial aid information to that institution.

Although some Mount Ida students transferred to the University of Massachusetts at Dartmouth, others wished to transfer to other institutions, but had difficulty because they had missed deadlines for transferring, having had no warning that Mount Ida would close in May. They also risked not completing their degrees on time and losing financial aid.

The trial court dismissed all of the students' claims for failure to state a claim. The trial court found no duty on the part of Mount Ida to notify students of its financial difficulties prior to its decision to close, and noted that audited financial statements for the college were publicly available. Most significantly, the trial court rejected the students' claim that Mount Ida owed its students a fiduciary duty to act in their interests. Instead, said the court, Massachusetts law created a fiduciary duty between college officers and trustees and the college itself, not its students. In fact, the court noted, the interests of the college and the students were in conflict, since earlier disclosure of the college's financial problems could have resulted in a worse financial picture for the college. Furthermore, said the court, Massachusetts law provides that the state's attorney general is responsible for overseeing the interests of the beneficiaries of a

charitable organization (here, the college); the court did not have the legal capacity to create a fiduciary duty between the college and its students.

The appellate court also rejected the plaintiffs' contention that their privacy rights under Massachusetts law had been violated, noting that Mount Ida had a legitimate business reason to share the students' academic information with the University of Massachusetts at Dartmouth.

Chapter 7

Faculty Academic Freedom and Freedom of Expression

Section. 7.1. General Concepts and Principles.

7.1.8. "International" academic freedom. As covered in *LHE6th* pp. 786-787, the U.S. Supreme Court upheld a travel ban initiated by the Trump administration in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), that placed entry restrictions on foreign nationals from seven nations. In early 2020, the Trump administration expanded the travel ban, or other entry or immigration limitations, to include six additional countries—Nigeria, Eritrea, Myanmar, Kyrgyzstan, Tanzania, and Sudan (Maria Saccheti, Abigail Hauslohner, & Danielle Paquette, "Trump Expands Long-Standing Immigration Ban to Include Six More Countries, Most in Africa," Jan. 31, 2020, *Washington Post*, available at https://www.washingtonpost.com/immigration/trump-expands-long-standing-immigration-ban-to-include-six-more-countries-most-from-africa/2020/01/31/413e93ec-443e-11ea-aa6a-083d01b3ed18_story.html). The Biden administration rescinded this travel ban through a Presidential Proclamation (Jayme Deerwester, "President Biden Ends Trump's Muslim Travel Ban, Outlines What's Next," *USA Today*, Jan. 21, 2021, available at <https://www.usatoday.com/story/travel/news/2021/01/21/biden-executive-order-ends-muslim-travel-ban-donald-trump/4240420001/>).

Section 7.2. Academic Freedom in Teaching

7.2.2.2. The classroom.

In *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019), a federal appellate court held that a professor's classroom speech that dealt with the professor's sex life and those of her students did not address a matter of public concern in rejecting the professor's as-applied First Amendment challenge to the university's sexual harassment policies. The court, in agreement with the lower court (see *LHE6th* pp. 801-802), stated that the "use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K-Third grade teachers." 919 F.3d at 885.

Meriwether v. Trustees of Shawnee State University, 2019 WL 4222598 (S.D. Ohio 9/5/19), dealt with the unsettled question of whether faculty classroom speech may qualify for First Amendment protection in light of the U.S. Supreme Court's decision in *Garcetti v. Ceballos* (see *LHE6th* Sec. 7.1.5 and Sec. 7.2). The case involved whether a faculty member at a public university had a First Amendment right, despite a university policy to the contrary, to refuse to use a student's requested name or preferred pronoun. During a class session, the professor, Meriwether, answered a student question with a "Yes, sir" response. After class, the student informed the professor that she was transgender and identified as female and wanted the professor to use feminine titles and pronouns when referring to her. After their exchange, the student reported the incident to an administrator, who suggested to the professor that if he did not want to follow the student's request, he should refer to all students by their last names and "eliminate all sex-based references from his expression." The professor continued to use titles for other students, but only used a last name when referring to the transgender student. The student eventually objected to this arrangement, and the professor and administrators were

unable to come to an arrangement that Meriwether's supervisors believed would not violate institutional policy or potentially result in a violation of the student's Title IX rights. A formal disciplinary action resulted in which the plaintiff received an official warning letter for violating the university's nondiscrimination policy.

In response to the professor's First Amendment retaliation claim, the federal district court considered whether his classroom speech related to the student qualified for First Amendment protection. The court rejected the university's argument that the professor's actions toward the student constituted conduct and not speech. It then considered the professor's argument that the speech at issue was exempt from the standards announced in *Garcetti v. Ceballos*. In *Garcetti*, the Supreme Court held that when a public employee engages in speech pursuant to the carrying out of official duties, then such speech is not eligible for First Amendment protection. The court in *Meriwether*, stating that the Supreme Court in *Garcetti* left undecided the issue of an academic freedom exemption, rejected the professor's argument that federal appellate courts had recognized such an exemption, including the U.S. Court Appeals for the Sixth Circuit. The court stated that neither the Supreme Court nor the Sixth Circuit had "decided that *Garcetti* does not apply, or that it applies in a different manner, to teachers at public colleges and universities." On the basis of *Garcetti*, the court concluded that the professor's speech related to the student's pronouns and gender identity occurred as part of Meriwether carrying out his official employment duties. As such, the speech did not qualify for First Amendment protection and could not be used to sustain a First Amendment retaliation claim. Even assuming that the professor's speech was made in a capacity as a private citizen rather than as an employee, the court concluded that such speech did not touch on a matter of public concern so as to be protected by the First Amendment.

A federal appeals court overturned the lower court in *Meriwether*, ruling that *Garcetti v. Ceballos* did not apply to the professor's speech when he declined to use the preferred pronouns of the student. The court ruled that the First Amendment protects the free speech rights of faculty members when teaching:

... [O]ur court has rejected as “totally unpersuasive” “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction.” *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). And we have recognized that “a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting.” *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001)... Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship....

In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth. In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment.... It concluded that the rule announced in *Garcetti* does not apply “in the academic context of a public university.”... The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that “academic freedom is a special concern of the First Amendment.” *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019) (quotation omitted) (analyzing the claim under the *Pickering-Connick* framework). Likewise, the Ninth Circuit has recognized that “if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values

previously articulated by the Supreme Court.” *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). Thus, it held 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.”...

One final point worth considering: If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as “comrades.” That cannot be. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe” such orthodoxy. *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178. (*Meriwether v. Hartop*, 992 F.3d at 505-506. (footnotes omitted) (some citations omitted))

Along with rejecting the university’s arguments that the professor’s speech claim was generally precluded by *Garcetti*, the court concluded that the specific speech was entitled to First Amendment protection, even if it did not directly deal with the subject matter of the lecture.

According to the court, the

academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor’s in-class speech to his students is anything but speech by an ordinary government employee. Indeed, in the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students’ interest in receiving informed opinion, (2) the professor’s right to disseminate his own

opinion, and (3) the public's interest in exposing our future leaders to different viewpoints. *See Lane v. Franks*, 573 U.S. 228, 236, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014); *Sweezy*, 354 U.S. at 250, 77 S.Ct. 1203 (plurality opinion). Because the First Amendment "must always be applied 'in light of the special characteristics of the ... environment' in the particular case," *Healy*, 408 U.S. at 180, 92 S.Ct. 2338 (alteration in original) (quoting *Tinker*, 393 U.S. at 506, 89 S.Ct. 733), public universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy. Otherwise, our public universities could transform the next generation of leaders into "closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511, 89 S.Ct. 733. Thus, "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." (*Meriwether v. Hartop*, 992 F.3d at 507)

The court also rejected the argument that First Amendment academic freedom protections only apply to institutions and not to individual faculty members.

Having decided that professors are entitled to First Amendment speech protection in the classroom, the court determined that speech dealing with pronouns dealt with a matter of public concern. It then considered whether the university had a sufficient countervailing interest to restrict the professor's speech. The university contended that it had a compelling interest in stopping discrimination against transgender students, but the court rejected this argument at the current stage of litigation. The court noted that the professor had proposed a compromise where he would have used the student's last name. Furthermore, it stated that at this stage of litigation the university had not shown that the professor's refusal to use the student's preferred pronouns

impeded the professor's ability to carry out his classroom duties. Additionally, the court rejected the argument at this stage of litigation that it had been established that the professor's refusal to use the student's preferred pronouns would violate Title IX.

Following the issuance of two Executive Orders issued during the Trump presidential administration, which were then rescinded by the Biden administration, aimed at Critical Race Theory (CRT) and the role of slavery in considerations of American history, some state laws and legislative proposals have sought to limit the use of CRT or the teaching of "divisive" concepts in college trainings and courses. These laws or legislative proposals present a potential infringement on faculty academic freedom rights under the First Amendment in relation to teaching. Along with legislation aimed at elementary and secondary schools, some legislative initiatives have included public colleges and universities (see Jonathan Feingold, "What the Public Doesn't Get: Anti-CRT Lawmakers are Passing Pro-CRT Laws," *The Conversation*, Nov. 30, 2021, available at <https://theconversation.com/what-the-public-doesnt-get-anti-crt-lawmakers-are-passing-pro-crt-laws-171356>; Rashawn Ray & Alexandra Gibbons, "Why Are States Banning Critical Race Theory?," Nov. 2021, The Brookings Institution, available at <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>). If states persist in applying such laws to ban or curtail courses offered at colleges and universities, legal challenges based on academic freedom are likely to arise. The laws raise questions over the extent of public faculty members' rights under the First Amendment related to the content of courses or statements made in class (see Sec. 7.2 of *LHE6th*), such as those at issue in *Meriwether v. Hartop* and considered in this update. Also in relation to academic freedom, anti-CRT laws raise questions of whether the legislation infringes on academic freedom rights that potentially are possessed at the institutional level (see Sec. 7.1.7 of *LHE6th*).

Florida has been among the states that have considered or have enacted legislation aimed at prohibiting Critical Race Theory (CRT) and related lines of critical scholarship in education, including at colleges and universities. The legislation in Florida is formally named the Individual Freedom Act, but the law has been commonly referred to as the Stop WOKE Act, as it contains provisions that were included in a bill introduced by Florida Governor Ron DeSantis (*See Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No.: 4:22-cv-304-MW/MAF (N.D. Fla. Nov. 11, 2022) (order granting in part and denying in part motions for preliminary injunction)).

Florida's law prohibits teaching CRT in all public schools and colleges and universities. The law bans faculty from providing "training or instruction that espouses, promotes, advances, inculcates, or compels" any student or employee to believe specific concepts. A lawsuit was brought on behalf of Florida faculty members and students arguing that the law violated their First and Fourteenth Amendment rights in its application to public higher education. In its response to these claims, the Florida Board of Governors, seeking to place faculty classroom speech under *Garcetti v. Ceballos*, argued in a court filing that "in-class instruction offered by state-employed educators is ... pure government speech, not the speech of the educators themselves" and, therefore, is not subject to First Amendment protection.

In seeking to reject academic freedom claims raised by the plaintiffs, the Board of Governors also argued that any judicial recognition of constitutional academic freedom for public colleges and universities accrues to institutions and not to individual faculty. The district court granted a preliminary injunction to block the law as applied to higher education teaching contexts.

The court compared the actions in Florida to the dystopian events in George Orwell's novel *1984*. While stating that the Supreme Court "has never definitively proclaimed that

‘academic freedom’ is a stand-alone right protected by the First Amendment,” and noting Eleventh Circuit precedent declining to recognize individual academic freedom as an “independent constitutional right,” the court stated that “academic freedom remains an important interest to consider when analyzing university professors’ First Amendment claims.” The court acknowledged the substantial authority of Florida to “prescribe the content of its universities’ curriculum,” but also pointed out this authority was not boundless. In alignment with this stance, the court refused to approve *Garcetti* as a basis to strip faculty members of any First Amendment speech protections in the classroom. The court differentiated the state’s content-based rights to determine curriculum from an “unfettered discretion” to impose viewpoint-based restrictions on professors’ being able to express views on the curriculum.

Looking to Eleventh Circuit precedent, the court turned to the *Bishop v. Aronov* decision, 926 F.2d 1066 (11th Cir. 1991), which applied standards from *Hazelwood School District, v. Kuhlmeier School*, 484 U.S. 260 (1988), to evaluate the faculty speech claims in opposition to the Stop WOKE Act. Making it clear that it was using *Bishop* and not *Garcetti*, the court applied the standards from *Bishop* to assess the plaintiffs’ speech claims. The court concluded that Florida failed to provide a meaningful justification to impose viewpoint restrictions on faculty (and students) in areas covered under the law. Additionally, the court determined that the academic freedom considerations in the case were those of the “highest order.” The court described the law as “antithetical to academic freedom and [as having] cast a leaden pall of orthodoxy over Florida’s state universities.” Under these factors, the court granted a preliminary injunction in favor of the professor and student plaintiffs who had satisfied standing requirements. The litigation in Florida highlights how anti-CRT laws raise important legal questions over the constitutional academic freedom and speech rights of public higher education

faculty. Litigation over these laws, such as in Florida, show ongoing legal debate over the extent to which public higher education faculty, despite the ruling in *Garcetti v. Ceballos*, may possess First Amendment speech rights related to the carrying out of their professional duties, such as in teaching and research.

Section 7.4. Academic Freedom in Institutional Affairs

7.4.1. In general. In *Calmelet v. Trustees of California State Univ.*, 2020 WL 5291925 (E.D. Cal. Sept. 4, 2020), a professor and department chair contended, among her claims, that she suffered retaliation in violation of her First Amendment rights for writing a minority report of a committee's evaluation of another faculty member's performance. The court, rejecting the First Amendment claim, ruled that the contents of the report did not touch upon a matter of public concern and only dealt with an issue involving an individual personnel dispute and grievance. In another case, *Bowers v. Univ. of Delaware*, 2020 WL 7025090 (D. Del. Nov. 30, 2020), a court, at least in refusing to dismiss a department chair's First Amendment retaliation claim, ruled that the chair had plausibly alleged that she had spoken as a private citizen, and not pursuant to her official duties. The speech at issue dealt with reporting alleged racist comments by another faculty member, including participation in an arbitration involving the faculty member alleged to have made racist comments that arose from the reporting of the alleged statements. In a case in which a faculty member claimed that he was retaliated against for reporting misconduct by a colleague, the court ruled that the speech at issue dealt with internal personnel matters of private concern and was not subject to First Amendment protection (*McReady v. Montgomery College*, 2020 WL 5849481 (D. Md. Sept. 30, 2020)).

Section 7.6. Administrators’ Authority Regarding Faculty Academic Freedom and Freedom of Expression.

In *Wozniak v. Adesida*, 932 F.3d 1008 (7th Cir. 2019), a federal appellate court, in a sharply worded opinion, rejected a professor’s arguments that his speech arising from a conflict with a group of students over a faculty teaching award was protected under the First Amendment. The professor, who “waged an extended campaign” against the students who had not given him an award, was dismissed from his tenured faculty position for his treatment of them. As characterized by the court, the professor’s “lead argument,” which the court soundly rejected, was that the First Amendment “entitles faculty members to make available to the public any information they please, no matter how embarrassing or distressful to students.” The court concluded that the speech was unprotected under *Garcetti* because it dealt with official duty or, alternatively, because the speech only touched upon matters of private concern.

Section 7.7. Protection of Confidential Academic Information: The “Academic Freedom Privilege”

Bibliographic Entry: Grant Garber and Erin Burcher, “Involuntary Expert Witnesses: Subpoenas of Faculty as ‘Unretained Experts’ under Federal Rules of Civil Procedure 45(d)(3)(B)(ii).” NACUANotes, Vol. 18 no. 10 (August 17, 2020). Discusses the use of subpoenas to compel faculty and staff to act as “unretained experts” in litigation in order to provide analysis and opinion testimony.

Chapter 8

The Student-Institution Relationship

Section 8.1. The Legal Status of Students.

8.1.3. The contractual rights of students. Beginning in the late winter/early spring of 2020, the COVID-19 pandemic resulted in many colleges and universities sending residential students home and switching to virtual instruction as a result of concerns for the health and safety of students and employees. As a result, dozens of institutions have been sued by students, demanding tuition and fee refunds.

Most of the claims are grounded in breach of contract and/or unjust enrichment. Some of these claims have survived colleges' motions to dismiss (*Salerno v. Florida Southern College*, 488 F. Supp. 3d 1211 (M.D. Fla. 2020); *Chong v. Northeastern University*, 494 F. Supp. 3d 24(D. Mass. 2020)), while most courts have dismissed the students' claims (*Lindner v. Occidental College*, 2020 U.S. Dist. LEXIS 235399 (C.D. Cal. 12/11/20); *Brandmeyer v. Regents of the University of California*, 2020 U.S. Dist. LEXIS 219766 (N.D. Calif. 11/10/20)). The outcomes in these cases appear to rest, in part, upon what documents the courts determine to have contractual significance, and whether specific promises to provide on-campus, in-person activities were made (see, for example, *Ford v. Rensselaer Polytechnic Institute*, 2020 U.S. Dist. LEXIS 236692 (N.D.N.Y. 12/16/20), in which the court rejected the college's motion for judgment on the pleadings because of what it considered to be promises to provide specific on-campus educational activities to students). In other cases, the institution's practice has been to charge lower tuition for online programs than for those delivered on campus (see, for example, *Martin v. Lindenwood Univ.*, 2021 U.S. Dist. LEXIS 135862 (E.D. Missouri 7/21/21)), which persuaded the court to deny the university's motion to dismiss.

The National Association of College and University Attorneys has compiled a list of these cases and their outcomes at <https://docs.google.com/spreadsheets/d/1Pa6UE77MuocHE7s-quLDsuxcyFnae0Gq/edit#gid=515069530>.

8.1.4. Student academic freedom.

Errata:

On *LHE6th* pp. 934-936, the discussion of the *Pompeo* case should read:

In a case arising in the same federal circuit as *Axson-Flynn*, a graduate student claimed that her professor and others had violated her First Amendment rights by criticizing a paper she had written in which she expressed negative opinions about lesbians. 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.” 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 met with her to discuss the difference between a thesis statement and an opinion, and told her she needed to rewrite the paper in order to get a grade.

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 supervisor attempted to work with the plaintiff to help her understand the need, in academic writing, to provide support for statements made, particularly controversial ones. The student refused to rewrite the paper and stopped attending the class. Although the university refunded her tuition for the course, she sued the professor and the supervisor, alleging violation of her First Amendment rights.

The trial court disagreed with 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, as stated in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (discussed in Section 6.2.2). Citing both *Brown v. Li* and *Axson-Flynn v. Johnson*, 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)

A second ruling by the trial court in 2015, however, awarded summary judgment to the individual defendants and the university. *Pompeo v. Board of Regents*, 2015 U.S. Dist. LEXIS 190134 (D.N.M. 9/22/15). The trial court, having the benefit of more information about the communications between the plaintiff and the defendant faculty members, as well as guidance from *Quinn v. Young*, 780 F.3d 998 (10th Cir. 2015), a case decided by the 10th Circuit after the trial court's first decision, ruled that the professors were protected by qualified immunity. (In *Quinn*, the 10th Circuit had ruled that a determination that a matter was "clearly established law" should not be made at a "high level of generality," but must rely on "cases of controlling authority," such as rulings by the 10th Circuit or the U.S. Supreme Court in a case with very similar facts.) The trial court in its previous ruling had relied on the *Axson-Flynn* case to find that a student's classroom speech was protected by the First Amendment. But under the teaching of *Quinn*, said the trial court in its second opinion, "Although *Axson-Flynn* most certainly clarified the law governing the first amendment rights of university students, it established fairly general principles, and its facts were materially distinguishable from the facts of the present case" [2015 U.S. Dist. LEXIS 190134 at *21-22]. The court explained:

Tenth Circuit law is unsettled as to the relationship between a finding that restrictions on student speech are reasonably related to legitimate pedagogical concerns and a finding that [the] instructor harbored subjective hostility to the student's viewpoint. There is no clear answer as to which finding controls liability under the First Amendment in a *Hazelwood* context. The Court concludes that the law as it existed in March and April of 2012 would not have provided Professor Hinkley with fair warning that she could be held liable for violating Plaintiff's First Amendment rights based on her subjective hostility to Plaintiff's homophobic speech even if the restrictions she imposed on

Plaintiff's speech were reasonably related to legitimate pedagogical concerns [2015 U.S. Dist. LEXIS 190134 at *23-24].

On appeal, the federal appellate court affirmed the award of summary judgment to the defendants. *Pompeo v. Board of Regents*, 852 F.3d 973 (10th Cir. 2017). The appellate court characterized the student's class work as "school sponsored speech," as discussed in *Hazelwood*, noting that "[r]egardless of the competing policy goals that might be considered in assessing whether school-sponsored speech should be restricted, *Axson-Flynn* does not clearly prohibit educators from restricting school-sponsored speech based on viewpoints that they believe are offensive or inflammatory" (852 F.3d at 986).

Turning to the defendants' claim that they were protected by qualified immunity, the court was required to determine whether, in fact, the alleged restrictions on the plaintiff's speech were related to legitimate pedagogical concerns. If so, then they would be protected by qualified immunity because their alleged conduct would not be unconstitutional under the *Hazelwood* precedent. The court noted that "it is unclear if courts should ask whether a defendant's actions were subjectively retaliatory or whether the retaliatory actions were objectively unrelated to a pedagogical goal. Nevertheless, under either standard, we conclude that the actions taken by Hinkley [the professor] and Dever [the supervisor] were sufficiently related to pedagogical goals that the claimed unconstitutional nature of their particular conduct was not clearly established" (852 F.3d at 987). The court continued:

From an objective standpoint, Hinkley's actions are related to legitimate pedagogical goals. Criticizing a student's paper, even in harsh terms, and asking her to rewrite it relate to the pedagogical goals of encouraging critical analysis, avoiding unsupported generalizations, and maintaining focus on assigned material rather than a student's

general opinions. And requesting a superior attend class to assist with a potentially disruptive student cannot be deemed unreasonable... Teaching students to avoid inflammatory language when writing for an academic audience qualifies as a legitimate pedagogical goal. (852 F.3d at 988–989)

The court concluded with language suggesting continued deference to the educators’ determination of appropriate pedagogical goals. “Our case law does not suggest that federal courts are in the business of determining whether a term is actually inappropriate for an academic audience, to the extent appropriateness can be objectively defined. Short of turning every classroom into a courtroom, we must ‘entrust[] to educators these decisions that require judgments based on viewpoint’” (852 F.3d at 989–990, quoting *Fleming v. Jefferson County School District*, 298 F.3d 918, 928 (10th Cir. 2002)).

