



4/13/2023

Office of General Counsel

Student Affairs Hot Dish

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MINNESOTA STATE

Outline of Today's Presentation

- Review cases and legal developments of interest.
- Discuss recent regulatory guidance of interest to ASA professionals focused on a shift in priorities and guidance with the change in administrations.
- Questions/Discussion

United States Supreme Court

Students for Fair Admissions v. Harvard College. Students for Fair Admissions v. University of North Carolina.

- Argued on October 31, 2022 (whether the Supreme Court should overrule **Grutter v. Bollinger** and hold that institutions of higher education cannot use race as a factor in admissions).
- Expect decision by end of June 2023.

United States Supreme Court (2)

Biden v. Nebraska.

- Argued on February 28, 2023 (whether six states have standing to challenge the Department of Education's student debt relief plan and whether the plan exceeds the secretary of education's statutory authority or is arbitrary and capricious).

Department of Education v. Brown.

- Argued on February 28, 2023 (whether two student-loan borrowers have standing to challenge the Department of Education's student-debt relief plan and whether the department's plan is statutorily authorized and adopted in a procedurally proper manner).
- Expect decision by end of June 2023.
- On November 22, 2022, the Biden Administration extended the pause on student loan payments until either (1) 60 days after the Supreme Court issues a decision on the program; or (2) 60 days after June 30.

United States Supreme Court (3)

Mahanoy Area School Dist. v. B.L., 594 U.S. _ (2021).

- High school student failed to make school's varsity cheerleading squad and subsequently posted 2 images on Snapchat expressing frustration with the school cheerleading squad, one containing vulgar language and gestures.
- School suspended student from the junior varsity cheerleading squad for one year for violating team and school rules.
- Student sued.
- **Holding:** School violated B.L.'s First Amendment rights.

Mahanoy, continued

- Schools may regulate off-campus speech BUT interest is *diminished*.
- In this case, B.L.'s speech was protected criticism and school did not prevent evidence of substantial disruption.
- **DICTA:** Court recognized school's interest in regulating:
 - Bullying or harassment targeting particular individuals.
 - Threats aimed at teachers or other students.
 - Failure to follow academic rules.
 - Breaches of school security devices.
 - Other rationales?

Sources of Federal Regulation

- Statutes.
- Regulations.
- Executive Orders.
- Sub-Regulatory Guidance (Dear Colleague Letters, FAQ Documents, Handbooks, etc.).

Current Title IX Regulations: Background

- April 4, 2011 Dear Colleague Letter.
 - System Procedure 1B.3.1 (used investigation and decision-making process from 1B.1.1).
- November 16, 2018 US Department of Education Notice of Proposed Rule-making.
- Proposed rule officially published in the federal register on November 29, 2018.
- 60 Day Comment Period = January 28, 2019.
- Final Rule = May 6, 2020.
- Effective Date = August 14, 2020 (to incidents occurring on or after that date).
- Response = revised System Procedure 1B.3.1

Current Title IX Regulations: Summary

- Narrower definition of Title IX Sexual Harassment.
- Narrower jurisdiction.
 - Only program or activity of c/u.
 - In the United States.
 - Generally complainant and respondent must be a student at the c/u.
- Federally mandated due process standards.
 - Enhanced investigatory requirements.
 - Live Hearing before discipline.
 - Cross-Examination.

Current Minnesota State 1B.3.1 Procedure: Overall Process Map

- Old 1B.3.1 Procedure
 - Complaint, Investigation, Decision-maker, internal appeal, Ch. 14 if serious student sanction.
- New 1B.3.1 Procedure
 - Formal Complaint, Investigation (with enhanced requirements), Ch. 14, Decision-maker, internal appeal.
 - And remember 1B.1 and Student Code of Conduct for situations outside of new Title IX Sexual Harassment jurisdiction.

Proposed New Title IX Regulations: Background

March 8, 2021 Executive Order:

- Directed Secretary of Education to perform 100-day review.
- All Title IX regulations, orders, guidance documents, policies.

April 6, 2021 Department of Education Announcement:

- Public Hearing June 7 – June 11 – aiming towards revised regulations.
- All Title IX regulations, orders, guidance documents, policies.

June 23, 2022:

- Biden administration releases proposed new regulations.
- Comment period closed on September 12, 2022 (approximately 240,000 comments).
- Final regulations expected in May 2023?
- Also monitoring possible Minnesota legislation amending Minn. Stat. 135A.15.
- Continue using current 1B.3.1 procedure while monitoring events.

