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“YEAR IN REVIEW: LEGAL ISSUES UPDATE 2009 CASES”

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The following case briefs are not intended to be a comprehensive list of all higher education cases from 2009. They have been selected by the authors as significant based upon the analysis, the holding or the breadth of the decision impact. These case reviews are not intended to provide legal advice.

FREEDOM OF EXPRESSION

Smith v. Tarrant County College District, U.S. Dist. Ct., N. Dist of Texas, November 6, 2009

- **Facts & Holding:** Clayton Smith and John Schwertz, Jr., students at Tarrant County College District, sought to protest Texas law and College policy prohibiting students from carrying concealed weapons on campus by wearing empty handgun holsters on campus, including in their classrooms. In addition, the students planned to wear t-shirts depicting empty holsters, and to hand out information pamphlets. Their actions were planned in conjunction with a nationwide demonstration against such laws and policies.

The Court imposed an injunction against TCC prohibiting the students from wearing their holsters, t-shirts, distributing flyers and discussing opposition to handgun regulations on all areas of the campus that are public forum areas. However, the students were denied the right to wear the empty holsters inside of the classrooms and the adjacent hallways.

- **Significance of the Case:** The significance of this case lies in the court’s analysis of fora on campus and the articulation of standards for public forum versus non-public forum (such as classrooms). In this case, although TCC regulated student demonstrations through a permit system (students were required to apply for a permit at least 24 hours in advance of the demonstration) for use of their free speech zones, they had no guidelines that governed the issuance of permits. The court stated that the TCC permit policy, which represented a “prior restraint of speech”, must meet a “strict scrutiny” standard (that is the policy must be content neutral, narrowly tailored to serve a significant institutional interest, and leave open ample alternative channels of communication). The court stated that “symbolic speech” such as wearing empty holsters was equally protected as actual speech. However, the Court further stated that classrooms are not considered public forum and within classrooms and adjoining hallways speech is subject to reasonable restrictions. The Court stated, having holster-wearing students passing through and participating in classes without the related contextual discussion of the concealed handgun controversy poses a significant risk of interference with education.

Jonathan Lopez, et al. v. Kelly Candaele, et al., U.S. Dist. Ct., Central Dist. of California, July 10, 2009 and Sept 16, 2009

- **Facts & Holding:** Jonathan Lopez, a student at Los Angeles Community College District made a presentation in a speech class, where he spoke about his religion-based opposition to same-sex marriage. His professor called him a “fascist bastard”, cut his speech short and refused to give him a grade for the speech, and threatened to have him expelled from school. Lopez filed a lawsuit alleging the College’s Sexual Harassment Policy was unconstitutional and that it constrained his profession of his beliefs for fear of punishment under the Policy. Language in the LACC Policy included: “sexual harassment can include disparaging sexual remarks

about your gender, repeated sexist jokes, dirty jokes or sexual slurs about your clothing, body or sexual activities, and display of sexually suggestive objects, pictures cartoon, posters, screensavers.”

The Court issued a Preliminary Injunction against the College forbidding implementation and enforcement of the College’s Sexual Harassment Policy. The court, finding the school’s policy was too broad and vague and prohibited a substantial amount of protected speech, held that a school may not prohibit speech unless the speech will “materially and substantially” interfere with the requirements of appropriate discipline in the operation of the school”.

In addition, the Court enjoined all the institutional officers from enforcing or publicizing the purported existence of the Policy. Upon a filing of reconsideration by the College, the Court again affirmed their earlier decision.

- **Significance of the Case:** This is a very important case because many student sexual harassment policies are developed using Title VII (employment law) language and standards, rather than Title IX standards. This distinction is critically important because a government entity- such as a public college- has broader discretion to restrict speech when it acts in its employer role. However, students have far broader First Amendment Rights in the institution, and Title IX applies a “severe, pervasive and objectively offensive” standard. Thus, EEOC language applied to the student context in sexual harassment policies can lead to 1st Amendment challenges—successful ones!

Rock for Life – UMBC, et al. v. Hrabowski, et al., U.S. Dist. Ct. Dist. of Maryland, 594 F. Supp. 2d 598, July 8, 2009

- **Facts & Holding:** . Rock for Life sought to set up a poster display on the campus as a part of their Genocide Awareness Project. The display included 24, 4’x8’ signs of pictures of aborted fetus. The university required them to move their display three times, each time to a less visible and less traveled location, stating that their facilities use policy provided authority to move events without notice. The group brought an action for declaratory, injunctive and monetary relief against the University and officials in their individual and official capacities, alleging that certain university policies violated their 1st Amendment rights of free speech and assembly and their 14th Amendment rights of due process and equal protection

The court held that the plaintiffs had standing to seek damages for violation of their free speech and equal protection rights based on the university’s application of the former facilities use policy, but not for the former code of conduct, or the institution’s sexual harassment policy.

- **Significance of the Case:** The court determined that the university’s application of the facilities policy resulted in treating the organization differently than similarly situated student organizations and favored speech and assembly of other less controversial and more politically favored groups. Even though the facilities policy was changed, the court stated that only affected issuing injunctive relief, but the plaintiffs were still entitled to compensatory and nominal damages based on application of the original policy. Regarding the sexual harassment policy, the court stated that the organization did not have standing to challenge because their activities could not be reasonably construed to fall within the confines of the policy. However, similar policies on other campuses were found to be unconstitutional.

Jews for Jesus, et al. v. City College of San Francisco, et al., U.S. Dist. Ct., N. Dist of California, Jan. 12, 2009

- **Facts & Holding:** Plaintiff, Robert Wertheim, an employee for Jews for Jesus attempted to distribute literature at the City College of San Francisco. On multiple occasions security officers demanded that he show a permit to distribute literature or desist from doing so. On most occasions Wertheim complied, but on one occasion he refused and was placed under arrest. The organization filed suit, alleging the college’s policies violated their 1st Amendment.

The court issued a preliminary injunction against the college's permit policy.

- **Significance of the Case:** The College had a permit policy requiring a five day advance registration for literature distribution. The court held that this requirement was an unconstitutional prior restraint under the 1st Amendment. The college policy allowed college officials to review literature before it is distributed and to deny permission at their unfettered discretion.

State of Nebraska v. Darren Drahota, 17 Neb. App. 678, June 16, 2009

- **Facts & Holding:** Drahota, a student at the University of Nebraska-Lincoln began writing to William Avery, a professor of political science at the university. There were a total of 18 e-mails which generally contained differing political opinions and issues of the day. Drahota's e-mails were lengthy and laced with profanity, often appearing to be rants. Avery's responses were brief, although he expressed disagreement with Drahota's comments. During this period Avery was a candidate for election to the state legislature (and was elected to the position. Their communication escalated to an emotional level and culminated with Drahota apologizing. Four months later Avery received two anonymous e-mails calling him a traitor and a terrorist. Avery contacted the local police who traced the e-mails to Drahota. Drahota was charged with disturbing the peace and quiet of Avery.

The court affirmed Drahota's criminal conviction based on analysis of his anonymous e-mails.

- **Significance of the Case:** The appellate court, citing to *Chaplinsky*, applied the "fighting words" doctrine (an inferred limitation on 1st Amendment free speech protection) to his criminal law "disturbing the peace" charge, although the Supreme Court has limited "fighting words" to unusually provocative, face-to-face encounters. The court stated that while the earlier e-mails represented "back and forth" banter, the two e-mails sent anonymously four months later, "hardly represents civil discourse or debate", and Drahota's accusations impugn Avery's loyalty to the United States, by calling him a traitor he was accusing Avery of treason. Colleges should be very cautious to apply a "fighting words" standard to written communication in spite of the holding in this case.

ON THE RADAR:

Student Punished for off-campus blog: Avery Doninger, a high school senior used her personal internet account to blog about a dispute with her principal over the use of school facilities for a concert. The principal barred her from assuming the office of class secretary and claimed that her conduct was disruptive even though there was no evidence that anyone read the blog at school, or had any actual disruptive impact. This case is currently at the Court of Appeals level.

University of Maryland engages in real life pornography case study: The University permitted a screening of a sexually explicit movie, followed by a discussion of free speech and pornography. However, they cancelled a subsequent showing after the University received a letter of protest from State Senator Andy Harris, who threatened to withhold funding from the school system if a policy prohibiting pornography was not implemented at the institution. This action has resulted in widespread discussions and examination of the concept of pornography, obscenity, censorship and the 1st Amendment. The Board of Regents subsequently voted not to adopt the proposed "porn policy" that would have required films screened on campus for entertainment purposes to have an educational element.

