

Legal & Legal“ish” Issues

Faculty Retreat

8.18.09



Augustana College
Rock Island, Illinois

Topics

- Legal Relationships
- Copyright
- Students with Disabilities
- Campus Safety (*with a little FERPA thrown in for fun*)
- Sexual Harassment

(don't worry, I know I only have 30 minutes...)



Legal Relationships

- College & Faculty → employer/employee
 - When you act or fail to act it is your employer acting or failing to act
- College & Student → contractual (*applied in a deferential manner*)
 - What are the contract terms?
 - College Catalog, Handbooks
 - Student Code of Conduct
 - Syllabus?



Elements of a Contract



Answer: A syllabus is not a contract

My opinion, my analysis.... Some may disagree



Syllabus Language

Sample #1: This syllabus is not a contract. With appropriate notice to students, the instructor reserves the right to alter the course requirements and/or assignments based on new materials, class discussions, or other legitimate pedagogical objectives.

NACAUANET

Sample #2: This syllabus is not a contract. The instructor reserves the right to alter the course requirements and/or assignments.

NACUANET

Sample #3: This syllabus is a contract. Western Kentucky Website



Legal Relationships, cont.

Key points:

- When interacting with students you are involved in the performance of a legally binding contract
- Contract terms can be found in a variety of places
- Failure to meet obligations can result in a breach of contract



Academic Decisions

- Tidbits to remember
 - A student (or the attorney) is more likely to attack the process by which a decision was made than the substantive decision itself
 - When reviewing academic decisions, the standard of review is not whether a court would have decided the matter differently, but rather, whether the faculty action was arbitrary and capricious
 - If the academic decision can't be challenged, attorneys look for a breach of contract



Copyright 101

- In order to “use” a work protected by copyright law, you must first:
 - Get permission from the owner OR
 - Determine that your use is “Fair Use” and accept the risks

Because your “use” is on the Augustana campus, for educational purposes does NOT make it “fair”



Don't We All Know This?

- No.
- Some people on campus know a great deal about copyright
 - Copy Center
 - Bookstore
 - Library
 - General Counsel



Students with Disabilities

- Section 504 of the Rehabilitation Act of 1973
 - Institutions cannot exclude from participation in or deny benefits of education to “otherwise qualified individuals with a disability”
- Americans with Disabilities Act of 1990
 - Prohibits discrimination against disabled persons by public entities
 - Prohibits discrimination against disabled persons by those who own or operate a place of public accommodation



Students with Disabilities Inquiry

- Key inquiries
 - Does the person have a “disability?”
 - Is the person “otherwise qualified?”



What is a disability?

- A physical or mental impairment that substantially limits one or more major life activity;
- A record of such impairment; or
- Being regarded as having such an impairment



Who is “otherwise qualified”

- A person is otherwise qualified if:
 - With or without reasonable accommodation, the person meets the academic or technical standards required for admission or participation in the program or activity
 - What are the core or essential things that a student must be able to do to participate effectively in the program or activity



NOTE:

A person who presents a risk of harm to self or others is not otherwise qualified



Accommodations

- When is an accommodation not reasonable?
 - Requires a fundamental alteration to or compromises the academic integrity of the program
 - Requires an undue financial or administrative burden



8.2009 NACUA Listserv Question

"What are the implications of faculty providing informal (i.e. undocumented) accommodations to a student where there has been no analysis or determination that the student is, in fact, disabled? Should faculty be dissuaded from doing this?"



NACUA Listserv Answer

Answer:

Once accommodations are granted by the faculty member, the student is now "considered" to have a disability and the end result is that the accommodations, with or without documentation or need, may have to stay in place indefinitely.



Campus Safety & FERPA

- Family Educational Rights and Privacy Act (FERPA) *misunderstandings*
- FERPA is NOT an obstacle to appropriate & desirable cautionary communications intended to protect student, campus, or public safety



FERPA 101

- College students have the right, *in general, to*:
 - Control the disclosure of their “education records” to others
 - Inspect and review their own “education records”
 - Seek amendment of their “education records”



What is a “record” for FERPA?

- Records that are:
 - 1) Directly related to a student; and
 - 2) Maintained by an educational agency or institution or by a party acting for the agency or institution
 - “Record” means any information recorded in any way, including, handwriting, print, computer media, video or audio tape, film
- PERSONAL KNOWLEDGE is *not* a record!



Campus Safety, cont.

- Emergency response planning:
 - *ongoing* (and it will be forever)
 - requires the help of the ENTIRE campus community

The ENTIRE campus community must participate in campus-wide drills.



Studies show that 80% of drills reveal “major flaws” in emergency preparedness.



Campus Safety

- Next campus safety drill: October 7, 2009



Sexual Harassment

- Still relevant to discuss?
- In a word.... YES



Potentially Harassing Behavior

- Verbal comments
- Visual items
- Physical acts directed at another because of his/her sex
- Propositions
- Cartoons
- Poster “art”
- Patting, hugging, kissing
- Comments on clothing or body



Story beginnings that I dislike:

- The professor's office lights were off
- We were sitting on the professor's couch
- The professor closed the door

The list goes on.....



Harassment & Academic Freedom

- Discussion of sexually explicit subject matter will not likely be considered sexual harassment when:
 - It is germane to the subject being taught
 - Can be supported by a legitimate pedagogical rationale

Bonnell v. Lorenzo, 241 F3d 800 (2001)



Illegal Behavior v. Unacceptable Behavior

- Augustana's Policy on Harassment, Discrimination and Human Dignity covers more than just illegal behavior.
- The culture and climate of your department and our classrooms start with you...



Interesting (aka worrisome) Trend

- Colorado Case – peer to peer sexual harassment/assault
- Claims of sexual assault by university athletes and high-school football recruits visiting campus



Colorado Case, cont.

- Appeals Court: university set an “official policy” by telling student athletes to show the recruits a “good time” and had failed to provide adequate supervision to prevent misconduct, and that the likelihood of misconduct was so obvious that it qualified as deliberate indifference.
- What’s the big deal?



Reported Settlement

- \$2.85 Million
- Since the Colorado case, at least 2 similar rulings



Big Picture Concern

“The presumption by courts that institutions can predict future bad behavior is frightening.”

Source: Barbara A. Lee, Rutgers University,
Professor of Human-Resource Management in
the School of Management and Labor Relations;
co-author *The Law of Higher Education*



Why should faculty be concerned?

- Important to train faculty and staff in how to respond to student allegations of sexual assault



Harassment & Confidentiality

- If a student or employee comes to you in confidence and tells you about harassment in your department, can you keep it confidential if that is the wish of the reporter?
- NO. You must take some action. The type of action depends on the severity of the allegation.



- You are not breaking confidentiality when you notify your department chair, dean or HR. Share the information only with people who need to know.



Not just *harassment*

- What do students talk to you about?
 - Do these conversations make you nervous?
 - Do you think they might make me nervous?
 - Might they make your mom nervous?
 - What if your friend or family member were involved? Would that make you nervous?



Most importantly....

A little common sense goes a long way!

Are you feeling that 2009 is all together too
strange a time to apply your traditional notions
of common sense?



That's OK!!!

You are not alone....

Just don't try to handle "it" (*whatever "it" might be*)
alone!



Still nervous?



That is why we buy insurance

- D&O liability insurance provides defense and settlement coverage against claims and lawsuits
- Definition of “insured” can cover directors, officers, trustees, faculty, committee members, employees & volunteers
- Coverage for libel, slander, defamation, emotional distress, etc.

