

Campus Legal Advisor

Email delivery
now available.
Call 888.378.2537
for more information.

Interpreting the Law for Higher Education Administrators

VOLUME 12, ISSUE 3

NOVEMBER 2011

TOP LEGAL CASES

COVER STORY

NEWS BRIEFS

Libraries face authors' wrath in suit over orphan works; IRS ends reporting rules for employees' cellphones; and more. **Page 2**

OCR SPECIAL REPORT

See the second installment of the letters chosen by Office for Civil Rights officials as the most important rulings from 2010–11.

Pages 7–12

ATHLETICS

Disgruntled employee's suit ends with court's dismissal. **Page 12**

ACADEMIC AFFAIRS

Appeals court gives second chance to plead race discrimination. **Page 13**

STUDENT AFFAIRS

Court rejects student's due process argument. **Page 14**

YOU BE THE JUDGE

Was a reporter unconstitutionally evicted from NCAA tournament? **Page 15**

Use today's challenges as tomorrow's best practices

Postsecondary education institutions are not really ivory towers. Ask general counsels or compliance officers and they will tell you that their institutions are a microcosm of the outside world.

But whereas attorneys usually specialize in one area — such as employment or personal injury — a university's legal counsel must be a generalist who in a single day may be asked to advise on such varied issues as student discipline, tenure and copyright.

That same lawyer may also be called upon to fend off a personal injury lawsuit or counsel on how to respond when a faculty member unexpectedly dies.

Campus Legal Advisor asked its Advisory Board members to share some of the major challenges they've faced in higher education and the lessons they've learned from handling them. **See full story, pages 4–5.**

Review tips

How would you handle the threat of copyright infringement concerning a course manual you had one of your professors create? **See page 5.**

HIGHLIGHTS

Consider risks before terminating tenured faculty

Sometimes more is lost than gained by assailing the holy grail that is tenure. Learn from a general counsel's recent experience when her institution tried to dismiss a tenured professor. **Page 3**

Adopt procedures to address online harassment

Review these guidelines to ensure that your institution's policies do not run afoul of recent federal court decisions regarding off-campus online speech. **Page 6**

Quick Study: Students' Rights under FERPA

Check out how the Department of Education's Family Policy Compliance Office has addressed recent complaints alleging that students' rights under the Family Educational Rights and Privacy Act have been violated. **Page 16**

Authors vs. libraries in suit over orphan works

Don't wait until a lawsuit is filed to ensure that your library's practices do not violate copyright law. The University of Michigan and four other universities are named defendants in a lawsuit filed by the Authors Guild.

LEGAL NEWS BRIEFS

is a regular feature highlighting recent lawsuit filings, settlements or regulatory actions impacting higher education.

The Guild claimed that the institutions — all members of a digital works repository

called the Hathitrust — used questionable practices to classify books as “orphans” and allow unlimited downloads of those works to faculty members and students. Orphan works are out-of-print books whose writers could not be located.

The Guild alleged that the institutions did not make adequate efforts to identify the authors of the so-called orphan works.

The University of Michigan's library suspended the practice, citing “serious” flaws in its process for identifying the orphan works, reported *Inside Higher Ed*. ■

IRS ends reporting rules for employees' cellphones

College employees no longer have to keep track of their personal use of business cellphones. The Internal Revenue Service recently issued a clarification on the tax treatment of employer-provided cellphones.

Thanks to a provision in the Small Business Jobs Act of 2010, cellphones are now an excludable employee fringe benefit. As a result, when a college or university provides an employee with a cellphone primarily for non-compensatory business reasons, the cellphone's business and personal uses are nontaxable to the employee. This eliminates the detailed recordkeeping that was previously required. ■

Catholic U. defends coed dorms elimination

Although not clear yet, there may be legally sound reasons for providing only single-sex dorms to undergraduates. The Catholic University of America recently went before the Office of Human Rights to defend its decision to eliminate coed residence halls.

CUA President John Garvey

claimed that the institution had seen a higher rate of irresponsible conduct in coed residence halls than in single-sex dorms, reported the Catholic blog *CatholicCulture.org*.

Garvey was quoted as saying that although the presence of young women was expected to be a civilizing influence on the men's behavior, the reality seemed to indicate that the opposite was true. ■

Student drug testing draws ACLU's fire

Although mandatory drug testing for students sometimes may seem like a good idea, it may be better to wait until the courts have ruled on the practice.

Linn State Technical College — a public institution in Missouri — has been sued by six students who were forced to submit urine samples for a drug test. The college claimed that testing incoming students is necessary because as part of their technical courses, they must operate heavy machinery.

But the American Civil Liberties Union, which is representing the students, contended that the practice violated the students' Fourth Amendment right against search and seizure. ■

Higher Education Publications from Jossey-Bass/Wiley

- Enrollment Management Report
- Student Affairs Today
- Campus Legal Advisor
- Dean & Provost
- Recruiting & Retaining Adult Learners
- FERPA Bulletin for Higher Education Professionals
- College Athletics and the Law
- Disability Compliance for Higher Education
- Assessment Update
- The Department Chair
- Campus Security Report
- The Successful Registrar

For information about any of these publications, call Customer Service at 888.378.2537.

CAMPUS LEGAL ADVISOR

Publisher:
Sue Lewis

Editorial Director:
Paula P. Willits,
Ed.D.

Copyright © 2011 Wiley Periodicals, Inc., A Wiley Company

Campus Legal Advisor (Print ISSN 1531-3999, Online ISSN 1945-6239) is published monthly by Wiley Subscription Services, Inc., A Wiley Company, 111 River St., Hoboken, NJ 07030-5774.

Executive Editor:
Robert Rosenberg,
Ph.D.

Legal Editor:
Aileen Gelpi, Esq.

Annual subscription rate is \$207 for individuals.

To order single subscriptions, call toll-free 888-378-2537, fax toll-free 888-481-2665, email jbsubs@wiley.com, or write Jossey-Bass, One Montgomery Street, Suite 1200, San Francisco, CA 94104-4594. Discounts available for quantity subscriptions—contact Sandy Quade at squadepe@wiley.com. Periodicals postage paid at Hoboken, NJ, and at additional mailing offices.

If you have a question, comment, or suggestion, please contact Legal Editor Aileen Gelpi at (561) 624-1345 or email aigelpi@wiley.com.

POSTMASTER: Send address changes to *Campus Legal Advisor*, Jossey-Bass, One Montgomery Street, Suite 1200, San Francisco, CA 94104-4594. Outside the United States, call 415-433-1740 or fax 415-951-8553.

Copyright © 2011 Wiley Periodicals, Inc., A Wiley Company. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, scanning, or otherwise, except as permitted under Section 107 or 108 of the 1976 United States Copyright Act, without either the prior written permission of the Publisher or authorization through payment of the appropriate per-copy fee to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400, fax 978-646-8600. Requests to the Publisher for reprint permission should be addressed to the Permissions Department, c/o John Wiley & Sons, Inc., 111 River St., Hoboken, NJ 07030-5774; 201-748-6011, fax 201-748-6326, www.wiley.com/go/permissions.

This publication is designed to provide accurate and authoritative information regarding the subject matter covered. It is provided with the understanding that the publisher and editor are not engaged in rendering legal counsel or other professional service. If legal advice is required, the service of a competent professional should be sought.

