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Saul Ewing LLP

Higher Education Practice

Higher Education Highlights

The Newsletter of the Higher Education Practice

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Not So Fast: Risk Managers Who Are Also Attorneys Are Not Always Protected by the Attorney-Client Privilege

By Cory S. Winter

Risk managers who also happen to be attorneys are not always protected by the attorney-client privilege, according to a recent decision by the U.S. District Court for the Eastern District of Pennsylvania. In *Casey v. Unitek Global Services, Inc.* (http://tinyurl.com/CaseyvUnitek), the court held that communications from a company's risk manager were not protected by the attorney-client privilege simply because the risk manager also happened to be an attorney. *Casey* provides a good reminder for colleges and universities that have risk managers or similar professionals not to assume that communications from lawyers who may be acting in a non-legal capacity will be protected by the attorney-client privilege.

The plaintiff in *Casey* – the defendant company's former director of risk management – sued the company for sex discrimination (and related claims). Though the plaintiff was a lawyer, her job duties for the company involved leading the company's risk-management and safety efforts. Yet in litigation, the company claimed that it did not have to produce any internal communications involving the plaintiff because the plaintiff's status as a lawyer meant that her communications were protected by the attorney-client privilege. In other words, the company elevated the plaintiff's status as a lawyer over her role as a risk manager. The court did not buy the company's argument.

The court instead held that the plaintiff did not act as an attorney for the company and therefore her communications could not be protected under the attorney-client privilege. A number of factors led the court to this holding. First, the company did not hire the plaintiff to be an attorney, nor did her job require "any legal knowledge, much less a" law degree. Second, the plaintiff's department (risk management) was separate from the company's legal department, where the company's general counsel resided. Third, although the plaintiff attended litigation meetings hosted by outside counsel, she did so as a *client* – specifically, as a representative of the company – not as an attorney. Plaintiff's participation in these meetings, the court found, was to assist

the company's executives in making "strategic business decisions" related to the litigation.

Further, the court stressed that communications can be protected under the attorney-client privilege *only* if they are made for the purpose of seeking or providing legal advice. To that end, communications are not protected by the attorney-client privilege just because they are sent or received by a lawyer. Protected communications are only those confidentially made for the purpose of seeking or providing legal advice. The court held that none of the relevant communications from or to plaintiff could meet this standard because plaintiff's role did not involve providing legal advice.

Colleges and universities that employ risk managers or similar professionals should pause to evaluate whether potentially sensitive communications would be protected by the attorney-client privilege. Otherwise, there is a real risk that a college or university could be forced to produce harmful communications to an adversary or third party. Ensuring that confidential, sensitive communications are protected by the attorney-client privilege requires foresight and planning. Although there is no precise panacea for protecting a risk manager's communications, the following few strategies will help bring those communications under the attorney-client privilege's shield:

- Before initiating potentially sensitive or confidential communications, risk managers should seek and receive express authorization from counsel (in-house or outside counsel) to engage in those communications. Doing so will help make the case that the risk manager was working at the direction of counsel.
- If the college or university has a general counsel, incorporate the risk manager as part of counsel's staff or have the risk manager report directly to counsel. This will help colleges and universities show that their risk manager works hand-in-hand with general counsel. To enhance this strategy, colleges and universities should amend the risk manager's job description to indicate that the duties include working with and reporting to general counsel. Organizational charts should also be updated accordingly.
- When communicating with general counsel, risk managers should expressly state that they are seeking the advice of counsel. Similarly, when communicating with other professionals, risk managers should explain, if true, that they are collecting information on behalf of counsel. Applying this advice will help define the line between "business" communications and "legal" communications. Colleges and universities that fail to recognize or blur this line do so at their own peril and risk the loss of the protection the attorney-client privilege provides.

A strategy that is guaranteed to fail is copying counsel on *all* e-mail communications or having counsel present for all meetings or phone calls. Unfortunately, this practice is common – and courts are not tolerating it. Indeed, the *Casey* court noted, "To prevent corporate attorneys from *abusing* the privilege by using it as a shield to thwart discovery, the claimant must demonstrate that the communication would not have been made *but for the client's need for legal advice or services.*" (emphases added.) Counsel's presence on an e-mail chain, on the phone, or in a meeting does not always transform those attendant communications into privileged ones.

