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Higher Education Highlights

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Questions and Answers on Title IX and Sexual Violence: Five Key Questions That Have Actually Been Answered – and Five New Questions

By James A. Keller

On April 29, 2014, the Office for Civil Rights of the United States Department of Education ("OCR") issued a "significant guidance document" that sought to address many of the questions that arose in the wake of the April 4, 2011 Dear Colleague Letter. This April 29, 2014 Q+A Document is 46 pages long, and will not be summarized in detail here. This note talks through five key questions that the Q+A actually does answer, and five new questions that this Q+A, itself, has created.

Five Key Questions, Answered

Q1: Does Title IX apply to transgender students?

A1: Yes.

Q2: Should we have a full-time Title IX coordinator?

A2: Yes. While not mandatory, "designating a full-time Title IX coordinator will minimize the risk of a conflict of interest."

Q3: When does our institution have "notice" of "possible" sexual violence that requires us to take "immediate and appropriate steps to investigate or otherwise determine what occurred?"

A3: Whenever a responsible employee knows, or in the exercise of reasonable care should have known, about an incident of sexual violence.

Q4: Who is a "responsible employee?"

A4: Any employee who:

- Has the authority to take action to redress sexual violence;

- Has been given the duty to report incidents of sexual violence ***or any other misconduct by students*** to the Title IX coordinator or other appropriate school designee; or
- A student could reasonably believe has such authority or duty.

Q5: Do we have to investigate incidents of sexual violence shared during "Take Back the Night" and similar events?

A5: No, although institutions should still offer counseling, health, and mental health services.

Five New Questions, Raised

Q1: **How broad is the responsible employee definition intended to be?** The Q+A defines a responsible employee to include those who have the duty of reporting "any other misconduct by students" to an "appropriate school designee." Professors, for example, almost certainly have the duty to report academic misconduct. Does this mean they are all responsible employees for Title IX reporting purposes?

Q2: **How much discretion does an institution have in determining whether a claim is credible and warrants further action?** The Q+A indicates that a school must take "immediate and appropriate steps to investigate or otherwise determine what occurred" once a responsible employee is on notice of possible sexual violence. However, in this same section (D-2), the Q+A states that "***if*** the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation." What if the school determines that it is unclear whether the sexual violence created a hostile environment; e.g., it is just not apparent what happened? Can the school decline to move forward with disciplinary proceedings, even if the complainant would like to, because the school has not determined that a hostile environment was created?

Q3: **How do we best capture, and convey, the "mostly-confidential" reporting sources on campus?** Campus mental-health counselors and pastoral counselors are not "responsible employees" and need not report – understood. But what are the exact contours of the "confidentiality" afforded to "social workers, psychologists, health center employees," or others who have some sort of confidential relationship with a student but are not mental-health or pastoral counselors? While the Q+A says that "OCR strongly encourages schools to designate these individuals as confidential sources," when you actually read the Q+A, the information being provided is not actually kept completely confidential – these folks still are told to report the nature, date, time, and general location of the incident to the Title IX Coordinator, and, it appears, should also generally report the perpetrator's name. How do we best explain to our students exactly what the nature of this "confidentiality" is?

Q4: **Realistically, should everyone receive some sort of training?** Section J of the Q+A discusses training for students, and for responsible employees, but also indicates that "***all employees***" likely to witness or receive reports of sexual violence should receive training. Is there anyone OCR believes, as a categorical matter, does not require training?

Q5: Retaliation: What does an institution do when a respondent files a claim of "false charges" against the complainant? How about when the respondent files a lawsuit against the complainant, asserting defamation or other claims? Is that *per se* retaliation? What "strong responsive action" would OCR suggest that the institution take? Is OCR suggesting that the institution can somehow prevent a respondent from exercising her/his right to bring a civil claim? If the institution ignores or declines to pursue the "false charges" student conduct claim on the grounds it is retaliation, isn't that creating a different type of Title IX risk?

