URMIA Journal

2013

Highlighting innovative and effective higher education risk management solutions.

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It's impossible that the improbable will never happen.

—Emil Gumbel (1891–1966),

German Mathematician and Political Writer

Table of Contents

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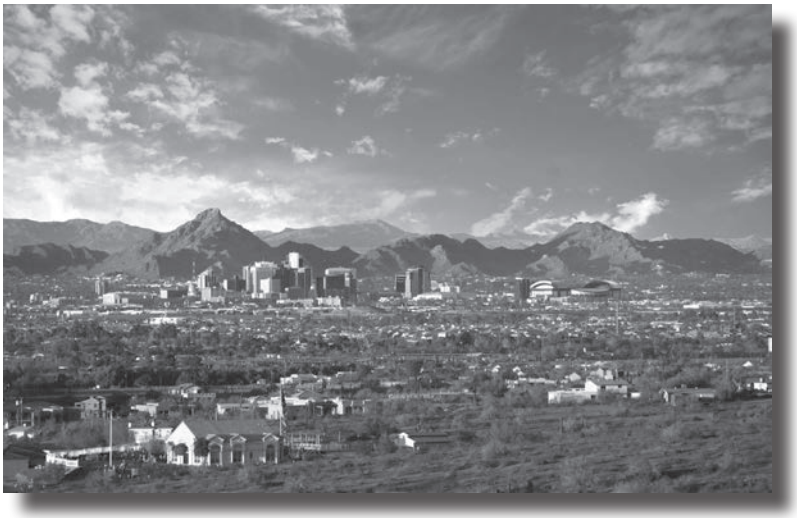

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A Professional Non-Profit Forum for the Exchange of Information, Concepts, Practices, and Developments Between Higher Education Risk Managers

From the President

Greetings from URMIA!

On behalf of our Communications Committee and Board of Directors, let me say that we are quite pleased to present another in the annual series of URMIA Journals, this year jammed with twelve informative presentations in furtherance of URMIA's mission to enhance the discipline of risk management in higher education. We are grateful for the efforts of the authors, the Communications Committee, and other volunteers, URMIA staff, and our sponsors in bringing to you this wonderful collection of informative material.

I would draw your attention especially to the article written by Dr. Christine Eick about the URMIA salary survey undertaken earlier this year. We have had a number of requests over the past few years for just such a survey, and I congratulate Dr. Eick and her colleagues for a rigorous scientific analysis. I would also highlight the winner of the URMIA Innovative Risk Management Solutions Award and recommend that you read about the institution's innovations and think about ways in which you, too, can improve your programs and processes.

I wish you an excellent start to the next academic year. I look forward to seeing you at our premier annual professional development event, the URMIA Annual Conference, which will be held in Phoenix this October and in Louisville in 2014.

Gary W. Langsdale, ARM
University Risk Officer
Pennsylvania State University
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It does not do to leave a live dragon out of your calculations, if you live near him.

—J.R.R. Tolkien (1892–1973),
Author and University Professor

Policies, Timing, Documentation, and Consistency: Four Tools for Colleges and Universities to Manage Employee Relations and Mitigate Risks of Employment Discrimination Claims

| *Christopher T. Vrountas, Esq., and Allison C. Ayer, Esq., Vrountas, Ayer & Chandler, P.C.*

Abstract: Just like any other organization, institutions of higher education would likely prefer to avoid employment-related lawsuits. While completely avoiding litigation of any kind is impossible, there are steps that administrators and risk managers at colleges and universities can take to limit employment-related claims and lawsuits. By better managing employee relations, institutions of higher education can oversee their employees' work more effectively. Good employee management encompasses four distinct areas: policies, timing, documentation, and consistency. Keeping these four principles in mind will help college administrators mitigate the risk of lawsuits and minimize exposure when faced with employment discrimination lawsuits.

Introduction

Any college or university would be thrilled to get an answer to the question, "What can I do so that I don't get sued?" In the employment context, as in other areas of the law, there exists no certain action to avoid a lawsuit. The reality is that employment discrimination claims are on the rise, and at some point a college or university is likely to face such a suit. While understandably frustrating for employers, the American justice system is structured in a way which permits even baseless claims to proceed at least part way down the path of litigation. Further complicating matters in employment cases is the fact that lawsuits brought by employees often are driven by an employee's perception that he or she was rejected based on a personal, protected characteristic as opposed to a performance issue. One way to counteract these emotion-driven claims is for colleges and universities to find a way to bring objectivity into the workplace. To that end, there are some basic principles about managing employee relations that can help colleges and universities more effectively oversee the work of their employees and minimize the risk of liability in employment claims. Good employee management can be summed up in four words: policies, timing, documentation, and consistency. Each of these relates to the other, and it is sometimes difficult to separate them. Nevertheless, this article provides a brief review of each concept and how it should be applied in the workplace. Keeping these four principles in mind, a college or university just might better position itself to mitigate the risk of a lawsuit ever being filed or, at the very least, minimize its exposure when faced with an employment discrimination lawsuit.

Keeping these four principles in mind - policies, timing, documentation, and consistency - a university could better position itself to mitigate the risk of a lawsuit or minimize its exposure when faced with an employment discrimination lawsuit.

Lawsuits Arising from Employment

As a preliminary matter, it is important to understand the typical claims a college or university might face if it gets sued. Because they are employers, colleges and universities face the same claims that any other employer might face, including discrimination or retaliation claims. However, colleges and universities play a specialized role in our society, and, as such, they are uniquely exposed to lawsuits involving faculty issues. These claims will be briefly discussed below.

The Rising Impact of Retaliation Claims

The United States Equal Employment Opportunity Commission (EEOC) recently released data concerning workplace discrimination claims filed for fiscal year 2012.

According to the EEOC, it received 99,412 private sector workplace discrimination charges during fiscal year 2012, down slightly from 2011.[1] The agency obtained more than $365 million in monetary recoveries on behalf of discrimination claimants, the largest ever from private sector and state and local government employers.[2]

Race claims were the most frequent type of discrimination claim seen by the EEOC in 2012.[3] The next most frequent type of discrimination claim involved sex discrimination charges, which includes claims of sexual harassment and pregnancy discrimination.[4] Disability and national origin discrimination claims were the next most common claims.[5] With filings in considerably lower frequency were discrimination claims based on national origin, religion, and color.[6, 7, 8]

The EEOC for the first time this year released a new table identifying the type of adverse employment action which formed the basis for the discrimination claims filed in the agency.[9] In fiscal year 2012, discharge was the most frequently-cited discriminatory action, followed by changes in "terms and conditions" of employment, and then discipline.[10]

Perhaps most notable from the EEOC's data was that retaliation claims were the most frequently filed claims. In fiscal year 2012, there were 37,386 retaliation claims filed, 38.1 percent of all filed claims.[11] This is more than race and sex discrimination claims; it is more than twice the number of national origin, religion, and color discrimination claims combined. According to EEOC statistics, the number of retaliation claims filed with that agency has been on the rise for some time; indeed, it has almost doubled since 1997. As of 2012, retaliation claims now exceed all other unlawful discrimination claims.[12]

The rise in retaliation claims may be due in part to the United States Supreme Court decision in *Burlington Northern & Santa Fe Railway Company v. White*.[13] Many interpret this decision as broadening the scope of retaliatory conduct by ruling that the anti-retaliation provisions of Title VII, unlike anti-discrimination provisions, extend beyond workplace or employment-related acts.[14] That is, there is no requirement that an adverse action materially affect the terms and conditions of employment to constitute actionable retaliation.[15] The Court also articulated what many argue is a lenient legal standard for proving retaliation: the employer must prove only that the employer's adverse action would discourage a reasonable worker from complaining.[16] Examples of such retaliation might include, for example, a change in job duties, a transfer to a different location, or even a negative review. While trivial annoyances created by an employer are not actionable, any treatment that is reasonably likely to deter protected activity could form the basis for a retaliation claim as the law currently stands.[17]

Retaliation claims also may be more popular than ever because they tend to be winning claims. It is not uncommon for employee-plaintiffs to lose a discrimination claim but succeed in a retaliation claim. As a practical matter, juries and judges seem more likely to find that an employer has retaliated against an employee for complaining or engaging in some other type of protected activity than they are to find, for example, that an employer has intentionally discriminated against an employee because she is female, African-American, or part of some other protected class.

Retaliation claims may be more popular than ever because they tend to be winning claims. It is not uncommon for employee-plaintiffs to lose a discrimination claim but succeed in a retaliation claim.

In one example in the college and university context, an associate professor at Tulane University lost his discrimination claims against the school, but his retaliation claim succeeded.[18] One important note is an employee who succeeds in a retaliation claim is entitled to the same significant statutory damages as a successful discrimination plaintiff, including emotional distress, reasonable costs, and attorneys' fees.[19]

That the current trend is for employees to pursue retaliation claims does not necessarily mean that colleges and universities cannot or should not discipline poor performing employees for fear of being sued. Colleges and universities are not precluded from taking adverse employment action against an employee merely because he or she made a complaint. If an employee legitimately is performing poorly and would objectively be subject to a negative review, discipline, or even termination, a college or university should not refrain from taking that action merely because the employee complained or engaged in protected activity. Indeed, applying the *Burlington North-*

ern standard, courts have denied faculty retaliation claims in the college and university context.[20] However, in light of the risk of discrimination and retaliation claims, colleges and universities need to employ effective strategies to try to mitigate the risk of retaliation and discrimination lawsuits and to strengthen the school's defenses if and when the lawsuit does happen.

That said, in its most recent session, the United States Supreme Court issued an opinion decided in the higher education context which indicates the Court's desire to moderate the recent prominence and success rate of retaliation claims. In *University of Texas Southwestern Medical Center v. Nassar*, Nassar was a physician of Middle Eastern descent who claimed that the university retaliated against him. In the case, after Nassar complained about religion and ethnicity discrimination and quit his faculty position, his supervisor contacted an affiliate hospital of the university to remind it that the hospital's offer to Nassar for a staff physician position was inconsistent with the affiliation agreement between the hospital and the university, which required the hospital to provide open positions to university faculty members (which Nassar no longer was). The hospital thereafter withdrew its job offer.[21] A jury had awarded Nassar over $3 million after trial.[22] However, the Supreme Court's decision vacated that jury award.[23] The Supreme Court ruled that a "but for" causation standard is proper for employment retaliation claims, i.e. a plaintiff must prove that the employer *would not have taken the action* in the absence of retaliation.[24] To put it another way, if the employer would have taken the same action in the absence of retaliation, then there exists no causation, and the plaintiff's retaliation claim fails.[25] Under the "but for" standard, if it could be shown that the affiliation agreement actually did preclude Nassar's hiring and the university would have sought to enforce that agreement in order to honor that agreement notwithstanding a retaliatory motive, it would not be liable for retaliation.[26]

The precise impact of the *University of Texas Southwestern Medical Center* case is unknown. Notably, the decision did not address that broadly defined conduct that may be retaliatory under *Burlington Northern*. Nevertheless, the Court's application of a stricter causation standard in retaliation cases will likely discourage plaintiffs from bringing retaliation claims, especially frivolous ones, by making it more difficult for them succeed in retaliation claim, notwithstanding the pro-employee ruling of *Burlington Northern*. Indeed, the Court reasoned in its decision that the more stringent "but for" causation would serve to discourage "frivolous claims which…siphon resources from efforts of employers, administrative agencies, and courts to combat workplace harassment."[27]

Tenure-Based and Other Faculty Focused Claims

In addition to employee retaliation and discrimination claims, colleges and universities also face specialized lawsuits by faculty members. Faculty lawsuits arise in a variety of contexts. Colleges and universities have been sued by faculty-employees for denying tuition to a professor who sought to take a course outside the permissible university system,[28] for refusing a request for graduate faculty status,[29] for allegedly preventing professors from fully participating in a faculty search,[30] for denying full professorship,[31] for denying sabbaticals, and many other situations. The most common faculty-related employment claim concerns the denial of tenure. The typical allegation is that tenure was denied on a discriminatory or retaliatory basis.

At the outset, it is important to acknowledge that tenure cases present a special challenge to courts. In deciding a tenure-based claim, the court must balance a college or university's right to academic freedom with the public policy against discrimination or retaliation. Courts routinely recognize that they cannot simply substitute their own views concerning faculty qualifications for those of the educational institutions.[32] At the same time, however, an employee's right not to be denied tenure for discriminatory reasons prevents completely insulating the tenure process from judicial review.[33] Accordingly, courts recognize that they are obligated to "take special care to preserve the university's autonomy in making lawful tenure decisions" and refrain from modifying those decisions, except in the case of discrimination, retaliation, or some other unlawful conduct.[34]

Because tenure-based claims, like other employment lawsuits, often settle confidentially before trial, it is sometimes difficult to ascertain how a jury might view them. One reported case, *Brown v. Trustees of Boston University*, provides a compelling example of what a jury could do when presented with an employment-related claim involving the denial of tenure.

Briefly, as background, the plaintiff, Julia Prewitt Brown, was an assistant English professor at Boston University.[35] Ms. Brown's tenure qualifications were evaluated in three areas: scholarship, teaching, and service to the university.[36] Many individuals and committees weighed in on whether Ms. Brown should receive tenure, and most recommended promotion and tenure.[37] One dean and the school's assistant provost expressed concerns about the quality of Ms. Brown's scholarship work and recommended denying Ms. Brown tenure.[38] Ultimately, the university president adopted the dean's and the provost's dissenting views, and at the president's recommendation, the board of trustees denied Ms. Brown tenure.[39]

Believing that she was denied tenure because of her sex, Ms. Brown sued the school for breach of contract on the theory that the denial violated the anti-discrimination clause of the faculty's collective bargaining agreement.[40] Ms. Brown also alleged a claim of sex discrimination under Title VII.[41] At trial, Ms. Brown presented evidence of male tenure candidates who had superior or equal qualification to Ms. Brown and were granted tenure.[42] Ms. Brown also presented evidence at trial that university administrators had made derogatory comments about women, such as, for example, stating, "I don't see what a good woman in your department is worrying about. The place is a damn matriarchy," even though women made up a minority of the members of the English department.[43]

The jury returned a verdict in favor of Ms. Brown and awarded her $200,000 in damages.[44] The court ordered the university to pay Ms. Brown an additional $15,000 in emotional distress damage and, perhaps most troubling for the school, the court *required* the university to grant Ms. Brown the position of associate professor with tenure.[45] The First Circuit affirmed the lower court's decision, upholding both the award of damages and the order requiring the university to grant Ms. Brown tenure.[46] Undoubtedly, a jury verdict today in favor of a faculty-plaintiff would result in an even larger damages award.

The *Brown* case makes clear that a college or university will face significant scrutiny and cost if and when it gets sued for denying tenure to a faculty member. Being sued as a result of the denial of tenure also tends to disrupt operations to the extent faculty members and even high-level administrators are required to testify. Legal defense fees are also likely to be costly in tenure-based lawsuits even if the case is baseless and the college or university's tenure decision is upheld. For example, one institution was required to defend a national origin and religious discrimination case for denying tenure to a faculty member who was subject to repeated and increasingly serious students' complaints about the would-be professor's conduct.[47] In another case, a professor sued the institution for refusing to waive tuition for a course she wanted to take at a school that expressly was not included in the institution's written tuition waiver policy.[48] In both cases, the schools stood on firm ground in denying tenure, and it is difficult to imagine a court not upholding the institution's faculty decision. The institutions were, nevertheless, required to defend against these claims. As with other employment claims, colleges or universities can mitigate some of the risk of tenure-related claims by implementing thoughtful policies, utilizing progressive discipline, and remaining cognizant of the timing, documentation, and consistency to manage employees, including faculty members.

Adopting written employment policies is an important initial step to improving employee-employer relations, but it is important to remember that not just any written policy provides the same protection.

The Role of Progressive Discipline, Anti-Discrimination, and Other Written Policies

Adopting written employment policies is an important initial step to improving employee-employer relations. By establishing clear, objective standards for workplace conduct, written policies can begin to eliminate the tendency for supervisors to manage their employees based on personal feelings. Written employment policies also help to manage an employee's expectations about how the employer will treat the employee. While not fool-proof, having written policies that provide an objective basis for

the employer's decision may make an employee less likely to view an adverse employment action as based on personal dislike or on the basis of protected class status. As an added benefit, if a college or university does get sued, a fact finder is also likely to consider if the school has tried to eliminate disparate treatment in the workplace by adopting employment policies. But it is important to remember that not just any written policy provides the same protection. The following provides some guidance about the content of written employment policies that can assist in managing employee relations and can help to bolster a college or university's defense if and when a lawsuit arises.

Job Descriptions/Tenure Standards

Preparing written job descriptions and/or the standards for tenure is a critical step to minimizing a college or university's exposure in an employment or tenure-based suit. Having a written job description and written expectations for faculty creates an objective standard on which to judge an employee's performance that has nothing do to with any protected personal characteristic. A job description or tenure standard can be used as a checklist from which to evaluate whether an individual is adequately performing his or her job functions. Having a written job description also helps a college or university avoid hiring or tenure denial discrimination claims if it can point to a specific aspect of the position which it believed the applicant could not perform. The content of a written job description will also be critical to a disability claim because if an individual cannot perform the essential functions of the job, then the Americans with Disabilities Act does not apply, and there can be no disability discrimination.

A well drafted job description or tenure standard will be specific and detailed; it will contain educational, intellectual, and physical requirements of the position. It should also be drafted with a principal focus of determining whether an individual is able to perform the essential job functions verses the personal characteristics of the employee. Importantly, the written job description must truly reflect the requirements of the job, as opposed to identifying the aspirational duties of the position. When a job description fails to realistically describe the job, not only will it fail to provide support for employment decisions, it may actually hurt the credibility of the employer. When drafting a job description, consider what the employee(s) in the position will do on a daily, weekly, or monthly basis, and then describe in detail what physical, cognitive, and educational qualifications an individual must have to be able to perform those tasks.

It is vitally important that employees realize that its college or university employer is willing to act on any violations of its anti-discrimination policy.

Anti-Discrimination Policies

Anti-discrimination policies are also vital to avoiding employment-related lawsuits, including tenure-based claims, and defending them once they happen. At a minimum, an anti-discrimination policy should articulate that the college or university is an equal opportunity employer and explicitly prohibit discrimination in the workplace. An anti-discrimination policy should also list the specific personal characteristics that are protected by federal law and by state statutes, which are often more protective than federal law. A prohibition against harassment on the basis of personal characteristics, such as race, sex, or sexual orientation, should also be addressed in an anti-discrimination policy. An anti-discrimination policy should also list examples of the types of conduct which violate the policy, but the anti-discrimination policy should also specifically state that the list of examples is *non-exhaustive* – that is, it should be clear that the listed conduct does not identify every single type example of conduct that could violate the policy. An anti-discrimination policy should also address the college or university's commitment to make reasonable accommodations for qualified persons with disabilities. A college or university's anti-discrimination policy should include a statement that it also prohibits retaliation. It is also vitally important that employees realize that its college or university employer is willing to act on any violations of its anti-discrimination policy. To that end, it is advisable that the anti-discrimination policy state that any person found

to violate an anti-discrimination policy may face discipline, up to and including termination.

Open Door Policies

A college or university is also well advised to adopt an open door policy. An open door policy seeks to achieve a way for an employee to make complaints internally about issues in the workplace. Having an open door policy helps to promote a climate of candor and openness between employees and management because it signifies an employer's commitment to resolving employee complaints. In that way, open door policies go hand in hand with anti-discrimination policies. If an open door policy is drafted in a way that encourages reporting, it also creates opportunities for a college or university employer to resolve employee issues before they escalate to a formal, external complaint like a lawsuit.

A college or university's open door policy should impress upon employees that it takes seriously any complaint, and it should also state that the school will investigate all complaints of discrimination, harassment, retaliation, or unfair/disparate treatment on the basis of one's personal characteristics. An open door policy should specify the process by which a complaint should be made. Colleges and universities should be cautious, however, about formalizing the process too much. If there are too many steps an employee must take to make a complaint, or if the process is too rigid, for example, by requiring completion of specific/multiple forms, the purpose of the open door policy might well be eliminated.

Open door policies also often explain that in the first instance, an employee should discuss any issues in the workplace with his or her supervisor before formally filing an internal complaint. While such a statement makes sense, it is critical that the open door policy also identify an alternative person to whom the employee may complain, just in case the alleged wrongdoer happens to be the complaining employee's supervisor. An open door policy also should identify the name and contact information of a point person(s) who holds a more senior position at the college or university to whom complaints should be made if the employee does not feel comfortable raising an issue with the direct manager. An open door policy should also identify an address and phone number for the state administrative agency responsible for investigating complaints of discrimination and retaliation.

A college or university should consider leaving out of its open door policy an absolute promise to keep complaints confidential. Absolute confidentiality often prevents a college or university from doing a full investigation of a complaint. It is quite difficult, if not impossible, to perform interviews to determine the validity of the complaint if the college or university cannot discuss the identity of the complaining employee or provide some background information about the complaint because of a promise of complete confidentiality. Instead, the school is well advised to state in its open door policy that it will make *reasonable efforts* to maintain confidentiality and balance the privacy rights of the complaining employee with its obligation to investigate the complaint.

It is also important that an open door policy reiterate the college and university's commitment against retaliation. An open door policy should explicitly state that a person who launches a workplace complaint will not be retaliated against, i.e. the college or university will not take an adverse employment action against an employee because the employee utilized the open door policy. Colleges and universities should also consider including a statement that anyone who participates in the investigation will not be retaliated against. It should also be made clear that the college or university strictly prohibits the alleged wrongdoer, or any other employee for that matter, from taking any adverse employment action against the complaining employee. To that end, an open door policy should state that any employee who retaliates against complaining or participating employees may be subject to discipline, up to and including termination.

To ensure that the complaining employee feels comfortable in the workplace even during the investigation, a college or university might also consider addressing in the open door policy the possibility for intermediate action to be taken against an alleged wrongdoer during a pending investigation. For example, many open door policies allow ways for the complaining employee to avoid contact with the alleged wrongdoer during an investigation. This type of proactive provision provides considerable cover for an employer against retaliation claims. The college and university employer must be certain, however, that in taking intermediate steps to separate the accused and the accuser, the terms and conditions of the complaining employee's employment are not altered in any way. If those mid-in-

vestigation steps change the complaining employee's job in any way, it could be retaliatory. When in doubt, always air on the side of inconveniencing the alleged wrongdoer.

Progressive Discipline

Adopting a progressive discipline policy is another effective way for colleges and universities to manage the risk of a discrimination/retaliation suit. Progressive discipline is an approach to employee and faculty management which seeks to achieve proportionality in the response to undesirable employee behavior in the workplace. Essentially, an employer responds to poor performance or misconduct by utilizing a broad range of consequences commensurate with the offense. A progressive discipline process might utilize informal counseling, official verbal warnings, written warnings, performance improvement plans, and suspensions, with or without pay, demotions, or even discharge, depending on the number or type of offense. Importantly, progressive discipline would not preclude an employer from terminating an employee for the first offense. Rather, a progressive discipline policy seeks to identify increasingly more serious disciplinary action for similarly more serious performance issues. Progressive discipline should also take into account the employee's performance history to identify the appropriate consequences for a discrete act. Progressive discipline would apply, for example, a harsher penalty to a person who steals from the employer than it would for an employee who simply was not performing well at his or her job. Likewise, under a progressive disciplinary approach, an employee who had performed poorly for months, including under a written performance improvement plan, might well face more serious employment consequences than a person who, for the first time, fell below the satisfactory level in a regular review. In short, a progressive approach to discipline attempts to achieve a policy where the "punishment fits the crime."

The Second Circuit has held that a retaliation plaintiff cannot establish retaliation if the adverse employment action that forms the basis for the claim was taken by the employer as part of a progressive disciplinary process that began before the plaintiff complained.

Not only does the implementation of progressive discipline help an employer mitigate the risk of employment discrimination or tenure denial claims, these types of policies have the added advantage of providing an ongoing means to manage employee conduct. Using a progressive disciplinary approach can often help to correct a performance issue before it escalates too far. Having a progressive discipline process also allows an employer to identify clear and known sanctions for a range of employee conduct it deems undesirable. A progressive discipline policy also provides an employer objective guidance on which to fall back for employee discipline, to the extent there might exist some personal bias against an employee. Lastly, an employer who follows a progressive discipline policy is much more likely to be able to point to a legitimate, non-discriminatory reason for its disciplinary action and/or its denial of tenure than one who does not, which in turn bolsters the institution's defense to any lawsuit that may result therefrom. Indeed, in some cases, the utilization of progressive discipline may form the basis for an absolute defense to a retaliation claim, whether brought by an employee who faces termination or a faculty member who is denied tenure.

For example, the Second Circuit has held that a retaliation plaintiff cannot establish retaliation if the adverse employment action that forms the basis for the claim was taken by the employer as part of a progressive disciplinary process that began before the plaintiff complained.[49] In the *Slattery* case, the court noted that when "gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise."[50] As a result, the court entered judgment to the employer because the decision to put the plaintiff on probation and subsequently terminate his employment could not be retaliation for his filing a charge of discrimination, when it was made as part of a progressive discipline initiated against the plaintiff months before he filed a charge

of discrimination because of his ongoing performance issues.[51]

When preparing a progressive discipline policy, consider incorporating the concept that the "punishment fit the crime." It should establish equitable treatment and set clear expectations for employees about their conduct and the sanctions therefore. Progressive disciplinary policies should also permit the consideration of multiple offenses. They should provide guidelines that are easy for all supervisors to follow. They should provide a systematic approach to performance issues and should establish consistent consequences that are applicable to all employee levels at the college or university.

A progressive discipline policy should also somehow implement a means to consider extenuating circumstances that might justify enhancing or lessening the formal disciplinary action. A good progressive discipline policy will connect consequences with particular behavior, rather than be based on personal attacks. Furthermore, it should go without saying that progressive discipline should in no way, whether in principle or in practice, be linked to a protected class of employees.

A college or university employer should also consider creating performance review records that are consistent with its progressive discipline policy. For example, an employer should consider creating performance evaluations for employees and faculty members alike and link the discipline to those evaluations. Some employers assign a color or number system to reflect the progressive approach to discipline. For example, a green or low number assigned to an offense might subject the employee to merely a verbal warning that is documented in the system, while a red or high numbered offense might suggest termination is the appropriate disciplinary action. But this type of designation is not necessary. The important principle is that the policy associate more serious consequences to more serious offenses.

The progressive discipline policy, or any written employee policy for that matter, should contain a disclaimer that does not transform the at-will employment relationship and that it does not constitute a contract between employee and employer. The progressive discipline policy should also clearly state that it merely serves as guidance about the consequences associated with employee performance issues and in no way shall limit the employer's right to take any action it deems fit to address a disciplinary issue in the workplace.

The closer the proximity in time between the employment decision and the protected activity, the more likely a fact finder will associate the decision with the protected activity.

Publication of Policies

All written policies should be widely distributed to faculty and staff, applicants for admission or employment, and other relevant parties. Colleges and universities should also prominently post their written policies on all websites and in areas around campus that employees frequent, such as employee lounges, department offices, and/or in any human resources department. Colleges and universities should also consider requiring employees to sign an acknowledgment form indicating that they have read and understand these important policies. This provides some "proof" that the employee was aware of the school's policies if and when a lawsuit arises.

The Guiding Principles for Employee and Faculty Management and Mitigating the Risk of Employment Lawsuits

While there is no certain way for a college or university to ensure that it will not get sued by one of its employees or faculty members, a college or university that adopts objective, reason-based written policies has taken significant steps toward managing the risk of an employment lawsuit. In addition to adopting well reasoned policies, there exist some guiding principles for managing employees that also help to mitigate the risk of getting sued. If utilized, these principles can help to mitigate the risk of lawsuits and minimize a college or university's exposure when the inevitable employment discrimination lawsuit is filed. A college or university that fairly and effectively implements its written policies and makes timely, consistent employment

decisions that it documents has substantial achievement towards mitigating the risk of employment lawsuits.

Timing

Timing is probably the most critical tool to managing the risk of an employment-related lawsuit, including a tenure denial claim. Nearly every fact finder will eventually focus on the timing of an employment or tenure decision and connect it to a prior event. For example, the relative timing of an adverse employment action (including tenure denial) to an employee's engagement in a protected activity is probably the single most significant factor in evaluating a retaliation claim. The closer the proximity in time between the employment decision and the protected activity, the more likely a fact finder will associate the decision with the protected activity.[52] That accordingly argues for proactive management and "striking while the iron is hot."

To that end, college and university employers should conduct performance reviews on a regular basis. If there exists a discipline problem, or if an employee is failing in some way to meet the school's performance standards, do not delay disciplining the employee. Employers also should not avoid disciplining the employees when discipline is warranted. While it may be counterintuitive, employers actually mitigate the risk of getting sued in the future by confronting performance issues and responding to an employee's failures immediately.

While a conversation about the ways in which an employee has failed to meet expectations may well be uncomfortable, it is almost guaranteed that the performance issues of an employee are NOT going to get better with time, especially if there is no employer intervention. Moreover, creating an open dialogue with an employee about his or her perceived deficiencies may actually improve the employee's performance. In turn, an employer might be able to avoid a demotion, termination, or other adverse employment action altogether. Providing contemporaneous feedback is likely to make the employee aware of an issue that he or she was oblivious to beforehand. Communicating about an employee's performance may even permit the employee and employer to identify solutions to the performance issues.

The tone of contemporaneous feedback given to employees is important, too. When discussing performance issues, employers should avoid statements of conflict and hope. Employers should never make performance reviews personal. Employers also should avoid saying things like, "don't worry about it," and "things will get better." These types of statements only permit denial about legitimate issues going on in the workplace. Colleges and universities should also coach their employees on an ongoing basis but especially on performance issues that supervisors identify as requiring improvement. Giving regular feedback, both positive and negative, is also helpful. Employers are also well advised to train managers on how to perform reviews, issue discipline, coach, and give feedback. Employers should document any feedback, coaching, and discipline as the employer gives it.

Real life cases give the best examples. In one case, a manager decided to discharge an administrative employee for performance reasons, which he had not previously documented. The manager waited to deliver the news because he did not want to deal with the emotions normally associated with job loss, including anger, blame, fear, and the isolation that comes with it. Finally, he summoned the courage to sit with her and, as he did so, the employee said she also had something to raise with him during the meeting. He literally offered, "Ladies first," and she proceeded to tell him about a disability that she had that needed accommodation. He listened and when she finished he informed her that she was discharged. How's that for timing? The employee ended up suing.

Obviously, there were a number of things he could have done to prevent the lawsuit that followed. First, the manager should have noted the employee's performance issues as they arose and not hold back his comments and concerns until he could not take it anymore. Second, he should have documented his coaching on those performance concerns as he gave it so that a record of those issues would have existed. Third, he should have started the final conversation with his own agenda as it was he who called the meeting and as the message he needed to deliver should have controlled the communication.

The main point is to avoid surprising the employee with a negative performance review or an adverse employment action like a termination. Rightfully so, an employee who hears for the first time that he or she is being terminated for employment issues about which he or she never knew is much more likely to perceive that the adverse employment action is unfair and perhaps even unlawful. Try

to avoid this perception by managing a regular dialogue concerning employee performance and raising any performance issues immediately.

Documentation

In addition to raising disciplinary issues in a timely fashion, employers who document those issues are much better able to manage their employees and, in turn, the risk of employment discrimination lawsuits.

Legal counsel is often mocked about its seemingly constant insistence that performance issues need to be documented. The fact of the matter is that the state and federal administrative agencies tasked with vetting discrimination claims look for documents to substantiate an employer's legitimate, non-discriminatory reasons, like an employee's substandard performance, for taking adverse action against an employee. Simply put, documentation provides the record of events that could eventually be the subject of lawsuits.

The process of documentation can also provide a vehicle for clear communication with employees, which may improve management and avoid lawsuits from the beginning. Nevertheless, because it is viewed as too formal, or even too inconvenient, employers often fail entirely to document employee performance issues. There have been countless times when employers faced with allegations of discrimination relay compelling stories of the ongoing performance issues of the complaining employee or the misconduct in which the employee engaged in throughout the employment. Yet when they are asked if they documented those issues, the answer is commonly "no." While the failure to document the performance issue does not in reality make the story any less compelling, the fact is that when the personnel file fails to substantiate an employer's story, or worse yet it conflicts with the employer's story, it raises serious credibility issues and may well affect the result of a discrimination case. For these reasons, management should get itself in the habit of documenting its dealings with employees.

It is important that whatever documentation does exist is accurate, complete, and thoughtful. To that end, college and university employers are well advised to avoid making hasty notations in the file or rushing through a form evaluation.

Employers should create standard performance evaluations and make all reviews in writing. Employers should discuss the written employment evaluations with the employees and require the employees to sign the reviews in writing. Similarly, any disciplinary action an employer tries to take should be in writing, and employees should sign their disciplinary notices. Employers are also well advised to include space on their evaluation and disciplinary notice forms for the employee to indicate his or her disagreement with the evaluations and/or disciplinary notices. To the extent the employee fails to take the opportunity to document his/her side of the story, there exists evidence that they had no disagreement at the time and only bolsters the legitimacy of the employer's action. Moreover, in some states, like Massachusetts, employees have to be notified of any documentation placed in a personnel file which might be viewed as negative, and he or she must be given the opportunity to respond. While the importance of documenting formal reviews and/or discipline seems more obvious, supervisors should even document their coaching comments. Employers should also provide regular training sessions to the managers and anyone responsible for reviewing employees about how to prepare and keep clear documentation of reviews, discipline, and feedback.

Obviously, not every communication with employees needs to be in writing. Indeed, the reality of operating a college or university would prevent documenting every comment or statement made to an employee about his/her work, but an annual review, a second and third warning, or other significant feedback should be in writing and, if possible, signed by the employee. This not only records the communication and preserves history, it also forces clear communication between management and employees. In light of the critical role documentation plays in managing the risk of discrimination lawsuits and minimizing the exposure if a lawsuit is filed, failing or delaying documentation of reviews, discipline, or other feedback because you "don't have the time" is simply not a good excuse.

It is also important that whatever documentation does exist is accurate, complete, and thoughtful. To that end, college and university employers are well advised to avoid making hasty notations in the file or rushing through a form evaluation as yet mere formalistic paperwork required under corporate rules. Even if it is just in a handwritten note, placing a thoughtful, well drafted note in the file about a coaching opportunity with an employee is helpful in recording the story of the employee's performance if there exists a lawsuit in the future. For this reason, using emails to communicate disciplinary decisions or performance evaluations, either among supervisors or with employees, is probably not a good idea. The drafters tone is often lost, and sometimes the drafters meaning can be misinterpreted when the message is delivered by email. At the end of the day, the goal is not to "make book" on employees but to manage them productively. Well timed documentation assists in that goal.

And, just as important, don't wait. The fact finder does not know that you intended to draft that write up before the filing of a charge of discrimination or complaint in court. If it does not exist at the time of filing, a belated entry will only be viewed as manipulative at best and fraudulent at worst. See ***Timing***, above.

Consistency

Adopting well drafted policies and documenting regular performance reviews are most certainly vital tools to manage the risk of employment discrimination claims. Equally important is the principle that the employer must apply its standards and policies consistently. The kindergarten support for this concept is typically phrased as "what is good for the goose is good for the gander." Indeed, the primary issue in the *Brown* case was that the plaintiff believed that the university had not consistently evaluated the tenure qualifications of male and female faculty members.[53]

As lawyers who often are called on to defend discrimination claims, in almost every case, we see written requests from administrative agencies or opposing counsel for the employer to provide a list of all employees other than the complainant who "have committed the same offense" with a follow up request for the documentation showing how the company responded to such offenses. The reality is that the fact finder in any employment discrimination or tenure denial case will examine the institution's history of dealing with similar offenses or tenure evaluations and compare the history to the case before it to determine if the school acted consistently with past practice. Any deviation from past practice, especially if the complainant is treated more harshly than other faculty members who were granted tenure or other employees who have committed similar offenses, will likely be interpreted as evidence of discrimination or other wrongful conduct by the employer. Perhaps the best way to ensure consistent evaluation and discipline is for the individuals charged with managing employees to take emotion out of employee review. Reason and standard performance guidelines, and not feelings about any individual employee, should drive how an employee does on an evaluation and what actions employers take to remedy a disciplinary issue.

That said, "a foolish consistency is the hobgoblin of little minds," according to Ralph Waldo Emerson.[54] In other words, an employer should not replace sound judgment with robotic reaction, but "due" attention to consistency will assist sound judgment rather than hinder it. The trick will be to maintain not only a culture of fairness but also an institutional memory of prior actions to help decision makers going forward.

Employers might want to develop a flexible but predictable progressive discipline policy or tenure standard, as more fully discussed above. An institution of higher education should document discipline and other feedback in a readily accessible manner. Prepare and implement an open door policy to ensure the exchange of communication between employees and management so that management can receive an early warning in the event of an unduly harsh or inconsistent manager. Prepare and update a policy handbook that makes clear how employees can complain about discrimination, harassment, and retaliation. Employers should also train managers on the progressive discipline policy, the open door policy, the anti-discrimination policy, and generally on providing well timed, good, and consistent feedback in a manner that improves productivity of workers. See ***Timing*** and ***Documentation*** above.

Checklist for Managing the Risks of Employment Claims

Timing

- Perform regular reviews.
- Respond immediately to a discipline problem.
- Coach on performance issues.
- Give regular feedback, both positive and negative.
- Be sure to document your feedback, coaching, and discipline as you give it.
- Train managers on how to perform reviews, issue discipline, coach, and give feedback.
- Do not fail to document your assessments and communications.
- Avoid conflict and hope statements, like "things will get better."
- Do not wait to address a performance issue – it WILL NOT get better.

Documentation

- Put reviews in writing.
- Put discipline in writing.
- Put coaching in writing.
- Place the writings in the personnel file.
- Be formal and specific – avoid vagueness.
- Think about the content of the evaluation/disciplinary notice/coaching before putting it in writing.
- Be complete and thoughtful in the writing.
- Discuss performance evaluations and disciplinary notices with the employee.
- Have employees and faculty members sign their discipline notices, evaluations, and coaching comments.
- Permit employees/faculty members space/time to comment/give their side of the story on the review/disciplinary notice.
- Train managers on how to prepare and keep clear and consistent documentation of reviews, discipline, and feedback.
- Avoid delaying documentation of reviews, discipline, or other feedback because you "don't have the time."
- Avoiding "sugar coating" in reviews.
- Avoid the use of emails to communicate about discipline.

