



TAFT'S HIGHER EDUCATION BULLETIN

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Higher Education Bulletin

We are pleased to present the 2019 issue of Taft's Higher Education Bulletin. At Taft, we have more than 30 attorneys in our cross-disciplinary Higher Education Industry Group who have substantial experience representing public and private universities. We work collaboratively among our offices in serving our institutional clients. This issue reflects our broad-based experience and highlights recent developments in higher education law. Covering many topics related to investigations, public-private partnerships, employment, ADA, Title IX, HEA, immigration, and GDPR, we hope this will be a valuable resource for attorneys working at public and private colleges and universities.



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He Said, She Said: Credibility Assessments in the Wake of #MeToo

Credibility assessments play an essential role in most sexual harassment and sexual misconduct investigations. When weighing the evidence collected during an investigation, the weight given to a key witness's testimony can ultimately tip the scale in one direction or the other. In the proverbial "he said, she said" situation, credibility assessments are often complex and determinative. Techniques for assessing credibility include identifying inconsistencies, contradictions or gaps in a person's story, as well as identifying corroborative evidence or authentically consistent details in multiple witness's accounts. The witness's tone, speed, responsiveness, clarity of memory and body language are noted. The investigator draws upon his or her own knowledge, training, and common sense to determine first whether there is inherent plausibility in the witness's account and next, whether there is reason to believe the witness was being truthful or has a reason to lie or withhold information.

In the wake of the #MeToo movement, investigators, like the rest of society, have become increasingly aware of the prolific sexual harassment and assault allegations shared publicly via social media, twitter and other news sources. Many of these allegations involve conduct so egregious it is hard to believe it could have occurred, conduct so open or frequent it is hard to believe it could have occurred without intervention, or conduct by individuals so esteemed and accomplished it is hard to believe they could be capable of such acts. As a result

of this increased consciousness, some of the traditional skepticism previously associated with allegations of sexual harassment and sexual misconduct allegations has started to fall away. Yet with this increased consciousness came floods of criticisms of inadequate responses by certain employers and industries and demands for justice for the allegedly falsely accused. Investigators cannot help but be acutely aware of these recent developments. On one hand, this reframing of what sexual harassment and its victims look like is a positive development. On the other hand, investigators must resist the temptation to make broad credibility assessments that swing in one direction or the other simply because of these recent events.

The United States Court of Appeals for the Sixth Circuit recently considered a case involving credibility assessments in *Doe v. Baum*, Case No. 17-2213 (Sept. 7, 2018). The issue on appeal was whether the trial court improperly granted the University of Michigan's motion to dismiss Doe's complaint alleging violations of the Due Process Clause and Title IX. *Id.* at 5. Doe's complaint alleged, among other theories, that the school violated the law by failing to allow him to cross examine witnesses during a sexual misconduct disciplinary proceeding. *Id.* The Court of Appeals reversed the trial court's dismissal holding, "[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused or his agent an opportunity to cross-examine the accuser and adverse

witnesses in the presence of a neutral fact-finder.” *Id.* at 2.

In reaching this decision, the court highlighted the importance—and inherent unwieldiness—of credibility assessments in “he said, she said” situations. According to the record below, the stories from the alleged victim and the accused were inconsistent. *Id.* The accounts of 23 other witnesses were as problematic as they were helpful because “[a]lmost all of the male witnesses corroborated Doe’s story, and all of the female witnesses corroborated Roe’s.” *Id.* at 3. After three months of investigating, the University’s investigator decided “that the evidence supporting a finding of sexual assault was not more convincing than the evidence offered in opposition to it” and recommended a ruling in Doe’s favor. *Id.* at 4. In response to Roe’s appeal, the Appeals Board reversed and, without considering any new evidence or interviewing any witnesses, concluded that Roe provided the more credible story. *Id.*

The Court of Appeals took issue with the Appeals Board’s reversal, explaining that “some form of *live* questioning *in front of the fact-finder*” is required by the Due Process Clause because “there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing...” *Id.* at 8, *citing* Brutus Essay XIII, in *The Anti-Federalist* 180 (Herbert J. Storing ed., 1985). The Court of Appeals also concluded the Appeals Board’s credibility assessments based on a “cold record,” paired with recent criticism and negative media reports about the University’s response to sexual assault, were sufficient factual allegations for Doe’s “erroneous outcome” Title IX gender discrimination claim. *Id.* at 12-14. Noting University’s Appeals Board purportedly “credit[ed] exclusively female testimony (from Roe and her witnesses) and reject[ed] all of the male testimony (from Doe and his witnesses),” the Court of Appeals found gender bias was a “plausible” alternative explanation for the Appeals Board’s conclusion, particularly because the Appeals Board’s credibility

assessment was not based on personal observation of the witnesses and was contrary to the conclusion of the investigator who had personally interviewed the witnesses. *Id.* at 13-14. Emphasizing the procedural posture of the case, the Court of Appeals explained, “Our job is simply to ensure that Doe is not deprived of an opportunity to prove what he has alleged unless he would lose regardless. Because Doe has alleged facts that state a plausible claim for relief, we reverse the district court’s decision to dismiss his complaint. Whether he will ultimately succeed is a question for another day.” *Id.* at 15.

