Campus Legal Advisor

Interpreting the Law for Higher Education Administrators

VOLUME 19, ISSUE 7 MARCH 2019

SNAPSHOTS

LEGAL BRIEFS

University settles wrongful termination suit, 1st Amendment dispute leads to policy changes, judge approves settlement with law school students, and more. **Page 2**

TRAINING TOOLS

Understand 'legitimate educational interest' under FERPA. **Page 6**

LAWSUITS & RULINGS

Review summaries of court cases and agency rulings. **Pages 7–14**

YOU BE THE JUDGE

Were student's tweets covered by conduct code? See if you can guess how the court ruled in this month's highlighted legal case. **Page 15**

QUICK STUDY

Review rulings involving student enrollment and disability. **Page 16**

OF COUNSEL

Know how to handle employee protests, refusals to engage in work

By Michael Porter, Esq., with Erin Burris, Esq.

Silent Sam is a 105-year-old statue of a Confederate soldier on the University of North Carolina campus. Protesters have toppled it, and UNC's leadership has had to address the campus unrest concerning the statue's placement, which is governed in part by North Carolina state law.

UNC teaching assistants added a new wrinkle to the controversy in late November, when many signed a petition indicating they wouldn't turn in grades unless and until UNC, in opposition to a recommendation of UNC's board of trustees, decides not to return Silent Sam to campus. The provost indicated that "serious consequences" would flow from failure to timely submit final grades.

UNC TAs aren't the first and won't be the last college and university employees to address a social or political issue by threatening to withhold, or actually withholding, work. And although refusals to work are generally insubordinate, mass dismissals aren't a practical solution to such a threat

Continued on page 3.

TRAINING TOOLS

Gain insight into preparing to manage legal, compliance issues of college esports

By Claudine McCarthy, Co-Editor

If you think competitive video gaming doesn't belong within the world of collegiate athletics, it just might be time for you to reconsider the way you define sports — or risk more than just failing to keep up with the times. In fact, varsity esports programs have already become established at more than 100 colleges and universities — a number that's experienced rapid and steady growth. Although some colleges and universities choose to establish esports as a club housed in student activities, other programs come under the purview of college athletics directors. And colleges and universities continue to

Continued on page 4.

DOI: 10.1002/cala

University settles wrongful termination suit

The University of Michigan has agreed to pay a $300,000 settlement to a former employee who sued, claiming she was wrongfully terminated by the school.

The plaintiff said she refused to cooperate with an associate vice president's request to "fraudulently misrepresent" another employee's role to federal immigration officials. After a disciplinary review, the school fired the plaintiff for "failing to meet expectations."

The university didn't admit any liability in the settlement, and claimed they had already corrected the other employee's visa issue, reports *The Michigan Daily.* ■

1st Amendment dispute leads to policy changes

Chicago State University settled a First Amendment lawsuit that spanned several years, reports *The Washington Free Beacon.*

In a blog they ran and called the "CSU Faculty Voice," two professors criticized a former CSU president and his administration. In a letter, CSU's general counsel and vice president insisted they take down the blog or face legal action, which then triggered the plaintiffs to sue for violation of free speech. In the settlement, CSU agreed to change its policies regulating faculty speech and to pay $650,000. ■

Judge approves settlement with law school students

Students who claimed they went into debt while attending the Charlotte School of Law but ended up unprepared to pass the bar exam can now expect to receive some compensation. A federal judge approved a proposed class action settlement requiring the Charlotte School of Law to pay former students $2.65 million, reports *wsoctv.com.*

But more than 70 students objected to the proposed settlement, claiming it will cover just a small fraction of their student loan debt accrued while attending the school, which closed in 2017 when the American Bar Association said it broke accreditation standards. ■

Students to receive millions in debt relief

Following a five-year investigation that uncovered deceptive practices, an Illinois-based education company has reached a settlement with 49 state attorneys general. As part of the settlement, more than 179,500 students nationwide will receive a total of about $494 million in student-loan debt relief from the Career Education Corp. The settlement also includes CEC's agreement to relinquish all efforts to collect institutional debt owed by former students residing in the states involved in the settlement, according to multiple media reports.

CEC's college brands had included for-profit schools such as the Brooks Institute, Brown College, Missouri College, the Harrington College of Design, Sanford-Brown and Le Cordon Bleu. But it now offers mostly online courses through American InterContinental University and Colorado Technical University.

For more information, email CECquestions@careered.com. ■

CAMPUS LEGAL ADVISOR

CAMPUS LEGAL ADVISOR (Print ISSN: 1531-3999; Online ISSN 1945-6239) is published monthly by Wiley Subscription Services, Inc., a Wiley Company, 111 River St., Hoboken, NJ 07030-5774. Periodicals Postage Paid at Hoboken, NJ and additional offices.

Postmaster: Send all address changes to *CAMPUS LEGAL ADVISOR*, John Wiley & Sons Inc., c/o The Sheridan Press, PO Box 465, Hanover, PA 17331.

Information for subscribers: *Campus Legal Advisor* is published in 12 issues per year. Subscription prices for 2019 are: **Personal Online Only:** $188 (US), £145 (UK), €173 (Europe), $188 (rest of world). **Personal Print + Online:** $254 (US, Canada, & Mexico), £236 (UK), €281 (Europe) $306 (rest of the world). **Personal Print Only:** $231 (US, Canada, & Mexico), £218 (UK), €260 (Europe $283), (rest of the world). **Institutional Online Only:** $3725 (US, Canada, Mexico), £1969 (UK), €3031 (Europe) $3725 (rest of world). **Institutional Print + Online:** $4657 (US, Canada & Mexico), £2462 (UK), €3789 (Europe), $4762 (rest of the world). **Institutional Print Only:** $3725 (US, Canada & Mexico), £1969 (UK), €3031 (Europe), $3809 (rest of the world). Prices are exclusive of tax. Asia-Pacific GST, Canadian GST/HST and European VAT will be applied at the appropriate rates. For more information on current tax rates, please go to www.wileyonlinelibrary.com/tax-vat. The price includes online access to the current and all online back files to January 1, 2013, where available. For other pricing options, including access information and terms and conditions, please visit www.wileyonlinelibrary.com/access.

