

Campus Legal Advisor

Interpreting the Law for Higher Education Administrators

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Of Counsel

Supreme Court's decision raises awareness of religious freedom on campus

By Michael Porter, Esq.

While some students may flock to Abercrombie & Fitch for the latest fashion trends, college and university administrators concerned with legal compliance can use a recent case involving the retailer to raise awareness about religious discrimination and religious freedom.

In *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, No. 14-86, the U.S. Supreme Court ruled that employees or applicants can prove intentional religious discrimination as long as they have evidence that the employer assumed the employee or applicant might need a religious accommodation.

In that particular case, a practicing Muslim applied for a job in an

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Crisis Management

Address legal, PR aspects of managing crises on your campus

By Daniel I. Prywes, Esq., and Scott Sobel

Bad things can happen at colleges and universities. When they do, the institution's legal interests aren't the only things at stake. Issues of liability and damages often pale in comparison to the college's or university's reputational interests.

A college or university viewed by the public as dangerous, uncaring, untrustworthy or irresponsible is likely to face difficulties in attracting students, faculty and financial support. A strong reputation built over decades can be tarnished overnight.

When allegations of misconduct are made, a lawyer's normal instinct is to move deliberately and confidentially in fact-finding.

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Read memo on program reporting

Jeff Baker, the policy liaison for federal student aid, released a memo regarding the findings that institutions are seriously misreporting academic-year dates and program lengths to the National Student Loan Data System.

LEGAL BRIEFS

is a regular feature highlighting recent lawsuit filings, settlements or regulatory actions impacting higher education.

The memo warns that if numbers continue to be misrepresented, additional steps, including additional reporting requirements, may become necessary to maintain compliance with statutory requirements.

Read more at <http://ifap.ed.gov/eannouncements/042015DSLL150PerEA17SchoolMisreportDataCODandNSLDS.html>. ■

NYU revises admissions policy

New York University has changed its admissions review process so that the first reading of all applications won't include

applicants' answers about criminal convictions.

Students will still have to answer the question, but admissions officials will only read it once the rest of the application has been reviewed, reports NPR.

The change comes as part of NYU's move to diversify its campus. Two-thirds of convicted felons considering college applications are discouraged from applying due to the perception that conviction will keep them from admittance. ■

Students protest debt from Corinthian

Nine students saddled with debt from attending Corinthian Colleges, a now-defunct, for-profit college and trade school system, sent a letter to the Department of Education, claiming that Corinthian Colleges misrepresented its job-placement numbers, according to *The New York Times*.

The students called for the Department of Justice to forgive their debts and help fix the problem, and the Department of Education followed up by fining Corinthian Colleges \$30 million.

The students have maintained

their protest by refusing to pay back their student loans, which they say are the product of a predatory for-profit system.

The Department of Education has the discretionary ability to forgive loans. ■

U. Va. dean sues *Rolling Stone*

A dean at the University of Virginia has sued *Rolling Stone* over her portrayal in the now-discredited story about campus response to an alleged frat house gang rape.

Nicole Eramo, an associate dean of students at U. Va., claims that she has suffered harm to her professional reputation after the *Rolling Stone* story portrayed her as insensitive to an alleged victim of sexual assault.

Eramo is seeking \$7.5 million in damages from the publication, alleging that *Rolling Stone* was aware of the unreliability of the story's source while the piece was being written.

The magazine will also potentially face a lawsuit from the fraternity alleged to have been at the root of the alleged assault, reports CNN. ■

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Publisher:
Lesley Iura

Co-Editors:
Aileen Gelpi, Esq.
Claudine McCarthy

Legal Contributor:
Richard H. Willits, Esq.
(reelrhw@hotmail.com)

If you have a question, comment, or suggestion, please contact Claudine McCarthy, co-editor, at (561) 964-2357 or email cmccarthy@wiley.com.

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Abercrombie clothing store and, consistent with her faith, wore a head scarf to her interview. The interviewer gave the applicant a high rating, but the district manager instructed the store to not hire the applicant because the head scarf would violate the company dress code, which banned caps.

The Equal Employment Opportunity Commission sued Abercrombie on behalf of the applicant. The court ruled in favor of the applicant. Even though the applicant hadn't requested an accommodation, Abercrombie's assumption that she needed an accommodation could serve as evidence of religious discrimination.

Understand broader scope of religious laws, rights

The *Abercrombie* case highlights only one narrow segment of religious discrimination laws and rights concerning religious freedom: Was the employer potentially violating Title VII of the Civil Rights Act of 1964 by choosing not to hire the applicant? But religious discrimination and religious freedom have many additional components. Employees have rights to accommodations for religious practices and beliefs — and in some situations, students do, too. Expression based on religious beliefs is often also protected by the First Amendment, and private institutions have religious rights as institutions.

In most workplaces, politics and religion are almost taboo. In contrast, most institutions of higher education welcome robust discussion of religious and political views as part of the learning environment and commitment to academic freedom. Institutional comfort with these topics can lead to a false sense of security that because the campus culture is open and welcoming to religious viewpoints, religious discrimination is unlikely to occur. When religious topics are openly discussed, however, the likelihood of a person's perception that she is subjected to discrimination may be higher than in places in which people tend to avoid religious discussion.

Consider the following scenarios:

➤ A campus organization invites a speaker with strong religious or antireligious beliefs, prompting media coverage. The coverage prompts workplace discussions around campus. From faculty meetings to facility department staff meetings to student residence halls, the speaker's viewpoint and whether the institution should have brought the speaker to campus are hotly debated. While most discussion participants recognize

or appreciate the discussion as part of the diversity on campus, a campus community member may feel offended or belittled based on his religious beliefs.

➤ An institution embraces and celebrates a range of holidays. A staff member expresses that she feels marginalized because her "traditional" holiday isn't given the attention it once had. The staff member is then criticized in a performance review for not embracing institutional diversity efforts.

➤ A student is required to take a class that includes group work. The student indicates he has a religious objection

to working with female students and requests to work only with male students (or vice versa).

➤ An institution has a requirement that first-year students live on campus in residence halls. A student requests an exemption for religious reasons.

➤ A student who is outspoken about her religious beliefs is accused of religious harassment by other students and disciplined after an investigation determines that the student created a hostile environment.