Supreme Court Asked If State Universities Are Exempt From Claims Under the False Claims Act

By Nicholas J. Nastasi and Brett S. Covington

Summary

A professor at the University of Texas Health Science Center has petitioned the U.S. Supreme Court to determine the standard for imposing liability on state universities (and their related entities, such as hospitals and research centers) under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.* In *King v. University of Texas Health Science Center*, the U.S. Court of Appeals for the Fifth Circuit held that the Health Science Center, a hospital within the University of Texas System, is an "arm of the state," and therefore both exempt from liability under the False Claims Act and immune from suit in federal court under the Eleventh Amendment.

The federal courts of appeal which have addressed this issue — whether a state university or related entity — have reached conflicting conclusions. Because there is a split among the federal circuits, this increases the likelihood that the Supreme Court grant certiorari on this issue.

Background

In this case, a former associate professor at the University of Texas Health Science Center filed a *qui tam* (or whistleblower) claim under the False Claims Act ("FCA"), alleging that the University violated the Act by covering up the misconduct of a professor who received federal research grants. Under the FCA, liability will be imposed on "*any person* who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-(B).

The whistleblower, Professor Terri King, worked in the Health Science Center's Department of Internal Medicine from 2001 to 2005. In 2001, she began working in a research lab under Dr. Dianna Milewicz's supervision. According to King's complaint, she began noticing discrepancies in Milewicz's data in 2004. King alleges that when she informed Milewicz about the discrepancies, she was retaliated against by receiving a "false and defamatory performance review" from Dr. Milewicz. King also alleges that she was retaliated against when she was reassigned to less favorable positions and eventually terminated.

In January 2011, King filed a *qui tam* lawsuit against the Health Science Center, alleging that Dr. Milewicz falsified research data and results. King claims that the fraud was in connection with federally-funded research, and that Milewicz used falsified results in order to obtain federal funding. King also alleged that the Center covered up Milewicz's misconduct relating to federal research grants. In addition, King asserted a retaliation and wrongful termination claim under the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h), alleging that she was retaliated against after notifying Dr. Milewicz of the alleged fraud. The United States, which has the right under the FCA to intervene in *qui tam* actions, declined to do so.

The U.S. District Court dismissed the whistleblower claim, concluding that the university hospital was an "arm of the state," and therefore exempt from the FCA's *qui tam* provisions. The district court also held that the plaintiff's retaliation claim was barred by the Eleventh Amendment's "sovereign immunity" protection. The district court's reasoning was based on the Supreme Court's decision in *Vt. Agency of Natural Resources. v. United States* (2000), which held that states (as well as state agencies) are not subject to liability under the False Claims Act because they are not a "person" within the meaning of that Act.

In November 2013, the Fifth Circuit affirmed the district court's ruling that the Health Science Center is an "arm of the state," and therefore not a "person" that can be held liable under the FCA. The Fifth Circuit applied six factors to determine whether the center qualifies as an "arm of the state," including: (1) whether state law characterizes the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy by the entity; (4) whether the entity is concerned primarily with local, as opposed to statewide problems; (5) whether the entity has authority to sue, and be sued, in its own name; and (6) whether the entity has the right

to hold and use property. In applying these factors, the Fifth Circuit recognized:

- The Health Science Center is part of the University of Texas, and the university is considered, under state statutory law, an "arm of the state." Texas law also recognizes that the Health Science Center is a "governmental unit."
- The Health Science Center receives significant funding from state sources.
- The Health Science Center has limited autonomy. A Board of Regents appointed by the Texas Governor is responsible for governing the University of Texas System, including the component institutions. All Health Science Center contracts must be in accordance with board rules or specially approved by the Board of Regents. As a state agency, the Center is also required to follow specific accounting and financial reporting requirements. In addition, the Board of Regents has the sole and exclusive management over the Center's right to hold and use property.
- The University of Texas System has locations throughout the state of Texas. Although the Health Science Center's facilities are confined to Houston, its research and education are created to benefit the citizens of the state, not just the local community.

For some of the above factors (particularly, the local/state factor), the Fifth Circuit framed the "entity" as the University of Texas, rather than the more narrow entity of the Health Science Center. In addition, despite the fact that the Health Science Center can sue, and be sued in its own name (a fact that King argues is important in demonstrating that the entity was not an "arm of the state"), the Court held this factor was outweighed by the others.

