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CONCURRENT SESSION TWO

What’s So Special About Being Private?
Relinquishing Legal Entitlements
Unique to the Private College

Faculty:

Dan Cormany
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WHAT’S SO SPECIAL ABOUT BEING PRIVATE?

HOW TO AVOID RELINQUISHING LEGAL ENTITLEMENTS UNIQUE TO THE PRIVATE COLLEGE:

FROM COUNSEL’S PERSPECTIVE
DAMAGE CONTROL: THE EXTINCTION OF THE DISTINCTION

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14th ANNUAL NATIONAL CONFERENCE ON
LAW AND HIGHER EDUCATION: ISSUES IN 1993
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INTRODUCTION

The differences between private and public educational institutions are becoming more difficult to articulate due to the enactment of affirmative social legislation. What follows is a discussion paper setting forth some history, analysis and specific examples of this phenomenon.

BACKGROUND

There is a basic premise that public institutions are subject to the authority of the government that created them and private institutions are protected from governmental control. For instance, a private institution may obtain its own perpetual charter of incorporation which the government is prohibited from impairing. Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).¹

Private schools justify their existence in the marketplace of education by being able to cater to interests (smaller class size, or religious education, etc.) which their public counterparts cannot address due to legal or political constraints.

Public institutions and their officers are subject to the federal and state Constitutions in the performance of their duties whereas private colleges and universities and their officers are not, simply because they are not agents of government. This distinction is due to the basic American concept that the Constitution was designed to limit the exercise of governmental power, not affect the rights of private citizens generally to control the use and enjoyment of their own property.
THE COURTS

The rights of Americans to keep the influence of government out of their private affairs, including their campuses, has traditionally been protected by the Federal Courts. For instance, in order for a court to apply Section 1983 and Section 1985 civil rights protections as well as those grounded in the Constitution, a finding by the court of "state action" is required. The process of making this finding is essentially a matter of distinguishing the public institution from the private institution, or the public portion of an institution from the private portion. The judicial trend since the early 1970's has been to make it less likely that state action will be found in any particular case, Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1982). Moreover, although government funding is often a central consideration in the state action determination, it is not the dispositive factor. Id.

Essentially, three approaches to the state action doctrine have appeared in the courts. First is the delegated power theory, whereby the private entity acts as a governmental agent in performing governmentally delegated tasks. Second, there is the public function theory, where the private university or college performs a function that is generally considered a governmental responsibility. Finally there is the government contacts theory, under which the independent institution receives prestige, encouragement, and resources from its connection with government.

The first theory, delegated power, was relied on in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). In that case the court
determined that New York State had delegated authority to Alfred University to operate a state ceramics school on campus, thus students attending the ceramics school were entitled to due process protections while students attending other schools within the university, were not. The same theory produced a different result in the *Wahba v. New York University*, 492 F.2d 96 (2d Cir. 1974) case. In that case, a research professor had been fired from a governmentally funded research project without being afforded even an informal hearing as due process would mandate. The court held that state action was not present because the government did not exercise even the slightest bit of managerial control over the project, and thus the professor was not entitled to due process.

The second theory, public function, has been used infrequently in the education context because courts have consistently recognized that education has substantial roots in the private sector and cannot be considered solely a public function.

The third theory, the government contacts theory, is the most utilized of the three. This theory focuses not on the general state involvement with private institutions but rather on state involvement in the particular activity giving rise to the lawsuit. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Brenner v. Oswald*, 592 F.2d 174 (3rd. Cir. 1979), students at Pennsylvania State University challenged the process by which members of the university's board of trustees were chosen. In applying the government contacts theory, and noting the numerous contacts between the university and the state, the court held that
state action was present.

Research institutions should note that government contracts are government contacts and most public funding documents specifically incorporate intrusive legislation as a condition of receipt of public money. Often, the contractually imposed mandates extend far beyond the department actually receiving the funds and permeate much of the institution's internal structure such as the offices of Human Resources and Purchasing.

Courts are more likely to find state action in age, sex or racial discrimination cases no matter which theory is being applied. In Williams v. Howard University, 528 F.2d 658 (D.C. Cir. 1976) the plaintiff raised two claims against Howard University, one asserting racial discrimination, the other asserting a deprivation of due process. The court, distinguishing between the two claims, held that although the university was the recipient of substantial federal funding, this was not a sufficient basis for a finding of state action as to the due process claim; however the federal funding was sufficient to demonstrate state action as to the racial discrimination claim.