➤ A student group seeks to exclude from its membership students who refuse to affirm a commitment to particular religious beliefs.

Each of these situations has its own potential legal challenges and demonstrates the tension between an institution's commitment to exposing the campus community to a broad scope of ideas while at the same time ensuring individuals' rights to exercise their own religious beliefs.

Reduce legal risk

To limit your institution's legal risk, first assess the landscape of rights and freedoms applicable to it. A public institution has very different obligations from a private institution, and private religious-affiliated institutions may be able to claim exemptions from certain laws that implicate religious beliefs.

Religion is often notably absent from discrimination- and harassment-related training for employees and students. Ensure that members of the campus community understand that if they believe they're subjected to religious discrimination or harassment, the institution will address their concerns under its policies prohibiting such conduct.

Religious expression and freedom are important parts of the fabric that makes up most college campuses. The *Abercrombie* case serves as a valuable reminder to ensure that your campus stays attuned to how individual rights are woven into that fabric. ■

About the author

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

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But under the white-hot glare of the media spotlight and with the 24/7 news cycle, there will be immediate pressure for a university to respond to the allegations and either rebut them or place them in context.

A college's or university's failure to publicly and promptly engage the facts may lead to a quick and irreversible "conviction" in the court of public opinion. To work effectively with your institution's legal counsel, you need to understand the interrelated legal and public relations issues that counsel can expect to face when the media storm blows its gale winds onto campus.

Choose a spokesperson for litigation-related matters

Sooner or later, most colleges and universities will face a significant crisis. When that crisis does arrive, one of the first tasks is for the institution to select an authorized spokesperson suitable for the circumstances.

We recommend selecting both a primary and secondary spokesperson, as the crisis-response effort may continue on a 24/7 basis for weeks or longer.

The best PR practice dictates finding a spokesperson who combines both clout and relevant knowledge. That could be a president or provost, thereby demonstrating to the public that the institution takes the controversy seriously and that a leader is in charge.

The best legal practice, however, is to avoid using high-level administrators as spokespersons. If their statements ultimately prove incorrect as more information is gathered, the university may be viewed more harshly by a court or jury in evaluating (a) the university's credibility for all purposes, (b) the university's satisfaction of any applicable duties of care, and (c) claims for punitive damages.

A key consideration is to select a spokesperson who has good presentation skills, an ability to think quickly on his feet, the fortitude to weather the entire crisis cycle, and the mental discipline and stamina to avoid making careless remarks that may pour fuel on the fire.

It isn't good practice to change the spokesperson in midcrisis because of the discontinuity and defeatism this suggests.

Often, the university's general counsel will be a prime candidate for the spokesperson role. When a crisis has a significant legal dimension, counsel will often be the best qualified to explain to the media

(on or off the record) *why* a decision was made.

However, a general counsel's interactions with the media may be limited by the ethical rules governing attorneys. Most states' ethics rules limit attorneys' statements to the media when litigation is underway or expected. These rules were originally developed to preserve a fair trial for all parties because attorneys were considered to have more credence with the public.

In most states, the ethics rules governing attorneys prohibit an attorney who is participating in an investigation or litigation from making an out-of-court statement the lawyer knows (or reasonably should know) will be disseminated by means of public

communication and will have a substantial likelihood of materially prejudicing a legal proceeding in the matter.

From a PR perspective, once a crisis gains steam, it's deadly to respond to media inquiries with "no comment," because that immediately kills the perception of candor. Thus, an attorney-spokesperson must balance the ethical requirements with good PR practice and presentation skills. An attorney-spokesperson is attempting to persuade an audience much larger than any courtroom could hold.

Fortunately, the ethics rules leave significant room for attorneys to communicate with the media. Under most states' rules, an attorney may state information contained in the public record, reveal that an investigation of a matter is in progress, and issue a warning of danger concerning the behavior of a person involved when there's a reason to believe there exists the likelihood of substantial harm to an individual or to the public interest.

In a criminal case, an attorney may also state the identity, residence and family status of the accused; information necessary to aid in the apprehension of a person; the fact of an arrest; the identity of the

About the authors

Daniel I. Prywes, Esq., is a partner with the law firm of Bryan Cave LLP in Washington, D.C. *Learn more at www.bryancave.com/danielprywes.*

Scott Sobel is the president of Media & Communications Strategies Inc., also in Washington, D.C. See www.macstrategies.com.

Both have experience advising universities that face adverse publicity. ■

CONTACT US

Do you have a comment, question, suggestion or story idea?

If so, please contact:

Claudine McCarthy, co-editor

Phone: (561) 964-2357

Email: cmccarthy@wiley.com

CLA website: www.campuslegaladvisor.com

investigating or arresting officers or agencies; and the length of the investigation.

Most importantly, under most states' ethics rules, a lawyer may "make a statement a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client," provided the statement is limited to such information necessary to mitigate the recent adverse publicity. In other words, an attorney may communicate to the media *defensively* to rebut adverse publicity.

Regardless of who is selected as "spokesperson," the crisis team should take steps to prevent inconsistent messaging (and ideally all messaging) from other institutional leaders. Inconsistencies suggest confusion, ineptitude, dishonesty or a cover-up.

As one experienced university attorney told us, it's critically important for university officials to "stay in their lane" when dealing with public controversies. Caution should also be exercised when speaking to the media "off the record" or upon a request that a statement not be attributed to the spokesperson. A well-seasoned PR practitioner should be consulted about the potential risks and outcomes of such communications.

Review common advice and its limits

Much has been written about how colleges and universities should prepare for and "manage" public crises and deal with the media.

The following principles are often cited:

1. Make advance preparations for the inevitable arrival of some form of crisis, even though the exact nature of that crisis can't be foreseen. Form a standing crisis-management team, allocate responsibilities, and engage in regular training.

2. As part of their preparations, universities should establish and maintain working relationships with relevant media outlets and first responders.

3. Train administrators, deans and department chairs to refrain from public comment on controversies and to refer media to the designated spokesperson.

4. As a crisis unfolds, you can expect the media to become increasingly aggressive if the matter has sensational appeal. Prepare staff to professionally rebuff media attempts to obtain leaks or confidential information.