The Fifth Circuit also affirmed the dismissal of the FCA retaliation claim, holding that the Health Science Center is an "arm of the state" and therefore entitled to "sovereign immunity" under the Eleventh Amendment. Under the Eleventh Amendment, a state, or "arm of the state," may generally not be sued for monetary relief. Therefore, to the extent King was seeking monetary relief relating to her termination, that claim was barred by the Eleventh Amendment.

On January 31, 2014, King filed a petition with the U.S. Supreme Court for review. While the Supreme Court has complete discretion in deciding whether to review cases, the fact that other federal courts of appeal have applied inconsistent standards in deciding this issue — whether state universities (or related entities) can be held liable under the FCA — increases the likelihood that the Supreme Court will decide this important issue. For example, the Fourth and Fifth Circuits consider whether the entity is concerned primarily with local, as opposed to statewide concerns, while the Sixth Circuit considers whether the entity's functions fall within the traditional purview of state or local government. While there is some overlap between these criteria, the broader approach by the Fourth and Fifth Circuit would lead to a greater range of entities considered as "arms of the state," and therefore exempt under the FCA.

In her petition for review, King argues that the Fifth Circuit's decision was wrong for the following reasons: (1) the Health Science Center has local autonomy; (2) the Center has $1 billion of its own assets (separate from the rest of the university); and (3) the Health Science Center is mostly concerned with local problems, rather than statewide. King also argues that the courts incorrectly conflated the Health Science Center with the University of Texas, when the courts should have focused on the *Health Science Center* specifically, rather than the University as a whole. King also asks the Supreme Court to either reverse its prior *Stevens* decision, or at least narrow the decision in order to "minimize the growing fraud in academic research."

Conclusion

Qui Tam actions have long been pursued in the defense, pharmaceutical and healthcare industries. More recently, counsel for plaintiffs have been looking to other industries to target including higher education. With significant federal funds spent on research and financial aid, higher education may be susceptible to such claims. If the Supreme Court grants certiorari in this case, the outcome will likely have a significant impact on state universities and their related entities.

VAWA Rulemaking Sessions Come to a Close – A Sneak-Peek at What May Be In Store for Colleges and Universities

By Christine M. Pickel

On March 31, 2014, negotiators concluded the last of three rulemaking sessions focused on tackling issues raised by the recent reauthorization of the Violence Against Women Act ("VAWA"). The three-session process culminated in a draft regulation which would modify the Clery Act regulations, 34 C.F. R. § 668.46. The next step in the process is publication in the Federal Register, followed by an opportunity for public comment.

The negotiators grappled with a number of complex issues outlined in five issue papers (which may be viewed at http://tinyurl.com/pmcdr5a). Among other things, the negotiators identified and attempted to resolve a number of inconsistencies and areas of potential confusion created by the new statutory language. This article discusses some key areas which the negotiators identified as particularly challenging, and how those challenges may or may not be resolved under the proposed rules.

- **Issue:** The definition of "domestic violence" under VAWA, and integrated into the Clery Act, references and incorporates the domestic and family violence laws of the local jurisdiction, which creates challenges in providing comparable data for all institutions.

- **Resolution:** The proposed regulatory language does not resolve the potential for inconsistency among institutions when reporting incidents of domestic violence. The determination of whether an incident of domestic violence occurred would depend on "*the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*" [Draft 34 C.F.R. § 668.46(a) (emphasis added)]. Similarly, the definition of "domestic violence" for Clery Act reporting purposes will require institutions to familiarize themselves with the domestic violence laws of all jurisdictions in which they have Clery Geography for purposes of determining whether an incident is Clery-reportable. Although the proposed provision is somewhat clarifying, it does not appear that the regulations will mitigate the potential burden on institutions.

- **Issue:** What is the "applicable jurisdiction" for purposes of implementing the requirement that institutions provide education programs which include the definitions of domestic violence, dating violence, sexual assault, stalking, and consent in the "applicable jurisdiction"?

- **Resolution:** This issue remains open as the proposed regulations do not define "applicable jurisdiction" as used in this context.

