

LEGAL ISSUES INFLUENCING INTERNATIONAL STUDY ABROAD PROGRAMS

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Introduction

Although the number of foreign students who study in the United States has declined in the years since September 11, 2001, the number of American college students who study abroad has continued to steadily increase over the past few decades. According to a recent survey by the Institute of International Education (IIE), in 2003-04¹ 191,321 U.S. students participated in international study abroad programs: an increase of 9.6% over the prior academic year. The largest number of U.S. students studying abroad travel to Britain (16.8%), Italy (11.5%) and Spain (10.5%). Notably, however, Europe's share of the overall study abroad pie has dropped by 6% (from 67 percent to 61 percent) in the last decade.

The flow of U.S. students to Africa, Asia and Latin America has been increasing sharply in recent years, with many students now studying in developing countries where health, safety and security conditions are often different than those in the United States and Western Europe. The percentage of American students studying in Asia, for example, shot up by 36% in 2003-04, with China experiencing the most dramatic increase at 90%. Despite the fallout from the SARS epidemic in 2002, China is now the ninth most popular overseas destination for American students studying overseas. Similarly, the number of American students studying in India jumped by 65% in 2003-04. The number of American students studying in Africa increased by 18% overall in 2003-04, led by increases of 26% in South Africa, 56% in Morocco and 89% in Egypt. In South America, Brazil witnessed a 16% increase in 2003-04 and Argentina a 52% increase. In the

¹ The most recent year for which statistics are available.

Middle East, there was an overall increase of 62% in 2003-04, which was driven primarily by a resurgence of interest in Israel, which witnessed an increase of 96%, but also by increases of 124% in Jordan, 64% in Lebanon and 67% in the United Arab Emirates. Percentage increases can be deceptive, of course, especially where, as here, the actual numbers are relatively small and the addition of even a handful of participants can have a large impact. Even allowing for this factor, though, the trend toward establishing more programs in developing countries seems obvious and significant.

In addition to the number of American students studying abroad, there also has been tremendous growth in the number of programs available. IIE's 2005 directory of international programs lists 3,199 academic year abroad programs and 2,895 short-term program opportunities. In 1996-97, just 2,371 programs were listed, an increase of 255% in just 7 years.

While the number of programs and students studying abroad is on the rise, the length of time American students spend studying abroad is shrinking. Just 6% of students who study abroad now do so for a full academic year, compared with 14% in 1993-94. In 2003-04, 38% of students studied abroad for a semester. The majority of American students (56%) studying abroad now opt for short-term programs of less than a semester (e.g., summer break, spring break, Christmas break or January term).

Thus, while the number of American students studying abroad and the number of available programs are rapidly increasing, more and more students are opting for short-term international trips to non-traditional locations that, in many cases, are less politically stable, safe and secure than in the past. As these trends would suggest, academic institutions are facing an increasingly broad spectrum of risk and potential legal liability than ever before with respect to the operation of international study abroad programs around the world. This is particularly true with respect to short-term international trips involving small groups of students and one or two faculty members traveling to destinations in the third world. These types of programs tend to involve travel to exotic or non-traditional international sites over the summer or during short breaks in the academic term. The level of university sponsorship of these programs is sometimes less than clear-cut. In some cases, the institution's administration may not even be aware of a particular program or activity, and few campuses seem to require formal administrative review, oversight or

approval for such trips.

With respect to short-term international programs, academic institutions rarely have full-time administrative employees or faculty on-site. Nor do these programs tend to have in place the sort of infrastructure that generally accompanies traditional semester or year long international programs. In addition, the level of due diligence invested by the institution's employees into pre-planning, orientation, safety, security, and health related issues can be as varied as the programs themselves. Reporting and communication lines with the home campus relative to the program may be less than clear-cut, and compliance with university policies and procedures can seem fortuitously reliant upon the knowledge involved faculty members happen to have of them.