With claims against colleges and universities on the rise, there is no better time than the present for schools to re-evaluate communications involving risk managers and related professionals. The attorney-client privilege can be taken for granted until it is needed to protect a confidential – and sometimes embarrassing – communication. But with proper forethought and action, colleges and universities can take steps to ensure that the communications of risk managers and similar employees are protected by the attorney-client privilege. Indeed, taking that action now will avoid the potentially devastating effects of producing documents in litigation later.

If you have any questions about this article or about best practices for protecting your risk manager's communications, please contact the author, Cory S. Winter, at 717.257.7562 or cwinter@saul.com. ■

Perkins Wind-Down: Your Institutional Obligations

By Meghan J. Talbot

The Federal Perkins Loan Program expired at midnight on September 30, 2015 ending the nation's longest running student loan program. Through Perkins, institutions provided subsidized, low-interest loans to undergraduate and graduate students. Despite the efforts of the House of Representatives (which passed a voice vote to save Perkins), the Senate failed to authorize funds to continue the program.

Anticipating this congressional inaction, earlier this year the Department of Education's ("Department") Office of Postsecondary Education issued two Dear Colleague Letters explaining institutional responsibilities during the program's eventual wind-down. *See* January 30, 2015 Dear Colleague Letter GEN-15-03, "Wind-Down of the Federal Perkins Loan Program" ("Jan. 30 DCL"); *see also* September 29, 2015 Dear Colleague Letter GEN-15-19, "Perkins Loan Program – Excess Liquid Capital" ("Sept. 29 DCL"). Now that the program has expired, schools may not make any Perkins loans to new borrowers as of September 30, 2015, and must return any excess loan amounts to the Department by December 31, 2015.

Narrow "Grandfathering" Provision for Previous Student Borrowers

The Jan. 30 DCL explains two narrow "grandfathering" provisions which enable schools to disburse Perkins loans to existing borrowers.

First, if prior to October 1, 2015, a school has already disbursed part of a Perkins loan to a particular student, the school may make any remaining disbursements of the 2015-2016 loan during the present school year.

Second, schools may make Perkins loans to certain students for up to five additional years, if doing so will enable these students to "continue or complete courses of study." Students receiving these "new" loans after September 30, 2015 must meet all of the following criteria:

(1) The student must have been the recipient of at least one Perkins loan disbursement on or before June 30, 2015;

(2) The student must be enrolled in the *same institution* where the student received the last Perkins loan disbursement;

(3) The student must be enrolled in the *same academic program* where the student received the last Perkins loan disbursement (as determined by the first four digits of the program's Classification of Institutional Program code);

(4) The student must need the Perkins loan to meet some or all of the student's unmet financial need *after* the student has been awarded all Direct Subsidized Loan aid for which the student is eligible. In other words, the Perkins loan must be the subsidized "loan of last resort."

Return of Excess Capital in Loan Fund

Additionally, institutions are obligated to return any excess liquid capital in their Federal Perkins Loan Revolving Fund by year's end. See Sept. 29 DCL. "Excess liquid capital" is defined as the amount of cash on hand that is in excess of the institution's estimated immediate needs. The Federal share of the institution's excess liquid capital must be returned to the Department no later than **December 31, 2015.**

The Department has provided a process for financial aid administrators to follow in order to determine the amount of capital to return; the outline of this process is available on the "Information for Financial Aid Professionals" (IFAP) website. Institutions will need to provide data from their two most recently submitted Fiscal Operations/Application to Participate; both the "latest award" FISAP (reporting loan activity for the 2014-2015 award year) and the "previous award" FISAP (reporting loan activity for the 2013-2014 award year).