- **Issue:** The definition of "dating violence" under VAWA relies on the existence of a social relationship of a romantic or intimate nature, which raises the question of whether an institution must investigate whether the alleged offender and victim were in such a relationship.

- **Resolution:** The proposed rule resolves this issue by defining "dating violence" as "[v]iolence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. (1) The existence of such a relationship shall be determined by the victim with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." [Draft 34 C.F.R. § 668.46(a) (emphasis added)]. It does not appear that the accused would have an opportunity to weigh-in regarding the nature of the relationship, at least for purposes of Clery Act disclosures.

- **Issue:** The VAWA definition of "stalking" is broad and appears to substantially overlap with the offense of intimidation (a hate crime category).

- **Resolution:** The proposed definition of "stalking" requires "a course of conduct" which would cause a reasonable person in the victim's circumstances to fear for the safety of himself or others, or to suffer substantial emotional distress. [Draft 34 C.F.R. § 668.46(a)]. A course of conduct would be defined as "two or more acts, including but not limited to, acts in which the stalker directly, indirectly, or through third

parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property." [Draft 34 C.F.R. § 668.46(a)]. "Intimidation," in contrast, is Clery-reportable as a hate crime and means "[t]o unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack." The differentiating factors are that stalking need not be motivated by bias, requires more than one event, and is not limited to the threat of physical harm.

Note that there is still some overlap. For example, if a victim is threatened with bodily injury motivated by bias (perhaps gender) and reports that incident, it would be categorized as intimidation. If a second, similar event occurs, then that course of conduct could be categorized as stalking. This means that the first incident could be counted as part of two separate incidents. The proposed regulation does not address this type of situation, and institutions will have to wrestle with this issue when preparing their crime statistics.

- **Issue:** Under VAWA, the terms "sex offense" and "sexual assault" appear to be synonymous – how should these terms be harmonized?

- **Resolution:** "Sexual assault" would be defined to include all of the Clery-reportable sex offenses, i.e., rape, sodomy, sexual assault with an object, fondling, incest and statutory rape, as defined in Appendix A of the regulation.

- **Issue:** Should the regulations specify parameters for how an institution must provide a "prompt, fair and impartial investigation and resolution" of alleged sex offenses?

- **Resolution:** The proposed regulation addresses this issue and provides that a "prompt, fair, and impartial proceeding" is one that is:

  "(A) Completed within a reasonable timeframe designated by an institution's policy and without undue delay;
  (B) Conducted in a manner that
  (1) Is consistent with the institution's policies and transparent to the accuser and accused;
  (2) Includes timely notice to the accuser and accused of all meetings relevant to the proceeding; and
  (3) Provides timely access to both the accuser and the accused to any information that will be used during the proceeding; and
  (C) Conducted by officials who do not have a real or perceived conflict of interest or bias for or against the accuser or the accused."

[Draft 34 C.F.R. § 668.46(k)]. The proposed rule further sets some parameters for what must be included in a disciplinary process related to a complaint of dating violence, domestic violence, sexual assault or stalking. These parameters include, among other things, that the proceedings will be conducted by trained officials; will provide both parties the opportunity to have others present; will not limit the choice of advisor (meaning that a lawyer could be a permitted advisor); and will require simultaneous notification of the result and appeal process (if there is one) to both parties. [Draft 34 C.F.R. § 668.46(k)]. In particular, the addition of lawyers to the disciplinary process is a landmark change with the potential to dramatically impact institutions and, particularly, offices of student conduct overseeing these types of hearings.

- **Issue:** What "result" must be reported following an investigation?

- **Resolution:** Under the proposed regulation, institutions would have to provide notice of the outcome and reason for the outcome. The regulation specifies that this disclosure will not be deemed violative of FERPA. [Draft 34 C.F.R. § 668.46(k)(3)(i)(C)(iv)].

The draft rule may be viewed in full at http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa3-regscleandraft.pdf

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The draft rule contains many additional and meaningful proposed changes to Clery Act reporting requirements than are covered here, and it merits close study in the coming months. Even this brief overview reveals that the negotiators recognized many of the complexities associated with implementing the new statutory framework and attempted to resolve some of them. The Department of Education expects the 2014 Annual Security Reports to comply with the statutory amendments. The proposed rule, even if not finalized by that time, may provide some helpful perspective as institutions work to comply with the new statutory requirements.

