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Higher Education Highlights

The Newsletter of the Higher Education Practice

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When Administrations Collide – Gender Identity Discrimination under Title IX

By Jessica Meller and Danielle Petaja

The Power of a Letter

On March 28, 2017, the United States Supreme Court was poised to hear *Grimm v. Gloucester County School Board*—a case slated to meaningfully impact the rights of transgender students under Title IX. The Court certified two questions. First, it certified the question of whether courts should defer to the May 2016 Dear Colleague Letter issued by the Department of Justice's Civil Rights Division and the Department of Education's Office for Civil Rights. The May 2016 DCL expressed the joint opinion of the Departments that *gender identity discrimination* is prohibited *sex discrimination* under Title IX. Notably, it interpreted Title IX to "require that when a student or the student's parent or guardian, . . . notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity." This re-enforced the Equal Employment Opportunity Commission's ("EEOC") position that gender identity discrimination is prohibited sex discrimination under Title VII. It also echoed several court opinions that Title VII protects against gender identity discrimination, and, in some cases, sexual orientation discrimination.

Second, the Court certified the question of whether – with or without deference to the May 2016 DCL – the Departments' interpretation of Title IX and 34 C.F.R. §106.33, which allows recipients of Title IX funds to provide separate toilet, locker room, and shower facilities on the basis of sex, if those facilities are comparable for each sex, should be given effect.

On March 6, 2017, however, the Supreme Court reversed course, vacating and remanding *Grimm* back to the Fourth Circuit. Why did this happen? On February 22, 2017, the Departments, now under the Trump Administration, issued a *new* Dear Colleague Letter. The February 2017 DCL, which Education Secretary Betsy DeVos allegedly contested, retracted the May 2016 DCL and expressly "with[drew] the statements of policy and guidance," citing States' rights, differing opinions, and a lack of legal scholarship to support the Obama Administration's interpretation of Title IX. In the new DCL, the Departments wrote, "[t]here must be due regard for the primary role of the States and local school districts in establishing educational policy." White House Press Sec-

retary Sean Spicer hammered this point, saying, "the President has maintained for a long time that this is a States' rights issue and not one for the federal government."

What's Next for *Grimm*?

With the retraction of the May 2016 DCL and remand from the Supreme Court, the Fourth Circuit must determine, on its own, whether Title IX protects the rights of transgender students within its prohibition of sex discrimination. It also may consider the *Grimm* plaintiff's Equal Protection argument, on which the Supreme Court's order was silent.

The *Grimm* plaintiff, a transgender high school student in Virginia, originally sued his school board for violating both Title IX and the Equal Protection Clause of the U.S. Constitution by issuing a school policy that required students to use the bathroom that corresponded to their "biological sex." Before the board issued the policy, Grimm had used the restroom that conformed to his gender identity with the approval of his school's administration. He filed his lawsuit against the school board in the United States District Court for the Eastern District of Virginia, alleging that the policy constituted sex discrimination under Title IX and violated the Equal Protection Clause.

On a motion from the school board, the Eastern District of Virginia dismissed Grimm's Title IX claim and denied his request for a preliminary injunction. Grimm appealed to the Fourth Circuit. The Fourth Circuit reversed, and ordered the Eastern District of Virginia to defer to the May 2016 DCL on the Title IX claim. It also ordered the court to apply the proper evidentiary standard when determining whether to grant or deny the preliminary injunction. In so doing, the Fourth Circuit became the first circuit court to answer in the affirmative "whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity."

Though *Grimm* focuses on the interpretation of "sex discrimination" under Title IX, its outcome will also impact how employers interpret Title VII sex discrimination in the employment setting. The remand will not, however, resolve inconsistencies between various courts, state laws, and local laws, all but guaranteeing that another transgender rights case will require the Supreme Court to provide clarity on the issue in the future.

Nationwide Response to the Differing DCLs

Almost immediately after the Departments issued the May 2016 DCL, 12 states and the Texas Attorney General sued the federal government to challenge the Departments' position on transgender rights. In response, Judge Reed O'Connor for the United States District Court for the Northern District of Texas issued a nationwide injunction. The injunction suspended the guidelines, and allowed schools to continue to receive federal funding while ignoring the May 2016 DCL's mandate. In addition, in December 2016, Judge O'Connor granted the Texas Attorney General an injunction to suspend enforcement of a federal mandate that prohibited discrimination against transgender individuals under the Affordable Care Act.

