A Special Message from the Editors:

IN MEMORIAM

CATHERINE PIERONEK
1962 – 2015

For the past twenty-one years, this journal has been blessed to have the great intelligence, the boundless energy, and unending generosity of Catherine Pieronek available to us any time we sought her assistance. First as student editor-in-chief, then as an associate editor, sometimes as an author, frequently as a referee, and always as a friend, Cathy was an invaluable resource to us, especially on issues that touched upon Title IX as it applies to the removal of barriers of all sorts to the full integration of women into academic life. She died this spring, still young in years. We know how dearly her husband and her family will miss her. We will miss her as well. Like them, we will treasure our memory of her. May she rest in peace.

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ARTICLES

This article provides a systematic analysis of the case law concerning student challenges to disciplinary sanctions, such as suspensions and expulsions, at public institutions of higher education (IHEs) in comparison to the corresponding case law for students at private IHEs. The selected variables included the frequency of the decisions, the states where they arose, the type of conduct, and the outcomes distribution. The leading finding was that the outcomes distribution was not significantly different for the cases arising at public as compared with private IHEs despite the added avenue of constitutional protections as the public IHEs.

This article explores the responsibility of university and college administrators, technology managers and licensing officers to consider broad stakeholder impacts in intellectual property ownership and enforcement decisions. It finds that there is a lack of coherency in policies, in part due to the failure to comprehensively assess university and college IP. Moreover, there is outright hostility toward a national regulatory option that could add uniformity. This article provides guidance by proposing a balancing framework that ties together various forms of intellectual property. It includes example tools based on the concept of copyright "fair use" that can be used to achieve an optimal blend of social good and local income.

unfettered ability of professional schools to sanction these students interferes with their First Amendment right to freedom of speech. Further, by categorizing the sanctions as academic in nature, professional schools are able to avoid the heightened procedural requirements for disciplinary sanctions accorded students under the Fourteenth Amendment. This Note calls for a new framework for addressing professional student claims in light of the growth of social media and the particularly harsh result reached in Keefe v. Adams and analogous cases.

Where the Federal Government Fails State Legislatures Can Succeed: Eliminating Student Debt by Regulating For-Profit Colleges and Universities

Matthew Munro 627

With the growing student debt crisis, the disproportionate amount of federal student aid going into for-profit colleges and universities has been identified as a primary problem. As a result, the practices of for-profit colleges and universities have been highly scrutinized, and both federal and state governments have made attempts to regulate such institutions. This article will examine the failed regulatory attempts by the Department of Education, as well as a newly established legislative and regulatory scheme in California. It will conclude that the regulatory failures at the federal level have left state governments in the strongest position to regulate the nefarious practices of for-profit intuitions.

College and University Data Breaches: Regulating Higher Education Cybersecurity Under State and Federal Law

Katie Beaudin 657

This Note explores how colleges and universities react and respond to data breaches as they become increasingly common in the higher education context. These institutions are subject to both federal regulations and state notification laws that alter how they prepare for data breaches and how they deal with the aftermath. This Note proffers best practices for colleges and universities, and examines the types of lawsuits these institutions can expect to face following a major cybersecurity breach.

ARE PROCEDURAL AND SUBSTANTIVE STUDENT CHALLENGES TO DISCIPLINARY SANCTIONS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION JUDICIALLY MORE SUCCESSFUL THAN THOSE AT PRIVATE INSTITUTIONS?

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INTRODUCTION

When faced with sanctions, including but not limited to dismissals,[1] students at public institutions of higher education (IHEs) may obtain judicial review under Fourteenth Amendment due process and other constitutional bases,[2] whereas their counterparts at private IHEs lack this protection. Exemplifying this glaring gap for students at private IHEs, Shook characterized their counterparts as follows: "[T]he public university student enters the arena of disciplinary hearings brandishing the sharp sword of constitutional safeguards."[3]

My recent empirical analysis of the case law specific to disciplinary sanctions of students in private IHEs showed that the courts, rather than closing the door on such cases, have provided procedural and substantive review under a contract or more general theory of jurisdiction.[4]

This Article provides a similarly systematic and comprehensive analysis of the case law at public IHEs, with the primary focus being on whether their constitutional safeguards serve as the purported sharp sword. After setting forth the framework in terms of the intersecting dimensions of type of IHE (i.e., public or private) and category of conduct (i.e., academic or nonacademic), the Article follows the template of empirical analyses in

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1. The use of a broad rubric, such as "sanctions," is purposeful here in light of not only the courts' disinclination to be definitive and uniform about the level of adverse action that qualifies as a property or liberty interest under the Fourteenth Amendment but also the focus here on an encompassing scope of institutions' disciplinary, as compared with academic, actions.

2. The pertinent other constitutional avenues include the First Amendment express and Fourteenth Amendment equal protection, although Fourth Amendment search/seizure and Fifth Amendment self-incrimination protections are more separably secondary. The primary focus for the institutional comparison is due process. *See, e.g.*, Project, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795 (1970).

3. Marc H. Shook, *The Time is Now: Arguments for the Expansion of Rights for Private University Students in Academic Disciplinary Hearings*, 24 LAW & PSYCHOL. REV. 77, 77 (2000); *see also* Wendy J. Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1009–10 (2006) (emphasizing the difference based on the presence or absence of "state action").

4. Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—As Compared with Public—Institutions of Higher Education: A Glaring Gap?*, 83 MISS. L.J. 863 (2014). "General" represents a broad, default category that started with a New York appellate case in 1893 that applied an arbitrary and capricious standard. *Id*. at 888. The theories of fiduciary duty and private associations played a negligible role. *Id.* at 873.

terms of the method, results, and discussion.

I. FRAMEWORK

Subject to further focusing,[5] Figure 1 provides the overall contextual framework for this analysis. The first row provides the area of stereotyped and supposed stark contrast.

Figure 1. Primary Avenues for Student Challenges to Sanctions of Public and Private IHEs

	Public IHE	**Private IHE**
Federal Constitution (e.g., 14th Am. procedural and substantive due process)		
State Common Law Torts (e.g., intentional infliction of emotional distress)		
Federal or State Civil Rights Acts (e.g., Titles VI or IX)		

As alternate avenues for judicial redress, the other rows of Figure 1 shows that students at both types of IHEs generally may obtain judicial review via federal civil rights laws, such as Title VI of the Civil Rights Act[6] or Title IX of the Education Amendments,[7] and state law, including human rights statutes and common law torts. However, these avenues offer only limited protection,[8] and they are largely common to both types of institutions.[9] In light of the "state action" prerequisite,[10] the distinctive fitting av-

5. *See infra* Figure 2.

6. 42 U.S.C. § 2000d (2010) (prohibiting discrimination on the basis race, ethnicity, or national origin in institutions that receive federal financial assistance).

7. 20 U.S.C. § 1681(a) (2010) (prohibiting discrimination based on sex at institutions that receive federal financial assistance).

8. The primary reasons are that 1) the federal laws typically only apply to designated "protected" groups; 2) the corresponding state laws vary from one jurisdiction to another; and 3) the tort law, such as intentional infliction of emotional distress, do no square well with the typical facts of IHE student discipline.

9. For example, the "federal financial assistance" requisite of some federal civil rights laws, such as Section 504 of the Rehabilitation Act, does not pose a significant difference between public and private IHEs in light of the wide application in the con-

enue in public IHEs consists of constitutional claims.

A. Due Process Protections at Public IHEs

The primary basis for constitutional, procedural, and substantive protections for challenging student sanctions at public IHEs is the Fourteenth Amendment's due process clause and, for the federal military academies, its counterpart under the Fifth Amendment.[11] In two successive decisions following an initial decision in the K-12 context,[12] the Supreme Court delineated the extent of Fourteenth Amendment procedural and substantive due process in relation to academic sanctions[13] at public IHEs. However, as these two Court opinions reveal, the limitation to academic matters is not clear-cut as a matter of the rulings or the rationales.

In its 1978 decision in *Board of Curators of University of Missouri v. Horowitz*,[14] the Court held that, in terms of Fourteenth Amendment procedural due process, public IHEs need not provide a hearing for dismissal of a student based on academic, as contrasted with disciplinary, grounds. In the majority's view, "[t]his difference calls for far less stringent procedural requirements in the case of an academic dismissal."[15] Specifically in response to a public IHE's dismissal of a fourth-year medical student for clinical deficiencies, including personal hygiene, peer and patient relations, and timeliness, the Court ruled:

> Assuming [without deciding] the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss re-

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text of higher education. *See, e.g.,* Radcliff v. Landau, 883 F.2d 1481, 1483 (9th Cir. 1989).

10. *See, e.g.*, Ralph D. Mawdsley, Commentary, *State Action and Private Educational Institutions*, 117 EDUC. L. REP. 411 (1997).

11. For the secondary and separable constitutional alternatives, see, for example, *supra* note 2.

12. Goss v. Lopez, 419 U.S. 565 (1975) (interpreting the Fourteenth Amendment's due process clause as requiring for a disciplinary suspension from one to ten days, a minimum of oral notice, and an opportunity for the student to tell his/her side of the story).

13. Although these decisions were specifically in response to student dismissals, the Court did not determine whether this severe action constituted the requisite liberty or property interest. Thus, the broader rubric of student sanctions is useful to extend to any other adverse IHE actions that may similarly fit within these protected confines.

14. 435 U.S. 78 (1978).

15. *Id.* at 86.

spondent was careful and deliberate.[16]

In doing so, the *Horowitz* Court reflected the fuzzy boundary between academic evaluations and disciplinary determinations. For example, supporting "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct,"[17] the Court cited its earlier decision that applied Fourteenth Amendment procedural due process to a clearly disciplinary action against a high school student.[18] Similarly, the majority found further support for its ruling in the overall nature of an educational institution,[19] thus subsuming both academic and disciplinary actions.[20] Moreover, Justice Marshall's partial dissent pointedly questioned the reliance on and workability of the distinction between "academic" and "disciplinary" matters.[21]

Although the *Horowitz* Court briefly visited Fourteenth Amendment substantive due process,[22] the subsequent decision in *Regents of University of Michigan v. Ewing*[23] crystallized its application by limiting judicial review to a narrow avenue. More specifically, in rejecting another medical student's dismissal from a public IHE,[24] the *Ewing* Court ruled that Fourteenth Amendment substantive due process only applies to a public IHE's adverse academic action if it is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[25] Although the dismissal in this case was unquestionably academic, as it was based on the student's failure of an important examination, the Court also relied in part on broader

16. *Id.* at 84–85.

17. *Id.* at 86.

18. *Id.* at 85–86 (citing Goss v. Lopez, 419 U.S. 565 (1975)).

19. *See, e.g.*, *id.* at 88 ("A school is an academic institution, not a courtroom or administrative hearing room."); *see also id.* at 91 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (supporting judicial deference to public educational institutions)).

20. On the other hand, the majority used *Goss* to distinguish between the factual determinations and adversary flavor of a disciplinary determination and the more subjective and educational nature of academic evaluations. *Id.* at 89–90.

21. *Id.* at 104 n.18, 106 (Marshall, J., partially dissenting).

22. *Id.* at 91–92 ("In this regard, a number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly arbitrary or capricious.' Even assuming that the courts can review under such a standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case." (internal citations omitted)).

23. 474 U.S. 214 (1985).

24. Again, the Court assumed that the student had a constitutionally protected interest without providing any analysis of what exactly constituted this requisite liberty or property right. *Id.* at 223.

25. *Id.* at 225.

considerations of judicial deference to legislation and to educational institutions.[26]

For disciplinary sanctions, i.e., those amounting to denials of the requisite property or liberty interest for student violations of valid rules of conduct,[27] the corresponding lower court decisions are the focus of this up-to-date empirical analysis. Early overviews showed that the Fourteenth Amendment provides more procedural protection than the academic-sanction cases,[28] although not entitling the student to the full-blown safeguards of adversarial civil proceedings, and with substantive due process playing a much more minor role based on its rather remote boundary.[29]

B. Academic v. Disciplinary Sanctions at Public and Private IHEs

The division between what one commentator translated as "cognitive" v. "non-cognitive" performance[30] pre-dates *Horowitz*.[31] Yet, despite cogent commentary in favor of a more nuanced approach,[32] the courts have con-

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26. *Id.* at 225–26.

27. *See supra* text accompanying note 17.

28. For a discussion of this contrasted category, see, for example, Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 AM. U. L. REV. 267, 338–61 (1992).

29. *See, e.g.*, Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359 (1987).

30. Joseph M. Flanders, *Academic Student Dismissals at Public Institutions of Higher Education: When is Academic Deference Not an Issue?*, 34 J.C. & U.L. 21, 46 (2007). However, this re-formulation does not provide a semantic solution. *See, e.g.*, Richmond v. Fowlkes, 228 F.3d 854, 858 (8th Cir. 2000) (upholding, in light of *Horowitz* the academic characterization of dismissal of pharmacy student based on the faculty's "non-cognitive evaluation"). Further revealing the semantic difficulties in line-drawing, another commentator, who is a higher education administrator, used "non-academic," in contrast to "academic" to refer to off-campus student activities, but, again, without consistent clarity. John Friedl, *Punishing Students for Non-Academic Conduct*, 26 J.C. & U.L. 701 (2000).

31. *See* Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975) (citing Brookins v. Bonnell, 362 F. Supp. 379, 382 (E.D. Pa. 1973) ("We are well aware that there has long been a distinction between cases concerning disciplinary dismissals, on the one hand, and academic dismissals, on the other.").

32. In the leading commentary on this issue, Dutile, observed, for example, that "situations in which higher-education students face adverse institutional decisions occupy a spectrum ranging from the purely academic through the purely disciplinary." Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy*, 29 J.C. & U.L. 619, 626 (2003). He advocated a unified approach, whereby "the nature of the hearing will vary with the nature of the loss" and courts accord "appropriate deference to the expertise. . .whether academic or disciplinary. . .of college and university decisionmakers." *Id*. at 652. Among subsequent commentary following Dutile's lead, see, for example, Flanders, *supra* note 30, at 76 (advocating treating each case as "mixed" with the court parsing the facts into cognitive and non-cognitive issues).

tinued to recite the academic-nonacademic dichotomy. For example, although Sinson observed, by way of example, that "bizarre and disruptive conduct of graduate students in clinical work may be academic or nonacademic because it 'reflect[s] both on the student's academic performance and the student's deportment,'"[33] the lower courts have followed *Horowitz* consistently in treating clinical cases, including student-teaching, as academic.[34] For cheating and plagiarism, the courts have been less consistent, but these issues would appear to be on the non-academic side of the line for several interrelated reasons. First, given the *Horowitz* Court's adoption of the traditional judicial framework of a dichotomy, thus limited to only two options, cheating and plagiarism are more a matter of "misconduct" than "failure to attain a standard of excellence in studies."[35] Second, the model codes of student conduct typically include cheating and plagiarism.[36] Third, while characterizing issues such as cheating as having "mixed status,"[37] Lee concluded "the prevailing view of courts across the federal circuits is that academic misconduct (as opposed to academic failure) should be viewed as a disciplinary matter, which entitles the student to procedural due process."[38] For example, in various student-cheating cases at public IHEs, courts have rejected the academic label.[39] Fourth, subsuming plagia-

33. Scott R. Sinson, Note, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L. REV. 195, 207 (1997) (quoting Pflepsen v. Univ. of Osteopathic Med., 519 N.W.2d 390, 391 (Iowa 1994)).

34. *See, e.g.*, Hennessey v. City of Melrose, 194 F.3d 237, 251 (1st Cir. 1999) ("The appellant's conduct at Horace Mann had academic significance because it spoke volumes about his capacity to function professionally in a public school setting."); Nickerson v. Univ. of Alaska Anchorage, 975 P.2d 46, 53 (Alaska 1999) ("While acknowledging that there is no clearly identifiable line between academic and disciplinary proceedings, we nevertheless recognize that school teachers must possess the ability to interact effectively with their students and colleagues, and, while less than tangible, such a skill may form an academic requirement necessary for satisfactory completion of a teaching program.").

35. Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 87 (1978) (citing Barnard v. Inhabitants of Shelburne, 102 N.E. 1095, 1097 (Mass. 1913)).

36. *See, e.g.*, Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script*, 31 J.C. & U.L. 1, 27 (2004); Gary Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137, 142 (1980).

37. Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J.C. & U.L. 511, 518 (2013) ("Plagiarism, cheating, and other forms of academic misconduct have a behavioral component, but determining whether academic misconduct occurred also requires professional judgment on the part of faculty or administrators—particularly in the case of plagiarism.").

38. *Id.* (citing four public IHE cases).

39. *See, e.g.*, Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 74 (4th Cir.

rism and cheating under the rubric "academic wrongdoing" as compared to "academic failure," Berger and Berger pointed out that despite the ultimate frequent fusion in terms of a course grade of an "F," the "foremost difference lies in the far deeper stigma that adheres to the finding of wrongdoing."[40] Finally, as they also pointed out, "in many situations proof of academic wrongdoing will not require an instructor's singular expertise."[41]

C. The Specific Scope of the "Gap"

Providing the refined focus of this Article, Figure 2 shows the boundaries of the purported gap between public and private IHEs. More specifically, Figure 2 magnifies the focus on the gap in the first row of Figure 1 to

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1983) (concluding that cheating was disciplinary rather than "evaluating the academic fitness of a student."); Slaughter v. Brigham Young Univ., 514 F.2d 622, 624 (10th Cir. 1975) (scholarly dishonesty is "on the conduct or ethical side rather than an academic deficiency."); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) ("[C]heating, [is] an offense which cannot neatly be characterized as either 'academic' or 'disciplinary'. The Supreme Court's reasoning in *Horowitz,* however, persuades me that cheating should be treated as a disciplinary matter."), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986); Lightsey v. King, 567 F. Supp. 645, 648 (E.D.N.Y. 1983) ("[D]espite the artful semantics of the defendants, this is not an instance of discretionary grading, and the cases relating to academic standards and sanctions for academic deficiencies are not apposite. This is a disciplinary matter, rather than an academic one. . ."); Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 931 (Tex. 1995) ("This argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."). *But cf.* Garshman v. Pa. State Univ., 395 F. Supp. 912, 920–21 (M.D. Pa. 1975) (ultimately analogizing cheating to professorial competence, which courts treat as an academic matter). The private IHE cases are less clear and direct in their characterization of cheating. *See, e.g.*, Valente v. Univ. of Dayton, 438 F. App'x 381, 384, 388 (6th Cir. 2011) (referring to disciplinary hearing but separately emphasizing academic standards); Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413, 438 (D.N.J. 1985) (emphasizing judicial deference regardless of whether an academic matter); Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984); Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 273 (N.J. Super. Ct. App. Div. 1982) (deferring to private IHE's characterization of cheating as an academic matter).

40. Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 303 (1999); *see also* Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 57 (2010) ("[D]isciplinary matters such as plagiarism or cheating, which potentially implicate serious and career-altering penalties, invite greater judicial scrutiny [than academic matters] . . . "); *cf.* Jennifer N. Buchanan & Joseph C. Beckham, *A Comprehensive Academic Honor Policy for Students: Ensuring Due Process, Promoting Academic Integrity, and Involving Faculty*, 33 J.C. & U.L. 97, 104–05 (2006) ("[A]cademic misconduct implicates the full range of due process protections available to students in public colleges and universities because the stigma associated with dishonesty and the potential loss of academic standing implicate liberty and property interests under the Fourteenth Amendment.").

41. Berger & Berger, *supra* note 40, at 303.

converge on student protections at public IHEs specific to nonacademic conduct.

Figure 2. Focusing on the Gap with Magnification

	Conduct	Public IHE	Private IHE
Procedural and Substantive Protections of Students	Nonacademic		
	Academic		

Based on the aforementioned[42] balance of authority and consistent with the prior Article, [43] cases of plagiarism and other forms of academic dishonesty were on the nonacademic side of the line, whereas case of clinical conduct were on the academic side. Moreover, in light of the findings of the previous Article, the purportedly dark segment includes the procedural and substantive protections under not only the Constitution but also, as a secondary non-distinctive strand, the contract and general theories that have emerged in the corresponding private IHE segment.

The purpose of this Article is to provide an empirical analysis[44] of the student litigation challenging sanctions for non-academic conduct at public

42. *See supra* text accompanying notes 33–41.

43. Zirkel, *supra* note 4 and accompanying text.

44. Although a broad, relatively imprecise term, "empirical" in this context refers to a systematic approach that introduces a quantitative dimension to supplement traditional qualitative legal analysis. For examples of the specific version of this approach, see Susan Bon & Perry A. Zirkel, *The Time-Out and Seclusion Continuum: A Systematic Analysis of Case Law*, 27 J. SPECIAL EDUC. LEADERSHIP 25 (2014); Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353 (2008); Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299 (2014); Linda Mayger & Perry A. Zirkel, *Principals' Challenges to Adverse Employment Actions: A Follow-Up Empirical Analysis of the Case Law*, 308 EDUC. L. REP. 588 (2014); Mark Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?*, 300 EDUC. L. REP. 1 (2014); Perry A. Zirkel, *Public School Student Bullying and Suicidal Behaviors: A Fatal Combination?*, 42 J.L. & EDUC. 633 (2013); Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175 (2011); Perry A. Zirkel & Caitlyn A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323 (2011); Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014).

IHEs, with the comparison to the findings for the corresponding case law at private IHEs as a background comparison. The specific questions are as follows:[45]

1. Within the specified scope, what is the total number of the court decisions?

2. In which jurisdictions have these decisions arisen?

3. How far back do these decisions date, and has their frequency changed during the intervening decades?

4. What has been the distribution of these decisions in terms of the a) student's level of education, b) type of conduct,[46] and c) level of sanction?

5. What has been the distribution of the various adjudicated claim categories, such as constitutional procedural due process and substantive due process,[47] in terms of (a) frequency, and (b) outcomes (i.e., claim category rulings)[48]?

6. What has been the overall outcomes distribution of the (a) claim category rulings and, moving to the larger unit of analysis of the decisions as a whole,[49] (b) the cases?

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45. These questions basically parallel those for the previous Article, Zirkel, *supra* note 4, at 874, except that the focus of the statistical comparison of outcomes here is between the public and the private IHEs. Conversely, this set of questions omits the statistical comparison of outcomes in terms of level of education, type of conduct, and level of sanction because 1) there is no reason to suspect significant differences in light of the findings of the previous Article (*id*. at 881–82), and 2) the public IHE cases provided less precise differentiation for each of these factors, due in part to the group nature of the conduct during the *Dixon* era.

46. As a combination of objectivity and simplicity, the references herein are to "conduct" or "alleged misconduct" rather than to the generic use of "misconduct" except where quoting a commentator or summarizing the court's characterization of what are typically allegation assumed for the sake of procedural disposition as fact.

47. "Claim category" is the designation of the tabulated rulings within each case. For the differentiation of the unit of analysis between the case and the rulings in the case, see, e.g., Chouhoud & Zirkel, *supra* note 44, at 367–68; Zirkel, *supra* note 44, at 639 (issue rulings); Holben & Zirkel, *supra* note 44, at 311; Paige & Zirkel, *supra* note 44, at 4; Zirkel & Lyons, *supra* note 44, at 335 (claim rulings); Zirkel & Skidmore, *supra* note 44, at 543–44 (issue category rulings). The reason for the "category" modifier is that the choice was to use the broad basis, such as Fourteenth Amendment due process, rather than the variations within it, such as insufficient notice or alleged hearing violations, such as lack of an impartial adjudicator or legal representation. For the specific categories in the tabulation, see *infra* note 67.

48. "Outcome" refers to whether the adjudication favored the student or the IHE according to the specific scale. *See infra* text accompanying note 69.

49. The outcome is for the final decision as a whole is based on the most student-favorable claim category ruling in the case. For example, if the student raised and the final decision adjudicated claims under more than one category of Fourteenth Amend-

7. Have these outcomes differed significantly between the public and the private IHE cases?

II. METHOD

The successive sources of the case law consisted of 1) a Boolean search of federal and state cases in Westlaw[50]; 2) a review of the higher education chapter of each YEARBOOK OF EDUCATION LAW since 1970[51]; 3) the citations in relevant law review articles[52]; and 4) the cases cited in the court decisions initially determined to fit within the scope of the study.[53] Similar to the prior Article,[54] the public IHEs, choices in relation to marginal cases resulted in more refined boundaries in terms of the various exclusions of court decisions that otherwise concerned student sanctions for nonacademic

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ment due process, with the ruling under procedural due process being conclusively in favor of the student and the one under substantive due process being in favor of the defendant IHE, the outcome entry for the case was conclusive in favor of the student. The rationale is that where the plaintiff resorted to the "spaghetti" strategy of resorting to multiple strands, or claims, the ultimate test is whether any of them "stuck." For previous examples of this conflation procedure for moving from the constituent to the case unit of analysis, see Bon & Zirkel, *supra* note 44, at 39–40; Mayger & Zirkel, *supra* note 44, at 592; Zirkel & Lyon, *supra* note 44, at 344.

50. The search terms included various combinations of "student," "state-supported," "college," "university," "disciplin!," "suspension," "expulsion," and "sanction."

51. The Education Law Association (formerly, the National Organization on Legal Problems of Education) publishes these annual compilations of court decisions. The earliest one that contained a chapter or appendix with college and university discipline cases was in 1969. Lee O. Garber & Edmund Reutter, THE YEARBOOK OF SCHOOL LAW 285 (1969). The most recent one was the 2014 edition. Joy Blanchard & Elizabeth T. Lugg, *Students in Higher Education*, *in* THE YEARBOOK OF EDUCATION LAW 207 (Charles J. Russo ed., 2014). The continuation of these sources for the period after the 2014 yearbook consisted of the higher education case blurbs in the Education Law Association's monthly SCHOOL LAW REPORTER.

52. E.g., Swem, *supra* note 29; Flanders, *supra* note 30; Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference between State and Private Educational Institution Disciplinary Legal Requirements*, 9 N.H. L. REV. 443 (2011); Edwin N. Stoner & Corey A. Detar, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 26 J.C.& U.L. 273 (1999); Edwin N. Stoner II & Bradley J. Martineau, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 28 J.C.& U.L. 311 (2002); Edwin N. Stoner & Bradley J. Martineau, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education*, 27 J.C.& U.L. 313 (2000); Edwin N. Stoner & Maraleen D. Shields, *Disciplinary and Academic Decisions Pertaining to Students in Higher Education – 2001*, 29 J.C.& U.L. 287 (2003).

53. For example, the New York court decisions, although having relatively short opinions, often contained string citations that included other relevant cases.

54. Zirkel, *supra* note 4, at 864–65. This version similarly excluded cases based on grounds that were applicable to both public and private IHEs, such as those based solely on federal or state civil rights legislation. *Id.*

conduct. First, in light of Figure 2, the scope excluded public IHE cases concerning academic sanctions.[55] Serving as the second but less robust exclusion were the relatively few cases relying solely on state laws.[56] The third exclusion consisted of cases limited to admission, readmission, or other institutional action in the absence of discipline.[57] Fourth, based on

55. *See, e.g.*, Bissessur v. Ind. Univ. Bd. of Trs., 581 F.3d 599 (7th Cir. 2009); Rogers v. Tenn. Bd. of Regents, 273 F. App'x 458 (6th Cir. 2008); Bell v. Ohio State Univ., 351 F.3d 240 (6th Cir. 2003); Richmond v. Fowlkes, 228 F.3d 854 (8th Cir. 2000); Megenity v. Stenger, 27 F.3d 1120 (6th Cir. 1994); Davis v. Mann, 882 F.2d 967 (5th Cir. 1989); Harris v. Blake, 798 F.2d 419 (10th Cir. 1986); Schuler v. Univ. of Minn., 788 F.2d 510 (8th Cir 1986); Mauriello v. Univ. of Med. & Dentistry of N.J., 781 F.2d 46 (3d Cir. 1986); Ikpeazu v. Univ. of Neb.,775 F.2d 250 (8th Cir. 1985); Hines v. Rinker, 667 F.2d 699 (8th Cir. 1981); Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975); Keefe v. Adams, 44 F. Supp. 3d 874 (D. Minn. 2014); Burnett v. Coll. of the Mainland, 994 F. Supp. 2d 823 (S.D. Tex. 2014); Stoller v. Coll. of Med., 562 F. Supp. 403 (M.D. Pa. 1983), *aff'd mem.*, 727 F.2d 1101 (3d Cir. 1984); Davis v. George Mason Univ., 395 F. Supp. 2d 331 (E.D. Va. 2005); Rossomando v. Bd. of Regents of Univ. of Neb., 2 F. Supp. 2d 1223 (D. Neb. 1998); Jenkins v. Hutton, 967 F. Supp. 277 (S.D. Ohio 1997); Carboni v. Meldrum, 949 F. Supp. 427 (W.D. Va. 1996); Lewin v. Med. Coll. of Hampton Roads, 910 F. Supp. 1161 (E.D. Va. 1996); Thomas v. Gee, 850 F. Supp. 665 (S.D. Ohio 1994); Davis v. Mann, 721 F. Supp. 796 (S.D. Miss. 1988); Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982); Ross v. Penn. State Univ., 445 F. Supp. 147 (M.D. Pa. 1978); Connelly v. Univ. of Vt. & State Agric. Coll., 244 F. Supp. 156 (D. Vt. 1965); Nickerson v. Univ. of Alaska Anchorage, 975 P.2d 46 (Alaska 1999); Dillingham v. Univ. of Colo. Bd. of Regents, 790 P.2d 851 (Colo. Ct. App. 1989); Gordon v. Purdue Univ., 862 N.E.2d 1244 (Ind. Ct. App. 2007); Lusardi v. State Univ. of N.Y. at Buffalo, 726 N.Y.S.2d 202 (App. Div. 2001); Sofair v. State Univ. of N.Y. Upstate Med. Ctr. Coll. of Med., 377 N.E.2d 730 (Ct. App. N.Y. 1978); Organiscak v. Cleveland State Univ., 762 N.E.2d 1078 (Ohio Ct. Cl. 2001); Elliott v. Univ. of Cincinnati, 730 N.E.2d 996 (Ohio Ct. App. 1999); Bleicher v. Univ. of Cincinnati Coll. of Med., 604 N.E.2d 783 (Ohio Ct. App. 1992); Elland v. Wolf, 764 S.W.2d 827 (Tex. Ct. App. 1989); Univ. of Tex. Health Sci. Ctr. At Houston v. Babb, 646 S.W.2d 502 (Tex. Ct. App. 1982); Lucas v. Hahn, 648 A.2d 839 (Vt. 1994); *cf.* Wheeler v. Miller, 168 F.2d 241 (5th Cir. 1999) (close call – doctoral dismissal w. alleged but unproven connection to cheating); Harris v. Blake, 798 F.2d 419 (10th Cir. 1986) (close call – court determined); Fuller v. Schoolcraft Coll., 909 F. Supp. 2d 862 (E.D. Mich. 2012) (close call – falsified nursing application); Heenan v. Rhodes, 757 F. Supp. 2d 1229 (M.D. Ala. 2010) (close call – criticism of clinical point program); Qvyjt v. Lin, 932 F. Supp. 1100 (N.D. Ill. 1996) (close call – intertwined misconduct and admission); Neel v. Ind. Univ. Bd. of Trs., 435 N.E.2d 607 (Ind. Ct. App 1982) (close call – clinical absences); Nawaz v. State Univ. of N.Y. at Buffalo Sch. of Dental Med., 744 N.Y.S.2d 590 (App. Div. 2002) (close call – clinical directive).

56. *See, e.g.*, Hand v. Matchett, 957 F.2d 791 (10th Cir 1992); Hanger v. State Univ. of N.Y., 333 N.Y.S.2d 571 (App. Div. 1972) (authority of board of regents); Morris v. Fla. Agric. & Mech. Univ., 23 So. 3d 167 (Fla. Dist. Ct. App. 2009); Barnes v. Univ. of Okla., 891 P.2d 614 (Okla. 1995); Kusnir v. Leach, 439 A.2d 223 (Pa. Commw. Ct. 1982); Tatum v. Univ. of Tenn., No. 01A01-9707-CH-00326, 1998 WL 426862 (Tenn. Ct. App. July 29, 1998); Daley v. Univ. of Tenn. at Memphis, 880 S.W.2d 693 (Tenn. Ct. App. 1994).

57. *See, e.g.*, Saunders v. Va. Polytechnic Inst., 417 F.2d 1127 (4th Cir. 1969);

the nature of the plaintiff, the scope did not extend to cases specific to the employment role of students.[58] The final exclusions were cases limited entirely to disposition on preliminary adjudicative grounds,[59] including those specific to public IHEs and, thus, arguably closest to inclusion in the case sample: 1) traditional threshold adjudicative issues, such as the application of the statute of limitations[60]; 2) the threshold issue of "state action"[61]; 3) the due process issue of the requisite liberty or property interest[62]; and 4) the threshold institutional defense of Eleventh Amendment immunity.[63]

Some of these exclusions were close calls, reflecting the inevitably blur-

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Woody v. Burns, 188 So. 2d 56 (Fla. Dist. Ct. App. 1996); *cf.* Martin v. Helstad, 699 F.2d 387 (7th Cir. 1983) (close call – also academic v. disciplinary); Bindrim v. Univ. of Mont., 766 P.2d 861 (Mont. 1988) (failure to grant degree).

58. *See, e.g.*, Burrell v. Bd. of Trs. of Univ. of Me. Sys., 15 F. App'x 5 (1st Cir. 2001) (work study); Duke v. N. Tex. State Univ., 469 F.2d 829 (5th Cir. 1972) (teaching assistant); Ross v. Univ. of Minn., 439 N.W.2d 28 (Minn. Ct. App. 1989) (medical residency).

59. Conversely, for those cases that extended to pertinent claim rulings, the tabulation only excluded the rulings beyond the boundaries of the study. *See, e.g.,* Park v. Ind. Univ. Sch. of Dentistry, 692 F.3d 828 (7th Cir. 2012) (tabulation contract and equal protection rulings, while excluding procedural and substantive due process claims, which the court rejected on threshold grounds).

60. *See, e.g.*, Philips v. Marsh, 687 F.2d 620 (2d Cir. 1982) (mootness and availability of preliminary injunction); Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970) (jurisdiction); Hill v. Trs. of Ind. Univ., 537 F.2d 248 (7th Cir. 1976) (exhaustion and standing); Phillips v. United States, 910 F. Supp. 101 (E.D.N.Y. 1996); Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991) (exhaustion); Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968); Keeney v. Univ. of Oregon, 36 P.3d 982 (Or. Ct. App. 2001) (mootness); Siblerud v. Colo. State Bd. of Agric., 896 F. Supp. 1506 (D. Colo. 1995) (statute of limitations); Salau v. Deaton, 433 S.W.3d 449 (Mo. Ct. App. 2014) (lack of final order); Schuyler v. State Univ. of N.Y. at Albany, 297 N.Y.S.2d 368 (App. Div. 1969) (injunctive remedy); Tex. Agric. & Mech. Univ. v. Hole, 194 S.W.3d 591 (Tex. Ct. App. 2006) (ripeness).

61. *See, e.g.*, Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Counts v. Voorhees Coll. 312 F. Supp. 598 (D.S.C. 1970).

62. *See, e.g.*, Charleston v. Bd. of Trs. of Univ. of Ill. at Chicago, 741 F.2d 769 (7th Cir. 2013); Williams v. Wendler, 530 F.3d 584 (7th Cir. 2008); Mercer v. Bd. of Trs. for Univ. of N. Colo., 17 F. App'x 913 (10th Cir. 2001); Lee v. Bd. of Trs. of W. Ill. Univ., 202 F.3d 274 (7th Cir. 2000); Harris v. Blake, 798 F.2d 419 (10th Cir. 1986); Krasnow v. Va. Polytechnic Inst., 551 F.2d 591 (4th Cir. 1977); Hill v. Trs. of Ind. Univ., 537 F.2d 248 (7th Cir. 1976); Mutter v. Madigan, 17 F. Supp. 3d 752 (N.D. Ill. 2014); Lee v. Univ. of Mich.-Dearborn, No. 5:06-CV-66, 2007 WL 2827828 (W.D. Mich. Sept. 27, 2007); Tobin v. Univ. of Me., 59 F. Supp. 2d 87 (D. Me. 1999); Szejner v. Univ. of Alaska, 944 P.2d 481 (Alaska 1997); Soong v. Univ. of Hawaii, 825 P.2d 1060 (Haw. 1992).

63. *See, e.g.*, Alston v. Kean Univ., 549 F. App'x 86 (3d Cir. 2013); Marino v. City Univ. of N.Y., 18 F. Supp. 3d 320 (E.D.N.Y. 2014); Robinson v. Green River Cmty. Coll., No. C10-0112-MAT, 2010 WL 3947493 (W.D. Wash. Oct. 7, 2010).

ry boundaries at the margins.[64] After determining the cases for inclusion, the first step was Shephardizing to identify the most recent relevant decision. The next step was summarizing selected information from each of these cases chronologically in a table[65] starting with the case name and the remainder of the citation and ending with clarifying comments, which included noted partial exclusions in brackets. In between, the table contains the following columns: 1) the state where the case arose; 2) a descriptor that includes the sanction level (e.g., suspension or expulsion), the student's educational level (e.g., undergraduate or medical), and the alleged misconduct (e.g., sexual harassment or exam cheating)[66]; 3) the claim basis that the court ruled on;[67] and 4) the judicial outcome of each claim basis[68] according to this four-category nominal scale[69]:

P = conclusively in favor of the plaintiff-student

( )=inconclusive, most often in favor of P (plaintiff-student) based on denial of defendant's motion for dismissal or summary judgment, but occasionally based on denial of both parties motions for summary judgment

P/D= mixed outcome, partially in favor of each side

U = conclusively in favor of the defendant university

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64. The table designates as "marginal" those close calls that, on balance, resulted in inclusion, rather than exclusion.

65. *See infra* Appendix C.

66. The specificity of these entries largely depended on the amount of detail in the court's opinion, although the descriptor was deliberately concise.

67. The categories for the claim basis, which yielded more than one entry in some cases, were as follows:

- 14th (or 5th) Amendment procedural due process (PDP) or substantive due process (SDP)
- 14th Amendment vagueness (or irrebuttable presumption) often combined with 1st Amendment overbreadth
- 14th Amendment equal protection (EP)
- 1st Amendment expression (Exp.)
- General or contract theory

In contrast, as noted in bracketed comments in the final column, the tabulation excluded incidental or peripheral claims, such as Fourth Amendment search/seizure and Fifth Amendment self-incrimination and double jeopardy, and state administrative procedures act (APA).

68. The designation of this outcome is "claim category ruling." See *supra* note 47.

69. "Nominal" in this context refers to the scale being separate categories without any ranking, or ordinality. Thus, whether an outcome of P is better or higher than an outcome of U depends on the opposing perspectives of the parties but is not answerable from an objective, or neutral, perspective. The four-category scale was a slight modification of the corresponding version in Zirkel, *supra* note 4, at 880–81.

III. RESULTS

This part reports the findings in relation to the aforementioned[70] questions. The interpretation of these findings is reserved for Part IV (Discussion). The tabulation of the cases is in Appendix B.

In response to the first two questions, the total number of cases within the specified scope of the gap is one hundred eighty-five, representing forty states, the District of Columbia, and Puerto Rico. The leading states have been New York (n=27), Texas (n=14), and Virginia (n=11).[71] In comparison, the corresponding analysis for private IHEs found ninety-five cases, representing twenty-six states and the District of Columbia, with the leading ones being New York, Massachusetts, and Pennsylvania.[72]

As for question #3, these court decisions date back to the turn of the century, with the first one in 1891, but the constitutional cases not starting until the "landmark"[73] Fifth Circuit decision in *Dixon v. Alabama State Board of Education*.[74] In this case, which is analogous *a fortiori* to the seminal, turning-point role of *Tedeschi v. Wagner College*[75] in the private IHE case law,[76] the Fifth Circuit reversed the trial court to rule that students have a right, under the Fourteenth Amendment due process clause, to notice and a hearing prior to expulsion from a public IHE.[77] Arising prior to the Supreme Court precedents in the context of public education[78] and for the most part more generally,[79] this decision, which was on a 2-to-1 vote, relied primarily on two secondary sources—an A.L.R. annotation and a law review article.[80] Moreover, having decisively ruled on this threshold issue

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70. *See supra* text accompanying notes 45–49.

71. An additional twenty-seven jurisdictions each have at least three cases: Indiana - 9; Florida and Pennsylvania - 8 each; Alabama, Illinois, and Missouri - 7 each; Georgia, Louisiana, Ohio, and Tennessee - 6 each; California, Connecticut, and Michigan - 5 each; Arkansas, South Carolina, and Wisconsin - 4 each; Kentucky and Maryland - 3 each; and Colorado, Kansas, Massachusetts, Maine, Minnesota, North Carolina, Puerto Rico, Rhode Island, and West Virginia - 2 each.

72. Zirkel, *supra* note 4, at 881.

73. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975); *see also* Jones v. State Bd. of Educ., 279 F. Supp. 190, 197 (M.D. Tenn. 1968) ("[t]he leading case").

74. 294 F.2d 150 (5th Cir. 1961).

75. 404 N.E.2d 1302 (N.Y. 1980).

76. Zirkel, *supra* note 4, at 886.

77. *Dixon*, 294 F.2d at 151, 158–59.

78. See *supra* notes 14–26 and accompanying text. For a similarly subsequent pair of employment cases within this context, see Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents of State Coll. v. Roth, 408 U.S. 564 (1972).

79. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Withrow v. Larkin, 421 U.S. 35 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970).

80. *See Dixon*, 294 F.2d at 158–59 (citing 58 A.L.R.2d 903, 909 (1958) and Warren A. Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1407

of the applicability of Fourteenth Amendment procedural due process, the court limited its "guidance" on the nature of the notice and the hearing to not only the disciplinary sanction of expulsion but also the particular circumstances of the case.[81] As the table in Appendix B makes clear, the prior pertinent judicial rulings were, like those in the private IHE context, limited to the non-constitutional theories, whereas the line of procedural due process and other constitutional claim rulings that more fully addressed their contours within the context of disciplinary proceedings for public IHE students proceeded directly after *Dixon*.

Figure 3 portrays the longitudinal trend, by decade, from these early cases to December 21, 2014, when the tabulation was finalized.[82] The vertical dotted line demarcates the turning-point role of *Dixon*.[83] The grey segment of the bar representing the current decade, 2011–20, is a tentative straight-line projection based on continuation of the present rate for the remaining part of the decade.

(1957)).

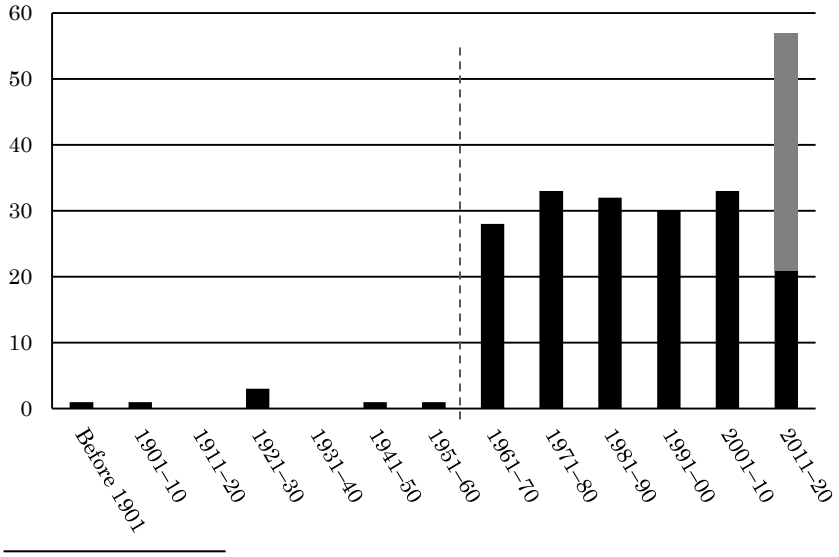
81. *Id.*

> The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. . . . In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection.

82. Due to the time lag in reporting of the decisions, some cases from the latter part of 2014 were not available as of the date of collection and tabulation.

83. As a result of *Dixon*, the starting point of each decade was one year after the corresponding starting points in the private IHE analysis. Zirkel, *supr*a note 4, at 882.

Figure 3. Frequency of Public IHE Nonacademic Sanction Cases per Decade



* Projected estimate extrapolated from 21 (no. as of 12/31/14) x 2.5 (based on 3.7 years after deduction for time lag of approx. 4 mos.) = 57. Dotted line represents *Dixon*.

Figure 3 shows that the totals for each decade were negligible until the 1960s and that the trend has been largely steady since then except for a possible uptick in the present, largely projected decade.[84]

In response to question #4, the distribution of the 185 cases were as follows for the selected factual features:

Student's Educational Level:[85]

84. The projection is very approximate, being based on little more than a third of the decade and an unsophisticated straight-line extrapolation. The specific numbers for each time interval are as follows: 1891–1900 - 1; 1901–10 - 1; 1911–20 - 0; 1921–30 - 3; 1931–40 - 0; 1941–50 - 1; 1951–60 - 1; 1961–70 - 28; 1971–80 - 33; 1981–90 - 32; 1991–2000 - 30; 2001–10 - 33; 2011–20 - 21 as of 12/31/2014, which was the end of data-collection period. The corresponding pattern for the private IHEs was largely parallel, except that the growth onset in the 1960s and 1970s was much more gradual. *Id.* at 882 n. 82.

85. Due to the relatively large number in the final, default category, the percentages here are based on the numbers in the other, more specific categories. The corresponding percentages for the private IHE cases were: undergraduate – 66%; law 9%; medical/dental – 6%; and other graduate – 11%. Zirkel, *supra* note 4, at 882–83.

Undergraduate[86] - 100 (67%)
Law - 12 (8%)
Medical/dental[87] - 22 (15%)
Other graduate- 16 (11%)
Mixed or unspecified[88] - 35 —

Types of Conduct:[89]
Academic dishonesty[90] - 37 (20%)
Sexual harassment or assault - 15 (8%)
Other disruption[91] - 64 (35%)
Political or religious incorrectness[92]- 4 (2%)
Miscellaneous other[93] - 65 (35%)

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86. This category broadly included community colleges (n=7 cases) and military, including merchant marine, academies at the federal or state level (n=14 cases).

87. This category included veterinary medicine (n=3 cases).

88. The majority of the cases in this category were based on groups of students who participated in mass protest demonstrations, such as "sit ins," without clear differentiation or limitation as to educational level.

89. This taxonomy from the previous Article was rather ad hoc, with only academic dishonesty being well-established as a subcategory in the related law review articles (although disputed as to whether it belongs in the academic or nonacademic domain). Moreover, the recitation of the facts, including the characterization of the charges, in the court opinions ranged widely in terms of specificity and terminology, making the entries only approximate. The corresponding percentages for the private IHEs was as follows: academic dishonesty – 34%; sexual harassment or assault – 16%; other disruption – 39%; political or religious correctness – 7%. Zirkel, *supra* note 4, at 883.

90. The leading examples in the category, similar to the private IHE cases, were cheating on an examination and plagiarism.

91. Due to its imprecision and its overlap with the other subcategories, especially assault and miscellaneous, this subcategory was a very broad catchall that ranged from clearly criminal to rather minor social behavior, such as an off-campus party. The most common examples were the various cases of mass protest demonstrations that predominated in the *Dixon* and immediate post-*Dixon* decades (i.e., 1961–70 and 1971–80).

92. This odd category consisted of these early cases: North v. Bd. of Trs. of Univ. of Ill., 27 N.E. 54 (Ill. 1891) (undergraduate who refused to attend mandatory chapel); Woods v. Simpson, 126 A.2d 882, 882 (Md. 1924) (female undergraduate whose behavior was "not readily submissive to rules and regulations"); Tanton v. McKenney, 197 N.W. 510, 511 (Mich. 1924) (female undergraduate who "smoked cigarettes on the public streets . . .[,] rode around the streets . . . in an automobile seated on the lap of a young man, and was guilty of other acts of indiscretion"); State *ex rel.* Ingersoll v. Clapp, 263 P. 433 (Mont. 1928) (female undergraduate who—with her husband, another student—served alcohol at parties in their home).

93. Unlike the private IHE cases, many of the public IHE court decisions did not provide specific information about the nature of the alleged misconduct.

Level of Sanction:[94]
Expulsion/dismissal - 94 (51%)
Diploma revocation- 2 (1%)
Suspension - 80 (43%)
Other, less than suspension[95] - 6 (3%)
Unspecified - 3 (2%)

Thus, the majority of the plaintiff-students were undergraduates, and their challenges were largely to expulsions or suspension for various forms of disruptive conduct or academic dishonesty.

To respond to question #5(a), the tabulation consisted of the general and contract theories that extended from the private IHE cases and the following constitutional categories: procedural due process, substantive due process, vagueness/overbreadth, expression, and equal protection.[96] As a result of some decisions adjudicating more than one claim category, the one hundred eighty-five cases yielded two hundred forty-one pertinent rulings. The distribution of these rulings in terms of the claim categories were as follows:[97]

Procedural due process- 154 (64%)
Expression- 22 (9%)
Vagueness/overbreadth- 17 (7%)
Equal protection- 14 (6%)
Substantive due process - 13 (5%)
Contract - 12 (5%)
General - 9 (4%)

Thus, procedural due process under the Fourteenth Amendment (or, for federal military IHEs, the Fifth Amendment) accounted for almost two-thirds of the rulings, with the other claim categories accounting for less

94. This taxonomy was largely sequential in level of severity, although it is arguable whether expulsion, or dismissal, is at a higher level than diploma revocation. For cases when the student received more than one sanction, the coding entry was for the highest of these subcategories. The corresponding percentages for the private IHE cases were as follows: expulsion/dismissal - 52%; diploma denial - 9%; suspension - 33%; other, less than suspension - 6%. Zirkel, *supra* note 4, at 884.

95. These six cases consisted of failing grade (n=3), probation (n=1), scholarship revocation (n=1); and various (n=1).

96. See *supra* note 67.

97. The corresponding frequency distribution for the private IHE cases was as follows: general - 35%; contract - 63%; law of association - 1%. Zirkel, *supra* note 4, at 888–89.

than one-tenth of the rulings and with the two categories that extend to private IHEs being at the lowest positions.

For question 5(b), the outcomes distribution for each of the claim categories—as presented in more detail in Appendix A—is summarized as follows in descending order of the rate of "U's," i.e., conclusive outcomes in favor of the public IHEs:

Substantive due process - 92%
Equal protection - 92%
Contract- 92%
General - 78%
Procedural due process - 75%
Expression - 70%
Vagueness/overbreadth - 68%

Thus, to the limited extent that the percentage conclusively in favor of the defendant summarizes these results,[98] the outcome's odds appear to be worst for students for the Constitution-based claim categories of substantive due process and equal protection but generally unfavorable across all of the claim categories.

For questions 6(a) and 6(b), Table 1 shows the outcomes distribution for the claim category rulings and, after conflation via the aforementioned[99] best-for-plaintiff basis, for the cases.[100]

98. The percentage of inconclusive rulings, as shown in Appendix A and explained in the Discussion section, plays an intervening role. For example, the alternative of summarizing the distribution in ascending order of the proportion of conclusive rulings in favor of the plaintiff-student is similar but not identical due to the varying percentages in the intermediate outcome category.

99. See *supra* note 49.

100. The conflation only required special treatment in one instance, which has a ruling in state court on one claim and in federal court for two other claims. Because the parties and the challenged discipline was the same, this pair of decisions was counted as one case. Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 637 (6th Cir. 2005) (procedural and substantive due process rulings); No. 04AP-1131, 2005 WL 736626, at *1 (Ohio Ct. App. Mar. 31, 2005) (contract ruling).

Table 1. Overall Outcomes Distribution for Claim Categories and Cases

Unit of Analysis[101]	**P**	**(Inc)**	**U**
Claim category rulings (n=241)	36 (15%)	20 (8%)	185 (77%)
Case decisions (n=185)	32 (17%)	18 (10%)	135 (73%)

Thus, the overall outcomes distribution of the cases was slightly less skewed toward the defendant IHEs as compared with the outcomes distribution. For example, the overall proportion of U's was 73% for the cases in comparison to 77% for the claim category rulings.

Finally, for question 7, Table 2 compares the outcomes distributions of the public IHE cases with those of the private IHE cases from the previous Article.[102] In addition to the descriptive statistics summarizing the outcomes distribution for the public and private IHEs, Table 2 provides the inferential statistic of chi-square (χ^2) to determine whether the difference is significant.[103]

Table 2. Outcomes Distribution Comparison for Public and Private IHE Cases

	P	**(Inc)**	**U**	
Public IHE Cases (n=185)	32 (17%)	18 (10%)	135 (73%)	$\chi^2 = 2.87$ ns

101. For information about these categories and subcategories, see *supra* notes 85–95 and accompanying text.

102. Zirkel, *supra* note 4, at 902–03.

103. As explained in the previous Article, Zirkel, *supra* note 4, at 891 n.138, significance in the context of inferential statistics is a determination of whether the differences are due to chance, i.e., measurement or sampling error, or are generalizable to the population for the sample. Here, the population would be all of the case law within the boundaries of the analysis, rather than the ample but incomplete sample available via Westlaw. Moreover, as explained elsewhere, chi-square is a common statistical test for determining significance for this categorical type of data, with the prevailing standards of probability (p) being .05, or more rigorously, .01. *See, e.g.*, Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U.L. REV. 175, 200 n.157 (citing MEREDITH D. GALL ET AL., EDUCATIONAL RESEARCH 325–27 (2007) and LORRIE R. GAY ET AL., EDUCATIONAL RESEARCH 329 (2009)).

Private IHE Cases (n=95)	10 (11%)	11 (6%)	74 (78%)	

ns = not statistically significant

Table 2 shows that the case outcomes did not differ significantly between the public and private IHEs.

Moreover, alternative bases of comparison yield the same not statistically significant results. More specifically, because distinctive multiple claim categories are more typical of public IHE cases,[104] Appendix B1 uses this alternative unit of analysis as the basis of the comparison, yielding a statistically nonsignificant difference.[105] In the opposite direction, because the purported distinction of the public IHE cases is the availability of Constitution-based claims,[106] Appendix B2 reanalyzes the public IHE decisions to the case outcomes, based on the best-for-plaintiff conflation procedure, in comparison to the private IHE case outcomes, which were based on distinctive theories without the availability of the Constitution. Again, the result was statistical nonsignificance.[107] Thus, with the various bases of analysis, there does not appear to be a generalizable difference between the outcomes of the public IHE and private IHE case law.[108] Figure 4 depicts this culminating finding.

Figure 4. The Purported Institutional Gap: Doctrinal Distinction Without Actual Difference

	Conduct	**Public IHE**	**Private IHE**
Procedural and Substantive Protections of Students	Nonacademic		

104. See *supra* note 49. More specifically, the 185 cases yielded 241 claim category rulings, amounting to a ratio of 1.3 rulings per case. In contrast, the private IHE cases yielded one distinctive ruling per case, based typically on broad and imprecise contract or general theories.

105. See *infra* Appendix B, Outcomes Comparison 1.

106. See *supra* note 3 and accompanying text.

107. See *infra* Appendix B, Outcomes Comparison 2.

108. As an incidental postscript, the results in relation to question 3 in terms of the turning-point role of *Dixon* (see *supra* note 73–83 and accompanying text) and the clustering of the mass protest cases from *Dixon* (1961) to 1980 (see *infra* Appendix C) suggested an outcomes comparison between these two periods, here designated as the *Dixon* era and the subsequent stage. The chi-square analysis reveals a statistically significant difference with a probability exceeding .05 between these two periods, with the outcomes tending to favor the defendant institutions even more strongly during the most recent stage. *See infra* Appendix B, Outcomes Comparison 3.

IV. DISCUSSION

The overall finding in response to question 1 of 185 public IHE cases, in comparison to ninety private IHE cases,[109] appears to be largely attributable to the relative sizes in student population. More specifically, the total number of students in public IHEs has been approximately two to three times the corresponding total for students in private IHEs for many years.[110] Although the relative comparisons are only approximate,[111] any difference in litigation rate appears to be in favor of private IHEs, because the overall ratio of public/private cases is lower than the ratio of public/private enrollments. An equivalent or higher rate of these cases for private IHEs runs counter to the stereotypic "gap" in legal protection for their students.

The findings in response to question 2 of a wider jurisdictional distribution for the public IHE cases and partially different leading states[112] are likely due to the national applicability of the Fourteenth Amendment due process and the other constitutional provisions, whereas the doctrinal development at the private institutions has more gradually germinated and spread from relatively few states, including New York, Massachusetts, and Pennsylvania. New York's generally high level of litigiousness concurrently contributes to its predominant position for both the public and private IHE cases.[113]

The findings, in response to question 3, of a similar, lengthy period but an earlier and clearer turning point for the public IHE cases—*Dixon* in 1961 as compared with *Tedeschi* in 1980[114]—seem to respectively reflect the gradual development of higher education law[115] and its confluence with

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109. *See supra* text accompanying notes 71–72.

110. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (2013) (Table 303.25), *available at* http://nces.ed.gov/programs/digest/d13/tables/dt13_303.25.asp (ratios of public v. private IHO enrollment totals ranging from 3.0 in 1970 to 2.6 in 2012).

111. Examples of inexactitude are that 1) the enrollment totals depend on the defined scope for IHEs and students; 2) the time periods are not identical in length; and 3) the identified court decisions are only the tip of the iceberg of litigation.

112. See *supra* text accompanying notes 71–72 (40 states plus two other jurisdictions for the public IHE cases compared with 26 states plus one other jurisdiction for private IHE cases, with New York the leader for both public and private IHE cases but different states in second and third positions).

113. *See, e.g.*, Perry A. Zirkel, *Trends in Impartial Hearings Under the IDEA: A Follow-Up Analysis*, 303 ED. L. REP. 1, 4 (2014) (finding New York to be the leading jurisdiction both on an overall basis and on an enrollment-adjusted basis for administrative adjudications in the context of K–12 special education).

114. See *supra* text accompanying notes 73–76.

115. *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (3d ed. 2013).

the civil rights movement in the 1960s.[116] As the *Dixon* opinion revealed, the relatively nascent recognition of procedural due process as a matter of constitutional protection[117] and elementary fair play[118] played a contributing role to the upward shift. The higher and wider precedential force of *Dixon*, as compared with *Tedeschi*, and its constitutional underpinning accounted for its more precipitous effect.[119]

The results in relation to question 4 concerning the distribution of the public IHE cases in terms of students' level of education, type of conduct, and category of sanction[120] largely align with expectations[121] but also parallel those of the private IHE cases.[122] Again, for comparison purposes, the overall trend is much more one of similarity than difference.

The results for question 5(a), which concerned the frequency distribution of the claim categories, showed that procedural due process was in first-place by far, and that the contract and so-called general theories were at the opposite, bottom positions.[123] The predominance of procedural due process is attributable to the general judicial inclination toward procedural issues and the specific judicial deference to substantive expertise in the context of education, as evidenced in the *Horowitz* Court's distinction of its academic issue from the disciplinary issue in *Goss v. Lopez*.[124] Although at the obverse end in terms of frequency, the relatively few public IHE cases that relied on the general or contract theory that indistinguishably applies to private IHEs showed the same general deference to institutional authorities.[125]

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116. *See, e.g.*, Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 9 (1999) (concluding, under the heading of the "civil rights movement," that "[t]he 1961 decision of the Fifth Circuit in *Dixon v. Alabama* marked the beginning of the end for *in loco parentis* as an immunity insularizing the public (and later, indirectly, the private) college.").

117. Dixon v. Alabama, 294 F.2d 150, 156 (citing, e.g., Slochower v. Bd. of Educ., 350 U.S. 551 (1956)).

118. *Id.* at 158 (citing Warren A. Seavey, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406, 1407 (1957)).

119. See *supra* notes 82–84 and accompanying text.

120. See *supra* notes 85–95 and accompanying text.

121. As observed in the earlier Article, the slight skew towards graduate student cases, such as law and medicine, fits with the higher stakes in terms of past investment and future income; the prevalence of issues of student safety, including mass disruption and sexual harassment, and academic integrity align with modern societal concerns; and the predominance of expulsion cases correlates with the high-stakes interest of the plaintiff-student. Zirkel, *supra* note 4, at 897–98.

122. See *supra* notes 85, 89, and 94.

123. See *supra* text accompanying note 97.

124. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 89–90 (1978).

125. *See, e.g.*, Cornette v. Aldridge, 408 S.W.2d 935, 942 (Tex. Ct. App. 1966) ("It

The results for question 5(b) revealed an encompassing outcomes skew strongly in favor of the public IHEs and, within it, the expected and interrelated judicial disinclination in applying substantive, as compared with procedural, due process.[126] The corresponding due process distinction within the academic analog is between the procedural focus of *Horowitz* and the substantive focus of *Ewing*.[127] The claim category outcomes also show that the indistinctly applicable (i.e., extending across private and public IHEs) contract and general theories fit within the range set by procedural and substantive due process; yet, the two bases most remote from the conduct-discipline issue—expression[128] and vagueness/overbreadth[129]—were the least favorable to the defendant IHEs.[130]

Upon examination overall for both units of analysis, per question 6, the skew in favor of public IHEs was slightly less pronounced upon conflation from claim category rulings to case decisions.[131] As Table 1 revealed, the aforementioned[132] spaghetti strategy was relatively limited in its extent[133] and effect.[134]

Closer examination of the conflated outcomes suggests successively corrective conclusions. First, in the plaintiff's direction, the overall proportion

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is difficult to imagine a period in the life of our nation when the courts need to give greater support to public school authorities concerning their discretion in dealing with students than now, so long as such discretion is not exercised in an unreasonable, arbitrary and capricious manner.").

126. See *supra* text accompanying note 98.

127. See *supra* notes 14–26 and accompanying text.

128. Although the dividing line is not clear-cut and the analysis is nuanced at the overlap, general expression is subject to First Amendment protection, and conduct is not. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

129. To the partial extent that the basis of vagueness/overbreadth is First Amendment expression, the same distinction applies. Moreover, in some of these cases, the challenge was to a state law rather than the IHE's own rules or charges. *See, e.g.*, Undergraduate Student Ass'n v. Peltason, 367 F. Supp. 1055 (N.D. Ill. 1973); Reliford v. Univ. of Akron, 610 N.E.2d 521(Ohio Ct. App. 1991).

130. Nevertheless, more than two thirds of the claim rulings for each of these two categories were conclusively in favor of the public IHEs. Moreover, as Appendix A shows, their relative rankings on the obverse side, which is the proportion of rulings, for each of these two categories, is reversed due to the relatively high proportion of inconclusive rulings for expression (14%).

131. See *supra* text accompanying note 99.

132. See *supra* note 49.

133. The ratio of claim category rulings to cases was 1.3, which was relatively limited compared, for instance, to the 7.5 ratio in Lyons & Zirkel, *supra* note 44, at 340, and the 4.5 ratio in Bon & Zirkel, *supra* note 44, at 40.

134. Due in part to its limited extent and in part due to the overriding trend in favor of the defendant institutions, the proportion conclusively in favor of students and the proportion of inconclusive outcomes each increased only two percentage points. *See supra* Table 1.

of inconclusive case outcomes (10%)[135] may well have had a leveraging effect for the students in terms of potential settlement.[136] Even if all of these cases were to settle in favor of the plaintiffs to the level of relief they would have obtained via a conclusive win in court, the odds in favor of the defendant public IHEs would still be 3:1. Second, given the unlikelihood of this full settlement assumption and the similarly potential converse counting of excluded cases[137] and rulings,[138] the overall 4:1 ratio in the private IHE sector[139] is a more objectively reasonable figure.[140] Third, as the Comments column of Appendix C reveals, the victory for the limited proportion of cases where the court ruled conclusively in favor of the plaintiff-student was often far less than full.[141] More specifically, the remedy of compensatory damages was the partial exception[142] rather than the rule.[143]

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135. Here, as the Outcome column of Appendix C shows, a higher proportion of the inconclusive rulings were in favor of the student than in the private IHE cases. Zirkel, *supra* note 4, at 890–91.

136. For a comparable limited ratio and increased settlement effect, see Paige & Zirkel, *supra* note 44, at 7 n. 45 (citing empirical support in Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 306 (2005); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization?: Employment Discrimination Litigation in the Post–Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–87 (2010)).

137. The arguably includable cases, which the tabulation excluded, were those that the court decided on threshold grounds in favor of the defendant public IHEs, such as lack of the requisite liberty or property interest or solely based on the Eleventh Amendment defense. *See supra* notes 60–63 and accompanying text.

138. As the Comments column in Appendix C shows, the analysis excluded various peripheral claim rulings, which were almost universally unsuccessful for the plaintiff-students.

139. Zirkel, *supra* note 4, at 890.

140. The exclusion of the state APA cases (*supra* note 56) served only as a limited offset, because—again, as the Comments column in Appendix C noted—several of the Florida cases were included even though they were marginal to the extent that their brief opinions did not sufficiently clarify whether the procedural due process rulings were based on the Constitution or the state APA. *See, e.g.*, Heiken v. Univ. of Cent. Fla., 995 So. 2d 1145 (Fla. Dist. Ct. App. 2008); Abramson v. Fla. Int'l Univ., 704 So. 2d 720 (Fla. Dist. Ct. App. 1998).

141. Partially offsetting this conclusion, the availability of attorneys' fees for prevailing plaintiffs in the Constitution-based cases provides an advantage in comparison to the private IHE cases, thus potentially contributing to the plaintiffs' leverage for settlements, the frequency of their cases, and their fiscal costs/benefits.

142. Alcorn v. Vaksman, 877 S.W.2d 390 (Tex. Ct. App. 1994) (awarding substantially reduced damages); *cf.* Castle v. Marquardt, 632 F. Supp. 2d 1317, 1341 (N.D. Ga. 2009) (preserved claim for further proceedings including, if verdict for plaintiff-student, possibility of actual or nominal damages).

143. For an explicit denial, see Smith v. Denton, 895 S.W.2d 550 (Ark. 1995). In most of the other cases, the absence of any such award in the court opinions that were conclusively in favor of the plaintiff-student seemed to suggest that the remedy was

The lack of such compensatory relief was likely largely attributable to the predominance of procedural due process among the cases conclusively in favor of the plaintiff-student.[144] In these cases, with very limited exceptions,[145] the typical relief was merely a remand for a re-hearing with constitutionally proper related procedures, which obviously could result in an outcome adverse to the plaintiff-student.[146] As the appellate court in one of these cases observed upon modifying the injunctive relief that the trial court had ordered, "[i]n general . . . the remedy for a denial of due process is due process."[147] Moreover as the same court also illustrated, the enduring doctrine of deference to educational authorities, also contributed to the reduced relief.[148]

The answer to the final question is probably the most significant finding of this follow-up analysis—namely, the outcomes distribution of the public IHE cases is, as a generalizable matter, not different from the outcomes distribution of the private IHE cases whether the comparison is on an overall

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limited to declaratory or injunctive relief.

144. As a result of the combination of their first-place frequency (*supra* text accompanying note 97) and their approximately second-place success rate (*infra* Appendix A), procedural due process accounted for more than two thirds of the cases decided conclusively in favor of the plaintiff-students. Additionally, the trend of conditioning reinstatement on a new hearing was not limited to procedural due process cases. *See, e.g.*, Hammond v. S.C. State Coll., 272 F. Supp. 947 (D.S.C. 1967) (clarifying in First Amendment expression case that nullification of the suspensions was subject to possible new disciplinary proceedings); *cf.* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 671 (1973) (ordering, in another First Amendment expression case, restoration of credits and reinstatement "unless [this plaintiff graduate student] is barred from reinstatement for valid academic reasons").

145. *See, e.g.*, Machosky v. State Univ. of N.Y. at Oswego, 546 N.Y.S.2d 513 (Sup. Ct. 1989) (ordering reinstatement without contingency of new hearing due to extremely long delay); Marin v. Univ. of Puerto Rico, 377 F. Supp. 613 (D.P.R. 1974) (ordering reinstatement and expungement without explicit or implicit contingency but based on various unconstitutional violations on the face of the voided IHE policies rather than procedural due process along).

146. As the Comments column in Appendix C also reveals, the relief of reinstatement not only was uncommon but also often contingent upon the outcome of the rehearing.

147. Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 933 (Tex. 1995).

