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Higher Education Highlights

The Newsletter of the Higher Education Practice

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Guidance from the U.S. Department of Education on the Implications of *Windsor* for Title IV Programs

By Jennifer A. DeRose

On December 13, 2013, the U.S. Department of Education's Office of Postsecondary Education issued a Dear Colleague Letter ("DCL") providing guidance on how Title IV student financial assistance programs are affected by the U.S. Supreme Court's decision in *United States v. Windsor*. In *Windsor*, the Supreme Court found unconstitutional the section of the Defense of Marriage Act ("DOMA") that prohibited federal agencies from recognizing same-sex marriages for purposes of their programs. Historically, the Department of Education had interpreted all provisions of Title IV of the Higher Education Act consistently with DOMA and did not recognize same-sex marriages within the context of Title IV programs.

In this DCL, the Office of Postsecondary Education explains that for purposes of the Title IV programs and questions concerning marriage and marital status on the FAFSA, the Department of Education is adopting a "place of celebration" rule: a student or parents of dependent students will be considered married if the marriage was celebrated in a U.S. or foreign jurisdiction that recognizes same-sex marriage, regardless of where the student or parents presently reside and regardless of where the student is attending school. Also, the 2014-2015 FAFSA is being revised to include gender-neutral terminology such as "Parent 1" and "Parent 2" rather than "Mother" and "Father."

The new policy impacts how the FAFSA should be completed and how the student's Expected Family Contribution ("EFC") will be calculated. Students submitting the 2013-2014 FAFSA for the first time should respond to all questions pertaining to marital status as "married" if the student or parent of a dependent student is, as of the date of submission of the FAFSA, legally married in any U.S. or foreign jurisdiction. In keeping with the "place of celebration" rule, FAFSA applicants should respond to such questions without regard to where the married couple resides or where the student attends school. This same rule is applicable to the 2014-2015 FAFSA and subsequent FAFSA years.

Students who previously submitted a 2013-2014 FAFSA but who were unable to respond to the marital status questions as "married" due to the Department of Education's prior interpretation of DOMA may now submit a correction, but only if the relevant student or parent of a dependent student was legally married at the time the 2013-2014 FAFSA was originally submitted. Note that students are not required to submit a correction; it is optional. If a student or parent of a dependent student chooses to make a change in marital status in light of the new guidance, the student's new EFC must be used by institutions for the 2013-2014 year, even if it means adjusting the student's financial aid package. Other changes may need to be made to FAFSA information, such as income or family size, in light of the student's or parent's change in marital status.

The DCL also notes that other provisions of the Higher Education Act are currently being reviewed in light of *Windsor*, including, for example, calculation of loan repayment amounts under Title IV income-driven repayment plans, and the eligibility of a stepparent to apply for a Direct PLUS Loan. No guidance is given with respect to these issues, only a statement that any further policy changes will be announced in subsequent communications. Thus, financial aid officers should remain alert for additional policy changes and guidance relating to Windsor.

New law lets students "lawyer up" in student-conduct hearings

By Cory S. Winter

Breaking new ground, the state of North Carolina became the first state to require its colleges and universities to allow students (and student organizations) to be represented by an attorney in any student-conduct hearing. Will other states follow suit?

Despite how they may feel to accused students, student-conduct hearings are not judicial proceedings. Nor are they criminal proceedings, where the accused has a right to be represented by an attorney. But in North Carolina, this tradition is changing.

In late August 2013, Governor Pat McCrory signed into law the Students and Administration Equality Act (made part of the Regulatory Reform Act of 2013 [http://info.saulnews.com/reaction/documents/2014/HigherEd/NC_law_student_represenation.pdf]). This new law requires colleges and universities to allow students and student organizations "accused of a violation of the disciplinary or conduct rules" of the institution to be represented by an attorney or a "nonattorney advocate." The school must permit the student's representative to "fully participate during any disciplinary procedure or other procedure adopted and used . . . regarding the alleged violation." Each student and organization is financially responsible for the advocate who provides representation.

There are two exceptions to a student's right to representation. The first is if the college or university "has implemented a 'Student Honor Court' which is fully staffed by students to address such violations." Second, a student i s not entitled to representation "[f]or any allegation of 'academic dishonesty' as defined by" the college or university.

Civil rights advocates have applauded the Act as a measure that has been long overdue in promoting students' civil rights. Those observers claim that students are ill-equipped to defend themselves against student-conduct charges regardless of severity, particularly when facing serious allegations like sexual assault. And when criminal charges are pending, a student's self-representation could result in the student inadvertently or ill-advisedly waiving his or her Fifth Amendment rights, these proponents of the Act say.