JOSSEY-BASS™
An Imprint of



Tread cautiously when moving to terminate a tenured professor

Denying tenure and dismissing a tenured professor rank very high on the list of the most difficult decisions that postsecondary education officials may ever be called upon to make. Ann Franke, president of Wise Results, LLC, called them “high-stakes” situations with great potential for litigation when she spoke earlier this year at Stetson University’s Conference on Law and Higher Education.

Campus Legal Advisor recently interviewed a university’s general counsel about her experiences when the administration tried to terminate a tenured professor. The GC told the story on the condition that her name not be revealed.

“One of the most challenging matters I’ve encountered during my career as a legal counselor in higher education was the time when my client wanted to terminate a tenured professor for poor performance,” she said. “When a university chooses to go down this route, every legal, policy and shared governance matter that touches higher education faculty employment comes into play.”

Expect faculty and outside organizations to rally their support behind the person being terminated, regardless of how poor the faculty member actually performs, she said. “It becomes personal to many involved,” she added.

“You need to be prepared to know and understand your processes, follow them closely, and keep all options on the table, as anything can happen,” she said.

The professor’s performance reviews were dismal, the GC said. But the professor ignored the reviews and her supervisor’s recommendations for improvement, the GC said.

“Students would not enroll in her class and those that did enroll gave her terrible reviews,” she said. “Her salary and benefits far exceeded the revenue her enrollment generated, with the university losing

some \$80,000 a year on her employment.”

The dean finally put the professor on a performance improvement plan, the GC said. But the professor did not achieve a single one of the plan’s goals, she added.

“Still, the faculty committee did not want to see the professor terminated and basically recommended a perpetual improvement plan,” she said. “Committee members believed that tenure was so sacred that, absent an egregious act, no tenured faculty member should ever be terminated.”

But the department chair and the dean recommended termination, she said. The vice president for academic affairs sided with them. That set in motion the termination process, which required a hearing before another faculty committee, she added.

However, early in the process it became clear that the faculty committee was not likely to support termination, the GC said. To complicate matters, the institution’s written process for termination of tenured faculty was ambiguous, she said.

The matter soon became a bone of contention between faculty and administrators throughout the institution. Outside organizations rallied to the professor’s aid, the GC said. It soon became obvious that the president would be placed in the precarious position of having to side with faculty or administrators, she said.

“There was no winning outcome,” the GC said. “The decision was sure to cost the president a great deal of political capital or perhaps a vote of incompetence by the faculty.”

In the end, the administration saw no other choice but to settle with the professor for a large amount of money, the GC said. “The university may have been in the right to want to terminate the faculty member, but prolonging the termination process would be far costlier than the settlement amount,” she said. ■

Follow this guidance when tenure is at stake

When faced with the prospect of terminating a tenured faculty member, general counsels should consider the following:

- Faculty members are extremely hesitant to support the termination of a tenured professor for nonperformance. Thus, any attempt to terminate a tenured faculty member will likely cause serious disruption within the academic community.

- An institution’s termination policy for tenured faculty must be clear and it must have been drafted with the faculty’s cooperation and support. Faculty members are not likely to support a colleague’s termination based on

an ambiguous policy that was drafted without their input.

- Ensure that the members of your institution’s tenure committees are willing to make the difficult decisions of tenure denial or nonrenewal.

Once a faculty member has been granted tenure, the same committee members who were uncertain about the candidate’s qualifications in the first place will support — albeit reluctantly — his continued employment.

- Sometimes, negotiating a graceful and private exit for the nonperforming tenured professor will be a better solution for your institution than getting embroiled in the very public process that termination necessarily entails. ■

Turn past challenges into blueprints for future success

Campus general counsels or compliance officers will tell you that their institutions are a microcosm of the outside world. But whereas an attorney usually specializes in one area, a university's legal counsel must be a generalist.

Below, *Campus Legal Advisor* Advisory Board members discuss major legal challenges they've faced and the solutions they used to counter them while working in higher education.

Issue: Personal injury

How a personal injury claim was handled resulted in some revised policies at Gadsden State Community College in Alabama, said Michelle Bradford, director of diversity and compliance. A student claimed that she was injured after tripping over a loose computer cable. Security was called and an incident report was issued, including the student's statements regarding the cause of her fall.



MICHELLE BRADFORD

An "all-employee safety alert" issued by Campus Security mentioned the accident and cautioned employees about loose cables. It explained how the fall could have been avoided if the cables were properly placed. The alert attributed liability for the accident to the college.

Bradford's analysis of the situation involved the following:

- ✓ GSCC is a state agency, so it is immune from most civil actions. Claims for personal and property losses for more than \$5,000 are handled through a Board of Adjustment process. Those under \$5,000 are processed by the specific college and reviewed by the director of diversity and compliance for possible liability.

- ✓ Alabama is a contributory negligence state, so any fault on the claimant's part can be used to deny a negligence action in court. Therefore, it is also used to deny liability with the college as well.

- ✓ The all-employee safety alert admitted fault by the college. Bradford faced the challenge of neutralizing that admission during the investigation.

After the incident, new policies and procedures were adopted, including:

1. All safety alerts issued by Campus Security must be general in nature and cannot mention ongoing incidents or investigations.

2. Security officers will report only facts, from the perspective of the individual making the report, not

opinions or allegations.

3. Incident reports must be reviewed by the compliance officer before they are issued to the claimant.

Issue: Student discipline

Another challenging issue Bradford recalled involved student discipline. A student was placed on probation after a discipline committee decided he was responsible for disruptive, inappropriate behavior toward another student and a professor. The probationary period was for the remainder of his enrollment. Any violations would result in suspension or expulsion.

When a second complaint for disruptive behavior was filed against the student, the committee decided he should be expelled. After the student appealed, the case was reviewed by the Compliance Office.

For Bradford, the case involved whether the:

- Discipline Committee had authority to expel or suspend the student based on the second complaint.

- Student received due process on the second complaint.

Bradford concluded that the committee's decision to expel was not valid, so it was rescinded. Then the college adopted new procedures requiring that all complaints against students be given separate hearings. To avoid due process rights violations, students would get notice and the opportunity to defend against each complaint.

Issue: Professor's death

Kimberly McCabe, dean of humanities and social sciences at Lynchburg College in Virginia, remembered when, in her second year as dean, she had to respond to a faculty member's unexpected death.

The professor, a long-time member of the Humanities Department, passed away unexpectedly one night in the middle of a semester.

McCabe arrived on campus early the following morning wondering how to break the news to his students. She met with a religious studies professor and asked an administrative assistant to order a wreath to be placed outside the professor's building entrance.

Meanwhile, a distraught and angry faculty member approached McCabe. He was upset because he received the news of his friend's death through a mass email sent by the chaplain's office. Realizing that others



KIMBERLY MCCABE

would be arriving soon, McCabe arranged for another professor to remain outside the humanities building to personally deliver the news to the faculty members.

McCabe decided that no mass email should go out to the student body until the professor's current students were personally notified. She, along with the department chair and the chaplain, delivered the news at the professor's afternoon class. After the initial shock, a student asked what would happen with their class. McCabe decided to cancel the professor's classes that week and resume them the following week. That would give her time to find replacement professors.