Short-term international programs to the developing world present unique health, safety and security risks. These risks can include, among many others, the lack of ready access to quality medical care, increased risk of exposure to potential disease, challenges posed by poor roads, civil unrest, political demonstrations, crime, terrorism and even natural disasters. To further complicate matters, faculty and staff members on-site with a small group of students may or may not be intimately familiar with local customs and culture, fluent in the local language, or aware of which behaviors and geographic areas (of neighborhoods, cities, regions or the country) should be avoided. In addition, the institution's sole representative on-site may or may not have been sufficiently oriented regarding the institution's expectations, and he or she may not view his or her role in the same manner as the home campus. Even in those instances when an individual faculty or staff member is familiar with these issues and has been effectively oriented by the home campus, the risk to students participating in short-term international programs still may be increased as a result of their own lack of familiarity with, and first-hand experience in, their new environment—and by a possible lack of complete fluency in the local language, intimate knowledge of local customs and experience living in the region.

When these inherent risks are coupled with the ad hoc nature of many short-term international trips, the trends identified above, the limited institutional infrastructure in-country, and the characteristic inconsistency in levels of pre-program planning and orientation, the potential for increased institutional legal liability seems clear. Thus, it is not surprising that most of the recent reported court decisions arising in the international study abroad field involve short-

term and ad hoc international trips. The legal issues these cases have addressed are almost as diverse as the programs themselves. They have included the extra-territorial application of the Americans with Disabilities Act and Title IX, the personal jurisdictional of U.S. courts over foreign-based program sponsors, personal injury claims, sexual assault claims, the statutory immunity of U.S. based public higher education institutions for accidents and injuries arising abroad, the duty to secure and adequately oversee medical treatment in the event of an emergency, and allegations of negligence in the selection of student housing. A review of these cases follows.

Recent Decisional Law.

The following court decisions from various jurisdictions across the United States serve as excellent examples to highlight the growing trend toward attempting to hold U.S. based colleges, universities and program sponsors legally responsible for their international programs and activities.

Paneno v. Centres for Academic Programmes Abroad, Ltd., 13 Cal.Rptr.3d 759 (Cal. Ct. App. 2004). Rocky Paneno was a student at Pasadena Community College when he enrolled in a study abroad program through the Centres for Academic Programmes Abroad- USA (CAPA-USA), a California corporation. CAPA-USA is the U.S. marketing, sales, and pre-departure administration arm of CAPA-UK, although the two companies are not owned, operated, or managed concurrently. CAPA-USA contracts with individual colleges and universities and individual students to provide services, as it did in Paneno's case. CAPA-USA receives the pricing and availability of programs from CAPA-UK, which is responsible for every aspect of the actual program's operation, including logistics, housing, and excursions. Students pay CAPA-USA, which remits the fees to CAPA-UK, which in turn contracts with and pays independent contractors for necessary services in each of the associated countries.

When Paneno entered into a contract with CAPA-USA in April 2000 to participate in a Florence, Italy, program, he agreed in writing to release CAPA, and its agents and employees, from liability for loss or damage. Upon arrival in Florence, he lived in an apartment procured by

one of CAPA-UK's overseas contractual partners. In October 2000, Paneno fell six stories after the balcony railing on his apartment gave way as he was leaning against it. He suffered serious injury in the fall, including paralysis.

Paneno initially filed suit against CAPA-USA and Pasadena Community College on premises liability and negligence theories. After learning of CAPA-UK's role in the relationship, Paneno amended his complaint to add it as a defendant in the case. The trial court dismissed CAPA-UK for lack of personal jurisdiction, despite Paneno's argument that it had purposefully availed itself of sufficient minimum contacts with California for jurisdiction to lie. An appeal followed. The appellate court found that the two companies, though not parent and subsidiary, were sufficiently closely related to impose the general jurisdiction of California's courts on CAPA-UK. The appellate court was particularly satisfied that this was appropriate in light of the fact that CAPA's brochures soliciting students appeared to be attempting to disguise the fact that CAPA-UK was actually responsible for operation of the program but could only be sued overseas.

Examples of Pro-Active Steps Universities Might Take in Response to this Case

*Consider conducting comprehensive risk assessments of program sites your college or university sponsors. As part of the assessment, consider having an expert on local building, fire and safety codes (e.g., your global insurance broker) do a walk through inspection of all academic and residential facilities in which your students live or study, searching for hidden defects or dangerous conditions of sufficient magnitude to cause a reasonable person to conclude that an accident is reasonably likely to occur. Convey recommendations concerning facilities your client does not own to the landlord or owner along with a request that they promptly repair any non-compliant or problem areas.