THE CONGRESS

The Constitution does not offer the same protections afforded faculty, staff and students at public universities to those involved in the private school community. This does not mean that members of the private community have no recourse for a real or perceived deprivation of their rights; while the courts have been reticent to expand state action, Congress hasn't shared that
hesitation. Certainly since the sixties, Americans have been given a plethora of non-Constitutional legislative protections, which are available to members of the community at private universities:²

a) Title VI of the Civil Rights Act of 1964 precludes discrimination (for the entire college) on grounds of race, color or national origin in any program or activity receiving federal financial assistance including financial aid sent directly to students. Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d.

b) Title VII of the Civil Rights Act of 1964 offers protection to employees, making it an unfair employment practice for any employer to discriminate against any individual with respect to hiring or the terms and conditions of employment because of such individual's race, color, religion, sex, or national origin; affects any employer (including colleges as of 1972) with 15 or more employees. 42 U.S.C. Sec. 2000e-2(a).

c) The Age Discrimination in Employment Act protects people forty years of age and over making it unlawful for an employer to fail or refuse to hire or to discharge any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age; any employer with 20 or more employees is controlled by the ADEA, 29 U.S.C. sec. 621.

d) The Rehabilitation Act of 1973 (Section 504) and its amendments protect handicapped employees stating: No qualified handicapped person shall, on the basis of handicap, be subject to discrimination in employment under any program or activity . . . ;

e) Title IX of the Education Amendments of 1972 prohibits the use of sex as a criterion for admissions in any program or activity receiving federal financial assistance including financial aid sent directly to students; applies to entire campus; exemptions for private single-sex undergraduate colleges, military academies and religious affiliates. Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681.

f) Section 1981, which is also a civil rights protective statute, states "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other". 42 U.S.C. sec. 1981.

g) See also:

i) The Equal Pay Act of 1963: prohibits gender discrimination in pay differentials; affects all colleges under the rubric of interstate commerce.

ii) Americans with Disabilities Act of 1990; (affects all employees)
iii) Rehabilitation Act of 1973, Section 503; affects any recipient of government contract in excess of $2,500.00; requires affirmative action.

iv) Vietnam Era Veteran Readjustment Act of 1974; affects any recipient of government contract in excess of $10,000.00; requires affirmative action.

v) Executive Order 11,246 (affirmative action required of institutions receiving government contracts totalling $10,000 or more in any one year not including grants or loans);

vi) Family Educational Rights and Privacy Act of 1974; affects any educational entity receiving federal educational funds including grants, financial aid or contracts; allows college to write its own compliance policy.

vii) Higher Education Act of 1965; affects participants in federal programs for student financial aid.

a) 1976 Amendments: dissemination of information on financial aid;

b) Student Right to Know Act of 1990; requires disclosure of graduation for the student body, particularly athletes;

c) Campus Security Act of 1990; requires publication of campus crimes and security measures;

viii) Drug Free Schools and Communities Act of 1989; requires development and implementation of a program to prevent substance abuse; affects recipients of any federal
ix) Drug Free Workplace Act of 1988; affects institutions receiving federal grants; focuses on employees.
h) And what about some old favorites:

ii) Copyright Act of 1976; affects everyone;

iii) Occupational Safety and Health Act of 1970; affects any employer (under the interstate commerce theory).
i) Statutes promulgated by your own state legislature.

**DISCIPLINE CASES**

Students and employees of private institutions still have little procedural protections in disciplinary proceedings. They are not entitled to the hearings or administrative reviews that are guaranteed in the public sector. The protections afforded are contractual in nature arising from the institution's policies and the agreements to attend or work at the institution and abide by its published policies.3

The courts have traditionally protected students from actions which are clearly arbitrary although still within the private institution's stated policy. Individuals are held only to a standard of conduct which reasonably sets forth the expectations of the institution. Cloud v. Trustees of Boston University, 720 F.2d 721 (1983). In addressing construction of the contract between the
students and university, the court in Cloud stated that the applicable standard was that of "reasonable expectations - what meaning that party making the manifestation, the university, should reasonably expect the other party to give it". Private universities are required to act in the exercise of honest discretion based on facts within the school's knowledge. Carr v. St. John's University, 17 A.D. 2d 632 (1962).

Students at a private university also do not enjoy Constitutional search and seizure protections. As long as government law enforcement officials are not directly or indirectly involved in the search or seizure, and university security officers have not been given public arrest or search powers, the private university is constrained only by its (contract) policy statement. U.S. v. Clegg, 509 F.2d 605 (5th Cir. 1975); People v. Zelinski, 24 Cal 3d 357 (1979).

They also are not ensured of any First Amendment freedoms except as are agreed upon in the contract (hate speech constraints; publication of campus newspapers, etc.).

**CONCLUSION**

The implementation of some simple low budget administrative procedures will assist in an effort to preserve a college's private identity:

a) Know what rights you have and those that you've surrendered or those that have already been taken away:

   - review federal and state legislation regularly; (have you written a Buckley policy to minimize the impact of FERPA
on your institution?);

- review your contracts and grants from government so you can identify (and comply with) the statutory obligations you may have already assumed;

- know what your Section 504 "Agreement to Participate" says;

- educate your faculty and staff on the procedure to alert some one designated source on campus about what rights the institution may have surrendered in order to accomplish a goal (such as obtaining a grant).

b) Promulgate clear and concise catalogues and handbooks which:

- clearly enunciate what conduct you expect and what rights you give;

- are consistent with each other;

- that avoid the use of the words "due process" and "double jeopardy" and other Constitutionally precise legal terms of art;

c) Develop and use published disciplinary codes which:

- are fair (notice; hearing; advisor; transcript; appeal) or are more than fair;

- are reviewed regularly so as to be current with the flexible concept of fair play;

- protect the rights of victims as well as perpetrators;

- will not, if adjudicated, give rise to "bad law" that affects the entire world of academia.
FOOTNOTES


2. For a lucid, usable explanation of the applicability of the federal legislation, see: WEEKS, Kent M. *Complying With Federal Law (a Manual for College Decision Makers)*. College Legal Information, Inc.: Nashville, Tennessee, 1992.