But fast forward to February 2017, precisely five days *after* the Departments revoked the May 2016 DCL, at least one court in Pennsylvania has taken a different approach. Judge Mark Hornak for the United States District Court for the Western District of Pennsylvania, enjoined an Allegheny County school district from requiring three transgender students to use bathrooms that conformed to their "biological sex." Interestingly, in light of the revocation of the May 2016 DCL, the court based its decision to enjoin on the students' Equal Protection Clause claim (instead of Title IX), noting that the students showed a likelihood of success on the merits of an Equal Protection Clause claim that the school district was treating them differently because of their sex. The importance of this initial decision is that it underscores the view of some that transgender discrimination is a constitutional issue. If so, it falls beyond the purview of the Department of Education, the EEOC, and their guidance regarding how to interpret anti-discrimination laws. The Pennsylvania case, *Evancho v. Pine-Richland School District*, will remain in the district court until trial on the merits. Regardless of the outcome, however, an appeal to the United States Court of Appeals for the Third Circuit is likely.

Similar disagreement exists outside of the courts at the state and local legislative levels. For example, in February 2016, the Charlotte City Council passed a law expanding its anti-discrimination protections to include LGBT individuals, as myriad municipalities have done. Nineteen states have also taken similar action. In response, the North Carolina legislature passed House Bill 2, prohibiting municipalities from expanding state anti-discrimination laws. House Bill 2 limited anti-discrimination

protection to the following protected classes: race, religion, national origin, age, handicap or biological sex as designated on a person's birth certificate.

What to Expect

Although the Supreme Court will not hear *Grimm* this term, schools and employers should expect the Court to hear a case like *Grimm* in the near future. *Evancho* demonstrates that transgender individuals will continue to pursue legal recourse for gender identity discrimination, despite the revocation of the May 2016 DCL. With this legal limbo, employers and schools should continue to maintain the protections they have in place for LGBT employees and students. They should also consult with counsel regarding state- and municipality-specific anti-discrimination laws that may impact their policies and practices.

Plan Governance – Key Risk Management Tool for Retirement Plan Fiduciaries

By Sally Church and Dasha Brockmeyer

Class action lawsuits brought against plan fiduciaries historically focused on large 401(k) plans. But more recently, plaintiffs have turned their focus to ERISA-covered 403(b) programs sponsored by institutions of higher education. Specific claims vary, but these complaints generally include a breach of fiduciary duty claim alleging excessive fees were paid from plan assets for recordkeeping or other administrative services. Because the fees associated with certain investment offerings (called expense ratios) reduce the earnings on monies invested in those funds, these lawsuits also claim that investment funds with lower expense ratios should have been offered to plan participants.

Depending upon who is sued and the specific allegations and facts, the outcome of these cases vary. Through settlement or court decision, millions of dollars have been restored to plans and significant legal fees paid to plaintiffs' counsel. The recently-filed cases involving ERISA-covered 403(b) plans are still working their way through the court system, with the federal courts currently considering motions to dismiss filed on behalf of the defendant institutions of higher education.

Notably, although there have not yet been any excessive fee claims brought against fiduciaries of non-ERISA 403(b) plans maintained by public institutions of higher education, such plans are not immune from excessive fee litigation. Fiduciaries of non-ERISA 403(b) plans maintained by public colleges and universities must comply with state law standards of fiduciary conduct. So it is important for all institutions to pay careful attention to these pending actions, and to ensure the implementation of good plan governance.

Establishing and maintaining good plan governance is essential to reducing the risk of an excessive fee case, as well as other allegations of fiduciary breach. Although, historically, plan sponsors of 403(b) participant-directed plans put the selection of investments on auto-pilot, continuing to do so puts the plans at risk for excessive fee and other breaches of fiduciary duty claims. To protect against such claims, it is critical to first understand who is the plan fiduciary (or fiduciaries) under the terms of a retirement plan and who is really acting in a fiduciary capacity, and then create an adequate plan governance process for the plan.

