

***LEGAL ISSUES –
YOU, YOUR LAWYER, YOUR
PROGRAMS, YOUR PEOPLE***

CGS December 5, 2018

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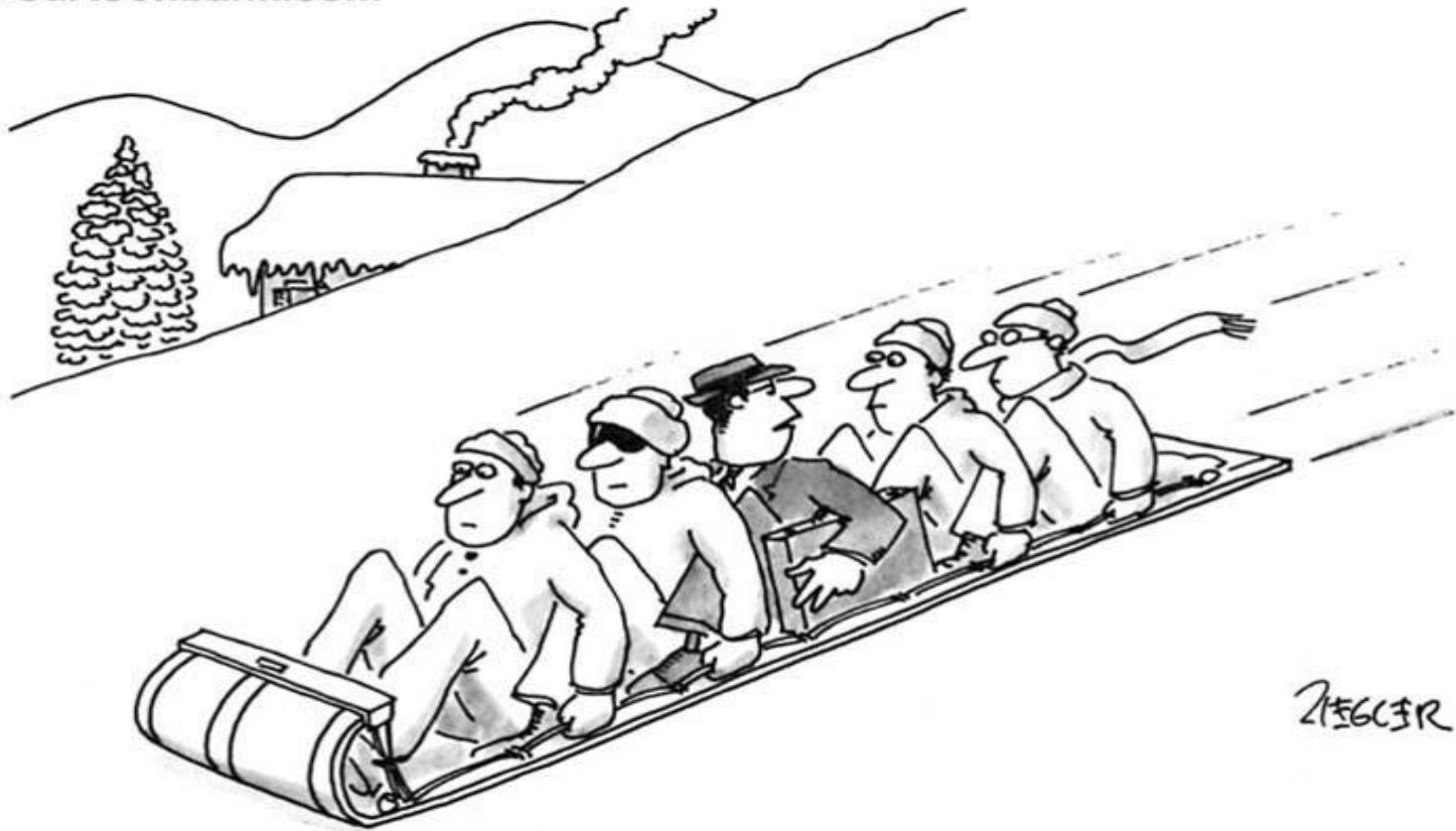
This Morning...