Section 8.2. Admissions

8.2.4. The principle of nondiscrimination.

8.2.4.6. Immigration status. In *Estrada v. Becker*, 917 F. 3d 1298 (11th Cir. 2019), the U.S. Court of Appeals for the Eleventh Circuit upheld a policy of the Georgia Board of Regents that requires components of the University System of Georgia to verify the “lawful presence” in the U.S. of the students they admit. Several applicants to these universities who were protected by the DACA program (Deferred Action for Childhood Arrivals) sued the presidents of the universities (Georgia State University, Augusta University, the University of Georgia, and the Georgia Institute of Technology), claiming that because of their participation in the DACA program, they were lawfully present in the United States. The plaintiffs alleged that this policy violated the equal protection clause of the Fourteenth Amendment as well as the supremacy

clause. The trial court rejected all of the plaintiffs' claims, determining that DACA did not give them "lawful presence" in the United States, and thus the policy, as applied to them, did not violate the Constitution.

8.2.5. Affirmative action programs. A closely-watched challenge to the affirmative action process used by Harvard College for undergraduate admissions may be headed to the U.S. Supreme Court. In *Students for Fair Admission v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), a federal appellate court upheld the ruling of the trial court that Harvard's consideration of race and ethnicity in making undergraduate admissions decisions did not violate Title VI of the Civil Rights Act of 1964. In this case, Asian American students who had not been admitted to Harvard had claimed that they were better qualified academically than applicants who had been admitted, including applicants of color and white applicants, and that prejudice against their ethnic group was the basis for their rejection by Harvard. The plaintiffs claimed that using subjective criteria, such as the result of interviews by admissions staff or letters of recommendation from high school teachers or counselors resulted in stereotyping of Asian American applicants and resulted in less favorable admissions decisions. They also alleged that Harvard's practice of giving preference to the children of Harvard alumni, to student athletes, and to the children of donors further biased the admissions process.

The appellate court summarized the plaintiffs' claims:

SFFA asserts that Harvard fails to meet the Supreme Court's standards for the use of race in admissions which are asserted to be justified by diversity in these ways: (1) it engages in racial balancing of its undergraduate class; (2) it impermissibly uses race as more than a "plus" factor in admissions decisions; (3) it considers race in its process despite the

existence of workable race-neutral alternatives; and (4) it intentionally discriminates against Asian American applicants to Harvard College (Id. at *7-8).

The appellate court explained, as had the trial court below, that Harvard's admission process considered not only academic merit, but a variety of additional dimensions, such as "extracurricular and athletic activities, awards, parents' and siblings' educational information, parents' occupations and marital status, teacher and guidance counselor recommendations, intended field of study, personal statement, and additional supplemental essays or academic material. Some information -- like racial identity -- can, but need not, be submitted" (Id. at *13). Admissions staff reviewed applications and gave each applicant a rating from 1 to 6 (a 1 being the highest rating and 6 the lowest). Applicants were rated by admissions staff on academic ability and performance, involvement in extracurricular activities, involvement in athletics, the strength of the school counselors' and teachers' recommendations, personal characteristics (such as leadership or "likeability"), and an overall score. The results of alumni and admissions officer interviews with applicants were also used to evaluate applicants. Harvard also used a "tip" process that gave applicants additional consideration (a "tip") if they met one or more of these criteria: outstanding and unusual intellectual ability, unusually appealing personal qualities, outstanding capacity for leadership, creative ability, athletic ability, legacy status, and geographic, ethnic, or economic factors. Race could also give an applicant a "tip." In addition, applicants in the category of ALDC may also be given a "tip." ALDC applicants included recruited athletes, the children of Harvard alumni, applicants on the Dean's interest list (relatives of Harvard donors), and the children of faculty and staff. Although applicants in this ALDC category constituted five percent of all applicants, they constituted 30 percent of admitted students each year (Id. at *26).

The appellate court discussed Harvard's deliberations with respect to the importance of diversity to the education of its students as well as Harvard's attempts to use race-neutral criteria to make admissions decisions (both of which were featured in the U.S. Supreme Court's opinions in *Grutter* and *Fisher II*). In particular, Harvard examined its recruitment and financial policies and adjusted them to attract a more diverse pool of applicants, but concluded that these efforts without more would not produce the level of diversity that it believed was important to the educational experiences of its students. Furthermore, a Harvard committee evaluated the impact on admissions of eliminating the preferences for the ALDC group and concluded that it would have a negative impact on Harvard's ability to compete in intercollegiate sports, would discourage alumni from supporting Harvard financially, and would eliminate an important benefit for its employees.

The appellate court then turned to the findings of the trial court. First, the appellate court ruled that Harvard had met the strict scrutiny test of *Grutter* in that it had established that diversity was a compelling educational interest (Id. at *67) and also that its limited use of race in making admissions decisions was narrowly tailored. In its consideration of the narrow tailoring prong of strict scrutiny, the appellate court agreed with the trial court's ruling that Harvard did not use racial balancing (Id. at *70), did not use race as a "mechanical plus factor" (Id. at *79), and had not identified "workable race-neutral alternatives" to the consideration of race in admissions (Id. at *86).

The court then turned to the trial court's review and analysis of the extensive statistical evidence presented at trial, finding that the court's careful review and the inconclusive nature of the statistical results did not support the plaintiffs' claim that Harvard engaged in intentional

discrimination against Asian American applicants. Concluding that the trial court had not erred in its legal analysis of the case, the appellate court affirmed the ruling of the trial court.

The plaintiffs have petitioned the U.S. Supreme Court for certiorari. On June 14, 2021, the Court invited the Acting Solicitor General to “file a brief in this case expressing the views of the United States.” 2021 U.S. LEXIS 3003 (6/14/21). On December 8, 2021, the Solicitor General filed a brief as *amicus curiae* asking the Court to deny certiorari in the case. As of the end of December 2021, the Court had not announced whether or not it intended to grant review of the case.

* * * *

The former plaintiffs in the *Fisher* case (see LHE6th pp. 992-998) have once again sued the University of Texas at Austin, claiming that the university’s undergraduate admissions process “improperly considers race” in violation of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. *Students for Fair Admissions, Inc. v. University of Texas at Austin*, 2021 U.S. Dist. LEXIS 138349 (W.D. Texas, 7/26/21). The university filed a motion for summary judgment, which the court granted on the basis of res judicata.

Bibliographic entry:

Lorelle L. Espinosa, Jonathan M. Turk, Morgan Taylor, and Hollie M. Chessman. *Race and Ethnicity in Higher Education: A Status Report*. Washington, DC: American Council on Education, 2019; and *Race and Ethnicity in Higher Education: 2020 Supplement* (available at <https://www.acenet.edu/Research-Insights/Pages/Race-and-Ethnicity-in-Higher-Education.aspx>). According to its website, “the report and microsite offer a data-informed foundation for those

working to close persistent equity gaps, by providing a comprehensive review of the educational pathways of today's college students and the educators who serve them. . . The reports examine over 300 indicators and draw data from several principal sources, including the U.S. Department of Education, U.S. Bureau of Labor Statistics, U.S. Census Bureau, and non-federal organizations. These data provide a foundation from which the higher education community and its many stakeholders can draw insights, raise new questions, and make the case for why race still matters in American higher education.”

Section 8.3. Financial Aid

8.3.8. Collection of student debts.

8.3.8.1. Overview of federal bankruptcy law. A federal appellate court ruled that a trustee in bankruptcy could claw back two years of tuition payments made to Sacred Heart University. In *DeGiacomo v. Sacred Heart University*, 942 F.3d 55 (1st Cir. 2019), the court explained that the parents of a student at Sacred Heart University had made two years of tuition payments while legally insolvent, and had subsequently pled guilty to fraud. The appellate court reversed a summary judgment ruling for the university, stating that the parents themselves received nothing of value for the tuition payments, and that they were not legally required to pay tuition for an adult child.

8.3.8.2. Student loans and bankruptcy law. The U.S. Court of Appeals for the Second Circuit has affirmed a trial court ruling that private education loans are dischargeable in bankruptcy. In *Homaidan v. Sallie Mae, Navaient Solutions, et al.*, 2021 U.S. App. LEXIS 20934 (2d Cir. 7/15/21), the plaintiff, Homaidan, had taken out two private education loans from Sallie Mae,

Inc., which was acquired by Navient Solutions. The loans were not administered by the college's financial aid office and their proceeds covered more than tuition costs. Homaidan graduated from Emerson College and subsequently declared bankruptcy. Although the bankruptcy court discharged the loans, Navient sought to collect the loans, and Homaidan believed that he was required to repay them, which he did. At a later time, Homaidan commenced a proceeding against Navient to recover the amount of the loans he repaid.

Section 523(a)(8) of the federal bankruptcy law exempts from discharge loans in three categories: federal student loans, "an obligation to repay funds received as an educational benefit, scholarship, or stipend"; or a "qualified education loan" as defined by the Internal Revenue Service. Navient argued that the loan to Homaidan was an "educational benefit." The trial and appellate courts disagreed, saying that the language did not encompass a loan from a private party that was not limited to paying for educational costs, such as scholarships or grants. Therefore, the original ruling of the bankruptcy court was correct and the loans were dischargeable.

Section 8.3.6. Discrimination against noncitizens.

8.3.6.2. Undocumented students., In *Estrada v. Becker*, 917 F.3d 1298 (11th Cir. 2019), the U.S. Court of Appeals for the Eleventh Circuit upheld a policy created by the Georgia Board of Regents that requires Georgia's three most selective colleges and universities to verify that all students that they admit are lawfully present in the United States. Although DACA students are "lawfully present" in the United States under the terms of that program, the appellate court rejected their claims that the policy violated their right to equal protection, refusing to apply strict scrutiny to the Regents' policy and using the "rational basis" standard instead.

Several states have added in-state tuition benefits to undocumented students since LHE 6th was published. As of 2021, the following states had enacted laws enabling state institutions to offer in-state tuition to students: Arkansas (DACA only), California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, Virginia, and Washington.

Seven states offer in-state tuition to undocumented students who attend institutions in the state university system: University of Hawaii Board of Regents, Kentucky Council on Postsecondary Education, University of Maine Board of Trustees, University of Michigan Board of Regents, Ohio Board of Regents, Oklahoma State Regents for Higher education, and Rhode Island's Board of Governors for Higher Education.

Eleven states offer financial assistance to certain undocumented students, including DACA students: California, Connecticut, Hawaii, Maryland, Minnesota, New Jersey, New Mexico, New York, Oregon, Texas, Virginia, and Washington. National Conference of State Legislatures, *Tuition Benefits for Immigrants*, 2021, available at <https://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>

Bibliographic Entry: Michael A. Olivas, *Perchance to Dream: A Legal and Political Analysis of the DREAM Act and DACA*, NYU Press, (2020). Describes the legal and political history of the attempted passage of the DREAM Act and the creation of DACA.

Section 8.4. Student Housing

8.4.2. Discrimination claims.

Bibliographic Entry: Jeffrey J. Nolan, Samantha Sears, and Kristopher Caudle. “Emotional Support Animals in Higher Education: Challenging Scenarios and Proposed Solutions.”

NACUANote, Vol. 14, No. 4, January 10, 2019. Summarizes the state of the law and some of the public and scholarly discourse on emotional support animals; includes suggestions for colleges and universities that have a “no pets” policy.

Section 8.6. Campus Security

8.6.1. Security officers. The U.S. Court of Appeals for the Eighth Circuit has issued an opinion that discusses the standard that campus security officers must meet in order to avoid constitutional liability for detaining and searching minors on campus. The opinion is instructive for those administrators and police officers who must protect the rights of the camp participants.

In *T.S.H. et al. v. Green*, 996 F.3d 915 (8th Cir. 2021), two high school students were attending a summer football camp at Northwest Missouri State University. They were staying in a residence hall next door to a second residence hall being used to house participants in a summer cheerleading camp. A counselor at the camp accused reported that students in rooms in the adjoining residence hall had photographed her through their residence hall window and hers while she was changing her clothes. She filed a complaint with the University police, who contacted the camp coach. The coach gathered seven high school students who were staying in the relevant residence hall rooms and kept them in a room, requiring them to answer questions about the alleged photographing and reviewing photos on their phones. None of the players confessed and all were expelled from the football camps.

The students sued the police officers for violations of the First and Fourth Amendments, as well as statutory rights to due process and privacy, claiming that they were subject to an

unreasonable seizure because, they said, the coach was acting at the direction of the police officers.

The court concluded that the officers had behaved reasonably in that their belief that the players had violated either the law or the University's rules. For example, said the court, photographing a female coach could be a Title IX violation or a state law invasion of privacy violation. Referring to *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the court concluded that the officers were protected by qualified immunity.

Police and security officers are encountering an increase in student mental health crises which may play out on campus or in residence halls. In *Estate of Scott Schultz v. Board of Regents of the University System of Georgia*, 2021 U.S. Dist. LEXIS 149529 (N.D. Ga. 8/10/21), the parents of a student shot by a campus officer at the Georgia Institute of Technology brought a wrongful death lawsuit against the Regents and the involved police officer, claiming violations under the Americans With Disabilities Act and the Rehabilitation Act. The plaintiffs' primary claim was that campus police had not received sufficient training to appropriately handle students undergoing a mental health crisis. The trial court dismissed the claim, stating that the plaintiffs had not identified a university official whose behavior was deliberately indifferent to the need for additional training for campus police, which is a necessary showing under the law.

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Bibliographic Entry: Karen Courtheoux and Ben Irwin. Emergency Notifications and Timely Warnings: Ten Practical Suggestions Informed by Clery Act Enforcement." *NACUANotes*. Vol. 17 No. 7, June 14, 2019. Discusses and clarifies the decision-making process for issuing

emergency notifications and timely warnings to students and employees, identifying Department of Education enforcement patterns with respect to these warnings.

Section 8.8. Student Records

8.8.1. Family Educational Rights and Privacy Act. The U.S. Department of Health and Human Services and the U.S. Department of Education have issued “Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* And the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* To Student Health Records. December 2018 Update. The document is available at

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf

8.8.2. State Law. The battles between FERPA and state public records law continue. In *Cincinnati Enquirer v. University of Cincinnati*, 2020-Ohio-5279 (Ohio Ct. Cl. 10/13/20), The Cincinnati Enquirer had requested records from the university’s Title IX coordinator concerning a student. Some of the records had been made by the university’s law enforcement office. The university refused the request, stating that the law enforcement records were used in the Title IX investigation and thus became education records, protected from disclosure by FERPA.

The court determined that law enforcement records collected by or created by the university’s law enforcement office were not education records, and thus did not enjoy the protection of FERPA. The university was ordered to produce the law enforcement records and other public records under the state law’s definition to the newspaper.

* * * * *

The Utah state legislature has amended Utah’s Government Records Access and Management Act to apply to the police departments of private universities. UTAH CODE § 63G-2-103(11)(b)(vi) (2019).

* * * * *

A New Jersey appellate court has determined that under the state’s open public records act, a state university must provide to a student copies of his own education records and the employment records of various faculty and staff. In *Doe v. Rutgers, the State University of New Jersey and Casey Woods*, 245 A.3d 261 (N.J. Super. App. Div. 2021), the court interpreted the state’s Open Public Records Act (OPRA) as requiring the university to disclose records to the student that he was entitled to under FERPA, and that requiring him to use FERPA to obtain those records violated OPRA.

The Supreme Court of Kentucky has determined that the University of Kentucky violated the state’s Open Records Act (ORA) by declining to disclose records related to the assault by a faculty member on two graduate students. In *University of Kentucky v. The Kernel Press, Inc.*, 620 S.W.3d 43 (Ky. 2021), a student newspaper, the Kernel Press, had requested the complete investigation file related to the matter. While the University provided the newspaper with the accused professor’s personnel records, resignation letter, and separation agreement, it declined to provide the investigation file, citing concerns for the privacy of the two students, who had not been named in the student newspaper’s coverage. The University had stated that the entire file was protected by FERPA, and a trial court agreed. An appellate court and the Supreme Court of Kentucky, however, did not.

The court stated that the University’s determination that the entire file was exempt was flawed because the statute requires that “[f]or each document the University claims can be

properly withheld from production pursuant to the ORA, the University had the burden to prove that the document fits within an exception by identifying the specific ORA exception and explaining how it applies” (620 S.W. 3d at 56). The court noted that some of the files in the investigation record were not “directly related to the student” as defined by FERPA (for example, the University’s sexual harassment policy, the accused faculty member’s curriculum vitae), and that others, even those that contained student names, were not within FERPA’s definition of an education record. And while the court acknowledged that ORA contained an exemption that would protect the privacy of individuals, such as the two students, from public disclosure of their names, it noted that privacy interests do not necessarily prevail. Said the court, “Kentucky citizens have a strong interest in ensuring that public institutions, including the University, respond appropriately to accusations of sexual harassment by a public employee. To the extent the personal privacy exemption is claimed as to a particular document on remand, the trial court must balance that interest against the strong public interest in knowing how promptly and effectively the University handled this matter.” [Id. at 60] The court remanded the case to the trial court with instructions to the University to propose redactions of information from the file that could lead to the identification of the two students.

* * * * *

There have been further developments in the case brought by a journalist against the University of Montana (p. 1152 of LHE6th). In *Krakauer v. State*, 445 P.3d 201 (Mont. 2019), the Montana Supreme Court made a final ruling in the long-running case. The court ruled that the student who had been accused of sexual assault had a right of privacy that overcame the public’s interest in having details of his disciplinary case revealed. Even though the journalist

had publicly identified the student by name, said the court, his continued interest in privacy prevailed and redaction of the education record in this case would have been futile.

Chapter 9

Student Academic Issues

Section 9.2. Grading and Academic Standards

In *Nelson v. Spokane Community College*, 469 P.3d 317 (Wash. Ct. App. 2020), a student received a failing grade in a nursing class after the instructor concluded that the student committed plagiarism in the completion of an assignment. The student was not afforded a hearing to challenge the plagiarism charge or the sanction, with the school contending in litigation that the student was not entitled to a hearing because the action dealt with a grade assignment and, thus, was academic versus disciplinary in nature. A state appeals court, overturning the lower court, rejected this position, ruling that the student was entitled to an adjudicative hearing based on the college's conduct standards, the course syllabus, and nursing program standards.

Section 9.3 Online Programs

9.3.3. Student legal claims about online programs. Jurisdictional questions over students enrolled in online programs continue to arise. In *Smith v. Maryville University of Saint Louis*, 2019 WL 5967206 (D. Minn. 11/13/19), a federal district court rejected a claim by a student, Smith, that an institution based in Missouri could be sued in federal court in Minnesota, the student's home state, based on the following actions by the institution:

(1) [the university's] establishment of an Internet presence in Minnesota, including the purchase of advertisements that Smith alleges were directed at Minnesota and its provision of a unique username and password for Smith to use on Canvas; (2) the contract it formed with Smith via its online student handbook; and (3) the letters, emails, and Skype call exchanged between Smith and Maryville with regard to Smith's alleged violation of the academic integrity policy.

Stating that the student's claims raised issues of specific versus general jurisdiction, the court concluded that contacts between the student and the institution, which occurred online, were insufficient for purposes of specific jurisdiction. Additionally, in distinguishing cases relied upon by the student in which courts had asserted jurisdiction over online providers, *Perrow v. Grand Canyon Educ., Inc.* and *Watiti v. Walden University* (both covered in LHE6th Sec. 9.3.3), the court stated that in both those cases each institution had purposely availed itself of the forum by actively recruiting students in the state. In contrast, Smith did not allege that Maryville had actively recruited students from Minnesota. Instead, Smith had "reached out to Maryville to inquire about its program and to enroll." The court also rejected assertions that the student handbook, letters to the student, or a Skype call created sufficient contacts to assert jurisdiction over Maryville.

Staheli v. Adler University, 2021 WL 2075737 (D. Ariz. May 24, 2021), dealt with a lawsuit by a student from Arizona enrolled in an online doctoral program offered by an Illinois university with campuses in Illinois and Canada. The student initiated the lawsuit in Arizona, but the university argued that the action should be dismissed based on a lack of personal jurisdiction and with Illinois a more suitable forum. The court ruled that the university had sufficient contacts with Arizona so as to establish personal jurisdiction:

... [E]ven though Adler provides its services to students throughout the world, it nevertheless targets Arizonans. It lists specific resources for Arizona students on its webpage, currently educates 7 Arizonans via its online programs, and has multiple employees located in the state of Arizona. Moreover, it specifically targeted Ms. Staeheli, whom—as the evidence overwhelming indicates—it knew to be an Arizona resident, once it accepted her to its doctoral program. Third, Adler’s provision of allegedly racially discriminatory education services to Ms. Staeheli caused her harm, which Adler knew would likely be suffered in Arizona. In sum, Ms. Staeheli has met her burden on the “purposeful direction” prong. (*Staeheli*, 2021 WL 2075737 at *2)

Further, the court concluded that university had failed to offer convincing reasons as to why Illinois would still provide a more appropriate forum for the litigation.

Section 9.4. Academic Accommodations for Students with Disabilities

9.4.1. Overview. In a case with possible implications for students in medical programs—and potentially students in other fields who must take nationally administered standardized tests—a medical student sought a preliminary injunction against the National Board of Medical Examiners (NBME) after she was denied requested accommodations on a standardized test, Step 1 of the United States Medical Licensing Examination (USMLE) (*Ramsay v. National Board of Medical Examiners*, 968 F.3d 251 (3d Cir. 2020)). The test was required for the student to continue in her medical studies. The NBME had denied the student’s initial request for accommodations, and she failed by one point to obtain the required score on the test in taking it without the requested accommodations. In re-taking the exam, the student again requested accommodations, such as additional time to complete the exam and taking the examination in a

room with reduced distractions. The student had received these and other accommodations as a medical student from her institution. The student had been diagnosed as an undergraduate student with Attention Deficit Hyperactivity Disorder, migraine headaches, and “probable dyslexia.” Additionally, while in medical school, the student had been diagnosed with a blood clotting disorder that required medication.