The definition of a fiduciary is functional. It does not matter who is identified as a fiduciary under the terms of the plan. While a plan may say that the plan administrator is the employer or plan sponsor, a committee or human resource professional may be making all of the discretionary decisions with respect to the day-to-day operation of the plan. The plan may indicate that the plan administrator is also the fiduciary with discretionary control over the management of plan assets, but a committee or someone in the finance department is the de facto investment fiduciary for the plan. The plan document should match up with the actual process and practice. Identifying individuals as fiduciaries in the plan does not absolve all other individuals making discretionary decisions in the plan from fiduciary responsibility.

The adequacy (or existence) of a plan governance process starts with answering the following questions:

- Who is acting as a plan fiduciary to the retirement plan?
- Is the individual or group of individuals performing fiduciary duties consistent with the terms of the plan?
- Has the plan sponsor formally delegated any fiduciary duties to others within the organization?
- Are plan fiduciaries and their respective duties and obligations specified in the plan document itself?
- Do plan fiduciaries regularly review plan service providers, document the review process and the reasonableness of administrative expenses paid from plan assets?
- Do plan fiduciaries have a process in place to review the performance and cost of the investment funds offered under a participant-directed plan; is that process followed, and are all decisions about the selection, retention or replacement of investment options documented?
- Has the investment fiduciary hired an experienced investment consultant to assist with properly analyzing and understanding investment fees and investment performance?

Identifying the actual fiduciaries of the plan, implementing and maintaining a good plan governance policy, regularly conducting both procedural and substantive due diligence with respect to service providers and investment offerings, and documenting the rationale for administrative and investment decisions is essential to defending against excessive fee litigation and other breaches of fiduciary duty.

Sanctuary Campuses and the Disclosure of Student Data to Immigration Officials

By Sandy Bilus and Andrew Bollinger

President Donald Trump made clear during his campaign that he intended to get tough on immigration, and recent executive actions demonstrate that he wants to make good on that promise. His actions have elicited a ripple effect of anxiety across many higher education institutions. One concern from education officials is that federal agencies may attempt to mine the sensitive data of students in an effort to identify and deport undocumented immigrants. In response, numerous institutions across the country have declared themselves "sanctuary campuses," drawing sharp rebuke from the Trump administration and Republican lawmakers.

But are schools facing a data privacy crisis? And if immigration officials do seek student information from schools, are there legal protections available to ensure the security of sensitive data?

Sanctuary Campuses

Before immigration officials can deport undocumented immigrants, they first must identify candidates for deportation. Officials identify undocumented immigrants in many ways: raiding workplaces suspected of hiring undocumented workers; investigating green card applications; investigating tips; and upon arrest or criminal investigation. Cooperation from the public can be crucial to these enforcement efforts.

As fears about deportations increase, many institutions have refused to voluntarily cooperate with immigration officials, designating themselves as "sanctuary campuses." While the precise definition of a sanctuary campus is up for debate, the general aim is clear: assist federal authorities only to the extent that is legally required. In other words, these institutions have announced that they will not voluntarily assist with deportation measures.

President Trump and Republican lawmakers swiftly responded to these declarations of "sanctuary campus" and similar "sanctuary city" initiatives. On January 25, 2017, Trump signed an executive order entitled "Enhancing Public Safety in the Interior of the United States," which Trump states will cut off federal grant money to jurisdictions that do not cooperate with immigration officials in enforcing deportations.

The executive order relegates to the Secretary of Homeland Security the "authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction," although it does not define "jurisdiction." While

Trump stated that he intends to target undocumented immigrants with criminal histories, the executive order is broad in scope and prioritizes enforcement against those who "have abused any program related to receipt of public benefits," and "in the judgment of an immigration officer . . . [those who] pose a risk to public safety or national security."

In addition, Trump promised on the campaign trail to eliminate the Deferred Action for Childhood Arrivals program ("DACA"), which permits undocumented immigrants who entered the country before the age of 16 to remain in the country for education or work. Although recent DHS guidance suggests that, at least for now, DACA will remain intact, there is always the possibility that the program could be terminated. Eliminating or reducing protections afforded under DACA could have a profound impact on higher education institutions, particularly enrollment and overseas research.

Data Concerns and Legal Implications

So how do these actions affect data privacy of students? Enforcement efforts first require identification of undocumented immigrants, and immigration officials need data—a lot of it. Higher education institutions provide one potential source of data that can be utilized to identify undocumented immigrants.