Customer Service: For ordering information, claims and any enquiry concerning your journal subscription please go to www.wileycustomerhelp.com/ask or contact your nearest office. **Americas:** Email: cs-journals@wiley.com; Tel: +1 781 388 8598 or +1 800 835 6770 (toll free in the USA & Canada). **Europe, Middle East and Africa:** Email: cs-journals@wiley.com; Tel: +44 (0) 1865 778315. **Asia Pacific:** Email: cs-journals@wiley.com; Tel: +65 6511 8000. **Japan:** For Japanese speaking support, Email: cs-japan@wiley.com. **Visit our Online Customer Help** available in 7 languages at www.wileycustomerhelp.com/ask

Wiley's Corporate Citizenship initiative seeks to address the environmental, social, economic, and ethical challenges faced in our business and which are important to our diverse stakeholder groups. Since launching the initiative, we have focused on sharing our content with those in need, enhancing community philanthropy, reducing our carbon impact, creating global guidelines and best practices for paper use, establishing a vendor code of ethics, and engaging our colleagues and other stakeholders in our efforts. Follow our progress at www.wiley.com/go/citizenship

View this journal online at wileyonlinelibrary.com/journal/cala

Co-Editors: Aileen Gelpi, Esq., and Claudine McCarthy.
Legal Contributor: Richard H. Willits, Esq.
Production Editor: Lalaine Bacea.
Editorial Correspondence: Claudine McCarthy, *Campus Legal Advisor.* Email: cmccarthy@wiley.com; Phone: 561.964.2357.
For submission instructions, subscription and all other information visit: wileyonlinelibrary.com/journal/cala
Printed in the USA by The Allied Group.

Continued from page 1

or action, and some protest activities may be legally protected. The Silent Sam controversy provides an opportunity to explore some parameters of protected activity by employees.

Pay attention to union-organizing rights

Most public and private institutions must be attuned to "protected concerted activity" related to union-organizing rights. The National Labor Relations Act governs labor law at private institutions, and most states have laws that incorporate concepts of the NLRA for public institutions, although state law may diverge from federal law in some areas.

The NLRA and most state laws protect employees when they engage in "protected concerted activity" related to employment issues. Although a refusal to work typically isn't protected concerted activity, it may be close. Indeed, at UNC the employees assert that returning Silent Sam is an extraction of labor without compensation because of the work associated with addressing the community unrest when Silent Sam is on campus.

The following cases illustrate how the NLRA protects campus activity:

➢ Following a suspension of a university employee involved in passing out leaflets to other union members describing allegedly illegal searches and terminations, two employees picketed the disciplinary action. The university dismissed one of the picketers for "engaging in intimidating behavior." The university argued the leaflets used provocative language and incited violence by, among other things, referring to a university "gestapo." These arguments didn't persuade the court, which found the leafleting was concerted activity warranting protection from disciplinary action (*N.L.R.B. v. N.Y. Univ. Med. Ctr.*, 702 F2d 284, 286 (2d Cir 1983)).

➢ A community college dismissed a faculty member after she sent a letter explaining her position that adjunct faculty were treated as a "disposable resource," and including statements that the college argued were disloyal and maliciously untrue. This activity was protected concerted activity protected by the state's labor relations act (*Moraine Valley Cmty. Coll. v. Ill. Educ. Labor Relations Bd.*, No. 1-15-2845, 2017 WL 1012438, at *2 (Ill App Ct Mar. 10, 2017)).

Disruptive work stoppages and employee action can be met with litigation initiated either by a college or university or by employees, but this type of litigation is highly adversarial, typically results in challenging public relations issues, and has very unpredictable outcomes.

Reflective of the complexity is a court case in which a community college dismissed a number of employees who had stopped work because of a college proposal to change pay structures (*Lake Mich. Coll. Fed'n of Teachers v. Lake Mich. Cmty. Coll.*, 390 F Supp 103, 114 (WD Mich 1974), rev'd on other grounds, 518 F2d 1091 (6th Cir 1975)).

A federal trial court required the college to file a state-court lawsuit to resolve state-law questions about whether the work stoppage was legal, requiring an appeal to a federal appellate court. Thus, a college or university will, in significant circumstances, explore litigation or threatening litigation. But managing the situation at issue through nonlegal means, such as efforts to engage the community in solving the problem, should usually be the first line of addressing this type of challenge.

About the authors

Michael Porter, Esq., is a partner, and Erin Burris, Esq., is an associate, with Miller Nash Graham & Dunn LLP, with offices in Oregon and Washington. *You may contact Porter at* Mike.Porter@MillerNash.com. ■

Consider 1st Amendment parameters, public institutions

Public institutions must also take care to avoid violations of the First Amendment, which protects speech made as a citizen on a matter of public concern. The TAs at UNC also characterized their actions as being based on a matter of public concern. There's little doubt that the Silent Sam debate is a matter of public concern; withholding grades, however, probably isn't speech made as a citizen on a matter of public concern.

Further, although not easy to evaluate, First Amendment protections subside when disruption to an institution's operations outweighs the individuals' speech. Refusals to work may equate to such a disruption. In sum, however, as with protections for protected concerted employee activity, institutions must proceed with caution when taking action against employees involved in campus political issues.

In conclusion, outright refusals to work rarely garner protection and can result in dramatic litigation, and employee protest activity can implicate a variety of protections. Administrators with responsibility to ensure campus operations run smoothly should take care to not act on employee protest activity without fully considering how the legal parameters and options intersect with leadership necessary to manage challenging campus issues. ■

Vol. 19, Iss. 7
DOI 10.1002/cala

Continued from page 1

invest an increasing amount in esports, including scholarships and aid, recruiting, coaches, tournaments, and stadium development.

As the number of college esports teams continues to grow, so does the number of financial and legal implications for institutions and students alike. To gain a better grasp of the potential impact of esports on college campuses, consider that professional video gaming has become a billion-dollar-plus worldwide industry, with professional gamers earning individual prizes reaching as high as $4 million-plus. With all that money at stake, and lots of rules, regulations, and laws to learn, it's a safe bet that compliance violations, lawsuits, and public relations mishaps are sure to follow.

To help you learn how to prepare to manage the rapidly growing world of college esports at your institution, *Campus Legal Advisor* spoke with Steve Walkowiak, Esq.; and P. William Stark, Esq., litigation shareholders with the Video Game and Esports Group, based in the Dallas office of the law firm Greenberg Traurig, LLP.

Here's an excerpt from our interview, which has been edited for space and clarity:

Q Why should higher ed administrators have esports on their radar? Why should it matter to them?

A Because it matters to their students. Whether they have an official program, esports team, or club, their students are playing these games recreationally as a hobby whether or not it's an official club. It's a revenue-generator, a way to attract students to your program and to set your institution apart.

Having an esports program and/or scholarship program may be a way to make that happen.

Competitive esports and video gaming can also help prepare students for many ancillary careers, such as video game designers, streamers, production assistants, or other roles related to entertainment and hospitality. By partnering with your institution's information technology or computer science department, your institution just might come up with the next hot game.

Q What's at risk if colleges don't pay attention to, or don't properly prepare for, esports on their campuses?

A Whenever people are engaged in activity representing your institution, to the extent it goes well, it reflects well on you; and to the extent it goes poorly, it reflects poorly on you. So, pay attention. You're going to have people who are gaming and conducting e-commerce on your servers. To the extent they're engaging in illegal or prohibited activities, that could put the institution at risk.