5. Voice compassion for victims, and apologize for undeniable wrongdoing.

6. Don't attack the alleged perpetrators or claimed victims unless confident of their wrongdoing.

7. Investigate the facts as quickly as possible and disclose initial findings in which the college or university has a high degree of confidence.

8. To the extent possible, get all the bad news out at once and make an effort to keep releasing good news.

9. Be proactive in shaping the institution's message.

10. Avoid "no comment" responses or their equivalents once a crisis gains steam. Even an update of previous information and a reaffirmation of the university's values are better than "no comment."

11. Avoid perceptions (and certainly the reality) of a "cover-up."

12. Formulate and announce a plan to prevent a repetition of the crisis.

13. Qualify all public statements as based on "the facts currently known" to preserve credibility if those facts prove wrong.

14. Treat media representatives politely and with sensitivity to their deadlines and challenges. Reporters are human, and they can't help but be affected by how they're treated.

15. Don't attack the media.

These are useful guidelines. But there are circumstances in which some will conflict with others and in which experienced legal and PR practitioners would recommend different approaches.

Some controversies are passing ripples, while others are tsunamis. It takes great experience to distinguish the two at the outset and to formulate the appropriate PR response. There is no single PR roadmap that fits every type of controversy.

Colleges and universities face special difficulty in conveying their message during a crisis because of the legal restrictions involving privacy and due process (discussed in next month's installment) that to some extent will handcuff a university in its public communications.

Because of their revered status in most communities, colleges and universities are also expected by the public to satisfy a higher moral standard than others. Yet when wrongdoing is alleged, people at colleges and universities may act selfishly or seek to shift blame. Many journalists are eager to find opportunities to dethrone community icons and expose hypocrisy.

All of these factors present an especially challenging PR environment at colleges and universities that find themselves under a media siege. ■

Next month...

Review what information your institution can't legally disclose in a crisis — and what information officials are compelled to disclose to be compliant. ■

Ensure campus software, technology are accessible to students with disabilities

By Halley Sutton

Just having software that's geared toward students with disabilities isn't enough. Review all software and technology providers used on campus, as well as campus websites, for compliance with Title II of the Americans with Disabilities Act to avoid costly complaints and lawsuits and provide students with disabilities with the most up-to-date and useful resources.

TRAINING TOOLS

This regular feature puts the law into easy-to-understand terms.

In *Aleeha Dudley v. Miami University, et al.*, 14-cv-038 (S.D. Ohio), the U.S. Department of Justice has moved to intervene in the lawsuit that Aleeha Dudley, a blind student, is pursuing against Miami University in Ohio and the university's president.

Understand implications of lawsuit

Dudley's suit alleges her studies were significantly impeded because the selection of software that Miami University offered her, including digitized textbooks and software not designed to be used with screen readers, didn't offer her equal access to educational materials.

Dudley seeks a judgment that would require Miami University to provide appropriate assistive technologies to students with disabilities as well as compensation for aggrieved individuals.

In its move to intervene, the Department of Justice stated that "Miami University has violated Title II of the Americans with Disabilities Act by requiring current and former students with disabilities to use inaccessible websites and learning management system software, and by providing these students with inaccessible course materials."

If the DOJ's motion to intervene is granted, it will join Dudley in suing the university. Miami University denies the allegations, stating that officials "take our

obligations under the Americans with Disabilities Act very seriously. Miami provides extensive resources and accommodations for our disabled students, and will continue to do so."

Consider all technology, software providers

Some of the software vendors that Miami University used, which were alleged to be insufficient in regard to Title II of the Americans with Disabilities Act of 1990, include Vimeo, YouTube and Google Docs, as well as course management software from Pearson, LearnSmart, WebAssign, Sapling, Turnitin and Vista Higher Learning. Miami University's website was also alleged to be out of ADA compliance for students with visual, hearing and learning disabilities.

The lawsuit reflects a growing scrutiny over technology in the classroom, and how much of it is accessible to students with disabilities.

Recent lawsuits and complaints have shown that technology companies and content providers don't provide schools with adequate tools for students with disabilities.

Earlier this year, the Department of Justice settled a similar case with edX, resulting in a commitment from the technology company, which provides massive open online courses, to create a platform that's more user-friendly for students with disabilities.

You can read the Department of Justice's full movement of intervention at www.justice.gov/opa/pr/justice-department-moves-intervene-disability-discrimination-lawsuit-alleging-miami. ■

About the author

Halley Sutton is assistant editor of *Disability Compliance for Higher Education*, a sister publication of *Campus Legal Advisor*, also published by Jossey-Bass, A Wiley Brand. For more information on that publication, please go to www.disabilitycomplianceforhighereducation.com. ■

Host therapy dogs on campus to reduce student anxiety

Support your students and on-campus counseling resources by providing therapy dogs to help reduce student anxiety and mental health disorders.

A study published by the *Journal of Creativity in Mental Health* found that students' self-reported feelings of anxiety fell by 60 percent after spending time with a certified therapy dog. Interacting with dogs is proven to alleviate feelings of stress and loneliness, especially beneficial for students suffering from academic pressures and the difficulties of living away from home. ■

AT A GLANCE
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DISABILITY — FERPA

**University student qualifies
 for ADA protection**

Case name: *Bonneau v. State University of New York at Brockport, et al.*, No. 11-CV-6273 (W.D. N.Y. 03/05/14).

Ruling: The U.S. District Court, Western District of New York reversed a previous ruling and allowed a student’s Americans with Disabilities Act claim to stand.

What it means: Amendments to the Americans with Disabilities Act have made it more lenient toward individuals with disabilities.

Summary: When Tina Bonneau — a student at the State University of New York at Brockport — notified university officials she was disabled in 2008, they provided extended test-taking time, short breaks during classes, and notes for missed class time.

Around that time, Bonneau disclosed to her art professor — Debra Fisher — that she had post-traumatic stress disorder. The two became friends, and Fisher became a regular reader of Bonneau’s blog.

In the fall, Fisher allegedly started telling Bonneau her thoughts about — and the grades of — other students, which was a violation of the Family Educational Rights and Privacy Act.

In November, Bonneau posted negative comments about Fisher on her blog, including incidents in which she claimed students were treated harshly. According to Bonneau, Fisher read those posts.