Students disclose personally identifiable information during the admissions process and throughout their attendance at an institution. In addition, many undocumented students have voluntarily disclosed personally identifiable information in reliance on DACA protection. If immigration officers obtain this data, some education officials fear it could be utilized to discover not only undocumented students, but undocumented relatives of students as well. For example, if immigration officials notice an increased admissions trend, this may signal the need for intensified workplace inspections in the surrounding community.

Higher education institutions face an uphill battle preventing immigration enforcement from obtaining student data. The Family Educational Rights and Privacy Act ("FERPA") prohibits from disclosure personally identifiable information derived from student education records. Thus, a school can rely on FERPA and refuse to voluntarily disclose education records to immigration officials—if they don't have a subpoena or a court order. But if immigration officials obtain a court order or subpoena that compels disclosure of education records, a school may have no choice but to turn over the data. FERPA expressly allows disclosure of education records in response to judicial orders or lawfully issued subpoenas. As a result, the "sanctuary campus" designation may be largely symbolic and carry little legal significance when it comes to student data privacy.

Outlook

Higher education institutions have responded to privacy concerns in many different ways. Harvard University president Drew Faust rejected the sanctuary campus label, stating that doing so risked unnecessary special attention to the university and may result in greater danger to students. In contrast, the president of Swarthmore College, one school declaring itself a sanctuary campus, stated that "as a nation and as a campus community, we are in unchartered waters with the new administration; our responses must be considered and firm."

Indeed, in light of threats to withdraw school funding, coupled with the need to protect sensitive student information, higher education institutions need to develop plans for responding to requests for information and aid from federal immigration officials. The stakes have been raised.

CYCLE by Saul – Covering Your Campus's Legal Education

The Higher Education Practice of Saul Ewing LLP is delighted to offer a free education CLE series CYCLE by Saul – Covering Your Campus's Legal Education. CYCLE by Saul provides regularly occurring legal education courses to in-house counsel and senior management of higher education institutions. CYCLE programming will focus on the unique nuances and legal challenges associated with operating a higher education institution, as it relates to particular areas of law including litigation (Title IX and Clery Act), labor and employment, real estate and intellectual property, among others. All workshops are interactive and informative.

If you would like to opt-in to the CYCLE mailing list to learn about future programming or are interested in having Saul Ewing's Higher Education team bring a CYCLE workshop to your college or university campus (at no cost), please contact Shannon Duffy, sduffy@saul.com.

Supreme Court Opens the Door for Students to Pursue Disability-Based Claims in Court

By Zachary Berk

In a recent decision dated February 22, 2017, the United States Supreme Court made it easier for parents of disabled children to pursue claims of discrimination against educational institutions in state and federal courts. The Supreme Court determined that parents do not need to exhaust the time consuming administrative procedures provided for under the Individual with Disabilities Education Act ("IDEA") before filing suit in state or federal court where the focus of a student's claim is based on something other than a denial of a "free appropriate public education," otherwise known as a "FAPE."

The IDEA, which is aimed at ensuring disabled children receive a FAPE, requires that parents and school representatives engage in exhaustive formal procedures before parents may seek judicial review of any perceived failure of a school to comply with the law. Typically, parents who do not believe their child is receiving a FAPE, due to an unsatisfactory "individualized education plan," for example, must file a complaint with the appropriate local or state educational agency to initiate the dispute resolution process. Thereafter, the parties participate in a "preliminary meeting" and/or a mediation process, followed by a hearing before an impartial officer and, in some cases, an appellate proceeding before a state agency. Only once all of those steps have been exhausted may parents seek judicial review.

While the IDEA provides that it is not intended to limit any "rights, procedures, and remedies" available under the Constitution, the Americans with Disabilities Act ("ADA") or any other federal laws that implicate children with disabilities, the IDEA states that its administrative procedures must be exhausted before someone may file a civil action seeking relief under another law if the same relief is available under the IDEA. Given that any violation of a federal law intended to protect disabled children will likely impede the affected child's ability to obtain a FAPE, an argument could be made that most, if not all, disputes raised by parents of disabled children should be funneled through the IDEA's administrative procedures.

The Supreme Court, however, clarified that IDEA administrative procedures are not a prerequisite to filing suit in state or federal court where the primary relief sought by parents is not related to the denial of a FAPE, *i.e.*, the denial of an appropriate education. Although there can be considerable overlap between what constitutes disability discrimination and the denial of an appropriate education, the Court articulated a few guideposts that can assist in determining whether parents' claims can be pursued in court without regard for the IDEA's administrative procedures. First, if the student's claims could conceivably be asserted against a public facility other than a school, it is an indication the substance of the dispute is not primarily related to the student's education. Whether an adult at the school, such as an employee or a visitor, could assert the same claim as the student is another indication of whether the substance of a student's claim concerns the student's access to an appropriate education.