Q What challenges should colleges prepare for related to esports?

A In certain instances, if you're allowing or endorsing certain activities, you can have some liability for that. If you're endorsing the activity, the institution should have some sort of framework, with an individual or department that reviews the rules of each individual game. It's not like soccer or baseball, where the rules of the game are the same across that sport. In esports, each publisher, network, and game has its own tournament rules. Schools would be well-served to have an advisor, such as someone in IT or an attorney, to advise them about the risks and how to approach them from a gaming standpoint.

Q Which staff members and departments need to become educated and prepared for esports on campus?

A It depends on what your institution wants to get out of it and what you want to provide to your students. Some colleges and universities are treating esports as athletics, so it would fall under the athletics department. Some are treating esports as a club that falls under student services. And some are trying to find a hybrid academic department, so it might fall under computer science.

Q What practical steps should higher ed administrators take now to prepare to manage the impact of esports on their campuses?

A Start working with the game publishers, to ensure full compliance with their rules and regulations to protect the institution and the students who are going into careers related to esports.

Not following the rules of esports can be a violation of the law and a criminal offense. A lot of game publishers right now are taking a very litigious approach in terms of their rules — they're looking at it as a form of theft because those who don't spend time learning the rules of the game are essentially stealing revenue from them in terms of game time, advertising time, and purchasing time.

Those who demonstrate how to cheat or exploit certain games can expect others to try to remove them from the ecosystem to create an even playing field.

Rule-following gamers see cheaters as decreasing their chances of winning fairly. We're seeing litigation solutions and bans, with people being kicked off servers.

DOI 10.1002/cala

A number of game publishers want to see how existing laws or new laws can be adjusted or written from civil and criminal standpoints to deal with the revenue theft from their games. It's pretty murky what the rules of the road are, and they change from game to game and day to day. It's a developing area of the law.

Esports in some ways is this decade's version of Napster, when colleges and universities were being ordered to take down entire groups of content or receiving cease-and-desist orders. Let's learn some lessons from that endeavor. You can either get ahead of this problem or it can punch you in the face.

Be proactive, get ahead of it, and develop relevant policies and procedures. Remember that if you have a policy and someone doesn't adhere to it, the policy helps protect the institution from liability. It's also critical for colleges and universities to educate students about the very real dangers of corruption, cheating, and gambling.

Q What applicable laws should higher ed administrators know?

A Institutions need to be aware of the laws worldwide. This is more important than ever, considering the increasing rise of international students and study-abroad programs. South Korea is very strict. If a South Korean player attending a U.S. institution engages in certain activities prohibited in South Korea, he might be sent back to South Korea or even to a third country. If a U.S. esports team travels to South Korea for a tournament and engages in cheating, the legal ramifications could impact that U.S. team. South Korea typically punishes cheating gamers with financial penalties and up to two years in prison.

Cheating in South Korea, the United States, and other countries usually leads to bans. They're essentially ending these people's careers by banning them from that game.

Some of these bans are coming down for cheating committed as a teen. So once a college gamer goes pro as an adult; the game publisher looks back at that gamer's history (readily available on the software); discovers unauthorized activity, such as boosting or even just giving the game control to a professional; and a career is over.

As soon as an institution embraces esports at the competitive level or as part of its academic curriculum, these are the sorts of issues they need to keep up with to stay in compliance and prevent violations.

Q Who makes the money from competitive esports?

A It depends. A college student could be in his institution's esport club or competitive academic team that wins or places in a tournament during the week, and then on the weekend he plays in a non-school-affiliated tournament and wins prize money. The question becomes: Is he a pro gamer or a college student-athlete governed by the NCAA? Or can he even be a professional in one game and an amateur in another? The amateurism controversy will come very soon.

Prize money varies wildly, from a few hundred to millions of dollars. The average salary of a professional U.S. gamer is now six figures, and there are players who make seven figures.

Esports is a billion-dollar industry and growing.

(*For a ranking of competitive gamers' prize earnings, go to* Esportsearnings.com.)

Q What can your firm do to help colleges prepare for and manage the challenges, liabilities, risks, and violations that might arise around esports?

A Esports is a very complicated and rapidly changing area of the law. We believe we're deeply positioned as the only major American law firm dedicated to esports and video games. We understand the risks and opportunities presented, and know how to mitigate those risks and maximize those opportunities.

For more information, email Stark at starkb@gtlaw.com *or follow him on Twitter:* @pwilliamstark, *or email Walkowiak at* walkowiaks@gtlaw.com *or follow him on Twitter:* @eSport_Law. *Or visit* www.gtlaw.com/en/capabilities/gaming/video-game-and-esports. ■

Collegiate esports association offers support

The National Association of Collegiate Esports is a nonprofit membership association organized by and on behalf of its 80-plus member institutions. The membership collaborates to develop the structure and tools for varsity esports programs, including laying the groundwork in areas such as eligibility, path to graduation, competition, and scholarships.

NACE has 1,500-plus student-athlete gamers receiving a total of $9 million in esports scholarships and aid.

The nearly three-year-old organization hosts an annual national convention and provides members with a private discord server (voice-over software) for athletics directors and coaches.

In 2016, only seven colleges and universities had varsity esports programs. Now, at least 100 colleges and universities have varsity esports programs.

For more information, go to https://nacesports.org/. ■

Vol. 19, Iss. 7
DOI 10.1002/cala

Understand 'legitimate educational interest' under FERPA

By Richard Rainsberger, Ph.D.

April 16, 2007 — the day Seung-Hui Cho, a troubled senior English major at Virginia Polytechnic Institute and State University, killed 32 people and wounded 17 more with two semi-automatic pistols. He then turned one of the pistols on himself, pulled the trigger, and died instantly.

The shooting was the deadliest school homicide in our history.

Privacy laws, one of which was the Family Educational Rights and Privacy Act, came under attack. Critics claimed these laws "handcuffed" Virginia Tech's school officials from disclosing/sharing information about Cho before and during the April 16 shootings.

In fact, that wasn't true. And I said so at the time. I was highly critical of the Virginia Tech school officials for *not* understanding what FERPA permitted.

For example, Virginia Tech officials didn't know they could have shared their concerns with Cho's parents. FERPA would have allowed Tech to share, for example, counselors' reports with the parents under the parental exception to written consent found at §99.31(a)(8). They weren't properly FERPA-trained. Furthermore, Tech had a policy (and still does) of not sharing any education records with parents without the student's written consent. Here is the disclosure policy that I found recently on the university's website:

Third Party Disclosures *are prohibited by FERPA without the written consent of the student. Any persons other than the student are defined as Third Party, including parents, spouses, and employers. All educational officials are required to secure written permission prior to the release of any academic record information* (found Nov. 12, 2018, at https://registrar.vt.edu/contact/FERPA.html).