As this case illustrates, the importance of neutral, well-reasoned credibility assessments in sexual harassment and sexual misconduct investigations cannot be overstated. Investigators and appeal panels must clearly and carefully “show their work” as to how their conclusions are reached to avoid allegations of gender bias and to avoid misinterpretation of legitimate, good faith credibility assessments in a subsequent legal proceeding. Investigation reports and appeal decisions should not only identify the witnesses and other evidence deemed most credible and relied upon, but also thoroughly explain the basis for the credibility assessments. *Doe v. Baum* supports the position that reasonable credibility assessments based on direct observation of witnesses may be entitled to deference over contrary assessments based on a cold record. *See, id.* at 13. Nonetheless, fact-finders at any stage of the disciplinary process should be conscious of any unique facts or circumstances that, if not specifically addressed in the analysis, could leave room for allegations of gender bias in any subsequent administrative or legal proceedings.

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Sarah Leyshock

Avoiding Potential Pitfalls in Public-Private Partnerships

Increasingly, Universities in need of new facilities have turned to public-private partnerships (commonly known as “P3s”) as an alternative to traditional delivery methods for the design, financing, construction and management of various types of buildings, including student housing, classroom space, laboratories and athletic and exhibition facilities. Compared to projects procured through a typical design-bid-build process and financed directly by a university, P3s offer many

advantages, including a streamlined procurement process; more efficient project design, construction and delivery; and privatized financing, operations, management and maintenance of the completed facility. While these attributes of P3s are valuable, P3s also pose distinct challenges. Fortunately, universities considering P3s can overcome these challenges by knowing potential pitfalls and planning accordingly.

Five Potential Challenges of P3s:

1. P3s Are a Long-Term Commitment

Universities and their staff should understand that P3s require a long-term commitment and are difficult to restructure after closing. In many P3s, a university will ground lease land to a non-profit that will own the completed project for a term of 30 years or more. Terms of that length are necessary to underwrite affordable construction financing and to cause the project to be attractive financially to the university's partner or partners who will own, operate and maintain the completed facility. After a P3 transaction is closed, materially changing the terms of the transaction is extremely difficult without buying out bondholders or lenders. When considering and structuring a P3, universities should anticipate long-term needs and the practical implications of a long-term commitment to the project. After the P3 transaction has closed, university leaders should make sure that they and their successors understand the university's and its partners' continuing rights and obligations with respect to the P3. Additionally, the university should have systems in place to assure that the university monitors the project and its partners and complies with its obligations. A senior university official or officials should be responsible for this monitoring and compliance so that all relevant university staff have clear, centralized direction over time regarding how the university will hold partners accountable and perform its obligations with respect to the P3.

2. P3s Involve Some Loss of Control

In P3s, universities must cede some control over the facility to their partners – *i.e.*, the owner, developer or manager of the project – especially after the project has been constructed. Of course, there are ways to assure that a university participates in important decisions regarding the design, financing, construction and management of the project. In many cases, however, a university's partners in a P3 are responsible for day-to-day decisions regarding operations, maintenance, budgeting, collection of revenue, payment of expenses and on-site programming. After closing a P3 transaction, a university may not be able to renegotiate the allocation of control between the university and its partners. Before entering into a P3, therefore, universities must thoroughly consider and identify the decisions over which they would like to retain control or influence and work with counsel to negotiate appropriate provisions in the relevant transaction documents. Additionally, to avoid conflict with partners, senior leaders of the university should have policies and procedures in place to assure that relevant university staff understand the university's role with respect to the operation and management of the project.

3. P3s May Involve Uncertain or Aggressive Underwriting Assumptions

Universities should thoroughly vet the underwriting analysis prepared by their underwriting partners to assure that the project will be financially feasible. In many P3s, the university will identify a particular revenue source to be generated by the completed project as the primary means of repaying bonds issued to finance construction. An underwriting firm will prepare a *pro forma* analysis that includes revenue and debt service projections over the term of the bonds. These analyses often rely in part on historical data from the university and other universities regarding revenue generated by similar facilities, as well as other data. Universities should scrutinize these assumptions carefully, especially if a university does not have an extensive track record operating the type of facility that will be constructed and operated through the P3. Universities may wish to consider advocating for more conservative revenue projections to provide a "cushion" in the event that actual revenues are lower than projected revenues. Although this strategy may reduce the size of the debt that can be financed, it will reduce the risk that actual revenues are insufficient to pay debt service. The consequences of insufficient revenue can be dire. In some cases, universities may be responsible for paying any shortfall between the amount of available revenue and the amount of debt service due (see below). Such payments may force the university to divert funds from other important uses, which may compromise the university's mission or disrupt its operations. Even if the university is not required to pay the shortfall, the university may be required to take other actions to increase revenue available to pay debt service. Those actions may also be costly or disruptive to university operations. In the worst-case scenario, if debt service cannot be paid, the university's partner may default on its financing, which could cause the bond trustee to foreclose on the project. Few good options exist when revenue is less than projected to pay debt service. Proper vetting of underwriting assumptions before closing is critical to protect universities.