*With respect to facilitated programs which your client does not sponsor, consider entering into a written agreement with the program sponsor that includes, among other things, (1) an appropriate indemnification provision for injuries involving your students; (2) a provision requiring that the program sponsor name your client as an additional insured under its policies of insurance; (3) a forum selection clause regarding the agreed upon situs for any litigation arising out of or relating to the international program or its operations; and (4) a dispute resolution clause indicating the manner, means and method by which any disputes will be resolved (e.g., mediation, arbitration, litigation) and where.

*With respect to facilitated programs which your client does not sponsor but in which your students participate in relatively large numbers, consider asking the program sponsor to certify, in writing, the steps they take to help ensure that the facilities they lease or own in connection with the program are free of hidden defects or dangerous conditions, comply with applicable building, fire and safety codes and have been recently inspected.

*For programs your institution sponsors, consider establishing a procedure so that, as soon as someone reports a potential defect or dangerous condition, the matter is referred to the appropriate individual or administrator who can promptly inspect the site and, if warranted, repair it. When necessary and appropriate, make temporary repairs promptly while longer-term solutions are explored.

*In the case of older buildings, do not rely solely upon an accident-free history or compliance with codes that were applicable when those facilities were built. Base your actions on a careful review of the current and reasonably foreseeable risks or dangers.

*When an accident or injury does occur, ask yourself what steps might reasonably be taken to help prevent or reduce the likelihood of a similar or repeat occurrence at the same location.

McNeil v. Wagner College, 667 N.Y.S.2d 397 (N.Y. App. Div. 1998).

Eileen McNeil was visiting a town in Austria as part of an overseas study program arranged by the college when she fell on ice and broke her ankle. While she was being treated at the hospital, the program's administrator, Dr. James Mittelstadt, acted as her interpreter. In her subsequent suit against the college, McNeil alleged that she suffered permanent nerve injuries as a result of Mittelstadt not informing her that the local treating physician had recommended that she undergo immediate surgery.

McNeil sued the college on the theory that its agent, Mittelstadt, was negligent in the supervision of her medical care. The trial court granted summary judgment to the college, and McNeil appealed. In affirming the lower court's judgment, the appellate court first found that the college had no obligation to supervise McNeil's medical care following her accident. It reasoned that New York had rejected the doctrine of in loco parentis at the college level and there was thus no duty. It further found that even if Mittelstadt had undertaken the responsibility to act as her interpreter, evidence did not sufficiently support the claim that he was aware of the treating physician's recommendation. There was thus no triable issue upon which McNeil could proceed.

Examples of Pro-Active Steps Universities Might Take in Response to this Case

*With respect to international programs that your institution sponsors, explore worldwide travel and medical assistance coverage. This coverage will provides your faculty, staff and students with access, 24/7, to medical professionals who will be available via telephone to talk with local doctors and nurses (in their native language) when students are injured concerning the student's medical diagnosis, treatment and prognosis.

*Orient on-site faculty and staff regarding their appropriate role and the institution's relevant policies and expectations in the event of a medical emergency.

*Consider conveying to students participating in international programs that your institution sponsors the role that will be played by your on-site faculty and staff in the event of a medical emergency.

*Consider having emergency protocols in place and orient students, faculty and staff participating in your institution's sponsored international programs about them.

Bird v. Lewis & Clark College, 303 F.3d 1015 (9th Cir. 2002).

Facts: In this case, a student who is a wheelchair bound paraplegic brought an action alleging that Lewis & Clark College violated Title III of the Americans with Disabilities Act ("ADA"), the Rehab Act and various fiduciary and other duties by failing to reasonably accommodate her disabilities during an overseas program in Australia. In the fall of 1994, the plaintiff was accepted into the College's Spring 1996 overseas program, which was largely field based and involved a lot of travel throughout the term. The College approached the Australian company making arrangements for the program and inquired about the possibility of including a student in a wheelchair. The company, Global Education Designs, indicated that the program could be revised to accommodate her. In advance of the trip, the on-site faculty host and the director of overseas programs at the College met with Bird to discuss her needs for special living accommodations and her need for various medications. Bird was informed then that she would not be able to participate in several activities on the program, but that adequate facilities would be available on most of the outdoor trips, alternative activities would be arranged, and her disability would be accommodated.