Consistency

- Prepare flexible but predictable progressive discipline.
- Document discipline and other feedback in a readily accessible manner.
- Establish an open door policy.
- Follow the policy.
- Make the "punishment fit the crime."
- Consider the effect of multiple offenses.
- Have a policy handbook with anti-discrimination, harassment, and retaliation policies.
- Develop and implement a fair and consistent standard/guidelines for granting tenure.
- Train managers on the policies.
- Train managers about being objective when reviewing/disciplining employee.
- Do not deviate from the policy without good reason.
- Do not make decisions based on emotion.
- Do not link the disciplinary/failing review to protected activities or personal characteristics.
- Avoid playing favorites.

Conclusion

Like any other employer, colleges and universities must adjust to the idea that this is a litigious society. Moreover, whether we like it or not, even baseless claims of discrimination or retaliation may go forward in court. The reality is that once a college or university gets sued, it often must incur significant costs, both in terms of time and money, to eventually prove that it did not discriminate against one of its employees. While well drafted policies, thorough and regular training, and consistent implementation cannot prevent the filing of a lawsuit, these actions certainly can go a long way toward mitigating the risk of an employment lawsuit. A college or university that makes timely, consistent employment decisions and then documents those decisions has taken significant and critical steps toward managing the risk of an employment lawsuit. A college or university can further mitigate the risk of lawsuits by adopting written employment policies. Importantly, even when these guiding principles do not prevent an employment-related lawsuit, they still most certainly help to decrease a finding of liability and minimize the exposure for damages that might be awarded to

an employee who sues his or her college and university employer. In conclusion, policies, timing, documentation, and consistency constitute critical concepts for a college or university to manage its business, employees, and the risks of employment discrimination and retaliation lawsuits.

About the Authors

Christopher V. Vrountas is the president of Vrountas, Ayer & Chandler, P.C. Mr. Vrountas has been in law practice for over 20 years and has substantial experience in employment matters, including employment discrimination and wage claims. He has appeared before various state civil rights commissions, as well as the Equal Employment Opportunity Commission (EEOC), the US Department of Labor, and the departments of labor of several states across the country. He has tried employment matters on behalf of businesses in both state and federal courts in a number of jurisdictions.

Allison C. Ayer is the vice president of Vrountas, Ayer & Chandler, P.C. Her practice concentrates on counseling employers, including colleges and universities, on preparing and complying with internal policies and applicable law and also defending educational institutions in state and federal court. Ms. Ayer has significant experience defending discrimination harassment claims at both administrative agencies and in court. Ms. Ayer also assists her employment clients with developing and implementing policies and procedures to help prevent litigation. She has reviewed and drafted employee handbooks and performed sensitivity and other legal training to employers in the region. Ms. Ayer has successfully defended colleges and universities in cases involving claims of negligent hiring and retention, invasion of privacy, false arrest, federal civil rights violations, sexual abuse, disability discrimination, and personal injury matters.

Endnotes

1 US Equal Employment Opportunities Commission (EEOC), "EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012," January 28, 2013, http://www.eeoc.gov/eeoc/newsroom/release/1-28-13.cfm.

2 Ibid.

3 Ibid. There were 33,512 race claims filed, which was 33.7 percent of the total number of EEOC claims.

4 Ibid. There were 30,356 sex discrimination claims filed in 2012, which was 30.5 percent of all claims.

5 US Equal Employment Opportunities Commission (EEOC), "Charge Statistics: FY 1997 Through FY 2012," http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. There were a total of 26,379 disability claims (26.5 percent) and 22,857 national origin claims filed (23 percent).

6 Ibid. National origin claims totaled 10,883, or 10.9 percent of total claims. There were 3,811 claims of religious discrimination, or 3.8 percent of total claims. Finally, charges of discrimination based on color amounted to 2,662 claims in 2012, which equaled 2.7 percent of claims filed in 2012.

7 EEOC, "EEOC Reports Nearly 100,000 Job Bias Charges in Fiscal Year 2012." In addition to these employee-driven administrative charges, in fiscal year 2012 the EEOC filed 122 lawsuits, including 86 individual suits, 26 multiple-victim suits, and 10 systemic suits. The legal department at the EEOC resolved 254 lawsuits, recovering more than $44.2 million in monetary relief. The EEOC completed 240 systemic investigations in fiscal year 2012 and secured $36.2 million dollars in benefits for more than 23,446 people through its administrative enforcement activities - mediation, settlements, conciliations, and withdrawals.

8 The full panoply of EEOC, as well as historical data concerning discrimination charges, lawsuits, and monetary benefits obtained, can be found at the EEOC's website: http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

9 Ibid.

10 Ibid.
US Equal Employment Opportunities Commission (EEOC), "Statutes by Issue: FY 2010 - FY 2012," http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm.

11 Ibid.

12 Ibid.

13 *Burlington Northern and Sante Fe Ry. Co. v. White*, 548 U.S. 43 (2006).

14 Ibid., 59-66.

15 Ibid.

16 Ibid., 67-68.

17 Ibid., 59-68.

18 *Rubinstein v. Administrators of the Tulane Educational Fund, et al.*, 218 F.3d 392 (5th Cir. 2000).

19 *See* 42 U.S.C. §2000e-5(g).

20 *Somoza v. University of Denver*, 513 F.3d 1206 (10th Cir. 2008).

21 *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, slip op. at 2-4 (U.S. June 24, 2013).

22 Ibid., 4, 23.

23 Ibid.

24 Ibid., 5-23.

[25] Ibid., 6-8. This "but for" causation standard is more stringent than the "mixed motive" standard applicable in status-based discrimination (i.e. claims that allege discrimination based on a personal characteristic such as race, color, national origin, or sex), where a plaintiff must prove that the discrimination was merely a *motivating factor* or a *substantial factor* in the employment decision.

[26] Ibid., 19.

[27] Ibid., 18. The Court's decision in *Vance v. Ball State University*, No. 11-556, slip op. (U.S. June 24, 2013), that the alleged wrongdoer must be able to take tangible employment actions against the alleged victim, like hiring and firing, to be considered a "supervisor" who can create liability for the employer under in a Federal discrimination claim similarly makes it more difficult for an employee to prove a discrimination case against an employer.

[28] *Meiners v. University of Kansas*, 359 F.3d 1222 (10th Cir. 2004).

[29] *Rubinstein v. Administrators of the Tulane Education Fund*.

[30] *Somoza v. University of Denver*.

[31] *Meyers v. Northern Kentucky University*, Civil Action No. 2011-113(WOB-JGW), 2013 WL 954230 (E.D.Kentucky Mar. 11, 2013).

[32] *Brown v. Trustees of Boston University*, 891 F.2d 337, 346 (1st Cir. 1990).

[33] Ibid.

[34] Ibid.

[35] Ibid., 340.

[36] Ibid.

[37] Ibid., 341-44.

[38] Ibid., 341-43.

[39] Ibid., 344.

[40] Ibid.

[41] Ibid.

[42] Ibid., 347.

[43] Ibid., 349-50.

[44] Ibid., 340.

[45] Ibid.

[46] Ibid., 361.

[47] *Keri v. Board of Trustees of Purdue University*, 458 F.3d 620 (7th Cir. 2006).

[48] *Meyers v. Northern Kentucky University*.

[49] *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 94-95 (2d Cir. 2001).

[50] Ibid., 94.

[51] Ibid., 94-95.

[52] Indeed, federal courts have noted that the close temporal proximity, i.e. a short duration in time, between protected activity and the adverse employment action can constitute evidence of retaliation. See *Meiners v. University of Kansas*, 359 F.3d 1222 (10th Cir. 2004) (while temporal proximity may be evidence of retaliation, elapsed time of two to three months between time of protected activity and tenure denial failed to support a claim of retaliation); *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001); *DeCaire v. Mukasey*, 530 F.3d 1, 19 (1st Cir. 2008) (evidence of temporal proximity may be sufficient to make out a prima facie case of retaliation for exercise of rights protected under Title VII); *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001); *Asmo v. Keane*, 471 F.3d 588, 593 (6th Cir. 2006); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361,1364 (11th Cir. 2007); *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 832-33 (8th Cir. 2002).

[53] *Brown v. Trustees of Boston University,* 340-46.

[54] Ralph Waldo Emerson, "Self-Reliance," *Essays: First Series*, 1841.

For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.

—Nelson Mandela (1918–),

South African President (1994-1999) and Anti-Apartheid Revolutionary

Out of this nettle - danger - we pluck this flower - safety.

—William Shakespeare (1564–1616),

Poet and Playwright

Off-Campus Harassment: Identifying the Geographical Reach of Title IX Compliance

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Abstract: Under Title IX, colleges and universities must work to prevent discrimination and sexual harassment in their programs and activities. However, what is the duty of colleges and universities to prevent such harassment during off-campus activities or programs? This article provides a survey of different cases in which harassment occurred off campus and what the findings of the courts were in those cases. With this information and helpful best practices for managing both on- and off-campus discrimination, higher education risk managers will be better equipped to manage and mitigate the risks of harassment of their constituents, wherever such harassment may occur.

Introduction

We tend to think our Title IX responsibility stops when we cross the street that separates campus from the real world when, in fact, the law is more intricate and complicated. This confusion often causes institutions to limit their monitoring and oversight to "the four corners of the campus." The error in this view is obvious when we consider that Title IX applies to "any education program or activity," defined as "all of the operations" of educational institutions.[1] Lots of school programs and activities occur off campus; some take place in other cities, states, and countries. It is pretty obvious that educational institutions have to prevent sexual harassment in their own programs and activities wherever they occur, but what about student activities in which schools aren't involved, especially activities or events happening off campus?

Educational institutions have to prevent sexual harassment in their own programs and activities wherever they occur, but what about student activities in which schools aren't involved, especially activities or events happening off campus?

Consider the case of *Rouse v. Duke University*.[2] In the early morning hours of an off-campus house party, Ms. Rouse said she was raped by a person who was unaffiliated with Duke. Rouse sued Duke under Title IX, alleging a hostile educational environment. Duke first moved, unsuccessfully, to dismiss the claim. The district court eventually granted a later motion for summary judgment. How could Duke possibly be held responsible for these events? The school argued it had no power to monitor private house parties thrown or attended by its students and that it couldn't control the assailant, who wasn't even known by any Duke officials. Nonetheless, the district court "assumed without deciding that an educational institution's response to an off-campus rape by an unaffiliated third party may trigger Title IX institutional liability, either by direct acts or by 'deliberate indifference' as defined by the Supreme Court."

The district court's decision to entertain Rouse's Title IX claim in the first place creates much worry but offers little wisdom for educational institutions. The court offers no guidance on when an educational institution might have Title IX responsibilities for personal off-campus student activities. To be sure, there were some unique allegations. The plaintiff alleged that she was raped at a party hosted by a university fraternity which was under the university's control and that the university had reason to believe the hosts provided alcohol to underage guests. She also alleged that there was on-campus fallout from the rape and her decision to report it.

While we probably can't do much to minimize the expense of defending claims like this, the costs of eventually securing a dismissal of such claims should buy educational institutions greater insight into how legally to protect themselves (and their students) when students are harmed during personal off-campus conduct.

Here are some analytical steps and practical recommendations to help educational institutions gauge their Title IX responsibilities when students meander off campus. This advice will also help educational institutions understand when they need to take action to satisfy their legal responsibilities.

Stop Thinking, "On-Campus vs. Off-Campus"

To hold an educational institution liable for damages for sexual harassment under Title IX, a plaintiff must show that an official with authority to address harassment had actual knowledge of, and was deliberately indifferent to, harassment that deprived the victim of access to the educational benefits or opportunities provided by the school.[3]

Title IX damages liability is limited to circumstances where the educational institution exercises substantial control over both the harasser and the environment in which the harassment occurs. This limitation is especially important for claims of off-campus sexual harassment. Whether an educational institution has the requisite control will depend on who is doing the harassing (e.g., teacher, staff member, another student, an unaffiliated third party) and where and when the harassment occurs (e.g., school-sponsored off-campus program, informal gathering initiated by school faculty or staff, wholly private gathering with no formal or informal school involvement). Certainly, it is easier to see that "on-campus" events are more likely to lead to liability than "off- campus" events, but the analysis doesn't end there.

Start Thinking, "How Much Control Do We Have Over the Situation?"

The "control" aspect of Title IX undercuts the view that geographical borders alone define an educational institution's Title IX liability. Instead, educational institutions need to consider the people and places it can legitimately influence to minimize the risks of discrimination. The Supreme Court has usefully broken down at least three contexts of sexual harassment with generally differing degrees of institutional control: staff-student harassment, student-student harassment, and proxy harassment, where, much like association discrimination, one student claims to have suffered sexual harassment by unaffiliated individuals associated with another student.

Here is where this is headed: it is easiest to show the requisite control in staff-student sexual harassment. So far, courts have rejected proxy harassment as too far beyond the control of educational institutions. Whether the requisite control is present in student-student sexual harassment claims depends on the specific context in which harassment occurs.

You Control Staff-Student Harassment, So Act Like It

Educational institutions are most in control when the offender is an agent of the school itself. This was true in *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), a leading case on Title IX sexual harassment. Alida Star Gebser was a high school student who had sex with a teacher both on and off school property. Gebser never reported the relationship. The school district terminated the teacher when it learned of the relationship, but Gebser sued under Title IX anyway. The *Gebser* case articulated the degree of control necessary for an educational institution to be liable for teacher-student harassment. Notably, the *Gebser* majority held that a plaintiff may not rely upon *respondeat superior*—that the teacher's actions should be treated as the school's actions—to establish a Title IX claim. Instead, the majority held that the only theory upon which damages liability may lie is if the school district is *directly liable* for its deliberate indifference to sexual harassment, assuming control and knowledge. Direct liability holds an educational institution responsible for its *own* failure to act within the span of its control in the face of knowledge that harassment is occurring.

A couple of recent off-campus sexual harassment cases clarify the degree of control needed to hold an educational institution liable for staff-student harassment.

Faculty and Beer Pong Don't Mix

Hunt v. Forbes and the Illinois State University, 2010 WL 1687863 (C. D. 2010), highlights the many risks surrounding informal staff-student interaction. Defendant Michael Forbes was a tuba professor at Illinois State University (ISU) who perhaps enjoyed off-campus student house parties way too much. Several years before plaintiff Megan Hunt's claim, another female student had made two complaints against Forbes' conduct toward her at two separate student house parties. The student alleged that at one party, Forbes asked

her to take off her shirt and make out with other male tuba students and put his hand up the shirt of another student. The student alleged that at another house party Forbes started rubbing her back, eventually leaning in and kissing her on the cheek. Additionally, a 19-year-old student at a different college alleged she had a sexual encounter with Forbes while he was visiting the school for a music program involving visiting college staff. ISU wasn't able to substantiate any of these allegations. Nonetheless, it instructed Forbes to stay away from situations that involved both students and drinking, restrictions which it lifted after ISU's Office of Diversity and Affirmative Action (ODAA) failed to substantiate any of the allegations.

Hunt alleged in her complaint that ISU was deliberately indifferent to Forbes' sexual harassment of students. She claimed that she was harassed by Forbes at one of the same 2005 house parties described earlier, when Forbes bumped up against her, put his hand on her stomach, and told her she felt really good. By the time of Hunt's complaint in 2006, she alleged Forbes had harassed her in stairwells of the school, in Hunt's car, in a practice room at school, and a final incident where Hunt felt compelled to engage in sexual acts with Forbes while babysitting for Forbes and his wife at their home.

The *Hunt* court didn't question that ISU had the requisite control over Forbes to support a duty to prevent sexual harassment by Forbes while at off-campus student house parties. The actual steps taken by the school bear this out, because the school actually exercised that control by instructing Forbes to avoid places with students and drinking, later lifting the restrictions following the ODAA's failure to substantiate any of the complaints against Forbes, and making the decision to terminate Forbes on the heels of Hunt's complaint. There is a lesson here: faculty and staff interact with students because of their employment; their employers have a right (and possibly the responsibility) to regulate the nature and quality of that interaction regardless of the location.

The lesson in one case: faculty and staff interact with students because of their employment; their employers have a right (and possibly the responsibility) to regulate the nature and quality of that interaction regardless of the location.

Two Out of Three Ain't Bad

Doe v. Boulder Valley School District, 2012 WL 4378162 (D. Colo. 2012), calls attention to a high-risk area for Title IX sex harassment claims: tournament travel. Tournament travel is a high-risk activity because it involves both school agents—teachers, coaches, and administrators—and school-supervised programs, including sports teams, bands, debate, and drama and other clubs. In this context, educational institutions should be motivated to manage risks of sexual harassment, ideally preventing it altogether.

Defendant Travis Masse was a college student studying to become a licensed teacher. Masse needed a field placement to observe other teachers as part of his curriculum. Masse obtained full-time field placement at Monarch High School in 2001. In 2001, Masse also volunteered as an assistant wrestling coach at Broomfield High School under the supervision of the head wresting coach. Masse lost his job at Monarch when the school learned he made unwelcome advances toward a student. The principal at Monarch terminated Masse, banned him from school premises, and notified the wrestling coach at Broomfield of the reasons for Masse's termination. In spite of that notice, however, Masse stayed on as volunteer assistant wrestling coach.

After graduation, Broomfield hired Masse as a part-time history teacher and assistant wrestling coach. Masse was later promoted to a full-time teacher and head wrestling coach. Masse selected female team managers to accompany him and the team to out-of-district and out-of-state wrestling tournaments. Jane Doe won the wrestling team manager position in 2006. She began receiving inappropriate text messages from Masse in 2007 and later began returning nude texts of herself. Doe and Masse had sex several times at away tournaments from December 2008 to February 2009.

The plaintiff in *Boulder Valley* had a factually difficult case: it hinged on proving that the school's awareness of Masse's 2001 termination from Monarch High School

eight years earlier put it on actual notice that Masse posed a substantial risk to students. The court didn't buy this argument and noted that the plaintiff's claim would fail in any case because the school wasn't deliberately indifferent to her harassment.

But the circumstances of *Boulder Valley* reveal how difficult this kind of Title IX can be to defend against. First, in this context, expect lots of witnesses. Several other coaches, the superintendent, many other students were at the tournament. Second, plaintiffs will have a good chance of showing both sexual harassment and actual knowledge in these cases, leaving educational institutions to defend only by showing no deliberate indifference. Third, these cases just look bad. Imagine jurors looking quizzically at one another, wondering how a bus full of faculty, staff, and students couldn't figure out until an away tournament that a teacher or coach was sexually harassing a student. As a result, it can be difficult to get over the deliberate indifference hurdle in these cases should the claim make it to a jury.

Imagine jurors looking quizzically at one another, wondering how a bus full of faculty, staff, and students couldn't figure out until an away tournament that a teacher or coach was sexually harassing a student.

Student-Student Harassment and Proving Notice

One year after *Gebser*, the Supreme Court addressed the question whether under Title IX an educational institution could be liable for student-student sexual harassment in *Davis, as Next Friend of Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). LaShonda Davis was a fifth-grade student who suffered a six-month period of sexual harassment by one of her fifth-grade classmates. The offensive conduct included touching the plaintiff's breasts and genitalia, rubbing up against the plaintiff, vulgar statements, and other suggestive behavior. During this period, LaShonda's grades dropped and her father discovered that LaShonda had written a suicide note. The offending student ultimately pleaded guilty to sexual misconduct.

LaShonda routinely reported her harassment to her mother and classroom teacher. LaShonda claimed that her classroom teacher assured her that the school principal was kept informed of the incidents. LaShonda's mother sued, claiming deliberate indifference to knowledge of LaShonda's harassment. To support their position, plaintiff alleged that the offending student had not been disciplined at all for his misconduct and also that no effort had been made to separate LaShonda from the offender.

The Supreme Court held that an educational institution can be held liable for student-student sexual harassment only when the harasser is under the school's disciplinary authority and the behavior is so severe, pervasive, and objectively offensive that it denies the victim equal access to the education Title IX is designed to protect.[4] The majority imported the standard for workplace sexual harassment into analysis student-student sex harassment claims in order to shield educational institutions from the "dizzying array of immature, sometimes gender-based, behavior that students will forever engage in but which does not deprive students of any educational benefit protected by Title IX."[5]

Moore v. Marion Community Schools Board of Education, 2006 WL 2051687 (N. D. Ind. 2006), provides a fuller explanation of this rationale and in a context that involves off-campus conduct. *Moore* involved escalating meanness between former friends. Plaintiff K.M. was a 12-year-old sixth-grade student, and defendant T.G. was a seventh-grade student at the same school. T.G. had a notebook that contained derogatory, but non-sexual, comments about K.M. Next, T.G. told another student over the phone that she and K.M. had engaged in sex acts. The student to whom T.G. told the rumor carried it back to school and the rumor spread. The school investigator believed that he only had jurisdiction to address the conversation that occurred at school but not the telephone conversation that had occurred away from school; remember the "four corners of campus" mistake? T.G. was later removed from school for misconduct unrelated to K.M., but other students continued to tease and taunt her. As a result, K.M. did not finish the school year.

The district court was quick to explain that, however humiliating and offensive, T.G.'s conduct simply was not severe enough to state a student-student sex harassment claim. The district court first cited to *Davis* for the proposition that "peer harassment, in particular, is less likely to satisfy [the requirements of Title IX sex harassment claims] than teacher student harassment."[6] The district court then explained why plaintiff's Title IX claim failed as a matter of law. The district court's explanation is instructive:

> In this case, it simply cannot be emphasized enough that this case is spurred by the conduct of pre-pubescent eleven-year-old girls who are still developing the skills necessarily to appropriately interact with their peers while on the verge of significant physical and hormonal changes. This court has no doubt that the rumor started by T.G. that spread throughout the school was a subjectively mortifying event for K.M. …This sort of treatment has become so commonplace in schools that similar conduct to that alleged here, namely gossiping and starting rumors at school, was the subject of a recent Paramount Pictures movie entitled *Mean Girls* (Paramount Pictures 2004). As unfortunate and common as this situation is, given the nature of the alleged harassment here, the court cannot conclude that it rises to the level of actionable harassment. …There can be no doubt given the age and social development of these children that having rumors of one's sexual orientation being circulated through a middle school is humiliating and offensive. Yet, this isolated event, without more, is simply not the type of conduct that is so severe and pervasive that it rises to the level of actionable sexual harassment. Indeed, the conduct complained of and the school's reaction to it is far less egregious than that of other cases that have failed to meet the Title IX standards.[7]

In *Davis*, the seminal student-student sex harassment case, the Supreme Court overturned the Eleventh Circuit's grant of defendant's motion to dismiss. In overturning the circuit court, the Supreme Court said plaintiff had alleged facts sufficient to state a claim:

> Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G.F. over a five–month period, and there are allegations in support of the conclusion that G.F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G.F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal. Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment. On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief."[8]

Recent student-student sex harassment cases have been less successful, often due to failures to give educational institutions adequate notice that harassment is happening. As in the *Moore* case, student-student sex harassment cases often involve juveniles who may not report for a variety of reasons. Also, the confluence of events that give rise to student-student sexual harassment can look quite different from the perspectives of school administrators and students. Plaintiffs in student-student harassment often assume that educational institutions were on notice of sexual harassment simply because schools received reports of (and perhaps responded to) a series of misconduct directed at one student over a period of time. Educational institutions tend to see this as ordinary day-to-day management of young, developing students.

Courts have been clear the notice required to state a harassment claim under Title IX is "actual notice," not simply awareness of ongoing student-student misconduct of a sexual nature. A prime example of this is *Tyrrell v. Seaford Union Free School District*, 792 F.Supp.2d 601 (E.D. N.Y. 2011).

Megan Tyrell was a 21-year-old female who had attended Seaford High School for ninth and tenth grade. On April 1, 2005, Tyrell went drinking with friends and acquaintances from another high school, first at one of the friend's homes, then in the parking lot of a Dunkin' Donuts, a teen hangout. Tyrell admitted she was drunk and that she remembered little from the night, including what time or how she got home. She later learned of that evening that she had sex with her female friend in the back of a car in the Dunkin' Donut's parking lot with three male teens watching and taking pictures. The next day, one of the male students from another high school who photographed the encounter loaded his pictures onto a photo sharing website from which Tyrell was able to confirm that she was depicted nude with another girl performing oral sex on her. Within a week, word spread about Tyrell's internet pictures. Students at her high school began ignoring her, making fun of her, and calling her names such as "lesbian carpet-muncher." A week later, Tyrell found graffiti in a school bathroom that said, "Megan Tyrell is a lesbian and has herpes." Tyrell left the school only two weeks after the internet posting and was home schooled for the remainder of the school year.

Seaford High School learned of the incident in a roundabout way. A friend of Tyrell's at another high school told one of his counselors that he was worried about Tyrell because she had been raped. The school counselor called Seaford officials and reported the incident. Seaford then interviewed Tyrell on April 1, 2005. Up to this point, Tyrell "had not told any adult at Seaford of the harassment, provide[d] them with the names of any of the students harassing her, or communicate[d] in any way" about the incident. Although plaintiff claimed that she "noticed that some of the teachers were getting a little concerned [and] always asked [her] if [she] needed somebody to talk to or if [she] was upset [she] could always go and turn to them," she did not talk to any teacher about the incident or harassment because she did not want to talk to anybody about what happened, "especially not a teacher if they already knew about it."

Following Tyrell's interview, a Seaford administrator confirmed the existence of the pictures. During the school investigation, several students reported Tyrell's pictures had been posted as background, or "wallpaper," on school computers in the computer labs for a few days, but the investigation didn't yield anyone who had actually seen the pictures. Seaford's director of technology confirmed that Tyrell's pictures had been accessed once from school computers. The technology director then blocked all access to Tyrell's pictures from school computers.

The failure to prove actual notice in *Tyrell* is a common issue in student-student harassment claims. In such cases, student perceptions do not always translate into institutional knowledge.

But Tyrell's sexual harassment claim failed as a matter of law on the narrow legal issue: Title IX does not protect against sexual orientation or gender stereotyping discrimination.[9] If she had not lost on that point, she would have lost on another. The court explained that Tyrell's claim would have failed in any case because Seaford didn't have actual notice of any alleged sexual harassment by Tyrell's peers. "Requiring actual, as opposed to constructive, knowledge [of the alleged sexual harassment] imposes a greater evidentiary burden on a Title IX claimant [than a Title VII claimant]."[10] Despite all of the rumors milling about, the evidence showed that only one Seaford administrator saw the pictures on one occasion and that was to confirm the existence of the pictures. Tyrell's allegation that the pictures had been downloaded or uploaded as "wallpaper" onto Seaford computers by a Seaford student or students wasn't supported by anyone with personal knowledge thereof. Additionally, other than Tyrell informing one Seaford administrator that a "few" unidentified students had called her names, Tyrell proffered no evidence that any one Seaford official or employee had actual knowledge of any pervasive harassment of plaintiff by her peers following the April 1, 2005, incident.[11]

The failure to prove actual notice in *Tyrell* is a common issue in student-student harassment claims. In such cases, student perceptions do not always translate into

institutional knowledge. Meeting Title IX's enhanced notice requirement is even more difficult when some or all of the alleged harassment occurs off campus, like in *Tyrell*.

But this is not a sanction for educational institutions to bury their heads in the sand. Most courts agree that "the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student."[12] Certainly the notice requirement is satisfied by something less than a formal complaint, but requires something more than suspicion.

A Note About "Proxy" Harassment

The term "proxy discrimination" is borrowed from *Doe v. Derby Board of Education*, 451 F.Supp.2d 438 (10th Cir. 2006). In July 2002, plaintiff Sally Doe, a 13-year-old student at Derby Middle School, was sexually assaulted by Christopher Porto, Jr., a 17-year-old student at Derby High School. The assault occurred during summer recess and off school grounds. Porto was eventually arrested and charged for the sexual assault of Doe.

In fall 2002 after the arrest, both Doe and Porto returned to school. At the time, Derby High School and Middle School students attended classes in the same building. Although the classes were held separately, students from the high school could interact with students from the middle school, and vice versa.

The plaintiff's father, John Doe, learned Porto was still in school and met with the school principal, Charles DiCenso, to complain, arguing the school had actual knowledge of the sexual assault after Porto's well-publicized arrest. Additionally, Porto's father was a voting member of the Derby Board of Education, indicating the school should have had knowledge of the arrest. After the meeting, Porto was suspended for 10 days with the school instructing that plaintiff Sally Doe would need to provide a statement about the sexual assault and cooperate with school authorities to initiate expulsion proceedings against Porto. Because of the traumatizing nature of the assault, plaintiff Doe never presented her claims to the institution, Porto was allowed to return to school, and it was alleged that the school never attempted to contact the police about the facts of the sexual assault.

Throughout the 2002-2003 school year off of campus, plaintiff Doe suffered teasing and harassment not only by the defendant but also by the defendant's friends, who spit at her and called her a "slut." Sometimes, plaintiff Doe experienced off-campus mistreatment by defendant's friends when the defendant wasn't present, such as when the defendant's friends would spot Doe while they were driving and yell things at her. The defendant's friends were not students at the school. Plaintiff Doe transferred to another school and the defendant was ultimately expelled from Derby for sexually assaulting another female student.

Evidence of "proxy harassment" can be used to bolster a plaintiff's sex harassment claim concerning the severity and offensiveness of the surrounding circumstances.

No one in *Derby* questioned that Doe might have a claim against the school for deliberate indifference to the conduct of the student defendant. Title IX student-student sexual harassment claims were recognized in *Davis v. Monroe County Board of Education*.[13] The novel question raised by plaintiff's complaint was whether Doe could also state a claim against the school for the conduct of the *defendant's friends*, who had no school affiliation. The court said "no," with a "but": "That [plaintiff] was harassed by [defendant's] friends, even if on his behalf, off school grounds, is not actionable because Davis mandates that the Board cannot be liable for any deliberate indifference to harassment in a context over which the Board has no control." However, the court went on to say that evidence of "proxy harassment" can be used to bolster a plaintiff's sex harassment claim concerning the severity and offensiveness of the surrounding circumstances.[14]

Does It Hurt to Investigate?

Does it hurt to investigate? It may be better to worry over what could happen if you don't investigate. The Office of Civil Rights April 2011 Dear Colleague Letter makes clear that schools must process complaints of sexual harassment using established procedures *regardless*

of where the conduct occurred.[15] Moreover, the purpose of a Title IX investigation of sexual harassment is different from a criminal or campus safety investigation of the same conduct. Because students may need ongoing protection from impacts relating to sexual harassment, educational institutions cannot wait for other investigations to conclude before taking "immediate action" to address sexual harassment.

Legally, institutional liability depends on the answers to three questions:

1. Does the institution have substantial control over the alleged wrongdoer and the environment in which the wrongdoing is carried out?
2. Is there actual notice of the wrongdoing?
3. Is there deliberate indifference?

Courts still have the responsibility to decide whether the *legal* standards have been met. The issue is *substantial* control, and that is something a court could decide on summary judgment. Similarly, there is actual notice, and there is inquiry notice, the latter being the kind of notice that makes you queasy even if you don't know why. You could investigate and find out whether you ought to be queasy. Or you could decide to do nothing, because you don't have actual notice.

When an institution sets out to investigate and remedy the wrongdoing, might the admittedly perverse result be that it loses the ability to defend itself against two of the three elements of the claim? Maybe. Here is how that might work: if the institution investigates and remedies an event, it plainly had notice and it plainly had some level of control. That may mean that, by carrying out the investigation and remediation, the institution is admitting that it could do so, and that admission might be enough evidence that the institution had substantial control and actual notice. Is that meaningful? Is it one of those situations in which the right moral answer could be the wrong legal answer? Taking action can easily undercut the institution's position as to the first and second of the elements. However, we also think that isn't a material consideration. Do the investigation. Do the remediation, if appropriate. A court may be able to sort out whether the evidence establishes substantial control and whether the queasiness amounted to "actual notice."

It seems that the better choice, and the better legal defense, is to focus on the last of the three elements of the claim. Don't be indifferent. Suppose you guess wrong on how the law might view your degree of control and you really did have substantial control over the situation. What if that queasiness you felt came out of a level of knowledge that the law might view as actual notice? If you have done nothing, you lose. However, there is even more at stake. By making a choice to do nothing based on a narrow legal analysis, you may have elected to be deliberately indifferent and may also have missed an opportunity to do the right thing by your students.

Conclusion

The cases discussed in this article illustrate the pertinent legal principles that guide courts in deciding legal issues, but they also offer real-life examples of how other schools have handled similar events and how those choices looked later in the unforgiving light of litigation. There is much to be learned from others' mistakes or successes. One of the lessons is that ambiguous situations cry out for a more conservative approach—that is, perhaps assume that you may be responsible and act accordingly—and clear situations have their own answers. Understanding the law is critical.

At the same time, however, the practical lessons from the real-life examples also demonstrate that institutions that allow their actions to be guided less by the law and more by the desire to do the right thing for their students are better positioned to survive legal challenges. While you should never forget about what the law says, it makes sense to borrow a page from physician training: the page that says, "first do no harm."

About the Authors

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Endnotes

1 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Definitions. See 34 C.F.R. § 106.2(h).

2 *Rouse v. Duke University*, 2012 WL 6681786 (M.D.N.C., 2012).

3 See *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998); *Doe v. Boulder Valley School District*, 2012 WL 4378162, at *4 (citing *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999).

4 *Davis, as Next Friend of Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), at 646-647, 652.

5 See *Broadsky v. Trumbull Board of Education*, 2009 WL 230708 (D. Conn. 2009); in this case in which a middle school student claimed that she suffered numerous instances of rude and unkind treatment by various peers, including name-calling, insults, the placement of a pencil under her bottom, and the slapping of her bottom in the hallway, it was found the actions were not sufficiently severe or pervasive to give rise to a claim under Title IX.

6 *Davis*, 526 U.S., at 6.

7 Ibid., 6-7.

8 *Davis*, 526 U.S., at 654.

9 *Tyrrell*, 792 F.Supp.2d 601, at 622-623.

10 Ibid., 623.

11 Ibid., 623-624.

12 *Doe v. Derby Board of Education*, 451 F.Supp.2d 438, 446 (2006); fact issue exists whether board received actual notice of sexual assault through substantial media attention devoted to the investigation and arrest of assailant and because assailant's father was a member of the board.

13 *Davis*, 526 U.S., at 629, 653.

14 *Doe v. Derby*, 451 F.Supp.2d, at 445.

15 US Department of Education Office of Civil Rights (OCR) Dear Colleague Letter (DCL), "Sexual Violence Background, Summary, and Fast Facts," April 4, 2011, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html.

Let our advance worrying become

advance thinking and planning.

—Winston Churchill (1874–1965),

British Politician and Prime Minister of the United Kingdom

A Primer for Completing a Special Event Incident Management Plan

| *Daniel Wears, Syracuse University*

Abstract: Whether a campus special event is as seemingly straight-forward as a college football game or as involved as a visit from a presidential candidate, higher education risk managers must manage the risk proactively. A special event is defined by the Federal Emergency Management Agency (FEMA) as something that is non-routine, places a strain on resources, may involve a large number of people, and requires special permits, planning, preparation, and mitigation. By creating a multi-disciplinary planning team, putting to use communications and social media, reviewing special event team consideration, and testing and refining a special events plan, campuses can better anticipate special event risks and work as a team when the inevitable happens and something deviates from the plan.

Introduction

Managing risk at institutions of higher education is a complex undertaking which requires integration from departments across campus, whether it is related to normal business operations, new and ground breaking research, athletics, insurance coverage, travel, or special events hosted or sponsored by the university. Effective risk management is not only undertaken by the risk management department but also by most other departments on campus, including emergency management. From a governmental perspective, emergency management is typically a public safety function, but in the realm of colleges and universities emergency management can be organizationally found in any number of departments, including the chancellor's office, environmental health and safety, public safety, or risk management. Regardless of the chosen location at each institution, emergency management can have a large impact on the way that an institution manages its risks, both manmade and natural. Although emergency management is only one way of managing risk, it is an important one and continues to grow on college campuses, and at all educational levels, based on recent events across the country. This includes both manmade hazards, such as campus shootings and bomb threats, as well as natural hazards, such as Super Storm Sandy's impact to the New York and New Jersey metropolitan area.

The four basic, overarching emergency management functions – preparedness, response, recovery, and mitigation – each have an impact on an institution's ability to manage its risk.

The four basic, overarching emergency management functions – preparedness, response, recovery, and mitigation – each have an impact on an institution's ability to manage its risk. To effectively manage this risk, it is critical for emergency managers to conduct capability assessments, hazard analyses, and vulnerability assessments and response plans. As part of these analyses and assessments, special events need to be considered as potential hazards for your campus.

Every university and college will likely undertake some type of special event each year, although what makes each of these events special to the particular campus is likely different. According to the Federal Emergency Management Agency (FEMA), a special event is:

- Non-routine
- Places a strain on community resources
- May involve a large number of people
- Requires special permits or additional planning, preparation, and mitigation

It could be an event that we don't usually plan for and execute, it could tax the resources we have readily available, it could bring an unusually large number of non-affiliated guests to campus, or it could include special effects or potential hazards. With the diversity in campus locations, sizes, available resources, and event schedules, there is no clear way to define what a special event is for each and every campus, locality, or venue across the country, as we each have different capability and experience

levels. What is perceived as a special event to most people may not be special at all to certain groups of individuals and venues. To the director of some stadiums, another event with 75,000 people may be just another day. His or her special event plan should have already been developed and included in their standard operating procedures. At the same time, 1,000 people attending a festival at a small community college may be a significant strain on resources and require special event planning to adequately integrate all departments, both internal and external to the college, especially if it includes a considerable number of people who may be unfamiliar with the campus or event location.