Proposed New Title IX Regulations

- Broader definition of sexual harassment.
- Broader jurisdiction
- More flexibility and discretion for colleges and universities to develop investigatory and resolution procedures.
 - No requirement for a live hearing with cross-examination.
 - Would allow investigator/decisionmaker model.

Gender Identity and Sexual Orientation Discrimination

January 20, 2021 Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

- Administration policy to “prevent and combat discrimination on the basis of gender identity or sexual orientation.”
- Directs federal agencies to review all existing orders, regulations, guidance documents, policies, and programs for consistency with that policy.
- Develop plan of action within 100 days.
- Dovetails with Department of Education April 6 Title IX announcement (discussed above).
- June 22, 2021 Department issues an Interpretation (Title IX’s prohibition on sex discrimination encompasses sexual orientation and gender identity).

Gender Identity and Sexual Orientation Discrimination (2)

Higher Education History:

- On May 13, 2016, the Department of Education and Department of Justice jointly issued a Dear Colleague Letter on Transgender Students (FAQs on expectations within higher education).
- On February 22, 2017, the Department withdrew this guidance.

Remember:

Both Board Policy 1B.1 and the MHRA prohibit discrimination and harassment based on gender identity and sexual orientation.

Proposed Change: Students' Eligibility for Athletic Teams

- NPRM released April 6, 2023.
- 30-day comment period.
- Schools “would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity.”
- Schools would have flexibility to develop team eligibility criteria that serve important educational objectives, such as ensuring fairness in competition or preventing injury.

Digital Accessibility Compliance Reviews

- On May 23, 2022, the United States Department of Education Office for Civil Rights announced that it would launch 100 new compliance reviews examining digital accessibility.
- Scope included elementary and secondary schools and districts, postsecondary institutions, etc.
- Reviews cover online learning, public-facing websites, and communications platforms to ensure compliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act.
- One review involves a Minnesota State institution. Review in process.

Student Organizations and the First Amendment Cases

- *Business Leaders in Christ v. University of Iowa*, 2021 WL 1080556 (8th Cir. March 22, 2021) (holding that the University violated the First Amendment when it refused recognition to a religious student organization based on the University's non-discrimination policy).
- **Key Fact.** Student organization was able to point to other recognized student organizations that did not follow the policy but were recognized.

Students Organizations and the First Amendment: Reminder/Primer

Recognition.

College/University may not refuse recognition merely because it disagrees with the organization's viewpoint. *Healy v. James*, 408 U.S. 169 (1972) (but can have viewpoint neutral criteria).

Non-discrimination Requirement.

Yes, if all-comers policy. *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010).

Student Fees.

Mandatory student fees OK so long as funding decisions made in a viewpoint neutral manner. *Board of Regents v. Southworth*, 529 U.S. 217 (2000); System Procedure 2.8.1 (requires viewpoint neutrality).

Student Senate.

Not subject to Minnesota Open Meeting Law, Election Law, and Data Practices Act. *Abegaz v. Duckworth*, State of Minnesota, Clay County, Case No. 14-CV-16-1336.

More Cases

COVID tuition and fee litigation (many cases).

- For example: *Chong v. Northeastern University*, U.S. District Court, District of Massachusetts (October 1, 2020) (dismissing breach of contract and unjust enrichment claims for failure to refund tuition and certain fees for spring 2020 semester).
- No Minnesota State case at this time.

Minnesota Court of Appeals transgender student discrimination case.

- *N.H. v. Anoka-Hennepin Sch. Dist.*, 950 N.W.2d 553, (Minn. Ct. App. September 28, 2020) (holding that a transgender high school student states a claim for a violation of the Minnesota Human Rights Act and the Minnesota Constitution when a school district denied the student use of a locker room that is available to the students of the gender with which the student identifies and to which the student has socially transitioned).

Minnesota Crown Act

Amends the Minnesota Human Rights Act, Minn. Stat. 363A.03, Subd. 36a.

- “Race is inclusive of traits associated with race, including but not limited to hair texture and hair styles such as braids, locs, and twists.”
- Effective August 1, 2023.

DACA

- Summer 2020 – the United States Supreme Court held that the administration improperly ended the DACA program.
- January 20, 2021 Executive Order titled “Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)” (stating current administration’s policy).
- On October 31, 2022, the Secretary of Homeland Security’s final rule went into effect.
 - USCIS continues to accept and process applications for current recipients.
 - Accepts but cannot process initial DACA requests.
- Continued litigation and possible legislative action.

Questions & Answers

Please Chat in your questions.

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