

How to Survive the Legalization of Higher Education

David. A. Armstrong, J.D.

Vice President of Enrollment and General Counsel

Notre Dame College

Introduction

In 1957, the Supreme Court described the atmosphere surrounding a university as one “which there prevail ‘the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹ This quote largely describes the judicial deference historically afforded higher education. From the very beginnings of America, courts granted colleges and universities a special type of respect which allowed the institution to operate without interference. Judges firmly believed “colleges and universities are best managed by their own; in the context of higher education, direct accountability to the people is not a virtue, but a threat to the academic mission.”²

However, in 1972 Congress began chipping away at this judicial shield that colleges and universities expected by making the civil rights statutes applicable to academe. Amy Gajda, in referencing a complaint from an early discrimination case, explained “Title VII, like Title IX, the ADA, the ADEA, and other civil rights statutes, prohibits not only discrimination but also retaliation against any person for having asserted claims of discrimination.”³ The conception of these statutes began a new era for higher education. Plaintiffs no longer had to rely upon common law tort claims or contract law to enforce their rights in the courts. With increasing

¹ Sweezy v. State of New Hampshire by Wyman, 77 S.Ct 1203, 1218 (1957).

² Gajda, A. (2009). *The trials of academe*. Cambridge: Harvard University Press.

³ *Id.* at 70-71.

federal regulation and the growing commercialization taking place on campuses, judicial deference was being replaced by the legalization of higher education. Nonetheless, by implementing sound policies and effective practices, higher education can survive the diminishment of judicial deference.

Tort Law on Campus

As noted by Gajda, “the supposed wall separating ‘non-academic’ tort claims from ‘academic’ tort claims is already crumbling.”⁴ The immunities that colleges and universities expected have been slowly eroded because of the growing duty placed upon them. Gajda explains that “a professor is no different from a surgeon or any other professional or commercial actor subject to ordinary negligence principles requiring ‘reasonable’ conduct.”⁵ College and universities now face a plethora of circumstances where a duty of reasonableness can be found. Many courts are finding colleges and universities responsible for combating high risk alcohol use, sexual assault, and suicide.⁶ Furthermore, schools face an increasing challenge in dealing with bullying and violence on campus.

Though judicial deference regarding tort law is crumbling, colleges and universities can take an active role to prevent threats on campus and litigation. One of the most important practices a school can adopt is a campus threat assessment committee. Threat assessment committees allow schools to identify and prevent many issues before they ever rise to a threatening level or reach a point of litigation. Identifying students who may pose a risk or policies that need to be improved are both vital roles of threat assessment committees. Open dialogue and confidentiality are essential elements of any threat assessment committee so that

⁴ Id. at 187.

⁵ Id. at 9.

⁶ Peter Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621 (2005)

members of the committee can freely discuss issues that they perceive as potentially threatening to the community. Committee membership should be a cross section of the campus community that includes academics, athletics, counseling center, dean of students, professors, etc.

Additionally, the role of reducing campus threats should extend further than just the threat assessment committee. During annual meetings, the entire campus community should be trained to handle problematic circumstances. Everyone on campus should understand how to respond to a threat or what action to take if a student believes they have been sexually assaulted. Whether it is an admissions counselor, the football coach, or the vice president of finance, all members of the campus community need to be aware of the threats that the campus could face and how to effectively and efficiently respond to those threats. By doing this, colleges and universities greatly reduce their risk of litigation or a possible threat becoming an actual threat. For more information regarding threat assessment, please see the following resources:

<http://www.threatassessment.vt.edu/index.html>

United States Postal Service Threat Assessment Team Guide: Publication 108

http://www.secretservice.gov/ntac/ssi_guide.pdf

Federal Regulation

Starting in 1972 federal regulation began imposing stricter responsibilities on colleges and universities. As noted by Gajda, before federal regulation of academics, “plaintiffs [were] often forced to invent their own theories based on contract, tort, or equitable doctrines such as promissory estoppels.”⁷ No longer do courts discuss the “dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a

⁷ Gajda, 2009.

university.”⁸ Though unquestionably beneficial, federal statutes such as Title VII, Title IX, ADA, Clery Act, and HEA (just to name a few) have arguably been the catalyst for diminishing judicial deference for higher education. No greater force has imposed stricter responsibilities on colleges and universities than federal regulation. Higher education must balance their own academic freedom with the federal regulations protecting students, faculty, and third-persons.