But finding replacements brought on new issues, McCabe discovered. Arrangements for compensating them had to be in place before classes resumed.

Then, over the next couple of days, a stream of faculty members sat in her office sharing their memories of the deceased professor. They needed to express their grief, so McCabe listened.

Many more questions cropped up. Some people wanted to know if there would be a memorial service, one person wondered if he could have the professor's desk, and someone asked if she could move into the now-vacant office.

From this sad event, McCabe formulated the following response plan for this type of emergency:

➤ **Communicating the news to faculty and staff.**

- Department chairs will call the dean in the event of a death or accident, then — if appropriate — they will call the members of their departments. Each chair will be given a wallet-sized card with the dean's home phone number, the administrative assistant's personal number, and the home numbers of each person in the department. The dean's card will also include the home numbers of each chair.

- Chairs will provide their home numbers to each faculty member with instructions to call them in the event of an emergency.

- If a dean receives news of an accident or death, he will call the chair, who then will call department members.

- A general email will be released by the chaplain's office, but only after faculty members receive the news from a familiar voice.

➤ **Communicating the news/class plans to students.** Someone from the chaplain's office, the department chair and the dean will attend the next class or classes of the deceased or injured professor. The chaplain's representative will communicate the news, and the chair will explain class plans.

➤ **Addressing reactions from faculty and staff.** Although some people will go to the counseling center, the department's dean will reschedule meetings and appointments to be available, as needed, for

faculty members.

➤ **Responding to questions asked by faculty and staff in the aftermath of the event.** Decisions that do not involve an immediate response to the tragic event or planning for the continuation of classes will be postponed until the end of the semester or academic year. Once those decisions are made, they will be communicated personally in a department meeting, rather than through email.

Issue: Copyright infringement

One of Edwin Ramos' biggest challenges involved copyright infringement and resulted in the creation of a new committee at his institution. He's president of Huertas Junior College in Puerto Rico.

Huertas Junior College's academic dean commissioned a professor to prepare a course manual. The arrangement was formalized in a written contract giving the copyright to the college.

The manual was sold to students through the college's bookstore. Everything was going well until Ramos received a "cease and desist" letter from an attorney representing a local doctor who alleged that the manual included one of her prescriptions. The doctor claimed she never gave authorization for reproduction of the prescription and demanded that the college immediately cease selling the manual. She also wanted a written apology and money damages for copyright violation and invasion of privacy.

Ramos verified that the prescription was indeed reproduced without the doctor's permission. However, the only information that should not have been reproduced was the doctor's address and phone number.

Ramos apologized in writing and gave assurances that professors would tear that page out of every manual in existence. Ramos also asserted that although he believed the doctor was not harmed by the college's action, the college was willing to pay \$3,000 for the nuisance value of the complaint.

The doctor rejected the offer, stating that she would seek \$100,000 in damages through a federal copyright action. At that point, Ramos turned the matter over to the college's insurance carrier. After about a year of negotiations, the doctor settled for \$3,000.

Ramos viewed the incident as an opportunity to review the college's copyright procedures. Since then, a Documents Review Committee has been put in place to evaluate and approve all proposed publications. ■



EDWIN RAMOS

Understand how 1st Amendment applies to online speech

With the Department of Education's new tough stance on harassment and bullying, public colleges and universities are finding themselves between the proverbial rock and a hard place.

TRAINING TOOLS

This regular feature puts the law into easy-to-understand terms.

The ED mandates a prompt and appropriate response to any conduct that can be construed

as harassment, including online postings. But several recent judicial decisions have struck down public schools' attempts to discipline students for their Internet speech. The courts have stated that students' off-campus online speech, such as on Facebook, MySpace or instant messaging, may be protected under the First Amendment. So how can an institution comply with the ED's guidance while avoiding a civil rights lawsuit?

"We must distinguish between language and behavior," said attorney Sandra Schuster, a partner with the National Center for Higher Education Risk Management. "Harassing actions or speech must rise to the level of being so severe or pervasive as to deny the person the benefits of the education," she said.

She provided the following guidelines to assist college administrators at public institutions in determining when a student can be disciplined for off-campus speech:

➤ **Did the speech target a student?** The speech at issue in recent judicial decisions mostly targeted school officials, Schuster said. "But if it had targeted another student, the decision may have been different," she said.

➤ **Was college equipment used to make the online posting?** When students use a college computer or network to make the offensive postings, the institution can enforce its equipment-use policy, instead of addressing the actual speech.

➤ **Did the speech include a specific threat?** The Eighth Circuit, in *D.J.M. v. Hannibal Public School District #60*, Nos. 10-1428, 10-1579 (08/01/11), held that a public school properly suspended a student who expressed his desire to kill several students in an after-school instant messaging conversation with a friend. The panel stated that because the statements constituted a "true threat," they were not protected speech.

➤ **Did the speech express an opinion?** "When there is no threat, but an opinion, then the question is whether it meets the standard of being severe, pervasive and objectively offensive," Schuster said. "One message versus 35 people telling one student that she's a slut, at this point it becomes pervasive and objectively offensive."

➤ **Did the speech create, or have the potential for creating, a substantial distraction in the academic environment?** College officials should apply this label sparingly because it is a stringent standard, Schuster said. Courts have stated that a school official's gut feeling, rescheduled classes or meetings, or gossiping in the hallways do not meet the standard.

"Institutions should not go trolling for this information," she said. But if the conduct is reported by someone, even if it's not the victim, the institution should take some sort of action, she said. "If later something happens, OCR would take issue if the school didn't do anything about it," she said.

The "Dear Colleague Letter" sent a clear message, and OCR is conducting compliance reviews, Schuster said. "It is paying attention to newspaper reports and Internet postings," she said. Institutions should heed the warning by ensuring that they have policies and procedures in place that promptly and effectively address harassment complaints.

You may contact Sandra Schuster at sandra@ncherm.org. ■

Review these recent free-speech decisions

Check out these federal court decisions on disciplining students for off-campus speech:

- *J.S., et al. v. Blue Mountain School District, et al.*, No. 08-4138 (3d Cir. 06/13/11). The Third Circuit held that suspending a student for posting a page on MySpace making fun of her school principal violated her free speech rights.

- *Layshock, et al. v. Hermitage School District, et al.*, No. 07-4465 (3d Cir. 07/13/11). The Third Circuit concluded that disciplining a student for a MySpace posting created on his computer, even if it included a photo copied from the school's website, was a First Amendment violation.

- *T.V., et al. v. Smith-Green Community School Corporation, et al.*, No. 1:09-CV-290-PPS (N.D. Ind. 08/10/11). The court held that a school violated a student's free-speech rights when it banned her from extracurricular activities because of photos she posted on the Internet.

- *D.J.M., et al. v. Hannibal Public School District #60, et al.*, Nos. 10-1428, 10-1579 (8th Cir. 08/01/11). The court upheld a student's suspension because during an off-campus instant messaging conversation, he said that he would "get a gun" and kill several schoolmates. The statements constituted a "true threat," the court stated. ■

AT A GLANCE

**A REVIEW OF THIS MONTH'S
LAWSUITS & RULINGS**

This issue includes the second installment of the letters chosen by Office for Civil Rights officials as the most important rulings from 2010–11. See pages 7–12.