148. *Id.* More specifically, in this case, the court reduced the trial court's injunctive relief and made it contingent upon the outcome of the new hearing, reasoning that the trial court's order represented "unwarranted judicial interference with the educational process." *Id.* at 934. Although this case concerned academic dishonesty, thus arguably overlapping with academic issues, the public IHE case law more generally reflected the same tradition of deference to educational authorities that was evident in not only *Horowitz-Ewing* (supra note 19 and text accompanying note 26), but also the private sector IHE case law (Zirkel, *supra* note 4, at 900).

basis[149] or—arguably the most appropriate basis[150]—when limited to the respectively distinctive theories.[151] For both sectors, the outcomes odds favor the defendant institutions at an approximate 4:1 ratio.[152] Thus, as Smith had concluded based on a much more limited and non-empirical basis, the difference between these institutions is "illusory," being not practically—as well as statistically—significant.[153] Instead, as Figure 4 symbolizes, rather than the gap-like black-and-white distinction between public and private IHEs, the level of protection for students in non-academic sanction cases tends to be the same light gray.[154]

Also, similar to the private sector analysis,[155] the likely explanations for the pro-defendant outcomes trend in the public IHE cases is a complementary combination of the persistent deference doctrine for courts vis-à-vis academia and the likely[156] improved policies and procedures in higher education for student disciplinary cases. Additionally and unlike the private IHE analysis, the individual and institutional defendants' respective defenses of qualified immunity[157] and Eleventh Amendment immunity,[158] which apply to constitutional claims, played a limited contributing role.[159]

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149. *See supra* Table 2 (cases) and *infra* Appendix B, Comparison 1 (rulings).

150. Just as both the private and public IHE analyses excluded claims equally applicable to both types of institutions, such as those premised on federal or state anti-discrimination laws, it may be argued that the contract and "general" theories that were characteristic of the private IHEs cases should not be included in this follow-up analysis.

151. *See infra* Appendix B, Comparison 2.

152. *See supra* notes 138–41 and accompanying text.

153. Smith, *supra* note 52, at 451–52.

154. This follow-up analysis serves to confirm the hypothesis in the earlier Article. See *supr*a Zirkel, note 4, at 893–94 ("it may be that the coloration of the corresponding public IHE side is a rather weak and indistinguishable shade of gray rather than a potent black protection for the plaintiff students."); *see also id*. at 901 ("It may be that students' litigative cudgels [at public IHEs] are similarly soft. . .").

155. *Id.* at 896.

156. Given the relatively clearly settled precedents in the post-*Dixon* era, there is solid reason to expect institutional improvement. The ethical mission of IHEs adds to the compliance incentive for such improvement. *See, e.g.*, Gary Pavela & Gregory Pavela, *The Ethical and Educational Imperative of Due Process*, 38 J.C. & U.L. 567, 569 (2012). However, as the previous Article pointed out, the empirical evidence is insufficient to determine the extent of this improvement. Zirkel, *supra* note 4, at 896 n.163.

157. *See, e.g.*, Clarke v. Univ. of N. Texas, 993 F.2d 1544, 1544 n.2 (5th Cir. 1993); Hall v. Med. Coll. of Ohio at Toledo, 742 F.2d 299, 307–10 (6th Cir. 1984).

158. *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 637 (6th Cir. 2005).

159. Inspection of Appendix C reveals that these defenses were infrequent, partially attributable to the exclusion of cases based solely on the Eleventh Amendment. See *supra* note 63 and accompanying text.

Finally, the incidental finding,[160] which the original seven questions did not directly address, was that the outcomes after *Dixon* were significantly different between the immediately subsequent two decades and—marked only approximately by the ten-year units and the clustering of mass demonstrations[161]—the more recent period extending from 1981 to the present.[162] This increased judicial skew toward the defendant educational institutions reflects the broader return of the proverbial pendulum after the activist era of the 1960s and 1970s.[163]

In conclusion, the results of this empirical study, in tandem with those of the earlier corresponding analysis, provide a firmer foundation and direction for scholars as well as practitioners and policymakers. The overall message is to avoid seductive stereotypes, such as the image of students at public IHEs being equipped, unlike their counterparts at private IHEs, a "sharp sword of constitutional safeguards" for judicial challenges to institutional sanctions.[164]

For scholars, these findings suggest the need for wider and deeper research with both the traditional legal approach and the complementary empirical models[165] focusing on the case law concerning student sanctions at private and public IHEs.[166] For example, what have been the frequency and outcomes trends for the corresponding case law concerning academic sanctions, and do these trends differ between the public and private IHEs and from the non-academic foci of this pair of analyses?

For practitioners and policymakers, these findings underscore the need to formulate and implement procedures and standards that fairly balance individual and collective interests. The rather basic procedural and substantive requirements that emerge from case law for both public IHEs under the Constitution,[167] and the private IHEs under other theories of funda-

160. See *supra* note 108.

161. This rough factual dividing line is derived from the Sanctions column in Appendix C.

162. See *infra* Appendix B, Comparison 3.

163. *See, e.g.,* Perry A. Zirkel, *National Trends in Education Litigation: Supreme Court Decisions Concerning Students*, 27 J.L. & EDUC. 235, 242 (1998) (finding in the 1980s, with the exception of the religion cases, "the pendulum-shift in the Supreme Court's decisions concerning k-12 students under the flexible provisions of the Constitution, seemingly overriding the specific factual variations of each such case.").

164. See *supra* note 3 and accompanying text.

165. Beyond the broad empirical categories of quantitative and qualitative methods, the emergence of "a more complex, multi-factored picture" will require, as the earlier Article recommended, "a sophisticated multi-method approach." Zirkel, *supra* note 4, at 897 and 897 n.165.

166. See *supra* Figures 1 and 2.

167. Although not the purpose of this analysis, the cases in Appendix C may serve as the basis for a comprehensive and current distillation of the specific safeguards that

mental fairness, provide ample latitude for providing students with a darker shade of safeguarding gray, as an ethical and educational matter.

the courts have required, thus updating the 1987 contribution of Swem, *supra* note 29.

APPENDIX A: OUTCOMES DISTRIBUTION OF CLAIM CATEGORIES

Category[168]	**Sub-total**	**P**	**(Inc)**	**U**
General	n=9	11%	11%	78%
Contract	n=12	0%	8%	92%
Procedural due process	n=15	17%	8%	75%
Substantive due process	n=13	0%	8%	92%
Vagueness/overbreadth+[169]	n=17	26%	6%	68%
Expression	n=22	16%	14%	70%
Equal protection	n=14	8%	0%	92%
TOTAL	241	15%	8%	77%

APPENDIX B: SELECTED OTHER STATISTICAL COMPARISONS

1. Outcomes Comparison Between Public IHE Claim Category Rulings and Private IHE Cases

	P	**Inc**	**U**	
Public IHEs (n=241 rulings)	36 (15%)	20 (8%)	185 (77%)	$\chi^2 = 1.77$ ns
Private IHEs (n=95 cases)	10 (11%)	11 (6%)	74 (78%)	

ns = not statistically significant

2. Outcomes Comparison Between Constitutional Cases (Public IHE) and Non-Constitutional (Private IHE) Cases

168. For information about these categories and subcategories, see *supra* notes 85–95 and accompanying text.

169. This category also included two cases that contained adjudicated claims of irrebuttable presumption.

	P	Inc	U	
Public IHEs (n=171 cases)	31 (18%)	16 (9%)	124 (73%)	$\chi^2 = 2.51$ ns
Private IHEs (n=95 cases)	10 (11%)	11 (6%)	74 (78%)	

ns = not statistically significant

3. Outcomes Comparison Between *Dixon* Era and Subsequent Stage's Public IHE Cases

	P	Inc	U	
Dixon (1961) thru 1980 (n=63 cases)	15 (24%)	11 (17%)	37 (59%)	$\chi^2 = 7.77$*
1981 thru 2014 (n=115 cases)	12 (10%)	12 (10%)	91 (79%)	

* statistically significant at the .05 level[170]

APPENDIX C: TABULATION OF COURT DECISIONS WITHIN SPECIFIED SCOPE

Case Name	Citation	State	Sanction	Theory	Out-come	Comments

170. *See* supra note 103.

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
North v. Bd. of Trs. of Univ. of Ill.	27 N.E. 54 (Ill. 1891)	Ill.	expulsion of under-grad for refusing to attend mandatory chapel	general?	U	marginal case – un-clear pro-tection for student
Gleason v. Univ. of Mi-ami	116 N.W. 650 (Minn. 1908)	Minn.	dismissal of law stu-dent for deficiency and insub-ordination	general	(P)	complete deference (as corp.) but subject to manda-mus – re-manded here for show cause
Woods v. Simp-son	126 A. 882 (Md. 1924)	Md.	dismissal of female undergrad for being "not readi-ly submis-sive"	general?	U	marginal case – non-interference unless ex-traordinary circum-stance. - cit-ing *Sullivan*
Tanton v. McKen ney	197 N.W. 510 (Mich. 1924)	Mich.	expulsion of under-grad for indiscrete female be-havior	general	U	not arb. & cap. - defer-ence
State *ex rel.* Inger-soll v. Clapp	263 P. 433 (Mont. 1928)	Mont.	expulsion of married undergrad for serving alcohol in her home	contract	U	not arb. & cap. – rely-ing on *Woods* inter alia – re-jecting *Gleason*, *Hill,* and *Anthony*
State *ex rel.* Sher-man v. Hyman	171 S.W.2d 822 (Tenn. 1942)	Tenn.	dismissal of medical students for cheat-ing (selling exams)	contract	U	fair hearing in IHE con-text. – deference - citing *Clapp* and private IHE deci-sion

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
People *ex rel.* Bluett v. Bd. of Trs. of Univ. of Ill.	134 N.E.2d 635 (Ill. Ct. App. 1956)	Ind.	expulsion of medical student for cheating	general	U	rejecting *Hill* and *Anthony* – no rt. to formal hearing
Dixon v. Alabama State Bd. of Educ.	**294 F.2d 150 (5th Cir. 1961)**	Ala.	expulsion of black students for off-campus demon-stration	14th Am. PDP	(P)	specifica-tion of no-tice and requisite hearing (distin-guishing private IHE cases) – **landmark decision**
Knight v. State Bd. of Educ.	200 F. Supp. 174 (M.D. Tenn. 1961)	Tenn.	suspension of black students for campus demon-stration	14th Am. PDP	P	reinstate-ment sub-ject to no-tice and hearing - *Dixon*
Due v. Fla. A&M Univ.	233 F. Supp. 396 (N.D. Fla. 1963)	Fla.	suspension of 2 under-grads for contempt conviction	14th Am. PDP	U	met *Dixon* touchstone of fairness
Cor-nette v. Al-dridge	408 S.W.2d 935 (Tex. Ct. App. 1966)	Tex.	indefinite suspension of under-grad for repeated reckless driving	general	U	not arb. & cap. - defer-ence (citing *Sherman*)
Wasson v. Trow-Trow-bridge	382 F.2d 807 (2d Cir. 1967)	N.Y.	expulsion of under-grad US-MMA ca-det for leading protest	5th Am. PDP	(P)	incomplete as well as inconclusive victory

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Ham-mond v. S.C. State Coll.	272 F. Supp. 947 (D.S.C. 1967)	S.C.	suspension of 3 under-grads for campus protest	1st Am. Exp.	P	nullification but subject to possible new disci-plinary pro-ceedings
Gold-berg v. Regents of Univ. of Cal.	57 Cal. Rptr. 463 (Ct. App. 1967)	Cal.	expulsion of students for campus demon-stration	14th Am. PDP	U	met *Dixon* standards
				1st Am. Exp.	U	
Buttney v. Smi-ley	281 F. Supp. 280 (D. Colo. 1968)	Colo.	suspension of less than 1 sem. of students for campus demon-strations	14th Am. PDP	U	
				1st Am. Exp.	U	
				14th Am. EP	U	not racial discrimina-tion
Zanders v. La. St. Bd. of Educ.	281 F. Supp. 747 (W.D. La. 1968)	La.	expulsion of black students for campus demon-stration	14th Am. PDP	U	
				1st Am. Exp.	P/U	reinstate-ment of 8 of 26
Barker v. Hard-way	283 F. Supp. 228 (S.D. W.Va.), *aff'd mem*., 399 F.2d 638 (4th Cir. 1968)	W.Va.	suspension of students for campus demon-strations	14th Am. PDP	U	
Moore v. Stu-dent Affairs Comm. of Troy State Univ.	284 F. Supp. 725 (M.D. Ala. 1968)	Ala.	indefinite suspension of under-grad for drug pos-session in dorm	14th Am. PDP	U	met *Dixon* [excluded 4th Am. claim re search of dorm room – U]

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Scoggin v. Lincoln Univ.	291 F. Supp. 161 (W.D. Mo. 1968)	Mo.	1-yr. suspension of students for campus demonstration	14th Am. PDP	P	nullification but subject to possible new disciplinary proceeding (w. proper PDP)
				1st Am. Exp.	U	
Marzette v. McPhee	294 F. Supp. 562 (W.D. Wis. 1968)	Wis.	suspension of black students for campus demonstration	14th Am. PDP	P	reinstatement contingent upon hearing
Stricklin v. Regents of Univ. of Wis.	297 F. Supp. 416 (W.D. Wis. 1969)	Wis.	suspension of 3 students for campus disorder	14th Am. PDP	P	subject to interim suspension with preliminary notice and subsequent more formal proceedings
Furutani v. Ewigleben	297 F. Supp. 1163 (N.D. Cal. 1969)	Cal.	expulsion of undergrad for campus demonstration	14th Am. PDP	U	
Wright v. Tex. S. Univ.	392 F.2d 728 (5th Cir. 1968)	Tex.	expulsion of students for campus disruptions	14th Am. PDP	U	adequate notice and hearing (subsuming arb. & cap. std.)
French v. Bashful	303 F. Supp. 1333 (E.D. La. 1969)	La.	suspensi-si-on/expulsion of 10 students for campus disturbance	14th Am. PDP	(P)	new hearing w. rt. to counsel
				14th Am. vagueness	U	
Jones v. State Bd. of Educ.	407 F.2d 834 (6th Cir. 1969)	Tenn.	indefinite suspension of students for campus	14th Am. PDP	U	
				14th Am. EP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
			unrest	1st Am. Exp.	U	
Scott v. Ala. State Bd. of Educ.	300 F. Supp. 164 (S.D. Ala. 1969)	Ala.	expulsion and indefinite suspension of black students for campus demonstration	14th Am. PDP	U	except 3 of 6 reinstated subject to proper proceedings
				1st Am. Exp.	U	
Esteban v. Cent. Mo. State Univ.	415 F.2d 1077 (8th Cir. 1969)	Mo.	suspension of 2 undergrads for campus demonstration	14th Am. PDP	P	relief of new hearing
Soglin v. Kauffman	418 F.2d 163 (7th Cir. 1969)	Wis.	expulsion of students for campus protest (SDS)	14th Am. vagueness/1st Am. overbreadth	P	"misconduct"
Buck v. Carter	308 F. Supp. 1246 (W.D. Wis. 1970)	Wis.	interim suspension of undergrads for raiding another fraternity	14th Am. PDP	U	
Norton v. Discipline Comm.	419 F.2d 195 (6th Cir. 1969)	Tenn.	suspension of undergrads for inflammatory dissemination	14th Am. PDP	U	
				1st Am. Exp.	U	
Keane v. Rodgers	316 F. Supp. 217 (D. Me. 1970)	Me.	expulsion of undergrad (cadet) for alcohol/ drugs in his car	14th Am. PDP	U	[excluded unsuccessful 4th Am. claim for searching his car]
Jones v. Snead	431 F.2d 1115 (8th Cir. 1970)	Mo.	suspension of students demonstration	14th Am. PDP	U	affirmed denial of preliminary injunction – short opinion

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Perl-man v. Shasta Joint Jr. Coll. Dist. Bd. of Trs.	88 Cal. Rptr. 563 (Ct. App. 1970)	Cal.	suspension and expul-sion of undergrad for insub-ordination	14th Am. PDP	P/U	upheld sus-pension but, due to bias, not expul-sion - relief was ex-pungement
Speake v. Gran-Gran-tham	317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd mem.*, 440 F. 2d 1351 (5th Cir. 1971)	Miss.	suspension of 4 stu-dents for disruptive leafleting	14th Am. vague-ness/1st Am. over-breadth	U	after suc-cessful TRO [excluded 8th Am. C&U claim]
				14th Am. EP	U	
				1st Am. Exp.	U	
Stewart v. Reng	321 F. Supp. 618 (E.D. Ark. 1970)	Ark.	suspension of under-grad for alleged drug use	14th Am. PDP	P	temporary injunction subject to new hear-ing
Sword v. Fox	446 F.2d 1091 (4th Cir. 1971)	Va.	suspension of students for sit in	14th Am. vague-ness/1st Am. over-breadth	U	
Bistrick v. Univ. of S.C.	324 F. Supp. 942 (D.S.C.19 71)	S.C.	expulsion of under-grad for participa-tion in campus demon-stration	14th Am. PDP	U	
				1st Am. Exp.	U	
Consejo Gen. de Estu-diantes v. Univ. of P.R.	325 F. Supp. 453 (D.P.R. 1971)	P.R.	interim suspension of students for campus demon-stration	14th Am. PDP	U	marginal case – in-substantial constitu-tional claim

Case Name	Citation	State	Sanction	Theory	Outcome	Comments
Gardendenshire v. Chalmers	326 F. Supp. 1200 (D. Kan. 1971)	Kan.	suspension of undergrad for carrying a firearm	14th Am. PDP	P	reinstatement contingent upon hearing
Andersen v. Regents of Univ. of Cal.	99 Cal. Rptr. 531 (Ct. App. 1972)	Cal.	expulsion of undergrad for academic dishonesty	14th Am. PDP	U	
Ctr. for Participant Educ. v. Marshall	337 F. Supp. 126 (N.D. Fla. 1972)	Fla.	suspension of student for insubordination in wake of protest	14th Am. vagueness/1st Am. overbreadth	U	[excluded unsuccessful 5th Am. double jeopardy claim]
				1st Am. Exp.	U	
				14th Am. EP	U	
Herman v. Univ. of S.C.	457 F.2d 902 (4th Cir. 1972)	S.C.	suspension of student for sit in	14th Am. PDP	U	
Lowery v. Adams	344 F. Supp. 446 (W.D. Ky. 1972)	Ky.	suspensision/expulsion of black undergrads for disruptive demonstration	14th Am. PDP	U	
				14th Am. vagueness/1st Am. overbreadth	U	
Winnick v. Manning	460 F.2d 545 (2d Cir. 1972)	Conn.	2-sem. suspension of student for campus protest	14th Am. PDP	U	
Paine v. Bd. of Regents of Univ. of Tex. Sys.	355 F. Supp. 199 (W.D. Tex. 1972),	Tex.	automatic 2-yr. suspension of student for drug conviction	14th Am. DP irrebuttable presumption	P	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
	aff'd mem., 474 F.2d 1397 (5th Cir. 1973)			14th Am. EP	P	
Sill v. Penn. State Univ.	462 F.2d 463 (3d Cir. 1972)	Pa.	suspension of 36 undergrads and 3 grads for campus protest	14th Am. PDP	U	[also sufficient evidence]
				14th Am. vagueness	U	
Hagopian v. Knowlton	470 F.2d 201 (2d Cir. 1972)	N.Y.	expulsion of West Point cadet for accumulated demerits	5th Am. PDP	(P)	limited success in terms of required hearing (and subsequently overruled re prelim. injunctive relief)[171]
Brookins v. Bonnell	362 F. Supp. 379 (E.D. Pa. 1973)	Pa.	expulsion of nursing student for purported academic issues	14th Am. PDP	P	conditional upon due process hearing – disciplinary > academic
Papish v. Bd. of Curators of Univ. of Mo.	410 U.S. 667 (1973)	Mo.	expulsion of grad student for distributing underground newspaper w. indecent cartoons	1st Am. Exp.	P	restoration of credits and reinstatement unless valid academic reason
Blanton v. State Univ. of N.Y.	489 F.2d 377 (2d Cir. 1973)	N.Y.	suspension of 5 students for sleep in	14th Am. PDP	U	
				1st Am. Exp.	U	

171. Philips v. Marsh, 687 F.2d 620, 624 (2d Cir. 1982).

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Kister v. Ohio Bd. of Regents	365 F. Supp. 27 (S.D. Ohio 1973)	Ohio	suspensi-si-on/expulsion of 9 students for criminal conviction in campus protest	14th Am. PDP	U	[excluded various other claims that appeared to be entirely peripheral]
Undergraduate Student Ass'n v. Peltason	367 F. Supp. 1055 (N.D. Ill. 1973)	Ill.	revocation of scholarships of students for demonstration	14th Am. vagueness/1st Am. overbreadth	P	
Brown v. Knowlton	370 F. Supp. 1119 (S.D.N.Y. 1974)	N.Y.	dismissal of West Point cadet for excess demerits	5th Am. PDP	U	citing *Hagopian*
McDonald v. Bd. of Trs. of Univ. of Ill.	375 F. Supp. 95 (N.D. Ill.), *aff'd mem.*, 503 F.2d 105 (7th Cir. 1974)	Ill.	dismissal of 3 medical students for cheating	14th Am. PDP	U	
Marin v. Univ. of Puerto Rico	377 F. Supp. 613 (D.P.R. 1974)	P.R.	summary suspension > 1 yr. of students for campus demonstration	14th Am. PDP	P	relief of reinstatement and expungement based on various violations not limited to PDP
				14th Am. vagueness/1st Am. overbreadth	P/D	mixed results among the challenged rules

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Haynes v. Dallas Cnty. Jr. Coll. Dist.	386 F. Supp. 208 (N.D. Tex. 1974)	Tex.	suspensi-si-on/expulsion of undergrad for off-campus drug use	14th Am. DP irrebuttable presumpsumption	U	distinguished *Paine* (automatic)
Garshman v. Penn. State Univ.	395 F. Supp. 912 (M.D. Pa. 1975)	Pa.	dismissal of medical student for academic dishonesty	14th Am. PDP	U	
Edwards v. Bd. of Regents of Nw. Mo. State Univ.	397 F. Supp.822 (W.D. Mo. 1975)	Mo.	suspension of undergrad for repeated disruptive conduct	14th Am. PDP	U	marginal case - not reaching constitutional proportions
Smyth v. Lubbers	398 F. Supp. 777 (W.D. Mich. 1975)	Mich.	possible suspensi-si-on/expulsion of 2 undergrads for drug possession	14th Am. PDP	P	narrowly limited substantial evidence standard [also borderline case because potential and largely 4th Am.]
Birdwell v. Schlesinger	403 F. Supp. 710 (D. Colo. 1975)	Colo.	disenrollment of USAFA cadet for having a car and apartment and lying about them	5th Am. PDP	U	[excluded unsuccessful self-incrimination claim]
				5th Am. SDP	U	
Nzuve v. Castleton State Coll.	335 A.2d 321 (Vt. 1975)	Vt.	expulsion of undergrad for criminal charges	14th Am. PDP	U	[excluded unsuccessful self-incrimination claim]

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Jenkins v. La. State Bd. of Educ.	506 F.2d 992 (5th Cir. 1975)	La.	suspension of 6 under-grads for boycott	14th Am. vague-ness/1st Am. over-breadth	U	
An-drews v. Knowl-ton	509 F.2d 898 (2d Cir. 1975)	N.Y.	dismissal of 2 West Point ca-dets for alcohol and cheat-ing respec-tively	5th Am. PDP	U	citing *Was-son* and *Hagopian*
Morale v. Gri-gel	422 F. Supp. 988 (D.N.H. 1976)	N.H.	suspension of under-grad for drugs	14th Am. PDP	U	[excluded unsuccess-ful 4th Am. claim]
De Prima v. Co-lumbia-Greene Cmty. Coll.	392 N.Y.S.2d 348 (Sup. Ct. Albany Cnty. 1977)	N.Y.	suspension of under-grad for disorderly conduct	14th Am. PDP	P	relief of new hearing
Escobar v. State Univ. of N.Y. at Old West-bury	427 F. Supp. 850 (E.D.N.Y. 1977)	N.Y.	suspension of under-grad for disruptive drunken-ness	14th Am. PDP	P	possible hearing on subsequent conduct
Adibi-Sadeh v. Bee Cnty. Coll.	454 F. Supp. 552 (S.D. Tex. 1978)	Tex.	expulsion of most of the Irani-an stu-dents who participat-ed in unru-ly demon-stration	14th Am. PDP	U	
				1st Am. Exp.	U	
Gabril-owitz v. New-man	582 F.2d 100 (1st Cir. 1978)	R.I.	potential expulsion of under-grad for rape	14th Am. PDP	P	proceed with hear-ing but with right to counsel - special circ.

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Mar-shall v. Maguir e	424 N.Y.S.2d 89 (Sup. Ct. Nassau Cnty. 1980)	N.Y.	expulsion of under-grad for ?? {unspeci-fied]	14th Am. PDP	P	relief of new hearing
Sham-loo v. Miss. State Bd. of Trs. of Insts. of Higher Learn-ing	620 F.2d 516 (5th Cir. 1980)	Ala.	suspension of Iranian students for campus demon-stration	14th Am. vague-ness/1st Am. over-breadth	(P)	prelim. in-junction against IHE regs.
Bleick-er v. Bd. of Trs. of Ohio State Univ. Coll. of Veteri-nary Med.	485 F. Supp. 1381 (S.D. Ohio 1981)	Ohio	2-quarter suspension of vet. med. stu-dent for academic dishonesty	14th Am. PDP	U	[separate from unsuc-cessful aca-demic dis-missal]
Turof v. Kibbee	527 F. Supp. 880 (E.D.N.Y . 1981)	N.Y.	suspension of under-grad for ??	14th Am. PDP	U	
Kolesa v. Leh-man	534 F. Supp. 590 (N.D.N.Y . 1982)	N.Y.	disenroll-ment of undergrad in NROTC for drug usage	5th Am. PDP	U	marginal case
Sohmer v. Kin-nard	535 F. Supp. 50 (D. Md. 1982)	Md.	expulsion of pharma-cy student for drug abuse	14th Am. PDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Light-sey v. King	567 F. Supp. 645 (E.D. N.Y. 1983)	N.Y.	zero grade of cadet undergrad for exam cheating	5th Am. PDP	P	marginal case remedy of restored grade
Hart v. Ferris State Coll.	557 F. Supp. 1379 (S.D. Mich. 1983)	Mich.	potential expulsion for sale of drugs	14th Am. PDP	U	
				14th Am. SDP	U	
				14th Am. EP	U	
McLaug hlin v. Mass. Mar. Acad.	564 F. Supp. 809 (D. Mass. 1983)	Mass.	expulsion of under-grad cadet for drugs and false-hoods	14th Am. PDP	P	rt. to coun-sel per *Ga-brilowitz* relief pre-sumably new hear-ing
Cody v. Scott	565 F. Supp.103 1 (S.D.N.Y. 1983)	N.Y.	dismissal of West Point ca-det for drug pos-session	14th Am. PDP	U	no rt. to counsel – *Wimmer* [excluded other as-sorted claims]
Jones v. Bd. of Gover-nors of Univ. of N.C.	704 F.2d 713 (4th Cir. 1983)	N.C.	1-semester suspension of nursing undergrad for exam cheating	14th Am. PDP	(P)	
Wallace v. Fla. A&M Univ.	433 So. 2d 600 (Fla. Dist. Ct. App. 1983)	Fla.	expulsion of under-grad for possession of drugs	14th Am. PDP	U	marginal case – inci-dental [excluded state law ruling]
Hart-man v. Bd. of Trs. of Univ. of Ala.	436 So. 2d 837 (Ala. Ct. App. 1983)	Ala.	suspension of under-grad for threat	14th Am. PDP	U	marginal case – inci-dental issue

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Wim-mer v. Leh-man	705 F.2d 1402 (4th Cir. 1983)	Md.	dismissal of Naval Academy cadet for drug pos-session	5th Am. PDP	U	
Henson v. Hon-or Comm. of Univ. of Va.	719 F.2d 69 (4th Cir. 1983)	Va.	expulsion of law stu-dent for academic dishonesty	14th Am. PDP	U	
Mary M. v. Clark	473 N.Y.S.2d 843 (App. Div. 1984)	N.Y.	suspension of under-grad for cheating	14th Am. PDP	U	[excluded APA claim]
Hall v. Med. Coll. of Ohio	742 F.2d 299 (6th Cir. 1984)	Ohio	dismissal of medical student for academic dishonesty	14th Am. PDP	U	qualified immunity
Jaksa v. Bd. of Regents of Univ. of Mich.	597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd mem.*, 787 F.2d 590 (6th Cir. 1986)	Mich.	1-sem. suspension of under-grad for exam cheating	14th Am. PDP	U	
Univ. of Hou-ston v. Sabeti	676 S.W.2d 685 (Tex. App. Ct. 1984)	Tex.	expulsion of student for exam cheating	14th Am. PDP	U	
North v. W. Va. Bd. of Re-gents	332 S.E.2d 141 (W. Va. 1985)	W.Va.	expulsion of medical student for false info on applica-tion	14th Am. PDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Tully v. Orr	608 F. Supp. 1222 (W.D.N.Y. 1985)	N.Y.	suspension of USAFA cadet for plagiarism and other miscon-duct	14th Am. PDP	U	denied pre-liminary injunction (also SDP?)
Fain v. Brook-lyn Coll.	493 N.Y.S.2d 13 (App. Div. 1985)	N.Y.	dismissal of under-grads for theft	14th Am. PDP	U	[excluded successful claim based on insuffi-cient evi-dence]
Nash v. Auburn Univ.	812 F.2d 655 (11th Cir. 1987)	Ala.	suspension of 2 vet. medicine students for aca-demic dis-honesty	14th Am. PDP	U	detailed analysis and broad contextual reliance
				14th Am. SDP	U	
Crook v. Baker	813 F.2d 88 (6th Cir. 1987)	Mich.	rescission of M.S. for plagiarism in thesis	14th Am. PDP	U	
				14th Am. SDP	U	
Barlet-ta v. State	533 S.E.2d 1037 (La. Ct. App. 1988)	La.	expulsion of dental student for unauthor-ized prac-tice	14th Am. PDP	U	
Rosen-feld v. Ketter	820 F.2d 38 (2d Cir. 1987)	N.Y.	suspension of law stu-dent for disorderly protest	14th Am. PDP	U	
				1st Am. Exp.	U	
Gorman v. Univ. of R.I.	837 F.2d 7 (1st Cir. 1988)	R.I.	one-year suspension of under-grad for sexual harass-ment and	14th Am. PDP	U	extensive analysis
Tellefse n v. Univ. of N.C. at Greens boro	877 F.2d 60 (4th Cir. 1989)	N.C.	suspension of under-grad for ??	14th Am. PDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
James v. Wall	783 S.W.2d 615 (Tex. Ct. App. 1989)	Tex.	failing grade of medical students for exam cheating	14th Am. PDP	(P)	marginal case – temporary injunction on various grounds
Machovsky v. State Univ. of N.Y. at Oswego	546 N.Y.S.2d 513 (Sup. Ct. Oswego Cnty. 1989)	N.Y.	suspension of undergrad for harassment	14th Am. PDP	P	reinstatement due to delay
Bauer v. State Univ. of N.Y. at Albany	552 N.Y.S.2d 983 (App. Div. 1990)	N.Y.	suspension of undergrad for exam cheating	14th Am. PDP	U	marginal case – short opinion and alternative rationale
Kalinsky v. State Univ. of N.Y. at Binghamton	557 N.Y.S.2d 577 (App. Div. 1990)	N.Y.	suspension of undergrad for plagiarism	14th Am. PDP	P	remand for new hearing[172]
Shuman v. Univ. of Minn. Law Sch.	451 N.W.2d 71 (Minn. Ct. App. 1990)	Minn.	1-yr. suspension of 2 law students for cheating	14th Am. PDP	U	
				contract	U	
Los v. Wardell	771 F. Supp. 266 (C.D. Ill. 1991)	Ill.	expulsion of law student for violence	14th Am. PDP	U	
Reliford v. Univ. of Akron	610 N.E.2d 521 (Ohio Ct. App. 1991)	Ohio	expulsion of undergrad for burglary conviction	14th Am. vagueness/1st Am. overbreadth	U	

172. The litigation continued after a new hearing, which found the student guilty, and the student was ultimately unsuccessful due to an untimely appeal. Kalinsky v. State Univ. of N.Y. at Binghamton, 624 N.Y.S.2d 679 (App. Div. 1995).

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Weide-mann v. State Univ. of N.Y. at Cortlan d	592 N.Y.S.2d 99 (App. Div. 1992)	N.Y.	dismissal of grad for exam cheating	14th Am. PDP	P	relief of new hearing
Armest o v. Weidne r	615 So. 2d 707 (Fla. Dist. Ct. App. 1992)	Fla.	suspension of law stu-dent for exam cheating	14th Am. PDP?	U	marginal case – in-tertwining APA with constitu-tional PDP plus suffi-cient evi-dence
Clarke v. Univ. of N. Tex.	993 F.2d 1544 (5th Cir. 1993)	Tex.	expulsion of grad student for sexual as-saults	14th Am. PDP	U	qualified immunity
Hen-derson State Univ. v. Spadoni	848 S.W.2d 951 (Ark. Ct. App. 1993)	Ark.	suspension of under-grad for assault	14th Am. PDP	U	
Osteen v. Hen-ley	13 F.3d 221 (7th Cir. 1993)	Ill.	expulsion of under-grad for assault	14th Am. PDP	U	
Abrams v. Mary Wash-ington Coll.	1994 WL 1031166 (Va. Cir. Ct. Apr. 27, 1994)	Va.	suspension of under-grad for sexual as-sault	14th Am. PDP	U	marginal case [excluded various oth-er claims]
Alcorn v. Vaks-Vaks-man	877 S.W.2d 390 (Tex. Ct. App. 1994)	Tex.	dismissal of doctoral student for purported academic reasons	14th Am. PDP	P	reinstate-ment and substantial-ly reduced damages ($10k) disciplinary > academic
				1st Am. Exp.	P	
Knapp v. Jun-	879 S.W.2d	Mo.	suspension of under-	14th Am. PDP	U	[excluded APA claim]

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
ior Coll. Dist. of St. Louis Cnty.	588 (Mo. Ct. App. 1994)		grad for campus disruption	1st Am. Exp.	(P)	
Herbert v. Reinstein	1994 WL 587095 (E.D. Pa. Oct. 21, 1994), *rev'd on other grounds*, 70 F.3d 1255 (3d Cir. 1995)	Pa.	suspension of law student for violence	14th Am. PDP	U	
Smith v. Denton	895 S.W.2d 550 (Ark. 1995)	Ark.	suspension of student for firearm	14th Am. PDP	P	denied damages
Gruen v. Chase	626 N.Y.S.2d 261 (App. Div. 1995)	N.Y.	expulsion of undergrads for ?? [unspecified]	14th Am. PDP	U	short opinion
				general	P	relief of new hearing – IHE failed to follow its own policies (*Tedeschi*)
Univ. of Tex. Med. Sch. at Houston v. Than	901 S.W.2d 926 (Tex. Ct. App. 1995)	Tex.	dismissal of medical student for academic dishonesty	14th Am. PDP	P	(marginal case because basis was state constitutional PDP) reduced relief to new hearing
Reilly v. Daly	666 N.E.2d 439 (Ind. Ct. App. 1996)	Ind.	dismissal of medical student for academic dishonesty	14th Am. PDP	U	[also substantial evidence]
				14th Am. EP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Haley v. Va. Com-monwealth Univ.	948 F. Supp. 573 (E.D. Va. 1996)	Va.	2-yr. sus-pension of grad stu-dent for sexual harass-ment	14th Am. PDP	U	[excluded Title IX claim]
Carboni v. Mel-drum	949 F. Supp. 427 (W.D. Va. 1996)	Va.	dismissal of veteri-nary medi-cine stu-dent for exam cheating	14th Am. PDP	U	[excluded unsuccess-ful 4th Am. claim]
Roach v. Univ. of Utah	968 F. Supp. 1446 (D. Utah 1997)	Utah	dismissal from 2 grad pro-grams for 1) unpro-fessional conduct, and 2) mis-leading info	14th Am. PDP	U/P	upheld first dismissal but ruled for student on second dismissal – and denied qualified immunity
				14th Am. SDP	U/(P)	not for first, but unde-veloped rec-ord for sec-ond
				contract	(U)/(P)	undevel-oped record
Donohu e v. Baker	976 F. Supp. 136 (N.D.N.Y . 1997)	N.Y.	expulsion of under-grad for rape	14th Am. PDP	(P)	1 of several claims (cross ex-am) [excluded state APA claim]
Crowley v. U.S. Merch. Marine Acad.	985 F. Supp. 292 (E.D.N.Y . 1997)	N.Y.	proposed expulsion of under-grad cadet for sexual miscon-duct	5th Am. PDP	P	continued the hearing with rt. to lawyer-advisor
Jackson v. Ind. Univ. of Penn.	695 A.2d 980 (Pa. Commw. Ct. 1997)	Pa.	suspension of under-grad for assault	14th Am. PDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Abram-son v. Fla. Int'l Univ.	704 So. 2d 720 (Fla. Dist. Ct. App. 1998)	Fla.	unspeci-fied disci-pline for disruptive conduct and false infor-mation	14th Am. PDP?	U	marginal case - short opinion that may be APA>14th Am.
Gagne v. Trs. of Ind. Univ.	692 N.E.2d 489 (Ind. Ct. App. 1998)	Ind.	expulsion of law stu-dent for lying on his appli-cation	14th Am. PDP	U	reliance on K-12 case law
				contract	U	
Salehpo ur v. Univ. of Tenn. at Mem-phis	159 F.3d 199 (6th Cir. 1998)	Tenn.	dismissal of dental student for insubordi-nation	14th Am. PDP	U	
				1st Am. Exp.	U	
Woodis v. Westar k Cmty. Coll.	160 F.3d 435 (8th Cir. 1998)	Ark.	expulsion of nursing undergrad for drug conviction	14th Am. PDP	U	
				14th Am. vague-ness	U	
Foo v. Trs. of Ind. Univ.	88 F. Supp. 2d 937 (S.D. Ind. 1999)	Ind.	expulsion of under-grad for alcohol vio-lation	14th Am. PDP	U	
				14th Am. SDP	U	
Cobb v. Rector & Visi-tors of Univ. of Va.	84 F. Supp. 2d 740 (E.D. Va.), *aff'd mem.*, 229 F.3d 1142 (4th Cir. 2000)	Va.	expulsion of black undergrad for exam cheating	14th Am. PDP	U	[excluded unsuccess-ful 14th Am. SDP and state tort/ contract claims from 1999 deci-sion]
				14th Am. EP	U	
Good-reau v. Rector & Visi-tors of Univ. of Va.	116 F. Supp. 2d 694 (W.D. Va. 2000)	Va.	revocation of under-grad de-gree for theft of club funds	contract	(P)	factual is-sue whether IHE had proper pro-cedures for degree rev-ocation

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Smith v. Rector & Visitors of Univ. of Va.	115 F. Supp. 2d 680 (W.D. Va. 2000)	Va.	suspension of under-grad for assault conviction	14th Am. PDP	(P)	factual issue re notice and deviation from assurances [excluded conspiracy and failure to supervise claims]
Pappachristou v. Univ. of Tenn.	29 S.W.3d 487 (Tenn. Ct. App. 2000)	Tenn.	indefinite suspension of law student for exam cheating	general	U	not arb. & cap.
Delgado v. Garland	2001 WL 1842458 (S.D. Ohio April 5, 2001)	Ohio	suspension of under-grad for sexual harassment	14th Am. PDP	U	
Morfit v. Univ. of S. Fla.	794 So. So. 2d 655 (Fla. Dist. Ct. App. 2001)	Fla.	suspension of grad student for misconduct	14th Am. PDP?	P	relief of new hearing [marginal case - intertwined state APA]
Watson v. Beckel	242 F.3d 1237 (10th Cir. 2001)	N.M.	expulsion of under-grad cadet for sexual assault	14th Am. PDP	U	
				14th Am. EP	U	
Hill v. Mich. State Univ.	182 F. Supp. 2d 621 (W.D. Mich. 2001)	Mich.	suspension of under-grad for riot	14th Am. PDP	U	
				14th Am. SDP	U	
Fedorov v. Bd. of Regents of Univ. of Ga.	194 F. Supp. 2d 1378 (S.D. Ga. 2002)	Ga.	dismissal of dental student for drug abuse	14th Am. PDP	U	[excluded §504/ADA claims]
Brown v. W.	204 F. Supp. 2d	Conn.	expulsion of under-	14th Am. PDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Conn. State Univ.	355 (D. Conn. 2002)		grad for ac. dishonesty	1st Am. Exp.	(P)	
Tigrett v. Rector & Visitors of Univ. of Va.	290 F.3d 620 (4th Cir. 2002)	Va.	1-semester suspension of under-grads for assault	14th Am. PDP	U	related to but separate from *Smith v. Rector & Visitors of Univ. of Va.*
Anderson v. Sw. Tex. State Univ.	73 S.W. 775 (5th Cir. 2003)	Tex.	2-semester suspension of student for zero-tolerance drug policy	14th Am. EP	U	failed to preserve unsuccessful 14th Am. PDP claim on appeal
Viriyapanthu v. Regents of Univ. of Cal.	2003 WL 22120968 (Cal. Ct. App. Sept. 15, 2003)	Cal.	1-semester suspension of law student for plagiarism	14th Am. EP	U	ducked whether disciplinary or academic – same result
Pugel v. Bd. of Trs. of Univ. of Ill.	378 F.2d 659 (7th Cir. 2004)	Ill.	dismissal of grad student for fraudulent academic conduct	14th Am. PDP	U	
				1st Am. Exp.	U	
Gomes v. Univ. of Me. Sys.	365 F. Supp. 2d 6 (D. Me. 2005)	Me.	1-yr. suspension for under-grads for sexual assault	14th Am. PDP	U	[excluded state law claims, including IIED]
Cady v. S. Suburban Coll.	152 F. App'x 531 (7th Cir. 2005)	Ill.	expulsion of under-grad for disorderly conduct in class	14th Am. PDP	U	
Butler v. Rector & Bd. of	121 F. App'x 515 (4th Cir.	Va.	expulsion of M.Ed. Counseling student	14th Am. PDP	U	
				14th Am. SDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Visitors of Coll. of William & Mary	2005)		for inappropriate conduct	contract	U	
Flaim v. Med. Coll. of Ohio	2005 WL 736626 (Ohio Ct. App. Mar. 31, 2005)	Ohio	dismissal of medical student for drug conviction	contract	U	ducked academic-disciplinary distinction, concluding same outcome w/o deference
	418 F.3d 629 (6th Cir. 2005)			14th Am. PDP	U	illustrates 11th Am. effect, leaving only individual Ds
				14th Am. SDP	U	same
Matar v. Fla. Int'l Univ.	944 So. 2d 1153 (Fla. Dist. Ct. App. 2006)	Fla.	expulsion of grad student for plagiarism	14th Am. PDP?	U	marginal case – indirectly or implicitly 14th Am.
Danso v. Univ. of Conn.	919 A.2d 1100 (Conn. Super. Ct. 2007)	Conn.	suspension of undergrad for stalking	14th Am. PDP	U	
Burch v. Moulton	980 So. 2d 392 (Ala. 2007)	Ala.	dismissal of medical student for drug possession	14th Am. PDP	U	
				general	U	not arb., cap., or in bad faith
Rubino v. Saddlemire	2007 WL 685183 (D. Conn. Mar. 1, 2007)	Conn.	2-yr. suspension of undergrad for disorderly conduct	14th Am. PDP	(P/U)	denied both sides' motions for summary judgment
				14th Am. SDP	(P/U)	same

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Heiken v. Univ. of Cent. Fla.	995 So. 2d 1145 (Fla. Dist. Ct. App. 2008)	Fla.	unspecified discipline of undergrad for ??	14th Am. PDP?	U	marginal case - short opinion that may be APA>14th Am.
Di Lella v. Univ. of D.C. David A. Clark Sch. of Law	570 F. Supp. 2d 1 (D.D.C. 2008)	D.C.	one-year suspension of law student for exam cheating	14th Am. PDP	U	[excluded §504/ADA claims and those barred by statute of limitations]
				1st Am. Exp.	U	
				contract (assuming)	U	
Holmes v. Poskanzer	342 F. App'x 651 (2d Cir. 2009)	N.Y.	unspecified discipline of 2 undergrads for confrontation w. adm'r	14th Am. PDP	U	short opinion not specifying discipline
				1st Am. Exp.	U	
Castel v. Marquardt	632 F. Supp. 2d 1317 (N.D. Ga.. 2009)	Ga.	suspension of nursing student for disruptive behavior	14th Am. PDP	(P)	preserved for trial and, if successful and if proven, possible damages (not from individual Ds)
				14th Am. SDP	U	
Sarver v. Jackson	344 F. App'x 526 (11th Cir. 2009)	Ga.	suspension of undergrad for ??	14th Am. PDP	U	
O'Neal v. Alamo	2010 WL 376602 (W.D.	Tex.	expulsion of undergrad for	14th Am. PDP	U	[excluded state tort law claims]

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Cmty. Coll. Dist.	Tex. Jan. 27, 2010)		terroristic threats	1st Am. Exp.	U	
Phat Van Le v. Univ. of Med. & Den-tistry of N.J.	379 F. App'x 171 (3d Cir. 2010)	N.J.	dismissal of dental student for exam cheating	14th Am. PDP	U	
Mawle v. Tex. A&M Univ. Kings-ville	2010 WL 1782214 (S.D. Tex. Apr. 30, 2010)	Tex.	expulsion of grad student for sexual harass-ment and plagiarism	14th Am. PDP	U	
				14th Am. SDP	U	
				1st Am. Exp.	U	
Smith v. Va. Mil. Inst.	2010 WL 2132240 (W.D. Va. May 27, 2010)	Va.	expulsion of under-grad for plagiarism	14th Am. PDP	U	
Furey v. Tem-ple Univ.	730 F. Supp. 2d 380 (E.D. Pa. 2010)	Pa.	expulsion of under-grad for altercation	14th Am. PDP	(P)	issues of material fact for some PDP claims
				14th Am. EP	U	
Lucey v. Bd. of Regents of Nev. Sys. of Higher Educ.	380 F. App'x 608 (9th Cir. 2010)	Nev.	various sanctions less than suspension of under-grad for dorm inci-dents	14th Am. PDP	U	
				contract (assum-ing)	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Esfeller v. O'Keefe	391 F. App'x 337 (5th Cir. 2010)	La.	1-year probation + anger mgmt. program of undergrad for Internet harassment	14th Am. PDP	U	
				14th Am. vagueness/1st Am. overbreadth	U	
Korte v. Curators of Univ. of Mo.	316 S.W.3d 481 (Mo. Ct. App. 2010)	Mo.	dismissal of medical student for theft	14th Am. PDP	U	
Willis v. Tex. Tech Univ. Health Sci. Ctr.	394 F. App'x 86 (5th Cir. 2010)	Tex.	expulsion of student for handgun threat	14th Am. PDP	U	indistinct from *Esfeller*
Coates v. Natale	409 F. App'x 238 (11th Cir. 2010)	Ga.	expulsion of undergrad for insubordinate in-class conduct	14th Am. EP	U	marginal case – threshold? [+ excluded PDP and SDP claims – denied on threshold grounds]
				contract	U	
Katz v. Bd. of Regents	924 N.Y.S.2d 210 (App. Div. 2011)	N.Y.	failing grade for undergrad for plagiarism	general	U	not arb. & cap. (relying on private IHE cases)
Yoder v. Univ. of Louisville	417 F. App'x 529 (6th Cir. 2011)	Ky.	dismissal of nursing undergrad for MySpace account of class	contract	U	
Carter v. Citadel Bd. of Visitors	835 F. Supp. 2d 100 (D.S.C. 2011)	S.C.	1-yr. suspension of undergrad for drug use	14th Am. PDP	U	

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Idahosa v. Farm-ingdale State Coll.	948 N.Y.S.2d 104 (App. Div. 2012)	N.Y.	dismissal of nursing undergrad for plagia-rism	general	U	not shock-ingly dis-proportion-ate sanction
Wells v. Colum-bus Tech. Coll.	2012 WL 1300276 (M.D. Ga. Apr. 16, 2012)	Ga.	suspension of under-grad for disruptive classroom conduct	14th Am. PDP	U	
				14th Am. SDP	U	
Barnes v. Zac-cari	669 F.3d 1295 (5th Cir. 2012)	Ga.	expulsion of under-grad for threaten-ing staff (Facebook)	14th Am. PDP	(P)	
Park v. Ind. Univ. Sch. of Dentis-try	692 F.3d 828 (7th Cir. 2012)	Ind.	dismissal of dental student for hybrid dis-ciplinary and aca-demic rea-sons[173]	14th Am. EP	U	[excluded PDP and SDP claims – disposed of on threshold grounds]
				contract	U	deference (citing aca-demic cas-es)
Caiola v. Sad-dlemire	2013 WL 1310002 (D. Conn. Mar. 27, 2013)	Conn.	expulsion of student for sexual assault	14th Am. PDP	U	
				14th Am. SDP	U	
Hunger v. Univ. of Ha-waii	927 F. Supp.2d 1007 (D. Haw. 2013)	Haw.	1-yr. sus-pension of grad stu-dent for terroristic threats	14th Am. PDP	(P)	probable violation but denied preliminary injunction

173. "[H]er 'admitted inability to prioritize and accomplish competing tasks' and her 'noncompliance [with] professional responsibilities' [including breach of confiden-tiality]." *Park*, 692 F.2d at 830.

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Buechler v. Wenatchee Valley Coll.	298 P.2d 110 (Wash. Ct. App. 2013)	Wash.	dismissal of nursing undergrad for distributing drugs	14th Am. PDP	U	
Medlock v. Trs. of Ind. Univ.	2013 WL 1309760 (S.D. Ind. Mar. 28, 2013)	Ind.	suspension of undergrad for drug possession	14th Am. PDP	U	[excluded unsuccessful 4th Am. claim]
Amaya v. Brater	981 N.E.2d 1235 (Ind. Ct. App. 2013)	Ind.	dismissal of medical student for academic dishonesty	contract	U	
Judeh v. La. State Univ. Sys.	2013 WL 5589160 (E.D. La. Oct. 10, 2013	La.	expulsion of grad student for harassment	14th Am. PDP	U	
Boyd v. State Univ. of N.Y. at Cortland	973 N.Y.S.2d 413 (App. Div. 2013)	N.Y.	suspension of undergrad for sexual harassment	14th Am. PDP	P	relief of continued hearing (detailed factual findings and opportunity for rebuttal)
Osei v. Temple Univ.	518 F. App'x 86 (3d Cir. 2013)	Pa.	suspension of undergrad for threatening faculty	14th Am. PDP	U	
Chang v. Purdue Univ.	985 N.E.2d 35 (Ind. Ct. App. 2013)	Ind.	dismissal of nursing undergrad for unprofessional conduct (e.g., angry behavior)	14th Am. PDP	U	marginal case due to clinical context for part of the conduct
				contract	U	deference - not arb., cap., or in bad faith

Case Name	Citation	State	Sanction	Theory	Out-come	Comments
Zimmer-man v. Bd. of Trs. of Ball State Univ.	940 F. Supp. 875 (N.D. Ind. 2013)	Ind.	suspension of 2 under-grads for off-campus Facebook pranks/har assment	14th Am. PDP	U	
				14th Am. SDP	U	
				1st Am. Exp.	U	qualified immunity
Yoder v. Univ. of Louis-ville	526 F. App'x 537 (6th Cir. 2013)	Ky.	dismissal of nursing student for inappro-priate blog post	14th Am. PDP	U	qualified immunity
				14th Am. vague-ness/1st Am. over-breadth	U	
				1st Am. Exp.	U	qualified immunity
Brew-baker v. State Bd. of Regents	843 N.W.2d 466 (Iowa Ct. App. 2014)	Iowa	suspension of grad student for sexual harass-ment	1st Am. Exp.	U	plaintiff failed to preserve PDP and EP claims [excluded double jeopardy and various state law claims]
Gati v. Univ. of Pitts-burgh	91 A.3d 723 (Pa. Su-per. Ct. 2014)	Pa.	dismissal of dental student for unprofes-sional con-duct, incl. forgery	14th Am. PDP	U	marginal case be-cause mixed academic-disciplinary and similar-ly unre-solved pub-lic-private IHE issue
Brown v. Univ. of Kan-sas	16 F. Supp. 3d 1275 (D. Kan. 2014)	Kan.	dismissal of law stu-dent for false ap-plication info	14th Am. PDP	U	[excluded unsuccess-ful state tort law claims]

TOWARD A FAIR SOCIAL USE FRAMEWORK FOR COLLEGE AND UNIVERSITY INTELLECTUAL PROPERTY

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ABSTRACT

In 2014, Penn State conducted the nation's first college or university-run auction of patent rights. According to university officials, the auction was arranged to dissuade patent trolls from purchasing the rights. This may have limited its success. The tradeoff of fewer licenses in order to avoid supporting patent trolls may have societal benefits, but it arguably harms certain stakeholders such as faculty-inventors and the college and university community. Similar concerns arise in the context of trademark licenses limited to avoid unfair labor conditions, copyright policies that en-

sure the flow of information by restricting authors, and patent licenses crafted to preserve public health. Is there a unifying strategy that can help a college or university determine how to balance the competing interests of its beneficiaries and the public?

This article explores the responsibility of college and university administrators, technology managers and licensing officers to consider broad stakeholder impacts in intellectual property ownership and enforcement decisions. It finds that there is a lack of coherency in policies, in part due to the failure to comprehensively assess college and university IP. Moreover, there is outright hostility toward a national regulatory option that could add uniformity. This article provides guidance by proposing a balancing framework that ties together various forms of intellectual property. It includes example tools based on the concept of copyright "fair use" that can be used to achieve an optimal blend of social good and local income.

INTRODUCTION

In March 2014, Penn State announced its intent to host the nation's first college or university-based patent auction.[1] The idea was to take approximately seventy patents in the university's portfolio and auction exclusive licenses for a minimum starting bid of $5,000. If successful, the auction would prove a revenue windfall. The bidding was open online between March 31 and April 11 at a website created by the university. The eventual bidding was less than frenzied. In the end, the university received only one bid on a pair of patents.[2] In conceding some disappointment, the university declared it a learning opportunity more than a financial success.[3] But the university put forth another distinct position as well: the lack of revenue was an acceptable exchange for avoiding patent trolls.

The potential connection between colleges and universities[4] and patent

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1. *Penn State to auction intellectual property licenses*, PENN STATE NEWS (Mar. 4, 2014), http://news.psu.edu/story/306440/2014/03/04/research/penn-state-auction-intellectual-property-licenses.

2. Goldie Blumenstyk, *Penn State's Patent Auction Produces More Lessons than Revenue*, CHRON. OF HIGHER ED., May 1, 2014, http://chronicle.com/blogs/bottomline/penn-states-patent-auction-produces-more-lessons-than-revenue/.

3. *Id.* In November 2014, Penn State announced plans for a second auction to begin on December 8, 2014. David Pacchioli, *Penn State plans second patent auction*, PENN STATE NEWS (Nov. 6, 2014), http://news.psu.edu/story/333600/2014/11/06/research/penn-state-plans-second-patent-auction. The auction was held from December 8 to December 11, but there are no public reports of the results. Still, there was some criticism of the patents available, suggesting a collection of technology more varied than the physical sciences. *See*, *e.g.*, Daniel Nazer, *Stupid Patent of the Month: Who Wants to Buy Teamwork From Penn Stat*e, ELEC. FRONTIER FOUND. (Nov. 24, 2014), https://www.eff.org/deeplinks/2014/11/stupid-patent-month-who-wants-buy-teamwork-penn-state.

4. This article uses the term "college and/or university" as a catch-all for any

trolls has been well understood for some time. Because colleges and universities generally do not make use of the patentable inventions their faculty members develop, it is in the university's interest to sell or license the technology to any outside company willing to pay. Unlike a private firm, a college or university will probably not end up on the infringing side of the equation. The rational strategy is to make deals with whoever will pay. However, such loose licensing can play right into the hands of a patent troll (a.k.a., patent assertion entity or patent aggregator), a firm that exists only to sue others for patent infringement.[5] For that reason, the Association of American Universities is officially opposed to members who license to trolls. Penn State acknowledged this concern from the outset and specifically designed the patent auction to be unpalatable to trolls by requiring use of the invention by the bidder, and requiring Penn State to control any litigation for a period of time. Most other colleges and universities would applaud these restrictions. This was a classic example of college and university technology managers acting in accordance with their perceptions of social responsibility.

But does a college or university's anti-troll strategy appropriately serve its stakeholders? Consider that in thwarting trolls, a college or university may be limiting itself to fewer licenses and less revenue. Inventions that could remain protected and royalty-producing may be abandoned. It is not only the college or university coffers that suffer; most colleges and universities have policies that permit their employee-inventors to share in the revenue.[6] The lost revenue will also not offset student tuition costs. And in the case of state colleges or universities, there will be less return on the investment of the citizens of the state. By putting the goal of preserving access and avoiding trolls above such stakeholders, colleges and universities are making a choice with definite tradeoffs.

In essence, this is just another chapter in the ongoing debate between the social obligations of the non-profit college and university versus the desire to commercialize the valuable information it produces. The issues are not limited to patent trolls. Colleges and universities are called upon to balance competing interests whenever they engage in socially responsible transfer or licensing whether it is patent rights that take into account access to med-

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non-profit institution of higher education including "universities," "colleges," and "schools."

5. It is possible that colleges and universities have already unwittingly supported patent trolls in other deals. *See* Daniel Engber, *In Pursuit of Knowledge, and Profit*, SLATE (May 7, 2014), http://www.slate.com/articles/technology/history_of_innovation/2014/05/patent_trolls_universities_sometimes_look_a_lot_like_trolls.html.

6. *See*, *e.g.*, *An Inventor's Guide to Technology Transfer at Penn State University*, PENN STATE UNIV. at 32, *available at* http://www.research.psu.edu/patents/education-and-training/PSU-Inventors-Guide-to-Technology-Transfer.pdf (stating that inventors receive 40% of the royalties received from Penn State University patents).

icines, trademark rights that consider the labor standards of apparel manufacturers, or copyright policies that promote open access over traditional journal publishers. What principles should colleges and universities apply to achieve the right balance between stakeholder interests and the public?

This article will consider the non-profit college or university's appropriate strategy related to intellectual property commercialization in view of its public mission. It undertakes a comprehensive approach to intellectual property rights that has heretofore been missing in the literature, as well as traditional college and university management. In Part I, the article will describe the emergence of the privatization model of college and university intellectual property, fostered by the Bayh-Dole Act and enhanced by the increasing profit potential of information. Part II will define the issue's broad scope by presenting examples in which colleges and universities have limited the reach of their intellectual property rights to serve a social goal. In Part III, the article will identify a college or university's stakeholder responsibilities derived from public funding sources and unique categories of beneficiaries. In Part IV, the article will describe the failure of colleges and universities to respond to stakeholders and their resistance to regulatory alternatives. Part V will consider the optimal analytical construct for colleges and universities to use in favor of abandonment or acquiescence in the face of social impacts. It will propose a "fair social use framework" for college and university IP and provide an example of an evaluation mechanism that can be used to ensure continued revenue while avoiding abuse.

I. COLLEGES AND UNIVERSITIES EMERGE AS IMPORTANT IP RIGHTS HOLDERS

Universities and colleges, particularly in the United States, have long-served as incubators for the basic research critical to the progress of science and industry. States and other stakeholders have begun to realize that capitalizing on the research and development (R&D) information output of colleges and universities has the potential to benefit a wide range of individuals both inside and outside of the institution.[7] Similarly, through various educational products, health care services and, perhaps most importantly, sports teams, colleges and universities can generate valuable brand information and creative content.[8] But information is difficult to appropriate without intellectual property protection. Thus, the desire to plug infor-

7. *See* Peter Lee, *Patents and the University*, 63 DUKE L.J. 1, 36−38 (2013) (describing the shift in traditional norms and the recent embrace of university patenting).

8. *See* Kevin Carey, *The Brave New World of College Branding*, CHRON. OF HIGHER ED., Mar. 25, 2013, http://chronicle.com/article/The-Brave-New-World-of-College/138107/ (describing the desire for and complexities in profiting from a prominent college or university brand without diluting it).

mation leaks and retain benefits underlies the rise in college and university intellectual property protection.[9] Coupled with the opportunities created by the Bayh-Dole Act, colleges and universities have emerged as major IP rights holders and occasionally litigants. Their impact on the IP environment can be profound and is now an important component in crafting national policy.

A. Research Colleges and Universities and Innovation-Based Intellectual Property Capture

Thanks to a model that places great emphasis on science and engineering in addition to a liberal arts education, American colleges and universities serve as the international model for the research institution. International rankings consistently place United States colleges and universities at the top of the list,[10] and a large part of their strength is their dedication to advanced research. Columbia University's Jonathan Cole notes that this is the result of a new model that blended aspects of the German and English college and university systems into a format uniquely structured to innovate and capitalize on scientific learning.[11] Cole notes, "Sixty percent of all Nobel Prize winners in science since World War II have been Americans or foreign nationals working at American Universities."[12] Moreover, many important industry centers like Silicon Valley have their foundations in institutions steadfastly dedicated to cutting-edge research, like Stanford University.[13]

Investment in college and university science and engineering research extends back to early adopters like Johns Hopkins University in the 1800s.[14] Additional support came in the form of the Morrill Acts of 1862

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9. See, *e.g.*, Maureen Farrell, *Universities That Turn Research Into Revenue*, FORBES, Sept. 12, 2008, http://www.forbes.com/2008/09/12/google-general-electric-ent-tech-cx_mf_0912universitypatent.html (describing the top patent-revenue generating colleges and universities). To get an idea of the broad ways that colleges and universities attempt to initially capture faculty output, *see generally* James Ottavio Castagnera, Cory R. Fine & Anthonly Belfiore, *Protecting Intellectual Capital in the New Century: Are Universities Prepared?*, 1 DUKE L. & TECH. REV. 1 (2002) (reporting the results of a review of 241 randomly selected university employment policies).

10. *See*, *e.g.*, *The World University Rankings*, TIMES HIGHER EDUC., http://www.timeshighereducation.co.uk/world-university-rankings/2013-14/world-ranking (last visited June 28, 2014); *see also QS World University Rankings,* QS TOPUNIVERSITIES, http://www.topuniversities.com/qs-world-university-rankings (last visited June 28, 2014).

11. Jonathan R. Cole, *The Great American University*, BULL. OF AM. ACAD. 27, 28−29 (2011), *available at* https://www.amacad.org/publications/bulletin/spring2011/great.pdf.

12. *Id.* at 29.

13. *Id.* at 31.

14. Nicholas Lemann, *The Soul of the Research University*, CHRON. OF HIGHER ED., April 28, 2014, http://chronicle.com/article/The-Soul-of-the-Research/146155/.

and 1890, which provided states with a grant of federal land in exchange for establishing a public institution for the teaching of agriculture, military tactics, and mechanical arts.[15] But the emphasis on research became truly prominent in the American system after World War II.[16] Part and parcel to the increase in college and university interest was a push at the federal level. The National Science Foundation, a major source of college and university research funding, was established in 1950 as a federal support mechanism for basic research.[17] Funding through other government agencies such as the National Institutes of Health also increased in the 1950s and 1960s[18]

The ability to profit from this wave of research production depends on appropriability, and intellectual property rights are the primary mechanism for doing so. For innovative output, patents tend to be the mechanism of initial interest. The desire to profit from college and university investment through patents extends back even before post-World War II emphasis on basic research. At first, many colleges and universities were reticent to consider patents part of academic culture.[19] They resisted knowledge capture in favor of the "communal norms" promoted by academia.[20] But even in the early years of the twentieth century, some colleges and universities did not discourage patenting and adopted a non-commercial approach different from industry.[21]

College and university patenting increased after World War II, and "[b]y the late 1940s most American [colleges and] universities had developed some sort of patent policy."[22] The most innovative institutions remained wary of monopolies and supported public access to important innovations in life sciences.[23] But it was clear that knowledge control through patents was being increasingly buttressed in large part by the shift in federal re-

15. ASSOC. OF PUBLIC & LAND-GRANT UNIV., THE LAND GRANT TRADITION 3−4 (2012).

16. DAVID C. MOWERY, RICHARD R. NELSON, BHAVEN SAMPAT & ARVIDS ZIEDONIS, IVORY TOWER AND INDUSTRIAL INNOVATION: UNIVERSITY-INDUSTRY TECHNOLOGY TRANSFER BEFORE AND AFTER THE BAYH-DOLE ACT IN THE UNITED STATES 23−27 (2004).

17. *National Science Foundation History*, NAT'L SCI. FOUND., http://www.nsf.gov/about/history/ (last visited June 28, 2014),

18. *A Short History of the National Institutes of Health*, Nat'l Inst. of Health, http://history.nih.gov/exhibits/history/docs/page_06.html (last visited June 28, 2014) (describing the increase in NIH-related agency budgets from $8 million in 1947 to $1 billion in 1966).

19. Lee, *supra* note 7, at 10.

20. *Id.* at 11.

21. *Id.* at 12.

22. Dov Greenbaum, *Academia to Industry Technology Transfer: An Alternative to the Bayh-Dole System for Both Developed and Developing Nations*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 336 (2009).

23. Lee, *supra* note 7, at 16.

search support from defense to basic science innovation.

B. The Bayh-Dole Transformation

Given the importance of federal funding in late twentieth century college and university research, it is not surprising that a change in federal policy heralded the greatest change in college and university patenting. Through grants, cooperative agreements, and contracts, federal funding now accounts for over half of the money that colleges and universities spend on research.[24] For example, in 2009, the federal government supported about $33 billion of the total $55 billion spent on college and university research.[25] The fate of federally supported inventions has had a major impact on the college and university IP presence.

Unfortunately, up until 1980 much of the federal investment in college and university research was underdeveloped and largely not commercialized. Many attributed this to misaligned intellectual property policy that permitted the patenting of federally funded research, but left control of the patents to the federal government. Particularly troublesome was the fact that most federal funding agencies retained title in the patents resulting from the funded research.[26] The government would generally grant nonexclusive licenses based on the notion that it would be improper to allow one company access to a public exclusion right. But obviously such licenses are unattractive to any business that requires exclusivity to recoup investment.[27] Some agencies, such as the United States Department of Defense, would permit patenting by the college or university-recipient, but only if a tech-transfer program existed.[28] Others, like the United States Health, Education and Welfare Department, had a more liberal policy of permitting patenting, but threatened to change from year to year.[29]

In 1980, Congress passed the Bayh-Dole Act[30] to cure the discrepancies between agencies and promote the utilization of federally funded research.[31] The law permitted recipients of federal contracts, grants or coop-

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24. *University Research: The Role of Federal Funding*, ASS'N OF AM. UNIV. (Jan. 2011), http://www.aau.edu/workarea/downloadasset.aspx?id=11588.

25. *Id.*

26. Gary Pulsinelli, *Share and Share Alike: Increasing Access to Government-Funded Inventions Under the Bayh-Dole Act*, 7 MINN. J.L. SCI. & TECH. 393, 398 (2006).

27. Howard Markel, *Patents, Profits, and the American People — The Bayh-Dole Act of 1980*, 369 N. ENG. J. MED. 794, 795 (2013).), http://www.nejm.org/doi/pdf/10.1056/NEJMp1306553.

28. Pulsinelli, *supra* note 26, at 401.

29. *Id.* at 401−02.

30. Bayh-Dole Act, Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified at 35 U.S.C. §§ 202−211 (2006 & Supp. IV 2010)).

31. Bd. of Trs. of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc., 131 S.

erative agreements to obtain patents and retain the revenues from licensing them. There is a presumption in favor of permitting patenting, though an agency does have the power to retain a patent in "exceptional circumstances."[32] A college or university must disclose inventions resulting at least in part from federal funding, and provide notice before applying for a patent.[33] The patent must contain notice of the government's interest.

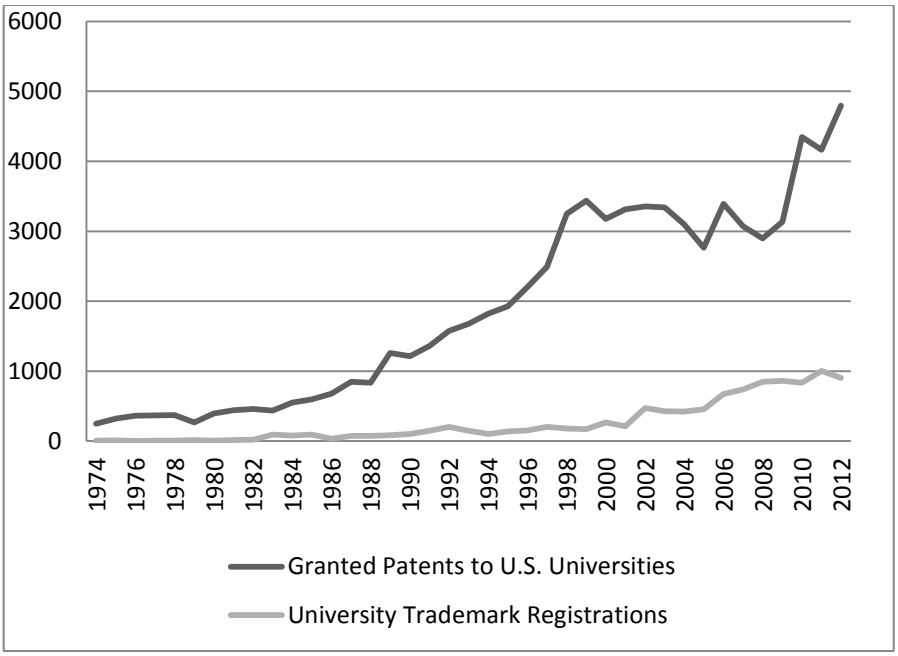
Under the current regime, college and university patenting of federally funded inventions is not without restriction. Most importantly, the federal government has "march in" rights that permit compulsory licensing when access is not available.[34] To date, these rights have never been exercised.[35] In addition, the federal government has a non-transferable, paid-up nonexclusive license to use the invention.[36] While colleges and universities do not have the right to transfer patent rights without permission of the authorizing agency,[37] such permission is not routinely withheld.

