Addiction Education and the Law: Protecting Yourself, Your University and Your Students

NAADAC 2022
John Korkow, PhD, LAC

Quote of the Year, 2012

“There are two ways to graduate from medical school today. Number one is to do the work and pass the exams. Number two is to hire an attorney.”

Anonymous Medical School professor
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**Learning Goals:**

Understanding the legal implications of a variety of actions when working with students

- Ability to ask the right questions when the professional’s legal rights are violated, and an understanding of what those rights do and do not entail.
- Understanding legal, ethical and moral obligations amongst students, education professionals and administration.

**Learning Objectives:**

- Following guidelines properly to avoid legal entanglements.
- Creating and maintaining proper student records.
- Avoiding day to day operational errors that can mushroom into lawsuits.

Presented by: John Korkow, LAC, SAP, PhD
While there is a dearth of information concerning education law for the professional working at an institution of higher education; students, 3rd party players, parents, and attorneys are rapidly educating themselves on this topic.

Recent cases, out of court settlements, contract disputes, and interpretations of the Americans with Disabilities Act, Title IX and FERPA, all point to the need for the professional in education to get up to speed on this rapidly expanding topic.

This workshop is designed so the educator can move forward and take appropriate ethical and legal steps when working with students, colleagues and administration.

This workshop will discuss the complex and altering legal landscape when working within higher education.

Breakouts will include brief case scenarios and discussions of similar cases and the outcomes in the real world.
The term “moral turpitude” is in numerous student and faculty handbooks, program descriptions, application standards, etc.

We all know that it means ___________?

The best working definition is found at the U.S. Department of Foreign Affairs

### What it is not

1. Damaging private property (where intent to damage not required);
2. (2) Breaking and entering (requiring no specific or implicit intent to commit a crime involving moral turpitude);
3. (3) Passing bad checks (where intent to defraud not required);
4. (4) Possessing stolen property (if guilty knowledge is not essential);
5. (5) Joy riding (where the intention to take permanently not required); and
6. (6) Juvenile delinquency
And the surprises continue:

1. Black market violations;
2. Breach of the peace;
3. Carrying a concealed weapon;
4. Desertion from the Armed Forces;
5. Disorderly conduct;
6. Drunk or reckless driving;
7. Drunkenness;
8. Escape from prison;
9. Failure to report for military induction;

What Moral Turpitude is:

- Most crimes committed against property that involve moral turpitude include the element of fraud. The act of fraud involves moral turpitude whether it is aimed against individuals or government. Fraud generally involves:
  - (1) Making false representation;
  - (2) Knowledge of such false representation by the perpetrator;
  - (3) Reliance on the false representation by the person defrauded;
  - (4) An intent to defraud; and
  - (5) The actual act of committing fraud
A quick listing

(1) Arson; (2) Blackmail; (3) Burglary; (4) Embezzlement; (5) Extortion; (6) False pretenses; (7) Forgery; (8) Fraud; (9) Larceny (grand or petty); (10) Malicious destruction of property; - Visas (11) Receiving stolen goods (with guilty knowledge); (12) Robbery; (13) Theft (when it involves the intention of permanent taking); and (14) Transporting stolen property (with guilty knowledge).

Crimes against the government

(1) Bribery; (2) Counterfeiting; (3) Fraud against revenue or other government functions; (4) Mail fraud; (5) Perjury; (6) Harboring a fugitive from justice (with guilty knowledge); and (7) Tax evasion (willful).
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**Items which are not Moral Turpitude**

- (1) Black market violations; (2) Breach of the peace; (3) Carrying a concealed weapon; (4) Desertion from the Armed Forces; (5) Disorderly conduct; (6) Drunk or reckless driving; (7) Drunkenness; (8) Escape from prison; (9) Failure to report for military induction; (10) False statements (not amounting to perjury or involving fraud); (11) Firearms violations; (12) Gambling violations; (13) Immigration violations; (14) Liquor violations; (15) Loan sharking; (16) Lottery violations; (17) Possessing burglary tools (without intent to commit burglary); (18) Smuggling and customs violations (where intent to commit fraud is absent); (19) Tax evasion (without intent to defraud); and (20) Vagrancy

**Moral Turpitude in a nutshell**

- Look it up, never assume someone has committed this breach, which some employers use as a catchall.
- Using MT as a reason to remove a student from a program, when it is not considered MT by the government can create a legal headache.