What is important is that the institution takes the time to adequately plan for each event to provide for a safe environment for both event staff and attendees. This planning can't stop with which entertainer is coming to campus, what two teams are going to play, how we are going to direct those unfamiliar with campus to the appropriate location, or what we are going to serve them. We also need to look at the "what ifs." What if someone has a heart attack at graduation? What if a large fight breaks out during the concert? What if a car crosses over the curbing, through fencing, and into a crowd of spectators? What if a fast moving storm enters the area and threatens unprotected attendees? This is only a partial list of "what ifs" that should be asked during special event planning meetings. The answers to these questions may be simple to some people or agencies, but documenting what should be done will provide a set of common expectations among all departments involved in planning your special event. Each special event planning team should conduct its own hazard analysis to determine which "what ifs" have a probability to impact each event you plan.

As potential hazards or vulnerabilities are identified during your analysis, it will also provide your planning team with an opportunity to review event policies, procedures, and preparedness measures. Some of your identified hazards may easily be mitigated by making small changes limited to the event itself. Depending on the identified hazards, perimeters could be extended, security processes may be altered, age restrictions may be enacted, or streets could be closed to reduce the probability of an incident impacting the success of your event. There is a balance that will need to be struck between what risks you are willing to accept and what you are able to mitigate. The limitations of your ability to reduce your vulnerabilities could be caused by financial pressures, resource limitations, or impacts to your patrons.

As potential hazards or vulnerabilities are identified, it will provide your planning team with an opportunity to review event policies, procedures, and preparedness measures.

The most important aspect of special event planning is that it works for your institution and the event for which you are planning. Each institution and locality has its own culture and processes for accomplishing similar tasks; the most important thing is that the plan accurately reflects what is expected and not theoretical assumptions that cannot be supported by your current local practices.

Developing Your Multi-Disciplinary Planning Team

It isn't enough to simply bring together a group of people to initiate the special event plan; you need to have the right group of people involved. This is much easier said than done. There is a wide spectrum of beliefs when it comes to planning, ranging from those who want every detail written down to those who "will figure it out when it happens," so bringing them all together could prove to be difficult, but it is critical to the planning process. Each person will have his or her own area of expertise and may not understand why it is important to document what seems to be second nature to the individual. At the top of this team, you need someone who is able to facilitate each of the different viewpoints and keep everyone focused on the overall intent of the plan. This planning effort should be about documenting high level responsibilities and expectations so everyone involved is better informed of each other's responsibilities.

Making certain decisions during a special event may have a ripple effect across other departments that is not readily apparent to those making the decision. If inclement weather is forecast for the day of your event and cancel-

lation is possible, does the institution know what time it needs to make that decision to limit the impact on food preparation and food service for the remainder of campus? Do you know the temperature and wind limits for food preparation at the site of your event? If your food service provider isn't included, what appears to be a simple decision could have a much larger impact across campus and leave food services unnecessarily scrambling to accommodate the changed schedule.

This is just one example of why a planning team is essential and why planning can't happen in a bubble. The larger and more complex your special event is, the more important it is to have a thorough special event incident management plan to ensure that all of the departments, agencies, and personnel involved in the event are aware of their responsibilities and expectations. To do this, it is imperative that all of the appropriate agencies and departments are included in your planning sessions and meetings.

Communications and Social Media Planning

With nearly every after action report you read, there is usually a mention of how communications need to be improved to enhance the response operations of both emergency responders and support agencies. Prior to hosting your special event, time should be spent addressing communications procedures for your special events. Large special events can have a host of complicating factors which could work against you if one of your "what ifs" actually happens. Take time to consider internal communications amongst event staff, including radio communications, cellular phone communications, and face to face communications in a command post. In addition to internal communications, external communications should be planned, including public affairs releases to the general public and media, communications with event attendees, and social media.

Internal Communications to Event Staff

Depending on the size and complexity of your event, you will likely have multiple organizations involved with its execution. These organizations could be from within and external to your institution and may or may not be organizations with which you generally integrate. The less familiarity you have with these organizations, the more important it is that you spend some time determining how you will coordinate and share information during the event. It is possible that your event organizers and participating departments utilize various radio channels, which may or may not also be used for that organization's daily operation. Ideally, you can streamline your communications by providing common radio channels for different aspects of your event operations, such as security, medical, and parking. When these channels are split by function, it is critical to have them monitored in a central location, such as a command post, which can distribute and share information across disciplines and radio frequencies. Depending on your particular setup and event, it may be beneficial to have a trained dispatcher in your command post to assist the facilitation of information across radio channels and to field units of all of the major organizations involved.

In addition to the dispatcher, your command post should include representatives for the event promoter, public safety agencies, venue management, a public information officer, and the individual responsible for the overall event management, at a minimum.

External Communications

The use of social media as a communications tool and source of information continues to grow and should be a critical element of your communications plan. Not only can social media enhance the effectiveness at which you reach event participants, especially if it is highly attended by your students, it can also be used as a way to receive information and to monitor your event through unofficial mediums. During Super Storm Sandy, we saw how important and detrimental social media has become to emergency planning and response efforts – so important that FEMA established a Twitter account to provide fact checking and myth busting information. Although on a smaller scale, this can also be an issue during a special event. During one special event, someone posted a picture of someone lying on the ground outside and indicated that a student had died during the event. It turns out this student had simply consumed too much alcohol (not at the event) prior to attending. This post wasn't found until after the event. In retrospect, social media channels should probably have been monitored during the event. This could have enabled the event organizers to immediately respond to the post that it was inaccurate information.

Event Planning Team Considerations

Each special event has its own set of unique circumstances, thus the "special event" label. With each of the unique characteristics, there are additional requirements for the event management team to consider and complete prior to and possibly following the event. Your special event could be a sporting event, homecoming, parade, or concert. Each special event could also include specific characteristics, which further complicate required planning, such as alcohol service, pyrotechnics, carbon monoxide emissions, a bonfire, or another potentially hazardous situation.

Decision Makers

Prior to your event, brainstorm what decisions may need to be made in the event of an emergency or other disturbance. This could include cancellation, postponement, delayed opening, evacuation, or other contingency to your anticipated plan. The alterations to your planned schedule may be caused by inclement weather, service disruptions, criminal activity, or another unplanned interruption. In anticipation of having to make this decision, it should be determined who will make the decision. Ideally, this person should be located at your command post during the event so they can be advised by other organizations involved in the event. In addition to making the decision, you should address how the decision will be disseminated to staff, attendees, and performers.

The planning process is much more important than the actual plan itself, as it helps people to generate working relationships prior to executing a special event plan.

Laws and Requirements

It is impossible to provide a list of all the laws, regulations, and ordinances that must be adhered to during a special event as each state and locality is different. Depending on your event, you may need to acquire permits for street closures, alcoholic beverage open container waivers, fireworks permits, mass gathering, or public assembly permits.

Integration with Local First Responders

Depending on the location, anticipated attendance, and your campus capabilities, you may need to work with your local first responders during your event planning and execution. Integrating them both into onsite event operations and possibly outside of the event on details such as traffic posts and security assignments may be necessary. This could aid in ingress to and egress from your event, as well as limit the disruption to surrounding neighborhoods or business districts.

In addition to your first responders, consider including your local public safety answering point (911 center) into your plan. Depending on the capabilities of your communications center staff, they may be able to assist with communications planning, integrating multiple radio frequencies, or monitoring the event radio traffic. If nothing else, they should be involved in planning so they are aware of any street closures or other interruptions to normal operations to enable them to efficiently dispatch additional resources to your event when needed.

Contracted Services and Performers

If the event includes contracted services or performers, you should also consider them during your planning to allow their plans to supplement your plan, rather than supplant it. If your contracted services are for products or resources, such as tents, stages, or portable restrooms, take the time to work directly with the vendor to become well informed of any vulnerabilities, such as wind or other elements which may inhibit their normal use. Unless your expectations have been clearly defined during contracting with the vendor, don't rely on the vendor to notify you of the situations which may impact the product they provided. For example, if tents become vulnerable to wind at 70 miles per hour, ensure you are monitoring wind speeds and keeping the appropriate agencies informed. The same situation should apply for stages, as occurred during the stage collapse at the Indiana State Fair. Depending on your local codes, you may consider or be required to have local code enforcement officials inspect things such as stages to certify they have been erected in compliance with code.

With the increased attention on special events, since the Indiana State Fair, some performers are beginning to

take emergency planning more seriously by including it as part of their performance preparedness. For example, Linkin Park was recently highlighted on a FEMA blog for the extent to which they have taken preparedness. They are the first ever touring musical artist to achieve the Storm Ready® designation from the National Weather Service.[1]

Severe Weather Planning

Throughout the United States, it seems as though severe weather is becoming more and more common. Whether you are in a location susceptible to tornadoes, hurricanes, or severe cold, if your event is outdoors it is imperative to have a severe weather monitoring and response section in your event and incident management plan. This plan should include evacuation plans and decision points, as well as re-entry, cancelation, and postponement protocols. In 2012, Lollapalooza evacuated 61,000 attendees from a Chicago area park without any reported injuries. After a two and a half hour interruption, the concert reopened and continued.[2]

Test Your Plan Prior to Executing It

Similarly to every other emergency management plan, your special event plan should be tested to ensure it meets the needs of your event and the agencies involved in responding to an emergency during it. At one of your last planning meetings, you should take the time to conduct a few table top exercises of the scenarios that were identified while conducting a hazard analysis for your event. This should not occur at your last planning meeting, since you may need to make changes to your plan based on the outcomes of the exercises. Table top exercises don't necessarily need to be elaborate, drawn out scenarios, but they should contain enough detail and depth to engage as many departments as possible. Depending on how much detail and effort you want to put into testing your plan, the Homeland Security Exercise and Evaluation Program provides a host of options, ranging from seminars up to full-scale exercises.[3] In total there are seven exercise options, but a table top or functional exercise is probably the most common for testing a special event plan.

Benefits of Special Event Planning

Most special events conclude without any significant incidents, or at least to the knowledge of the general public, so it may be difficult to measure the true benefits of special event planning. It could also be that because of the special event planning that has occurred the general public does not become aware of the minor incidents which occur during events, such as heart attacks, slips and falls, and even the occasionally intoxicated individual. The benefits and impacts of special event planning may remain immeasurable until a significant incident occurs during your event.

Whether or not you are faced with a significant incident during your special event, the planning process will put you much further ahead if you are faced with an incident. This process is much more important than the actual plan itself, as it helps people to generate working relationships with each other prior to executing a special event plan. The hope is that those who need to know will have an understanding of the plan and won't need to open it during the incident.

Although this article isn't a guide to completing your first special event and incident management plan, it should initiate some thought about what should be considered for inclusion. The first time you undertake a special event and incident management plan will be the most difficult and time consuming. Following each special event, an after action conference should be held to discuss what went well and what can be improved upon for future events. With each passing year and event, you will notice the time and effort required to complete this plan is significantly less.

About the Author

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Endnotes

1 Jim Digby, "Linkin Park Has an Emergency Plan Before Severe Weather Strikes," Federal Emergency Management Agency (FEMA), March 7, 2013, http://www.fema.gov/blog/2013-03-07/linkin-park-has-emergency-plan-severe-weather-strikes.

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3 Homeland Security Exercise and Evaluation Program, "About HSEEP," Federal Emergency Management Agency (FEMA), https://hseep.dhs.gov/pages/1001_HSEEP10.aspx.

Faced with crisis, the man of character falls back on himself.
He imposes his own stamp of action,
takes responsibility for it, makes it his own.

—Charles de Gaulle (1890–1970),
French General and Statesman

I used to think that cyberspace was fifty years away.

What I thought was fifty years away, was only ten years away.

And what I thought was ten years away... it was already here.

I just wasn't aware of it yet.

—Bruce Sterling (1954–),

American Science Fiction Author

MOOCs and the Institution's Duties to Protect Students from Themselves and Others: Brave New World or Much Ado About Nothing?

Joseph C. Monahan and Christina D. Riggs, Saul Ewing LLP[1]

Abstract: As massive open online courses, or MOOCs, increase in both numbers and enrollment, colleges and universities may face new and emerging risks related to student speech and conduct. While some of the risks are the same as the risks facing brick and mortar classroom settings, others are quite unique. What is a college's duty if a MOOC participant makes a threat? Are MOOC participants even "students"? Who is responsible for monitoring speech and conduct in these types of courses? This article discusses one issue of particular interest for risk managers: student speech in online discussion boards associated with a MOOC and its impact on the institution's interest in identifying and addressing campus safety concerns.

Introduction

Issues surrounding student speech and conduct pose interesting challenges for college and university administrators in the context of the traditional ivy-covered bricks and mortar of a campus setting. The increasing prevalence of "massive open online courses," or MOOCs, presents its own set of challenges and risks related to student speech and conduct. While some of these issues are the same as presented on the terrestrial campus, others are specific to the electronic world in which MOOCs exist. This article will focus on one such issue of particular interest to campus risk managers: student speech appearing on online discussion boards associated with a MOOC and its impact on the institution's interest in identifying and addressing campus safety concerns.[2] These postings could include threats directed at a member of the school community, including other students enrolled in the MOOC, or could be more in the nature of statements indicating the student's intent to do harm to himself.

A threshold question important for an analysis of the university's duties toward MOOC participants is whether the relationship between the individual and the university is that of student/university or whether it is something else.

I. What Is a MOOC?

Generally speaking, a MOOC is an online course with very large scale enrollment, often in the tens of thousands. The courses are typically free and not offered for credit. That said, a number of colleges and universities have started offering fee based courses which, while not offering college credit, do offer certificates evidencing the student's completion of the course. It would appear likely that as MOOCs continue to develop and the business model of the companies providing the platform for the courses evolves, it will become more common for students to obtain credit through their enrollment in a MOOC. At present, three of the more prominent MOOC providers are Coursera, edX, and Udacity, each of which offers online courses from various college and university partners. In addition to providing the course content for the MOOCs available through those providers, certain institutions of higher education also own an equity stake in the MOOC providers.[3]

II. Are MOOC Participants "Students"?

A threshold question important for an analysis of the university's duties toward MOOC participants is whether the relationship between the individual participating in a MOOC and the university offering that MOOC is that of student/university or whether it is something else. This is an interesting question and one that is not easily answered, particularly given the various and evolving forms of MOOCs and the different policies of the MOOC providers. For instance, under the heading "Disclaimer of Student-University Relationship," Coursera's Terms of Use call for the participant to agree that a university/student relationship is not created by virtue of the individual's participation in any of its courses

and that the individual's enrollment in the MOOC does not enroll him in the university offering the MOOC.[4] edX's Terms of Service state that "when you take a course through edX, you will not be an applicant for admission to, or enrolled in, any degree program of the institution as a result of registering for or completing a course through edX" and further provides that the course participant will not be eligible for student privileges or benefits provided to students enrolled in the degree program of the university offering the course.[5] Udacity, by contrast, has no similar provisions in its Terms of Use.[6]

While a court examining the issue would no doubt find the language of the provider's Terms of Service relevant to the issue of whether the MOOC participant is considered a student to which the university owes certain duties, that language may not be dispositive of the issue, and the court could still look beyond those terms to consider the actual features of the relationship between the participant and the university offering the MOOC. Here, too, there is variation. At one end of the spectrum is a MOOC for which the individual pays a fee, in return for which he receives a certificate of completion or perhaps actual college credit. In that context, it is quite possible that a court would consider that person to be a student to whom the university owes certain duties. As we move down the spectrum towards free MOOCs, open to anyone with a computer, the participant's status vis-a-vis the university is less clear. Indeed, one can imagine someone registering for a MOOC only to watch a lecture or two on a topic of interest to them, which might comprise a fraction of the MOOC curriculum as a whole, and never returning to the site. Such a casual viewer's connection to the university is particularly attenuated and would seem more akin to someone who views a video on YouTube than a student.[7] The duties, if any, that a university might owe to this person if it became aware of a threat posted in a MOOC online discussion are not clear, but it is less likely that the university will owe the person at this end of the spectrum the same duties that a university might owe to its traditional students or even that it might owe to a person participating in a fee-based MOOC.

The balance of this article will focus on the liability analysis a court is likely to apply assuming the MOOC participant is, in fact, deemed to be in a student/university relationship with the institution offering the MOOC.[8]

III. The Institution's Potential Liability for Harm to Its Students: A Primer

Before turning to the unique issues raised in the MOOC context, a brief review of the university's duties and risk exposure in the context of a traditional campus may be useful.[9] In short, courts imposing liability on the college for injuries suffered by its students typically have done so either by finding a "special relationship" between the college and its student or based on the college's independent duty, as landowner, to make its premises safe for invitees. These cases relate to "negligence by omission," where the college or university is alleged to have caused the injury by virtue of its failure to take some affirmative action to protect the injured student.[10]

A. The Restatement (Second) of Torts (1965)[11]

While the general rule traditionally has been that there is no special relationship between an institution of higher education and its students sufficient to trigger a duty to protect those students, there are exceptions to this general rule. A number of sections of the Restatement (Second) are relevant to this issue and provide the general parameters of the scope of a university's duty to act to protect one of its students from harming herself or to protect a student from harm caused by a third party.[12] Specifically, § 314A spells out a number of special relationships where an actor has a duty to take "reasonable action" to protect another from the "unreasonable risk of physical harm." Although that list of relationships does not include the school/student relationship, comment b to that Restatement section indicates that the list is not meant to be exclusive.

Restatement (Second) § 315 also has potential application in the college and university setting, providing that there is no duty to control a third person to prevent him from causing harm to another unless there is either a "special relation [that] exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct" or where a "special relation exists between the actor and the other which gives to the other a right to protection." Finally, Restatement (Second) § 323 provides that one who undertakes to render services to another "which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertak-

ing" if such failure either "increases the risk of such harm" or because the "harm is suffered because of the other's reliance upon the undertaking."

B. The Restatement (Third) of Torts (2011)

In 2011, the ALI released its Restatement (Third). Unlike its predecessor, the current Restatement (at § 40(b)(5)) includes the relationship between a school and its students in the listing of special relationships giving rise to a duty of reasonable care. As made clear by comment l to that section, however, "[t]he relationship between a school and its students parallels aspects of several other special relationships – it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents. . . . As with other duties imposed by this Section, it is only applicable to risks that occur while the student is at school or otherwise engaged in school activities. And because of the wide range of students to which it is applicable, what constitutes reasonable care is contextual – the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for college students." This explanation is of particular interest in predicting how the courts might view the relationship between a university that offers a MOOC and the students enrolled in that course and will be revisited below.

Restatement (Third) contains other sections that are analogous to the sections of Restatement (Second) described above. For example, § 37 explains that it is still the general rule that an "actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other" unless one of the affirmative duties imposed by one of the other sections enumerated in the Restatement applies, while § 42 is similar to § 323 of the Restatement (Second) that it replaces.

C. A Brief Overview of Case Law

Consistent with the general rule as set forth in both Restatements, before imposing on a college or university a duty of care with respect to the protection of its students, courts often analyze the issue by considering whether there was a special relationship between the parties sufficient to justify a duty of care. In many cases, courts have refused to find such a relationship. In many others, however, courts have determined that such a relationship exists. The inquiry is typically a very fact-specific one, and a review of the following cases should help to illustrate on which factors courts focus.

Two factors courts have considered is the degree to which there is a "mutual dependence" between the student and the college and the degree to which the college exercises control over the student.

Two factors courts have considered is the degree to which there is a "mutual dependence" between the student and the college and the degree to which the college exercises control over the student. For instance, where a University of North Carolina (UNC) junior varsity cheerleader was injured while performing at a women's basketball game, UNC was found to have a special relationship with the cheerleader sufficient to impose liability on the university.[13] Important for the court's analysis in that case was the fact that there was a mutual dependence between the student and the university, with UNC depending on the cheerleading program for a number of benefits and the participants also benefitting from the relationship, including university-provided uniforms and transportation and the ability to use their membership on the squad to satisfy one hour of their physical education requirement. Also important for the court was the degree of control that UNC exercised over the program. Noting that the cheerleaders had to maintain a minimum grade point average and abide by certain standards of conduct, the court noted that where a college exercises significant control over a student, the students not only have a higher expectation regarding the protections they will receive from the school but also that any concerns regarding a stifling of student autonomy by finding the existence of a special relationship between the parties are less compelling. Nevertheless and notwithstanding the finding that there

was a special relationship in that case, the court was careful to note that a university "should not generally be an insurer of its students' safety, and that, therefore, the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care."[14]

A third factor courts have also considered is the degree to which the university had knowledge of the student's participation in a dangerous activity. For example, where a student pledging a fraternity was injured while being subjected to hazing, the court found that a special relationship sufficient to impose a duty of care on the university existed.[15] After emphasizing that there is no generalized duty requiring the university to control its students based merely on the university/student relationship, "where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control."[16] In that case, the court also found liability based on the university's status as landowner and the injured student's status as invitee.[17]

A fourth factor on which courts have focused in finding a special relationship is the "community consensus." In a case involving campus sexual assault, the court found that even though "changes in college life" reflected a "general decline of the theory that a college stands *in loco parentis* to its students," the court nevertheless found that the school had a duty to protect its students from the criminal acts of third parties. The court noted this duty was "firmly embedded in a community consensus" that colleges and universities "customarily exercise care to protect the well-being of their resident students."[18] The court identified this consensus by relying on expert testimony that 18 other colleges in the area all took steps to provide adequate security on their campuses. Noting the school had undertaken a duty to protect its students from criminal conduct, the court also found that the university owed a duty of care to the student based on the principle that a "duty voluntarily assumed must be performed with due care."[19]

Perhaps the most important factor courts consider in determining whether a special relationship exists sufficient to impose a duty on the university is whether the harm was foreseeable. For instance, a college has been held liable for the suicide of one of its students where the college had knowledge of the student's prior threat of suicide as contained in a note to his girlfriend and was on notice of bruises to the student's head that he indicated he had inflicted on himself.[20] In so holding, the court recognized that there can be no claim for negligence unless there is breach of a duty recognized by law. Citing to §314A of the Restatement (Second), the court noted that a duty to assist or protect another person only arises where there is a special relationship between the parties. While recognizing that the Restatement listed a number of "special relationships" sufficient to give rise to tort liability, it did not include the relationship between a college and its students. The court also recognized that, as made clear by the commentary to that Restatement section, the list was not intended to be exhaustive.[21] The court went on to explain that under the facts of that case, where the student was a dormitory resident, where he had previously threatened to kill himself, where he had been observed by campus police with bruising on his head that he admitted he had inflicted on himself, where the college had notice of the student's anger management and emotional issues, having previously required him to receive counseling for same before being allowed to return to school, the suicide was sufficiently foreseeable that the college had a special relationship with the student sufficient to give rise to a duty to protect him from hurting himself.[22] In so holding, the court rejected the college's argument that the duty to prevent the suicide of another is limited to cases involving psychiatrists and their patients or jailors and prisoners.[23]

Perhaps the most important factor courts consider in determining whether a special relationship exists sufficient to impose a duty on the university is whether the harm was foreseeable.

However, not every court has found that the university had a special relationship with a student that committed suicide. For instance, the Iowa Supreme Court refused to impose liability on the University of Iowa for the dormitory room suicide of one of its students, even where university administrators had notice of the student's previous

threats to harm himself and were aware that he had moved his moped into his room so that he could use it as the instrumentality of his death.[24] Interestingly, the court did not employ a foreseeability analysis, but instead focused on Restatement (Second) § 323 and its duty not to negligently perform once the actor has undertaken to act. Specifically, the court rejected the argument that by adopting a policy of notifying the families of students who have engaged in self-destructive behavior, the university took on a duty, and that it negligently performed that duty when it failed to notify the student's parents of his psychological issues. In so doing, the court emphasized that before such a theory could impose a special relationship, a plaintiff would have to establish that the failure to complete the undertaking actually put the injured party at greater risk than he would have been had the university never taken on the undertaking initially. Since no such showing could be made, the court found for the university. "[T]he record before us reveals that the university's limited intervention in this case neither increased the risk that Sanjay would commit suicide nor led him to abandon other avenues of relief from his distress."[25]

In another case, the Massachusetts Superior Court refused to find a special relationship existed that would impose a duty on the university to protect its student from overdosing on heroin.[26] In so doing, the court noted that it was appropriate to balance the foreseeability of harm to the student against the burden imposed by taking the steps necessary to protect that student from harm. The court found that the student's use of heroin was not reasonably foreseeable and further noted that it had "grave reservations about the capacity of any university to undertake measures to guard against the risk of a death or serious injury due to the voluntary consumption of drugs."[27] Not only did the court believe that it was "not possible for the most vigilant university to police all drug use and protect every student from the tragic consequences" of illegal drug use, but the court also emphasized that if it were to find a special relationship existed giving rise to a duty to protect the student from harm, it would "conflict with the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students."[28]

Reading all of these cases together, several general principles emerge. While courts have been willing to find that a special relationship between student and college exists in certain circumstances, such a finding is not a certainty, and there is no generalized special relationship between universities and their students for all purposes. The instance where the courts are most likely to find that a special relationship exists is where the threatened harm is foreseeable or the conduct is particularly dangerous. Even where the harm is foreseeable, however, the court may still look to balance that foreseeability against the burdens associated with protecting the student from such harm.

While courts have been willing to find that a special relationship between student and college exists in certain circumstances, such a finding is not a certainty, and there is no generalized special relationship for all purposes.

IV. What Does All This Mean for MOOCs?

Mindful of the general overview of the duties imposed on brick and mortar colleges and universities, we turn now to MOOCs and the extent to which those duties have application in this rapidly growing part of the higher education landscape. In other words, what exposure does the college or university offering a MOOC have for a student who threatens himself or others in the online message boards? Should the school monitor those online discussions? Is the school offering the MOOC required to do anything to protect its students from harm, either self-inflicted or caused by a third party?

While the situation could arise under any number of factual scenarios, this article will focus on the two that would seem to be the most likely—either a MOOC student makes comments in the MOOC online discussion forum indicating that she intends to do harm to herself, or a MOOC student posts some sort of threat to a fellow student. In either situation, what duties, if any, does the school offering the MOOC have?

Given the novel nature of MOOCs, the courts have not yet been asked to consider these questions. If they did, however, and assuming the MOOC participant is considered a student, it is likely the court would use as an analytical starting point the principles articulated in the Restatement and the established jurisprudence applicable to colleges generally. There are clear differences between MOOCs and traditional university courses, however, the most obvious of which is that, unlike the situation where college students attend classes on a physical campus and reside in dormitories owned by the college, students enrolled in MOOCs attend classes by logging in from their own homes or offices that may literally be anywhere in the world. This distinction would seem to render inapplicable any duty that a college might otherwise have as landowner to make its campus safe for invitees. As is clear from the above discussion, however, the college has other duties towards its students beyond those imposed on it by virtue of its status as property owner.

Putting aside that physical difference in the learning environment, the relevant question for a court faced with the issue is whether there was a special relationship between the MOOC student and the school sufficient to impose a duty of care on the institution. As previously noted, given the fact-specific nature of this inquiry, it is difficult to predict the outcome with any degree of certainty. That said, certain factors will be relevant in guiding the discussion.

For one, to what degree did the institution exercise any control over the student?[29] Unlike a more typical university/student relationship, where the student is enrolled in classes for which they pay tuition and receive credit and which they attend in university buildings, while also perhaps living in university housing, the university's relationship with its MOOC students is very different. They typically pay no tuition and receive no college credit for the coursework. Moreover, because the courses are available online, the MOOC students can access them at any time on their own schedule. Accordingly, while it might not be accurate to say the college offering the MOOC has no control over the students enrolled in the course, the institution clearly has less control over the student than it does over a student enrolled in one of its traditional courses. This fact cuts against the finding of a special relationship between the college offering the MOOC and the MOOC student.

Another factor relevant to the determination of the existence of a special relationship is whether there is a mutual dependence between school and student, measured by the degree to which each receives benefits from the other.[30] For the student enrolled in the MOOC, the benefits of such enrollment are clear, as the student receives an education, on her own time, at a place that is convenient for her and at no or very low cost. Where the MOOC is offered free of charge, it may not be quite as apparent what benefit the university derives from offering the course, other than the publicity and good will generated by that offering. As alluded to earlier, however, some MOOCs charge a fee, in exchange for which the student receives a certificate of completion, if not full college credit. As this model becomes more common and perhaps even evolves into a credit for tuition arrangement, this mutual benefit analysis will also evolve, and the benefits conferred to both student and university will become more apparent. Moreover, for those universities having an ownership stake in the MOOC providers, the financial benefits to the university could be significant.

A third factor, and probably the most significant one, is the degree to which the harm in question was foreseeable by the college or university offering the MOOC.[31] For instance, where the university has actual notice of suicidal threats made by a student in a MOOC's online discussion forum or had notice of a specific threat made by one student against another student in that same forum, a court is likely to find that the later suicide of the MOOC student or harm caused by one student to the other was foreseeable to the university. In that case, the court would likely find the requisite special relationship existed and could impose liability if the institution failed to take adequate measures to assess and address that potential threat.[32] That said, given that the student posting the suicidal threat or the person being threatened by another MOOC participant could be located halfway around the world, with the university unlikely to know much at all about the student, including their living or family situations, a court could find that the burdens imposed by protecting such student outweigh the foreseeability of harm to them and thus decline to find the university has a duty to protect such students, or that the university's discharge of that duty is more easily achieved than for its students enrolled in traditional courses.

The question of whether the institution offering the

MOOC had notice of the threat, and thus whether it was foreseeable, raises the question of whether the university offering the MOOC is under any obligation to monitor the online discussion on the message boards associated with the MOOC to determine whether it contains any troubling student speech. While the professor or her teaching assistants (TA) will presumably be participating in at least some portions of the online discussion, given that MOOCs have a massive enrollment and that the online discussions emanating from these can have many threads and sub-threads, it is unlikely that the professor or her TAs will be involved in all of the discussions. Moreover, to attempt to monitor all of these discussions would itself be a very demanding undertaking.

Before deciding to monitor all MOOC electronic message boards, college risk managers should be mindful of the liability imposed for failing to adequately perform an undertaking as set forth in Restatement (Third) § 42. In short, if a university undertakes to render services to another and knows that the rendering of such services will reduce the risk of harm to another person, the university has a duty to exercise reasonable care in performing those services if failing to do so will increase the risk of harm to another person or where the person to whom the services are rendered relies on the fact that the university will exercise reasonable care in the undertaking. Given the practical challenges in monitoring the volume of postings at issue, it would be very difficult for anyone monitoring the discussions to be aware of everything that is said, and one can assume that some things would likely get missed.

While there are no easy answers, best practices suggest that the institution should err on the side of caution when it actually becomes aware of speech on a MOOC online message board that appears to be a direct threat against an identifiable person or a posting suggesting the poster's intent to do harm to himself. When faced with actual notice of such foreseeable harm, to the extent possible the university should proceed in the same way that it would in the context of a traditional campus, recognizing, of course, that it may be limited in what it can do to protect the MOOC students, over whom it has little control.

Best practices suggest that the institution should err on the side of caution when it becomes aware of speech on a MOOC online message board that appears to be a direct threat against a person or suggesting intent to do harm to oneself.

Given the burdens associated with generally monitoring all MOOC online discussions for problematic content and the liability that could attach if the school attempts this undertaking but somehow falls short of successfully identifying all threats to the safety of students communicated on those boards, risk managers should give careful consideration before instituting a policy of monitoring the MOOC discussion boards generally. If the college or university chooses not to monitor all of the MOOC online forums, it would be advisable to disclose that fact to the students enrolled in the course, similar to the way that Coursera, Udacity, and edX make similar disclosures, thus reducing the chance that a student could later claim he was relying on the school to protect him from himself or others by monitoring the MOOC discussion boards for threatening speech.

V. Conclusion

As noted above, in preparing Restatement (Third) § 40, which added the school/student relationship to the list of special relationships that can give rise to a duty of care, the American Law Institute's (ALI) commentary recognized that the relationship between a school and its student can take many forms and that the level of care an elementary school must exercise towards its students differs from the reasonable care applicable to college students. While the ALI commentary does not address MOOCs, it is probably fair to infer that the level of care owed to MOOC students is different from that owed to college students generally. Also, in noting the many hats that higher education institutions wear, as "custodian of students . . . a land possessor who opens the premises to a significant public population . . . [and one who] acts partially in the place of parents," the ALI signaled its rationale for including the school/student relationship on the list.

As the university wears none of those hats in the context of a MOOC, any argument based on the Restatement that there is a special relationship between the school offering the MOOC and its students is somewhat undermined, at least where the school had no notice of the threat at issue. However, where the institution does acquire actual notice of the threat, such that the threatened harm becomes foreseeable, the institution that chooses to do nothing does so at its peril.

MOOCs are a new and exciting entrant onto the higher education scene. While they bring great promise, they do not come without risks, at least several of which are discussed above. It will be interesting to see how MOOCs develop over time and to see whether courts treat them as analogs to traditional courses offered on campus or as different creatures altogether. Until these issues are addressed by the courts, campus risk managers would be prudent to proceed with caution, mindful of the potential exposures that threatening speech and conduct in the context of a MOOC can pose.

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Endnotes

1 The authors thank Jim Keller, their colleague in Saul Ewing's Higher Education Practice Group, for his invaluable assistance with this article.

2 The university's ability to discipline students based on such electronic postings raises its own set of issues, including, among others, potential First Amendment concerns. Those issues are beyond the scope of this article.

3 For a description of MOOCs generally, see James G. Mazoue, "The MOOC Model: Challenging Traditional Education," *EDUCAUSE Review*, January 28, 2013, http://www.educause.edu/ero/article/mooc-model-challenging-traditional-education.

4 Coursera, "Terms of Use," https://www.coursera.org/#about/terms.

5 edX, "edX Terms of Service," https://www.edx.org/tos.

6 Udacity, "Terms of Service," https://www.udacity.com/legal/tos.

7 One notable difference being that unlike the YouTube viewer, one wishing to participate in a MOOC must register for it and must provide certain personal information in order to do so.

8 While it is beyond the scope of this article, a separate issue exists regarding whether the company providing the MOOC and hosting the online discussion on its servers, whether it be Coursera, Udacity, edX, or some other provider, could have some duty to act if it learned of a threatening posting in one of the online discussions. Indeed, there have been cases seeking to impose liability on various social media sites based on claimed injury resulting from the content of the postings appearing on those sites, but the authors are not aware of any cases where the plaintiffs were successful in doing so. *See e.g.*, *Klayman v. Zuckerberg*, No. 11-874-RBW, 2012 WL 6725588 (D.D.C. 2012) (refusing to impose liability on Facebook for not timely removing postings calling for violence against Jews); *Doe v. MySpace Inc.*, 96 Cal. Rptr. 3d 148 (Cal. Ct. App. 2009) (refusing to impose liability on MySpace for sexual assaults against minors after meetings with perpetrators arranged through online MySpace exchanges). The terms of use for Coursera, Udacity, and edX all contain explicit provisions purporting to limit or disclaim their liability, along with terms prohibiting certain types of postings, including those threatening or harassing another. Moreover, each of the companies' respective sites make clear that they do not routinely monitor the content in the online discussions.

9 This issue was discussed at length in an excellent article appearing in the 2011 Edition of the *URMIA Journal*. See Jeffrey Nolan, Esq., et al. "Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now," *URMIA Journal* (2011), 105-122, (the "Campus Threat Article") which explored, among other topics, the legal duties that colleges and universities have with respect to violent incidents on campus and how risk managers can work to minimize campus risks.

10 As there are no "premises" in the electronic world of MOOCs, cases analyzing liability based on the university as landowner are of little relevance for purposes of this article.

11 As explained in the Campus Threat Article, *supra* note 9, the American Law Institute (ALI) promulgates, reviews, and periodically updates the Restatement of Torts, summarizing what it views to be the state of the common law in the United States. While the judges of every state do not necessarily adopt every section of the Restatement, it is a good resource for understanding the current common law and identifying any trends in the development of that common law. In 2011, the ALI issued the Restatement (Third) of Torts (2011) (referred to hereafter as "Restatement (Third)"). As stated therein, the ALI intended it to replace at least certain

aspects of its predecessor, the Restatement (Second) of Torts (1965) (referred to hereafter as "Restatement (Second)"). A brief summary of relevant sections of both Restatement (Second) and Restatement (Third) will help inform an understanding of the general principles governing the duties of an institution of higher learning to protect its students from harm, whether caused by themselves or a third party.

[12] While Restatement (Second) has been largely replaced by Restatement (Third), because many of the cases were decided before the Restatement (Third) was issued, and thus cite to Restatement (Second), a description of its relevant provisions is included herein. Moreover, not all courts have adopted or had occasion to adopt the Restatement (Third).

[13] *Davidson v. Univ. of N. Carolina at Chapel Hill*, 543 S.E.2d 920 (N.C. Ct. App. 2001).

[14] Ibid., 928.

[15] *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991).

[16] Ibid., 520.

[17] Ibid., 522.

[18] *Mullins v. Pine Manor College*, 449 N.E.2d 331, 335 (Mass. 1983).

[19] Ibid., 336.

[20] *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

[21] Ibid., 606-7.

[22] Ibid., 609.

[23] Ibid., 610-11. In another highly publicized case with similar facts, *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL 1869101 (Mass. Super. 2005), a court found that MIT had a special relationship with a student who committed suicide in her dorm room sufficient to impose a duty on the university to protect the student from harm. Important for the court's determination was the fact that the university administrators had notice of the student's psychological difficulties and previous threats of suicide, such that they "could reasonably foresee that [the student] would hurt herself without proper supervision." Ibid., 13.

[24] *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000).

[25] Ibid., 300.

[26] *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297 (Mass. Super. 2006). Ibid., 4.

[27] Ibid., 5.

[28] This question of control was important for the court in *Davidson*, *supra* note 13, where the court noted that when the college exercises a certain degree of control over the student, it ameliorates concerns that a finding that a special relationship between college and student exists would stifle student autonomy. Such autonomy would seem to be one of the hallmarks of a MOOC, which a student can take anywhere, at any time and at their own pace.

[29] The *Davidson* court also focused on this factor. *Davidson*, *supra* note 13.

[30] This was the key factor for the court in *Schieszler*, *supra* note 20.

[31] For a complete discussion of campus threat assessment measures on campus, *see* the Campus Threat Article, *supra* note 9.

Learned institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.