In her initial request for an accommodation from NBME, the student had provided medical and educational records from high school and college. As shown in these records, the student had received accommodations in college and high school. In denying the first request for accommodations on Step 1 of the USMLE, NBME responded that, “Overall, the documents you provided do not demonstrate a record of chronic and pervasive problems with inattention, impulsivity, behavioral regulation, or distractibility that has substantially impaired your functioning during your development or currently.” Further, NBME responded that the student had been able to “progress through primary and secondary school” without “grade retention, evaluation, or services and with an academic record and scores on timed standardized tests sufficient to gain admission to college, all without accommodations.” In applying for accommodations for re-taking of the test, the student provided materials from additional assessments and other supporting evidence, but the NBME again denied several requests for accommodations, though based on the clotting condition, it did grant her additional break time, testing over a two-day period, and a separate testing room where she could stand, walk, or stretch. In appealing the decision, the student submitted documentation from an additional round of evaluation and assessment. The appeal and another request for reconsideration were denied by NBME, and the student sought a preliminary injunction to receive an accommodation of double time on the exam on the basis of Title III of the ADA and the Rehabilitation Act.

The NBME argued that the student's overall academic success, lack of formal accommodations earlier in her education, and general educational success, including on the ACT and MCAT, showed that she was not disabled under the ADA or the Rehabilitation Act. NBME also relied on the conclusions of two of its consultants, each of whom disputed the findings in evaluations submitted by the student. The NBME experts did not conduct independent evaluations of the student. The court stated that "while performance is unquestionably an important factor to consider, the Regulations make clear that it is not the *only* consideration. And, the record here does reflect that Plaintiff has a history of having struggled with reading, visual perception, focus and attention beginning at least in the first or second grade." The court noted that informal accommodations had been provided to the student in elementary school, such as use of an alphabet board, a seating assignment meant to reduce distractions, and allowing her to finish assignments during recess. Further, her academic struggles continued in middle and high school. In college, the student received a diagnosis of ADHE and of probable dyslexia, and requested accommodations during her college studies.

In deciding in favor of the student, the court concluded that the NBME had incorrectly had its experts focus on whether the student met the definition of a disability, with the court noting that, under the regulations, the definition of a disability should be interpreted "broadly in favor of expansive coverage." According to the court, NBME's experts, in "re-analyzing the results of the numerous diagnostic tests that were administered" to the student improperly "focused on whether Plaintiff met the definition of a disability, rather than whether the covered entity had complied with their obligations" under the ADA and Rehabilitation Act. Additionally, the court concluded that the NBME "either discounted or disregarded entirely the admonition to focus on 'how a major life activity is substantially limited, and not on what outcomes an

individual can achieve’ and apparently ignored the example that ‘someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.’ 29 C.F.R. § 1630.2(j)(4)(iii).” The court determined that the NBME’s “exclusive focus” on prior academic success and her performance on the ACT and MCAT without accommodations was “improper” as the NBME failed to consider other evidence provided by the student. Further, the court faulted NBME for failing to give any weight to previous accommodations that had been provided to the student. The court, granting the preliminary injunction, concluded that the student was a qualified individual with a disability for purposes of the ADA and that she had established the likelihood of harm—being forced to withdraw from medical school—if not granted the requested preliminary relief of double time on the exam. At the time of this update, NBME was appealing the ruling.

9.4.2. Requests for programmatic or other accommodations.

9.4.2.1. Domestic Programs. In *Gati v. Western Kentucky University*, 762 F. App’x 246 (6th Cir. 2019), a federal appeals court upheld a lower court ruling (see *LHE6th* pp. 1203-1204) in which the court determined that a university was not obligated under the ADA, the Rehabilitation Act, or the Kentucky Civil Rights Act (KCRA) to offer a disabled student enrolled in a master’s program the option of completing required residential courses offered at an institution’s main campus at either a satellite location or online.

A student claimed that she was impermissibly removed from a master’s of social work program for inappropriate conduct that occurred over a two-day period and that was caused by

bipolar disorder, but that did not involve violation of ethical or professional standards in the field or affect her work with clients (*Neal v. East Carolina University*, 2020 WL 5775145 (E.D. N.C. Sept. 28, 2020)). The court rejected this argument, stating that university employees based their decision on multiple instances of problematic conduct by the student in off- and on-campus settings. In upholding the university's dismissal of the student, the court concluded that the student's good academic standing in terms of course grades proved insufficient to overcome the institution's decision, noting that professionalism standards were important parts of achieving satisfactory performance in the social work program. Furthermore, the court rejected the student's arguments that she was removed from the program based on her disability on the basis of several faculty members noting in emails that she appeared to be suffering from some form of mental illness. Such conjecture by faculty members, without more, was insufficient to establish discrimination on the basis of a disability. Additionally, the court stated that misconduct, even if connected to a disability, can serve as the basis for removal from an academic program, as it did in this case. In *Neal v. East Carolina University*, 53 F.4th 130 (4th Cir. 2022), a federal appeals court, upholding the grant of summary judgment in favor of the defendant university, ruled that the university could dismiss the student from the social work program on professionalism grounds, such as excessive absences and concerning interactions with professors, despite the student earning satisfactory grades in courses. The court also upheld the district court's determination that the individual's dismissal from the program was not on the basis of a disability so as to support the former student's ADA claim.

In *Guess v. St. Martinus University*, 2021 WL 1387784 (E.D. Mich. April 13, 2021), a federal district court rejected a student's argument that Title III of the ADA should apply to a private medical school located outside of the United States. The plaintiff argued that Title III of

the ADA should apply because the institution also had a campus in the United States. However, the court, while noting that the same family owned both campuses, stated that each campus constituted a distinct legal entity. As such, it ruled that the medical school constituted a foreign university to which Title III of the ADA did not apply.

The U.S. Court of Appeals for the Ninth Circuit considered claims by blind students, who were also joined in the lawsuit by the National Federation of the Blind, who sued a community college district in Los Angeles for discrimination under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (*Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729 (9th. Cir. 2021)). While the students were granted some accommodations, they still reported encountering accessibility problems. The court held that the plaintiffs could pursue disparate impact claims through a private cause of action under Title II of the ADA and Section 504. In doing so, the court considered the U.S. Supreme Court’s decision in *Alabama Department of Public Safety v. Sandoval*, 532 U.S. 275 (2003), where it held that no private right of action existed under Title VI of the Civil Rights Act of 1964 to pursue a claim of race discrimination based on disparate impact instead of a claim of intentional discrimination. The appeals court differentiated the ADA and Section 504, stating in its opinion that these laws did “not create an analogous limitation on disparate impact disability discrimination claims. *Sandoval*, therefore, does not upset the historical understanding that Section 504 and the ADA were specifically intended to address both intentional discrimination and discrimination caused by ‘thoughtless indifference’ or ‘benign neglect,’ such as physical barriers to access public facilities” (*Payan*, 11 F.4th at 736-37). The court also ruled, in response to arguments from the community college district, that the lower court erred in limiting all of the students’ claims to disparate impact. According to the court, a “disability discrimination claim may be

based on “one of three theories of liability: disparate treatment, disparate impact, or failure to make a reasonable accommodation” (*Payan*, 11 F.4th at 738). The court, remanding the case to the lower court, held that some of the claims should have been considered by the lower court on an individual failure to accommodate framework and others using a disparate impact framework.

Brown University entered into a settlement agreement with the U.S. Department of Justice pertaining to a compliance investigation that dealt with the denial of readmission to students who took leaves of absences from the university for mental health reasons as a violation of Title III of the ADA (https://www.ada.gov/brown_sa.html). As part of the settlement agreement, the university revised its medical leave policy and agreed to provide additional training for staff. The institution also agreed to provide \$684,000 in compensation for individuals identified by the Department of Justice who had been denied their readmission request following a leave taken on mental health grounds.

9.4.2.3. *Online programs.* The National Association of the Deaf (NAD) entered into a consent decree with Harvard University to resolve a class action lawsuit brought against the university (for the consent decree, see <https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf>; see also “Settlement Caption Requirements,” Harvard University, <https://accessibility.huit.harvard.edu/settlement-caption-requirements>). A federal court had earlier refused to dismiss the case against Harvard for a second time, as well as a similar suit against MIT (Lindsay McKenzie, “Legal Battle over Captioning Continues,” *Inside Higher Ed*, April 8, 2019, available at <https://www.insidehighered.com/news/2019/04/08/mit-and-harvard-fail-get-out-video-captioning-court-case>).

As part of the consent decree, Harvard adopted a Digital Accessibility Policy that requires that university websites created on or substantially revised on or after December 1, 2019, will comply with the Worldwide Web Consortium’s Web Content Accessibility Guidelines version 2.1, Level AA Conformance (for these standards, see <https://www.w3.org/WAI/standards-guidelines/wcag/>). The agreement with Harvard covers such accessibility steps as the captioning of videos posted on university websites. The consent decree specified that content covered under the agreement included audio or video content produced by university sponsored student organizations, content in massive open online courses (MOOCs), content “created and produced at Harvard and posted ... on the official YouTube channel” and other third party platforms such as Vimeo, and the captioning of “legacy” content (i.e., produced before December 1, 2019) within two years of the execution of the consent decree or earlier if based upon a specific user request. Under the agreement, Harvard also agreed to provide “industry-standard live captioning for University-wide events,” such as commencement, that it would create a process for individuals to submit a captioning request, and that the university will “‘strongly urge’ all community members, including students, to: (1) caption all videos they create at the time they are produced, (2) caption all videos they post on third-party platforms; and (3) post content only on accessible third-party platforms.”

As covered in *LHE6th* pp. 1207-08, the National Federation of the Blind (NFB) has also supported plaintiffs in challenging the online accessibility for students. In *Payan v. Los Angeles Community College District*, 2019 WL 218138 (C.D. Cal. 5/21/19), the NFB joined with two students who are blind in successfully challenging the inadequacy of several accessibility accommodations under Title II of the ADA, including access to the college’s website, the

college's library electronic database, and a handbook used in a class that was not available in an electronic format.

In a later order, 2019 WL 3298777 (C.D. Cal. 7/22/19), the court ordered the community college to implement multiple corrective actions, including: (1) taking action to ensure that available library resources are “fully accessible to blind students,” (2) appointing or designating a dean of educational technology, (3) ensuring accessibility of the college's website for blind students, and (4) ensuring that educational resources purchased or licensed from third party vendors are accessible to blind students or that alternatives are made available to students in a “timely manner,” such as before or at the same time as for sighted students. For more on issues involving making digital course materials available to students with disabilities, see Lindsay McKenzie, “the Digital Courseware Accessibility Problem,” *Inside Higher Ed*, Dec. 2, 2019, available at <https://www.insidehighered.com/digital-learning/article/2019/12/02/professors-colleges-and-companies-struggle-make-digital>.

With applicability to online content that includes online courses and also extends to online contexts outside of course offerings, the U.S. Department of Justice's Civil Rights Division issued guidance in March 2022 on web accessibility under the ADA (<https://beta.ada.gov/resources/web-guidance/>). The guidance lists examples of accessibility barriers, such as having no captions on videos or using color alone to provide information, and guidelines that can be followed to make sure that web content is accessible under the ADA.

The University of California at Berkeley entered into a consent decree with the federal government regarding “free online courses, lectures, and other campus events in video and audio formats” hosted by the university (see <https://www.justice.gov/opa/press-release/file/1553291/download>). The National Association of the Deaf filed a complaint with the

U.S. Department of Justice’s Civil Rights Division alleging that various online material provided by UC-Berkeley violated Title II of the ADA by being inaccessible to individuals who are deaf or hard of hearing. The consent decree applied to content that included the MOOCs platform operated by the university, Berkeley X, and to content that was created or maintained by third parties, such as podcasts, but controlled by a Berkeley entity covered in the consent decree. The agreement did provide that UC-Berkeley would not be held in violation of the decree if a third-party did not have the technical capability to be made compliant with the decree, with it noted in the document, for example, that YouTube did not support audio description at the time the consent decree was issued. The consent decree covered measures that UC-Berkeley would undertake to formulate applicable standards and policy, make content accessible, procedures for individuals to report issues, and to provide for the auditing of university online content for accessibility.

Section 9.5. Sexual Harassment of Students by Faculty Members

A student in social studies education program claimed that an institution had or should have had notice of a faculty member’s sex discrimination against the student but failed to adequately respond to or investigate the student’s complaints (*Mosier v. State University of New York*, 2020 WL 42830 (E.D. N.Y. 1/2/20)). The student had lodged a complaint with other faculty member’s over the professor’s alleged conduct that was relayed to the institution’s Title IX office. The university contended that it had taken action and informed the student six months after her complaint that the allegations had been substantiated. For purposes of summary judgement, the court refused to dismiss the student’s Title IX claims based on allegations that the university was aware of the potential of the professor to sexually discriminate against students

and the claim that the response period of six months could constitute deliberate indifference. The court stated that discovery should be allowed to continue regarding what ameliorative steps were taken after the student had complained of the professor's actions and while he remained the faculty director for the program in which she was enrolled.

In *Bose v. Bea*, 947 F.3d 983 (6th Cir. 2020), a federal appellate court rejected a former student's efforts to use a "cat's paw" theory to establish institutional liability under Title IX based on claims that a professor had threatened to make a student appear before an honor council in retaliation for rejecting the professor's sexual advances. While the student was expelled for academic misconduct, the court stated that the former student had not established a "discriminatory motive" on the part of the institution and would not impute the professor's alleged discrimination to the college. The appeals court, reversing the lower court, did conclude that the student's claims based on defamatory statements made by the professor in the honor council hearing could proceed. As the matter took place at a private institution, the court rejected the argument that the professor's comments made in the hearing satisfied the public benefit requirement to qualify for an absolute privilege under Tennessee law.

In *Wamer v. University of Toledo*, 27 F.4th 461 (6th Cir. 2022), a federal appeals court ruled that in instances involving teacher-student harassment that additional instances of harassment are not required to sustain a Title IX claim. In doing so, the court refused to apply the standard announced in *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2020) (see Section 14.5.3.3. of this update), which dealt with peer sexual harassment. Besides showing additional instances of harassment as able to sustain a Title IX claim in the context of harassment by an employee, the court in *Wamer* ruled that a student could also show the existence of "an objectively reasonable fear of further harassment caused the plaintiff to take

specific reasonable actions to avoid harassment, which deprived the plaintiff of the educational opportunities available to other students.”

In granting three cases for review involving Title VII and discrimination in employment on the basis of sexual orientation or transgender status, the U.S. Supreme Court also shed light on continuing questions over the applicability of Title IX to claims based on sexual orientation or gender status. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), discussed in Section 5.3.8 of this Update, the U.S. Supreme Court, considering the three cases together, held that Title VII’s prohibitions against sex discrimination applied to individuals who are homosexual and to individuals who are transgender. *Bostock* is important in relation to Title IX, since courts typically interpret the statutes in a similar manner, which could affect claims by students involving faculty members.

Faculty members accused of sexual harassment or assault may be encouraged to challenge discipline or dismissal under Title IX because another federal circuit court has held that employment discrimination claims can be brought under Title IX as well as under Title VII. See the discussion of *Vengalattore v. Cornell University* in Section 5.2.3 of this Update.

Section 9.6. Academic Dismissals and Other Academic Sanctions

9.6.2. Contract issues and fiduciary duty issues. An Ohio appeals court, reversing the lower court, held that summary judgment against a student who had been dismissed from a PhD program and challenged the dismissal on contract grounds and unlawful age discrimination was inappropriate (*Grubach v. Univ. of Akron*, 2020 WL 3469691 (Ohio Ct. App. June 25, 2020)).

The court decided that the student raised credible factual issues as to whether professors deviated from “accepted academic norms and did not exercise professional judgment” in failing the

student on a comprehensive examination. In particular, one professor, after consulting with other faculty members, changed his grade from pass to fail on the comprehensive examination. The student, who was in his sixties, claimed that the actions taken against him were motivated by ageism. The court also reinstated a claim by the student that he was denied the grievance procedures laid out in the student handbook.

A student dismissed from a neuroscience PhD program at the University of Utah asserted claims against the university that included breach of contract, breach of the covenant of good faith and fair dealing, and negligence (*Rossi v. Univ. of Utah*, 496 P.3d 105 (Utah 2021)). The Supreme Court of Utah affirmed the dismissal of all three claims on summary judgment. The student was dismissed from the program after she failed her dissertation defense and did not satisfy standards set forth in a remediation plan. During this period, the student filed an internal university grievance. In considering the breach of contract claim, the court stated:

... [W]e expressly acknowledge that a university likely does have a contractual relationship with its students to some degree. ... Our holding is thus more limited. We simply reject the notion of a blanket rule establishing that all formal university documents are enforceable in contract. And we hold that the question of the enforceability of any university document under the law of contract depends on whether the terms of the document can be shown to amount to a legally enforceable promise made in exchange for a promise or performance by a student” (*Rossi v. Univ. of Utah*, 496 P.3d at 111-12).

If express language in relevant documents does not resolve the contract question, the court stated that “any ambiguities may be resolved by reference to a course of dealing or established practice in a university community” (*Rossi v. Univ. of Utah*, 496 P.3d at 113). The court reviewed multiple documents and policies—a policy from the student code contained in the university catalog, the faculty code, the institutional conflict of interest policy, the institutional research misconduct policy, a policy on academic standards by the neuroscience program, a “compact” signed between the student and her advisor, and the remediation plan letter—that the student claimed served to establish a basis to enforce her contract claims. As to the catalog, the court noted that it contained an express provision that the catalog did not constitute a contractual relationship between the student and the university. In relation to the other documents and policies, the court concluded that none established an enforceable contractual relationship between the student and the university as to the claims asserted. Similarly, in rejecting the breach of covenant of good faith and fair dealing claim, the court held that the student failed to connect this claim to any specific contract provision or “identified any basis for her claim in the parties’ ‘course of dealings or settled custom or usage of trade’” (*Rossi v. Univ. of Utah*, 496 P.3d at 118). In relation to the negligence claim, the court rejected the student’s request “to establish either a fiduciary duty of educators to students or a duty based on a special relationship between educators and students” (*Rossi v. Univ. of Utah*, 496 P.3d at 118). The court did clarify that it was not holding that a tort duty could never arise in a university setting, such as “a duty to avoid an unreasonable risk of physical harm to students they interact with in certain circumstances” (*Rossi v. Univ. of Utah*, 496 P.3d at 119). While the student’s state court claims were unsuccessful, in a separate federal legal action involving the student’s dismissal from the PhD

program, a federal district court allowed several claims by the student to proceed, including ones based on procedural due process (see section 9.6.3, below).

9.6.3. Constitutional issues. A federal appellate court rejected a student's claims that a university violated his due process and equal protection rights for dismissing the student for cheating on an exam when the student had submitted evidence, including from two experts, that he did not cheat or plagiarize on the final exam (*Patel v. Texas Tech University*, 941 F.3d 743 (5th Cir. 2019)). Rejecting the student's claims, the court stated that under cases such as *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), a court should extend substantial deference to the review of academic decisions. The court added that this "exceedingly narrow scope for judicial review of academic decisions applies to both due process and equal protection claims."

The issue of professionalism and student speech rights was addressed in *Hunt v. Board of Regents of University of New Mexico*, 2019 WL 60003284 (10th Cir. 11/14/19). A medical student was subjected to discipline under the professionalism standards for the medical school based on comments he made on his personal Facebook page deriding individuals who supported the Democratic party or its candidates. The student was placed on and successfully completed a "professionalism enhancement prescription," which consisted of working with a series of faculty mentors. In refusing to reverse a lower court's determination that administrators at the university were entitled to qualified immunity, the court noted the unsettled nature of the law concerning the legal standards applied to the off-campus speech of graduate students at public colleges and universities:

... [D]ecisions from our court and other circuits have not bridged the unmistakable gaps in the case law, including whether: (1) *Tinker* applies off campus; (2) the on-campus/off-campus distinction applies to online speech; and (3) *Tinker* provides an appropriate framework for speech by students in graduate-level professional programs, such as medical schools, *cf. Salehpoor v. Shahinpoor*, 358 F.3d 782, 787 & n.5 (10th Cir. 2004) (applying the public-employee analysis to speech by a graduate-level engineering student). (2019 WL 6003284, at *8)

Professionalism standards and student speech were also at issue in *Felkner v. Rhode Island College*, 203 A.3d 433 (R.I. 2019). In the case, a master's student in social work program secretly tape recorded a conversation with a professor and then posted a "rough" transcript of the conversation to a website that he had created. The professor initiated a complaint against the student on the grounds that the surreptitious recording of their conversation violated professionalism standards that applicable to students in the social work program. After a committee found the student in violation of relevant professionalism standards because of the recording, the student pledged that he would no longer record his social work colleagues without consent. Another dispute later arose over program officials rejecting the student's plans to complete a field placement in the Rhode Island's governor's office working on welfare reform, but the placement was eventually approved.

Amid ongoing disputes with program faculty and officials, the student filed a lawsuit in which, among his claims, he argued that he had been deprived of his free expression rights, had been subjected to unconstitutional conditions as a requirement of being able to continue in the program, and had suffered retaliation for his political views

and for criticizing the institution for having a liberal bias. In an amended complaint, the student also argued that the school had violated his procedural due process rights in its handling of the complaint over the secret recording. Reversing the lower court, the Supreme Court of Rhode Island ruled that, at this stage of litigation, sufficient evidence existed in the record for a factfinder to consider whether the actions taken against the student “were truly pedagogical or whether they were pretextual.” 203 A. 3d at 450. The court also reversed the lower court’s summary judgment in favor of defendants on the student’s retaliation claim, compelled speech claim, and unconstitutional conditions claim.

A federal district court refused to dismiss claims from a PhD student that he was dismissed from his program without sufficient due process (*Plumb v. Univ. of Utah*, 2020 WL 7249733 (D. Utah Dec. 9, 2020)). While the student did not distinguish between substantive and procedural due process violations in his claims, the court stated that he alleged sufficient facts to state claims that both forms of due process had been violated. The court noted that a committee had reinstated the student to the program after it decided that appropriate institutional procedures had not been followed in an initial dismissal of the student. However, faculty members then failed to engage the student in a meaningful manner to help him satisfy academic requirements. As to procedural due process, the court agreed with the institution that the student was not entitled to a hearing since his dismissal was for academic reasons, but faculty members and administrators failed to provide the student with sufficient information regarding academic deficiencies and required corrective action on the part of the student.

For a recent case in which a federal appeals court upheld summary judgment against an undergraduate student who claimed that a failing grade in an accounting course violated procedural and substantive due process, see *Lambert v. Board of Trustees*, 793 F. App'x. 938 (11th Cir. 2019).