U.C. Davis professor makes bomb remark—spends 4 days in jail: James Marchbanks, a graduate teaching assistant arrived on the last day of class (a Drama class) and announced as he put out the teacher evaluation forms, "I have a bomb, this is the last time I am ever going to see you, I'm going to leave before the bomb goes off but

you are going to stay until it's done." Several students felt fear and reported it to campus police. Marchbanks was arrested for making terrorist threats, false imprisonment and making a false bomb threat and jailed for four days. His bail was set at \$150,000.

Tufts University creates speech code: Tufts University, a private institution, created a document entitled "Declaration on Freedom of Expression" that outlines a series of broadly defined values that limits what students can say and do. An example: "Expression at Tufts should respect the human dignity of others and maintain a climate that does not interfere with students' ability to study, grow, and attain their full potential"

Butler University drops lawsuit but pursues discipline against blogger: Student, Jess Zimmerman posted anonymous blogs about the university. He created the blog because he felt students and faculty didn't have a place to discuss university issues. Zimmerman accused the university administration of abuse of power and poor leadership. Initially the university planned a lawsuit for libel and harassment, but has decided not to file the suit and instead initiate discipline action against him for "violating school rules".

Northwestern University student's "blackface" costumes creates controversy: Two students attended a Halloween party in blackface, one dressed as Bob Marley, the other as a tennis player. The photos from the event were posted on Facebook and have prompted public outcry and a closed discussion forum. The university president stated, "While I fully support the principles of free expression, at the same time I am deeply disappointed to see any example of insensitivity that demeans a segment of our community."

FREEDOM OF RELIGION

Christian Legal Society v. Kane, U.S. Ct. of Appeals, 9th Circuit, March 17, 2000

- **Facts & Holding:** The facts, as set forth at the district court level, are that the Christian Legal Society chapter at the U.C. Hastings law school sought exemption from the religious and sexual orientation portions of the university's non-discrimination policy. As this policy applied to CLS, it would force the chapter to allow persons who hold beliefs and engage in conduct contrary to the CLS Statement of Faith (which includes a prohibition on extramarital sex) to join as voting members and to run for officer positions. The university denied this request and stripped the chapter of recognition and the benefits of recognition, including student activity fee funding. The CLS argued that Hastings was practicing viewpoint discrimination and violating their right to expressive association because other organizations could require their leaders and/or members to agree with the organizations beliefs and purposes. The CLS argues that it is unconstitutional for a state-funded law school to deny official recognition to a religious group because of its "core religious viewpoints".

In a very brief response, with no articulated analysis, other than reference to *Truth v. Kent School District*, 542 F. 3d, 634, 9th Circuit Court of Appeals, April, 2008, the Court ruled that the law school could lawfully bar the Christian Legal Society from being recognized as a student group for requiring its members to sign a statement of faith. The court issued the following statement: "The parties stipulate that Hastings imposes an open membership rule on all student groups – all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable."

- **Significance of the Case:** The Court of Appeals, affirming the District Court decision, ruled in favor of the defendants, including the university, the school officials and the Hastings Outlaw, another student organization. The Court examined the issue as a free speech issue, rather than a freedom of religion issue. The court, in indicating Hastings had created a "limited public forum" is significant inasmuch as that designation only requires the regulation of speech to be "viewpoint neutral" and "reasonable" (rather than subject to "strict scrutiny") – in

this case the application of the regulation was deemed to be both. The Court's finding the institutional regulation to be one regarding conduct as opposed to philosophy is very significant. This ruling could set a precedent for the way Christian organizations can or cannot retain their distinct religious beliefs public colleges with non discrimination policies, and for campus groups that receive funding through student fees.

- **NOTE:** On May 5, 2009, the CLS filed a petition for writ of certiorari to the U.S. Supreme Court, seeking a reversal of the Circuit Court decision. On December 7, 2009, the Supreme Court agreed to hear the case during their Spring Term. The Court will render their decision in this case summer of 2010.

Every Nation Campus Ministries at San Diego State University, et al. v. Achtenberg, U.S. Dist. Ct. S. Dist. California, February 6, 2009

- **Facts & Holding:** The Every Nation Campus Ministries held university recognition for 6 years and received institutional benefits by complying with the university's non-discrimination policy. They changed their constitution to state that their members must be Christians who have professed their faith in the Lord Jesus Christ, and each member must sign an oath stating they have read, agree with and believe this statement of faith; as well, they specifically excluded from membership individuals who believe they are homosexual. The group was subsequently denied recognition. Three other Christian organizations applied similar restrictions to membership and were also denied recognition. The four organizations filed suit, seeking an injunction against CSU campuses from denying them formal recognition.

The court held that the free exercise, free speech, and freedom of association rights of the four student religious organizations were not violated by a university's decision not to grant official recognition based on their refusal to comply with the program's non-discrimination policy.

- **Significance of the Case:** The court applied the standard that school sponsored organizations are limited public forum for free speech purposes and that the school's non-discrimination policy served a reasonable purpose for "sharing values of a civilized social order". When the state creates a limited public forum, like the program as CSU, it may restrict access to that forum so long as the restrictions are viewpoint neutral and reasonable in light of the purposes served by the forum, even if these rules have the effect of limiting a group's ability to engage in protected speech, such as the right to speak, publish on a particular The court found that CSU's non-discrimination policy regulates conduct in the form of restrictions on admission to membership in student groups, not the content or viewpoint of their speech.

Recognition is important to student groups because it comes with benefits such as funding and access to campus meeting rooms.

Christian Legal Society, et al. v. Eck, University of Montana, et al., U.S. Dist. Ct., Dist of Montana, May 19, 2009

- **Facts & Holding:** The CLS challenged the Student Bar Association and School of Law at the University for denying CLS funding. At the university all law students pay mandatory student activities fees and are automatically members of the Student Bar Association. The SBA executive board is the governing body of the SBA. Although CLS meetings and activities are open to all students regardless of race, religion, or sexual orientation, to be a voting member of the organization a person must affirm the CLS Statement of Faith. This statement and the accompanying morality standards states that "unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.

The court held that CLS was ineligible for SBA funding because they violated the law school's policies regarding open membership and non-discrimination.

- **Significance of the Case:** The court examined the controversy, stating that the crux of this case is the tension between a public law school's interest in enforcing its non-discriminatory policies and a religious student group's interest in exercising its constitutional rights of free speech, association and religion. In this case the court determined that the non-discrimination policy was intended to target or single out religious beliefs. Rather, it is a policy that was neutrally applied and intended for general application. Additionally, the governmental interest in prohibiting such discrimination is not directed at or related to suppressing expression. The court determined that the UM school of law's constitutional authority, as a state institution, to enforce its open membership and non-discrimination policy and that such policies further a governmental interest that is unrelated to CLS' right to expressive association.

DUTY, LIABILITY & RISK MANAGEMENT

Board of Trustees of the University District of Columbia v. DiSalvo, Dist. of Columbia Ct. of Appeals, July 2, 2009

- **Facts & Holding:** DiSalvo was attacked in a University parking garage and stabbed through the cheek forcefully enough to break a tooth. She was able to escape her attackers, and subsequently sued the University, under the premise that the attack was foreseeable, and thus UDC had breached its duty to protect her (and others).
A jury awarded her \$300,000 and her husband \$100,000 (loss of consortium). UDC asked the trial court judge to overturn the verdict. He denied their motion and they appealed. The Appellate Court ruled in UDC's favor, remanding the case with an order to overturn the verdict.
- **Significance of the Case:** This case is significant in three ways. The first deals with the Court's analysis of UDC's possible foreseeability of the attack. This – as it usually does – hinged on prior reports of crimes. In this case, DiSalvo introduced only 5 prior crimes in the area from the previous year. None of which occurred in the garage (Seriously? In DC? This is the safest urban parking garage I have ever heard of!). The Court noted that “It is not sufficient to establish a general possibility that the crime would occur...” in order to establish adequate foreseeability. The second is that it appears DiSalvo did not use any of the Clery reports to accrue data on the crime statistics that might have aided her case, but relied on local PD reports. Third, and most legally interesting, is that the Court overruled (2-1) a unanimous jury. This does not happen often, and, to illustrate most courts' views on this, here is a quote from the dissenting judge in this case: “*Now, two judges of this court hold, as a matter of law that the experienced trial judge and all twelve jurors acted unreasonably. Because I find myself in agreement with the "unreasonable thirteen," rather than the "reasonable two," I dissent.*” Taken in concert with Smith from last year – where the university lost – this case serves as a reminder to pay particular attention to your high crime areas on campus.

