

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT September 2015

Oregon State University Hit with Title IX Lawsuit

In what seems like a never ending news update, another higher education institution was hit with a Title IX lawsuit from a student. This time, Oregon State University (OSU) was sued by a former student alleging she was raped as a result of OSU and its former football coach failing to address a sexually violent culture in the football program. The rape is alleged to have occurred 16 years ago (1999).

Source: [Oregon Live](#)

UVA Resolves Title IX Inquiry with US DOE

This month, the University of Virginia (UVA) resolved a Title IX investigation initiated by the United States Department of Education's (US DOE) Office for Civil Rights (OCR). In sum, following an investigation, OCR found that UVA's Title IX policies and procedures did not provide for the prompt and equitable resolution of student and employee complaints. OCR further concluded that UVA failed to properly investigate complaints, failed to eliminate a hostile environment, and failed to ensure its Title IX coordinator oversaw and coordinated all Title IX complaints.

As part of the resolution, UVA, among numerous other things, revised its policies and procedures related to handling and resolving Title IX complaints involving students, employees, and third parties. Importantly, OCR reviewed the revised policies and procedures and found that they are in compliance with Title IX. Higher education institutions working on Title IX policy and procedure revisions may want to review the Resolution Agreement and UVA's new policies and procedures.

The Resolution Agreement is available at the following link: [OCR](#).

MSU to Modify its Response to Title IX Complaints Following OCR Investigation

Michigan State University (MSU) joins UVA in resolving a Title IX investigation this month initiated by OCR. Regarding MSU's handling of Title IX complaints, OCR concluded as follows (quoted from press release):

- It did not promptly investigate the two complaints that were the subject of OCR's investigation, although the university's investigations of both complaints ultimately were thorough and equitable;

- It operated noncompliant grievance procedures, had an inadequate notice of nondiscrimination, and failed to appropriately notify students and employees of the identity of the Title IX coordinator; and
- Its failure to address complaints of sexual harassment and sexual violence in a prompt and equitable manner caused and may have contributed to a continuation of a sexually hostile environment for numerous students and staff on campus during the years covered by OCR's investigation, 2009 to 2014.

The resolution reached between MSU and OCR requires MSU to engage in numerous acts to demonstrate its compliance with Title IX. They are as follows (quoted from press release):

- Revise its notice of non-discrimination, Title IX-complaint procedures and other procedures to make these compliant with Title IX.
- Issue a public anti-harassment statement notifying all members of the campus community that the university does not tolerate sexual harassment and encouraging students to report any such incidents to the Title IX coordinator.
- Train its staff on the revised procedures and on how to properly conduct and document future Title IX investigations.
- Develop a procedure to ensure the university maintains documentation regarding sex discrimination complaints, including complaints of sexual harassment, sexual assault, and sexual violence, and the university's handling of those complaints.
- Provide bi-annual mandatory training to all university faculty and staff regarding recognizing and reporting incidents of sexual harassment.
- Provide mandatory online training to all university students regarding sexual harassment and sexual assault/violence and to offer a series of in-person information sessions to students that cover similar topics.
- Review and revise any and all university training materials used to train student athletes with respect to matters involving sex discrimination, sexual harassment, sexual assault and sexual violence.
- Develop a memorandum of understanding (MOU) with the university police, and revise its MOU with the East Lansing police and other local law enforcement agencies; and provide the university police with Title IX training.
- Conduct resource assessments and add relevant staff as needed in to order promptly and equitably respond to Title IX complaints.
- Create a committee comprised of representatives from various students groups and university faculty and staff to meet and identify strategies for ensuring that students understand their rights under Title IX; how to report possible violations of Title IX; and to identify strategies for the prevention of sexual harassment, sexual assault and sexual violence.
- Conduct a series of student and employee climate checks and develop a monitoring program to assess the effectiveness of the university's overall anti-discrimination and anti-harassment efforts.
- Provide annual training to students who are members of sororities or fraternities in the campus area that covers topics related to sex discrimination, sexual harassment and sexual assault/violence.

- Examine past grievance files, evaluate whether the grievances were properly handled and assess whether any additional action or remedies are warranted. Offer to provide remedies to individuals to address any harm they incurred as a result of the university's delay in processing their complaints.
- Evaluate the safety of certain areas of campus to ensure the areas have sufficient lighting and emergency phones.

A press release issued by OCR and the Resolution Agreement are available at the following link: [OCR](#).