So you had a perfect storm brewing: (1) ignorance of what FERPA allowed to be disclosed to any "appropriate parties" under the health and safety emergency exception and (2) Tech's conscious decision to not disclose any education records to parents without the student's written consent.

And you can see what happened.

The next year (2008), the Family Policy Compliance Office gave the health and safety emergency exception much-needed clarification. It specifically mentioned "parents of an eligible student" as one of the "appropriate parties" to whom education records could be shared "if knowledge of the information is necessary to protect the health or safety of the student or other individuals" (§99.36(a)).

It also added the following new statement as §99.36(c):

(c) In making a determination [that an emergency exists], an educational … institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the … institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the [FPCO] will not substitute its judgment for that of the … institution in evaluating the circumstances and making its determination.

Unlike the pre-2008 regulations, college officials now know they have a clear legal basis to deal with a health or safety emergency. The statement above (1) requires each college to document its reasoning for determining an emergency exists, (2) specifically permits notification of a student's parents if the information disclosed is necessary to safeguard the health and safety of individuals or the campus community, and (3) assures each college the FPCO won't question the decision of the college as long as a documented, rational basis exists.

Still, although the FPCO has made the health and safety emergency exception to a student's written consent easier to understand and implement, this is only half of the solution. The other half is making sure those individuals who are faced with a potential or real health or safety emergency understand what the regulations say and how they can proceed legally. That requires a FERPA-informed campus — and that requires FERPA training. ■

About the author

Richard Rainsberger, Ph.D., a former registrar, is a nationally recognized authority on the Family Educational Rights and Privacy Act. *Contact him at* ferpadoc@hotmail.com. His column runs every month in *The Successful Registrar*, also published by Jossey-Bass, A Wiley Brand. *For more information on that publication, please go to* www.wileyonlinelibrary.com/journal/tsr. ■

March 2019
DOI 10.1002/cala

AT A GLANCE

A REVIEW OF THIS MONTH'S LAWSUITS & RULINGS

ATHLETICS — EQUAL PAY ACT

Judge finds unequal pay doesn't violate statute

Case name: *Miller, et al. v. The Board of Regents of the University of Minnesota*, No. 15-CV-3740 (D. Minn. 02/01/18).

Ruling: The U.S. District Court, District of Minnesota granted a summary judgment in favor of the University of Minnesota Duluth.

What it means: Unequal wages resulting from market conditions aren't prohibited by the Equal Pay Act.

Summary: After quitting her job as the University of Minnesota Duluth women's head basketball coach, one of the plaintiffs in this case joined in a lawsuit that had been filed by other female coaches against the university. In that lawsuit, the former women's head basketball coach asserted a claim under the Equal Pay Act, contending she was paid less than the men's basketball head coach.

The university filed a motion for summary judgment.

The district judge wasn't at all sure the former women's head basketball coach was paid less, because he was skeptical about the manner and method used to compare compensation packages. However, after assuming for the purpose of argument that her numbers were correct, he said her claimed disparity was just over 2 percent.

In addition, he attributed the pay differential between the coaches to market forces. He explained that unequal wages resulting from market conditions weren't prohibited by the statute.

The former women's head basketball coach cited the case of *Drum v. Leeson Electric Corp.* for her contention that market forces couldn't justify paying a woman less than a man for equal work. But the judge said the employer in the *Drum* case had hired both the male and the female from the same market of human resources directors. He ruled *Drum* was irrelevant because UMD hired the men's head basketball coach from the market of men's basketball coaches, and it hired the plaintiff from the different market of women's basketball coaches.

He also noted her salary was above market for women's basketball coaches, and the men's head basketball coach's salary was below market for men's basketball coaches.

The judge granted a summary judgment in favor of the university. ■

Vol. 19, Iss. 7
DOI 10.1002/cala

DISABILITY — ACCESS

Judge allows access suit about parking to continue

Case name: *Twede, et al. v. University of Washington*, No. C16-1761 (W.D. Wash. 02/13/18).

Ruling: The U.S. District Court, Western District of Washington allowed portions of a lawsuit against the University of Washington to proceed.

What it means: An ADA plaintiff usually must allege all noncompliant architectural features at a facility in order to provide fair notice to a defendant.

Summary: A University of Washington student and two nonstudents filed a lawsuit claiming the campus parking lots violated the Americans with Disabilities Act.

The three plaintiffs (1) claimed they were unable to walk without assistance, (2) identified barriers and obstacles at the 36 campus parking lots they visited, and (3) briefly described how each barrier affected them.

The university filed a motion to dismiss, arguing the plaintiffs had no right to challenge those parking lots they had not visited.

The judge noted the plaintiffs had only specified 36 parking lots and had not alleged any visits to any of the other lots. He agreed with UW that they could only complain about the lots they claimed to have visited.

The university next argued that the plaintiffs had not specified when each of the 36 parking lots were built or modified. It explained that such data was essential because the standards for parking lots became stricter over the years.

The judge acknowledged that an ADA plaintiff usually must allege all noncompliant architectural features at a facility in order to provide fair notice to a defendant. However, he refused to make the plaintiffs plead those dates, stating that such information was likely known by UW, and it would be almost impossible for the plaintiffs to find out that data without subpoenas and depositions. ■

DISABILITY — ACCOMMODATIONS

Judge rules temporary impairment meant student was disabled

Case name: *Cooney v. Barry School of Law*, No. 16-11419 (11th Cir. 01/09/18).

Ruling: The U.S. Court of Appeal, 11th Circuit ruled a trial judge mistakenly found no disability.

What it means: The decision of whether an impairment substantially limits a major life activity must be made without regard to mitigating measures.

Summary: The plaintiff, a student at the Barry School of Law, became blind in one eye when an ocular implant became disengaged in March 2011.

The plaintiff then made several accommodation requests, including additional time to turn in a legal writing class assignment. However, the professor refused to extend that deadline.

The plaintiff was academically dismissed in January 2012 for failing to maintain adequate grades.

After his vision was restored at an unspecified time by surgery, the plaintiff filed a lawsuit claiming violations of the Americans with Disabilities Act.

One of several reasons given by the trial judge in granting a summary judgment in favor of the Barry School of Law was the plaintiff had not been disabled within the meaning of the ADA because his impairment was surgically corrected.

On appeal, the court explained the 2008 ADA amendments expressly changed the statute with respect to mitigation, and quoted its language: "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."

The panel ruled the plaintiff was indeed disabled within the meaning of the ADA, but affirmed the summary judgment after finding that other reasons given by the trial judge were valid. ■

DISABILITY — ACCOMMODATIONS

Court decides college didn't retaliate against dean

Case name: *Tenpas v. Riverside Community College District*, No. D073007 (Cal. Ct. App. 02/13/18).