4. P3s May Involve University Liability for Revenue Shortfalls

Because many P3s are financed by the ground lessee, rather than directly by universities, university staff may believe that they have little responsibility for the payment of debt service on the bonds issued to finance construction. In fact, universities often have significant obligations to assure that revenue is available to make debt service payments. Such obligations vary by project and can fall anywhere along a continuum from an upfront contribution of cash, to a full guaranty of debt service payments, to lesser obligations designed to assure minimum utilization of the facility (including, without limitation, in the form of master leases, occupancy guarantees and first-fill agreements), or a combination of such obligations. Performance of these

obligations can have a significant impact on a university's finances and operations. Failure to be aware of and prepared to comply with such obligations could be an existential threat. Universities must have policies and procedures in place to assure that senior officials with appropriate expertise are aware of the university's obligations in the event of any revenue shortfall; take proactive steps to identify potential weaknesses in revenue as soon as possible (and preferably before any shortfall occurs); have the authority to take necessary actions to prevent a shortfall, and, if necessary, have the authority to comply with the university's obligations in the event of any shortfall.

5. P3s Require Succession Planning

Perhaps of greatest importance, most P3 projects will outlast the tenures of the university officials who participate in planning and first implementing them. After the departure of those officials, lost institutional knowledge could lead to critical misunderstandings between the university and its P3 partners or failures by the university to abide by the terms of the P3. The complexity and distinct terms of each P3 project exacerbate this risk. Transferring the knowledge and understanding of retiring officials to their successors is a daunting but critical challenge. Universities should develop succession plans to assure that future university officials will understand the terms and provisions of, and the university's rights and obligations with respect to, each P3 partnership and project.

Conclusion

P3s in the university setting became common within the last 10-15 years. Many projects are only a few years old. As time passes, the university community will

continue to learn about the potential pitfalls of P3s and actions that universities can take to avoid them. Nevertheless, the importance of careful planning before and after implementation have been demonstrated and documented. P3s are long-term commitments that can significantly impact a university's control over facilities, as well as a university's finances and operations. Universities should work with counsel to understand the university's long-term goals and negotiate and document the P3 to best achieve those goals and protect the university's interests. Additionally, universities should engage in detailed succession planning to assure that future university officials will be prepared to protect the university's interests and comply with its obligations over the entire term of the P3.

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Howard Zweig

DOL's Overtime Rule: Here We Go Again

The Department of Labor ("DOL") has once again proposed an increase to the salary threshold for exempt employees under the Fair Labor Standards Act ("FLSA"). Sound familiar? In 2016, a federal judge struck down the DOL's attempt to raise the minimum salary. That rule had employers scrambling to understand its impact given the large number of employees who could have become eligible for overtime. Perhaps that fire drill will make it easier this time around. Still, given the fact that it is estimated 1.3 million employees will gain overtime eligibility under the 2019 proposal, this new rule cannot be taken lightly. Colleges and universities will benefit from being prepared to respond to the DOL's new salary basis test.

What You Need to Know

The proposed rule directly impacts whether an employee is non-exempt or exempt. Typically, a non-exempt employee is paid on an hourly basis and is entitled to overtime at 1.5 times their regular rate for hours worked over 40 in a workweek. Exempt employees are paid on a salary basis and have no right to overtime pay. The most common exempt employees are the "white collar" executive, administrative, and professional ("EAP") positions. Each has a duties-based test and must meet the minimum salary threshold.

There will be no changes to the job duties tests. Instead, the DOL proposes raising the minimum salary level from the current amount of \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually). This is far more modest than the 2016 increase to \$913 per week (\$47,476 annually). The 2019 proposal also raises the “highly compensated employees” exemption from \$100,000 to \$147,414 annually. This applies to employees earning this amount and satisfying at least one of the duties in the respective EAP test.

As in 2016, the 2019 rule will also allow employers to use nondiscretionary bonuses, incentives and commissions to satisfy up to ten percent of the \$35,308 minimum. But unlike its 2016 automatic escalator approach, the DOL will instead periodically review and may update the salary threshold through notice and comment rulemaking. This is an employer-friendly change.

Does this really affect colleges and universities?

Colleges and universities employ many employees, both exempt and non-exempt. Specific to higher education, professors, adjunct instructors, faculty members who teach online or remotely, and teachers substantially involved in extracurricular activities, have been classified as exempt “Teachers.” Even coaches and athletic instructors can fall under this exemption when their primary duty is teaching. In addition, academic administrative employees, such as department heads, academic counselors, advisors and intervention specialists, salaried graduate teaching assistants, research assistants and residential assistants, usually qualify as exempt.