A student was expelled from a dental-hygiene program two month before graduation after telling a professor that she had made mold impressions of two patients' teeth at her home outside of a clinical setting (*Worcester v. Stark State College*, 860 F. App'x. 460 (6th Cir. 2020)). The professor reported the student's actions and shortly after the school informed the student of her dismissal from the program. The student initiated a lawsuit, claiming that the institution violated her due process rights by failing to adhere to its own procedures before dismissing her. The appeals court, in denying the student's Section 1983 claim, stated that she had failed to identify a custom or policy on the part of the school that resulted in the alleged injury.

A federal district court ruled that enrollment in a PhD program was a constitutionally protected property interest, a position it stated was supported by Tenth Circuit precedent and Utah law (*Rossi v. Univ. of Utah*, 2020 WL 2134217 (D. Utah May 5, 2020)). Thus, the student was entitled to procedural due process protections when the university removed her from the PhD program. The court, while noting that that the student was dismissed for a mix of academic and disciplinary reasons, concluded that academic reasons were the primary driver of the dismissal. Since the reasons for dismissal were primarily academic, the court ruled that the student was not entitled to a pre-termination hearing, with the student having received adequate notice, including a failed dissertation hearing, that her academic performance was not acceptable. The court also considered whether, as an academic decision, the decision to dismiss the student

from the PhD program reflected careful and deliberation consideration. While dismissing multiple claims by the student against the institution and individual faculty members, the court ruled that at the current stage of litigation, several claims could proceed, including claims that the student’s substantive due process rights had been violated in inappropriately dismissing her from the program. As covered in updates in this document for Sec. 9.6.2 (see above), the student unsuccessfully pursued contract and tort claims in state court, with the dismissal of these claims affirmed by the Supreme Court of Utah.

The appellate court rejected the trial court’s rulings for the student (*Rossi v. Dudek*, 2022 U.S. App. LEXIS 12142 (10th Cir. May 5, 2022), finding that she had received sufficient due process protections—both substantive and procedural—on her property right claim. Said the court,

[t]he parties suggest that the procedural and substantive due process standards are effectively the same in a case like this, as Rossi alleges she was dismissed for impermissible reasons. . . . We agree, so we analyze Rossi's due process challenges together, focusing on whether it was clearly established that the decision to dismiss her was anything other than careful and deliberate. We conclude that, because the University provided an extensive administrative appeals process which Rossi does not directly charge with bias, Rossi cannot show that her clearly established rights were violated (Id. at *23-24).

The appellate court also reversed the trial court’s denial of sovereign immunity to the faculty members who served on her dissertation committee. Although the appellate court stated that the appeals committee had given some deference to the dissertation committee’s evaluation of Rossi’s work, rather than making its own determination as to its quality, the court explained that “It was not clearly established that an administrative appeals process fails to produce a careful

and deliberate decision just because it may not have involved de novo review of all aspects of an academic determination that is alleged to have been based on nonacademic factors” (Id. at *29).

A student challenged his failure in a course after he was accused of cheating on an exam and an honor panel found the student in violation of institutional rules (*Byerly v. Virginia Polytechnic Institute and State Univ.*, 2019 WL 6684523 (W.D. Va. Dec. 6, 2019)). The student received a failing grade for the course and was not refunded any tuition or fees. In dismissing a second amended complaint by the student, the court ruled that the student had failed to establish a protected property or liberty interest to challenge the failing grade on due process grounds.

In *Texas Southern University v. Villarreal*, 620 S.W.3d 899 (Tex. 2021), a law student who was dismissed for failing to maintain a 2.0 or higher GPA challenged the dismissal as violating various rights, including his procedural and substantive due process rights under the Texas constitution. In its opinion, the Texas Supreme Court stated that the lower court had incorrectly concluded that the student had a protected liberty interest in his graduate education. Instead, according to the court, prior cases had focused on “whether dismissal from a university interferes with the student’s liberty interest in his or her reputation and employability, not on whether education is a protected liberty interest” (*Villarreal*, 620 S.W.3d at 905). Further, “In deciding whether a dismissal from government employment or education amounts to the deprivation of a liberty interest under the due process clause of the U.S. Constitution, the U.S. Supreme Court looks to whether the dismissal imposes a stigma” (*Villarreal*, 620 S.W.3d at 905) (looking to U.S. Supreme Court cases as nonbinding but persuasive authority in interpreting due process standards under the Texas constitution)).

The court pointed to student dismissals as generally based on either academic or disciplinary grounds. As to disciplinary grounds, the court noted:

Courts frequently conclude that disciplinary suspensions and dismissals carry sufficient stigma to implicate a protected liberty interest. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 575, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975) (concluding that suspension from public high school for disruptive or disobedient conduct “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment”); *Doe v. Miami Univ.*, 882 F.3d 579, 599–600 (6th Cir. 2018) (holding suspension of student for sexual misconduct impacted his reputation). (*Villarreal*, 620 S.W.3d at 906)

In relation to academic dismissals and the issue of stigma, the court offered the following assessment:

Whether an academic dismissal gives rise to sufficient stigma has received less attention, but the cases identify some relevant considerations. In *Horowitz*, the plaintiff was dismissed from medical school for academic deficiencies. The Supreme Court placed some emphasis on evidence that the reasons for her dismissal were not publicly released, but it ultimately declined to decide whether she was deprived of a liberty interest. Rather, it assumed the existence of a protected interest and concluded that the plaintiff had been afforded sufficient process. . . .

In [*University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)] [see *LHE 6th* p. 1254] we [the Texas Supreme Court] used the [U.S.] Supreme Court’s stigma framework to examine due course of law protection for a student

dismissed from a state university. We held that a dismissal for disciplinary reasons implicated a protected liberty interest under the Texas Constitution. Citing *Roth*, we focused on the stigma associated with Than's dismissal and its impact on his future in the profession. (*Villarreal*, 620 S.W.3d at 906)

Determining that the student's dismissal was on academic grounds, the court stated:

We conclude that unlike a disciplinary dismissal, the fact of dismissal for academic reasons does not "seriously damage" a student's reputation for honor or integrity. *See Roth*, 408 U.S. at 573, 92 S.Ct. 2701. Nor does Villarreal allege that the School disclosed reasons underlying the dismissal or other information that would harm his good name. *See Bishop v. Wood*, 426 U.S. 341, 348–49, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (holding fact of police officer's dismissal from employment did not impact his reputation where reasons for discharge were not publicly disclosed). In addition, Villarreal was free to apply for readmission to the School after two years or to seek admission to another law school. To be sure, dismissal from an academic institution may create practical difficulties for a future academic or professional career. But proof that an academic dismissal for poor performance made an individual somewhat less attractive to other institutions or employers would not demonstrate stigma. *See Roth*, 408 U.S. at 574 n.13, 92 S.Ct. 2701 ("Mere proof, for example, that his record ... might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'").

Finally, it is unclear what remedy a court could offer Villarreal. As we discuss further below, courts are ill equipped to evaluate the academic judgment of professors and universities. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 88

L.Ed.2d 523 (1985). Presumably Villarreal wants the School's response to the cheating scandal adjusted in some way, but he does not explain how. And we cannot see how additional discovery, which Villarreal mentions in his brief, would provide clarity. For these reasons, we hold that Villarreal's allegations regarding his dismissal do not establish that the School deprived him of a liberty interest protected by the Texas Constitution's due course of law clause. (*Villarreal*, 620 S.W.3d at 907-908 (footnote omitted))

The court next turned to the issue of the student's claims of a property interest and due process rights. As to procedural due process rights, the court ruled that the student had received a sufficient level of process:

Here, Villarreal undisputedly had notice that the School's Rules and Regulations required him to maintain a 2.0 grade point average to continue. And he was given multiple opportunities to appeal his grade and, ultimately, his dismissal. The dean advised students of the opportunity to contest their criminal law grades individually. Villarreal failed to do so. He proceeded to file multiple, admittedly late petitions with the Academic Standards Committee. The committee reviewed and denied his first petition. Villarreal then met with the committee and the dean after filing his second petition, which was later denied. And he was afforded the opportunity to re-enroll after a two-year waiting period. We conclude as a matter of law, therefore, that Villarreal received adequate procedural due course of law in connection with his dismissal. (*Villarreal*, 620 S.W.3d at 909)

On the issue of a substantive due process right connected to his law school education, the court ruled that "Because our [Texas] Constitution does not recognize higher education as a fundamental right, ...Villarreal's alleged property right does not fall within any substantive

protection provided by the due course of law clause” (*Villarreal*, 620 S.W.3d at 909). Further, the court added:

Unlike the U.S. Constitution, our Texas Constitution is quite lengthy and frequently amended. When Texans want to provide substantive constitutional protection for educational rights, they are not shy about saying so expressly....

If the people of Texas want a fundamental right to higher education, they can create one by amending our Constitution. It is not our role as judges to adopt such a right for them. As a matter of Texas constitutional law, therefore, we decline to recognize substantive protections for educational rights that emanate implicitly from the due course of law clause.

For these reasons, we conclude that Villarreal is not entitled to substantive due course of law protection for any property right in his continued education, and that he received the procedural protections due in connection with his dismissal. Therefore, Villarreal’s allegations do not establish that the School deprived him of a protected property interest without due course of law. (*Villarreal*, 620 S.W.3d at 909-910) (footnote omitted))

An incarcerated individual alleged that he was dismissed from an educational program operated by the University of Michigan in violation of his due process rights and on the basis of impermissible viewpoint discrimination (*Davis v. Regents of Univ. of Michigan*, No. 19-12121, 2021 WL 2885806 (E.D. Mich. July 9, 2021)). A federal district court upheld a magistrate judge’s recommendation and report that the claims should be dismissed. The student was dismissed from the program for submitting written assignments that were deemed to give inappropriate attention to an instructor in the program. In accepting the recommendation, the court agreed that the individual’s First Amendment claims related to student speech had to be

considered in the context of instruction in a correctional setting. As such, the instructor was entitled to substantial deference in concluding that the written assignments were inappropriate.

In *Babinski v. Queen*, No. CV 20-426-SDD-EWD, 2021 WL 4483061 (M.D. La. Sept. 29, 2021), the court denied in part and granted in part a motion to dismiss in a lawsuit brought by a PhD student claiming that he was dismissed from theater program for writing a class paper that was critical of the program and of the course for which the student submitted the paper. A referral was made to the university police and the student conduct office over the paper, but no security violation or conduct violation was determined to have taken place in regard to the class paper. The defendants argued that the paper should be subject to the standards from *Hazelwood School District v. Kuhlmeier* as it was written as part of class assignment. However, the court agreed with the student that the paper should be subject to the standards from *Tinker v. Des Moines Independent Community School District*, as the student's paper could not be perceived as bearing the imprimatur of the university. Furthermore, even if *Hazelwood* applied, the court stated that the student had plausibly alleged that the expulsion was not related to a legitimate pedagogical purpose. The court ruled that the student had stated a claim for First Amendment retaliation. Other claims based on due process, equal protection, and conspiracy were dismissed.

9.6.4. Discrimination issues. A nursing student alleged that she was improperly placed on academic probation and then dismissed from a nursing program based on faculty members' knowledge that she had previously been an adult model and actress (*Gililand v. Sw. Oregon Cmty. Coll. Dist.*, No. 6:19-CV-00283-MK, 2021 WL 5760848 (D. Or. Dec. 3, 2021)). The institution countered that the student was placed on academic probation for plagiarism and then dismissed from the program for failing required nursing courses. The student brought claims

based on Title IX, breach of contract, and intentional infliction of emotional distress. The court declined to dismiss the Title IX claim against the institution on the basis of gender stereotypes and pointed to an alleged statement by one of the instructors that the nursing profession was only appropriate for “classy” women. However, the court held that Title IX did not permit claims against individuals in their individual capacity. The court allowed the breach of contract claim to proceed based on the student’s allegations, such as holding the student to standards and treatment different from other students, and the existence of a contract between the institution and the student based on the institution’s discrimination and harassment policy and nursing student handbook. As to the infliction of emotional distress claim, the court ruled that the student’s allegations were not so “extreme or outrageous” as to support this claim.

In a superseding opinion, the U.S. Court of Appeals for the Ninth Circuit—in a case in which it upheld a lower court’s decision granting summary judgment to a university accused of discriminating against a Chinese international student on the basis of national origin—clarified that it did not address whether implicit bias could be probative or serve as evidence of intentional discrimination under Title VI (*Yu v. Idaho State Univ.*, 15 F.4th 1236 (9th Cir. 2021)). In its earlier opinion, the court had noted that the trial court had not committed error in considering expert testimony on implicit bias.

Chapter 10

Student Disciplinary Issues

Section 10.1. Disciplinary and Grievance Systems

10.1.3. Codes of conduct. A federal appeals court, in *Doe v. Valencia College*, 903 F.3d 1220 (11th Cir. 2018), upheld the lower court ruling in *Koeppel v. Romano*, 252 F. Supp. 3d (1310)

(M.D. Fla. 2017), a case noted in *LHE6th* p. 1279, that a college could discipline a student for harassing text messages sent off campus to another student.

10.1.4. Judicial systems.

Considering claims by a student expelled for sexual misconduct, a federal district court rejected the argument that the student was entitled to have legal representation in a student disciplinary proceeding. *Doe v. Northern Michigan University*, 393 F. Supp. 3d 683 (W.D. Mich. 2019). The court stated that the U.S. Court of appeals had

recognized only two scenarios in which an accused student *may* have a constitutional right to counsel in an academic disciplinary proceeding: (1) if the hearing is unusually complex or (2) when the university uses an attorney in the investigation or decision-making process... Neither scenario is present here. (393 F. Supp. 3d at 695)

The court did, however, decide that the student had sufficiently alleged other deficiencies to avoid dismissal of all the student's claims.

Section 10.2. Disciplinary Rules and Regulations

10.2.2. Public institutions. A case involving a nursing student, *R.W. v. Columbia Basin College*, No: 4:18-CV-5089-RMP (E.D. Wash. 10/4/19), dealt with a student's off-campus comments to a mental health worker about homicidal thoughts toward faculty members in the nursing program. Following the individual's discharge from voluntary inpatient counseling and evaluation, the mental health professional believed that she had a duty to warn regarding the student's homicidal thoughts. She contacted the local police department, which in turn contacted the college's campus security. The college's campus conduct office was also informed. The student was

barred on an interim basis from campus, and, following a conduct proceeding, was issued a trespass order until he could gain readmission to the nursing program, participate in counseling, and complete a mental health evaluation.

The student challenged the college's actions as impermissible on First Amendment grounds. The college argued that the "school violence" cases developed under the *Tinker* standards (see *LHE6th* Sec. 10.4.1) should apply to the student's speech. The court rejected this argument, stating that while the U.S. Court of Appeals for the Ninth Circuit had "extended the *Tinker* doctrine to encompass off-campus, identifiable threats of violence for high school students, neither the Supreme Court nor the Ninth Circuit has extended *Tinker* to college campuses." The court also stated that the Ninth Circuit had not "addressed" college campuses in its consideration of recent "school violence" cases decided in the circuit. Instead of *Tinker*, the court considered the speech under "general First Amendment principles." Under a true threat analysis the court, granting summary judgment to the student on this issue, concluded that the student's speech did not constitute a true threat and was protected speech because "no reasonable factfinder could conclude that [the student] had the requisite intent to transform his statements into true threats to intimidate his instructors," as the student did not communicate or intend to communicate his thoughts to nursing faculty members. Further, the court concluded that university officials were not entitled to qualified immunity on this issue. However, the court did conclude that whether the student posed a direct threat so as to justify the institution's actions was a genuine issue of material fact.

A football player and graduate student at the University of Northern Colorado accidentally left a loaded pistol in a university football locker. The university's dean of students issued sanctions that included suspension for a semester. An appeals committee agreed with the

student that the sanctions were too severe, but the dean rejected the findings and recommendations from the appeals committee. A federal district court, in granting an injunction, held that the student was likely to succeed on the merits in relation to substantive and procedural due process claims (*Williams v. Sonnentag*, No. 1:21-CV-02757-RMR, 2021 WL 5198101 (D. Colo. Nov. 9, 2021)). The court, in granting the injunction, observed that the university failed to follow its own procedures and concluded that the dean's actions in rejecting the appeals committee findings appeared to be arbitrary.

10.2.3. Private institutions. An applicant was initially admitted to a private university's college of engineering, but the acceptance was rescinded after officials learned that the applicant failed to provide information on his application materials that he had been dismissed from another university on disciplinary grounds (*Kamila v. Cornell Univ.*, 182 A.D.3d 692 (N.Y. App. Div. 2020)). The student did not deny that he had been dismissed for violating code of conduct standards at the previous institution, but he claimed that legitimate reasons led him to leave out the information in his application materials. In an ensuing lawsuit, a lower court agreed that the institution had erred in not following its own conduct standards in making the decision to rescind the admissions offer. The appeals court reversed, stating in its opinion that a college official acted in good faith and with basic fairness in providing the applicant an opportunity to explain the omission of information on his application materials. When given this opportunity, the applicant confirmed that he had omitted the information from his application materials, which triggered the withdrawal of admission.

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

10.3.3. Private institutions. In *Shaw v. Elon University*, 400 F. Supp. 3d 360 (M.D. N.C. 2019), a federal court held that under North Carolina law, the “policies, procedures, alleged obligation, and tenets outlined” in a private university’s handbook did not constitute an enforceable contract. The court distinguished several recent North Carolina state court cases where courts had allowed a contract theory to survive a motion to dismiss. The case provides a helpful reminder of how, even though the student-institutional relationship is often viewed at least in certain aspects as a type of contractual relationship, the laws of specific states can differ in important respects on when a student and institution are considered to have entered into a legally enforceable contract based on documents such as student handbooks.

A student at a private university, among the claims made in challenging a determination that he had violated the institution’s sexual misconduct standards, argued that the institution failed to provide him sufficient accommodations related to his ADHD, dyslexia, and word-retrieval challenges in its investigation, initial hearing, and appeals hearing (*Rossley v. Drake Univ.*, 979 F.3d 1184 (8th Cir. 2019)). The student had received accommodations in his academic coursework, which he argued provided constructive notice for a request to the university for such accommodations during the disciplinary process. Additionally, the student claimed that his father had requested accommodations from a university official, which constituted a third-party request. The court, in affirming the lower court’s ruling, concluded that no formal or informal direct request for accommodation had been made. According to the court, the student and his father, with the court assuming the permissibility of third-party requests for accommodations, failed to identify how particular accommodations were needed to ensure that the student could effectively participate in the disciplinary proceedings.

Section 10.4. Student Protests and Freedom of Speech

10.4.1. Student free speech in general. A national organization of students, parents, faculty and “concerned citizens,” called Speech First, has initiated litigation against several public universities, alleging that certain university student conduct regulations violate their First Amendment free speech rights. In *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), the organization challenged the University of Michigan’s policy prohibiting harassing and bullying behavior and its use of a Bias Response Team to investigate complaints. The plaintiffs alleged that the policy was unconstitutionally broad and that the Bias Response Team’s suite of disciplinary sanctions suppressed otherwise lawful student speech. The plaintiffs sought to enjoin the university from enforcing its policy and from using the most severe of the possible sanctions.

At the trial court level, the judge rejected the plaintiffs’ motion for an injunction, questioning whether the plaintiffs had standing, and noting that the university had changed its policy after the lawsuit was initiated, making their claims moot. 333 F. Supp. 3d 700 (E.D. Mich. 2018). The appellate court, in a 2-1 ruling, reversed and remanded that ruling.

The appellate court noted that the university had changed the policy so that it tracked state law, which the plaintiffs had not claimed was unconstitutional. But, said the court, there was nothing to stop the university from reinstating a broader prohibition, and thus the matter of the preliminary injunction was not settled. With respect to the plaintiffs’ challenge to the authority of the Bias Response Team, the court said:

The Response Team's page on the University's website defines a "bias incident" as "conduct that discriminates, stereotypes, excludes, harasses or harms anyone in our community based on their identity (such as race, color, ethnicity, national origin, sex, gender identity or expression, sexual orientation, disability, age, or religion)." Causing a

bias incident is not punishable under the Statement, unless the conduct that caused the bias incident violated some policy in the Statement. Speech First contends, however, that the term "bias incident" is overbroad and that the Response Team's practices in responding to bias incidents intimidate students, quashing their speech. (939 F.3d at 762)

Although the Response Team itself did not have the authority to mete out discipline, it could refer individuals accused of violating the harassment and bullying policy to the student conduct office or the police. The appellate court explained that the mere threat of such a referral

is a real consequence that objectively chills speech. The referral itself does not punish a student—the referral is not, for example, a criminal conviction or expulsion. But the referral subjects students to processes which could *lead* to those punishments. The referral initiates the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality. . . . Furthermore, nothing in the record suggests that the Response Team may refer matters only if the reporting student assents. By instituting a mechanism that provides for referrals, even where the reporting student does not wish the matter to be referred, the University can subject individuals to consequences that they otherwise would not face. (939 F.3d at 765)

The appellate court did not accept the plaintiffs' invitation to order the trial court to issue the preliminary injunction, but it did reverse the lower court's rulings that the plaintiffs had standing and that the challenge to the policy was moot because it had been changed. The dissenting judge disagreed with all of these rulings, stating that she believed that the plaintiffs did not have standing and that the challenge to the policy was moot.

In other litigation, Speech First filed a lawsuit aimed at multiple policies at the University of Texas at Austin related to the regulation of speech (*Speech First, Inc., v. Fenves*, 979 F.3d 319 (5th Cir. 2020)). A federal district court ruled that Speech First lacked standing to challenge the policies. The U.S. Court of Appeals for the Fifth Circuit decided that the potentially chilling effect on speech of allegedly vague policies alongside the possible sanctions for violating the various policies sufficed to establish standing on the part of Speech First to challenge the policies, on behalf of the students, under the First and Fourteenth Amendments. The institutional rules included several limitations on speech that:

A. is not necessary to the expression of any idea described in the following subsection [“an argument for or against the substance of any political, religious, philosophical, ideological, or academic idea is not verbal harassment even if some listeners are offended by the argument or idea”];

B. is sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with or diminishes the victim’s ability to participate in or benefit from the services, activities, or privileges provided by the University; and

C. personally describes or is personally directed to one or more specific individuals. *Speech First, Inc.*, 979 F.3d at 323.