In December, Fisher purportedly began to harass Bonneau about her mental health, saying “There must be some kind of medication you can take!” and “Therapy is not helping you.”

In March 2010, Fisher emailed administrators she heard Bonneau was crazy and a “ticking time bomb.”

A few days later, an assistant dean told Bonneau she had been labeled a “student of concern.” Bonneau then went into a university building to speak to a professor. Fisher — who was teaching in that building at the time — allegedly closed her classroom door and implied to the class that Bonneau was a threat. After that, Bonneau stayed away from the campus and didn’t complete her academic work.

Bonneau sued the university and others, asserting several theories. One of them was that it had violated the Americans with Disabilities Act by denying her reasonable accommodations for her disabilities, and by treating her less favorably than her peers. She didn’t attempt to raise any FERPA violations.

SUNY Brockport filed a motion to dismiss.

The district judge originally dismissed the case, ruling Bonneau hadn’t provided any details about

RETALIATION — ADMISSIONS

Lengthy time between discrimination complaint and adverse action defeats lawsuit

Case name: *McCullough v. The Board of Regents of the University System of the State of Georgia*, No. 1:13-CV-118 (M.D. Ga. 09/30/14).

Ruling: The U.S. District Court, Middle District of Georgia dismissed a suit brought by a former student against Bainbridge College.

What it means: A plaintiff claiming retaliation must allege more than speculation and conclusions.

Summary: Michael McCullough — a black Bainbridge College student — was allegedly accosted in 2010 by a white female student named Heather Morton. Even though McCullough claimed he wasn't the aggressor, Bainbridge administrators directed him to participate in a hearing, but didn't require Morton to have a hearing.

After his hearing, McCullough was prevented from taking one of his exams, which caused him to fail that course.

Believing he was treated poorly as a result of being black, McCullough brought a representative from the National Association for the Advancement of Colored People to Bainbridge to review his educational and disciplinary records. However, he was purportedly told the records were unavailable.

Connie Snyder — a Bainbridge employee and the boss of Morton's husband — met with McCullough and the NAACP representative in July. During that meeting, McCullough asked why he, a black student, was required

to participate in a hearing but the white student wasn't.

A year later, McCullough left Bainbridge and unsuccessfully attempted to enroll at Valdosta State University. He later learned that falsified disciplinary records implying numerous violations were allegedly sent to VSU by Bainbridge employees. McCullough assumed that was the reason for the refusal to admit him.

He filed a suit claiming Bainbridge unlawfully retaliated against him for reporting discriminatory practices. The college filed a motion to dismiss.

The district judge said McCullough hadn't shown any causation because the complaint failed to allege the Bainbridge employees who sent the falsified records knew he had made any discrimination complaints to Snyder. He acknowledged that a plaintiff with no other proof of causation could sometimes rely on the nearness in time between the events to support a case, but ruled that a gap of one year between the remarks to Snyder and the falsified records was too long.

The judge also said the complaint merely stated McCullough must have been singled out because of his race and the alleged unlawful practices he reported, and ruled that such conclusory assumptions alone were insufficient. He granted the motion to dismiss but allowed McCullough an opportunity to amend his complaint. ■

how her disability had impaired a major life activity.

However, Bonneau filed a motion for reconsideration — or in the alternative, a motion to amend.

In response, the university conceded that the 2009 amendments to the ADA had changed the pleading requirements in favor of Bonneau.

Consequently, the judge reversed his earlier ruling, granted Bonneau's motion, and allowed her ADA claim to proceed. ■

ADULT LEARNER — DISMISSAL

Poor academic performance justifies med student's dismissal

Case name: *Kadokia v. Rutgers, The State University of New Jersey*, No. 13-2450 (D. N.J. 03/24/15).

Ruling: The U.S. District Court, District of New Jersey dismissed a former student's suit against Rutgers University.

What it means: A student charged with poor academic performance is merely entitled to an informal faculty evaluation.

Summary: Sarin Kadokia was accepted into a combination undergraduate and medical school curriculum at the Robert Wood Johnson Medical School at Rutgers University in 2007.

In his second year, Kadokia failed two courses. He successfully remediated one of them but failed the other a second time. After a hearing, the school's academic standing committee placed him on academic warning for the remainder of his time in medical school.

In his third year, Kadokia received grades of conditional pass in two clerkships because he failed the national exam in those subjects. Kadokia remediated those grades by retaking and passing the exams.

However, the physicians who observed Kadokia during a medicine clerkship expressed concern over his lack of clinical knowledge and his inability to apply that knowledge to patients. Accordingly, Kadokia received a failing grade, and his appeals were denied.

After a hearing at which Kadokia appeared with counsel, he was dismissed because of persistent academic difficulties.

Kadokia filed a suit claiming he had been denied due process. Rutgers filed a motion for summary judgment.

Assuming for the sake of argument that Kadakia had a constitutional right to continue his studies, the district judge held that he failed to prove the dismissal was beyond the pale of reasoned academic decision-making because there was ample evidence Rutgers properly dismissed him for poor academic performance.

The judge also ruled Kadakia had been afforded far greater procedural due process than the “informal faculty evaluation” that was constitutionally required, because two hearings were held — and he was represented by counsel at one of them — and he had exercised his appellate rights. ■

CAMPUS SECURITY — FMLA

University wins lawsuit in spite of suspicious timing

Case name: *McGill v. Board of Supervisors of the University of Louisiana System, et al.*, No. 13-4829 (E.D. La. 10/17/14).

Ruling: The U.S. District Court, Eastern District of Louisiana granted summary judgment in favor of the supervisor of the Southeastern Louisiana University police department.

What it means: Suspicious timing alone won't defeat a motion for summary judgment.

Summary: Michael McGill was hired in 2008 to work in the Southeastern Louisiana University police department as its captain. In June 2012, he obtained time off pursuant to the Family Medical Leave Act to undergo a total knee replacement.

The director of the police department was discharged on July 17. On July 25, Southeastern accepted the recommendation of Marvin Yates — the vice president for student affairs and the supervisor of the campus police — and appointed Sergeant Carmen Bray to serve as interim director. The next day, McGill returned from medical leave.