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Quick and easy examples, you decide..

- Case 1: Several years ago, a University of New Hampshire professor exposed himself to a woman and her teenage daughter in a Market Basket parking lot.
- Case 2: A professor was originally charged with felony incest after it was discovered he was having a consensual sexual relationship with his 24-year-old daughter.

Outcomes

1) He still has his teaching job. This is because a faculty union representative ruled that termination of employment would violate the terms of the AAUP contract at the university. The ruling is binding.
2) This professor was placed under conditional discharge for one year, and kept his job.

First, let’s begin with what a diploma is and is not, then we’ll talk about the syllabi.

- It is not a gift the University bestows on deserving students.
- It is not merely a piece of paper the graduate hangs on their office wall.
- It IS legally defined as property, more and more legal cases regarding the diploma are decided as property rights cases (contract law).
- By the way, the vast majority of laws in the United States are property rights laws....

Syllabi continued

So if the diploma is property, what are your syllabi?

1) Syllabi, no matter how poorly written, are legally binding contracts between the institution and the student. Period.
2) Syllabi specify what the student must do to obtain certain grades and complete the course successfully.
3) Syllabi are not merely a guide to the course anymore.
Syllabi, do’s and don’ts

- Do not underestimate the power of including or excluding important information.
- Do include rubrics, many good examples of rubrics for papers, presentations, even classroom discussion, exist online. Find and modify them.
- Do not skip attendance policies, disability policies, Title IX statements, freedom in learning statements.
- Do include links to your school’s student handbooks, manuals, etc.
- This is a case of “more is better.” Brevity is not wise.

Georgia State University & Copyright

- May 11, 2012 the “publishers” vs. GSU Copyright suit ended with a 350 page ruling. (Minor updates have occurred)
- This ruling answered many legal questions about Fair Use, and despite publishers’ misinformation campaign, is very clear, broad in scope, and it is very unlikely it will be contested successfully for decades to come.
- Our schools and our libraries “won,” the publishers suffered a massive defeat.
The Nuts and Bolts of the Ruling and how it effects us

☐ We are still bound to the rules of our individual schools, and we can still be reprimanded for disobeying those rules, what follows is what the judge stated in the suit, it is not taken to be your new policy!

☐ Should a school employee violate copyright code (particularly as defined by this suit), unless a publisher can now prove (very difficult) exact financial damages, the employee shall attend a copyright workshop at his/her expense.

You are kidding, right?

☑ The court determined that a school or an employee may NEVER be compensated, beyond normal per page copy expense, for excerpts from any work. Charges beyond copying fees are illegal and a violation of copyright law, unless a written agreement with the publisher has been reached. (you cannot charge $50 for a ten page excerpt from a journal, for instance)

☑ If the employee has used the work for educational purposes in the scope of their employment at an educational facility, the court bars further retribution on the part of the publisher (but the school can take any action it wishes).
Yes, everything has really changed

- I can’t copy any portion of a book right? And if I do, it can only be a few pages, right?
- Wrong: The finding of the court is that up to 10% of any book may be copied and distributed to students for educational purposes, one can charge normal copying expenses, and no more.
- That just means chapter pages are in that full count, not blanks, dedications, indices, appendices?
- Wrong: 100% of the book pages count.

What ten percent really means

- For example, a workbook I wish to copy a portion of a workbook that has numbered pages equaling 200 pages, 20 blank pages in the back and 5 dedication pages, plus a blank page between all 10 chapters. Are you telling me that I can count 235 pages, and copy up to 23.5 of those?
- Short answer, “YES, absolutely.”
- Caveats to any fair use, you do need to show how the copied material reasonably ties into the course.
The court determined that there was no evidence of financial damages, set a very high bar for future proof of financial damages by publishers, and even determined via its own research that giving students copies actually INCREASED sales of the original material!