But this leaves a myriad of other positions on campus. And many of these may be impacted if their salary is less than \$35,308.

What You Should Do Now

Colleges and universities will benefit from doing the following: (1) identify white collar exempt employees earning less than \$35,308 and highly compensated employees earning less than \$147,414; (2) evaluate bonus, incentive and commission payments that may satisfy up to ten percent of the standard salary level; (3) review exempt job descriptions and job duties to ensure they accurately reflect EAP duties; and (4) weigh options for compliance. Now would also be the time to evaluate workloads, schedules and staffing for existing and converted non-exempt positions. This way, when the employee’s position is reviewed alongside the new salary threshold, the institution will better understand its next steps. These steps can include raising salaries, converting some exempt positions to non-exempt, or some other restructuring.

In the end, it may feel like 2016 again. And maybe some of this work was already completed at that time. But do not wait until it is too late to prepare for the possibility of a new minimum salary in 2020. Starting early will ease this transition for colleges and universities.

Authorities used: Fed. Reg. 10,900, 10,949 (proposed Mar. 22, 2019) (to be codified at 29 C.F.R. pt. 541); 29 U.S.C. § 207 (2010); 29 U.S.C. § 213 (2018); 29 C.F.R. § 541.100, 200, 301, 601 (2019); 84 Fed. Reg. at 10,901; 84 Fed. Reg. at 10,902; DEP’T OF LAB., WAGE AND HOUR DIVISION, FACT SHEET #17S

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Campus Security: Mental Health Issues and Direct Threats Under the ADA

While universities and colleges have always faced student safety issues, a recent increase in lawsuits against universities related to students’ mental health has caused confusion among administrators and campus professionals. When confronted with students who may present a direct threat to themselves or others, universities must determine the proper course of action while navigating federal, state and local laws, along with the competing interests of the campus community and the institution itself. A review of recent litigation provides some guidance for handling students with mental health

issues under the Americans with Disabilities Act (“ADA”).

Top ranked schools in particular are facing allegations of disability discrimination for failing to accommodate its students’ mental health needs. In March 2019, a student forced on a leave of absence filed a complaint against Harvard University alleging that Harvard has a “mental health discriminatory culture.” Stanford University was similarly hit with a class action lawsuit in August 2018 when students alleged that the school coerced students

with mental health issues—such as anxiety, self-harm and suicidal thoughts—to take leaves of absence.

A December 2018 report by the Ruderman Family Foundation reviewed all Ivy League Schools' leave of absence policies. It singled out some top named universities alleging that their leave of absence policies constituted mental health discrimination. While universities generally argue that their lack of resources justifies sending students home if they are at risk of harming themselves or others, disability advocates allege that universities apply these policies too broadly and prioritize university image over students' well-being.

A recent lawsuit against Northern Michigan University, filed by a student, has sparked an emerging policy focus. After the student discussed her depression and suicide risk with a friend, the university concluded that the student was a direct threat and required her to complete a psychological assessment and behavioral agreement to refrain from discussing her suicidal ideation. The National Behavioral Intervention Team Association ("NaBITA"), which provides resources to make school and workplace environments safer, responded by issuing a position statement in March 2019 about involuntary withdrawals and behavioral agreements that offered some best practices:

- Use an evidence-based risk rubric to ensure that objective criteria is used to assess the severity of the behavior and associated risk;
- Facilitate a collaborative process that incorporates the campus administration, the student, the student's family and medical professionals to promote a course of action that considers the student's best interests;
- Avoid threatening an immediate leave of absence or

other automatic responsive action for students who may voice suicidal thoughts; and

- Implement and utilize a violence threat assessment for responding to direct threats to the safety of others under the ADA, because relying solely on a mental health assessment does not adequately address the full range of risks or help develop a comprehensive threat management plan.

Universities should continue evaluating mental health and other direct threat issues on a case-by-case basis using objective criteria and consider any accommodations that would help the student succeed while remaining on campus. Universities should also continue to review their codes of conduct and disciplinary policies, and stay informed on any updates to the relevant federal, state and local laws. By creating flexible direct threat response plans and university policies, universities will be better prepared to handle and adequately respond to the evolving mental health needs of students, thereby promoting safe, inclusive campus communities.

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The Five Most Significant Changes In The Proposed Title IX Regulations

In November 2018, United States Secretary of Education Betsy DeVos released new proposed Title IX regulations, which opened them up for a 60-day comment period that ultimately resulted in more than 100,000 comments. Like almost everything involving Title IX over the past few years, the release of these proposed Title IX regulations has generated considerable commentary—some positive, some negative. Regardless of the position that one takes about whether these regulations are an improvement or a deterioration of the law governing Title IX, no one can dispute that these regulations, if enacted in their proposed form, would require significant changes for many colleges and universities.

Highlighted below is analysis of five proposed changes that would have a significant impact on colleges and universities.