—James Madison (1751–1836),

American Statesman and Fourth President of the United States

Looking at Information Security Threats Beyond the Network:
Managing Risks in University Voicemail and Conference Calling Systems

| *Alan Brill and Jason Straight, Kroll*

Abstract: While cyber threats should be at the top of the list of concerns for higher education risk managers, there may be another related risk that is overlooked at your institution: voicemail and conference calling system risks. The mobile devices we use daily incorporate more and more of our online lives, e-mail systems, and communication technology, as well as access to other university systems and tools, than ever before. Because they are so ubiquitous, it is easy to overlook the risks they include. This article highlights some of the voicemail and conference calling risks facing colleges and universities. It also provides best practices and solutions for how everyone on your campus can work to make your communication systems more secure and safe.

Introduction

As we have hurtled through 2013, it has been impossible to ignore the growing threats to our networks and data systems posed by cyber criminals, hacktivists, nation states, and careless insiders. Indeed, there is no question that cyber threats should be near the top of the list of concerns for university risk managers. However, the intense media focus and regulatory activity surrounding cyber attacks may have caused us to overlook another source of information security risk from a familiar but unassuming source: the telephone. The phones on our desks—and in our pockets—have become more versatile over time. Depending on the system your university uses, phones can contain your phone book, provide your voicemail, forward your calls, and connect you to conference bridges. Because they are so much a part of our everyday lives, we don't think of them as sources of risk. The hard truth of the matter, however, is that they are sources of risk, and we have to look at them in a different light.

We are also familiar with the huge volume of sensitive information that may be exposed by a computer hacker. But what about the "data" sitting in your voicemail inbox?

Voicemail Risks

Virtually every one of us uses voicemail. Regardless of the brand of phone system your college or university uses, voicemail is most certainly a standard feature. It is used by your school's staff and often by dormitory residents. It can be accessed from your campus "landline" phone or, in many cases, from any phone, anywhere. Some can even be accessed from websites which can play the messages through your computer or tablet's speakers.

We usually assume that voicemail systems are simple and do what they are supposed to do. Someone leaves you a message, then you retrieve the message and listen to it. You can then either save the message or discard it. There are even other options, such as forwarding, which are available in many systems. However, for most users, the choices are to either delete or save. Using the system is easy.

But what if voicemail is not secure? What if people who should not be listening to your messages can do so without your even knowing? Due to society's awareness of cyber threats, we have all been sensitized in recent years to the risks associated with hacking attacks targeting our email inboxes and networks. We are also familiar with the huge volume of sensitive information that may be exposed by a computer hacker. But what about the "data" sitting in your voicemail inbox? Think about the harm that could result if that data were compromised.

As a risk manager, one might imagine the following scenarios:

- An unhappy ex-lover listens to her former partner's dorm room voicemail. She hears very personal messages from the person she thinks may have caused the break-up and decides to seek retribution.

- A disgruntled student anticipating a bad grade listens to a professor or teaching assistant's voicemail looking for information to use for blackmail or intimidation purposes.
- A student who is looking for ways to harass someone whose race, religion, or sexual orientation "bothers him" discovers that he can learn a lot by intercepting the target's voicemail. He might even record the messages and forward them to like-minded hate groups or simply make them public in order to harass the victim.

Voicemail interception, or "voicemail hacking" as it is often called, is very real. In Great Britain, 55 journalists were arrested between April 2011 and mid-February 2013 on criminal charges arising out of the phone hacking scandal which resulted in the shutdown of the century-old tabloid *News of the World*. The charges involved hacking the voicemail of celebrities, politicians, and even a young woman who was declared missing and later determined to be a murder victim.

Given the breadth of the British voicemail hacking scandal, it is easy to overlook that voicemail interception is not new (and certainly wasn't invented by the British press). According to published reports,[1] a reporter at the *Cincinnati Enquirer* partly based an investigative report on thousands of voicemails obtained without authorization. The newspaper eventually published a front-page formal apology, stating, "The facts now indicate that an *Enquirer* employee was involved in the theft of this information in violation of the law."[2] The newspaper also paid a multi-million dollar settlement to avoid litigation. Both the reporter and the reporter's boss were fired.

Many university voicemail systems are easy targets for hackers. While we have substantially hardened our network and data security in response to rising cyber threats, voicemail security has languished in a state of suspended animation, changing little since its introduction decades ago. First, mailbox passwords are usually short—most often only four digits. Most systems do not rule out codes that are easy to guess, like 1111, 9999, 1234, and so on, nor do they require users to change passwords periodically in the way that many computer systems do. Others have standard default passwords for new users, such as the last four digits of the phone number, while others have a standard default code. Hackers seem to know all the defaults, common codes, and other commands. For example, if you discovered that a voicemail that you have yet to listen to has been stored as a "saved message," you might wonder how it became saved if you didn't listen to it. A hacker, though, can use the "save as unheard" command, even after he or she has listened to—and perhaps even recorded—a message. When you, the authorized user, access your voicemail, it is still listed as a "new message," apparently never heard.

What is a college or university's potential liability, both economic and reputational, if voicemail is misused, in part thanks to the institution's weak or almost non-existent security common to so many systems? What if a student or faculty member is harassed? What if they are physically assaulted or worse? How well could you defend your university for not requiring strong passwords or failing to let users know how to secure and protect their voicemail accounts? Given the very prominent coverage of the journalist phone hacking scandal in the United Kingdom, can the risk manager really claim that he or she was not aware of the risk?

Our experience is that, while the level of security you can provide is often limited by the capabilities of your chosen voicemail system, it is a great investment for the risk manager to discuss ways to provide additional security with the voicemail system manager. Avoiding easy-to-guess or default passwords is a good start. Letting people know how they can change their voicemail password if they believe (or know) it has been compromised is also important. Also, if your voicemail provider is not offering adequate security features, make it clear that you will consider taking your business to a vendor that takes security more seriously. Furthermore, as a part of your voicemail security awareness program, make sure that your users understand that listening in on someone else's voicemail without their permission is not only wrong and should subject them to appropriate disciplinary action), but it is also a potentially serious crime.

The one thing you cannot afford to do is ignore the problem.

Conference Call Risks

Another phone-related service used by virtually every college and university is the dial-in call bridge. This is

a system through which multiple people can call into a designated telephone number and be connected together. Bridge lines are frequently used for both one-off and regularly scheduled virtual meetings.

Like voicemail, call bridges used to facilitate conference calls might seem innocuous to the risk manager. They are not. Higher education managers likely have regular conference calls involving a dozen or more participants during which sensitive and proprietary information is discussed. Given the turnover in call participants over time and the fact that call-in numbers and access codes are rarely changed, however, there is a substantial risk of not really knowing who is listening in on your conference calls.

On January 17, 2012, an international conference call was held between the FBI, England's Scotland Yard, and a number of other law enforcement agencies to discuss investigations that the agencies were conducting concerning Anonymous and other hacking groups. Unfortunately, one of the law enforcement officers invited to the call (but who actually didn't participate on it) forwarded the invitation from his work e-mail to his personal e-mail account, which was hacked. The invitation, of course, provided the date and time of the call, the subject, and the dial-in numbers and access codes. A hacker, who has since been identified and charged with an eavesdropping crime, dialed in at the appointed time and silently joined the call. He not only listened to the call, but also made a recording of it, which he later released on the Internet.[3]

The idea of listening in on your "opposition" is not new. In 2002, a Virginia Republican Party official was reported to have listened in and recorded a statewide conference call held for Democratic Party leaders.[4] The ensuing scandal when the eavesdropping was made public cost that official his job, as well as that of the Party's chairman and two other Republican legislative aides. The state Republican Party paid most of a $750,000 settlement of a lawsuit brought by Democratic legislators who were on the intercepted call. The Republican Party official who recorded the call also pled guilty to a felony charge.

Conference calling bridges are easy to set up and use. There are hundreds of services available, some of which can provide these calling services at no cost. Others are paid services, which can provide users with numbers and access codes that can be used on demand at any time.

Unfortunately, human nature is fallible. While the vast majority of people who leave one employer for a competitor would never think of continuing to dial into their former employer's weekly management call, there are those who would do exactly that, even though it is probably a crime in most jurisdictions.

Depending upon the circumstances, intercepted conference calls can lead to significant liability as well as reputational damage.

Depending upon the circumstances, intercepted conference calls can lead to significant liability as well as reputational damage.

Unfortunately, much like the antiquated voicemail security discussed above, many conference calling systems make it easy for the hacker to eavesdrop. Most users never change the access codes associated with their bridge numbers or even know how to do so. Calls can be made regularly over a period of years with the phone number and access code never changing. For many calls, keeping track of how many callers are on the line represents a challenge. Some systems first ask callers to record their names and then announce them to the group by playing the recorded name and saying "now joining." Other systems simply use a beep-tone when new callers join a call, while still others may provide no indication.

Fortunately, some conference calling systems do provide very useful tools for making sure only authorized users are on the call. While these tools differ by service provider, here is a short list of the more common commands that can help secure your calls:

- *Give Caller Count:* This command causes the system to tell you how many callers are on the call. If you expect 10 callers and get 12, you know there is a problem. Of course, if you expect 10 and get 10, you cannot be sure that an unauthorized person did not join the call in place of an authorized person who failed to dial in.

- *Announce Caller Name:* This can force the system to ask each caller to record their name and then play it with a "Now joining" message. If you use this method and someone does not announce himself or herself, you should assume you have a problem and terminate the call.
- *Call Lock Out:* Let us assume you expect three people including yourself. You hear two entry beeps and your two expected callers announce themselves. The Lock Out command tells the system not to allow anyone else on the call, even if they have the right access code.
- *Administrator Access:* After (and in some cases during) a call, some systems allow you to go to the call bridge operator's site and see how many people are on the call and sometimes the numbers from which they are calling, particularly if you are providing a toll-free number to the caller.
- *Change Access Code:* This command can give you a new password; this can even be used to assign a new password for every call.

One thing to remember is that on many systems there are two access codes, one for the call originator and one for the call participants. You have to be particularly careful to protect the originator code, because if it is compromised, the hacker can often change the security features on the system without your ever knowing that they have been changed—until it is too late.

Conclusion

So what is the bottom line for you as the risk manager for your college or university? Simply that your institution must recognize and manage these risks just like any other campus risk. Fortunately, there are low or no-cost steps that you can take to mitigate these risks with a little help from both technology security and risk management professionals.

About the Authors

Alan Brill, senior managing director at Kroll, is an internationally recognized expert in the field of cyber security and cyber forensics. His work in the field over more than 30 years has ranged from attacks on mainframe computers to state-sponsored attacks on corporations around the world. The author or co-author of six books and more than 100 articles, he provides assistance to organizations that have been the targets of successful penetrations and helps other organizations to avoid becoming the next victim while maintaining a commercially reasonable level of security. He is a Fellow of the American Academy of Forensic Sciences, has lectured for both the FBI and Secret Service, and recently served as the keynote speaker in the cyber terrorism course given at the NATO Center of Excellence for Defense Against Terrorism in Ankara, Turkey. He holds CISSP, CFE, and CIPP certifications.

R. Jason Straight, managing director at Kroll, provides expert guidance to attorneys, IT professionals, information security directors, compliance officers, and risk management personnel, among others, in the areas of information assurance, computer forensics, cyber investigations, and data breach response. Mr. Straight provides clients with advice on digital investigations, data privacy protection, information security best practices, and tactical incident response. He has been involved in or overseen dozens of complex engagements involving intellectual property theft, network intrusion incidents, loss of personal customer or employee data, and all manner of internal corporate investigations. Previously, Mr. Straight practiced law at Fried, Frank, Harris, Shriver & Jacobson.

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Thinking is easy, acting is difficult, and to put one's thoughts into action is the most difficult thing in the world.

—Johann Wolfgang Von Goethe (1749–1832),
German Writer, Artist, and Politician

Translating ERM from a Theoretical Perspective into Practical and Effective Actions that Impact Performance

| *Dr. Prodyot Samanta, ThirdEye RiskInsights, and Sherry Wolfe and Katherine McCabe, Investor Analytics*

Abstract: Enterprise risk management (ERM) can be a difficult process for individuals at any organization or company to get their arms around; institutions of higher education are no different. One reason for this difficulty in envisioning and implementing an ERM program is the fact that it focuses on all of an organization's component, which can vary widely. This article uses the authors' experiences in implementing ERM in the financial services sector and extrapolates lessons learned and other guidance to colleges and universities. First, it reviews common barriers to ERM implementation, followed by a number of suggestions that managers across many fields, departments, or offices can implement now to work around these barriers.

Introduction

Successful implementation of enterprise risk management (ERM) practices within an institution of higher learning, a fast moving consumer goods company, or a financial services firm can be a significant challenge. One reason for this is that, by definition, ERM involves a myriad of interrelated components ranging from articulating a clear understanding of an organization's broad strategy and risk appetite[1] to how it ties in with specific metrics, such as strategic job coverage ratios and the impact on agreed upon measures of performance. Often, ERM and "integrated risk management" tend to be used interchangeably, as it involves a bringing together in unison of the collective decision making process of an organization.

The sharing of experiences related to process change initiatives can be beneficial to all firms independent of the industry and sector in which they operate. With this perspective in mind, this article offers practical guidance based on our experiences from the financial services sector on how to circumvent some common barriers to implementing a successful ERM program, making it an effective agent of change.

ERM is a risk communication process which requires updating and maintenance. To approach ERM as a "point in time" initiative is a waste of resources.

Some Common Barriers to Implementing a Successful ERM Program

In simple terms, ERM is a risk communication process and, like any other manufacturing process, requires updating and maintenance. To approach ERM as a "point in time" initiative is a waste of resources. It is important to plan and implement an ERM strategy similar to implementing any other organizational change management program.

At the start of the implementation journey, it is very important to recognize and harness the synergies of existing risk management frameworks and process improvement methodologies, such as AS/NZS 4360, ISO 31000, Define Measure Analyze Improve Control (DMAIC), balanced scorecard, and the Committee of Sponsoring Organizations of the Treadway Commission (COSO).[2] While some of these approaches pay more attention to issues of risk and others to process improvement, they create the building blocks for developing truly integrated organizations with clear communication channels. At its core, ERM is about effectively communicating risks and opportunities within an institution and externally to its partners; it requires a cultural change with respect to how the institution identifies, measures, manages, and reports on this portfolio of threats and opportunities. As a result, the duration of an effective ERM program is always ongoing and long-dated. Effectively communicating to the workforce that ERM is not a one-time project but a "neural network" of interlinked processes (or projects) that succeeds on the collective commitment and belief of purpose of the entire institution is worth the time and effort.

Buy-in and execution play a critical role in successfully implementing ERM. Similar to what Kaplan and Norton have demonstrated with respect to implementing the balanced scorecard,[3] some common barriers to implementing an ERM program are:

Awareness Barrier: Not Understanding the Broad Vision of the Institution

It is important for all employees to understand the vision and direction of the institution. Awareness builds understanding, which leads to action, resulting in execution. Institutions where ERM has gained traction have been those where senior decision makers have taken the time and devoted resources to ensuring that employees have an awareness and understanding of the organization's key objectives. ISO 31000 defines risk as the effect of uncertainty on objectives, hence the need to ensure that a majority of the workforce has a clear understanding of what the institution is looking to accomplish. If, for example, the objective is to publicize a new state of the art neuroscience program, then a lack of understanding by employees within the admissions office can impact potential applications and, ultimately, performance or return on investment of this initiative.

Linking incentives to short-term targets builds focus and to long-term objectives ensures commitment.

What's in it for Me? Clear Incentives and How They Link to an Employee's Daily Activities

In the financial world, the linking of incentives and executive compensation to short-term objectives has shown to negatively impact performance—sometimes severely and with widespread repercussions—as recently evidenced by the financial crisis. Misaligned incentives are all too common within organizations. Individuals need to know how their daily work and actions are linked to accomplishing the institution's objectives in both the short and long term. Incentivizing one more than the other is not necessarily an optimal strategy. Linking incentives to short-term targets builds focus and to long-term objectives ensures commitment.

Management Barrier: Dedicating Time to the Program

Mentoring the team and spending time reiterating goals and objectives by senior management significantly helps with achieving ERM milestones. In a number of instances, we have found employee saying that senior management is "too busy with other meetings" and not committed to the "seeing this through." Once senior decision makers clearly understand what the board of trustees expect of them and how implementing ERM benefits the institution and them individually, they will be in a position to provide the time and guidance to their departments and teams.

Resource Barrier: Failing to Link the Program to the Institution's Planning and Budgeting Process

Any strategy, unless linked to the budgeting and resourcing process of the organization, is doomed to be unsuccessful. Since ERM articulates the impact of uncertainty on an institution's objectives and department and unit level initiatives drive the accomplishment of those objectives, the allocation of resources to support these initiatives are critical to the success of embedding ERM. Within large financial services firms, chief risk officers (CRO) are increasingly playing a critical role in the strategic planning and budgeting process, alongside the chief financial officers (CFO).

Overcoming Common ERM Barriers

So how does an institution overcome these commonly observed hurdles to successfully implementing ERM and positively impact performance?

Adopt a Definition of ERM that "Resonates" with Your Institution

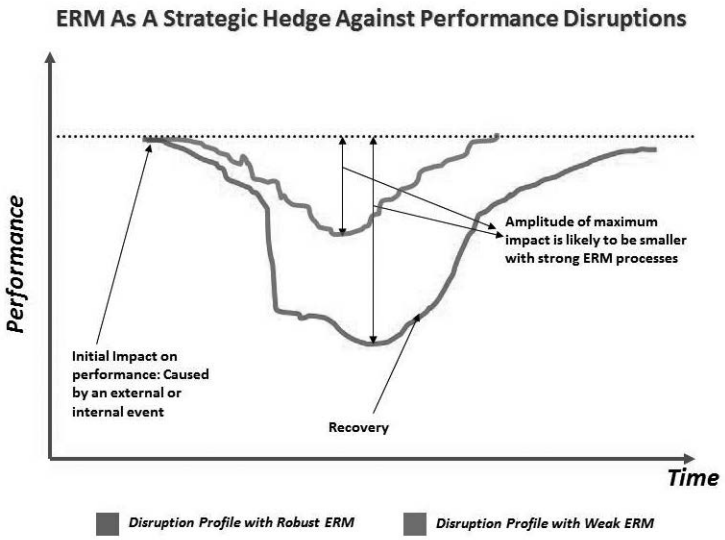
While the fundamental principles of ERM are similar across industries, the actual formalization and implementation of the process would differ depending upon the size, nature, and idiosyncratic features of the institution. To ensure that ERM becomes a tractable process, adopt a definition of ERM that resonates with your institution. A

definition of ERM regardless of industry or sector that we have used is as follows: ERM is the discipline and art of listening, learning, and responding proactively to all types of threats and opportunities, internal and external, that face an organization, so as to create mutually beneficial and lasting relationships with its existing and potential partners.

We avoid using the term "risk" in the definition because it is inherent in both threats and opportunities. The impact of this uncertainty on an institution's reputation and performance can stem from mismanaged endowment funds owing to a lack of market knowledge and/or inadequate analytical tools to mentally unstable individuals. We prefer using the term "partners" instead of stakeholders, clients, or customers, so as to engender a sense of ongoing and long-term commitment to the process, as well as the ability to seek their guidance and advise when things go wrong. Embedding ERM does not preclude an event impacting an institution, but it clearly lessens the damage and time to recover.

Other ways to envision ERM are as follows:

- ERM is a *communication tool* based off an integrated risk-embedded information framework for steering the board of trustees and senior management discussions and business decisions.
- ERM is *not only* about efficient models of financial risk management but also about overall infrastructure, people, systems, and processes. Financial measures of risk will always be important, but they need to be supplemented by non-financial perspectives (and measures) that will identify the topology of threats and opportunities.
- ERM is an *ongoing and long-term process* that flows through an institution embodying its risk culture. It is a core component of the strategic decision making processes, presenting a portfolio view of the risks and opportunities facing the organization. Robust ERM processes act as a strategic hedge against disruptions to reputation and performance of an organization (see Figure 1).[4]



Source: ThirdEye RiskInsights

FIGURE 1: ERM as a Strategic Hedge Against Performance Disruptions

It should be noted that it is nontrivial to evaluate the quality of an ERM program in the short term. From a cost perspective, expenditures on ERM will be considered a period expense, and so a cut back on certain dimensions of such an initiative is an easy way for an entity to enhance its short-term earnings. Long-term consequences of a weak ERM function may not surface in the short run or at the peak of a business cycle. However, when the tide of economic conditions worsens, weak risk management practices will come to the forefront.

ERM for a University Community

The Higher Education Funding Council of England (HEFCE) defines risk management as:

> A process which provides assurance that: objectives are more likely to be achieved; damaging things will not happen or are less likely to happen; and beneficial things will be or are more likely to be achieved.

Communication is not just about transparency. It is also about education, guidance, and steering things in the right direction. ERM for a university community is a communication framework and a knowledge management process that enables:

1. The creation of a safe and progressive multicultural environment that is intellectually rich and

well-endowed to foster the growth and sharing of new ideas through the dissemination of knowledge and interdisciplinary research for the greater benefit of the community and the world at large.

2. The identification of events that present risks and opportunities to the brand and reputation of the institution, and the evaluation of the severity and likelihood of those events.
3. The identification and mapping of ownership and controls against those risks.
4. Establishing acceptable risk thresholds for the various departments, facilities, student-bodies, faculty, and communities.
5. The evaluation of appropriate risk responses and treatments to mitigate, transfer, or assume the risks.
6. Identification of meaningful risk metrics and key risk indicators (KRI) that enable proactive decision making for the institution and community.

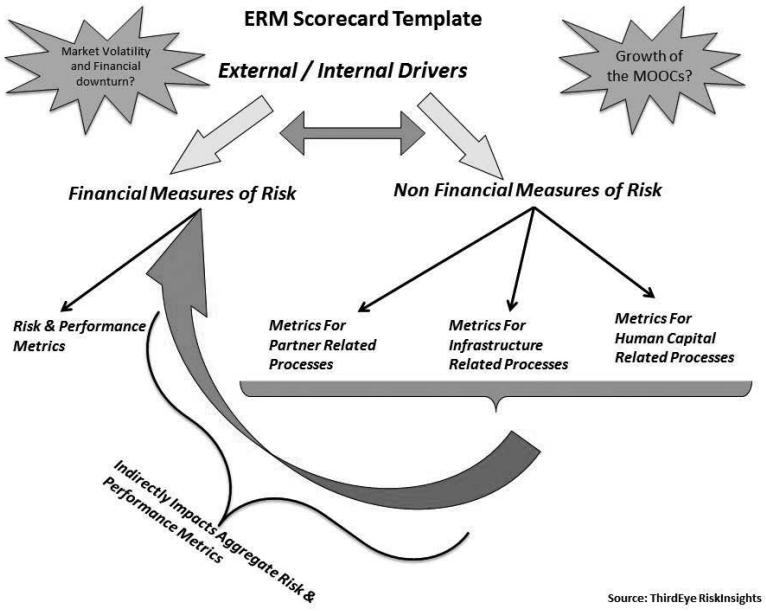


FIGURE 2: ERM Scorecard Template

Design and Communicate the End Product of the Implementation Process First

Start with the end product in mind as it helps build focus and commitment. The ultimate goal of an ERM program is to facilitate the communication of threats and opportunities that an organization is exposed to, along with possible courses of action if necessary and their potential impacts. This broad goal applies to educational institutions, as well. Initiate the process with an ERM strategy workshop where the end product and its benefits form the focal point of the discussions. This sets the tone and establishes a common voice and set of parameters for guiding the process.

A few years ago, risk dashboards and heat maps were used to drive this process. While these tools are still in use, they do not necessarily capture the essence of ERM. In the financial services world, when considering market risk exposures, an institution benefits from the use of a risk dashboard or a heat map, as it could indicate the effect of market volatility on the portfolio and/or its components. On the other hand, an ERM scorecard, similar to a balanced scorecard,[5] has a broader connotation as it incorporates several self-assessment components, such as the dean of admission's view on why applications for a specific school are on the decline, that do not readily lend themselves to any specific formulaic structure. ERM scorecards also embody analysis stemming from the use of surveys and questionnaires, not typical of dashboards.

An ERM scorecard, as depicted by the template in Figure 2,[6] is very helpful in assisting an organization's leadership with designing its end product and communicating the ERM initiative throughout the organization.

Clearly, the content of such a template will evolve over time as awareness and understanding of the initiative takes hold. Start by using the template to build awareness and understanding through education and communicating the plan across all units and departments of the institution about the importance of ERM, its benefits, why the university has decided to pursue its implementation now, and what it would entail, including roles and responsibilities of all members, commitment, time lines, and long-term sustainability. Often times you will find business units and departments arguing that their current silo-based risk management practices are robust and similar to an ERM process and, therefore, they don't need to participate in the corporate initiative. During this phase, provide a perspective on how this approach to risk management differs from the current view of risk management.

Ask the group about their views on the exponential growth of massive online open courses (MOOC) and how

that might impact the very existence of brick and motor universities. Which group/department is likely to be impacted? Should we embrace the concept? Or do we try and circumvent it? Whose responsibility is it to understand the impact and strategize on ways to address the issue? Or was the impact of the financial crisis and lack of consumer confidence on the enrollment profile of the university fully understood along with its knock-on effects? These are real issues affecting all personnel from the board of trustees to the security guard. Using the template to show the pervasive and interlinked nature of such a complex event will drive the importance of patience in embedding an ERM culture: building processes that enable collaborative identification, assessment, and treatment of threats and opportunities.

Use a needs assessment questionnaire to highlight the varying degrees of understanding of risk management within the department or unit itself. This is usually revealing for the group and works as an effective tool in building awareness and communicating the organization's desire to implement ERM, as well as providing reason enough to leverage the collective risk intelligence of the units and to add new processes as needed.

The other components consist of detailed maps, questionnaires, and templates of interviews, surveys, and gap assessments for all units and departments along key risk dimensions, such as governance, measurement, and communication. These include several sub-areas related to assessing and identifying risks; collecting data; constructing appropriate metrics; ensuring the linkages and integration with key business planning processes and physical assets; developing reports, scorecards, and risk dashboards; and then embedding, monitoring, and establishing milestones for the ongoing development of the process.

The value of the analytic processes to measure and monitor risk is really quite simple: you can't manage what you can't measure. This is particularly critical when looking at the institution's endowment, pension, charitable gift, and working capital assets.

Communicate the Value of Analytic Processes that Capture and Monitor Financial Risks of the Institution

Another approach to drive focus and commitment in implementing ERM is to build the process around financial measures of risk and performance. For example, a mid-sized bank had embarked upon an ERM program but was not successful at gaining traction and commitment. After a few brainstorming sessions, they decided to focus the team's efforts on understanding and identifying the more pressing risks first, which were primarily establishing market risk practices and measures for trading operations. This helped the process immensely as they experienced tangible successes that drove the impetus to incorporate the more nebulous aspects of ERM. It never hurts to communicate and emphasize the value of analytical tools and metrics during the initial stages of the journey.

Every organization needs to measure and monitor financial risk in order to manage financial risk. Therefore, the value of the analytic processes to measure and monitor risk is really quite simple: you can't manage what you can't measure. This is particularly critical when looking at the institution's endowment, pension, charitable gift, and working capital assets. A deep understanding of the risk in both the institution's varied investment portfolios, as well as across the overall asset pool, is critical to making better investment decisions and managing the financial risks facing the institution. When this is done well, it has an empowering effect, and the institution can justify allocating a portion of the returns to fund other components of the ERM program.

To gain this understanding, develop a financial risk management framework and governance process that provides stakeholders with analytic measures, guideline limits, and defined responses to changes in key risk indicators so individuals can proactively act to safeguard the institution's assets against financial stresses. Communicate how

this framework empowers and protects the institution by providing warnings when risk parameters are approaching limits or signaling sensitivity to market downturns. For example, as in Figure 3, institutions that saw their correlated risk (simulating when correlations go to one) approach limits as the 2008 crisis was building could proactively reallocate to decrease the risk in their portfolios and, therefore, protect against major losses.[7]

Key risk indicators include absolute risk measures, such as net and gross exposure across asset allocations, value at risk, and expected shortfall; risk attribution analytics, such as marginal, incremental, correlated, and component value at risk; relative risk analytics, such as betas, tracking error, correlations, and benchmark risk; and historic scenario and stress testing results. Trend analysis and guideline limits on these key risk indicators give the institution insight into changing market conditions and empower stakeholders to act to protect the institution's assets.

When all is said and done, however, what these analytics enable the institution to do is to proactively ask and act on questions and their answers as part of its risk management framework. Such questions include:

- What are exposures and points of leverage by asset class, and are they in line with policy asset allocations?
- How are the portfolio and its underlying strategies and managers tracking benchmark(s)?
- What are the greatest contributors to risk in the portfolio?
- What are the most volatile positions, exposures, sectors, regions, or asset classes?
- How correlated (or uncorrelated) are the strategies, and which strategies are providing diversification benefits?
- How would the current holdings have fared during a previous market regime?
- How would the risk in the portfolio change if the domestic equity markets went up by 5 percent while international fixed income went down by 1.5 percent?
- What would the risk in the portfolio look like if correlations all go to one or zero, and is the trend consistent with the institution's risk tolerance?
- To which markets is the portfolio most sensitive, and are there unintended correlations that are of concern?
- What has the risk profile looked like over time, and where is the portfolio positioned versus policy limits?
- If the institution had to buy-down the risk in the portfolio, can this be accomplished most effectively by increasing or decreasing the allocation to managers or strategies?

Once armed with a comprehensive risk governance process and the answers to these types of questions, better decisions and outcomes ensue. That is the real value to communicate through the institution.

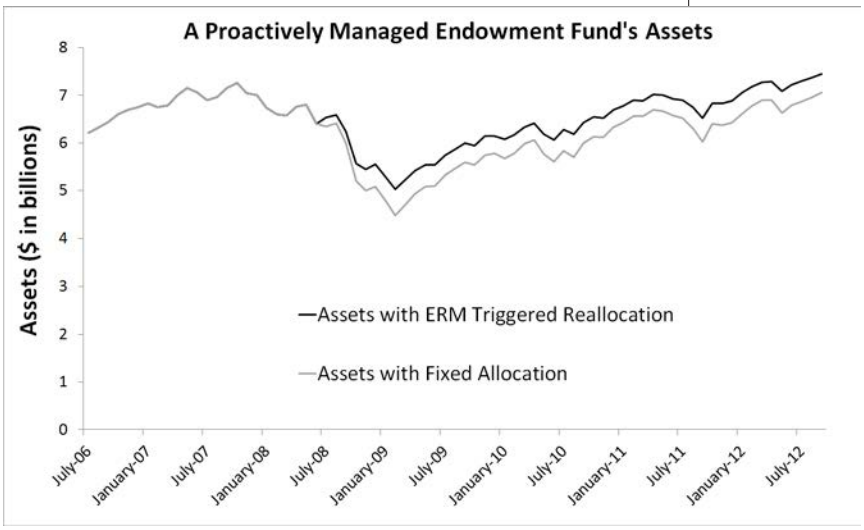


FIGURE 3: Comparing Endowment Funds with Different Management Approaches

Link Financial and Non-Financial Measures of Risk with Performance Metrics of the Institution to Activate the ERM Scorecard

The psychologist B. F. Skinner found that he could motivate (or reward) a rat to complete the boring task of negotiating a maze by providing the right incentive: corn at the end of the maze. Each time the rat took a wrong turn, it was punished with an electric shock.

Insights from the works of experimental psychologists on change management plays an important role in implementing ERM as a proactive, collegial, and performance

enhancing process for the organization. According to the consulting firm McKinsey and Company, employees will only alter their attitudes toward change if they can see why the change is occurring and agree with it – at least enough to try it on for size. Additionally, "The surrounding structures (reward and recognition systems, for example) must be in tune with the new behavior. Employees must have the skills to do what it requires. Finally, they must see people they respect modeling it actively. Each of these conditions is realized independently; together they add up to a way of changing the behavior of people in organizations by changing attitudes about what can and should happen at work."[8]

Boards and senior management have a fiduciary duty to proactively incentivize and strengthen the risk management culture within their organizations. Left solely to the dynamics of the free market process, the punishment for not strengthening this culture of risk management could be fatal, as recently experienced by the "electric shock" of a financial crisis.

To ensure that an organization's leadership and individuals effectively embed the tools of an ERM program in their daily activities and decision making culture, the following supporting structures need to be established:

1. *Motivating a common belief and purpose among all employees.* This involves each of them understanding his or her role and the benefits individually and collectively to the larger group, organization, and community. This needs to come from the key decision makers and leadership of the organization.
2. *Linking ERM objectives and milestones to performance evaluations criteria of all involved, and establishing a varying incentive mechanism.* Incentives should be aligned with the degree of importance of the objectives and may change over time as the process gets embedded in the culture of the organization.
3. *Training individuals to adapt ERM tools to their individual situations.* This is not a one-time training session but an ongoing process that needs to dovetail individual goals and aspirations with those of the organization.
4. *Establishing ERM champions or role models.* Here, key managers or decision makers of business units and departments play a critical role in the success of the program. Not everyone is born a leader or has the necessary skills of emotional intelligence to lead the charge. As John F. Kennedy once said, "Leadership and learning are indispensable to each other,"[9] and so some of these champions may need to be taught the skills to be role models if the program is to be effective.

Conclusion

There is growing consensus that the traditional approach to risk management is fragmented, myopic, and narrowly viewed, primarily as a control and reporting function, with minimum or inconsequential participation in the strategic decision making processes of an organization. What is needed is an enterprise view of the risks facing an institution and their interrelationships and potential impacts on performance. While this may seem appealing and logical, implementing a robust and effective ERM process can be challenging. However, with planning, focus, and commitment on the part of the chief executive and the cadre of senior and mid level managers, it can be translated into an effective process that positively impacts an institution's performance.

About the Authors

Dr. Prodyot Samanta is the president of ThirdEye RiskInsights, a boutique enterprise risk management (ERM) think tank and diagnostics firm, based in Westchester, New York. Dr. Samanta engages with organizations to provide them with risk management services that include a diagnostic testing of their ERM processes with a gap analysis, design and implementation of a customized ERM framework, and risk management training/workshops. He has conducted ERM assessments of several institutions, including banks, hedge funds, asset managers, and energy trading firms across North America, Europe, Asia-Pacific, and Latin America. He provides thought leadership on ERM through research and publications and teaches ERM and strategy for executive MBA programs in the United States and Asia.

Previously, Dr. Samanta has held positions with S&P as a director for ERM, and at Algorithmics (now IBM) as head of financial engineering for North America, where he implemented ERM solutions. Dr. Samanta was honored by *Treasury and Risk Management* magazine as "one of the 100 most influential individuals in finance." Dr. Samanta holds a PhD, with specialization in financial econometrics, from Fordham University.

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Endnotes

1. Broadly speaking, risk appetite is an aggregate monetary amount that an organization is prepared to lose while continuing to do business (over its planning cycle) in the eventuality of an event affecting its performance. We have observed that senior decision makers attempting to reach a consensus on this amount can often lead to a stalemate and stall the implementation process. Hence, designing and communicating the end product of the implementation process first is important, as outlined later in the article.
2. The ISO 31000:200, *Risk Management: Principles and Guidelines*, can be obtained from http://www.iso.org/iso/home/standards/iso31000.htm. This framework has its roots in the Australia/New Zealand AS/NZS 4360 guidelines of 1998. The approach adopted by ISO 31000 is in our view a tangible approach to implementing enterprise wide risk management practices. ISO 31000 uses the term "risk indicators" instead of "risk appetite" as it is an easier concept to grasp. DMAIC is the acronym for the six-sigma process: Define, Measure, Analyze, Integrate, and Control. The balanced scorecard is the strategic management system designed by Kaplan and Norton.
3. Balanced Scorecard Institute, "Balanced Scorecard Basics," https://www.balancedscorecard.org/BSCResources/AbouttheBalancedScorecard/tabid/55/Default.aspx.
4. Prodyot Samanta, "ERM: A Strategic Hedge Against Performance Disruptions," *Journal of Risk Management for Financial Institutions*, 2 n. 3 (April-June 2009).
5. Robert S. Kaplan and David P. Norton, "Using the Balanced Scorecard as a Strategic Management System," *Harvard Business Review* (January-February 1996).
6. ThirdEye RiskInsights, New York.
7. Investor Analytics, New York.
8. Emily Lawson and Colin Price, "The Psychology of Change Management," *McKinsey Quarterly*, June 2003, http://www.mckinsey.com/insights/organization/the_psychology_of_change_management.
9. Gayle A. Brazeau, "Leadership and Learning," *American Journal of Pharmaceutical Education*, 72 n. 3 (2008).

To map out a course of action and

follow it to an end requires courage.

—Ralph Waldo Emerson (1803–1882),

American Essayist, Lecturer, and Poet

In order to lead a country or a company, you've got to get everybody on the same page and you've got to be able to have a vision of where you're going. America can't have a vision of health care for everybody, green economy, regulations - can't have a bunch of piece-meal activities. It's got to have a vision.

—Jack Welch (1935–),

American Business Executive and Past CEO of General Electric

Does Your Insurance Policy Protect Against Liability Under the New HIPAA Regulations?

| *Jerold Oshinsky, Linda D. Kornfeld, and Kirsten C. Jackson, Kasowitz Benson*

Abstract: On March 26, 2013, the Omnibus Rule went into effect, including important changes to the Health Insurance Portability and Accountability Act's (HIPAA) Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health (HITECH) Act and the Genetic Information Nondiscrimination Act (GINA). These changes may result in increased liability for university hospitals, also impacting other university-owned health care providers and their business partners. This article highlights these changes and offers ways for colleges and universities to ensure they are meeting their HIPAA requirements and the new requirements under the Omnibus Rule.

Introduction

On January 17, 2013, the US Department of Health and Human Services announced important modifications to the Health Insurance Portability and Accountability Act's (HIPAA) Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health (HITECH) Act and the Genetic Information Nondiscrimination Act (GINA).[1] These changes are known as the Omnibus Rule. The Omnibus Rule went into effect on March 26, 2013, and covered entities must comply with the requirements of the Omnibus Rule by September 23, 2013.[2] These new requirements may result in increased potential liability by university hospitals and other university-owned health care providers, not only for their own alleged HIPAA violations but also for violations of HIPAA by business partners. This article highlights the key changes to HIPAA that may affect universities, as well as explains the ways in which universities may protect against possible increased risk exposure.