Supreme Court Deals Affirmative Action Another Blow, But Impact on Colleges and Universities Likely Limited

By Gregory G. Schwab

The U.S. Supreme Court continued its decade-long interest in the role of affirmative action in the higher education admissions process, and decided to uphold a state law banning the practice. In *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court upheld a Michigan state law that outlawed the practice of considering race in admissions to that state's public universities.

In 2003, a narrowly divided Supreme Court upheld affirmative action at the University of Michigan's law school, but struck down a different point-based method the same university employed for undergraduate admissions, because it made race too dominant a factor. That set the stage for the state's voters to pass a ballot proposal outlawing race-based admissions decisions in 2006. The measure told the state's public colleges and universities that they could no longer "grant preferential treatment" on the basis of race in their admissions policies.

The Supreme Court's Decision in *Schuette*

In considering the challenge to the Michigan ban, the Supreme Court focused not on the appropriateness of affirmative action, but on when statewide votes are legitimate tools to set policies that have an impact on minority citizens.

The plurality opinion — written by Justice Anthony Kennedy and joined by Chief Justice John Roberts and Justice Samuel Alito — stressed that the court was not ruling on the constitutionality of the consideration of race in admissions, only on the right of states not to exercise their right to have such consideration at their public colleges.

"This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. Here, the principle that the consideration of race in admissions is permissible when certain conditions are met is not being challenged," the opinion says. "Rather, the question concerns whether, and in what manner, voters in the states may choose to prohibit the consideration of such racial preferences.

Where states have prohibited race-conscious admissions policies, universities have responded by experimenting with a wide variety of alternative approaches. The decision by Michigan voters reflects the ongoing national dialogue about such practices."

Justice Sotomayor, joined by Justice Ginsburg, wrote a lengthy dissent that strongly disagreed with the majority.

Justice Sotomayor wrote that Michigan voters "changed the basic rules of the political process in that state in a manner that uniquely disadvantaged racial minorities." In order to obtain admissions preferences, they now would have to amend the state Constitution, she wrote, while other groups — such as alumni children or athletes — could obtain admissions preferences more easily, such as by lobbying administrators.

Effect and Import of Decision May Be Limited

The Supreme Court's ruling does not invalidate last year's decision that, under certain circumstances, it is constitutional for public colleges and universities to consider race in admissions. That decision — *Fisher v. University of Texas at Austin* — found that institutions have a right to consider race, but not an obligation to do so. *Schuette* now adds to the jurisprudence by saying that states can reject the use of that right.

Eight states since 1996 have ended affirmative action in admissions decisions. These bans now appear to be safe from challenge based on *Schuette*. Some legislators in other states have now expressed their support for adopting similar laws, but most expect there will be no groundswell in legislative activity. The impact on colleges and universities may be just as limited.

Many institutions do not use race or ethnicity as considerations in their admissions decisions, but instead actively recruit minorities through different methods. Some schools focus recruitment efforts in urban areas or other areas that have larger concentrations of minorities, particularly African-American and Hispanic students. Institutions may also look to factors other than race — such as first-generation status or low-income backgrounds — in considering an applicant's admission. And in states where affirmative action bans do not exist, institutions may still consider race as a factor.

Common Issues Related to the Sale of Gifted Stock

By Craig F. Zappetti

One of the more challenging aspects of managing a development office at a college or university is managing the sale of a gift of company stock. While there is no set criteria for determining when to accept such a gift, or for managing a gift of company stock once received, we have seen a number of issues recurring. This article provides a brief overview of the common issues colleges and universities face in dealing with the complexities of gifted company stock.

To Sell or To Hold?