Admissions

Letter to: Le Cordon Bleu College of Culinary Arts Las Vegas 7

Accommodation

Letter to: Thomas M. Cooley Law School 8
Letter to: Strayer University 8
Letter to: Utah Valley University 9
Letter to: University of Nebraska - Lincoln 10
Letter to: San Diego State University 11

Title IX — sexual harassment

Krumlauf, et al. v. Benedictine University, et al. 12

Athletics — discrimination

Moberly v. University of Cincinnati Clermont College, et al... 12

Academic affairs — discrimination

Tann v. Ludwikoski, et al..... 13

Student affairs — dismissal

Willis v. Texas Tech University Health Sciences Center..... 14

You Be the Judge

Salazar v. NCAA 15

Review critical OCR rulings from 2010–2011

In *Campus Legal Advisor's* October issue, we published four of the 10 most important recent rulings as selected by the Office for Civil Rights' chief civil rights attorneys Howard Kallem and Joan Rubin. This issue includes the remaining six rulings. Review the findings and decide how your institution's policies would fare in an OCR investigation.

Key issue: Admissions

Case name: *Letter to: Le Cordon Bleu College of Culinary Arts Las Vegas, No. 10102028 (OCR 04/22/10).*

Ruling: The Office for Civil Rights determined that Le Cordon Bleu College of Culinary Arts Las Vegas' admissions policy did not discriminate against qualified disabled applicants on the basis of disability.

What it means: A college or university does not discriminate against applicants with disabilities by adopting an admissions policy requiring a showing that they have satisfied the academic requirements for high school graduation.

Summary: OCR investigated an allegation that Le Cordon Bleu College of Culinary Arts Las Vegas discriminated against an applicant in violation of Section 504 of the Rehabilitation Act. The applicant claimed that by denying her admission because she had an adjusted high school diploma instead of a standard diploma, the college discriminated against her on the basis of disability.

Under Nevada law, students with disabilities who do not satisfy the requirements for a high school diploma may receive an adjusted diploma if they satisfy the requirements provided for in their Individualized Education Plans.

The college's admissions policy provided that only applicants who had a high school diploma, General Educational Development transcripts or a recognized equivalent were considered for enrollment. College officials explained that the policy responded to the Accrediting Commission of Career Schools and Colleges' accreditation standards. They also stated that applicants without a standard high school diploma or its equivalent would have difficulty completing the program's rigorous curriculum.

The Rehabilitation Act provides that higher education institutions may not discriminate against a qualified disabled individual on the basis of disability. Its regulations define a "qualified individual with a disability" as a disabled person who meets the academic and technical standards required for admission or participation in an educational program.

OCR noted that in Nevada, earning an adjusted high school diploma did not provide evidence that a student had satisfied the academic requirements for a standard diploma. Additionally, the standard diploma was available to students with disabilities if they satisfied the state-defined graduation requirements.

As a result, OCR concluded that the college's requirement did not deny admission to applicants based on their disability.

Key issue: Accommodation

Case name: *Letter to: Thomas M. Cooley Law School*, No. 15-08-2067 (OCR 11/03/10).

Ruling: The Office for Civil Rights determined that the Thomas M. Cooley Law School violated the Rehabilitation Act's regulations by providing significant assistance to a student organization that failed to provide necessary auxiliary aids to a student with a disability.

What it means: Higher education institutions violate Section 504 of the Rehabilitation Act if they provide significant assistance to an agency, organization or person that discriminates on the basis of disability in providing any aid, benefit or service to beneficiaries of the institution's program or activities.

Summary: OCR investigated a student's allegation that the Thomas M. Cooley Law School discriminated against her based on her disability (hearing impairment). The complainant claimed that the law school did not ensure that the Student Bar Association provided her with necessary auxiliary aids for a tutoring program.

The SBA was a registered student organization that received substantial financial funding from activity fees collected by the law school. It conducted its business from an office in the law school, and its student-employees were paid directly by the law school.

The SBA offered a series of tutorials covering the law school's required courses. The tutorials were free to the law school's students.

The complainant requested communication assistance real-time technology as an auxiliary aid to participate in the tutorials. However, the law school denied the request based on its belief that the accommodations had to be provided by the SBA because it was an independent, nonprofit organization. The SBA also refused to provide the auxiliary aid after it determined that the cost would adversely impact its budget.

Under Section 504 regulations, a higher education institution may not aid or perpetuate discrimination against a qualified person with a disability by providing significant assistance to an agency, organization or person that discriminates on the

basis of disability in providing any aid, benefit or service to beneficiaries of the institution's program or activities. Among the criteria used to determine whether a relationship falls within the scope of the regulations are (1) the substantiality of the relationship, including financial support, and (2) whether the other entity's activities relate so closely to the college's program or activity that they fairly should be considered the college's own activities.

OCR concluded that the relationship between the SBA and the law school was sufficiently substantial and their activities were so closely related that the activities of the SBA could be considered activities of the law school.

The agency determined that the law school and the SBA denied the complainant an equal opportunity to participate in and enjoy the benefits of the SBA tutorial program by failing to provide her with services that were as effective as those provided to students without disabilities.

As a result, OCR concluded that the law school aided or perpetuated discrimination against the student on the basis of disability by providing significant assistance to the SBA, in violation of Section 504 regulations.

Key issue: Accommodation

Case name: *Letter to: Strayer University*, No. 11-09-2115 (OCR 03/01/11).

Ruling: The Office for Civil Rights concluded that Strayer University-Newington was not in compliance with federal disability laws and regulations because it had inconsistent procedures for accommodations requests, denied an auxiliary aid to a student with a visual impairment, and had an inaccessible website and online student portal.

What it means: Institutions must establish reasonable procedures for students to request and obtain accommodations.

Summary: OCR investigated allegations that Strayer University-Newington discriminated against a student on the basis of disability (visual impairment). The student enrolled as an undergraduate in Strayer's online learning division in January 2005 but was completing an MBA when she filed the complaint.

OCR found evidence to substantiate the following of her numerous claims:

1. Lack of reasonable procedures for responding to students' requests for academic adjustments and auxiliary aids. The university failed to notify the student about whether her requested accommodations were approved. "Reasonable procedures" provide for students to receive notice of

a university's determination with regard to their requests, OCR stated.

The university also failed to provide the complainant with a written list of her accommodations prior to September 2009. It never notified her in writing that the accommodations she requested in 2004 were approved. However, in a November 2009 letter to OCR, the university explained that it had adopted new procedures that included sending such letters.

Other concerns about the university's policies and procedures included:

- Failure to provide consistent information about whom students should contact to request accommodations, whether requests must be in writing, and when requests should be submitted.

- A restrictive, inflexible requirement that students submit accommodations requests at least 30 days before classes began. That time frame did not consider the need for some students to review course syllabi to determine required aids. Although university officials stated "generic" syllabi for courses were available, professors often did not have specific syllabi available until classes began, so students could not know about unique course requirements before the deadline.

Procedures should clarify that if a student requests an accommodation after the deadline because necessary information was not available earlier, interim accommodations should be considered and the accommodation request expedited, OCR said.

The university agreed to revise its published policies.

2. Denial of necessary academic adjustments.

The student requested that graphs be provided in textual or alternative formats or that alternative assignments be provided for her in an economics class. Officials said they were not aware that the student had requested the accommodation. Instead, they thought that she had hired a private tutor to assist her.