1. **Colleges and Universities will have to provide a much more defined process and set of protections to the parties involved in a complaint of sexual harassment.**

This first "change" is actually a collection of many changes, all of which relate to the processes and protections that colleges and universities will have to provide to the parties involved in a complaint of sexual harassment. A few of these process-related changes include:

- Colleges and universities must provide a written notice to all the known parties with certain specific information.
- Colleges and universities must “[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the [school] does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.” The significant change here is the fact that schools would have to permit the parties to review any evidence obtained, even if that evidence is not relied upon by the school in reaching any determination. Simply put, if a school receives or uncovers some sort of “evidence” during its investigation, but that evidence is not used in any manner by the investigator to make any preliminary finding, the school must still make that “evidence” available to the other party.
- The college or university must implement a platform by which it can electronically share the evidence with the parties, but at the same time restrict the parties and their advisors from downloading or copying the evidence.
- Colleges and universities must provide for the opportunity to have a live hearing.
- At that live hearing, the school must permit the parties to cross-examine the other party and witnesses. The party’s advisor must be permitted to conduct the cross-examination. If the party does not have an advisor present, the school “must provide that party an advisor aligned with that party to conduct cross examination.” If a decision maker excludes any cross-examination question as irrelevant, the decision maker “must explain” the decision to exclude questions that are not relevant.
- The college or university must make arrangements that allow for cross-examination to occur with the parties located in separate rooms with technology that enables the decision-maker and parties simultaneously to see and hear the party answering the questions.

2. Colleges and university can no longer use a “single investigator” model.

Historically, there have been several different models used by colleges and universities to both investigate and decide or adjudicate allegations of misconduct. One such model was a “single investigator” model. As the name denotes, a “single investigator” model involves an investigator who both investigates the allegations and ultimately decides whether there has been a violation of a college or university policy.

A few of the “pros” to that model include: it is more cost-effective; it can be quicker and more efficient as there are less scheduling delays and often no live hearing which involves coordinating many schedules; and it allows for greater assurance that the primary person

involved (*i.e.*, the single investigator) is highly trained in all aspects of investigations, the institution’s policy, and the legal issues surrounding the situations. A few of the “cons” to that model include: a more significant risk of bias from the single investigator; the inability of a single investigator quickly to proceed through a complicated investigation with many witnesses and large amounts of evidence; and the collective wisdom, insight, and experiences of a multiple-person hearing panel can ensure a more just outcome than the findings of one person.

While some schools still use a “single investigator” model, the new regulations would foreclose that option. First, schools would be required to offer the parties a live hearing, which is typically not used in the “single investigator” model. Second, the proposed regulations state that the person who ultimately decides whether a policy violation has occurred “cannot be the same person(s) as the Title IX Coordinator or the investigator(s).” Simply put, colleges and universities will have to offer a live hearing where the ultimate decision-maker(s) is someone different from both the Title IX Coordinator and the individual(s) who performed the investigation.

3. Colleges and universities may use a higher standard of proof and have the flexibility to use informal resolution procedures.

Under the Obama administration, the Department of Education required schools to use a preponderance of the evidence standard in disciplinary matters involving sexual harassment. The Obama administration also prohibited schools from facilitating informal resolution procedures (*e.g.*, mediation) to resolve complaints of sexual harassment.

As to the standard of proof, the new regulations would permit schools to raise the standard to clear and convincing evidence. The new regulations provide that the preponderance of the evidence standard may be used only if that standard is also used for policy violations that carry the same maximum disciplinary sanction as would a finding that the person violated the sexual harassment policy. Simply put, if a finding of sexual harassment would allow for dismissal as a sanction, the preponderance of the evidence standard can only be used for sexual harassment allegations if every other policy violation that allowed for dismissal as a sanction also used the preponderance of the evidence standard.

Regarding informal resolution procedures, the new regulations would permit schools to use methods such as mediation if the school can get the parties’ voluntary, written consent to the informal resolution procedure.

4. The new regulations would only require colleges and universities to address formal complaints made to a Title IX Coordinator or any official who has the ability to remedy the situation.

The proposed regulations note that a college or university with “actual knowledge” of sexual harassment has a duty to respond in a manner that is not deliberately indifferent to that harassment. Following that more general statement, the proposed regulations define “actual knowledge” as “notice of sexual harassment or allegations of sexual harassment to a [school’s] Title IX Coordinator or any official of the [school] who has the authority to institute corrective measures” The proposed regulations further note that “respondeat superior or constructive notice” are not sufficient to constitute actual knowledge and that even if an employee is able or obligated to report sexual harassment, the employee is not necessarily someone who has authority to institute corrective measures.

Under the prior administration, if essentially any representative of the college or university learned of sexual harassment, the school was assumed to have knowledge that triggered its responsibilities under Title IX. The fact that these proposed regulations would limit the school’s legal liability does not necessarily suggest that schools will actually roll back their requirements that nearly all employees must report incidents or allegations of sexual harassment. Both culturally and as a matter of legal risk, it may be inadvisable for a school to roll back those requirements, but it is possible that some schools would see this change as a greenlight to do so.