An institution must decide whether to sell or hold the gifted stock. While holding the stock of a hot public company may seem appealing due to its potential appreciation in value, development offices are generally not in the business of stock speculation, and not surprisingly, many institutions have an investment policy that calls for immediate liquidation of stock holdings. This also ensures that the value of the gift can be realized and immediately deployed into more conservative investments. With the increased volatility of the stock market, an excessive delay in resale can reduce the ultimate value of the gift. For example, suppose the gift received is 100,000 shares of PubCo stock that is trading at $60 per share on the gift date. If it takes 60 days to complete the resale and the price drops to $50 per share in that time, then the value realized on resale will be $1 million less than it was on the date of the gift. Accordingly, a common strategy is to liquidate this stock as soon as possible after its receipt.

What are the obligations of owning a private company's stock?

While it is generally possible to liquidate public company stock, private company stock, on the other hand, often has no resale market and the donee is forced to hold the stock until the sale or merger of the issuer or the potential initial public offering of the issuer's common stock. Holding private stock may create additional obligations or burdens for an institution.

For example, in a private company, an owner is often required to sign contracts that regulate ownership of the equity. In a limited liability company, this contract is an operating agreement and in a corporation it is generally a shareholders' agreement. Institutions must be wary of restrictions on resale, additional capital contributions for future funding requirements or acquisitions, restrictive covenants such as non-competition agreements, and voting requirements. The development office would be well-served in conferring with legal counsel about these additional obligations.

Is the stock of a public company registered or restricted stock?

The first step in the sale process of public company stock is to identify the status of the stock as either registered or restricted. In order to resell stock in the United States, the resale either needs to be registered with the Securities and Exchange Commission ("SEC"), or the seller must have some exemption from registration that applies to the sale in question. The donor should be able to determine the status of the gifted stock. If not, an inquiry to the issuer should provide the answer.

Registered Stock

Stock that has already been registered will generally only require the donee to (1) sign a seller's representation letter and stock power covering the stock, and (2) deliver these executed documents to the issuer's transfer agent. However, when the stock has registration rights and the issuer completes the registration of the resale of the stock, the process becomes more complex. In that scenario, the donee is listed as a selling stockholder on the registration statement and must comply with the securities laws or risk liability for failing to do so. In addition, the donee will need to verify the accuracy and completeness of disclosure information listed in the selling stockholders section of the registration statement. This information usually includes a brief description of how the institution acquired the stock and how it plans to dispose of the stock. Once the shares are registered, the donee can sell the shares through a stock broker on the open market, to a market maker, or to another investor in a private transaction.

In addition to these disclosures, the donee will also be required to sign an underwriting agreement that commits it to

register the resale of the shares in the registration statement. The underwriting agreement will contain various representations and warranties that the donee will be required to make to the issuer. It is important for the donee to have its legal counsel review these representations and warranties to ensure that they are not overly broad. In addition, counsel should verify that the underwriting agreement does not include any unreasonable covenants or obligations applicable to the donee. Notably, the donee is expected to pay any commissions and legal fees that it incurs in connection with the sale of the stock. Other than those commissions and fees, all other expenses related to the resale registration are generally paid by the issuer.

Restricted Stock

For restricted stock, the most common exemption from registration is Rule 144 promulgated under the Securities Act of 1933, as amended ("Rule 144"). Rule 144 provides a safe harbor from classification as an underwriter for all parties that comply with its applicable requirements.

The first step in the resale of restricted stock under Rule 144 is to identify the status of the donor and to verify whether or not the donor is an affiliate of the issuer of the stock. An affiliate is a party that has the ability to control the issuer and generally consists of either an officer, director or greater than 10 percent stockholder of the issuer.

For non-affiliates, as long as the shares have been held for at least six months, all of the shares can be sold. In calculating this holding period, the donee will generally be able to include or "tack" the holding period of the donor. In order to sell the shares, the non-affiliate will need to deliver a seller's representation letter to the issuer's transfer agent which confirms that the donee is a non-affiliate and has held the stock for the requisite holding period. Affiliates must also comply with sales volume limitations, file Form 144 with the SEC reporting the proposed transaction, and adhere to a number of insider trading rules and requirements. A development office will generally find counsel's assistance necessary to navigate and satisfy these requirements.