The circumstances of the recently decided Supreme Court case, *Fry v. Napoleon Community Schools*, help illustrate when a student may forego the IDEA administrative procedures and file a complaint in court. In *Fry,* school administrators denied the request of a child with a severe form of cerebral palsy that she be permitted to have her trained service dog, a goldendoodle named Wonder, accompany her at school throughout the day. Wonder provided the child with assistance by, among other things, helping her balance, open and close doors, operate light switches, use the bathroom and take off her coat. The school took the position that the dog was unnecessary at the school because the child could be assisted by the adults working there. The Supreme Court determined that the parents' claims challenging the school's decision, which alleged violations of the ADA and § 504 of the Rehabilitation Act, did not "suggest any implicit focus on the adequacy of [the child's] education." Thus, the Court suggested that the parents would not be required to exhaust the administrative procedures of the IDEA before pursuing their claims in court.

Ultimately, the Supreme Court's decision in *Fry* likely opens the door for increased litigation of disability-based discrimination claims with educational institutions in state and federal courts. Parents who do not want to partake in the lengthy administrative procedures of the IDEA, or who simply want to

put additional pressure on an adverse school (financially or otherwise), now have direction from the Supreme Court as to how to structure claims, if at all possible, such that they do not fall within the scope of the IDEA's administrative procedures. So long as a claim can be characterized as arising out of an issue that may exist independent of a student's education, parents may pursue their disputes in court from the outset.

Mandatory On-Campus Residency Policy at Public University Not Necessarily Immune From Antitrust Liability Under *Parker v. Brown* State Action Doctrine

By Michael A. Finio

On March 9, 2017, the U.S. Court of Appeals for the Third Circuit, in a precedential opinion, partially affirmed the dismissal of a case in which Edinboro University's mandatory on-campus residency policy was challenged as monopolistic conduct under Section 2 of the Sherman Act. In reaching that conclusion, however, the Third Circuit applied a different analysis than the District Court. For that reason, the Third Circuit remanded the case with instruction to enter the dismissal *without prejudice,* thus leaving open the possibility of plaintiffs re-pleading the complaint to allege facts that could plausibly overcome dismissal on state action immunity grounds under a subset of relevant *Parker v. Brown* analysis.

Background

Edinboro University, a public institution and member of the Pennsylvania State System of Higher Education, needed to add student housing. To accomplish this, Edinboro decided to collaborate with the non-profit Edinboro University Foundation to build new student dormitories. In order to participate in this activity, the Foundation amended its Articles of Incorporation to authorize its borrowing of funds to "acquire, lease, construct, develop and/or manage" real property. The Foundation then signed a "Cooperation Agreement" with the University, via which the University leased the Foundation land in a favorable location. This allowed the Foundation to issue bonds to finance, construct, and then manage the new dormitories.

At the time those events occurred, Edinboro had in place a parietal rule requiring "non-commuting first-year and transfer students" to live on-campus for two consecutive semesters. In May 2011, after the first of the new dormitories were opened, Edinboro amended the parietal rule to require certain students to live on-campus for either four consecutive semesters or until they completed 59 credit hours.

Antitrust Challenge

Plaintiffs, private businesses and owners of off-campus residential housing near the University sued the Foundation and the University President[1] alleging that the change in the parietal rule evidenced a conspiracy to monopolize the student-housing market in violation of Section 2 of the Sherman Act, which prohibits monopolization and attempted monopolization. Plaintiffs claimed that their business declined 50 percent after the parietal rule change. Plaintiffs also claimed that the rule change harmed students by forcing them to pay higher board rates and participate in meal plans.

District Court Decision

The District Court dismissed the plaintiffs' claims with prejudice, finding that the defendants' conduct was state action under *Parker v. Brown* and was therefore immune from antitrust liability.