“The world has moved on in a lot of ways,” Brandon Butler, director of information policy at the University of Virginia Library, told PW last April, (2019, Publisher’s Weekly) after a final round of briefs were filed ahead of Evans’ latest remand decision. “We’re now looking to university presses as partners in an open access world, which of course includes access by students. I think more and more libraries are also looking at e-book licenses that allow unlimited simultaneous users as an attractive way to support affordable education for our students—a model that would facilitate assigning a chapter here and there. We are also supporting open educational resources that in some cases can replace expensive textbooks and, perhaps, render e-reserves less important.”

Fair Use

- The suit hinged on Fair Use, the court found for the defendants on every clause, so Fair Use bears a bit of analysis.
- **Factor 1: Purpose and Character of the Use**, including whether such use is of a commercial character or is for nonprofit educational purposes
  - For profit may be an issue, but any non-profit enjoys the full protection of fair use.

Factor 2: Nature of the Copyrighted Work: Factual basis

- Copyright protects original works of authorship. Copyright protects expression. *It does not protect ideas.*
- Courts generally hold that "the scope of fair use is greater with respect to factual than nonfactual works." Factual works, such as biographies, reviews, criticism and commentary, are believed to have a greater public value and, therefore, uses of them may be better tolerated by the copyright law.
- Works containing information in the public interest may require less protection. Fictional works, on the other hand, are often based closely on the author's subjective impressions and, therefore, require more protection.
Factor 3:

- **Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole**
- Ten percent, ten percent, ten percent as applied to books.

Journals are a bit fuzzy, what we do know:

- Fine to distribute to students if the school possesses a license to the journal, the license presumes the school WILL use the journal for educational purposes, therefore the use has been paid for already.
- Reprinting entire journals for class use is not acceptable fair use. However, if the publisher is charging unfairly for such use (i.e. a single article is $59.00, while the entire journal originally sold for $19.00), the court frowns on denial of copying when permissions charges are outrageous.
Journals, in the words of the court

- Use is considered Fair Use if one of the below applies:
  - 1) the reading is from a journal to which the university has a license
  - 2) the reading is in the public domain
  - 3) the reading is a fair use
  - 4) the professor has obtained permission from the rights holder

Factor 4:

- The Effect of the Use on the Potential Market for or Value of the Copyrighted Work

  "Factor four focuses on whether Defendants' (the professors' and the students') use of excerpts of Plaintiffs' copyrighted works adversely affected the potential market for or value of the copyrighted work in question. Factor four should weigh against defendant only when the harm is significant, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); however, because Defendants have the burden of proof on all elements of the fair use defense." [enough said]

- Updates, minor, which all support reasonable fair use:
  https://www.acm.org/publications/authors/guidance-for-authors-on-fair-use
In *Kirtsaeng v. John Wiley & Sons*, the Court considered the “first sale” doctrine of copyright law. (case settled in March 2013)

This is a rule that means that when a publisher sells a copyrighted work once, it loses any right to complain about anything later done with that copy.

This is the rule that makes it okay to resell a used book to a used-book store, and for that store in turn to sell used books to its customers.


The issue in *Kirtsaeng* was whether the first-sale doctrine applies to copyrighted works manufactured overseas.

Kirtsaeng bought textbooks in Thailand, where they are cheap, brought them to the United States, and resold them at a large profit.

The lower courts said he couldn’t do this, and ordered him to pay damages to the publisher (John Wiley) of $600,000. The Supreme Court disagreed. The Justices said that the first-sale doctrine applies to all books, wherever made.

So even if you buy a book made in England, you can resell it without permission from the publisher.
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Title IX

- [https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)
  - Title IX
  - The U.S. Department of Education’s Office for Civil Rights (OCR) enforces, among other statutes, Title IX of the Education Amendments of 1972. Title IX protects people from discrimination based on sex in education programs or activities that receive federal financial assistance. Title IX states:
    - 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.