The student dropped the course, but when she later enrolled with a different professor who provided the textual descriptions, she earned an A.

OCR's investigation revealed university officials knew the student was having problems due to the graphs. Also, the original professor had been asked to provide the graph descriptions. OCR concluded the university and the professor were engaged in a dispute about the feasibility of the approved accommodation and the complainant was caught in the middle.

OCR ruled the university failed to provide an effective academic adjustment. It was not appropriate for Strayer to rely solely on the complainant hiring a tutor rather than exploring academic adjustments

so she could access the course herself.

The university agreed to reimburse her for the dropped course and develop a plan to ensure that professors assigned to provide text descriptions of graphs are trained to do so.

3. Inaccessible website and online student portal. OCR confirmed that many images on Strayer's website and online learning management systems were missing "alt tags" to provide alternative text for graphic images. That meant students with visual impairments couldn't download audio and text files that accompanied weekly lectures.

Institutions with inaccessible websites or online learning programs can satisfy their obligations under Section 504 by providing the information and services through other accessible means, such as a staffed telephone line, OCR said. But providing the same courses in a traditional "brick-and-mortar" campus does not provide equal access.

The university agreed to insert the missing tags. They also will phase out one inaccessible learning environment and adopt one that had received the National Federation for the Blind's "Non-visual Accessibility Gold Certification."

Key issue: Accommodation

Case name: *Letter to: Utah Valley University, No. 08102026-B (OCR 07/16/10).*

Ruling: The Office for Civil Rights concluded that Utah Valley University's policy of charging a fee to students with hearing impairments who did not show up to class and failed to timely cancel their sign language interpreter services did not violate federal laws and regulations.

Need more issues of *Campus Legal Advisor*?

Quantity subscriptions for *Campus Legal Advisor* are available for a discount. For more information, contact Sandy Quade at (860) 339-5023 or by email at squadepe@wiley.com.

Number of subscriptions	Discount	Price of each subscription
1-4	0%	\$207.00
5-9	30%	\$144.90
10-29	35%	\$134.55
30-49	40%	\$124.20
50-99	50%	\$103.50
100-249	60%	\$ 82.80
250+	70%	\$ 62.10

What it means: Some no-show policies that charge students approved for sign language interpreter services when they do not attend class and fail to provide timely notice are legal.

Summary: OCR investigated a complaint alleging that Utah Valley University discriminated against a student with a hearing impairment by charging him for sign language interpreters when he did not show up for class.

The university explained that it had a published “no-show” procedure solely for students who received sign language interpreter services. The procedure provided that a “no-show” occurred when a student for whom sign language interpreter services were provided failed to attend a class without giving the coordinator of interpreter services at least two hours’ notice (or less for difficult circumstances) so that the services could be cancelled or reassigned. Students could cancel the services through six different communication methods. When students had more than three no-shows in one course, they were charged \$30 for the fourth and each subsequent no-show in that course. Students could reduce the charge if they agreed to participate in a “No Show and Academic Success Workshop.”

University officials explained that the policy’s goals were to facilitate students’ understanding of the fiscal and administrative requirements of the service, the importance of attendance to their overall college success, and creating a pattern of responsible behavior that would serve them well outside the academic environment. The officials also clarified that the university did not rely on its no-show policy as a revenue stream because the charges did not cover the cost of the unused interpreter services.

OCR noted that an educational institution cannot convert a right created by law and regulation into a privilege that can be revoked or a commodity for which students must pay. But the agency acknowledged that delivering interpreters on a cost-effective basis required advance planning and the cooperation of the students served, so that an institution did not pay for interpreters that were not used.

OCR also stated that an educational institution may charge for providing services that go beyond what is legally required. With regard to the student’s complaint, OCR noted that the university was providing and paying for sign language interpreting services that were not serving any purpose because the student did not show up for class and failed to timely cancel the service.

As a result, OCR concluded that the university’s policy of imposing charges for persistent, unexcused no-shows was not an illegal surcharge in violation of Title II or Section 504.

Key issue: Accommodation

Case name: *Letter to: University of Nebraska - Lincoln*, No. 07102094 (OCR 04/08/11).

Ruling: The University of Nebraska - Lincoln entered into a resolution agreement with the Office for Civil Rights to resolve allegations that it discriminated against individuals with hearing impairments at several of its sports facilities.

What it means: Colleges and universities must ensure that their sports facilities have assistive listening devices/receivers that comply with federal disability regulations.

Summary: OCR received a complaint alleging that the University of Nebraska - Lincoln discriminated against individuals with hearing impairments at the following facilities:

1. Memorial Stadium.
2. NU Coliseum.
3. Hawks Field.
4. Ed Weir Stadium.
5. Nebraska Soccer Field.
6. Devaney Center (basketball arena, indoor track and natatorium).
7. Nebraska Tennis Center.
8. Bowlin Stadium.

After OCR notified university officials that it was opening an investigation, the university agreed to enter into a resolution agreement. As a result, OCR did not make any findings of fact or law, or issue a final determination with respect to the complaint.

The university stipulated that it adopted the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities as its new construction and alteration standard. Therefore, the university had the option of choosing to comply with either the 1991 Standards or the 2010 Standards issued by the Department of Justice on Sept. 15, 2010. The 2010 Standards become effective on March 15, 2012.

The university also agreed that adopting the 1991 standards for the existing facilities at issue did not waive its obligation to comply with any new

Want CLA on your iPhone, iPad?

Now you can receive *Campus Legal Advisor* directly on your iPhone or iPad! The Jossey-Bass Newsletter Mobile Reader is a *free* application available from iTunes, while still receiving your hard copy by mail or PDF by email.

For more information, call Customer Service at (888) 378-2537. Or visit the iTunes app store and download the Jossey-Bass Newsletter Mobile Reader. ■

or revised standard in effect at the time of any new construction or alteration to the existing facilities.

The university agreed to provide to OCR the following information for each facility: (a) seating capacity; (b) type of audio-amplification device used, if available; (c) number of assistive listening devices/receivers located within the facility, if available; (d) location of the assistive listening devices/receivers, if available; and (e) blueprint or drawing of the facility indicating the location of the current assistive listening system and signage indicating the availability of an assistive listening system.

If the university chose to comply with the 1991 standards, it had to formulate a plan to provide a minimum number of assistive listening devices/receivers equal to 4 percent of the total number of seats. It could do so by either providing a permanently installed assistive listening system that complied with the standards or an adequate number of electrical outlets or other supplementary wiring necessary to support a portable listening system.

The plan had to include the type of assistive listening device (including its description and the company manufacturing it) the university had or intended to make available; the location where the devices/receivers were stored; the university’s anticipated alterations, renovations or construction plans; the expected start and completion dates; and an explanation of how the plan would meet the requirements for the addition of, or modification to, any assistive listening systems and signage. The university also had to install signage notifying patrons of the availability of an assistive listening system that included the international symbol of access for hearing loss.

If the university chose to comply with the 2010 Standards, it had to develop a plan to provide a minimum number of receivers for assistive listening systems in accordance with the table provided in 36 CFR Part 1191, App. B § 219.3 (see table below). It would also have to install signage notifying patrons of the availability of an assistive listening system that included the international symbol of access for hearing loss.