Third Circuit Review and Decision

Because the District Court dismissed the action pursuant to a Fed.R.Civ.Proc. 12(b)(6) motion, the Third Circuit had the op-

1. The University was not sued, as plaintiffs conceded its Eleventh Amendment immunity. The President was sued in her official capacity for prospective relief.

portunity to exercise "plenary review" of the lower court's decision. In doing so, the Third Circuit further parsed the *Parker* state action immunity doctrine, which, when first crafted by the Supreme Court in 1943, clearly stood for the proposition that the Sherman Act did not prohibit anticompetitive state action.

However, almost 50 year later, in *FTC v. Ticor Title Ins. Co.*, the Supreme Court announced that "state-action immunity is clearly disfavored" and in that decision set out three distinct methods by which an assertion of state action immunity had to be analyzed. These were:

1. "ipso facto" immunity – which applies to actions of state legislatures and state supreme courts, but not to entities that are state agencies for limited purposes;
2. *Midcal* scrutiny – which applies to private parties and state agencies that are controlled by "active market participants;" and
3. *Hallie* scrutiny – which applies to municipalities and, perhaps, state agencies.

Of these three tests, "ipso facto" is the least rigorous, and is found when the activity being analyzed is clearly the direct result of a state exercising its traditional sovereign powers. The Supreme Court has held that this exists in only two situations – where either the state legislature or the state supreme court is behind the challenged activity. On the other end of the spectrum, *Midcal* represents the most rigorous scrutiny because it involves a two-part test, requiring a finding of both a clearly articulated and affirmatively expressed state policy, *and* active state supervision. Representing a middle ground, *Hallie* requires a finding of conformity of conduct to a clearly articulated state policy, but not active state supervision.

Which test applies turns on the character of the person engaged in the challenged conduct, according to the Third Circuit. Here, the challenged conduct was the *University's* conduct in changing its housing rule. The Foundation, according to the Third Circuit, was acting purely under the direction of the University and did not engage in any allegedly anticompetitive activity itself. Although the Foundation derived an advantage from the University's rule, it merely acted as it normally would in the marketplace in order to pursue its business.

By focusing on the University, as the person engaged in the challenged conduct, the Third Circuit determined that *Hallie* scrutiny was appropriate because Edinboro is more like a municipality than a private market participant. Although the District Court effectively applied the ipso facto test, stemming from its belief that the University's Eleventh Amendment immunity made it ipso facto immune from antitrust liability, the Third Circuit took a different approach – reasoning that the two immunity doctrines (Eleventh Amendment and ipso facto) are not coextensive. According to the Third Circuit, although Edinboro is an arm of the state, it is not a "sovereign" because it cannot legislate or judicially mandate an anticompetitive policy on behalf of the Commonwealth. Instead, Edinboro's amending its on-campus housing policy was deemed by the Court as an exercise of discretion afforded it by the Pennsylvania legislature in a state-agency-like capacity. And for this reason, *Hallie* was the appropriate test.

Importantly, in applying the *Hallie* test, the Third Circuit rejected the defendants' reliance on *Saenz v. University Interscholastic League*, a 1973 Fifth Circuit decision supporting *Parker* immunity for a defendant deemed to be an "integral part of the University of Texas at Austin." In so doing, the Third Circuit stated that it was joining those courts that denied ipso facto immunity to public universities.

As a result, the choice before the Third Circuit was between *Midcal* and *Hallie*, and the Court chose the latter because the University's actions were more akin to the municipal actions in *Hallie* than the private market participant involved in *Midcal*. This ruling meant that the University's actions would be exempt from the "active supervision" requirement and that the focus would be on the issue of clearly articulated state policy. The Third Circuit held that what Edinboro did clearly fit within the Pennsylvania legislature's identification of higher education as a "valuable public function" – and what the University did with respect to the housing decisions it made fit within the clearly articulated state policy that it was delegated to carry out.
The Court concluded, "mandating on-campus residency is a

foreseeable consequence of the legislative mandate to provide appropriate student living facilities.”[2]

As a caveat, however, the Third Circuit made clear that if the Foundation – a private enterprise and an active participant in the real estate market – “dominated and controlled the University” the outcome could be different and the University would be at risk to lose any semblance of *Parker* immunity. Presently, the plaintiff “did not plead any facts that plausibly” allowed that conclusion – but it could, and the Third Circuit's decision to remand and instruct the lower court to dismiss without prejudice keeps open the possibility of an amended complaint to make such allegations.