Since the passage of the Bayh-Dole Act, college and university patenting has increased by a factor of more than ten (see Figure 1).

Ct. 2188, 2192−93 (2011).

32. 35 U.S.C. § 202(a) (2006).
33. *Id.* at § 202(c)(1)−(3).
34. *Id.* at § 203.
35. Greenbaum, *supra* note 22, at 410 n.365.
36. 35 U.S.C. §202(c)(4) (2006).
37. 37 C.F.R. § 401.1 (2015).

Figure 1. University-Owned Patents and Trademarks



Sources: *See* U.S. COLLEGES AND UNIVERSITIES UTILITY PATENT GRANTS, CALENDAR YEARS 1969-2012, USPTO (Mar. 2014), *available at* http://www.uspto.gov/web/offices/ac/ido/oeip/taf/univ/univ_toc.htm; *see also* Jacob H. Rooksby, *University™: Trademark Rights Accretion in Higher Education*, 27 HARV. J.L. & TECH. 349 (2014).[38]

Given the large proportion of college and university R&D funding that is supplied by the federal government, it is reasonable to conclude that the Act played a major role in the increase. Moreover, industry support of colleges and universities has likely increased as a result of the Act. According to the 2012 Congressional Research Service report, industry financing of college and university R&D rose from 3.9% in 1980 to 7.2% in 2000 due to increased industry interest in college and university research.[39] Businesses were no longer concerned that collaborations would be "contaminated" by federal research funds.[40] In the modern era, colleges and universities have become players in the patent environment. And their participation has led to calls for increased monetization.

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38. Special thanks to Professor Rooksby for sharing the detailed data underlying his paper.

39. WENDY H. SCHACHT, CONG. RESEARCH SERV., RL32076, THE BAYH-DOLE ACT: SELECTED ISSUES IN PATENT POLICY AND THE COMMERCIALIZATION OF TECHNOLOGY 8–9 (Mar. 6, 2012), *available at* https://www.autm.net/Bayh_Dole_Act_Report.htm.

40. *Id.* at 9.

C. Branding Institutions

In addition to patent ownership, colleges and universities have moved aggressively into the area of trademarks in recent years.[41] A review of federal trademark registrations over the last forty years demonstrates a significant recent uptick, though not as significant as patents (see Figure 1). Given the fact that trademark rights extend beyond registered marks (e.g., one of the most prominent recent cases involved unregistered college and university colors on t-shirts[42]), the full extent of the increase is impossible to measure. It seems certain, though, that trademarks are an important component of increased college and university interest in intellectual property.

Trademark rights are less about research productivity than image or "brand," but such rights still reflect the outcome of substantial economic inputs. Generally speaking, prominent college and university brands are created by significant investment in quality services. In many cases, this may involve sports teams.[43] However, college and university trademarks can cover any aspect of college or university operations and are attractive to those who simply revere the college or university itself.

According to a recent article by Professor Jacob Rooksby, the rise in college and university trademark protection and enforcement can be linked to events that are independent of the patent explosion.[44] This includes television sportscasts, favorable tax treatment by the IRS, litigation success, and the emergence of licensing consortia.[45] Through this confluence of factors, colleges and universities have found it easier to gain revenue from trademark licensing. In particular, the outsourcing of some of the most complicated enforcement duties to entities like the Collegiate Licensing Company[46] — namely, policing sports merchandise — has enabled the increased monetization of college and university source indicators.[47]

In many cases, college or university trademarks are related to promotion

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41. *See* Jacob H. Rooksby, *University™: Trademark Rights Accretion in Higher Education*, 27 HARV. J.L. & TECH. 349, 367−70 (2014) (describing the reasons for substantial growth in university trademark ownership after 1990).

42. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co., 550 F.3d 465 (5th Cir. 2008).

43. *See* Robert Lattinville, *Logo Cops: The Law and Business of Collegiate Licensing*, 5 KAN. J.L. & PUB. POL'Y 81, 81 (1996) (describing the impact of sports on university trademark licensing programs).

44. Rooksby, *supra* note 41, at 359−69.

45. *Id.*

46. CLC represents 200 educational institutions and related events, comprising 80% of the market for college merchandise. *About CLC*, COLLEGIATE LICENSING CO., http://www.clc.com/About-CLC.aspx (last visited Apr. 16, 2015).

47. According to the CLC, the marketplace for collegiate licensed merchandise was $4.59 billion in royalties in 2013. *CLC Names Top Selling Universities and Manufacturers for 2013-14*, COLLEGIATE LICENSING CO. (Aug. 5, 2014), http://www.clc.com/News/Archived-News/Annual-Rankings-2013-14.aspx.

of the institution's educational services or sports teams. Sports merchandising is extremely profitable, applying to valuable goods such as apparel and intangibles such as video games.[48] Such contexts are also attractive to those who would trade off of a college or university's name and reputation, providing the source of extensive litigation.

It is also possible for colleges and universities to retain marks for more social goals. For example, some large colleges and universities operate health care services like hospitals and clinics.[49] Trademarks related to those services protect their reputation and communications, which in turn promote the public purpose of the service. Additionally, colleges and universities may encompass philanthropic endeavors that are promoted with certain words and symbols. For example, Penn State University students hold an annual dance marathon called "Thon" to raise money for research related to childhood cancer.[50] The university considers "Thon" to be a trademark and holds federal registrations for associated phrases such as "for the kids" and "FTK."[51]

Regardless of the purpose, college and university trademark licensing is now a multi-million dollar business that brings significant revenue into institutions large and small.

D. Creative Content Owners

As large employers, colleges and universities create a great amount of copyrightable content. The content may relate to the administrative and promotional functions of the college or university in the form of operations manuals, college brochures, and software among other items. If created in the scope of an employee's position, any resulting copyrightable works would likely be considered automatically owned by the instruction under the work-for-hire doctrine.[52] In many ways, this is essentially identical to the works produced by any similarly sized company that is not primarily a content creator. However, due to the educational mission and creative drive of its academic employees, colleges and universities produce at least two

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48. *See* Rooksby, *supra* note 41, at 393–94

49. *Id.*

50. *See*, *About*, THON: PENN STATE IFC/PANHELLENIC DANCE MARATHON, http://thon.org/About (last visited Apr. 16, 2015). Thon has such a strong brand image that sports commentator Keith Olbermann's perceived criticism of the event earned him a week's suspension from his employer, ESPN. *See Keith Olbermann off air after tweets*, ESPN (Feb. 24, 2015), http://espn.go.com/espn/story/_/id/12375585/keith-olbermann-critical-penn-state-twitter-do-show-rest-week.

51. Pennsylvania State University, Registration No. 4460813 (Registered Jan. 7, 2014 to the Pennsylvania State University).

52. *See generally* Mamie Deaton Lucas, Note, *Copyright, Independent Contractors, and the Work-for-Hire Doctrine:* Community for Creative Non-Violence v. Reid, 67 N. C. L. REV. 994 (1989) (explaining the application and tracing the history of the work-for-hire doctrine).

additional and important categories of works that may be owned by the institution.

A college or university could own educational materials, which often involve a substantial amount of copyrightable content, if their creation is defined as an employee responsibility.[53] Having long ago moved beyond the syllabus and course-pack, college and university educational materials include slides, videos and computer software. Depending on the specific agreement between educators and the institution, ownership may rest with the college or university as a work-for-hire.

Certain kinds of teaching materials, such as business case studies, have long been captured and monetized with copyright.[54] But as colleges and universities embrace online environments and distance education, the value of instructional materials has increased. Web-based interaction has become a core component in the movement to expand classroom teaching to new, remote audiences. By utilizing and repurposing content created in traditional classrooms, colleges and universities can jump-start an online presence. To date, actual profits from online content have been elusive,[55] but hope for the future creates an incentive to preserve copyright protection.

In addition to classroom copyright, colleges and universities can theoretically extend copyright ownership to scholarly materials.[56] Again, the necessary predicate is that scholarly production is within the scope of employment. Many institutions exclude scholarly materials from the scope of employment by agreement or explicit policy, permitting faculty to own articles and textbooks or assign/license the works to others.[57] It has traditionally been a path for additional income for many college and university employees, as well as the economic basis for academic publishers. But colleges and universities are free to redefine the scope of employment to gain rights over such works should the desire arise.

A possible limitation to college and university copyright assertion over academic works is the ill-defined "teacher exception" that has been articulated by a few courts.[58] The notion is that there is something special in na-

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53. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (determining that scope of employment is to be understood in light of common law of agency).

54. *See Copyright Permission Guidelines*, HARVARD BUSINESS PUBLISHING, http://hbsp.harvard.edu/list/rights-permissions (last visited, Apr. 16, 2015).

55. Tamar Lewin, *Students Rush to Web Classes, but Profits May be Much Later*, N.Y. TIMES, Jan. 6, 2013, http://www.nytimes.com/2013/01/07/education/massive-open-online-courses-prove-popular-if-not-lucrative-yet.html?smid=pl-share&_r=1.

56. Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 598−600 (1987).

57. *See* Robert C. Denicola, *Copyright and Open Access: Reconsidering University Ownership of Faculty Research,* 85 NEB. L. REV. 351, 379–82 (2006) (discussing the common text of college and university copyright policies concerning faculty).

58. Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 N.W. J.

ture of academic employment that creates the presumption that scholarly work is an expression outside the scope of employment. Moreover, it should also be of little interest to educational institutions.[59] The latter rationale is clearly invalid today.[60] Some have concluded that the exception was superseded by the passage of the 1976 Copyright Act (which detailed the work-for-hire definition without mentioning a teacher exception).[61] No case has applied the exception since then, and it has been mentioned favorably only in dicta.[62] To avoid any ambiguity, many colleges and universities simply define by contract whether scholarly writings and textbooks are works covered by the faculty member's employment relationship with the college or university.[63]

It is very difficult to empirically measure college or university copyright ownership, primarily because copyright protection exists as soon as a work is fixed in a tangible medium,[64] a significantly lower threshold than even use in commerce for trademarks. The vast majority of college and university copyrights are likely not formally recorded. However, there is an incentive to register some works in the U.S. because it is a requirement for enforcing a copyright[65] and a deposit requirement accompanies publication.[66] This incentive is long standing, and thus copyright registrations might reasonably indicate whether there are changing trends in college and university ownership, even if they do not capture the full extent of rights. A review of the copyright registration database demonstrates, somewhat surprisingly, that college and university registrations have remained relatively constant since 1978 (see Figure 2).

TECH. & INTELL. PROP. 377, 403−09 (2013).

59. Williams v. Weisser, 273 Cal. App. 2d 726, 734–35 (1969).

60. *See* Elizabeth Townsend, Legal and Policy Responses to the Disappearing "*Teacher Exception*," or *Copyright* Ownership in the 21st Century, 4 MINN. INTELL. PROP. REV. 209, 243–44 (2003).

61. *See*, *e.g.*, Molinelli-Freytes v. Univ. of P.R., 792 F. Supp. 2d 164, 172 (D.P.R. 2010).

62. *Id.*

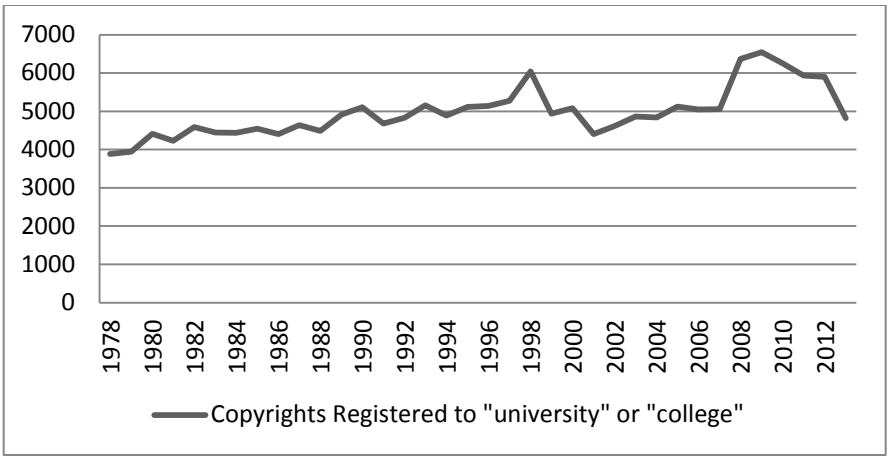
63. *See* Denicola, *supra* note 57, at 379–82.

64. 17 U.S.C. § 102(a) (2012).

65. 17 U.S.C. § 411 (2012).

66. 17 U.S.C. § 407 (2012).

Figure 2. University Owned Copyright Registrations.



Source: U.S. Copyright Office Online Public Catalog[67]

This consistency actually comports with the overall steady trend in copyright registrations, which have numbered around 500,000 each year since 1980.[68] The takeaway is that college and university investment in copyright is not insubstantial. Moreover, various interests are impacted by college and university copyright and it is an important part of the rights management conversation.

E. Capturing the Face(s) of the College or University

An emerging area of intellectual property is the proprietary interest that exists in one's image, voice, signature and personality. Generally referred to as the right of publicity, it is an area of law that straddles privacy and branding.[69] Essentially, it concerns having a say in the commercial use of one's personality.[70] In the context of colleges and universities, the right of publicity is important for any individual employee or student famous enough that there is some ability to profit from appearances and endorse-

67. Public Catalog, U.S. COPYRIGHT OFFICE ONLINE PUBLIC CATALOG, http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First. Very broad search conducted using the terms "university" or "college" in the copyright claimant (KCLN) field. It is important to note that this search may be under inclusive in the years closer to 1978 due to database coding issues. Moreover, the search is slightly over inclusive throughout the full time period because the search terms read on some private companies like the College Entrance Examination Board, which publishes the Scholastic Aptitude Test (SAT). A sampling of the results suggests that private companies are a small minority of the records returned by this search.

68. U.S. COPYRIGHT OFFICE FISCAL 2012 ANNUAL REPORT 24 (2012), http://www.copyright.gov/reports/annual/2012/ar2012.pdf).

69. *See* Robert T. Thompson III, *Image as Personal Property: How Privacy Law Has Influenced the Right of Publicity,* 16 UCLA ENT. L. REV. 155, 157–58 (2009).

70. *Id.*

ments. Although it is possible that a famous scientist or economist[71] may need to protect a right of publicity, it is coaches and athletes who have the most valuable rights in this regard.[72]

In general, the right of publicity is a personal right that would not at the outset be owned by a college or university. Only through a contractual license or transfer would the college or university become the administrator of personality property. This may happen as part of a co-branding effort.[73] However, such a transfer may also occur in the context of students who give up their rights to remain eligible for team sports. This is of course not theoretical; the National Collegiate Athletic Association (NCAA) has for years required college and university athletes to relinquish their right to the commercial use of their image.[74]

II. THE QUEST FOR SOCIAL RESPONSIBILITY IN COLLEGE AND UNIVERSITY IP TRANSACTIONS

The growth of college and university intellectual property ownership means that rights assertion also has a greater societal impact. Moreover, such rights give colleges and universities the power to shape the marketplace in ever more prominent ways. However, because colleges and universities rarely produce products related to the rights they license, they may be disconnected from the impacts and effectively ignore them. It is this latter fact that attracts social activists. Colleges and universities can work to ensure that their use and licensing of intellectual property compels their business partners to act in ways that promote good behavior and social responsibility. In this manner, institutions practice what might be referred to as college or university social responsibility, similar in many ways to corporate social responsibility (CSR).

It is useful to explore particular examples of instances in which colleges and universities have been encouraged to place limitations on the licensing of their property to promote social goals. But one should keep in mind that other contexts certainly exist and more will emerge in the future. College and university technology managers and licensing officers face constant

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71. As co-author of *Freakonimics*, Steve Levitt is a University of Chicago economist who also enjoys a significant ability to profit from endorsements. *See* Steven D. Levitt, http://pricetheory.uchicago.edu/levitt/home.html (last visited Apr. 16, 2015).

72. *See* Matthew G. Matzkin, *Getting' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 246–49 (2001).

73. Steve Berkowitz, *Latest trend for College Football Coaches: Trademarked names,* USA TODAY SPORTS, Nov. 6, 2013, http://www.usatoday.com/story/sports/ncaaf/2013/11/06/college-football-coaches-pay-name-likeness-trademarks/3449829/.

74. Julia Brighton, Note, *The NCAA and the Right of Publicity: How the O'Bannon/Keller Case May Finally Level the Playing Field,* 33 HASTINGS COMM. & ENT. L.J. 275, 279–80 (2011).

(and growing) solicitations to put a public service face on intellectual property ownership.

A. The Inconsiderate College or University

Although colleges and universities have without a doubt become more important players in the intellectual property game, their interests still constitute only a fraction of overall ownership. Colleges and universities obtained less than 4% of the U.S.-owned utility patents in 2012[75] and less than 0.5% of trademark registrations in 2011.[76] The size belies the important impact of college and university intellectual property that is bolstered by the special incentives they have to get their property into the hands of third parties and the foundational nature of their work. This exaggerated impact is an important reason why social activists believe that college and university policymakers are worth influencing.

First among the factors that enhance college and university intellectual property power is the fact that they generally do not produce products or provide services (other than education and in some circumstances health care and other assorted outreach endeavors). Their intellectual property is a pool of assets ready for third-party purchase and utilization.[77] Moreover, the failure to put the intellectual property into use can result in substantial losses. The average patent costs thousands of dollars in filing fees, attorney time and administrative time.[78] Even the initial stage of filing a provisional patent application is expensive. Federal trademark registration applications are significantly less costly, but the amount of money is substantial.[79] And, while it is true that copyrights receive protection as soon as they are fixed in a tangible medium[80] and registration costs can be deferred until transfer or litigation, the production of copyrightable works reflects some investment in the original creative act. This is funded through college or university salaries and materials. Once costs are sunk, the failure

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75. *University Report Table of Contents*, U.S. Colleges and Universities Patent Grants 1969-2012 (last visited Apr. 16, 2015) http://www.uspto.gov/web/offices/ac/ido/oeip/taf/univ/asgn/table_1_2012.htm.

76. Rooksby, *supra* note 41, at 390; U.S. PAT. & TRADEMARK OFF., PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2011 (2012), *available at* http://www.uspto.gov/about/stratplan/ar/2011/.

77. *See* Engber, *supra* note 5.

78. *See* David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677, 698–90 (2012) (estimating the average cost to obtain a patent to be approximately $22,000).

79. Karen E. Klein, *When is the Right Time to Trademark Your Company's Name?*, BUS. WK., July 5, 2013, http://www.businessweek.com/articles/2013-07-05/when-is-the-right-time-to-trademark-your-companys-name (addressing trademark registration costs and profiling a firm that is "middle of the road" in price at around $2000 per classification).

80. 17 U.S.C. § 102 (2012).

to sell or license can mean a loss of monetary investment. Maintenance fees add to the burden. The longer that a college or university holds onto unlicensed patents and trademarks, the more it will cost in terms of maintenance fees and other administrative burdens.[81] Therefore, colleges and universities have a strong incentive to move rights off their books and attempt to at least recoup the acquisition costs.

Second, because colleges and universities generally do not face litigation in return for their intellectual property distribution (and public colleges and universities have an even stronger Eleventh Amendment protection against federal suits),[82] there is no economic incentive to be judicious in enforcing or licensing the rights. Consider in contrast the disincentives that exist for a typical firm: (1) there is the possibility that an assignee or licensee will use a firm's own right to harm the firm's position in the marketplace, and (2) it is possible that a non-licensee competitor will use its rights to sue in return (or license to another who will sue). In the marketplace, there is utility in equilibrium. No such disincentives exist for colleges and universities, though, because they are not generally producers or infringers.[83] There is no economic reason for a college or university to hold back in its licensing practices for fear of a competitor's counterattack. From the position of the institution's stakeholders, it makes sense to always sell to the highest bidder (or any bidder).

And third, because college and university rights often cover basic research, they may have foundational power over an industry. Many college and university patents are related to nascent technologies.[84] They may be the building blocks for some future firm or even industry segment. Foundational patents can be particularly powerful if appropriately drafted. It may be possible to impact a large part of a developing industry unaware of the scope of protection over such basic technology. The blockbuster college and university success stories are often related to these kinds of broad rights.

Compounding the unique market position of colleges and universities is the fact that institutional managers find the intellectual property revenue stream delicate and resist top-down legislation that would impose curtailing restrictions. This is particularly true in the context of patents. For example, in the most recent patent reform legislation, the *America Invents Act,* col-

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81. Kimberly A. Moore, *Worthless Patents,* 20 BERKELEY TECH. L.J. 1521, 1521–26 (2005).

82. Mark. A. Lemley, *Are Universities Patent Trolls?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 615–16 (2008).

83. It is true that colleges and universities may infringe patents on research tools, but not with the same risk of reflexive litigation that an operating firm faces.

84. *See* Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine,* 66 LAW & CONTEMP. PROBS. 289, 291 (2003) (describing university patenting of basic research technology).

leges and universities were given a special exemption from the provision that grants prior user rights for undisclosed pre-filing uses of the invention.[85] This protection was enacted entirely as a benefit to colleges and universities. A more recent example involves non-practicing patent entities or patent trolls and the failure of bipartisan legislation due in part to college and university pressure.[86]

As a result of the unique incentives for colleges and universities, social responsibility advocates have focused on convincing individual college and university actors to take independent action. In essence, socially responsible licensing is now a critical part of some college and university programs. It is generally a response to specific issues, and a one-sided restriction without significant reflection on the affect of the revenue losses.

B. Recent Socially-Responsible College and University Licensing Efforts

There have been calls for socially responsible behavior with regard to college and university intellectual capital dating back at least to the early resistance to patenting academic research. But the formation of an actual resistance movement required sufficient forward momentum by colleges and universities. It is only after colleges and universities emerged as important intellectual property owners that activists found a great need for explicit confrontation. Clear examples exist in the patent, trademark, and copyright field, suggesting a pan-intellectual property phenomenon that is subject to a more general plan for redress.

1. Trolls Besiege the Ivory Tower

Due largely to the incentive to put college or university patents into the hands of any third parties, no matter what their motivations, industry had raised concerns about the potential for colleges and universities to fuel patent trolls. The special relationship that colleges and universities have with these classes of disfavored actors is an important factor that precludes easy solutions.

Patent trolls are entities that own patents and produce no products. In popular culture, they have been portrayed as opportunistic actors with no other real business purpose than to sue legitimate businesses.[87] Receiving particular ire are trolling firms that engage in no invention but merely purchase patents from another. Set up with nothing but a mailing address in a

85. 35 U.S.C. § 273(e)(5) (2006).

86. *See infra* notes 167-181, and accompanying text.

87. *See*, *e.g.*, David Segal, *Has Patent, Will Sue: An Alert to Corporate America*, N.Y. TIMES, July 13, 2013, http://www.nytimes.com/2013/07/14/business/has-patent-will-sue-an-alert-to-corporate-america.html?_r=0 (profile of Erich Spangenberg, owner of patent assertion entity, IPNav).

supposedly favorable forum like the Eastern District of Texas,[88] the apocryphal troll charges a toll on a bridge they did not build simply because the law allows them to. In some cases, trolls go after weak and unknowledgeable defendants who are end users of someone else's allegedly infringing technology.[89] Not all trolls fit the foregoing archetype, but the image is powerful enough to inspire presidential condemnation[90] and legislative action.[91]

On deeper investigation, the troll problem is more complicated than it would initially appear, and this can be observed in the debate about appropriate categorization and terminology. The first non-disparaging name applied to trolling firms was "non-practicing entity" (NPE). Although this captures the worst of the trolls, it also included other innocent actors like colleges and universities, innovation labs or failed startups. A subsequent, neutral term used by many is "Patent Assertion Entity" (PAE),[92] coined to reflect the litigation purpose of trolls. Less commonly used, but of the same ilk is Patent Monetization Entity (PME). All of these terms are an attempt to highlight perceived bad behavior.

Even the impact of trolling is debatable.[93] Initial reports focused on the dramatic increase in litigation in recent years showed that a large percent of that increase was comprised of troll lawsuits.[94] However, critiques of this

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88. David O. Taylor, *Patent Misjoinder,* 88 N.Y.U. L. REV. 652, 660 (2013).

89. *See* Timothy B. Lee, *There are two patent troll problems. The House bill only fixes one of them*, WASH. POST, Dec. 4, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/04/there-are-two-patent-troll-problems-the-house-bill-only-fixes-one-of-them/ (interview with U.S. Representative Bob Goodlatte in which he describes the problem of trolls suing unsophisticated end-users).

90. *See* PATENT ASSERTION AND U.S. INNOVATION, EXEC. OFFICE OF THE PRESIDENT 2 (June 2013) [hereinafter WHITE HOUSE REPORT], *available at* https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (discussing impact of patent assertion entities on U.S. economy); David Kravets, *History Will Remember Obama as the Great Slayer of Patent Trolls*, WIRED (Mar. 20, 2014), http://www.wired.com/2014/03/obama-legacy-patent-trolls/ (reviewing the five executive orders aimed at reducing patent inefficiencies including trolls).

91. *See Patent Progress's Guide to Federal Patent Reform Legislation*, PATENT PROGRESS, http://www.patentprogress.org/patent-progresss-guide-patent-reform-legislation/ (last visited Apr. 14, 2015) (listing fourteen different bills drafted to address the patent troll problem).

92. Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. 649, 650 (2014).

93. *See* Stephen Haber & Ross Levine, *The Myth of the Wicked Patent Troll*, WALL ST. J., June 29, 2014, http://online.wsj.com/articles/stephen-haber-and-ross-levine-the-myth-of-the-wicked-patent-troll-1404085391 (arguing that the increase in patent litigation by non-practicing entities does not necessarily indicate a negative impact on innovation).

94. *See*, *e.g.*, Colleen Chien, *Patent Trolls by the Numbers,* PATENTLY-O (Mar. 14, 2013), http://patentlyo.com/patent/2013/03/chien-patent-trolls.html (stating that patent assertion entities brought 62% of all patent litigations in 2012).

work eventually emerged that pointed out that the increase in litigation was partially due to new joinder rules that limit cases in which multiple defendants can be sued in a single action.[95] In addition, it has been suggested that the worst-of-the-worst type of troll—the firm that exists only to extract unearned licensing fees from the weak—is actually responsible for a relatively small percentage of annual cases.[96]

Regardless of definitional debates, few would argue that a firm possessing a weak (e.g., likely invalid) patent, suing mom and pop establishments for using a commercial system possessing a minor, patented component and offering to settle for a nuisance fee is a positive economic force.[97] Businesses large and small have no love for such behavior. And there is a sense that its impact may grow and affect other industries.[98]

Taken together, college and university patent portfolios are particularly attractive targets for trolls, and that concerns both policymakers and industry. College and university rights that would otherwise sit fallow may be valuable at least as a threat value to trolls. The point at which trolling value and college or university return on investment meet is fairly low. Reportedly, some colleges and universities have already fallen into the troll trap and inadvertently (or inconsiderately) fueled bad behavior.[99]

The potential for colleges and universities to mix with trolls has led some to call for anti-troll licensing policies. Most prominently, the Association of American Universities (AAU) has explicitly advocated an anti patent troll position for its membership. In a 2007 document memorializing points of agreement from a small but representative meeting of prominent college and university tech transfer individuals, the AAU advises members to "Be mindful of the Implications of working with patent aggregators."[100] The document includes the normative observation:

> Without delving more deeply into the very real issues of patent misuse and bad-faith dealing by such aggregators, suffice it to say that universities would better serve the public interest by ensuring appropriate use of their technology by requiring their li-

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95. *See generally* Cotropia, et al., *supra* note 92.

96. *Id.* at 666; *Cf.* James Bessen, *ALL the Facts: PAEs are Suing Many More Companies*, PATENTLY-O (Jan. 28, 2014), http://patentlyo.com/patent/2014/01/facts-suing-companies.html (responding to Cotropia, et al.).

97. *See* James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes,* 99 CORNELL L. REV. 387, 422–23 (2014) (reporting on survey of costs of NPE litigation and concluding that it is a significant social problem due to the net economic losses).

98. Erika C. Hayden, *'Patent trolls' target biotechnology firms*, 477 NATURE 521 (2011).

99. Engber, *supra* note 5.

100. *In the Public Interest: Nine Points to Consider in Licensing University Technology*, ASS'N OF AM. UNIV., (2007), *available a*t http://www.aau.edu/workarea/downloadasset.aspx?id=2642.

> censees to operate under a business model that encourages commercialization and does not rely primarily on threats of infringement litigation to generate revenue.[101]

Thus, there is an established sentiment that colleges and universities have a special responsibility to avoid patent trolls and there is also accompanying pressure to address that responsibility.

2. Licensing to Promote Access to Essential Medicines

Pharmaceutical companies are well accustomed to concerns that their patent rights create barriers for access to essential medicines. As a market exclusion device, patents can drive up the costs of goods that have no simple substitute.[102] In the context of medicines that may provide the best treatment for a particular disease, patents can convey great power and demand a significant price premium.[103] In wealthy countries, such prices may be absorbed by the health care system, but in developing and least developed countries adequate funds may not be available. Firms have many options to facilitate greater access, from utilizing price discrimination to providing low-cost branded goods to developing nations to authorizing third parties to produce generics.[104] The extent to which a firm chooses an access option depends on a variety of factors that include the nature of the global market, the severity of the disease, and the extent to which research and development can be accounted for in developed nations. Activists constantly try to push firms toward greater access.[105]

Colleges and universities may be confronted with many of the same issues as pharmaceutical companies.[106] When college and university scientists develop chemical and biologic compounds that are central to essential medicines, they will likely license such inventions to a firm that will com-

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101. *Id.* at 8.

102. An excellent review of the literature underlying this proposition, followed by a critique, is provided by Benjamin N. Roin, *Intellectual Property versus Prizes: Reframing the Debate*, 81 U. CHI. L. REV. 999 (2014).

103. *See*, *e.g.*, Daniel R. Cahoy, *Confronting Myths and Myopia on the Road from Doha*, 42 GA. L. REV. 131, 140–41 (2007).

104. Kevin Outterson, *Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 193, 203–05 (2005) (describing the effects of price discrimination — or arbitrage — for patented goods).

105. *See* Joseph E. Stiglitz, Dean Baker & Arjun Jayadev, *Obama Versus Obamacare*, PROJECT SYNDICATE (Feb. 10, 2015), http://www.project-syndicate.org/commentary/obamacare-india-generic-drugs-by-dean-baker-et-al-2015-02 (arguing that aggressive patent protection reduces access in developing countries).

106. *See*, *e.g.*, Ellen F.M. 't Hoen, *The Responsibility of Research Universities to Promote Access to Essential Medicines*, 3 YALE J. HEALTH POL'Y, L. & ETHICS 293, 297–99 (2003) (arguing that colleges and universities have a public responsibility to address access to medicines in patenting and licensing decisions).

mercialize. Traditionally, little thought has been given to the firm's commercialization plans beyond guarantees that some use will occur that will produce an income stream. But activists argue that the licensing transaction is a key opportunity to put some controls on intellectual property use that provide greater access.[107]

Recent years have seen the growth of a movement to compel colleges and universities to require access in out-licensing transactions. One of the most prominent of these groups is Universities Allied for Essential Medicines (UAEM), which lists chapters at the most prominent medical research colleges and universities in the country, such as Harvard, Yale, Penn, and Stanford.[108] The goal is to encourage the limitation of licenses so that humanitarian uses are preserved through mechanisms such as non-assertion agreements and reservation of rights agreements.[109] Overall, such restrictions may make the use of the intellectual property less attractive or less valuable. But the social goal is deemed paramount.

3. Branded Merchandise and Fair Labor Standards

Outrage over the deplorable working conditions in which clothing is produced in developing countries has fostered a growing sensitivity to supply chain ethics. Companies have been cited for using suppliers that rely on child labor, require unreasonable shifts, or permit dangerous working conditions.[110] The branded company logo on the side of the factory with mistreated workers is a metaphorical black eye.

Colleges and universities may be on the hook as well. Although colleges and universities rarely directly contract to produce clothing, they often license outside vendors who then depend on developing country supplies for materials and manufacture. In the same way that a major company may find its logo on a t-shirt produced through child labor, so may a university or college.

This reality has led to a movement to set forth fair labor standards in college and university trademark licensing. Students initially led the way.[111]

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107. *See generally* Krista L. Cox, *The Medicines Patent Pool: Promoting Access and Innovation for Life-Saving Medicines Through Voluntary Licenses*, 4 HASTINGS SCI. & TECH. L.J. 291 (2012).

108. *Chapters,* UAEM, http://uaem.org/chapters/ (last visited Apr. 14, 2015).

109. Beirne Roose-Snyer & Megan K. Doyle, *The Global Health Licensing Program: A New Model for Humanitarian Licensing at the University Level*, 35 AM. J. L. & MED. 281, 285–86, 288–89 (2009).

110. *See* David Barboza, *In Chinese Factories, Lost Fingers and Low Pay*, N.Y. TIMES, Jan.5, 2008, http://www.nytimes.com/2008/01/05/business/worldbusiness/05 sweatshop.html?pagewanted=1& (describing accusations of unfair labor practices levied at companies like Nike and Gap).

111. Purnima Bose, *From Agitation to Institutionalization: The Student Anti-Sweatshop Movement in the New Millennium*, 15 IND. J. GLOBAL LEGAL STUD. 213

Groups like United Students Against Sweatshops (USAS)[112] now work to influence college and university apparel manufacturing decisions. A slight hurdle has been the large consortium that typically license college and university trademarks. An attempt by several colleges and universities to work together to set standards could be considered an antitrust issue.[113] However, the college or university acting alone would be able to incorporate standards. And the licensing associations themselves can create basic standards that avoid the whiff of collusion.

4. Mandated Open Access

The spiraling cost of academic journals and educational materials can create access issues.[114] For some time, the sciences have been under scrutiny for copyright restrictions—pay walls, proprietary databases, etc.—impacting journals that cover issues related to medicine.[115] According to many, the restrictions mean that cutting edge work that can be the foundation for future advancement is not accessible by researchers and institutions with less funding.[116] Colleges and universities have a particularly acute perception of access issues through stretched library funding[117] and the yearly student complaints about the high cost of educational works, like textbooks.[118]

The federal government has responded with some plans for requiring articles based on federally funded research to be accessible by the public. The strongest current policy is the National Institutes of Health's (NIH) Public Access Policy.[119] It requires peer-reviewed manuscripts accepted

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(2008).

112. *About*, USAS, http://usas.org/about/ (last visited, Apr. 16, 2015).

113. Bose, *supra* note 111, at 238.

114. Jorge L. Contreras, *Confronting the Crisis in Scientific Publishing: Latency, Licensing, and Access*, 53 SANTA CLARA L. REV. 491, 505–08 (2013).

115. Thomas Lin, *Cracking Open the Scientific Process*, N.Y. TIMES, Jan. 16, 2012, http://www.nytimes.com/2012/01/17/science/open-science-challenges-journal-tradition-with-web-collaboration.html?_r=0.

116. *See* Kristopher Nelson, *The Impact of Government-Mandated Public Access to Biomedical Research: An Analysis of the New NIH Depository Requirements,* 19 ALB. L.J. SCI. & TECH. 421, 429–31 (2009) (describing the rising cost barriers for academic publications).

117. Julie Nicklin, *Libraries Drop Thousands of Journals as Budgets Shrink and Prices Rise*, CHRON. OF HIGHER ED., Dec. 11, 1991, at A29.

118. Allie Bidwell, *Report: High Textbook Prices Have College Students Struggling,* U.S. NEWS, Jan. 28, 2014, http://www.usnews.com/news/articles/2014/01/28/report-high-textbook-prices-have-college-students-struggling.

119. *NIH Public Access Policy Details*, NAT'L INST. OF HEALTH, http://publicaccess.nih.gov/policy.htm (last updated, Mar. 27, 2014). *See also* Paul Basken, *NIH to Begin Enforcing Open-Access Policy on Research It Supports*, CHRON. OF HIGHER ED., Nov. 19, 2012, *http://chronicle.com/article/NIH-to-Begin-Enforcing/135852/* (describing enforcement of the NIH Policy).

after April 2008 and arising from any direct NIH funding to be "publicly available."[120] The White House Office of Science and Technology Policy (OSTP) announced a much broader open access policy in 2013.[121] It requires all federal agencies with $100 million or more in "research and development expenditures to develop a plan to support increased public access to the results of [government funded research]."[122] To date, the effort is still in the planning stage, but it should eventually have a more significant impact. Still, this top down approach covers only a small part of the content that college and university employees produce, with very little coverage for many social sciences and the humanities.

What should be done with those copyrighted works not covered by federal mandates? Many colleges and universities have taken it upon themselves to enact open access policies for faculty and staff.[123] Such policies may simply envision an archive site that provides an alternative or complement to journal publishing (often referred to as the "green road"). But the more onerous strongly favor (arguably require) open access publishing and suggest the use of open access journals.[124] For example, Harvard University's Faculty of Arts and Sciences (FAS) adopted a permission mandate in 2008 that requires faculty members to grant to the University a "nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright,"[125] essentially revising the standard model of faculty full ownership of academic works. Although there is an exception for explained need for restriction, the policy imposes on faculty the obligation to either publish in open access journals or attempt negotiation with proprietary publications for greater rights.[126]

When colleges and universities adopt open access policies, they are making a decision to favor a general public policy to the detriment of their own stakeholders. In some cases, these policies may push faculty to less attractive outlets, impacting scholarly reputation and advancement. Alternatively, they may impact college or university resources. In response to the call for more access, many journals now provide a parallel publication path that, for a hefty fee as high as $10,000, removes access limitation for a

120. NAT'L INST. OF HEALTH, *supra* note 119.

121. Memorandum from John P. Holdren for the Heads of the Executive Departments and Agencies: Increasing Access to the Results of Federally Funded Scientific Research (Feb. 22, 2013), *available at* https://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.

122. *Id.* at 2.

123. *See* Contreras, *supra* note 114, at 526–28 (describing self-archiving and noting that groups such as the Association of College and Research Libraries (ACRL) and the Scholarly Publishing and Academic Resources Coalition (SPARC)).

124. Priest, *supra* note 58, at 385–400.

125. Harvard Faculty of Arts and Sciences *Open Access* Policy, HARV. U. LIBR. OFF. FOR SCHOLARLY COMM. (Feb. 12, 2008), https://osc.hul.harvard.edu/hfaspolicy.

126. *Id.*

particular article.[127] In a sense, the school buys out the copyright limitation. That funding, of course, must come from other college or university uses with attendant stakeholder impacts.

Notably, open access policies are directed towards the faculty and staff of the institution. However, they may not impact the rights of outside authors who publish in school-owned journals and other publication. Thus, one could argue that colleges and universities are more likely to set a social policy agenda that sacrifices their own employees' rights when it is acknowledged that such a policy is unreasonable for others.[128]

5. Profiting from Student Labor

One of the greatest controversies in college sports is the treatment of student athletes. In high profile sports, like football and basketball, students have the capacity to make great sums of money from their participation as well as their product endorsements.[129] However, the NCAA prohibits its student athletes from receiving any compensation for the use of the names, images, and likenesses in broadcasts, videogames and other depictions.[130] As members of the NCAA, colleges and universities embrace and embody these rules.

The inequity of this rights restriction was highlighted in the recent case of *O'Bannon v. National Collegiate Athletic Association*.[131] In that case, a former UCLA basketball player and other similarly-situated plaintiffs sued the NCAA for unlawfully restraining their ability to profit from the sale of their personalities to video game companies (in particular, Electronic Arts). According to the plaintiffs, the NCAA requirement against compensation and related transfer of rights constituted an anti-competitive agreement among member institutions. The court agreed that the compensation restriction was a form of illegal price fixing, but did not find an injury to competition for the group licensing of players images.[132] In the end, the case represented an important victory for student athletes and demonstrated the significant value of the images of individual college and university ac-

127. *See* Contreras, *supra* note 114, at 528–31 (referring to what some term the "gold route" of journal publication).

128. *See* Raizel Liebler, *Copyright Hall of Janus?: Harvard University's Two-Faced Approach to Copyright*, THE LEARNED FANGIRL (Aug. 31, 2009), http://thelearnedfangirl.com/2009/08/31/copyright-hall-of-janus-harvard-universitys-two-faced-approach-to-copyright/ (contrasting Harvard's policy for its faculty with the Harvard Business Review's policy for its own content).

129. Marc Edelman, *21 Reasons Why Student-Athletes Are Employees And Should Be Allowed To Unionize*, FORBES (Jan. 30, 2014), http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/.

130. *See* Brighton, *supra* note 74, at 279–80.

131. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

132. *Id.* at 988, 996–97, 998.

tors.

In essence, by continuing to limit the student income from endorsements (with the collaboration and oversight of the NCAA), colleges and universities are engaging in restrictive licensing. The fact that such licensing arguably serves an academic purpose could qualify it as a form of social policy limitation. And as with the other types of intellectual property licenses described above, the impact on the employee (the student athlete) is not a consideration.

III. THE OTHER SIDE OF THE COIN: STAKEHOLDERS IN COLLEGE AND UNIVERSITY IP

Few would assert that colleges and universities act unreasonably in considering the social impact of their commercial activities. But it is also reasonable for colleges and universities to consider the positive impacts on third parties who benefit from the income. Are they required to balance these considerations? In other words, do colleges and universities owe any special duty to stakeholders?

To the extent that colleges and universities have become more commercial,[133] one could argue their stakeholder obligations are similar to private firms. Few would argue that corporations have an obligation to return profits to anyone but the shareholders. And given the absence of college and university shareholders (at least in non-profit colleges and universities), one could argue that stakeholder obligations are reduced even more as compared to a firm.

However, such a view ignores fundamental advantages given to colleges and universities that demand a more substantive accounting. Most important are various forms of indirect funding, which include student grant programs, tax relief and student loans. Direct funding also plays a smaller, but important role, particularly at state colleges and universities.

Additionally, colleges and universities can be said to have fiduciary-like obligations. There are many types of beneficiaries with different capacities who reap different types of rewards. For the sake of evaluating the impact of patent licensing or alienation policy, it is easiest to consider beneficiaries in terms of those who receive direct economic benefits and those whose benefits are received more downstream. The latter may include both economic benefits and broader social benefits, with the social side being a bit more ambiguous.

A. Obligations to Funders

The public service role of a college or university is complemented by the

133. *See generally* DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION (2003).

expectation of public support at some level.[134] Whether through direct funding or indirect support, U.S. colleges and universities rely on a societal understanding that they have some of the characteristics of a public good. This strong connection to public resources also creates an expectation that they will be caretakers of the property they have and create. In the context of intellectual property, one can argue that public support requires that colleges and universities treat the fruits of their creativity and innovation as a trust for stakeholders. At least, it is a reasonable motivation for fully utilizing this property supported by the public.

1. Direct Funders

The American public college or university is an institution critical to modern higher education. The first public colleges and universities date back to the founding of the country.[135] With the subsequent expansions spurred by the Morrill Acts and the post-WWII increase in funding, public colleges and universities became a prominent fixture and source of academic output.[136] Public funding, largely through state governments, was essential to the size and character of public schools. Accompanying the funding, state governments retain some direct control over the governance of the institutions, through delegation, which is obviously essential due to the expansive nature of many such schools. But as a collection of state or state-related employees, even remote administrators understand an obligation to care for state assets that include intellectual property.

More recently, the role of the state in direct public funding of colleges and universities has come into question. According to a recent report in the *Chronicle of Higher Education*, we are nearly at a tipping point past which students will actually provide a greater amount of funding than the states.[137] At many schools, state support has fallen from around 50%-60% in the mid-1980s to under 20% in 2012.[138] Regardless, even at 10%, the citizens of a state have an interest in what happens to the property they partially support.

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134. *See* DEREK BOK, BEYOND THE IVORY TOWER 61–66 (1982) (noting the relationship between public support and the public service mission of the college or university).

135. Chartered in 1789 and opened in 1795, the University of North Carolina claims to be the country's first public university. About UNC, UNIV. N.C. AT CHAPEL HILL, http://unc.edu/about/ (last visited Apr. 14, 2015).

136. *See supra* notes 14–18, and accompanying text.

137. Sara Hebel, *From Public Good to Private Good*, CHRON. OF HIGHER ED., Mar. 3, 2014, http://chronicle.com/article/From-Public-Good-to-Private/145061.

138. *25 Years of Declining State Support for Public Colleges*, CHRON. OF HIGHER ED., Mar. 3, 2014, http://chronicle.com/article/25-Years-of-Declining-State/144973/.

2. Indirect Funders

All non-profit colleges and universities—public and private—also receive a great deal of indirect support in the form of tax exemptions and various types of tuition support for students. As section 501(c)(3) intuitions under the federal tax code, colleges and universities are exempt from federal income tax.[139] They are also often exempt from state property taxes, though many institutions make some payment in lieu of taxes to help account for their use of local services.[140] A multitude of federal grants, such as Pell Grants and low-cost student loans, funnel tuition into colleges and universities.

As with direct funding, the public stands behind these indirect methods of support and has a reasonable expectation of competent administration of college and university resources. The level of accountability is not perhaps as great as with direct state control, but it seems fair to count taxpayers as at least a remote stakeholder in college and university intellectual property licensing and enforcement decisions.

B. Direct Economic Beneficiaries

Given the unique structure of research colleges and universities and the way profits from intellectual property licenses are distributed, direct economic beneficiaries include groups beyond the nonprofit institution itself.[141] At a minimum, the faculty inventors on a patent must be included. Students and taxpayers (particularly in the case of public colleges and universities) also stand to benefit from many types of intellectual property revenue.

1. Filling the College and University Coffers (or Not)

Whatever notions may have once existed about college or university technology capture and transfer having a public benefit goal, it seems clear that many, if not most, colleges and universities pursue patents out of a desire to obtain extra income to shore up dwindling state investment and donor funding. To many college and university administrators, faculty and staff members are untapped income sources,[142] and obtaining a patent is like purchasing a lottery ticket that may turn on the financial spigots. This

139. *See* Peter D. Blumberg, Comment, *From "Publish or Perish" to "Profit or Perish": Revenues from University Technology Transfer and the § 501(c)(3) Tax Exemption*, 145 U. PA. L. REV. 89, 101–104 (1996).

140. Gerald Rokoff, *Alternative to the University Property Tax Exemption*, 83 YALE L.J. 181, 183–88 (1973).

141. *See* Lisa Vertinsky, *Universities as Guardians of Their Inventions,* 2012 UTAH L. REV. 1949, 1988–89 (2012)

142. *See* Lee, *supra* note 7, at 36–38 (describing the general shift in university administrative and faculty attitudes toward patenting in recent years).

is particularly so if the patentable research is a natural consequence of the college's and university's research and development. No additional research support is required to produce a patent portfolio, and it is money left on the table if not captured through intellectual property rights.

Some might consider a college's or university's economic desires to be unattractive and contrary to the academic mission. Colleges and universities have often been criticized for acting too much like businesses.[143] But one must concede that there are some benefits. Revenue flowing into the institution from one source means more money is released for other uses.[144] The Bayh-Dole Act enabling rules require that royalties retained by the nonprofit be "utilized for the support of scientific research or education,"[145] but that leaves open many possibilities. Theoretically, tuition increases could be blunted, building funds could be supplemented and high level faculty and staff could be attracted. Because the nonprofit college and university has so many public benefits by nature of its daily operations, it is easy to see how patent income is a net positive, all things being equal. Similar is the justification for sports revenue. Although one might believe colleges and universities should not be involved in any business-like activities, the income has the potential to make the institution stronger, which should have positive spillover effects.

Given the positive impact of additional revenue generation, one would expect a literature replete with stores of blockbuster licensing deals and tech transfer offices that have become college and university cash cows. To be sure, there is real money involved, with colleges and universities engaging in more than 5,000 patent licenses and netting about $2.6 billion in 2012 according to a survey by the Association of University Technology Managers (AUTM).[146] And indeed, there are some prominent success stories. Columbia University's patents related to inserting foreign DNA into cells have reportedly provided $790 million in revenue.[147] Northwestern University has earned hundreds of millions of dollars from its patents li-

143. *See* William W. Keep, *The Worrisome Ascendance of Business in Higher Education*, CHRON. OF HIGHER ED., June 21, 2012, http://chronicle.com/article/The-Worrisome-Ascendance-of/132501/ (using the dismissal of University of Virginia President Teresa Sullivan as evidence of a trend toward business management of college and university resources).

144. *See* Lemann, *supra* note 14 (describing the difficulty colleges and universities have in simply cutting costs).

145. 37 C.F.R. § 401.14(k)(3) (2013).

146. *ATUM Licensing Activity Survey: FY 2012*, ASS'N OF UNIV. TECH. MANAGERS 12, 14, *available at* https://www.autm.net/FY2012_Licensing_Activity_Survey/14318.htm [hereinafter AUTM SURVEY].

147. Richard Pérez-Peña, *Patenting Their Discoveries Does Not Pay Off for Most Universities, a Study Says*, N.Y. TIMES, Nov. 20, 2013, http://www.nytimes.com/2013/11/21/education/patenting-their-discoveries-does-not-pay-off-for-most-universities-a-study-says.html?_r=0.

censed to Pfizer to produce Lyrica.[148] There are others, but in the final tally, they are few and far between. Overall, most colleges and universities operate their tech transfer offices in the red. According to a 2013 report sponsored by the Brookings Institute, approximately 84% of college and university tech transfer offices spend more money on staff and legal costs than they receive in patent licensing revenue.[149] Moreover, there is evidence that in some fields, the potential to apply for patents may reduce the quality and quantity of research conducted.[150] For the 16% of tech transfer offices that do make money (and the others that hope to soon), patent licensing is a real economic benefit that supports employees and facilities.

2. Rewarding Inventors

An important part of the Bayh-Dole Act is its requirement that nonprofit contractors like colleges and universities "share royalties with the inventor."[151] Many colleges and universities would undoubtedly share royalties without this legal requirement, but the influence of federal funding means that royalty sharing is solidly the norm. College and university inventors, whether they are faculty members, research staff or graduate students, have a stake in the profits from patent licenses.

The Bayh-Dole Act does not specify the royalty percentage that colleges and universities must pay to inventors. Policies can differ significantly, but many employ a fixed percentage of profits in the range of 25% to 33.3%.[152] The specific amount can be higher or based on other metrics. For example, the Penn State royalty sharing policy allocates 40% of revenue after expenses to the inventor and 20% to the administrative unit of the inventor's college.[153] Importantly, such royalty sharing agreements refer to costs associated with the licensed invention. Thus, it is quite possible that a college or university's tech transfer office is a money loser, but an inventor would stand to retain substantial profits from her specific invention.

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148. Vicki Loise & Ashley J. Stevens, *The Bayh-Dole Act Turns 30*, LES NOUVELLES, 188 (Dec. 2010), *available at* http://www.bu.edu/otd/files/2011/02/The_Bayh-Dole_Act_Turns_30.pdf.

149. Walter D. Valdivia, *University Start-Ups: Critical for Improving Technology Transfer*, BROOKINGS (Nov. 20, 2013), http://www.brookings.edu/research/papers/2013/11/university-start-ups-technology-transfer-valdivia.

150. *See* Brian J. Love, *Do University Patents Pay Off? Evidence from a Survey of University Inventors in Computer Science and Electrical Engineering*, 16 YALE J. L. & TECH. 285 (2014) (survey of 269 university inventors in the field of computer engineering and computer science).

151. 35 U.S.C. § 202(c)(7)(B) (2006).

152. Alan S. Gutterman, 19 BUSINESS TRANSACTIONS SOLUTIONS § 87:24 (West update 2014).

153. *What Happens After Submission of the Invention Disclosure?*, OFFICE OF THE VICE PRESIDENT FOR RESEARCH AT PENN STATE, http://www.research.psu.edu/patents/protect-your-invention/what-happens-after-submission (last visited Apr. 15, 2015).

With the above percentage in mind, it is clear that inventor royalties are quite high compared to industry norms. Forgoing this revenue by allowing the patent to lapse without licensing could mean a substantial loss of income for the inventor(s). And with control of the patent firmly in the hands of the college or university, inventors have no other option for licensing the invention.

3. Lowering Costs for Other College and University Contributors

Beyond those who receive payments from a college or university, licensing income can be reasonably seen to benefit those on the other side of the equation. If one makes payments to a college or university in order to fund its daily operations, new licensing revenue could theoretically reduce costs and help cut the contribution necessary.[154] Under this view, individuals such as students and taxpayers could be regarded as direct beneficiaries.

An excellent case in point is the Wisconsin Alumni Research Foundation (WARF), the nonprofit patent licensing arm of the University of Wisconsin-Madison. WARF explicitly touts the benefits of its licensing revenue, which created a $2 Billion endowment over the years.[155] According to WARF, the licensing corporation has over the years contributed to the funding of fifty-eight building projects, provided funds for research facilities, and supported faculty and staff salaries.[156] The foundation's contribution to the University in 2011 was $66.2 million.[157] This is money that Wisconsin taxpayers and students will not be paying.

It is certainly true that long-time licensing entities, like WARF, are unlikely to suffer substantially with the adoption of an anti-troll posture. But there may be some revenue impact, and it is important to include this broader group of licensing beneficiaries as stakeholders in the debate.

C. Indirect Economic Beneficiaries

In the same way that policymakers and scholars consider the broader positive impacts of the intellectual property system—promoting the progress of humanity, supporting American industry, etc.—one can do the same with college and university acquisition and licensing. There are,

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154. Analogously, when valuing property by the income method, relief from royalty payments is as important as actual licensing revenue. *See* GORDON V. SMITH & RUSSELL L. PARR, VALUATION OF INTELLECTUAL PROPERTY & INTANGIBLE ASSETS (3d ed. 2000).

155. *About Us*, WIS. ALUMNI RES. FOUNDATION, http://www.warf.org/about-us/about-us.cmsx (last visited Apr. 15, 2015).

156. *Benefits to UW-Madison*, WIS. ALUMNI RES. FOUNDATION, http://www.warf.org/about-us/background/benefits-to-uw-madison/benefits-to-uw-madison.cmsx (last visited Apr. 15, 2015).

157. *Id.*

however, some important differences. Patents are supposed to provide incentives to invent something that would not be invented without the possibility of an economic reward.[158] Society benefits when inventors bring these ideas into the sun rather than keep them as trade secrets.[159] Although it differs depending on the art, private industry can be expected to invent some things specifically because of patents.

Colleges and universities, on the other hand, are filled with faculty members and staff who would probably undertake almost the same amount of inventing in the absence of patents. The incentives to create are primarily provided by a desire for peer-recognition and to satisfy tenure and promotion requirements. It is possible that some amount of inventing is redirected away from basic research to more applied ideas in view of the possibility of licensing revenue,[160] but that is likely a small consideration and the extent to which this is a positive shift is debatable at least. So the fundamental societal benefit of patenting is likely not impacted much by college and university activity in this area. In fact, given that there is a cost to patents in terms of temporary monopoly, one could reasonably argue that society tallies a net deficit.

Where college and university patenting takes on a more clearly positive societal role is in the follow-up development of patented information. In addition to providing an incentive to invent in the first place, patents can provide a competitive advantage that creates an incentive for investors to jump in.[161] Many industry licensing arrangements with colleges and universities would be impossible without patents and certainly college and university start-ups are greatly encouraged by intellectual property exclusivity. As noted above, this commercialization was the explicit goal of the Bayh-Dole Act. According to a recent AUTM licensing survey, 705 startup companies formed and 591 commercial products were created based on college and university patent licensing in 2012 alone.[162]

It is of course debatable whether, in a given context, proprietary commercialization yields greater benefits than contributing information to the public domain. The open source movement depends on the notion of shared information at the base of further development. To that end, college and university patenting can still play a role. It is possible to use patents in

158. *See* Daniel R. Cahoy, *An Incrementalist Approach to Patent Reform Policy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 587, 598–99 (2005) (describing the appropriate incentive mechanism in the patent system, which is to increase inventive activity above the level that would exist without the rights).

159. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 326–29 (2003).

160. Love, *supra* note 150, at 285.

161. Brett M. Frischmann, *The Pull of Patents*, 77 FORDHAM L. REV. 2143, 2156–57 (2009).

162. AUTM SURVEY, *supra* note 146, at 12.

a manner that permits some direction and control or protection in an industry that cannot fully thrive in a nonproprietary role. An example of a bet on this behavior is Elon Musk's recent announcement that Tesla will open its patent portfolio to competitors through a commitment not to enforce them.[163] The goal is more collaboration in the fundamentals of electric car development such that an industry with a critical mass forms. By continuing to own the patents, Tesla can retain some control over the technology and even provide some protection to those interested in investing in competing ventures.

IV. THE FAILURE OF COLLEGES AND UNIVERSITIES TO RESPOND TO STAKEHOLDERS

Clearly, colleges and universities have an obligation to balance the interests of various stakeholders. To date, however, college and university balancing efforts have fallen short. One reason is that the large and complex institutions that tend to own the most property fail to undertake a global approach, with different offices controlling different rights and no comprehensive understanding of college or "university IP." A second reason is that colleges and universities often default to unilateral abandonment and dedication to the public domain because of a broad public service posture and intellectual property owner-stakeholders do not have a seat at the table. Guidance could come from state actors, such as the federal government, which hold a lot of sway through the enabling legislation of the Bayh-Dole Act and federal patent and copyright law. But such efforts have failed due in part to strong college and university resistance to new legislative barriers. The status quo is inequitable and likely not sustainable.

A. The Breakdown of Current College and University Integration Efforts

Given the diversity of college and university ownership and interests, it might seem desirable to take a more or less market approach and permit colleges and universities to set the policies that work best for their constituents. But there is good reason to think that institutional barriers prevent an effective college or university response. It is fair to suggest that colleges and universities do not fully appreciate the stakeholder issues, utilize sparse toolkits, and employ an oppositional approach to top-down reform.

1. Global Administration of Intellectual Property Is Rare But Important

Colleges and universities are, by nature, decentralized entities. They

163. Elon Musk, *All Our Patent Are* [sic] *Belong to You*, TESLA BLOG (June 12, 2014), http://www.teslamotors.com/blog/all-our-patent-are-belong-you.

bring together multiple disciplines that produce knowledge and intellectual content in a great variety of ways. Perhaps for that reason, they have commonly administered intellectual property in different units with varying levels of autonomy.[164]

One could ask whether it makes sense to administer college and university intellectual property as a single concept. In fact, there are social, economic and legal threads that connect intellectual property in a way that legitimizes some collective administration. Courts often borrow concepts from one area—such as applying the law from inducement to infringe a patent to copyright infringement[165]—in order to ground analogous doctrine. It would make sense to pursue a central strategy.

2. Unilateral Embargoes are a Poor Default Solution

A straightforward way for colleges and universities to avoid supporting bad behavior is to structure intellectual property sales and licenses such that they are unattractive to such entities. While this may render the rights unattractive to others as well, the college or university could at least feel secure that it will not face the scrutiny of those who believe tech transfer is part of the problem.[166] For example, in the Penn State patent auction discussed above, the university's requirement that it control litigation for a period of six months likely dissuaded opportunistic trolls hoping to make a quick buck after the license. The requirement for licensee use removed the prospect of sublicensing to accused infringers. But these provisions likely dissuaded legitimate licensees as well, particularly aggregators who might serve a useful purpose in putting together a suite of technology for others. The burden of Penn State's move (and similar actions by other colleges and universities) rests with their stakeholders.

Perhaps the greatest issue with the unilateral approach is that it places the inefficiencies and quirks of the intellectual property system on the shoulders of one party's stakeholders. For example, the aforementioned patent trolls are successful and problematic because patent litigation is expensive and there is significant information asymmetry. They take advantage of firms and individuals whose desire to avoid litigation exceeds the troll's proposed licensing fee. But that is not an immoral tactic per se. Many business interactions related to law involve the threat of litigation as

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164. Vertinsky, *supra* note 141, at 1985–88.

165. Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 545 U.S. 913, 936–37 (2005).

166. *See* April Glaser, *Students and Researchers: Take a Stand Against Patent Trolls*, ELEC. FRONTIER FOUND. (June 12, 2014), https://www.eff.org/deeplinks/2014/05/students-and-researchers-take-stand-against-patent-trolls (suggesting that colleges and universities are not acting in the best interests of their stakeholders when they oppose anti-troll legislation).

a bargaining chip. What sets trolls apart is the additional suspicion that they are working with invalid patents. The patent threat does become a social policy issue when the most basic litigation costs exceed the advantages of proving the weakest patent invalid. We disparage weak patent holders who contribute to the inequitable litigation environment by providing their rights to patent trolls. If legitimate rights holders are aggressively asserting rights against all possible infringers, on the other hand, that is arguably a power they have earned under the law.

Against this backdrop, it appears that colleges and universities should bear a special burden only if they are attempting to license weak (*i.e.,* potentially invalid) intellectual property. Most colleges and universities would argue that their portfolios do not fall into this group, and they would certainly have the power to refrain from licensing problematic patents, copyrights and trademarks. If a college or university has secured a legitimate right, it has earned the right to monetize it, as any private firm does.

Another problem with the unilateral limitations on licenses is that they may end up dedicating an improperly large class of rights to the public domain. The commercialization that may accompany exclusive rights will not take place.

B. Targeted State Action is Often a Nonstarter

Another way to deal with the social consequences of college or university intellectual property ownership and enforcement is to undertake a top-down, regulatory approach that ensures equal treatment among schools. Similar to Bayh-Dole restrictions, it would be possible for federal and state legislatures to impose norms that closely align to societal expectations. That would, of course, create some difficulties in accounting for the character and mission differences in various types of schools. But even aside from the drafting complexities, regulatory responses are likely to fail due to the prominent political interference of a critical actor: the colleges and universities themselves.

Due to their economic contributions, non-profit missions, and strong emotional pull on their alumni, colleges and universities have often been able to exercise outsized political influence in opposing strict regulation over intellectual property. In fact, colleges and universities have been successful at preserving special considerations in areas such as educational use of copyrighted materials[167] and prior user right of patents.[168] They have not been shy in opposing legislative restrictions that would create a fair playing field for applying fair social use.

Perhaps the best example of college or university stonewalling of legis-

167. 17 U.S.C. § 110 (2012).
168. 35 U.S.C. § 273(e)(5) (2012).

lative approaches to fair social use is the recent failure of patent troll legislation. In the wake of media reports of various trolling ills, bills were introduced in Congress to make patent enforcement more difficult.[169] In July 2013, the White House released a report from the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy that identified the problems created by certain types of non-practicing entities:

> [F]irms who do not practice the patents they own and instead engage in aggressive litigation to collect license and other fees from alleged infringers. A review of the evidence suggests that on balance, such patent assertion entities (PAEs) (also known as "patent trolls") have had a negative impact on innovation and economic growth.[170]

The report cites anecdotal examples and suggests that certain type of PAEs do nothing to increase innovation or develop products, but merely extract from businesses.[171] It highlights a number of victims, including small businesses and downstream users.[172]

In response to calls from industry and the public, Congress proposed several bills to curtail patent trolls. The most prominent bill, and the one seen as the best candidate for compromise and development, was S. 1720, sponsored by Senator Patrick Leahy. The bill contained provisions intended to increase the transparency of the parties, provide for customer stays, and scrutinize demand letters.[173] Other provisions, such as a heightened pleading requirement and more stringent fee shifting provisions were proposed in other bills[174] and considered for incorporation.

However, colleges and universities and small inventors launched an opposition campaign. For example, a consortium of interests including 124 colleges and universities, as well as smaller companies, expressed general concern with the direction of the anti-troll legislation:

> We are concerned that some of the measures under consideration go far beyond what is necessary or desirable to combat abusive patent litigation, and, in fact, would do serious damage to the patent system. As it stands, many of the provisions assume that every patent holder is a patent troll. Drafting legislation in this way seriously weakens the ability of every patent holder to enforce a

169. *See* PATENT PROGRESS, *supra* note 91.

170. WHITE HOUSE REPORT, *supra* note 90, at 2.

171. *Id.* at 9–10.

172. *Id.* at 10.

173. Patent Transparency and Improvements Act, S.1720, 113th Cong. (2013).

174. Patent Abuse Reduction Act, S.1013, 113th Cong. (2013); Patent Litigation Integrity Act, S. 1612, 113th Cong. (2013). At least eleven other troll-related bills were proposed. *See* PATENT PROGRESS, *supra* note 91.

> patent. This approach clearly favors a business model that does not rely on patents and tilts the balance in favor of patent infringers, thereby discouraging investment in innovation.[175]

Colleges and universities raised particular objections with regards to fee shifting, believing it prejudiced college and university patent enforcement, and increased transparency due to the concern that it might violate confidentiality agreements with venture capital investors among others.[176] The legislation came to a screeching halt in May, due in no small part to the opposition of colleges and universities.

In May 2014, Senator Leahy declared the effort dead by removing the legislation from the Senate Judiciary Committee's Agenda.[177] The efforts of the college and university community figured prominently in the defeat.[178] College and university associations declared satisfaction (i.e. relief).[179] Although they pledged a willingness to work with legislatures to provide a more palatable reform bill, it is not entirely clear that a route exists for doing so that would have much impact on trolling. Because of their deep interests in the patent world, colleges and universities are likely to stand in opposition to comprehensive anti-troll legislation.[180] In the wake of congressional inaction, recent Supreme Court cases have actually done the most to take some air out of patent trolling strategies.[181]

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175. Letter from Patent Coalition, to the Hon. Patrick Leahy & Hon. Chuck Grassely, Comm. on the Judiciary (Apr. 28, 2014), *available at* https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=14795.

176. *University Views on Senate Legislative Proposals to Curb Abusive Patent Practices*, ASS'N OF AM. UNIV. 2–3 (Mar. 19, 2014), *available at* https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=15119.

177. Edward Wyatt, *Legislation To Protect Against "Patent Trolls" is Shelved*, N.Y. TIMES, May 21, 2014, http://www.nytimes.com/2014/05/22/business/legislation-to-protect-against-patent-trolls-is-shelved.html.

178. *See* Joe Mullen, *How the patent trolls won in Congress*, ARS TECHNICA (May 23, 2014), http://arstechnica.com/tech-policy/2014/05/how-the-patent-trolls-won-in-congress/ (referring to the "Innovation Alliance's" opposition as a major reason for the bill's failure).

179. *University Associations & Innovation Alliance Applaud Decision to Hold on Patent Legislation,* ASS'N OF AM. UNIV. (May 21, 2014), *available* at https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=15276.

180. *See*, *e.g.*, Letter from 14 Big Ten University Presidents to Congressman Sean Duffy, (Jan. 20, 2015), *available at* http://patentdocs.typepad.com/files/big-10-letter.pdf (letter in opposition to the Innovation Act, H.R. 9, 114th Cong. 2015).

181. In two recent cases, the Supreme Court took some of the air out patent trolling strategies by making fee shifting more likely. In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), a case involving a patent on elliptical exercise machines, the Court determined that an "exceptional" case that could give rise to fee shifting under the patent act was not as strict as the Federal Circuit had previously determined. Exceptional cases, according to the Court, were merely those that stand out in terms of the parties' litigating positions or the unreasonable manner of the litigation. *Id.* at 1756. In *Highmark Inc. v. Allcare Health Management Systems, Inc*., 134 S. Ct. 1744 (2014), a case involving patents on methods in managed health care systems, the

V. A NEW MODEL FOR BALANCING CONFLICTING STAKEHOLDER INTERESTS: "FAIR SOCIAL USE"

Despite their interest in intellectual property-based profits, many colleges and universities have embraced socially responsible rights management. But it is not entirely clear what role colleges and universities should play. To some, it is obvious that colleges and universities must act to limit their negative social impacts whenever identified. After all, colleges and universities desire to make positive social contributions and be viewed as good public citizens. They embrace sustainability,[182] host philanthropic events,[183] and encourage faculty to contribute to the community. And they certainly claim to care about commercialization over litigation.[184] One might expect that they would be more proactive than a firm in a similar position. However, because a broad stakeholder view makes clear the harm that legitimate beneficiaries may suffer, the answers are less than clear. Colleges and universities also strive to fulfill their employee obligations in good faith and serve as good stewards of their publicly supported property. These conflicting stakeholder interests require a more balanced approach.