Those who opposed the Act's passage believe that attorneys will serve to hamper the student-conduct process, thus increasing costs. The Act also makes internal conduct proceedings the equivalent of criminal proceedings, which they are not. Moreover, opponents of the Act argue the Act may create an advantage for students who are able to afford lawyers over those who cannot.

As colleges and universities in North Carolina begin implementing the Act, they do so with some questions left unanswered. For example, the Act leaves undefined what it means for a student's attorney to "fully participate" in the student-conduct proceedings. Does this mean that an attorney's role in the student-conduct process is broader than advising the student he or she represents?

While it remains to be seen whether other states will follow North Carolina's lead, pending legislation in Virginia would do just that. Virginia Delegate Rick Morris has proposed a bill that would allow students at Virginia public colleges and universities the right to counsel when charged with sanctions that could lead to expulsion or suspension of at least ten days. Student organizations would have similar rights for certain violations. Civil-rights advocates, fresh on the heels of their victory in North Carolina, will likely push for similar laws elsewhere.

Service Employee International Union (SEIU) Continues Its Aggressive Push To Organize Adjunct Professors In Boston

By Ira M. Shepard

The SEIU — fresh off of its continued success in organizing and representing Adjunct Professors in the Washington, DC metropolitan area at Georgetown University, George Washington University, American University, and Montgomery College — is extending its efforts to the college-rich Boston area and beyond.

The SEIU announced that it intended to conduct a mail ballot election at both Tufts University and Bentley University. Two hundred and eighty Adjunct Professors at Tufts University and two hundred and forty Adjunct Professors at Bentley University were eligible to vote in the election. By a margin of only two votes, the Adjuncts at Bentley declined unionization. In contrast, the Adjuncts at Tufts voted 128 to 57 in favor of unionization by the SEIU. Under applicable rules, the union will be certified as the collective bargaining representative of the adjunct faculty at each of the respective universities if a majority of those voting at each school vote for representation. If the union is certified, each university will be obligated to bargain in good faith with the SEIU over a collective bargaining agreement setting wages and hours and working conditions for all of the adjunct faculty at the school.

The SEIU organizing campaign director says the major workplace issues for adjuncts are wages, benefits, and job security. He also claims that the Adjunct Professors at Northeastern University are ready to file an election petition with the NLRB, and that the SEIU is pursuing organizing efforts at a number of other Boston based universities. The union campaign director notes that many colleges rely heavily on adjuncts, with adjuncts constituting as much as 40 to 70 percent of the professor ranks at most institutions. The SEIU also claims that adjunct professors are falling behind in wages, benefits, and job security.

The attempted unionization of adjuncts is also spreading to the West Coast, as the SEIU most recently announced plans to organize campuses in the Los Angeles area.

College leadership should be diligent in coordinating with applicable institution administrators who manage adjunct professor relations to alert them to these developments. The institution's response to such unionization efforts must be evaluated in relation to the impact on other institutional stake-holders. Moreover, institutions should be sensitive to thorny National

Labor Relations Act (NLRA) legal issues for private institutions, and state analogue rules for public institutions, which regulate the tenor and scope of an institution's response to such organization drives. If adjunct unions are established, the institution must continue to navigate NLRA/NLRB compliance on issues like collective bargaining rules and the obligation to bargain in good faith over wages, hours, and working conditions.

The Push for Pregnancy and Parenting Rights Under Title IX

By Marisa R. De Feo

Introduction

In June 2013, the Department of Education released more Title IX guidance. This time, the Department reminded its constituents that pregnancy and parental status are included in the definition of sex-based discrimination. Pregnancy discrimination is prohibited in admissions, hiring, coursework accommodations and completion, pregnancy leave policies, workplace protection, and health insurance coverage in educational programs and activities.

Pregnancy and parenting discrimination received considerable attention after recent studies concluded that a significant percentage of new parents fail to graduate and several lawsuits were filed against educational institutions on the basis of pregnancy discrimination. This article summarizes the Department's guidance aimed at supporting the academic success of pregnant and parenting students. Although the Department's guidance is focused on high schools, it is equally applicable to institutions of higher education that receive federal funding.

Office for Civil Rights' (OCR) Guidance

According to OCR, schools:

- ***Must* Allow Pregnant and Parenting Students the Same Opportunities in Classes and Extracurricular Activities by:**
  - Allowing participation in advanced placement and honors classes, school clubs, sports, honors societies, student leadership, and other school-sponsored activities;
  - Providing *voluntary* instructional programs or classes for pregnant students;
  - Allowing participation in classes and extracurricular activities without a doctor's note, unless a doctor's note is required from all students who have a physical or emotional condition requiring treatment by a doctor;
  - Providing the student with reasonable accommodations, which may include a larger desk, elevator access, or allowing a student to make frequent trips to the restroom.
- ***May Not* Penalize a Student for Excused Absences and Medical Leave and must allow participation by:**
  - Permitting excused absences due to pregnancy or childbirth for as long as the treating physician deems necessary;
  - Allowing the student to return to the same academic and extracurricular status as before the medical leave, including the opportunity to make up any work missed;
  - Training and educating teachers and staff on the Title IX requirements related to excused absences/medical leave;

- Providing pregnant students with the same special services it provides to students with temporary medical conditions; for example, at-home tutoring or independent study opportunities.