The rules also contained a section with an acceptable use policy for electronic communications. Under this policy, while noting even “heated arguments” are not considered to violate the policy unless threatening or otherwise unlawful, the university encouraged users to be “polite and courteous.” The policy also instructed individuals to cease communicating with someone if requested to do so. Another rule dealt with residence halls and instructed individuals to “behave in a civil manner that is respectful of their community and does not disrupt academic

or residential activity. Uncivil behaviors and language that interfere with the privacy, health, welfare, individuality, or safety of other persons are not permitted” (*Speech First, Inc.*, 979 F.3d at 324). The university also provided information and standards related to its Campus Climate Response Team and “Hate and Bias Incidents Policy.” The rules and standards at issue provided information on potential sanctions for students found in violation of specific standards.

Speech First argued that the students whose interests it represented feared that the university, under the assorted rules, would potentially punish them for speech protected by the First Amendment under standards of being biased, rude, uncivil, or harassing. The court shared in its opinion the following types of beliefs held by students as potentially subject to unlawful regulation according to Speech First:

In its complaint, Speech First described more specifically the views of its student-members at the University. For example, it stated that one student-member considers herself a “Tea Party conservative,” “strongly supports Israel, believes in a race-blind society, supports President Trump, is pro-life, and supports the border wall.” Another student-member “strongly supports the Second Amendment right to keep and bear arms, believes in a race-blind society, and has serious concerns that the ‘Me Too’ movement will erode due process.” He thinks “affirmative action should be prohibited and that Justice Brett Kavanaugh was innocent of the accusations made against him and was properly confirmed to the U.S. Supreme Court.” A third student-member “believes that the breakdown of the nuclear family has had many negative effects on society, he is strongly pro-life, he strongly supports the Second Amendment, and he believes that Justice Kavanaugh was treated unfairly during his confirmation proceedings.” *Speech First, Inc.*, 979

F.3d at 326.

On behalf of the represented students, Speech First sought a declaratory judgment that the aforementioned institutional policies contained multiple provisions that violated the students' First Amendment speech rights, such as prohibitions on incivility, rudeness, intimidation, and harassment. Speech First appealed after a federal district court dismissed the case for lack of standing. During Speech First's appeal of the trial court ruling, the university modified language in several places in its policies, which the court described as follows:

First, it changed the prohibition on harassment in the Institutional Rules from banning "hostile or *offensive* speech" that is "severe, pervasive, or *offensive*" to banning "hostile or *threatening*" speech that is "severe, pervasive, and *objectively offensive*" (emphasis added). Second, the University eliminated the Acceptable Use Policy's references to "civil" and "[not] rude or harassing correspondence." Third, the University eliminated the Residence Hall Manual's prohibition on "uncivil behaviors and language" and redefined the Manual's harassment rule to match strictly the Institutional Rules. ... Fourth, the University changed the Manual's disciplinary process for harassment in order to channel all allegations of harassment directly to the Dean of Students, thus eliminating the separate Housing disciplinary process. *Speech First, Inc.*, 979 F.3d at 327.

Based on these changes, the university, in addition to arguing for dismissal based on standing, also contended that the claims raised by Speech First were now moot, as the alterations had addressed the First Amendment concerns raised earlier in the litigation.

As to mootness, among the reasons for denying this ground as a basis to dismiss the action, the court stated that issues raised by Speech First regarding how the university defined

harassing behavior in various policy sections was still in dispute. Additionally, the court determined that not allowing mootness by “voluntary cessation” potentially avoided a circuit split, with the court referencing a Sixth Circuit case involving Speech First, *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019) (see above). In that case, the court stated that the Sixth Circuit offered three reasons not to dismiss litigation as moot based on a university’s voluntary alteration of contested policies: (1) the absence of a controlling statement of future intention; (2) the suspicious timing of the change; and (3) the university’s continued defense of the challenged policies. ... (*Speech First, Inc.* 979 F.3d at 327 (citations omitted)).

Deciding to follow the approach adopted by the Sixth Circuit, the court ruled that the issues raised in the current case were not moot. The court pointed out that the university had not issued a “controlling statement of future intention” (*Speech First, Inc.*, 979 F.3d at 328). The court characterized the timing of the policy changes as “suspicious,” as the university only initiated the alterations after the issuance of the district court’s opinion and did not provide an explanation or rationale for why the change occurred before the policies were subject to review by the appeals court. Finally, the court found it important that, despite the changes in policy language, the institution continued to defend in litigation the constitutionality of the original policies.

The court also concluded that Speech First satisfied standing requirements in relation to its preliminary injunction request, with the court, in its assessment of standing criteria, concluding that individual student members of Speech First had the right to sue individually. As to standing based on the intention of student members to engage in First Amendment protected speech that could potentially be chilled or subject to discipline under university rules, the court wrote, “It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive

area of public regulations governing bedrock political speech” (*Speech First, Inc.*, 979 F.3d at 331). The court agreed as well with Speech First that the students faced potential disciplinary action—that is, an injury in fact for standing purposes—from the university because their intended speech implicated the rules at issue.

In further elaborating on the potential enforcement actions faced by the students, the court, seeming to question the need for portions of the language contained in the various policy sections, offered the following thoughts:

Even more to the point, if there is no history of inappropriate or unconstitutional past enforcement, and no intention to pursue discipline against students under these policies for speech that is protected by the First Amendment, then why maintain the policies at all? At least, why maintain the plethora of potential sanctions? After all, the University regulatory policy for speech, including the Acceptable Use Policy, could have stated succinctly that students will be disciplined, up to and including academic punishment and criminal referral, for speech that is outside the protection of the First Amendment and, perhaps, Title IX, which covers sexual harassment in institutions receiving federal funds. A reasonable observer must deduce that the University meant to expand its regulatory authority beyond the First Amendment; consequently, a reasonable student must act on the same assumption and self-censor her speech in accord with the perceived policies. *Speech First, Inc.*, 979 F.3d at 337 (footnote omitted).

Based on consideration of these aforementioned factors, the court ruled that Speech First had standing to seek a preliminary injunction and that the university’s amendment of the policies prior to review of the case by the appellate court did not render the action moot.

A federal district court, in a memorandum opinion, granted in part and denied in part Speech First’s request for a preliminary injunction related to multiple policies at Virginia Tech University (*Speech First, Inc. v. Sands*, No. 7:21-cv-00203, 2021 WL 4315459 (W.D. Va. September 22, 2021)). The court ruled that Speech First lacked standing to challenge the university’s bias incident response team and bias-related incidents protocol, as the organization had failed to allege that student members of Speech First at Virginia Tech suffered any harm. The court observed that the bias response team lacked authority to punish or discipline students and, at most, could invite students to participate in a voluntary conversation. In reaching this outcome, the court noted that it had reached a different decision regarding standing compared to bias response team litigation involving Speech First in decisions from the Fifth Circuit (*Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020)) (see earlier coverage in this update) and the Sixth Circuit (*Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019)) (see earlier coverage in this update). Likewise, the court, again noting its departure from the Fifth and Sixth Circuit decisions, denied standing in relation to the university’s discriminatory harassment policy. However, the court determined that standing existed for purposes of a preliminary injunction in relation to the university’s computer use policy, concluding that a prohibition on “intimidation, harassment, and unwarranted annoyance” was “clearly vague and overbroad.”

For another case in which Speech First prevailed in obtaining a preliminary injunction to halt a public university’s policies related to “discriminatory-harassment” and “bias-related-incidents,” see *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (vacating the original opinion but still granting the preliminary injunction against the university). In granting the preliminary injunction, the court concluded that the policies were almost certainly overbroad and also resulted in impermissible content- and viewpoint-based restrictions.

In *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021), a student group, Business Leaders in Christ, alleged that a university violated its rights to free speech, free association, and free exercise of religion when it rescinded the group's status as an officially registered student organization for failing to comply with the university's policy on human rights. While the lower court ruled that these rights of members of the student organization were violated, it also held that individual university employees were entitled to qualified immunity on the basis that the law at issue was not clearly established. The university did not impose an accept-all-comers requirement on student groups, but it did have a nondiscrimination policy with the following standards:

Membership and participation in the organization must be open to all students without regard to race, creed, color, religion, national origin, age, sex, pregnancy, disability, genetic information, status as a U.S. veteran, service in the U.S. military, sexual orientation, gender identity, associational preferences, or any other classification that deprives the person of consideration as an individual. The organization will guarantee that equal opportunity and equal access to membership, programming, facilities, and benefits shall be open to all persons. (*Business Leaders in Christ*, 991 F.3d at 973)

Despite the nondiscrimination provision, the court noted that the "University has approved constitutions of at least six RSOs that expressly limit access to leadership or membership based on race, creed, color, religion, sex, and other characteristics that the Human Rights Policy protects" (*Business Leaders in Christ*, 991 F.3d at 973). For example, one student group required members to agree to "gay affirming statement of Christian faith." Another organization limited enrollment to enrolled Chinese scholars and students. And another organization, affiliated with the Iowa National Lawyers Guild, required members to agree with the group's aims of seeking

““basic change in the structure of our political and economic system.””

Business Leaders in Christ denied a leadership position to a student who was gay and disagreed with the group on the religious permissibility of same-sex relationships. The student filed a grievance with the university, alleging that the organization violated the institution’s non-discrimination policy. As a result of this process, including an effort by the organization to revise its constitution, the university informed the organization that it would have to have standards in place that would permit individuals to serve as leaders in the group no matter their sexual orientation or gender identity.

The lower court, granting the student group’s motion for summary judgment, ruled that the university had violated the members’ constitutional rights of free speech, free exercise, and free association. The court determined that the university had denied, without sufficient justification, any kind of religious exception to the nondiscrimination policy for the religious group while it had granted exceptions to the policy to several secular student organization. The court stated that the university could have applied its policy in a neutral and even-handed manner or have applied an accept-all-comers policy.

The lower court did reject the student group’s arguments that individual university defendants were not entitled to qualified immunity. On appeal, the university did not challenge the lower court’s ruling on the free expression, free association, and free exercise issues. The issue presented to the appeals court was limited to whether the individual university defendants were entitled to qualified immunity. The court, overturning the lower court on this issue, held that it was clearly established law at the time when the individual defendants’ conduct violated the rights of the student organization related to free speech and exercise. It agreed with the lower court, however, that qualified immunity was appropriate as to the free exercise claim. In a

concurring opinion, one member of the appeals panel argued that the law was also clearly established at the time of the violation of the members' free exercise rights.

In *InterVarsity Christian FellowshipUSA v. University of Iowa*, 2021 WL 3008743 (8th Cir. July 16, 2021), the U.S. Court of Appeals for the Eighth Circuit again invalidated a denial of official recognition to a student organization by the University of Iowa. The organization was de-registered by the university when it engaged in a review of all student organizations under the university's human rights policy as a result of the *Business Leaders in Christ* case, which is discussed above. The student organization refused to amend language in its constitution that leaders for the group had to affirm a statement of faith. The university reinstated InterVarsity following the grant of a preliminary injunction in the *Business Leaders in Christ* litigation, but the group initiated a lawsuit after the loss of a significant number of members and over a "fear of retaliation" from the university. The appeals court agreed with the lower court that the university engaged in impermissible viewpoint discrimination in de-registering InterVarsity as a student organization. As in *Business Leaders in Christ*, the court ruled that the individual university defendants were not entitled to qualified immunity. For a case with a similar outcome, one in which the court found that the university granted multiple exceptions to its nondiscrimination policy while denying recognition to a student religious organization, see *InterVarsity Christian FellowshipUSA v. Board of Governors of Wayne State University*, 2021 WL 1387787 (E.D. Mich. April 13, 2021).

In *Mahanoy v. B.L.*, 141 S. Ct. 2038 (2021), the U.S. Supreme Court held that a public high school violated a student's First Amendment rights when it suspended her from a cheerleading squad for social media postings that contained vulgar language and gestures. The student made the posts after she failed to make the senior varsity cheerleading squad. The

Supreme Court held that while schools may possess a special interest to regulate some off-campus speech, such circumstances were not at play in this case. In the opinion for the Court, Justice Breyer wrote that some circumstances exist where a school could regulate a student's off-campus speech:

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers. (*Mahanoy v. B.L.*, 141 S. Ct. at 2045)

The Court, however offered ways in which school officials' interests in regulating students' off-campus speech was often diminished in relation to on-campus speech:

We can ... mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect,

guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little

more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example. (*Mahanoy v. B.L.*, 141 S. Ct. at 2046)

The court rejected the school's arguments—teaching good manners, preventing disruption, and a concern for team morale—as sufficient justifications to sanction the student's off-campus speech. Courts should distinguish between the interests of elementary and secondary schools from those of higher education institutions when it comes to regulation of student speech. Still, courts may look to elementary and secondary cases when deciding speech cases involving higher education students. Thus, *Mahanoy v. B.L.* may well be cited in future cases involving the off-campus speech of college students, even if the institutional interests of higher education institutions would be distinct, and often weaker, than those of elementary and secondary schools.

10.4.2. The “public forum” concept. A public university student and a non-student set up a table on a patio outside the university's student union in an attempt to recruit student members for an effort to establish a local chapter of Turning Point USA, but the pair sued after they were not allowed to set up the table at the desired location (*Turning Point USA at Arkansas State Univ. v. Rhodes*, 973 F.3d 868 (8th Cir. 2020)). At issue were several university speech-related policies. The university argued that its campus was not an open public forum but noted that it had established several free speech locations around campus that were available to individuals who obtained advance permission and adhered to reasonable time, place, and manner restrictions. Some campus areas were also available for speeches, marches, and demonstrations. In relation to

the patio area sought for use by the plaintiffs, the university stated that it had an unwritten rule that that tabling in the area was restricted to registered student organizations and university departments.

The court decided that the patio area constituted a limited public forum subject to standards of reasonableness and viewpoint neutrality and that only the unwritten tabling policy was properly before the court. As an initial matter, the court stated that the status-based distinction of limiting tabling in the patio area was permissible in a limited public forum and did not implicate viewpoint discrimination concerns. The court then turned its attention to the issue of reasonableness, with its inquiry guided by “(1) the University trustees’ and administrators’ expertise in creating educational policies; (2) the purpose served by the forum; and (3) the alternative channels of communication available ... in light of the policies” (*Turning Point USA at Arkansas State Univ.*, 973 F.3d at 876). The court questioned the appropriateness of not extending to the student the same access to the patio as that had by student organizations:

According to the defendants, the Union Patio is “unique.” The University’s policies “afford privileges to [registered student] organizations to use that space,” which are not afforded to other organizations and individuals. The Union, defendants say, is the “living room of campus.” It is where students eat, hang out, and attend meetings. And so the area outside the Union — the Union Patio — is supposed to remain a comfortable area — an area in which students need not worry about whether they’ll be harassed by pushy buskers, hucksters, and pamphleteers.

This might reasonably justify excluding non-University individuals from speaking at the Union Patio. *Cf. Bowman*, 444 F.3d at 980–83 (citing, as reasons

for speech restrictions, safety concerns about persons unaffiliated with the university). But unlike the plaintiff in *Bowman*, Hoggard was a student — she belonged on campus. She was, to use the defendants’ phrase, a “part of [the] campus community.” She presumably paid the Student Union Fees supporting maintenance of the Student Union and aspects of the registered student organization program. We fail to see why restricting Union Patio tabling to registered student organizations is any more conducive to creating a “comfortable,” “living-room” atmosphere within the Union than opening Patio tabling to all students and groups thereof. The First Amendment protects the rights of both groups *and individuals*. See *Healy v. James*, 408 U.S. 169, 180–85, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) (requiring courts to examine First Amendment implications when state colleges restrict the speech and associational rights of non-recognized student groups); see also *McCutcheon v. FEC*, 572 U.S. 185, 206, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (“The whole point of the First Amendment is to afford *individuals* protection against ... infringements [on free speech in the name of the public good].”) (emphasis added). *Turning Point USA at Arkansas State Univ.*, 973 F.3d at 877 (footnote omitted).

The court also commented that under the university’s policy that it was unclear what alternative channels of communication were available to the student if she were not entitled to use the patio. Based on consideration of these factors, the court ruled that the unwritten tabling policy in the patio area was not reasonable, stating:

When we consider these factors together, we find that the Tabling Policy, as applied to [student] Hoggard, is unconstitutional. We defer to the defendants’

judgment about the importance of establishing a space serving as the campus “living room,” as well as their determination that students should feel comfortable in the space in which they eat, meet, and socialize. But this legitimate university interest bears no rational relationship to the distinction between registered student organizations and individual students when it comes to using the Union Patio.

Turning Point USA at Arkansas State Univ., 973 F.3d at 879.

Because the unconstitutionality of the policy was not clearly established, however, the court ruled that the defendants were entitled to qualified immunity and affirmed the lower court’s grant of summary to the defendants on these grounds.

While not a case centered on students, in *Keister v. Bell*, 29 F.4th 1239 (11th Cir. 2022), a federal appeals court ruled that the sidewalks at a public university constituted a limited public forum rather than a traditional public forum. Even though the sidewalks were owned by a local municipality as opposed to the university, the court found it more important that the sidewalks were maintained by the institution and were located in a central part of campus. The court also ruled that the university standards imposed on the forum—such as requiring a permit for speakers—were constitutional, including an exception to the policy for casual recreational or social activities.

Chapter 11

Rights and Responsibilities of Student Organizations and Their Members

Section 11.1. Student Organizations

11.1.3. Mandatory student activity fees. A federal appellate court, in a decision in which it reversed the lower court (see *LHE6th* at p. 1387 for a discussion of the lower court opinion), considered the permissibility under viewpoint neutrality standards of a student government eliminating all funding previously made available from mandatory student fees for student media organizations. *Koala v. Khosla*, 931 F.3d 887 (9th Cir. 2019). The student government took the action after a satirical article in a student newspaper that received fee funding offended numerous individuals on campus. The court ruled that the student newspaper's free speech press claims were sufficient to survive a motion to dismiss. Additionally, it held that the lower court improperly classified the limited public forum at issue as only encompassing the available funding for student media. Instead, stated the court, the relevant forum should encompass the entire student activity fund. The court remanded to the lower court to reconsider whether viewpoint discrimination had taken place in light of how the appellate court defined the forum.

In another mandatory fee case, *Apodaca v. White*, 401 F. Supp. 3d 1040 (S.D. Cal. 2019), members of a student organization at a public university challenged the permissibility of mandatory student fees used to support student organizations. The student group relied on *Janus v. AFSCME*, 134 S. Ct. 2448 (2018) (for a discussion of this case, see p. 359 *LHE6th* Sec. 4.5.3), a case in which the U.S. Supreme Court ruled that it was impermissible to require public employees to pay union fees to public sector employee unions. In *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), a case in which the Supreme Court approved of the constitutionality of using mandatory student fees to support student organizations, the Court had relied on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which was overruled in *Janus*. (The *Southworth* decision is discussed in *LHE 6th* beginning at p. 1381.) The court rejected the students' argument that the *Janus* case had also

invalidated *Southworth*, stating its belief that “*Janus* bears little significance in the public university context where the case law and the parties all agree that schools have expansive latitude in the manner educational missions are implemented.” 401 F. Supp. 3d at 1053. But, the court did agree with the students that the university violated viewpoint neutrality standards in how it had distributed funding to student organizations. Future claimants may well make similar claims arguing that *Janus* has negated the standards announced in *Southworth*.

11.1.4. Principle of nondiscrimination. Conflicts between institutions and certain religious student organizations have continued since the U.S. Supreme Court’s decision in *Christian Legal Society v. Martinez* (discussed in *LHE6th* beginning at p. 1391). Two court opinions involving InterVarsity Christian Fellowship and public universities, in which the universities refused or withdrew recognition of the student chapters of this national organization because the organizations’ requirement that chapter leaders embrace Christian religion, were published in the fall of 2019.

In the first case, *InterVarsity Christian Fellowship/USA et al. v. Board of Governors of Wayne State University*, 413 F. Supp. 3d 687 (E.D. Mich. 2019), the student chapter of InterVarsity challenged the decision of administrators at Wayne State University in 2017 to withdraw recognition to the organization because it required its leaders to be Christians. The University explained that this requirement violated its nondiscrimination policy. A chapter of InterVarsity had been active on the Wayne State campus for 75 years and had been previously recognized by Wayne State as an official student organization. InterVarsity claimed that this decision violated the members’ First Amendment rights of free speech and free exercise of religion, the First Amendment’s establishment clause, the Fourteenth Amendment’s due process

and equal protection clauses, and provisions of Michigan's constitution and state nondiscrimination act. Wayne State filed a motion to dismiss all of the claims.

In addition to its constitutional claims, InterVarsity alleged that Wayne State selectively enforced its nondiscrimination policy—for example, by permitting single sex Greek organizations and club athletic teams, affinity groups based upon religion or race/ethnicity, as well as a student church group to be recognized.

With respect to InterVarsity's speech claims, the court rejected Wayne State's argument that *Martinez* required dismissal of these claims, stating that the nondiscrimination policy in *Martinez* was different enough from the language in Wayne State's policy such that *Martinez* was not controlling. The court rejected the University's motion to dismiss the free speech and constitutional claims.

The second case, *InterVarsity Christian Fellowship/USA et al. v. University of Iowa et al.*, 408 F. Supp. 3d 960 (S.D. Iowa 2019), addressed issues similar to those in the previous case. Although the approach to recognizing student organizations by the University of Iowa was somewhat different than that of Wayne State, the University refused to recognize InterVarsity because of its requirement that leaders be members of the Christian faith, while other sex-, race- or religion-exclusive organizations at Iowa only required organization members to state their agreement with the mission of the organization, whether or not they were members of the religion, race or gender at issue.

The plaintiff students and their national organization alleged violations of the First Amendment (free speech, free exercise, freedom of association), the Fourteenth Amendment (equal protection), and Iowa's constitution and law against discrimination. The court applied strict scrutiny analysis to the First Amendment claims and concluded that the plaintiffs'

allegations of selective enforcement of the University's nondiscrimination policy, where exceptions were allowed for organizations with secular purposes but not religious ones, was viewpoint discrimination and did not pass the strict scrutiny test. The court granted summary judgment to the plaintiffs on their free speech, expressive association and free exercise of religion claims.

The court rejected the plaintiffs' claim that they were protected by the "ministerial exception" to federal nondiscrimination laws as discussed in the *Hosanna Tabor* case (discussed in *LHE6th* at pp. 574-76), as had the trial court in the Wayne State case discussed above, because the ministerial exception only applies as an affirmative defense to an employment discrimination lawsuit. It also rejected, as had the court in the Wayne State case discussed above, the University's claim that the *Martinez* precedent protected its actions because the University's policy was not an "all comers" policy such as the policy at issue in *Martinez*. The court awarded summary judgment to the University on the plaintiffs' First Amendment religious clauses claims, stating that their success on the free exercise clause claim provided the required protection.