Court determined that because the exceptional determination rested in the discretion of the district court, it was reviewable only for abuse of discretion. *Id*. at 1749. Together, Octane and Highmark make it more likely that a defendant will be awarded fees when sued by a troll, though the needle has not been moved a great deal. Another recent Supreme Court case that may create a barrier for some types of trolling behavior is *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 134 S. Ct. 2111 (2014). In that case, the plaintiff asserted infringement of a patent covering data delivery over a content delivery network (CDN). *Id.* The defendant, however, did not complete all of the steps of the claimed invention. *Id.* In fact, it appeared that no defendant directly infringed (as defined in prior case law) by completing all of the steps of the claim. *Id.* The Court determined that such divided infringement could not constitute inducement under the patent act. *Id*. at 2118. The consequence for patent trolls is that certain method patents that require end-user interaction may no longer be valid, and this is arguably a larger portion of trolling patents. *See* Shubha Ghosh, *No Gifts for Patent Trolls*, NAT'L REV. ONLINE (Apr. 29, 2014), http://www.nationalreview.com/article/376780/no-gifts-patent-trolls-shubha-ghosh (arguing, before the Court's decision, that the Limelight case is important for controlling the effects of widespread patent litigation).

182. *See, e.g.*, *School of Sustainability*, ARIZONA STATE UNIV., http://schoolofsustainability.asu.edu/ (last visited Apr. 17, 2015) (information on ASU's prominent school of sustainability).

183. *See*, *e.g.*, Penn State IFC/Panhellenic Dance Marathon (THON), https://thon.org/ (last visited Apr. 17, 2015) (university student organization directed to raising money for childhoods cancer).

184. *See* Gene Quinn, *Universities are NOT Patent Trolls*, IPWATCHDOG (June 6, 2014), http://www.ipwatchdog.com/2014/06/06/universities-are-not-patent-trolls/id=49951/ (interviewing AUTM President Jane Muir, who declares "university tech transfer offices were put into place to ensure that the new discoveries that happen in the research laboratories ultimately get out into the marketplace by way of product and services that improve the human condition.").

A. Fair Use as a Model

It may seem at first to be an impossible task to internally balance the opposing goals of intellectual property beneficiaries and the needs of society. Interests and incentives must push decision makers toward a particular end, and, outside of an adversarial hearing, it is inherently difficult to consider the views of those not at the table. This is certainly an argument for top-down regulation with mandated answers to complex problems. But, in fact, there are some excellent examples of balancing mechanisms that can work internally and efficiently lead to fair outcomes (or at least something approaching that). The closest fit is the very familiar exception for fair use in copyright[185] and trademark law.

Fair use is a concept that first gained hold in copyright law as a way to balance copyright owners' interests with the speech rights of society. It has long been understood that strong rights can have unintended spillover effects. Often these spillovers do not significantly serve the content owner, but have the potential to cause great harm to society. For example, a news organization may need to refer to a controversial passage from a web video, and while the excerpts use does not diminish the copyright owners potential for profit, it does greatly enhance society's ability to discuss matters of public concern. Attempting to remedy this situation by carving out blanket exceptions can reduce the incentive to create, which in the long term causes societal harm as well. Thus, there is a need for a test that balances interests in a relatively predictable way.

Courts have been using some form of a multi-factored test in the United States at least since the case of *Folsom v. Marsh* in 1841.[186] There, Justice Story articulated balancing principles that continue to guide modern analysis.[187] Four factors were codified in the Copyright Act of 1976: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount used in relation to entire copyrighted work; and (4) the effect on the market for the copyrighted use.[188] The extent to which, overall, these factors weigh more in favor of the content owner or the user dictates whether the use is fair and provides a defense to infringement.[189] Fair use has been clearly expanded to trademark law in which it balances the likelihood of consumer confusion with a societal interest in nominative and other

185. 17 U.S.C. § 107 (2012).

186. No. 4901, 9 F. Cas. 342 (C.C. D. Mass 1841).

187. *See* Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 145–47 (2011) (describing Justice Story's intent in creating principles for determining justifiable use and their future application).

188. 17 U.S.C. § 107 (2012).

189. Technically, fair use is an exception to infringement rather than a defense, but most courts address it like a defense and it has become the more common interpretation. Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1787–88 (2010).

speech-related uses.[190]

Although we often think about fair use as a court's assessment tool, it is just as important in an initial assessment. Property owners and users are expected to consider fair use before acting. This expectation is exemplified in copyright law by the damages limitation premised on a good faith reliance on fair use[191] as well as the penalty that exists for issuing a take down notice under the Digital Millennium Copyright Act without considering the potential for fair use.[192] It is reasonable to expect laypersons to be able to use and apply tests that balance property owner and societal rights.

B. The Elements of a Fair Social Use Framework

The need for a balancing test in addressing college or university-licensing limitations is apparent. In any given instance, the stakeholder interests can be broken down to beneficiaries versus societal freedom, just as in copyright/trademark fair use. But, of course, the issues and contexts are much broader than those existing formats. Speech is only one concern, and, arguably, all aspects of human rights could be entertained. Additionally, there is no fair use provision at all in patent law, and a sui generis system would be necessary to comprehensively treat innovation issues alongside those for creative works. Truly, a "fair social use" test is called for.

For some situations, the analysis may be relatively straightforward. For example, a license for the University of Florida's drink sold under the "Gatorade" mark[193] is unlikely to raise societal issues that require burdensome restrictions in need of balancing (see Figure 3). Conversely, a weak patent obtained only to prevent safety or environmental impact testing[194] is unlikely to demand respect for property owner rights and incentives.

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190. Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 41–43 (2013).

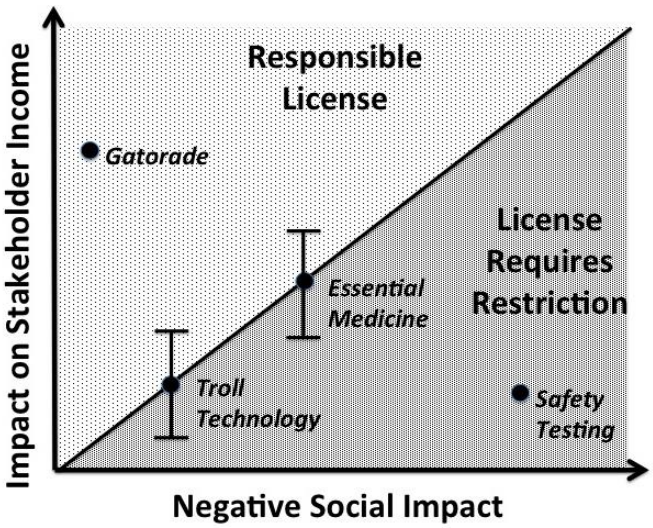
191. 17 U.S.C. § 504(c)(2) (2012).

192. *See* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (finding that plaintiff violation 17 U.S.C. 512(f) by failing to consider defendant's fair use rights).

193. Joe Kays & Arline Phillips-Han, *Gatorade: The Idea that Launched an Industry*, EXPLORE RESEARCH AT THE UNIV. OF FLA. (2003), *available at* http://www.research.ufl.edu/publications/explore/v08n1/gatorade.html.

194. *See generally* Daniel R. Cahoy, Joel Gehman & Zhen Lei, *Fracking Patents: The Emergence of Patents as Information-Containment Tools in Shale Drilling*, 19 MICH. TELECOMM. & TECH. L. REV. 279 (2013) (describing how patents may be used to constrain the testing of hydraulic fracturing technology in order to contain safety concerns).

Figure 3: Ambiguity in Fair Social Use



But in many tough cases, applying "fair social use" requires more than just eyeballing where a particular license or right fits in terms of equity. Depending on the license terms, market and social needs, a range of positives and negatives exist. For example, a college or university license for patented technology that is attractive to trolls may weigh in favor of profit limiting restriction if the licensee is likely to impost negative social externalities and return little revenue to the college or university. A license for a patent on essential medicine may not merit restriction if the only market is the developing world and low price restriction would disincentivize potential licensees. Both situations could easily be reversed with different facts. It is important to have a more sophisticated means of analysis than intellectual property, technology or licensee type.

Clearly, a detailed set of factors is necessary to fully assess fair social use. Although there are many possible perspectives that one could include, a basic assessment would highlight the college's or university's unique obligations and mission. The three basic factors of such analyses are: (1) the overall impact on the college or university; (2) the direct impact on employees; and (3) how closely the restriction aligns with a particular college's or university's mission.

1. Overall College or University Impact

In weighing the equity of intellectual property use restriction, a primary factor must be the overall impact on the college or university. While this measure could be interpreted as purely quantitative, ideally it would take into account how lost revenue impacts the institution. In other words, a reduction in staffing at the technology transfer office may not be as consequential as eliminating a position that directly serves student interests.

In addition, it seems clear that some large colleges and universities may be in a better position to budget for more social use than others, ensuring that lost revenue is predicted and accounted for. Again this is a goal of making the process less ad hoc and more fully integrated into the college or university mission. It is possible that an endowment may specifically fund some types of college or university social use. Thus, one undertakes an impact assessment only with a thorough understanding of the nature of the institution.

2. Direct Employee Impacts

As a stand alone factor, the assessment of specific, direct employee impact is important to bring out the major stakeholder impact of college or university intellectual property stewardship. Because, by law and practice, college and university employees are direct beneficiaries of intellectual property in ways that private company employees are not, they deserve special consideration. Even if the overall impact of restricting an opportunity for sale or license is relatively small, when an employee specifically loses income, it is significant. Such is commonly the case in the context of patent and copyright restrictions, but rarely in trademark.

One way to add depth and flexibility to the assessment of employee impacts is to provide a clear forum for employee participation in social use decision-making. It may be the case that employees are quite willing to forego additional income if an important social goal is met. Bringing employees into the picture could be as simple as asking them to respond to a survey of preferences, or as complicated as inviting them to actually play a role in negotiation. Notably, for patent intellectual property, inventor-employees are often on the hook for continuing participation in the prosecution process and occasionally helping to identify licensees. This existing relationship is a natural opening for employee integration in decision-making.

3. Restriction Alignment with University or College Social Goal

Not all social use restrictions meet with a college's or university's interests and goals. Obviously, different types of non-profit colleges and universities—public, religious, historically black, etc.—can have different priorities in terms of social goals. Some social uses may legitimately be of no interest to particular institutions. They may even conflict with other college or university social goals, and should at least be attenuated if not.

More generally, some social uses may have a market goal that is less important to the overall social mission than impacting the health or wellbeing of vulnerable populations. For example, if a college or university were to relax some intellectual property enforcement policies to benefit local businesses (e.g., regarding the use of college and university trademarks on

t-shirts or copyrighted lecture materials), that may be less important than a restriction that ensures access to medicines or prevents child labor. It truly depends on the nature of the institution.

Of course, determining the alignment of social goals and college or university ideals presumes that the college's or university's ideals are actually known by the administration. To some extent, this knowledge can be enhanced through advocacy groups like United Students Against Sweatshops that bring to light overlooked issues. But for more complex or obscure social issues, surveys may be necessary to gauge interests. Regardless, the goal of assessing alignment and strength is important as a means of providing some justification for the impact on stakeholders.

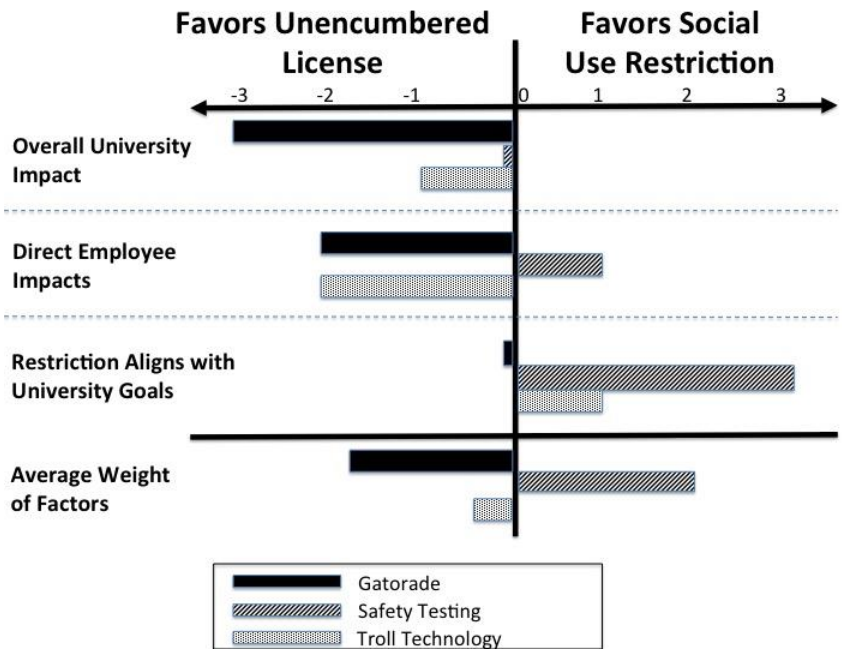
In addition to alignment, it is also important to measure the actual social impact of any limitation. Although related to subject matter alignment—a restriction with little impact doesn't do much to serve a college's or university's social mission, even if aligned—impact implies a quantified assessment that considers the specific intellectual property at issue. For example, a patent for a niche technology field, a copyright for an obscure blog and a trademark for an outdated slogan are all unlikely to have a major social impact. Severe restrictions on licenses related to these items will do little good.

4. An Example Fair Social Use Balancing Mechanism

Giving voice to the above factors is useful in and of itself. Simply expressing the extent to which employees may be impacted versus the social utility of licensing restrictions can be a useful exercise. However, for a more reportable and quantifiable assessment, it can be helpful to present the test as a series of strength measures. One might employ something akin to Likert items[195] that are summed on a scale. Consider the example in Figure 4, below, that charts the differences in a college or university trademark license for a product like Gatorade, a license for a patent that is primarily useful for restricting third party safety testing, and a license for a patent that may be attractive to trolls but would otherwise be abandoned.

195. *See* Rensis Likert, *A Technique for the Measurement of Attitudes*, 22 ARCHIVES OF PSYCHOL. 140 (R.S. Woodworth ed., 1932).

Figure 4. Fair Social Use Balancing Example



Gatorade brings in high college and university revenue with some royalty sharing with faculty and little interference with college and university social goals.[196] The final scale should be substantially in favor of an unencumbered license. On the other hand, the patent restricting safety testing is unlikely to be commercialized and bring in revenue for either the college or university or individual employees, yet it is may impede important information production by third parties. The final scale is substantially in favor of a restricted licensing that ensures non-commercial third parties can still access the technology. And in the middle is the troll-attracting technology, which has strong employee impacts and favors an unencumbered license without more evidence of a social impact.

C. Additional Measures that Promote Fair Social Use

Given the large percentage of college and university patents that have Bayh-Dole obligations, it should be possible to modify the statute in a way that reduces the likelihood of licensing to trolls. Many of the provisions that colleges and universities are attempting to enact independently could be applied to all government-supported inventions. The advantage would be to ensure an equitable sharing of the burdens.

196. *See* Rooksby, *supra* note 41, at 400 n.245.

In addition, intellectual property exchanges or pooling arrangement may permit rights to be aggregated and licensed on terms that limit the worst behavior. As with Bayh-Dole act revisions, the advantage is that many college and university actors could share the burden of restriction. In addition, more rights may be licensed instead of abandoned unilaterally.

CONCLUSION

Although colleges and universities may have important impacts on society through their intellectual property licensing and enforcement, they also have important stakeholders with legitimate demands for rights monetization. There is no easy way to elevate one set of interests over the other. The key is to balance sales and licensing efforts in a manner that will address the most concerning social harms while preserving income. This approach will not guarantee that college or university intellectual property will never create a barrier for vulnerable populations and firms. But rights that are legitimately earned may always have this effect, and normative evaluation should take place only alongside a consideration of the entirety of college and university stakeholder obligations and benefits.

THE AMERICANS WITH DISABILITIES ACT AND HIGHER EDUCATION 25 YEARS LATER: AN UPDATE ON THE HISTORY AND CURRENT DISABILITY DISCRIMINATION ISSUES FOR HIGHER EDUCATION

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I. INTRODUCTION

The year 2013 was an opportunity to reflect on forty years of higher education disability developments since the 1973 Rehabilitation Act. The year 2015 provides an opportunity to reflect on what the 1990 Americans with Disabilities Act added with respect to disability discrimination requirements over the past twenty-five years.

This article provides a brief historical overview of this issue.[1] This article highlights the critical and most important issues to which college and university counsel and administrators should be giving attention at this

1. In 2010, a 50th Anniversary issue of the Journal of College and University Law included an overview of the history of disability law in higher education. *See* Laura Rothstein, *Higher Education and Students with Disabilities: A Fifty Year Retrospective,* 36 J.C. & U.L. 843, 846 (2010). That article can be referenced for a more detailed overview of the history.

time. The discussion in this article is based on issues arising within higher education, statutory changes and regulations, recent regulatory guidance (including opinion letters, agency decisions, commentary and compliance), judicial decisions, and significant settlement agreements.

While the primary focus of the article is on student issues, there are other important areas addressed as well. These include employment issues relating to faculty and staff and overarching issues that affect students, faculty, staff, and the public. The crosscutting issues affecting all of these groups include technology, architectural barriers, service and emotional support animals, and food. These are also addressed.

II. A HISTORICAL OVERVIEW

The application of disability law to higher education began in 1973 with the enactment of Section 504 of the Rehabilitation Act of 1973, which prohibited discrimination on the basis of disability for programs receiving federal financial assistance.[2] Because higher education institutions were some of the few programs that received substantial federal funding, they became a laboratory for interpreting the statute in its earliest years.[3] Because comprehensive federally supported special education opportunities did not come into existence until 1975,[4] it took a few years before a substantial number of students with disabilities were prepared for and sought entry into higher education institutions. For that reason, the courts did not focus on Section 504 of the Rehabilitation Act to any great degree until about 1979, with the Supreme Court decision in *Southeastern Community College v. Davis*.[5] Between 1979 and 1990, the courts began to focus on procedural issues and some substantive issues. There was little judicial attention in that timeframe to whether the individual met the definition of "disabled" under the statute. Instead the courts focused on whether the individual was otherwise qualified and what reasonable accommodations would be required in a particular case.[6]

The passage of the Americans with Disabilities Act (ADA) in 1990[7] began to change the judicial focus. The ADA expanded protection against disability discrimination to most employers (those with fifteen or more em-

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2. 29 U.S.C. § 794 (2014).

3. *See* Laura Rothstein, Southeastern Community College v. Davis*: The Prequel to the Television Series "ER"*, *in* EDUCATION LAW STORIES 197–215 (Michael Olivas & Ronna Schneider eds., 2007).

4. *See* LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW ch. 3 (4th ed. 2015) (overview of special education law) [hereinafter DISABILITIES AND THE LAW].

5. 442 U.S. 397 (1979).

6. See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective,* 36 J.C. & U.L. 843 (2010) for an overview of these developments.

7. Pub. L. No. 101-336, 101 Stat. 327 (1990) (codified at 20 U.S.C. §§ 12101−12213 (2006)).

ployees), to state and local governmental programs (which included many colleges and universities already covered by the Rehabilitation Act), and to twelve categories of private providers of public accommodations, including educational programs (which included many private colleges and universities that had been covered by the Rehabilitation Act). The ADA application to most employers, however, resulted in backlash. Employers who were now faced with increasing demands by individuals in the workplace began to bring summary judgment and motions to dismiss actions claiming that the individual was not disabled. This culminated in the 1999 and 2002 Supreme Court decisions narrowing of the definition of coverage.[8] It took until 2008, however, to amend the ADA (and the Rehabilitation Act) to broaden the definition of coverage to what many thought had been intended in the first place.[9]

With the amended definition and subsequent clarifying regulations from several federal agencies, the courts have in the past five years begun to clarify several issues falling under the ADA and the Rehabilitation Act within the context of higher education. The past five years have also brought increased federal agency attention to compliance with a number of highly publicized settlement agreements and some areas of controversy over agency interpretation. A number of developments within the past five years highlight the importance of revisiting these issues.

- The Affordable Care Act[10] has begun to have an impact. This may have particular impact on access to mental health services, which are addressed in the Mental Health Parity and Addiction Equity Act[11] enacted in 2008.
- The return of large numbers of veterans from combat in the Middle East has resulted in a population of students with post-traumatic stress disorder, traumatic brain injury, and physical injuries.
- There is an increase in the stress among students, and this results in increasing concerns about mental health issues on campus.

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8. *See* Sutton v. United Air Lines, 527 U.S. 471 (1999); Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (deciding that determining whether one has a disability includes reference to mitigating measures); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (narrowing the definition of what constitutes a major life activity).

9. Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as portions of 42 U.S.C. §§ 12101−12210 and 29 U.S.C. § 785).

10. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

11. 29 U.S.C. § 1185a (2010); *see also* 42 U.S.C. § 300gg-5 (2008).

- The number of students with disabilities (particularly those with learning disabilities) on campus continues to increase.[12]
- New and emerging technologies and the increasing use of technology in teaching and other programming in higher education continues to require institutions of higher education to be proactive in a range of areas where technology might become an issue. The recent interest in MOOCs and expanded use of the internet presents new challenges.
- The aging professoriate (baby boomers who may not want to retire) requires attention.
- Recent judicial activity has addressed the issue of what it means to be "otherwise qualified" in the context of professional education with results that are sometimes surprising and inconsistent and which may signal a lessened judicial deference to institutions of higher education.
- The Obama administration signals activities that may require institutions of higher education to anticipate and plan for greater attention to disability issues. The potentially greater access to community colleges[13] is an example of how an increase in the population of students with disabilities at institutions that are often the least well staffed and funded may result in concerns for institutions of higher education. Attention to sports and athletics for students with disabilities and enforcement on food issues highlights current Obama administration focus and attention to these issues.
- The 2014 Ebola crisis has implications for higher education.[14] Policies related to handling of contagious and infectious diseases may have a discriminatory impact. The recent dramatic attention to this reminds institutions of the value of proactive planning.

These recent developments, combined with economic challenges within

12. See *Students with Disabilities from Post-Secondary Degree Granting Institutions: First Look*, NAT'L CTR. FOR EDUC. STATISTICS (2011), *available at* http://nces.ed.gov/pubs2011/2011018.pdf, for statistics as of 2011.

13. *See generally Higher Education*, WHITE HOUSE, http://www.whitehouse.gov/issues/education/higher-education (last visited Apr. 24, 2015).

14. Karen MacGregor, *Higher education and West Africa's Ebola outbreak*, UNIV. WORLD NEWS (Aug. 30, 2014), http://www.universityworldnews.com/article.php?story=20140829160149102; Elizabeth Redden, *On Edge Over Ebola*, INSIDE HIGHER ED (Oct. 20, 2014), https://www.insidehighered.com/news/2014/10/20/us-campuses-are-edge-over-ebola.

higher education, might result in institutions using the "undue burden" defense, which has to date not been raised in most (if any) cases.

For each of the issue topics in this article, the following will be provided as appropriate: the statutory framework, the regulatory framework, any administrative agency guidance or opinion letters, judicial interpretations, a perspective on interesting trends and developments, and thoughts about how institutions of higher education can proactively implement disability policy on campus. The approach of the article is to discuss what the law requires (what higher education "must" do), what the areas of litigation or complaints to OCR are likely to be (and why), how disputes about whether the requirements have been violated are likely to be resolved, and how campus service providers, administrators, policymakers, and faculty members (and the students themselves) can be proactive in developing policies, practices, and procedures to respond to what is required, what is not required, and how to best accomplish the goals of current law. The approach is preventive lawyering –with the strategy of avoiding litigation by assisting all stakeholders in understanding the requirements and how far they extend and ensuring a positive (rather than a defensive) approach to implementation of disability nondiscrimination policy.

III. MAJOR ISSUES FOR STUDENTS

A. Definition of Coverage and Documentation

1. Statutory and regulatory framework

The statutory and regulatory definitional framework applies to students, faculty, staff, and the public. Under both the Rehabilitation Act, and the ADA, to receive protection an individual must be substantially limited in one or more major life activities, meaning they must be regarded as so impaired or have a record of such impairment.[15] The individual must be otherwise qualified – able to carry out the essential functions of the program with or without reasonable accommodation.[16] Institutions are not required to engage in activities that would pose an undue hardship, fundamentally alter a program or lower standards. Individuals must not pose a direct threat and must make "known" the disability and have appropriate documentation, and must do so in a timely manner in order to demonstrate that program discriminated or failed to provide a reasonable accommodation.

The ADA Amendments Act of 2008 clarified and amended the defini-

15. 29 U.S.C. § 794 (2014); 42 U.S.C. § 12102(2) (2012); *see* DISABILITIES AND THE LAW, *supra* note 4, at § 3:2.

16. *See* 34 C.F.R. § 104.3(l) (2000); 42 U.S.C. § 12131(2) (2001); 42 U.S.C. § 12182(b)(2)(A) (2009); DISABILITIES AND THE LAW, *supra* note 4, at § 3:3.

tion of "disability."[17] These amendments responded to 1999 and 2002 Supreme Court decisions[18] that had narrowed the definition, and provide for a broad interpretation of the definition of disability under the ADA.[19]

The Amendments clarified that major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.[20] A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[21] The references to major life activities that include "concentrating, thinking, and communicating" may make it more likely that an individual with a learning disability or with certain mental impairments will fall under the definition.

To meets the requirement of "being regarded as having such an impairment," the individual must establish "that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." [22] The definition of disability does not apply to impairments that are transitory and minor. A transitory impairment is one with an actual or expected duration of six months or less.[23]

The 2008 Amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity.[24]

The Amendments also provide that

> Nothing in this Act alters the provision. . .specifying that reasonable modifications in policies, practices, or procedures shall be

17. *See* 42 U.S.C. § 12102 (2014). Regulations pursuant to the amendments relevant to employment were promulgated on March 25, 2011, effective May 24, 2011. They can be found at 29 C.F.R. § 1630 (2011) and are available at www.eeoc.gov. The Amendments state that the definitions are also to be applied to the Rehabilitation Act. 29 U.S.C. § 705(9)(B) (2014), incorporating 42 U.S.C. § 12102.

18. Sutton v. United Air Lines, 527 U.S. 471 (1999); Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

19. 42 U.S.C. § 12101(b) (2012).

20. 42 U.S.C. § 12102(2).

21. *Id.*

22. 42 U.S.C. § 12102(3).

23. 42 U.S.C. § 12102(4)(D).

24. 42 U.S.C. § 12102(4)(E).

> required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved. [25]

The past five years have brought substantial regulatory agency and judicial attention to interpreting the Amendments. The following sections highlight those responses.

2. Administrative agency guidance (regulations), opinion letters and enforcement activities

There are several federal agencies likely to play a role in disability discrimination policy on campus. The primary agencies include the Department of Justice (enforcing Titles II and III of the ADA), Housing and Urban Development (regarding housing on campus), the Department of Education (educational programming), and the Equal Employment Opportunity Commission (regarding employment). A number of other agencies may play a role in architectural barrier issues, which may have impact on buildings that are used by the public.[26]

Administrative agencies carry out several roles in implementation of statutory policy. They promulgate regulations (which are subject to notice and public comment); they issue agency guidance; and they may have enforcement roles through opinion letters or other means.

The key regulations for higher education and disability are from the original regulations promulgated by the Department of Health Education and Welfare (HEW) in 1978 for Section 504.[27] More recently, a substantial body of regulatory guidance has been developed under the ADA of 1990 and the ADA Amendments Act of 2008. Important recent regulations relevant to higher education and student issues were issued by the Department of Justice in 2010,[28] the agency with primary responsibility for enforcing Title II and Title III of the ADA. These sets of regulations (which are quite similar) update previous regulations and include requirements related to definitions, service animals, mobility devices, ticketing (relevant to stadium

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25. 42 U.S.C. § 12201(f).

26. These include the Architectural and Transportation Barriers Compliance Board, the National Institute on Disability and Rehabilitation Research (within the Department of Education), and the National Center on Accessibility. *See generally* Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO ST. L.J. 1263, 1273 (2014) (discussing the agency activities related to architectural barrier issues).

27. *See* Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104 (2000). HEW is now the Department of Health and Human Services and the Department of Education.

28. *See* 28 C.F.R. §§ 35−36 (2010).

and concert seating), auxiliary aids and services, architectural barriers (including housing at places of education, assembly areas, and swimming pools), examinations and courses, transportation, and telecommunications and interpreting. This set includes clarification about housing on campus.[29]

Other sets of regulations relevant to student issues include regulations regarding housing, issued by the Department of Housing and Urban Development[30] and general regulations issued by the Department of Education.[31]

In addition to regulations, agencies often issue agency guidance. Such guidance does not have the same force as regulations, but it can signal how an agency is likely to interpret a statute or regulation.[32] Agencies also often provide technical assistance, which provides guidance about how to implement regulatory requirements.

3. Judicial interpretations

a. Meeting the definition

There are a number of cases addressing the issue of who is entitled to protection from discrimination in the higher education student context.[33] The first decision by the Supreme Court addressing any aspect of disability discrimination rights involved exactly that issue. The 1979 decision in *Southeastern Community College v. Davis*[34] decided the question of whether a student with a severe hearing impairment enrolled in a nursing program was "otherwise qualified" to continue because of concerns about safety of patients. While the Court did not question whether Francis Davis had a disability, it incorporated the requirement that to be protected one must not only have a disability, but must be otherwise qualified to carry out the essential requirements of the program.

As noted earlier in this article, in the early years of application of Section 504 of the Rehabilitation Act to higher education, the courts rarely focused on whether the individual was "disabled" under the statute.[35] Nor were there many such cases under the ADA. The exceptions primarily involved students with learning disabilities and some mental health conditions.[36] The courts addressing the issue of who is "disabled" were primarily

29. *See id.*
30. 24 C.F.R. §§ 100−200 et seq. (1996).
31. 34 C.F.R. § 104 (2000).
32. *See generally* ADA, www.ada.gov (last visited Apr. 24, 2015).
33. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:2.
34. 442 U.S. 397 (1979).
35. *See* Laura Rothstein, *Southeastern Community College v. Davis: The Prequel to the Television Series "ER,"* Ch. 7, EDUCATION LAW STORIES 197–215 (Michael Olivas & Ronna Schneider eds., 2007).
36. *See* DISABILITIES AND THE LAW, *supra* note 4, at §§ 3:2; 3:22; 3:24. *See*, *e.g.*, Swanson v. Univ. of Cincinnati, 268 F.3d 307 (6th Cir. 2001) (holding that a surgical

those where employment was the context.[37]

The 2010 article[38] written for the fiftieth anniversary of NACUA was written too soon after the 2008 ADA Amendments (which took effect on January 1, 2009)[39] for much case law to have developed.[40] Cases decided since 2010 generally reinforce the fact that in higher education, at least in the student context, the issue of whether the individual has a disability is rarely addressed. Instead the courts focus more on the aspect of otherwise qualified (including direct threat). The case law involving definition of disability in higher education often incorporates a focus on documentation, but usually addresses whether the documentation justifies the accommodation, not on whether the documentation demonstrates that the individual has a disability.

One of the issues that recent decisions in higher education have addressed is whether certain mental health conditions meet the definition for an individual to be considered "disabled" and entitled to protection. In some cases, the courts have remanded for further consideration.[41]

For example in *Doe v. Samuel Merritt University*,[42] a student with anxiety disorders claimed the right to have additional opportunities to take medical licensing exam. The case was allowed to go forward on issues of whether test taking is a major life activity.[43] Another example of a court's

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resident with major depression was not substantially limited in ability to perform major life activities; difficulty with concentrating was temporary and alleviated by medication; communications problems were short-term, caused by medication and there were only a few episodes).

37. *See* DISABILITIES AND THE LAW, *supra* note 4, at Ch. 4. Discussion of cases on this issue in the context of faculty and staff are addressed later in this article. *See infra* Part X.

38. *See* Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective,* 36 J.C. & U.L. 843 (2010).

39. Most cases have held that the amendments do not apply retroactively. *See, e.g.*, Singh v. George Wash. Univ. Sch. of Med. & Health Sciences, 667 F.3d 1 (D.C. Cir. 2011) (arising pre-ADA Amendments).

40. In Cordova v. University of Notre Dame Du Lac, 936 F. Supp. 2d 1003 (N.D. Ind. 2013), the court addressed a case involving a student claiming a learning disability and psychological disability who claimed numerous denials of requested accommodations. The court dismissed the case for statute of limitations reasons and also found that isolated bouts of depression did not constitute disabilities under the pre-2008 interpretation of the ADA when the complained of actions occurred. *Id.* at 1009. It is unclear whether these conditions would be more likely to be found to be disabilities applying the language of the amendments.

41. *See also* Millington v. Temple Univ. Sch. of Dentistry, 261 F. App'x 363 (3d Cir. 2008) (holding that a long list of health problems that were not sufficiently documented as demonstrating substantial limitation was not a disability and in addition the student had not met academic standards).

42. 921 F. Supp. 2d 958 (N.D. Cal. 2013).

43. *Id.* The case was also allowed to go forward on the issue about whether the limit on taking exams was entitled to deference by the courts.

further consideration is *Forbes v. St. Thomas University, Inc.*,[44] in which the court held that there were issues of material fact remaining regarding whether post-traumatic stress disorder was a disability and, if so, whether the law student had received reasonable accommodations.[45]

In *Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,[46] the court found that a doctoral student with recurrent depression and a head injury was not substantially limited in a major life activity.[47] In another case in which the court found the student not to be disabled, *Rumbin v. Association of American Medical Colleges*,[48] the court looked at the testing done to demonstrate the disability and found that the evaluating optometrist did not compare reading skills of a medical school applicant to those of an average person. The comparison group is not to other test takers or to future doctors. When compared to the general population, his reading skills were not substantially limiting and thus the applicant was not entitled to accommodations on the medical school exam. Because this case was based on application of the pre-2008 ADA, it is not certain whether the outcome would be different today, although the comparator group issue has not changed because of the 2008 Amendments.

One unusual holding applying the 2008 definition involved a student who was HIV positive and whether that student was disabled so as to be covered by discrimination law. While pre-2008 cases involved a few decisions in which it was not clear that HIV positive status would be almost a "per se" disability, it was generally believed that after the 2008 Amendments which provided that major life activities include operation of the immune system that anyone who was HIV positive was substantially limited in that major life activity.[49] In *Alexiadis v. New York College of Health Professions*,[50] however, a college student who was HIV positive was arrested for stealing a bag of hand sanitizer and was dismissed from college. The court allowed the claim to go forward regarding whether he was disabled, whether the dismissal was because of disability, and whether the explanation was a pretext. While it is not unusual that the case would proceed on these other grounds, the issue of whether he was disabled should have been decided without further judicial attention. Anyone who is HIV

44. 768 F. Supp. 2d 1222 (S.D. Fla. 2010).

45. *Id.* The court also noted that there was evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program. *Id.* at 1234.

46. 842 F. Supp. 2d 1003 (M.D. La. 2012).

47. *Id*. The court also held that accommodation of attendance exceptions was contingent on her providing accommodation letter to professors, that the student's work was substandard and denied retroactive withdrawal or assigning grade of "incomplete."

48. 803 F. Supp. 2d 83 (D. Conn. 2011) (occurring before the 2008 Amendments).

49. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:24.

50. 891 F. Supp. 2d 418 (E.D.N.Y. 2012).

positive is substantially limited in the major life activity of the operation of the immune system major bodily function.[51]

A key principle of claiming disability discrimination is that the individual must make "known" the disability or condition to have it taken into account before participation in the activity.[52] Recent cases have highlighted that requirement. In *North v. Widener University*,[53] the court held that disclosing a disability after dismissal is not sufficient to give protection. The student's admission essay about taking medications for behavior was not adequate to demonstrate that faculty members knew of his ADHD and had discriminated against the student because of that condition. Similarly in *Cunningham v. University of New Mexico Board of Regents*,[54] the court found that a medical school student did not allege that his Scoptic Sensitivity Syndrome was a disability in claims against the university.

The 2008 Amendments clarify the "regarded as" prong to the definition of disability by providing in the definitions the following:

> To meet the requirement of "being regarded as having such an impairment" the individual must establish "that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[55]

There has been some post-2008 judicial clarification about this. In *Widomski v. State University of New York at Orange*,[56] the court addressed a claim of discrimination by a student in a medical technician program whose hands shook too much to draw blood from patients. The court held that he was not perceived to have an impairment limiting a major life activity and that he was still employable for medical technician jobs not requiring phlebotomy so his condition did not substantially limit a major life activity.

b. Documentation

An issue that arises in the context of definitional coverage is what kind of documentation must be provided to demonstrate that an individual is disabled within the statute. This often relates to the documentation required for a requested accommodation. The discussion of this issue includes the qualifications of the evaluating professional, what deference is

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51. 42 U.S.C. § 12102(2)(B) (2012).
52. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:8 (collecting cases).
53. 869 F. Supp. 2d 630 (E.D. Pa. 2012).
54. 779 F. Supp. 2d 1273 (D.N.M. 2011), *aff'd*, 531 F. App'x. 909 (10th Cir. 2013).
55. 42 U.S.C. § 12102(3) (2012).
56. 748 F.3d 471 (2d Cir. 2014).

required for documentation provided by the treating professional, the payment for such documentation, and how recent it must be. These issues are discussed in the section on accommodations.[57]

B. Otherwise qualified

Under the Rehabilitation Act and the ADA, a student claiming protection must not only have a disability as defined in the statute but must also be otherwise qualified, which can include not posing a direct threat.

1. Statutory and regulatory framework

The 1973 Rehabilitation Act provided virtually no guidance about the terms "otherwise qualified" and "direct threat." The implementing regulations for postsecondary education provide that a qualified person with a disability is one "who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."[58] The Supreme Court's early guidance in *Southeastern Community College v. Davis*[59] as well as other judicial interpretations became the basis for the much more specific and detailed statutory provisions of the ADA and its implementing regulations, both in the 1990 statute and within the 2008 Amendments and regulations promulgated under both. Because the Rehabilitation Act is intended to be interpreted as consistent with the ADA, the definitions are relevant to both statutes.

Under the ADA statutory language, the term "otherwise qualified" is not more fully defined with respect to students, although there is specificity for employment.[60] The same is true for the implementing regulations.[61] There is, however, some administrative agency guidance on this issue.[62]

2. Administrative agency guidance and enforcement

The administrative agencies that would be most involved with student issues are the Department of Education (enforcing Section 504) and the Department of Justice (enforcing Titles II and III of the ADA). Both have provided guidance, but the guidance is not necessarily clear or consistent, particularly in the case of interpreting what is meant by "direct threat."[63]

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57. *See infra* Part III.D.

58. 34 C.F.R. § 104.3(l)(3) (2000).

59. 442 U.S. 397 (1979).

60. 42 U.S.C. § 12111(8) (2011) (defining "qualified individual" for employment).

61. 29 C.F.R. § 1630(2)(g)–(n) (2012).

62. *See generally The ADA: Questions and Answers*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N., http://www.eeoc.gov/eeoc/publications/adaqa1.cfm (last visited Apr. 25, 2015).

63. *See infra* Part III.C.

3. Judicial interpretations

The Supreme Court's first decision to address any issue of disability discrimination involved the issue of "otherwise qualified." In *Southeastern Community College v. Davis*,[64] the Court considered whether a nursing student with a significant hearing impairment was otherwise qualified to continue in the nursing program because of the possible risk to patients. The Court held that "[a]n otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap,"[65] and found her not to meet the necessary qualifications.

In the years since 1979, courts have applied this standard to numerous settings requiring that students meet academic requirements, honesty requirements, technical abilities, attendance requirements, and behavior and conduct expectations.[66] Cases decided within recent years provide examples of such judicial assessments.

In *Singh v. George Washington University School of Medicine and Health Sciences*,[67] the court found that the student was academically deficient and that causes other than learning disabilities (including extracurricular activities, anxiety, and poor study habits) related to those deficiencies. Another recent decision involving academic deficiencies is *Peters v. University of Cincinnati College of Medicine*,[68] in which a medical student with depression, a learning disability, and ADD was placed on academic probation. The medical school refused to allow her to retake exams after her medication regimen had stabilized because her history of depression and mood swings would prevent her from being a good physician. However, the court found that evidence that the dismissal was because of a pattern of psychiatric difficulties might establish a Title II case. Failure to request accommodation until after academic deficiencies was also a factor in the decision not to readmit a student in an osteopathic program.[69]

In *Shaikh v. Lincoln Memorial University*,[70] a student who was dismissed from an osteopathic medicine program was found to be not otherwise qualified because of academic deficiencies. Accommodations had been provided (additional exam time, access to lecture notes, class video recordings). The requested accommodation of deceleration of program was

64. 442 U.S. 397 (1979).

65. *Id.* at 406.

66. DISABILITIES AND THE LAW, *supra* note 4, at § 3:3 (collecting cases).

67. 667 F.3d 1 (D.C. Cir. 2011) (holding that the 2008 ADA Amendments do not apply retroactively to the student's claim and the student had failed to establish a relationship of the impairment to her performance).

68. No. 1:10-CV-906, 2012 WL 3878601 at *1 (S.D. Ohio Sep. 6, 2012).

69. *See* Shaikh v. Lincoln Memorial Univ., 46 F. Supp. 3d 775 (E.D. Tenn. 2014) (finding that a request for the deceleration of a program occurred after decision to dismiss in case where other accommodations had been requested and provided).

70. *Id*. at 775.

made after dismissal recommendation. The court found that such an accommodation would be unreasonable because it would require changes to clinical program, financial aid, and accreditation procedures.

While the case has not yet been decided and the preliminary opinion only allowed the case to go forward, the court addressed alleged theft of a bag of hand sanitizer by a student who was HIV positive. In *Alexiadis v. New York College of Health Professions*,[71] the student who was dismissed from college because of the theft claimed that the dismissal was because of the disability and that the explanation was a pretext. The court allowed the claim to go forward regarding whether he was disabled; whether dismissal was because of disability, and whether explanation was a pretext.

Students whose disabilities might relate to their misconduct must raise that connection before the misconduct occurs. In *Halpern v. Wake Forest University Health Sciences*,[72] a medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences. The proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

Attention to the issue of technical requirements has been the subject of a recent decision that called into question the issue of deference to the educational agency.[73] Some recent cases provide examples of cases on this topic. In *Widomski v. State University of New York at Orange*,[74] the court upheld the denial of admission of a student to a phlebotomy program. The university did not reach the issue of whether he was otherwise qualified because his hands shook too much to draw blood from patients. Instead the case was dismissed because he was not "disabled" within the statute because he was not perceived to have an impairment limiting a major life activity. The court found that he was still employable for medical technician jobs not requiring phlebotomy.

The case of *Sjöstrand v. Ohio State University*,[75] involved denial of admission to a Ph.D. program by an applicant with Crohn's disease. She had disclosed her condition in the application process, but the court found that it was not discriminatory to deny her admission because faculty interviewers had a legitimate basis for not accepting her for program. On appeal, however, the circuit court found that there were sufficient issues of fact regarding the reason for rejection and remanded to the lower court for further

71. 891 F. Supp. 2d 418 (E.D.N.Y. 2012).

72. 669 F.3d 454 (4th Cir. 2012).

73. This is discussed more in the later section on professional education standards and possible emerging trends. *See infra* Part III.E.

74. 748 F.3d 471 (2d Cir. 2014).

75. 930 F. Supp. 2d 886 (S.D. Ohio 2013).

review.[76]

Judicial decisions have been consistent that attendance is often an essential requirement and deficiencies need not be excused. In *Harville v. Texas A&M University*,[77] the court held that it did not violate the ADA to terminate a research assistant because of excess absences. Similarly in *Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,[78] the court found that a doctoral student with depression and anxiety did not make out a Title I or Title II case. The student was not qualified to perform essential functions of her graduate assistantship. She did not adequately request accommodations for her head injury excusing her from attendance and allowing additional time to turn in assignments. The university had provided accommodations by providing letters supporting absences and extra time.

C. Direct Threat

1. General Principles

The issue of direct threat is an element of whether a students is "otherwise qualified." It is an area of some contention within the context of higher education and student issues. It has received substantial attention in light of the numerous highly publicized mass shootings involving students on campus and students who had recently been dismissed or left campus.[79] The issue also receives attention whenever there is a suicide on campus.

Direct threat can involve a threat to others, and acting on the basis of such a threat is generally permissible. Where the threat is to oneself, it is less clear what actions may be taken. There is statutory language under Title I that defines direct threat as meaning a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[80] Neither Title II nor Title III includes statutory language about the definition of direct threat as applicable to those sections of the ADA.

The regulations under Title I (employment), which were promulgated by the EEOC, expand the definition by defining it as "a significant risk of substantial harm to the health or safety of the individual or others that cannot

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76. S**jö**strand v. Ohio State Univ., 750 F.3d 596 (6th Cir. 2014) (remanded as issues of face remained regarding reason for PhD school psychology program's admission denial to student with Crohn's disease).

77. 833 F. Supp. 2d 645 (S.D. Tex. 2011).

78. 842 F. Supp. 2d 1003 (M.D. La. 2012).

79. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:24. *See also* Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption,* 35 J.C. & U.L. 691 (2009).

80. 42 U.S.C. § 12111(3) (2012). *See also* DISABILITIES AND THE LAW, *supra* note 4, at § 4:12 (collecting cases and discussing the issue of "otherwise qualified—direct threat").

be eliminated or reduced by reasonable accommodation."[81] This regulation further clarifies that such an assessment is to be individualized and "based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence."[82] Factors for making that assessment are the following:

(1) Duration of the risk;

(2) Nature and severity of the potential harm;

(3) Likelihood that potential harm will occur; and

(4) Imminence of potential harm.[83]

The statutory language for Titles II and III, however, is silent on the definition of "direct threat," and universities are left to rely on regulations and agency guidance. The Title II regulations (which would seemingly apply to most student situations) provide the following regarding direct threat:

> Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.[84]

The determination of direct threat is to be based on an individualized assessment and is to be,

> based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.[85]

While the EEOC regulation has been upheld by the Supreme Court as being valid and within the scope of the statute in *Chevron U.S.A. Inc. v. Echazabal*,[86] the Title II regulation (which is part of the regulations issued in 2010) has not been subjected to judicial review. While the Title II regulation is silent as to whether it might be permissible to use threat to self as a basis for responding to a student's conduct, the Department of Education guidance is unclear but indicates that it would view such action as discrim-

81. 29 C.F.R. § 1630.2(r) (2011) (emphasis added).

82. *Id.*

83. *Id.*

84. 28 C.F.R. §35.104 (2011) (definitions) (emphasis added).

85. 28 C.F.R. §35.139(b) (2011). This provision is particularly relevant to issues involving contagious and infectious diseases (such as HIV) and mental health impairments.

86. 536 U.S.73 (2002). The Court made this decision although the statutory language is silent and some legislative history suggesting that a contrary result was intended.

inatory.[87]

2. Self-Harm Situations

Many in higher education have raised concerns about how the Title II regulation (not considering threat to "self") will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

A 2014 NACUA Note provides a thorough review of the history of the need for more guidance on this issue, including recent OCR Resolution Agreements about Self-Harm.[88] The Note points out that resolution agreements, while not legally binding precedent, can provide insight into OCR analysis and identifies some consistent principles from agency action. This well reasoned NACUA Note provides the following as guiding principles until there is something more official from federal agencies:

- Avoid "direct threat to self" language
- Conduct individualized risk assessments in a team environment
- Assess observable conduct that affects the health, safety, or welfare of the campus community
- Enforce conduct codes or other policies applicable to all students
- Compare with similarly-situated, non-disabled students to avoid disparate treatment
- Absent emergency circumstances, first consider voluntary leave or other voluntary restrictions
- Consider "behavioral contracts" with reasonable, tailored terms
- Resort to involuntary removal in emergency or direct threat situations
- Satisfy due process concerns by providing adequate notice, an opportunity to present information, and an appeal
- Establish reasonable and individualized conditions for a student's return.[89]

The Note concludes by reminding institutions of the "absence of formal guidance or a clear model on how best to comply" in self-harm situations. Subsequent to the NACUA overview, a recent settlement addressed a stu-

87. *See infra* Part III.C.2.

88. Paul G. Lannon, Jr., *Direct Threat and Caring for Students at Risk for Self Harm: Where We Stand Now*, NACUANOTES (Sept. 3, 2014), http://www.nacua.org/nacualert/notes/selfharm.pdf.

89. *Id*. at 9–11.

dent who sought mental health counseling, where it was alleged that she was summarily dismissed.[90] It highlights the importance and value of having policies and procedures in place before issues arise.

3. Threat to Others

The cases involving threat to others are much easier to respond to in terms of whether it violates disability discrimination law to adversely treat a student in such a situation. One recent decision provides valuable guidance on dealing with students whose conduct raises issues of direct threat. In *Stebbins v. University of Arkansas*,[91] the court addressed the issue of accommodating a student with "intermittent explosive disorder" who had engaged in tactless behavior with a faculty member. The court discussed the student's repeated incidents of misconduct applying the "direct threat" analysis and determined that the student did not have to be readmitted because he was not otherwise qualified. Another recent case illustrates what seems to be consistent judicial treatment of such cases. In *Rivera-Concepción v. Puerto Rico*,[92] a student with bipolar disorder was expelled from a government internship program. The student did not make out case of disability discrimination because the expulsion was based on a manic episode and the program was not aware of mental condition. The expulsion was based on behavior. What accommodation might be expected in such a case is addressed in the later section on accommodations.[93]

A later section on professional education and trends raises an issue relevant to "direct threat."[94] Professional education programs may be asked by state licensing boards whether students have been diagnosed or treated for mental health impairments or substance addiction. While asking about behavior and conduct (that might be a result of such impairment) seems permissible, it is questionable how these agencies can demonstrate that diagnosis or treatment indicates that an individual is a "direct threat."

4. Access to Treatment

Another issue that is more a social policy issue than a disability discrimination issue is the increasing need for mental health services on college campuses today. While a discussion of that topic is beyond the scope of this article, it should be noted that every time one of the high profile shoot-

90. *Settlement Agreement between the United States of America and Quinnipiac University under the Americans with Disabilities Act*, ADA.gov (Dec. 19, 2014), *available at* http://www.ada.gov/quinnipiac_sa.htm.

91. No. 10-5125, 2012 WL 6737743, at *1 (W.D. Ark. Dec. 28, 2012).

92. 786 F. Supp. 2d 489 (D. P.R. 2011).

93. *See infra* Part III.D.

94. *See infra* Part III.E.

ings has occurred, the media, policymakers, and others raise the need for more access to mental health services (particularly in light of the increasing stress on campus). The lack of institutional will to do something in combination with financial realities, however, leaves this concern largely unaddressed. While the Affordable Care Act[95] allows parents to keep children aged 26 and under on their health insurance policies and provides much broader protection for preexisting conditions in combination with the Mental Health Parity and Addiction Equity Act,[96] there are indications that true access to mental health services is still woefully inadequate.[97]

5. Privacy and Confidentiality

Another issue beyond the scope of this article is that whenever issues of any disability, particularly those with stigma attached, are part of a student record, extreme care must be taken about protecting the privacy and confidentiality of those records.[98] Both the Family Educational Rights and Privacy Act of 1974 (FERPA)[99] and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[100] provide coverage on this issue. It is important, however, that internal policies implementing FERPA and HIPAA take into account the challenge of ensuring confidentiality within student records and that only those with a need to know have access to this information. Protections should be included in practices and procedures, and training should ensure this protection.

6. Contagious and Infectious Diseases

The late 2014 attention to Ebola threats, while it has been less of a concern after an initial strong and confusing reaction by officials, different states, federal agencies, and the media, should be a wake-up call to campuses to anticipate such issues. Students (and others) who return from countries where Ebola has been present may raise questions about whether

95. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

96. 29 U.S.C. § 1185a (2009); *see also* 42 U.S.C. § 300gg-5 (2010) (interaction with the Affordable Care Act); 29 C.F.R. § 2590 (2009) (regulations regarding group health insurance policies promulgated pursuant to the Employee Retirement Income Security Act of 1974).

97. *See, e.g.*, Jill Harkins, *Study: Increased Demand, Inadequate Resources for College Mental Health Services*, PITTSBURG POST-GAZETTE (Feb. 7, 2015), http://www.post-gazette.com/news/education/2015/02/07/Study-Increased-demand-inadequate-resources-for-college-mental-health-services/stories/201502070034.

98. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:21. *See also* 34 C.F.R. § 99 (2014); 73 Fed. Reg. 74,806 (Dec. 9, 2008) (Department of Education regulations relating to school records).

99. 20 U.S.C. § 1232g(a)−(i) (2013). See also 34 C.F.R. § 5b (2012) for regulations.

100. 42 U.S.C. § 300gg (2012).

they should be quarantined, excluded, or other adverse action taken. While no case has yet addressed such treatment as an ADA issue, it is quite likely that such individuals might be "perceived as" having a disability, and thus protected under disability discrimination law. The failure to make individualized assessments regarding threat to others may risk liability for the institution. This is an area where campus policymakers would do well to be proactive before the next epidemic of this type occurs.[101]

D. Accommodations

1. Statutory and regulatory requirements

Both the Rehabilitation Act and the ADA require more than nondiscrimination. Both statutes require reasonable accommodations. Although the Rehabilitation Act mandates are found initially in the model regulations,[102] the ADA (and the 2008 Amendments) incorporates specific language into the statute[103] and also expand on the requirements within the regulations.[104]

In the context of students in higher education, the accommodations generally fit within two categories: 1) auxiliary aids and services and 2) modifications of policies, practices, and procedures. In a sense, architectural and other design features could be viewed as proactive accommodations, but these are addressed in a separate section of this article.[105]

The ADA Amendments of 2008[106] codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that auxiliary aids and services are to include:

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and

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101. *See generally* Ashley Killough, *Chris Christie on Possible Ebola Lawsuit: 'Whatever'*, CNN (Oct. 29, 2014), http://www.cnn.com/2014/10/29/politics/chris-christie-lawsuit/ (commentary on Governor Chris Christie's quarantine decision regarding a nurse with no symptoms of Ebola).

102. 34 C.F.R. § 104 (2015).

103. *See* 42 U.S.C. § 12103(1) (2011); 42 U.S.C. § 12111(9) (2010); 42 U.S.C. § 12182(b)(2)(A) (2010); 42 U.S.C. §§ 12201(f) & (h) (2010).

104. *See* 29 C.F.R. § 1630.2(o) (2012); 29 C.F.R. § 1630.9 (2011) (Title I); 28 C.F.R. § 35.104 (2011); 28 C.F.R. § 35.135(7) (2010); 28 C.F.R. § 35.135-138 (2010) (Title II); 28 C.F.R. § 36.104 (2011); 28 C.F.R. §§ 36.302−36.303 (2011); 28 C.F.R. § 36.306 (2010); 28 C.F.R. § 36.309(b) (2013) (Title III).

105. *See infra* Part VIII.

106. 42 U.S.C. § 12103(1) (2010).

- other similar services and actions.

Accommodations can also include:

- additional time for exams;
- other exam modifications (separate room; extra rest time);
- reduction, waiver, substitution, or adaptation of course work;
- extensions on assignments;
- extension of time for degree completion;[107]
- preference in registration;
- permission to tape record classes;
- modification of policies, practices and procedures such as modification of attendance policies, and allowing assistance or emotional support animals in some settings.[108]

The regulations specifically provide that accommodations do not include "attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."[109]

While modification of programs may not require substantial financial expense, the provision of auxiliary aids and services (such as interpreters and modified written materials) may require funding. The issue then may become whether the higher education institution is responsible for payment of these expenses, or if another program (such as a state vocational rehabilitation program) can be held responsible. Primarily because of cost concerns, the issue of reasonable accommodations has been the basis of litigation over the years.[110]

2. Judicial interpretation

a. General historical framework

The 1979 decision in *Southeastern Community College v. Davis*,[111] recognized the interrelationship between otherwise qualified and reasonable accommodation, when the Court noted that a higher education institution could not refuse to admit a student simply because a modification or ad-

107. In *Shaikh v. Lincoln Memorial University*, 46 F. Supp. 3d 775 (E.D. Tenn. 2014), the court found that it would be unreasonable to grant the accommodations of deceleration of the program because it would require changes to the clinical program, financial aid, and accreditation procedures. In addition, the request was made after the academic deficiencies had occurred and other accommodations had been granted.

108. DISABILITIES AND THE LAW, *supra* note 4, at § 3:9.

109. 34 C.F.R. § 104.44(d)(2) (2010).

110. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:10.

111. 442 U.S. 397 (1979).

justment might be necessary to allow participation.[112] The Court clarified that the reasonable accommodation requirement does not require substantial modifications or fundamental alterations in the nature of the program.[113]

Litigation in the 1980s addressing the responsibility for paying for accommodations has resolved this issue to some extent.[114] It would seem fairly settled that while an institution of higher education can request and facilitate a student obtaining payment and provision of certain services through the state vocational rehabilitation agency or another charitable organization, it still falls primarily to the higher education agency to ensure that reasonable accommodations and services are provided. Because of the lead time it can take for a student to establish eligibility for such services,[115] higher education programs would do well to develop proactive procedures and communications to students about seeking eligibility for the services. It is also valuable for there to be good communications among the agencies with these responsibilities. Because there has been very little litigation on this point, it is not clear whether ultimately the institution of higher education would not be responsible if it can demonstrate undue financial burden.[116] It may be that large higher education institutions with significant budgetary resources within the athletics programs do not seek to raise this defense for political reasons. It may also be that litigation raising this defense has been settled. It is also quite possible that institutions of higher education have engaged in the interactive process, and as a result, these issues are resolved before they reach a dispute in court.

There are a number of recent opinions interpreting the requirements for reasonable accommodations, but a key touchstone decision is *Wynne v. Tufts University School of Medicine*,[117] which addressed the standard and burden of demonstrating whether a particular accommodation should be provided. The court addressed this issue in the context of a student seeking to take a multiple-choice exam in a different format. The court provided that in cases involving modifications and accommodations, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the pro-

112. *Id*. at 412–13.

113. *Id*. at 413.

114. DISABILITIES AND THE LAW, *supra* note 4, at § 3:10.

115. It should also be noted that state vocational rehabilitation services are not necessarily available to all individuals with disabilities. Quite often students in graduate and professional programs do not qualify for such services. These are state established requirements.

116. What courts have never addressed is what budget is to be considered in the context of claiming undue burden. Would it be only the departmental budget, the entire university budget, the entire higher education budget for state universities, or some other consideration?

117. 932 F.2d 19, 26 (1st Cir. 1991).

gram, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration. While this is not a Supreme Court decision, it is so frequently cited that it carries the weight of such a decision.

Another key principle of deciding about accommodations is the expectation that the higher education agency engage in an interactive process in addressing requests for accommodations. The obligation to engage in the process also is applied to the student.[118]

The following are examples from recent cases[119] of the kinds of issues that courts have been addressing in the context of reasonable accommodations, often incorporating the reasoning of Southeastern Community College and *Wynne v. Tufts University*. Before reviewing those recent opinions, it is important to note that a general principle of resolving issues under the Rehabilitation Act and the ADA is that the parties engage in an interactive process to resolve issues of reasonable accommodations and other disability discrimination issues. Having good policies, practices, and procedures that ensure that students and others know where to turn to request accommodations is also a positive factor in avoiding litigation. Currently there is substantial guidance on good or best practices for implementing accommodation issues. This is available through the Association on Higher Education and Disability[120] and government websites.[121]

b. Tutors

There is no specific mention of tutors within the Rehabilitation Act or ADA statutory or regulatory language. Because such a service might be interpreted as of a personal nature, it has generally been determined that tu-

118. *But see* Schneider v. Shah, No. 11-2266(SRC), 2012 WL 1161584, at *5 (D.N.J. Apr. 9, 2012) (holding that the obligation to engage in an interactive process about accommodations ends on the day student sues university). The case involved a student in paralegal program who had excess absences. *See also* Cutrera v. Bd. of Supervisors of La. State Univ., 429 F.3d 108 (5th Cir. 2005) (holding that university foundation office should have engaged in interactive process to decide about reasonable accommodation to visual impairment); Edmunds v. Bd. of Control of E. Mich. Univ., No. 09-11648, 2009 WL 5171794, at *7 (E.D. Mich. Dec. 23, 2009) (granting summary judgment against student seeking accommodations because student did not allow good faith interactive process, although lengthy, to resolve request for accommodations to clinical off-campus program).

119. *See also* T.W. v. Hanover Cnty. Pub. Sch., 900 F. Supp. 2d 659 (E.D. Va. 2012) (holding that there is no obligation on the college under special education statutes (IDEA) to offer free tuition to a student with disability after graduation from high school; the state required free education only through high school graduation).

120. *See generally* AHEAD, https://www.ahead.org (last visited Apr. 23, 2015).

121. For example, the federal Job Accommodation Network (JAN) provides significant information on accommodations. Much information can be found through the government homepage for the ADA. *See, e.g*, www.ada.gov (last visited Apr. 23, 2015).

toring services to assist a student with a learning or mental impairment is not a required auxiliary service.[122] If, however, a program offers such a service to students generally, it must be offered on a nondiscriminatory basis, and reasonable accommodation might be required when providing such a service.[123]

One recent case involving tutors is *Sellers v. University of Rio Grande*,[124] in which the court held that although ordinarily tutors are not required, where services are provided to the general student population they must be provided to students with disabilities. The case involved disputed facts about whether a nursing student had been prevented from accessing these services.[125]

c. Interpreters, transcription and similar services

Services for individuals with hearing impairments can be costly. Programs of higher education would do well to plan for this through budgetary allocations. An unresolved issue is whether the student is entitled to a preferred accommodation or the best accommodation in a particular setting, or whether it is sufficient to ensure that the student has received an accommodation that is "reasonable."

Two recent cases have addressed the issue of such services generally. In *Argenyi v. Creighton University*,[126] a medical student with significant hearing loss requested communications access to real time transcription and interpreters as accommodations. The lower court deferred to the faculty decision that because the student could not show that certain accommodations would be necessary (although they were helpful), they were not required to be provided.[127] On appeal, however, the court issued a preliminary order remanding the case, recognizing that fact issues about whether the request was reasonable remained.[128] The court allowed a claim to proceed regarding interpreter service in *Wolff v. Beauty Basics, Inc.*[129] The student was denied a sign language interpreter during the enrollment process. The outcome of cases such as this could also provide guidance regarding programming such as orientation, tutoring, or extracurricular activities. It is important that institutions not conflate the issue of undue burden with

122. *Facts on the ADA, Disability, and Accommodations*, IMPERIAL VALLEY COLL., https://www.imperial.edu/students/dsps/information-about-disabilities/facts-on-the-ada-disability-and-accommodations/ (last visited May 11, 2015).

123. *Id.*

124. 838 F. Supp. 2d 677 (S.D. Ohio 2012).

125. *Id.*

126. No. 8:09CV341, 2011 WL 4431177, at *1 (D. Neb. 2011), *rev'd*, 703 F.3d 441 (8th Cir. 2013).

127. *Argenyi*, 2011 WL 4431177, at *10.

128. *Argenyi,* 703 F.3d at 450.

129. 887 F. Supp. 2d 74 (D.D.C. 2012).

whether such a service must be provided. It is likely that courts will find that any programming or service offered to students must generally be accompanied by reasonable accommodations.

d. Tape recording

There is virtually no case law addressing when a faculty member must permit a student to tape record classes. Certainly as a general rule, such recording must be considered as an accommodation. The Wynne standard noted previously should then be provided to address situations where a faculty member does not wish to have a class recorded[130] With current technology, it is quite possible for students to video and/or audio record classes without anyone knowing. For that reason, faculty members should discuss with relevant administrators how to implement such policies appropriately and reasonably for students (both those with and those without disabilities).

e. Foreign language, math and other required courses

Some types of learning disabilities make it quite challenging to learn foreign languages and/or mathematics information. As a general rule, courts are deferential to the educational institutions in setting curricular and other programmatic requirements and are not likely to require waiver of required courses.

Two related and early decisions raised this issue. In *Guckenberger v. Boston University*,[131] the court held that the university had demonstrated that waiving foreign language would be a fundamental alteration of program, although in an earlier decision involving the same parties the court had held that course substitution for foreign language might be a reasonable accommodation but course substitution in math was not.[132]

Little reported litigation on this issue occurred after those decisions, although a recent case addressed the issue. In *Hershman v. Muhlenberg College*, the court held that it was not appropriate to dismiss the case of a student seeking to substitute a class when facts had not been considered regarding fundamental alteration including the student's major and the nature of courses involved.[133]

f. Excusing performance deficiencies or misconduct

The issue of excusing academic or behavior performance deficiencies was previously addressed in the context of the issue of "otherwise quali-

130. Wynne v. Tufts Univ. Sch. Of Medicine, 932 F.2d 19 (1st Cir. 1991).

131. 8 F. Supp. 2d 82 (D. Mass. 1998).

132. Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997). The court also awarded $30,000 in damages to the students. *Id.* at 155.

133. 17 F. Supp. 3d 454 (E.D. Pa. 2014).

fied."[134] Requests for "second chances" can arise in several different situations. These include the student who did not know that he or she had a learning or other impairment before the deficiency occurred, the student who knew but did not realize the need to request an accommodation because none had been needed previously, and the student who simply requests that the failure be excused because of the disability.

As a general rule, programs are not required to excuse performance or conduct deficiencies even if they are related to a disability.[135] Institutions are only required to provide accommodations where the disability has been made known, so even if the student did not know, second chances are generally not required.[136] A suggested practice, however, is that institutions should take account of this fact in making readmissions decisions.[137] Institutions can require that documentation demonstrate the relationship between the disability and the requested accommodation.[138] That issue is discussed in more detail in the section on documentation issues below.[139]

One recent decision illustrates a complex fact setting in which a medical student with ADHD and an anxiety disorder was dismissed from medical school.[140] The student had not requested accommodations until several years after engaging in unprofessional acts, which included abusive treatment of staff and multiple unexcused absences.[141] The court in *Halpern v. Wake Forest University Health Sciences*,[142] found that the proposed accommodations (allowing psychiatric treatment, participating in a program for distressed physicians, and continuing on strict probation) were not reasonable.

Another recent case involved a student who had received numerous modifications for her ADHD.[143] She was granted a medical withdrawal after disciplinary issues arose; however, the court in *Reichert v. Elizabethtown College* held that the student could not make out a claim for "constructive discharge" from the academic program.[144]

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134. *See supra* Part III.B.

135. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 3:4, *supra* text accommodating note 8; *supra* text accommodating note 14.

136. 34 C.F.R. 104.12(a) (2013).

137. 34 C.F.R. 104.42 (2014).

138. 34 C.F.R. 104.42(c).

139. *See infra* Section III.D.2.h.

140. Halpern v. Wake Forest Univ. Health Sciences, 669 F.3d 454 (4th Cir. 2012).

141. *Id.* at 465.

142. *Id.*

143. Reichert v. Elizabethtown Coll., No. 10-2248, 2012 WL 1205158, at *1 (E.D. Pa. Apr. 10, 2012).

144. *Id.* at *13.

g. Testing

The issue of testing is one that has been the subject of a significant amount of litigation in recent years. This judicial attention has arisen in three contexts that relate to higher education. First are the cases involving standardized testing for admission to programs of higher education.[145] Second are cases of testing given in the higher education programs themselves.[146] Third are the professional licensure tests.[147]

An issue common to all of these topics is whether "test anxiety" and similar conditions are in and of themselves disabilities, a factual determination essential to requiring the institution to provide accommodations.[148] Unless the condition substantially limits a major life activity (such as learning or thinking), it does not entitle the individual to accommodations. The comparator group is most people in the general population, not other individuals taking the same examination.[149]

Another common issue in the testing context is what deference should be given to accommodations that were previously given and what deference is

145. The most high profile case involving admission testing resulted in a consent decree between the Department of Justice (DOJ), the California Department of Fair Employment and Housing (DFEH), and the Law School Admission Council (LSAC). Consent Decree, Dep't of Fair Emp't. and Hous. v. Law Sch. Admissions Council, No. CV 12-1830-EMC (N.D. Cal. May 29, 2014). The case involved a number of disputed practices including flagging of scores reported to law schools. *Id.* at *1; *see also* Ruth Colker et al., *Final Report of the "Best Practices" Panel*, CAL. DEP'T. OF FAIR EMP'T. AND HOUS., *available at* http://www.dfeh.ca.gov/res/docs/LSAC/Final%20Panel%20Report%20redacted.pdf (a draft document proposing best practices for accommodating the LSAT). The Law School Admissions Council has objected to these recommendations. *Council Challenges Proposed LSAT Disability Accommodations*, NAT'L. LAW J. (Mar. 27, 2015), http://www.nationallawjournal.com/id=1202721888115/Council-Challenges-Proposed-LSAT-Disability-Accommodations.