As it turned out, on the trip, Bird did not have full wheel-chair access at some 22 locations. For example, she needed assistance to enter or leave her lodgings in Sydney, because of a steep curb to the sidewalk and a steep ramp. She could not use the shower or the toilet without

assistance in several locations. At one, she had to be carried up the stairs to reach a cafeteria and at another she could not get to her bedroom due to a stairway. In terms of outdoor activities, she could not join a tour exploring the tide pools at one site. One tour required multiple stream crossings, too, so Bird was not allowed to participate. At Rubyvale, Bird could not go mining because the mine shaft involved a vertical drop. Finally, she had to be carried onto certain ground transportation during the trip.

The College countered with evidence of having accommodated Bird's disability. It paid for her use of taxis in Sydney and for her to fly from Canberra to Brisbane while other class members used buses and trains. It arranged for a wheelchair accessible van to transport her around Stradbroke Island. It paid two students on the program to be her helpers. It purchased a sleeping cot manufactured to Bird's specifications, and a special shower head for her use. It also provided a smaller, narrower wheelchair so she could move indoors when door openings were too narrow for a normal wheelchair. When she complained about a home stay, she was offered but declined a different, more fully accessible house. She was offered a choice of rooms at multiple locations on trips and rooms on the ground floor at 2 sites. Finally, a number of alternative outdoor activities were designed for and offered to Bird. For example, she joined one study group in the outdoors by working close to a path and used a raft provided by Global so she could float in the water and observe coral reefs. In addition, a rainforest study was moved to a more accessible location. She was able to go on boat tours with the group, too, and to visit an archeological site. She also went on various excursions and traveled to an aboriginal community.

Procedural history: Bird sued the College alleging violations of Title III of the ADA, the Rehab Act, breach of contract, breach of fiduciary duty, defamation, negligence, fraud, negligent misrepresentation and intentional infliction of emotional distress. The crux of her claims was that

the College discriminated against her on the basis of her disability while she was on the Australia program. Both parties moved for summary judgment. The district court granted judgment against Bird on her defamation and intentional infliction of emotional distress claims. Two claims for equitable relief, under the Rehab Act and Title III, were tried to the court. The remaining claims were tried to a jury. The jury found against Bird on all but the breach of fiduciary duty claim, awarding her \$5,000.00 in damages. Her claims under the Rehab Act and the ADA were denied by the court. Both parties then appealed to the U.S. Court of Appeals for the Ninth Circuit.

Appellate Court Holding and Rationale: On appeal, the Ninth Circuit held that Bird, because she had graduated from Lewis & Clark by the time the case was decided, lacked standing to obtain a declaration that the College discriminated against her on the basis of her disability or an order requiring the College to change its overseas programs to prevent future discrimination against disabled persons. The court held that Bird did have standing on her request for an order enjoining the College from releasing her grades for the semester she participated in the Australia program. On the merits, the court rejected Bird's Rehab Act claim, concluding that the College had provided her with "meaningful access to its programs." While reasonable modification of policies, practices, programs and procedures can be required under both the Rehab Act and the ADA, the court recognized that fundamental or substantial modification cannot. On the facts of the case, the court found the College's steps "reasonable." Importantly, the court noted that it is not the number of locations and occasions on which wheelchair access was denied to Bird, but rather whether the program, viewed in its entirety, was readily accessible to and usable by individuals with disabilities. According to the court, the College offered ample evidence of having accommodated Bird's disability. It hired two helpers, paid her to fly while others took trains and buses, and paid for a cot, a second wheelchair and even a unique showerhead built to her

expectations. She received alternative wheelchair accessible lodgings at almost every location where the class stayed. The Court held that the College did not necessarily fail to make reasonable modifications simply because some aspects of the program did not conform to Bird's expectations. She enjoyed many of the benefits offered by the program, including outdoor activities and classes, and she received full credit for her term abroad. The court did not reach the question of whether or not the ADA and the Rehab Act apply extraterritorially to overseas programs.