Today, federal regulations govern almost every aspect of academe. Title IX and Title VII impact tenure for professors and how the process is handled. The Clery Act affects campus security and how threats are dealt with by campus safety and communicated to the college community. Further complicating the issue, multiple regulations govern one aspect of higher education, making it increasingly difficult for college and university administration to follow the legislative maze that governs their institution. Title IV and the Higher Education Act control academic scholarships and areas of financial importance. Recent trends indicate the growing desire of federal agencies to blend the restrictions colleges face in reporting sexual assault under the Clery Act with harassment regulation in Title IX. Not only is it difficult for higher education to determine *if* certain federal regulations apply, but with the growing interactions between regulations, it is complicated to establish *which* regulations apply.

Federal regulation is a daunting obstacle for higher education. It is vital for colleges and universities to avoid the negative press, federal agency reviews, and loss of Title IV funding that is associated with violating a federal regulation. For many, this thought is overwhelming. However, with sound practices and policies, higher education can avoid federal regulation pitfalls. One of the most important tips to remember is a simple phrase: there is no need to reinvent the wheel. Put in another way, you do not need to do this on your own. There are many

⁸ Sweezy at 1217-18

colleges and universities across the nation that handle federal regulation well. They face the same obstacles you do. Most policies are now available online and normally administration is happy to discuss with you the development and implementation of their policies. It is often helpful to look for schools that share your institution's size and academic goals as those policies will be most helpful to accommodate your own educational mission.

Furthermore, the same agencies that execute the federal regulation offer materials to ensure you are within compliance. There are no more pertinent resources than what these agencies offer. A college or university can look towards "Dear Colleague Letters" as not only an explanation of what the agency expects, but also an indication of what the agency perceives as the role of the regulation in the future. Also, since public comment is normally generated by these letters, they can serve as an excellent indication of how other institutions feel about the regulation. Additionally, the respective agency website offers various documents that can be used to develop individual policies. These documents can create a greater level of understanding in determining an institution's responsibilities and how to ensure compliance. Since the respective agency executes the legislative regulation, the resources the agency provides are very significant and should be treated with great weight.

Below are a few links that are helpful in determining regulation responsibilities:

<http://www2.ed.gov/policy/gen/guid/significant-guidance.html>

<http://www.securityoncampus.org/>

<http://www2.ed.gov/policy/highered/leg/edpicks.jhtml>

Conclusion

Gajda explains “the goal is not, by any means, to exclude all litigation, but rather to push judges and academics alike to a fuller accounting of the costs of campus litigation so that a more accurate balance point between desirable and undesirable claims can be found.”⁹ Taking this a step further, Gajda believes higher education needs to “educate courts about the breadth and nature of the ‘academic’ role.”¹⁰ Gajda is precisely correct - courts must understand the nature of the academic role. The days of judicial deference are over and there will be no return. Courts must understand, however, the intricacies involved in regulating a traditionally unregulated body. Higher education must accept and deal with the regulation and legalization of colleges and universities. This is where the balance must lie. Courts must recognize the challenges facing higher education and, at the same time, higher education must identify and effectuate the regulation that will continually govern them. Only when the courts and higher education accept the differences between their respective worlds will true cooperation exist. Until then, higher education must take a proactive approach in dealing with the legalization of higher education. The development of sound policies and practices is absolutely vital to survive in today’s world. Without a grasp on regulation and the ever changing common law facing higher education, colleges and universities will face certain litigation. However, by effectuating sound policies and taking proactive steps to ensure safety on campus, colleges and universities can survive the legalization of higher education.

⁹ Gajda, 2009

¹⁰ Gajda, 2009

References

Gajda, A. (2009). *The trials of academe*. Cambridge: Harvard University Press.

Peter Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621 (2005)

Sweezy v. State of New Hampshire by Wyman, 77 S.Ct 1203, 1218 (1957).