146. *See, e.g.*, Johnson v. Wash. Cnty. Career Ctr., 982 F. Supp. 2d 779 (S.D. Ohio 2013) (holding that reasonable issues remained regarding reasonable accommodations for student with dyslexia who had requested reading device for tests); McInerney v. Rensselaer Polytechnic Inst., 977 F. Supp. 2d 119 (N.D. N.Y. 2013) (holding that allowing graduate student with permanent brain damage to have only one break during doctoral candidacy exam was not a denial of reasonable accommodation because student could have but did not ask for additional breaks); Ladwig v. Bd. of Supervisors of Louisiana St. Univ. & Agric. and Mech. Coll., 842 F. Supp. 2d 1003 (M.D. La. 2012) (holding that a doctoral student with depression and anxiety did not make out Title I or Title II case because she did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments and that university had provided accommodations by providing letters supporting absences and extra time); Hoppe v. Coll. of Notre Dame of Md., 835 F. Supp. 2d 26 (D. Md. 2011) (holding that program was not required to provide an additional opportunity to pass comprehensive examinations for a student with ADD).

147. *See* DISABILITIES AND THE LAW, *supra* note 4, at § 5:7.

148. *See generally id.* at § 3:2.

149. 29 C.F.R. § 1630.2(j)(1) (2014).

to be given to the professionals making recommendations for accommodations. The regulations under Title III relating to examinations and courses provide that considerable weight should be given,

> to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) . . . or a False Section 504 Plan.[150]

Guidance from the Association of Higher Education and Disability on documentation practices is quite helpful. It notes the basic principle of a broad interpretation of the ADA and its application found in the 2008 Amendments. This guidance notes the core values of individualized review, common sense approach, nonburdensome process, and the standard for current and relevant information.[151]

A concern that should be considered, however, is the transition from a K-12 setting to a higher education program. A student receiving special education or Section 504 accommodations in a K-12 situation should have been provided accommodations based on a fairly thorough evaluation process that was paid for by the educational program.[152] Both the educational programming itself and testing within such programs can be very different in higher education. The practices of review of accommodation requests vary substantially from institution to institution. Community colleges and open admission program often have fewer resources, and do not necessarily ensure that experts have reviewed the documentation of the disability or the connection to the requested accommodation. As the regulation notes, prior documentation should be reviewed in light of whether the situations involve "similar testing [and perhaps other] situations."[153] The kinds of tests given in higher education and by standardized testing programs may be very different than a high school exam. The concern then is that a student might be given an accommodation based on documentation that has not been carefully reviewed. That student at the next stage of education may then have an unreasonable expectation that whatever was received before will be given in all settings. Institutions should thus advise students receiving accommodations that each institution has its own standards.[154]

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150. 28 C.F.R. § 36.309(b)(1)(v) (2014). *See also Supporting Accommodation Requests: Guidance on Documentation Practices*, AHEAD (Apr. 2012), https://ahead.org/learn/resources/documentation-guidance.

151. *See Supporting Accommodation Requests*, *supra* note 150.

152. 34 C.F.R. 104.35 (2014).

153. 28 C.F.R. 36.309(b)(1)(v) (2014).

154. A significant gap in preparation for higher education is the fact that many students (and their parents) do not realize that the burdens and standards are different in higher education. As noted previously, it is the student's obligation to request accommodations, whereas in K-12, the educational program has the obligation to be proactive

Another testing issue is whether "best ensures" is the standard to be applied in determining what is meant by a "reasonable accommodation." Title III regulations applicable to examinations given for admission, licensure, certification, or credentialing state that the institution should ensure that

> [t]he examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure). . .[155]

It is important that this regulation not be used to claim that an institution in all settings must provide the "best" accommodation. This standard is limited to testing and only to certain types of disabilities (sensory, manual, or speaking). While the standard could be useful in providing guidance for other settings, it does not require a higher education institution to provide a student with a learning disability triple time on an exam because of a claim that this is the "best accommodation" for that student.

An issue that relates to testing, but also to other accommodations, is the issue of documentation and the expectation that the professional evaluator document not only the disability itself, but also the relationship of the disability to the requested accommodation.[156] Finally, an issue in testing is the format of the test itself (often raised in multiple choice exams).[157] The primary universal guidance to draw from these decisions about testing is the importance of making an individualized assessment and engaging in an interactive process.

In the context of professional licensing tests,[158] three major issues have been addressed by recent decisions.[159] These are limiting the number of times a licensure test can be taken, changing the format, and using technology on bar examinations.

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in identifying students eligible for special education.

155. 28 C.F.R. § 36.309(b)(1)(i) (2014) (emphasis added).

156. 28 C.F.R. 36.309(b)(1)(iv).

157. That was the issue in the *Wynne v. Tufts University School of Medicine* decision setting the standard for the burden on determining whether something is a reasonable accommodation. In a remand in that case, the court upheld the use of multiple choice tests in that particular setting, and few if any decisions since have required any change in format nor has that generally been raised as an issue. Wynne v. Tufts Univ. Sch. of Med., No. 88-1105-Z, 1992 WL 46077, at *1 (D. Mass. Mar. 2, 1992).

158. *See also* DISABILITIES AND THE LAW, *supra* note 4, at § 5:7.

159. Other issues receiving judicial attention include auxiliary aids and services. *See supra* text accompanying notes 7−10.

There is no clear direction yet from the courts about the permissibility of policies that limit the number of times an individual may take a state licensure exam. One unpublished opinion involving a dental exam and a student with a reading disorder upholding the denial of a request to be allowed to take the exam an unlimited number of times without paying the rematriculation fee each time.[160] Another recent opinion allowed the case to go forward on whether limiting the number of opportunities for an individual to take the medical licensing exam was permissible.[161]

The *Wynne v. Tufts University* decision established the standard for demonstrating the basis for why an accommodation is not reasonable in the context of a request to take a test in another format.[162] There have been few cases in which that standard has been considered in the context of testing formats. One of the few other cases to do so is *Falchenberg v. New York State Department of Education*,[163] which involved a request to take a state teacher test as an oral exam and to use a dictionary. The court held that such an accommodation would be a fundamental alteration and would not test writing skills.

The use of technology on state bar examinations has been the subject of a number of recent decisions, most resulting in holdings (or at least preliminary injunctions) in favor of the individual seeking the accommodations. The issue in these cases involved the use of screen reading devices by individuals with visual impairments. The plaintiffs in these cases had been granted this accommodation while in law school, but the bar authorities denied the use on the Multistate Professional Bar Exam, pursuant to the requirements of the National Conference on Bar Examiners standards. Some state bars had allowed the accommodation for other portions of the bar exam.[164]

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160. Lipton v. N.Y. Univ. Coll. of Dentistry, 865 F. Supp. 2d 403 (S.D.N.Y. 2012), *aff'd*, 507 Fed App'x 10 (2d Cir. 2013). *See also* Healy v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc., 870 F. Supp. 2d 607 (S.D. Ind. 2012) (addressing issue of accommodations for student with ADHD).

161. Doe v. Samuel Merritt Univ., 921 F. Supp. 2d 958 (N.D. Cal. 2013) (allowing the case to go forward on the issue of whether test-taking is a major life activity).

162. Wynne v. Tufts Univ. Sch. Of Med., 932 F.2d 19 (1st Cir. 1991).

163. 567 F. Supp. 2d 513 (S.D.N.Y. 2008), *aff'd*, 338 Fed. App'x 11 (2d Cir. 2009).

164. *See, e.g.*, Enyart v. Nat'l Conference of Bar Exam'rs, Inc., 630 F.3d 1153 (9th Cir. 2011) (issuing a preliminary injunction for a blind bar exam applicant who had been denied a computer accommodation she had used throughout law school and on the California bar exam applying the "best ensure" standard); Bonnette v. D.C. Ct. of App., 796 F. Supp. 2d 164 (D.C. Cir. 2011) (applying the "best ensures" standard from ADA regulations requiring bar examiner to allow use of certain technology); Elder v. Nat'l. Conference of Bar Exam'rs, No. C11-00199 SI, 2011 WL 672662, at *12 (N.D. Cal. Feb. 16, 2011) (issuing a preliminary injunction allowing the use of screen reader); Jones v. Nat'l. Conference of Bar Exam'rs, 801 F. Supp. 2d 270 (D. Vt. 2011) (issuing a preliminary injunction allowing a bar applicant with visual impairment to use screen

An issue that is addressed in the cases involving the use of screen readers as an accommodation on bar examinations is important to highlight at this point. The cases address the "best ensure" standard in the ADA regarding test accommodations.[165] Title III of the ADA (which is probably also applicable to any testing given by state agencies) includes a provision applicable to entities providing examinations or courses for applications, licensing, certification or credentialing.[166] The limitations of that provision, however, are unlikely to apply in the cases involving screen readers because the applicants do have sensory impairments. The "best ensures" standard might be misinterpreted in other settings, as noted previously.[167]

This provision should not be considered to require that test takers be given the "best" or "preferred" accommodation in test taking. It is also important to emphasize that this provision relates to test taking and applies only to those with sensory, manual, or speaking impairments. It does not apply to individuals with learning disabilities and it does not apply to settings other than testing.[168]

Another provision that has the potential for being misinterpreted is the ADA requirement related to deference to past accommodations. The issue involves whether a program must grant the same accommodations that an individual has received in the past for the same disability. The Title III regulations are also the basis for this issue. This provision also applies to test taking, but might be applied to consideration for other accommodations being requested.

> When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations, or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to [S]ection 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan.)[169]

This requirement may be misinterpreted by some individuals with disabilities to mean that "considerable weight" is the same as absolute presumption. It is important to understand that each setting is different, and that

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access software on Multistate Professional Responsibility Exam).

165. *See Enyart*, 630 F.3d at 1163.

166. 42 U.S.C. § 12189 (2010).

167. *See supra* note 140 and accompanying text.

168. For additional discussion of this issue, *see* Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?,* 22 AM. U. J. GENDER SOC. POL'Y & L. 519, 564–66 (2014).

169. 28 C.F.R. § 36.309(b)(1)(v) (2014) (emphasis added).

IDEA often provides for more than a "reasonable accommodation," unlike the ADA and Section 504, which do not have such a requirement.[170] Students must therefore, change their expectations based on the differing standards in higher education.

h. Documentation issues

The issue of documentation raises several questions. These include what is to be required, how recent it must be, what professionals are qualified to provide documentation, and who must pay for the documentation. Documentation may be needed not only to demonstrate that an individual has a disability that ensures protection against discrimination, but also to demonstrate the connection between the disability and the requested accommodation.[171]

This issue has been addressed in the most recent ADA regulations that respond to litigation on these issues and that incorporate the intent of the amended ADA.[172] The challenge is to strike the balance between nondiscrimination and fairness to others within an education program. There are also concerns of validity when standardized testing is at issue.

ADA regulations promulgated in 2010 provide new guidance on the documentation that should be required to receive accommodations on tests given by testing companies. The new regulations provide that documentation requests should be reasonable and limited to the need for the accommodation, that considerable weight should be given to documentation of past accommodations, and that responses to requests should be timely.[173]

Issues of documentation have not been clearly resolved by the courts, although one recent high profile settlement was reached involving documentation for standardized testing.[174] The case challenged practices for documentation by the Law School Admission Council for individuals seeking accommodations on the LSAT.[175] Because the case was settled, and the

170. *See generally A COMPARISON of ADA, IDEA, and Section 504*, DISABILITY RIGHTS EDUC. & DEFENSE FUND, dredf.org/advocacy/comparison.html (last visited May 11, 2015).

171. *See Forty Years, supra* note 168, at 570–74.

172. The early cases addressing this issue were *Guckenberger v. Boston University,* 957 F. Supp. 306, 313–16 (D. Mass. 1997), and *Bartlett v. New York State Board of Law Examiners,* 226 F.3d 69 (2d Cir. 2000). The *Guckenberger* court recognized the burden of requiring documentation to be created within the past three years and held that this standard should be applied where qualified professionals demonstrated that retesting was not necessary. The court in the litigation also clarified the professional credential for testing learning disabilities, ADD, and ADHD.

173. 28 C.F.R. § 36.309(b)(1)(iv)-(vi) (2014).

174. Dep't of Fair Emp't. and Hous. v. Law Sch. Admissions Council Inc., 896 F. Supp. 2d 849 (N.D. Cal. 2012).

175. The case was settled and the settlement also addressed the issue of flagging reported test scores. Consent Decree, Dep't of Fair Emp't. and Hous. v. Law Sch. Ad-

terms of the settlement are still in stages of resolution, there is not yet definitive judicial guidance on an array of documentation issues.[176]

The concern about documentation and the deference to be given to past accommodations is that each setting is different in a variety of ways. In the K-12 setting students are entitled to much more than "reasonable accommodation," and while accommodations received subject to an individualized education program should be considered, they are not necessarily dispositive of what must be provided.

E. Students in Professional Education Programs and the Relationship to Licensure: Judicial Trends in "Deference"

Students in professional education programs (particularly law and health related programs) who are seeking licensure to practice within the chosen field raise special considerations. The 2010 ADA regulations under Titles II and III and some recent judicial decisions highlight the unique status of these educational programs. Given the high stakes for those individuals participating in the programs, it is not surprising that many of the cases challenging denial of admission or accommodations or other adverse action arise in the context of such professional education programs.[177]

Following the continuum of participation in these programs, the first step is the admission process. This raises two issues. First is the requirement for documentation of the disability and the related accommodation requests for taking a standardized test with accommodation. This issue has arisen in the context of the Law School Admission Test.[178]

A much different admissions issue is raised in the context of an individual with an impairment that may not affect performance in the early aspects of the academic program, but who may have difficulty in later stages of the program leading to licensure (such as clinical rotations or performing technical requirements that might requiring dexterity or visual acuity). How should it be determined whether that individual is "otherwise qualified" for admission? It raises the question of whether the educational program may use licensure requirements in determining qualifications for admission into the professional education program or denying accommodations during the academic portion of the program. Traditionally educational programs were given substantial deference by the courts in making such decisions, particularly in the context of health related professions (medical school, nursing

missions Council, No. CV 12-1830-EMC (N.D. Cal. May 29, 2014).

176. *See Law School Admission Council Agrees to Systemic Reforms and $7.73 Million Payment to Settle Justice Department's Nationwide Disability Discrimination Lawsuit*, DEP'T OF JUSTICE, OFFICE OF PUB. AFFAIRS (May 20, 2014), http://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice for information about the settlement.

177. *See also* DISABILITIES AND THE LAW, *supra* note 4, at § 10:7.

178. *See supra* Part D.2.h.

school, dentistry, optometry, chiropractic, etc.) because of patient health and safety issues. It is not clear whether that same deference continues.

The most recent example was noted earlier.[179] In denying admission to a chiropractic school to a student who was blind, the school had previously established specific technical program requirements which included the requirements that "candidates must have sufficient use of visionFalsenecessary. . .to review radiographs."[180] The school had looked to the licensing requirements that included the ability read x-rays and interpret them in establishing that requirement. Although Mr. Palmer was able to complete coursework in the first four semesters and achieve a strong grade point average with accommodations, the program denied continuation and any further accommodation to his visual impairment. In taking the position that allowing any further accommodations in subsequent semesters would be a fundamental alteration of the educational program, the school would not allow further accommodations. The state civil rights committee found that this was an ADA violation, but that was overruled by the district court.[181] The Supreme Court of Iowa, however, sided with the state commission and found the decision to be a violation of the ADA.[182] This outcome is in stark contrast to a much earlier case in Ohio, where deference was given to the medical school in denying admission to a blind student in a situation similar to the Palmer case.[183] The Iowa Supreme Court noted the importance of individualized determination, but declined to give the traditional deference to educational institutions (particularly those involving health care professional programs) to the school's determination of fundamental requirements.[184] It would be inappropriate to view this as a broad turn away from judicial deference, but the decision was surprising to many in higher education.

A related issue has arisen in the context of several cases involving students with learning and related disabilities and mental health conditions that may not initially affect academic performance, but which involve questions of qualifications at a later point either because of the inability to pass interim exams or because of conduct and behavior during the clinical phases of the programs. The chiropractic school in the Palmer case had just such a concern and seemed to question whether it was appropriate to even admit him for the undergraduate portion of the program before he was to

179. Palmer v. Davenport Civil Rights Comm'n, 850 N.W. 2d 326 (S. Ct. Iowa) (addressing admission of a blind student to chiropractic program and accommodations).

180. *Id.* at 330.

181. *Id.* at 332.

182. *Id.* at 346.

183. Ohio Civil Rights Comm'n v. Case W. Reserve Univ., 666 N.E.2d 1376 (St. Ct. Ohio 1996) (holding that a blind medical school applicant was not otherwise qualified).

184. *Palmer*, 850 N.W. 2d at 337−39.

engage in clinical and technical requirements.[185]

The final phase that is somewhat unique to professional programming involves the licensure. At this phase, there have been recent developments involving accommodations on the licensing exam and mental health history issues in the character and fitness aspect of licensure. Both of these areas of development arise primarily in the context of entry into the legal profession.

IV. TECHNOLOGY

Technology issues affect access not only for students, but also for faculty and staff and for others "visiting" the campus in a range of ways. For the students, classroom technology (classroom materials, access to Blackboard, and other similar teaching platforms) is the primary concern. For the applicant for admission, ensuring that websites and admissions processes are accessible is essential. For faculty and staff, communication issues can involve technology. Attendees at sports events, concerts, and graduations can require access that technology can facilitate or make more challenging.

Currently there are an array of statutes and regulations that impact the range of technology issues on campus. These include Section 508 of the Rehabilitation Act[186] and the 21st Century Communications and Video Accessibility Act.[187] Proposed regulations in this area are also in progress.[188] There is a general philosophy that compliance with Section 504 requires some level of ensuring access to websites, etc., and that compliance with Section 508 is one way to ensure such compliance.[189] But much remains unresolved as to the specifics.

The most difficult aspect of ensuring compliance is understanding what is required, especially in light of the evolving standards and regulations and the fact that courts have not yet provided guidance. While there have been several high profile settlements in litigation surrounding these issues, there

185. For more cases on health care professional programs and technical requirements, *see* DISABILITIES AND THE LAW, *supra* note 4, at § 10:7.

186. 29 U.S.C. § 794d (2013). *See also* 36 C.F.R. §§ 1194 (2000) (implementing Section 508).

187. Pub. L. 111-260, 124 Stat. 2751 (Oct. 8, 2010). *See generally 21st Century Communications and Video Accessibility Act*, FED. COMMC'NS COMM'N (May 27, 2014), http://www.fcc.gov/guides/21st-century-communications-and-video-accessibility-act-2010.

188. 80 Fed. Reg. 10,880 (Feb. 27, 2015). *See generally 4 Steps to Ensure Electronic and Information Technology Accessibility*, ACADEMIC IMPRESSIONS.COM (Sept. 10, 2015), http://www.academicimpressions.com/webcast/4-steps-ensure-electronic-and-information-technology-accessibility.

189. *See generally What is section 504 and how does it relate to Section 508?*, U.S. DEP'T. OF HEALTH & HUMAN SERV., www.hhs.gov/web/508/section504.html (last visited May 11, 2015).

is very little reported case law to provide precedent and guide institutions about what they must do. There is a fair amount of technical assistance, however, so institutions taking a proactive approach have at least some guidance on how to best ensure access for individuals with visual and hearing impairments, who are those most affected by technology issues.[190]

A. Course Materials and Other Teaching Issues

Technology has changed the way coursework is presented in many ways. Course materials are now available on line, as e-readers, or as textbooks with links to materials on the web. Many courses are now presented only on line or through other distance learning such as MOOCs (massive online open courses). The MOOCs initiative has often been seen as a way for a university to receive the benefit of tuition dollars with lower investment. Without consideration about ensuring access, however, such plans may go awry.

Faculty members frequently use Blackboard and other teaching platforms for communicating with students. They may use streaming or threaded discussion platforms. Faculty members often use power point presentations for in class or online teaching. Again, without planning, such teaching techniques may be a landmine. Most faculty members have not been made aware of these issues and many (particularly those who did not grow up with technology) are ill prepared to make the materials accessible. There are also concerns about copyright issues[191] as well as academic freedom questions.

At higher education institutions with open enrollment or other enrollment plans where students often enroll at the last minute are faced with a significant challenge. A student enrolling in a course that does not have teaching materials that are already in an accessible format may be delayed in obtaining accessible materials. Student service offices charged with ensuring that materials are accessible are often understaffed and not able to react quickly to such requests. If publishers made sure that all of their publications were accessible, this would be much less burdensome for institutions. It is suggested that at least at some institutions, it may become a practice that materials that are not accessible will not be adopted for use in

190. *See generally* L. Scott Lissner & Lisa LaPoint, *4 Common Misperceptions about EIT Compliance*, ACADEMIC IMPRESSIONS.COM (Aug. 19, 2014), http://www.academicimpressions.com/news/4-common-misperceptions-about-eit-compliance.

191. *See, e.g.,* Author's Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff'd*, 755 F.3d 87 (2d Cir. 2014). This case addressed whether production of material in an alternate media is allowed by the fair use exception to the Copyright Act and protection under the Chafee Amendment, which affects taking published books and putting them on tape, on braille, large print, etc. The Second Circuit ruled that it is fair use.

a particular course. Such a practice would certainly be an incentive to the publishers.

Several recent settlements and agency actions highlight the importance of universities taking a proactive approach to the use of technology on campus websites and in teaching materials.[192] The National Federation for the Blind, the Department of Education, and the Department of Justice have all sent signals that this is a high priority issue.[193]

192. An April 2, 2015 settlement between DOJ and edX addressed issues of the web page, online platform and mobile applications. *Settlement Agreement Between the United States of America and EDX INC.*, DJ. No. 202-36-255 (Apr. 1, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf. The case is significant because edX, Inc., is a large provider of online course material and its courses are used at some of the nation's most prestigious universities. *See also* Resolution Agreement, South Carolina Technical College System, Office of Civil Rights No. 11-11-6002 (Feb. 28, 2013), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf ; Resolution Letter from Alica B. Wender, Regional Director, U.S. Dep't of Educ., Office of Civil Rights, to Dr. Darrel W. Staat, President, South Carolina Technical College System (Mar. 8, 2013), available at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc; *Justice Dept. Settles with Louisiana Tech Univ. Over Inaccessible Course Materials*, JUSTICE.GOV (July 23, 2013), *available at* http://www.justice.gov/opa/pr/2013/July/13-crt-831.html (settlement between Department of Justice and Louisiana Tech University and University of Louisiana System involving online learning program that excluded a blind student from the course); *Settlement Agreement Between the United States of America, La. Tech Univ., & the Bd. of Supervisors for the Univ. of La. System under the Americans with Disabilities Act*, DJ #204-33-116 (July 23, 2013), *available at* http://www.ada.gov/louisiana-tech.htm (prohibiting University from purchasing materials that are not accessible and providing guidance on faculty involvement in ensuring access); Settlement between the Regents of the Univ. of Cal. And Disability Rights Advocates (May 7, 2013), *available at* http://dralegal.org/sites/dralegal.org/files/casefiles/settlement-ucb.pdf (settlement regarding assistive technology and accessibility of library material). The Office of Civil Rights (OCR) recently issued a resolution agreement with the University of Montana as a model for institutions to use to ensure their electronic and information technologies (EIT) are accessible and compliant with Section 508 of the Rehabilitation Act of 1973. Letter from Barbara Wery, Team Leader, U.S. Dep't of Educ., Office for Civil Rights, to Dr. Royce C. Engstrom, President, University of Montana-Missoula (Mar. 10, 2014) http://www.ahead.org/Presidents%20Post/March%202014/Final%20Agrmt%20Univ%20Montana-Missoula%203-10-14%20Accessible.pdf (enclosing the Resolution Agreement between OCR and the University of Montana); *see also Dear Colleague Letter,* 43 NAT'L DISABILITY L. REP. 75 (OCR 2011). This opinion letter advises universities that use of technology in classroom settings must either ensure full access to students with disabilities or provide an alternative that allows them to use the same benefits.

193. Tamar Lewin, *Harvard and M.I.T. Are Sued Over Lack of Closed Captions,* N.Y. TIMES, Feb. 2, 2015, http://www.nytimes.com/2015/02/13/education/harvard-and-mit-sued-over-failing-to-caption-online-courses.html?_r=0 (Harvard and Yale were sued in February 2015 over their online course captioning).

B. Websites

It is unimaginable today that an institution of higher education does not have a web presence. Virtually all of them have a home page for the college or university and there are often separate home pages for various academic departments and athletic programs. A few early cases raised the issue about whether a website is even a program of "public accommodation" under Title III (and by reference whether web pages should be treated as a service under Title II), but the case law to date seems to trend towards an expectation that websites are subject to the ADA.[194] What is less clear is what is expected in terms of design and function and content for webpages.[195]

An individual with a visual impairment who cannot use a computer mouse is at a significant disadvantage if material is not coded to be readily navigated by use of a keyboard cursor alone. It is likely that under current and evolving statutory and regulatory guidance, that the design and navigation of a webpage will be expected to meet accessibility standards.

The content also requires attention. Many websites include links to video tours of campus or a link to a lecture that was given at an event. Such links present obstacles to individuals with visual and hearing impairments. Someone with a visual impairment cannot see the visual aspect of something like a campus tour or even still pictures. If there is audio recording along with the presented material, without transcription, an individual with a hearing impairment cannot access that program.

At a college or university, there are often links to various documents, including archived materials. If the materials themselves are not in an accessible format, that means that an individual with a visual impairment cannot use them. Large sets of archived materials (such as materials on microfiche) may be a particular challenge. It is far from clear exactly what materials must be made accessible, and there is concern that a policy requiring all archived materials to be made accessible may have an adverse impact

194. *See, e.g.*, Nat'l Assoc. of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012) (holding that a subscription video company video streaming website is a place of public accommodation). *See also U.S. Education Department Reaches Agreement with Youngstown State University to Ensure Equal Access to its Website for Individuals with Disabilities*, U.S. DEP'T OF EDUC. (Dec. 12, 2014) http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-youngstown-state-university-ensure-equal-access-its-websites-individuals-disabilities (settlement about website accessibility). *See also* DISABILITIES AND THE LAW, *supra* note 4, at § 9:5.

195. *See Settlement Agreement Between the United States of America and EDX INC.*, DJ. No. 202-36-255 (Apr. 1, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf. This is a settlement and does not necessarily define what is required, but it sends an important signal about what the Department of Justice will be expecting related to webpages.

on research because universities will simply take these materials out of archives for use by scholars and others rather than put them into an accessible format.[196]

Finally, it is uncertain when webpages link to materials such as a faculty publication, whose responsibility (if anyone's) it is to ensure that these documents are accessible. For example, a faculty member might have a webpage that links to an authored article. Does such a link in and of itself require that the linked document be accessible?

The Communications and Video Accessibility Act, which became effective in October 2013,[197] requires that video content owners (not distributors) have the primary responsibility for captioning video information. Universities that use video on their websites or at events should be sure that they are in compliance with these requirements. This is likely to receive greater attention by plaintiff advocates in the future.

C. Events and Other Public Issues

The third major area that would benefit from proactive attention involves technology for individuals other than students, faculty, and staff at events such as athletics events, performance events (concerts, plays, lectures), and alumni activities. Many higher education institutions have museums on campus that include films and/or video materials at various display areas. The area receiving the greatest attention to date involves technology at sports events.[198]

The lessons to be drawn at this point (because there is little specific case law or detailed guidance) are to include individuals with disabilities in facilitating access. As regulatory guidance and technical assistance evolves, this is likely to be an area of increased attention by advocates and an area that would benefit from proactive planning.

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196. *See generally* FRANK H. SERENE, MAKING ARCHIVES ACCESSIBLE FOR PEOPLE WITH DISABILITIES, *available at* www.archives.gov/publications/misc/making-archives-accessible.pdf.

197. 47 C.F.R. § 79.4(c)((1) (2014).

198. *See, e.g.*, Innes v. Bd. of Regents of Univ. Sys. of Md., 29 F. Supp.3d 566 (D. Md. 2014). This case addresses whether a university must provide certain transcription services on jumbo-trons and similar places at athletic events to ensure equal access to individuals who are deaf. The court allowed the case to go forward and recognized that compensatory damages could be required under Title II of the ADA and the Rehabilitation Act. The case also discussed how alternative technologies, such as hand-held devices at sports events, did not provide equal access. *See also* Feldman v. Pro Football Inc., 579 F. Supp. 2d 697 (D. Md. 2008) (requiring access under Title III to deaf and hard of hearing attendees to aural information broadcast by a professional football team). The Fourth Circuit affirmed this decision in an unpublished opinion on March 25, 2011. Feldman v. Pro Football, Inc., 419 F. App'x 381 (4th Cir. 2011). In the Fourth Circuit, unpublished opinions are not binding precedent.

V. SERVICE AND COMFORT ANIMALS

In recent years there have been a number of developments relating to animals on campus.[199] A set of 2010 Department of Justice regulations provided some specific guidance as did some judicial decisions, OCR opinions, and court settlements. One of the issues that remains unclear, however, involves the issue of animals in campus housing.[200]

There is nothing in the ADA or Rehabilitation Act statutory language that directly references animals as an accommodation for individuals with disabilities. The 2010 regulations, however, responded to a number of questions that have been raised as more individuals seek to have a range of animals that provide specific assistance or that provide emotional support (comfort) to individuals with mental health disabilities. These regulations, however, only address when animals may be required as an accommodation in public accommodation or public service settings. They do not provide guidance on what is mandated in employment or housing settings. For that reason, it is important to first identify the kind of situation at issue, the type of animal, and the service or accommodation being performed to determine what is required.[201]

The regulations for Title II and Title III seek to balance the concerns about the need for the animal and the burden of having documentation to justify the need. It is suggested that in striking that balance, the Department of Justice may not have completely considered the unique setting of a university campus and how the balance may not work as well in that setting compared to a shopping mall, restaurant, hotel, or health care office where the person is a visitor for a short term and not on a sustained basis where the concerns of others may be more relevant.

It should be noted at the outset that regardless of whether it is required that the animal be allowed, the specific regulations and cases addressing these issues recognize that the animal must itself be "otherwise qualified" in a sense. It cannot be disruptive or dangerous. Providers of programs are not expected to take care of the animal's care needs nor are they required to clean up after the animals. Exclusion of animals for these reasons is not

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199. *See, e.g.,* DISABILITIES AND THE LAW, *supra* note 4, at § 5:5; Rebecca J. Hussal, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417 (2012); *see also Update on Accommodating Service and Assistance Animals on Campus: Making Heads or Tails of Federal Disability Laws*, NACUANOTES (Mar. 16, 2012), *available at* http://www.calstate.edu/gc/documents/AccomodatingServ-AssistanceAnimals.pdf.

200. *See Update on Accommodating Service and Assistance Animals on Campus*, *supra* note 199.

201. One of the recent cases to address this issue is *Alejandro v. Palm Beach State College*, 843 F.Supp.2d 1263 (S.D. Fla. 2011). The court granted a temporary injunction to a student seeking to bring a psychiatric service dog to campus and classes. The dog was trained to alert her to impending panic attacks.

generally considered discrimination on the basis of disability. Guidance from settings other than higher education provides examples of how courts have addressed some of these issues.[202]

The DOJ regulations applying to Title II and Title III entities provide that only dogs and miniature horses are service animals that are referenced as accommodations.[203] The animal must be trained to do something. That means that emotional support or comfort animals need not be allowed. Documentation of a disability and any training is not allowed. The only inquiries that are allowed are "whether the animal is required because of a disability and what work or task the animal has been trained to perform."[204] Animals may be excluded if they are not under control of the handler or if they are not housebroken.[205]

For appropriate implementation of these requirements, training of various campus personnel (or at least communication about the requirements) is needed. What is not clarified in the regulations themselves is how to address situations where others are affected. Individuals with allergies, fear or phobias about animals, and other concerns may be put in the position of "accommodating" another individual, rather than the program itself providing the accommodation. Federal regulatory guidance seems to indicate that such concerns do not justify denial of having the animal. This concern has not yet been tested in court, but those implementing policies should keep that concern in mind and be proactive about that. It is more likely to be an issue in the housing setting, where individuals are in close physical proximity to each other for extended periods of time, than it might be in other settings. This is one of the issues that is particularly appropriate for an individualized interactive process.[206]

The regulations seem to indicate that campus housing is considered to be part of the public accommodation or public program, so the DOJ regulations would seem to apply. The Fair Housing Act, however, probably also applies to some (or even all) campus housing situations,[207] and accommo-

202. DISABILITIES AND THE LAW, *supra* note 4, at § 5:5, *see also supra* notes 7–16 and accompanying text.

203. 28 C.F.R. § 35.136 (2014); 28 C.F.R. § 36.302(c) (2014).

204. 28 C.F.R. § 35.136(f) (2014); 28 C.F.R. § 36.302(c)(6) (2014).

205. 28 C.F.R. § 35.136(b) (2014); 28 C.F.R. § 36.302(c)(2) (2014).

206. For additional commentary on this issue from AHEAD, *see* L. Scott Lissner, *Staying out of the Dog House, Revisited*, AHEAD (May 21, 2013), *available at* http://www.ahead.org/uploads/docs/Staying%20out%20of%20the%20Dog%20House%20Revisited%20S%20Lissner%20AHEAD.doc.

207. *See, e.g.,* United States v. Univ. of Neb. at Kearney, No. 4:11CV3290, 2013 WL 2146049, at *1 (D. Neb. May 15, 2013). The court decision determined that student housing at the University of Nebraska is subject to the Fair Housing Act. This makes the university subject to HUD guidance related to support and service animals. *See also* Velzen v. Grand Valley State, 902 F. Supp. 2d 1038 (W.D. Mich. 2012). The court addressed the applicability of FHA and Section 504 to residential settings on campus. The case involved a student who had been prohibited from living with her

dations in the housing setting are both broader and narrower than under ADA Titles II and III.[208] Animals in housing that provide emotional support or comfort may be included, but under the FHA, a program might be allowed to require more documentation for such animals. The same could be true in the employment setting. The major complicating situation would be a dog that is primarily for emotional support. While dogs are accommodating animals allowed under Titles II and III of the ADA, they must be trained to perform a service to be allowed in those settings. This leaves a dilemma for housing supervisors (such as residence hall counselors) regarding what questions can be asked and what documentation can be required. Further guidance from federal agencies would be helpful, but such guidance has not been recently updated.

VI. FOOD ISSUES

Food on campus has received recent attention although there is not yet definitive guidance on this issue. The food issue primarily involves peanut products and other foods that have significant allergic reaction potential. Related to that is the issue of celiac disease and students and others who may need (or want) to only eat gluten free products, sometimes including products that have been prepared in gluten free settings.

Requested accommodation decisions might first require a determination about whether the individual is "disabled" under the statute. While some with food allergies and reactions might only be mildly affected, for many, these foods can create reactions that substantially affect major life activities such as breathing. It is not clear whether campuses are required to provide gluten free foods or only ensure that labeling is provided. While campuses that have mandatory food plans would seem to be subject to ensuring that gluten free and peanut free options be available, it is less certain what might be required in other settings.

One highly publicized settlement addresses this issue, but it is important to note that a settlement is not precedent, and care should be taken in assuming that the settlement terms are what is required for every institution. The case by the Department of Justice on behalf of a student against Lesley University could provide some guidance.[209] The case involved a mandato-

guinea pig as a comfort animal to control stress. Although she had moved off campus, she was still enrolled and might still want to live on campus. The campus policy about animals had not changed so the case was not moot.

208. The Department of Housing and Urban Development is the agency responsible for regulations under the Fair Housing Act. For cases on this issue, *see* DISABILITIES AND THE LAW, *supra* note 4, at § 7:8; *see supra* notes 25–26 and accompanying text.

209. *See Settlement Agreement Between the United States of American and Lesley University*, DJ No. 202-36-231 (Dec. 20, 2012), *available at* http://www.ada.gov/lesley_university_sa.htm; *Questions and Answers About the Lesley University Agreement*

ry meal plan. The settlement notes that only reasonable steps are required that do not fundamentally alter the program.

Another food related issue is eating disorders – anorexia and bulimia. It is likely that both conditions would be defined as disabilities in most settings. What is less clear is what action an institution may take when there are concerns about students engaged in this type of self-harm. This falls into the general issue of "direct threat" discussed previously.[210]

VII. MENTAL HEALTH ISSUES

Mental health issues have been addressed in several previous sections of this article. They arise in the context of the definition of who is protected, what it means to be otherwise qualified (including direct threat issues), and professional education leading to licensing. Separate focus is given here because of the significant concerns that have arisen involving students (and others on campus) with mental health impairments.

Such impairments may affect the ability to meet the requirements of the program, but they may also present a concern for the well being of the individual and for others on campus.[211] One outcome of the numerous unfortunate high profile events (including Virginia Tech and others) has been greater attention to these issues. With respect to the definitional coverage, it is important to keep in mind that the "regarded as" portion of the definition may be applicable in the context of individuals with mental health issues. Any adverse action towards an individual based on a perceived or actual mental health impairment raises potential discrimination claims.

While the need for more mental health services arises whenever a high profile event occurs, and the Affordable Care Act in combination with the Mental Health Parity Act should make access to such services more available, this continues to be a concern. It can be of particular relevance to veterans returning from combat, but it is also an ongoing issue in light of economic pressures in society.

VIII. ARCHITECTURAL BARRIERS

Access to the built environment should be less of an issue today given the fact that it has been over forty years since the Rehabilitation Act of 1973 was enacted. Regulations promulgated pursuant to the Americans with Disabilities Act (and applicable to institutions under Section 504) have provided substantial guidance for new construction, existing facilities,

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and Potential Implications for Individuals with Food Allergies, ADA (Jan. 25, 2013), www.ada.gov/q&a_lesley_university.htm. Some of the practices included answering questions about menu ingredients and changing ingredients upon request.

210. *See supra* Part III.C.

211. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 691 (2009).

and renovations.[212] These design standards have addressed a broad range of building issues. Institutions of higher education should long ago have done self-evaluations and developed and implemented transition plans.

A key element of such plans is to consider facilities programmatically, taking into account the various users of physical space and anticipating that not only in design, but also for signage and parking. For example, a law school building may be used primarily for classes, with students and faculty needing access to and within classrooms. The library, however, may be open to visitors other than students and faculty. A law school clinic may have clients who visit. The admissions office will be visited by prospective applicants. Public events may be held in auditoriums and court room spaces. Employers may visit to interview students. It is therefore wise to periodically reassess how space is used and make sure that all anticipated users have appropriate access.

The basic original requirements for access under the regulations have been in place for some time. The 2010 DOJ regulations of relevance to higher education are the detailed additional guidelines regarding accessible seating at performance and sports event, and accessible swimming pools.[213]

There has not been a great deal of litigation involving architectural barrier issues on campus in the past or recently.[214] A 2010 NACUA outline provides additional references to settlements and investigations involving architectural barrier issues and highlights the fact that most situations are settled and do not get litigated in court.[215]

The case of *Covington v. McNeese State University*[216] involved a prolonged battle by a wheelchair user regarding lack of an accessible restroom in a student life center on campus in 2001 (many years after such an issue should have been addressed). In the most recent disposition, the court reversed some of the attorney fee awards and held that district court decisions on the amounts was not an abuse of discretion, but it did not overrule any of the substantive issues. The court ordered a substantial award in attorneys' fees and costs in case involving 15,000 architectural barriers. The court noted the university's "prolonged 'militant' behavior" over several years of litigation in allowing over one million dollars in attorneys' fees to

212. *See* 28 C.F.R. §§ 35.149–59 (2014).

213. For information on 2010 standards for accessible swimming pools, see *Accessible Pools Means of Exit and Entry*, ADA (May 24, 2012), http://www.ada.gov/pools_2010.htm. And for stadium seating, see *Accessible Stadiums*, ADA.GOV, http://www.ada.gov/stadium.pdf.

214. DISABILITIES AND THE LAW, *supra* note 4, at §§ 3:16−3:20 (collecting cases).

215. *See, e.g.*, John H. Catlin, et al., *Surviving and ADA Accessibility Audit: Best Practices for Policy Development and Compliance* (June 2010), *available at* http://www.higheredcompliance.org/resources/resources/xxiii-10-06-61.doc.

216. 118 So. 3d 343 (La. 2013). For the facts in this case that lead to the decision, see *Covington v. McNeese St. Univ.*, 98 So. 3d 414 (La. Ct. App. 2012).

the plaintiff's attorney.[217] The university must have incurred substantial court costs for attorney's fees in defending the suit.

Recent regulations involving stadium seating should remind universities of the importance of addressing stadium access proactively. An October 2007 opinion letter from the Department of Justice Office for Civil Rights[218] to the University of Michigan found several aspects of its stadium out of compliance with Section 504. These included location and number of accessible seating, accessible routes to and within the stadium, lack of restroom access, and inaccessible shops and concession stands.[219] The lengthy letter provides a detailed discussion of the violations, the standards to be applied, and expected compliance.

Other recent cases have raised issues of parking[220] and whether there is any limitation on damages when there is continuing violation.[221] The issue of damages has also been raised with respect to whether ongoing violations require repeated awards of damages.

IX. OTHER ISSUES

A. Greeks on Campus

It might seem that the ADA and Section 504 do not apply to fraternities and sororities because of the private club exception[222] and the fact that they do not receive federal financial assistance. The interrelationship of the main university with regulating Greek life, as well as the fact that on some campuses, the buildings themselves are owned by the university and leased to the fraternal organizations, however, raises the potential for at least indirect application of disability discrimination law.

Because a university could decide not to officially recognize a fraternity or sorority as a student organization entitled to various benefits (use of

217. *Covington*, 98 So. at 431.

218. Opinion Letter from Harry A. Orris, Director, Clevend Office, Midwestern Division, U.S. Dept. of Ed. Office for Civil Rights, to Gloria A. Hage, Associate Vice President and Deputy General Counsel, Univ. of Mich. (Oct. 26, 2007), *available at* http://www.galvin-group.com/media/60384/ocrletter_umichiganstadiumaccess%5B1%5D.pdf

219. *Id.*

220. *See, e.g.*, Adams v. Montgomery Coll., 834 F.Supp.2d 386 (D. Md. 2011) (allowing a claim by a student regarding inadequate parking accommodations during period of construction); Cottrell v. Rowan Univ., 786 F. Supp. 2d 851 (D.N.J. 2011) (denying standing to advocates for disability rights in an attempt to monitor handicap parking violations; holding that ban from campus was not retaliation but was based on activity that was hostile, harassing, disruptive, and aggressive).

221. *See, e.g.*, Grutman v. Regents of the Univ. of Cal., 807 F. Supp. 2d 861 (N.D. Cal. 2011) (declining to exercise supplemental jurisdiction over a claim involving college student's case that each day her disability affected ability to open dorm door was a new violation of state law).

222. 42 U.S.C. § 12187 (2010).

space, use of official communications channels, etc.), it is useful to at least provide an overview of how the range of disability discrimination requirements might affect Greek life on campus.

Meeting membership requirements is likely to be less subject to federal law because the private club exception is carved out primarily in recognition that private clubs can make their own rules of membership so long as they are not becoming programs that are generally open to the public. On the other hand, it is difficult to imagine that a Greek organization could have official university recognition if it discriminated on the basis of race. For that reason, membership requirements that might adversely impact individuals with disabilities might be called into question. It is probable that any challenge to such exclusions would uphold requirements that individuals meet academic and behavior and conduct expectations. A fraternity or sorority that excluded an individual solely on the basis of a physical or mental impairment, however, could probably be challenged in cases where there is university oversight of Greek life.

Perhaps the biggest concern is the issue of architectural barriers. Fraternity and sorority houses on campus are often old buildings. Some may even have historic landmark designation. They were not designed with elevators or accessibility features in mind and can be difficult to retrofit. The requirements of the ADA should be taken into account, however, when new building construction or renovations take place.[223] It may be that certain activities might need to be relocated for individuals with mobility impairments. Chapter meetings in basement rooms are a good example. Often sleeping rooms are on floors not reached by elevators, and it may prove unduly burdensome to relocate such rooms. In considering whether ramps or other entry access should be added, it is useful to note that these have other benefits, such as facilitating the use of roller luggage and delivery carts. In addition, while the members themselves might not have mobility impairments, it would not be unusual for a parent or other family member visiting the member to require accessible entry. Carrying individuals up stairs, however, is almost never an acceptable accommodation, except, perhaps in the case of an emergency.

Within a fraternity or sorority setting, the application of the various principles described previously can take on unique considerations. Accommodations such as interpreters may be needed at social events, which are often integral to Greek life participation. The extent to which these are required would be evaluated under the principles of "reasonableness" considering undue burden and essential requirements. The privacy of chapter meetings and Greek rituals may require considerations of how to provide interpreter

223. *See* Tahree Lane, *Suit settled: UT agrees to install lifts for disabled*, TOLEDO BLADE, Nov. 23, 1989, at E1 (describing how the University of Toledo settled a case agreeing to install platform lifts on a fraternity and sorority complex).

service. Creative solutions may be needed. This is not an issue that has yet arisen in the context of ADA cases.

Issues related to mental health and behavior impairments may be particularly challenging in Greek settings where behavior standards and academic achievement are often integral to membership. These issues can relate to depression, substance use and abuse, Asperger's, ADD, ADHD, anorexia, and bulimia.

The obligation to accommodate food allergies such as Celiac disease or peanut allergies may have unique challenges in a fraternity or sorority. The request to have an emotional support animal raises the question of whether a Greek house is covered as housing or under the ADA public accommodations requirements.

For Greek organizations that might be affected by the ADA (directly or indirectly), one of the most challenging issues would be the architectural barrier issues for the chapter facility, especially if it includes housing. Many sororities and fraternities were built long before the ADA, and some have historical significance. Few were constructed with elevators, which makes the social access which is important to Greek life difficult to ensure.

B. Returning Veterans

After many years of military engagement in the Middle East, many veterans are returning to campus and this influx has the potential for raising disability discrimination issues. Some veterans will have apparent mobility impairments, where the condition is readily visible and the related necessary accommodations are apparent. More challenging, however, are veterans with Post-Traumatic Stress Disorder or Traumatic Brain Injury.[224] A veteran with such an impairment requesting an accommodation may have difficulty complying with the ordinary requirements for documentation of the condition and the need for related accommodations. This is because the military branches of government are not known for getting paperwork done quickly. It seems unethical to deny an accommodation in some of these situations. No court cases have addressed this, but an institution might find a practice of allowing at least some accommodations on a temporary basis until documentation is received. These could be renewable accommodation grants, with the student record clarifying that there is no guarantee that the accommodations would be continued on an indefinite basis.

C. Facilitated and Sponsored Programming –Who's In Charge?

Increasingly alumni organizations are sponsoring programs, such as

224. It is important that institutions not make assumptions that all veterans have PTSD or anger management issues. Doing so runs the risk that some actions by the institution may be claimed to be based on the "regarded as" prong. Training staff about this issue is important.

travel programs for alums. While the responsibility for ensuring nondiscrimination for such events is relatively untested in court, a proactive approach is essential to avoid liability. University alumni offices should ensure that the contracts with providers address and anticipate such issues, and they should be aware that simply by sponsoring or facilitating the programs, there is the potential for liability should it be determined that the travel program itself is not in compliance.[225]

Similar issues could be raised regarding vendors (such as book stores, food vendors, and banks) that operate on campus through contractual arrangements such as leases, licenses, or other plans. The individual faced with noncompliance may be able to recover from either the university or the provider of services or goods, with those parties left to sort out indemnification between them. Similarly, hosting conferences and events at locations that are off campus requires attention to anticipating who is responsible for ensuring architectural access and various accommodation services.

Study abroad programs also fall under this category.[226] The obligation to ensure access to such programs is not clear. There is some indication that because these programs are abroad, that the ADA does not apply.[227] Such a position does not explain how an institution can defend hosting and giving credit to students for such programs that are not accessible. Would these institutions make the same argument if the issue were race or gender discrimination? The better approach is to try to assess what is reasonable to expect in terms of access to such programs. Many programs are located in places where there are many historic buildings or sites and in countries without an ADA equivalent law. It is suggested that the obligation of the host institution should be that at least housing and classroom components should be located in accessible facilities. The enrichment visits to historic sites and buildings should be described in a way that an individual with a mobility impairment would be able to determine in advance whether it would be feasible to benefit from participation in such a program. This has not been addressed in any reported litigation. With respect to auxiliary aids and services such as interpreters for individuals with hearing impairments, the challenge can be one of cost. This can be particularly the case for a program in a country where another language will be used for a significant

225. *See, e.g.*, Alumni Cruises, LLC v. Carnival Corp., 987 F.Supp. 2d 1290 (S.D. Fla. 2013) (allowing issues to be tried on whether the cruise line had made reasonable modifications; organization was allowed to have standing to bring these claims).

226. DISABILITIES AND THE LAW, *supra* note 4, at §3:20.

227. *See, e.g.*, Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL. REV. 291 (2003); Letter from L. Thomas Close, Supervisory Team Leader, Dep't of Educ. Office of Civil Rights to Dr. Lattie Coor, President, Ariz. State Univ. (Dec. 3, 2001), *available at* http://www.nacua.org/documents/ocrcomplaint_signlanguageinterpreter.pdf (stating that neither §504 nor Title II apply to extraterritorial programs).

component of the classroom experience. While guidance on this is sparse, it is an area for proactive policymaking.

While it was noted previously, the issue of distance learning programs bears attention in this section. Institutions are increasingly offering on line courses and giving credit to such courses from other institutions. While such courses may improve access for individuals with mobility impairments, they can create barriers for those with sensory impairments (hearing and vision). The unresolved issues include determining which institution is responsible for any costs associated with access to the course and for planning related to accessible textbooks, captioning materials, providing interpreters, etc. Similar issues can arise even for a single institution that has multiple campuses. It is advisable for institutions to engage in advance planning on these issues to avoid disputes and costly litigation.

D. Title IX for Students with Disabilities?

In 2013, the Department of Education Office for Civil Rights raised the issue of equal athletic opportunities for students in educational programs. This is primarily an issue for K-12, but it could have implications for higher education. A January 25, 2013, Dear Colleague Letter notes what is already required – that programs should provide reasonable modifications to rules and other requirements, although they need not make fundamental alterations to programs. The letter gives some examples and encourages separate programs in some instances.[228]

Any requirements to provide equivalent athletic programming for student with disabilities do not clarify what types of disabilities should be provided equivalent special programming. While having separate programs for students with mobility impairments or sensory impairments might be possible in some cases, what about students with mental health impairments? While the 2013 Department of Education attention was well meaning, it probably makes the most sense to clarify and remind institutions that they are obligated to make reasonable modifications to programs and not to discriminate against students who want to participate in those programs. It does not seem realistic to expect a college to provide an entire separate basketball or tennis program for wheelchair users. This issue has receive little enforcement or other attention since 2013.

X. FACULTY AND STAFF ISSUES

Faculty and staff issues are essentially employment issues that are not

228. *See* Dear Colleague Letter from Seth M. Galanter, Acting Assistant Sec'y. for Civil Rights, U.S. Dep't. of Educ., *Students with Disabilities in Extracurricular Athletics* (Jan. 25, 2013), *available at www.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf.*

necessarily unique to higher education. The unique requirements for higher education faculty work, however, do provide some differences. The primary significant feature of faculty employment that is somewhat different than other employment is the often vague job descriptions or lack of clarity about fundamental requirements of the program.[229] As today's baby boomers reach what in the past (in the 1980s) would have been mandatory retirement age, the shaky economy and the fact that teaching in higher education offers substantial benefits (such as contact with students, access to office space and support for technology needs, travel funding, clerical support) means that faculty are staying on longer. Why leave a faculty position if one does not have to?

With respect to employment generally, it is important to first examine the most recent judicial guidance on the definition of coverage since the 2008 Amendments. It is difficult to assess the impact of the 2008 Amendments on whether the broadened definition has affected litigation in employment. That is because measurement of changed employer practices and policies is difficult and the fact that more disputes may be resolved through internal alternative dispute resolution or external settlement of disputes. A general impression, however, is that there are fewer cases addressing the issue of whether one met the definition of coverage.[230] In the context of higher education employment cases, the focus is not on definition, but more on whether the individual is otherwise qualified or whether the adverse action by the employer was based on nondiscriminatory reasons.[231]

Some recent examples of cases addressing the issue of definitional coverage include *Carter v. Chicago State University* (sleep apnea not a disability),[232] *Coursey v. University of Maryland Eastern Shore* (aberrant behavior did not make professor regarded as having a disability),[233] *Hamilton v. Oklahoma City University*, (selection committee not aware that applicant for

229. Laura Rothstein, *Disability Law and Higher Education: A Road Map For Where We've Been and Where We May Be Heading,* 63 MD. L. REV. 122, 122 (2004).

230. *See generally* DISABILITIES AND THE LAW, *supra* note 4, at § 4:8.

231. DISABILITIES AND THE LAW, *supra* note 4, at § 3:26. *See also* AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009) (discussing the trends that courts are no longer as deferential to institutional decision making than has been the case previously).

232. No. 07C4930, 2011 WL 3796886, at *1 (N.D. Ill. Aug. 24, 2011). In a preliminary decision in the case the court applied the 1990 definition of disability under the ADA and held that sleep apnea was not a disability. It is likely that under the 2008 Amendments, it would be covered. In this case the accounting professor was also found not to be otherwise qualified and that reasonable accommodations had been provided.

233. No. CCB-11-1957, 2013 WL 1833019, at *1 (D. Md. Apr. 30, 2013). A professor was required to undergo fitness for duty after aberrant behavior. The court found that he was not regarded as having a disability and issues of student safety were job-related.

position had vertigo),[234] and *McCracken v. Carleton College* (employee with mental health concerns was regarded as disabled).[235]

Institutions are still generally prevailing when the merits of the cases are reached.[236] Some examples include decisions where the faculty member did not meet established publication guidelines for tenure,[237] termination of employment based on offensive blog entries and email correspondence with a supervisor,[238] and termination for excessive absences.[239]

It is becoming more apparent that there is a need for a proactive approach to establishing essential functions and fundamental requirements at the outset[240] and that documenting deficiencies should be done consistently and not just for older faculty members (where age discrimination might be an issue). Institutions should also be reminded of the requirement to keep employment records about a disability separate, to make individualized decisions, to engage in an interactive process,[241] and to ensure that any ad-

234. 911 F. Supp. 2d 1199 (W.D. Okla. 2012) (ordering a summary judgment against the professor).

235. 969 F. Supp. 2d 1118 (D. Minn. 2013) (recognizing prima facie case of disability discrimination by university buildings and grounds employee; burden of demonstrating his mental health and other conditions made him regarded as disabled).

236. *But see* Suzanne Abram, *The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty,* 32 J. L. & EDUC. 1 (2003) (discussing cases involving faculty members who prevailed).

237. Caruth v. Texas A&M Univ. – Commerce, No.3:12-CV-351-B, 2013 WL 991336, at *1 (N.D. Tex. Mar. 14, 2013) (granting summary judgment to the University).

238. Craig v. Columbia Coll. Chicago, No. 09-CV-7758, 2012 WL 540095, at *1 (N.D. Ill. Feb. 16, 2012) (holding that a college instructor with a hearing impairment was not denied tenure track position based on a disability; nonrenewal was based on offensive blog entries and email correspondence to a supervisor).

239. Horton v. Bd. of Trs. of Cmty. Coll. Dis., 107 F.3d 873 (7th Cir. 1997) (upholding termination of community college professor terminated because of excessive absences making him not otherwise qualified).

240. The failure to have information on position descriptions in a faculty file can compromise the ability to evaluate accommodation requests, FMLA leave requests, and ADA requests for accommodation.

241. *Compare* Tse v. N.Y. Univ., No. 10 Civ. 7207DAB, 2013 WL 5288848, at *1 (S.D.N.Y. Sept. 19, 2013) (denying university's motion for summary judgment; holding that there were triable issues remaining about reasonable accommodation in a case involving a professor who lost status as a program director; employer was not required to provide preferred accommodation to faculty member with severe arthritis and Lupus, but questions remained about whether university engaged sufficiently in the interactive process), *and* Dansby-Giles v. Jackson State Univ., No. 3:07-CV-452 HTW-LRA, 2010 WL 780531, at *1 (S.D. Miss. Feb. 28, 2012) (allowing case regarding professor claiming denial of coordinator position and issues of interactive process in accommodation process to go forward), *with* Hoppe v. Lewis Univ., 692 F.3d 833 (7th Cir. 2012) (finding no ADA violation when interactive process had been provided to a faculty member with clinically-diagnosed adjustment disorder with request for accommodation for office location). ***See also*** Lawrence C. DiNardo, John A. Sherrill, & Anna R. Palmer, *Specialized ADR to Settle Faculty Employment Disputes,* 28 J.C. & U.L. 129

verse actions by the institution are not based on retaliation.[242]

It is likely that initial appointment letters in 2015 are much more specific than those from 1975, when a baby boomer professor might have received the first appointment.[243] But many institutions have not implemented practices of refining those expectations for all faculty members after they achieve tenure. While many have implemented post-tenure review processes, it is unclear how carefully the issue of redefining "essential requirements" has been thought through and put into practice. Consistency in documenting misconduct and performance deficiency is critical. If only the unlikeable faculty member who is thought to be "crazy" or problematic or becoming senile is evaluated on a regular basis, this is problematic from the perspective of differential treatment.

Institutions should also take guidance from the case of *Wynne v. Tufts University School of Medicine*.[244] While the case involves accommodation for a student, it provides guidance for faculty and other employment decisions. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower standards or require substantial program alteration.[245]

Institutions should take care with respect to their policies for terminating employment of faculty members. Until recently, the American Association of University Professors (AAUP) had a guidance policy that recommended separate policies for dismissal for faculty with disabilities. In recognition that this was not within ADA policy, a revised policy was issued in

(2001).

242. Stevens v. Bd. of Trs., S. Ill. Univ., No. 11-CV-126-DRH, 212 WL 3929894, at *1 (S.D. Ill. Sept. 9, 2012) (allowing case to go forward regarding engagement in interactive process where university professor responsible for maintaining and repairing nuclear magnetic resonance instruments had back problems affecting performance and needed more graduate assistance and allowing consideration of ADA/Section 504 and FMLA retaliation claims). *See also* Housel v. Rochester Inst. of Tech., 6 F. Supp. 3d 294 (W.D.N.Y. 2014) (granting summary judgment to university finding there was no evidence of link between request for accommodation and FMLA requests and termination and performance issues were already in question).

243. *See generally* Barbara A. Lee & Judith A. Malone, *As the Professoriate Ages, Will Colleges Face More Legal Landmines?*, CHRON. OF HIGHER EDUC. at B6-B8 (Nov. 30, 2007).

244. 976 F.2d 791 (1st Cir. 1992). *See* discussion *supra* Part III.D.2.a.

245. *See generally* BARBARA A. LEE & PETER H. RUGER, ACCOMMODATING FACULTY AND STAFF WITH PSYCHIATRIC DISABILITIES, (NACUA 1997). In addressing accommodations for faculty members, it is important to also consider institutional policies on medical leave and federal requirements under the Family and Medical Leave Act.

2012.[246]

XI. SUMMARY AND CONCLUSIONS

My 2010 article reflecting on fifty years of NACUA provides a framework for the summary and conclusions to a reflection on the impact of the twenty-five years of ADA in higher education. The following is from the section of that article entitled "The Crystal Ball – 2011 and Beyond?"[247] Commentary and update looking at the past five years and forward to the future is noted in italics at the end of each comment.

> Some of the current challenges for postsecondary institutions include the transition of students from K-12 (and the lack of preparation for the change), providing the range of services (many that are resource intensive or require specialized knowledge), and providing staffing for these needs (such as for coaching students with autism in social skills).

Transition is still a problem (students not realizing that special education is not the same as ADA accommodations).

> Lack of awareness of some faculty members about the legal requirements relating to students with disabilities presents another problem.

Most faculty members are still not prepared for the expectations of online courses, interactive learning, the need to ensure that materials are accessible.

> The growing number of veterans with disabilities will require attention, as will students with intellectual disabilities.

The influx of veterans has increased and while some institutions have been quite proactive in addressing disability concerns, some have not recognized the unique needs relating to documentation and proactive outreach.

> There are already signals of the future legal issues. These include **distance learning** and **online coursework** and **web access** and other access to technology.

This is proving to be a major issue that should be proactively addressed and planned for. Institutions that do not do so are vulnerable to private litigation and Department of Justice enforcement. The use of such technology is the wave of the future and universities should consider this at the procurement stage and coursework selection stage.

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246. Media Release, American Ass'n of Univ. Professors, Rights and Responsibilities of Faculty Members Who Have Disabilities (Feb. 7, 2012), *available at* http://www.aaup.org/media-release/rights-and-responsibilities-faculty-members-who-have-disabilities.

247. Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective,* 36 J.C. & U.L. 843, 871–74 (2010).

> Health care reform is likely to affect access to mental health and other mental health services that may have particular impact for students with disabilities.

The number of high profile cases involving higher education situations and mental health demonstrate the need for attention to this issue. Many campuses have implemented proactive intervention programs, but the issue of what can be done when a student is only engaging in self-harm has yet to be resolved.

> These may be of particular importance for returning veterans from Iraq and Afghanistan.

The movie "American Sniper" brought attention to this issue. Whether it will be adequately addressed remains to be seen.

> Another health care related issue is the increasing concern about **contagious and infectious diseases** (such as H1N1) and how students with disabilities might raise unique concerns about how such situations are handled.

The public attention to the Ebola issue in late 2014 where a few institutions reacted out of fear, not fact, highlights the need to plan for such situations more proactively.

> The economy and the high stakes of a professional education may drive more individuals to pursue legal remedies when they seek accommodations on **licensing exams** or raise issues about character and fitness questions asking about mental health or substance abuse.

This issue is currently receiving substantial attention, particularly in the context of use of technology for state bar exams and the mental health history question still being asked in the licensure process for membership in the legal profession. Interaction between the institutions and state licensure agencies would be beneficial to avoid protracted and expensive litigation.

> It is likely that increasing attention to the issue of **service and emotional support animals** in various arenas, including higher education, will occur.

The primary area where there is a need for clarification at the federal agency level involves student housing.

> It is likely that litigation will clarify the impact of the **ADA Amendments Act and the broader definition of disability** that it now includes.

Preliminary indicators are that the 2008 Amendments and the regulatory guidance have proven to make it much less likely that institutions will focus on whether the student or faculty member has a disability and will focus primarily on whether the individual is otherwise qualified and whether the requested accommodations are reasonable. The issue of cost may begin to

receive more attention because of shrinking resources.

> This is probably an era where there will be little legislative activity (other than on health care), but substantial regulatory guidance, and continued litigation and OCR activity.

This remains true. Today's Congress does not seem likely to engage in any major overhaul of federal law in this area, although the special education statute may receive attention during its reauthorization. That could have some impact for higher education. The Department of Justice has been quite active in recent years in a number of matters related to higher education, and often settlements in these cases are being publicized, probably as a means of encouraging institutions to be proactive in compliance.

The 2010 article did not include any "Crystal Ball" predictions related to architectural barriers. The McNeese case (involving a student center with no accessible restroom) referenced previously[248] should be noted, however, because of the high financial cost to the institution in defending the case (over a million dollars in attorney's fees and damages paid to the plaintiff and the litigation costs to the institution itself) and the good will costs. Institutions do not want the bad publicity associated with cases such as this, and should view such cases as cautionary tales and engage in regular self-assessments and other activities that demonstrate positive attitudes, not resistance.

What does the Crystal Ball tell us for 2020, the next five-year milestone? The issue of accessible technology is likely to continue to receive major attention. Depending on who is in the White House after the 2016 election, there may well be a continued attention in enforcement by federal agencies on disability issues in higher education. And it is likely that key advocacy organizations, such as the National Federation for the Blind and the National Federation for the Deaf, will also bring cases with the goal not only of changing things at a particular institution, but also to gain attention so that others will change. Many recent cases have received high profile settlements and have been quite costly in terms of money and good will to some colleges and universities.

For those representing these institutions, a proactive and positive approach and an ongoing review and consideration of all policies, practices, and procedures will be of great value. Including individuals with disabilities in these efforts will be of great value in ensuring compliance and avoiding litigation and compliance reviews. There is a lot of good technical assistance available. Those who take advantage of it are less likely to make the headlines.

248. *See supra* Part VII.

APPENDIX

Scholarship on Disability Law and Higher Education by Laura Rothstein

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Disability Law Issues for High Risk Students: Addressing Violence and Disruption, 35 J.C. & U.L. 691 (2009).

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COMING SOON TO A COLLEGE OR UNIVERSITY NEAR YOU . . . VAWA

REBECCA LEITMAN VEIDLINGER *

With the Violence Against Women Reauthorization Act of 2013, Pub.L. 113-4 ("VAWA"), the federal government expanded the work colleges and universities must do with respect to addressing violence against women. Institutions are already required by the Clery Act[1] to track crimes committed on their campuses and by Title IX[2] to take steps to prevent, investigate and redress sexual harassment and sexual assault.[3] Now, under VAWA,

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1. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012) [hereinafter Clery Act].

2. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012) [hereinafter Title IX]. Title IX applies to all educational institutions that receive federal funds, both public and private. Almost all colleges and universities must follow Title IX and its implementing regulations, 34 C.F.R. § 106, because they receive federal funding through federal financial aid programs used by their students. 20 U.S.C. § 1681(a) (2012); 34 C.F.R. § 106.11 (2000).

3. Title IX provides "[n]o 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 education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2012). Its prohibition on sex discrimination has been

institutions must add programs and policies concerning domestic violence, dating violence, and stalking (collectively, "DV").[4]

Perhaps reflecting an influence from the current flurry of recent Title IX federal attention[5] and guidance,[6] White House focus,[7] and increased public awareness, the DV programs and policies mandated by VAWA mirror in many ways what institutions must already do under Title IX. Indeed, VAWA's mandates do more than just expand the counting and reporting requirements typically associated with the Clery Act. VAWA is, in several important ways, a sister statute to Title IX—one that addresses DV rather than sexual harassment/assault. For instance, VAWA adopts Title IX's focus on informing those who experience DV of all of their options, includ-

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interpreted through case law and federal guidance documents (some of which are discussed *infra* note 6) as including sexual harassment and sexual assault.

4. While non-intimate partner stalking is included in VAWA, this article addresses only the aspects of VAWA related specifically to DV. VAWA also includes sexual assault; however, because campuses' response to sexual assault is already highly regulated through Title IX, this article's analysis is limited to the new DV-related components of VAWA.

5. As of the date of publication, approximately 106 institutions of higher education were under a Title IX review by the Department of Education's Office for Civil Rights ("OCR"). *See* Tyler Kingkade, *106 Colleges Are Under Federal Investigation For Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015), http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html.

6. The most recent guidance from OCR regarding the implementation of Title IX includes the following: Questions and Answers on Title IX and Sexual Violence, U.S. DEP'T OF EDUCATION, QUESTIONS AND ANSWERS ON TITLE IX SEXUAL VIOLENCE (Apr. 29, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter Title IX Q&A]; Dear Colleague Letter, Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't. of Education, to Colleague (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter 2011 DCL]. Additional Title IX guidance (informative but not binding) comes from Voluntary Resolution Agreements and related letters between OCR and various institutions, including the 2013 University of Montana Letter, Letter from Anurima Bhargava, Chief of Educational Opportunities Section, Civil Rights Div., U.S. Dep't of Justice, & Gary Jackson, Regional Director, Office of Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), *available at* http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf [hereinafter 2013 Montana Letter]. A list of recent Voluntary Resolution Agreements can be found here: Recent Resolutions, Office for Civil Rights, http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html (last visited May 10, 2015) [hereinafter Voluntary Resolution Agreements]. As used in this article, the term "Title IX" refers generally to the statute, its regulations, and all federal guidance documents including these documents and agreements from OCR.

7. The White House Task Force to Protect Students from Sexual Assault has released advisory guidance regarding Title IX. *See* WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014), *available at* https://www.notalone.gov/assets/report.pdf [hereinafter Not Alone].

ing the option to report the incident to law enforcement or to decline such reporting.[8] VAWA also adopts Title IX's requirement[9] that institutional staff handling these issues be well-trained and assuredly competent as they investigate, adjudicate, and interact with students involved in allegations of DV.[10] And like parties in a Title IX sexual assault investigation, parties in a VAWA DV investigation now have the right to simultaneous, written notice of the outcome and equal rights to have an advisor assist them.[11]

As institutions scramble to implement the new DV mandates, they must answer difficult questions, including who should be responsible for drafting DV policies, which entity on campus should be responsible for DV investigations (e.g., student affairs v. Title IX office), and what DV investigations should look like (e.g., hearing board v. single investigator model). Institutions will no doubt answer these questions in a variety of ways specific to their existing structure. No matter what shape institutions' DV policies and investigations take, it is imperative that the systems ultimately implemented for addressing DV on college campuses consider the following advice.

I. CLARITY AND TRANSPARENCY ARE BEST FOR THE COMPLAINANT[12]

The best tool for addressing sexual and domestic violence on campus is to provide clarity and transparency in the reporting process for complainants. With regard to the importance of complainant accessibility, Title IX guidance is instructive[13]. The theme running through recent Title IX guidance is quite clear: campuses must ensure they have widely-understood, easy to use and effective systems in place for addressing sexual violence on their campuses; in sum, sexual assault policies must have transparency,

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8. Violence Against Women Act, 79 Fed Reg. 62,752, 62,781 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46 (b)(11)(iii)).