WILL NOT BE a presentation about “the 10 things you should all know about the law.”

WILL BE a discussion that (hopefully) gets you thinking about what you want from your lawyer, and what your lawyer may (or may not) provide to you.

A LAWYER? Really? Geez, Do I Have To?

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“Look, I’m not saying it’s going to be today. But someday—someday—you guys will be happy that you’ve taken along a lawyer.”

Our Institutions: What Are WE?

How We Think Of Ourselves – Educators
How Others May See Us – **Educators PLUS...**

“Responsible Adult Employer Purchaser
Government Contractor Business Incubator
Landowner Developer Landlord Police Force
Restaurateur Retailer Fitness Club
Sports Team Theatre, Music and Concert Venue
Power Plant Operator Hazardous Materials Handler
Health Care Provider... Including Mental Health
Bank Lender Internet Service Provider
Source of Tax Revenue(?)

Higher Ed – The Most Regulated Sector?

PART I—GENERAL HIGHER EDUCATION PROGRAMS

Higher Education Act of 1965

(P.L. 89-329)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Higher Education Act of 1965".

TITLE I—GENERAL PROVISIONS

PART A—DEFINITIONS

SEC. 101. [20 U.S.C. 1001] GENERAL DEFINITION OF INSTITUTION OF HIGHER EDUCATION.

(a) INSTITUTION OF HIGHER EDUCATION.—For purposes of this Act, other than title IV, the term "institution of higher education" means an educational institution in any State that—

(1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(2) is legally authorized within such State to provide a program of education beyond secondary education;

(3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) ADDITIONAL INSTITUTIONS INCLUDED.—For purposes of this Act, other than title IV, the term "institution of higher education" also includes—

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a); and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students persons who are beyond the age of

1

One Hundred Tenth Congress of the United States of America

AT THE SECOND SESSION

*Began and held at the City of Washington on Thursday,
the third day of January, two thousand and eight*

An Act

To amend and extend the Higher Education Act of 1965, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Higher Education Opportunity Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. References.
Sec. 3. General effective date.

TITLE I—GENERAL PROVISIONS

Sec. 101. General definition of institution of higher education.
Sec. 102. Definition of institution of higher education for purposes of title IV programs.
Sec. 103. Additional definitions.
Sec. 104. Protection of student speech and association rights.
Sec. 105. Treatment of territories and territorial student assistance.
Sec. 106. National Advisory Committee on Institutional Quality and Integrity.
Sec. 107. Drug and alcohol abuse prevention.
Sec. 108. Prior rights and obligations.
Sec. 109. Diploma mills.
Sec. 110. Improved information concerning the Federal student financial aid website.
Sec. 111. Transparency in college tuition for consumers.
Sec. 112. Textbook information.
Sec. 113. Database of student information prohibited.
Sec. 114. In-State tuition rates for Armed Forces members, spouses, and dependent children.
Sec. 115. State higher education information system pilot program.
Sec. 116. State commitment to affordable college education.
Sec. 117. Performance-based organization for the delivery of Federal student financial assistance.
Sec. 118. Procurement flexibility.
Sec. 119. Certification regarding the use of certain Federal funds.
Sec. 120. Institution and lender reporting and disclosure requirements.

TITLE II—TEACHER QUALITY ENHANCEMENT

Sec. 201. Teacher quality enhancement.

TITLE III—INSTITUTIONAL AID

Sec. 301. Program purpose.
Sec. 302. Definitions; eligibility.
Sec. 303. American Indian tribally controlled colleges and universities.
Sec. 304. Alaska Native and Native Hawaiian-serving institutions.
Sec. 305. Predominantly Black Institutions.
Sec. 306. Native American-serving, nontribal institutions.
Sec. 307. Assistance to Asian American and Native American Pacific Islander-serving institutions.