5. The new regulations would define sexual harassment to include “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”

Under the Obama administration, sexual harassment was defined as “unwelcome conduct of a sexual nature.” Along with arguing that this proposed definition is much narrower than the one offered by the Obama administration, many commentators have complained that the proposed definition also departs from the definition of sexual harassment used by courts. That is, the definition often used by courts under Title IX (and Title VII) is “unwelcome conduct on the basis of sex that is so severe or pervasive . . .”, whereas the proposed rule’s definition appears to require the conduct to have been severe and pervasive to constitute sexual harassment.

Critics of this proposed definition are concerned that this more narrow definition of sexual harassment will discourage potential victims from reporting allegations of sexual harassment because they are concerned that the conduct would not meet the higher threshold provided by this new definition.

One aspect of the Title IX regulations not receiving much attention:

One interesting and surprisingly under-analyzed aspect of these proposed regulations is the potential impact on how colleges and universities must deal with sexual harassment allegations made against employees. One possible reason why this issue has not been discussed all that much by commentators may stem from the fact that the Department of Education itself did not appear to view these proposed regulations with an eye on its impact on employees of educational institutions. For example, in conjunction with the Department of Education’s release of the proposed regulations, Secretary DeVos primarily referenced the need for these regulations as it relates to students. See <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all> (Nov. 16, 2018). Additionally, the Executive Summary in the official Notice of Proposed Rulemaking stated, *inter alia*: “In addition to providing recipients with clear legal obligations, the transparency of the proposed regulations will help empower students to hold their schools accountable for failure to meet those obligations.”

Further confirming the proposed regulations’ emphasis on its impact on students, the Department of Education included the following question in the “Directed Questions” that it specifically sought input on from commenters: “Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public’s perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider.” Simply put, the Department of Education seemed to recognize that it needs more input about how these proposed regulations would impact the employer-employee relationship.

The American Council on Education identified this issue early in the comments it submitted to the Department of Education, lobbying the Department of Education to limit the proposed regulations to just matters involving students. The American Council on Education contends that applying the processes required under the proposed regulations to employees “will prove unworkable and be at odds with employer obligations under Title VII of the Civil Rights Act of 1964, state laws, and sound human resource policies.”

<https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> (Jan. 30, 2019). Similarly, the American Association of University Professors submitted comments to the proposed regulations that, “concern employees who are faculty – a category whose ‘unique circumstances’ are not adequately considered in the draft regulations.” <https://www.aaup.org/sites/default/files/AAUP%20Com>

ments-Title-IX-Regulations-28-January-2019-0.pdf (January 28, 2019).

Another complicating factor for many higher education institutions is the fact that higher education institutions often employ individuals with varying protections already in place. For example, college and university faculty employees often hold different statuses (i.e., tenured, tenure-track, non-tenure-track, contingent, etc.). The faculty members with tenure likely already have certain protections in place that govern their employment while other faculty members do not. Similarly, many employees of colleges and universities are unionized and therefore have a collective bargaining agreement with the school. Often, those agreements already have formalized disciplinary processes and limit when the parties are supposed to reevaluate those processes.

As the American Council on Education warns, these new regulations may ultimately “require an unnecessary, costly, complex, time-consuming, and wholesale redesign of campus human resources functions” and “impose undue regulatory burdens on higher education institutions that are not imposed on any other employers.” <https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> (Jan. 30, 2019). Whether or not the extent of the impact on college’s and university’s relationships with their

employees is as dire as the American Council on Education believes, it is true that the changes will be significant if the regulations are adopted in their proposed form.

What to do now?

While the wait continues on finalized regulations, colleges and universities will be well served by considering these five significant changes, with special attention to how those changes would impact the schools’ current policies, and how the schools would endeavor to assign resources to implement those changes. While the focus of the Department of Education and most schools has been on the impact of these new regulations on students, it is quite possible that the more significant impact will be on how colleges and universities deal with allegations involving employees. Colleges and universities be best served by considering how these changes would affect their policies, protections, and relationships within their hierarchy of employees.

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Evan Priestle

HEA Reauthorization: Where We’ve Been and Where We’re Going

The Higher Education Act of 1965 (“HEA”) was enacted to strengthen the educational resources of colleges and universities and to provide financial assistance to students in higher education. HEA has been reauthorized and amended several times since its enactment, most recently in 2008. The terms of its reauthorization have been a source of significant debate in recent years.

In December 2017, House Republicans introduced an HEA reauthorization bill, the Promoting Real Opportunity, Success and Prosperity through Education Reform (“PROSPER”) Act. The PROSPER Act did not pass, criticized by some as:

- Unreasonably eliminating the public service loan forgiveness program;
- Legitimizing and deregulating for-profit institutions;
- Instituting unworkable borrowing caps; and
- Lacking bipartisan input and support.