Ruling: The Court of Appeal of California, 4th Appellate District affirmed a summary judgment in favor of the Riverside Community College District.

What it means: A plaintiff claiming disability discrimination must present more than mere speculation.

Summary: In 2011, the plaintiff, a Riverside Community College District employee, became a dean at Moreno Valley College.

The plaintiff also became an acting dean at another district campus a year later, while she was still holding the full-time position of Moreno Valley dean for technology and instructional and support services.

The plaintiff was granted seven months of medical leave in March 2013 because of major depression and sleeplessness.

While she was on leave, the plaintiff asked to be allowed to work from home two days a week whenever she returned to work. The district denied her request, stating her Moreno Valley duties required her to be on-site full time.

According to the plaintiff, her office conditions were less favorable when she returned to work because: her voicemail was inoperative, another person's business cards were in her office, and her name had been removed from the office door. In addition, the plaintiff claimed she was being excluded from meetings of other deans, and was being left out of departmental decision-making.

After the plaintiff was notified in December that the position of Moreno Valley dean was being eliminated because of budget constraints, she filed a lawsuit that asserted several theories. One was disability discrimination, and another was retaliation for requesting an accommodation.

However, the trial judge granted a summary judgment in favor of the district.

On appeal, the court ruled the stated budgetary reasons for eliminating the Moreno Valley deanship were legitimate and nondiscriminatory because the plaintiff had not presented any convincing evidence to the contrary.

The court wasn't impressed by her evidence of "less favorable office conditions" upon her return to work, ruling they were relatively trivial. It also held the plaintiff didn't present any evidence sufficiently connecting her accommodation request to the elimination of the TISS dean position.

The appellate court affirmed the ruling of the trial judge, stating it wasn't enough for the plaintiff to speculate that discrimination existed. ■

DISABILITY — ACCOMMODATIONS

Court decides college may have discriminated against employee

Case name: *Williams v. Tarrant County College District*, No. 16-11804 (5th Cir. 01/18/18).

Ruling: The U.S. Court of Appeals, 5th Circuit reversed a summary judgment that had been entered in favor of Tarrant County College.

What it means: The 2008 amendments to the Americans with Disabilities Act and the applicable regulations broaden protection for the disabled by clarifying that a showing of a plaintiff's substantial limitation doesn't usually require scientific, medical, or statistical analysis.

Summary: The plaintiff had attention deficit hyperactivity disorder and post-traumatic stress disorder since childhood. In addition, she was diagnosed with major depressive disorder and hypothyroidism in 1995.

The plaintiff began working as a tutor at Tarrant County College in 2009. However, her symptoms worsened over the years.

When a supervisor informed the plaintiff in 2012 that she had been the subject of a faculty complaint, she cried uncontrollably and took several hours to regain her composure.

After that incident, the plaintiff was placed on administrative leave. During that time, a psychiatrist informed the college that she had major depressive

Vol. 19, Iss. 7
DOI 10.1002/cala

disorder and anxiety, as well as problems eating, sleeping, and focusing.

The plaintiff attempted to return to work in January 2013. She provided a certification of fitness for duty completed by her doctor, and requested unspecified "reasonable accommodations." However, she wasn't permitted to return.

The plaintiff was terminated five days later, and she filed a lawsuit claiming violations of the ADA.

In response to a motion for summary judgment filed by the college, the plaintiff presented her declaration, which detailed her diagnoses, treatments, and symptoms since childhood, and which explained she had trouble forming thoughts, communicating, and sleeping.

The trial judge granted a summary judgment in favor of the college, ruling the declaration was insufficient because there was no medical documentation.

The appellate court ruled the trial judge shouldn't have disregarded the declaration, stating that major depressive disorder and PTSD were specifically listed in the relevant ADA regulations as impairments that should "easily be concluded" to substantially limit brain function.

The panel also ruled the plaintiff didn't have to provide any medical documentation because the 2008 amendments to the ADA and their regulations broadened protection for the disabled by clarifying that showing a substantial limitation of a plaintiff "usually will not require scientific, medical, or statistical analysis." It also explained all she had to prove was the college knew of an impairment.

Because the plaintiff had presented evidence that the college was aware that she was impaired, the court reversed the ruling of the trial judge and allowed her ADA claims to proceed. ■

DISABILITY — ACCOMMODATIONS

Improved delivery of aids addresses deaf student's claims

Case name: *Letter to: Berkeley City College*, No. 09-15-2037 (OCR 08/19/15).

Ruling: Berkeley City College entered into a resolution agreement with the Office for Civil Rights to resolve a disability-discrimination complaint.

What it means: Federal regulations require a public college or university to take steps to ensure communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. OCR looks at timeliness of delivery, accuracy of communication, and whether the manner and medium used are appropriate to the significance of the message and the abilities of the disabled individual.

Summary: OCR completed an investigation into a student's complaint alleging Berkeley City College discriminated against her on the basis of disability. Specifically, the complainant alleged that during the fall 2014 semester, the college failed to provide her with the auxiliary aids and services necessary to participate in the education program. She claimed the college didn't provide her with ongoing class notes from a note-taker in her history class, and failed to provide closed-captioning on video clips in her art, English, and history classes. She also claimed the college didn't ensure availability of American Sign Language interpreters. For the spring 2015 semester, the complainant also described a note-taking problem in one class, and an inaccurately captioned video in another class.

The investigation revealed the complainant, who was deaf, had enrolled on and off at the college since 2011. She enrolled in four classes in the fall 2014 semester. She requested, and was approved to receive, other accommodations, including priority registration, time and a half for exams/quizzes in a distraction-reduced environment, shared notes/note-taker, and sign language interpreters. The complainant passed all of her fall 2014 semester classes. She enrolled in five classes for the spring 2015 semester but dropped two of them. She was approved for the same accommodations as the previous semester.

OCR found the college had a policy that included a 24-hour turnaround time for provision of class notes for students with disabilities. However, the agency also found the policy was unwritten and neither students nor note-takers knew about it.

With regard to video captioning, OCR found faculty were uncertain about who was responsible for providing the service, and what steps to take to acquire this service for videos they planned to show in class. OCR found no evidence the college met its obligation to provide this auxiliary service by, for example, having a detailed, step-by-step procedure with timeframes in place to process the requests for captioned videos. The evidence showed part- and full-time instructors were unaware of what to do, even though they were expected to contact the disability services office for video captioning requests

LAWSUITS & RULINGS

This regular feature summarizes recent court or agency records of interest to higher ed administrators.

Lawsuit court records are summarized by Richard H. Willits, Esq. OCR rulings are summarized by Aileen Gelpi, Esq., co-editor. ■

DOI 10.1002/cala

and services. Videos without captions shown to deaf and hard-of-hearing students who were approved to receive the video captioning service lacked significant content, the absence of which discriminated against deaf and hard-of-hearing students.