* * *

While the receipt of a stock gift is generally a win for a development office, such a gift presents a host of compliance issues and strategic considerations that will require the attention of the institution's officers and legal counsel. The ability to navigate these issues in an efficient manner is essential to liquidating the gifted stock in a manner that allows the institution to best use the funds to further its educational mission, just as the donor intended.

Uptick in Hazing-Related Incidents Provides Sobering Reminder of Potential Claims Against Colleges and Universities

By Cory S. Winter

Across the United States there has been a recent surge of injuries — and deaths — resulting from hazing and initiation rites led by student organizations. These tragic events have produced lawsuits and investigations into the enforcement of policies at some colleges and universities. Here are a few recent examples:

- Just weeks ago, a lawsuit was filed by the family of a student whose death was attributed to an overdose of painkillers. The student had visible contusions to his head and surrounding area, which the family claims was the result of physical blows the student suffered as a fraternity pledge. According to the family, the son of the university's president led the hazing, which also included drug and alcohol abuse. The family has also argued that the university's campus police chief ordered his staff to go easy on the president's son. While this allegation has not yet been tested against the evidence, the family will likely point to the fact that the campus police investigated but found no evidence of a homicide as suggesting that the investigation was mishandled.

- Police in Pennsylvania are investigating whether the recent suicide of a fraternity pledge was caused by hazing. Police are investigating potential hazing, including drug-and-alcohol abuse in addition to physical abuse. While criminal charges have yet to be brought, authorities have not ruled them out.
- Earlier this year the death of a first-year student was ruled a homicide after he was repeatedly tackled while blindfolded in a frozen backyard as part of a "game." Members of the fraternity left the pledge unconscious and unresponsive for over an hour before taking him to the hospital. Police are investigating whether the fraternity members — and the fraternity's national executive vice president — attempted to conceal the circumstances related to the death.

While it is important to note that the above cases are still pending, and many facts are still left undetermined, these three cases provide a stark reminder of the perils associated with hazing — both for the individuals involved and for institutions. Colleges and universities that do not take immediate, proactive measures to address allegations of hazing could find themselves the targets of criminal or civil investigations in addition the lawsuits seeking damages for those who were injured. The following are some actions colleges and universities should consider in addressing hazing-related issues.

1. **Review policies regarding hazing/initiations/rituals.** While hazing is typically linked to Greek organizations, it often extends to other student groups, including athletics teams. Institutions should therefore examine the policies that exist for all student groups and activities and promote a policy that not only defines and prohibits hazing, but applies meaningful sanctions to those who fail to comply. These policies should be clearly detailed and identified in the institution's student code of conduct. While hazing is a difficult term to define, most consider it to include physical, mental, or emotional abuse, regardless of whether the individual being hazed perceives an injury.

2. **Train student leaders on the prevention of hazing and the institution's anti-hazing policies.** Student leaders of all organizations — regardless of size and function — should be trained regularly on issues relating to hazing. Special attention should be given to the college or university's applicable policies and potential sanctions. At a minimum, student leaders should leave this training with an appreciation of the dangers associated with hazing and the knowledge that their organizations (and individual students found responsible for hazing others) will be held accountable for the injuries attributable to their respective organizations' treatment of prospective and current members.

3. **In any investigation, ensure there is no conflict of interest, including a *perceived* conflict.** Colleges and universities face a credibility challenge when an apparent conflict is perceived. Such a conflict may arise when an investigation has at least an indirect connection with a high-ranking or well-respected member of the campus community. While the culture at each college or university is unique, the university can protect itself by engaging a third-party investigator (including law enforcement, where appropriate) to conduct the investigation. Doing so not only protects the integrity of the investigation at issue, but promotes a healthy campus culture of transparency and accountability.

4. **Remember that hazing might be a mask for bullying.** While the concept of hazing often connotes a student's "rite of passage" or initiation into an organization, it can sometimes be more nefarious. Indeed, in an October 2010 Dear Colleague Letter ("DCL"), the U.S. Department of Education noted that hazing could be used as a "label to describe" an incident of bullying.[1] And when bullying is attributable to a protected class under civil rights laws, the DCL mandates that colleges and universities take immediate action to remediate the effects. In analyzing reports of hazing, colleges and universities should be sure to evaluate whether the incident reflects bullying based on a protected class and therefore requires immediate, remedial action on the college or university's part. Of course, colleges should always consider whether immediate action is needed to address the effects of hazing even when those effects are not specific to a protected class under civil-rights laws.