The plaintiffs sought a permanent injunction against the University's future denial of recognition to InterVarsity. The court noted that, while the litigation was pending, the Iowa Legislature had enacted a law that would limit the University's ability to refuse to recognize organizations such as InterVarsity:

a public institution of higher education shall not deny any benefit or privilege to a student organization based on the student organization's requirement that the leaders of the student organization agree to and support the student organization's beliefs, as those beliefs are interpreted and applied by the organization, and to further the student organization's mission. (Iowa Code § 261H.3(3))

Because the court said that it was uncertain that the new law would survive a court challenge, the court issued a permanent injunction prohibiting the University from enforcing its nondiscrimination policy against InterVarsity based upon the content of its leadership selection policies.

New rules (85 FR 59916) from the Trump administration could potentially circumvent the standards announced in *Christian Legal Society v. Martinez* and the center of dispute in the aforementioned cases involving InterVarsity Christian Fellowship. The Trump administration did clarify that accept-all-comers policies, such as that approved of in *Christian Legal Society v. Martinez*, was still permissible under the rule (NASPA, Oct. 1, 2020, “The Other Final Rule in Which You Need to be Aware—Religious Liberty and Free Inquiry Rule,” available at <https://www.naspa.org/blog/the-other-final-rule-in-which-you-need-to-be-aware-religious-liberty-and-free-inquiry-final-rule>). Private institutions are held under the rule to the standards published in relevant institutional policy and rules, such as student handbooks. The decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), was cited as supportive legal authority for the rule (for discussion of *Trinity Lutheran*, see *LHE6th* Sec. 11.1.4 and Sec. 1.6.4). As with other rules and regulations, the Biden administration may seek to alter interpretation of the rules or to withdraw them.

Section 11.2. Fraternities and Sororities.

11.2.2. Institutional recognition and regulations of fraternal organizations. As discussed in *LHE6th* at p. 1415, Harvard University has enacted a policy that excludes undergraduate students who join single-sex social organizations from eligibility for certain leadership positions and to receive certain scholarships. Several single-sex social organizations have challenged the

permissibility of the policy in state court. *Alpha Phi International Fraternity v. President and Fellows of Harvard College*, 2020 WL 741544 (Mass. Super. 1/14/20). The court ruled that the plaintiffs had alleged sufficient allegations to support a claim under the Massachusetts Civil Rights Act. It also decided that discovery should proceed on the plaintiffs' claim of tortious interference with advantageous relations.

In *Omicron Chapter of Kappa Alpha Theta Sorority v. University of Southern California*, 2022 WL 212339 (Cal. Ct. of App. January 25, 2022) (unreported decision), a group of fraternities and a sorority at the University of Southern California challenged a delayed recruitment rule that required new members to have earned a minimum of 12 academic units and at least a GPA of 2.5. The student groups brought their action under California's Leonard Law, which requires private, non-sectarian higher education institutions in California to provide students with the equivalent rights possessed under the First Amendment by students at public colleges and universities. While the rule at issue applied to a co-curricular activity, the court found that the policy represented an academic judgment on the part of the university that merited judicial deference. Characterizing the policy in this light, the court rejected arguments that the policy constituted impermissible viewpoint discrimination against fraternities and sororities at the university.

11.2.3. Institutional liability for the acts of fraternal organizations. A Tennessee appeals court ruled that, for purposes of comparative fault, whether a student plaintiff was responsible for at least 50 percent of his injuries sustained as a result of hazing should have been a question for the jury (*Halmon v. Lane College*, 2020 WL 2790455 (Tenn. Ct. App. May 29, 2020)). The college

argued that the student was aware of and “openly submitted to the [hazing] hazards he experienced with full knowledge.” While the student was aware of some incidents that would likely occur during the hazing process, such as paddling, the court agreed with him, at least for summary judgment purposes, that “it is not clear, as a matter of undisputed fact, that he fully appreciated or understood the whole nature of the hazing he claims to have endured. In light of this and other considerations discussed above, we are of the opinion that the trial court’s apportionment of fault to Mr. Halmon was error at this stage of the proceedings” (*Halmon*, 2020 WL 2790455, at * 5). The court also held that based on multiple prior hazing infractions by the fraternity at issue, the student’s injuries were foreseeable by the college, and it was improper for the lower court to rule that the college owed no duty to student based on the evidence presented for summary judgement. Additionally, the court, agreeing with the lower court, refused to dismiss the potential for the college to be vicariously liable for the student’s injuries based on the actions of an employee advisor to the fraternity. The university argued that the employee had acted so far outside the scope of his employment duties so as to preclude a vicarious liability claim, but the court concluded that additional factual determinations were needed to make such a determination.

Section 11.3. The Student Press

11.3.2. Mandatory student fee allocation to student publications. See discussion above of *Koala v. Khosla* in Sec. 11.1.3 of this Update for a case involving a challenge to a student government’s decision to make all student media ineligible for funding provided through student fees.

Section 11.4. Athletic Teams and Clubs

11.4.1. General principles. A court ruled that a Penn State football player who claimed that hazing had taken place among team members had stated, among multiple causes of action, a claim of negligence *per se* against Penn State University on the basis of a new hazing law enacted in Pennsylvania but not under the previous law (*Humphries v. Pennsylvania State Univ.*, 2020 WL 5878409 (M.D. Pa. Oct. 2, 2020)). The court dismissed a negligence *per se* claim against the head football coach under the new and previous laws, but sustained a claim against the university's athletics director under both laws. The court ruled that the allegations, depending on the date at issue, would be evaluated under either the old or new statute, as the revised anti-hazing law could not be applied retroactively.

11.4.3. Athletes' freedom of speech. A cheerleader at Kennesaw State University alleged that university officials conspired with local law enforcement to stop her from exercising her First Amendment rights by adopting a policy that required cheerleaders to remain off the field before football games while the national anthem was played (*Dean v. Warren*, 12 F.4th 1248 (11th Cir. 2021)). A federal appeals court rejected the cheerleader's claims that the alleged action sufficed to establish a plausible theory of a civil rights violation based on conspiracy. The court also rejected the student's First Amendment claims that a conspiracy was undertaken to prevent the cheerleaders from engaging in speech protected by the First Amendment. As to the free speech claims, in a concurring opinion, Judge William Pryor argued that the speech at issue was government speech, as the cheerleaders were engaged in speech on behalf of the university in their roles as cheerleaders, so as to negate the First Amendment claim.

A University of Georgia baseball player was dismissed from the team after using a racial slur at a football game that the player attended as a spectator (*Sasser v. Bd. of Regents of Univ.*

Sys. of Georgia, No. 1:20-CV-4022-SDG, 2021 WL 4478743 (N.D. Ga. September 30, 2021)).

The individual was also subject to sanctions under the student conduct code. The student claimed in a lawsuit that the actions against him violated the First Amendment. Among the reasons for dismissing the action, the court declared that the student did not have a constitutionally protected right as to his place on the baseball team.

11.4.5. Athletic scholarships. California passed a law that will allow college athletes to earn compensation for the use of their likeness, to enter into endorsement agreements, and to hire agents for representation. Colin Dwyer, “California Governor Signs Bill Allowing College Athletes to Profit from Endorsements,” *NPR*, Sept. 30, 2019, available at <https://www.npr.org/2019/09/30/765700141/california-governor-signs-bill-allowing-college-athletes-to-profit-from-endorsem>. Other states are considering similar legislation, and federal legislation has also been introduced. Matt Norlander, “Fair Pay to Play Act: States bucking NCAA to let athletes be paid for name, image, likeness,” *CBSSports.com*, Oct. 3, 2019, available at <https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/>. The U.S. Supreme Court ruled in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), that the NCAA violated antitrust rules in limiting the education-related benefits of college athletes (see Section 15.4.4 of this Update for discussion of this case). The Supreme Court’s decision was limited to educational benefits and did not reach the issue of college athletes earning income from their name, image, and likeness (that is, non-education benefits). However, following the decision and in response to proposals in multiple states for college athletes to be able to profit from their name, image, and likeness, the NCAA adopted an interim policy. The interim policy lets college athletes earn income from their name, image, and

likeness. The policy marks a significant shift in the NCAA's rules on college athletes earning income from their name, image, and likeness. The NCAA also supports the adoption of a national law to regulate name, image, and likeness in college athletics (see <https://www.ncaa.com/news/ncaa/article/2021-06-30/ncaa-adopts-interim-name-image-and-likeness-policy>).

The NCAA released additional guidance regarding Name, Image, and Likeness (NIL) agreements for college athletes (https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf). Among the items covered in the guidance, institutions are limited in the services that can be provided to athletes related to NIL, other than educational, unless such services are available to all students. Institutions cannot, for instance, provide contract review or tax preparation for NIL agreements for athletes unless such services are provided to the entire student body. The new guidance does allow institutions to ask donors to contribute to entities that are seeking to maximize NIL opportunities for students at specific institutions.

The NCAA board of governors approved a new draft constitution in December 2021 that will now receive a full vote by the organization in January 2022 (Heather Dinich, "NCAA Board Approves Constitution Changes: Full Vote Set for January," ESPN, Dec. 16, 2021, available at https://www.espn.com/college-sports/story/_/id/32884018/ncaa-board-approves-constitution-changes-full-vote-set-january). Among the changes, member schools would be required to make their name, image, and likeness policies publicly available. Pay-for-play is prohibited, but the new constitution permits member institutions to provide educational and other benefits to athletes. The document also has provisions that deal with the physical and mental well-being of athletes.

A soccer player sued after she was dismissed from the team and her scholarship revoked for making a gesture with her middle finger following a match that was broadcast on national television (*Radwan v. Univ. of Connecticut Board of Trustees*, 465 F. Supp. 3d 75 (D. Conn. 2020)). The player challenged the action under Title IX and as violative of equal protection, procedural due process, and First Amendment speech rights. The court dismissed the claim of selective enforcement under Title IX, as the player's examples of incidents involving male players did not deal with any instances of making an inappropriate gesture on a national television broadcast. The court granted summary judgment as well to the defendants on the student's equal protection claims. As to the procedural due process claim, the court ruled that the player's athletic scholarship—grant-in-aid award—did not create a constitutionally protected property interest so that the court needed to analyze further the procedural due process claim. In relation to the First Amendment claim, the court ruled that the defendants were entitled to qualified immunity as it was not clearly established law that the First Amendment protected the student speech at issue.

A federal appeals court upheld the lower court's grant of summary judgment as to the player's First Amendment and due process claims in *Radwan v. Manuel*, 55 F.4th 101 (2nd Cir. 2022). The appeals court affirmed the summary judgment as to the free speech claims on the grounds that the defendants were entitled to qualified immunity. Additionally, while the court affirmed the dismissal of the due process claims, also on the basis of qualified immunity, it noted that player did possess a constitutionally protected property interest in her scholarship. However, the court reversed as to the district court's grant of summary judgment in favor of the defendant's as to the student's Title IX claims. The appeals court concluded that the student had

put forth sufficient evidence that she had been treated differently in terms of punishment compared to male athletes for similar violations.

11.4.6. Sex discrimination. In *Lazor v. University of Connecticut*, 2021 WL2138832 (D. Conn. May 26, 2021), the court granted a temporary restraining order to stop the University of Connecticut from disbanding the women’s rowing team. The court determined that the plaintiffs had shown a substantial likelihood that the university was out of compliance with Title IX’s effective accommodation requirement. The university had announced that it would cut the women’s rowing team and two men’s teams for budgetary reasons. The court rejected the university’s argument that the average size of women’s teams served to establish substantial proportionality for purposes of Title IX. According to the court, the average team size provided one point of reference but “the determination of substantial proportionality is inherently case- and fact-specific, considering the institution's specific circumstances” (*Lazor*, 2021 WL 2138832 at *4). The court concluded that the “participation gap is well above a viable team size even when using the participation gap numbers offered by UConn” (*Lazor*, 2021 WL 2138832 at *5).

Former players sued after the University of North Dakota eliminated its women’s hockey team but not its men’s team (*Berndsen v. N. Dakota Univ. Sys.*, 7 F.4th 782 (8th Cir. 2021)). Reversing the lower court’s dismissal of the case for failure to state a claim, a federal appeals court ruled that the district court failed to take into account regulatory language applicable to contact sports like hockey. According to the court, “an institution sponsoring a single-sex contact sports team (e.g., men's ice hockey) ... [must] sponsor a team for the other sex (e.g., women's ice hockey) if: (1) ‘opportunities for members of the excluded sex have historically been limited’;

and (2) “[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team” (Berndsen, 7 F.4th at 789).

College athletes at five Division I colleges and universities brought a class action lawsuit alleging that 25 institutions and the NCAA violated their rights under the Fair Labor Standards Act (FLSA) and applicable state laws by refusing to classify them as employees (*Johnson v. NCAA*, No. CV 19-5230, 2021 WL 3771810 (E.D. Pa. Aug. 25, 2021)). In a memorandum opinion, a federal district court refused to dismiss the lawsuit at this stage of litigation. A long-standing tradition of amateurism in college sports, stated the court, was insufficient to dismiss the FLSA claims. Additionally, the court concluded that Department of Labor regulations did not, as a matter of law, preclude the possibility of college athletes qualifying as employees. The court also determined that the athletes had plausibly alleged that they satisfied factors that would establish them as employees under the FLSA so as to deny the motion to dismiss.

A federal appeals court affirmed in part and reversed in part a lower court ruling in favor of women athletes who argued that the elimination by a university of six athletic teams for budgetary reasons, which included two women’s teams, violated Title IX (*Portz v. St. Cloud University* (8th Cir. October 28, 2021)). The court concluded that the district court did not commit error in finding that the university organized its athletic teams using a tier approach in which different tiers received different levels of support and funding. However, the appeals court, reversing on this issue, ruled that the lower court improperly evaluated equity within the tiers instead of evaluating the athletics program in its entirety. The court also concluded that the lower court committed error by failing to include in its findings the high level of support for the women’s volleyball team, a fact that should have influenced its analysis.

An amended settlement agreement to litigation involving Title IX claims originally brought by women athletes against Brown University in the 1990s was approved by a federal appeals court (*Cohen v. Brown Univ.*, 16 F.4th 935 (1st Cir. 2021)). Some class members objected to the revised settlement agreement, but the appeals court upheld the district court’s conclusion that representation was adequate for the revised settlement agreement. The court also ruled that the district court did not abuse its discretion in deciding that the amended settlement agreement was fair, reasonable, and adequate. In affirming the district court’s decision, the appeals court stated that over almost three decades, the university had made “considerable strides” in ensuring gender equity in its athletics programs so that the need for continued judicial supervision was “diminished.”

See the discussion of *Radwan v. Manuel*, 55 F.4th 101 (2nd Cir. 2022), in *Sec. 11.4.5* of this update, where a federal appeals court ruled that a soccer player, who had her scholarship terminated after making an obscene hand gesture that was captured on television, had put forth sufficient evidence that she had been treated differently in terms of punishment compared to male athletes for similar violations

11.4.9. Tort liability for athletic injuries. While deciding the issue on different grounds than the lower court (see *LHE6th* at p. 1506), the Supreme Court of Pennsylvania held that a college had a “duty to provide duly licensed athletic trainers for the purpose of rendering treatment to its student athletes participating in athletic events,” which included a football practice in which the two plaintiffs were injured. *Feleccia v. Lackawanna College*, 215 A.3d 3 (Pa. 2019). The lower court ruled that a general duty existed under Pennsylvania law to have licensed athletic trainers available at athletic events, including at practices. The Supreme Court of Pennsylvania

concluded that rather than the need to recognize such a general duty, under existing legal standards the college had created an expectation of the presence of licensed medical trainers at practices on which the athletes could reasonably rely. Additionally, the court determined that a genuine issue of material fact existed as to whether the college violated this duty. The court also ruled that waivers signed by the athlete plaintiffs in the case did not apply to acts of gross negligence or recklessness. However, the court, in agreement with the trial court and reversing the lower appellate court, ruled that a waiver signed by the athletes was legally enforceable as to claims of ordinary negligence.

A student who was a member of a university's ultimate frisbee club team was injured in a car accident that took place during the return drive after an ultimate frisbee tournament. The vehicle was owned and driven by a team member. Under university policy, the team members should have made the trip in a rental vehicle reserved through university channels. In a lawsuit filed by the student, the court ruled that the student driver of the vehicle was not an agent of the university for purposes of establishing university liability for the accident (*Turner v. Univ. of Cincinnati*, 143 N.E.3d 605 (Ohio Ct. App. 2020)).

A state appellate court in Oregon has reversed a summary judgment ruling for the University of Oregon in a case involving the injury of a potential basketball recruit. In *Clark v. University of Oregon*, 2022 Ore. App. LEXIS 832 (Or. Ct. App. 2022), the University's basketball coaches invited the plaintiff to visit and told him that he would be participating in basketball workouts with coaches. The coaches developed several drills for the plaintiff to compete, knowing that the plaintiff had injured both knees previously which had required surgery. During the drills, one of the assistant coaches collided with the plaintiff, throwing him off balance and injuring one of his knees. The plaintiff sued the University for negligence, and

the trial court awarded summary judgment to the University, agreeing with the University's defense that the injury resulted from a "normal risk" of possible injury while playing basketball.

The appellate court disagreed. The court explained:

[D]efendants invited plaintiff to visit the university, informed him that he would be engaging in basketball workouts with coaches, devised a series of drills for him to complete, instructed him on how to perform the drills, physically participated in the drills, and, in the course of the drills, performed the act that injured plaintiff. Defendants did those acts despite their knowledge of plaintiff's previous knee surgery and despite the fact that most of the acts, including the act of allowing or requiring plaintiff to participate in any workout with coaches at all, violated NCAA rules. The conduct by defendants that plaintiff alleges unreasonably created a foreseeable risk of harm to him goes beyond ordinary participation in a sports activity. It is squarely within the province of the jury to assess the reasonableness of defendants' conduct and the foreseeability of the risk of harm to plaintiff. Thus, the trial court erred in granting summary judgment for defendants.

A federal magistrate judge has rejected motions to dismiss claims of negligent retention, negligent supervision, and gross negligence in a case involving a student athlete who sustained serious injuries as a result of a coach's requirement that the team participate in a drill that required them to be hit in the head at a high velocity by soccer balls. The case, *Mitchell v. Baylor University*, 2022 U.S. Dist. LEXIS 112732, involved claims that the university had been negligent in hiring, supervising, and retaining the soccer coach, and that those failure constituted gross negligence. Plaintiffs alleged that the equipment used to project the balls was not used by any other collegiate soccer team, and that the university, after learning of a first injury to the

plaintiff resulting from the use of the equipment, allowed the coach to require its continued use. The magistrate judge recommended that only the negligent hiring claim be dismissed.

Chapter 12

Local Governments and the Local Community

Section 12.2. Zoning and Land Use Regulation

12.2.2. Public institutions and zoning regulations. California state law requires public universities, to develop an Environmental Impact Report (EIR) that demonstrates how they will mitigate the impact on the environment when they make decisions regarding growth and development, including enrollment increases. In *Save Berkeley's Neighborhoods v. The Regents of the University of California*, 264 Cal. Rptr. 3d 864 (Ct. App. Cal., 1st App. Dist. 2020), a state appellate court reversed a trial court ruling favorable to the university.

The university had developed a plan for enrollment growth in 2005 and had developed an EIR in conjunction with that plan for enrollment growth. The plan stated that the Berkeley campus of the University of California would increase enrollment by 1,650 students. In 2018, the plaintiff organization sought a writ of mandamus from the trial court, asserting that enrollment on the Berkeley campus had grown by 8,300 students, without public notice or an amendment of the university's EIR. The appellate court agreed that enrollment increases above those proposed in the 2005 EIR were subject to environmental review, and remanded the case to the trial court with orders to vacate its ruling.

Section 12.3. Local Government Taxation

The city of San Francisco requires drivers who park in paid parking lots to pay a parking tax to the operator of the parking lot, who is then required to transmit the tax revenues to the city. The University of California owns parking lots in San Francisco, and refused to charge individuals who park in its paid lots the required tax. The city then sought a writ of mandate from the state court to compel the university to collect and remit the tax. Although the trial and appellate courts refused to issue the mandate, the state supreme court reversed, saying that the requirement to collect and remit the tax was a minimal burden on the university and did not interfere with its sovereignty as an agency of the state.

Chapter 13

The College and State Government

Section 13.5. Other State Regulatory Laws Affecting Postsecondary Education Programs

13.5.2. Open meetings and public disclosure. In *Judicial Watch, Inc. v. University of Delaware*, No. 32, 2021, 2021 WL 5816692 (Del. December 6, 2021), the Supreme Court of Delaware considered freedom of information requests made to the university in relation to papers donated by then-Senator Joseph Biden. The requests, made by Judicial Watch and a non-profit media organization, were for records and communications related to the release of the papers, visitor logs to the department where the papers were located, and the senator's papers. The university denied the requests for the reason that the open records law did not apply because no public funds had been spent in relation to the senator's papers, a decision upheld by a lower state court. On appeal, the parties limited their challenge to a denial of records dealing with the agreement for the papers, related communications, and board minutes. They argued that the information was

covered under the state law as public funds were expended in the maintenance and storage of the records. The court concluded that this view was incorrect, stating that the public records law applied when the “contents” of the record involved the expenditure of public funds. However, the court remanded to the lower court to consider whether the university had satisfied the burden of proof as to its assertions that no public funds were spent on the maintenance of the papers and that no records existed in relation to conducting an adequate search for records that would have qualified as a public record if such records did exist.

13.5.3. Open records laws.

p. 1658. Another court has found that a foundation linked to a public university is not subject to the state’s open public records act. In *Transparent GMU v. George Mason University*, 835 S.E.2d 544 (Va. 2019), the Supreme Court of Virginia, in a matter of first impression, considered whether a private corporation established to raise funds and manage donation for George Mason University, a public institution, was subject to the Virginia Freedom of Information Act (VFOIA). The court considered the plaintiff’s assertion that the foundation operated as an “alter ego” of the university so that the VFOIA should apply to the foundation’s operations. An officer of the foundation testified in a lower court proceeding as to a number of close connections between the foundation and the university, including:

“ ... the Foundation is located on GMU’s campus in a building the Foundation owns, and from which the Foundation leases offices to GMU. She [the foundation officer] testified that Foundation staff are listed on GMU’s directory and the Foundation’s website is located on GMU’s website for convenience. She further

testified the Foundation pays more than 75% of GMU's president's salary because of the limit on state funding allowed to be used for that purpose.