Orzech et al. v. Fairleigh Dickinson University, Superior Ct. of New Jersey, Appellate Div. Dec. 29, July 2, 2009

- **Facts & Holding:** Orzech was an RA at FDU (he was also 21 years old at the time.) he hosted a party in his apartment with 10-12 people and he provided the alcohol (including grain alcohol). He was “taken to bed” by friends at 2:00am, and sometime between 4:20 and 9:00 a.m. he accidentally fell to his death. It was determined that his BAC at the time of his death was 0.166%. His family sued, asserting intentional and negligent infliction of emotional distress, breach of contract, and premises liability – for not maintaining the windows - (these were dismissed), and wrongful death. In the wrongful death claim, the jury found Orzech and FDU equally negligent in causing Orzech's death. The jury assessed total damages at \$ 520,000, which

was adjusted to \$260,000 plus costs. FDU moved for dismissal based on a charitable immunity defense at the lower court and lost. The Appellate Court reversed the lower court's ruling, finding for FDU.

- **Significance of the Case:** Again, we find a jury verdict being overturned, only this time on the basis of the lower court judge making an improper ruling on the charitable immunity claim. Institutions eligible for this claim generally have to establish that the Plaintiff was receiving the benefit of the charity at the time of the injury. Here, Orzech's mere presence in the hall as a resident constituted "receiving the benefit" of the educational mission of FDU. (Finally, Residence Life offices now have a court case that recognizes the educational function/importance of on campus housing!) Of significant interest is: typically a showing of gross or willful and wanton negligence will overcome charitable immunity for private schools (or sovereign immunity for publics)– this is usually illustrated by an overt and consistent lack of policy enforcement. Here, the fact that Orzech was the person responsible for enforcing the policy could be interpreted either way. Clearly, the Court here indicates that they do not see the fact that the person responsible for policy enforcement hosting a party as indicative of FDU's lack of enforcement. I am not sure every court would be so forgiving – the jury clearly was not.

University of Texas at Austin v. Hayes, Texas Ct. of Appeals, March 6, 2009

- **Facts & Holding:** UT-Austin had set up barricades, etc around campus in anticipation of the weekend football game. This included a standard 4-foot sawhorse barricade blocking a driveway. Behind the barricade was a "dark colored, rusty chain" stretched the length of the driveway. Hayes – a non-employee, non-student – was biking from home to a restaurant (after, admittedly ingesting alcohol & marijuana!) and went around the barricade, striking the chain, being thrown from his bike and sustained injuries, including a broken jaw. The lower court denied the University's motion to dismiss on jurisdictional grounds; this Court (in a 2-1 opinion) affirmed the denial of the University's motion. In essence, UT loses in that the case may now potentially proceed to trial.
- **Significance of the Case:** While this case gives an excellent overview of Texas premises liability and the terms defined within as legal terms of art (e.g., "trespasser," "obstruction." etc.), it is instructive to those who coordinate these efforts (games, graduation, concerts, etc.) to be mindful of their responsibilities. In particular, in this case the Court makes notable and repeated mention that the university makes no attempt to discourage or regulate traffic "after hours," yet sets up these barricades, etc. in areas known to have pedestrian and bicycle traffic. As such, the Court looks to considerations such as whether or not t.u.(this author is an Aggie) created a condition that created an unreasonable risk of harm. Note: No judgment was given in this case! The Court merely denied UT's request to have the case thrown out, and indicated there were questions for a jury. We did not yet determine if/what settlement occurred.
- **Significant note to Conduct Administrators/Counsel:** In a footnote, the Court outlines (quite nicely) the support and grounds for college administrators to restrict access to the public from areas of campus, particularly those expressly designated for students, faculty and staff – this is good case law support for Persona Non Grata letters, particularly in Texas.

Patrick Elwood, Adm. for Scot Elwood v. Alpha Sigma Phi, Iota Chapter, Appellate Div. of the Supreme Ct. of New York, Third Dept. May, 7, 2009

- **Facts & Holding:** After drinking heavily at a party at a fraternity house near Cornell, Elwood and a friend parked illegally in a private parking lot. They were confronted and walked away. Elwood then walked to the rear of the property crossed over a fence and fell 80' to his death into a gorge. The lower Court denied the motion for summary judgment filed by the property owner (ASP). The Appellate Court reversed, granting the motion and dismissing the case.
- **Significance of the Case:** This case, although a finding for the property owner, is a reminder that the Court's are still not consistent in the area of tort law, in particular where alcohol is involved. The missing

social host liability claim is noteworthy as well, and institutions should pay particular attention to whether or not your jurisdiction is “plaintiff-friendly,” “defendant-friendly” or inconsistent. On the radar within this case is that, as the next decade unfolds, more and more “helicopter parents” (in the pejorative sense) will be on juries, institutions should remember their expectation of *en loco parentis*. This is also a reminder that institutions need to continue to get increasingly serious about alcohol issues; with the dramatically increasing numbers of AOD hospitalizations/poisonings, the foreseeability of these types of incidents grows, and over reliance on assumption of risk as a defense may be misplaced.

ON THE RADAR:

Sacramento State University student beaten to death in dorm: Scott Gregory, a first year student at the University was beaten to death by one of his 5 roommates. Gregory had Asperger syndrome that “made him very obsessive about his favorite things”.

UCLA student slashes another in lab class: A female student was critically injured after a fellow student stabbed her five times and slashed her neck in a chemistry lab class. Members of the university community had reported to the university administration that the assailant was exhibiting erratic behavior in the months leading up to the incident.

University of Washington changes rules for study abroad: Following the murder charge against student Amanda Knox, the university has completely revamped their study abroad programs. Knox received very few guidelines or institutional oversight when she engaged in her study abroad program. Additionally, the university had no protocols in place for providing support to Knox or for dealing with the complicated legal-judicial matter.

4th AMENDMENT/SEARCH & SEIZURE

Commonwealth v. Carr, 76 Mass. App. Ct. 41 (2009)

- **Facts & Holding:** Campus police at Boston College responded to a residence hall room after receiving a report that student, Daniel Carr was in possession of a knife, bullying people, and possibly had a fake gun in his room. Police knocked on the door and Carr let them in, with his roommate present. Carr directed the officers to where the fake gun was. Knives and other weapons were found in violation of residence hall policies. The students then consented to a full search of the room and signed both a Miranda waiver and consent to search form. The search revealed large quantities of drugs (with baggies) along with price lists and names. The students were arrested. The trial court granted a motion to suppress the drug evidence, finding that the initial entry into the residence hall was unlawful and that the search was done without the “free and voluntary” consent of the students. The appellate court reversed the trial court’s order of suppression.
- **Significance of the Case:** The court’s decision seemingly reflects an important distinction between a sworn police officer working for a private institution enforcing college policies vs. one working in that same capacity in search of evidence as part of a criminal investigation. Here the court found that the officers were engaging in a private function at the direction of their “private” employer – assisting residence life staff with enforcement of college policies. And while the Boston College police are subject to the constraints of the 4th amendment, the private function they were engaging in did not require a search warrant before entering the room. The court also found that the officers acted reasonably when entering the room by knocking first, waiting for the residents to respond, and then coming in at the invitation of the residents. The consent was voluntary and freely given to search the room. Finding the room entry to be valid, the court found no facts to

suggest that the students may have been intimidated by the officers and therefore afraid to ask them to leave. There was also no indication that the students were coerced into allowing the search.

ON THE RADAR:

ACLU files lawsuit over cell phone search: Richard Wade, a 12 yr. old student had his phone confiscated after he read a text message from his father during football class. The school policy calls for confiscating a student's phone if used during prohibited times and turn it in to the school office. In this case, school officials searched through the phone's texts and messages. Upon finding photos of "gang related activity" they turned the phone over to the police. Wade, an honor student, was first suspended for three days, then expelled. The photos turned out to be of him dancing in his home. The ACLU is suing, on Wade's behalf, under the 1st, 4th, and 14th Amendments.