The plan also had to include the type of assistive listening device the university had or intended to make available; the storage location for the assistive listening devices/receivers; anticipated alterations, renovations or construction plans; the expected start and completion dates; and an explanation of how the plan would meet the requirements for the addition of, or modification to, any assistive listening systems and signage.

Although OCR closed the complaint, the agency advised that it would monitor the implementation of the agreement until it determined that the university fulfilled its terms and was in compliance with Section 504 and Title II regulations.

Key issue: Grievance procedures

Case name: *Letter to: San Diego State University, No. 09-10-2062 (OCR 01/31/2011).*

Ruling: The Office for Civil Rights concluded that San Diego State University did not apply the appropriate legal standards when it investigated a student’s disability discrimination complaint. The university entered into a resolution agreement that resolved the noncompliance issue.

What it means: Investigations of disability discrimination complaints must apply legal standards that take into account the parties’ preconceived notions about complainants’ disabilities.

Summary: A student submitted a complaint to OCR alleging that San Diego State University discriminated against him because it did not use the appropriate legal standard for review of his internal disability discrimination grievance.

OCR’s investigation revealed that the complainant was a veteran with post-traumatic stress disorder. He was an undergraduate at the university and had registered with Disabled Student Services. After an incident with a professor, the professor filed complaints against the student with the Center for Student Rights and Responsibilities and the campus police. After a hearing, the student was allowed to return to class only if he was accompanied by his DSS counselor.

2010 Standards: Receivers for assistive listening systems

Seating Capacity in Assembly Area	Minimum # Required Receivers	Minimum # Required Receivers Hearing-aid-compatible
50 or less	2	2
51 to 200	2 + 1 per 25 seats over 50 seats	2
201 to 500	2 + 1 per 25 seats over 50 seats	1 per 4 receivers
501 to 1,000	20 + 1 per 33 seats over 500 seats	1 per 4 receivers
1,001 to 2,000	35 + 1 per 50 seats over 1,000 seats	1 per 4 receivers
2,001 and over	55 + 1 per 100 seats over 2,000 seats	1 per 4 receivers

While the student's case was pending, the professor sent out two emails to the class regarding academic matters. After the student returned to class, the professor sent two more emails. But the student did not receive any of the emails.

The student's internal grievance alleged that the professor discriminated against him based on his disability and veteran status by filing complaints with the CSRR and campus police and excluding him from the emails sent to the rest of the class.

During the internal investigation, the professor stated that he did not think students with PTSD should be in the classroom. He added that he did not recall excluding the student from the emails.

The university's investigation resulted in two findings: (1) that the professor's complaint was justified because it was not related to the student's disability or veteran status and (2) that the professor's conduct regarding the emails was not discriminatory but it was "unprofessional."

OCR concluded that the university conducted a prompt and thorough investigation of the student's discrimination complaint. But the agency found that the university did not apply the appropriate legal standards under Section 504 and Title II of the ADA.

Although OCR concluded that the university's finding that the professor's conduct was unprofessional but not discriminatory was within its discretion and reasonably supported by the evidence, the agency expressed concern with the university's failure to find discrimination.

"In not finding discrimination, the University failed to take into account the Professor's preconceived notions of students with PTSD and failed to act upon the inferences arising from the Professor's inadequate rationale for excluding the complainant from e-mails he/she sent to every other student in the class," OCR noted.

OCR found that by excluding the student from the emails after he had returned to class with the DSS counselor, the professor prevented the student from participating and receiving educational benefits to which he was entitled. ■

TITLE IX — SEXUAL HARASSMENT

Court rules for program director, dismisses sex harassment claim

Case name: *Krumlauf, et al. v. Benedictine University, et al.*, No. 09 C 7641 (N.D. Ill. 08/04/10).

Ruling: The U.S. District Court, Northern District of Illinois dismissed sexual harassment claims filed by five former students against the director of

Benedictine University's Master of Science in Clinical Exercise Physiology program.

What it means: Title IX does not authorize sexual discrimination claims against college officials, professors and other individuals.

Summary: Five female students at Benedictine University sued the institution and Craig Broeder, alleging sexual discrimination under Title IX.

Broeder was Benedictine's director of the Master of Science in Clinical Exercise Physiology program, a two-year, part-time evening program designed for adults. The plaintiffs were students enrolled in the program at various times between 2005 and 2008. They alleged that Broeder engaged in sexually harassing behavior toward them during their time at Benedictine.

Broeder moved to dismiss certain portions of their complaint. He asserted that Title IX does not allow for damages actions against individuals.

Title IX provides that "no person...shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The District Court agreed with Broeder and dismissed the Title IX claim against him. The judge explained that in addition to the administrative remedies available under Title IX, the Supreme Court has held that Title IX is enforceable through an implied private right of action. However, the scope of that action is limited because the statute has "consistently been interpreted as not authorizing suits against school officials, teachers and other individuals." ■

ATHLETICS — DISCRIMINATION

Disgruntled employee's suit ends with court's dismissal

Case name: *Moberly v. University of Cincinnati - Clermont College, et al.*, No. C-1-08-569 (S.D. Ohio 08/31/10).

Ruling: The U.S. District Court, Southern District of Ohio dismissed Jason Moberly's employment discrimination claim against the University of Cincinnati - Clermont College.

What it means: A plaintiff alleging employment discrimination under Title VI must show that he suffered an adverse employment action because he engaged in a protected activity.

Summary: In 2007, Moberly contacted the head basketball coach at Clermont College seeking to be hired as the assistant coach. He was not interviewed because it was too late in the year for Clermont to hire him. But he agreed to help the coach with the

team during the 2007–08 season.

He applied for the position the following year but, pursuant to university policy, two other candidates were also interviewed. Although the coach was inclined to hire Moberly, Clermont’s director of student affairs — who oversaw intercollegiate athletics — chose another candidate as better qualified.

Soon after being informed of the decision, Moberly contacted the university’s director of the Equal Opportunity Office. He claimed that he had knowledge of alleged instances of race discrimination at Clermont toward members of the basketball team.

In the meantime, the chosen candidate disappeared after being informed of the need to undergo a pre-employment criminal records background check. The university then offered the position to Moberly and he accepted. He was employed as an assistant basketball coach beginning in October 2008.

Moberly filed suit against Clermont and several university officials because he was not the first choice for the position. He claimed discrimination under Title VI, discrimination and retaliation under 42 U.S.C. § 1981, and retaliation for exercising free speech under 42 U.S.C. § 1983.

Ruling on Clermont’s motion to dismiss, the court held that Moberly did not suffer a materially adverse action.

To succeed on a Title VI claim, a plaintiff must prove that (1) he engaged in activity protected under the act; (2) the protected conduct was known to the defendants; (3) the defendants took a materially adverse action against him; and (4) there was a causal connection between the protected activity and the materially adverse action.

The judge explained that the fact that Clermont initially offered the position to another person was not an adverse action against Moberly. ■

ACADEMIC AFFAIRS — DISCRIMINATION

Appeals panel gives second chance to plead race discrimination

Case name: *Tann v. Ludwikoski, et al.*, No. 10-1380 (4th Cir. 08/18/10).