Van Leunen [the foundation officer] admitted that the Foundation is designated as a "component unit" in GMU's accounting, and explained that this designation refers to "private independent entities." She explained the designation was used to reflect the Foundation as a source of potential future financial benefit to GMU.

Van Leunen also testified that she is a member of GMU's Gift Acceptance Committee, which is a committee that reviews unusual gifts to GMU. She stated that she assisted in drafting GMU's gift acceptance policy, because it protects the Foundation from accepting gifts GMU could not use. She explained that the Foundation's distributions are controlled by "[t]he donors' intentions" and that GMU does not direct or control these distributions. She further stated that the Foundation does not engage in fundraising, but once funds are raised, the Foundation assumes a caretaker role to manage, invest, and disburse those funds. She admitted that the 2013 affiliation agreement designates the Foundation as GMU's "primary depository for private gifts on behalf of the university," and the Foundation is designated to "receive all of those private gifts." *Transparent GMU*, 835 S.E.2d at 550.

The Virginia Supreme Court affirmed the lower court's ruling that the foundation was not subject to the VFOIA. Rejecting the "alter-ego" theory, the court stated that the foundation operated with a "separate identity" from the university, with its own bylaws, articles of incorporation, and statutes. Furthermore, stated the court, "The manner in

which the Foundation and GMU deal with each other further indicates that they are separate entities. The record contains evidence that the Foundation and GMU regularly enter into a series of contractual arrangements. GMU does not supervise the decision making of the Foundation” (*Transparent GMU*, 835 S.E.2d at 553). The court also found it important that the foundation was not supported with public funds. Based on this combination of factors, the court ruled that the foundation was a separate and distinct entity from the university. The court additionally rejected the argument that based on agency principles the VFOIA covered the foundation, with the court stating that even if there existed an agency relationship, the VFOIA would still not apply to documents in the foundation’s possession.

For a case in which a student newspaper was improperly denied records requested under a state opens record act, see *University of Kentucky v. Kernal Press Inc.*, 620 S.W.3d 43 (Ky. 2021). The Kentucky Supreme Court faulted the university for seeking to withhold all records for a story dealing with the university’s investigation into complaints of sexual assault against a professor:

In essence, the University treated the Harwood Investigative File as if it were one giant record, unable to be separated or compartmentalized when in fact the investigative file is a 470-page collection of various types of records. Grouping all the documents together as one record to avoid production is patently unacceptable under the ORA. KRS 61.878(4) specifically requires that “[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.” Because the investigative file likely contains documents that are excepted under the ORA and documents that are not, the

University's duty, as a public agency, was to separate excepted and nonexcepted documents. For each document the University claims can be properly withheld from production pursuant to the ORA, the University had the burden to prove that the document fits within an exception by identifying the specific ORA exception and explaining how it applies. KRS 61.880. The boilerplate paragraph—this but if not this then that—used for every withheld document was wholly unacceptable. (*Univ. of Kentucky v. Kernal Press Inc.*, 620 S.W.3d at 55-56)

The court also rejected the argument raised by the university that FERPA prohibited the disclosure of all records related to the investigation. Likewise, the court ruled that, rather than all the records, that specific records could be withheld or redacted so as to comply with a privacy exemption contained in the state's open records law. This case is also discussed in Section 8.8.2 of this Update.

The University of Vermont prevailed in a challenge by an organization seeking disclosure under Vermont's Public Records Act (PRA) of a faculty member's emails related to her service as a journal editor and government advisory committee member. In *U.S. Right to Know v. University of Vermont*, 2021 Vt. 33 (Vermont 2021), the nonprofit public health research association, U.S. Right to Know, requested a medical school professor's emails involving her editorial work with two journals as well as correspondence related to her service on scientific advisory committees. The University determined that, although the professor had used the University email system for this correspondence, these emails were not related to the professor's University-related work, but were done in her private capacity, and thus the emails were not public documents subject to disclosure under the PRA. An appellate court agreed, and the Vermont Supreme Court affirmed.

Chapter 14

Section 14.2 Federal Regulation of Postsecondary Education

14.2.3. Regulation of research

14.2.3.3. Laws governing animal research. A federal trial court has issued a preliminary injunction, stopping the University of Washington from releasing documents to an animal rights organization that contain personal identifying information for members of the university's Institutional Animal Care and Use Committee (IACUC). Members of the IACUC are not publicly identified, even at their meetings, which are open to the public. In *Sullivan v. The University of Washington*, 2022 U.S. Dist. LEXIS 75826 (W.D. Washington Apr. 26, 2022), the plaintiffs, members of the IACUC, had provided evidence that individuals associated with animal research had been harassed and threatened via emails, letters and voice mail messages, and had experienced picketing outside of researcher's private home, and kidnapping of pets. The University did not oppose the issuance of the preliminary injunction, and the court granted the plaintiffs' motion.

14.2.5. Copyright law.

14.2.5.4. The fair use doctrine. The litigation involving Georgia State University and several academic presses has continued. As noted on p. 1738 of *LHE6th*, the U.S. Court of Appeals for the Eleventh Circuit vacated and remanded a district court opinion that was favorable to the defendant universities. *Cambridge University Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018). The appellate court explained that "the district court misinterpreted our mandate and misapplied the test of fair use," but that the district court did not abuse its discretion when it declined to reopen the record.

Two years later, a trial judge issued a ruling in *Cambridge University Press v. Becker*, 446 F. Supp. 3d 1145 (N.D. Ga. 3/2/2020). The trial judge performed a fair use analysis on forty-eight allegations of copyright infringement, following the guidance from earlier appellate court opinions in this case. The judge found that plaintiffs prevailed in alleged infringements of six different works over a period of several years, and that the defendants prevailed on all of the other allegations.

14.2.7. Trademark law. A recent article describes the extent to which one prominent university has gone to protect its intellectual property. In “Mark of the Devil: The University as Brand Bully,” 31(2) *Fordham Intellectual Property, Media and Entertainment Law Journal* 391 (2021), authors James Boyle and Jennifer Jenkins examine the behavior of Duke University in initiating trademark opposition and cancellation proceedings at the United States Patent and Trademark Office. The authors found that 85% of Duke’s opposition and cancellation actions filed between 2015 and 2018 were either clearly erroneous as a matter of trademark law or far-fetched. Examples include actions by Duke to oppose third-party trademark applications to register “The Dude Diet,” for a diet-related website; “Kuke,” for electronic products; “Goluke,” for clothing; and “Le Duc,” for food and drink services. The authors view this behavior as evidence of “the expansion of universities into the role of mega-brands.”

Section 14.3. Federal Taxation of Postsecondary Education

14.3.5. Gifts and contributions The U.S. Department of Education created an online portal for colleges and universities to report foreign gifts and contracts worth more than \$250,000 (<https://www.ed.gov/news/press-releases/secretary-devos-unveils-enhanced-online-portal-higher-education-institutions-report-foreign-gifts-and-contracts>). Reporting such foreign gifts and contracts is required for compliance with Section 117 of the Higher Education Act.

Section 14.4 Federal Aid-to-Education Programs

14.4.5. Enforcing compliance with aid conditions. New borrower defense to repayment rules were published in the Federal Registrar on November 1, 2022 (87 Fed. Reg. 65,904). These new rules, reversing trends from the Trump administration, make it easier for borrowers to have their student loans discharged for fraud or misrepresentation on the part of an institution. The final rules, also reversing actions taken during the Trump administration and returning to the policy put in place in the Obama administration, prohibit the use of pre-enrollment arbitration agreements and enrollment agreements where students must agree to waive class action claims.

Section 14.5. Civil Rights Compliance

14.5.1. General considerations. The U.S. Department of Education's Office for Civil Rights issued an updated Case Processing Manual (CPM) (<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>). The CPM sets out the procedures that OCR follows in investigating and responding to complaints under civil rights laws such as Title IX the ADA.

14.5.2. Title VI. Legal battles over the use of race conscious admissions policies continue. Recent litigation has focused on practices at private institutions and whether particular race conscious policies violate Title VI. Harvard University was sued under Title VI for alleged discrimination against Asian Americans in admissions. *Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019). Harvard

acknowledged its use of race in admissions, but countered that it did so in a legally permissible manner. Considering the claims against Harvard under Title VI, the court applied the same standards announced by the U.S. Supreme Court in reviewing, for a second time, the race-conscious admissions policies at the University of Texas at Austin. *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (commonly referred to as *Fisher II*) (see *LHE6th* Sec. 8.2.5 for more on affirmative action in admissions). In an opinion in which the court spent considerable space parsing through dueling statistics, the court concluded that Harvard's race conscious admissions practices did not violate Title VI and discriminate against Asian Americans. The U.S. Court of Appeals for the First Circuit affirmed the decision (*Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020)). These cases are discussed in Section 8.2.5 of this Update.

A \$577 million settlement agreement was finalized in Maryland to end litigation brought by the state's four HBCUs that the institutions had been underfunded by the state and that historically white institutions had been allowed to replicate programs offered at the state's HBCUs (Danielle Douglass-Gabriel & Ovetta Wiggins, "Hogan Signs Off on \$577 Million for Maryland's Historically Black Colleges and Universities," *Washington Post*, March 24, 2021, available at <https://www.washingtonpost.com/education/2021/03/24/maryland-hbcus-lawsuit-settlement/>).

14.5.3. Title IX.

14.5.3.1. Overview. Title IX "does not apply to an educational institution which is controlled by a religious organization if the application of [that prohibition] would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a). The application of this religious

exemption was at issue in *Maxon v. Fuller Theological Seminary*, 2021 U.S. App. LEXIS 36673 (9th Cir. 2021)(unpublished). In *Maxon*, two students were dismissed by the Seminary when staff learned that each was married to a same-sex spouse. Fuller’s policies stated that its Community Standards, which students were required to follow, included a statement that marriage was only between a man and a woman. Applying the Title IX religious exemption, the trial court dismissed the plaintiffs’ Title IX claims and the appellate court affirmed.

* * * * *

A new Title IX rule issued under the Trump administration became effective on August 14, 2020 (85 FR 30026). The U.S. Department of Education released a summary of major provisions in the new rules (<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>). The department also issued a *Questions and Answers Regarding the Department’s Final Title IX* rule document on September 4, 2020 ([https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf?utm_content&utm_medium=email&utm_name&utm_source=govdelivery&utm_t](https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf?utm_content&utm_medium=email&utm_name&utm_source=govdelivery&utm_term))erm). Some of the notable requirements of the new Title IX rule include:

- Permitting institutions to use the “clear and convincing evidence” or the “preponderance of the evidence” standard in campus Title IX proceedings as long as the standard is the same whether the proceeding involves allegations against a student or an employee;
- Continuing to permit institutions to address misconduct that does not constitute sexual harassment for purposes of Title IX;
- Other than for student claims against an employee, permitting the use of alternative resolution procedures as long as voluntarily agreed to by both parties;

- Disallowing the use of a single investigator model in which the same individual serves as the investigator and decision-maker;
- Requiring institutions to hold a live hearing, either in-person or virtually, in which both parties are able to see and hear the questioning of witnesses;
- Permitting the cross-examination of parties and witnesses by a party’s advisor of choice. The final rule changed language in the proposed rule that allowed direct cross-examination by either party;
- Requiring that an institution must provide a party an advisor free of charge if a party does not have one. The final rule clarifies that the advisor does not have to be an attorney;
- Requiring that parties must be given an equal opportunity to review evidence directly related to the allegations;
- Stating that an institution’s Title IX responsibility in the United States includes property owned or controlled by an officially recognized student organization (a standard that raises questions regarding the exact boundaries of an institution’s Title IX responsibility for off-campus conduct (see Greta Anderson, May 12, 2020, “Location-Based Protection,” *Inside Higher Ed*, available at <https://www.insidehighered.com/news/2020/05/12/new-title-ix-regulation-sets-location-based-boundaries-sexual-harassment-enforcement>; Greta Anderson, August 14, 2020, “Deadline Time for New Federal Sexual Assault Policies,” *Inside Higher Ed*, available at <https://www.insidehighered.com/news/2020/08/14/colleges-implement-changes-meet-title-ix-deadline>);

- Providing that Title IX’s coverage does not extend to study abroad programs (R. Shep Melnick, June 11, 2020, “Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct,” *Brookings Institution*, available at <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>);
- Requiring institutions to presume that a student (or employee) accused of misconduct is presumed innocent of the allegations, which has potential implications for pre-hearing restrictions that may be imposed on an accused individual;
- Requiring that parties must be allowed to appeal a decision on three grounds: (1) procedural irregularities that affected the outcome of a proceeding; (2) new evidence that could alter the outcome of a matter; and (3) bias or conflict of interest on the part of Title IX personnel that affected the outcome of a matter; and
- Providing that the rules will not be applied retroactively after going into force on August 14, 2020.

The Biden administration is moving to change the Title IX rules adopted under the previous administration. The U.S. Department of Education issued a notice of proposed rulemaking for Title IX on June 23, 2022 (<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>) (87 FR 41390). The proposed changes would reverse several of the standards introduced under the Trump administration, such as removing the requirement for live hearings and requiring institutions to use a preponderance-of-the-evidence standard unless a clear-and-

convincing-evidence standard is used in all other comparable proceedings. The proposed changes would also seek to clarify protections for pregnant students and would also clarify that Title IX protections encompass issues of sexual and gender identity.

Until the new rules become effective, in July 2021 the U.S. Department of Education issued *Questions and Answers on the Title Regulations on Sexual Harassment (July 2021)* (available at <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>). As covered in the document, postsecondary institutions are required to have live hearings as part of the Title IX grievance process. At live hearings, institutions must allow each party to have an advisor present, which may be an attorney. The document affirms that under the 2020 amendments to the Title IX regulations that an institution cannot use a different standard of proof in hearings for students and employees. Thus, if a clear and convincing evidence standard is used for employees, then the same standard of proof must be used for students.

Among the other issues dealt with in the document, if an individual does not participate in cross-examination, then statements by the person cannot be relied upon to determine whether the respondent engaged in the alleged sexual harassment. However, a federal court, while preserving other aspects of the Title IX regulations put in place in the Trump administration, determined that this provision was arbitrary and capricious under federal administrative law. The court sent the issue back to the U.S. Department of Education for further consideration and explanation (Jeremy Bauer-Wolf, Aug. 5, 2021, “Federal judge finds provision of Trump-era Title IX Rule unlawful,” *Higher Ed Dive*, available at <https://www.highereddive.com/news/federal-judge-finds-provision-of-trump-era-title-ix-rule-unlawful/604299/>).

The court issued a subsequent order to clarify that the provision—Section 106.45(b)(6)(i)—on statements not subject to cross-examination was vacated (*Victim Rts. L. Ctr. v. Cardona*, No. CIV 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021)). The U.S. Department of Education issued an update to announce that it would immediately stop seeking to enforce the provision on statements not subject to cross-examination (available at <https://www2.ed.gov/about/offices/list/ocr/blog/20210824.html>). Thus, for example, a hearing committee or decision-maker may now consider statements even if a party does not participate in cross-examination in a live hearing. Police reports, Sexual Assault Nurse Examiner documents, and medical reports may also be considered by decision-makers.

Colleges and universities need to be prepared for ongoing changes in how institutions meet their legal obligations under Title IX, but until the new regulations are formally adopted, they will need to follow the 2020 regulations (with the exceptions noted above).

The U.S. Department’s Office for Civil Rights issued a resource dealing with nondiscrimination and the rights of students on the basis of pregnancy or related conditions (e.g., childbirth, false pregnancy, or termination of pregnancy) (<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-pregnancy-resource.pdf>). The resource notes that schools must treat pregnancy and related conditions the same as any temporary disability in relation to any hospital or medical benefit or policy. The resource also covers that a school must provide leave to a student as long as their physician deems it medically necessary.

The applicability of Title IX to issues of gender identity and sexual orientation remains a contested issue. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the U.S. Supreme Court, considering three cases together, held that Title VII’s protections applied to individuals who are homosexual and to individuals who are transgender. *Bostock* is important in relation to Title IX given how courts typically interpret the statutes in a similar manner. The *Bostock* case is discussed in Section 5.3.8 of this Update.

In March 2021, the U.S. Department of Justice (DOJ) issued a memorandum dealing with the application of the U.S. Supreme Court’s decision in *Bostock v. Clayton County* to Title IX. In the memorandum, the DOJ referenced an executive order from President Biden—*Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (86 Fed. Reg. 7023 (Jan. 25, 2021)). The DOJ stated in the memorandum that the *Bostock* decision informed the agency’s interpretation of Title IX, noting that courts consistently look to Title VII when interpreting Title IX. The DOJ pointed out in the memorandum that two federal appeals courts had applied *Bostock* to decisions involving Title IX and the rights of transgender students (see *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert. filed*, No. 20-1163 (Feb. 24, 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020) (covered below in this update), *petition for reh’g en banc pending*, No. 18- 13592 (Aug. 28, 2020)). Based on these factors, the DOJ stated in the memorandum that it would interpret Title IX to include discrimination on the basis of gender identity and sexual orientation. The U.S. Department of Education released a similar memorandum (available at <https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of->

[the-education-amendments-of-1972-with-respect-to-discrimination-based-on](#)). However, A federal district court granted a preliminary injunction that at least temporarily halted the guidance from the U.S. Department of Education and the DOJ to apply Title IX's protections to gender identity and sexual orientation (*see Tennessee v. U.S. Department of Education*, 2022 WL 2791450 (E.D. Tenn. July 15, 2022)). The changes to Title IX rules proposed by the Biden administration specifically include gender identity and sexual orientation as protected under Title IX (<https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>).

In *Adams v. School Board of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020), the court ruled that it violated a transgender student's equal protection and Title IX rights to prohibit the student from using the boy's restroom. As to the equal protection claim, the court rejected the argument that heightened scrutiny did not apply, stating that based on circuit precedent that a policy that distinguished on the basis of transgender status constituted sex discrimination subject to heightened scrutiny for equal protection purposes. While assuming that the school board had an important interest in protecting privacy in student bathrooms, the court concluded that no substantial relationship existed between this policy and the treatment of the student, with the court pointing out that the school board only presented hypothetical concerns that were contradicted by the evidence. The court also stated that the policy relied on gender stereotypes of transgender students. In relation to Title IX, the court found significant the U.S. Supreme Court's decision in *Bostock v. Clayton County*.

Also looking to *Bostock*, the U.S. Court of Appeals for the Fourth Circuit ruled that a school district impermissibly sought to prohibit a transgender student from using

the boy's restroom and improperly refused to amend the student's school records to reflect the appropriate gender as requested by the student (*Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) (see *LHE6th* p. 1885 for more on the *Grimm* litigation). In *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), a federal appellate court ruled that it was permissible for a school to allow transgender students to use the bathroom that matched their gender identity without violating Title IX or students' constitutional right to privacy.

The U.S. Department of Education's Office for Civil Rights released a resource collection titled "Back to School: Supporting Educational Environments Free from Discrimination: A Resource Collection for Post-Secondary Institutions" (available at <https://www2.ed.gov/about/offices/list/ocr/docs/back-to-school-binder-postsecondary-sept-2021.pdf>). The document contains information on issues involving harassment and COVID-19, information on Title IX regulations, confronting LGBTQI+ harassment, and a Dear Colleague letter on retaliation.

14.5.3.3. Claims by accusing students. The circumstances under which institutions may be found liable under Title IX for failing to prevent or adequately addressing claims of peer sexual harassment continue to generate litigation. *LHE6th* at p. 1896 covered *Farmer v. Kansas State University*, 2017 WL 980460 (D. Kan. 3/14/17). In affirming the decision, 918 F.3d 1094 (10th Cir. 2019), a federal appellate court agreed that the plaintiff presented plausible allegations that the university had sufficient control over an off-campus fraternity house to sustain a deliberate indifference claim. After receiving the student's complaint of sexual assault at the fraternity

house, the university responded to the student that it would not investigate a rape that took place off campus and was unrelated to a university program or activity.

In seeking summary judgment, the university looked to cases that included *Roe v. St. Louis University*, 746 F.3d 874 (8th Cir. 2014), a case in which the court concluded that an off-campus rape was not under the institution's control so as to support a deliberate indifference claim. However, in *Farmer* the court determined that the plaintiff sufficiently alleged that the university had substantial control over the fraternity and the off-campus residence for Title IX purposes to sustain a claim. (See also *Weckhorst v. Kansas State University*, 241 F. Supp. 3d 1154 (D. Kan. 2017), *affirmed*, 918 F.3d 1094 (10th Cir. 2019).) (See *McNeil v. Yale University*, 2020 WL 495061 (D. Conn. 1/30/20), for a recent case in which the court rejected that sufficient institutional control existed over fraternity housing to support a Title IX claim against the university.)

For a case in which a federal appellate court, affirming the lower court, rejected claims by three students that a university had violated Title IX by failing to protect them from stalking and sexual harassment by another student, see *Pearson v. Logan University*, 937 F. 3d 119 (8th Cir. 2019) (per curiam). See also *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019), and *Karasek v. Regents of University of California*, 2020 WL 486786 (9th Cir. 1/30/20), for two federal appellate court cases where courts dismissed claims that universities had responded with deliberate indifference in how they responded to reports of sexual harassment by students. In *Karasek*, the appeals court did remand to the district court to determine whether allegations that the university had systematically failed to educate students were sufficient to survive a motion to dismiss. On remand, the lower ruled that the students had plausibly stated a claim that the university showed deliberate indifference to sexual harassment

by failing to systematically educate students about sexual assault and appropriate sexual interactions (*Karasek v. Regents of University of California*, 2021 WL 1405479 (N.D. Cal. April 14, 2021)). The university had been faulted in a state audit on sexual harassment and sexual violence conducted at four California universities, including a failure to provide such education. For another case where a court allowed a student's claims to proceed, see *Doe v. Moravian College*, 2021 WL 843603 (E.D. Pa. March 5, 2021), where the court ruled that a former student's Title IX and infliction of emotional distress claims could proceed based on allegations that the college failed to discipline the students alleged to have assaulted her, discouraged her from pursuing a complaint, and reprimanded her in the wake of reporting multiple violations of the a contact order. See also *Posso v. Niagara University*, 2021 WL 485699 (W.D. N.Y. Feb. 10, 2021), where the court ruled that members of a women's university swim team had sufficiently alleged that university officials had actual notice of a risk of sexual assault by members of the men's swim team.