Boston College confiscates student's computer: Riccardo Calixte, a computer science major at the University had his computer, cell phone, iPod and electronic storage devices seized by campus police following a report by his roommate that he was illegally downloading files, hacked into the campus computer system and to change grades and sent rumors about his roommate via e-mail. He was without these items for over two months, including during final exams. A Mass. Supreme Court justice threw out the search warrant saying that the "troubling weak" accusations of the roommate were insufficient to provide probable cause for a search warrant, or to seize Calixte's possessions.

SEXUAL MISCONDUCT

Lisa Ryan Fitzgerald, et al., v. Barnstable School Committee et al., U.S. Supreme Ct., 129 S. Ct. 788, January 21, 2009

- **Facts:** This is a 2001-2 K-12 case involving the alleged repeated sexual harassment of a kindergarten student by a 3rd grade boy. Specifically, he would bully her into lifting her skirt, pulling down her underpants and spreading her legs on the bus (and later in the school). Her parents contacted the school, and the principal (Scully) and another official (Day) interviewed the girl, the boy, some other students, and the bus driver. They could not corroborate the girl's story. They offered the parents some remedial suggestions (including moving their daughter to the front of the bus, leaving intentional space between her and the older children or moving her to another bus. The parents felt this was punishing their daughter, and asked that the boy be moved. He was not. Subsequently, the girl began to miss school more often, and her parents drove her to school rather than make her ride the bus.

They sued the school district under Title IX and §1983. The District Court dismissed both claims, and the parents appealed. The Court of Appeals found that the school was an institution covered by Title IX, that the behavior was sufficiently severe, pervasive and objectively offensive to deny plaintiff her educational opportunities, but the actions of the school - responding immediately with an investigation - did not constitute "deliberate indifference." The Court of Appeals held that "deliberate indifference" required more than a showing that the institution's response to harassment was less than ideal, but that it requires a showing that the institution's response was "clearly unreasonable in light of the known circumstances". Fitzgerald asserted the §1983 claim because under Title IX the remedies are more restrictive than those provided under §1983 (for example, Title IX does not provide for a private right of action against individual school officials for monetary relief). The court of appeals found insufficient demonstration of deliberate indifference to support a Title IX claim and that §1983 actions were precluded by Title IX.

The US Supreme Court - in a unanimous decision - REVERSED the Court of Appeals and remanded the case.

- **Significance of the Case:** The Court indicated that Title IX is not the exclusive remedy or to be used in substitute for §1983 claims. This settles some law, but has some significant implications for those responsible for investigating claims that may be covered under Title IX or §1983 – this would include sexual assault and sexual (or any gender based) harassment. In essence, it appears that merely following your current procedure – doing an investigation as Scully & Day did – may not be adequate to overcome the (lower) “reasonable” standard of review. Additionally, §1983 exposes the individual administrator to liability in addition to the institution. We will discuss this case at length in the presentation.

J. B. v. Lawson State Community College, Supreme Ct. of Alabama, June 26, 2009

- **Facts:** J.B. was a student and basketball player on the LSCC women’s basketball team. On March 6, 2004, she was raped in a hotel by the Asst. Coach, Boris McCord. He was convicted of rape in criminal court and is serving life plus 20 years. She sued LSCC (and the President, AD, and Head Coach) under Title IX and Sec. 1983, alleging that they (LSCC and the administrators) had prior knowledge of the predilection toward harassment and other negative actions on the part of McCord. Specifically, she pointed to two incidents, one which was reported to administration, and one which was not. The lower court granted LSCC and the administrator’s motion for summary judgment, and the Appellate Court affirmed.
- **Significance of the Case:** This case is not as prescriptive for administrators, as the fact pattern is easily distinguishable from most (more egregious) fact patterns. Here, the Coach/AD immediately investigated (the only complaint she was made aware of), and reprimanded McCord. Additionally, the Court found that J.B.’s own testimony that McCord was more like a “father figure” did not assist her case. One interesting note is that the administrators, when made aware of the significant closeness of J.B. and McCord’s relationship (driving her to/from school, having her at his house with his fiancé and child, etc.), did have a conversation (pre-complaint) with both – both indicated the relationship was not sexual and was consensual. This proactive and reactive combination undoubtedly served the defendants well.

Andrews, et al., v. Monroe County Board of Education, U.S. Dist. Ct., S. Dist. of Alabama, S. Div., November 25, 2009

- **Facts:** This is a K-12 case in Alabama brought under Title IX and Section 1983. This case is a case that was sent back to the lower court to decide the issue of qualified immunity in regards to Payne, the school principal. Payne was the principal when Floyd, a teacher was accused of no less than 14 separate incidents of sexual harassment of RSH, CC, and another young boy at his school. It is marginally pertinent that all of these students are “special needs” students. It is relevant that it was during Payne’s investigation of the initial complaint (by RSH) that he learned about some of the other activities. It is most significant that, upon learning of these issues, Payne failed follow through on the school’s procedure – to notify the parents, upper administration, and commence and full investigation. Initially, the lower Court had granted Payne’s immunity, the Court of Appeals reversed the finding – in part – and remanded for the remaining analysis. The lower court then rejected Payne’s request for a summary judgment on the qualified immunity grounds, and left the remaining section 1983 issues to be determined by the jury.
- **Significance of the Case:** This case serves as a significant reminder to follow your policies, In particular, here, Payne did not follow through with even a simple notification of the upper level administration, and, his investigation was, at best, cursory. Even more significant is that the remaining claims for him are against him personally and professionally.

Allen v. University of Vermont., Supreme Ct. of Vermont, March 27, 2009

- **Facts:** This is a state court case dealing with a state statute that essentially mirrors Title IX. Allen alleged that she had been “date raped” in September 2005 during her freshman room. She reported the incident to the Women’s Center Advocate (VCA) as a “rape,” indicating she had been drugged. Of particular note is that the

VCA did not tell Allen to fill out any paperwork regarding filing a sexual “harassment” claim, nor did she refer Allen to the EEO officer. The VCA did refer Allen to the student conduct office. The SCO did an investigation, held a hearing, and there was a determination of “not responsible.” Allen’s father contacted general counsel, who indicated that their process had been followed and she could do nothing about the outcome. The lower court granted summary judgment to the University and the state Supreme Court affirmed.

- **Significance of the Case:** This case was brought under the premise that sexual assault is sexual harassment (it is), but that the UVM staff that responded, in particular the VCA and conduct officer, did not inform Allen about her options regarding filing a sexual harassment complaint. The Court here found for UVM (keep in mind this is Vermont decision), but this case is instructional in that an institution’s staff that are responsible for being the central gathering/reporting point for sexual assault cases should inform students of all of their options (criminal, civil, sexual harassment, student conduct, TROs, no-contacts, etc.). A checklist to hand to victims/survivors would be a good process.

ON THE RADAR:

Student files lawsuit against Catholic University for negligently handling sex assault case: A first year nursing student was sexually assaulted by a male lacrosse player and three of his friends, following an off-campus party. The complainant stated that she consumed more than a dozen alcoholic beverages before the assault. The university held the hearing four months after the complaint and found the student in violation and expelled him from school. The complainant alleged the university failed to take timely disciplinary action against him and did not accommodate her academic schedule based on her physical and psychological injuries.

Court denies anonymity in sexual assault lawsuit at East Stroudsburg University: A federal district court judge ruled that six former students who filed a Title IX lawsuit against the university must provide their names if they want to proceed with the case. The former students stated that the university violated Title IX by failing to prevent a former Vice President from making unwanted sexual advances toward male students even after his behavior was reported repeatedly. The former students sought to remain anonymous to protect their reputations with business colleagues, friends and relatives. The judge stated that the public has a right to know who is making the accusations.

University of Northern Colorado under fire for failing to respond to sexual misconduct of professor: Past and present UNC students allege that theatre professor, Vance Fulkerson engaged in unwelcome sexual conduct with male students for two decades, and the school was aware of the complaints and did nothing to address the complaints. The professor is facing up to 18 months in prison and \$100,000 in fines. The university has retained an outside investigator to determine if the university should have acted on prior complaints.

Marshall University cheerleader receives \$25,000 in jury verdict: Kacie Chambers, brought a lawsuit against Marshall University alleging the university and the cheerleading coach had knowledge of the sexual harassment by male members of the cheerleading squad. The repeated harassment resulted in her quitting the squad and forfeiting her scholarship. The jury determined the university was liable for negligent supervision and emotional distress and dismissed the charges against the coach.