Finally, the IFAP website has provided additional "questions and answers" regarding specific administrative issues for the Perkins wind-down. *See* http://ifap.ed.gov/cbpmaterials/attachments/PerkinsQandAs.pdf

If you have any questions regarding your institution's financial aid compliance obligations, Saul Ewing's Higher Education Practice would be pleased to assist you. ■

Campus Carry: States Weigh Laws on Concealed Weapons at Colleges and Universities

By Jessica L. Meller

Violence in and around college campuses is sadly not a new problem for administrators, students, and parents. Between the spring of 2014 and 2015, the number of schools under investigation by the U.S. Department of Education's Office for Civil Rights for sexual assault more than doubled. Almost daily, online papers and blogs publish articles about hazing-related incidents. And too often, the media reports another tragic shooting in a quiet college town. This may explain the uptick in "campus carry" bills – those that either permit or prohibit the carrying of concealed weapons on college campuses and inside college buildings – introduced during 2015.

Since earlier this year, roughly 20 states have considered bills that were poised to modify that state's existing law regarding concealed weapons on campuses. The majority of those bills *favored* concealed carry. Though most of the bills were defeated, Texas successfully passed SB 11 into law on June 13, 2015. SB 11, which does not go into effect until August 1, 2016, will permit license holders to carry concealed handguns on campuses and inside campus buildings of institutions of higher education in Texas. It will also prohibit Texas institutions from adopting rules that proscribe license holders from carrying concealed handguns on campus, though the institutions may adopt rules concerning the storage of handguns in on-campus dormitories or other residential facilities owned or leased and operated by the institution. Private or independent institutions, however, are permitted to prohibit license holders from carrying handguns on the campus of the institution *only after* consulting with students, staff, and faculty.

Alternatively, the State of California, introduced and passed a bill *prohibiting* concealed carry. Signed into law on October 10, 2015, SB707 specifically prohibits concealed carry holders from carrying their weapons onto California college or university campuses without explicit permission from the president of the college or university or his or her designee. Those who violate the law can face up to three years in prison. If the firearm is loaded, they may be incarcerated for four years. The law does not apply, however, to certain authorized security guards and peace officers. This signifies a departure from preexisting law, which permitted any person holding a valid license to carry a concealed firearm onto campus.

Other pro-carry bills are still on the table in other states, including Georgia, Florida, Michigan, Ohio, and Wisconsin. In Georgia, HB 544 would permit a license holder to carry a weapon in or on any real property or building owned by or leased to any public or private college, university, or institution of postsecondary education. In Florida, HB 4001 would delete the provision of current law that bans concealed carry licensees from carrying concealed weapons or firearms into college or university facilities. As of November 4, 2015, it was strongly favored by the Higher Education and Workforce Subcommittee and passed to the Judiciary Committee. Michigan's SB 442 would allow any licensed carrier to request an exception that would permit the licensee to carry a concealed weapon into the dorms or classrooms of a college or university; however, private property owners would still be able to prohibit concealed carry. Ohio HB 48 would modify current law so that concealed carry weapons would not be explicitly banned any longer. Instead, it would place the decision to permit concealed carry into the hands of the particular college's or university's governing body. It was favored 9-2 during the most recent vote in the House.

Most recently, Wisconsin legislators proposed competing bills – one favoring campus carry and another that would criminalize it. Wisconsin's current concealed carry law is similar to Ohio's HB 48, because it delegates to the University of Wisconsin System and technical colleges the authority to ban concealed weapons in campus buildings. Using that authority, the UW System added a provision to its administrative code prohibiting persons from carrying, possessing, or using any dangerous weapon on university land or in university buildings or facilities.

Two proposals seek to shift the current state of the law. The "Campus Carry Act," SB 363, would exempt any college or university in the UW System and any technical college from the current law. In other words, these schools would no longer be able to choose whether or not to ban firearms on their land or in their buildings. The bill would also repeal the UW System administrative code that prohibits dangerous

weapons on university land or in university buildings and facilities. In response, the "College Dangerous Weapon Ban" was introduced and would make it a Class I felony to "intentionally go armed" with a dangerous weapon into the building or facility of, or onto the grounds of, a college or university. The competing Wisconsin bills reveal the strongly divergent viewpoints on this topic. Ultimately, whether campus carry laws actually increase or decrease violence on campus remains to be seen, but it is important that institutions review and update their applicable policies. Saul Ewing's Higher Education Practice is ready and willing to help with that initiative. ■

Department of Education's Draft "Dear Colleague Letter" Aims to Explain When Institutions Can Give Student Medical Records to Their Attorneys

By Alexander R. Bilus

The Department of Education's draft "Dear Colleague Letter to School Officials at Institutions of Higher Education" gives new proposed guidance to schools about the disclosure of student medical records. This letter instructs school officials not to share a student's medical records with the institution's attorneys or a court except when:

- the student consents to the disclosure;
- a court orders the disclosure; or
- the records are relevant and necessary to a litigation that relates directly to the student's medical treatment itself or to the payment for the treatment.