The DOJ Intervenes in Lawsuit Against Miami University

A federal court recently granted the United States Department of Justice's ("DOJ") motion to intervene in a private lawsuit filed by Aleeha Dudley, a blind student, who sued the University of Miami. According to the complaint, the university violated Title II of the Americans with Disabilities Act by using technology, such as website, that are inaccessible to students with vision, hearing, or learning disabilities.

Source: [Washington University](#)

Trial Court to Apply Modified Test to Determine if Student RN's are Employees under FLSA

In *Schumann, et al. v. Collier Anesthesia, P.A., et al.*, Case No. 14-13169, the Eleventh Circuit Court of Appeals recently adopted a newer version of the "primary beneficiary" test originally created in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639 (1947), to determine whether trainees are employees for the purposes of the Fair Labor Standards Act ("FLSA"). The crux of the issue is identifying a primary beneficiary of the modern day internship for academic credit. As stated by the Eleventh Circuit, the dilemma arises in determining the primary beneficiary in a relationship where both the intern and the employer obtain significant benefits.

The Plaintiffs/Appellants in this case are 25 former student registered nurse anesthetists ("Students") who attended Wofford College. During their study they participated in a mandatory clinical curriculum. The Students filed suit in an attempt to recover unpaid wages and overtime under FLSA for their clinical hours. The trial court originally found that no employment relationship existed, thus, the Students were not entitled to minimum wage or overtime pay. FLSA's protections extend only to employees so only those classified as employees are entitled to minimum wages and overtime. The Students argued on appeal that the trial court improperly declined to follow the six-factor test issued by the Department of Labor's Wage & Hour Division. The case was remanded to the trial court with instructions to apply the revamped, more modernized version of the primary beneficiary test first outlined in *Portland Terminal Co.* and discussed in more detail below.

The appellate court criticized the trial court's application of the original *Portland Terminal Co.* test, stating the test was no more than a reduction of the specific facts from the 1940's case that involved a railroad company's training class and is too rigid to apply to workplaces in modern

times. The newer, more modern test will account for the unique qualities of the type of internship at issue in the present case. The Eleventh Circuit ruled that the trial court must balance all of the circumstances expressed in the following seven factors:

- 1) extent to which the intern and employer clearly understand that there is no expectation of compensation;
- 2) extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;
- 3) extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
- 4) extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
- 5) extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
- 6) extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
- 7) extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

It will be interesting to see how the trial court applies the factors on remand.

Source: [Schumann, et al. v. Collier Anesthesia, P.A., et al.](#)

Ninth Circuit Ruling Allows the N.C.A.A. to Limit Payment to Athletes

Whether and how college athletes should be compensated has been a controversial topic since Ed O'Bannon, a former UCLA basketball player sued the N.C.A.A. for using his name and image in videogames, among other things, without paying him additional compensation. In *O'Bannon v. National Collegiate Athletic Ass'n*, Case No. 14-16001, the Ninth Circuit Court of Appeals ruled that the N.C.A.A. may restrict colleges from compensating college athletes in excess of the cost of attendance.

Source: [New York Times](#)

Compensatory Education IDEA Remedy not Limited to Two Years

In *G.L. v. Ligonier Valley School District Authority*, No. 14-1387 (3d Cir. Sept. 22, 2015), the 3d Circuit addressed a matter of first impression resolving a potential ambiguity created by two sections of the Individuals with Disabilities Education Act (IDEA). The IDEA's statute of limitations provision potentially conflicted with its remedy provision awarding "Compensatory education." Compensatory education requires a school district to place disabled children in the same position they would have occupied but for the school district's violations of IDEA by providing educational services children should have received in the first instance. The court held parents must file their due process complaints on behalf of a child within two years of the date they knew or should have known of the IDEA violation, unless the state has its own statute of

limitations, in which case the state's statute controls. The court also held, however, that regardless of when a parent reasonably should have known of the special needs of the their child or the school system's failure to respond to those needs, the school system has an independent duty to the child to identify and “expeditiously design and implement” an appropriate plan. As such, assuming an IDEA claim is timely filed and there is liability, the court can require the school system to provide compensatory education beyond the two-year period; a court can require services for a period “equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.”

Source: [Decision](#)

Beach Please, one retailer sues another over a Tote bag

The retailer H&M filed a lawsuit against Forever 21, for allegedly selling knock offs of its tote bags. The tote bags in question say “Beach Please.” Regardless of whether this slogan is an intentional or incidental play on words, the bags have been well received by customers.

Source: [Business Insider](#)

Firm News

Kenyetta M. Mullins was elected to serve on the Board of Directors for the Tallahassee Senior Center Foundation.