9. Title IX Q&A, *supra* note 6, at 40.

10. Violence Against Women Act, 79 Fed Reg. 62,752, 62,773 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46 (k)(2)(ii)).

11. Violence Against Women Act, 79 Fed Reg. 62,752, 62,773−32,774 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46(k)(2)(iii)−(v)); 2011 DCL, *supra* note 6, at 12.

12. Language choices are very individualized and terms can have different connotations for different people. The terms complainant, victim and survivor are often used to refer to individuals who have experienced sexual and relationship violence. I have generally chosen to use the term complainant in this article but also use the terms victim and survivor depending on the particular sentence and context.

13. *E.g.,* 2011 DCL, *supra* note 6, at 7 ("a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination."). Again, as noted above in note 6, the term "Title IX" in this article refers generally to the statute, its regulations, and all federal guidance documents from OCR.

clarity and integrity. The 2011 DCL, for example, states that colleges and universities must make clear what conduct constitutes sexual harassment.[14] The 2013 Montana Letter, which detailed the compliance review and investigation into the University of Montana, identified as the University's first problem that "[the] sheer number [of policies related to sexual harassment and sexual assault] and the lack of clear cross references among them leaves unclear which should be used to report sexual harassment or sexual assault and when circumstances support using one policy or procedure over another."[15] The 2013 Montana Letter requires the University to revise its policies "to dispel any confusion about when, where, and how students should report various types of sex discrimination."[16] The reason for avoiding this confusion is plain: complainants who don't understand what conduct is prohibited or where to report allegations will remain silent.

Likewise, without an understandable DV policy and an accessible, clearly-identified unit on campus responsible for DV investigations, institutions of higher education risk confusing complainants, and as an unwanted result, possibly also chilling reporting on their campuses. First, people who experience dating and domestic violence and stalking must understand where to report DV and which policy applies to them. Instances of DV are often enmeshed with other forms of sexual violence, including sexual assault, and sexual assault often occurs within a dating context. Given the already complex emotional and psychological dynamics of experiencing DV, it is unreasonable to expect a complainant to read the institution's sexual assault policy and as well as a separate DV policy and then determine which better fits his/her situation, which institutional entity s/he should report to, and which set of procedures will govern the investigation into his/her complaint. Thus, in the establishment of its DV policies pursuant to VAWA, institutions must steer clear of the tendency to add yet another policy, yet another set of distinct procedures, and different staff to its existing structures, and should instead strive to develop a comprehensive and clear unified structure for addressing all of these aspects of sexual violence.[17] It is critical that those who experience sexual violence understand how to make reports, comprehend the processes that will be used, know what resources are available for support, and have access to the reporting/investigative system without undue obstacles.

II. INSTITUTIONAL STAFF HANDLING DV CONCERNS MUST BE

14. 2011 DCL, *supra* note 6, at 7.

15. 2013 Montana Letter, *supra* note 6, at 7.

16. 2013 Montana Letter, *supra* note 6, at 9.

17. Because allegations often include aspects of DV, sexual assault and stalking together, institutions may find that the best use of resources will be to co-locate their Title IX and DV investigations within one office.

KNOWLEDGEABLE ON ISSUES OF GENDER-BASED AND SEXUAL VIOLENCE (AND BY THE WAY, SO SHOULD THE TITLE IX STAFF)

In order to effectively investigate dating violence, domestic violence and stalking, the assigned investigative staff will need to understand a host of complex issues involved with sexual and gender-based violence. They will need to appreciate the interplay of power, gender, and sexuality,[18] why many people who experience DV choose not to report their abuser or choose not to cooperate with official efforts to hold abusers accountable[19], how DV complainants can experience peer stigmatization[20] and victim responses to trauma.[21] It will not be enough for campus staff handling DV issues to be educated in the arena of student conduct and student affairs. [22] Rather, for many of the same reasons that prosecutors' offices often have dedicated domestic violence units,[23] institutional investigation of DV requires a particularized knowledge base and skill set.

Because DV and sexual assault share many core issues, colleges and universities should use the implementation of VAWA's requirements as an opportunity to assess the knowledge and skills of their Title IX staff. "In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence."[24] Like those

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18. *See generally* LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN (2003); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1993); SUSAN ESTRICH, REAL RAPE (1988).

19. *See, e.g.*, LESLIE MORGAN STEINER, CRAZY LOVE (2010).

20. *See, e.g.*, Diana M. Quinn, et al., *Examining Effects of Anticipated Stigma, Centrality, Salience, Internalization, and Outness on Psychological Distress for People with Concealable Stigmatized Identities*, PLOS ONE (May 9, 2014), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0096977; Keertana Anandraj, *No More Silence. No More Violence*., CHANGE MAGAZINE, Oct. 29, 2014, *available at* http://change-magazine.org/2014/10/no-more-silence-no-more-violence/.

21. *E.g.*, Rebecca Campbell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual*

Assault on Women's Mental Health, 10 TRAUMA, VIOLENCE, & ABUSE 225 (2009).

22. The regulations promulgated pursuant to VAWA specifically require that DV investigative staff "at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability." Violence Against Women Act, 79 Fed Reg. 62,752, 62,773 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46 (k)(2)(ii)).

23. Jennifer Gentile Long & John Wilkinson, *The Benefits of Specialized Prosecution Units in Domestic and Sexual Violence and Cases*, 8 Strategies in Brief (Dec. 2011); *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, Nat'l Inst. of Justice ch. 6, sec. 18 (June 2009), *available at* http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/ch6/Pages/specialized-prosecution-units.aspx.

24. 2011 DCL, *supra* note 6, at 12. It further noted that where an allegation involves forensic evidence, that evidence "should be reviewed by a trained forensic ex-

employees working in DV investigations and adjudications, Title IX staff must be knowledgeable beyond generalized student conduct matters and procedures.[25] To be most effective, Title IX investigators should also be educated about the dynamics of counter-intuitive victim responses to trauma,[26] memory fragmentation and delayed recall,[27] uncooperative victims, and the interplay of power/gender/sexuality.[28] Both Title IX investigators and DV campus staff must appreciate the stress caused by and the ramifications of reporting sexual violence for a student within her peer community and the peer stigma that might exist for all involved parties within small groups such as fraternities, sororities, athletic teams, and university residence halls.[29] If an institution's Title IX staff is not trained in these issues, the timing of the implementation of the VAWA amendments to the Clery Act is the perfect moment for a comprehensive staff investigative training. Many advocacy agencies and women's shelters can provide a comprehensive training about the dynamics of all forms of sexual violence and understanding survivor experiences.

III. CREATE INVESTIGATIVE PROCESSES THAT CONFORM TO FEDERAL GUIDANCE TRENDS AND ACCEPTED BEST PRACTICES

Institutions do not need to reinvent the wheel when it comes to developing investigative practices for DV under the new VAWA requirements. Indeed, they should look to the growing body of established best practices stemming from the federal government's interpretation of Title IX for guidance on how best to investigate DV on their campuses.[30] Many of the

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aminer." *Id.* at 12 n. 30.

25. Title IX Q&A, *supra* note 6, at 14 (institutions may use general student disciplinary procedures to resolve sexual violence complaints, but must ensure those procedures meet all of the Title IX procedural requirements as well).

26. Patricia L. Fanflik, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, NAT'L DIST. ATTORNEYS ASS'N (Aug. 2007).

27. Matt J. Gray & Thomas W. Lombardo, *Complexity of Trauma Narratives as an Index of Fragmented Memory in PTSD: a Critical Analysis*, 15 APPL. COGNIT. PSYCHOL. S171–S186 (2001); Rebecca Campbell, Webinar, *The Neurobiology of Sexual Assault*, NAT'L INST. OF JUSTICE (2012), *available at* http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx.

28. *See, e.g.*, BANCROFT, *supra* note 18; BROWNMILLER, *supra* note 18; ESTRICH, *supra* note 18.

29. Because those investigating sexual assaults and DV must both understand the cultural attitudes regarding gender-based violence and various cultural norms regarding sexuality and relationships, many institutions may conclude that the best use of resources will be to use the same staff for both kinds of sexual violence. *See* Title IX Q&A, *supra* note 6, at 40 (requiring that sexual misconduct investigators receive "cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.").

30. *E.g.,* 2011 DCL, *supra* note 6; Title IX Q&A, *supra* note 6; Voluntary Resolution Agreements, *supra* note 6; NOT ALONE, *supra* note 7.

procedures for investigating sexual violence under Title IX and investigating DV under the VAWA amendments to the Clery Act are either identical or can be analogized as similar enough to warrant similar processes.

In addition to these procedural similarities, the parallels between the two forms of sexual violence make it reasonable to borrow certain best practices from the Title IX field to use in the field of DV. For example, the interim measures[31] institutions are encouraged to use for complainants in sexual assault investigations—class or housing separations, no contact orders, and express directives of no retaliation—make equal sense for DV complainants;[32] the already-established procedures and networks for triggering these interim measures can therefore be brought into the DV context with little alteration.[33] Moreover, regardless of the shape of their investigative and adjudicatory structures, institutions should choose the "preponderance of evidence" standard[34] for their burden of proof in DV cases. While VAWA does not explicitly require the preponderance standard,[35] colleges and uni-

31. "Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation." 2011 DCL, *supra* note 6, at 15. Institutions must implement these interim measures "promptly" upon getting notice of an allegation of sexual harassment or sexual violence, and must minimize the burden of these interim measures on the complainant. *See id.* at 15–16. The specific interim measures delineated in Title IX federal guidance include options for no-contact and changes to academic and extracurricular activities, including living, transportation, dining, and working situations. *See* Title IX Q&A, *supra* note 6, at 32.

32. VAWA regulations require institutions to reasonably accommodate requests for changes in a complainant's academic, living, transportation, and working situations, as well as protective measures. Violence Against Women Act, 79 Fed Reg. 62,752, 62,762–62,763 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46 (b)(11)(v)).

33. If an institution has not yet formalized its policy and process for providing interim measures in its Title IX cases, again, the added requirement of DV should be the trigger for implementing a wholesale protocol.

34. Allegations of sex discrimination (including sexual harassment and sexual assault) under Title IX must be reviewed by the institution using the preponderance of evidence standard of proof, i.e., that it is more likely than not that the alleged conduct occurred. Title IX Q&A, *supra* note 6, at 26; 2011 DCL, *supra* note 6, at 9–11. In requiring the preponderance of the evidence standard of proof, OCR relies on case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *See* REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, DEPT. OF EDUC. vi (2001) ("Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX."), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf; *see, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (preponderance of evidence standard generally applies in cases under Title VII); Price Waterhouse v. Hopkins, 490 U.S. 228, 252−55 (1989) (approving preponderance standard in Title VII sex discrimination case) (plurality opinion); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

35. VAWA requires only that the institution publicly state the burden of proof it

versities would be remiss (and potentially inviting scrutiny from the federal government) to ignore the lessons of Title IX when it comes to establishing these important aspects of their decision-making in DV matters.[36]

IV. PUT EFFECTIVE PARTNERSHIPS IN PLACE IN ORDER TO ROBUSTLY FULFILL ALL OF VAWA'S MANDATES

VAWA's mandates extend beyond investigative policy and require enhanced coordination and communication with law enforcement as well as ample survivor services. At the heart of these mandates is the acknowledgement that relationships with sexual violence advocates and law enforcement are key to effectively addressing all forms of campus sexual violence. This is because incidents of alleged DV often give rise to parallel criminal investigations, resulting in common respondents/defendants, common witnesses, and common evidence. When considering the creation of a DV policy and process, an institution should consult with campus and local law enforcement so that each agency's role and boundaries are clear. If possible, it is best to put in writing exactly what procedures must be followed, who will respond, and who will be notified in the event of an incident of DV in the campus community.

Survivor advocacy services are also an essential component of an institution's DV policy. Campuses will rely on advocates to facilitate communication between complainants and various departments of the institution, to explain the institution's DV policies and process, to receive confidential information, and to provide support and resources. To make sure survivor interests are at the forefront of an institution's DV policy, input from advocates is necessary in the drafting of an institution's DV policy, and institu-

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will be using. However, because VAWA addresses sexual assault as well as incidents of DV, because Title IX requires the "preponderance" standard for sexual assault adjudications, and because—as noted elsewhere in this article—institutions may co-locate their DV and sexual assault investigative/adjudicative offices, it is reasonable to infer that "preponderance" is the wiser choice for institutions' DV adjudications.

36. While OCR has been steadfast in its specific requirement of the preponderance standard and in its general aggressive enforcement of Title IX with respect to campus sexual assault, this approach is not without its detractors. *See, e.g.*, Elizabeth Bartholet et al., *Rethink Harvard's sexual harassment policy*, BOSTON GLOBE, Oct. 15, 2014, http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html; Joe Palazzolo, *Harvard Law Professor: Feds' Position on Sexual-Assault Policies is 'Madness'*, WALL STREET JOURNAL LAW BLOG (Dec. 31, 2014), http://blogs.wsj.com/law/2014/12/31/harvard-law-professor-feds-position-on-sexual-assault-policies-is-madness/; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

tions should continue to meet regularly with advocates to check in and confirm the process is functioning appropriately.[37]

V. EDUCATE, EDUCATE, EDUCATE

As many educators who work with adolescent and college-age populations know, even important lessons sometimes must be repeated to ensure that learners internalize the concepts. The combination of Title IX's educational mandates[38] and VAWA's new educational mandate seems to embody this life truism. Title IX requires educational programs on sexual harassment and sexual violence.[39] VAWA requires educational programs on dating and domestic violence, stalking, and sexual assault.[40] Both statutes strongly encourage initial and ongoing educational programs.[41] Because of the overlap and connection between Title IX and VAWA, institutions should consider developing comprehensive sexual violence education programs for their students that include lessons on consent, bystander intervention, risk reduction and the logistics of the institution's reporting and grievance procedures.

The problems of domestic and dating violence, stalking and sexual assault are complex, and cannot be remedied by an institutional policy that focuses on investigations to the detriment of prevention. The vast majority of incidents of sexual violence are unreported. If colleges' and universities' strategies for addressing sexual violence rely solely on investigations (which, by definition, occur after some report to the institution is made), a large portion of sexual violence will go unaddressed. Preventive education in the field of sexual assault, dating and domestic violence, and stalking is therefore particularly critical to reach the most students. VAWA specifies

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37. While robust resources for complainants are necessary for campus DV proceedings, institutions must ensure fairness and balance in their systems by protecting the due process rights of students and employees accused of DV. Some protections are spelled out explicitly in the VAWA regulations, including each party's right to an advisor (often an attorney), simultaneous written notification of outcomes, transparent and "prompt, fair, and impartial process," equal access to information. Violence Against Women Act, 79 Fed Reg. 62,752, 62,771–62,772 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46(k)).

38. Institutions should provide training to students on Title IX and sexual violence, specifically including but not limited to extensive information about the institution's sexual violence policy and procedures; the effects of trauma including "neurobiological changes;" the role of alcohol/drugs; bystander intervention strategies; reporting and confidentiality options; law enforcement information; and the protection against retaliation. Title IX Q&A, *supra* note 6, at 41.

39. Title IX Q&A, *supra* note 6, at 41; 2011 DCL, *supra* note 6, at 14.

40. Violence Against Women Act, 79 Fed Reg. 62,752, 62,769 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46(j)).

41. Title IX Q&A, *supra* note 6, at 41; Violence Against Women Act, 79 Fed Reg. 62,752, 62,758 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46(j)(2)(iii).

the content that must be covered in such prevention programs.[42] Institutions should invest significantly in prevention and educational programs targeted at changing cultural norms and social behavior as a means to reduce the incidence of sexual violence on their campuses, and students should receive such programming throughout their educational years.

Institutions of higher education vary greatly—in size, public/private, commuter-oriented/highly residential, etc. Because of these differences, compliance with the VAWA amendments to the Clery Act is likely to look different from campus to campus. Regardless of the particular structure that a college or university chooses, the components discussed above constitute the minimal competencies that should be at the basis of every institution's approach to sexual violence. While the federal government continues to define institutions' role in addressing campus dating and domestic violence, stalking and sexual assault under VAWA with new regulations, these precepts provide a solid starting point for institutions implementing VAWA's mandates on their campuses.

42. Violence Against Women Act, 79 Fed Reg. 62,752, 62,769 (Oct. 20, 2014) (to be codified at 34 C.F.R. § 668.46(j)).

PROFESSIONAL STANDARDS ON SOCIAL MEDIA: HOW COLLEGES AND UNIVERSITIES HAVE DENIED STUDENTS' CONSTITUTIONAL RIGHTS AND COURTS REFUSED TO INTERVENE

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* I received my B.A. from Loyola University New Orleans in 2012, and my J.D. from Notre Dame Law School in 2015. I would like to give a special thank you to Professor John Robinson for advising me throughout the research and writing of this Note. Finally, I would like to thank my friends and family for the constant support they have given me, especially my mom, Kristine, who put up with the long hours I spent working on this Note over the holidays.

In an atmosphere dominated by social media, students increasingly communicate through smart phones designed to "post" at the touch of a button. Facebook, Twitter, Instagram, Vine, Foursquare and numerous other social media websites connect students with thousands of their closest friends and followers on a daily basis. The downside to such ease of communication and accessibility is that it can be difficult to control your intended audience. Most students attempt to limit their online presence to seem inoffensive to employers, grandparents, etc. However, the majority of social media users have at least one account rather kept "private", meaning available only to approved friends and followers, not the general public. With privacy emerging as a relative concept in the age of social media, the question then becomes: in what circumstances are professional schools able to confront students for online speech never intended to reach the eyes of school administrators?

I. FACTS OF *KEEFE V. ADAMS*

The U.S. District Court of Minnesota was forced to answer that exact question in *Keefe v. Adams* in August 2014.[1] Craig Keefe was removed from the state-run Central Lakes College's degree nursing program as a result of conduct deemed unprofessional by school administrators.[2] In response to his dismissal from the program, Keefe brought a §1983 action against college administrators, in their individual and official capacities, alleging that they denied him due process, violated his right to free speech, violated his right to be free from unreasonable searches and seizures, violated his right to privacy, and conspired to violate his constitutional rights.[3]

As part of his enrollment in the Fall 2012 semester, Keefe had received a handbook stating in relevant part that "'[a]ll current and future students are expected to adhere to the policies and procedures of this student handbook as well as all policies of clinical agencies in which the student is placed."[4] Under "Student Removal from Nursing Program," the handbook states that "students who fail to meet professional standards are not eligible to progress in the program."[5] Failure to meet professional standards includes be-

1. 44 F.Supp.3d 874, 888 (D. Minn. 2014). With respect to a § 1983 claim, a plaintiff must prove four elements: (1) actions taken under color of law; (2) deprivation of constitutional or statutory right; (3) causation; and (4) damages. 42 U.S.C. § 1983 (2012).

2. *Id.*

3. *Id.* at 876.

4. *Id.* at 877.

5. *Id.*

haviors that violate academic, moral, and ethical standards including, but not limited to, "transgression of professional boundaries" along with other behaviors described in the College Catalog Student Code of Conduct.[6] One can infer from the Court's discussion that the professional boundaries referred to in the student handbook are based upon the American Nurses Association (2001) Code for Nurses with Interpretive Statements (Code for Nurses).[7]

In November 2012, a student, who was enrolled in a lecture course with Keefe, expressed concerns to the instructor, Kim Scott, about statements Keefe had made on Facebook.[8] Keefe's posts included statements such as "[there is] not enough whiskey to control that anger" (in reference to frustration over a group project); wanting to "give someone a hemopneumothorax" (also known as a pneumothorax)[9] with an electric pencil sharpener; claiming to "need some anger management;" calling another student a "stupid bitch" for reporting his posts; and calling out other students for having exam accommodations, claiming that the accommodations system is "sexist."[10] Although the posts did not name individual students, Keefe used offensive language to describe classmates and air grievances regarding school activities in which he participated at Central Lakes College.

The statements were brought to the attention of Connie Frisch, the College's Dean of Nursing.[11] After reviewing the statements and confirming that Keefe had made them on his Facebook page, Dean Frisch contacted Kelly McCalla, the College's Vice President for Academic Affairs.[12] In early December 2012, Dean Frisch set up a meeting between Keefe and Vice President McCalla.[13] Dean Frisch did not tell Keefe that students had reported his Facebook posts.[14] In response to an email from Keefe, Dean Frisch assured him that "he did not need to prepare in any way" for his meeting with Vice President McCalla and that "the topic of professional

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6. *Id.* at 878.
7. *Id.* at 877.
8. *Id.* at 878.
9. *Id.* at 879. "A pneumothorax is a collapsed lung. Pneumothorax occurs when air leaks into the space between your lungs and chest wall. This air pushes on the outside of your lung and makes it collapse. In most cases, only a portion of the lung collapses. A pneumothorax can be caused by a blunt or penetrating chest injury, certain medical procedures involving your lungs, or damage from underlying lung disease. Or it may occur for no obvious reason. Symptoms usually include sudden chest pain and shortness of breath." *Pneumothorax Definition*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/pneumothorax/basics/definition/con-20030025 (last visited April 13, 2015).
10. Keefe v. Adams, 44 F.Supp.3d 874, 878–79 (D. Minn. 2014).
11. *Id.* at 878.
12. *Id.* at 880.
13. *Id.*
14. *Id.*

boundary is central to the role of the nurse and I am sure you appreciate the delicacy of the topic."[15] During another conversation with Keefe, Dean Frisch again refused to discuss the issue further with Keefe via phone or email.[16]

Dean Frisch testified that she opened the meeting on December 5, 2013 by reading the disciplinary policy from the student handbook.[17] Next, she explained the charge in terms of boundary issues and professionalism.[18] According to Dean Frisch, Keefe was surprised that his statements were publicly available; he characterized at least some of the statements as a joke; and was not receptive to the message that his statements were unprofessional.[19] She testified that based on Keefe's "lack of remorse, lack of concern, and lack of recognition," he decided to remove him from the associate degree nursing program.[20]

Keefe appealed his decision through Central Lakes College's appeal process. Keefe asserted in his appeal that his removal from the associate degree nursing program was too harsh; that he had "removed these offensive comments that offended individuals viewing [his] page as well as not displaying [his] professional image as a nursing student as well as CLC's nursing program;" and that he had not previously been subject to any discipline at the college.[21] He closed his appeal by apologizing for his "unethical and unprofessional behavior."[22]

Vice President McCalla reviewed Keefe's appeal.[23] He testified that he was "reasonably sure" that he had also reviewed a nursing association's professional standards.[24] At his deposition, he was unable to "recall the specific standards on the website if [he] did in fact go look at them." He also testified that he "saw nothing in Mr. Keefe's appeal that led [him] to believe that [Keefe] had not violated that professionalism standard."[25] Vice President McCalla subsequently denied the appeal and Keefe filed suit in the district court.[26]

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15. *Keefe*, 444 F.Supp.3d at 880.
16. *Id.*
17. *Id.* at 881.
18. *Id.*
19. *Id.*
20. *Keefe*, 444 F.Supp.3d at 881.
21. *Id.* at 883.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Keefe*, 444 F.Supp.3d at 883.
26. *Id.*

II. *KEEFE*'S DUE PROCESS CLAIM

In regards to Keefe's claim that he was not accorded sufficient due process, the U.S. District Court of Minnesota, without extensive discussion, categorized Keefe's dismissal as academic, rather than disciplinary.[27] The court said that "the term 'academic' in this context is somewhat misleading" because "[c]ourts have frequently held that an academic dismissal may be properly based on more than simply grades."[28] The court cited cases where personal hygiene and timeliness,[29] lack of candor in the application process,[30] inability to interact with students in a professional manner (Ku),[31] and refusal to seek treatment for mental illness (Shaboon)[32] were important factors in categorizing the dismissal as academic.

The court went on to assess whether Keefe was afforded the requisite level of procedural due process accorded academic dismissals. In order to satisfy the Fourteenth Amendment, a student who is dismissed from a public college or university for academic reasons must be afforded "notice of faculty dissatisfaction and potential dismissal," and the decision must be "careful and deliberate."[33] A formal hearing is not required for an academic dismissal.[34] The Court ultimately held that there was a rational basis for the decision to dismiss Keefe from the program and that his dismissal from the program was not the product of arbitrary and capricious conduct.[35]

III. THE DISTINCTION BETWEEN ACADEMIC AND DISCIPLINARY MISCONDUCT

The U.S. Supreme Court has distinguished academic from disciplinary situations, according greater respect for the professional's judgment in academic decisions.[36] In *Board of Curators of University of Missouri v. Horowitz*, the Court let stand a dismissal of a medical school student, Charlotte

27. *Id.* at 885.

28. *Id.* (quoting Yoder v. Univ. of Louisville, 526 F.App'x 537, 550 (6th Cir. 2013) (unpublished table decision)).

29. Board of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 91 n.6 (1978).

30. Fenje v. Feld, 398 F.3d 620, 625 (7th Cir. 2005).

31. Ku v. Tennessee, 322 F.3d 431, 435–36 (6th Cir. 2003).

32. Shaboon v. Duncan, 252 F.3d 722, 731 (5th Cir. 2001); *see also* Monroe v. Arkansas State Univ., 495 F.3d 591, 595 (8th Cir. 2007) (student dismissed for failure to finish his coursework while seeking medical treatment).

33. Keefe v. Adams, 44 F.Supp.3d 874, 885 (D. Minn. 2014) (quoting Richmond v. Fowlkes, 228 F.3d 854, 857 (8th Cir. 2000)).

34. *Id.*

35. *Id.* at 887.

36. Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J.C. & U.L. 511, 517–18 (2013) (quoting Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985)).

Horowitz, without a hearing based on her failure to meet institutional standards.[37] Justice Powell, concurring in Horowitz, explained that:

> A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protectsino traditionally imposed under the Due Process Clause. An academic judgment also involves this type of objectively determinable fact—e.g., whether the student gave certain answers on an examination. But the critical decision requires a subjective, expert evaluation as to whether that performance satisfies some predetermined standard of academic competence.[38]

Similarly, in *Regents of University of Michigan v. Ewing*, a medical student, Scott E. Ewing, challenged his dismissal from medical school without a hearing.[39] The U.S. Supreme Court rejected his claims, noting:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[40]

As other commentators have noted, by refusing to grant relief in both Horowitz and Ewing, the Supreme Court differentiated academic from disciplinary sanctions.[41] The Court did not, however, provide further guidance for determining whether a case is academic or disciplinary in nature.[42] Instead, the Court appears to assume that the distinction between categories requires no explanation, when in reality, situations in which students face sanctions for misconduct often "occupy a spectrum ranging from the purely academic through the purely disciplinary."[43]

Some lower courts have attempted to further define the distinction between academic and disciplinary sanctions.[44] The Texas Supreme Court has held that "[a]cademic dismissals arise from a failure to attain a standard

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37. Bd. of Curators of Univ. of Missouri. v. Horowitz, 435 U.S. 78 (1978).

38. *Id.* at 96 n.5 (Powell, J., concurring).

39. Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985).

40. *Id.* at 223–25.

41. *See generally* Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003) (discussing academic versus disciplinary sanctions).

42. *Id.* at 625.

43. *Id.* at 626.

44. See *id.* at 628 for a more in-depth discussion of lower court opinions that attempt to articulate the distinction between academic and disciplinary sanctions.

of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."[45] The U.S. District Court of Minnesota has held that "academic decision is based upon established academic criteria."[46] In holding that plagiarism was an academic, rather than a disciplinary offense, the New Jersey Appellate Court reasoned that:

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement . . . Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.[47]

Thus, although some lower courts have attempted to define the differences between academic and disciplinary sanctions, these courts do not have much guidance in making their determination.

The U.S. District Court of Minnesota dismissed Keefe's claim that he should have been afforded the more searching, procedural due process of a disciplinary dismissal, categorizing his dismissal as academic without much discussion.[48] However, the U.S. Supreme Court's reason for according heightened deference to academic decisions — refusal to substitute the judgment of the courts for those whose job it is to assess academic performance — does not clearly apply in a situation like Keefe's, where a professional school student is dismissed for failure to abide by professional standards. The decision was not a result of grades, performance, attendance or even cheating or plagiarism, which is frequently litigated and has usually been held to be disciplinary in nature.[49] Ultimately, Central Lakes College's decision involved whether or not Keefe's Facebook posts were so egregious as to violate professional standards. Therefore, it appears that the decision does not require an assessment of academic performance, but rather an assessment of the seriousness of Keefe's offense.

In a recent case, *Walker v. President & Fellows of Harvard College*, the

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45. *Id.* at 630 (quoting Univ. of Texas. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 931 (Tex. 1995)).

46. Hall v. Univ. of Minn., 530 F. Supp. 104, 108 (D. Minn. 1982).

47. Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982).

48. Keefe v. Adams, 44 F.Supp. 874, 886–87 (D. Minn. 2014).

49. *See, e.g.*, *Napolitano*, 453 A.2d at 263; Jaber v. Wayne State Univ. Bd. of Governors, 487 F.App'x 995 (6th Cir. 2012); Katz v. Bd. of Regents of Univ. of State, 924 N.Y.S.2d 210 (App. Div. 2011); and Beauchene v. Mississippi Coll., 986 F.Supp.2d 755 (S.D. Miss. 2013) (examples of cases where plagiarism was treated as academic, rather than disciplinary, in nature).

United States District Court for the District of Massachusetts upheld Harvard College's decision to treat plagiarism in a draft of Megon Walker's journal note as a disciplinary offense.[50] Harvard is a private institution, and therefore, is not subject to the same Fourteenth Amendment requirements as Central Lakes College and other public institutions. Thus, Walker brought a breach of contract claim, among other unsuccessful claims, against Harvard.[51] The court recognized the existence of a contract between Walker and Harvard in the student handbook, reasoning that a student "forms a contractual relationship with her university, and a disciplinary code can be part of that contract."[52] Although her claim was ultimately dismissed, it is interesting to note that the court characterized the plagiarism as a disciplinary offense, and therefore, required that Walker's hearing comport with notions of basic fairness.[53]

In a case similar to Keefe that did not involve professional standards, a student who was involved in verbal altercations with two university employees about the student's use of a staff van was categorized and subsequently treated as disciplinary.[54] In *Gorman v. University of Rhode Island*, two women complained to the University that Raymond J. Gorman, III had engaged in verbal abuse, harassment, and threats in violation of the university's student handbook.[55] Without debate, the First Circuit categorized the resulting dismissal as disciplinary and therefore, requiring a hearing where the student was given the opportunity to explain his version of the facts and to appeal the sanction that had been imposed on him.[56] While the Gorman decision is not binding precedent outside of the First Circuit, it serves as an example of how similar cases involving public college and university students have been treated. The same distinction between academic and disciplinary applies in professional school cases; therefore, similar conduct occurring at the university level should be treated similarly.

A recent case, *Al-Dabagh v. Case Western Reserve University*, involved a medical student, Amir Al-Dabagh, who allegedly came late to group discussions and asked the instructor to lie for him, behaved inappropriately towards two female students at a school dance, failed an internship and was convicted of driving while intoxicated.[57] As a result, Case Western Reserve University School of Medicine refused to certify him for graduation

50. Walker v. President & Fellows of Harvard Coll., No. 12-10811-RWZ, 2014 WL 7404557, at *1 (D. Mass. Dec. 30, 2014).

51. *Id.* at *1.

52. *Id.* at *2 (quoting Kiani v. Trs. of Boston Univ., No. 04-cv-11838-PBS, 2005 U.S. Dist. LEXIS 47216, at *15 (D. Mass. Nov. 10, 2005).

53. *Id.* at *3.

54. Gorman v. Univ. of R.I., 837 F.2d 7 (1st Cir. 1988).

55. *Id.* at 7.

56. *Id.* at 8.

57. Al-Dabagh v. Case W. Reserve Univ., 777 F.3d 355, 357 (6th Cir. 2015).

and Al-Dabagh challenged the university's decision in court.[58] A federal district court found that Al–Dabagh had proven himself worthy of a diploma and ordered the university to give him one, disregarding the university's determination that he lacked the professionalism required to discharge his duties responsibly.[59] The Sixth Circuit reversed, stating in relevant part:

> Case Western's student handbook supplies the contract's terms, as the parties agree, and makes clear that the only thing standing between Al-Dabagh and a diploma is the Committee on Students' finding that he lacks professionalism. Unhappily for Al-Dabagh, that is an academic judgment. And we can no more substitute our personal views for the Committee's when it comes to an academic judgment than the Committee can substitute its views for ours when it comes to a judicial decision.[60]

The Sixth Circuit's reasoned that because the university made an overall, cumulative decision regarding whether Al-Dabagh possessed the professionalism required to enter the profession, the decision was academic in nature.[61] If the decision had been the result of an isolated or specific incident, it likely would have crossed the line into the realm of disciplinary and Al-Dabagh would have been entitled to the heightened procedural requirements accorded a disciplinary dismissal.

IV. WHAT PROCESS IS DUE

The first step in evaluating the requisite due process is determining whether Keefe possessed a valid property interest in his enrollment at Central Lakes College. Courts have generally assumed that professional students attending a public college or university have a valid property interest in their enrollment.[62] Therefore, the same due process requirements articulated by the U.S. Supreme Court in K-12 cases involving disciplinary suspensions and dismissals also apply in the professional school setting.[63]

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58. *Id.*
59. *Id.*
60. *Id.* at 358.
61. *Id.*
62. *See* Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007) ("[W]e assume without deciding that Monroe's interest in pursuing his education constitutes a constitutionally protected interest."); Richmond v. Fowlkes, 228 F.3d 854, 857 (8th Cir. 2000) ("Assuming, without deciding, the existence of a property or liberty interest, we conclude that Richmond received all the process that he was due."); Hennessy v. City of Melrose, 194 F.3d 237, 249–50 (1st Cir. 1999) ("[T]he claim to such a property interest is dubious, and in this case it seems especially tenuous because Salem State did not expel the appellant, but merely precluded him from continuing in a particular program." (citations omitted)).
63. The U.S. District Court of Minnesota assumed that Keefe had a valid property

If Keefe's dismissal had been categorized as disciplinary instead of academic, he would have at least been entitled to oral or written notice of the charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story.[64] The U.S. Supreme Court described the reasoning behind these heightened procedural requirements for disciplinary sanctions in *Goss v. Lopez*, a case involving a number of Columbus, Ohio students reviewing their suspensions without a hearing:

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.[65]

Notably, the court in Goss also declared that longer suspensions or expulsions might require more formal procedures.[66]

Dixon v. Alabama State Board of Education, a case that, like Goss, expanded the due rights of students, involved students at Alabama State College who protested the college's policy of segregation by participating in several sit-in demonstrations off-campus during the civil rights era.[67] As a consequence, they were expelled without notice or hearing.[68] The Fifth Circuit held that the Board of Education was required to give the accused students notice of the charges, explanation of the case against the student, and an opportunity to be heard in their own defense.[69]

Moreover, notice must be such as is reasonably calculated to reach interested parties to afford them due process of law.[70] Keefe twice requested information from school officials regarding his upcoming meeting with the vice president of student affairs, was refused both times, and advised that "[he did] not need to prepare in any way" for the meeting.[71] Keefe was not given written or oral notice of the charges against him until the meeting where the Vice President of Student Affairs determined, based on his responses, he should not be allowed to continue in the program. Thus, Keefe was not given the requisite notice for a disciplinary dismissal.

In order for the hearing requirement to be met, the student must have the

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interest in his enrollment in the associate degree-nursing program.

64. Goss v. Lopez, 419 U.S. 565, 579 (1975).
65. *Id.* at 580.
66. *Id.* at 583.
67. Dixon v. Ala. State Bd. of Ed., 294 F.2d 150 (5th Cir. 1961).
68. *Id.* at 152.
69. *Id.*
70. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950).
71. Keefe v. Adams, 44 F.Supp.3d 874, 880(D. Minn. 2014).

opportunity to respond, explain and defend his or her position.[72] Thus, courts require something more than an informal interview with an administrative authority of the college.[73] Prior to his dismissal from the program, Keefe had only an informal interview with the vice president of student affairs. After his dismissal, Keefe appealed the decision through the College's appeal process in a letter explaining his position; however, the Court has said that as a general rule, the hearing should precede removal of the student from school.[74] Thus, even if the appeal process allowed Keefe the opportunity to defend his position, Central Lakes College did not meet the hearing requirement for a disciplinary dismissal prior to Keefe's dismissal.

If Keefe's dismissal had been properly categorized as disciplinary in nature, his dismissal without notice and a hearing would be unconstitutional under the Fourteenth Amendment. One way to avoid violating due process rights is to police the line between academic and disciplinary sanctions. Multiple commentators have addressed the failings of such a poorly defined distinction between academic and disciplinary dismissals.[75] Just because a college or university categorizes certain conduct, such as unprofessional speech, as academic in nature in the student handbook does not mean that academic deference is warranted. Courts must develop criteria for assessing the distinction between academic and disciplinary misconduct. A clearer distinction would help colleges and universities give students the necessary due process. It would also encourage colleges and universities to provide definitions of academic and disciplinary misconduct to students, so that they might better understand the potential consequences of their actions.

V. *KEEFE*'S FIRST AMENDMENT CLAIM

Next, the court addressed Keefe's claim that his dismissal violated his First Amendment rights. Holding that Keefe's First Amendment rights had not been violated, the court reasoned that Central Lakes College's associate degree nursing program incorporated nationally established nursing standards into the student handbook.[76] The court said the college's ability to discipline students for a transgression of professional boundaries reflects the ability of the Minnesota Board of Nursing to "deny, revoke, suspend, limit, or condition the license and registration of any person to practice pro-

72. Goss v. Lopez, 419 U.S. 565, 579 (1975).

73. Dixon v. Ala. State Bd. of Ed., 294 F.2d 150, 158 (5th Cir. 1961).

74. However, "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." *Goss*, 419 U.S. at 582.

75. *See generally* Lee, *supra* note 36, at 517–18; *see also* Dutile, *supra* note 41, at 625.

76. *Keefe*, 44 F.Supp.3d at 888.

fessional, advanced practice registered, or practical nursing" for "'[e]ngaging in unprofessional conduct.'"[77] The court believed "[g]reater specificity [was] not required."[78] The court also noted that access to Keefe's Facebook page was not restricted because Keefe's privacy settings allowed the public to view his posts.[79]

Courts have generally protected students' First Amendment rights in K-12 cases unless the speech constituted a substantial disruption or otherwise fell into the category of an exception.[80] Courts have struggled with whether or not to extend the same analytical framework to college and university cases. Applying this analysis to professional school students has created further confusion, with the latest string of cases granting sweeping authority to public colleges and universities to limit professional student speech.[81]

VI. SCHOOL SPEECH CASES AND THE FIRST AMENDMENT

A. *Tinker v. Des Moines Independent Community School District*

Tinker was a landmark case involving sanctions for on-campus, K-12 school speech.[82] Although Tinker has not yet been applied in a college or university setting by the U.S. Supreme Court, Tinker set an important precedent that cannot be ignored. In Tinker, administrators suspended two high school students and a junior high student in December of 1965 for wearing black armbands as symbols of opposition to the Vietnam War.[83] The U.S. Supreme Court held that the action violated the students' First Amendment rights, famously declaring that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[84] However, the Court also explained that First Amendment rights must be "applied in light of the special characteristics of the school environment."[85] Since the sanction here was for "'silent, passive expression of opinion, unaccompanied by any disorder or disturbance,'" the speech "did not interfere. . .'with the rights of other students to be secure and to be let alone.'"[86] In short, students have a right to a

77. *Id.* (quoting Minn. Stat. § 148.261, subd. 1(6) (2012)).
78. *Id.* at 888.
79. *Id.*
80. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
81. *See, e.g.*, Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012) (discussed *infra* at pg. 22 and n. 97).
82. *Tinker*, 393 U.S. at 503.
83. *Id.* at 504.
84. *Id.* at 506.
85. *Id.*
86. Tracey Wirmani, Note, Tinker *Takes on* Tatro*: The Minnesota Supreme Court's Missed Opportunity*, 65 OKLA. L. REV. 769, 772 (2013) (quoting *Tinker*, 393 U.S. at 508).

peaceful learning environment, but here, the Court found no substantial disturbance occurred.

As a result of Tinker, "a public high school may not" sanction "student speech unless the speech substantially interferes with the work of the school or intrudes upon the rights of others."[87] Subsequent K-12 cases, however, distinguished Tinker, ultimately rejecting First Amendment arguments.

B. Post-Tinker School Speech Cases

In *Bethel School District No. 403 v. Fraser*, a high school student was disciplined for a nomination speech of a classmate that he delivered at a school assembly using an "elaborate, graphic, and explicit sexual metaphor."[88] The U.S. Supreme Court contrasted the political message of the armbands in Tinker against the sexual nature of the respondent's speech in Bethel.[89] Because of this marked difference between the expression of a "political viewpoint" and the "vulgar and lewd speech" in this case, the Court concluded that the First Amendment did not prevent the school from sanctioning speech that "undermine[s] the school's basic educational mission." [90]

By the time *Hazelwood School District v. Kuhlmeier* reached the U.S. Supreme Court, it had already decided Bethel. In Hazelwood, the Court upheld the constitutionality of a public high school principal's censorship of a student newspaper produced in a journalism class.[91] The Court declared "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[92] The Court also noted that although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the "First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in its other settings."[93] Thus, the Court identified a distinction between speech that occurred on school premises and speech that was communicated through a school newspaper.[94] The Court ruled that school

87. *Id.*

88. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

89. *Id.* at 680–81.

90. Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 70 (2008) (quoting *Bethel*, 478 U.S. at 685).

91. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 258 (1988).

92. *Id.* at 273.

93. *Id.* at 266 (citations omitted).

94. Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1118 (2010).

officials could exercise greater control over the latter activity.[95]

Finally, *Morse v. Frederick*, the U.S. Supreme Court's most recent K-12 speech case, involved a student disciplined for his failure to take down a banner with the message "BONG HiTS 4 JESUS," during an Olympic torch relay.[96] The banner was displayed at an off-campus, school-sponsored activity.[97] The Court, applying Tinker, held that schools might regulate off-campus speech that could be construed as encouraging illegal drug use.[98]

VII. SOCIAL MEDIA AND THE FIRST AMENDMENT IN SCHOOL SPEECH CASES

The Third Circuit has specifically addressed the issue of speech on social media occurring off-campus. In *Layshock v. Hermitage School District*, parents of a high school student brought a § 1983 action alleging that the school violated the student's First Amendment rights by disciplining him for creating a fake MySpace profile and for posting statements posing as the student's high school principle.[99] The Third Circuit held that the First Amendment free speech clause prohibits a public school from reaching beyond the schoolyard to impose what otherwise might be appropriate student discipline.[100] The court reasoned that:

> It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.[101]

The court also held that the school should not be allowed to treat the student's speech as on-campus speech just because it was aimed at the Principal and could be accessed on-campus.[102] Thus, the Third Circuit refused to allow schools to discipline students for offensive, off-campus speech even when accessed on-campus.

VIII. THE *TINKER* LINE OF SUBSTANTIAL DISRUPTION CASES IN HIGHER EDUCATION

The U.S. Supreme Court has not explicitly applied the Tinker line of

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95. *Id.* at 1118–19.
96. Morse v. Frederick, 551 U.S. 393, 397 (2007).
97. *Id.* at 397–98.
98. *Id.* at 410.
99. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011).
100. *Id.* at 219.
101. *Id.* at 216.
102. *Id.*

substantial disruption cases in a post-secondary setting. In *Healy v. James*, the first post-secondary case decided after Tinker, the Court begins its discussion by quoting Tinker.[103] The Court, however, goes on to say, "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[104] Due to the lack of clarification over where Tinker applies, the Circuits, in varying degrees, have been reluctant to apply Tinker in a higher education setting.[105]

Some courts have invoked the standard articulated by the U.S. Supreme Court in Hazelwood, Tinker's progeny, in higher education settings.[106] The Eleventh Circuit applied Hazelwood in a case challenging the University of Alabama's ability to limit student government campaign speech to a narrow electioneering window, concluding that the Hazelwood rationale permitted the university to regulate candidates' speech even if the speech was not alleged to be unlawful or disruptive.[107] The Sixth Circuit applied Hazelwood in *Ward v. Polite*, where the court stated that:

> [F]or the same reason this test works for students who have not yet entered high school . . . it works for students who have graduated from high school. The key word is student. Hazelwood respects the latitude educational institutions—at any level—must have to further legitimate curricular objectives . . . Nothing in Hazelwood suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one.[108]

Thus, some courts have chosen to apply the Tinker framework amid confu-

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103. "At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." Healy v. James, 408 U.S. 169, 180 (1972) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (citations omitted)).

104. *Healy*, 408 U.S. at 180.

105. *See generally* Meggen Lindsay, Note, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1480–83 (2012) (discussing the application of the *Tinker* line of substantial disruption cases to post-secondary cases).

106. *See generally* Frank D. LoMonte, *"The Key Word Is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 333–41 (2013) (discussing *Hazelwood* invoked in a higher education setting).

107. Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1347 (11th Cir. 1989).

108. Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) (citations omitted). For a further discussion of this issue, see *infra* notes 126–129 and accompanying text.

sion over whether it should apply in a post-secondary setting.

IX. PROFESSIONAL SCHOOL CASES AND THE FIRST AMENDMENT

Despite objections that college and university-aged students should be accorded greater protection for their speech, courts have generally rejected their First Amendment claims, declining to apply the Tinker line of substantial disruption cases in a post-secondary setting.[109] Courts have similarly declined to follow a strict application of these standards in professional school cases like Keefe, where the student has been sanctioned for failure to adhere to standards of professionalism.[110] However, aggrieved students continue to bring First Amendment challenges, so courts must continue to decide whether the framework articulated in K-12 cases is appropriate in the professional school setting. The following provides an overview of the most recent decisions involving sanctions for misconduct in professional school programs and the articulated framework for deciding these cases.

A. *Tatro v. University of Minnesota*

The Minnesota Supreme Court declined to apply Tinker to the professional school setting in *Tatro v. University of Minnesota*.[111] In Tatro, Amanda Tatro challenged sanctions issued by school administrators at the mortuary science program at the University of Minnesota for comments posted on her private Facebook page.[112] A Facebook page is considered "private" if the user elects to control the audience for his or her posts, photos and information, disallowing the public from viewing his or her page. Tatro alleged that the University's rules did not authorize the University to act and that its actions were arbitrary, lacked evidentiary support, and violated her constitutional right to free speech.[113] The speech at issue included comments that she was looking forward to taking out her aggression during an upcoming embalming session; that she want[ed] to stab a certain someone in the throat with a trocar; and that she intended to spend the weekend updating her "Death List."[114] Tatro first exhausted the University's appeals process, where the Provost's Appeal Committee (PAC) upheld the sanctions in the University's final determination.[115] Next, Tatro appealed to the Minnesota Court of Appeals by writ of certiorari, raising several challenges

109. Lindsay, *supra* note 105.
110. Keefe v. Adams, 44 F. Supp. 3d 874 (D. Minn. 2014)
111. 816 N.W.2d 509, 511–19 (Minn. 2012).
112. *Id*. at 509.
113. *Id*.
114. *Id*. at 513.
115. *Id*. at 515.

to the University's imposition of disciplinary sanctions.[116] The Court of Appeals affirmed the sanctions.[117]

On appeal, the Minnesota Supreme Court declined to apply Tinker's substantial disruption test because it "[did] not meet the purpose of the [university's] sanctions here."[118] The Court reasoned that the University disciplined Tatro because her Facebook posts violated the mortuary program's rules, not because they created a substantial disruption.[119] Upon enrollment in the mortuary science program, Tatro attended an orientation program addressing proper student conduct and signed a disclosure form agreeing to abide by University rules.[120] The rules prohibited "blogging" about the anatomy lab or cadaver dissection.[121] Testimony from an instructor indicated that during orientation, students were told that blogging included Facebook and Twitter.[122] The Court concluded that the University did not violate Tatro's free speech because the program rules were "narrowly tailored and directly related" to established professional conduct standards.[123] Finally, the Minnesota Supreme Court emphasized "its decision [was] based on the specific circumstances of the case."[124]

B. *Ward v. Polite* and *Keeton v. Anderson–Wiley*

The Sixth and Eleventh Circuits recently addressed professionalism standards of students in counselor education programs. In both cases, the student was disciplined for failure to adhere to professionalism standards relating to willingness and ability to counsel clients of all sexual orientations. The Sixth Circuit case involved Julea Ward, a student who requested to refer a client to another counselor rather than "affirm" his same sex relationship.[125] Ward was ultimately dismissed from the counseling program after refusing to change her behavior due to her inability to conform to the program's requirements and the university's concern that her refusal to counsel clients involved in a same-sex relationship violated the American Counseling Association's (hereinafter the "ACA") Code of Ethics.[126] The lower court determined that the University had not violated Ward's rights in dismissing her from the counseling program.[127] The Sixth Circuit re-

116. *Tatro*, 816 N.W.2d at 515.
117. *Id*.
118. *Id*. at 520.
119. *Id*. at 512.
120. *Id*.
121. *Id*. at 513.
122. *Id*. at 510.
123. *Id*. at 521.
124. *Id*. at 524.
125. Ward v. Polite, 667 F.3d 727, 729 (6th Cir. 2012).
126. *Id*. at 730–31.
127. *Id*. at 732.

versed the lower court, holding that judgment in favor of the University was inappropriate because a jury could possibly conclude that the program impermissibly retaliated against Ward for the expression of her religious views.[128]

The Eleventh Circuit case involved a student, Jennifer Keeton, with perceived difficulties in counseling gay, lesbian, transgender and gender-queer clients.[129] Keeton, as a result, was required by the University to complete a remediation program before enrolling in a clinical program.[130] The Eleventh Circuit ultimately upheld the lower court's decision to deny Keeton's request for preliminary injunction prohibiting her dismissal from the counselor education program.[131] The Eleventh Circuit found that a counseling program can require its students to follow the ACA's Code of Ethics, and that Keeton's statements to professors and students had conveyed her intention to violate the ACA's Code of Ethics upon becoming a counselor.[132]

X. ADHERING TO VAGUE STANDARDS OF PROFESSIONALISM

A. "Narrowly Tailored and Directly Related"

The Minnesota Supreme Court in Tatro declined to apply the Tinker line of substantial disruption cases, instead allowing the University of Minnesota to sanction student speech that was in violation of program rules that are "narrowly tailored and directly related" to professional conduct standards.[133] By upholding the university's decision, Tatro comes to an opposite result from Tinker, where the court determined that sanctions violated student First Amendment rights where the speech did not cause a substantial disruption.[134] The court in Keefe used a similar analysis to Tatro, holding that dismissal for failure to comply with professional standards did not violate Keefe's constitutional rights.[135] In both cases, the college or university was able to categorize the misconduct as academic rather than disciplinary, and benefit from more lenient procedural protections.

The Court in Keefe concluded that the associate degree-nursing program incorporated nationally established nursing standards and that the college administrators could discipline students for failure to adhere to those standards.[136] Notably, neither the court nor the college administrators responsible

128. *Id*. at 741.
129. Keeton v. Anderson-Wiley, 664 F.3d 865, 865 (11th Cir. 2011).
130. *Id*.
131. *Id*. at 879–80.
132. *Id*.
133. Tatro v. Univ. of Minn., 816 N.W.2d 509, 510 (Minn. 2012).
134. *Id*.; Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 514 (1969).
135. Keefe v. Adams, 44 F. Supp. 3d 874 (D. Minn. 2014)
136. *Id*. at 888.

for Keefe's dismissal pointed to any specific established standard that Keefe violated, except to say that his behavior was simply "unprofessional."[137] In order to meet the standard articulated in Tatro, the program rules have to be "narrowly tailored and directly related" to professional standards.[138] "Narrowly tailored and directly related" requires more than formulating a program rule that generally prohibits unprofessional speech when no such rule exists in the corresponding professional standards. Tatro's decision to post indiscreet comments about the cadaver on Facebook was a clear violation of professional standards. Unlike in Keefe, the speech in Tatro was directly linked to a specific conduct standard of the mortuary profession. Also unlike in Keefe, the speech at issue was expressly prohibited by the program rules.

In Tatro, the mortuary science program at the University of Minnesota expressly prohibited blogging about the anatomy lab and cadaver dissection.[139] Moreover, students were told that the term "blogging" was intended to be broad and extended to both Facebook and Twitter.[140] The Tatro decision does not conduct an in-depth analysis of the specific professional standards that relate to the prohibition against blogging. However, it is clear from the court's discussion that the prohibition against blogging directly relates to the professional standard requiring respect and discretion in handling cadavers.[141] The University of Minnesota stressed in its brief that bodies donated to mortuary science must be treated with the "utmost respect and dignity" and that any conversation discussing a donor must be "respectful and discreet."[142] Further, the instructor for the course testified that the primary reason for the rules is that "people who have volunteered to graciously donate their bodies for the purposes of anatomy education do so with the intent to teach anatomy, not for the purposes of public display for amusement and fascination."[143] These professional standards are widely accepted and followed within the profession and made clear to students upon their entrance into the program.

B. Application of "Narrowly Tailored and Directly Related" to *Keefe*

In contrast, the associate degree nursing program at Central Lakes College reserves the right to sanction students for transgression of professional

137. *Id.*
138. *Tatro*, 816 N.W.2d at 511.
139. *Id.* at 512.
140. *Id.*
141. *Id.*
142. Respondent's Brief at 5, Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012) (No. A10-1440).
143. *Tatro*, 816 N.W.2d at 513.

boundaries as articulated in the student handbook.[144] Each student, including Keefe, was given a copy of the student handbook upon enrollment.[145] The student handbook does not elaborate on what constitutes a "transgression of professional boundaries."[146] Students were not made aware of prohibited speech during orientation or informed that statements made on Facebook or other social media sites would constitute a violation.[147]

Additionally, the boundaries referred to in Keefe's student handbook are presumably based upon the Code for Nurses, which outlines "the goals, values, and ethical principles that direct the profession of nursing and the standard by which ethical conduct is guided and evaluated by the profession."[148] However, no language in either the student handbook or the accompanying Code for Nurses prohibits the type of speech at issue in Keefe.[149] Even if Keefe's speech constitutes a "transgression of professional boundaries" and is therefore, prohibited by the student handbook, the program rule prohibiting such a transgression is not narrowly tailored to any professional standard. The Code for Nurses broadly requires that the nurse, in all professional relationships, practice with "compassion and respect for the inherent dignity, worth, and unique attributes of every individual."[150] In regards to professional boundaries, the Code for Nurses requires more specifically that when acting in a professional capacity, the nurse must "recognize and maintain appropriate personal relationship boundaries."[151] There is an argument that Keefe did not act with the requisite compassion and respect for his professional colleagues. However, it is unclear whether Central Lakes College considered his lack of compassion and respect in formulating the program rule, or in determining whether Keefe's speech constituted a violation.

Finally, the potential for academic repercussions for speech on Facebook was never explained to Keefe. Central Lakes College claims that notice was provided to Keefe, and all other students, in the form of the student handbook. However, as discussed previously, the student handbook makes no mention of prohibited speech, even in the most general sense. The student handbook certainly does not refer to Facebook or other social media websites. As a result of this omission, most students may have failed to realize that these boundaries extended to social media.

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144. Keefe v. Adams, 44 F. Supp. 3d 874, 877 (D. Minn. 2014).
145. *Id.*
146. *Id.* at 878.
147. *Id.*
148. *Id.* at 877.
149. CODE OF ETHICS FOR NURSES WITH INTERPRETIVE STATEMENTS, AMERICAN NURSES ASSOCIATION 1 (2015), *available at* http://www.nursingworld.org/MainMenuCategories/EthicsStandards/CodeofEthicsforNurses/Code-of-Ethics-For-Nurses.html.
150. *Id.* at Provision 1.
151. *Id*. at Provision 2.4.

Moreover, if concerned about the content of Keefe's Facebook posts, Central Lakes College could have made a note in his academic file, so that any potential employer or licensure board would be notified of Keefe's speech. Central Lakes College could also have disciplined Keefe for the violent nature of his posts or the threats contained in them. However, the college chose not to focus on the threatening nature of Keefe's posts in determining the appropriate punishment. Finally, Central Lakes College could have disciplined Keefe for disrupting the learning environment of fellow students. In that case, determining Keefe's punishment would not have warranted an assessment of his ability to abide by professional standards. The focus would be on the effect Keefe's posts had on his fellow students and how disruptive to the learning environment at Central Lakes College his comments had been. Also in that case, it is likely that the analysis performed by the court would bear a closer resemblance to the Tinker substantial disruption line of cases. At the very least, Tinker would have been more applicable, if the court had chosen to utilize that analytic framework.

In sum, the holding in Keefe means that professional degree programs at public colleges and universities may sanction students for almost any speech deemed offensive under the guise of upholding standards of professional conduct. Under such a vague standard, these programs can punish students for almost any speech without having to reference a professional conduct standard prohibiting the speech. To warrant discipline, the student's speech must only be determined unprofessional by college or university administrators, whom the courts are hesitant to second-guess in their academic decision-making. There is no requirement that prohibited speech be explained to the students during orientation, that the rule be adequately described in a handbook, or even be "narrowly tailored and directly related" to an established professional conduct standard.

XI. ON-CAMPUS AND OFF-CAMPUS SPEECH

Tatro, Ward, Keeton, Al-Dabagh and Keefe all have factual differences, but are distinct from the Tinker line of substantial disruption cases because these cases occurred in a setting where part of the curriculum includes preparing students to enter into in their chosen professions. Like most professions, counseling, mortuary science, medicine and nursing all have conduct requirements that must be met in order to obtain and maintain licensure. Among the primary stated reasons for disciplinary action in each of these cases included the recognition of a failure on the part of the student to meet the standards of conduct necessary for admission into the profession. Thus, the Tinker substantial disruption test was determined to be inappropriate for deciding whether the speech or conduct was protected.

If the substantial disruption test had been applied, it is likely that Keefe's speech would have been protected because it occurred off-campus. However, the distinction between off-campus and on-campus speech is less

meaningful when applied to a situation where, with the growth of social media, it is almost impossible to determine where the speech occurred. It is also less meaningful in a situation where the program is focused less on maintaining an atmosphere conducive to learning and more on preparation for a professional career. The responsibility of secondary schools to provide an environment conducive to learning is heightened by the fact that attendance is mandatory.[152] The First Amendment rights of one student must be balanced against the rights of others to be free from disruption. In contrast, adults attend professional schools voluntarily, with the expectation of entering into the profession upon graduation. For these reasons, the colleges and universities have the additional responsibility of ensuring that each student can conduct him or herself in a professional manner.

XII. THE ROLE OF PROFESSIONAL SCHOOLS IN DETERMINING FITNESS

At least one commentator has argued that colleges and universities, to the extent that they allow the students in their professional degree programs to complete the program and graduate, are "signing off on their students' fitness to enter the profession in question."[153] Focusing on whether the program rules bear a connection to established standards of professional conduct allows for much broader control over student speech. If this level of control is warranted because of an increased responsibility to prepare students for a profession, perhaps these schools should be allowed to judge fitness using professional standards as guidance, without regard for First Amendment rights.[154] In some sense, bestowing a degree upon Keefe would signal Central Lake College's belief in his fitness to enter into the profession. The argument then becomes that Keefe's unprofessional speech signaled his lack of ability to meet the standards of the profession and that, therefore, his dismissal was warranted. It does not matter that the program rules were not "narrowly tailored and directly related" to the professional standards, or that Keefe's speech was not a clear violation of program rules. All that would matter, in this instance, is that Central Lakes College no longer felt able to certify Keefe's fitness to become a nurse.

If colleges and universities have the responsibility and discretion to determine fitness, Keefe's speech would undoubtedly give the College pause. However, one might also argue that that decision is properly left to the state licensure board, not the college or university that issues the diploma. This argument is strengthened by the fact that Keefe may still enroll in another nursing program and become a licensed nurse. Central Lakes College does not have the "last word" on Keefe's ability to enter the nursing profession.

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152. Lindsay, *supra* note 105, at 1482.

153. Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 383 (2013).

154. *Id.*

In fact, even if his speech was reported to the appropriate authority, it is unclear whether Keefe would face sanctions. If Keefe's speech clearly prevented him from obtaining his nursing license, one could argue that allowing him to continue in the program would be a waste of time and resources. As is, Central Lakes College made a decision that is, arguably, not theirs to make.

XIII. SPEECH OCCURRING OUTSIDE OF A PROFESSIONAL CAPACITY

Courts should differentiate speech made in one's capacity as a professional and speech made privately in professional school cases. Speech made in one's capacity as a professional should be treated as subject to the standards of that profession. However, if a student speaks outside of his or her professional capacity, the expression should be insulated from punishment unless it is disruptive under the Tinker test. Here, the distinction between off-campus and on-campus speech has more relevance as an important factor in determining whether the speech was made in a professional capacity. Speech made on-campus that is reasonably related to professional subject matter is the most obvious example of unprotected speech. Determinations regarding off-campus speech would be more difficult, with discussions of confidential, professional subject matter (such as was the case in Tatro) falling in the category of unprotected speech. At the very least, some distinction should be made between speech made in a professional capacity and speech made privately that bears little relation to the student's professional work.

XIV. THE EMPLOYMENT SPEECH CASES

When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.[155] The respondent in *Garcetti v. Ceballos*, an assistant district attorney named Richard Ceballos, filed a §1983 suit against his supervisors for alleged retaliation as a result of a memorandum that Ceballos wrote, recommending dismissal of a case prosecuted by the district attorney.[156] The U.S. Supreme Court held that the controlling factor was not that Ceballos expressed his views inside his office rather than publicly, or that the memo concerned the subject matter of his employment.[157] Instead, the controlling factor was that Ceballos' expressions were made pursuant to his official duties.[158] If Ceballos had written the memorandum as a private citi-

155. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
156. *Id.* at 414–15.
157. *Id.* at 420–21.
158. *Id*.

zen, his expressions may have been insulated from employer discipline.

In order to determine whether public employee speech is protected, courts first determine whether the employee spoke as a citizen on a matter of public concern.[159] If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech.[160] If the answer is yes, the question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public.[161] Thus, courts weigh the interests of the employer against the First Amendment rights of the employee, performing a balancing test.[162]

Courses of study aimed at training students for professions in counseling, law mortuary science, medicine and nursing often have a clinical component. When students move beyond the classroom into clinical training for regulated professions, adherence to professional standards does more than prepare that student for practice — it protects clients. [163] The analysis of First Amendment rights in a public employment context is an example of how courts can — and sometimes do — choose to analyze First Amendment challenges in a professional school setting. Although not completely analogous, the two situations bear similarities. In fact, the Eleventh Circuit in *Watts v. Florida International University*[164] and the United States District Court for the Eastern District of Pennsylvania in *Snyder v. Millersville University*[165] applied the Garcetti framework to students who brought free speech claims against their universities. Watts involved a student, John Watts, in a Masters of Social work program who was assigned to perform a practicum at a local hospital.[166] Watts was terminated from the hospital because of an incident in which he allegedly counseled a patient that "one place [she] could find a bereavement support group was church."[167] Snyder involved a student, Stacey Snyder, enrolled in a Bachelor of Science in Education degree program who was assigned to teach at a local high school.[168] The principle of that high school barred her from

159. Connick v. Myers, 461 U.S. 138, 147 (1983).

160. *Id.*

161. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Illinois, 391 U.S. 563, 568 (1968).

162. Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

163. William Bush, Note, *What You Sign Up For: Public University Restrictions on "Professional" Student Speech After* Tatro v. University of Minnesota, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 547, 576–77 (2014).

164. Watts v. Florida Int'l Univ., 495 F.3d 1289, 1294 (11th Cir. 2007)

165. Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140, at *14–15 (E.D. Pa. Dec. 3, 2008).

166. *Watts*, 495 F.3d at 1292.

167. *Id.* at 1293.

168. *Snyder*, 2008 WL 5093140, at *3.

campus for MySpace posts mocking her faculty supervisor.[169] In order to successfully assert a First Amendment claim under Garcetti, Snyder had to show that she was speaking as a public citizen on a matter of public concern, a difficult standard to meet.[170] The students in both Watts and Snyder argued that they should not be subject to this framework because they were students at a university, not public employees.[171] The courts disagreed, stating that the students had essentially been acting in an employment context.[172] Thus, these courts were able to analyze the student's claims under the established framework for First Amendment rights in a public employee setting. While this analysis is undoubtedly restrictive, it at least provided a coherent test for evaluating the student's First Amendment rights.

XV. CONCLUSION

The widespread use of social media has necessitated the development of a new framework for addressing First and Fourteenth Amendment claims in an educational setting. Under this framework, professional school students have experienced a particularly harsh result. Professional school students' constitutional rights have been greatly limited by the application of *Tatro*'s "narrowly tailored and directly related" standard. The court in *Keefe* further limited students' constitutional rights by allowing Central Lakes College to dismiss Keefe for Facebook posts, basing their decision on a student handbook rule that bears little relation to any professional standard. Other constitutional challenges brought by professional school students under this emerging framework have been summarily denied. In contrast, courts have generally protected speech made on various forms of social media in a K-12 setting as off-campus speech. Courts have also protected speech made by a public employee speaking as a private citizen when the speech relates to matters of public concern. If courts continue down the path of *Keefe*, professional schools at public colleges and universities will have the unfettered ability to sanction students for any form of speech deemed unprofessional by administrators without regard for their constitutional rights.

169. *Id.* at *8.
170. *Id.* at *14.
171. *Id*. at *15; *Watts*, 495 F.3d at 1293.
172. *Id*. at *15; *Watts*, 495 F.3d at 1294.

WHERE THE FEDERAL GOVERNMENT FAILS STATE LEGISLATURES CAN SUCCEED: ELIMINATING STUDENT DEBT BY REGULATING FOR-PROFIT COLLEGES AND UNIVERSITIES

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INTRODUCTION

Throughout recent decades in the United States, choosing to invest in oneself through education, regardless of the costs, has been a practical way to a happier and more successful life.[1] Furthermore, such an investment is easily achieved, thanks to accessible financial support for students from the federal government.[2] The result of this reality has been an increase in the number of people seeking post-secondary educations.[3] This increase leads to more students, higher education costs, and, ultimately, increased student debt.[4] The two most common forms of federal financial aid are grants and loans.[5] In order to qualify for the largest grant programs, students have to show financial need, while student loans are available to all potential students.[6] Because of this availability, student loans are the most common form of federal aid.[7] Student loans, although long-term and low-interest, still come with the obligation of repayment and have created a massive debt burden.[8] In 2014, the total amount of debt created by student loans surpassed one trillion dollars.[9] This amount is triple the amount of student debt in 2004, and is now greater than debt caused by either credit cards or auto loans.[10] Such a debt burden creates a multitude of economic problems for students and threatens the viability of pursing higher-level education. This Note seeks to evaluate what has been identified as one of the main contributors to the problem of rising student debt: for-profit colleges and universities –specifically, the disproportionate amount of debt originating from students at for-profit institutions. At both the federal and state level, government action has been underway to establish greater regulation of for-profit institutions, but recent federal attempts at such regulations have been stymied by federal courts.[11] First, this Note will evaluate attempted regula-

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1. *See, e.g.*, Katherine Peralta, *Benefits of College Still Outweigh Costs, Fed Study Says*, U.S. NEWS & WORLD REPORT (June 24, 2014), http://www.usnews.com/news/articles/2014/06/24/benefits-of-college-still-outweigh-costs-fed-study-says.

2. *See Federal Student Loans*, SIMPLETUITION, http://www.simpletuition.com/student-loans/federal/ (last visited Mar. 1, 2015).

3. *See Fast Facts: Enrollment*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=98 (last visited Mar. 1, 2015).

4. *See* Janet Lorin, *Student Debt: The Rising U.S. Burden*, BLOOMBERG (Oct. 8, 2014, 11:48 AM), http://www.bloombergview.com/quicktake/student-debt.

5. *Fast Facts: Financial Aid*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=31 (last visited Mar. 1, 2015).

6. *Id.*

7. *See id.*

8. *See* Lorin, *supra* note 4.

9. *Id.*

10. *Id.*

11. *See infra* Part II; *see also infra* Part IV.

tions by the Department of Education, and the judicial decisions vacating their implementation. After establishing the barriers to regulation at the federal level, this Note will examine the California State Legislature's efforts to regulate for-profit institutions. Finally, this Note will conclude that although a comprehensive legislative plan at the federal level would be the ideal way to regulate for-profit institutions and reduce overall student debt, state legislatures can offer more practical and immediate assistance to these problems.