Notably, the court did find that a 'special relationship' existed between Bird and the College; and therefore, that the finding of a breach of fiduciary duty by the jury was not erroneous. Critical to the court's finding of a special relationship were the College's assurances to Bird that the overseas program would accommodate her disability, that Global and the on-site director of the program routinely handle people both in the field and in home stays with disabilities more physically challenging than Bird's, and that adequate facilities would be available at most outdoor trips.

Examples of Pro-Active Steps Universities Might Take in Response to this Case

*Work cooperatively with disabled students to reasonably accommodate their disabilities.

*Consider not asking program *applicants* whether they are disabled or require accommodations. Wait until after students are admitted to your overseas programs to ask whether or not they have any special needs. Have your institution's counsel review any forms or other materials addressing these issues.

*Once a disabled student has been admitted to an overseas program, use the time before they go abroad to utilize your on-campus resources (e.g., Office for Students With Disabilities) and be in touch with on-site program staff in the country to which they will be traveling. Involve

the student in these discussions and inquire about each student's specific needs, capabilities and desires.

*Be prepared to reasonably accommodate disabled students who want to participate in your overseas programs. While you need not fundamentally alter your programs, you can make reasonable modifications. These may include steps such as finding accessible housing, moving some class meeting locations, securing alternative transportation or lodgings while traveling with the group, providing some alternative activities, etc.

*Do not steer students away from international programs because they are disabled or might require accommodations.

*Do be candid with students about the realities of accessibility issues in the country to which they will be traveling, including roads, sidewalks, curb cuts, ramps, lodgings, class rooms, historic buildings, field trips, trains, buses and other transportation issues, as well as other aspects of the program.

*Do the detail work in advance by asking detailed questions, in advance, about program locations, accessibility issues, available resources, etc. Good communication and reasonableness are the keys to success.

*Do not overpromise or commit to things you cannot deliver abroad (note the special relationship found by the court to exist in the Bird case).

Fay v. Thiel College, 2001 WL 1910037 (Pa.Com.Pl. 2001), Amy Fay, a student participant in a 3-week international study abroad program in Peru that was sponsored by Defendant Thiel College fell ill during the trip. She was taken to a medical clinic in Cuzco, but then left in the care of a Lutheran missionary not affiliated with the college. The trip was

supervised by 3 faculty members. They and the rest of the group continued on their journey as scheduled. At the Cuzco Clinic, the plaintiff underwent an unnecessary appendectomy, even though she had asked beforehand whether the surgery was absolutely necessary, whether she could be transferred to a hospital in Lima and whether she could call her parents. All of these requests were denied. The surgeon and the anesthesiologist who treated the plaintiff sexually assaulted her after the surgery, while she was conscious but under a local anesthetic. The Plaintiff sued the College on the basis of the faculty supervisors' alleged negligence, alleging that if she had not been left alone in Cuzco, she would not have suffered her injuries. The defendants moved for summary judgment in the case, relying upon the liability waiver the student signed before the trip and asserting that they owed no legal duty to the plaintiff. The Court denied the defendants' motion, concluding that the exculpatory clause was invalid and unenforceable because the waiver of liability form constituted a contract of adhesion under Pennsylvania law, and that the form did not spell out by express stipulation and with the requisite particularity an intention to release the college from liability stemming from medical decisions made by one or more of the faculty supervisors. Both parties agreed the form was presented on a 'take it or leave it' basis. The Court also found that the consent form the student signed, which allowed the College to authorize medical treatment of the plaintiff in an emergency created a 'special relationship' between the College and the Plaintiff and that this special relationship created a duty. In an emergency, the faculty supervisors had a duty to 'secure whatever treatment is deemed necessary, including the administration of anesthetic and surgery.' The court also rejected as questions of material fact the defendants' arguments that even if they had stayed in Cuzco they would have been unable to prevent the plaintiff's injuries and that the Peruvian surgeon's actions were a superceding cause. Significant to the court's ruling was its conclusion that the defendant's were trying to exculpate

themselves from their own negligent acts. The case was referred for a jury trial on the question of whether or not the College breached the duty of care it owed to the student on the basis of the 'special relationship' between the parties arising out of the medical consent form the student signed. The court clearly stated that the separate medical consent form the student signed was not the same as a liability waiver form, and that it failed to state that the plaintiff waived any claims based upon the negligent failure to secure or oversee emergency medical treatment.