Ruling: The Fourth U.S. Circuit Court of Appeals reversed the District Court’s dismissal of Michael Tann’s race discrimination claims against two Baltimore County Community College officials. The case was remanded for further proceedings.

What it means: Employees of a public educational institution created by state law are state actors for purposes of claims under 42 U.S.C. § 1983.

Summary: Tann appealed the District Court’s summary judgment dismissing his 42 U.S.C. § 1983 complaint against a professor and a dean at Baltimore County Community College. He claimed that the professor, David Ludwikoski, treated him differently than white students regarding classroom and course policies. He alleged that Ludwikoski made exceptions to his classroom policies for white students regarding late class and homework assignments. He also claimed that Ludwikoski gave a white student points for an incorrect answer but refused to give him points for the same answer.

Tann also alleged that the assistant dean for the college’s Science Department also discriminated against him by reinforcing and upholding Ludwikoski’s allegedly discriminatory decisions.

The District Court dismissed Tann’s claims, holding that the defendants were not state actors and their conduct could not be attributed to the state.

But the Fourth Circuit reversed the judgment on appeal. The panel explained that to state a claim under 42 U.S.C. § 1983, the plaintiff must allege

Campus Legal Advisor Board of Advisors

Kathleen C. Boone

Associate Vice President for Academic Affairs & Equal Opportunity and Affirmative Action Officer
Daemen College

Michele Graham Bradford

Director of Diversity and Compliance and Title IX Coordinator
Gadsden State Community College

Pamela W. Connelly

Associate General Counsel
University of Pittsburgh

Darron C. Farha

Vice President and General Counsel
Valparaiso University

Laverne Lewis Gaskins

University Attorney
Valdosta State University

Kimberly A. McCabe

Dean of Humanities and Social Sciences,
Professor of Criminology
Lynchburg College

Edwin Ramos

President
Huertas Junior College

Kevin B. Scott

Attorney
Fox Rothschild LLP

Allan L. Shackelford

Attorney and Consultant
for Higher Education Institutions
and Nonprofits

that the defendant violated “a right secured by the Constitution and laws of the United States,” and that the defendant was acting under color of state law. A state employee is generally considered to be acting under color of state law, the panel explained.

As a result, the court concluded that both college officials, as employees of a state public educational institution created by state law, were state actors.

The case was remanded to the District Court for further proceedings. ■

STUDENT AFFAIRS — DISMISSAL

Court rejects due process argument, affirms student’s dismissal

Case name: *Willis v. Texas Tech University Health Sciences Center*, No. 10-50300 Summary Calendar (5th Cir. 09/01/10).

Ruling: The Fifth U.S. Circuit Court of Appeals affirmed the summary judgment dismissing Robert Willis’ claims that the Texas Tech University Health Sciences Center violated his right to due process when it dismissed him.

What it means: A student facing disciplinary dismissal must be given notice of the charges against him, an explanation of the evidence that will be used against him, and the opportunity to present his side of the story.

Summary: Willis was expelled from the Texas Tech University Health Sciences Center after the Student Conduct Board concluded that he threatened his

ex-girlfriend — a fellow student — with a handgun.

Prior to his dismissal, the board sent Willis a detailed letter explaining that a complaint had been filed against him. The letter notified him of a hearing date and included: (1) the factual basis for the complaint; (2) the portions of the *Student Code* that were allegedly violated; (3) the board members’ names and an opportunity to challenge them for partiality; and (4) an explanation of how to submit evidence, call witnesses on his behalf, and secure an advisor.

At the hearing, Willis had the opportunity to state his position but he did not call any witnesses. After his dismissal, Willis filed suit alleging that the university violated his due process rights.

Ruling on the university’s motion for summary judgment, the District Court noted that Willis had a protected right to his education but held that the university gave him all the process he was due.

On appeal, the Fifth Circuit cited *Esfeller v. O’Keefe*, No. 09-30611 (5th Cir. 08/03/10), a recent unpublished opinion where it held that “[a] student subject to school disciplinary proceedings is entitled to some procedural due process. The student must be given notice of the charges against him, an explanation of what evidence exists against him, and ‘an opportunity to present his side of the story.’ The student is not entitled to the ‘opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.’”

As a result, the panel held that Willis was given more than the minimum process required by the Constitution. ■

Statement of Ownership

Statement of Ownership, Management, and Circulation (required by 39 U.S.C. 3685), filed on OCTOBER 1, 2011 for CAMPUS LEGAL ADVISOR (Publication No. 1531-3999), published Monthly for an annual subscription price of \$207 at Wiley Subscription Services, Inc., 111 River Street, Hoboken, NJ 07030.

The names and complete mailing addresses of the Publisher, Editor, and Managing Editor are: Publisher, Wiley Subscription Services, Inc., 111 River Street, Hoboken, NJ 07030; Editor, Aileen Gelpi, 1201 Sabal Ridge Circle, Apt. H, Palm Beach Gardens, FL 33408; Managing Editor, None, Contact Person: Joe Schuman; Telephone: 415-782-3232.

CAMPUS LEGAL ADVISOR is a publication owned by Wiley Subscription Services, Inc. The known bondholders, mortgagees, and other security holders owning or holding 1% or more of total amount of bonds, mortgages, or other securities are (see list).

	Average No. Copies Each Issue During Preceding 12 Months	No. Copies Of Single Issue Published Nearest To Filing Date (Sept. 2011)		Average No. Copies Each Issue During Preceding 12 Months	No. Copies Of Single Issue Published Nearest To Filing Date (Sept. 2011)
15a. Total number of copies (net press run)	442	391	15d(2). In-county nonrequested copies stated on PS form 3541	0	0
15b. Legitimate paid and/or requested distribution (by mail and outside mail)			15d(3). Nonrequested copies distributed through the USPS by other classes of mail	0	0
15b(1). Individual paid/requested mail subscriptions stated on PS form 3541 (include direct written request from recipient, telemarketing, and Internet requests from recipient, paid subscriptions including nominal rate subscriptions, advertiser’s proof copies, and exchange copies)	286	250	15d(4). Nonrequested copies distributed outside the mail	0	0
15b(2). Copies requested by employers for distribution to employees by name or position, stated on PS form 3541	0	0	15e. Total nonrequested distribution (sum of 15d(1), (2), (3), and (4))	6	5
15b(3). Sales through dealers and carriers, street vendors, counter sales, and other paid or requested distribution outside USPS	0	0	15f. Total distribution (sum of 15c and 15e)	292	255
15b(4). Requested copies distributed by other mail classes through USPS	0	0	15g. Copies not distributed	150	136
15c. Total paid and/or requested circulation (sum of 15b(1), (2), (3), and (4))	286	250	15h. Total (sum of 15f and 15g)	442	391
15d. Nonrequested distribution (by mail and outside mail)			15i. Percent paid and/or requested circulation (15c divided by 15f times 100)	97.9%	98.0%
15d(1). Outside county nonrequested copies stated on PS form 3541	6	5	I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on this form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties). Statement of Ownership will be printed in the November 2011 issue of this publication.		
			(signed) Susan E. Lewis, VP & Publisher-Periodicals		

Was reporter unconstitutionally evicted from NCAA tournament?

Ben Salazar sued the NCAA, the College World Series of Omaha, Inc., and NCAA Credentials Director David Worlock. He claimed that the defendants violated his civil rights in an altercation during a CWS baseball game on June 16, 2005.