Take Away

State action immunity is alive and well, but the factual scrutiny to be afforded public university conduct is intensive, and the relationship between private actors and the role they play in university activities and decisions is a critical one in light of the Third Circuit's ruling. It will be interesting to see whether the plaintiffs in the *Edinboro University Foundation* action plead new facts that credibly allege that the Foundation “dominated and controlled” the University in any relevant way. Moving forward, public universities would be wise to revisit their relationships with supporting foundations and other enterprises that assist the institution deliver higher education-related services that are also offered in surrounding private commercial markets.

2. By contrast, the Tenth Circuit decided a similar case after this one was argued. In that case, *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments*, 843 F.3d 1225 (10th Cir. 2016), the Tenth Circuit decided that in applying the *Hallie* test, the Colorado legislature “did not intend to displace competition in the student - housing market” because it could not locate any “clear articulation” of such a policy in Colorado law.

Attorney-Client Privilege Waived When Client Shared an Opinion Letter With Consultants Offering Advice on the Same Matter

Should Your Attorney Hire Your PR Consultant?

By William E. Manning

In the recent case of *Bousamra v. Excela Health et. al.*, 2017 Pa. Super. LEXIS 166 (Pa. Super. Mar. 13, 2017), the Pennsylvania Superior Court ordered the production of a lawyer's opinion letter to her client which advised on the central issue in a defamation case. Why? Because the client passed the letter along to a public relations consultant assisting on that same subject, resulting in a waiver of the privilege. With careful discussion between client and counsel at the outset of the engagement, such a waiver might be avoided.

In 2011, a Western Pennsylvania health care system, in a public announcement, identified two cardiologists who, according to peer review evaluations, had performed scores of unnecessary stent procedures. The cardiologists sued, advancing two claims: 1) that the surveys were rigged in order to favor the hospital's own cardiology practice; and 2) defamation arising from the public announcement.

Prior to the announcement, counsel had provided an opinion letter to defendant regarding the liability exposure caused by the public disclosure of the survey findings and the public identification of plaintiffs. At or about the same time, the defendant also engaged a public relations firm to create a media plan for public announcement of the survey findings. During a critical few day period, the following events occurred in this order:

- Client told PR firm that “legal issues” prevented the public naming of the two cardiologists;
- Client received counsel's opinion letter, apparently advising to the contrary;
- Client advised PR firm that it was now comfortable with the public identification of the cardiologists by name, forwarding by email a copy of the opinion letter.

After reviewing the privilege log, plaintiffs' counsel became aware of the opinion letter and the fact that it had been

forwarded to the PR firm. Plaintiffs moved to compel both the letter and emails surrounding its disclosure to the PR firm. Defendant asserted the attorney-client and work product privileges. A discovery master for the trial court concluded that the attorney-client privilege prevented disclosure of the opinion letter. Defendant's claim to work product privilege was not considered.

The trial court disagreed, however, concluding that the privilege had been waived by the defendant's sharing of the opinion letter with its PR firm. The Superior Court affirmed, noting that:

- Defendant's general counsel did not consult with the PR firm "about the legal implications of using the doctors' names." *Bousamra v. Excela Health et. al.*, 2017 Pa. Super. LEXIS 166, at *17 (Pa. Super. Mar. 13, 2017).
- He "did not recall having legal discussions ... [with the PR firm] about any other matter." *Id.*
- The PR firm "was not consulted to aid in the legal discussion." *Id.*

In making these observations, the court was not simply being the master of the obvious (why would the client seek legal advice from a non-lawyer?). Its point, relying on *United States v. Kovel*, 296 F. 2d 918 (2nd Cir. 1961), was that in order for the privilege to be saved, "the presence of a third party ... must be necessary or, at the very least useful, for purposes of the lawyer's dissemination of legal advice." *Bousamra*, supra at *15-16. The court found that the PR firm's presence was not necessary or useful and that both the attorney-client and work product privileges had been waived. *Id.* at *27.

If a university needs both legal and public relations advice about the same matter, reputational risk might be quite high. It is important that counsel consider carefully whether it, rather than the client, should engage the public relations firm and establish a record demonstrating that the quality of legal advice depends on input from the public relations consultant. Legal advice in crisis scenarios is frequently informed by advice from seasoned public relations experts and all experts, in order to do their jobs, need the comfort of knowing that their communications will not later be discovered.

Saul Ewing is sensitive to this need and has advised clients in critical situations lying at the intersection of legal and reputational risk.

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