The Department called for input on the draft letter after issuing it on August 18, 2015 and is now evaluating the feedback it received. This article discusses the federal statutes that govern the disclosure of student medical records, the events that led to the Department issuing the letter, the guidance contained in the letter, and the responses to the letter from the higher education community.

FERPA and HIPAA Basics

The Family Educational Rights and Privacy Act ("FERPA") protects the privacy of student education records. Under FERPA, an educational institution that receives funds under any program administered by the Department cannot disclose personally identifiable information from a student's education records without the student's consent, except in certain circumstances.

FERPA covers student medical records and counseling records possessed by an educational institution. Medical and psychological treatment records are excluded from the definition of "education records" if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment. If a school discloses a student's treatment records for purposes other than treatment, however, the records are no longer excluded from the definition of "education records." FERPA allows schools to release a student's information without their consent in certain circumstances – for instance, a campus medical provider might determine that treatment records should be disclosed to the student's parents in connection with a health or safety emergency.

The Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is a federal law that protects medical records. It requires covered entities like health care providers to protect individuals' health records and other identifiable health information by requiring safeguards to protect privacy and by setting limits and conditions on the uses and disclosures that may be made of this information without patient authorization.

HIPAA's Privacy Rule does not apply to student education records or treatment records under FERPA. Thus, those records are subject to the confidentiality restrictions of FERPA rather than HIPAA. Records of students who are patients at a hospital that is affiliated with a university, by contrast, are not typically education records or treatment records under FERPA, because the hospital is not providing health care services to students on behalf of the educational institution. Instead, service is provided without regard to the person's status as a student and not on behalf of the university. Thus, these records are covered by HIPAA and not FERPA.

The University of Oregon Lawsuit

In January 2015, a female student sued the University of Oregon and claimed that three men on the university's basketball team had sexually assaulted her. She alleged that Oregon officials knew that allegations of sexual misconduct had been made against one of the men at another school but that the Oregon officials did not notify other students. While defending itself against the lawsuit, Oregon obtained the female student's therapy records from its health clinic and provided the records to its lawyer.

Two employees at the clinic issued an open letter to the university community decrying the university's use of the records in the lawsuit, and the public revelation of Oregon's actions ignited the attention of the media.

The focus of the uproar was the perception that FERPA provided less confidentiality protection to student medical records than the protection provided to non-student medical records by the Privacy Rule of HIPAA.

To address this perceived "gap" in confidentiality protections for student medical records, on August 18, 2015, the Department issued the draft Dear Colleague Letter to School Officials at Institutions of Higher Education (the "draft DCL") and called for comment from the higher education community.

The Draft "Dear Colleague" Letter

The Department takes the position that students "have a reasonable expectation that institutions will maintain the confidentiality of their conversations with health care professionals." Students should not, in the Department's view, "be hesitant to use" on-campus medical services, including mental health services, "out of fear that the information they share with a medical professional will be inappropriately disclosed to others." In furtherance of its view, the Department's draft DCL offers guidance to educational institutions on how to manage disclosure of student medical records in the context of FERPA and HIPPA.

The draft DCL contemplates that when a student sues an institution, FERPA should be construed to forbid the institution from sharing the student's medical records with the institution's attorneys or a court unless the institution obtains written consent or a court order or unless "the litigation in question relates directly to the medical treatment itself or the payment for the treatment." Even when the litigation relates to the treatment or payment for the treatment, an institution may "only disclose those records that are relevant and necessary to the litigation." And although FERPA generally does not require consent or a court order before an institution may disclose to a court those records that are relevant for the institution to proceed with a lawsuit against a student or defend itself from a lawsuit by a student, the draft DCL maintains that "this general rule should be read in light of the special sensitivity of those [education records, including medical records or counseling records]."