The Omnibus Rule added a number of important new regulations as to how health care providers must treat protected health information, which go above and beyond pre-existing HIPAA regulations.

Overview of the New HIPAA Omnibus Rule

Under the new HIPAA Omnibus Rule, breach has been more broadly defined, penalties have been substantially increased, and covered entities (including university hospitals) may now be liable for violations by business associates and subcontractors. These key changes, which could increase universities' potential liability under HIPAA, are as follows:

New Regulations on the Treatment of Protected Health Information

The Omnibus Rule added a number of important new regulations as to how health care providers must treat protected health information. The new regulations limit the use and disclosure of protected health information for marketing and fundraising purposes.[3] They also prohibit the sale of protected health information without individual authorization.[4] These regulations go above and beyond pre-existing HIPAA regulations, under which health care providers were already required to comply with strict administrative safeguards and notification and documentation requirements deemed necessary to ensure the safety of protected health information.

One of the most significant developments in the Omnibus Rule is its change in the definition of what constitutes a breach. Previously, a breach required a finding that the access, use or disclosure of personal health information posed "a significant risk of financial, reputational, or other harm to an individual."[5] This harm threshold had to be met before health care providers were required to notify patients of the breach.

The Omnibus Rule replaces the "harm threshold" with a new standard.[6] Under the new regulations, a breach is presumed whenever protected health information is

acquired, accessed, used, or disclosed in a way that violates HIPAA's stringent standards. Patients must be notified unless a risk assessment demonstrates that there is a "low probability that the protected health information has been compromised."[7] This risk assessment must take into account four factors: "(1) to whom the information was impermissibly disclosed; (2) whether the information was actually accessed or viewed; (3) the potential ability of the recipient to identify the subjects of the data; and (4) in cases where the recipient is the disclosing covered entity's business associate or is another covered entity, whether the recipient took appropriate mitigating action."[8]

Any failure of university hospitals—or, as we will see, their business associates, subcontractors, and other agents—to follow the new, stricter rules regarding the treatment of protected health information may expose them to liability for HIPAA violations. Under the new Omnibus Rule these penalties have increased.

Penalties for HIPAA Violations Have Increased

Under the new Omnibus Rule, there are now four categories of violations that reflect increasing levels of culpability and four corresponding tiers of penalty amounts that increased the minimum penalty amount for each violation.[9] The maximum penalty is now $1.5 million annually for all violations of an identical provision.[10] However, as the US Department of Human Health Services warns, "a covered entity or business associate may be liable for multiple violations of multiple requirements, and a violation of each requirement may be counted separately. As such, one covered entity or business associate may be subject to multiple violations of up to a $1.5 million cap for each violation, which would result in a total penalty above $1.5 million."[11]

At the same time that the penalties for HIPAA violations have expanded, affirmative defenses for these violations have narrowed. The Omnibus Rule removes the previous affirmative defense to the imposition of penalties if the covered entity did not know and with the exercise of reasonable diligence would not have known of the violation.[12] Moreover, previously there were no penalties for violations that were corrected in a timely manner unless the violation was due to willful neglect. However, under the new Omnibus Rule, penalties may now be imposed even for violations that are timely corrected.[13]

Due to the increases in fines and penalties, now more than ever, violations of HIPAA's regulations could result in potential liability for university hospitals and other university-owned health care providers.

Business Associates and Subcontractors Are Directly Liable for HIPAA Violations

The new Omnibus Rule not only affects health care providers like university hospitals, but makes business associates of these entities directly liable for compliance with many of the HIPAA Privacy and Security Rules' requirements. The Omnibus Rule defines "business associate" as a person or entity "'who creates, receives, *maintains*, or transmits' (emphasis added) protected health information on behalf of a covered entity."[14] Moreover, now "subcontractors"—persons "to whom a business associate delegates a function, activity, or service"—are specifically included in the new definition of "business associate."[15] The rules are not simply limited to direct subcontractors but also apply to "downstream entities."[16]

Previously, business associates and their subcontractors could only be held liable for breach of their contracts with health care providers. Under the new Omnibus Rule, however, business associates and subcontractors are directly liable for HIPAA violations.[17] It is necessary for business associates and subcontractors to follow all rules regarding the use and disclosure of protected health information due to their potential liability. Moreover, it is necessary for university hospitals to closely monitor their business partners, as under the new Omnibus Rule hospitals face potential risk of vicarious liability.

Health Providers Liable for Violations by Business Associates and Subcontractors

The new Omnibus Rule could increase the likelihood that university hospitals and other health care providers will face liability for conduct by business partners. This is significant, as by some estimates these business partners, rather than the health care providers themselves, are responsible for more than 60 percent of HIPAA violations.[18]

Previously, health care providers were excepted from liability for the acts of agents where the agent was a business associate, the relevant contract requirements had been met, the covered entity did not know of a pattern or

practice of the business associate in violation of the contract, and the covered entity did not fail to act as required by the Privacy or Security Rule with respect to such violations.[19] The new Omnibus Rule does away with this exception.[20] Moreover, the Omnibus Rule adds a parallel provision that creates a civil money penalty liability against a business associate for the acts of its agent.[21] Under the new rule, it does not matter whether the health provider or business associate has a HIPAA-compliant business agreement in place.[22]

The Omnibus Rule applies the federal common law of agency.[23] Whether a business associate is an agent is fact-specific and turns largely on the right or authority of the health provider to control the business associate's conduct in the course of performing a service on its behalf.[24] The right or authority to control is likewise the essential factor in determining whether an agency relationship exists between a business associate and its business subcontractor.[25]

The US Department of Health and Human Services has given some helpful examples regarding how agency applies:

> A business associate generally would not be an agent if it enters into a business associate agreement with a covered entity that sets terms and conditions that create contractual obligations between the two parties. Specifically, if the only avenue of control is for a covered entity to amend the terms of the agreement or sue for breach of contract, this generally indicates that a business associate is not acting as an agent. In contrast, a business associate generally would be an agent if it enters into a business associate agreement with a covered entity that granted the covered entity the authority to direct the performance of the service provided by its business associate after the relationship was established. For example, if the terms of a business associate agreement between a covered entity and its business associate stated that "a business associate must make available protected health information in accordance with § 164.524 based on the instructions to be provided by or under the direction of a covered entity," then this would create an agency relationship between the covered entity and business associate for this activity because the covered entity has a right to give interim instructions and direction during the course of the relationship. An agency relationship also could exist between a covered entity and its business associate if a covered entity contracts out or delegates a particular obligation under the HIPAA Rules to its business associate.[26]

The right or authority to control is the essential factor in determining whether an agency relationship exists between a business associate and its business subcontractor.

The US Department of Health and Human Services has warned that a "business associate can be an agent of a covered entity: (1) Despite the fact that a covered entity does not retain the right or authority to control every aspect of its business associate's activities; (2) even if a covered entity does not exercise the right of control but evidence exists that it holds the authority to exercise that right; and (3) even if a covered entity and its business associate are separated by physical distance (e.g., if a covered entity and business associate are located in different countries)."[27] The new Omnibus Rule could potentially increase the possibility of liability by university hospitals and other university-owned health care providers for the actions of third parties.

Insurance Coverage for HIPAA Violations

Given the addition of new regulations under HIPAA, an increase in fines and penalties for HIPAA violations, and the possibility of broader liability for the acts of business partners under the new Omnibus Rule, it is essential that university hospitals and other university-owned health care providers protect themselves against potential risk exposure. Federal enforcement of HIPAA claims against health care providers is on the rise. Insurance is an important means of protecting universities from the costs of defense against these claims, as well as from fines and penalties if liability is found.

Traditional D&O and E&O policies may provide coverage for HIPAA violations unless explicitly excluded. For example, even under policies that do not have express penalty coverage, HIPAA violations still may be covered.[28] Moreover, it may be possible to obtain coverage for business associates and subcontractors as "independent contractors" insured under a traditional policy. At least one court has rejected an insurer's attempt to narrowly construe independent contractor language in a healthcare D&O policy.[29] However, recently many insurance companies have developed health care policies that provide coverage specifically for HIPAA investigations. These policies cover defense costs and penalties associated with HIPAA violations.

Time is of the essence. The new HIPAA Omnibus Rule went into effect on March 26, 2013, and university hospitals will only have until September 23, 2013, to comply with the new requirements. Now is the time to re-examine your insurance policy to ensure that you are protected against potential liability under the new HIPAA Omnibus Rule.

Broad Definition of Loss

Given what is at stake, universities should consult with experienced insurance counsel to ensure their policies include coverage for violations of HIPAA. Certain insurers provide coverage specifically for losses associated with HIPAA violations. For example:

> **"Loss"** means damages, judgments (including pre/post-judgment interest on a covered judgment), settlements, and Defense Costs; however, Loss shall not include:
>
> 1. civil or criminal fines or penalties imposed by law, **except**:
> 2. HIPAA Penalties, subject to the HIPAA Penalties Sublimit of Liability set forth under Clause 6 "LIMIT OF LIABILITY (FOR ALL LOSS – INCLUDING DEFENSE COSTS)" of this policy.

In this particular example, "wrongful act" was defined as "the failure to comply with the privacy provisions of HIPAA." Likewise, "HIPAA penalties" included "civil money penalties imposed upon an Insured for violation of the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 and any amendments thereto."[30]

In another example, an insurance policy provided that:

> HEALTH INFORMATION PRIVACY AND NOTIFICATION COSTS
>
> Subject to the Information Privacy aggregate limit of liability stated on the certificate of insurance, we will:
>
> 1. Pay "HIPAA" fines and penalties pursuant to the Health Insurance Portability and Accounting Act "HIPAA", which you become legally obligated to pay arising from a "HIPAA" proceeding with respect to the management and transmission of confidential health information; and
> 2. Reimburse you for notification costs related to the disclosure of confidential personal information provided that you obtain our prior approval before incurring such costs.
> 3. Pay claim expenses related to 1. and 2. above.[31]

Unlike the first policy, this policy provides coverage for expenses associated with notifying patients of a breach that compromised their protected health information. Give that the standard for when breach notification is mandatory has been lowered, *see supra*, and given that the US Department of Health and Human Services has estimated that the costs of notification may run into the millions of dollars per year, this coverage may be desirable.

In sum, given the possible risks facing university hospitals following passage of the Omnibus Rule, broad coverage for losses stemming from HIPAA violations is essential.

Broad Investigations Coverage

Universities should also ensure that their policies contain broad investigations coverage, including coverage for loss arising from investigations brought by the government alleging HIPAA violations. For example, certain policies provide coverage explicitly for HIPAA investigations:

"HIPAA Proceeding" means an administrative proceeding, including a complaint, investigation or hearing instituted against you by the Department of Health and Human Services or its designee alleging a violation of responsibilities or duties imposed upon you under the Health Insurance Portability and Accountability Act ("HIPAA"), or any rules or regulations promulgated thereunder, with respect to the management of confidential health information.[32]

In this particular policy, the insuring agreement broadly provided express coverage for all "claims expenses" related to any "HIPAA Proceeding." Because not only the fines associated with HIPAA violations but defending against the investigations themselves can be quite costly, investigations coverage is necessary.

High/No HIPAA Penalties Sublimit

Moreover, universities should ensure their policies contain sublimits of coverage for HIPAA liabilities that meet their needs. In the above example, the policy contained a "HIPAA Penalties Sublimit of Liability:"

HIPAA PENALTIES SUBLIMIT OF LIABILITY:
The maximum limit of the Insurer's liability for all HIPAA Penalties, in the aggregate, shall be $ ___ (the "HIPAA Penalties Sublimit of Liability"). The HIPAA Penalties Sublimit of Liability shall be part of, and not in addition to, the Aggregate Limit of Liability set forth in Item 3(b) of the Declarations, and shall in no way serve to increase the Insurer's Aggregate Limit of Liability as stated therein.[33]

Because each HIPAA violation—whether by the university hospital or its business partners— could potentially result in up to $1.5 million in liability, universities must ensure this limit is appropriate to their needs. If possible, universities should negotiate with their insurer and obtain policies which offer full policy limits for fines, penalties and defense costs for HIPAA violations.

Given potential liability created by business associates' and subcontractors' activities under the new Omnibus Rule, universities should make sure that their policies cover the exposures of others.

Additional Insured Coverage

Given potential liability created by business associates' and subcontractors' activities under the new Omnibus Rule, universities should make sure that their policies cover the exposures of others. Where possible, university hospitals should add business associates and subcontractors to their list of additional insureds. Moreover, university hospitals should enter into agreements with their business associates and subcontractors whereby the latter would be responsible for obtaining additional insured coverage for the hospital under their own policies.

Cyber Liability Coverage

In certain circumstances, you may also want to consider purchasing a cyber liability policy that insures against liability for data security breaches, including protected health information under HIPAA. For example, certain insurance policies promise to reimburse insureds for:

"Security event costs" means (CYBER LIABILITY):
All reasonable and necessary fees, costs, and outside expenses you incur with our prior written consent in connection with a security breach, privacy breach or breach of privacy regulations, as described below:

1. Notification costs and related expenses that you incur to comply with requirements of governmental statutes, rules or regulations, or which you incur as a result of a judgment, settlement, consent decree, or other legal obligation, including the services of an outside legal firm to determine the applicability of and actions necessary to comply with governmental statutes, rules or regulations;
2. Computer forensic costs of outside experts retained to determine the scope, cause, or ex-

tent of any theft or unauthorized disclosure of information, but such expenses will not include your compensation, fees, benefits, or expenses of those of any of your employees;

3. Credit protection services for the affected individual.[34]

However, it is worth noting that traditional insurance carriers may be reluctant to provide such broad insurance coverage for university hospitals, as colleges and health care organizations present unique risks due the inherently sensitive nature of student and patient records. University hospitals may need to consider not only traditional insurance carriers but also cyber-specific insurers in order to find the best available coverage.

Conclusion

If universities experience losses associated with HIPAA violations, they should act quickly to protect their rights. Insurance policies have strict deadlines in which to file notice of a claim, after which time the insurer will argue that coverage is lost. Moreover, at some point during the claims process, universities may need to litigate or arbitrate with an insurer. Universities should secure experienced insurance coverage counsel to ensure that they receive all the coverage to which they may be entitled.

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I had some experience in dealing with people who have mental illness and depression, but I didn't see the signs in myself. I couldn't ask for help because I didn't know I needed help.

—Clara Hughes (1972–),
Canadian Cyclist, Speed Skater, and Olympic Medalist

College Administrators as Case Managers: Challenges of Managing Risk of Violence Related to College Student Mental Illness

| *Kelley Woods and Steven M. Janosik, Virginia Tech*

Abstract: Managing threats of campus violence is a high priority for college and university administrators. Managing these threats takes on a greater level of complexity when student mental health issues are involved. This article examines the legal implications for institutions of higher education when managing students who pose foreseeable risk of harm to themselves or others. It also outlines recommendations for balancing the best interests for the individual with those of the community and the institution, including multidisciplinary response teams and case management, efficient and resourced campus counseling centers, student-parent-institution partnerships, and public health programs.

Introduction

Campus violence remains a critical issue for college administrators. Suicide is now the second most common cause of death of college students,[1] and violence against others on college campuses has increased in lethality.[2] Acts of violence related to mental health issues are of special concern as an increasing number of students come to college with pre-existing mental illness, and a greater number of these students report more severe issues.[3] Mental health issues are not only prevalent, but persistent. Of students who reported mental health problems upon entering college, 60 percent had at least one or more mental health problems two years later.[4]

Although most students with mental illnesses will never commit acts of violence,[5] administrators have a duty to warn of any resultant threatening behaviors. While college administrators work to prevent such incidents, predicting and preventing violence is not always possible. In the recent murder-suicide committed by a University of Maryland, College Park, graduate student, university officials were unaware of the student's mental health issues as he never sought assistance from university counselors and his concerning behaviors were never reported by his roommates to university officials.[6] In the 2012 Aurora, Colorado, movie theater shootings, college officials at the University of Colorado, Denver, had knowledge of the shooter's potential threat to campus, but this information was not communicated to those outside the campus, and he was no longer under the care of university counselors after he withdrew from the institution.[7] In both cases, information existed that may have helped to prevent the incidents that occurred; however, the information was never reported to those who could intervene. College administrators are currently required to act when threats are reasonably foreseeable. The incidents previously reviewed raise questions about the management of concerning student behaviors and the capacity of college administrators to effectively act as case managers providing ongoing care to potentially threatening students in the college community, particularly as the need for mental health services has outpaced the growth and resourcing of counseling centers on campuses. The purpose of this paper is to examine the legal implications of managing students who pose foreseeable risk and offer recommendations for balancing the best interests for the individual with those of the community and the institution.

Recent incidents raise questions about the management of concerning student behaviors and the capacity of college administrators to effectively act as case managers providing ongoing care to potentially threatening students.

Challenges and Legal Implications

College and university administrators face growing concerns about potentially threatening behaviors associated with student mental health issues. Equally challenging is the emergence of litigation related to institutional action and inaction when addressing these issues. Students have

claimed disability discrimination under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, breach of contract, and violation of the Fair Housing Amendments Act by institutions upon receiving mandated withdrawals or leaves of absence from school.[8] On the other hand, plaintiffs have also claimed gross negligence and wrongful death against institutions, suggesting a duty to prevent student self-harm and related acts of violence.[9] These decisions complicate college administrators' responses. Removing a potentially threatening student can be aggressive to the point of violating the individual's rights, while attempting to manage care for that student's mental health to prevent harm reinforces institutional duty to care and liability for negligence should that student commit harmful behaviors while under institutional care.

Duty and Negligence

Despite the increase in litigation dealing with student suicide, suicidal ideation, and violence, Peter Lake argues that the "legal guidance" available to help college and university administrators make reasonable decisions is greatly lacking.[10] Until recently, courts generally ruled in favor of the defendant institutions under the premise of sovereign immunity.[11] In the case of suicide or self-harm, this stance was supported by the definition of such action being uncontrollable and unforeseeable by college and university administrators.[12] These opinions have shifted, and as increasing numbers of college students seek assistance for mental health issues—whether voluntarily or involuntarily—the relationship between institutions and students is being redefined. Institutional duty to prevent foreseeable harm has been established in both *Schieszler* and *Shin*.[13] While the theory of special relationships as described in Section 314A of the Restatement (second) of Torts applies directly to landlord-tenant and caregiver relationships, courts have found that the definition was flexible enough to include colleges and universities when the relationship in question is an established service expectation, such as counseling services, and when foreseeability of harm is imminent.[14] These conditions were met in both the *Schieszler* and *Shin* cases as affirmed by the courts.[15] In both cases, college administrators and counselors were involved in managing care for the students' mental health concerns. In *Shin* particularly, the lack of parental notification about the student's potentially suicidal behavior was found to be the determinant factor in administrators' failure to warn, establishing that using the Family Educational Rights and Privacy Act (FERPA) to defend lack of notification is indefensible in cases of such threats.[16]

As increasing numbers of college students seek assistance for mental health issues—whether voluntarily or involuntarily—the relationship between institutions and students is being redefined.

Civil Rights and Due Process

There have been increases in claims and reports to the Office of Civil Rights (OCR) about disability discrimination, breach of contract, and violation of the Fair Housing Amendments Act against institutions by students who were dismissed, temporarily or permanently, from colleges and universities or their on-campus residence halls.[17] A growing number of administrators are creating mandatory withdrawal or leave of absence policies, which, if used without proper grounds as suggested by the settlements in *Nott* and *Doe* cases, can be found to violate individual rights.[18] Both the ADA and Section 504 of the Rehabilitation Act place the burden of proof of documented disability upon the person with the disability, not the institution. Once documented, however, institutions are required to allow full participation of "otherwise qualified" individuals and cannot exclude them based on their disability.[19]

Disability laws do not compel an institution to alter its programs or standards or accept an "undue burden" to accommodate a student with disabilities.[20] In addition, a student who can be defined as a "direct threat"—one who, according to the OCR, "poses a significant risk to the health and safety of the student or others [with] a high probability of substantial harm and not just a slightly increased, speculative, or remote risk"—is not considered as a qualified individual under the ADA or the Rehabilita-

tion Act.[21] "Direct threat" can be challenging to prove, as an individualized assessment of the student by qualified professionals must be completed to establish a sufficient claim.[22] In addition, administrators must consider the nature, duration, and severity of the threat and whether or not reasonable accommodations can be made to mitigate or remove the threat before removing the student.[23]

Counseling Centers

The 2010 National Survey of Counseling Center Directors reveals some concerning perceptions about the ability of college counseling centers to provide the type of managed care administrators rely on when responding to students with the potential to harm. While the number of students seeking services for severe psychological issues increased from 16 percent in 2000 to 44 percent in 2010, counseling centers saw little relative increase in their staffing and services.[24] Sixty-four percent of directors surveyed reported staff burnout and shortages, particularly at peak times of need, as major issues affecting services.[25] Seventy-six percent reported reducing the number of visits for non-crisis patients to deal with the overall larger demand and the more time-consuming needs of clients with serious issues.[26] The International Association of Counseling Services Standards recommends a ratio of one counselor to every 1,500 students on campus.[27] Most public institutions fall far short of this figure, and large private schools face the same challenge.[28] Counseling centers which previously primarily provided short-term care for transitional issues are more frequently providing long-term care to more vulnerable populations of students who are less equipped to deal with failure, emotional stress, and ambiguity than earlier generations, and those who come to college already prescribed psychiatric mediation that needs to be administered by professionals.[29] Response to increased service demands includes changes to service delivery, such as use of group sessions and briefer therapies and the employment of more interns and social workers, adjustments to intake and scheduling to increase efficiency and target specific concerns, and partnerships with extra-institutional agencies.[30]

The special relationship defined between the institution and the student that requires duty to care and prevent foreseeable harm is not the only motivation for college clinicians to be concerned about student mental wellness; the ethical concerns that arise when services cannot be effectively and efficiently delivered strain clinicians further.[31] College counseling center clinicians also deal with an increasingly complex set of demands from a variety of stakeholders: administrators who rely on the privileged information they discover, parents who demand information about their students, media and society that questions the ethics of protecting individual rights at the potential expense of public safety, and the student-client's best interests.[32] While both the American Psychological Association (APA) and the American Counseling Association (ACA) allow for reasoned flexibility in ethical confidentiality,[33] balancing the role of agent of the institution with confidant to the client is increasingly stressful to clinicians in an increasingly litigious environment.[34] College counseling centers that are not equipped to handle the volume and severity of issues students bring present a serious source of liability as college administrators cannot reasonably claim that mandating such services fulfills the duty to care when a student presents foreseeable risk.

Case Management

One way college administrators have met the challenge of relieving the burden on counseling centers and increasing information sharing is through distribution of managed care throughout the institution. Multidisciplinary groups of administrators and faculty, such as threat assessment teams and care teams, work to identify students of concern and take appropriate actions. Sometimes these teams define their work as "case management," and case manager job descriptions are becoming more common outside the clinical setting at colleges.[35] The Case Management Society of America (CMSA) defines case management as:

> Case management is a collaborative process of assessment, planning, facilitation, care coordination, evaluation, and advocacy for options and services to meet an individual's and family's comprehensive health needs through communication and available resources to promote quality, cost-effective outcomes.[36]

The CMSA further states in its philosophy that case managers should be certified to demonstrate necessary preparation for effectiveness in patient care.[37] Practically,

college administrators practice case management when engaging in ongoing, collaborative work to provide support to students of concern. The use of the commonly accepted professional term "case manager" without the accompanying training, certification, and support could create liability should the case manager not be found adequate to meet the standards of duty to care.[38] In many cases, individuals participating in case management on threat assessment teams and care teams hold other primary roles throughout the institution rather than focusing completely on case management.[39] This also poses risk of falling short of institutional duty. While these teams certainly play a positive role in reducing serious incidents, they also expose the institution to liability when insufficiently trained or qualified to adequately meet the duty to care.

Litigation claims arising from actions of university officials regarding self-harm are likely to continue along with the admission of more students with mental health issues. College and university administrators have to balance showing care for individuals with their obligations to the community. Responses to one demand, such as removing threatening students, do not always provide sufficient response to the other.[40] As former NASPA - Student Affairs Administrators in Higher Education Executive Director Gwendolyn Jordan Dungy asked, "What [can we] do to support our students while protecting our universities?"[41] The primary legal implication this seeming contradiction presents is how administrators show care appropriately and reasonably without unnecessary risks.

Regardless of interventions, there is never any guarantee of complete safety to the individual student or others. Creating policies that label self-harmful thoughts and behaviors as violations with sanctions such as involuntary withdrawal from residence halls or the campus could lead to reduced reporting and access to critical resources.[42] On the other hand, administrators who opt to continue to support students on campus through ongoing therapy and monitoring through care teams and threat assessment teams also run the risk of finding themselves at the center of a claim that they did not do enough, such as in *Shin*.[43] The creation and use of mandated assessment and mandated withdrawal or leave policies comes with an expectation of reasonable use, as well. The legal implications of their overuse are established in the claims of disability discrimination and due process violations brought against institutions.

Strategies for Response and Reducing Liability

Responses to threatening student behaviors should focus on balancing care for the individual with the interests of the community and the institution. College administrators must be committed to providing effective and efficient responses that respect student rights, fulfill duty to care, and promote the academic mission of the institution.[44]

Multidisciplinary Response Teams and Case Management

While the development of threat assessment and similar teams can result in additional liability for institutions, they have been shown to be effective in increasing information sharing and response time regarding students of concern through collective planning and shared responsibility.[45] These groups should coordinate inquiries into all students of concern rather than selecting which to consider in arbitrary fashion, and members of the team should not only be empowered to take necessary action, but also recognize their shared responsibility for communication and action to reduce personal and institutional liability.[46] A critical factor in increasing effectiveness and decreasing liability of such groups is training. Basic training should include a thorough understanding of the policies and procedures to which the group is accountable.[47] Further training regarding principles of professional case management and mental health needs of students adds to the legitimacy of such individuals to perform the task assigned.[48] Finally, threat assessment teams should have members that are solely dedicated to case management as the primary focus of their jobs. College administrators have multiple competing priorities, and effective case management cannot be compromised amongst them.[49]

Efficient and Resourced Campus Counseling Centers

The significant increase in the number of students seeking mental health services on college campuses, while challenging to service providers, is not negative. The increase in reporting is positive for administrators seeking to promote a healthy educational environment and reduce risk. Counseling centers are used by about 10 percent of the entire student population in a single year.[50] With budget challenges persisting for college administrators, additional funding and staffing of college counseling centers is not immediately realistic. Improving services to students in

ways that do not diminish the quality of service are essential to effective treatment and fulfillment of duty to care.

Some strategies for approaching care differently include group therapy sessions and briefer treatments. These types of treatment can often be facilitated by post-graduate interns and social workers who are more affordable to counseling centers and have fewer demands from students presenting more severe issues that require administration of psychiatric medications.[51]

As another example, some institutions such as the University of Virginia have developed triage systems that provide service based on severity of need.[52] The triage system initially evaluates a student's current mental health status before assigning the student to immediate intervention on campus or delayed intervention with a campus counselor or off-campus private practitioner.[53] This system increases immediate response to the most critical needs, as well as distributes care across campus and community counselors to better handle the case load. One challenge of the University of Virginia triage system is the different nature of the relationship with the institution between university-employed and privately-practicing counselors. While both are required by the Health Insurance Portability and Accountability Act (HIPAA) to maintain certain standards of patient privacy,[54] those in university counseling centers have a different defined relationship with respect to their duty to care as agents of the university. This is usually expressed through the use of disclosure forms for students attending mandated assessment sessions. Such agreements may not be viewed as professionally acceptable beyond the confines of the campus. This method for increasing efficiency could unintentionally limit the intended information sharing of such systems that groups such as threat assessment teams and care teams rely upon without carefully constructed agreements between institutions and other providers. Another concern noted with outsourced mental health care is lack of knowledge of the academic environment and understanding of institutional duty and reasonable accommodations that can be made to students with mental health needs. Forming partnerships with outside agencies will require a greater commitment to sharing information and promoting shared understanding of expectations, cultures, and interests.[55]

Working within FERPA, more administrators are asking students at time of enrollment if they want to sign disclosure waivers to include their parents willingly in conversations about their well-being.

Student-Parent-Institution Partnerships

Campus officials are reducing liability by creating a shared sense of responsibility between students, parents, and administrators. Working within FERPA, more administrators are asking students at time of enrollment if they want to sign disclosure waivers to include their parents willingly in conversations about their well-being.[56] This certainly raises the burden on administrators to use the established line of communication, but it creates a network of support for the student that, if engaged, is not solely the responsibility of the institution. College administrators should be honest with parents and students about the limitations of their abilities to completely control or provide support for certain student behaviors. Per the ADA guidelines and the identification of "direct threat," administrators can implement mandatory withdrawal or leave policies and deny students reinstatement if certain disabilities cannot be adequately accommodated. Being transparent with parents and students about these policies does not guarantee lack of litigation, but it does provide some context should such challenging decisions need to be made in the most extreme cases.

Public Health Programs

The use of threat assessment teams, counseling services, and partnerships can help effectively mitigate known risk.[57] Unfortunately, risk cannot always be perceived. In the University of Maryland, College Park and Aurora, Colorado incidents, the risk was unknown and the outcomes generally considered unpreventable. While no legal action has been filed against the institutions at this time, information did exist that could have led to timely

interventions that may have changed the tragic outcomes. The use of these services on college campuses is primarily responsive to a behavioral issue or enacted threat after it has occurred.[58] In many cases, the impact is minor. In some, it can be devastating. Taking a public health approach to promote mental health and overall wellness throughout the campus community is one method of reducing incidents, increasing self-regulation and reporting, and reducing liability.[59] Cornell University, for example, has created a public health framework that focuses on multiple aspects of mental health care, including environmental factors, internal factors, and institutional responses and policies.[60] This framework allows college administrators to establish a culture that values care for mental health and operates in ways that promote collective and individual responsibility in regards to mental health.[61] Counseling center clinicians continue to play an important role in providing service to students, and important and professionally appropriate roles emerge for non-clinician administrators as well, such as promotion of life skills and resilience, development of healthy social networks, and creation of healthy environments.[62] By including administrators trained more in student development theory than college student counseling in such a framework, institutions may reduce their overall liabilities by encouraging these methods as ways of promoting public health and decreasing concerning behaviors at their institutions.

Another positive impact of normalizing mental health promotion through a public health framework is the reduction in the stigma of reporting mental health issues or concerns. Despite the overall increase in students seeking services, many students still do not disclose issues or concerns. Less than 25 percent of students with depression receive treatment for depression, and the frequency is similar in students with anxiety disorders.[63] In a 2011 survey conducted by the National Alliance on Mental Illness (NAMI) of college students who identified themselves as having a mental illness, 35 percent of students responded that they did not report their mental illness to their institutions in any manner, believing that their institutions were completely unaware, even when they felt they were in crisis.[64] Another study found that students most frequently claimed they did not have time or financial support to receive services, they were concerned about the lack of privacy at their institutions, and they were skeptical about the effectiveness of treatment.[65]

Incorporating strategies to increase reporting and information sharing could prevent harm from acts of violence. One of the aims of the triage system at the University of Virginia is to reduce the stigma of reporting by making the process as seamless as possible for students who do choose to report.[66] Socially constructed stigma about mental illness is hard to overcome, and institutionally created policies that seemingly punish students dealing with mental health issues further the reluctance to report. The Jed Foundation produced a list of recommendations for creating a caring campus culture that considers risk management from a perspective of partnerships and inclusion with at-risk students. The recommendations reflect the Cornell framework; among them are promoting social networks that create a connection to community and individuals; creating intentional education programs to develop coping skills, identifying triggers and symptoms, and seeking appropriate assistance; and creating policies and physical spaces that promote safety rather than mandating punitive consequences for undesirable behaviors.[67] Ideally, increasing community awareness also increases the likelihood that community members will not only be able to notice concerning behaviors, but will also know where to report them or, better still, where to take an individual exhibiting concerning behaviors for help. Creating a caring campus community to reduce liability does not remove the threat of student self-harm or violence toward others, but it does display recognition of institutional duty to care and the creation of an environment that encourages disclosure so that appropriate and timely actions can be taken.

Socially constructed stigma about mental illness is hard to overcome, and institutionally created policies that seemingly punish students dealing with mental health issues further the reluctance to report.

Conclusions

College and university administrators deal with challenging uncertainties concerning how to address threatening or troubling student mental health issues. While a great majority of students with mental health issues successfully participate in higher education with little incident, some students have greater needs and present greater threats to themselves and the community.[68] Administrators must understand that current case law opinion has more liberally defined "special relationships" to extend to the relationship between an institution or individual administrators and students in ways that create a duty to prevent foreseeable harm. At the same time, administrators must be sensitive to the creation of policies and procedures designed to protect individual students and the community that in actuality create fear of reporting and seeking resources and discriminate against students with disabilities. Administrators can never guarantee complete safety and security of students from self-harm or harm by others, but careful attention to how students of concern are addressed, supported, and monitored are essential duties that cannot be ignored. The creation of programs and policies to carry out these tasks must be done with serious and full commitment to be effective.

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Gender equality is more than a goal in itself.
It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development, and building good governance.

—Kofi Annan (1892–1976),
Ghanaian Diplomat and
Seventh Secretary-General of The United Nations

The Top Ten Things We Need to Know About Title IX (That the DCL Didn't Tell Us)

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Abstract: This article provides a top 10 list of Title IX-related priorities for institutions of higher education in 2013. Title IX requires gender equity for boys and girls in every educational program that receives federal funding. While most think of Title IX in terms of athletics, it addresses 10 key areas in addition to athletics: access to higher education, career education, education for pregnant and parenting students, employment, learning environment, math and science, sexual harassment, standardized testing, and technology. Higher education administrators and risk managers can review these top 10 considerations and reflect on what their institutions are doing - or need to be doing - to ensure they are effectively handling related risks.

Introduction

Title IX, a portion of the Education Amendments of 1972, was enacted on June 23, 1972, and celebrated its 40th anniversary in 2012. This law requires gender equity for boys and girls in every educational program that receives federal funding. While most people who know about Title IX think of it in connection with athletics programs and sports, the law addresses 10 key areas in addition to sports: access to higher education, career education, education for pregnant and parenting students, employment, learning environment, math and science, sexual harassment, standardized testing, and technology.

This article highlights a top 10 list reflecting our 2013 priorities for this topic. Despite the "Top 10" format, this article does not rank the importance of Title IX topics. If it did, child abuse reporting, retaliation, and pregnancy would surely have been included. Instead, *our* top 10 list is framed around some of the more commonly misunderstood areas of Title IX practice on campuses, allowing us to maintain a practical focus for this article.

> **"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance..."**

The Top Ten List

1. Title IX applies to employees, too (and faculty members, adjuncts, and temporary hires are employees!)
2. Title IX requires reconciling multiple campus resolution processes to create equity of rights for faculty, students, and staff
3. The equitable release of investigation and hearing outcomes to all parties
4. Promptness and the 60-day rule
5. Appropriately incorporating pattern and previous history evidence in our processes
6. Mandated reporting and mandatory reporters – who has to tell what, to whom, and when?
7. What role does consent of the victim play in whether or how the institution pursues notice of their victimization?
8. While the DCL addressed sexual violence, Title IX applies to any rule violation in which sex- or gender-based discrimination occurs
9. Title IX and off-campus behavior – what can we, must we, and should we do?
10. Best practices for reporting campus sexual misconduct to public safety and/or local police

1. Title IX Applies to Employees, Too (and Faculty Members, Adjuncts, and Temporary Hires Are Employees!)

College and university administrators have been working diligently since April 2011 to implement the mandates of the US Department of Education Office of Civil Rights (OCR) Dear Colleague Letter (DCL)[1] addressing campus sexual violence under Title IX. We are witnessing a sea

change on this issue, which is touching campuses across the country at the same time in an unprecedented way. We have much work to do, but we have come very far, very quickly. The dramatic increases in the number of reports of incidents by students on our campuses are evidence of the effectiveness of our efforts.

Yet many campuses are still missing one key point about Title IX that went unremarked in the DCL but must be acknowledged if we are going to get Title IX right. Title IX applies to employees, which campuses already understand. Title IX controls an employee-on-student or student-on-employee complaint of sex or gender discrimination, and you have adapted your policies and procedures accordingly. But that's not the whole story.

Employee-on-employee situations, such as staff-on-staff complaints and faculty-on-faculty complaints, also fall within Title IX. That has been settled law since the Supreme Court decided *North Haven v. Bell* 456 U.S. 512 (1982) 30 years ago. The mandates of the DCL apply to employees in much the same way as they apply to student-on-student cases, and they apply broadly—not just to sexual harassment but to all forms of gender and sex-based discrimination, including stalking, relationship violence, bullying, and sexual violence.

It is important to note that Title VII also applies to an employee-on-employee complaint of sex or gender discrimination. Title IX is an additional overlay, and colleges and universities must be compliant with both laws. We have made strides to bring equity to our campus student conduct processes. Rights, privileges, benefits, or opportunities in those processes that are typically afforded to males are now also typically afforded to females, and vice versa. Campus administrators must carry those changes into the faculty and employee resolution processes, as well, and into renegotiations of collective bargaining agreements.

2. Title IX Requires Reconciling Multiple Campus Resolution Processes to Create Equity of Rights for Faculty, Students, and Staff

If your campus has modified policies and procedures in cases of cross-constituent complaints (faculty-on-student, for example), we want to provoke deeper questions about equity in *all* of your remedial processes. In 2012, the American Association of University Professors (AAUP) challenged the DCL's mandate for the use of the *preponderance of evidence* standard, believing that it would make faculty vulnerable to accusations by employees and students. AAUP's stance is mystifying, given that in cases of faculty-on-faculty harassment or discrimination, the preponderance standard better protects the victim, who in this case is also a faculty member whose protection the AAUP professes to ensure. Additionally, in an equitable environment, why should one campus constituency be more or less protected than any other? Victims deserve as much protection of their rights as the accused does, and this has not been the case on many campuses prior to the issuance of the DCL. More importantly, the application of Title IX to these cases means that we have to provide that equitable protection of rights on our campuses, regardless of interest group advocacy.