- ***Must*** **Protect Against Harassment:**
  - Harassment based on pregnancy or related conditions is prohibited when it interferes with the student's ability to benefit from or participate in educational programs or classes;
  - Examples include: making comments or jokes about a pregnancy, spreading rumors about sexual activity, or making sexual propositions or gestures, among others.

Responding to OCR's Guidance

Institutions of higher education should revisit their current Title IX policy to explicitly include pregnancy and parenting as a basis for sex discrimination. To the extent the above-listed requirements do not conform with your institution's policy, consider incorporating them into existing policies and procedures.

Favorable Ruling for University Employer Encourages Accountability

By Brittany McCabe

In 2007, years before the 2011 Title IX Dear Colleague Letter, the University of Iowa held an administrator accountable for failing to respond appropriately to allegations of a sexual assault. The President of the university found the administrator's failure to take any action, or even respond to letters from the alleged victim's parents, so troubling that she fired the administrator following two formal internal investigations into the handling of the matter. The Supreme Court of Iowa recently upheld this decision by affirming the lower court's decision to dismiss the ex-employee's "kitchen sink" complaint. This decision is instructive for colleges and universities that find themselves in situations where they must balance the need to enforce and ensure compliance with policies and procedures against the risk that disgruntled employees may fight back when found to be non-compliant.

The Facts

A day after an alleged sexual assault, Dean of Students, Phillip E. Jones, learned of the alleged incident. Consistent with the university's then existing procedures, the department of athletics ("DOA") commenced an informal investigation into the incident and issued a report to the Office of Equal Opportunity and Diversity ("EOD"), Jones, and the university's general counsel. Jones placed the report in a general disciplinary file but took no further action on the matter.

The victim later filed a criminal complaint with the university's Department of Public Safety alleging that she had been subjected to continued harassment and was dissatisfied with the university's response to her allegations. The victim's mother also contacted Jones directly to discuss the continuing harassment. Among other things, he falsely told the mother that he "had nothing" on the incident. Following a meeting with the victim and her mother, Jones sent letters to the students accused of harassment notifying them of the school's anti-retaliation policy. He did not inform the students of the existing allegations against them.

Following this series of events, the university's Board of Regents asked its general counsel to conduct an investigation into the university's compliance with its policies and procedures in responding to the sexual assault complaint. While the investigation was ongoing, the victim's parents wrote two letters to university officials sharply critical of the university's handling of the incident. Jones received both letters, read them, and placed them in a general file without taking any additional action.

The Internal Investigations

After a comprehensive review of the facts, the general counsel reported that it appeared that university officials had complied with internal requirements for responding to allegations of sexual assault. However, the Regents later learned of the two letters written by the victim's parents and decided a second review of all actions taken by university personnel in response to the alleged assault was warranted. The outside law firm hired to conduct the review reported that Jones' failure to act in response to the alleged sexual assault was "fundamentally inconsistent with the 'substance' and intent of those policies," even though he had not technically violated the letter of the school's policies and procedures. As a result, the University of Iowa President terminated Jones from his employment.

The Inevitable Lawsuit

Jones sued the University of Iowa, the President, the Regents, and the law firm that created the report on a variety of theories, including false light, invasion of privacy, defamation, wrongful termination, intentional interference with an employment contract, intentional interference with prospective business advantages, due process violations, and civil rights violations. The district court dismissed these claims, and the Supreme Court of Iowa recently affirmed the dismissal.

Most relevant here, the court dismissed Jones's claims of employment discrimination, and found instead that the President properly terminated Jones due to her loss of confidence in his professional abilities based on his mishandling of the sexual assault incident. Jones' claims against the law firm that created the report were equally unsuccessful because the record demonstrated that the firm based its conclusions on a "thorough and deliberate investigation."

The Take-Away

In this particularly egregious case, where the ex-employee lied repeatedly to investigators and the victim's parents, the university's decision to terminate employment was upheld. While termination would not be the appropriate remedy in all situations where an employee fails to follow the letter or spirit of an institution's policies, this case instructs that a university, as an employer, has the right to expect and enforce compliance with policies and procedures, especially where student safety is concerned. Colleges and universities may avoid such situations by continuing to engage in training and self-study with respect to internal compliance and taking corrective action upon findings of non-compliance.