Likewise, although the Department acknowledges that FERPA permits disclosure without consent to "school officials" when those officials have a "legitimate educational interest" in the records, the Department takes the position that attorneys representing institutions in student-involved legal proceedings "generally" should not be determined to have a legitimate educational interest in accessing the student's education records, including medical records, unless the litigation relates directly to the medical treatment or payment for the treatment. In reaching this view, the Department seeks to offer protections to a student's medical records that are "similar" to those provided by HIPAA to medical records in the context of litigation between a patient and a covered health care provider such as a hospital. Under HIPAA, a covered health care provider that is not a party to a lawsuit or administrative action may only use or disclose the minimum necessary protected health information in the course of the proceedings without an individual's authorization, pursuant to a court order or certain "satisfactory assurances."

Ultimately, when an institution decides to disclose personally identifiable information ("PII") from education records (including medical records) without consent, the Department advises that the institution "should always take care to consider the impact of such sharing, and only disclose the minimum amount of PII necessary for the intended purpose." The Department also "recommends" that institutions "give great weight to the reasonable expectations of students that the records generally will not be shared, or will be shared only in the rarest of circumstances, and only to further important purposes, such as assuring campus safety."

And to the last point, the draft DCL acknowledges that under FERPA an institution does not need consent or a court order before disclosing education records to appropriate parties if the student poses a threat to himself or herself or to others. But even in that scenario, the Department cautions that when sharing PII from a student's education records that is

"essential to protect the health and safety of the student or others," an institution must disclose only the information that is "necessary" to protect the student or others. Thus, as the Department sees it, in "many cases," actual records may not be necessary or critical and in "most cases," a counselor's summative statement of the relevant and necessary information from the records will be sufficient.

Responses to the Draft "Dear Colleague" Letter

After releasing the draft DCL, the Department asked for input from the higher education community. In particular, the Department sought comment on whether the guidance would create any unintended consequences (such as restricting the work of threat assessment teams) and whether there was a way to mitigate the burden of requiring a court order or consent without lessening the protections given to students. Several organizations issued written responses to the draft DCL.

The National Association of College and University Attorneys ("NACUA") responded and expressed concern over some of the draft DCL language and sought clarification on other language. Although NACUA agreed that FERPA does not give and should not be construed to give attorneys for higher education institutions greater access to student medical records than attorneys for off-campus medical providers have to patient records under HIPAA, it contended that the draft DCL would deprive campus medical providers of the ability to obtain needed legal advice that off-campus medical providers are able to obtain. Specifically, NACUA contended that current language of the draft DCL could (1) "[b]e misinterpreted to prohibit campus medical providers from consulting their attorneys about legal issues that arise outside the context of actual, already filed litigation," (2) "obstruct campus attorneys' ability to put in place litigation holds," and (3) "hinder the on-campus threat assessment process by preventing attorneys from participating in that process and advising threat assessment teams and their members."

NACUA also worried that the draft DCL did not sufficiently clarify that FERPA allows sharing of student information among campus employees with a job-related need-to-know basis only when such sharing also is permitted by other applicable restrictions, such as state medical confidentiality laws. NACUA also explained that when a medical provider consults an attorney, the physician-patient and attorney-client privileges work together to provide continuing protection to the information disclosed to the attorney.

In addition to stating its concerns over explicit language in the draft DCL, NACUA asked the Department to clarify two points:

(1) that campus medical providers can share confidential medical information with an attorney to seek advice about the medical provider's rights and responsibilities in certain circumstances. This includes when:

   a. a patient has threatened a malpractice claim;

   b. a provider wishes to assert a payment claim;

   c. a provider needs to determine the scope of applicable medical confidentiality laws with respect to a particular case, the scope of a patient's access to records, or whether it has a duty to report abuse;

   d. a provider needs to understand whether it can treat a minor without a parent's permission and whether it must notify the parent; or

   e. a counselor needs to understand whether it has a duty to warn of potential harm; and

(2) that FERPA allows attorneys to play a role in segregating and preserving the chain of custody of relevant documents for purposes of complying with litigation hold requirements, and to advise campus threat assessment teams when necessary.