University of Pacific Official makes distinctions on types of rape: A university spokesperson, responding to a lawsuit filed by a former female basketball player, made a distinction between “date rape” and “outright rape” in describing the university’s position regarding the suit. The complainant stated that she was raped by three men’s basketball players while intoxicated, and although initially supportive of her, the university resorted to victim-blaming tactics, including stating that she demonstrated “a lot of sleazy behavior”, when she insisted that two of the players be expelled, not suspended.

Tufts University bans sex when roommates are present: The university's office of Residential Life and Learning banned any sex act in a dorm room while one's roommate is present, and further stipulated that any sexual activity in the room should not interfere with a roommate's privacy, study habits, or sleep.

OCR rules on sexual harassment in cyberspace: In response to a sexual harassment complaint filed by a student who received hundreds of sexually explicit and sexist comments posted on the Juicy Campus site, the Office of Civil Rights stated that schools have the same obligations to respond to sexual harassment in cyberspace that they have when the harassment occurs in the classroom. Although the OCR didn't find the college responded inappropriately in this case, they articulated a new principle of law. It remains to be seen whether an "effective response" is to shut down these types of sites all together, or whether they can take lesser steps to prevent harassment at the websites.

New Arizona law expands domestic-violence protection to dating relationships: Arizona passed a domestic violence law in Sept. that adds dating relationships to a list that already included those who are married, living together or related by blood or have a child together. The state AG said "protection of people is more important than the status of a relationship".

Update on SMU women's basketball coach lawsuit: In 2008, Colli filed a lawsuit against SMU claiming her scholarship was revoked because she complained to the AD about Coach Rompola's inappropriate "interest" in relationships with players. An alleged relationship between Rompola and an Asst. Coach was also alleged. The suit appears to have disappeared. Colli is pursuing a modeling career and Rompola is still the coach at SMU and is now married to the men's coach UNC-Greensboro.

Heike vs. CMU update: A federal judge dismissed – without commenting on the substantive merits – the Title IX claim that Heike lost her scholarship and playing time because her coach (Guevara) was discriminating against her because she was not a lesbian. She did appeal to CMU's internal panel, who upheld her scholarship revocation based on her athletic performance. Since the merits are still alive, there are indicators that Heike will re-file under state law.

STUDENT DISCIPLINE

Stephanie Kim Kuehn v. Cardinal Stritch University, 563 F.3d 289 (7th Cir. 2009)

- **Facts & Holding:** Kuehn was a student enrolled in a master's program at the university. The university offered a "pay as you go" option which Kuehn exercised, but she stopped paying approximately halfway through her program. Despite this the university allowed her to continue with classes and receive her degree. Thereafter Kuehn requested a copy of her transcript to verify with her employer that she completed the program. The university refused her request because of outstanding tuition due. Despite her filing a bankruptcy petition listing the university as a creditor and a court order discharging the debt, the university still refused to provide a copy of her transcript. The bankruptcy court ordered the university to provide the transcript. On appeal, the district court affirmed. The 7th circuit court of appeals held that the student had a right to receive the transcript and the university's refusal to provide one constituted a violation of the bankruptcy court's order of discharge.
- **Significance of the Case:** To support its decision, the court indicated it is "customary" for universities to provide transcripts as proof of grades and a degree, and indicated it was "an implicit term of the educational

contract.” The court also referred to grades as a “property right” and that therefore the student had a corresponding right to transcripts.

Iota Xi Chapter, Sigma Chi Fraternity v. Patterson, 566 F.3d 138 (4th Cir. 2009)

- **Facts & Holding:** The fraternity and its members were involved in a series of incidents over a period of 1 ½ years which ultimately resulted in the organization’s recognition being revoked at George Mason University for a lengthy time period and with sanctions imposed upon several members. The fraternity and student members filed suit against the university and administrators alleging violation of due process and infringement upon their free speech rights as a result of the sanctions. The district court found no merit to their claims and awarded summary judgment to the defendants.

The court of appeals affirmed the district court’s decision. Plaintiffs argued that their liberty interest in a right to free association had been infringed upon. The court disagreed, holding that the disciplinary decision did not infringe upon the members’ free association right since they were not restricted from joining other fraternities. The court also found that plaintiffs were unable to prove a “constitutionally protected property interest” in the Chapter’s reputation. Finally, the court found no merit to plaintiffs’ infringement of free speech claims. Ample grounds existed to support the sanctions against the organization and its members independent of the speech-related issues raised by plaintiffs.

- **Significance of the Case:** Prior to the case proceeding before the student conduct board, the dean of students attempted to “settle” the matter by offering the chapter a two year suspension in lieu of proceeding with the case. The chapter refused the offer, the case went forward, and the hearing board imposed a harsher sanction – a 10 year revocation of the chapter’s recognition. The court found this practice acceptable. This case also seemingly signifies that fraternities, sororities and their members have a 1st amendment right of free association.

Lovely v. United States of America, 570 F.3d 778 (6th Cir. 2009)

- **Facts & Holding:** Plaintiff Lovely was a student at the University of Dayton enrolled in the ROTC Program. He was disciplinarily suspended from the university after being charged with and found responsible for sexual assault. Consequently he was removed from the ROTC program for misconduct by the commander, Lt. Washington. Lovely filed suit under the Federal Tort Claims Act against the United States and the ROTC agency alleging, among other claims, intentional infliction of emotional distress based on actions by commander Lt. Washington that impacted Lovely and his disciplinary case. The district court dismissed plaintiff’s complaint for lack of subject matter jurisdiction, rely on a doctrine espoused in *Feres v. United States*, 340 U.S. 135 (1950) (“Feres Doctrine”) which shields the government from liability under the Federal Tort Claims Act for injuries to servicemen “where the injuries arise out of or are in the course of activity incident to service.” The court of appeals affirmed the judgment of the district court.
- **Significance of the Case:** Interestingly, the court relied on prior case precedent and rejected plaintiff’s argument that the doctrine should not apply to his claims since at the time of his alleged injuries, he was an ROTC cadet and therefore not on “active duty,” The court determined that an ROTC cadet is a member of the armed forces despite not being on active duty. The court also rejected plaintiff’s argument that the “activities” in issue (i.e., attending a student disciplinary hearing) were student related, not military related, and determined that Lovely’s alleged injuries arose out of his relationship with his commanding officer and the military and therefore “incident to military service.” His student status was based in part by his contractual relationship with the government and being provided a scholarship to serve as an ROTC candidate. The two were inextricably intertwined.

Castle v. Marquardt, 632 F. Supp. 2d 1317 (N.D. Ga. 2009)

- **Facts & Holding:** Plaintiff, a student enrolled in Appalachian Technical College's nursing program, brought suit against administrators alleging that they violated her procedural and substantive due process rights during the course of disciplinary action taken against her. She also alleged that the college's decision to dismiss her was made in retaliation of her action in filing a complaint against a faculty member resulting in termination.

Plaintiff engaged in several incidents of disruptive behavior occurring inside and outside the classroom between March and August 2007. She received a written warning concerning her behavior in March. Her behavioral problems escalated during the summer of 2007. On August 22, a significantly disruptive incident occurred during clinic involving plaintiff, students and a faculty member resulting in plaintiff reporting a student for consistently leaving the nursing clinic early and the faculty member for consistently allowing early dismissals in violation of state regulations. The day after, that student reported plaintiff's pattern of disruptive behavior to the college and the college investigated plaintiff's allegations regarding the student and faculty member. On August 24, as a result of its investigation, the college terminated the faculty member and at the same time launched an investigation into the most recent reported incidents of plaintiff's disruptive behavior. That same day, defendants met with plaintiff, informed her of the results of their investigation, and notified her that she was dismissed from the nursing program.

The court's findings regarding plaintiff's procedural due process claim were concerning. Specifically: the college never interviewed plaintiff during the investigation; the information gleaned from the investigation was conflicting in some respects; the decision to terminate plaintiff from the program was made without providing plaintiff with a hearing – either before or after the decision was made; and the plaintiff actions did not constitute such a threat to the college community to justify denying a hearing before the decision to dismiss was made. The court therefore determined that there were material factual issues in dispute on the procedural due process claim which warranted a trial on the merits.

Significance of the Case: Plaintiff won her case at trial. The verdict: \$450,000 for being wrongfully dismissed by the college!! This decision reflects the critical importance of providing procedural due process to students when invoking disciplinary proceedings – as reflected in *Dixon v. Alabama* and its progeny.