House priorities on this and many other matters shifted when Democrats took control in January 2019. In February 2019, led by Representative Bobby Scott (D-VA), the House Committee on Education and Labor announced its intent to hold five bipartisan hearings on higher education in an effort to move forward with reauthorization efforts. The topics of those hearings are:

1. The Cost of College: Student Centered Reforms to Bring Higher Education Within Reach,
2. Strengthening Accountability in Higher Education to Better Serve Students and Taxpayers,
3. The Cost of Non-Completion: Improving Student Outcomes in Higher Education,
4. Engines of Economic Mobility: The Critical Role of Community Colleges, Historically Black Colleges and Universities, and Minority-Serving Institutions in Preparing Students for Success, and
5. Innovation to Improve Equity: Exploring High-Quality Pathways to a College Degree.

The first of these hearings took place in March 2019, in the wake of allegations of an extensive bribery scandal in college admissions. Rep. Scott dubbed the breaking news as “a powerful reminder that elements of our higher education system are in desperate need of repair,” and identified the rising cost of college as one of the biggest challenges to be addressed.

The Senate Health, Education, Labor and Pensions Committee, chaired by Senator Lamar Alexander (R-TN), has been busy with its own hearings on the issue of HEA reauthorization. Sen. Alexander has identified as his three priorities:

1. Simplifying the federal student aid application;
2. Developing a new way to repay loans; and
3. Establishing a new accountability system for colleges based upon whether borrowers are actually repaying their student loans.

In an effort to address these and related issues through HEA reauthorization, the Senate Committee has held several hearings in 2019 on topics including: Simplifying the FAFSA and Reducing the Burden of Verification, Addressing Campus Sexual Assault and Ensuring Student Safety and Rights, and Strengthening Accountability to Protect Students and Taxpayers.

The Trump Administration has also weighed in, identifying as its principles of higher education reform to:

- Reorient the accreditation process to focus on student outcomes,
- Increase innovation in the education marketplace,
- Better Align Education to the Needs of Today’s Workforce,
- Increase Institutional Accountability,
- Accelerate Program Completion,
- Encourage Responsible Borrowing,
- Simplify Student Aid,
- Support Returning Citizens, and
- Give Prospective Students More Meaningful and Useful Information about Schools and Programs.

The Trump Administration proposal focuses on student debt, noting that “American student loan debt is now approaching \$1.5 trillion” and stating a commitment to “reforming higher education through legislation and regulatory reforms that provide more Americans access to a quality education, hold institutions accountable, and help students and families make informed decisions regarding their educational options.”

Colleges and universities should continue to monitor the discussions and any bills proposed to reauthorize the HEA.

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Connie Kremer

Updates on the Final Policy Memorandum on the Accrual of Unlawful Presence for Foreign Nationals in F, J, and M Nonimmigrant Status

On May 3, 2019, the U.S. District Court for the Middle District of North Carolina issued a nationwide preliminary injunction that temporarily prevents the enforcement of U.S. Citizenship and Immigration Services’ (USCIS) August 9, 2018 policy memorandum on accrual of unlawful presence for foreign nationals in F-1 and M-1 nonimmigrant status for students, and J-1 nonimmigrant status for exchange visitors.

The new policy memorandum expanded the circumstances under which foreign nationals in these statuses accrue unlawful presence in the U.S. Under the policy memorandum, F, J, and M nonimmigrants will automatically begin to accrue unlawful presence:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program;
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the foreign national excluded, deported, or removed.

The accrual of significant lengths of unlawful presence can have severe immigration consequences for foreign nationals in F, J, or M nonimmigrant status. Unlawful presence for more than 180 days results in a three-year

bar from reentering the U.S; unlawful presence for a year or more results in a ten-year bar.

The nationwide preliminary injunction was granted as part of a lawsuit filed on October 23, 2018, which challenges the new policy memorandum (Guildford College et al v. Nielsen et al. Civil Action No. 18-891). In the complaint, the plaintiffs asked the court to vacate the memorandum, declare it unlawful, and enjoin its application.

On January 28, 2019, the District Court issued a Temporary Restraining Order (TRO) that prevented the government from applying the unlawful presence memo against two named plaintiffs in the case. The plaintiffs are Department of Defense (DOD) Military Accessions Vital to National Interest Program (MANVI) recruits who entered on F-1 visas and would suffer imminent harm under the policy. MANVI is a DOD recruitment tool to enlist certain nonimmigrants and other foreign nationals who have skills that are considered vital to the national interest of the U.S. Under USCIS' unlawful presence memo, the named plaintiffs would likely be accruing unlawful presence while waiting for their orders to report to basic training, subjecting them to bars from reentering the U.S.

