TUESDAY, FEBRUARY 16, 1993
2:15 - 3:45 p.m.

CONCURRENT SESSION THREE

Special Legal Issues Affecting the Administration of Two Year Colleges: Particular Legal Concerns Affecting Health and Technical Programs

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SPECIAL ISSUES AFFECTING TWO-YEAR COLLEGES

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Presented at the Stetson University
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14th ANNUAL NATIONAL CONFERENCE ON
LAW AND HIGHER EDUCATION: ISSUES IN 1993
Sheraton Sand Key Resort Hotel
Clearwater Beach, Florida
February 14-17, 1993
1. Clinical agreements
2. Leases for use of premises/facilities
3. Leases of vehicles

D. Selected hold harmless clause issues:

1. Issues related to sovereign immunity
   a. Is particular college entitled to claim sovereign immunity? This is a matter of the state law.
      See, e.g., Community College of Allegheny County v. Siebert, 601 A.2.2d 1348 (Pa. Cmwlth. 1992) Held: A community college in Pennsylvania is a "local agency" entitled to governmental immunity;
   b. Does the college have the authority to waive its sovereign immunity?
      See, e.g., Florida Attorney General's Opinion: No. 90-121 (March 20, 1990) Concluded: State Department of Corrections is not authorized to alter by contract the state's waiver of immunity in tort.

2. Liability for negligence acts of other contracting party
3. Attorney's fees and costs

E. Claims for indemnity based on implied rather than express agreement

II. The ADA and limited access programs: Selected issues

A. Admissions
1. "Reasonable accommodation": Nature of handicap and its relationship to safe performance of training and professional duties
Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 9890 (1979) Held: "Section 504 of Rehabilitation Act imposes no requirement upon an educational institution to lower or effect substantial modifications of standards to accommodate a "handicapped person." But case which involved an applicant whose severe hearing impairment made it unsafe for her to practice as a nurse, must be closely examined.
Later cases dealing with Section 504 and the meaning of "otherwise qualified": Pushkin v. University of Colorado, 658 F.2d 1372 (10th Cir. 1981) Held: Multiple sclerosis did not permit denial of admission to psychiatry program; Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991) dealt with the issue of modifying examination format for dyslexic medical student.

2. Future employment prospects as criteria for admission?

B. Assurances of Employment: Is there a cause of action?
Unlikely, but see, e.g., Joyner v. Albert Merrill School, 97 Misc. 2d 568, 411 N.Y.S. 2d 988 k(N.Y. City Civ. Ct. 1978) Held: Vocational school fraudulently induced student into computer programming course and falsely promised job placement.
III. AIDS/Communicable Diseases

A. What about mandatory HIV screening in healthcare programs? What is the institution's duty to students and to patients?

_Arlene v. School Board of Nassau County_, 107 S.Ct. 1123 (1987)
The Court held that a person afflicted with a contagious disease could be a "handicapped individual" within the meaning of §504. The Court set the following 4 criteria to determine whether a handicapped person with a contagious disease is otherwise qualified: a) the nature of the risk, b) the duration of the risk, c) the severity of the risk, and d) the probability the disease will be transmitted and will cause varying degrees of harm.

_Chalk v. United States District Court Central District of California_, 840 F.2d 701 (9th cir. 1988) A teacher diagnosed as having AIDS was reassigned to an administrative position. The court cited _Southeastern_ as footnoted in _Arlene_ that "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a
grantee, or requires a "fundamental alteration in the nature of the program." The court also said that one posing a "significant risk of communicating an infectious disease to others... will not be otherwise qualified... if reasonable accommodation will not eliminate that risk." Chalk was ordered to be reinstated to his position as a teacher.

*Doe v. Washington University, 780 F.Supp. 628 (1991).* A dental student tested positive for AIDS antibodies; the school determined that it would not be possible for the student to meet graduation requirements since he would not be allowed to perform invasive procedures that were required for graduation. The student filed suit for discrimination in violation of §504. The institution characterized his dismissal as academic because of the clinical patient safety issue. The court held that it was an academic decision and that he was not an "otherwise qualified" handicapped individual.

**B. Is there liability for breach of confidentiality?**

*Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J. 1990)* held that public disclosure of HIV constituted a valid civil rights claim; the government's interest in disclosure did not outweigh the individual's privacy interest. But what about *Tarasoff*, where the court held that when a psychotherapist determines or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs
an obligation to use reasonable care to protect the intended victim against such danger.