Consequently, OCR found sufficient evidence to support a conclusion of noncompliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act regarding note-takers and closed-captioned videos. The college agreed to review and, as necessary, revise its policies, procedures, and practices to ensure the timely provision to students with disabilities of notes from note-takers, and to clarify the 24-hour notes delivery expectation to students and providers. Additionally, the college agreed to review and, as necessary, revise its policies, procedures, and practices to ensure the timely provision of captioned videos to students with disabilities, and to conduct an internal audit of the Alternate Media Office to assess its ability to provide captioned videos in a timely manner and in good quality, including a resource study to determine whether its current staffing levels and other resources were appropriate to ensure the college provides students with disabilities equal access to captioned videos. Regarding individual remedies for the complainant, the college agreed to credit the complainant's college account for the fall 2014 history class. ■

DISABILITY — ACCOMMODATIONS

Med student seeks accommodations after girlfriend commits suicide

Case name: *Letter to: Ponce Health Sciences University*, No. 02-16-2195 (OCR 10/07/16).

Ruling: Ponce Health Sciences University entered into a resolution agreement with the Office for Civil Rights to address a medical student's disability-discrimination complaint.

What it means: Section 504 of the Rehabilitation Act requires higher education institutions to modify their academic requirements when necessary to ensure they aren't discriminatory on the basis of disability, and to take steps to ensure no qualified individual with a disability is subjected to discrimination because of the absence of educational auxiliary aids and/or services.

Summary: OCR investigated a student's complaint, alleging Ponce Health Sciences University discriminated against him on the basis of his disabilities. Among other claims, the complainant alleged he was denied the academic adjustment of an extension of time to fulfill the requirements for the U.S. Medical Licensure Exam Step 2 CK. He alleged he had depression, anxiety disorder, and a learning disability, which became acute after his girlfriend committed suicide while she was a student at the same university.

OCR determined that pursuant to the university's accommodations policy, students with disabilities must submit written requests for special accommodations to the Office of Academic Affairs. The requests should be accompanied by a report from a licensed professional establishing the specific condition for which the accommodation is necessary. The university makes determinations regarding accommodations and auxiliary aids on a case-by-case basis. Finally, pursuant to the policy, accommodations not considered reasonable because they impose extraordinary difficulty or burden for the institution, or require fundamental changes of academic standards or coursework, may be declined. Determinations may be appealed to the corresponding program's dean.

On the other hand, the university's *Student Policy Manual 2013–2018* provides that a medical student is allowed a maximum of two semesters of enrollment beyond the standard required to complete the medical program; students enrolled in the four-year or five-year program receive a maximum of five or six years, respectively, to complete the medical program, with summer enrollment considered a part of the academic year. The manual also states the last opportunity to take and pass the 2CK Exam, to complete the requirement with the student's graduating class, will be the first week of April of the corresponding graduation year.

The complainant enrolled in the university's five-year Doctor of Medicine program in or around July 2009, with an expected graduation date of June 2014. OCR determined the complainant didn't register with the university as a student with a disability when he first enrolled in the medical program. OCR also found the complainant's last date of attendance at the university was on or about May 22, 2015, and that the university determined that in order to graduate, the complainant had to pass the 2CK Exam and submit a score report to the university no later than May 24, 2016.

The complainant asserted that following the suicide of his girlfriend around August 2015, and his ensuing use of prescribed medication to address his disabilities, it was nearly impossible for him to study, sit for the 2CK Exam, and submit the results within the university's specified timeframes for graduation. The complainant asserted he repeatedly requested the university grant him additional time to take and submit the results of the 2CK Exam as an academic adjustment, during the period from Sept. 3, 2015, through May 16, 2016.

Vol. 19, Iss. 7
DOI 10.1002/cala

The university acknowledged that on May 16, 2016, the complainant requested an extension of time to take the 2CK Exam as an academic adjustment. However, it stated its determination was pending because the complainant failed to submit the requisite medical documentation in support of his request.

On Oct. 6, 2016, the university voluntarily entered into a resolution agreement, allowing the complainant additional time to complete his academic requirements. ■

DISABILITY — ACCOMMODATIONS

College honors approved adjustment after prof rejects student's request

Case name: *Letter to: Kennesaw State University*, No. 04-15-2277 (OCR 08/27/15).

Ruling: Kennesaw State University ended an investigation by entering into a resolution agreement with the Office for Civil Rights.

What it means: Colleges and universities must ensure faculty and staff provide the accommodations that are approved for students with disabilities.

Summary: OCR investigated a complaint alleging discrimination on the basis of disability against Kennesaw State University. The complainant asserted the university failed to provide her son, who has a disability, with academic adjustments and auxiliary aids and services in a history class during the fall 2014 semester. The complainant claimed her son failed the class due to the lack of accommodations.

The complaint alleged the student was denied the opportunity to take make-up exams for the history class midterm and final exams, which he was unable to take on their original dates due to disability-related absences.

OCR found the student's approved accommodations were preferential seating, audio-recording lectures, advance notice of assignments, help arranging note-takers as needed, flexible attendance and make-ups, allowing test rescheduling/make-up when absence is disability-related, extended time, and a low-distraction environment. The documentation reflecting the student's accommodations didn't require absences to be supported by medical documentation.

The student's history professor told OCR the student had previously been enrolled in another course he taught during the fall of 2013. The professor added that at the beginning of the fall 2014 semester, he met with the student to review his accommodations. He stated that he informed the student he wanted to work with him at each level to ensure he received appropriate accommodations in his class. The professor stated that during the fall 2014 semester, the student began missing assignments and exams. He also asserted he requested the student provide a doctor's excuse for an absence that caused him to miss the midterm exam. However, the student didn't provide a written excuse, resulting in the professor not allowing a make-up exam.

The evidence also showed the student missed the final exam because he was in the hospital. Emails between the complainant and the university confirm the university was informed of the student's hospitalization at the time of the exam. The student didn't take the exam on another date.

OCR didn't complete the investigation because the university requested to resolve the allegations through a voluntary resolution agreement. Pursuant to the agreement, the student was offered the option of receiving a "W" (withdrawal) for the course or an "I" (incomplete), with the option to retake the two missed exams and to have the class grade recalculated based on the new test grades. ■

DISABILITY — ACCOMMODATIONS

College agrees to address student's need for accommodations

Case name: *Letter to: Kennedy-King College, City Colleges of Chicago*, No. 05-15-2127 (OCR 08/05/15).

Ruling: Kennedy-King College entered into a resolution agreement with the Office for Civil Rights to resolve a student's disability-discrimination complaint.