The American College Health Association ("ACHA"), together with the Association for University and College Counseling Center Directors and the American College Counseling Association, asked the Department to emphasize that FERPA's permissive exceptions do not preempt any state laws that may provide more stringent privacy protections and asked for guidance on the application of FERPA when a litigation hold is placed on a student's medical record. These organizations also sought guidance on the release of records to the Department, writing that such releases should only be permissible "when an investigation relates directly to the medical treatment itself or the payment for that treatment."

The American Council on Education ("ACE"), joined by a number of other associations, stated that the draft DCL's incorporation of HIPAA standards to govern the non-consensual disclosure of education records would disrupt the existing FERPA framework and lead to confusion over what constitutes compliance with the disclosure requirements. ACE wrote that it was concerned that the draft DCL's approach would result in a chilling effect on the disclosure of records in situations of public safety for fear of falling out of compliance. ACE also

asked the Department to use a formal regulatory process to make any changes to regulation in this area instead of issuing a "Dear Colleague" letter.

Next Steps

The period for public comment on the draft DCL closed on October 2, 2015. The Department has not stated when it will issue a final letter or whether it might modify the letter to address the comments that have been submitted.

In light of the Department's focus on this issue and its relevance to lawsuits involving students, officials at higher education institutions and their attorneys should review their policies to determine how those policies currently govern the disclosure of student medical records. Institutions should decide how best to handle student medical records while waiting for the Department to issue its final letter, and how to comply with the guidance contained in the letter once it has been finalized.

If you have any questions about this article or the intersection of student privacy and litigation involving students, please contact the author Alexander R. Bilus at 215.972.7177 or abilus@saul.com. ■

Attorneys in Saul Ewing's Higher Education Practice provide trusted "one-stop" legal services for institutions of higher education worldwide. The map below identifies those geographic locations where Saul Ewing has recently provided legal services to higher education institutions. Contact the firm's Higher Education Practice leaders for more information about these services.

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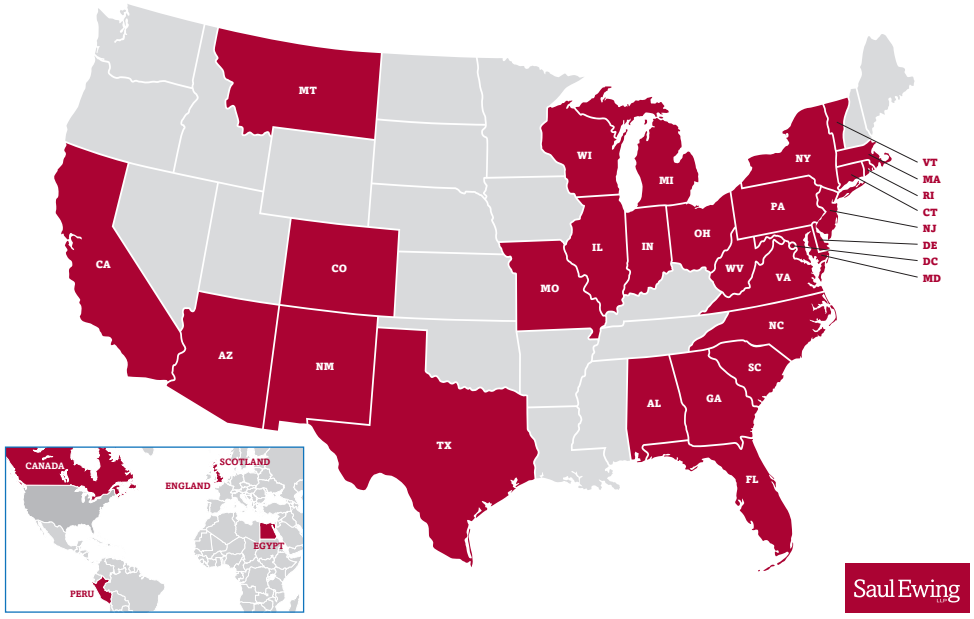

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