IV. Drug Testing

A. In the public sector?

*Skinner v. Railway Labor Executives Association*, 109 S.Ct. 1402 (1989) Railway labor organizations sued to prohibit enforcement of drug and alcohol testing. The Supreme Court held that while the Fourth Amendment was applicable in this situation, the tests required by these regulations were reasonable despite there being no requirement for a warrant or reasonable suspicion. The compelling government interest in ensuring safety outweighs the privacy interests of the employees.

*National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989). The union sued the Customs Service challenging the constitutionality of the drug-testing program for employees applying for promotions to positions that involved interdiction of illegal drugs and required them to carry firearms. The Supreme Court held that the program was subject to reasonableness under the Fourth Amendment but that there was no need for a warrant to conduct the program and that the program was reasonable under the Fourth Amendment. Given the national crisis in law enforcement caused by the smuggling of illegal narcotics and the risk of life to the citizenry resulting from the use of deadly weapons by those with impaired perception, the government has a compelling
interest which outweighs the privacy interests of those being tested.

American Federation of Government Employees, AFL-CIO v. Cavazos, 721 F. Supp. 1361 (1989) Suit was brought challenging the constitutionality of the Department of Education's drug-testing plan. The District Court held that: 1) random urinalysis testing of Dept. of Ed.'s motor vehicle operators pursuant to Department's drug-testing plan was constitutionally permissible; 2) Dept. of Ed. failed to demonstrate a compelling interest in subjecting automatic data processors, who did not have access to truly sensitive information, to random testing; and 3) individualized suspicion by supervisor that employee is impaired while on duty was not required in order to constitutionally validate Dept. of Ed.'s program authorizing testing of an employee if a reasonable suspicion existed that they were using drugs.

National Federation of Employees v. Cheney, 884 F.2d 603 (1989) Labor union brought action to stop implementation of Army's compulsory drug-testing program for certain civilian employees. The Court of Appeals held that 1) testing of civilian employees who occupied positions in aviation, police and guard, and direct service staff who were primarily drug counselors did not violate Fourth Amendment, and 2) drug testing of laboratory workers and those in specimen chain of custody violated Fourth Amendment.
Derdyn v. University of Colorado, Boulder, 832 P.2d 1031
(1992) Student athletes challenged the university’s
mandatory drug testing program. The Court of Appeals
held that this public university’s interest was NOT
compelling as was the case in Skinner and therefore the
urine testing program at the university was
unconstitutional under the Fourth Amendment. Nor was
the consent the athletes signed voluntary (which would
validate an otherwise invalid search). The court did speak
to the exception to the requirement of probable cause:
reasonable suspicion. If there were different
circumstances, "an objective reasonable suspicion
standard might well be constitutionally permissible" for a
testing program.
B. In the private sector?
Jennings v. Minco Technology Labs, 765 S.W.2d 497, (Tex.
App. 1989) Employee brought suit against her employer to
restrain it from testing its employees through urinalysis to
determine whether they had recently consumed illegal
drugs. It was determined that the employer’s plan to test
"at will" employees, with consent, was lawful and
enforceable even though failure to consent was grounds
for dismissal. The company is a private employer
concerned about illegal drug use among its employees and
resulting threats to the company’s business and products,
the users of its products, and the health and safety of all
its employees.
But, *Twigg v. Hercules Corporation*, 406 S.E.2d 52 (W. Va. 1990) had a different result. Here the court held that 1) it is contrary to public policy for private employer to require employee to submit to drug testing and 2) drug testing by private employer will not violate public policy grounded in potential intrusion of person's right to privacy where it is conducted by employer based upon reasonable good faith objective suspicion of employee's drug usage or while employee's job responsibility involves public safety or safety of others.

*Bally v. Northeastern University*, 532 N.E. 2d 49 (Mass. 1989) Student athlete challenged the private university's drug testing program for the athletic teams. The Massachusetts Supreme Judicial court held that the program did not violate the state's civil rights or privacy statutes.

*Hill v. National Collegiate Athletic Association*, 273 Cal. Rptr. 402 (1990) The NCAA drug testing program was found to be violative of the privacy rights guaranteed in the California Constitution. There were no health and safety issues to support the testing. Alcohol and tobacco were not among the drugs tested for. The reason for testing (fair competition) was not sufficient to overcome the individual's privacy rights. There was no counseling component to the program, nor was there an education component.