I. THE FOR-PROFIT PROBLEM

Under Title IV of the Higher Education Act of 1965 ("HEA"), Congress made financial assistance available to qualified students attending colleges and universities.[12] Students could receive either a Federal Pell Grant, which required no repayment from the student and was only available to students of demonstrated need, or federally guaranteed loans, which required repayment.[13] Originally, this financial assistance was limited to students attending non-profit colleges and universities.[14] However, in 1972 Congress amended the HEA, extending Title IV assistance to students at proprietary institutions of higher learning.[15] This change in the HEA led to an explosion of for-profit institutions ("FPIs") in the early 1980s.[16]

Due to the availability of federal assistance, FPIs have grown and expanded into a wide-ranging and profitable industry over the last thirty years.[17] The majority of FPIs are either owned by companies traded on a major stock exchange or by a private equity firm.[18] In 2009, the publicly traded companies that own one or more FPIs "had an average profit margin of 19.7 percent, [and] generated a total of $3.2 billion in pre-tax profit. . ."[19] For the most part, these profits are the result of Title IV financial assis-

12. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1232 (1965) (codified as amended in scattered sections of 20 U.S.C. §§ 1070−1099c-2, 42 U.S.C. §§ 2751−2756b (2012)).

13. *See Fast Facts: Financial Aid*, *supra* note 5.

14. Higher Education Act of 1965, § 421(a)(1).

15. Education Amendments of 1972, Pub. L. No. 92-318, § 417B(a), 86 Stat. 235, 258 (1972) (extending Title IV eligibility to students enrolled at proprietary colleges and universities).

16. *See* Mark Andrew Nelson, Note, *Never Ascribe to Malice that which is Adequately Explained by Incompetence: A Failure to Protect Student Veterans*, 40 J.C. & U.L. 159, 161 (2014).

17. *Id.*

18. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, MAJORITY COMMITTEE STAFF REPORT AND ACCOMPANYING MINORITY COMMITTEE STAFF VIEWS 2 (July 30, 2012) [hereinafter FAILURE TO SAFEGUARD].

19. *Id.*

tance, with the government investing as much as thirty-two billion dollars in FPIs in 2009.[20] FPIs are eligible to receive "up to 90 percent of their revenue from taxpayer dollars, with the additional revenue frequently coming from veterans' benefits and private student loans."[21] Additionally, the for-profit industry only continues to grow as the number of students has increased "from approximately 766,000 students in 2001 to 2.4 million students in 2010."[22]

Many believe this growth is cause for concern, because, as they see it, the rise in for-profit education has contributed to the growing student debt crisis. The Obama Administration, for example, has expressed concern about the fact that "[s]tudents at for-profit colleges represent only about 13 percent of the total higher education population, but about 31 percent of all student loans. . . ."[23] Of even more cause for concern, recent numbers suggest that students at for-profit colleges account for nearly half of all loan defaults, and "about 22 percent of student borrowers at for-profit colleges defaulted on their loans within three years. . . ."[24] The cause of this debt crisis with students at FPIs is twofold. The first cause is the large number of FPI students who fail to graduate. For example, a Senate investigation of select FPIs in 2012 showed that "more than half of the students who enrolled in those colleges in 2008-9 left without a degree or diploma within a median of 4 months."[25] Additionally, among students seeking a two-year associate's degree, sixty-three percent left without earning their degree.[26] At some FPIs the withdrawal rate tops seventy-five percent, leaving the majority of students with debt and no diploma.[27] The second cause is the failure of graduates of FPIs to obtain gainful employment. According to another study done by the Department of Education, "the majority [of programs] – 72 percent – produced graduates who on average earned less than high school dropouts."[28] Therefore, even if students enrolled at FPIs are able to defy the odds and graduate, it is still unlikely that they will find gainful employment and be able to manage their student debt.

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20. *See id.* (stating that in 2009-2010 for profit colleges and universities received $32 billion or "25 percent of the total Department of Education student aid program funds.").

21. Press Release, U.S. Dept. of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014) [hereinafter Obama Administration Takes Action].

22. FAILURE TO SAFEGUARD, *supra* note 18, at 32.

23. Obama Administration Takes Action, *supra* note 21.

24. *Id.*

25. FAILURE TO SAFEGUARD, *supra* note 18, at 1.

26. *Id.* at 2.

27. *See* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 111TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 11 (2010).

28. Obama Administration Takes Action, *supra* note 21.

II. DEPARTMENT OF EDUCATION ATTEMPTS REGULATION

Beginning in 2009, the Department of Education passed new regulations under Title IV of the HEA in order to improve program integrity and graduate-employment placement.[29] These regulations applied to all Title IV institutions, but targeted problems perpetuated by FPIs. The first set of regulations targeted the abusive recruitment techniques used by some FPIs, which were believed often to be aggressive, misleading, and deceptive ("Abusive Recruitment Regulations").[30] Then in 2010 and 2011, the Department of Education passed a series of regulations regarding the rate of gainful employment obtained by graduates of FPIs ("Gainful Employment Regulations").[31] This second set of regulations was aimed at creating specific standards that FPIs would be required to meet in order to continue gaining HEA Title IV funding.[32] The Department of Education hoped these two sets of regulations would help protect students from predatory institutions and promote responsible use of Title IV financial assistance.[33]

A. Abusive Recruitment Regulations

The recruiting practices of FPIs have been identified as one of the more malicious and indecent aspect of the for-profit system. The focus of FPI recruiting is usually on "a population of non-traditional prospective students who are often not familiar with traditional higher education and may be facing difficult circumstances in their lives."[34] Admissions representatives are often trained to target painful aspects of a potential student's life, and then exploit that emotion to enroll the student.[35] Compounding on this viciousness, FPIs will then often misrepresent information to potential students:

> Internal documents, interviews with former employees, and Government Accountability Office (GAO) undercover recordings demonstrat[ed] that many companies use tactics that misled prospective students with regard to the cost of the program, the availability and obligations of Federal aid, the time to complete

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29. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728 (May 26, 2009).

30. *Id.*

31. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616 (July 26, 2010) (codified at 34 C.F.R. § 668); Program Integrity: Gainful Employment-New Programs, 75 Fed. Reg. 66,665 (Oct. 29, 2010) (amending 34 C.F.R. §§ 600.10, 600.20); Program Integrity: Gainful Employment–Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (codified at 34 C.F.R. § 668.7).

32. *See* Nelson, *supra* note 16, at 175.

33. *See id.*

34. FAILURE TO SAFEGUARD, *supra* note 18, at 4.

35. *Id.* at 58.

> the program, the completion rates of other students, the job placement rate of other students, the transferability of the credit, or the reputation and accreditation of the school.[36]

Admission services at FPIs have also aggressively recruited veterans and service members for a variety of economic advantages.[37] Primarily, veterans have access to additional federal student aid by way of military benefits, providing FPIs with another source of potential revenue.[38] Veteran service members are such attractive prospects for FPIs that recruiting has even occurred inside wounded warrior centers and veterans hospitals, with many recruiters having "misled or lied to service members as to whether their tuition would be covered by military benefits."[39]

One possible explanation for this behavior and other recruitment problems is that FPIs frequently offer financial incentives to their admissions representatives.[40] These positions became intense sales jobs "in which hitting an enrollment quota was the recruiters' highest priority,"[41] and under many circumstances "[r]ecruiters who failed to bring in enough students were put through disciplinary processes and sometimes terminated."[42] Previously, in 1992, an amendment to the HEA eliminated enrollment-based compensation for all institutions of higher learning.[43] However, this amendment only eliminated the use of incentives and did not restrict FPIs from establishing general enrollment quota requirements for their recruiters.[44] Furthermore, in 2002 the Department of Education created twelve regulatory "safe harbors" that allowed for specific types of incentive-based compensation for recruiters.[45] These incentives could not be based directly on the number of enrolled students, but could be based on other indirect factors such as the number of recruited students that completed their educational program.[46]

The Abusive Recruitment Regulations proposed by the Department of Education sought to eliminate these payment-based incentives for FPI recruiters.[47] By adjusting regulations, the Departments proposal would have

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36. *Id.* at 4.

37. *Id.* at 68. *See also* Nelson, *supra* note 16, at 172 ("Student veterans are entitled to benefits under the Post-9/11 GI Bill which is not a Title IV program.").

38. FAILURE TO SAFEGUARD, *supra* note 18, at 68.

39. *Id.* at 70.

40. *See id.* at 48.

41. *Id.* at 4.

42. *Id.*

43. *Id.* at 48.

44. FAILURE TO SAFEGUARD, *supra* note 18, at 4.

45. *Id.* at 48.

46. 34 C.F.R. § 668.14(b)(22) (2010).

47. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728 (May 26, 2009).

eliminated the twelve "safe harbors" that had been created under the 2002 regulations.[48] In addition to eliminating incentive based compensations, the 2009 regulations broadened the definition of "misrepresentation" in order to prevent FPIs from continuing to recruit students using wrongful or misleading information.[49] These types of regulatory changes would hopefully benefit prospective students, allowing them to make unpressured, informed, and reasonable decisions regarding their education. However, these regulations would not benefit any potential graduates of FPIs struggling in the future to find gainful employment and establish viable economic stability.

B. Gainful Employment Regulations

Concerned with the rate of employment obtained by graduates of FPIs, the Department of Education imposed a series of new statutory based regulations, the last of which became effective on July 1, 2011.[50] These regulations focused on previously inactive statutory language within the HEA that requires institutions of higher learning to offer a "program of training to prepare students for gainful employment in a recognized occupation."[51] Relying on this "gainful employment" language, the Department of Education believed it had the statutory authority to monitor vocational programs, associate degree programs, and certain baccalaureate programs.[52] Thus, all of the Gainful Employment Regulations would apply broadly to any educational program that intended to prepare students for "gainful employment." However, the regulations were motivated out of concerns surrounding poor performing programs at FPIs,[53] and the Department of Education sought to implement "regulatory benchmarks that measured FPI performance against objective metrics of their graduates' employment process."[54]

The regulatory benchmark instituted by the Department was a debt measure rule ("Debt Measure Rule"). This Debt Measure Rule presented a debt-to-income standard, which determined if an educational program did a successful job of preparing a student for employment, "by comparing a

48. Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 438 (D.C. Cir. 2012) [hereinafter Duncan I].

49. *Id.* at 439.

50. Program Integrity: Gainful Employment−Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (codified at 34 C.F.R. § 668.7).

51. 20 U.S.C. § 1001(b)(1) (2012).

52. The regulations could not apply to baccalaureate programs offered by accredited FPIs offering said programs after January 1, 2009. 20 U.S.C. § 1002(b)(1)(A)(ii) (2012).

53. *See*, *e.g.*, Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,671 (July 26, 2010) (codified at 34 C.F.R. § 668).

54. Nelson, *supra* note 16, at 175.

program completer's typical educational debt and income levels."[55] Under this standard, for a program to be eligible for Title IV funds, a typical student's annual loan payment must represent "no more than 12 percent of annual earnings or 30 percent of discretionary income, using median loan debt and mean or median earnings."[56] The Debt Measure Rule also maintained a debt repayment standard.[57] This standard measured educational programs on whether or not students in their programs are repaying their loans, regardless of completion.[58] Under this standard, students enrolled in FPI programs must repay their Federal loans at an aggregate rate of at least thirty-five percent.[59] If an FPI failed to meet this standard in three out of four years their eligibility for Title IV funding would be jeopardized.[60] Finally, the Gainful Employment regulations also had a disclosure rule. This rule required FPIs to disclose and report all information necessary to conform to the standards under the Debt Measure Rule.[61]

Finally, the Gainful Employment Regulations also implemented a rule that required Department of Education approval for additional programs instituted at FPIs ("Program Approval Rule").[62] Under this rule, the Department could have requested that FPIs formally apply for approval and be evaluated "on several factors including whether the number of additional educational programs being added is inconsistent with the institution's historic programs offerings, growth, and operations."[63] Another primary factor would have considered if an FPI has demonstrated "financial responsibility and administrative capability in operating its existing programs."[64] The focus on these factors would have allowed the department to conclude whether or not the FPI was offering a new educational program that offers the potential for "gainful employment in a recognized occupation."[65]

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55. *Gainful Employment Debt Measures: Debt-to-Earnings Ratios*, TEX. GUARANTEED STUDENT LOAN CORP. (2012), *available at* http://www.tgslc.org/pdf/GE-Debt-to-Earnings-Ratios.pdf.

56. *Id.*; *see also* Program Integrity Issues: Gainful Employment, 75 Fed. Reg. at 43,618.

57. Program Integrity: Gainful Employment−Debt Measures, 76 Fed. Reg. 34,386, 34,395 (June 13, 2011) (codified at 34 C.F.R. § 668.7).

58. *Id.*

59. *Id.*

60. *Id.* at 34,405.

61. Program Integrity Issues: Final Rule, 75 Fed. Reg. 66,832, 66,835−36 (Oct. 29, 2010) (codified at 34 C.F.R § 668.6(b)).

62. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,665 (July 26, 2010) (codified at 34 C.F.R. § 668).

63. Press Release, U.S. Dep't of Educ., Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers (Oct. 28, 2010).

64. Nelson, *supra* note 16, at 177 (quoting 34 C.F.R. § 600.20(d)(1)(ii)(E) (2010)).

65. 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), 1002(c)(1)(A) (2012).

Both the Gainful Employment Regulations and the Abusive Recruitment Regulations offered significant and meaningful changes to the landscape of the For-Profit education industry. However, because FPIs believed their creation was unlawful, the regulations would face aggressive legal challenges.[66] Ultimately, the fate of the Department of Education's regulations would ultimately be decided in the federal courts.

III. REGULATIONS REJECTED

A. *Association of Private Sector Colleges and Universities v. Duncan* – June 5, 2012

After being approved by the Department of Education, both the Abusive Recruitment Regulations and the Gainful Employment Regulations were challenged on legal grounds by the Association of Private Sector Colleges and Universities ("APSCU"). Each regulation was the subject of individual lawsuits filed in the DC Circuit. In the first lawsuit, the APSCU sued to have the Abusive Recruitment Regulations invalidated.[67] Within this lawsuit, the regulations expanding the definition of misrepresentation ("Misrepresentation Regulations") and the regulations removing protections for compensation incentives ("Compensation Regulations") were specifically targeted.[68] At the District Court level both the Misrepresentation Regulations and Compensation Regulations were upheld.[69] This District Court ruling was appealed to the DC Circuit Court of Appeals producing the decision in *Association of Private Sector Colleges and Universities v. Duncan* ("*Duncan I*") on June 5, 2012.[70]

On appeal the APSCU argued, *inter alia*, that the Abusive Recruitment Regulations exceeded the limits of the Department of Education's authority under the HEA.[71] In determining the extent of the administrative agency's statutory authority, the court applied a *Chevron*[72] analysis.[73] The court determined that the Misrepresentation Regulations exceeded the Depart-

66. *See* Duncan I, 681 F.3d 427 (D.C. Cir. 2012); *see also* Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 147 (D.D.C. 2012) [hereinafter Duncan II].

67. Duncan I, 681 F.3d at 437.

68. *Id.*

69. *Id.* at 440.

70. *Id.*

71. *Id.*

72. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). A Chevron analysis is a two-part analysis where the court first determines whether or not the applicable statue is clear or contains the unambiguous expressed intent of Congress. *Id.* If the intent of Congress is not clear, then the court determines if the agency's interpretation is based on a permissible construction of the statute. *Id.*

73. Duncan I, 681 F.3d 427, 441 (D.C. Cir. 2012)

ment's statutory authority under the HEA.[74] The court pointed out the term "substantial misrepresentation" has an unambiguous meaning within the context of the HEA, meaning "[a]ny false, erroneous or misleading statement."[75] However, the new regulations attempted to expand the definition of "misrepresentation" to mean "any statement which has the likelihood or tendency to deceive or confuse."[76] It was the court's view that this extended definition fell outside the scope and purpose of the HEA's unambiguously defined "substantial misrepresentation."[77] Therefore, the court said, the new definition in the Misrepresentation Regulations went beyond Congress's intentions in enacting the HEA and could not be considered valid.[78]

Moving on to the Compensation Regulations, the court found that the regulations were not a violation of the Department's statutory authority under the HEA.[79] Instead, the court held the regulations invalid on procedural grounds, saying that two aspects of the Compensation Regulations were arbitrary and capricious for want of reasoned decision-making.[80] First, the court addressed the elimination of the safe harbor that allowed for compensation based on students "completing their educational programs, or one year of their educational programs."[81] Out of the twelve safe harbors that the Compensation Regulations eliminated, this graduation or completion based safe harbor was the only one the court determined to be arbitrary and capricious.[82] The court said that eliminating this safe harbor exception lacked proper explanation, claiming the Department's explanation was "brief", "fleeting", and "insufficient."[83] Second, the court evaluated the Department's response to concerns that removing the protections for compensation based incentives "could have an adverse effect on minority enrollment."[84] The court determined the Department "fell short" and "failed to address" the concerns.[85] As a result of these two failures, the court reversed, in part, the judgment of the district court and remanded the issue with instructions for the Department to better explain its reasoning behind these two aspects of the Compensation Regulations.[86]

The decision in *Duncan I* eliminated much of the practical impact of the

74. *Id.*
75. *Id.* at 452.
76. *Id.*
77. *Id.* at 452−53.
78. Duncan I, 681 F.3d at 452−53.
79. *Id.* at 442.
80. *Id.* at 447.
81. *Id.* at 448 (quoting 34 C.F.R. § 668.14(b)(22)(ii)(E) (2010)).
82. *See id*. at 447–49.
83. Duncan I, 681 F.3d at 448.
84. *Id.*
85. *Id.* at 448−49.
86. *Id.* at 449.

Abusive Recruitment Regulations. A later section of this essay will examine the second blow to these regulations by discussing the most recent ruling on the remanded portion of *Duncan* I regarding Compensation Regulations.[87]

B. *Association of Private Sector Colleges and Universities v. Duncan* – June 30, 2012

A second lawsuit filed by the APSCU targeted the Gainful Employment Regulations created by the Department of Education. The district court for the District of Columbia decided *Association of Private Sector Colleges and Universities v. Duncan* ("*Duncan II*") only weeks after the decision in *Duncan I*.[88] Just as in *Duncan I*, the district court in *Duncan II* was considering whether or not the Department of Education exceeded its statutory authority under the HEA in promulgating the Gainful Employment Regulations.[89] The focus of the court's decision was on the Debt Measure Rule within the Gainful Employment Regulations.[90] In evaluating the Debt Measure Rule, the district court decided that the Gainful Employment Regulations were "a reasonable interpretation of an ambiguous statutory command," and that, therefore, the Department of Education did not exceed its statutory authority under the HEA.[91] The district court did find, however, a portion of the Debt Measure Rule invalid on procedural grounds.[92] As discussed in Part II.B, the Debt Measure Rule maintained two standards, a debt to income standard and a loan repayment standard.[93] The district court held that the Department acted arbitrarily and capriciously when it promulgated the debt repayment standard.[94] Furthermore, the district court determined that the remaining parts of the Gainful Employment regulations were not severable from the Debt Measure Rule, vacating virtually the entire regulation.[95]

In evaluating the Debt Measure Rule the district court determined that the facts and reasoning provided by the Department of Education supported the establishment of the debt-to-income standard. However, in evaluating the debt repayment standard, the court determined the standard "was not based upon any facts at all," and "[n]o expert study or industry standard

87. *See infra* Part III.A.1.
88. Duncan II, 870 F. Supp. 2d 133 (D.D.C. 2012).
89. *Id.* at 145.
90. *Id.*
91. *Id.* at 149.
92. *Id.* at 154
93. *See supra* Part II.B.
94. *Duncan II*, 870 F. Supp. 2d at 154.
95. *Id.* at 155. One small portion of the regulations requiring FPIs to disclose debt measure information to potential students was not vacated. *Id.*

suggested that the rate selected by the department would appropriately measure whether a particular program adequately prepared its students."[96] As a result, the district court concluded the debt repayment standard was the result of arbitrary and capricious decision-making.[97] Despite the separate determinations for the two standards, the district court said that they could not be ruled on separately "[b]ecause the Department has repeatedly emphasized the ways in which the debt repayment and debt-to-income standards were designed to work together."[98] Thus, the entire Debt Measure Rule was vacated.[99] The district court also determined the Program Approval Rule within the Gainful Employment regulations was not severable from the Debt Measure Rule.[100] The reasoning was that the purpose of the Program Approval Rule was to keep the relevant institutions from circumventing the Debt Measures Rule.[101] The court described the Program Approval Rule as "centered on" the Debt Measures Rule, and for that reason, it was also vacated and remanded.[102]

This decision, along with decision in *Duncan I* effectively blocked the Department of Education's attempt to solve many of the student debt problems related to FPI. The Department of Education filed a motion to amend the judgment in *Duncan II*, but the motion was denied.[103] *Duncan I* and *II* reveal the complex difficulties in attempting to implement mass administrative regulations at the federal level. Additionally, there has been no significant legislative action in response to *Duncan I* and *II* to address the student debt problems created by FPIs.[104] Instead, the only federal response has been attempts by the Department of Education to rework the remanded regulations from *Duncan I* and *II*.[105]

IV. RESPONDING TO *DUNCAN I* AND *II*

A. Editing the Abusive Recruitment Regulations

The decision in *Duncan I* remanded the Abusive Recruitment Regula-

96. *Id.* at 154.

97. *Id.* ("In setting the debt repayment rate, the Department picked a palatable figure. Because the Department has not provided a reasonable explanation of that figure, the court must conclude that is was chosen arbitrarily.").

98. *Id.*

99. Duncan II, 870 F. Supp. 2d at 154.

100. *Id.* at 158.

101. *Id.*

102. *Id.*

103. Ass'n of Private Sector Colls. & Univs. v. Duncan, 930 F. Supp. 2d 210 (D.D.C. 2013).

104. Legislation has been passed to help remedy the problems surrounding FPIs and Veteran students. *See* Nelson, *supra* note 16, at 186.

105. *See infra* Part III.

tions to the Department of Education so that it could provide sufficient explanation and show that the Compensation Regulations are not arbitrary and capricious actions. Specifically, the court in *Duncan I* ordered the Department, "(1) explain its elimination of the safe harbor for graduation-based compensation and (2) respond to commenters' concerns about the effects of the Compensation Regulations on diversity initiatives."[106] The Department of Education responded by amending sections of the preamble to the Abusive Recruitment Regulations. The Department's additions to the preamble focused on the already existing ban on enrollment-based compensation established by the HEA.[107] The preamble additions argued that "[b]ecause a student cannot successfully complete an educational program without first enrolling in the program, the compensation for securing program completion requires the student's enrollment as a necessary preliminary step."[108] Therefore, the Department argued, the HEA ban on enrollment-based compensations also requires a ban on graduation-based compensations.[109] Additionally, the Department was concerned that completion-based compensation encourages student enrollment in programs without concern for a student's academic ability or for the quality of the program.[110] Instead, a recruiter might only be concerned about how quickly and easily a student could complete a program, thus giving a possible incentive for recruiters to lower a student's standards and misrepresent programs.[111] The Department also acknowledged that completion incentives may have caused some schools to "have devised and operated grading policies that all but ensure that students who enroll will graduate, regardless of their academic performance."[112]

The Department also added language to the preamble that addressed the concern that the Compensation Regulations would damage existing incentives that encouraged recruitment of minority students and the development of a diverse student body.[113] The additions said:

> The incentive compensation ban is designed, among other things, to keep students of all races and backgrounds from being urged or cajoled into enrolling in a program that will not best meet their needs. Minority and low income students are often the targeted

106. Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 14-277, 2014 U.S. Dist. LEXIS 139970, at *7–8 (D.D.C. Oct. 2, 2014) [hereinafter Duncan III].

107. Program Integrity Issues, 78 Fed. Reg. 17,598 (Mar. 22, 2013); *see also* 20 U.S.C. § 1094(a)(20)(2011).

108. Program Integrity Issues, 78 Fed. Reg. at 17,599.

109. Duncan III, 2014 U.S. Dist. LEXIS 139970 at *9.

110. *Id.*

111. *Id.*

112. Program Integrity Issues, 78 Fed. Reg. at 17,599.

113. *Id.* at 17,600.

> audience of recruitment abuses, and our regulatory changes are intended to end that abuse. [114]

These limited explanations for why graduation- and diversity-compensation should be eliminated were the only additions to the Abusive Recruitment Regulations. Suffice to say, these limited changes by the Department to the regulation's preamble did not prevent the APSCU from once again bringing suit against the Abusive Recruitment Regulations.

1. *Association of Private Sector Colleges and Universities v. Duncan* – October 2, 2014

The APSCU challenged the Department of Education's amended Abusive Recruiting Regulations arguing "that the Department has once again failed to support its regulations with record evidence and substantiated assertions."[115] Meanwhile, the Department argued that it had satisfied the requirements of the D.C. Circuit Court's "limited remand."[116] On October 2, 2012, the district court for the District of Columbia decided *Association of Private Sector Colleges and Universities v. Duncan* ("Duncan III") and once again found the regulations to be invalid.[117] First, the court said that the Department had "failed to explain and substantiate its wholesale ban on graduation-based compensation."[118] The court's reasoning focused on how the Department had been ordered to provide "some better explanation" and "point to evidence" to support its assertions.[119] The court emphasized repeatedly that the rationale in the amended preamble did not include any kind of supporting evidence.[120] While the preamble did identify a number of potential concerns for graduation-based compensation, the Department's additions did not, the court said, "identify factual grounds in the record for its concerns."[121] Consequentially, the court held the regulation to be invalid and was remanded again to the Department of Education.[122]

The court also evaluated the Department's attempt to suppress concerns that the Compensation Regulations would negatively affect efforts by FPIs to establish diverse student bodies. The APSCU argued that the amended preamble only repeated rationales that had already been rejected by the

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114. *Id.*
115. Duncan III, No. 14-277, 2014 U.S. Dist. LEXIS 139970, at *1 (D.D.C. Oct. 2, 2014)
116. *Id.* at *2.
117. *Id.*
118. *Id.* at *15.
119. *Id.* at *16.
120. Duncan III, 2014 U.S. Dist. LEXIS 139970 at *1, *19–20, *22.
121. *Id.* at *20.
122. *Id.* at *22.

D.C. Circuit Court.[123] Agreeing with the APSCU, the court said the Department had not furnished "an adequate response to commenters' concerns about the impact of its regulations on minority recruitment."[124] Instead, the court said the Department's amendments to the regulation's preamble were non-responsive and simply restated its statutory authority to eliminate enrollment-based compensation.[125] The Department was specifically ordered "to address the potential effect on minority recruitment, i.e., whether minority enrollment could decline under new regulations."[126] The court found the amended preamble did not attempt to answer such specific questions. For that reason, the court held the Compensation Regulations to be invalid and remanded the matter back to the Department of Education.[127]

It is unclear whether or not the Department was unable to meet the demands on remand or just simply failed in its attempt. Regardless, the actions of the *Duncan III* court are another example of the judicial barriers to effective regulation of FPIs by the Department of Education. The final result is a third case showing the reluctance of federal courts to allow administrative agencies to create substantial regulation of FPIs. The Department of Education may well have believed that it would be able to rely on its administrative authority and on judicial deference to that authority in creating regulation of FPIs. However, *Duncan III* and its ancestry clearly show this is not the case.

B. 2014 Gainful Employment Regulations

On March 14, 2014, the Obama Administration announced that the Department of Education was offering another set of proposed regulations focused on the gainful employment of FPI graduates ("2014 Gainful Employment Regulations").[128] These new regulations made significant changes in the previous regulations that had been proposed in 2011. The 2014 Gainful Employment Regulations still contain a debt measure rule, however the only standard requirement under the rule is the debt-to-income standard.[129] The previous Gainful Employment Standards also contained a loan repayment standard in addition to the debt-to-income standard.[130] As

123. *Id.*
124. *Id.* at *15.
125. Duncan III, 2014 U.S. Dist. LEXIS 139970 at *23.
126. *Id.* at *24.
127. *Id.* at *24–25.
128. Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31 2014) (codified at 34 C.F.R. §§600, 668).
129. *Id.* at 64,891.
130. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,616−19 (July 26, 2010) (codified at 34 C.F.R. §668) (requiring students repay their Federal loans at an aggregate rate of at least 30 percent).

discussed in Part III.B, the court in *Duncan II* primarily remanded the previous Gainful Employment Regulations because it determined the loan repayment standard to be the result of unreasoned decision-making.[131] The Department of Education originally included a loan repayment standard in the 2014 Gainful Employment Regulations, but it was removed during the Department's approval process.[132] Furthermore, the existing debt-to-income standard has been lowered in the 2014 Gainful Employment Standards.[133] Under the previous regulations, the debt-to-income standard for FPIs required that an institution's graduates have annual debt payments that were twelve percent or less of their average annual income or thirty percent or less of their discretionary income.[134] Under the 2014 Gainful Employment Regulations, the rates under the debt-to-income standard have been lowered to eight percent and twenty percent, respectively.[135] Finally, the 2014 Gainful Employment Standards also do not contain any version of the Program Approval Rule that had been included in the previous regulations.[136]

The 2014 Gainful Employment Standards were approved by the Department of Education on October 31, 2014, and they become effective on July 1, 2015.[137] By removing the loan repayment standard from the Debt Measure Rule, the Department has given the 2014 Gainful Employment Standards a much better chance of being upheld by the courts.[138] However this advantage is gained at a significant cost. Now the Debt Measure Rule considers only graduates of FPIs; it will not consider the debt of students who withdraw and never complete their program. Considering that around half of all students enrolled at FPI will not complete the program,[139] the 2014 Gainful Employment Standards do not hold FPIs accountable for a significant portion of their students. Given their lack of degrees, students who withdraw from FPIs are also the most likely to default on their student loans.[140] As a result, the new regulations will not create standards addressing the most significant population contributing to the overall student debt

131. *See supra* Part III.B.

132. Program Integrity: Gainful Employment, 79 Fed. Reg. at 64,916.

133. *Id.* at 64,891.

134. Program Integrity: Gainful Employment, 75 Fed. Reg. at 43,616.

135. Under the 2014 Regulations the debt to income standard was referred to as the debt to earnings. Program Integrity: Gainful Employment, 79 Fed. Reg. at 64,891.

136. *Id.* at 64,991.

137. *Id.* at 65,037.

138. The loan repayment standard was the only portion of the Gainful Employment Standards the District Court found to be invalid on its face. The remaining portions were found invalid only because they were not severable from the loan repayment standard. Duncan II, 870 F. Supp. 2d 133, 158 (D.D.C. 2012).

139. FAILURE TO SAFEGUARD, *supra* note 18.

140. *Id.* at 118–19.

crisis. The APSCU has filed suit against the 2014 Gainful Employment Regulations, saying, "[i]nstead of correcting the flaws that rendered its 2011 rule invalid, the Department's new rule only repeats and exacerbates them."[141] Inevitably, yet another *Duncan* case will be decided soon, but regardless of the outcome, the regulation's potential effect has already been seriously limited.

V. CALIFORNIA LEGISLATIVE REGULATIONS

Turning to the evaluation of state regulation of FPIs, this Note will focus on and examine the California's legislative and regulatory history of private postsecondary institutions. While many states have been involved in significant attempts to regulate FPIs,[142] the for-profit problem has been a significant one for the state of California.[143] During the rise of FPIs in the 1980s, California gained the reputation of being the "diploma mill capital of the world."[144] Despite various regulatory attempts, California has not been able to eliminate this reputation and, as of 2011, still had the highest number of "diploma mills" of any state.[145] Part of this reputation could be due to the sheer size of California's private education sector. As of 2013, California's regulatory body for private postsecondary institutions oversaw 1,960 institutional locations serving a total of 316,000 students.[146] Of the 316,000 total students, 255,000 were enrolled in vocational programs offering diplomas or certification.[147] These numbers show the potential impact state regulation of FPIs could have in California. Additionally, because of the state's historical struggles with the for-profit industry, if California's most recent regulations are found to be effective, then states that have encountered fewer difficulties with FPIs might also be able to promulgate effective regulations. Given these factors, an examination of California's actions allows for the strongest study of whether or not state legislatures are in the position to offer practical and immediate assistance in regulating

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141. Press Release, Ass'n of Private Sector Colls. & Univs., APSCU Files Suit Against Anti-Student Gainful Employment Regulation (Nov. 6, 2014).

142. *See* Thomas L. Harnisch, *Changing Dynamics in State Oversight of For-Profit Colleges*, AM. ASS'N OF STATE COLL. & UNIV. (Apr. 2012), *available at* http://www.aascu.org/uploadedFiles /AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/Policy_Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf.

143. *Cal. Private Postsecondary Educ. Act*: *Hearing before the Cal. Subcomm. on Educ. Analysis*, 2013−2014 Legis., 1–2 (Apr. 30, 2014).

144. *Id*.

145. Eyal Ben Cohen & Rachel Winch, *Diploma and Accreditation Mills: New Trends in Credential Abuse*, VERIFILE ACCREDIBASE (Mar. 2011), *available at* http://www.icde.org/filestore/ Resources/Reports/NewTrendsinCredentialAbuse.pdf.

146. *Cal. Private Postsecondary Educ. Act Hearing*, *supra* note 143, at 3.

147. *Id.*

FPIs.

A. Maxine Waters School Reform and Student Protection Act of 1989

California's regulation of FPIs stretches back into the late 1980's.[148] During this time FPIs, along with all other education institutions, were regulated by the California State Department of Education.[149] In order to promote the integrity of degrees issued by private postsecondary schools in the state, California created a twenty-member body to oversee specifically degrees offered by private colleges and universities.[150] This body, called the Council for Private Postsecondary Education ("CPPVE") came into existence in 1989.[151] Later that year, California passed the Maxine Waters School Reform and Student Protection Act of 1989; the objectives of the act were "to protect students and reputable institutions, ensure appropriate state control of business and operation standards, ensure minimum standards for educational quality, prohibit unfair dealing, and protect student rights."[152] The Act was also concerned with the fact that many students received funding from state or federal loans that they were unable to repay "because they were unable to obtain the proper educational preparation for jobs."[153] Strikingly, the Act attempted to address many of the same concerns the Department of Education was trying to regulate twenty-five years later.

Unlike the 2014 Department of Education regulations of FPIs, the Maxine Waters Student Protection Act included minimum program-completion rates as well as minimum-employment rates for FPIs as well as all private postsecondary institutions in California.[154] Under the Act, sixty percent of students who start a program at a private postsecondary institution must complete it during the specified duration of the program.[155] Additionally, at least seventy percent of students who complete their program had to be employed within six months in a position for which their program was designed.[156] These regulations were enforced by the CPPVE, and if an institution failed to meet these standards then it could be subject to various

148. BUREAU FOR PRIVATE POSTSECONDARY EDUC., http://www.bppe.ca.gov/about_us/history.shtml (last visited Apr. 15, 2015).

149. *Id.*

150. *Id.*

151. *See* BENJAMIN M. FRANK, BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUC., INITIAL REPORT OF THE OPERATION AND ADMINISTRATIVE MONITOR 9 (Sep. 26, 2005), *available at* http://bppe.ca.gov/about_us/op_monitor_report.pdf.

152. Maxine Waters School Reform and Student Protection Act of 1989, CAL. EDUC. CODE § 94850(d) (2005).

153. *Id.* at § 94850(c).

154. *Id.* at §94854(a).

155. *Id.*

156. *Id.*

types of sanctions.[157] The most serious sanction required an institution to cease offering programs in violation of the standards.[158] More commonly, institutions subject to sanctions could be required to maintain compliance reports conducted by an independent certified public accountant.[159] Thus, the Act set high standards of performance for all private postsecondary institutions as well as methods of enforcement to ensure accountability.

However, ultimately the Act only had a moderate amount of success. As noted earlier, the CPPVE had briefly been in existence before the Act took effect.[160] After the Act was passed, the CPPVE and its governing rules attempted to adopt the rules and regulations of the Act.[161] The result was, "a fragmented structural framework with numerous duplicative and conflicting statutory provisions."[162] Adding to these functional problems were the realistic difficulties inherent in the Act's regulatory standards. The sixty percent completion standard and seventy percent employment standard were too high. Many traditional colleges and universities in California would not be able to meet such high standards.[163] In particular, some of California's public community colleges would be unable to meet the Acts high standards, but such schools were not subject to such standards due to their public status.[164] Despite these problems, the Act stayed in place with limited changes until 2007 when the legislation expired.[165] In 2006, the California Legislature passed a bill that would extend the Act's expiration date, but California Governor Arnold Schwarzenegger vetoed the legislation.[166] Governor Schwarzenegger believed that the legislation then in effect was ineffective and called for legislative overhaul and comprehensive reform.[167] The legislation also ended the operation of the California Bureau for Private Postsecondary and Vocational Education, which had replaced the CPPVE in 1997, leaving no state regulatory agency to oversee FPIs and other private postsecondary institutions operating in California.[168]

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157. CAL. EDUC. CODE § 94854(f)–(g) (2005).

158. *Id.* at § 94854(g).

159. *Id.* at § 94854(f).

160. *See* FRANK, *supra* note 151, at 9.

161. *See Bureau for Private Postsecondary History, supra* note 148.

162. *Id.*

163. *See* WILLIAM G. TIERNEY & GUILBERT C. HENTSCHKE, NEW PLAYERS, DIFFERENT GAME 124 (2007).

164. *See id.*

165. *See* ANNUAL REPORT TO THE LEGISLATURE AND CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUC. 1 (2006), *available at* http://www.dca.ca.gov/publications/05_06_bppve_annrpt.pdf.

166. *See id.*

167. *See id.*

168. *See* Frank, *supra* note 151, at 22.

As a result, the California Legislature worked on creating new legislation and eventually passed the California Private Postsecondary Education Act of 2009, signed into law by Governor Schwarzenegger on October 11, 2009.[169]

B. California Private Postsecondary Education Act of 2009

The California Private Postsecondary Education Act of 2009 ("CPPEA") established the Bureau for Private Postsecondary Education ("BPPE") to oversee the regulation of all private postsecondary institutions, including FPIs, operating in California.[170] Hoping to eliminate the functional problems of the past, the BPPE became the clear regulatory authority for FPIs. The Bureau began its operation on January 1, 2010[171] with the intent to fulfill the following goals outline in the CPPEA:

> (1) Minimum educational quality standards and opportunities for success for California students attending private postsecondary schools in California.
>
> (2) Meaningful student protections through essential avenues of recourse for students.
>
> (3) A regulatory structure that provides for an appropriate level of oversight.
>
> (4) A regulatory governance structure that ensures that all stakeholders have a voice and are heard in policymaking by the new bureau created by this chapter.
>
> (5) A regulatory governance structure that provides for accountability and oversight by the Legislature through program monitoring and periodic reports.
>
> (6) Prevention of the deception of the public that results from conferring, and use of, fraudulent or substandard degrees.[172]

While these goals are directed toward all private postsecondary institutions, including FPIs, they show the CPPEA's intent to establish accountability for substandard institutions. Additionally, the CPPEA can be seen as primarily concerned with the regulation of FPIs given the types of institutions exempt under the act.[173] For example, under the law an institution is exempt if it is "owned, controlled, and operated and maintained by a religious organization lawfully operating as a nonprofit religious corporation. . ."[174]

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169. CAL. EDUC. CODE § 94800.5 (2009).

170. *See id.*

171. *See* BUREAU FOR PRIVATE POSTSECONDARY & EDUC., http://www.bppe.ca.gov/ (last visited Apr. 15, 2015).

172. CAL. EDUC. CODE § 94800 (2009).

173. *Id.* at § 94874.

174. *Id.* at § 94874(e)(1).

Also exempt are institutions that operate as a "nonprofit benefit corporation."[175] Finally, any institution with education programs costing $2,500 or less, with no part paid through state or federal aid, is also exempt.[176] These exemptions illuminate the exact scope of the CPPEA and show a clear legislative intent to promulgate regulations directed at FPIs.

Despite its lofty goals, some considered the CPPEA to be a hollow piece of legislation that would be less effective than the preceding regulatory structure.[177] As noted earlier, the CPPEA ended a two-year lapse of oversight after the expiration of previous legislation in 2007. During the two-year lapse there were two attempts made by members in the California legislature to pass bills that would re-establish a regulatory scheme similar to the one that existed in 2007.[178] One of these bills was held in committee, while the other was ultimately passed by the legislature and vetoed by Governor Schwarzenegger.[179] In addition to being burdened by the politics of the legislative process, some believed the CPPEA was adversely affected by significant lobbying of FPI groups.[180] FPI groups "donated at least $197,700 in 2009 and 2010 to the campaigns of Assembly members and state senators who were in office when the law was passed."[181] However, this figure is a very small fraction of the over sixty million dollars estimated to have been contributed toward Assembly Seat members in the 2010 election cycle.[182] While it is difficult to determine how the two-year lapse and lobbying by FPI groups affected the CPPEA, it is not difficult to determine that the CPPEA had some obvious shortcomings.

The CPPEA eliminated the harsh completion and employment standards that existed under the Maxine Waters Act, but did not create any new reasonable completion- or employment-standards. The new regulations under the CPPEA instead focused on ensuring that prospective students of FPIs received sufficient and accurate information about the educational programs being offered. In order to do so, the CPPEA required FPIs to provide

175. *Id.* at § § 94874(h).

176. *Id.* at § 94874(f).

177. *See* Nanette Asimov & Stephanie Lee, *Protections have been weakened for-profit institutions' students*, S.F. CHRON., July 26, 2014, http://www.sfgate.com/ education/article/Protections-have-been-weakened-for-profit-5649498.php.

178. CAL. ASSEM. COMM. ON HIGHER EDUC., ANALYSIS OF A.B. 48, 2009−2010 Legis. 20 (2010).

179. *Id.*

180. *See* Asimov & Lee, *supra* note 177.

181. *Id.*

182. *See Find Contributions*, MAPLIGHT, http://maplight.org/california/contributions? s=1&office_party=Assembly%2CDemocrat%2CRepublican%2Cindependent &election=2010&business_sector=any&business_industry=any&source=All (last visited Apr. 15, 2015) (saying in 2010 election cycle for California Assembly Members alone there were 52,840 contributions totaling $61,571,279).

students with a "School Performance Fact Sheet" before enrollment.[183] Information required to be on the Fact Sheet included: completion rate, placement rates, license examination passage rates, salary or wage information, new program data, and a description about how said figures were determined.[184] However, the Fact Sheet lacked important information, most notably information about whether or not the FPI in question was accredited.[185] Additionally, the CPPEA also contained several loopholes that would allow some FPIs to exploit or disguise information that would be critical to prospective students. For example, FPIs were required to disclose salary data for the careers associated with particular programs offered, but the salary data provided did not have to be the salaries of the institution's own graduates.[186] In fact, the statute requires FPIs to disclose the average salaries of their graduates only "if the institution or a representative of the institution makes any express or implied claim about the salary that may be earned after completing the educational program."[187] Finally, the CPPEA also contained a section of exemptions that could result in some FPIs not being subject to the Fact Sheet regulations or any oversight regulation implemented by the BPPE.[188] The California legislature was able to overhaul its regulation structure and centralize authority under the BPPE, but the CPPEA as enacted in 2009 failed to present a comprehensive regulatory scheme.

1. 2012 California Assembly Bill 2296

The first amendment to the CPPEA came in 2012 and focused on fixing the oversights and loopholes within the School Performance Fact Sheet regulation. Assembly Bill 2296 (A.B. 2296) was signed into law by Governor Brown on September 26, 2012, and it enacted requirements that increased the information FPIs and other private institutions must provide to prospective students.[189] Most significantly, A.B. 2296 required FPIs and other private postsecondary institutions offering associate, baccalaureate, masters or doctoral programs to include information regarding the institution's accreditation, thereby fixing a clear oversight of the original Fact

183. CAL. EDUC. CODE § 94910 (2009).
184. *Id.* at § 94910(a)−(e).
185. *See id.*
186. *Id.* at § 94910(d)(1).
187. *Id.* at § 94910(d)(2).
188. *Id.* at § 94874 (2009) (identifying ten types of institutions that are to be except from regulation with the CPPEA or promulgated by the BPPE).
189. *Notice to Licensees of Changes to Statute Governing Private Postsecondary Educational Institutions,* BUREAU FOR PRIVATE POSTSECONDARY EDUCATION (2009), http://www.bppe. ca.gov/lawsregs/ab2296_notice.pdf; *see also* A.B. 2296, 2011−12 Leg. Sess. (Cal. 2012).

Sheet requirements within the CPPEA.[190] Additionally, A.B. 2296 removed § 94910(d)(1) and (d)(2) from the CPPEA. Those two subsections had created the loopholes allowing FPIs to report misleading information regarding employed graduate's salaries.[191] Concurrently, A.B. 2296 amended the statutory definition for "Graduates employed in the field." The term now means "graduates who are gainfully employed in a single position for which the institutions represents the program prepares its graduates within six months after a student completes the applicable educational program. . ."[192] These concurrent changes ensure that the graduate salary information reported by FPIs is legitimate and is based on the actual salaries of an institution's graduates in their respective fields of employment. Finally, A.B. 2296 added another section that required any FPI that maintains a website to publish its completed Student Performance Fact Sheet on its website.[193] This same section also required that an FPI's website provide the institution's most recent annual report submitted to the BPPE as well as a link to the BPPE website.[194]

Despite these positive changes, the amendment still neglected to address the number of institutions exempt from regulation under the CPPEA. Additionally, when the amendment was enacted in 2012, the BPPE was entering its third year of operation and started to reveal significant performance flaws. Since the passing of A.B. 2296, the BPPE has been criticized for underperforming.[195] A state audit evaluating the BPPE's performance through 2013 identified various failures by the Bureau.[196] For example, despite being required by the CPPEA to conduct equal amounts of announced and unanchored inspections, the BPPE had conducted only two unannounced inspections versus 456 announced inspections.[197] The BPPE also had a backlog in processing school's licensing applications, with 1,100 outstanding licensing applications at the end of 2013.[198] And some of the applications were at least three years old, having been submitted as far back

190. CAL. EDUC. CODE § 94909(a)(16) (2015). A.B. 2296 added § 94909(a)(16) to the CPPEA. This section required the Fact Sheet to include, "A statement specifying whether the institution, or any of its degree programs, are accredited by an accrediting agency recognized by the United States Department of Education." *Id.*

191. CAL. EDUC. CODE § 94910 (2009).

192. *Id.* at 94928(e)(1).

193. *Id.* at 94913.

194. *Id.*

195. *See* Asimov & Lee, *supra* note 177.

196. *Bureau for Private Postsecondary Education: It Has Consistently Failed to Meet Its Responsibility to Protect the Public's Interests*, CAL. STATE AUDITOR (Mar. 2014), *available at* http://www.auditor.ca.gov/pdfs/reports/2013-045.pdf.

197. *Id.* at 20–21.

198. *Id.* at 15.

as 2010.[199] The audit was also concerned with the BBPE's inability to effectively respond to complaints, saying, "[t]he bureau also failed to respond appropriately to complaints against institutions, even when students' safety was allegedly at risk."[200] The BPPE on average took two hundred fifty-four days to respond and close a complaint, with some complaints going unacknowledged for months.[201] These disappointing figures left little doubt that the CPPEA need further review and shortly after the audit was published the California Legislature introduced additional amendments.

2. 2014 California Senate Bill 1247

In order to address the growing and continued concerns surrounding the CPPEA and the BPPE, the California Legislature passed Senate Bill 1247 (S.B. 1247) and it was signed into law on September 29, 2014.[202] S.B. 1247 addressed issues not covered by A.B. 2296. First, S.B. 1247 took a crucial step in reducing the number of institutions exempt from regulation under the CPPEA. The bill added § 94874.2 to the California Education Code. That section says, "an institution that is approved to participate in veterans' financial aid programs . . . may not claim an exemption from this chapter."[203] With the large number of FPIs participating in veterans' financial aid programs, such as the Post 9/11 GI Bill benefits, the added section drastically reduces the number of FPIs exempt under the previous version of the law.[204] Furthermore, adding this section also acknowledges a desire to stem the ongoing exploitation of veterans' benefits by FPIs.[205] The previous versions of the CPPEA had not addressed this crucial issue.

In addition to addressing veterans' benefits and the CPPEA's exemption problems, S.B. 1247 also contains statutory language that would remedy the problems outlined in the state's audit of the BPPSE. These changes largely focused on the inefficiency of the BPPSE. This is clear in a section of S.B. 1247 that addresses the BPPE's problems in efficiently evaluating FPIs' approval applications.[206] The amendment requires the BPPE to establish "[a]pplication processing goals and timelines to ensure an institution that has submitted a complete application for approval to operate has that

199. *See id*.
200. *Id.* at 2.
201. CAL. STATE AUDITOR, *supra* note 196.
202. S.B. 1247, 2013−2014 Leg. Sess. (Cal. 2014).
203. CAL. EDUC. CODE § 94874.2 (2015).
204. *See Cal. Private Postsecondary Educ. Act Hearing*, *supra* note 143, at 3 (noting that three hundred and eighteen institutions participated in federal veteran's financial aid programs).
205. *See generally* Nelson, *supra* note 16 (discussing the common and increasing exploitation of veteran's benefits by FPIs).
206. *See* CAL. EDUC. CODE § 94888(b)(2) (2015).

application promptly reviewed. . .”[207] These goals would apply to applications from both accredited and non-accredited institutions seeking operation approval.[208] Additionally, S.B. 1247 included new language regarding the BPPE’s policies for announced and unannounced inspections. This new language prioritized inspections “based on risk and potential harm to students.”[209] The goal of this change was “[t]o ensure that the bureau’s resources are maximized for the protection of the public. . .”[210] The statute tasked the BPPE with establishing a set of priorities for inspections that would focus inspections on “institutions representing the greatest threat of harm to the greatest number of students.”[211] In order to assist the BPPE in developing these priorities, S.B. 1246 identified nine different characteristics of high risk FPIs.[212] The first four identified characteristics are:

> (1) An institution that receives significant public resources, including an institution that receives more than 70 percent of its revenues from federal financial aid, state financial aid, financial aid for veterans, and other public student aid funds.
>
> (2) An institution with a large number of students defaulting on their federal loans, including an institution with a three-year cohort default rate above 15.5 percent.
>
> (3) An institution with reported placement rates, completion rates, or licensure rates in an educational program that are far higher or lower than comparable educational institutions or programs.
>
> (4) An institution that experiences a dramatic increase in enrollment, recently expanded programs or campuses, or recently consolidated campuses. [213]

These identified characteristics reflect the same concerns expressed in the various regulations promulgated by federal Department of Education in 2011 and 2014.[214] Focusing the BPPE inspections on these types of issues should help the Bureau be more effective, and it also provides California with an opportunity to implement regulations in areas where the federal government has failed.

S.B. 1247 also sought to remedy the problems the BPPE had ineffectively addressing formal complaints. Similar to the approach taken on the in-

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207. *Id.*
208. *Id.* at § 94890(a)(2).
209. *Id.* at § 94932.5.
210. *Id.* at § 94941(b).
211. *Id.*
212. CAL. EDUC. CODE § 94941(c)(1)−(9) (2015).
213. *Id.*
214. *See supra* Part II; Negotiated Rulemaking Committees, *supra* note 29; Program Integrity Issues: Gainful Employment, *supra* note 31.

spection amendments, S.B. 1247 sought to increase efficiency in handling complaints through prioritization. Under the new legislation, the BPPE shall prioritize complaints "alleging unlawful, unfair or fraudulent business acts or practices, including unfair, deceptive, untrue, or misleading statements."[215] The amendment also instructs the BPPE to focus on complaints that allege private postsecondary institutions have been deceptive or misleading in reporting the information required under the Fact Sheet regulations.[216] Thus, this portion of S.B. 1247 encourages the BPPE to improve its efficiency as well as bolster the regulatory goals established within the Fact Sheet requirements. Furthermore, the amendment lists specific types of complaints that should be given priority by the BPPE.[217] These include complaints regarding:

> (2) Job placement, graduation, time to complete an educational program, or educational program or graduation requirements.
>
> (3) Loan eligibility, terms, whether the loan is federal or private, or default or forbearance rates. . .
>
> (6) Affiliation with or endorsement by any government agency, or by any organization or agency related to the Armed Forces, including, but not limited to, groups representing veterans. . .
>
> (8) Payment of bonuses, commissions, or other incentives offered by an institution to its employees or contractors.[218]

Once again, these specifically identified priorities echo the priorities and concerns found throughout the federal Department of Education's attempted regulations. S.B. 1247 puts both the BPPE and the California Legislature in the position to enforce and develop regulations that have been repeatedly promulgated by the Department of Education and rejected by the federal courts.

C. Future Measures and Regulations.

In addition to making substantial change to the structures and functions of the BPPE, S.B. 1247 also places an emphasis on developing future legislation. First, the amendment provides a short re-authorization period.[219] It authorizes the BPPE only until 2017, at which point the legislature is required to consider renewing the BPPE's authority.[220] The original CPPEA

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215. CAL. EDUC. CODE § 94941(e) (2015).

216. *Id.* (saying priority complaints should include "misleading statements, including all statements made or required to be made pursuant to the requirements of this chapter. . .").

217. *Id.* at (e)(1)−(8).

218. *Id.*

219. CAL. EDUC. CODE § 94801(d) (2015).

220. CAL. EDUC. CODE § 94950 (2009).

passed in 2009 authorized the original BPPE for five years.[221] This short reauthorization period suggests the potential for further changes and shows that the legislature expects immediate adjustments from the BPPE. Additionally, S.B. 1247 instructs the BPPE to investigate and recommend future legislative changes. This new section instructs the BPPE to consider "requirements that are utilized by the United States Department of Education, the Student Aid Commission, accrediting agencies, and student advocate associations. . ." and then "make recommendations to the Legislature, on or before December 31, 2016."[222] The section also gives the BPPE power to investigate possible regulations by allowing for "a personal services contract with an appropriate independent contractor to assist in the evaluation[s]."[223] Taking all these sections together, it is clear that the California Legislature intends to further develop its regulation of the for-profit education industry.

Finally, in the passing of S.B. 1247, the Legislature provided the BPPE with the ability to pursue legal remedies in conjunction with the state Attorney's General office.[224] This change allows the BPPE to seek future enforcement through legal action. Under the new law, if the BPPE "has reason to believe that an institution has engaged in a pattern or practice of violating the provisions of [chapter 8] or any other applicable law . . . the bureau shall contract with the Attorney General for investigative and prosecutorial services, as necessary."[225] Previously, the CPPEA did not allow for any judicial enforcement of its regulations, which many thought to be a fundamental flaw of the original 2009 law.[226] Now that this flaw has been addressed, the law has gained more appropriate enforcement capabilities. This change in enforcement power gives legitimacy to the CPPEA and increases the possibility for California courts to take future measures in regulating irresponsible FPIs throughout California.

CONCLUSION

Regardless of any future measures that California may take in regulating FPIs, the limited scope of the state's regulations prevents any action from being as effective and comprehensive as federal regulations could be. With some of the most prominent FPIs maintaining both national and online presences, the federal government is in the best position to issue uniform and successful regulations.[227] Additionally, the student-debt problem is

221. *Id.*
222. *Id.* at § 94929.9(a).
223. *Id.* at § 94929.9(b).
224. *Id.* at § 94945(c).
225. *Id.*
226. *See* Asimov & Lee, *supra* note 177.
227. *See* Gregory Ferenbach & Matthew Johnson, *Major Changes in California's*

fundamentally a federal problem, with the vast majority of student debt being the result of federal student aid. Regulations of FPIs can contribute to the reduction of the nationwide student debt only if the federal Department of Education is able to adopt and enforce the appropriate regulations. The good news is that the federal Department of Education is willing to regulate FPIs. The bad news is that regulation of FPIs at the federal level is failing. Poorly constructed regulations and the Department of Education's inability to adequately respond to judicial decisions have resulted in ineffective attempts to regulate FPIs.

In the last five years two of the federal Department of Education's more significant regulatory attempts, the Abusive Recruitment Regulations and the Gainful Employment Regulations, have been vacated and remanded by federal courts. The Abusive Recruitment Regulations have been remanded twice, in *Duncan I* and *Duncan III*, because the Department of Education had not promulgated valid regulations to restrict the recruitment techniques of FPI. Furthermore, a primary goal of the Abusive Recruitment Regulations is to simply remove regulatory safe harbors the Department itself had previously established. Nonetheless, in two separate attempts at rulemaking the Department was unable to identify and explain its reasoning for the Abusive Recruitment Regulations. It would appear that the Department of Education has been relying on the existence of judicial deference and the result has been ineffective regulations.

The Gainful Employment Regulations have also suffered at the hands of judicial review and poor agency rulemaking. The initial challenge to these regulations in *Duncan II* found only one small standard to be invalid on its face, yet the entire Gainful Employment Regulations had to be remanded because of a lack of severability. On remand, in a blatant display of agency arrogance, the Department promulgated the same loan repayment standard that had resulted in the regulations being remanded. Ultimately, this standard was removed during the rulemaking process, but there was no attempt to offer a modification of a standard the Department clearly felt was important. Without a loan repayment standard, the latest version of the Gainful Employment Regulations may well survive any legal challenges from the ASPCU or any other similar plaintiff. However, the Gainful Employment Regulations now lack an important standard that held FPIs accountable for graduating too many students who are unable to repay their loans.

While limited in scope, regulations promulgated by state legislatures are not the result of agency rulemaking and are less likely to be exposed to harsh legal challenges. They provide an alternative and practical way to

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Regulation of Private Postsecondary Institutions, COOLEY LLP (Oct. 21, 2014), *available at* http://www.cooley.com/PdfManager/getpublicationpdf.aspx?type=alert&show=70390 (discussing "physical presence" triggers and the limited jurisdiction of California regulations).

implement regulation of FPIs. To be fair, California's history of regulating private postsecondary institutions shows the potential shortcomings of state legislatures. However, California's most recent legislation, the CPPEA, re-establishes the state's regulatory scheme in this area. Its subsequent amendments attempt to implement many of the same goals outlined in the federal Department of Education's failed regulations. This kind of legislation at the state level provides an opportunity for states to implement federally developed regulations for FPIs. If a state's appointed regulatory agency can effectively implement legislation similar to California's amended CPPEA, then state governments present an avenue by which the federal Department of Education's invalidated regulations could be implemented. Additionally, California's most recent laws focus on ensuring an efficient regulatory body and are expected to have an immediate impact on California's regulation of FPIs and other private post-secondary institutions.[228] Since 2009, California's legislative actions have provided a strong example of how states have the potential to reduce the nation's student debt through the regulation of FPIs. Such state actions against abusive FPIs will not completely remedy the nation's student debt problem, but it does show that individual states have the means to have a serious and influential role in addressing this enduring crisis.

228. *See id.*

COLLEGE AND UNIVERSITY DATA BREACHES: REGULATING HIGHER EDUCATION CYBERSECURITY UNDER STATE AND FEDERAL LAW

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INTRODUCTION

As our reliance on technology increases, so do threats of cyberattacks. Recently, there has been a serious increase in breaches of data and information security. These breaches have attacked some of the largest corporations in the United States, including Target Corp., Neiman Marcus, and eBay. However, these breaches are not confined to public corporations. Colleges and universities have access to a great deal of private information, including educational and medical records, as well as employee data. Because of this wealth of private information, and, oftentimes, shoddy security measures, there have been over 700 data breaches involving educational institutions publicly recorded between 2005 and 2014.[1] The way that these institutions prepare for and respond to these breaches is indicative of how likely they are to be subjected to litigation or government action.

1. Chronology of Data Breaches – Educational Institutions, PRIVACY RIGHTS CLEARINGHOUSE, https://www.privacyrights.org/data-breach/new (last visited Apr. 14, 2015).

A recent study by BitSight Technologies rated the cyber security performances of a number of colleges and universities based on their collegiate athletic conferences.[2] The study determined that colleges and universities are not adequately addressing cybersecurity challenges, and can easily fall victim to high levels of malware infections.[3] Many colleges and universities do not have cyber plans in place and are not ranking information security as a key issue on campus.[4]

Colleges and universities are in a unique position in that they are subject to a multitude of federal and state statutes regulating data privacy, from consumer reporting laws to the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA). Additionally, they can face class action lawsuits and Federal Trade Commission (FTC) action in the wake of a cyber breach.[5] This Note will discuss the types of breaches commonly faced by higher education institutions and what steps these institutions can take to limit liability and properly respond to potential litigation.

Part I will address how data breaches occur, and Part II will outline what kind of data breaches commonly affect colleges and universities, including examples of colleges and universities that have recently experienced those types of breaches. Part III will address the statutes that control how colleges and universities must treat data, react to breaches and notify students. Part IV highlights recent data breaches, how those colleges and universities have dealt with them, and what type of litigation, if any, has resulted. Part V offers advice for college and university counsel on how best to insulate from liability, including timely notification and free credit monitoring services, and how to defend against class actions stemming from a breach. Finally, Part VI addresses potential future regulations that colleges and universities should anticipate having to follow.

I. WHAT IS A DATA BREACH?

The Identity Theft Research Center defines a data breach as "an incident in which an individual name plus a Social Security number, driver's license number, medical record or financial record (credit/debit cards included) is potentially put at risk because of exposure."[6] These breaches can lead to

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2. *Powerhouses and Benchwarmers: Assessing the Cyber Security Performance of Collegiate Athletic Conferences*, BITSIGHT TECHNOLOGIES (Aug. 2014), http://media.scmagazine.com/documents/90/bitsight_insights_athletics_q3_22351.pdf.

3. *Id.* at 2.

4. *Id.* at 6.

5. *See infra* Part III for a discussion of FTC action related to data breaches, and Part IV for a discussion of class actions resulting from higher education data breaches.

6. *Data Breaches*, IDENTITY THEFT RESEARCH CENTER, http://www.idtheftcenter.org/id-theft/data-breaches.html (last visited Apr. 14, 2015). The Privacy Technical Assistance Center defines a data breach as "any instance in

identity theft, privacy violations, and fraud.[7] Stored personal information can be compromised in numerous ways, including insider theft, employee error, hacker attack or physical theft.[8]

a. Hacking

A survey of data breaches over the past several years found that hackers caused thirty–one percent of all breaches.[9] In the higher education context, thirty–six percent of breaches are attributable to hackers and malware.[10] A major hacker tactic is an advanced persistent threat, which employs undetectable access into a computer system through software vulnerabilities and the eventual theft of large amounts of data.[11]

Hackers are interested in the theft of valuable personal information such as credit card numbers or other personal information that can be used for bank fraud.[12] The hackers use a systematic process for initiating an attack on a computer network.[13] The process begins by gathering information about the organization and targeting individuals with access to sensitive data.[14] The hackers then identify the weaknesses in the network to find openings, which they use to penetrate the system by exploiting a valid user account with a weak password.[15] Once they are in the system, they find another user account that has greater access privileges to sensitive information.[16] They use this account to install malware on the computer and gain command over network infrastructure to transmit the stolen data to their hacking platform.[17] The last step involves concealing the attack by

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which there is an unauthorized release or access of [personally identifiable information] or other information not suitable for public release." *Data Breach Response Checklist*, PRIVACY TECHNICAL ASSISTANCE CENTER 2 (Sep. 2012), *available at* http://ptac.ed.gov/sites/default/files/checklist_data_breach_response_092012.pdf.

7. DATA BREACH AND ENCRYPTION HANDBOOK 7 (Lucy Thomson ed., 2011).

8. *See Data Breaches*, *supra* note 6.

9. *Data Loss Statistics*, OPEN SECURITY FOUND., http://datalossdb.org/statistics (last visited Apr. 14, 2015).

10. *Just in Time Research: Data Breaches in Higher Education*, EDUCASE 6 (2014) [hereinafter Data Breaches in Higher Education], https://net.educause.edu/ir/library/pdf/ECP1402.pdf. There is some overlap between the various types of data breaches, meaning that sometimes a hacking incident could also be classified under insider theft. *Id.*

11. JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 13 (2013).

12. THOMSON, *supra* note 7, at 27.

13. *Id.* at 59.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 60.

clearing the history and leaving no trace back to the hackers.[18]

b. Theft

Theft of laptops or other electronic devices are another source of data breaches.[19] These devices can include laptops, desktop computers, portable electronic devices such as smart phones, or hard drives.[20] Theft of such devices compromised seven million sensitive medical records and student personal information records from 2009 to the beginning of 2010.[21]

A major problem with theft of mobile devices is the lack of encryption on these devices.[22] Many colleges and universities have a Bring Your Own Device (BYOD) culture that allows employees to use their personal smart phones or laptops for professional work.[23] Allowing personal devices can involve the transfer of a great deal of confidential information to the device, and the creation and access of sensitive data on a device the college or university does not adequately control.[24] Because of this data transfer, the theft of employees' personal devices, which are rarely encrypted, can put student information at risk.

c. Malicious Insiders

Roughly ten percent of all data breaches occur at the hands of a malicious insider.[25] A malicious insider is defined as "a current or former em-

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18. *Id.*

19. *See, e.g.*, *Data Loss Statistics*, *supra* note 9. Eleven percent of data breaches have occurred because of a stolen laptop, four percent from a stolen computer, and one percent from a stolen drive. *Id.* In the higher education context, seventeen percent of reported breaches have involved theft. *Data Breaches in Higher Education*, *supra* note 10, at 6.

20. RHODES & POLLEY, *supra* note 11, at 16.

21. THOMSON, *supra* note 7, at 23. In California, during 2012 and 2013, physical theft and loss of devices accounted for 25% of education industry data breaches. *California Data Breach Report*, OFFICE OF THE ATTORNEY GEN. 11 fig. 7 (Oct. 2014), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/2014data_breach_rpt.pdf.

22. THOMSON, *supra* note 7, at 18. The University of San Francisco had to alert patients when an unencrypted personal laptop computer was stolen from an employee's locked car. Elizabeth Fernandez, *UCSF Alerts Some Patients About Laptop Computer Theft*, U.C. SAN FRANCISCO (Oct. 2, 2013), http://www.ucsf.edu/news/2013/10/109381/ucsf-alerts-some-patients-about-laptop-computer-theft. The laptop contained personal information for 3,541 patients. *Id.* There were also paper documents for thirty-one patients stolen along with the laptop that contained personal information such as name, date of birth, and health information. *Id.*

23. RHODES & POLLEY, *supra* note 11, at 7.

24. *Id.*

25. *Data Loss Statistics, supra* note 9. However, only three percent of higher education data breaches were the result of an insider. *Data Breaches in Higher Education*, *supra* note 10, at 6.

ployee, contractor, or other business partner who has or had authorized access to an organization's network, system, or data and intentionally exceeded or misused that access in a manner that negatively affected the confidentiality, integrity, or availability of the organization's information or information systems."[26]

Insider threats involve individuals abusing their security privileges to access sensitive records.[27] Employees choose to steal data for reasons such as financial gain, with the intent to sell the data to third parties, or for revenge on the institution.[28] Additionally, many insider threats involve employees who were recently fired, resigned, or changed positions and steal as an act of revenge, or involve employees who just joined the entity and lack a sense of loyalty to the institution.[29] About a quarter of insider-initiated data breaches involved these types of newly hired or fired employees.[30]

Malicious insiders can be students as well as employees. In August 2014, a former Brigham Young University student was arrested for remotely hacking the BYU network to change his student status.[31] He also admitted to hacking the systems through computers belonging to professors and administrators in order to change his grades and access other students' personal information.[32] This has become increasingly prevalent on campuses, as students use keystroke loggers to capture professors' passwords and then use this information to change grades.[33] These actions only highlight the ease with which other hackers could access personal information stored on college and university systems.

d. Improper Disposal

Although most personal information is now stored electronically, there can be breaches resulting from an improper disposal of paper records in-

26. *Insider Threat*, CERT, http://www.cert.org/insider-threat/ (last visited Apr. 14, 2015).

27. THOMSON, *supra* note 7, at 25.

28. RHODES & POLLEY, *supra* note 11, at 20. Other motivations for insider hacking can include fame, capability, divided loyalty, delusion, or even just a perceived challenge to hack the system. *See* Charles P. Pfleeger, *Reflections on the Insider Threat*, *in* INSIDER ATTACK AND CYBER SECURITY: BEYOND THE HACKER 5, 7 (Salvatore J. Stolfo et al. eds., 2008).

29. RHODES & POLLEY, *supra* note 11, at 20.

30. *Id.*

31. Candi Higley, *Police: Former BYU student hacked into school computers to change grades*, DAILY HERALD (Aug. 5, 2014), http://www.heraldextra.com/news/local/crime-and-courts/police-former-byu-student-hacked-into-school-computers-to-change/article_1d68bda3-ab1e-5ecb-a7ce-6757c8bda858.html.