Hagel v. Portland State University, 203 P.3d 226 (Ore. 2009)

- **Facts & Holding:** Student Robert Hagel had numerous interventions with the assistant director of residence life over conduct related issues. The assistant director lived on campus with his family. Hagel told two individuals that he intended to harm or kill the assistant director and his family. When the individuals reported this to school officials, the assistant director was advised of the specific threats, which prompted him to move with his family to an undisclosed location and seek a protective order. At the hearing Hagel denied making any threats to harm or kill the assistant director or his family. The conduct review committee found differently and held him responsible for the threats to harm and disruption, and dismissed him from the university. Hagel filed suit, arguing that he did not make these threats directly to the assistant director or his family. Relying on Oregon case law and the Oregon constitution, he argued that his speech was constitutionally protected.
- **Significance of the Case:** The court in this case found that the university did not infringe on Hagel's free speech rights accorded to him under the Oregon constitution. While the court acknowledged that the statements were not made directly to the parties involved, the court analyzed those statements in light of all the facts and circumstances in the case. The student seemed to have deep hatred toward the staff member. The assistant director was frightened for he and his family to the point where he moved off campus. Hagel also was very specific as to how he was going to harm the assistant director. It was also found that the student had guns in his room. Based on these circumstances, the court found a significant disruption in the

university's operations, that it was reasonable for the victim of the threats to be fearful, and therefore the university's actions and decision was reasonable.

Warner v. Elmira College, 873 N.Y.S.2d 381 (2009)

- **Facts & Holding:** Student Alisa Warner's room was searched after receiving a confidential tip that drugs were present in the room. Residence life staff searched the room and found a white powdery substance. Campus security tested the substance, and the results supposedly determined cocaine. The matter was referred for a disciplinary hearing and the student was found responsible and expelled from the university. The administrative appeal was denied. The student filed an application in the trial court for review of the decision which was denied. On appeal, the court found the decision to be arbitrary and capricious and found no rational basis for the decision. The test results were not consistent with a finding of cocaine. Furthermore, the campus safety and security official did not appear at the hearing to speak to the method of testing and its interpretation. The court found that the hearing committee relied on information on the testing form that was ambiguous regarding its findings.
- **Significance of the Case:** Courts are generally reluctant to engage in a substantive review of disciplinary hearing decisions, but will do so if there appears to be no rational basis for the decision, thereby rendering it arbitrary and capricious.

Gorum v. Sessoms, 561 F.3d 179 (3rd Cir. 2009)

- **Facts & Holding:** Gorum was a professor at Delaware State University who, during the course of an investigation, was found to have changed or assigned random grades for students in courses that he was not the instructor for. The president, Allen Sessoms, initiated dismissal proceedings against the professor. An ad hoc committee determined to suspend him but Sessoms, unsatisfied with the outcome, petitioned the Board of Trustees for a dismissal of the professor which the Board ultimately agreed to. Gorum filed suit alleging that president's actions against him were in retaliation for Gorum's exercise of his freedom of speech and association protected by the 1st amendment. Gorum cited three specific events/situations in support of his argument. The district court found no merit to Gorum's claims and awarded summary judgment to the defendants.

The court of appeals affirmed the district court's decision. The court analyzed the 1st amendment infringement claim in the context of plaintiff being a public employee. To be successful in making such a claim, the plaintiff's proof must include that he was acting as a citizen and that the matter was one of public concern. Reviewing the three situations plaintiff relied upon in support of his claim, the court determined that Gorum was not speaking as a citizen, but as an employee carrying out his official duties. The court also determined that none of the matters cited involved ones of public concern, and that the president's decision was wholly unrelated to these incidents.

- **Significance of the Case:** One of the speech-related "activities" that Gorum referred to related to his expressive/speech-related activities in serving as an advisor to a student athlete in all aspects of the university's disciplinary process. The court found this activity to be part of the professor's official university-related duties – and not acting as a "citizen." The court also determined that this activity was not one of "public concern," since the matter was considered private and Gorum made no public statements arising from the incident.

ON THE RADAR:

James Madison University disciplines student journalists: JMU initiated disciplinary proceedings against two student journalists for their efforts to report a story for the student newspaper. A student reporter went to a

residence hall to interview individuals after reports of someone breaking in the hall and opening shower curtains to watch women shower. The reporter spoke with a student outside the hall and was invited in by that student to talk with others. The reporter was joined by a second reporter. The RA asked the reporters to leave, although there was no school policy restricting such access. After finishing their interviews the reporters left and subsequently received an e-mail communication stating that they were charged with trespassing, disorderly conduct and non-compliance with an official request.

University of Michigan pays for removing student from school: The University was ordered to pay \$320,990 in legal fees to a former dental student who alleged she was illegally kicked out of school. The legal fees were in addition to a \$1.72 million dollar jury verdict in favor of the former student. The jury ruled that the student's due process rights were violated when she was dismissed after her third year in dental school. She had a "B" average but was told she wasn't performing well in clinical as the basis for her dismissal.

STUDENT ORGANIZATIONS

Iowa Beta Chapter of Phi Delta Theta Fraternity v. University of Iowa, Supreme Court of Iowa, April 6, 2009

- **Facts & Holding:** In October 2001, Phi Delta Theta was tape recorded in their own house by Vejar, a non-member (who hid the tape recorder and later retrieved it) engaging in a "line up" of their pledges. Vejar shared the tape with Jones, the VPSA, and action was taken against PDT for violating the hazing a alcohol policies. This included a hearing on the charges. PDT also lost its national charter as a result of these charges. In September 2003, a hearing was held where the chapter accepted responsibility for violating the alcohol provisions, but not the hazing rules. Using the tape as the primary evidence, the hearing officer found the chapter responsible, and they were suspended. In November, PDT informed Iowa that they may have been in violation of an Iowa statute involving the tape recording. (Basically, you can not tape someone without their knowing, unless you are the PD). Iowa dropped the hazing charge, but upheld the suspension for the alcohol charge only. This was appealed to the President, who in June 2004 essentially gave PDT credit for "time served." In 2005, PDT filed suit, alleging Iowa (and all the staff involved) had violated the tape recording statute.

At a bench trial, the Court found for PDT an awarded \$98,300 in damages plus attorneys fees, and fined Jones \$5000 individually. Iowa appealed and the State Supreme Court upheld the finding, but modified the damages.

- **Significance of the Case:** In these days of FaceBook, MySpace and handheld digital cameras, conduct administrators should be acutely aware of their state law regarding unknowing recordings. It bears noting that these laws often hinge on the "expectation of privacy" of the individuals being taped. Very significant here is that, for the purposes of the Iowa statute, the Court treated the fraternity as a "person," since Iowa "had as (well)" (not holding some members individually accountable, but as members of the fraternity and then sanctioning the fraternity for their actions). This, at least in Iowa, is prescriptive on the issue of holding individuals and/or their organizations accountable. Lastly, it should be noted that the punitive damages were dropped against the VPSA, but only after some judicial wrangling.

Young America's Foundation v. Robert M. Gates, U.S. Ct. of Appeals, Dist. of Columbia Cir., July24, 2009

- **Facts & Holding:** YAF, a conservative group "committed to ensuring that young Americans understand and are inspired by ... the importance of a strong national defense," filed a motion with the Court to compel Sec. of Defense Gates to withhold federal funds from UC – Santa Cruz (under the Solomon Amendment) after UCSC cancelled 5 job fairs between 2005-2007 because of protesters, thus

depriving their members of access to military recruiters. The lower court found for UCSC, dismissing the claim, and the Court of Appeals affirmed the decision.

- **Significance of the Case:** The primary reason for the dismissal centered on a lack of standing for YAF to file the suit at all and the fact that the decision to withhold funds by the Secretary is discretionary, not required. What is relevant to college administrators is that the Court mentions the fact that UCSC followed their procedures (including pursuing action against those disruptive students who broke the rules) and only cancelled the events when the disruption was too interfering with the mission of UCSC and/or there was a safety concern. This is a *Tinker* reminder that it cannot be just the threat of disruption that causes you to take action, it must be actual disruption or a history of it.