In contrast to *Farmer v. Kansas State University*, 918 F.3d 1094 (10th Cir. 2019) (see above), the court ruled in *Kollaritsch* that a claimant needed to establish that further harassment to an individual took place after the institution possessed actual knowledge of harassment. In contrast, in *Farmer* the court did not require a showing that the claimant was subjected to further additional harassment, only that future harassment was more likely because of deliberate indifference. The U.S. Supreme Court declined to grant review in *Kollaritsch* (2020 WL 6037223 (U.S. Oct. 13, 2020)). See also *Karasek v. Regents of Univ. of California*, 956 F.3d 1093 (9th Cir. 2020) (holding that lapses of more than eight months and thirteen months between complaint and sanctions did not constitute deliberate indifference on the part of the university

but, reversing the lower court, to hold that a pre-assault claim based on deliberate indifference was cognizable under Title IX).

In another notable deliberate indifference case, in *Foster v. Board of Regents of Univ. of Michigan*, 2020 WL 7294759 (6th Cir. Dec. 11, 2020) (en banc), the Sixth Circuit in a divided *en banc* decision—with eight justices in the majority and six in dissent—ruled that a university was not deliberately indifferent to a student’s claim of sexual harassment when the institution took steps to address a continuing pattern of harassment of the student by another student. The judges in the dissenting opinion argued that under the facts presented in the case, the issue of whether the university had acted with deliberate indifference to continuing alleged claims of harassment presented factual determinations that should have been decided by a jury.

In *Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018), reversing the lower court in part, a federal appellate court ruled that members of student feminist organization (Feminists United) sufficiently alleged in their complaint that a university failed to adequately respond to sustained incidents of cyberbullying on the social media platform Yik Yak (now defunct), so as to constitute deliberate indifference under Title IX. The court, rejecting the university’s argument that it lacked substantial control over incidents and comments that took place on Yik Yak, noted that the complaint alleged that the institution could have taken additional steps to stop the harassment and intimidation of the students, which was taking place on campus through the use of the social media platform. These potential steps included disabling Yik Yak on campus, seeking to identify students who were making threats on the social media site, and taking more direct and forceful steps to stop the threatening behavior against the students, such as having “mandatory assemblies to explain and discourage cyber bullying and sex discrimination.” The court rejected the contention that the university faced potential First

Amendment hurdles in regulating the comments on Yik Yak, with the court stating that the threatening conduct of the type alleged in the complaint was not protected by the First Amendment.

The appellate court in *Feminist Majority Foundation* also ruled that the institution could be liable for “student-on-student retaliatory harassment” under Title IX. The retaliation claim was based on alleged threats and intimidation that resulted from the publication of a newspaper column by one of the plaintiffs speaking out against sex discrimination at the university and in response to suspension of activities by the university rugby team for inappropriate conduct. The court rejected the university’s arguments that the retaliation claim was duplicative of the sex discrimination claim and that student-on-student harassment could not, as a matter of law, be used to sustain a retaliation claim against the university. Instead, the court stated that the complaint “plainly faults [the university] for its failure—over several months—to address and seek to eliminate retaliatory harassing conduct [against the students].” According to the court, “[i]n sum, if an educational institution can be liable for student-on-student sexual harassment, ... it can also be liable for student-on-student retaliatory harassment.” 911 F.3d at 696.

Besides litigation and federal regulatory guidance, state law may also serve to impose obligations on institutions concurrent to or in addition to those required under Title IX. For example, Pennsylvania passed legislation in 2019 that, among its provisions, requires colleges and universities in the state to create online, anonymous systems for students and employees to report sexual assaults (Marc Levy, “Pennsylvania Orders Stronger Sex Assault Reporting on Campus,” *Associated Press*, July 8, 2019, available at <https://www.apnews.com/6cc2b7cb8d6a4768ac3bd1a393ea6933>). The law also mandates that witnesses or victims reporting a sexual assault are to be exempted from being charged with a

violation of an institution's drug or alcohol policy. As another example, Texas passed legislation in 2019 that comes with requirements for employees to report complaints of sexual harassment or sexual violence (see Katherine Mangan, "Texas Professors Could be Criminally Charged if They Don't Report Sexual Violence," *Chron. Higher Educ.*, May 23, 2019, available at <https://www-chronicle-com.umiss.idm.oclc.org/article/Texas-Professors-Could-Be/246361>).

While not a peer sexual harassment case, in *Bose v. Bea*, 947 F.3d 983 (11th Cir. 2020), the court considered vicarious liability under Title IX. In *Bose v. Bea*, a student expelled for cheating argued that the action against her came as a result of fabricated charges by a professor after the student rebuked him for inappropriate conduct. The appeals court affirmed the lower court's ruling that the student's Title IX claim against the college should be dismissed but it reversed on the issue that the student's defamation claim against the professor was barred under Tennessee law. In relation to Title IX, the court stated that the student could not use a "cat's paw" theory to attribute the alleged actions and retaliatory motives of the professor to the institution. According to the court, "Under a cat's paw theory, the decisionmaker need not have notice of the subordinate's discriminatory purpose. The cat's paw theory, rather, imputes knowledge and discriminatory intent—the cat's paw is the "unwitting tool" of those with the retaliatory motive" (*Bose*, 947 F.3d at 990). Such a theory, stated the court, could not form the basis of a successful Title IX claim against the college. However, for the defamation claim, the court reversed the lower court, ruling that Tennessee does not provide an absolute privilege for statements made in a quasi-judicial hearing. Specifically, the court concluded that Tennessee law did not recognize such an absolute privilege to apply to statements made by the professor in the college's disciplinary hearing.

In *Doe v. Bd. of Regents of Univ. of Wisconsin* (W.D. Wis. Nov. 3, 2021), the court ruled that a student's Title IX's deliberate indifference and erroneous outcome claims could proceed. The student alleged that the university showed deliberate indifference by continuing to allow the accused student to attend school. For the erroneous outcome claim, the court ruled that the student had, at the pleading stage, sufficiently alleged that the university was motivated to overturn a prior institutional decision finding that the accused student had violated sexual harassment standards because the student was a football player. The court did dismiss a due process claim because the student failed to identify "exact" contractual promises by the school that would give rise to a protected property interest.

14.5.3.4. Claims by accused students. Students accused of sexual misconduct continue to challenge conduct actions taken against them as violative of their rights under Title IX, as well as asserting challenges based on constitutional due process or equal protection grounds, breach of contract, or state tort standards. Some courts have refused to dismiss lawsuits by accused students, at least at preliminary stages of litigation, under Title IX, contract theory, or due process. For instance, in *Doe v. Princeton University*, 30 F.4th 335 (3d Cir. 2022), a federal appeals court, reversing the lower court's dismissal of the action for failure to state a claim, held that a male student pled with sufficiency that a university had treated his allegations of harassment by his girlfriend with less seriousness than the girlfriend's claim of misconduct and that the girlfriend's violation of a no-contact order resulted in only a "mild" response from the institution. The court also concluded that the accused student had plausibly alleged that the university had treated accused male students unfairly due to external pressures to respond aggressively to allegations of sexual misconduct from female students. Besides the student's

Title IX claims, the court also ruled that the student had, at this stage of litigation, offered sufficient factual allegations to support his claims of breach of contract and breach of the implied covenant of good faith and fair dealing under state law.

In *Doe v. American Univ.*, 2020 WL 5593909 (D. Colo. Sept. 18, 2020), the court considered that some circuits have moved away from using “strict categorical tests”—erroneous outcome, selective enforcement, deliberate indifference, and archaic assumptions—to establish claims in Title IX litigation (citing *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019); *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020); and *Schwake v. Arizona Board of Regents*, 967 F.3d 940 (9th Cir. 2020)). The court followed the Seventh Circuit’s lead in *Doe v. Purdue University* to consider whether the facts alleged, if true, raised a plausible inference that the institution had discriminated against the claimant on the basis of sex. Under this less categorical-based approach, the court refused to dismiss the accused student’s Title IX claim.

In *Sheppard v. Visitors of Virginia State University*, 993 F.3d 230 (4th Cir. 2021), the court considered claims by a student who was suspended after an altercation with his former girlfriend and another female student. The court, highlighting different approaches by federal appeals courts, considered what a Title IX claimant must “plausibly allege” in a student disciplinary hearing:

Looking to how our sister circuits have addressed this issue, courts are split. The first approach, articulated by the Second Circuit, in *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994), provides that “[p]laintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories,” erroneous outcome and selective enforcement. *Yusuf* then announced the requirements for establishing either claim. *See id.* The First and Fifth Circuits have followed *Yusuf*’s approach. *See Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 73–74 (1st Cir.

2019) (holding to succeed on a selective enforcement theory, plaintiff must show that “the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender.” (quoting *Yusuf*, 35 F.3d at 715)); *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204, 210 (5th Cir. 2019) (recognizing *Yusuf*'s two-theory framework).

The Seventh Circuit, however, has rejected *Yusuf* as an all-inclusive doctrinal framework for student disciplinary proceedings. *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019) (holding *Yusuf*'s categories merely describe ways a party could allege discrimination on the basis of sex). Instead, *Purdue* articulated an approach that more closely tracks the text of Title IX, asking merely “do the alleged facts, if true, raise a plausible inference that the university discriminated against [the student] on the basis of sex?” *Id.* at 667–68 (internal quotation marks omitted). Many circuits have agreed with that approach. *See Doe v. Univ. of Sciences*, 961 F.3d 203, 209 (3d Cir. 2020) (“[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex. Although parties are free to characterize their claims however they wish, this standard hews most closely to the text of Title IX.”); *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020) (“To state a claim, therefore, [plaintiff] must allege adequately that the University disciplined him on the basis of sex—that is, because he is male.”); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020) (“We adopt [the Seventh Circuit's] far simpler standard for Title IX claims. ...”). (*Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d at 235–236 (4th Cir. 2021) (footnotes omitted))

The court concluded that it would follow the approach taken in the Seventh Circuit, stating:

We agree with the Seventh's Circuit's approach and see no need to deviate from the text of Title IX. In adopting this approach, however, we find no inherent problems with the erroneous outcome and selective enforcement theories identified in *Yusuf*. In fact, either theory, with sufficient facts, may suffice to state a plausible claim. We merely emphasize that the text of Title IX prohibits all discrimination on the basis of sex. (*Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d at 236)

The court also noted that under its approach is a “requirement that a Title IX plaintiff adequately plead causation—that is, a causal link between the student's sex and the university's challenged disciplinary proceeding” (*Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d at 236). Using this standard, the court concluded that the student had failed to plead any facts that would give rise to a plausible inference of discrimination on the basis of sex in how the student was treated during the disciplinary process. On similar grounds, the court also dismissed the student’s equal protection claims.

For a case where a student successfully challenged a lower court’s grant of summary judgment to a university, see *Doe v. University of Denver*, 1 F.4th 822 (10th Cir. 2021). In the case, a federal appeals court, reversing the lower court’s grant of summary judgment for the university, ruled that a student found to have committed sexual misconduct had provided “sufficient evidence for a jury to decide whether the investigation into the allegations and subsequent disciplinary action discriminated against him because of his sex” (*Doe v. University of Denver*, 1 F.4th at p. 825). The accused student raised procedural deficiencies in the investigation that included failing to interview all the witnesses requested by the accused student while interviewing all those requested by the complainant. For purposes of summary judgment, the court also agreed that

the Final Report that the disciplinary committee reviewed before expelling John, when viewed in the light most favorable to John, can be construed as ignoring, downplaying, and misrepresenting inconsistencies in Jane’s account of the alleged assault. In addition to Jane’s conflicting accounts of the alleged assault, the record reveals several examples of Jane making inconsistent statements about other matters to John, her classmates, and the investigators. (*Doe v. University of Denver*, 1 F.4th at 832)

The court also agreed with the student that only relying on partial information from a medical report, with the complainant declining to turn over the entire report to investigators, could have potentially resulted in a failure to produce potential exculpatory evidence. For a case in which a court ruled that some defects in the investigation and hearing process were insufficient to sustain an intentional bias claim under Title IX, see *Doe v. University of Southern Indiana*, 2022 WL 3152596 (7th Cir. August 8, 2022).

In *Does v. Regents of the University of Minnesota*, 999 F.3d 571 (8th Cir. 2021), a federal appeals court, reversing the lower court on this issue, held that football players found to have committed sexual misconduct had sufficiently stated a claim for Title IX sex discrimination on the basis that a combination of external and internal pressures had biased the disciplinary process in violation of Title IX. For example, the players alleged that the investigator believed that football players had “covered-up sexual misconduct complaints” in a prior investigation.

A key issue that has emerged, one that has resulted in a seeming split among federal appellate courts, involves the extent to which accused students should be able to engage in cross-examination in conduct proceedings. In *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the court held that a university violated a student’s due process rights in denying him cross-examination in a conduct hearing for sexual misconduct that turned on issues of witness credibility. The court

stated in its opinion that “if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.” 903 F.3d at 581. A university investigator had concluded that the student should not be found in violation as the evidence in favor of a finding of misconduct was not “more convincing” than evidence offered to establish that the student was not in violation. A university appeals panel that reviewed the investigator’s report decided differently, concluding that issues of evidence and witness credibility favored a finding of misconduct on the part of the student. The court looked to the lack of cross-examination as also supportive of the student’s Title IX claim of erroneous outcome to survive a motion to dismiss.

In contrast to *Doe v. Baum*, a federal appellate court in *Haidak v. University of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019), decided to “stop short” of imposing a cross-examination requirement. As to mandating that accused students be able to engage in cross-examination in conduct hearings that involved issues of credibility, the court in *Haidak* stated,

We stop short of adopting that latter pronouncement [cross-examination] because we have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation. We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials. (933 F.3d at 69)

While not specifically turning on the issue of cross-examination, but in a case involving witness credibility issues, a federal appellate court held that a student had sufficiently alleged defects in the process used to find him in violation of the university’s sexual harassment standards. *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019). The court noted that two of three panel members on the committee that found the student

in violation admitted to not having read the investigative reports, “which suggests that they decided that [the student] was guilty based on the accusation rather than the evidence.” 928 F.3d at 663. Additionally, the court found it “particularly concerning” that committee members had concluded that the accusing student was “the more credible witness—in fact, that she was credible at all—without ever speaking to her in person.” 928 F.3d at 664.

While not implicating Title IX, In *Doe v. University of Sciences*, 961 F.3d 203 (3d Cir. 2020), the court ruled that under contract principles, some form of live cross-examination must be permitted in a student conduct case at a private university in Pennsylvania under principles of state law and fairness in the treatment of students in which credibility determinations of parties or witnesses are at issue. In *Doe v. Michigan State University*, 989 F.3d 418 (6th Cir. 2021), the court held that the fact that a hearing officer did not ask a complainant every question requested by an accused student in cross-examination did not violate the accused student’s due process rights when considered in the overall context of the proceedings. The court also noted that making a claimant respond to all requested questions in cross-examination would run counter to protecting the interests of alleged victims of sexual assault. As such, the court found that the university acted in compliance with the standards laid out in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

In a per curiam opinion, a federal appeals court upheld a determination that a student accused of sexual harassment could not state a theory of deliberate indifference under Title IX because the student was not a victim of sexual harassment (*Whitaker v. Bd. of Regents of Univ. Sys. of Georgia*, No. 20-13618, 2021 WL 4168151 (11th Cir.

Sept. 14, 2021). As to an erroneous-outcome theory, the student was prohibited from advancing such a claim as he had been found “not responsible” by the institution. The dismissal of a selective enforcement claim was also upheld, and the court also upheld the dismissal of claims based on Title IX retaliation and equal protection.

In *Doe v. Regents of Univ. of Cal.*, 285 Cal. Rptr. 3d 532 (Cal. App. Sept. 30, 2021), affirming a lower court judgment, a California appeals court, among the issues considered, ruled that a student was not entitled to a live hearing and a chance to cross-examine witnesses when credibility was not an issue. The court found it important that the student admitted in a written statement to the behavior that served as a basis for the student to be found in violation of university sexual harassment policy.

In *Overdam v. Texas A&M University*, 43 F.4th 522 (5th Cir. 2022) (per curiam), a federal appeals court considered (1) what is the appropriate pleading standard under Title IX for a challenge to a university’s disciplinary proceeding and (2) whether constitutional due process requires a student accused of sexual assault be allowed the opportunity to for their attorney to directly cross examine the student’s accuser during the university’s disciplinary proceeding.

As to the pleading standard, the court stated that two frameworks have emerged to analyze university disciplinary proceedings under Title IX. The first—called the *Yusuf* framework—outlines four theories of liability under Title IX to challenge an institution’s disciplinary proceeding: (1) erroneous outcome; (2) selective enforcement; (3) archaic assumptions; and (4) deliberate indifference. The second framework, articulated in *Doe v. Purdue University* 928 F.3d 652 (7th Cir. 2019), does not use doctrinal tests to evaluate a Title IX challenge to a university’s disciplinary proceeding. The court stated that it interpreted no

tension between the two approaches, with either providing an appropriate approach to sustaining a Title IX claim against a disciplinary proceeding.

On the issue of cross examination, the court concluded that it was sufficient that the accused student was allowed cross examination of the accusing student by submitting questions to be asked through the hearing panel and not directly by the student’s attorney.

The new Title IX rules, discussed above, issued by the Trump administration provide a right of cross-examination but allow institutions to assign this role to a student advisor rather than to permit the student to personally engage in cross-examination.

Chapter 15

The College and External Private Entities

Section 15.2. Applicable Legal Principles

In response to a lawsuit from the U.S. Department of Justice on antitrust grounds (for more on antitrust law, see *LHE6th* Sec. 14.2.8.), the National Association for College Admission Counseling entered into a consent decree in which it agreed not to “establish, attempt to establish, maintain, or enforce any Early Decision Incentives Rule, Transfer Student Recruiting Rule, or First-Year Undergraduate Recruiting Rule.” The association amended its ethics rules in response to the DOJ legal action (Scott Jaschik, Dec. 16, 2019, “Justice Department Sues, Settles with NACAC,” *InsideHigherEd*, available at

<https://www.insidehighered.com/admissions/article/2019/12/16/justice-department-sues-and-settles-college-admissions-group>.

Section 15.3. The College and the Accrediting Agencies

15.3.2. Accreditation and the courts.

15.3.2.2. State common law and “federal common law.” the U.S. Court of Appeals for the Eleventh Circuit declined to consider whether a federal common law due process right exists in ruling that, even if such a right exists, an accreditor did not act unreasonably or arbitrarily in revoking a college’s accreditation (*Paine College v. Southern Association of Colleges and Schools Commission on Colleges*, 810 F. App’x 852 (11th Cir. 2020)). The court stated that minor departures from procedures did not suffice to trigger a due process violation and that substantial evidence supported the revocation of accreditation, a process that took place over a period of four years.

Section 15.4. Athletic Associations and Conferences

15.4.4. Antitrust laws. In a much-anticipated ruling, the United States Supreme Court unanimously decided in June 2021 that the National Collegiate Athletic Association (NCAA) violated federal antitrust law under the Sherman Act by promulgating rules, in conjunction with collegiate athletic conferences, that limit the education-related benefits institutions may offer to student-athletes. *NCAA v. Alston*, No. 20-512 (June 21, 2021). The case involved admitted horizontal price fixing by the NCAA and member conferences in the market for collegiate athletics, in which they admittedly exercise monopoly control. Accordingly, the Court applied the rule of reason test, as opposed to a more deferential test that the NCAA sought, in analyzing the antitrust claim.

The opinion contained few surprises, except for an explicit refutation of earlier dicta by the Court in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), in which the Court stated that “The NCAA plays a critical role in the maintenance of a revered tradition of

amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.” The NCAA referenced those lines to support its model for collegiate athletics, whenever and wherever challenged. The *Alston* court explicitly minimized the dicta from *Board of Regents*, calling it “an aside” that amounted to “stray comments” that had no bearing on the issues *sub judice*. The Court declined to view the NCAA as immune from the terms of the Sherman Act because its actions “happen to fall at the intersection of higher education, sports, and money.”

On the subject of money, importantly, the *Alston* case did not disturb NCAA rules restraining the compensation that student-athletes can receive, but only because the issue was resolved in favor of the NCAA at the district court, and the student-athlete plaintiffs chose not to appeal. However, in what could be viewed as a prescient concurring opinion by Justice Brett Kavanaugh, he noted that “the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws,” suggesting that subsequent litigation on the topic may find a sympathetic ear. Stating that “The NCAA’s business model would be flatly illegal in almost any other industry in America,” the concurrence suggested that the NCAA’s justification for not compensating student-athletes rests on circular and unpersuasive reasoning (i.e., that the defining feature of college sports is that student-athletes are not paid). Observing that many of the student-athletes who generate revenue for universities are African-American and from lower-income backgrounds, who end up “with little or nothing,” Justice Kavanaugh ended his concurrence by stating that “The NCAA is not above the law.”

Chapter 16

The College and the Business and Industrial Community

Section 16.4. The College as Research Collaborator and Partner

16.4.2. The research agreement. The lower court decision in *Partlow v. Kennedy Krieger Institute, Inc.*, 2017 WL 4772626 (Md. Ct. Spec. App. 10/23/17), covered in *LHE6th* at p. 2017, involved claims brought by a sibling of a participant in a KKI research study. Affirming the lower court, the Court of Special Appeals of Maryland ruled in *Partlow v. Kennedy Krieger Institute, Inc.*, 191 A.3d 425 (2018), that the special relationship between KKI and the study's participants, which was established in earlier litigation, also encompassed the plaintiff. In affirming the decision, the Court of Appeals of Maryland stated:

Here, we hold that a duty of care exists in the limited circumstances where:

(1) a medical research institute knows of the presence of a child, who is not a participant in a research study concerning lead-based paint abatement of a property, who resides at a property that is subject to the research study during a participant child's enrollment in the study; (2) the medical research institute has signed a consent agreement with a parent or guardian for a participant child's enrollment in the research study and both the participant and non-participant children reside at a property subject to the study; (3) the medical research institute knows or should know of the presence or suspected presence of lead in the property; (4) the medical research institute determined the level of lead-based paint abatement for the property; and (5) the non-participant child who resided at the property during the research study was allegedly injured by being exposed to lead at the property. The bottom line is that we hold that, under the circumstances alleged in this case, considering the record in a light most favorable to the non-moving party, on the

question of duty, it was error to grant summary judgment in favor of KKI on grounds that KKI owed no duty of care . . . under the common law. 191 A.3d at 449–50.