32. *Id.*

33. Gerry Smith, *Why Study? College Hackers Are Changing F's To A's*, HUFF POST (Mar. 7, 2014), http://www.huffingtonpost.com/2014/03/05/student-hacking_n_4907344.html.

volving personally identifiable information.[34] These paper breaches make up nearly twenty-six percent of breaches.[35] Sometimes the breach comes from something as simple as someone throwing confidential information in the trash as opposed to taking more secure measures such as using a shredder.[36] The same issue can arise with electronic records, due to the improper disposal of hard drives or other media in too public of places.[37]

e. Accidental Exposure

Thirty percent of higher education data breaches stem from unintended disclosures.[38] There are many different kinds of accidental exposure, including human error, pure accidents, or natural disasters.[39] People make simple errors such as mistakes in judgment, failure to follow procedures, accidental deletion, and even something as easy as clicking the wrong button.[40] Moreover, incidents on a campus such as fire, damage to computers, earthquakes, or flooding can lead to unintentional exposure of data.[41]

II. DATA BREACHES IN THE HIGHER EDUCATION CONTEXT

Colleges and universities are susceptible to numerous kinds of data breaches due to the vast amount of data they compile from students, faculty, employees, and other individuals affiliated with the campus. In addition to educational records, many colleges and universities have "on-campus healthcare systems, restaurants, book stores, conference centers, research labs and more."[42] One of the reasons higher education institutions are so susceptible to cyber attacks is because of the openness of their online communities.[43] These institutions need to balance the security of their in-

34. RHODES & POLLEY, *supra* note 11, at 22.

35. THOMSON, *supra* note 7, at 23.

36. *See id.*

37. *Id.* at 25.

38. *Data Breaches in Higher Education*, *supra* note 10, at 6.

39. RHODES & POLLEY, *supra* note 11, at 23−24.

40. *See id.* at 23. In June 2014, an official at University of Virginia Law School accidentally sent an email to 160 students releasing personal information related to clerkship applications. Valerie Strauss, *U-Va. Law School Mistakenly Sends Out E-Mail with Private Student Data*, WASH. POST (June 5, 2014), http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/06/05/u-va-law-school-mistakenly-sends-out-e-mail-with-private-student-data/. The email included a great deal of personal information, and was simply a mistake of sending an email to the wrong listserv. *Id.*

41. RHODES & POLLEY, *supra* note 11, at 23−24.

42. *Powerhouses and Benchwarmers*, *supra* note 2, at 5.

43. Matt Zalaznick, *Cyberattacks on the Rise in Higher Education*, UNIV. BUS. (Oct. 2013), http://www.universitybusiness.com/article/cyberattacks-rise-higher-education. The article quotes the Director of the Indiana University for Applied Cybersecurity Research as saying "We want our faculty and our students and our public and

formation systems with their focus on the free flow of information.[44] Colleges and universities "have a complex mix of private and public areas, secure and open networks, and have a vast amount of personal and intellectual property information" that makes them increasingly vulnerable to hacker attack.[45]

The following part will outline the types of data that colleges and universities typically store and what makes them so susceptible to cyber attacks.

a. Information Collected by Medical Centers

Many colleges and universities have medical centers that treat students, as well as the general public, and are a part of the institution itself.[46] These medical centers store medical records and patient information. Under section 13402(e)(4) of the Health Information Technology for Economic and Clinical Health Act (HITECH Act), institutions that experience a breach of unsecured protected health information affecting 500 or more individuals must report to the Secretary of the Department of Health and Human Services, who then must post a list of the breaches.[47] Therefore, the institutions are required to publicize any large-scale compromise of confidential or sensitive information that they have experienced.

Some of the breaches reported since 2013 include two at the University of Pennsylvania Health System.[48] On November 26, 2013, University of Pennsylvania reported a paper breach involving a third party business associate that affected 3,000 individuals.[49] Additionally, there was a paper theft affecting 661 individuals that occurred from May 1, 2014 to June 19, 2014.[50] The paper theft involved stolen receipts from a locked office that

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our donors to connect pretty easily to us." *Id.*

44. Richard Pérez-Peña, *Universities Face a Rising Barrage of Cyberattacks*, N.Y. TIMES (July 16, 2013), http://www.nytimes.com/2013/07/17/education/barrage-of-cyberattacks-challenges-campus-culture.html?pagewanted=all&_r=0.

45. Sue Poremba, *5 Higher Education Information Security Threats You Should Know Before Your Child Leaves for College*, FORBES (Nov. 5, 2014), http://www.forbes.com/sites/sungardas/2014/11/05/5-higher-education-information-security-threats-you-should-know-before-your-child-leaves-for-college/.

46. *See, e.g.*, *Ronald Reagan UCLA Medical Center*, UCLA HEALTH, https://www.uclahealth.org/reagan/Pages/default.aspx (last visited Apr. 14, 2015).

47. *Breaches Affecting 500 or More Individuals*, HHS, https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf (last visited Apr. 14, 2015). An example of a university having to report a data breach occurred at Duke University Health System on July 1, 2014 when it experienced a theft of a portable electronic device that affected 10,993 individuals. *Id.* For more information on the HITECH Act, *see infra* Part III(c).

48. *Breaches Affecting 5000 or More Individuals*, *supra* note 47.

49. *Id.*

50. *Id.*

included information such as "patient name, date of birth, and the last four digits of credit card numbers."[51] The University sent notification letters and began conducting an internal investigation into the breach.[52]

The University of California – San Francisco (UCSF) experienced a burglary in 2014 of unencrypted desktop computers from a satellite office that contained personal and health information.[53] UCSF launched an investigation into what information was available on those computers and found that the computers stored personal and health information, including "individuals' names, dates of birth, mailing addresses, medical records, health insurance ID numbers, and driver's license numbers."[54] UCSF sent out notification letters, offered credit monitoring, and established a hotline to provide information about the breach.[55]

Sometimes breaches are targeted at campus student health centers, rather than large-scale medical centers. In March 2014, the University of California – Irvine experienced a breach of student information.[56] Three computers in the Student Health Center were infected with a keylogging virus that captured keystrokes as the user typed and transmitted that information to hackers.[57] The information collected included "name, unencrypted medical information" and "bank name" as well as address and other medical information.[58] The University offered free credit reporting services to affected students.[59]

b. Personal Information from Education and Admissions Records

Colleges and universities store a lot of personal information data from students. This data can include name, address, date of birth, social security numbers, and financial information. Two of the largest data breaches of personal information in recent history occurred at the University of Maryland and Indiana University, respectively.

On February 18, 2014, the University of Maryland reported a breach of

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51. Stacey Burling, *Penn Medicine Rittenhouse has Data Breach*, PHILLY.COM (July 18, 2014), http://articles.philly.com/2014-07-18/news/51663609_1_data-breach-social-security-numbers-identity-theft.

52. *Id.*

53. Elizabeth Fernandez, *Computer Theft at UC San Francisco*, UNIV. OF CAL. SAN FRANCISCO (Mar. 12, 2014), https://www.ucsf.edu/news/2014/03/112556/computer-theft-uc-san-francisco.

54. *Id.*

55. *Id.*

56. Letter from J. Patrick Haines, Exec. Dir. of the Student Health Ctr., Univ. of Cal. Irvine & Marcelle C. Holmes, Assistant Vice Chancellor for Wellness, Health and Counseling Services, Univ. of Cal. Irvine, to Students (Apr. 21, 2014), *available at* http://oag.ca.gov/system/files/UCIrvine%20Notice%20Letter%20Sample_0.pdf?.

57. *Id.*

58. *Id.*

59. *Id. See also infra* Part V(e).

data systems by a computer security attack.[60] The breached database included 287,580 records of students, staff, faculty, and affiliated persons.[61] The data accessed included name, date of birth, University identification number, and social security number.[62] The University responded by offering free credit monitoring services, launching a large-scale investigation into the breach, and holding information sessions on data privacy.[63]

On February 25, 2014, Indiana University notified the Indiana Attorney General that personal data for students and recent graduates might have potentially been exposed, including names, addresses, and social security numbers for roughly 146,000 individuals.[64] The University opened up a call center to establish whether or not any of the individuals were victims of identity theft.[65] Because the data was encrypted, it was difficult for hackers to decode and ultimately, no cases of identity theft were found.[66] In July 2014, the University shut down the call center and closed the investigation, but not after spending around $130,000.[67]

Personal information can also be found in admissions records. In March 2013, hackers accessed a database of student admission records at Kirkwood Community College in Cedar Rapids, Iowa.[68] They used an international IP address to unlawfully access a website with archived application information.[69] The information accessed "may have included applicant names, birthdates, race, contact information and social security numbers."[70] The Community College responded by alerting law enforcement, hiring an outside firm to do a forensic analysis of the breach, and offering credit monitoring to affected individuals.[71]

c. Financial Information

Colleges and universities have access to student financial information including account balances, loan history, credit information, credit cards,

60. *UMD Data Breach*, UNIV. OF MD., http://www.umd.edu/datasecurity/ (last visited Apr. 14, 2015).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *IU says no victims reported in data breach*, INDIANAPOLIS BUS. J. (July 17, 2014), http://www.ibj.com/articles/48628-iu-says-no-victims-reported-in-data-breach.

66. *Id.*

67. *Id.*

68. *Kirkwood Website Experienced Unlawful Access*, KIRKWOOD CMTY. COLL. (Apr. 8, 2013), http://kirkwoodonlinenews.org/?p=3947.

69. *Id.*

70. *Id.*

71. *Data FAQs*, KIRKWOOD CMTY. COLL., http://www.kirkwood.edu/datafaqs (last visited Feb. 5, 2015).

debit cards, and other payment forms.[72] Many are also putting in place payment card systems that allow payments on-campus and at certain off-campus venues, which essentially operates as a credit card.[73] Additionally, these institutions often use consumer credit reports for background checks on employees and for determining if students should obtain loans.[74] This wide array of financial information is extremely valuable to hackers interested in identity theft and is therefore very vulnerable to data breaches.

III. LEGISLATION HOLDING COLLEGES AND UNIVERSITIES ACCOUNTABLE FOR DATA SECURITY

Colleges and universities come under the umbrella of a multitude of federal regulations and state statutes. This part will highlight the major regulations that higher education institutions are required to follow, and how they affect institutional decisions.

a. Health Insurance Portability and Accountability Act (HIPAA)

HIPAA focuses on health insurance portability and on the prevention of health care fraud and abuse by adoption of standards and requirements for electronic transmission of health information.[75] There are three separate part of HIPAA's information security component: the privacy regulations, the electronic transaction standards, and the security regulations.[76] These three parts regulate the security standards for protected health information[77], the privacy of patient-identifiable information[78], and the standardization of electronic transactions.[79]

Higher education institutions fall under the definition of a "covered entity" under HIPAA if they provide health care services and engage in one or more covered electronic transaction.[80] Electronic transactions include health care claims, health care payments, coordination of benefits, eligibil-

72. David Shannon & John Farley, Presentation, *Privacy and Network Security Liability in Higher Education* 6, WELLS FARGO INSURANCE SERVICES (Nov. 6, 2012), http://www.dedcmdasfaa.org/docs/conferences/Conference2012Fall/presentations/PrivacyAndNetworkSecurityLiabilityInHigherEducation.pdf.

73. *See* John L. Nicholson & Meighan E. O'Reardon, *Data Protection Basics: A Primer for College and University Counsel*, 36 J.C. & U.L. 101, 115 (2009).

74. *Id.*

75. Toby D. Sitko et al., *Life with HIPAA: A Primer for Higher Education*, CTR. FOR APPLIED RESEARCH (Apr. 1, 2003), *available at* https://net.educause.edu/ir/library/pdf/ERB0307.pdf.

76. *Id.* at 3.

77. *See infra* Part III(i).

78. *See infra* Part III(ii).

79. *Id.*

80. *Id.* at 4.

ity for a health plan, and enrollment in a health plan.[81] Many colleges and universities fall under HIPAA because they provide health services to students and often run medical centers in concert with their medical programs. However, because of the exception for FERPA educational records, if a center solely services students, it may be exempt from HIPAA.[82]

The type of information protected is "individually identifiable health information," defined as "information that is a subset of health information, including demographic information collected from an individual" that "identifies the individual" or provides "a reasonable basis to believe the information can be used to identify the individual."[83] Protected health information does not include "education records covered by [FERPA]" or "employment records held by a covered entity in its role as employer."[84]

The HITECH Act covers electronic medical records, and requires a covered entity to notify affected individuals when unsecured personal health information has been breached.[85] It extended application of both the security and privacy rules of HIPAA.[86] It also amended HIPAA to increase civil and criminal penalties, require notification of data breaches, and change disclosure rules, among others.[87]

i. Security Standards

The Security Rule requires that covered entities have security standards for properly training those who have access to health records, and accounting for the costs of security and the capabilities of systems used in maintenance of health records.[88] Colleges and universities that are considered

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81. *Id.* at 5, Table 2.

82. Sitko, *supra* note 75, at 9.

83. 45 C.F.R. 160.103 (2014).

84. *Id.* For more information on FERPA, *see infra* Section III (b).

85. Health Information Technology for Economic and Clinical Health Act, P.L. 111-5 §§ 13402, 13407, 123 Stat. 260−71 (Feb. 17, 2009).

86. GINA STEVENS, CONG. RESEARCH SERV., FEDERAL INFORMATION SECURITY AND DATA BREACH NOTIFICATION LAWS 11 (Jan. 28, 2010).

87. *Id.* at 13. HITECH amended HIPAA with the creation of:

> [E]xtended application of certain provisions of the HIPAA Privacy and Security Rules to the business associates of HIPAA-covered entities making those business associates subject to civil and criminal liability for violations; established new limits on the use of protected health information for marketing and fundraising purposes; provided new enforcement authority for state attorneys general to bring suit in federal district court to enforce HIPAA violations; increased civil and criminal penalties for HIPAA violations; required covered entities and business associates to notify the public or HHS of data breaches (regardless of whether actual harm has occurred); changed certain use and disclosure rules for protected health information; and created additional individual rights.

Id.

88. 42 U.S.C. § 1320d-2(d)(1)(A) (2014). The statute states that the "Secretary

covered entities under HIPAA must maintain "reasonable and appropriate administrative, technical and physical safeguards."[89] These safeguards include insuring "the integrity and confidentiality of information" as well as protecting "against any reasonably anticipated" threats to security and unauthorized use of information.[90] It is the responsibility of the covered college or university to "ensure compliance with" the standards "by the officers and employees" of the entity.[91]

Covered entities are required to conduct a risk assessment of their practices that takes into account "the size of the entity, its infrastructure and security capabilities, the cost of security measures, and the potential likelihood that identified threats will exploit security vulnerabilities to compromise the confidentiality, integrity, or availability of" personal health information.[92] The assessment should provide information to the covered entity to aid them in designing personnel screening processes, identify important data, determine "whether and how to use encryption" and "determine the appropriate manner of protecting health information transmissions."[93]

ii. Privacy Safeguards

The privacy rule of HIPAA "limits the circumstances under which an individual's protected health information may be used or disclosed by covered entities."[94] Covered entities are required to ensure that protection information is not used or disclosed in violation of the Act.[95] Entities must set up a security management process that includes a risk analysis, risk management, a sanction policy, and information system activity review.[96] It is important that covered colleges and universities establish a contingen-

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shall adopt security standards" that assess:

> (i) the technical capabilities of record systems used to maintain health information; (ii) the costs of security measures; (iii) the need for training persons who have access to health information; (iv) the value of audit trails in computerized record systems; and (v) the needs and capabilities of small health care providers and rural health care providers.

Id. at § 1320d-2(d)(1)(A)(i)−(v).

89. 42 U.S.C. § 1320d-2(d)(2) (2014). The "reasonable and appropriate" standard can be contrasted with the Gramm-Leach-Bliley Act "appropriate standard" for security program implementation. 15 U.S.C. § 6801 (2014).

90. *Id.* at § 1320d-2(d)(2)(A)−(B).

91. *Id.* at § 1320d-2(d)(2)(C).

92. ABA SECTION OF ANTITRUST LAW, DATA SECURITY HANDBOOK 27 (2008).

93. *Guidance on Risk Analysis Requirements under the HIPAA Security Rule*, HHS at 3 (July 14, 2010), *available at* http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/rafinalguidancepdf.pdf.

94. STEVENS, *supra* note 86, at 11.

95. 45 C.F.R. § 164.530(c) (2014).

96. 45 C.F.R. § 164.308(a)(1)(ii)(A)–(D) (2014).

cy plan, which requires "policies and procedures for responding to an emergency or other occurrence. . .that damages systems that contain electronic protected health information."[97]

iii. Notification

HIPAA does not require mandatory notification after a breach. However, it is recommended that after "discovery of a breach of unsecured protected health information", each individual is notified if his or her health information "has been, or is reasonably believed. . .to have been, accessed, acquired, used or disclosed as a result of such breach."[98]

iv. Monetary Penalties

HIPAA, following the implementation of the HITECH Act, sets out a detailed penalty scheme for the Secretary to follow when a violation of a provision has occurred. It has penalties specific to when an entity did not know and "by exercising reasonable diligence would not have known" that a provision had been violated.[99] Additionally, there are penalties for when a "violation was due to reasonable cause and not to willful neglect."[100] The greatest penalties attach when an institution acted with willful neglect.[101] The civil penalties can be as low as $100 per violation but cannot exceed $1,500,000 no matter the number of violations.[102] If it is found that the college or university knowingly and deliberately violated HIPAA, criminal penalties can be imposed.[103] If a violation was for personal gain or malicious harm, it could result in ten years' imprisonment.[104]

v. Enforcement

In May 2013, Idaho State University paid $400,000 to the Department of Health and Human Services (HHS) following alleged violations of HIPAA.[105] The penalty stemmed from a breach of unsecured electronic

97. 45 C.F.R. § 164.308(a)(7) (2014).
98. 45 C.F.R. § 164.404(a)(1) (2014).
99. 42 U.S.C. § 1320d-5(a)(1)(A) (2014).
100. *Id.* at § 1320d-5(a)(1)(B).
101. *Id.* at § 1320d-5-(a)(1)(C).
102. Manuel R. Rupe, *Beyond Privacy: FERPA Exceptions and Communication Within the University Regarding Student Conduct*, UNIV. OF COL. OFFICE OF UNIV. COUNSEL (Summer 2007), http://www.ucdenver.edu/life/services/CARE/Documents/FERPA%20Resources.pdf
103. 42 U.S.C. § 1320d-5(a)(3) (2014).
104. 42 U.S.C. § 1320d-6(b)(3) (2014).
105. News Release, *Idaho State University Settles HIPAA Security Case for $400,000*, HHS (May 21, 2013), http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/isu-agreement-press-release.html.html.

protected health information at the University's Pocatello Family Medicine Clinic.[106] A Health and Human Services Office of Civil Rights investigation indicated that the University "did not conduct an analysis of the risk to the confidentiality of [electronic protected health information] as part of its security management process" and "did not adequately implement security measures sufficient to reduce the risks and vulnerabilities."[107]

One year later, in May 2014, Columbia University agreed to settle charges that it had violated HIPAA and pay $1.5 million in HIPAA settlements.[108] In 2010, the medical center, in tandem with New York Presbyterian Hospital, reported a breach of electronic protected health information related to 6,800 individuals.[109] The Office of Civil Rights found that they did not make efforts "to assure that the server was secure and that it contained appropriate software protections."[110]

vi. Private Causes of Action

HIPAA itself does not create a private cause of action; HIPAA can, however, be used to establish a standard of care in a tort action.[111] In *Acosta v. Byrum*, the plaintiff claimed that her doctor improperly allowed his office manager, Robin Byrum, to use his medical record access code number to retrieve the plaintiff's confidential medical and healthcare records.[112] Byrum then provided this information to third parties without the plaintiff's authorization or consent.[113] The plaintiff filed an action alleging negligent infliction of emotional distress against the doctor alongside a claim of invasion of privacy against Byrum.[114] The court allowed the plaintiff to proceed with her claim because HIPAA established the standard of care that the doctor allegedly breached.[115]

A federal district court in Missouri also held that HIPAA may provide a basis for a state law private cause of action.[116] In *I.S. v. Washington University*, the plaintiff alleged that the defendant had forwarded a set of medical records relating to her HIV status, mental health issues, and insomnia

106. *Id.*

107. Resolution Agreement, Idaho State University, HHS (May 13, 2013), http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/isu-agreement.pdf.

108. *Data Breach Results in $4.8 Million HIPAA Settlements*, HHS (May 7, 2014), http://www.hhs.gov/news/press/2014pres/05/20140507b.html.

109. *Id.*

110. *Id.*

111. Acosta v. Byrum, 638 S.E. 2d 246 (N.C. Ct. App. 2006).

112. *Id.* at 249.

113. *Id.*

114. *Id.*

115. *Id.* at 251.

116. I.S. v. Wash. Univ., No. 4:11CV235SNLJ, 2011 U.S. Dist. LEXIS 66043, at *4 (D. Mo. June 14, 2011).

treatments to her employer without her consent.[117] The plaintiff brought a claim for negligence per se using HIPAA, arguing that she was referencing HIPAA solely to establish the standard of care by which to judge whether the defendant's acts were negligent.[118] The court found that a federal statute, such as HIPAA, that does not provide a private cause of action may be a legitimate element of a state law claim.[119]

These two cases, while weak as precedent, suggest that colleges and universities could face suit for negligence using HIPAA as the standard of care, as well as facing civil, criminal or monetary penalties. Under HIPAA, colleges and universities must have strong policies in place to protect patient information and react efficiently if a breach does occur.

b. Family Educational Rights and Privacy Act (FERPA)

FERPA covers educational institutions that receive funds for programs administered by the Department of Education.[120] The information covered includes education records, defined as records that "contain information directly related to a student" and are maintained by the educational institution.[121] Additionally, directory information is covered, defined as information "that would not generally be considered harmful or an invasion of privacy if disclosed."[122] Because directory information is not harmful, all that is required of a covered college or university is "public notice of the categories of information which it has designated as such information."[123]

i. Enforcement

Like HIPAA, FERPA does not establish a private cause of action. Only the Secretary of Health and Human Services can bring an action to enforce FERPA.[124] In *Gonzaga University v. Doe*, the Supreme Court held that a plaintiff could not sue for damages under 28 U.S.C. §1983 to enforce a FERPA provision.[125]

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117. *Id.* at *3.
118. *Id.* at *3–*4.
119. *Id.* at *4.
120. 20 U.S.C. § 1232g(a)(3) (2014).
121. *Id.* at § 1232g(a)(4)(A).
122. 34 C.F.R. § 99.3 (2014). Directory information includes:
> the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A) (2014).
123. 20 U.S.C. § 1232g(a)(5)(B) (2014).
124. *See* Girardier v. Webster Coll., 563 F.2d 1267, 1277−78 (8th Cir. 1977).
125. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002).

Unlike HIPAA, courts have found that FERPA cannot be used to establish a state law tort claim. The Sixth Circuit found that FERPA does not support a claim of negligence per se because it does not define a standard of care.[126] Moreover, a district court in North Carolina held that FERPA does not establish a fiduciary relationship so there is evidence that plaintiffs cannot use a FERPA violation to create a state tort claim for breach of fiduciary duty.[127]

While private actors cannot sue using FERPA to support a cause of action, they can file a complaint with the Family Policy Compliance Office or the Secretary of the Department of Education.[128] From there, the Secretary can withhold further payments from the college or university, compelling compliance through a cease and desist order, or terminating eligibility to receive funds under a program.[129] Since the passage of FERPA, "the Family Policy Compliance Office has never withheld funds because voluntary compliance has always been secured."[130]

ii. FERPA and Cloud Computing

Some critics have suggested that FERPA should be amended now that cloud computing is more popular with colleges and universities.[131] Colleges and universities are beginning to take advantage of the convenience of cloud computing as they are drawn to its increased efficiency, mobile access, innovation and access to new services.[132] They are moving storage, messaging, video conferencing and computing power to the cloud.[133] Due to the increased popularity of cloud services, Senators Edward J. Markey and Orrin G. Hatch released a draft FERPA amendment that focuses on regulating private parties with access to student data.[134]

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126. Atria v. Vanderbilt, 142 Fed. App'x 246 (6th Cir. 2005).

127. McFadyen v. Duke Univ., 786 F. Supp. 2d 887 (D.N.C. 2011).

128. 34 C.F.R. § 99.63 (2014).

129. *Id.* at § 99.67.

130. *FERPA at Idaho State University*, IDAHO STATE UNIV., http://www.isu.edu/areg/policy-proc/ferpafacts.shtml (last visited April 18, 2015).

131. Daniel Solove, *FERPA and the Cloud: Why FERPA Desperately Needs Reform*, SAFEGOV (Dec. 10, 2012), http://www.safegov.org/2012/12/10/ferpa-and-the-cloud-why-ferpa-desperately-needs-reform. Cloud computing is a way for colleges and universities to store their data and access programs over the Internet rather than on a hard drive. Eric Griffith, *What is Cloud Computing?*, PC MAG (Mar. 13, 2013), http://www.pcmag.com/article2/0,2817,2372163,00.asp.

132. Scott Cornell, *Why Colleges Are Chasing Cloud Computing*, FARONICS (Apr. 18, 2013), http://www.faronics.com/news/blog/why-colleges-are-chasing-cloud-computing/.

133. *Id.*

134. *Markey and Hatch Release Discussion Draft of Legislation Addressing Student Privacy* (May 14, 2014), http://www.markey.senate.gov/news/press-releases/markey-hatch-release-discussion-draft-of-legislation-addressing-student-

The only section of FERPA applicable to cloud computing notes that if an educational agency discloses information to a third party, that party must "not disclose the information to any other party without the prior consent of the parent or eligible student."[135] The concern is with the institution's control over the personal data turned over to a third party service. FERPA provides only that a college or university must exercise "direct control" over the third party, but doesn't require any specific standards from the third party.[136] These cloud computing services may also fall within the school official exception, which defines school official as people such as "professors; instructors; administrators; health staff; counselors; attorneys; clerical staff; trustees; members of committees and disciplinary boards; and a contractor, volunteer or other party to whom the school has outsourced institutional services or functions."[137] The exception allows a school to designate the cloud provider as an official to facilitate the sharing of information. As a contractor, a cloud computing service could fall under this exception. The exception would allow the service to access information without prior written consent because of a legitimate educational interest in review of the information.[138] If this analysis proves correct, then it would be incredibly easy for cloud computing services to access and use student information without full disclosure to the students.

iii. FERPA and Online Educational Services

Another concern is the increased use of online educational services, including software, mobile applications, and web-based tools created by third parties and used by colleges and universities.[139] Some of these services use FERPA-protected information, while others collect metadata related to that information.[140] If it only involves "directory information", it falls within an exception.[141] It will be important for colleges and universities to assess each online service and determine whether to notify students and identify the information, if any, that falls under FERPA.

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privacy.

135. 34 C.F.R. § 99.33(a)(1) (2014).

136. Solove, *supra* note 131.

137. *FERPA General Guidance for Students*, U.S. DEP'T. OF EDUC., http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html (last visited April 18, 2015).

138. *Id.*

139. *Protecting Student Privacy While Using Online Education Services: Requirements and Best Practices*, PRIVACY TECHNICAL ASSISTANCE CTR. (Feb. 2014), *available at* http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf.

140. *Id.* at 2. The problem with metadata is that it can have "direct and indirect identifiers" that are considered protected information.

141. *Id.* at 3.

c. State Consumer Protection Statutes

Most states have a data breach notification law.[142] While many have broad provisions that hold anyone in possession of personal information liable for a data breach, some of them are considerably narrower in that they only require notification by specific agencies or businesses in the event of a breach.[143] Moreover, states differ as to who must be notified; some require notification only to consumers, while others require entities to notify credit reporting agencies or the government.[144] California and Illinois have broader requirements and represent a majority of the states that require notification of a breach from any business entity (including higher education institutions) that has access to, and maintains, personal information.

i. California

The California Law on Notification of Security of Breach requires notification to the affected individuals when a data breach of personal information occurs.[145] The type of personal information involves name, social security number, driver's license number, and account or credit card number in combination with an access code or password.[146] Notice must be made in "the most expedient time possible and without unreasonable delay."[147] Entities must notify the consumer and the government, but they are not required to notify credit-reporting agencies.[148] There has been litigation under this law as recently as September 2014 when a federal district court in California granted a Motion to Dismiss in a consolidated action against Adobe Systems, a major software company, for a data breach.[149] The court determined that the plaintiffs did not have standing because they "fail[ed]

142. *See, e.g.*, COLO. REV. STAT. §6-1-716 (2014) (Colorado); FLA. STAT. §501.171 (2014) (Florida); 815 ILL. COMP. STAT. 530/1 et seq. (2014) (Illinois); N.Y. GEN. BUS. LAW §899-aa (2014) (New York). New York City even has a regulation specific to the personal information of New York City Residents. N.Y. CITY ADMIN. CODE §20-117 (2014).

143. *See, e.g.*, R.I. GEN. LAWS § 11-49.2-3(a) (2014) (requiring notification only by state agencies that maintain personal information).

144. *See, e.g.*, ALASKA STAT. § 45.48.040 (2014) (requiring entities to notify a credit reporting agency); DEL. CODE ANN. TIT. 6 § 12B-102(a) (2014) (requiring entities to notify only the "affected Delaware resident"); ID. CODE ANN. § 28-51-105(1) (2014) (requiring entities to notify the state attorney general).

145. CAL. CIV. CODE § 1798.82 (2014). Data breach is defined as "the unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal informationFalse" *Id.* at § 1798.82(g).

146. *Id.* at § 1798.29(e).

147. *Id.* at § 1798.82(a).

148. *Id.* at §1798.82.

149. In re Adobe Sys. Privacy Litig., No. 13-CV-05226-LHK, 2014 U.S. Dist. LEXIS 124126, at *77 (N.D. Cal. Sept. 4, 2014).

to allege any injury resulting from a failure to provide reasonable notification of the 2013 data breach."[150]

California also has a separate law regarding data protection.[151] The difference between this law and the notification law is that this law covers information about a California resident, regardless of whether the business that owns or licenses the information conducts business in California.[152] The business must "implement and maintain reasonable procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure."[153] Personal information includes the same information as outlined in the notification law. Therefore, a college or university outside of California that does not adequately protect information about a student who resides in California could be held liable.

An injured person can bring a civil action to recover damages under either the notification law or the data protection law.[154] They can receive civil penalties for "willful, intentional, or reckless violation[s]."[155]

ii. Illinois

In Illinois, the Personal Information Protection Act covers data collectors, which explicitly includes private and public universities.[156] A breach is defined as an "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information."[157] Notice to affected individuals must be accomplished "in the most expedient time possible and without unreasonable delay."[158] Violating the Act is considered an unlawful practice under Illinois's Consumer Fraud and Deceptive Business Practice Act.[159] Under the Act, only notifi-

150. *Id.* at 38.

151. CAL. CIV. CODE § 1798.81.5 (2014).

152. *Id.* at § 1798.81.5(b). This means that colleges and universities located outside of California may be subject to the law even if they have just one student from California. John L. Nicholson et. al, *Data Privacy Issues – Know Your Rights and Responsibilities*, NACUA (Jun. 22−25, 2008), *available at* http://www.higheredcompliance.org/resources/publications/Data-Privacy-Issues1.doc. North Carolina's notification statute also applies to entities that do not have to be conducting business within the state. N.C. GEN. STAT. § 75-65(a) (2014).

153. *Id.*

154. *Id.* at § 1798.84(b).

155. *Id.* at § 1798.84(c). A willful, intentional or reckless violation can lead to a civil penalty of up to $3,000. *Id.* However, a pure violation can still entitle a victim to up to $500. *Id.*

156. 815 ILL. COMP. STAT. 530/5 (2014).

157. *Id.* The personal information covered is the same as in California, including name, social security number, driver's license number, and credit card information. *Id.*

158. *Id.* at 530/10(a).

159. *Id.* at 530/20.

cation to consumers is required; entities are not required to report to credit reporting agencies or the government.[160]

d. FTC Action

Colleges and universities can fall under the regulatory umbrella of the FTC through the Gramm-Leach-Bliley Act (GLBA)[161] or the Red Flags Rule[162] When colleges and universities participate in financial activities, such as making federal loans, they fall under the regulations of the FTC as a financial institution for purposes of GLBA. GLBA requires an information security program coordinated by the institution, including identification of reasonably foreseeable risks and oversight of service providers.[163] GLBA has a privacy rule that educational institutions are exempt from if they comply with FERPA.[164] This is because the FTC felt that the privacy regulations under FERPA were adequate and FERPA compliance would be equivalent to compliance under GLBA.[165] However, under the Safeguards Rule of GLBA, there is no exemption for institutions that are subject to FERPA, likely because there is no equivalent requirement under FERPA.[166] The Safeguards Rule requires financial institutions to have a written information security program that ensures the safety of customer records, protects against anticipated threats and protects against unauthorized access.[167]

The FTC Red Flags Rule can be applied to colleges and universities.[168] The Red Flags Rule is a part of the Fair and Accurate Credit Transactions Act.[169] The National Association of College and University Business Officers identified several areas of the Rule that can cause colleges and universities to fall under the rule as creditors.[170] This includes institutions that participate in the Federal Perkins Loan program[171], act as a school lender in

160. *Id.* at 530/10(a).
161. 16 C.F.R. § 314.1 (2014).
162. 16 C.F.R. § 681.1 (2014).
163. 16 C.F.R. § 314.4 (2014).
164. *FTC's Gramm-Leach-Bliley Act Safeguards Rule: Guidelines for Compliance*, NACUA (May 16, 2003), http://www.nacua.org/nacualert/docs/GLB_Note_051603i.html.
165. Privacy of Consumer Financial Information, 65 Fed. Reg. 33,648 (May 24, 2000).
166. *Id.*
167. 16 C.F.R. § 314.3(a) (2014).
168. 16 C.F.R. § 681.1 (2014).
169. *Id.*
170. Larry Ladd, *The Red Flags Rule: What Higher Education Institutions Need to Know*, GRANT THORNTON, *available at* http://www.grantthornton.com/staticfiles/GTCom/Advisory/GRC/Red%20Flags%20materials/Red%20Flags%20Rule%20White%20Paper%20(Higher%20Ed)%209_21.pdf.
171. 34 C.F.R. § 674 (2015).

the Federal Family Education Loan Program[172], offer institutional loans, or offer a payment plan for tuition that runs throughout the semester as opposed to requiring a full payment at the start of the semester.[173]

The rule requires a plan to identify, detect, and respond to attempts to use stolen identity information. The plan must include identification of relevant Red Flags, detect Red Flags in the program, respond appropriately to Red Flags to prevent and mitigate identity theft, and ensure periodic update of the program.[174] A Red Flag is defined as "a pattern, practice, or specific activity that indicates the possible existence of identity theft."[175] The Rule provides that after December 31, 2010, any occurrence of identity theft could expose an institution to an FTC investigation.[176] If there is a violation of the rule, institutions are required to submit additional compliance reporting and could be subject to an injunctive compliance order.[177] Further violations can lead to monetary penalties of up to $16,000 per occurrence and a potential civil suit in federal court.[178] Like HIPAA, an individual can use the Red Flags Rule as the standard of care in a private suit.[179]

Like many other colleges and universities, the University of Wisconsin has a policy in response to the Red Flags Rule.[180] The policy requires university personnel who administer covered accounts to take steps to prevent and mitigate identity theft when Red Flags are detected.[181] These steps include: monitoring covered accounts, contacting account holders, changing passwords, notifying law enforcement, and attempting to identify the cause and source of the Red Flag.[182]

The National Association of College and University Business Officers provides sample policies for compliance with the Red Flags Rule.[183] One of these is the policy from the University of California – Los Angeles.[184]

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172. 20 U.S.C. §§ 1087aa-ii (2012).

173. *Id.* at 2.

174. 16 C.F.R. § 681.1(d)(2) (2014).

175. 16 C.F.R. § 681.1(b)(9) (2014).

176. Ladd, *supra* note 149.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Red Flag Rules*, UNIV. OF WIS., http://www.uwc.edu/money-matters/business-office/red-flag-rules (last visited April 18, 2015).

181. *Id.*

182. *Id.* It is important for personnel to take mitigating steps such as changing passwords, requesting additional documentation, and closing existing accounts if there is any sign of a Red Flag. *Id.*

183. *FTC Red Flags Rule*, NACUBO, http://www.nacubo.org/Business_and_Policy_Areas/Privacy_and_Intellectual_Property/FTC_Red_Flags_Rule.html (last visited Feb. 7, 2015) (linking to sample policies for Red Flags Rule compliance from colleges and universities such as University of Puget Sound and Xavier University).

184. *Red Flag Regulation Implementation at UCLA Student Financial Services*,

The policy requires each manager in Student Financial Services to "maintain responsibility for the implementation and ongoing support of this regulation."[185] It also requires quarterly audits of compliance procedures.[186]

Beyond the regulations that specifically apply to colleges and universities, the FTC has used "its authority to police unfair and deceptive trade practices" to enforce privacy policies.[187] It relies on Section 5 of The Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[188] While the FTC very rarely levies fines against violators of Section 5, the FTC can influence reputation by bringing bad press and instilling fear in companies by threatening a lengthy auditing process.[189] When the FTC reasonably believes that Section 5 is being violated, it initiates an enforcement action and investigates the company before issuing a complaint or order that usually ends in a settlement.[190] The FTC currently uses this enforcement power to regulate for-profit colleges and vocational schools, and to ensure that these institutions are not committing unfair trade practices by misleading students as to their accreditation, facilities, qualifications, and employment prospects.[191]

Because the FTC is charged with regulating commerce and profit-making activities, it suggests that the FTC cannot control the actions of colleges and universities that are not for-profit institutions.[192] If this reasoning is correct, then the FTC cannot bring an enforcement action against a college or university for violation of their privacy policy because students are not considered consumers, and nonprofit educational institutions are not considered profit-making institutions. The Department of Education is tasked with regulating privacy in the education context; it is unlikely that the FTC will take over this role despite its ever-expanding role as privacy regulator.[193]

e. Private Causes of Action

It is possible for a student, employee, faculty member, or third party to

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UNIV. OF CAL. – LOS ANGELES (Jan. 1, 2009), *available at* http://www.nacubo.org/documents/business_topics/UCLA_Redflags.pdf.

185. *Id.*

186. *Id.*

187. Daniel J. Solove & Woodrow Hartzog, *The FTC and The New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585 (2014).

188. 15 U.S.C. § 45(a)(1) (2012).

189. Solove & Hartzog, *supra* note 187, at 604–06.

190. *Id.* at 609.

191. Guides for Private Vocational and Distance Education Schools, 78 Fed. Reg. 68,987, 68, 990 (Nov. 18, 2013).

192. Woodrow Harztog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 G.W. L. REV. (forthcoming 2015).

193. *Id.* at 29–30.

bring an action against a college or university.[194] However, private causes of action are limited when it comes to holding a college or university liable for a data breach. As discussed earlier, FERPA cannot be used to supplement a private cause of action. HIPAA can be used, but only to establish a standard of care. The problem is that, to date, courts have been reluctant to say that institutions have a duty to protect their students from data breaches.

Case law over the past forty years has suggested that colleges and universities, as well as their employees, could have a duty to their students. In *Duarte v. State*, a California court found that a college had a duty to protect students from third-party attack due to its superior control over the residential facility where the attack occurred.[195] The court also noted that the college was responsible for providing adequate security for foreseeable risks.[196] In *Niles v. Board of Regents of the University System of Georgia*, a Georgia appellate court said that a duty to warn or protect a student is dependent "upon the foreseeability of the [danger]" as well as the student's knowledge.[197] Moreover, in *Peschke v. Carroll College*, the Montana Supreme Court found that a college had a duty to provide a reasonably safe environment for its students after a priest's inaction led to an on-campus shooting, but the court did not think that this meant the college was automatically liable for the injury.[198]

While these cases primarily involve physical injury to students, it could be interpreted that colleges and universities also have a duty to protect student information given the level of control these institutions have over the information.

However, an Illinois Appellate Court held that there is no common law duty to safeguard personal information for purposes of a negligence claim in a K–12 setting.[199] In *Cooney v. Chicago Public Schools*, the plaintiffs filed a lawsuit against their employer, Chicago Public Schools, after a printing company mistakenly sent a list including personal information to employees, rather than the intended COBRA Open Enrollment List.[200] The defendant notified the employees of the breach and offered one year of free

194. *See, e.g.*, ABA SECTION OF ANTITRUST LAW, DATA SECURITY HANDBOOK 122 (2008) (detailing a tort theory that plaintiffs could bring regarding data security). As is true of most negligence actions, the tort theory involves a showing that: (1) the defendant had a duty to secure the information, (2) the defendant breached the duty, (3) the breach proximately caused the plaintiff's harm, and (4) the plaintiff suffered actual harm. *Id.*

195. 148 Cal. Rptr. 804, 812 (Ct. App. 1978).

196. *Id.*

197. 473 S.E.2d 173, 175 (Ga. App. 1996).

198. 929 P.2d 874 (Mont. 1996).

199. Cooney v. Chicago Pub. Sch., 943 N.E.2d 23 (Il. App. Ct. 2010).

200. *Id.* at 27.

credit protection insurance.[201] The court determined that there was no common law duty to safeguard information so there could be no negligence claim against the defendant.[202] However, an analysis of the case found that "both the majority and the dissent agreed that a data security statute can be used to establish a duty for negligence purposes even if the underlying statute does not itself provide a private right of action."[203] This supports the assertion that HIPAA, as a data security statute, could serve as the standard of care in the case.

IV. PRIVATE LITIGATION RESULTING FROM DATA BREACHES

There have been over seven hundred data breaches involving educational institutions in the past nine years, some of which have resulted in class action litigation. The following part will highlight recent class action suits against educational institutions, as well as college and university medical centers. While there were a variety of claims brought against these institutions, most ended with a settlement agreement.

a. Class Action Suit Against University of Hawaii

Between April 2009 and June 2011, multiple campuses of the University of Hawaii were accused of releasing the private information of 90,000 individuals.[204] The affected information included names, social security numbers, phone numbers, address, and credit card information.[205] Some of the affected individuals filed a class action complaint against the University.[206] The University settled the lawsuit and provided the free benefits asked for by the class members.[207] The cost of providing all the benefits was approximately $550,000 plus attorneys' fees and costs.[208]

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201. *Id.*

202. *Id.* at 29.

203. *IL Appellate Court: No Duty Exists to Safeguard SSNs for Purposes of a Negligence Claim*, INFORMATION LAW GROUP (Feb. 3, 2010), http://www.infolawgroup.com/2011/02/articles/lawsuit/il-appellate-court-no-duty-exists-to-safeguard-ssns-for-purposes-of-a-negligence-claim/.

204. *Frequently Asked Questions*, University of Hawai'i Data Breach Settlement, http://uhdatabreachlawsuit.com/?q=node/3 (*last visited* Apr. 14, 2015). The affected campuses included Kapiolani Community College in April 2009, Honolulu Community College in May 2010, University of Hawai'i at Manoa in June 2010, University of Hawai'i at West Oahu in October 2010, and Kapiolani Community College in June 2011. *Id.*

205. *Id.*

206. Complaint at *1, Gross v. Univ. of Hawai'i et al, No. 1:10cv684 (D. Haw. Nov. 18, 2010), ECF No. 1.

207. *Frequently Asked Questions*, *supra* note 204. Class members asked for "Continuous Credit Monitoring Services, Call Center, Consultation Services, and Restoration services" for two years. *Id.*

208. *Id.*

b. Class Action Suit Against Maricopa County Community College District

In 2013, the Maricopa County Community College District experienced a large-scale data breach involving academic and personal data of 2.4 million current and former students, and employees.[209] While the breach occurred in April 2013, students were not notified until November of that year.[210] The compromised information included employee social security numbers, driver's license numbers, bank account information, and student academic information.[211] The Community College District decided to spend $7 million to notify parties and to fund repairs, including the construction of a call center facility.[212]

The victims of the breach filed a class action complaint against the Community College District on April 28, 2014.[213] They allege negligence, negligence per se under two Arizona state statutes, breach of fiduciary duty, bailment, breach of the right of privacy, and violation of a federal statute related to the unlawful disclosure of personal information from a motor vehicle record.[214] The first negligence per se claim was brought under A.R.S. 41-4172 which requires the entity to "develop and establish commercial reasonable procedures to ensure that entity identifying information and personal identifying information. . .is secure and cannot be accessed, viewed or acquired unless authorized by law."[215] The other negligence per se claim was brought under A.R.S. 44-7501, which establishes "a duty of reasonable care to notify in a timely manner if [personal identifying information] or other sensitive information was potentially exposed to unauthorized access."[216] The case has been removed to federal court.

In May 2014, the District had to approve an additional $2.3 million to pay for lawyers' fees, as well as $300,000 for records management, which brought the total amount spent on the breach to $20 million.[217] In order to pay for the data breach, the Maricopa County Community College District

209. Mary Beth Faller, *Maricopa Colleges waited 7 months to notify 2.4 million students of data breach*, ARIZ. REPUBLIC (Nov. 27, 2013), http://archive.azcentral.com/community/phoenix/articles/20131127arizona-college-students-data-breach.html.

210. *Id.*

211. *Id.*

212. *Id.*

213. Class Action Complaint, Roberts v. Maricopa County Cmty. Coll. Dist., No. CV2014-007411 (Ariz. Super. Ct. Apr. 28, 2014).

214. *Id.*

215. *Id.*

216. *Id.*

217. Mary Beth Faller, *Data Breach Costs Approach $20 Million*, ARIZ. REPUBLIC (May 20, 2014), http://www.azcentral.com/story/news/local/phoenix/2014/05/19/data-breach-costs-approach-million/9312729/.

increased the tax levy.[218] The two percent increase will bring in $21 million in revenue, $7.2 million of which will be spent on the information technology department.[219]

Databreaches.net filed a complaint regarding the breach with the FTC in June 2014.[220] The complaint asked that the FTC investigate the District's data practices and security configurations.[221] It also accused the District of failing to "remedy known security vulnerabilities" implementing "the recommendations of its own personnel's strategic plan that had recommended common and industry-standard approaches to good data security."[222] The complainant believed that the District's practices were so inadequate that they had violated the Safeguard Rule[223] and asked that the FTC take action against the conduct.[224]

c. Suit Against Stanford Hospital and Clinics

A business associate of Stanford Hospital and Clinics, located in Palo Alto, California, experienced a data breach when a subcontractor caused a health information breach.[225] Information regarding 20,000 patients treated by the hospital's emergency department was posted on a website, affecting patients treated between March 1, 2009 and August 31, 2009.[226] This information included patient names, medical records, hospital account numbers, emergency room dates, and medical codes detailing the reasons for the visit and billing charges.[227] Despite hospital action to remove the information within twenty-four hours of discovery, the information was posted online for nearly a year.[228]

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218. Mary Beth Faller, *Maricopa College District Raises Property Taxes*, ARIZ. REPUBLIC (May 28, 2014), http://www.azcentral.com/story/news/local/phoenix/2014/05/28/maricopa-college-district-raises-property-taxes/9677067/.

219. *Id.*

220. Complaint by Dissent, In the Matter of Maricopa County Cmty. Coll. Dist., FTC (Jun. 14, 2014), *available at* http://www.databreaches.net/wp-content/uploads/MCCCD_SafeguardsRule.pdf. The complainant uses Dissent as a pseudonym, and is a privacy advocate and blogger with Databreaches.net. *Id.* at 2.

221. *Id* at 6.

222. *Id*.

223. 16 C.F.R. 314 (2014).

224. *Id.* at 7.

225. Howard Anderson, *Stanford Reports Website Breach*, HEALTHCARE INFO SECURITY (Sep. 9, 2011), http://www.healthcareinfosecurity.com/stanford-reports-website-breach-a-4038?webSyncID=48311491-1e00-80ab-6632-dbb9dbc56bba&sessionGUID=224eea96-7db7-b72e-9ca4-132222770896.

226. *Id.*

227. *Id.*

228. *Id.* The hospital released a statement regarding the actions taken to remedy the breach:

> Stanford Hospital & Clinics has been working very aggressively with the vendor to determine how this occurred in violation of strong contract com-

Some of the victims brought a class action suit against the Medical Center and the vendors.[229] The suit settled for $4 million including attorneys' fees in March 2014.[230] A provision of the California Confidentiality of Medical Information Act allowed the patients to bring an action against the entity seeking minimum damages of $1,000 per person with no proof of actual damage required because the entity negligently released individually identifiable medical information.[231] As part of the settlement, the Health Center agreed to contribute $500,000 to create an educational project managed by the California HealthCare Foundation.[232]

d. Suit Against University of Pittsburgh Medical Center

In 2014, the personal and financial information of 62,000 employees at the University of Pittsburgh Medical Center (UPMC) was compromised in a major data breach.[233] UPMC sent a letter to victims explaining, "[E]mployees were targeted by a fraudulent tax return scheme."[234] In February 2014, some of the victims brought a lawsuit against UPMC following the breach of personal information.[235] The suit claimed that the Medical Center and its payroll processor were negligent in the measures they took to protect employee information.[236] Larry Ponemon, the President and Founder of Ponemon Institute, a cybercrime researcher, said that the average cost of the data breach would be $201 per record, which includes the

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> mitments to safeguard the privacy and security of patient information. The vendor . . . is conducting its own investigation into how its contractor caused patient information to be posted to the website, and the hospital may take further action following completion of the investigation.

Id. (omission in original).

229. Complaint at *1, Springer v. Stanford Hosps. & Clinics, No. BC470522 (Cal. Super. Ct. Sep. 28, 2011).

230. Marianne Kolbasuk McGee, *Stanford Breach Lawsuit Settled*, DATA BREACH TODAY (Mar. 24, 2014), http://www.databreachtoday.com/stanford-breach-lawsuit-settled-a-6670.

231. *Id.*

232. *Id.*

233. Marianne Kolbasuk McGee, *Victim Tally in UPMC Breach Doubles*, DATA BREACH TODAY (June 2, 2014), http://www.databreachtoday.com/victim-tally-in-upmc-breach-doubles-a-6901.

234. Letter from John P. Houston, Vice President, Privacy and Information Security & Associate Counsel, UPMC, to Employees, *available at* http://www.wtae.com/blob/view/-/25534940/data/1/-/16bay7z/-/Letter-to-UPMC-workers.pdf. The letter notified employees that they would receive identity theft protection services free of charge, and also urged employees to contact credit card companies, the IRS, and banks to notify them of the breach. *Id.*

235. Brian Bowling, *Class-action Lawsuit Targets UPMC, Software Company for Big Data Breach*, TRIBLIVE (May 9, 2014), http://triblive.com/news/adminpage/6086833-74/upmc-software-says#axzz3D2glL6rr.

236. *Id.*

cost of an investigation and a one-year period of credit monitoring for each victim.[237]

The complaint alleged the defendants had a duty to protect the private, confidential, personal and financial information and the tax documents of the plaintiffs.[238] The plaintiffs claimed negligence and breach of contract.[239] The plaintiffs discussed the Federal Trade Commission's guidance on "Protecting Personal Information: A Guide for Business" and argued that because UPMC violated those administrative guidelines by failing to ensure adequate data security, they failed to meet industry standards.[240] The plaintiffs also alleged that UPMC's failure to maintain adequate security practices caused actual damages to the plaintiffs because personal information was used to file fraudulent tax returns.[241] Additionally, the plaintiffs alleged that they were put "at an increased and imminent risk of becoming victims of identity theft crimes, fraud and abuse" and needed to spend "considerable time and money to protect themselves."[242] As of this writing, the case remains unresolved.

V. HOW COLLEGES AND UNIVERSITIES SHOULD PREPARE AND REACT TO BREACHES

As stated earlier, it is rare for colleges and universities to be sued by private plaintiffs for torts such as negligence with regards to data breaches, and governmental action is also rare, but the preceding section shows that, of late, data breach suits have become more common. It is important that colleges and universities take preventive measures to ensure the safety of student, faculty, and employee data. There are also remedial measures that must be implemented immediately when a higher education institution learns of a potential data breach. This part will detail preventive measures such as proper information technology policies, encryption, and insurance. It will also address remedial measures such as timely notification, offering free credit monitoring, and properly defending itself in a class action suit.

a. Information Technology Best Practices & Security Policies

The best way for colleges and universities to ensure that they will not be held liable for a cyber attack is to institute comprehensive information technology policies. Higher education institutions should create a "written information security plan" that "outlines data security methodologies and

237. *Id.* The total cost of the breach could be as much as $5 million. *Id.*

238. Second Amended Class Action Complaint at 4, Dittman v. UPMC, No. GD-14-003285 (Pa. County Ct. June 25, 2014).

239. *Id.* at 13–15.

240. *Id.* at 7–8.

241. *Id.* at 9.

242. *Id.*

gives users insight into their role in data protection."[243] The plan should detail how data is collected, stored and protected.[244] Moreover, there should be an incident response plan in place to complement the information security plan that sets up a clear response in the event of data vulnerability.[245]

An example is Princeton University, which has a detailed information technology policy in place.[246] The policy acknowledges that personal information is "protected by federal and state laws or contractual obligations that prohibit its unauthorized use or disclosure."[247] The University holds employees responsible for assessing the sensitivity of information and ensuring adequate protection for that information.[248] Additionally, the University requires that personally identifiable information not be stored or used unless there is a legitimate business need and there is no reasonable alternative for the information.[249] Perhaps the most important part is that the policy sets out guidelines for employees and contractors alike, requiring third parties with access to confidential information and technology services take the necessary secure steps.[250]

According to the New York Times, some unnamed institutions are being so cautious as to not allow professors to take laptops abroad.[251] This is because a majority of hacks originate overseas, especially in China.[252] When professors visit these countries, the hackers have become advanced enough that they copy the entirety of the professor's hard drive the moment he or she connects to a network.[253] Some of them plant a virus or some other type of malware on the computer that will activate when the computer connects to the home network upon arrival back at the professor's home institution, giving the hackers access to the entire college or university net-

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243. Deena Coffman, *Managing Data Protection in Higher Education*, RISK MANAGEMENT MAGAZINE (Sep. 1, 2014), http://www.rmmagazine.com/2014/09/01/managing-data-protection-in-higher-education/.

244. *See id.*

245. *Id.*

246. *Information Security Policy*, PRINCETON UNIV. (Nov. 10, 2009), http://www.princeton.edu/oit/it-policies/it-security-policy/#comp0000503ecd50000001f1a12a0c.

247. *Id.* The policy outlines the applicable statutes, including FERPA, HIPAA, the Red Flags Rule, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act. *Id.*

248. *Id.*

249. *Id.* This information includes social security number, date of birth, place of birth, mother's maiden name, credit card numbers, bank account numbers, income tax records, and driver's license numbers. *Id.*

250. *Id.*

251. Pérez-Peña, *supra* note 44.

252. *Id.*

253. *Id.*

work.[254]

It would also be good practice for colleges and universities to participate in voluntary self-assessments of information security. There are many ways to review cyber security practices, such as the Cyber Resilience Review or the Cybersecurity Evaluation Tool.[255] One of the difficulties with implementing these assessments is that college and universities are often understaffed in their technology departments.[256] One study found that thirty-nine percent of organizations had inadequate staffing for security and twenty-eight percent claimed that their personnel lacked the proper security skills.[257] Dell Incorporated, a major American computer technology company, suggests that institutions should partner with third-party security services to help prepare and deal with cybersecurity threats.[258] However, as previously discussed, giving third parties access to confidential information creates a different onslaught of issues related to HIPAA and FERPA protections.

b. Encryption

Encryption is defined as "the process of obscuring information to make it unreadable without a decryption key.[259] The goal of encryption is to make sure that "even if sensitive information is compromised, it remains useless to anyone without a key to decrypt it," although some advanced hackers have the ability to override any sort of encryption.[260] The American Bar Association suggests that any organization that collects any kind of sensitive information should create an encryption policy to secure the data in the event that it becomes compromised.[261]

In Texas, a state regulation requires higher education institutions to implement encryption procedures.[262] It requires encryption of confidential information that is transmitted over the Internet or stored in a public location.[263] It also discourages storage of confidential information on portable

254. *Id.*

255. *See* Presentation, Amy Banks & DeShelle Cleghorn, *Integrating Cybersecurity with Emergency Operations Plans (EOPs) for Institutions of Higher Education (IHEs)*, READINESS & EMERGENCY MANAGEMENT FOR SCHOOLS, http://rems.ed.gov/Docs/Integrating_Cybersecurity_with_EOPs_for_IHEs_slides.pdf.

256. *Top 2 Information Security Challenges for Higher Education*, DELL SECUREWORKS, http://www.secureworks.com/assets/pdf-store/white-papers/wp-top-2-info-security-challenges-for-higher-edu.pdf.

257. *Id.* at 2.

258. *Id.* at 3.

259. ABA SECTION OF ANTITRUST LAW, DATA SECURITY HANDBOOK 19 (2008).

260. *Id.*

261. *Id.*

262. 1 TEX. ADMIN. CODE §202.75(4) (2014).

263. *Id.* at § 202.75(4)(A)–(B).

devices and requires encryption if it is used on portable devices.

Although encryption does not insure against data breaches, it is a step in the right direction toward data protection. Encryption protects confidential data by making it more difficult for hackers to discern what the information is and who is belongs to. It is a necessary step for colleges and universities to take to show students and employees that they are serious about data protection.

c. Offsetting Costs with Cyber Insurance

One of the most difficult parts of a data breach is the financial implication for the college or university. Oftentimes, these institutions are not prepared for the high costs of remedying a breach and providing services to victims of the breach.[264] Additionally, few institutions actually have cyber insurance to help offset these costs.[265] Expenses can include "forensics consultants, lawyers, call centers, websites, mailings, identity-protection and credit-check services, and litigation."[266] An intangible expense is the damage to an institution's reputation that occurs when they experience a breach of data security.[267] It can be especially difficult for public institutions that rely on state funding to absorb the costs of a cyber attack.[268]

Data Breach Insurance is available to colleges and universities to help protect them in case a breach occurs.[269] As the threat of cyber attacks increases, so do the number of companies buying cyber insurance.[270] Some insurance carriers are beginning to specifically market cyber insurance for higher education institutions.[271] Insurance can cover both the tangible ex-

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264. Megan O'Neil, *Data Breaches Put a Dent in Colleges' Finances as Well as Reputations*, CHRON. HIGHER EDUC. (Mar. 17, 2014), http://chronicle.com/article/Data-Breaches-Put-a-Dent-in/145341/ (noting that "[f]ew institutions budget in advance for data breaches").

265. *Id.*

266. *Id.*

267. *Id.*

268. Pérez-Peña, *supra* note 44 (discussing how the University of California – Berkeley has had to double its cybersecurity budget, already in the millions, in response to a huge increase in attempted cyber attacks).

269. *See Data Breach Insurance Protection*, THE HARTFORD, http://www.thehartford.com/data-breach-insurance/ (last visited November 12, 2014). The Hartford offers Data Breach Insurance to companies, providing "access to professionals who can help you comply with regulatory requirements" and "guidance on how to help prevent a data breach and handle a breach crisis if one occurs." *Id.*

270. *See* Deirdre Fernandes, *More Firms Buying Insurance for Data Breaches*, BOSTON GLOBE, Feb. 17, 2014, http://www.bostonglobe.com/business/2014/02/17/more-companies-buying-insurance-against-hackers-and-privacy-breaches/9qYrvlhskcoPEs5b4ch3PP/story.html (discussing how "one in three companies now has insurance to specifically protect" against losing customer information).

271. *See CyberEdge*, AIG, http://www.aig.com/CyberEdge_3171_417963.html (last visited Nov. 13, 2014) (offering cyber security insurance to protect third-party loss

penses as well as efforts to recover any damages to the institution's reputation. The benefits of insurance include protections for breach of contract claims, computer forensics, notification costs, regulatory actions, healthcare protections in the case of an on-campus medical center, and hacker damage.

Unfortunately, cyber insurance is expensive and oftentimes difficult to obtain.[272] Some insurance companies require institutions to have strong security procedures in place in order to be eligible for insurance.[273] If colleges and universities are implementing proper procedures per the FERPA guidelines[274] and the GLBA Safeguard Procedures[275], they should have no problem adhering to the standards set forth by insurance companies.

d. Timely Notification

It is important for colleges and universities to know their state's data breach notification law. Each state's law can vary in the definition of what constitutes a data breach, what timely notification is, and who needs to be notified. Moreover, some states are imposing data protection on out-of-state entities, meaning "physical presence in the state is often not required for an institution to be subject to the law."[276] Therefore, if an institution has students from a wide array of states, they may be subject to the notification requirements of each state.

Timely notification differs by state. In Florida, notification must occur "no later than 30 days following determination of the breach."[277] Some state statutes do not have a set amount of time but rather require notification "in the most expedient time possible and without unreasonable delay."[278] It is in the best interest of colleges and universities to become familiar with the data breach statute of their home state, but also to keep in mind that they might be required to notify students in accordance with the student's home state.[279]

e. Free Fraud Protection

Most colleges and universities deal with breaches by offering free credit

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resulting from a cyber attack, lost income, and other costs resulting from a breach).

272. O'Neil, *supra* note 264.

273. *Id.*

274. *See supra* Section III(b).

275. *See supra* Section III(d).

276. Nicholson & O'Reardon, *supra* note 73, at 119.

277. FL. STAT. §501.171 (2014).

278. LA. REV. STATS. CH. §51:3074 (2005).

279. For an overview of all state notification statutes, *see State Data Security Breach Notification Laws*, MINTZ LEVIN, http://www.mintz.com/newsletter/2007/PrivSec-DataBreachLaws-02-07/state_data_breach_matrix.pdf (last visited Dec. 4, 2014).

monitoring to the affected students. This involves high costs for the colleges and universities, which might make it more difficult for public entities to fund. Indiana University reacted to a data breach by supplying "Social Security numbers and names of those potentially affected to all three major credit-reporting agencies."[280] California State University East Bay sent a letter to affected parties offering complimentary 12-month credit monitoring services.[281] The University of Maryland offered five years of free credit monitoring.[282]

Offering credit monitoring is a positive response to a data breach that might convince victims not to bring suit and convince the court not to levy too harsh a penalty in the case of a suit.

f. Lack of Standing Argument

One of the most difficult hurdles for class action plaintiffs suing for losses incurred as a result of a data breach is proving that they have standing. Most of the previous cases involving data breaches have settled prior to the class certification stage. The issue is the inability to show a tangible injury. The Supreme Court ruled on Article III standing in federal class action suits in *Clapper v. Amnesty International, USA* in 2013.[283]

The *Clapper* decision involved human rights groups, public interest lawyers, and media organizations that claimed that the wiretapping program under the Foreign Intelligence Surveillance Act affected their work.[284] The question before the court was whether the respondents had Article III standing to seek prospective relief.[285] The respondents asserted that their injury in fact was an "objectively reasonable likelihood that their communications" could be acquired under the Act in the future.[286] The Court determined that this theory was "too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'"[287] In order for the plaintiffs in the underlying litigation to be affected

280. *Indiana University Reports Potential Data Exposure*, IND. UNIV. (Feb. 25, 2014), http://news.iu.edu/releases/iu/2014/02/data-exposure-disclosure.shtml

281. Sample Notice Letter from Brad Wells, Vice President, Administration and Finance & Chief Financial Officer at California State University East Bay, to CA Residents, *available at* http://oag.ca.gov/system/files/California%20State%20University%20East%20Bay%20-%20Sample%20Notice%20Letter%20to%20CA%20Residents%20%285089625x7AB84%29_1.pdf?

282. UMD Data Breach, UNIV. OF MD., http://www.umd.edu/datasecurity/ (last visited Nov. 8, 2014).

283. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

284. *Id.* at 1142.

285. *Id.*

286. *Id.* at 1143.

287. *Id.* (*quoting* Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). In order to establish standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Mon-

by the Act, the government would have had to go through a "highly attenuated chain of possibilities" that the court did not find convincing.[288]

The plaintiffs in the underlying litigation also tried to argue that they had standing because they undertook costly measures to avoid being affected by the Act.[289] The Court was unconvinced by the argument that the respondents suffered present costs and burdens as reasonable reaction to a threat of harm because the harm was not certainly impending.[290] The Court held that respondents could not "manufacture standing by incurring costs in anticipation of non-imminent harm."[291] *Clapper* does not carry over to state courts, but colleges and universities should assess the current law of standing in the state where litigation is brought to determine if an injury of the kind experienced in *Clapper* is enough to certify a class.

For colleges and universities facing class action suits stemming from a data breach, it will oftentimes be better to litigate rather than settle because of the plaintiffs' inability to show standing and establish jurisdiction. At the very least, these institutions should move to dismiss data breach class actions on lack-of-standing grounds. It is important for colleges and universities to provide credit-monitoring services immediately upon discovering a breach because that will make it even more difficult for plaintiffs to plead a concrete injury.[292]

The plaintiffs with the best chance of convincing the court to hear their case are those who have actually experienced identity theft and can prove that their injuries occurred directly as a result of the college or university's breach.[293] Therefore, class action plaintiffs seeking redress following a data breach will have to show more than the possibility of identity theft. Even if plaintiffs can show that they suffered identity theft, they have to jump another hurdle and prove that the information stolen directly resulted from the college or university data breach. Considering the wide variety of personal information people give away on a daily basis, it will be difficult for plaintiffs to pinpoint the exact entity that a hacker got their information from.

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santo Co. v. Geertzon Seed Farms, 561 U.S. 139, 149 (2010).

288. *Clapper*, 133 S. Ct. at 1148.

289. *Id.* at 1150−51.

290. *Id.* at 1151.

291. *Id.* at 1155.

292. Alison Frankel, *Why (Most) Consumer Data Breach Class Actions vs Target are Doomed*, REUTERS (Jan. 13, 2014), http://blogs.reuters.com/alison-frankel/2014/01/13/why-most-consumer-data-breach-class-actions-vs-target-are-doomed/

293. *See id.* Frankel notes that victims of the Target data breach will likely only be able to prove standing if they have actually suffered identity theft as a result of the information stolen from Target, and the information used for the identity theft was actually taken from the Target hacking. *Id.*

VI. POTENTIAL FUTURE REGULATIONS

The Protecting Student Privacy Act of 2014 sponsored by Senator Ed Markey in the United States Senate could become the newest regulation affecting colleges and universities.[294] The proposal would amend FERPA to require institutions to implement information security policies and procedures, and threatens to take away funds if institutions do not comply.[295] The amendment notes that funds will not be available if an educational institution has not implemented information security policies to protect personally identifiable information and require third parties working alongside colleges and universities to have information security policies in place.[296] It focuses on outside parties and requires them to have stronger policies and procedures in place for dealing with student information.[297]

Moreover, Senator Bill Nelson introduced the Data Security and Breach Notification Act of 2015 in January 2015.[298] If enacted, it would preempt all state breach notification laws.[299] The bill has detailed procedures for notification and timeliness, as well as disclosure to the FTC and the Department of Homeland Security.[300] It was referred to the Committee on Commerce, Science and Transportation in January 2015.

Additionally, in 2014, the non-profit Electronic Privacy Information Center released a Student Privacy Bill of Rights that would increase student control over personal information.[301] There are six major features of the Bill of Rights: (1) access to and amendment of student records, (2) focused collection of data, (3) respect for context, (4) security, (5) transparency, and (6) accountability.[302] The focus is on the right to access records, to reasonably limit the amount of data collected and retained, to know what their data is being used for, and to hold institutions and third parties accountable for the way they handle data.[303]

Finally, one article has suggested that colleges and universities need to begin to regulate student social networking in order to reduce the risk of

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294. Protecting Student Privacy Act of 2014, S. 2690, 113th Cong. (2014).

295. *Id.*

296. *Id.* at (4)(A).

297. *Id.* at (6)(C) (requiring educational institutions to require outside parties to "to have policies or procedures in place regarding information security practices regarding the education records. . .").

298. Data Security and Breach Notification Act of 2015, S. 177, 114th Cong. (2015).

299. *Id.*

300. *Id.*

301. Valerie Strauss, *Why a 'Student Privacy Bill of Rights' is Desperately Needed*, WASH. POST, Mar. 6, 2014, http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/03/06/why-a-student-privacy-bill-of-rights-is-desperately-needed/.

302. *Id.*

303. *Id.*

identity theft.[304] The authors of the article express concern about students' lack of awareness as to the risks of identity theft.[305] Identity theft can affect these students long after they graduate from a college or university, so colleges and universities need to prevent identity theft, as well as discuss remedial measures with victims of identity theft.[306] The primary issue with social networking sites is that they require use of students' real names.[307] The article finds that students should be educated about protecting their own personal data and suggests that this should be mandatory for compliance with regulation.[308]

VII. CONCLUSION

Colleges and universities have seen a dramatic increase in the amount of data security breaches on campuses. These institutions are very susceptible to cyber attacks due to the large amounts of data they store, particularly if they have a medical center on campus. Additionally, they are subject to a multitude of state and federal regulations dealing with everything from data monitoring, protection, and destruction, to breach notification. It is important for these institutions to be aware of the regulations they are controlled by, and how they must shape their practices in accordance with these regulations. It is also necessary that colleges and universities have information security policies in place, and breach response plans to ensure that they will decrease their potential liability in the event of a breach.

304. Jamison Barr & Emmy Lugus, *Digital Threats on Campus: Examining the Duty of Colleges to Protect Their Social Networking Students*, 33 W. NEW ENG. L. REV. 757, 763 (2011), *available at* http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1673&context=lawreview.

305. *Id.* at 786 (noting that identity thieves can "deduce social security numbers from online data that may be considered innocuous, such as birthdates and hometowns.").

306. *Id.* at 786.

307. *Id.* at 764.

308. *Id.* at 773.