What it means: Federal regulations require higher education institutions notify participants, beneficiaries, applicants, and employees that they don't discriminate on the basis of disability, and they must disseminate a notice specifying the name or title, address, and phone number of the individual who coordinates reviews of complaints inside the institution.

Summary: OCR completed an investigation of a student's complaint alleging discrimination on the basis of disability against Kennedy-King College. The complainant claimed she was denied academic adjustments, auxiliary aids and services, and modifications necessary for her to participate in her educational program.

OCR found that during the application process to the college's French pastry program, the complainant notified the college's finance director on three occasions she needed academic adjustments to address her disabilities (dyslexia, bipolar disorder, and anxiety). She requested a note-taker, tutoring, a quiet location for testing, use of spell check with computer assistance for all tests, and all books recorded on tape.

DOI 10.1002/cala

The complainant told OCR the finance director informed her she would receive the academic adjustments if she brought documentation of her disabilities to orientation. The complainant asserted she brought documentation supporting her need for academic adjustments during orientation, and pursuant to the finance director's directions, delivered it to the college's admissions department. But she said she didn't receive any response regarding her request before her program's first day of instruction.

The complainant explained that after her classes began, she continued to request academic adjustments from her instructors and from administrators but was told by the dean of student affairs she wouldn't get her requested adjustments because then every other student would want the same adjustments. She also claimed she requested academic adjustments from the operations director on Feb. 14, 2014, and that he also said she couldn't get the requested adjustments.

Additionally, between the time the complainant applied for admission to the program and Feb. 14, 2014, none of the administrators and instructors with whom the complainant discussed her need for academic adjustments referred her to the college's Disability Access Center. The complainant also alleged the college's failure to provide her with academic adjustments caused her to withdraw from the program on Feb. 17, 2014.

OCR concluded the college discriminated against the complainant on the basis of her disabilities to the extent it failed to make such modifications to its academic requirements as were necessary to ensure such requirements didn't discriminate against the complainant on the basis of her disabilities. The college entered into a resolution agreement to resolve the allegations and provide an individual remedy to the complainant. ■

DISABILITY — ADULT LEARNER

Judge declines to recognize hostile learning environment

Case name: *Toma v. University of Hawaii*, No. 16-00499 (D. Hawaii 01/16/18).

Ruling: The U.S. District Court, District of Hawaii dismissed a lawsuit against the University of Hawaii.

What it means: No court in the 9th Circuit has recognized the validity of a lawsuit claiming a "hostile learning environment" in violation of the Americans with Disabilities Act.

Summary: Not long after the plaintiff became a medical student at the University of Hawaii at Manoa in 2005, he began to experience episodes of anxiety and depression. The plaintiff was placed on academic probation in 2009. The plaintiff was granted several months of leave as an accommodation for his depression in June 2010. Four months later, he began treatment for hypothyroidism.

In December, the director of the Office of Student Affairs ordered the plaintiff to appear before the Student Standing and Promotion Committee to evaluate his academic progress.

The plaintiff informed the director of his disabilities a week prior to the scheduled meeting, and unsuccessfully requested additional time to allow his hypothyroidism treatment to become fully effective.

After the SSPC voted unanimously to dismiss the plaintiff for failing to maintain adequate grades, he filed a lawsuit claiming the university "created a hostile environment" in violation of the Americans with Disabilities Act. In support of that theory, the plaintiff cited a Massachusetts case that held a hostile-learning-environment claim existed under the ADA, because: (1) the statute wasn't limited to discrimination in the employment context and (2) the statutory language was similar to Title IX, which was the statutory basis for hostile-learning-environment claims involving sexual harassment.

The university filed a motion to dismiss.

The district judge refused to follow the Massachusetts case, explaining: (1) the 9th Circuit Court of Appeals had not recognized such a cause of action, and (2) other trial courts had specifically refused to follow it. The judge dismissed the lawsuit. ■

FREE SPEECH — CAMPUS SECURITY

Judge decides university overcharged student group

Case name: *College Republicans of the University of Washington, et al. v. Cauce, et al.*, No. C18-189 (W.D Wash. 02/09/18).

Ruling: The U.S. District Court, Western District of Washington ordered the University of Washington to reconsider a fee it intended to charge a student organization.

What it means: Because many students first encounter differing viewpoints at institutions of higher learning, the vigilant protection of freedoms is nowhere more vital than in those locations.

Summary: A college student organization known as the "University of Washington College Republicans" petitioned UW for permission to present a rally at a designated campus "limited public forum" that was to feature a controversial political speaker.

Vol. 19, Iss. 7
DOI 10.1002/cala

Pursuant to its "Safety and Security Protocols for Events" policy, UW notified the student organization it would charge approximately $17,000 for necessary security costs. It explained the anticipated fee reflected the campus police chief's estimate that the rally would require 24 officers for 4.5 hours. The estimate was accompanied by the chief's written declaration that he had considered "objective facts" and consulted "open-source websites" indicating the scheduled speaker had been assaulted at other rallies.

College Republicans filed a lawsuit contending the UW fee policy violated the U.S. Constitution, and asking the court to order UW to assess a reasonable security fee based only on "objective criteria."

The district judge said restrictions on speech in "limited public forums" must be reasonable, viewpoint-neutral, and based on a definite and objective standard. She also explained a university couldn't suppress speech merely because officials opposed the speaker's view.

The judge decided the UW policy gave administrators too much discretion to decide how much to charge for enhanced security. She predicted administrators relying on instances of past protests would inevitably impose elevated fees for events featuring controversial and provocative speech. The judge then ruled that assessing costs in that manner impermissibly risked suppression of "speech on only one side of a contentious debate."

She also ruled the loss of free speech for even a minimal period of time unquestionably constituted irreparable injury.

The judge granted a temporary restraining order. She explained the fee wasn't particularly troubling, but the process by which it was assessed chilled the exercise of free speech.

The judge recognized the difficult position faced by public universities when campus events featured controversial speakers. However, she said that since many students first encountered differing viewpoints at institutions of higher learning, vigilant protection of freedoms was vital at those locations. ■

TITLE VII — HOSTILE WORK ENVIRONMENT

Judge decides plaintiff's environment wasn't hostile

Case name: *Miller, et al. v. The Board of Regents of the University of Minnesota*, No. 15-CV-3740 (D. Minn. 02/01/18).

Ruling: The U.S. District Court, District of Minnesota granted a summary judgment in favor of the University of Minnesota Duluth.

What it means: Title VII doesn't provide shelter from the slings and arrows of the typical workplace.

Summary: The University of Minnesota Duluth women's softball coach declined to renew her contract in 2014. She later joined others in a lawsuit against UMD that claimed a hostile work environment in violation of Title VII.

The university filed a motion to dismiss.

In response, the former softball coach presented a long list of complaints about the way she was treated, including fights about: budgets, equipment, field usage, the location of her office, and how she should address certain issues.