Examples of Pro-Active Steps Universities Might Take in Response to this Case

*Orient faculty and staff taking students abroad not to leave behind, unsupervised, an ill or injured student while continuing on with the trip itinerary. Have an emergency action plan or policy in place that speaks to how such situations will be handled. Build some redundancy into the plan.

*When students are injured or hospitalized, make sure faculty or staff on-site appropriately and adequately supervise the student's medical care. Many travel insurance plans now include global medical assistance with 24-hour hotlines. These are an excellent resource in seeking, obtaining and overseeing emergency medical care. Often, medical professionals who speak the local language are available via phone to speak with the local doctors and ask the right questions.

*Communicate immediately and regularly with the home campus and the student's family through on-site faculty or staff (or through on-campus employees) when a student is ill or injured.

*Consider augmenting emergency medical consent forms and liability waiver forms to include exculpatory waiver language for the institution's (or on site faculty or staff) failure to secure, obtain or supervise adequate medical care for ill or injured students.

*Augment emergency medical consent forms to clearly indicate that they do not create a 'special relationship' between the institution and the student, and that the student releases the

institution and its employees and agents from all liability for any injury or damage the student sustains as a result of any medical care they receive in the host country, including but not limited to medical malpractice or treatment that is not in accordance with U.S. standards, as well as for any medical treatment decision or recommendation made by an employee or agent of the institution.

*Even if it means changing plans for the entire group or added cost and inconvenience, avoid leaving an ill or injured student behind or in the care of a non-institutional employee.

*Inform program participants in writing and in advance of the trip if the medical care where a group will be traveling is not up to U.S. standards, is difficult to reach or is far away.

King, et. al. v. Eastern Michigan University.

Facts: In this case, six female students from Eastern Michigan University (“EMU”) brought a Title IX claim alleging gender discrimination and sexual harassment against Eastern Michigan University. The Plaintiffs alleged that they were forced to leave a 5-week summer study abroad program sponsored by EMU in South Africa early because of the actions of three male EMU students – two of whom were participating in the program and another student who was the assistant to Dr. Okafor, the on-site faculty advisor. After repeated incidents of harassment by the three male students, which culminated in a violent altercation; and, after repeated attempts to involve Dr. Okafor in the resolution of the problem, the plaintiffs left the program early. They subsequently filed suit.

The case turned on whether Title IX has extraterritorial application outside the United States, and whether the court had subject matter jurisdiction over the plaintiffs’ claims? Although the court answered this question in the positive, resolving the substance of the case, the underlying

facts and circumstances of the case provide excellent guidance concerning pro-active preventative steps institutions can and should take to avoid liability in this context.

Substantively, the court found the broad language of Title IX itself, the legislative history and the implementing regulations all “provide affirmative evidence that Congress intended for Title IX to apply to every single program of a university or college, including study abroad programs.” Defendants’ motion to dismiss Plaintiffs’ Title IX claim of sex discrimination was denied. The main battle appears over the language of 20 U.S.C. §1681 which states “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . .” EMU focused on the language “no person in the United States” whereas the plaintiffs relied on “under any educational program” to make their argument. The court quoted Gesber v. Largo Vista Independent School District to define Title IX as remedial legislation with two primary objectives, “to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.” 524 U.S. 274, 286-290 (1998). Since “remedial statutes are to be read broadly so as to effectuate their purposes” the court looked to the legislative history and implementing regulations for direction. Tcherepin v. Knight, 389 U.S. 332, 336 (1967). The legislative history provided little discussion of “no person in the United States” limiting the phrase to the language of Title VI of the Civil Rights Act. However, more detailed discussion of the meaning of “education program or activity” was provided. There was “sufficient affirmative evidence that Congress intended extraterritorial application of Title IX where so required, i.e. where the educational program or activity makes it necessary for a student to leave the territorial limits of the United States in order to avail him or herself of the educational opportunities offered.” p.4

The court held that to limit Title IX jurisdiction over the international study abroad placement would in effect be limiting a woman's opportunity to participate in these programs and would essentially allow for situations that would be illegal if they occurred in the United States. The court also found that plaintiffs were "persons of the United States" for purposes of Title IX. If plaintiffs proved such harassment occurred then as continuing EMU students they were denied equal access to resources when EMU failed to stop the harassment of its male students. The court stated, "Study abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students' education as a whole and detracts from their overall education."