The AAUP has long championed multi-tiered, hierarchical hearing and appeals processes to protect accused faculty members. However, consider what value that model will have in an environment of Title IX equity today. Every chance to appeal for an accused faculty member must also provide a chance for the complainant to appeal, as well. Five levels of appeal now afford no more protection to an accused employee than does one level, because equitable appeals under Title IX cannot be unilateral, by definition. The more appeals there are in an equitable framework, the more vulnerable to accountability an accused employee may be. Campus administrators have dispensed with one-sided due process protections in student-related procedures; it makes sense to do so with employee-related procedures, as well. Title VII is silent on equitable procedures, but Title IX now speaks loudly and carries a big stick.

Additional complexity is added by the fact that not all complaints are intra-constituency (student-on-student) or cross-constituency (employee-on-faculty) but are hybrids. Faculty members take classes; students teach them and serve as our employees. The employee-student and the student-employee pose challenging questions of what policy and process apply when there are multiple processes that could apply, all of which vary to some degree in the rights, privileges, benefits, and opportunities they afford to their participants.

While the following example may be an outlier, it highlights the complexity of this issue. Imagine nightmare

non-tenure track master's level faculty member who is taking doctoral classes, works part-time in the rec center, serves as the graduate student rep to student government, and plays a sport. Depending on the circumstances under which a complaint is made, that is potentially five to six separate processes that the complainant may have to endure to "be heard." No complainant would want to pass through such a gauntlet, and it explains why guidance on Title IX is compelling colleges and universities to "clean up the mess" and merge the processes.

Title IX also poses an additional challenge to our tendency to resolve complaints based on role-defined rather than gender-defined rights. A faculty member accused in a faculty process has certain protections, but their faculty accuser may not have the same protections under your current policies. However, under student conduct policies revised in accordance with the DCL, a faculty accuser of a student has rights as a complainant in the student conduct process that they likely lack when accusing another faculty member of the very same misconduct. Compare your processes and ask why a faculty member should be more protected as an accused person in the faculty process than if they were a complainant in the student conduct process accusing a student. Such inequity defies logic and any reasonable justification.

Accordingly, campuses have three options in considering the implications of the DCL and its applicability to employees. One is to maintain legacy processes for students, faculty, and staff that have historically been disparate and will remain so, though at the risk of non-compliance with Title IX guidance. A second option is to take however many resolution processes your campus utilizes and, while keeping them separate, move them to mostly align with each other and reflect similar rights, privileges, benefits, and opportunities. A third and final option is to move to a unified single policy and process that governs all sex or gender discrimination complaints for all faculty, students, and staff. Campuses could even use this model to address all forms of discrimination, not just those based on gender or sex.

Options one and two either create disparate protections that can undermine equity, or they create unnecessary and inefficient duplication of resources by leaving us to manage three or more parallel processes, distinguished only by the constituency of those involved.

The advantages of a unified policy and process are clear. A unified policy addressing sexual misconduct and other forms of discrimination covers everyone equally with the same kind and degree of protection of their rights. A unified process can be centrally administered and overseen, often by expanding the Title IX coordinator role in the form of an institutional equity officer. Unification simplifies the investigation function and avoids duplicative training when there are multiple bodies all resolving the same kinds of complaints across the campus. Unification allows consistent sanctions and responsive actions for the same types of misconduct, whether it is committed by a student, faculty, or staff member. Unification fosters collaboration across the departments that are stakeholders, including human resources, student conduct, and academic affairs while retaining their needed voice in the resolution process. Critically, a unified process can also be essential to the detection and tracking of patterns of misconduct to limit the frequency of repeat offenses.

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Ultimately, we believe unified models will become the standard accepted practice. For those who fear that campus cultures or politics will not accept a unified approach, the momentum created by the DCL may make this the right window of time to champion such sweeping change. Our hope is that now is the time to envision what can and should be done and to lay the groundwork for a unified policy and resolution model on campuses. A model policy and procedure is available from ATIXA.[2]

3. The Equitable Release of Investigation and Hearing Outcomes to All Parties

It can be very instructive to focus separately on the finding, sanctions, and rationale as three releasable pieces of information in Title IX complaints and how and when they should be released to the parties to a complaint. Title IX requires institutions to share the "outcome" of the complaint in writing with the complainant. The DCL seems to cause confusion as to what "outcome" means; it could potentially include the finding, the finding and sanction, or the finding, sanctions, and rationale therefor. Ultimately, Title IX requires institutions in all cases to provide the complainant with written notice of the findings.

The amount of information that should be disclosed about the sanction or corrective action depends in large part on the identity of the respondent (i.e., the person accused) but also on how much the sanctions or corrective actions directly relate to the complainant (e.g., an apology requirement directly relates to the complainant, but a sensitivity training requirement may not) and on the type of offense. Different rules can apply for sexual assaults, because of their likelihood to have criminal code implications and mandates imposed by the Clery Act, than for sexual harassment. Whether the rationale for the finding and/or sanctions is shared depends on whether it is your institutional practice to share a rationale with the accused individual. If so, it will be equitable to share a version with each party, though each version may not be completely identical, depending on the circumstances.

For any sex- or gender-based discrimination complaints where the respondent is a student, institutions should disclose in writing the finding and any sanctions pertaining to the complainant, which would include a student being suspended, no-contact orders, etc. The Family Educational Rights and Privacy Act (FERPA) typically precludes sharing any results that do not directly relate to the complainant, such as required counseling or remedial education. It is important to note that under the Clery Act, when a complaint involves sexual assault, institutions must disclose the findings, sanctions, and rationale to the complainant, but this applies only to sexual assault and not to all forms of sex or gender misconduct that fall within Title IX. This provision is not student-specific and applies to all acts of sexual assault on campus.

Another lens suggests this may be too narrow an interpretation, though it is the one embraced by the DCL. Equity demands that we act with fairness under the circumstances. To withhold some details of a sanction from a victim may deprive him or her of an equitable result.

Institutions have a duty to remedy and to prevent reoccurrence. How can a victim know this duty has been satisfied without fully understanding the entire range of sanctions?

Another way to frame this is that institutions have a duty to remedy and to prevent reoccurrence. How can a victim know this duty has been satisfied without fully understanding the entire range of sanctions? Yet another argument is that a victim cannot play a full role in helping to monitor and enforce the terms of a sanction if s/he is not fully informed of those terms. Many campuses simply apply the equitable rule that what they share with one party they share with the other, but it is always wise to consult campus counsel on the FERPA implications of such a practice.

When a faculty member is the respondent, FERPA plays no role in protecting their records, and Title IX, as federal law, still requires revelation of the outcome, regardless of state-based employment privacy laws. Accordingly, a complainant should be notified of both the finding and any attendant sanctions/responsive actions to ensure they are informed as to how Title IX's remedial requirements have been met. Student complainants will, again, have a right to any sanction information that directly relates to them under FERPA.

4. Promptness and the 60-Day Rule

The OCR has articulated a "prompt and effective" standard for addressing notice of sexual misconduct on campuses. The general standard to be applied is a 30- to 60-day timeframe to meet the promptness requirement, not

just for the investigation phase of the process but for the entire process from notice to final determination of any appeals and the implementation of sanctions and remedial actions. Many schools have been concerned that the OCR will target them for failure to comply when their investigation runs over the 60-day period, but the reasons why a campus might exceed 60 days matter. The OCR requires that schools (1) investigate, (2) stop the harassing behavior, (3) engage in remedial support for the victim and the community, (4) take action to reasonably prevent the reoccurrence of the harassing behavior, and (5) do so in a prompt, equitable, and effective manner. When a school delays their investigation and resolution processes beyond the 60-day requirement, they are failing to adequately meet the mandated elements as set forth by the OCR for compliance with Title IX.

There have been many cases over the past decade (since the 2001 OCR Title IX Guidance[3] was published) in which colleges and universities allowed unreasonable delay of their resolution processes. Sometimes schools were waiting for criminal processes to complete; sometimes there were administrative delays; and sometimes delays were caused by the parties. Whatever the reason, undue delays in resolution of allegations of sexual misconduct allow for potential continued harm to the victims.

Is this 60-day period a hard and fast rule? The OCR expects that schools will promptly address sexual misconduct without undue delay. In fact, they use the term "promptly" frequently in describing the manner in which a school must respond. The OCR evaluates many elements to determine the extent to which a school has responded promptly, such as creating prompt timeframes for all major stages of a complaint, investigation, and resolution; informing the parties of this timeframe and updates on the status of the investigation; and maintaining a timeline of all actions, responses, calls, reasons for delays, and all communications related to the case.

The DCL spoke specifically to the delay in institutional resolution of sexual misconduct cases resulting from accompanying criminal investigations. The OCR stated that law enforcement investigations are not to be the sole response by an institution. The OCR stated that institutions may temporarily delay their investigation to enable law enforcement to gather evidence and to engage in preliminary investigation of a sexual misconduct matter that may also violate the state criminal code. However, the OCR cautions that this delay "typically takes 3-10 calendar days."

Our advice to schools is that any delay created by the need for exclusive law enforcement investigation without concurrent institutional investigation should not exceed this 3- to 10-day time period unless there are extenuating circumstances that the institution has duly documented. Of course, during this delay period, the school should be engaged in all efforts to provide remedial support and assistance to the victim/survivor and the community.

The OCR views days as "business days," and the general consensus is that the OCR is forgiving of a delay for a few days over a holiday break in school (again, as long as remedial support is provided and documented). However, delays that are a result of the break from spring or fall terms are not acceptable, nor are excessive delays that are a result of administrative foot dragging, caseload, insufficient staffing, resources, or internal factors the campus can control. Delays requested by a victim are often seen as reasonable but not those caused by the accused individual. Delays caused by external factors wholly outside the control of the campus are typically seen as reasonable but not if the institution has the ability to control or influence the external factors.

The best advice is to create a reasonable timeframe for your investigation and resolution process early on in your strategy development, keeping the 60-day rule as your guideline for timeline development. Inform the parties of your timeline, keep them informed throughout the process, and document all actions, particularly anything that creates a delay as you work diligently toward resolution.

5. Appropriately Incorporating Patterns and Previous History Evidence in the Resolution Process

Our view advocates for consideration of pattern and history at the finding stage, where previous similar acts lent evidence of the currently alleged violation. Traditionally, the student conduct process has looked to history and pattern only in sanctioning an offender. Previous violations have not been considered as evidence at the *finding* stage of the resolution process. Multiple violations by the same offender have been addressed through separate processes when they have involved separate victims. However, sexual misconduct offenses tend to be pattern or repeat offenses.

Certainly, the DCL advocates for investigations to seek to identify patterns and predatory situations; the OCR has recently advised that it views pattern and history evidence expansively. It could, for example, include past campus offenses by the same offender but also criminal offenses. It might also include past good faith allegations, even if those allegations did not result in findings. Your current case might corroborate a past investigation as a pattern, rather than the other way around. Finally, the OCR has suggested that similar incidents can evidence a pattern and that "similar" refers to any behavior that falls within Title IX. Previous acts of stalking lend evidence to current accusations of sexual harassment. Previous acts of intimate partner violence lend evidence to current accusations of sexual misconduct. The OCR recognizes the continuum of gender-based violence and that offenders often progress over time to more egregious acts of discrimination, exerting power and control in relationships with a common set of behaviors. Admitting and considering this information correctly requires an enhanced level of training for investigators, administrators, hearing officers, and appellate panel members.

6. Mandated Reporting and Mandatory Reporters: Who Has to Tell What, to Whom, and When?

Does the law require every employee to report knowledge of sexual misconduct on campus? Not necessarily, but policy might. While Title VII (employee-on-employee) complaints have led to widespread reporting mandates on college campuses, Title IX only requires reporting from "responsible employees," which for purposes of policy can be defined to include:

1. Those with authority to address and remedy sex- and gender-based discrimination and harassment; and/or
2. Those with responsibility to report sexual misconduct to a supervisor; and/or
3. Those who a student would reasonably believe have such authority or obligation.

Like Title VII, all supervisors are responsible employees, but not all responsible employees are supervisors. Unlike Title VII, the OCR has tried to meaningfully give victims control over reporting through Title IX. This empowerment will be impeded by a reporting mandate on all employees framed only with Title VII in mind.

A broad reporting mandate is where campus attorneys and sexual misconduct victims' advocates collide. Advocates want broad rights to preserve privacy, while some attorneys want reporting by every employee to ensure that no complaint slips through the cracks.

A broad reporting mandate is where campus attorneys and sexual misconduct victims' advocates collide. Advocates want broad rights to preserve privacy, while some campus attorneys, based on potential exposure to liability, want reporting by every employee to ensure that no complaint slips through the cracks. Both these goals have merit, but requiring all employees to report everything they know immediately may not be good policy. Is a university exposed to liability under Title IX if it fails to act on third party notice from an employee of an incident that perhaps the victim doesn't want the institution to act on? Instead, institutions of higher education could benefit from a compromise approach.

First, campus legal counsel faces significant challenges in giving good advice on this question. Reporting of sexual assault by employees is required by three different federal laws—Title VII, Title IX, and the Clery Act—and some state statutes. Each of these laws creates its own reporting requirement, irrespective of the standards used by the other laws. So should we train employees on these three varied reporting schemes and state law? That is both impractical and a potential intellectual impossibility. Instead, we have come to favor the following approach. All employees should, by policy, be mandated reporters of what they know within 24 hours of coming to know it, but only some employees have to share all that they know. These individuals, deemed "responsible employees" under Title IX, should be trained accordingly. Employees not

deemed "responsible employees" can satisfy their duty to report but may withhold personally identifiable information, at least initially. This allows reporting to be accomplished, satisfying the Clery Act and Title IX, without starting the domino effect of actual or constructive notice without the consent of the alleged victim.

Perhaps the simplest summary of this complex policy issue is the following:

- All employees must report incidents of sex/gender misconduct and discrimination to the coordinator or deputy coordinator within 24 hours of learning of the incident.
- If the victim wishes, the employee may pass along all known information.
- Some employees are empowered to make Jane/John Doe reports initially (i.e.: reports that omit personally identifiable information about those involved) if the employees are not supervisors or responsible employees. Note, however, that these employees may be expected to provide additional details later if the coordinator needs them.
- Counselors, clergy, and other confidential employees fulfill their reporting mandate by making John/Jane Doe reports for statistical purposes and pattern tracking but do not divulge personally identifiable information without client consent.
    - An exemption to not report can be made when the confidential employee deems reporting to not be in the client's best interests.
- Employees who are unsure of their duty to report or how much information to report should ask the coordinator and will be advised accordingly.
- As appropriate and required by law, the coordinator will share information with campus law enforcement or public safety to satisfy the Clery Act.

Clarity on reporting duties requires training, but the DCL already made the need for enhancing our training programs very clear. The use of an online reporting form available to students and employees, with optional and mandated fields clearly noted, can effectively guide employees on reporting expectations, options, and requirements, while also helping public safety to accurately categorize and classify offense statistics under the Clery Act.

The value of John/Jane Doe reporting is in preserving as much victim autonomy and agency as possible, thereby controlling what actions the institution takes, while still tracking patterns and satisfying other reporting mandates, such as those in the Clery Act. Some campuses call this "anonymous reporting," but that can be confused with a right for the reporter to withhold their own personally identifiable information, which this approach does not permit. Reporting employees must be fully identified. Another exception to this policy would be in the case of a harassed or victimized employee; these individuals would not be required to report their own victimization but could make an anonymous report.

Once the coordinator or other appropriate administrator or investigator receives the report, they would conduct a "small i" preliminary inquiry or investigation, looking into the incident description, history file, and whether the report matches any other recent reports. With any sign of pattern, predation, violence, or threat, institutional obligations cannot be determined solely by what the victim wants. However, administrators can take gradual "next steps," such as requiring more information from the reporter, meeting with the alleged victim, and deciding what remedial actions are needed, desired, and possible. Note that it is not a requirement that the Title IX coordinator meet with every victim. Indeed, such a meeting could be, in and of itself, re-victimizing and discouraging of future complaints, a practice antithetical to Title IX.

For that reason, no employee should ever promise absolute confidentiality, though some, such as licensed counselors, are better able to protect information than others. Campus ombudspersons are not exempt from expectations of reporting.

The approach described above is set up so that we can "push over one Domino at a time," giving the victim as much control as possible. However, victims should also know that actions may need to be sped up, depending on whether the circumstances indicate a need to protect the community. Training should teach all employees that reports are private but not confidential (unless made to a confidential resource). Employees should be trained on ways to convey this to victims without chilling the victims' willingness to report. It takes tact, but it can be done.

If you do not take the approach recommended here, you really only have two other options. One is a blanket

reporting mandate that all employees must report everything they know with an exception for privileged or confidential employees. This approach's intent is to make sure that all reported incidents are known to appropriate administrators. However, having such a broad reporting requirement instead creates a chilling effect on reporting where less is known about campus incidents, not more. Victims need some safe space, and the OCR is not encouraging us to zealously hunt down notice from unwilling victims.

The other option is to train all employees on their actual legal duties. This would include informing all "responsible employees" of what to report when behaviors fall within Title IX. The institution would also create supervisory reporting duties to address compliance with Title VII. Finally, some of the same employees who are "campus security authorities" will need additional training on their duty to report statistical and timely warning information in compliance with the Clery Act. Having done these trainings at the behest of clients all over the country, we can assure you that the end result of all this training is that you will have confused your employees, who can't keep all three reporting schemes straight, let alone keep straight various campus hotlines, whistleblower policies, behavioral intervention team reporting, and any applicable Sarbanes-Oxley requirements for reporting financial improprieties.

The bottom line is the approach outlined above works where other approaches fail. It addresses a complex and challenging set of inter-related but disconnected federal compliance standards.

7. What Role Does Consent of the Victim Play in Whether or How the Institution Pursues Notice of Their Victimization?

What do we do when the victim of an offense tells us s/he does not want us to pursue notice or will not participate in our process? We probably do not know whether the act is singular, individually targeted in nature, part of a pattern, or predatory. We can only guess if respecting the victim's wishes will leave him or her and the campus community exposed to a risk we could potentially prevent by acting on the notice.

If you read the DCL, you can feel the tension the OCR understood when it wrestled with this all too real dilemma. The OCR took the position that a victim's failure to participate does not alleviate a campus of the duty to respond and remedy, though it may limit what the campus can do. We have a greater duty to the many than to the one, a principle all campus administrators understand.

However, the OCR muddied the waters by using the term "consent," which refers to victim participation in the process, not consent to whether the campus proceeds. In all cases and without exception, the campus must preliminarily investigate notice to determine what actions it needs to take.

What does the preliminary investigation—the "small i"—entail? Every case is different, but typically the coordinator, investigators, and/or other appropriate administrators talk to the victim or complainant, if possible. They try to learn why the victim does not wish to proceed. They check files for recent similar offenses and may check the disciplinary files on the accused individual for pattern information. They might check criminal backgrounds or consult with the campus behavioral intervention team. They will catalogue the potentially available independent evidence and try to assess how viable pursuing the case may be without the victim's cooperation. Rarely will a preliminary inquiry involve contacting witnesses or the accused individual. This inquiry will conclude with a decision on whether to proceed and, if so, how.

In some cases, the "small i" will lead to the "big I," which is a thorough, reliable, and impartial full investigation. In cases where the preliminary investigation does not indicate pattern, predation, threat, or violence, the campus has more latitude to respect the wishes of the victim. Remedies in such cases can take the form of accommodations to the victim, education, and policy reinforcement directed to the offender/offending population, but it will not extend to discipline of the alleged offender.

However, where pattern, predation, threat, or violence are indicated by the preliminary investigation, the campus will have to pursue the notice to the fullest extent possible, understanding that victims still have the right to consent or refuse to participate. In some instances, the physical evidence—rape kits, pictures, messages, and witness information—are sufficient for the resolution to take place without any victim involvement. The tact involved in explaining this nuance to a victim is a skill that student conduct administrators and coordinators need to acquire and practice. Just putting it in a policy is cold and imper-

sonal, and leaving it to a victim's advocate (if you have one) may create a missed opportunity to learn why the victim does not wish the campus to proceed. Finally, this discussion really applies to student-on-student complaints only. There is not the same latitude to proceed or not proceed in Title VII cases (employee-on-employee) once notice is given.

8. While the DCL Primarily Addressed Sexual Violence, Title IX Applies to Any Rule Violation in Which Sex- or Gender-Based Discrimination Occurs

Title IX prohibits sex/gender discrimination, and the 2011 DCL defines sexual harassment as "unwelcome conduct of a sexual nature." Not all sexual harassment will be actionable under Title IX for purposes of lawsuits, even though such behavior may be a violation of your campus policy. Sexual harassment has to be unwelcome, have a sex- or gender-based discriminatory effect, and be sufficiently severe, pervasive (or persistent), and offensive to cause that discriminatory effect. Put another way, the behavior limits or denies a person access to or participation in their education or employment.

Campus policies can cover a broader range of conduct than what creates the foundation for a Title IX lawsuit, but public institutions are wise to use the Title IX standard when policing harassing speech to respect First Amendment protections. Regardless of the terms that form the basis of campus policy, there will be low-level harassment that fails to rise to the level of being discriminatory under Title IX.

Further, the OCR deems *all* acts of non-consensual physical sexual contact (i.e. "sexual violence"), such as "rape, sexual assault, sexual battery, and sexual coercion," as sexual harassment and therefore within Title IX's purview.[4] Accordingly, all incidents of sexual violence must be viewed and approached using a Title IX lens and Title IX-appropriate investigations and remedies. This could include matters of hazing, such as the alleged alcohol enema incident at the University of Tennessee, or bullying behavior that is sex- or gender-based. To be sex- or gender-based, conduct must be either sexual in nature or directed at someone because of their actual or perceived sex (male or female) or gender (masculine or feminine), thus addressing the often asked questions about how Title IX protects our lesbian, gay, bisexual, transgender, and questioning (LGBTQ) community members.

Other areas that fall within Title IX include actions motivated by gender or sex, such as bullying, stalking, hazing, or relationship violence, and program equity decisions, such as admission, athletics participation, hiring, firing, or promotion.

Other areas that typically fall outside of the "sexual violence" label but can fall within Title IX and require the prompt and effective response include actions motivated by gender or sex, such as bullying, stalking, hazing, relationship violence, vandalism, arson, and program equity decisions, such as admission, athletics or club participation, hiring, firing, or promotion.

Further, any rule or policy of a school or college, if violated on the basis of the victim's actual or perceived sex or gender, could fall within a Title IX set of policies and resolution procedures *if the behavior was sufficiently severe, pervasive, or persistent to cause a discriminatory effect*. Some information only comes to light once the investigation begins, which, if the school is not using a Title IX-appropriate process, may result in the school failing to approach the situation in a manner commensurate with its Title IX responsibilities (immediately stop the harassment, remedy its effects, and prevent its recurrence). This is one of the many reasons we encourage campuses to bring all their investigation and resolution procedures into compliance with Title IX.

9. Title IX and Off-Campus Behavior: What Can We, Must We, and Should We Do?

Title IX does not have geographically defined jurisdiction. It does not apply to one location or another or even on- or off-campus. It is instead a nexus rule,[5] applying to those situations with sufficient connection to the activities of a funding recipient such that the recipient is responsible

for addressing them. The courts have uniformly applied a two-prong test to Title IX's applicability, assessing whether the institution has:

1. control over the harasser (subject to our rules) and
2. control over the context of the harassment (on our property, in our programs, on land we lease or control, or at events we sponsor).

If both prongs are met, we are obligated to respond to notice in accord with Title IX. However, how should off-campus conduct or conduct outside of school be addressed? The lawyer's answer: it depends. At public institutions, the leading cases—*J.S. v. Blue Mountain*[6] and *Layshock v. Hermitage*[7]—place limits on our ability to address purely off-campus speech, even if it is harassing, as First Amendment protected speech. Conduct is addressable more broadly than pure speech. An institution should not fear First Amendment implications in the case of an off-campus sexual assault between students and instead heed the expansive view of the court in *Simpson v. University of Colorado*,[8] which included the definition of a "school sponsored" activity to include an off-campus sexual assault on private property, calling it a result of behaviors and culture "created" by the institution.

How should off-campus conduct or conduct outside of school be addressed? The lawyer's answer: it depends.

The somewhat over simplified legal rule is that we may address off-campus or out-of-school harassment in public forums (Internet speech, Facebook, etc.) only when those off-campus or out-of-school acts have a demonstrable and significant on-campus or in-school disruptive impact. Private schools and colleges have the ability to address off-campus and out-of-school speech and conduct more broadly than public institutions. The DCL seems to imply the need to take off-campus jurisdiction—and certainly no campus can refuse to—when a Title IX issue occurs off-campus at a campus-sponsored activity or event. However, there is no obligation to pursue purely private off-campus conduct that is not connected to the institution. The language in the DCL instead refers to the need to take action if on-campus repercussions occur as a result of the off-campus conduct. To do that, it is effective to address the initial behavior, as well.

There also seems to be some confusion over extra-territorial jurisdiction to Title IX. The OCR has said it does not apply outside the United States, but some of our Title IV funding is spent to support programs outside the United States. Additionally, courts have applied Title IX to incidents outside the United States.[9] Without more definitive guidance, it may be prudent to establish structures that allow your campus to apply Title IX resolution procedures to incidents occurring abroad that meet the two-prong standard.

Perhaps the better question is whether we need the OCR to tell us to assume jurisdictions over our own off-campus programs. Institutions should implement a policy that allows them to take off-campus/out-of-school jurisdiction when deemed appropriate and necessary.

The following model policy language was developed by the Pennsylvania State University:

> Students at [School/University] are annually given a copy of the Code of Student Conduct. Students are charged with the responsibility of having read, and agreeing to abide by, the provisions of the Code of Student Conduct and the authority of the student conduct process. The Code of Student Conduct and the student conduct process apply to the conduct of individual students and school/university-affiliated student organizations. Because the Student Code of Conduct is based on shared values, it sets a range of expectations for school/university students no matter where or when their conduct may take place; therefore, the Code of Student Conduct applies to behaviors that take place on the campus, at school/university-sponsored events and may also apply off-campus or outside of school when the administration determines in its discretion that the off-campus or outside-of-school conduct affects a substantial school/university interest. A substantial school/university interest is defined to include:

- Any action that could constitute a criminal offense as defined by federal or state law. This includes, but is not limited to, allegations of single or repeat violations of any local, state or federal law in the municipality where the school/university is located;
- Any situation where it appears that the student may present a danger or threat to the health or safety of him/herself or others;
- Any situation that significantly disrupts the rights, property or achievements of self or others or significantly breaches the peace and/or causes social disorder; and/or
- Any situation that is detrimental to the educational interests of the school/university (private schools and campuses, only).[10]

10. Best Practices for Reporting Campus Sexual Misconduct to Public Safety and/or Local Police

There has been a troubling increase in a problematic practice at colleges and universities: the mandated reporting of all Title IX-related matters to campus and/or local police by campus employees, administrators, and Title IX coordinators. While we support mandated reporting policies for all employees (as detailed above), we must pay attention to where the mandate tells our employees to take the information they may have.

Perhaps the popularity of police-based mandated reporting policies is a knee-jerk reaction to the Jerry Sandusky case at the Pennsylvania State University, but a blanket requirement to notify police has the potential to undermine an institution's efforts to appropriately address sex discrimination in the educational setting. That said, we do support a practice of reporting to police in situations involving abuse of minors, some individuals with disabilities/diminished capacity, clear threats of harm to others, and in any case where the victim welcomes police involvement. Outside of those exceptions, we believe a police-based mandate will do far more harm than good, may violate the law, and will stifle the willingness of victims to report.

To comply with Title IX, we need policies that create the expectation that responsible employees will report sexual harassment or discrimination to appropriate school officials, such as a Title IX coordinator or the employee's supervisor. However, Title IX does *not* require responsible employees to report such matters to campus or local police, though some states may impose such a mandate by statute. While state mandates cannot be ignored, campus legal counsel should be consulted on how administrators should balance the state duty to report against the Title IX requirement that campuses conduct confidential investigations that are largely driven by the willingness of the victim. A federal confidentiality mandate can be argued to supersede state reporting requirements with respect to adult victims.

Another reason to avoid a blanket police reporting mandate is that many sexual harassment incidents and other forms of discrimination that fall under Title IX may violate institutional policies but are not crimes. Accordingly, such reports have the potential to distract police from their sworn duties and present them with information that should be kept confidential by the institution. Worse, by funneling victims to the wrong resource, we run the risk of misdirecting situations that need to be resolved by the Title IX coordinator or other appropriate administrator. To compensate, campuses will have to add an extra step to refer and communicate information from police to the appropriate campus official. Such a path is not ideal, and communication breakdowns on some campuses will result in failures to act in the face of the obligation to act. This is especially true when the reporting mandate is to local police, not campus law enforcement.

A related argument is that mandated reporting of Title IX matters to local or campus law enforcement can violate FERPA. Where a student is victimized, records of his or her victimization kept by campus administrators are protected by FERPA as part of the student's education record. That protection is important. Reports to campus law enforcement may not be FERPA-protected, and reports to local law enforcement are not.

We must also address the path from the reporting employee to campus or local police. FERPA permits internal (intra-institutional) sharing of private education record information when there is consent from the student or without consent when there is a "legitimate educational interest." While campus police and public safety departments can have a "legitimate educational interest" in some cases, they do not in all cases. This includes even cases of sexual violence, in which their interest may be a law

enforcement interest, not an educational interest.

Certainly, local law enforcement can never have a legitimate educational interest as defined by FERPA, and so any mandated reporting to them without the consent of the record owner (the victim) will violate FERPA unless an emergency health and safety concern is present. Without victim consent, a reporting mandate in all Title IX-related matters will undermine the interest colleges and universities have in encouraging reporting and empowering victims. Given the lack of success in prosecuting such cases in almost every jurisdiction, one can only wonder at the rationale supporting such a reporting mandate.

Accordingly, it is not advisable to mandate reporting of all Title IX-related incidents to campus or local law enforcement. Victims often seek out a campus remedy specifically because they have no desire to report an incident to the police. Victims articulate many reasons for this hesitation. A few of the more commonly cited reasons: they are uncomfortable interacting with police, they feel the institution's administrative approach will be less stressful, they are uncomfortable with the formality of the police process, they desire to keep the matter more confidential than public police records permit, or they do not self-identify as victims of a crime. As a side note, this final item is one of the many reasons institutions should always inform victims of their right to file a report with the police.

An argument can be made that a policy of mandated reporting to police is in fact retaliatory, as it may require victims who wish to seek institutional assistance to first waive their right of confidentiality in order to do so. In most cases, victims should have the right to choose whether police will be involved. Let's not add to their burden with unnecessarily disempowering –and potentially illegal—campus policies and practices.

Finally, this discussion should not distract from the fact that campus law enforcement and security officials are "responsible employees" and thus mandated reporters for those reports that do originate with them. There is no state law or investigation exception that applies, and thus what is reported to campus law enforcement must be duly shared with the campus Title IX coordinator or other appropriate officials.

About the NCHERM Group, LLC & ATIXA

- The NCHERM Group, LLC, is a law and consulting firm dedicated to systems-level solutions for safer schools and campuses. The NCHERM Group, LLC provides outside counsel and deploys consultants to higher education on a wide range of risk management topics.
- ATIXA, the Association of Title IX Administrators, is a leading source of expertise and professional development on Title IX for school and college officials. ATIXA has certifies Title IX Coordinators and Investigators through its comprehensive training programs.

About the Authors

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Endnotes

[1] US Department of Education Office of Civil Rights (OCR) Dear Colleague Letter (DCL), "Sexual Violence Background, Summary, and Fast Facts," April 4, 2011, https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html.

[2] Brett Sokolow, W. Scott Lewis, and Saundra Schuster, *Gender-Based and Sexual Misconduct Model Policy*, ATIXA and NCHERM, 2011, http://www.atixa.org/documents/ATIXA%20Model%20Policy.pdf.

[3] US Department of Education Office of Civil Rights (OCR) Dear Colleague Letter (DCL), "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties – Title IX," January 19, 2001, http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[4] US Department of Education Office of Civil Rights (OCR) Dear Colleague Letter (DCL): "Sexual Violence," 1-2.

[5] As set forth by Justice O'Connor in *Davis, as Next Friend of Lashonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

[6] *JS ex rel. Snyder v. Blue Mountain School Dist.*, 650 F. 3d 915 (2011).

[7] *Layshock v. Hermitage School District*, Dist. Court, WD Pennsylvania (2006).

[8] *Simpson v. University of Colorado Boulder*, 500 F. 3d 1170 (2007).

[9] *King v. Board of Control of E. Michigan Univ.*, 221 F. Supp. 2d 783 (2002).

[10] Please cite Association of Title IX Administrators (ATIXA)/The Pennsylvania State University as the source for any use or adaptation of this policy language.

Society as a whole benefits immeasurably from a climate in which all persons, regardless of race or gender, may have the opportunity to earn respect, responsibility, advancement, and remuneration based on ability.

—Sandra Day O'Connor (1930–),

Retired United States Supreme Court Justice

Innovation distinguishes between a leader and a follower.

—Steve Jobs (1955–2011),

Co-founder, Chairman, and CEO of Apple Inc.

Protecting Innovation with Innovative Insurance: Intellectual Property Insurance

| *Robert W. Fletcher, Intellectual Property Insurance Services Corporation (IPISC)*

Abstract: Nearly all companies and other organizations, including higher education institutions, need to consider intellectual property (IP) rights as part of their complete risk management plan. Not only are IP rights very important to organizations, but IP litigation is on the rise. Litigation can also be time consuming and expensive. IP insurance is one way a company, organization, or institution can help protect itself from IP litigation. This article highlights the different risk management considerations present when considering IP rights and walks through what types of coverage is available to organizations of all sizes and types. It also discusses some of the nuances of managing IP risk, including assessing the overall risk, managing IP litigation, underwriting IP insurance, and looking to the future to identify risks that might affect an institution or organization in the future.

Introduction

A new generation of entrepreneurs starting businesses based upon the products of their minds, in their simplest sense, has rejuvenated the US entrepreneurial spirit. Companies rely on intellectual property (IP) rights, made up of patents, copyrights, trademarks, and trade secret laws, to give their owners a competitive advantage and protect them. Virtually all companies possess IP. Recent studies have found that up to 80 percent of a company's value may reside in its IP. Therefore, companies, including other organizations like higher education institutions, can no longer afford to ignore the importance of IP assets. According to a March 2012 study by the Economics and Statistics Administration, IP-intensive industries directly support at least 27.1 million jobs and indirectly support an additional 12.9 million. These industries contribute more than $5 trillion to the US GDP, comprising 35 percent of the US economy, making IP an important part of the continuing U.S. prosperity.[1]

Recent studies have found that up to 80 percent of a company's value may reside in its IP. Not only are patent lawsuits increasing in frequency, but they are also time consuming and can be incredibly expensive.

IP Litigation: Expensive, Frequent, and Time Consuming

Companies and organizations, including colleges and universities, that are knowingly, or unknowingly, self-insuring their IP portfolios are potentially risking their futures. They can no longer afford to disregard reality when, in fact, the number of patent lawsuits filed in the United States has trended upward over the past 20 years. In the US federal courts, in 2012 there were 5,589 patent lawsuits filed, as opposed to 1,403 in 1992 (see Figure 1).[2] Keep in mind that these are patent statistics only and do not take into consideration copyright, trademark, or trade secret suits filed.

Not only are patent lawsuits frequent, but they are also time consuming, continuing for five years or more before being settled or reaching a verdict in court. Patent lawsuits can also be incredibly expensive. According to the AIPLA 2011 Report of the Economic Survey,[3] the average cost to litigate a pat-

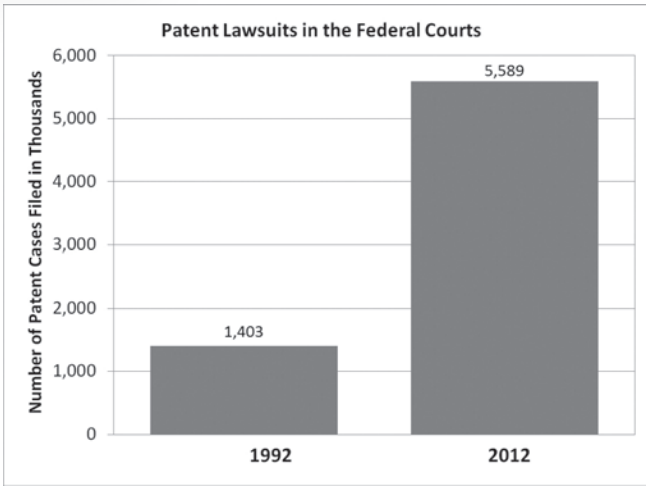

FIGURE 1: Number of Patent Lawsuits by Year

ent lawsuit in the United States is $2.8 million (see Figure 2) if the amount in controversy is between $1 million and $25 million dollars, and damages assessed in the event of unsuccessful litigation average $9 million dollars.

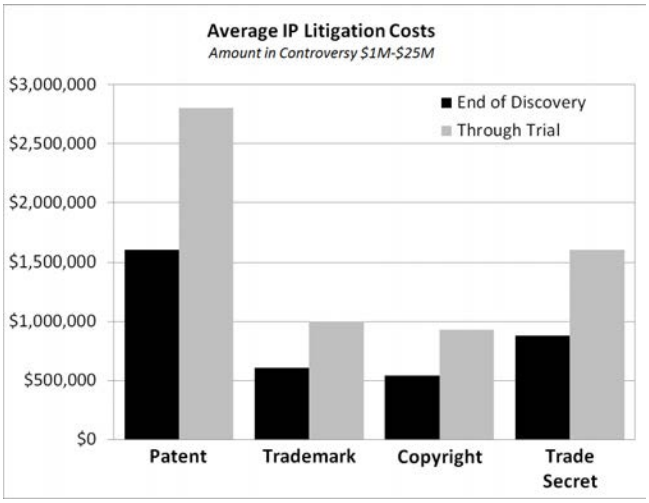

FIGURE 2: IP-Related Litigation Costs by Type

Most companies, organizations, and colleges and universities do not have sufficient contingency funds or borrowing capability to absorb the cost of IP litigation. Organizations owning significant breakthrough technologies put forth more than hard work and creativity; they also generate a strong and sizable budget to pay for experimentation, prototyping, product development, patent drafting, and prosecution. However, they often fail to plan for the cost of defending their current operations and enforcing their IP. Because of this, the disproportionate cost of IP litigation burdens many patent holders with the risk of owning an expensive, but ultimately worthless, asset.