But the judge said none of the matters on the list had to do with her being female. Instead, he characterized them as the types of disputes ubiquitous in college athletics departments. He explained Title VII didn't provide shelter from the slings and arrows of the typical workplace.

The judge said a plaintiff asserting a hostile work environment was required to show conduct was so severe or pervasive that it created an objectively hostile or abusive work environment.

He cited as examples three previous cases where hostile-environment claims had been dismissed.

In one, a supervisor purportedly squeezed an employee's nipple and gave a towel to her after rubbing it on his crotch.

In another, a supervisor allegedly propositioned the employee, repeatedly touched her hand, and asked her to draw an image of a phallic object.

In the third, the plaintiff claimed a harasser: (1) asked him to watch pornographic movies and masturbate together, (2) suggested he would advance professionally by causing the harasser to orgasm, (3) kissed him on the mouth, (4) grabbed his buttocks, and (5) "briefly gripped" his thigh.

He said the most serious conduct cited by the former softball coach in her complaint was an alleged statement by the assistant athletics director after she complained to the media about mistreatment. The assistant AD purportedly reacted by saying he would have punched the former softball coach in the face if he had seen her. But the judge ruled an isolated threat made outside her presence fell far short of the bad behavior in those examples he had cited where hostile-environment claims were dismissed. ■

DOI 10.1002/cala

Were student's tweets covered by conduct code?

By Aileen Gelpi, Esq., Co-Editor

The plaintiff, a University of Kansas student, began dating fellow student A.W. in 2012.

The plaintiff allegedly physically restrained A.W. in his car for more than an hour in June 2013, and threatened that if she left, he would commit suicide, spread rumors about her, and make the campus environment so hostile that she wouldn't attend any university in the state.

A.W. filed a complaint with the university that same month, alleging the plaintiff had sexually harassed her.

After the plaintiff received a no-contact order, he tweeted some critical posts about A.W. to his friends. When the university learned about them, it emailed the plaintiff a warning that even tweets not specifically naming A.W. were in violation of the no-contact order. However, the plaintiff subsequently posted 14 tweets indirectly referring to A.W., posting three of them after he was told to stop.

A panel found the plaintiff in violation of the university's sexual harassment policy after a November hearing. The vice provost for student affairs then expelled him.

A trial judge set aside the expulsion, and the Kansas Court of Appeals agreed. Both courts concluded the university's conduct code didn't give the vice provost authority to expel the plaintiff, because the purported events didn't happen on campus.

The plaintiff then sued the vice provost, claiming she had violated his right of free speech. However, the judge dismissed it. The vice provost appealed.

Yeasin v. Durham, No. 16-3367 (10th Cir. 01/05/18).

YOU BE THE JUDGE
This regular feature details a recent court case. Review the facts. Think how you would have handled the situation. Then test your legal knowledge by trying to determine how the court ruled.

Did the appeals court overturn the lower court's judgment?

A. Yes. The students have a constitutional right to free speech, which can't be abridged by public university officials.

B. Yes. Public universities can't adopt rules or sanctions that apply to students' off-campus conduct.

C. No. Qualified immunity protected the vice provost's actions.

D. No. Public universities have the right to adopt rules and sanctions that apply to students' off-campus conduct.

Correct answer: C.

On appeal, the court explained the doctrine of "qualified immunity" protected government officials from liability if their conduct didn't violate clearly established rights of which a reasonable person would have known.

The panel acknowledged the plaintiff's situation presented interesting questions regarding the tension between one student's free-speech rights and another student's Title IX rights to receive an education without sexual harassment. However, it ruled the law in that area was unsettled.

The court also ruled that the vice provost had a reasonable belief based on the June 2013 incident — and on the plaintiff's tweets — that his continued enrollment at the university threatened to disrupt A.W.'s education and interfere with her rights. It also held that no reasonable person would have considered at that time the plaintiff has a clearly established right of free speech for off-campus conduct. The appellate court affirmed the ruling of the trial judge. ■

Vol. 19, Iss. 7
DOI 10.1002/cala

CAMPUS LEGAL ADVISOR

QUICK STUDY

An overview of the key topics faced by campus administrators with citations to noteworthy cases, statutes, regulations, and additional sources.

Review rulings involving student enrollment and disability

Overview

Review recent Office for Civil Rights rulings on issues pertaining to student enrollment and disability.

Key Rulings

• A student in the Nurse Anesthesia Program at Georgetown University's School of Nursing and Health Studies alleged to OCR that a professor questioned his ability to succeed in the program after he disclosed his disability, advised him to withdraw from the university or transfer from the program, and stated the complainant would have no option to return to the NAP. The parties entered into an agreement that addressed the complainant's allegations. The complainant transferred to the Family Nursing Practitioner Program, and was able to transfer 11 of the 23 credits he had earned in the NAP. He also received financial credits for future coursework. *Letter to: Georgetown University*, No. 11-14-2326 (OCR 02/09/15).

• An undergraduate student at the University of California, Los Angeles was placed on interim suspension based on a determination that he was a danger to the health and safety of other students. His appeal of the suspension was denied, and the university advised it couldn't lift the suspension until he satisfied its terms, including providing full treatment records. OCR concluded that the university's request for more complete records of his treatment was a reasonable condition for readmission. *Letter to: University of California, Los Angeles*, No. 09-14-2252 (OCR 03/19/15).

• A student's mother complained to OCR that the State University of New York at Delhi failed to accommodate her son on the basis of disability or retaliated by removing him from his woodworking classes. The university had determined the student wasn't demonstrating he understood safety procedures, among other problems. The university proposed two alternative plans for the student to achieve his degree, which the student rejected. The college developed a customized plan that allowed him to demonstrate his knowledge of woodworking power tools at his father's workplace. OCR determined the university offered to accommodate the student by providing an alternative means to achieve his degree. *Letter to: State University of New York at Delhi*, No. 02-15-2006 (OCR 04/17/15).

• A complainant alleged he wasn't allowed to enroll in the Psychology 681 course at Virginia Commonwealth University because of his slow processing speeds in the laboratory section. Enrolling in the course required the professor's permission, and the university told the student it had found a reasonable basis to deny his request. During the investigation, the professor said the student was disruptive in an earlier course. OCR didn't conclude discrimination occurred but found the university's grievance procedures didn't comply with federal laws and regulations. *Letter to: Virginia Commonwealth University*, No. 11-16-2312 (OCR 04/10/17). ■

What You Should Know

• A university can't prevent a qualified student with a disability from participating in an academic program.

• A university can require documentation showing a student judged to be a danger to others has received appropriate treatment.

• An institution can accommodate a student by providing an alternative path to a degree.

• A professor must have a reasonable basis to deny a student enrollment in a class that requires permission. ■

March 2019
DOI 10.1002/cala