Because he had been passed over for the interim director position, McGill sued the university and Yates, claiming a violation of the FMLA. Yates filed a motion for summary judgment, claiming the previous director was discharged because of ongoing turmoil in the department, which included disputes between divided factions of officers. Yates also claimed both he and the president believed Bray was the best-suited employee within the department to lead it on an interim basis because of his neutral and calm personality.

McGill argued the reasons given by Yates were pretextual because: (1) Bray was equally involved in the turmoil and disruptions, (2) McGill was better qualified, (3) Yates hastily recommended Bray the day before McGill returned from FMLA leave, and (4)

a recommendation could have been made by Yates after McGill returned to work.

McGill's argument rested on the fact that he was passed over for the interim director position on the day before he returned from FMLA leave, according to the judge. However, she ruled the issue of timing alone was insufficient to defeat a motion for summary judgment. ■

FIRST AMENDMENT — ADULT LEARNER

Lack of evidence stalls former student's lawsuit

Case name: *Weil v. White, et al.*, No. 4:12-CV-00413 (M.D. Pa. 10/24/14).

Ruling: The U.S. District Court, Middle District of Pennsylvania granted summary judgment in favor of Lock Haven University administrators.

What it means: A theory of retaliation must be supported by facts.

Summary: Stephen Weil was a student in the physician's assistant program at Lock Haven University.

In June 2010, he began a clinical rotation under Michael Greenberg, M.D., in a private primary care clinic. Nadine McGraw was Greenberg's P.A. After two weeks, McGraw refused to continue working with Weil because both she and Greenberg claimed he had engaged in insubordinate behavior toward superiors, rudeness toward patients, and medical incompetence.

When Weil was suspended from the rotation, he told the department chairs the hostility from Greenberg and McGraw arose because of his complaints that Greenberg's office recorded false material in medical charts in order to bill insurance companies for tests.

Three months later, Weil wasn't allowed to graduate because of a failing grade.

Ultimately, the provost changed the failing grade to an Incomplete on a temporary basis and allowed Weil to re-enroll. However, she imposed the condition that he perform a practical demonstration of his physical examination skills.

In September 2011, Weil performed the practical examination but failed it. Two weeks later, he failed a retest of the examination.

Weil was dismissed from the program, and his appeal to the provost was unsuccessful.

He then sued the provost and other university administrators, claiming they had retaliated against him for engaging in speech protected by the First Amendment. The defendants filed a motion for summary judgment.

The district judge ruled that speaking out about alleged legal or ethical violations was constitutionally protected, but the issue was whether there had been

any retaliation that caused Weil's problems. Weil argued the requirement of successfully demonstrating physical examination skills before returning to the program violated the student handbook. However, the judge found that Weil hadn't referred to any specific handbook language supporting his claim. Furthermore, he ruled it wasn't an unusual or unreasonable requirement.

He explained that students who had been absent from the program for an extended period of time should demonstrate that their examination skills were satisfactory before being allowed to return.

Weil also asserted his dismissal was retaliatory because the provost didn't adequately investigate his appeal. But according to the judge, Weil had offered no facts in support of that claim. He explained that Weil's mere disagreement with the decision was insufficient to establish an inference of retaliatory causation.

The court granted summary judgment in favor of the defendants. ■

FREE SPEECH — CAMPUS SECURITY

Disruptive behavior warrants removal of speaker at roundtable discussion

Case name: *Young v. Brown University, et al.*, No. 12-937 (D. R.I. 10/22/14).

Ruling: The U.S. District Court, District of Rhode Island dismissed a suit against Brown University.

What it means: A university is justified in taking action to prevent disruptive behavior.

Summary: Christopher Young and his wife, Kara, attended a roundtable discussion on health care reform that took place on the Brown campus in November 2009.

Shortly after entering the room, Young began videotaping various members of the audience. He then handed his wife the video camera so he could take his turn at the microphone set up for audience participation.

When he stepped up to the microphone, Young embarked on a long, rambling narrative in which he stated: (1) health care reform was a subsidy of the pharmaceutical industry, (2) he couldn't agree to fund abortion, (3) birth control activists were eugenicists, and (4) the intent of Planned Parenthood was to bring about ethnic cleansing. Members of the audience shook their heads and grumbled at Young's remarks.

He then held up a DVD and explained it contained a film on genocide he wished to give to one of the members of the forum panel.

Young stepped away from the microphone and approached the panel, flinging the DVD onto the table in front of a panel member. He then returned to the microphone and continued his monologue.

Members of the audience yelled at him, interrupted

his speech, and began booing him. A university vice president asked Young to finish and step back from the microphone. When he didn't, two uniformed officers approached Young, who continued to repeat his prior allegations.

One Brown police officer touched Young on his elbow, turned the microphone away from him, and encouraged the next questioner in line to take her place at the microphone. Undeterred, Young continued his narrative in a louder voice. As three uniformed officers tried to guide him toward the back of the hall, Young then began to shout "This isn't a free country anymore" and continued to resist attempts to move him.

He was handcuffed, brought to the campus police station, and charged with disorderly conduct. A few weeks later, he was banned from entering Brown's campus. He sued the university, claiming he hadn't been allowed to share his Catholic viewpoint at the forum. The university filed a motion to dismiss.

Young had been allowed to share his views until he became repetitive and disruptive and failed to cede the microphone after having been asked to do so, according to the district judge. He dismissed the case, ruling Young had made no showing that the university violated his constitutional rights or that the police action was based on the content of his remarks. ■

DISABILITY — ACADEMIC ADJUSTMENTS

Unilateral denials of accommodations by faculty violate disability laws

Case name: *Letter to: Wright State University*, No. 15-13-2011 (OCR 10/22/13).

Ruling: The Office for Civil Rights concluded Wright State University violated a student's rights under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act.

What it means: A practice of allowing faculty to unilaterally deny accommodations and academic adjustments to students with disabilities violates Section 504 and Title II regulations.

Summary: OCR investigated a student's allegations he was excluded from participation in a scuba course because of his disability (epilepsy) and denied an approved accommodation for a trigonometry class.