Salazar, a Mexican-American, published *Nuestro Mundo*, an Omaha, Neb., bilingual newspaper. Salazar and his staff usually received CWS press credentials, as they did for the 2005 CWS baseball tournament in Omaha. The NCAA and CWS jointly sponsored the annual CWS tournament.

On June 16, Salazar and a colleague, both bearing *Nuestro Mundo* press credentials, were admitted to the CWS game through the press box. In accordance with past practice approved by the NCAA, they sat in open seats, as *Nuestro Mundo* did not have assigned seating. The understanding between the newspaper and the NCAA required that if someone arrived demonstrating assignment to the seats occupied by *Nuestro Mundo* press members, the *Nuestro Mundo* press would relocate.

The court noted that an “exceedingly unpleasant argument over seating erupted” on June 16. People not involved in the litigation rudely berated Salazar and his colleague. Then Worlock appeared and matters further deteriorated.

The parties exchanged words, and Worlock revoked Salazar’s credentials. He even grabbed the credentials draped on a cord around Salazar’s neck and yanked them off him. Then Worlock summarily evicted Salazar from the stadium.

Salazar sued for, among other things, a violation of his First Amendment rights under 42 U.S.C. § 1983.

Salazar v. NCAA, No. 8:06cv415 (D. Neb. 03/05/07).

Did the events at the tournament violate Salazar’s First Amendment rights?

A. Yes. The NCAA officials infringed on Salazar’s First Amendment rights, as a member of the press, to report on the game for his newspaper.

B. Yes. By evicting Salazar from the game NCAA officials imposed a prior restraint on the publication of a news story in violation of the First Amendment.

C. No. Although the First Amendment guarantees access to games by members of the press, the NCAA is not required to provide free access to its tournaments.

D. No. Because the First Amendment prohibits infringement by the government on the freedom of the press, the NCAA is a private actor that cannot be held liable for a constitutional violation.

Correct answer: D.

The court explained that in this case, even assuming the truth of the factual allegations in the complaint, Salazar did not allege a factual basis for state action.

The U.S. Supreme Court previously determined that the NCAA does not act under color of state law for purposes of 42 U.S.C. § 1983. The court further stated that Salazar failed to explain why the same rationale would not apply to the CWS. Also, since the NCAA was not a state actor, Salazar asserted no reason why its employee, Worlock, was anything but a private individual.

Editor’s note: This feature is not intended as instructional material or to replace legal advice. ■

YOU BE THE JUDGE

This regular feature details a recent court case. Review the facts. Think how you would have handled the situation. Then test your legal knowledge by trying to determine how the court ruled.

YES! Please start my one-year subscription (12 issues) to *Campus Legal Advisor* for \$207.

4 EASY WAYS TO ORDER



CALL Toll-Free: 888.378.2537



FAX Toll-Free: 888.481.2665



MAIL:
Jossey-Bass, An Imprint of Wiley
One Montgomery Street, Suite 1200
San Francisco, CA 94104-4594



EMAIL: jbsubs@wiley.com

Jossey-Bass/Wiley Guarantee: If you are not completely satisfied with this newsletter, let us know and we will refund the cost of your subscription.

PAYMENT OPTIONS: (all payments must be in U.S. dollars)

My Check payable to John Wiley & Sons is enclosed.

VISA MC AMEX

Your credit card payment will be charged to: John Wiley & Sons

Card #: _____

Card Security Code: (Required) _____ (3 digits on back of MC, VISA) (AMEX, 4 digits above card #)

Expiration Date: ____/____

Card Holder Name: (Please Print) _____

Authorized Signature: (Required) _____

Name: _____ Title: _____

Company: _____

Address: _____

City: _____ State: _____ ZIP Code: _____

Email: _____ Phone: _____

Yes, I’d like to hear about special discount offers, new products, and more. Place me on the Jossey-Bass email list.

Individual rate subscriptions must be paid by personal check or credit card. All orders subject to credit approval. Price includes postage, packing, and handling charges worldwide. Canadian residents add GST and any local sales tax. GST #128424017. Individual-rate subscriptions may not be resold or used as library copies.

CAMPUS LEGAL ADVISOR

QUICK STUDY

An overview of the key topics faced by campus administrators with citations to noteworthy cases, statutes, regulations and additional sources.

Students' Rights under FERPA

Overview

The Family Educational Rights and Privacy Act gives students certain privacy protections and other rights with respect to their education records. Generally, while students are in elementary through high school, FERPA rights belong to their parents. But these rights are permanently transferred to students when they turn 18 or enroll in a higher education institution. Learn how the Department of Education's Family Policy Compliance Office has addressed recent complaints alleging that students' or parents' rights under FERPA have been violated.

Key Rulings

- A student alleged that a university she attended violated her rights when it disclosed to a third party information about her mental health and a report about a sexual harassment complaint she had filed against a professor. She claimed that she never consented to such disclosures. The FPCO explained that the disclosure may have been permitted under FERPA's "school official" exception. The agency needed more information to determine if the disclosure was made to a university official with a legitimate educational interest in the information. *Letter to: Anonymous student* (FPCO 01/28/11).
- A complainant claimed that an article published in a local newspaper stated that her college's alumni office disclosed former students' Social Security numbers to a printer who printed the alumni newsletter. The FPCO declined to investigate the allegation. It explained that the college's president had given assurances that the college had taken

steps in response to the data breach. If the student wished to pursue her complaint, she had to provide more detailed information, such as the date the records were disclosed and the name and title of the school officials she believed were involved in the disclosure. *Letter to: Anonymous student* (FPCO 09/30/09).

- A parent alleged that her daughter's school violated her rights under FERPA when the school's physical therapist shared with the child's private doctor information from the child's education records without prior consent. The physical therapist had been following up with the doctor regarding post-surgical care for the student. The FPCO explained that the physical therapist's communication with the doctor was permitted under FERPA's "health and safety emergency" exception, which allows disclosures when there is an articulable and significant threat to the health or safety of a student or other individuals. *Letter to: Anonymous parent* (FPCO 12/20/10).

- The University of Central Arkansas' interim president inquired whether it could disclose to a local newspaper the names of recipients of the institution's Presidential Discretionary Scholarship Program. The scholarships, which granted tuition waivers, were not awarded on the basis of any published criteria and the amount awarded to each student varied. The FPCO explained that although some scholarships may fall within the category of directory information as an "honor or award," when the basis for a scholarship is undefined, or when it is related to financial aid, it does not fall within that category. Therefore, the recipients' names may not be disclosed without their prior written consent. *Letter to: University of Central Arkansas* (FPCO 05/06/09). ■

What You Should Know

- **FERPA's health and safety emergency exception permits certain communications between a college's health personnel and a student's private doctor.**
- **Scholarships based on undefined criteria or related to financial aid are not considered "honors or awards" and cannot be disclosed as directory information.**
- **Most disclosures of information between school officials are permitted under FERPA, as long as they are related to a legitimate educational interest.**
- **The health and safety emergency standard is flexible, and the FPCO defers to college administrators' determinations as to what constitutes an "articulable and significant" threat.** ■

Please direct editorial inquiries to Legal Editor Aileen Gelpi, Esq., by phone at (561) 624-1345, or email aigelpi@wiley.com.