Alpha Kappa Lambda Fraternity v. Washington State University, Washington State Ct. of App., Sept. 17, 2009

- **Facts & Holdings:** AKL was suspended for 5 years after being found in violation of a number of alcohol and drug violations, as well as a policy violation involving the lack of a live in advisor in a university conduct hearing. The hearing involved a significant amount of testimony from law enforcement – specifically about some confidential informants and controlled buys. AKL appealed within the WSU conduct system and the sanctions were upheld. AKL sued, arguing that the Board's decision was not supported by substantial evidence, the sanctions were arbitrary and capricious, the Board failed to follow prescribed procedures, and that the decision violated AKL's constitutional right to freedom of association. The lower court upheld WSU's findings and the Court of Appeals affirmed.
- The detective explained that people in the business of dealing with illegal narcotics often keep a running total of who owes them money. The crib note indicated that several other AKL members and officers owed B.B. (pledge educator) money for drugs, including E.S., N.H., and C.H., who was AKL's risk manager & their live-in advisor. Chapter President perpetuated a fraud when he bribed a member to sign a form agreeing to be live-in advisor; the "New Member Educator" was selling cocaine, and the "Social Chair" AKL appealed the Conduct Board's decision, arguing there were procedural errors, the findings were not supported [***15] by substantial evidence, and the sanctions imposed were overly severe. On March 26, 2008, the University Appeal Committee affirmed the Conduct Board's decision.
- **Significance of the Case:** This is a terrible fact pattern for AKL, and you have to wonder why they chose this one to take to Court. The Pledge Educator was dealing, the Risk Manager was buying and selling drugs, the President bribed a member, and the Social Chair was arrested for intimidating a witness! In short, this case is an affirmation of the regulations good Boards are using, including allowing basic hearsay evidence (and the ability to challenge it), using the preponderance of the evidence standard, and having this statement in their handbook: "WSU's regulations allow the admission of hearsay evidence in Conduct Board proceedings," and "... the formal rules of process, procedure, and technical rules of evidence, such as are applied in a criminal or civil court, are not used in student conduct proceedings." Of additional note was WSU's intentional choice of 5 years to allow for all the students affiliated with AKL to leave the institution before it could reestablish itself.

ON THE RADAR:

Colorado State University expels sorority for hazing: The university suspended recognition of Zeta Phi Beta after seven women filed a complaint with the university reporting that they were forced to do hours of strenuous exercise, including running and pushups to the point that they threw up and had muscle spasms, in addition, the chapter president required a pledge to do her homework for her.

Massachusetts Institute of Technology suspends two police officers for destroying student newspapers: Two MIT police officers, unhappy with the student newspaper's coverage of a fellow officer's arrest for drug trafficking emptied several hundred copies of the newspaper from campus newsstands. The paper featured a mug shot of an officer who was arrested in a sting, accused of distributing prescription painkillers. The officers have been suspended without pay during the investigation.

Brigham Young University-Idaho dissolves student political parties: The University dissolved the student-run College Republicans and College Democrats to insure the university's political neutrality policy is being followed. The university stated that, "we feel it is in the best interest of our university to be politically neutral".

Eastern Michigan University suspends fraternity following a gang rape: The University suspended Kappa Phi Alpha after a local hospital reported a women seeking treatment reported being fondled by several men and raped by at least one other. The woman had been drinking at a party at the fraternity house and gone willingly with the men. She reported that someone turned off the light and she was pushed against the wall and assaulted.

Men's Group forms at the University of Chicago: A student group, Men in Power, was formed at the university. The organization's purpose is to help men get ahead professionally. The group's formation has been controversial on campus, and charged that its premise is misogynistic.

SUNY-Geneseo students receive jail terms for hazing: Two former members of a college fraternity, the Orange Knights admitted that they plied a student with so much liquor during a three-day hazing that the young man died of alcohol poisoning. The students were expelled from the university and were charged criminally and sentenced to four months of weekends in jail.

Rider University implements comprehensive alcohol policies and programs in response to student death: Rider University settled a lawsuit with the family of a student who died of alcohol poisoning at a fraternity event in 2007. Although the financial terms were not disclosed, as a part of the settlement the university agreed to ban alcohol in dorms and on-campus fraternity and sorority houses social events, strengthen sanctions for alcohol violations and tell parents about incidents of alcohol violations.

Parents sue Prairie View A&M University for son's death: The parents of a 20 year old student sued the university and Phi Beta Sigma for negligence and wrongful death after their son died while he and other pledges were participating in an early morning run off campus. After collapsing, the student was taken by fraternity members to a local hospital and abandoned. The university has indefinitely suspended all pledging activities while the school investigates.

Penn State suspends fraternity parties in wake of student death: After a first-year student fell to his death from a restraining wall into a stairwell during a Phi Gamma Delta fraternity party, the university suspended all fraternity parties and social events during the investigation.

Utah State University fraternity and sorority charged with felony hazing: University chapters of both a fraternity and a sorority were charged with felony hazing in connection with the alcohol poisoning death of an 18

year old fraternity pledge. The sorority members captured the pledge and fed him vodka in the presence of other fraternity and sorority members. He was found unconscious by paramedics later that evening. Tests showed his blood alcohol level to be 4 times the legal limit. Although coercion was not an issue, because the student was under the age of 21, state statute allows for conviction even if the victim consented.³

ON-LINE SOCIAL NETWORKING

Nina Yoder v. University of Louisville, U.S. Dist. Ct., W. Dist. of Kentucky at Louisville, August 3, 2009

- **Facts & Holding:** Nina Yoder was dismissed from the University of Louisville School of nursing due to a blog she posted on her MySpace page. The blog post, entitled, “How I witnessed the Miracle of Life” was a graphic, cynical, crass description of an obstetric patient who Yoder was assigned to follow through the birthing process. Following her post, students reported it to the course instructor who reported her concerns to the Assoc. Dean that Yoder had revealed confidential information about the birth mother. The Dean reviewed the posting and determined that Yoder violated the School of Nursing (SON) Honor Pledge Code and Confidentiality Statement. Yoder was dismissed from the SON. Yoder was provided a appeal and the appeal decision upheld the dismissal. Yoder then filed a civil rights action against the school and the two administrators in their official and individual capacities alleging that they violated her First Amendment right to free speech; that the Honor Code and Confidentiality statements were unconstitutionally vague and that defendants violated her Fourteenth Amendment right to due process. She sought declaratory judgment regarding the Code and Confidentiality Agreement as being unconstitutional and sought permanent injunctive relief prohibiting their enforcement; and immediate injunctive relief ordering her return to class.

The court held there were no constitutional issues of free speech or due process and therefore, no §1983 action could hold against the institution or the administrators. Additionally, the Court found that the blog posting did not violate either the Honor Code or the Confidentiality Statement, and ordered Yoder’s reinstatement.

- **Significance of the Case:** The court stated that although the blog was “vulgar and distasteful and generally crass and uncouth”, it did not violate the nursing school’s confidentiality rules or honor code. The University argued that her detailed blog violated confidentiality rules by giving information about the date the patient was in labor, the number of children she already had, the fact she had an epidural, and the reaction of her family, but the courts analysis was that there was no information about medical, financial, personal or employment sufficient to identify the patient and therefore there was no violation of the Confidentiality Statement. Although defendants argued that the blog violated the “professionalism” provision of the honor code, there was no definition of professionalism in the Code, nor could the administrator provide one. The court stated that the blog was not “unprofessional”, it was “non-professional”, and that is, it was not posted as representative of the SON and thus fell outside the Honor Code.

ON THE RADAR:

Third Circuit to hear two cases involving MySpace issues: The Third Circuit Court of Appeals is set to hear two, nearly identical, cases involving discipline of students for material posted on MySpace and addressing issues of the limits of school officials’ authority to discipline students for off-campus speech. In the first case, a male student created an unflattering profile of his principal on MySpace poking fun of the principal’s size, and made references to his sexuality, intimidation and drinking. He was suspended for 10 days and barred from school activities. He sued and prevailed at the district court level, claiming his First Amendment rights were violated. In the second case, two students were suspended from school after creating a fake MySpace profile of their principal, and, although did not identify him by name, did include his picture and described him as a sex-obsessed pedophile. The school determined the students violated school policy on false accusations and the school’s

computer use policy. One of the students sued, arguing a First Amendment right. The district court denied her request for a temporary restraining order and preliminary injunction and granted summary judgment to the school district, ruling that the school could discipline lewd and vulgar off-campus speech that had an effect on campus, even if it didn't rise to the level of "substantial disruption" under *Tinker v. Des Moines Ind. School District*.

U. of Mass. computer systems administrator steals nude student photos from Facebook: A university administrator was fired and charged criminally with hacking into student e-mail and Facebook accounts and downloading nude and partially nude photographs of 16 female students. Robert DeCampus would go to the Facebook accounts and reset the passwords using his access to the women's e-mail accounts.