OCR found that the decision to exclude the complainant from the scuba class was made by the instructor and the chair of the university's health and kinesiology department on the basis of a list of attributes that cause a person and his diving partner to be at risk of injury and death. The list was developed in the 1950s. The department chair added he personally researched alternatives to the scuba class but found none and that

DISABILITY — ACCESSIBILITY

University must ensure its websites are accessible to vision-impaired students

Case name: *Letter to: University of California, Santa Cruz*, No. 09-10-2144 (OCR 11/13/13).

Ruling: The Office for Civil Rights concluded the University of California, Santa Cruz wasn't in compliance with the requirements of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act.

What it means: It's unacceptable for colleges and universities to use emerging technology in their programs and services without ensuring it's accessible to individuals with disabilities.

Summary: OCR investigated a student's complaint alleging the University of California, Santa Cruz discriminated against him on the basis of disability. The complainant — a student with a visual impairment — claimed the university's van service for individuals with disabilities didn't provide him with transportation services comparable to and equally effective as the bus service for nondisabled students. Among other things, the student also claimed the university's websites were inaccessible to individuals with visual impairments and the university failed to adequately respond to an internal disability-related complaint he filed.

OCR found the university provided accessible van service to all individuals with disabilities. The vans were available during the same hours as the regular campus buses, and the complainant had access to those services. Although the university wasn't required to provide a personal attendant for the complainant, the van drivers initially escorted the complainant to the entrance at his destination. After that service was discontinued and the

student complained, the university provided him with training from an orientation specialist and mobility assistants.

The university also implemented a sighted guide program as a separate system to accommodate vision-impaired students on campus.

As a result, OCR concluded there was insufficient evidence to support a determination of noncompliance with federal disability laws and regulations.

OCR also found essential university websites weren't fully accessible to individuals with vision impairments. Additionally, the university relied on complaints from individuals with disabilities to detect and notify instances of inaccessibility, rather than routinely monitoring its essential sites.

OCR noted the duty to maintain compliance ultimately rests with the university, and accessibility should be a necessary component of developing, selecting or acquiring software used by essential programs, such as the student registration page or the site where faculty post course materials.

Finally, OCR found the student wasn't provided with a prompt and equitable resolution to his grievance because of the university's website inaccessibility issues, the confusing nature of the information on the website, and the fact that the staff and the senior administrators weren't fully aware of how the university's grievance procedures worked.

The university entered into a resolution agreement to resolve the noncompliance issues identified in OCR's investigation. ■

it was "unrealistic" financially and given the course's format to assign a caretaker or assistant for the student.

With regard to the second allegation, OCR found the student requested and was approved to use a list of formula identifiers or "cheat sheets" for exams in the trigonometry class. However, the course instructor denied the accommodation because he believed it would alter a core element of the course. But the evidence showed that the math department didn't have a uniform policy regarding cheat sheets for trigonometry courses.

OCR concluded the university didn't engage in a collaborative, reasoned process or consider any alternatives prior to denying the student's participation in the water portion of the scuba course. Therefore, OCR couldn't give deference to the decision to exclude the student and determined the university violated Section 504 and Title II regulations.

OCR also determined that despite the trigonometry instructor's belief that cheat sheets alter a core element of the course, the math department didn't

have a uniform policy on the matter and the university hadn't taken any steps to eliminate their use. Therefore, the evidence didn't indicate the department considered the memorization of trigonometry formulas to be an essential element of the course.

OCR also noted the university's systemic practice of allowing faculty to unilaterally deny students with disabilities approved accommodations as part of "academic freedom" was a violation of Section 504 regulations.

The university entered into a resolution agreement to resolve the allegations. ■

FERPA — IMPROPER DISCLOSURES

FPCO requests additional info, evidence before opening investigation

Case name: *Letter to: Anonymous parent* (FPCO 02/27/14).

Ruling: The Family Policy Compliance Office

didn't investigate a parent's allegation of improper disclosure of education records.

What it means: The FPCO doesn't investigate complaints containing generalized allegations of violations of the Family Educational Rights and Privacy Act.

Summary: The FPCO declined to investigate a parent's allegation that her daughter's education records were improperly disclosed.

The complainant alleged a permission slip she faxed to her child's school from her place of employment was disclosed to her employer. She asserted that "everything [she] had sent or emailed ... ended up in the hands of [her] boss at [her] place of work."

The FPCO explained that education records are those records directly related to a student and that are maintained by an educational agency or institution or by a party acting for the agency or institution.

Under FERPA, "disclosure" means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written or electronic means, to any party except the party identified as the one that provided or created the record.

The office added it investigates complaints containing specific allegations of fact giving reasonable cause to believe a FERPA violation has occurred.

It advised that if the parent believed the school district disclosed personally identifiable information from her daughter's education records to her employer and wished to pursue her allegation, she should provide the following information:

- Date or approximate date the alleged disclosure occurred, or the date she learned of the alleged disclosure.
- Name of the school official who made the disclosure, if known.
- Identity of the third party to whom information was disclosed.
- The specific nature of the information that was disclosed from the education records.
- Evidence that the information was disclosed. ■

FERPA — ENFORCEMENT

FERPA doesn't authorize the FPCO to seek sanctions against school officials

Case name: *Letter to: Anonymous parent* (FPCO 11/18/13).

Ruling: The Family Policy Compliance Office advised it needed additional evidence before it could investigate a parent's allegations that her rights under the Family Educational Rights and Privacy Act were violated.

What it means: The FPCO doesn't have authority under FERPA to require that educational institutions

take punitive action against individual school officials.

Summary: A parent submitted a complaint to the FPCO alleging her child's school district violated FERPA when it failed to comply with her request for amendment of education records and when it failed to give her access to those records.

The parent also claimed the district didn't provide her with notice of her rights under FERPA.

The FPCO explained that educational institutions have to notify parents and eligible students of their rights under FERPA, including the right to:

- Inspect and review a student's education records and the procedure to do so.
- Seek amendment of records believed to be inaccurate and the procedure to do so.
- Consent to disclosures of education records, except to the extent FERPA authorizes disclosure without consent.

The notification also must inform parents of their right to file a complaint with the FPCO and a specification of criteria for determining who are school officials for FERPA purposes and what constitutes a legitimate educational interest in education records.

However, educational institutions don't have to provide individual notice to each parent or eligible student. Instead, notice can be given by any means that are reasonably likely to inform parents and eligible students of their rights. These means could include publication in the institution's activities calendar, newsletter, website or student handbook.