Also, non-practicing entities (NPE), commonly known as "patent trolls" and "grasshoppers," routinely force companies into complex legal proceedings. These two types of entities have completely different modes of operation: one seeks to copy successful products in defiance of patents, while the other accumulates patents to assert almost as extortion. However, both wreak havoc with their objectionable business practices. Generally, patent trolls do not make a product. Instead, they simply accumulate a portfolio of patent rights with the sole objective of targeting smaller companies who are unable to pay patent defense costs, thus forcing them into signing license agreements and paying royalties. Patent trolls are notorious for suing companies with the sole objective of extracting royalties, often regardless of the lawsuit's merits. A company can obtain a dedicated IP defense policy to defend against these many times frivolous infringement allegations.

Grasshoppers may sound harmless enough, but in the world of innovative, patented products, they are becoming a dreaded plague. The term "grasshopper," coined by Chief Judge Randall Rader of the US Court of Appeals, refers to entities that leap in and practice an invention, knowing that the under-funded patent holder does not have the money to successfully enforce his patents against the interloper.

IP abatement insurance offers an excellent risk transfer solution since a patent holder would have a difficult time finding contingent fee counsel to take on representation against a grasshopper. Even the contingency fee arrangements fall short since companies must assume additional non-attorney litigation costs, which are significant. Many selective law firms will not even take a small entity's case if it cannot prove it has the money to fund the litigation, since the result is always the same: after an initial struggle, the small entity runs out of funds and gives up.

Therefore, as part of structuring an IP risk management plan, it is important to understand what a company or other organization's IP portfolio looks like in terms of enforcement and defense costs and address any concerns or potential exposures. IP is often times an organization's most valuable asset, yet it is also often seriously neglected during risk management reviews.

The Solution: IP Insurance

Every organization, including institutions of higher education, that is making, using, importing, selling, or offering for sale most goods or services in commerce is vulnerable to charges of IP infringement. Similarly, companies or organizations having rights in patents, trademarks, copyrights, or trade secrets have the potential to be infringed upon, making anti-piracy of their IP a critical part of protecting their market share. IP can be a double-edged sword and can be used for or against a company. It is crucial to have a comprehensive understanding of every exposure that an organization may have and then properly manage these risks through appropriate IP insurance products.

It is important for the insurance industry to embrace IP coverage, not only as a duty to its clients, but also an obligation to their shareholders to generate additional rev-

enue streams. The immediate challenge is simply making known that IP insurance is available to cover the needs of otherwise seriously exposed companies or organizations.

Company Size and Organization Type Determines Coverage

Company size many times is a driving factor in the type of IP insurance coverage needed. That is not to say that each company of the same size has the same concerns or needs, though. Therefore, it is important to know the audience and target the questions accordingly to assess the most applicable policy.

Innovators, Start-Ups, and Small Companies

These entities many times have a single or few issued patents that cover a product or a service constituting a major portion of their business. Generally, they use insurance to transfer their IP risks and free up their working capital, to be used for expansion and growth. These companies need IP insurance products to protect their market share and deter exuberant or frivolous infringement charges. An IP policy also enables them to fill contractual IP indemnification obligations by adding additional insureds to ensure funds will be available in the event of IP litigation against their customers.

Mid-Cap Companies

These companies manufacture an array of products and/or perform services and may or may not have issued patents on everything they do. These companies generally use insurance as a means to transfer their insurable IP risks to avoid exhausting working capital needed to support and expand operations. They also need IP insurance to deter over-the-top or frivolous infringement charges and to fill contractual IP indemnification obligations. These companies are likely to purchase both IP abatement and IP defense policies.

Every organization, including institutions of higher education, that is making, using, importing, selling, or offering for sale most goods or services in commerce is vulnerable to charges of IP infringement.

Large Companies

Generally, large companies only purchase high-limit, high self-insured retention, damages coverage to thwart unforeseen large losses. Insurance to fund the cost of litigation is not a necessity, as they prefer to handle litigation matters themselves. Many times these companies instead require their vendors to add the IP defense insurance as a means to shore-up contractual indemnification agreements requiring the vendors to indemnify them against IP litigation. Requiring IP insurance in the agreements ensures that, should an IP lawsuit ensue, the funds will be available through an insurance vehicle to enable the vendor to back up the agreed-upon indemnification.

All Companies

All companies may be at risk should they lose an underlying, insurance-covered IP lawsuit. These companies may experience business interruption, lose their commercial advantage, or incur expenses for redesign, remediation or reparations. Coverage under a multi-peril policy ensures that the party damaged by the loss of the insured IP lawsuit is made whole and is able to get back into the market with a competing product as soon as possible.

It is important to be aware of and recommend the right insurance protection. Assessing companies' IP risk and ensuring they have the right protection in place for this potentially costly exposure is essential to a company's overall financial survival. The inability to protect IP is a leading cause of failure for companies and organizations and can be avoided through specialized IP insurance products and services.

Universities and State Agencies

While universities and state agencies can generally claim sovereign immunity under the 11th Amendment, there are instances where these groups find IP insurance to be advantageous. One avenue of exposure is where a state waives its sovereign immunity when it removes to a Federal Court a complaint that had been filed in state court. See, for instance, *Lapides v. Board of Regents of Univ.*

System of GA.[4] In that case, the Supreme Court stated it would be unfair to allow a state to both invoke federal jurisdiction and assert sovereign immunity to deny that very jurisdiction. The court also concluded that the general rule of *Lapides* does not need to be limited to instances of removal.

In the case of *Board of Regents of the University of Wisconsin System v. Phoenix International Software, Inc.*,[5] the University of Wisconsin challenged the Trademark Trial and Appeal Board's decision, cancelling its mark to "condor" by filing a separate action in Federal District Court. The 7th Circuit held that the direct filing in Federal Court waived immunity, and the university system's waiver of immunity was broad enough to encompass compulsory counter claims required under Rule 13a of the Federal Rules. Therefore, the ruling enabled Phoenix International Software to pursue its counter claims against the University of Wisconsin on remand. Again, the theory was that a university should not be able to advance its litigation position by choosing a federal forum and then invoking sovereign immunity.

Thus, procuring a defense policy to cover the possibility of waiver of sovereign immunity, whether intentional or inadvertent, is a judicious step for any university. Moreover, the primary exposure that an IP defense policy would cover is through the act of waiver premiums, which generally could be expected to be lower and, thus, quite attractive. Frequently, business partners of universities do not enjoy the same protection of sovereign immunity, leading to potential exposure to IP infringement lawsuits.

It goes without saying that IP infringement abatement coverage, along with other IP policies, can be used by state agencies and their partners in the same way that for-profit enterprises use the policies. Especially, the abatement policy can afford universities the protection and help needed to fund costly enforcement IP lawsuits.

Procuring a defense policy to cover the possibility of waiver of sovereign immunity, whether intentional or inadvertent, is a judicious step for any university.

What Insurance Coverages Are Available?

IP insurance helps reduce the financial burden associated with an IP lawsuit. Below is a snapshot of typical IP policy terms common to all polices:

- Limits available up to $10M per claim/aggregate (higher limits may be available)
- Co-pay – 10 percent
- Self-Insured Retention - Minimum 2 percent of the per claim limits
- Worldwide coverage is available
- The insured chooses litigation counsel
- The insured controls the lawsuit

The following IP insurance products are specific to certain IP risks:

IP Abatement Insurance

If a company, organization, or institution of higher education has issued patents, patent applications, provisional patent applications, registered trademarks, trademark applications, common law trademarks, copyrights, or trade secrets, it should consider an IP Abatement insurance policy. Abatement-type insurance policies are unique because they are "plaintiff's" policies. IP Abatement coverage provides the wherewithal to pursue infringers and often provides the incentive for adversarial parties to reach a quick and equitable settlement.

There is also an Abatement IP insurance policy designed specifically for individual inventors, start-ups, and small companies needing a "starter" policy. These policies are low-limit, affordable policies to help protect innovators from the predatory business practices of some companies. They level the playing field and protect against the potential financial hardship that IP infringement by a third party can inflict on a small entity or start-up.

IP Defense Insurance

All companies have the potential to become involved in IP litigation. A company or organization is vulnerable if it is simply making, using, selling, importing, or offering for sale a product and/or service; or, if it holds sought-

after technology on products and/or processes. IP defense insurance reimburses the litigation costs of defending charges of infringement made by third party IP holders against an insured. In addition, the coverage includes reimbursement for the cost of invalidity defense to charges of infringement, cost of patent post-grant proceedings, and damages and/or settlement.

The fact that the insured has a patent on its product does not guarantee that there will not be a suit brought by a third party holding similar IP rights. Even if the case against the insured is unjustified or frivolous, there are still legal expenses involved in funding the insured's defense. It is always possible that reasonable minds would differ regarding the scope of existing patents, thus there is always a need for IP defense insurance no matter how clean the products appear.

Companies experiencing or planning a merger and/or acquisition would also benefit by securing an IP defense policy. Such a policy could obviate escrowing the funds for unforeseen IP litigation. The practical effect is that an IP defense insurance policy can reduce the uncertainty in going forward with a merger or acquisition.

Multi-Peril IP Insurance

As part of IP risk mitigation, organizations must plan for their own future in the event of a loss of an IP lawsuit. If there is a loss, they must be prepared to withstand a business interruption because their product had to be taken off the market, or they may suffer a loss of commercial advantage because their patent was invalidated, making the product becomes "off patent." Some companies or organizations must start over by having to redesign their product, remediate, or make reparations.

Multi-peril insurance is first-party coverage for reimbursing losses/costs resulting from losing IP litigation; it reimburses money directly to the policyholder beyond the legal costs of the underlying case. The multi-peril policy covers debilitating expenses that may otherwise be present because of overlooking the simple step of making sure the company or organization itself has a recovery plan in place in the event of the loss of an IP lawsuit.

Involved Underwriting

Underwriting the IP risk is often a complex task, which is not to be taken lightly. There is no "rate card" for an underwriter to turn to when underwriting an IP risk. Significant technical expertise, proprietary databases, and associated software programs are critical to underwriting IP risks. Successful IP risk underwriting requires that procedures and methods have been developed, including application forms, policy endorsements, confidential rating manuals, copyrighted policy language, and a myriad of other form letters and communications.

For large numbers of high volume, low technology products a complete and comprehensive investigation of existing patents may not be possible. Increased self-insured retentions are frequently used to hedge against the risk that the investigation yielded few results or was otherwise limited. Results of an in-house investigation of existing patents, and probes into the practices that the applicant employs to avoid infringement are also considered in establishing the threshold of insurable risk. The underwriting of specialized IP policies is best left to those skilled in the provisions and practice of intellectual property law.

Managing IP Litigation

Litigation management is crucial to promoting efficient and effective claims resolution. Intellectual property infringement is quite unlike other casualties, such as fire, life, auto, and health, since it is very difficult to know when the named peril of infringement will occur.

The development of claims management protocols and associated methods and procedures are an important part of the successful management of intellectual property suits. The goal of litigation management is to resolve infringement controversies promptly at the lowest possible cost and to the greatest possible satisfaction of the parties involved. This can best be done by active involvement of all parties, including legal counsel.

Programs such as early intervention infringement resolution are incentives for alternative dispute resolution, and the carefully phrased language of all correspondence pursuant to the claims process contributes to a prompt, efficient, full, and fair resolution of claims at minimal cost.

Assessing IP Risk

It is important to recommend the right insurance protection, which includes assessing the IP risk and ensuring the right protection is in place for this potentially costly

exposure. Fundamental questions in making such an assessment are:

- Does the organization have IP rights?
- Does the organization have sought-after technology on products and/or processes?
- How competitive is the market?
- Is the organization concerned about being sued or suing another for IP infringement?
- Does the organization have, or think they have, any current defensive coverage under an existing general liability or business owner's policy?
- Can the organization afford to self-insure?
- Does the organization have a risk management strategy for their IP?
- Does the organization have a contractual obligation to indemnify against IP infringement?
- Is the organization prepared to license their products, processes, and/or their IP?
- Does the organization have a recovery plan in the event of the loss of an IP lawsuit?
- Is the organization concerned about non-practicing entities (NPE)?
- Is there a pending sale, merger, and/or acquisition in the organization's future?

Keeping Up with IP Risk

Companies, organizations, and institutions of higher education, along with their outside risk management professionals, must take the time to make sure the IP risk management plan is current. Risk managers should be cognizant of the fact that, as the company or organization evolves, so too will the plan need to be altered to fit the current situation. Changes such as the following should prompt a re-assessment of the plan:

- New products and/or services are added or dropped from production
- Redesigned products and/or services are marketed
- Licensing deals are impending
- Planned mergers or acquisitions are completed
- Working with new suppliers or vendors begins
- Contractual indemnification changes
- Newly filed or issued patent and/or trademark applications are reported
- New competitors enter the market
- Monitoring the activities of patent trolls show how they are filing lawsuits which may involve the organization's products
- Trends in IP litigation are reported

When these and other changes occur, it is important to revisit the IP risk plan.

Intellectual Property Insurance Is the Solution

Although organizations are becoming more frequently cautioned regarding the lack of true IP coverage in other insurance policies, many are still simply unaware that their commercial general liability policy may not be providing coverage for their most valuable asset, intellectual property. These IP rights may be needlessly at risk if companies and organizations become engaged in IP litigation

IP infringement insurance is the most logical and economical choice that a company, organization, or other entity can make to ensure that the means are available to protect against the high cost and consequences of an IP infringement case. This insurance is just as valuable, if not more so, than general liability, errors and omissions, and directors and officers insurance policies. Surprisingly, these latter policies are routinely offered and placed by insurance professionals, while IP insurance is many times overlooked or avoided altogether. IP insurance is the solution to protect against the potential financial hardship that IP litigation can inflict by helping fund the litigation expenses to get through the case on the merits. As the saying goes, "You can't get fire insurance if your house is already on fire." Being proactive and insuring IP risks early makes for sound risk management.

About the Author

Robert Fletcher is the president and founder of Intellectual Property Insurance Services Corporation (IPISC), the worldwide leading provider of intellectual property (IP) insurance. Under Mr. Fletcher's direction, IPISC serves as the program manager for IP risks. In addition to founding IPISC over 23 years ago, Mr. Fletcher has more than 40 years of experience as a patent attorney and played a lead role in conceiving and developing IP infringement abatement insurance.

Mr. Fletcher holds degrees in chemical engineering and law from the University of Wisconsin and an MBA from the University of Louisville.

Endnotes

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3 American Intellectual Property Law Association (AIPLA), *AIPLA Report of the Economic Survey 2011*, http://www.aipla.org/learningcenter/library/books/econsurvey/2011/Pages/default.aspx.

4 *Lapides v. Board of Regents of Univ. System of GA(01-298)*, 535 U.S. 613 (2002) 251 F.3d 1372.

5 *Board of Regents of the University of Wisconsin System v. Phoenix International Software, Inc.*, 99 USPQ2d 1571 (7th Cir. 2011).

Do you know what my favorite renewable fuel is?

An ecosystem for innovation.

—Thomas Friedman (1953–),

American Journalist, New York Times Columnist, and Author

URMIA 2012 Innovative Risk Management Solutions Award

Automated Environmental Health and Safety Management System

| *Steve Nelson, Auburn University*

Abstract: URMIA launched its Innovative Risk Management Solutions Award in 2007 to recognize new and creative risk management efforts implemented by our members which address specific exposures or risk management topics in colleges and universities. It also encourages members to share their successful ideas or projects as potential resources for others and to facilitate sharing of this information. In 2012, Auburn University was honored as the recipient of the Innovative Risk Management Solutions Award.

This article provides an executive summary of Auburn University's automated environmental health and safety management system. The hope is that other college and university risk managers will be able to modify and implement similar programs on their own campuses and benefit from the sharing of these materials.

Introduction

Maintaining compliance with environmental regulations is a challenge for many colleges and universities. Costs for non-compliance can severely impact an institution both financially and through damage to public image. Auburn University (AU) is a major land grant, research institution with facilities distributed throughout Alabama, including a satellite campus, a regional airport, and numerous research centers and agricultural experimental stations. Each facility works independently to maintain environmental regulatory compliance, receiving oversight and support from the Risk Management and Safety Department (RMS) located on the main campus.

In 2009, AU completed a comprehensive environmental compliance audit of all facilities and operations. In addition to identifying numerous compliance issues the audit helped to highlight a critical need for improving the process for managing compliance responsibilities in the university system.

The university chose to develop a web-based environmental health and safety (EHS) system using Microsoft SharePoint. SharePoint is user friendly, highly customizable, and scalable for any size organization. The system developed provides RMS with immediate access to the status of compliance activities at all AU facilities at all times and relief from the administrative burden associated with program and task oversight.

Managing EHS programs is a challenge for both large and small colleges and universities, due to the diverse range of compliance needs.

Section I – The Challenge

What risks or exposures were addressed by your solution?

Managing EHS programs is a challenge for both large and small colleges and universities, due to the diverse range of compliance needs, including maintaining a chemical inventory, performing laboratory inspections and safety audits, tracking training records, and managing research protocol reviews. Small institutions often have a single person tasked with documenting overall compliance. Large schools must track and document compliance across a number of independent working groups or campuses.

The US Environmental Protection Agency (EPA), as well as state environmental regulators, have been very active with inspections and enforcement in the College and University sector. Since the early 1990s when the EPA initiated the College and University Compliance Initiative, many private and public schools both large and small have received substantial penalties for environmental non-compliance including Boston University, which received a $771,000 fine, and the University of Missouri-Columbia, with a $582,296 penalty.

In addition to financial impacts, violations can impact the image of colleges and universities. Maintaining a "green" image is becoming increasingly important for colleges and universities as they move toward more sustainable business practices and operations.

Why was this risk or exposure a priority?

AU's RMS is charged with the responsibility of overseeing EHS compliance at all facilities across the university. In 2009, AU completed a comprehensive compliance audit of all facilities and operations. In addition to identifying numerous compliance issues requiring correction, the audit also helped identify some of the root causes contributing to non-compliance:

- Numerous compliance tasks with various deadlines for all 26 facilities.
- Many individuals are responsible for performing compliance inspections and tasks. Some of these individuals were not aware of these responsibilities or didn't have the information they needed to complete the tasks.
- Most people with responsibility for compliance tasks have other primary, competing responsibilities.
- Lack of an automated, centralized method to gather information, organize and document tasks, and keep data current.

RMS needed easy access to the complete EHS program status. A great deal of time was spent hunting down information to determine the compliance status of any one facility. This presented a significant administrative burden and expense and reduced the amount of time staff had to focus on important EHS initiatives.

What makes your solution a unique or innovative approach?

Many colleges and universities are turning to software programs to help document and manage their EHS programs. However, third party software is typically expensive, and the ability to customize it to meet specific needs is often restricted. Microsoft SharePoint is a powerful organizational solution that can address many of the needs of both small and large EHS programs in a customizable, scalable, and cost effective way. SharePoint allows users to develop customized applications and workflows that will meet their specific needs and existing processes. SharePoint offers powerful tools to display, collect and process information and has a number of attributes that are very useful for constructing EHS program solutions, including:

- It integrates easily with the Microsoft Office suite (Access, Excel, Word, and Outlook).
- Microsoft web user interface is familiar to users, minimizing training requirements.
- It allows workflow modeling to automate process or task administration.
- It offers a wide range of permission options to control access to site content.
- It offers customized views for user groups.
- It gives the ability to collect information from web-based forms electronically.
- It has built-in tools, such as task lists, document libraries, and databases.

In addition to the above, scalability was a factor in choosing to develop our management system using SharePoint. We had a limited budget and needed something that we could build on as additional time and resources became available. With SharePoint, we were able to design the basic site for managing compliance tasks quickly and at minimal cost.

What programs or services on your campus were affected or improved by this project?

The EHS management system has affected and improved virtually every aspect of the environmental compliance process. Prior to implementing the system, there was no systematic process for managing due dates and deadlines and ensuring accountability. The management system covers environmental compliance activities for all AU facilities and operations, not just the main campus.

One of the first steps in developing the management system was to create a compliance calendar. The compliance calendar is used to track and manage all environmental compliance tasks, such as hazardous waste storage and disposal, inspections for oil and hazardous materials storage areas, environmental permits, and regulatory reporting. Developing the compliance calendar alone was a fantastic exercise for process improvement as it clearly defines the tasks, due dates, and lines of responsibility for completing compliance activities for all areas of the university, not just within the RMS department.

In addition, the system has improved the management of compliance information, including permits, licenses, and equipment data, such as boilers, storage tanks, and

transformers. Previously, all of this information was maintained in paper files. RMS is in the process of converting these documents to electronic format. The EHS management system will make these documents available anywhere, anytime via the web. In addition, SharePoint offers virtually unlimited customization for controlling access to these records on a secure server.

What are the positive results of the implemented program?

Prior to implementing the EHS management system, RMS staff dedicated a considerable amount of time to tracking down and managing compliance activities. RMS staff monitored program status and task completion through email, phone calls, and face-to-face meetings. With the system in place, staff can determine the compliance status of all AU facilities at any given time by accessing the custom Management Dashboard.

In addition, personnel outside the RMS department with responsibilities for completing environmental compliance activities receive timely notices when tasks are due. The system also maintains support documentation to assist these users in completing their assigned tasks.

Since developing the basic program management features of the site, RMS has continued to expand the system. New functions include a dashboard to organize and track information regarding the numerous above ground and underground storage tanks owned and operated by AU, as well as team sites for committees and work groups to organize and share information.

The EHS management system has affected and improved virtually every aspect of the environmental compliance process. The system manages due dates and deadlines and also covers environmental compliance activities for all facilities and operations, not just the main campus.

How were the changes received by those affected by the program or service?

Response from both the RMS Environmental Health and Safety Staff and users outside the RMS department has been positive. For the RMS staff, the system provides a platform for tracking and documenting regulatory compliance, distributing information on their program areas, and organizing and reporting program status.

From the perspective of users outside of the RMS department, the system provides them with information and resources they need to proactively manage their compliance responsibilities. Two factors, both related to the unique features available in SharePoint, have helped to gain support from users. First, we have created custom features to simplify data entry and task management. Second, we have capitalized on the ability of SharePoint to interface with other information management systems to streamline how users manage tasks.

Section II – Budget and Solution

What was the total budget for this project?

Total expenses for developing the management system were $9,752. This was for the consultant to develop the site and custom forms. At this point, we are managing the site ourselves with assistance from the university IT department.

How many staff were allocated to this project and for what length of time?

No additional staff was required for the project. All work was completed using existing staff. The AU team included three RMS Staff personnel and one representative from the university IT department. Development of the basic management system required approximately one year.

How are you tracking your success on risk reduction as a result of implementation?

Performance metrics were built into the EHS Management System. The system tracks the status of compliance tasks and dates of completion. Custom dashboards are included in the system so that users and administrators can quickly determine the compliance status of their op-

erations. Fundamental success of the system is measured by the number of tasks completed on time vs. past due.

What strategies or venues did you use for communication to the college or university community?

Rollout of the EHS Management System was accomplished in October 2010. Communication was targeted at the individuals and groups tasked with environmental compliance responsibilities. An introduction letter, shown below, was sent to all individuals responsible for completing tasks in the system. In addition, RMS staff met with supervisors and department heads in these areas.

RMS provided training to users to ensure that they understood their roles and responsibilities within the management system, as well as how to access and use the system. Live web-based training was provided to personnel located at facilities remote from the AU main campus. Training is provided to new users on an as needed basis.

FIGURE 1: INTRODUCTORY MESSAGE SENT TO NEW USERS

WELCOME TO AUBURN UNIVERSITY
ENVIRONMENTAL MANAGEMENT DASHBOARD
You have been identified as an AU Employee with responsibility for managing one or more tasks relating to environmental regulatory compliance. The AU Environmental Management Dashboard was developed to assist you in meeting that responsibility.

The Dashboard is managed through the department of Risk Management and Safety, Environmental Health and Safety program.

The dashboard tracks tasks that are required by Auburn University staff. As an individual with primary responsibility for a given task, Responsible Party 1 (or RP1), you will receive automatic notices when items are coming due. Once you have completed tasks, you will be expected to log onto your dashboard, https://sites.auburn.edu/admin/rms/default.aspx, to mark items as complete. At the top of your dashboard you will notice a table. This is where you can mark items as complete, as well as the date of completion.

Within a few weeks the alert system will be initiated. At that time you will begin receiving regular email notices identifying that a particular task is due or, in some cases, past due. Before the email alert system is initiated you should log onto your system dashboard using your Banner ID and Password, and identify items that have been completed prior to today's date. The alert workflow is described in the attached document.

If you have questions or need assistance with your dashboard please contact the EHS program office at hazmat1@auburn.edu or call extension 4-4805.

Section III – Result

How could other risk managers utilize your solution on their home campus?

The AU EHS Management System was developed using MS SharePoint, which is publicly available software. We were fortunate because AU had recently acquired a site license for MS SharePoint, and support was available from the AU Office of Information and Technology. Schools which do not have their own SharePoint systems can have their site hosted on an off-campus server for a fee. In any case, it is strongly advised to select a strategic partner with expertise in working with SharePoint and a background in environmental compliance.

SharePoint is highly customizable, and there are many options for application development. It is easy to get overly enthusiastic when you see all the possibilities and to branch off into too many directions. It is important to start with one application and stay focused. Application development also requires clear communication between the EHS group and the IT developer. It is often difficult and time consuming for an EHS group to communicate their processes and requirements to an IT group, and having a partner which understands both the IT aspects and the environmental compliance aspects of the system is very beneficial.

AU chose Environmental Health and Engineering (EH&E) for a strategic partner to assist with the application development. Because of their experience, EH&E understood our compliance needs and were able to expedite the development of the system. There are other consultants working with SharePoint, and as more schools begin developing systems there is an opportunity for collaboration between institutions.

Is your solution scalable for smaller/larger campuses?

SharePoint systems are completely scalable for small or large campuses.

Section IV – The Project Materials and Final Product

The EHS Management System is a web-based system. Section V provides copies of representative sections of the system for review and discussion during the interview process.

EHS Management System Overview

Figure 2 is a screenshot of the EHS Management System home page. The calendar provides a quick view of all compliance tasks for the current month. Navigation links are provided on the ribbon and side menus for accessing other features and areas of the site. The page content and navigation are easily customized for individual pages or users.

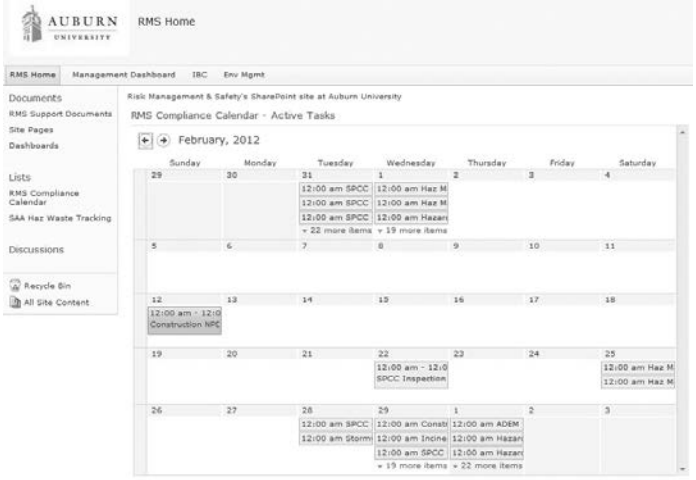


FIGURE 2: EHS Management Home Page

Compliance Calendar

The first application developed was a compliance calendar focusing on environmental compliance tasks and activities. The calendar acts as a "master compliance task list" for the main campus and all off-site facilities and serves as the core of the management system.

For each compliance task, we identify what the task is, what sites it applies to, who is responsible, and when must the task be completed. This is an extremely valuable exercise. It helps us ensure that roles and responsibilities were clearly defined and allows us to close any gaps in the program (see Figure 3).

Once the basic components of the list were determined, we identified what additional information must be collected and tracked. This was determined by asking the following questions:

- What metrics will AU want to report?
- How does AU currently administer their program?
- How does AU want their staff to access the information?

Task	Type of Task	Dependent Tas	Media	Frequency	Due Da	Status	Responsible Person 1 (F
SPCC Inspections (Elevators)	Inspection		SPCC	Monthly	5/31/2012	Completed	Lipham, Steve
Stormwater Sampling (007 only)	Sampling	007 - vehicle & equipment washing operations	Stormwater	Monthly	5/31/2012	Completed	Yerby, Rick
WORF Groundwater Monitoring Report Submital	Reporting	WORF GW Report Review	Water Groundwater	Semi-Annual	5/31/2012	Completed	McCauley, Tom
Zone 1 Monthly Containment Checks	Inspection	Funchess Hall	SPCC	Monthly	5/31/2012	Completed	Lipham, Steve
Zone 2 Monthly Containment Checks	Inspection	BEMC, Jule Collins Museum	SPCC	Monthly	5/31/2012	Completed	Lipham, Steve
Zone 3 Monthly Containment Checks	Inspection	Walker Pharmacy, Lowder Building, Shelby Ctr, Student	SPCC	Monthly	5/31/2012	Completed	Lipham, Steve
Zone 4 Monthly Containment Checks	Inspection	Facilities Division Mechanical Shop, Facilities Div	SPCC	Monthly	5/31/2012	Completed	Lipham, Steve
AOC-D Groundwater Monitoring Report Submital (Knapp, Spidle, Boyd &	Reporting	AOC-D Groundwater Sampling Report	Water Groundwater	Semi-Annual	5/31/2012	Completed	McCauley, Tom
SPCC Container Inspection - Farm Services	Inspection		SPCC	Monthly	5/31/2012	Completed	Pate, Greg
SPCC Container Inspection - Dairy Unit	Inspection		SPCC	Monthly	5/31/2012	Completed	Beardon, Wayne
SPCC Container Inspection - Beef Unit	Inspection		SPCC	Monthly	5/31/2012	Completed	Peacock, Rob
SPCC Container Inspection - Plant Breeding Unit	Inspection		SPCC	Monthly	5/31/2012	Completed	Nightengale, Steve

FIGURE 3: Compliance Calendar Sample

Development and maintenance of the compliance calendar is an ongoing process. Each year, we populate the calendar with upcoming tasks. In addition, whenever new compliance tasks or activities are identified, they are added to the calendar. The calendar is easily customized so new fields can be added as needed to accommodate additional information.

Workflows

The next critical step was to create a flow chart to map out how the tasks will be processed and by whom. This helps ensure that the collection of the information is built into the master compliance task list. Additionally, it helps identify the "triggers" for email alerts and to whom they should be sent.

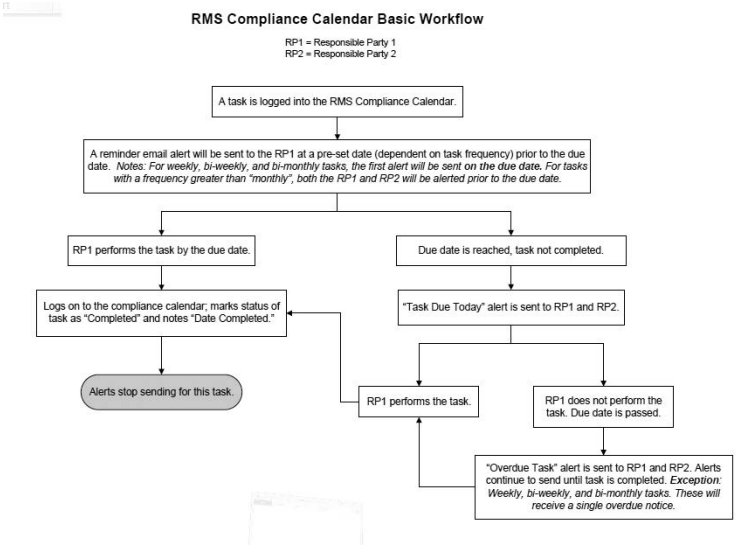
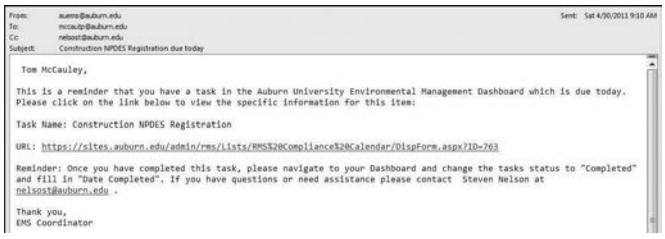


FIGURE 4: Compliance Calendar

Alert Messages

Once a task is created in the compliance calendar, the system automatically issues alert messages via email to individuals identified as responsible for a task. For our system, we identified two basic responsible individuals, identified as RP1 and RP2. RP1 is the individual with primary responsibility for completing a given task. RP2 is the person, typically an RMS staff member, responsible for oversight of the compliance program under which the task is required, such as waste management, storage tank management, or storm water management.

Alert messages are issued based on a predetermined schedule. For example, alerts for a monthly task are issued to RP1 one week prior to the due date. If the task is not completed, an alert is issued to the RP1 and RP2 on the due date. If it is not completed on the due date, past due alerts are issued to RP1 and RP2 on a daily basis until the task is complete. Following are examples of the alert messages:


From: auems@auburn.edu Sent: Sat 4/30/2011 9:10 AM
To: mccaulp@auburn.edu
Cc: nelsost@auburn.edu
Subject: Construction NPDES Registration due today

Tom McCauley,

This is a reminder that you have a task in the Auburn University Environmental Management Dashboard which is due today. Please click on the link below to view the specific information for this item:

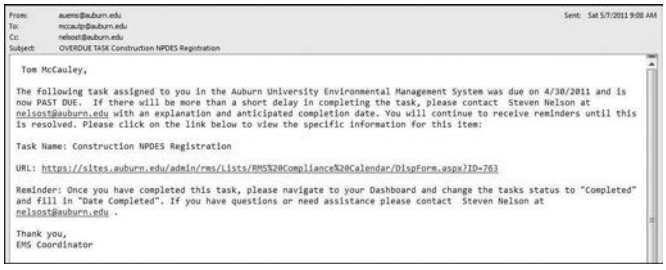
Task Name: Construction NPDES Registration

URL: https://sites.auburn.edu/admin/rms/Lists/RMS%20Compliance%20Calendar/DispForm.aspx?ID=763

Reminder: Once you have completed this task, please navigate to your Dashboard and change the tasks status to "Completed" and fill in "Date Completed". If you have questions or need assistance please contact Steven Nelson at nelsost@auburn.edu .

Thank you,
EMS Coordinator

FIGURE 5: Sample E-mail Alert - Task Due


From: auems@auburn.edu Sent: Sat 5/7/2011 9:08 AM
To: mccaulp@auburn.edu
Cc: nelsost@auburn.edu
Subject: OVERDUE TASK Construction NPDES Registration

Tom McCauley,

The following task assigned to you in the Auburn University Environmental Management System was due on 4/30/2011 and is now PAST DUE. If there will be more than a short delay in completing the task, please contact Steven Nelson at nelsost@auburn.edu with an explanation and anticipated completion date. You will continue to receive reminders until this is resolved. Please click on the link below to view the specific information for this item:

Task Name: Construction NPDES Registration

URL: https://sites.auburn.edu/admin/rms/Lists/RMS%20Compliance%20Calendar/DispForm.aspx?ID=763

Reminder: Once you have completed this task, please navigate to your Dashboard and change the tasks status to "Completed" and fill in "Date Completed". If you have questions or need assistance please contact Steven Nelson at nelsost@auburn.edu .

Thank you,
EMS Coordinator

FIGURE 6: Sample E-mail Alert - Task Overdue

Task Management

The RP1 has two options for completing a task in the system. If the task is completed prior to receiving an alert message, RP1 can navigate to the site to enter the required information and mark the task complete. In addition, the alert messages include a hyperlink, which opens the task window where the RP can record information and change the status to complete.

The system allows for creating custom forms tailored to a specific task. For example, we created a special alert for the "Generator Log" task. This task requires the RP1 to report the quantity of chemical waste and waste oil generated at their location on a monthly basis. To simplify the steps required to complete the task, we include a hyperlink to the data entry form with the alert message. When the RP1 accesses the link, the following form is opened:

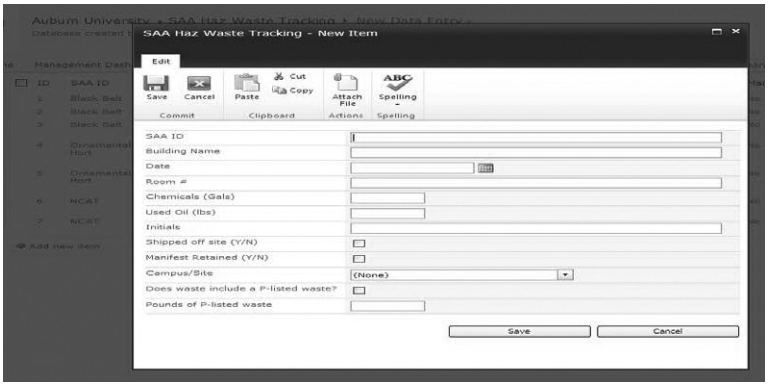


FIGURE 7: Hazardous Waste Tracking Form

Once the form is completed, the system automatically records the date of completion and changes the task status to "complete" so that the alert messages are stopped.

Integration with Facilities Division Work Management System

A unique feature of the SharePoint system is the ability to integrate with other information management systems. This allowed us to create an interface between the EHS Management System and the Work Management System used by the AU Facilities Management Division. This means that facilities personnel only have to learn and use their own Work Management System.

Dashboards

Dashboards were created to display information useful to the different users of the system. This allows us to create custom displays of the information in the EHS Management System tailored to the needs of individuals using the system.

Figure 8 is a screen image of the Management Dashboard created for RMS Environmental Health and Safety staff. The dashboard allows RMS staff to quickly determine the status of compliance activities at each of the AU facilities. It also provides performance data to assist with program evaluation.

Figure 9 provides a view of the dashboard created for the AU at Montgomery (AUM) user group. By creating this dashboard for the AUM users, we were able to make pertinent information easier for them to locate. In addition, we are able to limit access of the group to the information they are authorized to view.