A New Form of Student Union

Scholarship Athletes Seek Bargaining Rights

By Edward R. Levin

NCAA colleges and universities should have seen it coming after years of vigorous campaigning by football and basketball players and their advocates for a greater say in the business of college sports. The shock came on January 30 when the Collegiate Athletes' Players Association (CAPA), a group backed by the National Collegiate Players Association and the United Auto Workers, petitioned the National Labor Relations Board (NLRB) to allow "[a]ll football players receiving grant-in-aid athletic scholarships from Northwestern University" at Northwestern University to form a union.

The social and economic issues over whether big time college sports programs should share with athletes the huge revenues the players generate are well known. This new development raises legal issues and challenges for higher education institutions that turn the debate into a real challenge to the existing system.

The National Labor Relation Act establishes a legal process for "employees" of a business "engaged in an industry affecting commerce" to choose an "exclusive representative" for purposes of "collective bargaining" in a "unit appropriate for such purposes." Employees seeking to pursue bargaining rights or an organization seeking to represent them may file a petition with the NLRB. The NLRB will determine if the act applies and if the petitioning employees or the petitioning organization are entitled to a vote on whether a majority of covered employees in the "unit" want to be represented by the organization.

The most obvious legal battle lines will be drawn in this case where they have been fought previously in the case of attempts by graduate students to unionize. The issue will be whether scholarship athletes are, legally speaking, employees of the university. CAPA argues that scholarships and related stipends along with all of the restrictions on the athletes attached to those scholarships establish an employment relationship.

In 2000 the NLRB ruled that graduate students at New York University who engage in teaching duties as part of their graduate studies program, and receive grants in exchange for such duties, are employees covered by the Act. That precedent was reversed in the case of Brown University some years later and is the current law. The basic rule adopted in the Brown University case is that the grad students' role was overwhelmingly that of students and not of workers and teaching is merely a part of their overall course of study. The law has been revisited again at NYU and in 2012 the director of the labor board's New York office wrote that he must defer to the 2004 decision, but pointed out that there are factors which point to employee status: "The instant record clearly shows that these graduate assistants are performing services under the control and direction of" N.Y.U. "for which they are compensated," he wrote. He balanced that with a finding: "It is also clear on the record that these services remain an integral component of graduate education."

The director's decision then went to the NLRB for review. Before the NLRB could issue a final ruling, NYU and the United Auto Workers Union, which sought to represent the grad students there, reached a voluntary agreement to hold an election in which the union won bargaining rights. They have since signed a contract and withdrawn the petition so that the case will not be decided by the NLRB.

Whether scholarship athletes are employees engaged in the work of playing a collegiate sport which is not secondary to their overwhelming role as students is a question that has been at the heart of the debate over whether athletes should be paid. That will be the central issue before the NLRB and perhaps the courts. Commentators are generally in agreement that the leap into totally disrupting college sports seems to many like a bridge too far.

While much of the public discussion has been about pay, CAPA states that compensation is not its focus. To the athletes, the scholarship compensation is for now merely the hook upon which they hang their argument that they are, in fact, paid employees entitled to negotiate terms of employment. They make the case that they really want to focus negotiations on such issues as preservation of scholarships for injured athletes and university responsibility for continuing medical care and other consequences of long term or permanent injury.

There are other significant legal issues in play. The National Labor Relations Act does not apply to public institutions. Therefore, ultimate success in this case would only make collective bargaining possible in private institutions and fracture the NCAA structure. However, many states allow unionization of public employees under state law. Application to student athletes would most likely require legislative action, which seems very unlikely even in union-friendly states because of all the other implications it would have for higher education.

Moreover, it should be noted that if the NLRB concludes that scholarship athletes are employees under the NLRA, we could see a ripple effect under other employment laws, such as those pertaining to payment of minimum wages and overtime for all hours worked, reasonable accommodation of disabilities, etc., not to mention tax laws. While the NLRB's determination of the athletes' status as employees under the NLRA is not controlling as to their status under other employment laws, a favorable ruling at the NLRB could easily spur legal challenges in other arenas.

The ultimate outcome of the Northwestern case is many years off. It will certainly come long after the current players who supported the CAPA petition at Northwestern have left college sports. However, the clear immediate strategy is to shake up the *status quo* at the NCAA and member institutions. CAPA has undoubtedly taken this legally tenuous step to create momentum and incentive for the institutions to begin to deal with issues such as injury and other student athlete concerns.

It is predictable that big time sports in higher ed will need to address these issues creatively through insurance programs similar to workers compensation or through other contractual guarantees. The growing public concern over concussion and other traumatic injury, along with controversy over the huge amount of money generated in major college football and basketball, is undoubtedly creating front burner issues that institutions can no longer ignore.

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