The FPCO added it needed additional information before it can consider the parent's allegation. It suggested the complainant contact an appropriate school official to inquire whether the school published an annual notification of FERPA rights and, if so, where and when it was published. If the school didn't publish the annual notification, the parent would have a valid allegation.

To submit it, the parent had to provide a summary of any conversations with school officials regarding the matter and any other relevant information to support an allegation the school was in violation of FERPA.

The FPCO also explained its enforcement process is intended to work cooperatively with educational institutions to achieve voluntary compliance with FERPA's requirements. Following a review of the evidence and allegations submitted by a complainant, the agency may initiate an administrative investigation.

If the FPCO determines there was a FERPA violation, it advises the institution by a letter of finding containing corrective actions needed to come into compliance. Such measures can include training of school officials or a memo advising school officials of the specific requirements at issue in the complaint. And the FPCO clarified there's no basis under FERPA to require an

institution to take punitive action against an individual school official as a result of a FERPA violation. The investigation is closed when the institution completes the required corrective actions. ■

DISABILITY — ACCESSIBILITY

Failure to reassign class to accessible location brings OCR to college's door

Case name: *Letter to: American Samoa Community College*, No. 10142001 (OCR 04/07/14).

Ruling: The Office for Civil Rights entered into a resolution agreement to resolve a complaint alleging disability discrimination against American Samoa Community College.

What it means: Colleges and universities must ensure students with disabilities aren't denied the benefits of their programs because of inaccessible facilities or locations.

Summary: OCR investigated a student's complaint alleging American Samoa Community College discriminated against individuals with disabilities because an exterior ramp that served the building housing the mathematics department was inaccessible. The student also alleged the college discriminated against her individually by denying her request to reassign her class from an inaccessible location to an accessible location.

Before OCR completed its investigation, the college agreed to enter into a resolution agreement to resolve the allegations. Under the agreement, the college must revise its accessibility policies and procedures to ensure compliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. The new procedures must address accessibility requests from students, employees, and members of

the public, such as requests to reassign courses or activities to accessible buildings and locations.

With regard to the ramp, the college must develop and implement a plan to ensure it complies with accessibility standards for its slope, surface and edge protection.

The agreement also requires development of a process for providing information about the college's accessible services, programs and facilities.

At a minimum, this process must include:

- Regular, public notice about accessibility policies and procedures, and the existence and availability of accessible services, programs and facilities.
- Publication of an accessibility map identifying the accessible facilities and routes on campus.

The college also agreed to send a letter to the complainant, explaining its commitment to providing accessible services, programs and facilities, and offering to meet with her to address future accessibility requests.

OCR advised it would monitor the agreement's implementation and close the complaint when its terms are fulfilled. ■

DISABILITY — ACADEMIC ADJUSTMENTS

Willingness to address allegations brings quick resolution

Case name: *Letter to: Anoka-Ramsey Community College*, No. 05-14-2036 (OCR 04/14/14).

Ruling: The Office for Civil Rights closed a student's disability discrimination complaint against Anoka-Ramsey Community College.

What it means: Higher education institutions must ensure faculty members understand and comply with their obligation to provide approved

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academic adjustments and auxiliary aids to qualified students with disabilities.

Summary: OCR investigated a student's complaint against Anoka-Ramsey Community College, alleging discrimination on the basis of disability and retaliation.

Specifically, the complainant claimed the instructor for his nursing clinical course during the fall 2013 semester didn't provide his approved academic adjustments and the college denied his request to transfer to another section with a different instructor.

The complainant also alleged the instructor retaliated against him when he reported the failure to provide accommodations to the dean and the disability services office. He claimed the instructor required he answer questions in front of the class for the entire preclinical time while no other students were required to do the same. According to the complainant, the instructor also required he complete a long-form case study assignment twice, gave him a zero on the assignment, and granted him less time to complete the second long-form case study than was granted for the first assignment.

Finally, the complainant claimed the instructor told another student in his course he didn't have the critical thinking skills to become a nurse.

The complainant withdrew from the course in October 2013 at his psychiatrist's recommendation.

The college informed OCR it investigated the student's grievance and although it concluded the allegations were unsubstantiated, it allowed the student to enroll in the same course with a different instructor. The tuition paid for the original course was credited to the new one. The college also provided training to its nursing instructors on their obligations regarding the provision of accommodations for students with disabilities.

After finding the actions taken by the college resolved the student's allegations, OCR closed the complaint. ■

ACCOMMODATIONS — ACADEMIC AFFAIRS

Prof's dislike of audio-recording gets college in trouble with OCR

Case name: *Letter to: Eastern Florida State College*, No. 04-13-2625 (OCR 01/27/14).

Ruling: The Office for Civil Rights entered into a resolution agreement with Eastern Florida State College to resolve a disability discrimination complaint.

What it means: Colleges and universities are responsible for ensuring faculty members provide approved accommodations to students with disabilities.

Summary: OCR closed an investigation into a complaint alleging disability discrimination and retaliation

against Eastern Florida State College. A student claimed a humanities professor didn't allow him to use an approved accommodation (audio-recording) and the college forced him out of the class, enrolled him in a different course, and penalized him with absences in the new course after he complained to the disability services office.

The college voluntarily entered into a resolution agreement to address the allegations. Under the agreement, the college had to send a letter of apology to the complainant, expressing regret for dismissing him from the course.

The college must also take the following actions:

- Expunge all records indicating the student was withdrawn from the course due to having caused a "disruption to class decorum and learning environment."
- Send a letter to the humanities professor instructing him on his obligation to provide students with disabilities with approved accommodations, including the use of audio-recording devices. The letter had to specify the professor is prohibited from making any attempts to dissuade students from using the approved accommodation of audio-recording his class, offering other accommodations, or recommending students enroll in another class with a professor who doesn't object to audio-recording.
- The letter also had to advise the professor that any form of retaliation against students is prohibited, and that retaliation against students who are seeking accommodations that he disagrees with will subject him to disciplinary action.
- Send a letter to DS staff reminding them that when faculty members object to approved accommodations, they must be advised of their obligation to provide the accommodations, and that failure to do so is a violation of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, and can result in disciplinary action against the faculty member.
- Revise grievance procedures to ensure investigations provide prompt and equitable resolution of disability-related complaints.