The importance of student organizations of all shapes and sizes on campus is undisputed. But in the wake of recent events involving hazing, colleges and universities must take steps now to prevent future tragedies on and off campus.

1. For an overview of the Department's October 2010 Dear Colleague Letter, go to http://sitepilot02.firmseek.com/client/saul/www/media/alert/1954_pdf_2779.pdf.

Who pays when the authorities come calling?

Syracuse Univ. v. National Union Fire Ins. Co. of Pittsburgh, P.A.

By James D. Taylor, Jr.

With the seemingly endless stream of federal and state investigations implicating institutions of higher education, a recent New York decision offers a glimmer of hope to those schools that find themselves in the cross-hairs. In a case resulting from the investigation of allegations that former Syracuse basketball coach Bernie Fine sexually abused young boys, the New York Supreme Court Appellate Division upheld a ruling requiring Syracuse's insurance carrier to pay the costs incurred to respond to government subpoenas. The case is instructive for those negotiating and purchasing insurance contracts and provides support for those schools incurring ever-increasing legal fees in response to allegations that indirectly implicate the school.

On March 7, 2013, the Supreme Court of New York held that National Union must pay (under the directors and officers policy) the costs of defense incurred by Syracuse in responding to three grand jury subpoenas *duces tecum* from the United States Attorney's Office and three grand jury subpoenas *duces tecum* from a simultaneous New York State investigation. The subpoenas sought production of: i) electronic equipment issued to Fine; ii) a list of all secretaries who previously worked for Fine; iii) a list of Fine's hotel accommodations while traveling with the basketball team in 2001 and 2002 and bus companies known by plaintiff to provide bus service to away games during the 2001 to 2002 season; iv) complaints made about Fine and any documents about how Syracuse responded; and v) communications after the date Fine was suspended from the university and tailored to determine whether there may have been any attempt to cover up the allegations.

Syracuse immediately put its carrier on notice of the claims, but National Union denied coverage because Syracuse was not a target of the investigation and (it argued) the mere issuance of a subpoena was not a covered proceeding (the insurance policy defined a claim as "[a] written demand for monetary, non-monetary or injunctive relief," and included criminal proceedings in its definition). The New York Supreme Court disagreed:

> While most of the questions in the subpoenas deal with Fine, any liability of the plaintiff [Syracuse] was necessarily dependent on the predicate liability of Fine inasmuch as Fine was an employee of plaintiff, a relationship that implicates issues regarding responsibility, including potential, vicarious, supervisory or derivative liability for Fine's actions.
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> . . .
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> Moreover, the [insurance company's] argument that the subpoenas contain no facts or allegations of a wrongful act ignores the requirement that facts or allegations may 'potentially' be within the protections purchased in the insurance policy and that there be no possible factual or legal basis upon which the [insurance company] would be required to indemnify [the university] . . . Therefore, the fact that [Syracuse] may not have been a target at the time the subpoenas were issued is not controlling upon the US Attorney's Office in its determination whether to bring charges . . . based on information derived from the subpoenas.

Syracuse University v. National Union Fire Ins. Co. of Pittsburgh, 975 N.Y.S.2d 370, ____ (2013) The appellate division upheld the lower court's decision in a one-sentence order on December 27, 2013.

Although insurance cases invariably hinge on the language of the policy and contractual interpretation, the court concluded that "[t]he grand jury's investigations and the subpoenas constitute a 'written demand ... for non-monetary relief' and the

investigations are 'criminal proceedings for monetary or non-monetary relief which [are] commenced by: ... (ii) return of an indictment, information or similar document (in the case of a criminal proceeding).'" The Court thought it of no moment that no complaint had been filed and instead only subpoenas had been issued.

Universities finding themselves in the uncomfortable position of responding to government investigations – whether criminal, civil or administrative — now have more reason to engage their insurance carriers early in the process with the goal of securing defense and advancement of fees.

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