The court's nationwide preliminary injunction, in contrast to the TRO, blocks the application of the memo to all impacted individuals. In its Memorandum Opinion and Order, the court concluded that the plaintiffs demonstrated a likelihood of success with respect to

their claim that the policy memorandum was promulgated in violation of the Administrative Procedure Act's (APA) notice and comment procedures for rulemaking, and that its method for calculating unlawful presence conflicts with the Immigration and Nationality Act (INA) and is invalid.

On May 3, the court further ordered an expedited summary judgment briefing to conclude at the end of the month, and a final decision could be rendered in June or soon thereafter. If the court rules the policy memorandum should be overturned based solely USCIS's failure to comply with the notice and comment procedures under the APA, USCIS could engage in rulemaking to codify the memo; if it is determined that the policy memorandum conflicts with the INA, Congressional action would be needed to implement the measures described in the policy memorandum. If USCIS prevails, a similar policy could be extended to other nonimmigrant visa categories.

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Jennifer Snead

GDPR One Year Later: Five Considerations for Higher Education

We are now a year into the General Data Protection Regulation (GDPR) era. Like traditional businesses, universities are also struggling to understand the law's reach and impact on its processing of personal data. After a couple of years working on GDPR (before and after its May 25, 2018, effective date), here are some thoughts and tips to consider.

1. Does the GDPR apply? As with all laws, start with the rules and determine whether they apply to your institution. The fact that you have a students from the European Union (EU) attending your campus in the United States does not, by itself, mean GDPR applies to the processing of those EU students' personal data. The GDPR applies to the processing of "personal data" of data subjects that are in the EU. The processing has to be done by entities also in the EU or with data processing activities targeted at data subjects in the EU. "Personal data" is broadly defined by the GDPR to include anything that can identify or reasonably be used to identify a data subject. "Processing" is likewise very broad in

definition and encompasses anything you could do with a data subject's personal data.

***Tip!** The GDPR does not mention citizenship or residency. Rather, the law is only concerned with data subjects "in the Union." American students attending school in the EU for a summer abroad or other program have rights under the GDPR.*

2. Not just current students. The GDPR would reasonably cover any prospective students to which your school markets or recruits, as well. This includes any activity in which you process personal data in marketing the school, even before the completion of an application. Accordingly, transparency of such data processing is important to include. Examples of how to achieve transparency include providing clear privacy policies and obtaining consent to such use of any personal data you might collect from a prospective student.

Tip! You likely process personal data through automated means via your website and online portals through cookies, web beacons and other such technologies. Do not forget that it is important to disclose such technologies in your privacy policies and obtain consent for cookies in some cases.

- 3. Not just students.** Do not limit your focus to students, as any employees or business partners (vendors or contractors) with whom you have a relationship in the EU will also require your assessment for GDPR compliance. You should pay attention to employment contracts, policies and all business contracts to determine how GDPR will be addressed and that the school has established a lawful basis for any cross border transfer of personal data and processing it in the United States.

Tip! Don't forget that the GDPR does not distinguish between personal data collected through a business relationship (such as someone's work phone number or email address) and a personal or consumer relationship. Personal data is any data that can identify an individual person, regardless if it is for work, personal or consumer purposes.

- 4. Data governance planning is key.** If GDPR applies, you need to determine in what capacity you process such personal data, as either a "controller" or a "processor." In most cases and with respect to students, a university will be a controller as it holds the relationship with the data subject and directs the processing of any personal data for that data subject. Under the GDPR, the university is under an obligation to ensure it has established data governance policies and procedures to ensure such personal data is processed in accordance with the lawful basis under which the school collected that personal data, be it an application for enrollment, privacy policy, or contract.

Tip! As a controller, you have an obligation to ensure any third parties with which you share personal data (processors) are under contract to only use personal data as you direct them to do so. For example, if you contract with an email service provider or website management company that will have access to student personal data and manage

such personal data, your current contracts should reflect the requirements reflected in Article 28 and other articles of the GDPR.

- 5. Even if you don't think GDPR applies currently, play the game as if it does.** If you determine that the GDPR does not apply to your data processing details, I strongly encourage you to review the GDPR model and commence data governance planning as if it did. The reality of our modern world is that the digitization and globalization of data and the harms that can befall data subjects is driving legislators to implement new or more robust regulations with hefty fines for noncompliance. Currently, the GDPR is the most conservative and robust model we have. Here in the U.S., California has passed the California Consumer Privacy Act (CCPA) to complement its long list of privacy-centric laws. The CCPA requires disclosure for data processing and selling activities, with other GDPR-like requirements for businesses processing of personal data on California consumers. The GDPR is a sign of things to come.

Tip! The bottom line is that data governance planning is moving away from a simple best practice in many industries to a legal requirement. Having documented privacy and security policies and a program through which they are enforced is becoming the norm and the cost of doing business today. As with all such changes, it is always preferable (and less costly and stressful) to do it on your timeline and not in response to a legal requirement or deadline, whether it comes through litigation, data breach or regulatory enforcement.

ⁱ For purposes of this article, all references to "personal data" are intended to mean the personal data subject to the GDPR and not all personal data a school might process.

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