Examples of Pro-Active Steps Universities Might Take in Response to this Case

- Orient faculty and staff taking students abroad to the institution's sexual harassment policy. Make sure they know to whom complaints should be reported under your policy and that they must be reported immediately. Have a plan for dialogue with those on-site and the home campus when a crisis arises and know who will be included in the discussion.
- Review institutional sexual harassment policies to make sure they can reasonably be applied overseas. For example, does the policy specify who will investigate complaints of sexual harassment at off-campus locations? Does the policy provide for what happens if the alleged harasser is the only university employee on the trip?
- Consider making investigatory powers delegable under the policy (e.g, by the Provost with respect to complaints against academics, by the Vice President for

Human Resources with respect to complaints against institutional staff, by the Vice President for Student Affairs with respect to complaints against other students).

- Orient students concerning the institution's policies in advance and inform them to whom complaints should be reported, both on-site and on the home campus.
- Consider developing a policy and program for those leaving study abroad programs early, which addresses refunds.
- Augment liability waiver forms for international trips to allow students to be sent home at the discretion of institutional representatives, without a refund, if they violate institutional rules, become a danger to themselves or others, or behave in a manner that disrupts the academic program.
- When complaints of sexual harassment are reported, investigate them promptly and take swift appropriate action to protect the rights of those involved.

Bloss v. University of Minnesota Board of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999).

Adrienne Bloss participated in a cultural immersion program sponsored by the University of Minnesota for study in Mexico. As part of the program, she lived with a host family approximately two-and-a-half miles outside the city of Cuernavaca, which was where the main campus was located. During her initial mandatory orientation program in Mexico, she received explicit oral and written warnings about safe ways to travel from her host home to the city. In disregard for these instructions, she hailed a taxi on the street outside her home, while traveling alone at night, and got into the front seat of the car with the driver. During the trip, the driver pulled off to the side of the road and raped her at knife point. This was the first time in the 18 year history of the program that any student or tourist was known to have been raped.

Bloss sued the university for negligence in failing to secure housing closer to the campus, for failure to provide transportation to and from campus, for failure to adequately warn her of risks, and failure to protect students from foreseeable harm. The university made a motion to dismiss, arguing, among other things, that it was immune from suit under Minnesota statute and that Bloss had executed a valid release from liability. The trial court denied the motion, finding that the waiver and release was overbroad and that immunity did not apply because the challenged conduct was 'ministerial,' as opposed to the 'discretionary' conduct protected by statute.

On appeal, the Minnesota Court of Appeals analyzed the nature of the university's immunity for discretionary functions in light of the aim of preventing courts from passing judgment on policy decisions entrusted to other branches of state government. The court concluded that each of the challenged actions (housing with local families, use of public transportation, and warning of students) involve a degree of policy planning as opposed to purely day-to-day activities that would fall under the ministerial function. Because the university was making a policy level decision on how best to construct overseas programs, its decisions were entitled to statutory immunity. Concluding that the university was not the guarantor of the student's safety, the appellate court reversed the trial court's decision to deny statutory immunity.

Conclusion

As this brief examination of some of the recent reported cases involving the potential legal liability of colleges and universities with respect to international programs illustrates, the volume, breadth and diversity of claims seems to be on the rise. This seems to be consistent and commensurate with a corresponding increase in the number and type of international programs, particularly with respect to short-term and ad hoc trips involving small groups of student and few

faculty going to third world locations. The best institutional protection against increased litigation and liability in this context seems to be improved risk assessment and management with respect to international programs. In this context, the best defense to the proliferation of student legal claims would seem to be a good offense in the form of pro-actively working to attempt to reasonably reduce the risk of reasonably foreseeable injury and harm to students, faculty and staff in the first instance. For these reasons and others, colleges and universities should consider investing greater resources in preventative law, pro-active risk assessment, training, education and orientation for students, faculty and staff in the context of international study abroad programs.