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WHAT'S SO SPECIAL ABOUT BEING PRIVATE? HOW TO AVOID RELINQUISHING LEGAL ENTITLEMENTS UNIQUE TO THE PRIVATE COLLEGE: FROM A PRIVATE COLLEGE PRESIDENT'S PERSPECTIVE.

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I. Review of the Dartmouth College decision that provided the basis for private college status in the U.S.

II. There are six general areas in which the private nature of a college or university accords it special considerations, different treatment, or exceptions to public policies.

A. The Mission of a College is determined by its governing board, not by the public, state legislative actions or state departments of education. Ensured by this, then, are the following:

1. ability to change to adapt to societal needs or to adhere strictly to original mission as determined by the institution itself;

2. right to maintain a single-sex college;

3. possibility of promoting religious beliefs, values, or sponsorship;

4. a narrow or wide approach to service;

5. education of students, foreign or domestic, within whatever standards for admission, attendance, or graduation are determined by the college.

B. The Governance Structure of a private college is determined by its founders and its particular bylaws. The particular privileges stemming from this are:

1. the governing board is self-perpetuating rather than being publicly
elected or gubernatorially appointed;

2. the trustees are chosen for expertise in areas needed for policy decisions of the college in academic affairs, investments, student affairs, development, public policy issues;

3. the board is usually larger than one at a public college which allows the workload to be spread out among a wider range of trustees with a broad scope of competence;

4. the terms of office are determined by bylaws instead of being externally fixed terms thereby providing continuity and historic perspective, opportunity to keep good people, and opportunity to appoint alumni who have a genuine interest in and understanding of the college;

5. the trustees serve as primary fund raisers, directly eliminating the need for a separate foundation to bypass legislative control of funds;

6. the board may meet in closed session which makes possible confidential deliberations concerning:

   a. personnel matters,
   b. salary determinations,
   c. potential land or building acquisitions,
   d. future developmental plans,
   e. pending legal actions.

C. The Student Admission Standards can be adjusted to correspond with the mission of the college by requiring:

1. specific course preparations;
2. entrance examinations with specific levels of achievement;
3. quality of secondary school;
4. rank in class;
5. curricular interests;
6. students from out-of-state (because service to them is part of the mission) at the same tuition, whereas state colleges chartered to serve residents are subsidized by state taxpayers and must require non-residents to pay greater portion of actual cost.

D. **The Fiscal Affairs** of a private college are such as to make its income dependent on student enrollment, development efforts, and investment strategies, not on tax base, whims of legislature, or cutbacks dictated by state's economy.

E. **The Academic Affairs** of a private college are determined by its mission and provide opportunities for:

1. rapid curricular changes when societal changes require adaptation;
2. limiting scope of service, instead of trying to be all things to all people, because of restricted mission, specific admission standards, and possible limitation on size of college;
3. rejecting federal contracts and the controls associated with them if desired.

F. **The Developmental Efforts** of private colleges can be directed toward the specific missions without external intrusion:
1. policies for fund raising governed by board itself;
2. amount needed to be raised is determined internally by needs exhibited;
3. publicity, such as press releases, annual reports, etc., can be controlled in regard to time and amount most favorable to promoting the institution.

III. There are a variety of challenges to the private status of colleges through the following:

A. "linkage taxes" in lieu of actual taxes;
B. legislative intrusion through request for favors for constituents in order to gain support for private sector interests;
C. zoning control of campus buildings;
D. state mandated student insurance and immunization;
E. caps on amount of tax-exempt bonds available to private sector through federal law;
F. state approval of program expansion;
G. state accreditation of colleges when federally funded student loans reach a given default rate;
H. standards of professional accrediting groups, such as ABA, ABET, NCAA, which tend to dictate faculty size, student-faculty ratios, salaries, overhead allowances, tenuring policies, development activities, barring of military recruitment on campus because of ban on homosexual enlistments;
I. use of college personnel to check on registration for Selective Service, immigration status, etc.

IV. A suggested list of ways in which private colleges can protect their status includes the following:

A. use them as widely as possible;
B. stay alert to possible attempts to erode them;
C. support private college participation in state policy formation;
D. be alert to non-legal social pressures and provide consistency in responses;
E. emphasize contributions made in lieu of taxes, such as volunteerism, access and choice, lowered demand for increase in state college facilities at taxpayers' expenses, graduation rate of minorities, tourism boost, impact on local economy, availability of cultural and sports events, as well as library and museum facilities open to the public.
F. avoid taking state or federal funds, to the extent possible, to avoid the controls attached.