The typical user group site dashboard provides a simplified view of the compliance calendar, listing of upcoming tasks, and access to support documents, such as forms, policies, and procedures, pertinent to the group or site operations. The dashboard may be customized based on the needs of the users.

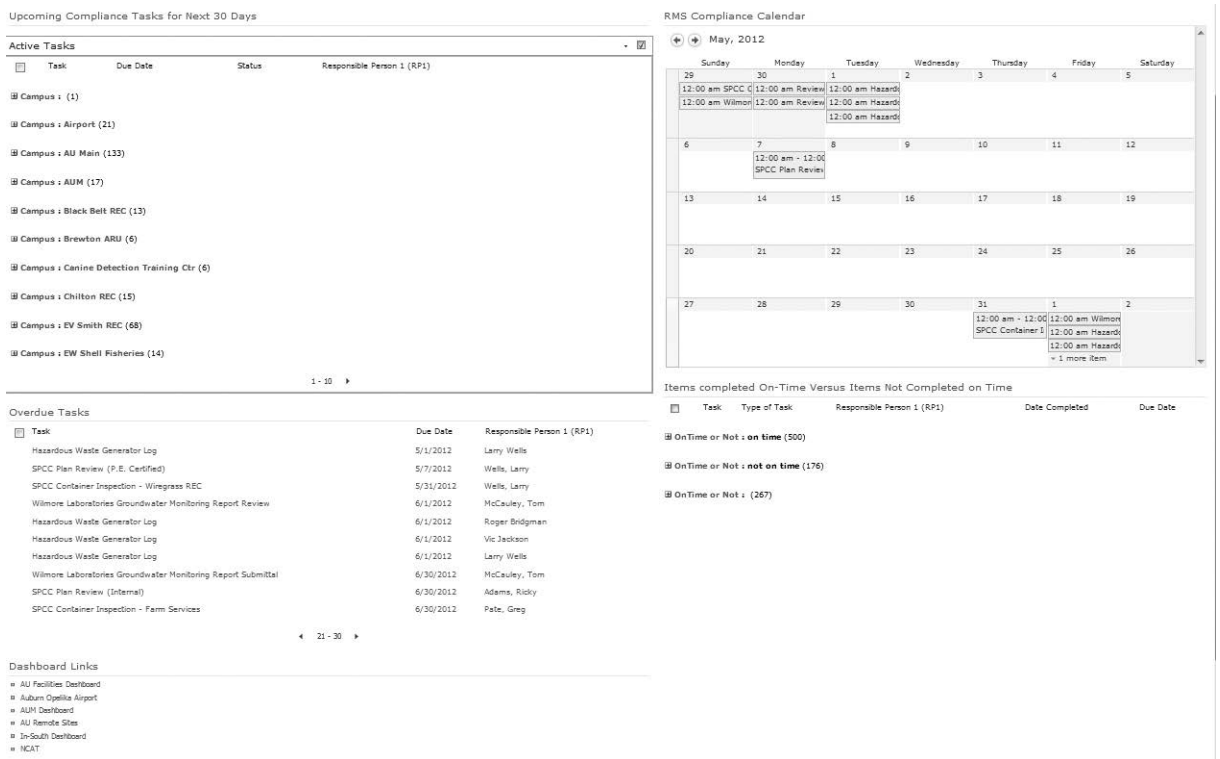


FIGURE 8: RMS Management Dashboard

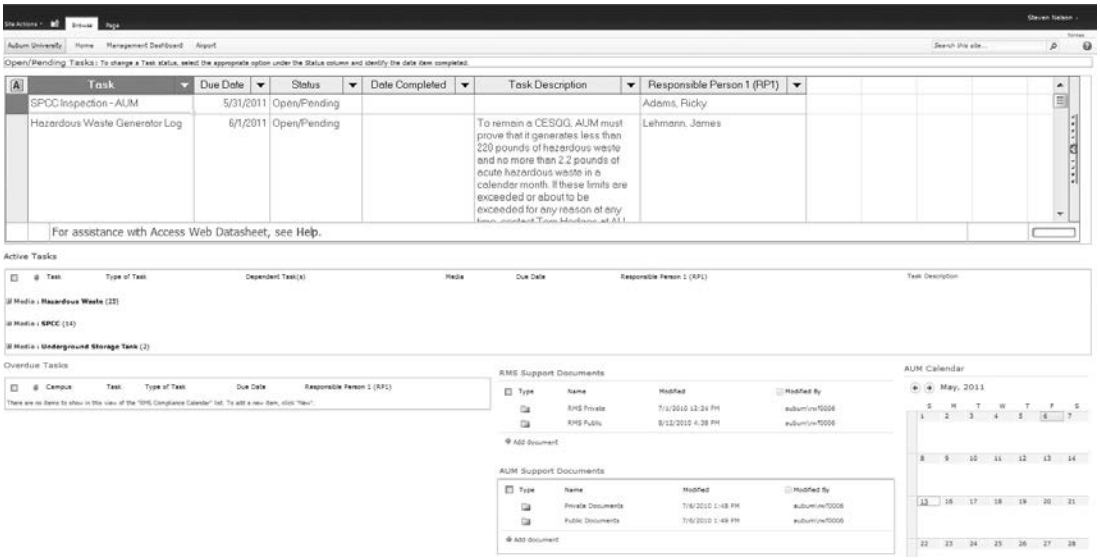


FIGURE 9: Auburn University at Montgomery Dashboard

Support Document Libraries

Document libraries were created to provide additional support to system users. Forms and reference information are included in the libraries. In addition, custom libraries were created so that users see only the documents pertaining to their operations.

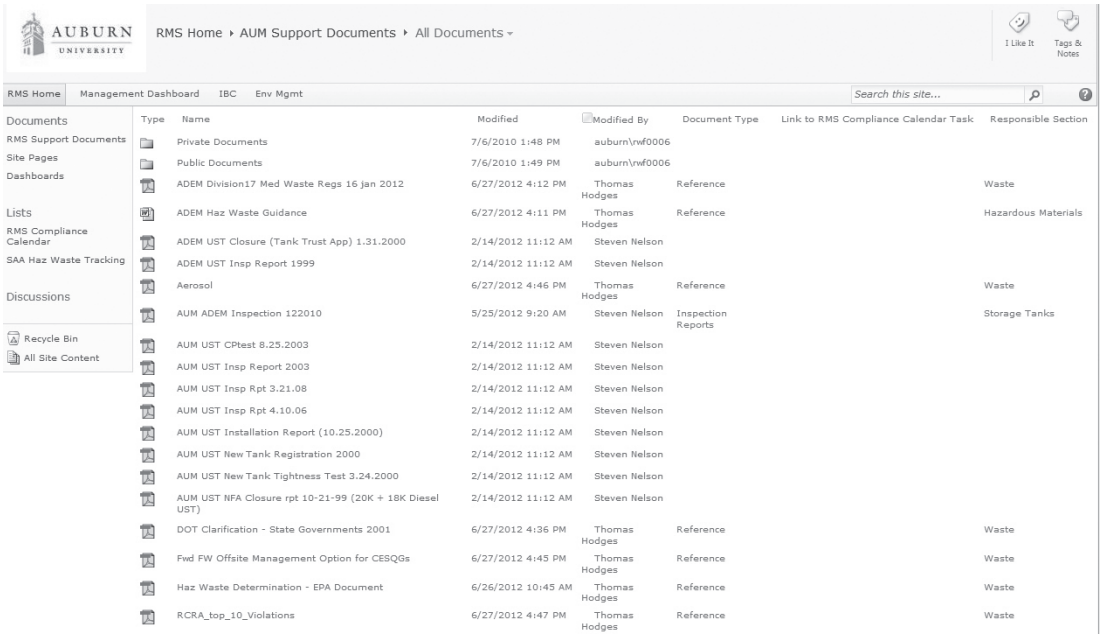


FIGURE 10: Example of Document Library

About the Author

Steve Nelson, ARM, REM, is the associate director for environmental health and safety (EHS) at Auburn University. He has over 25 years of experience in the environmental field. For the past 18 years, he has focused on development of EHS programs in higher education.

Research is creating new knowledge.

—Neil Armstrong (1930–2012),

American Astronaut and the First Person to Walk on the Moon

An Analysis of Differences in Compensation Across Higher Education Risk Management Professionals

| *L. Lee Colquitt and Christine Eick, Auburn University, and David W. Sommer, St. Mary's University*

Abstract: This paper is based on data collected from a salary survey of University Risk Management and Insurance Association (URMIA) members. Data are first presented regarding characteristics of the sample institutions, the risk management departments of these institutions, and the individual senior risk management professionals who completed the survey. This is followed by analysis of compensation information. Compensation data are presented by institution type, job title, gender, age, experience, education, and geographic region. Regression analysis is performed to investigate the impact of various factors on the compensation of higher education risk management professionals.

Introduction

The University Risk Management and Insurance Association (URMIA) often receives requests from its members for information on salaries, reporting relationships, levels of staffing, and areas of responsibility within college and university risk management departments. The 2013 URMIA Salary Survey was designed to collect salary data, as well as detailed information about the risk management departments of URMIA member institutions. The survey instructions indicated that the survey "should be completed by the most senior risk management professional at your college or university." Prior to distribution, the survey was reviewed by a peer group, with representatives ranging from small private colleges to large public research universities.

On April 1, 2013, the survey invitation was sent to 548 URMIA member primary representatives. The e-mail invitation included an electronic link to the online survey. Three reminder e-mails were sent to the URMIA primary members during the month of April. By the closing date of the survey, 149 URMIA members had completed the survey. Below, we provide an analysis of the information collected in the survey. We begin by describing the characteristics of the institutions represented on our sample. Next, we describe the characteristics of the individual senior risk management professionals who completed the survey. Third, we describe the characteristics of the risk management departments in the sample. Finally, we analyze the compensation data, including a regression analysis exploring the factors that influence the salaries of senior risk management professionals in higher education.

The sample represents a wide variety of types of institutions, including public and private institutions, land grant universities, religiously affiliated schools, community colleges, and institutions with a medical school. The sample is also geographically diverse.

Characteristics of Sample Institutions

The sample represents a wide variety of types of institutions. It is balanced between public and private institutions and includes representation from land grant universities, religiously affiliated schools, community colleges, and institutions with a medical school. The sample is also geographically diverse, with no single region making up less than 11 percent or more than 22 percent of the sample (the regions are designated consistent with the 2013 RIMS Risk Management Compensation Survey). In addition, the sample includes significant representation across a number of Carnegie classifications, including schools identified as associate's (15 percent), bachelor's (14 percent), and master's (23 percent), as well as the different types of research institutions (11 percent doctoral/research, 17 percent high research, and 17 percent very high research). Finally, schools of all sizes are included, from 11 percent with fewer than 3,000 student FTEs to 6 percent with more than 50,000.

FIGURE 1: Institutions by Type

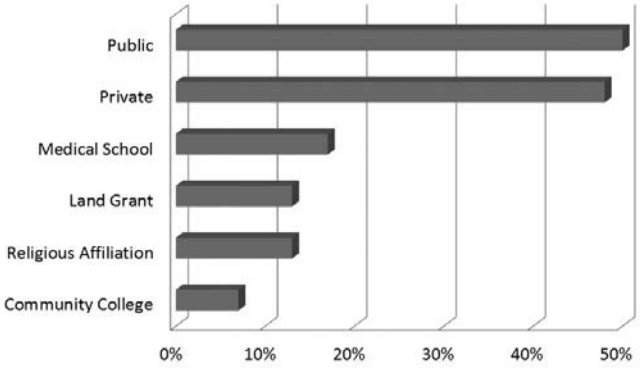


FIGURE 2: Institutions by Region

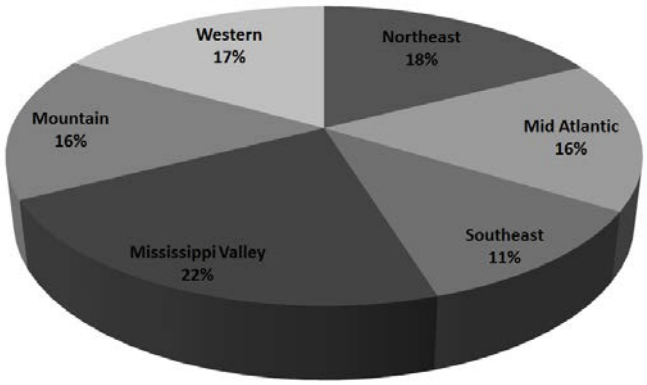


FIGURE 3: Institutions by Carnegie Class

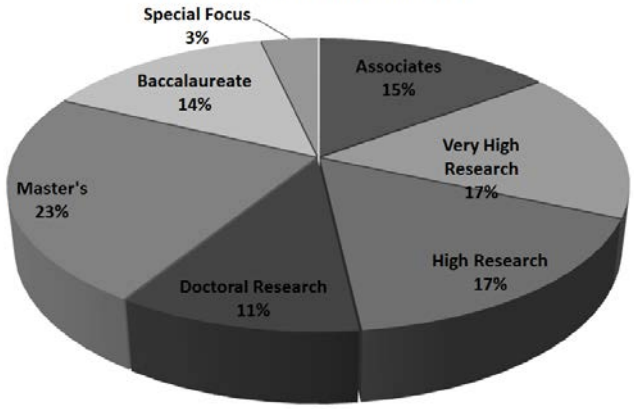
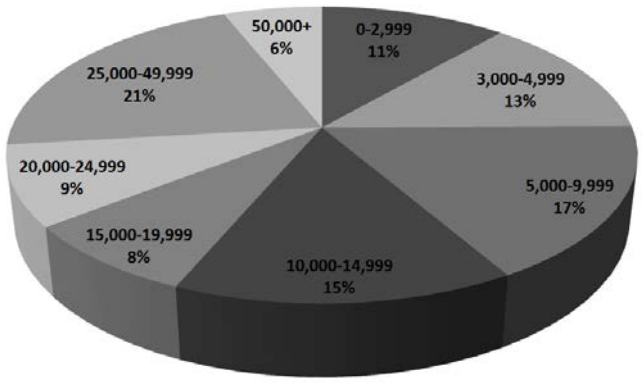


FIGURE 4: Institutions by Student FTE



Characteristics of Responding University Risk Management Professionals

The sample is extremely well balanced in terms of gender, with 51 percent of respondents being male and 49 percent being female. Not surprisingly, the distribution of the respondents by age is somewhat of a bell curve, with smaller percentages at the youngest and oldest age bands. Interestingly, a significant majority of respondents under the age of 50 are women, while a majority of those over the age of 50 are men, implying that the gender mix within the college and university risk management profession is likely to change substantially in coming years. Similarly, a higher percentage of those with less risk management experience (less than 15 years) are women, while a higher percentage of those with greater experience (more than 20 years) are men. Again, these percentages will almost certainly change significantly in the coming years.

The respondents to the survey are a well-educated group, with the overwhelming majority having completed a bachelor's degree and over 50 percent holding a master's degree or higher. Forty-six percent hold at least one of the eight professional designations included in the survey, with the two most frequently reported designations being the Associate in Risk Management (ARM) (with almost 35 percent) and the Chartered Property Casualty Underwriter (CPCU) (with almost 15 percent). A higher percentage of those holding professional designations are men, which may simply reflect the age and experience differences between men and women that are described above. Finally, although the respondents' titles are quite diverse, almost two-thirds have the title of either risk manager or director, risk management.

FIGURE 5: Respondents by Gender

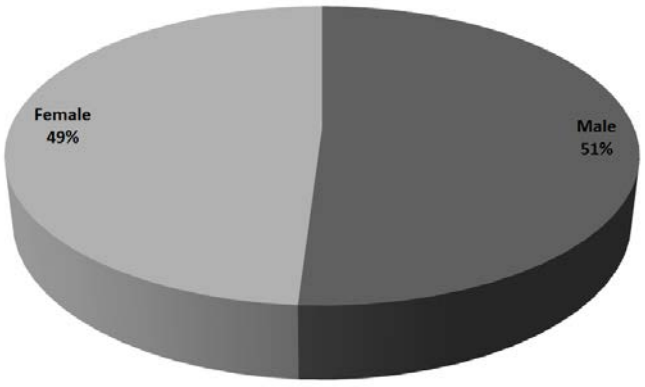


FIGURE 6: Respondents by Age

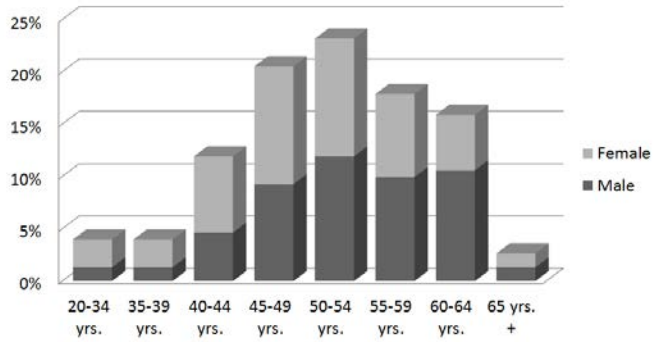


FIGURE 7: Respondents by Experience

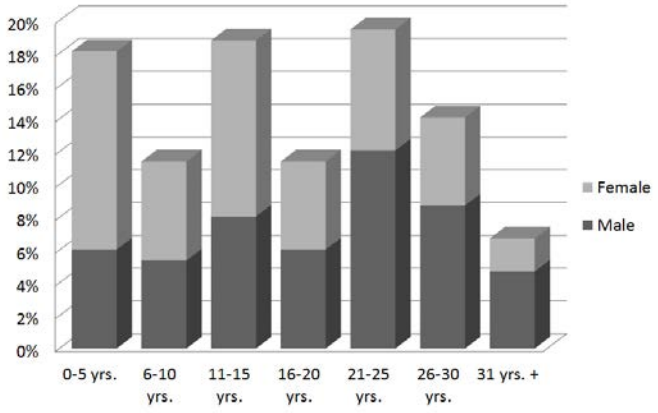


FIGURE 8: Respondents by Education

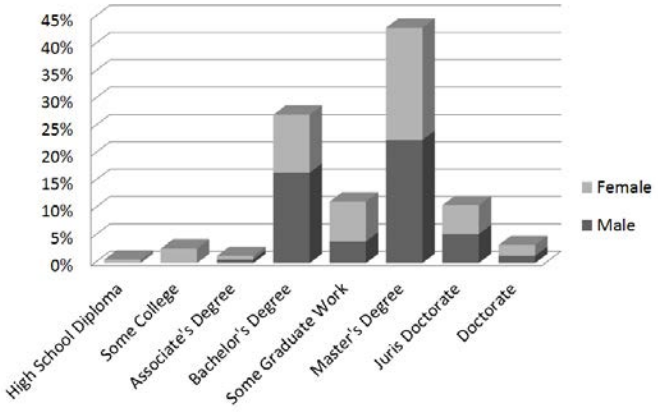


FIGURE 9: Respondents' Designations

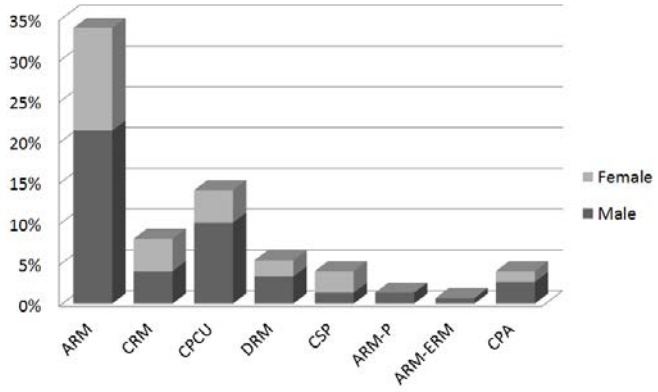


FIGURE 10: Respondents' Titles

Characteristics of Sample University Risk Management Departments

The survey collected a variety of information about the risk management departments of the respondents' institutions. College and university risk management departments tend to be small, with 68 percent reporting fewer than three full-time equivalent risk management employees. The number of safety employees is higher, with 15 percent of participants reporting 20 or more safety FTEs. The title of the person to whom risk management departments report varies widely across institutions, with chief financial officer (CFO), vice president for business, and executive vice president being the most common. A wide variety also exists in terms of areas that report to the senior risk management professional, with some respondents indicating no reports to others indicating 10 or more. Finally, significant variation is seen in the percentage of risk management departments that manage various insurance programs. Over 90 percent manage property, vehicle, general liability, professional liability, and crime/employee dishonesty. Just under half of departments manage student health insurance and aviation insurance programs, while 14 percent manage a captive insurer.

FIGURE 11: Departments by Number of Risk Management FTEs

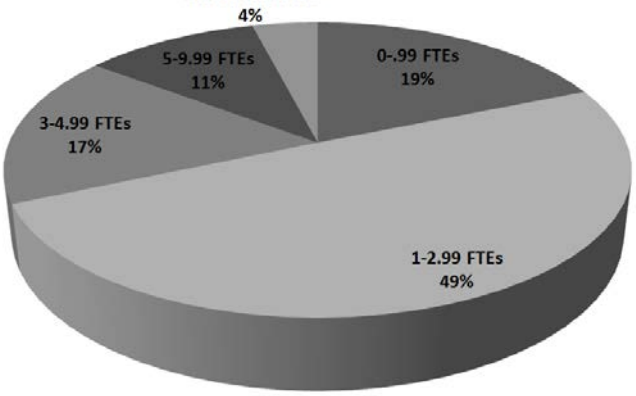


FIGURE 12: Departments by Number of Safety FTEs

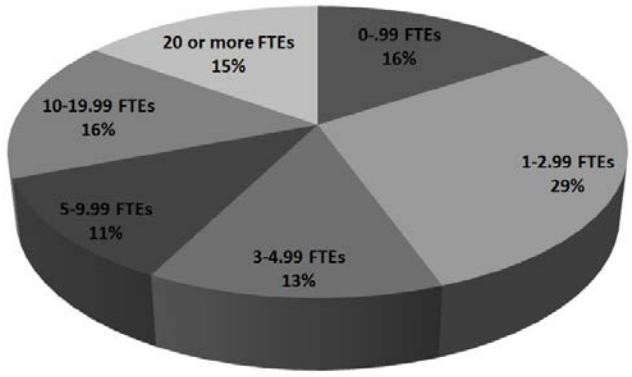


FIGURE 13: Title of the Person to Whom Risk Management Reports

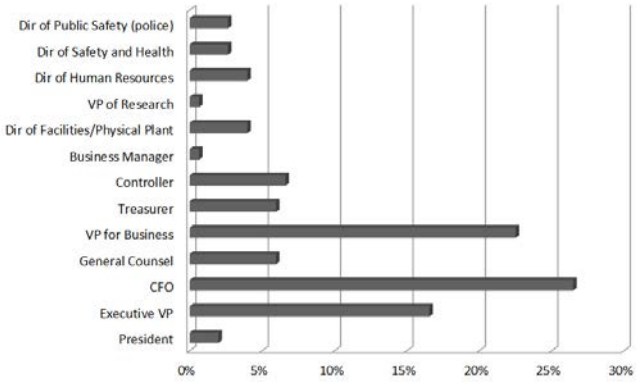


FIGURE 14: Number of Areas that Report to the Most Senior Risk Management Professional

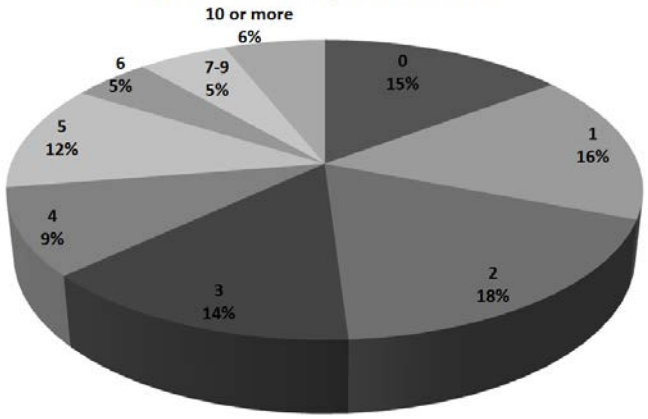


FIGURE 15: Top Ten Areas that Report to the Most Senior Risk Management Professional

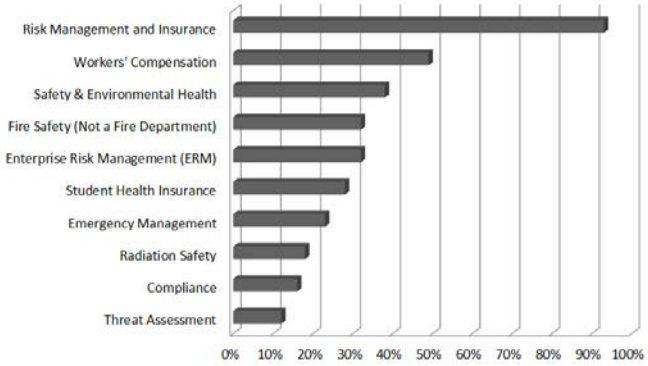
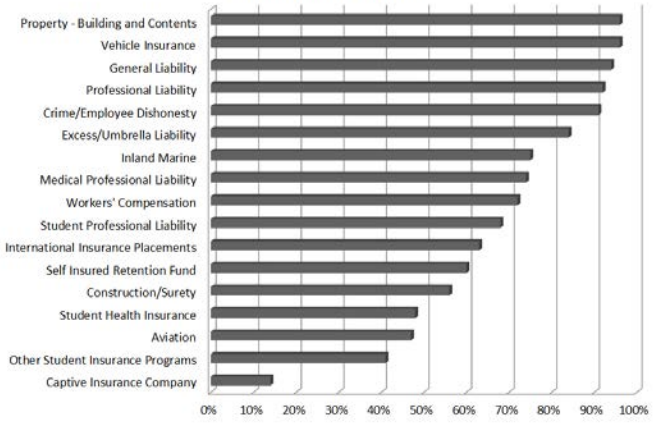


FIGURE 16: Percentage of Risk Management Departments that Manage Various Insurance Programs



Compensation Data[1]

The graphs below describe the compensation data collected in the survey. Compensation includes both salary and bonuses. The mean compensation of all respondents is $103,632, while the median compensation is $101,000. Compensation of female respondents is on average $17,945 less than compensation for male respondents. The ratio of average female compensation to average male compensation is 0.84. The salary differential by gender will be further explored in the regression analysis that follows. Compensation differs widely across job titles, with those having the title of assistant or associate vice president, risk management, earning on average nearly twice as much as those with the title of risk manager. As would be expected, higher levels of education are associated with higher compensation. Regarding experience, those with 20 or more years of risk management experience earn substantially more than those with fewer years of experience. Risk management professionals at research institutions tend to earn more than those at other institutions. Finally, those in the Northeast earn more than those in any other region of the country.

FIGURE 17: Distribution of Compensation

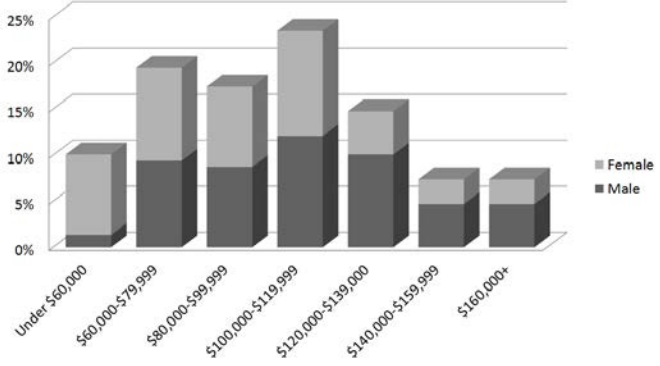


FIGURE 18: Average Compensation by Gender

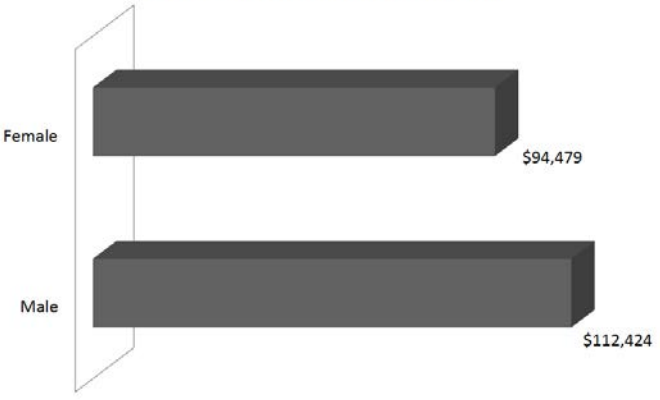


FIGURE 19: Average Compensation for the Most Senior Risk Management Professional by Common Job Titles

FIGURE 20: Average Compensation by Age

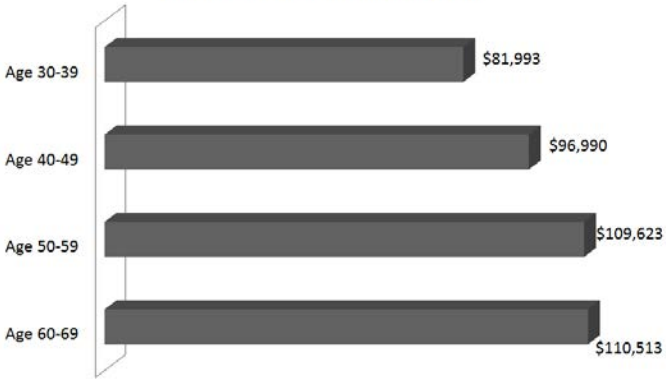


FIGURE 21: Average Compensation by Education Level

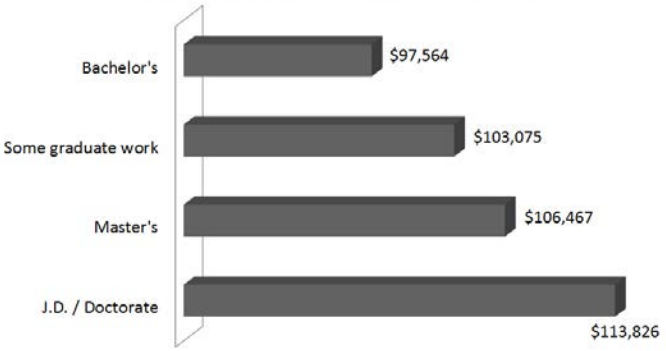


FIGURE 22: Average Compensation by Years of Risk Management Experience

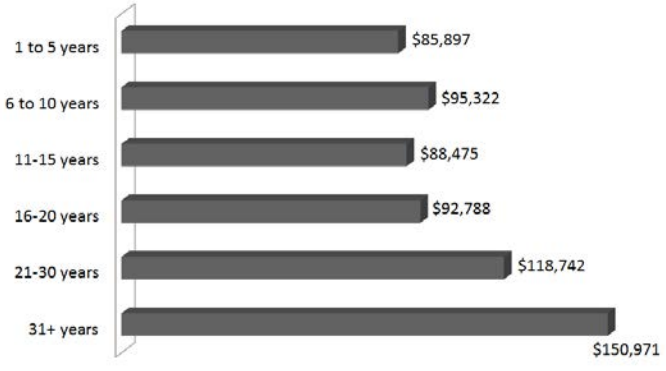


FIGURE 23: Average Compensation by Carnegie Classification

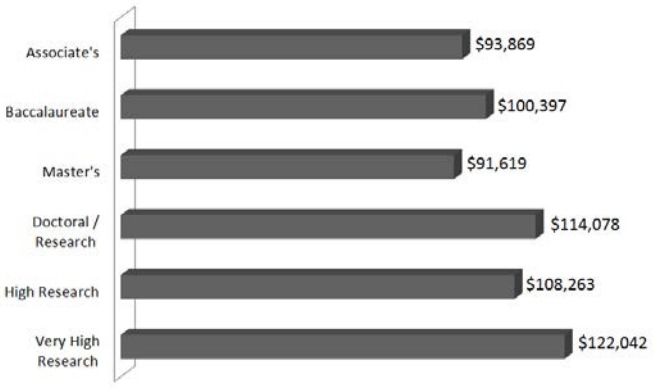
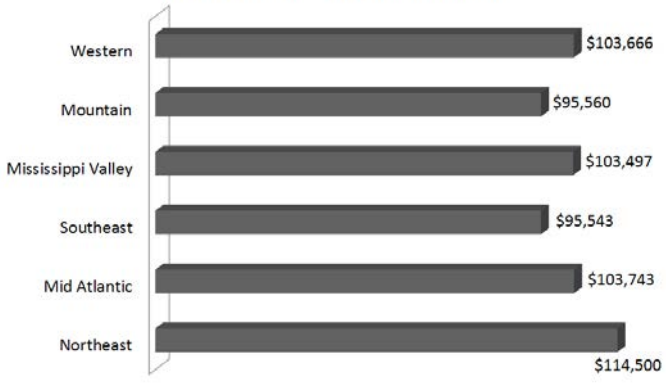


FIGURE 24: Average Compensation by Region



Regression Analysis of Compensation Data

Regression analysis allows us to take a deeper look at the survey data. Regression reveals the relationship between various factors and a variable of interest. Our variable of interest, also called the dependent variable, is compensation. Regression analysis disentangles the impact of various factors on compensation, allowing us to see the true influence of each individual factor. We are able to determine which factors have a statistically significant impact on compensation, and we are also able to measure the size of that impact.

We began with a large set of factors, or variables, that potentially explain variation in compensation levels across university risk management professionals. We tried various combinations of these variables in the regression model with compensation as our dependent variable. Below, we present the results of the final regression model. This model contains all of the variables which were found to have a statistically significant relationship with compensation, plus a variable indicating the gender of the respondent.[2]

FIGURE 25: COMPENSATION REGRESSION RESULTS

VARIABLE	COEFFICIENT	P-VALUE
Intercept	63.725	0.000
Public	-11,604	0.012
Northeast	9,704	0.098
Very High Research	11,390	0.070
Graduate Degree	18,746	0.000
Years of Risk Management Experience	1,002	0.000
Risk Management FTE Employees	3,368	0.000
Areas Reporting to Risk Management	2,090	0.007
Female	-5,631	0.213
$R^2 = 0.557$		

In the table above, a p-value of less than 0.10 means that the variable has a statistically significant impact on compensation levels. As can be seen, every variable in the model is significant, with the exception of gender. The p-value for the variable indicating that the respondent is female is 0.213, which indicates that after controlling for the other factors in the regression model, the data do not show that gender has an independent, statistically significant impact on the compensation of college and university risk management professionals. This is of interest because a simple test of equality of means indicates a statistically significant difference in salary based on gender, with a p-value of less than 0.01. However, the statistical significance disappears after controlling for the other factors in the model.

Described intuitively, what this means is that if a male and female were drawn randomly from the sample, the male would be expected to have a higher salary. However, for a male and female who are identical in terms of the other factors in the model (i.e., same years of experience, same educational status, same type of institution, etc.), the model would not predict any difference between their compensation.

The remaining results are all statistically significant. A positive sign on the regression coefficient means that the associated variable has a positive impact on compensa-

tion, while a negative sign implies a negative relationship. Therefore, the data indicate that risk management professionals at public institutions in our sample tend to receive lower compensation than those at private institutions. The size of the coefficient quantifies the impact, implying that all else equal, being at a public institution results in compensation that is $11,604 less than being at a private institution.

University risk management professionals in the Northeast are found to have salaries that tend to be $9,704 higher than for those outside the Northeast, all else equal. Those at universities designated as Very High Research universities by Carnegie classification also have statistically significantly higher salaries, with the coefficient implying a compensation differential of $11,390. The results indicate that having a graduate degree raises compensation by $18,746 compared to the rest of the sample. Not surprisingly, years of experience is also a significant factor in compensation, with each additional year of experience raising compensation by about $1,000, all else equal. Those with larger risk management departments, as measured by number of risk management FTE employees, also receive higher compensation. Finally, a positive relationship exists between compensation and the number of areas that report to risk management.

The regression model has an R^2 of 0.557. This implies that the factors in the model are able to explain about 56 percent of the variation in compensation across respondents, making it a very credible model. However, by the nature of survey analysis, these results are based solely on those who responded to the survey, and the results cannot necessarily be generalized to the entire population of college and university risk management professionals.

Conclusion

Our data analysis reveals a number of interesting findings. As expected, higher education risk managers are a highly educated group, which fits with the higher education environment where continual education is supported and free tuition is a common benefit for college and university employees. The results identify a number of factors that are associated with statistically significantly higher salaries for risk management professionals in higher education, including the number of years of risk management experience, higher levels of education, and a larger scope of work through having more program areas reporting to risk management. Working for a research university also positively impacts risk management salaries. This is not surprising, since research activities add complexity to risk management programs and provide significant money to support overhead and administrative costs through indirect cost allocations from grants and research projects.

A trend that will be interesting to follow is the gender mix of senior risk management professionals. When evaluating the gender mix by age band, it is clear that the demographics of the profession are changing dramatically; a majority of those aged 50 and over are male, while a significant majority of those under the age of 50 are female. Simple averages indicate that female risk management professionals earn 84 cents for every dollar earned by a male. However, when controlling for other factors, such as years of risk management experience, level of education, scope of area supervised, and type of institution, no statistical difference in salary between men and women is found for our sample. This is interesting, given an April 2013 report by *National Underwriter* on the widening gender gap in the risk management profession generally.[3] However, it should be noted that the *National Underwriter* report provided only averages, without controlling for other potentially relevant factors; therefore, that study is not directly comparable to ours.

About the Authors

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Endnotes

1. The compensation data presented here is only for the senior risk management professional at each responding institution. The survey instrument also requested salary information on various supporting positions within risk management departments. However, due to a lack of credible responses to these survey questions, no salary data on supporting positions are reported here.
2. In addition to those variables that appear in the final regression, we also tried including subsets of a variety of other variables in different models. These variables included the following: indicator for having a medical school, student FTEs, number of safety FTEs, the number of insurance programs managed by the department, indicator for holding any professional designation (or holding a particular designation), and age of respondent. None of these variables was ever statistically significant.
3. Property Casualty 360, "Risk Manager Compensation Survey," *National Underwriter*, March 29, 2013, http://www.propertycasualty360.com/2013/03/29/risk-manager-compensation-survey.

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