OCR advised it would reopen the complaint and investigation if the college fails to fulfill its obligations under the agreement. ■

LAWSUITS & RULINGS

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

Lawsuit court records are summarized by Richard H. Willets, Esq. (*You may contact him at* reelrh@hotmail.com.)

FPCO and OCR rulings are summarized by Aileen Gelpi, Esq., co-editor. ■

Did student-athlete have chance to state her case?

By Aileen Gelpi, Esq., Co-Editor

Jolie Krooks was accepted onto the Haverford College women’s softball team. Prior to enrolling, she advised Coach Jennifer Ward that she had an eating disorder.

During Krooks’ freshman year, Ward didn’t allow Krooks to play, and limited her participation in practice.

In the spring of her freshman year, Krooks left school after her health deteriorated due to her eating disorder. She completed her finals at home.

In the fall of 2010, Krooks returned to Haverford and re-started her participation on the softball team. In November, she provided Haverford’s director of health services with signed medical clearances from her cardiologist and her family physician. However, the director refused to allow Krooks to play or practice with the team.

In February 2011, the Haverford dean created a list of conditions Krooks would have to meet to be eligible to play softball. They included weekly meetings with a faculty advisor, weekly consultations with health services, and comprehensive evaluations by Haverford’s staff psychiatrist.

From that time until August, Krooks didn’t play softball.

In August, Krooks notified the college she had complied with the conditions and had been cleared by her physician to play softball. However, Haverford officials imposed additional requirements.

Finally, in January 2012, an assessment team formed by the dean decided that Krooks met all of the conditions to be eligible for the softball team.

But the next month Ward cut her from the team. Krooks then unsuccessfully attempted to join the tennis team.

In July 2014, after graduating from Haverford the year before, Krooks sued the college, claiming violations of the Americans with Disabilities Act.

The college filed a motion to dismiss, claiming Krooks had waited too long to file a suit. Everyone agreed the statute of limitations was two years, but Krooks argued the limitations period didn’t begin to run until she graduated in 2013.

Krooks v. Haverford College, No. 14-4205 (E.D. Pa. 01/14/15).

Did the judge give the student the opportunity to plead her case?

A. Yes. The judge agreed with Krooks that the statute of limitations didn’t begin to run until after she left the college.

B. Yes. Although the judge believed the statute of limitations had expired, he applied an extended statute that applied in the state of Pennsylvania for disability-related suits.

C. No. Although an extended Pennsylvania statute of limitations applied, the judge dismissed the case because of the failure to properly plead it in her complaint.

D. No. The judge dismissed the case because the student waited to file more than two years since the date of the alleged discriminatory act.

Correct answer: D.

The district judge ruled the final alleged discriminatory act was refusing to allow Krooks to join the tennis team in the spring of 2012, so the suit should have been filed by the spring of 2014. He also ruled that Krooks’ continued distress — and the consequences of the decisions — throughout her tenure at Haverford was irrelevant.

Krooks argued she didn’t institute legal action at an earlier date because of a fear of further discrimination that might have impacted her ability to graduate and gain admission to medical school.

But the judge dismissed the case, ruling that such fear didn’t extend the time to file suit. ■

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CAMPUS LEGAL ADVISOR

QUICK STUDY

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

Review cases involving accessible facilities

Overview

College and university officials must become familiar with federal accessibility standards to comply with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. When colleges and universities fail to make their facilities available to individuals with disabilities, they risk the Office for Civil Rights' scrutiny and lawsuits. See how OCR has ruled in recent cases involving the accessibility of campus facilities.

Key Rulings

- A student complained to OCR that a university discriminated against individuals with disabilities by failing to provide programs and activities accessible to, and usable by, individuals with mobility impairments at its football stadium. The student specifically cited stadium restroom entry doors that weren't accessible, a lack of accessible seating, insufficient accessible parking spots, and an unstable route from the accessible parking to the stadium entrance. Before OCR issued any findings, the institution agreed to inspect the areas in the complaint and address problems with them. *Letter to: University of Arkansas at Pine Bluff*, No. 06142025 (OCR 05/16/14).

- A student complained that a college's ceramics classroom wasn't accessible to individuals with disabilities because the opening force of the classroom door was excessive, the sink wasn't accessible, and there were an insufficient number of parking spaces on the shortest accessible route to the building's accessible entrance.

Before OCR completed its investigation, the college agreed to provide a sink that met the 2010 ADA Standards for Accessible Design. It also agreed to ensure that both classroom doors met ADA standards and to add accessible parking spaces near the building. *Letter to: Mohave Community College*, No. 08-14-2149 (OCR 05/20/14).

- A student complained to OCR that an exterior ramp that served the math department was inaccessible and that the college discriminated against her by failing to reassign her class to an accessible location. Before OCR completed its investigation, the college agreed to revise its accessibility policies and procedures to ensure compliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. The new procedures must address accessibility requests such as those that ask to reassign courses or programs from an inaccessible location to an accessible one. The college will also ensure the ramp complies with accessibility standards. *Letter to: American Samoa Community College*, No. 10142001 (OCR 04/07/14).

- A complaint to OCR alleged that a university didn't provide sufficient accessible parking at the Avon Williams campus and charged individuals with disabilities \$200 for reserved accessible parking spaces. The university agreed to bring the parking lot into compliance with the Americans with Disabilities Act Accessibility Guidelines. But since all employees who wanted a reserved parking spot were charged the same fee, OCR didn't find sufficient evidence to support a finding of noncompliance on the issue of fees. *Letter to: Tennessee State University*, No. 04-13-2150 (OCR 09/12/13). ■

What You Should Know

- **Facilities, including sports stadiums, must be accessible to, and usable by, individuals with mobility impairments.**

- **College and university facilities must comply with federal guidelines governing such details as the force needed to open doors, the height and the knee and toe clearance for sinks, and the inclines of ramps.**

- **Institutions must have a process to address accessibility requests in older facilities, such as relocating classes or programs from inaccessible to accessible locations.**

- **An institution may charge a fee for a reserved accessible parking space, so long as nondisabled individuals are charged the same fee for a reserved space. ■**