U. of Minnesota student banned from campus for Facebook posting: Amanda Tatro was banned from campus because her instructors in her mortuary science program felt threatened about her Facebook posts. Tatro, angry after breaking up with her boyfriend posted on Facebook that she was "looking forward to Monday's embalming therapy...give me room, lots of aggression to be taken out with a trocar (a sharp surgical instrument)". When she arrived at class the following Monday she was patted down, questioned by police and banned from campus.

MIT experiment, applies software to identify which students are gay based on Facebook information: Using data from Facebook, two students created a software program that conducted analysis based on the person's online friends to predict whether the person was gay.

Facebook "poke" counts as harassment: Shannon Jackson, of Tennessee has been forbidden from telephoning or communicating with her "victim" via Facebook because the Facebook "poke" breached a protection order. She was charged with harassment and could face a year in jail and up to \$2,500 in fines.

Illinois Beauty School sues student for Facebook comments: An Illinois Beauty school sued a student for his defamatory comments on Facebook that encouraged students to vent about their instructors. The school said his Facebook site looked like the school's site and he posted libelous comments about school officials on the site.

St. John's University student arrested for posting menacing Facebook messages: Radames Santiago, a student at the university was charged with making terroristic threats on his Facebook site. On that site he threatened to kill people on the campus with a "Virginia Tech" attack. He told the police that he was drunk and depressed about everything when he posted the message.

Ohio State University removed, then allowed critical Facebook postings: The university deleted comments on their Facebook site posted by a student critical about the President's involvement with an energy company. The University's response to the comments was to prohibit all posts on the site, but two days later reopened the page to postings. A spokesman stated, "It's a new feature and it's a learning curve."---Indeed!

University of Chicago demands student remove derogatory information on Facebook: The University demanded that a male student remove his Facebook comments stating, "the power to censor off-campus, disrespectful, or allegedly disrespectful speech". This followed an incident in which the student posted a photo album of an ex-girlfriend and stated, "she cheated on me and you're next". His friends commented on the posting, several calling the women a "whore". The University has threatened disciplinary action unless he removes the comments.

MISCELLANEOUS CASES

(Student Gun Legislation) **Students for Concealed Carry on Campus, et al. v. The Regents of the University of Colorado**, El Paso County Dist. Ct., 4th JD, April 2009

- **Facts & Holding:** The Regents of CU adapted a policy prohibiting weapons on campus with the exception of law enforcement personnel. Students filed suit to strike the policy, arguing (1) it violated the Colorado state constitution which they interpreted as having an absolute right to bear arms; and (2) it was inconsistent with the Colorado Concealed Carry Act which establishes statewide standards for possession of concealed handguns. The court disagreed with plaintiffs' arguments and dismissed the complaint.

The Colorado statute at issue allows for the people of Colorado to possess concealed handguns with a proper permit, and emphasizes that a "local" government has no authority to adapt a policy or resolution inconsistent with the statute. Students argued that the Regents are a local government. In relying on case law, the court disagreed and held that the Regents have been provided with statewide authority with powers to create and enforce legislation. Regarding plaintiffs' argument of a state constitutional right to bear arms, the court found no such "right" in the provision of the constitution that plaintiffs relied upon. To the contrary, the court determined that the Colorado Supreme Court has not found any such absolute right to bear arms in the provision relied upon.

- **Significance of the Case:** The Regents created the weapons policy out of its belief that possession and carrying of weapons on campus undermines the academic mission of the institution, disturbs the peace and "tranquility" of the campus/educational environment, and fosters a climate of violence. The court indicated that it would not supplant its beliefs/values with those of the Regents regarding having weapons on campus.

(Disturbing the peace via e-mail) **State of Nebraska v. Darren Drahota**, 772 N.W. 2d 96 (Neb. 2009)

- **Facts & Holding:** Darren Drahota, a former student at the University of Nebraska – Lincoln, and his professor, William Avery began a series of email exchanges in February 2009 which reflected a bantering back and forth on a variety of current issues political in nature. In the beginning Drahota's emails were respectful of the professor but the tone reflected anger and hostility towards the topics and contained profanity. Avery started to become personally offended by the emails and at one point Drahota threatened to physically harm him. It was at that point Avery requested Drahota stop communicating with him via email or he would call the police.

Four months later Avery received two email messages from a fraudulent email account laced with similar tone and content and referred to Avery as a traitor. The police were contacted, and Drahota admitted he sent the messages. He was ultimately convicted for disturbing the peace and quiet of Avery. Avery appealed. The appellate court affirmed the conviction. The court concluded that the content was libelous, accused Avery of being affiliated with a terrorist group, and contained other disturbing comments.

- **Significance of the Case:** Interestingly, on appeal Drahota asserted that the communications in his emails sent to Avery in June were constitutionally protected, relying on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The court disagreed. In doing so, it referred to a Nebraska Supreme Court decision and opined that the emails were personally abusive (referring to Avery as the lowest form of life on the planet), laced with epithets and not protected.

(Copyright-plagiarism checking service) **A.V. et al. v. Paradigms, LLC**, 562 F.3d 630 (4th Cir. 2009)

- **Facts & Holding:** This case was initially presented in our 2009 "Year in Review" paper and contained a summary of the federal district court's opinion denying plaintiffs' claims for copyright infringement based, in part, on the "fair use" doctrine. Plaintiffs are students whose high school utilizes the "Turnitin" technology service to detect plagiarism in students' written work. The service can archive *all* submitted written work for

future use as a detection mechanism. Plaintiffs submitted their work with a disclaimer providing no consent for archiving their works. When they discovered their papers were archived, they sued for copyright infringement. On appeal, the 4th circuit relied on the fair use doctrine and upheld the decision of the district court.

- **Significance of the Case:** The court examined the potential effect on the market value of the plaintiffs' work (the submitted papers), and determined that Turnitin's "use" of the papers was not for content or for expressive purposes but limited to storing them in its database to detect possible instances of plagiarism in other works. It therefore found no real loss of potential market value in their work. Note: this was also supported by the students own deposition testimony – in which they acknowledged no loss of potential market value in their papers.

ON THE RADAR:

Eastern Michigan University uses Google maps to support Clery reporting: The University and the City of Ypsilanti partnered to create a mapping and tracking system for area crime. The team created a Google mashup to provide users with a visual representation of where crime is occurring by adding markers to a map of the campus and city. Creation of the application took several months to create and cost \$15,000.

University of Kansas takes strong action against underage drinking: Although the university was aware of underage drinking issues on their campus for over a decade, they took more drastic action after the deaths of two persons in two months. The university re-wrote their policies, implemented new rules to involve parents and plan to assess incoming freshman on their alcohol use.

Owens College sued for losing nursing accreditation: Owens Community College is being sued by 87 nursing students for losing national accreditation. The students are charging that the college did not do enough to maintain its accreditation, that it misrepresented itself as having an accredited program when it was in jeopardy and did not keep students informed through the process.

East Central University removes disabled student from residence hall: Joshua Jackson, a quadriplegic is challenging the university's decision to remove him from his dorm unless he hires an assistant to stay overnight. The school says it's a matter of safety and they are unable to appropriately accommodate him. He has no ability to move from his bed and would be unable to evacuate his room if there is an emergency, thus becoming a risk to himself and others. Diane Berty, VPSD, states that his refusal to move from his dorm "Is a behavioral conduct issue – that's the hallmark we work from. Because he can't evacuate his dorm on his own at night, he is violating school codes and residence hall rules."

Monroe College sued for educational malpractice: Student, Tina Thompson, has filed a lawsuit against the university claiming that she had not been able to obtain gainful employment because the college provided inadequate career-placement services. Thompson alleges that only the top students receive substantial help from placement personnel.

Temple University student sues for separate bathrooms: Student, Jennifer Weiler, has sued the university for not creating and maintaining separate bathroom facilities for men and women. She states that state law requires all public buildings need to have separate bathrooms, and although the university designated a women's bathroom in her dorm, they did nothing to prohibit male students from using it.

Florida A&M student gets prison term for grade changing case: A former Florida A & M student was sentenced to 22 months in prison for engaging in unauthorized changes to grades and residency status of 90 students at the university.

Appalachian Technical College pays \$450,000 in student whistleblower case: Student, Sara Castle, reported to school authorities the she and her classmates weren't getting the clinical training they needed because an instructor repeatedly dismissed students early. The teacher was fired, but Castle was expelled from the college. Following a jury trial Castle was awarded \$400,000 in punitive damages and \$50,000 for emotional injuries.