Where Do Campus Leaders Get Their Legal Advice?



What do Campus Lawyers *DO*?

- Identify relevant law
- Legal advice
- Litigation
- Transactions
- Compliance
- Policy development and training
- Governance

What do Campus Lawyers *DO?*, cont'd

- Counsel
- Problem-solve
- Truth-seek (figure out what happened)
- Ask the hard (or uncomfortable) questions
- Flag possible unintended consequences
- Keep institutional mission in mind

What Kind of Lawyer do You Have?
What Kind of Lawyer do You REALLY Want?

Describer and Explainer

Provides explanation of applicable law that may be relevant to decisions that will be made by others

“Just tell me what the law says.”

What Kind of Lawyer do You Have?
What Kind of Lawyer do You REALLY Want?, cont'd

Advisor and Thought Partner

Helps others identify and assess alternatives
before they make decisions

*“What are my options, and
what do you think of them?”*

What Kind of Lawyer do You Have? What Kind of Lawyer do You REALLY Want?, cont'd

... As an Advisor and a Thought Partner, your lawyer can help you assess...

- Who will be angry?
- What are the unanticipated consequences?
- Do we need more inputs before deciding?
- How should we do this?
- What should we say... and to who? (What is our communications plan?)

What Kind of Lawyer do You Have?
What Kind of Lawyer do You REALLY Want?, cont'd

[Shared] Decision-Maker

[Partially] “Owning” the Decision

*“What should we do?
You can give me cover on this one, right?”*

What Kind of Lawyer do You Have?
What Kind of Lawyer do You REALLY Want?, cont'd

An Institutional Conscience

**Assessing Consistency With Institutional
(And a Leader's) Values**

“What’s the right thing to do here?”

What Kind of Lawyer do You Have?
What Kind of Lawyer do You REALLY Want?, cont'd

As Institutional Conscience, your lawyer can help you assess...

- How does this issue relate to our institutional (or grad program's) mission?
- Do we want to go above and beyond the law?
- It may be legal, but is it the RIGHT thing to do?

Select Issues

- **Student IP and Innovation**
- **Title IX and #MeToo**
- **Graduate Assistant “Employee” Relations**
- **Graduate Admissions and Diversity**

Student IP and Innovation

**What we want you to
know for sure.**

Student IP and Innovation

- **Public/private Grant Programs**
- **Institutional Partnerships with Corporations**
- **Faculty Start Ups**
- **Incubators**

Student IP and Innovation

Points to Consider:

- Student ownership may conflict with university's obligations to third parties (e.g. funding agencies)
- Student ownership may impact professor's ability to secure future research funding due to student-owned IP
- University may have to negotiate license from student (dependent on university policy)
- Patenting new inventions from future faculty research may be difficult where common inventorship or ownership of improvement inventions is absent

Student IP and Innovation

Additional Points to Consider:

- IP may be developed using both university and company research facilities
- If student is not paid by university (e.g. assistantship or grant) or only uses facilities as part of student's coursework, student may not have to disclose or assign new IP to university, leading to fragmented ownership
- Students might not keep accurate records regarding where IP was developed and what funds /resources were used for making inventions

Student IP and Innovation

Review institutional policies and procedures to ensure these issues are meaningfully addressed:

- Patent Assignment Agreements
- Disclosure of Inventions
- Student Inventions and IP
- Conflict of Interest (Students)
- Student Involvement in Outside Activities of Faculty
- Management Role in Company

Student IP and Innovation

**What keeps you up
at night?**

Title IX and #MeToo

**What we want you to
know for sure.**

Title IX and #MeToo

Title IX Proposed Regulations

What's going on?

An NPRM (Notice of Proposed Rulemaking)

Why you should care?

Timeline?

Information and Resources?

ACE website

<https://www.acenet.edu>

[search Title IX 2018, or
go to the “Advocacy” page



Title IX and #MeToo

Faculty – [Graduate] Student Relationships

“‘We need to be thinking about faculty-student relationships,’ said Mary Sue Coleman, president of the [the Association of American Universities]. *‘I want to be perfectly clear about this: Universities are not somehow different from the rest of society. . . . We’re talking about culture – deeply embedded culture.’*”

Title IX and #MeToo

Washington Post, May 10, 2018: “Academia’s #MeToo moment: Women accuse professors of sexual misconduct”

“Since December, more than 2,400 anonymous accounts of sexual misconduct have been posted online through a spreadsheet in which victims and witnesses described incidents they say occurred in their work with lecturers, professors, deans and others.”

Title IX, #MeToo, Etc., cont'd

As of last week, the number of posted accounts on this crowdsourcing survey...

2,438

<https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTenrBsS9yk-8C5M/edit#gid=1530077352>

Title IX, #MeToo, Etc., cont'd

Grad students and PIs



September 2018 – The NSF published a term and condition for awards that require institutions to notify the NSF of:

- Any findings or determinations that an NSF-funded principal investigator or co-principal investigator **committed** harassment, including sexual harassment or sexual assault.
- The placement of the principal investigator or co-principal investigator on administrative leave, or of the imposition of any administrative action relating to a harassment or sexual assault finding or an investigation.

https://www.nsf.gov/news/news_summ.jsp?cntn_id=296610

https://www.nsf.gov/od/odi/term_and_condition.jsp

Title IX, #MeToo, Etc., cont'd

**What keeps you up
at night?**

Graduate Assistant Employee Relations

**What we want you to
know for sure.**

Graduate Assistant Employee Relations

Private Institutions

- Governed by NLRA
- Columbia (2016): National Labor Relations Board ruled that graduate research and teaching assistants are entitled to collective bargaining under the National Labor Relations Act.
- Overturns Brown decision (2004)
- Current landscape

Graduate Assistant Employee Relations

Public Institutions

- Governed by state laws, not NLRA
- Rights of grad assistants to organize varies
- In 17 states grad assistants are entitled to collectively bargain, either by express statutory statements, state labor board rulings, or voluntary recognition
- *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, (2018): Ruled unconstitutional the collection of union dues from nonmembers as a form of forced representation, violating free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

Graduate Assistant Employee Relations

No Union, No Problem?

- Meet and confer
- Do not interfere with what could be defined as “protected” or “concerted” activity
- Remember the DOs and DON'Ts during early organizing activity

**What keeps you up
at night?**

Graduate Admissions and Diversity

**What we want you to
know for sure.**

Graduate Admissions and Diversity

Students for Fair Admission (Harvard undergrad/2014-__)

Fisher (UT-Austin undergrad/2008-16)

Grutter & Gratz (UMich law school & undergrad/1997-2003)

Bakke (UCal Med School – Davis/1974-78)

Graduate Admissions and Diversity

So far...

- 1. The Supreme Court has repeatedly recognized the educational value of a diverse student body.**
- 2. It has continued to permit colleges and universities to pursue the version of diversity that best suits their own mission and goals.**

Graduate Admissions and Diversity

3. The Supreme Court allows for a narrowly tailored consideration of race as one factor in a holistic admissions process.

But courts are required to apply “strict scrutiny” to their review of challenges to race-conscious admissions programs.

Graduate Admissions and Diversity

What's likely next in the *Harvard* case... and when?

- More briefs and maybe more testimony
- A trial court decision
- An appeal to the federal court of appeals, sitting in Boston
- A request for Supreme Court review
- A decision by the Supreme Court... in June 2021?

Graduate Admissions and Diversity

**What keeps you up
at night?**

Take Aways

- ❖ Good lawyers look around the corner
- ❖ Good lawyers identify possible unanticipated consequences and encourage discussion of them
- ❖ Good lawyers give advice about how to make better decisions
- ❖ Good lawyers simplify
- ❖ Good lawyers work WITH you, and WANT you to work with them!

QUESTIONS

?



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Council on
Education[®]