Scope of Title IX

- Title IX applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the Department.
- These recipients include approximately 17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums.
- Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories of the United States.
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*Title IX New Transgender Guidelines 2022*

- The Department of Education, through its Office for Civil Rights (OCR), helps protect the rights of all students to learn in school settings free from sex discrimination—including discrimination based on sexual orientation or gender identity.
- We do this by providing assistance and resources, and by enforcing Title IX of the Education Amendments of 1972. Title IX protects all students at institutions that receive federal funding, including all public K-12 schools and almost all colleges and universities.

To learn more about how Title IX protects LGBTQ+ students from discrimination, check out OCR’s resources for LGBTQ+ students.
- Anyone who believes that a school receiving federal funding has discriminated against someone because they identify as LGBTQ+ or because they do not conform with sex stereotypes, or for another reason, can file a complaint with OCR within 180 days of the alleged discrimination. For more details, please visit [www.ed.gov/ocr/complaintintro.html](http://www.ed.gov/ocr/complaintintro.html).
Office for Civil Rights vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from the Department comply with the law. OCR evaluates, investigates, and resolves complaints alleging sex discrimination. OCR also conducts proactive investigations, through directed investigations or compliance reviews, to examine potential systemic violations based on sources of information other than complaints.

(The days of institutions fully “self-investigating” Title IX complaints are over). These investigations almost universally resulted in the organization finding itself blameless. Misinforming a student about Title IX rights is a violation in itself.

We all know what Ferpa is, right? Our schools all have the definition posted in a place accessible to students and faculty, but the posted definitions are often outdated and inaccurate. Go directly to the source http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html. It can be dangerous to rely on your college or university to keep this (and other) information up to date.
Ferpa enforcement:

- Complaints must:
  - be in writing and must contain specific allegations of fact giving reasonable cause to believe that a violation of FERPA or PPRA has occurred;
  - be filed by the parent or by the student *(if the rights have transferred to the student at age 18)*; and
  - be filed within 180 days of the alleged violation or within 180 days after you knew or should have known about the violation.

Commonsense protocols, designed to protect the student, normally do not conflict with other confidentiality and privacy policies.

- You cannot reveal attendance, grades, GPA, student record information to an outside entity (and yes, that includes mom and dad, it also includes internship sites!)
- You need written releases of information to reveal information (as noted above) outside of the institution, mainly pay attention to this for internship purposes— a simple one page form allowing exchange of progress and grading information with the internship site will do.
Ferpa continued

☐ Be cautious what you state is a “sole possession” record, one of the loopholes in Ferpa. While the government simply is not prosecuting these cases, the federal courts are more than willing to step in when invited.

☐ Emails about students, grading information you share within the department, classroom recordings that are viewed by students, admin, or faculty are ALL part of the student record… alarmingly, so are faculty discussions about student issues...

Ferpa, a wrap up

☐ Never bargain with a student over access to records, be cheerful, and get copies to them rapidly (you can only charge reasonable costs, and courts will only allow you 30 days to comply).

☐ Do not forward student emails, they are considered private and protected communications, forwarded emails are where most lawsuits regarding Ferpa violations reside (easy to obtain proof of the violation, easy to prosecute, easy for the plaintiff to win)

☐ Never send student information to a non-educational account (stalkers and parents will create fake accounts to gain access to student information)
Creating and maintaining proper student records

- If you do not have a problem with a student ever, you will never have a need for records beyond grading.
- However, if you live in the real world, these problems can and do occur, and can end up in a court of law.
- Your institutional protocols probably are not extensive enough to protect you in the event of an angry student with legal knowledge.

Protections

- Understand that there is NO protection you can design if you are truly abusive, immoral, or prone to acting in an illegal manner.
- Assuming the opposite, the first essential is a student-centered attitude by you, your department, administration and your institution.
  - This does not mean coddling students, it does mean fully understanding laws and regulations (of which this presentation is merely the tip of the iceberg)
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Student centered protections

- All information necessary to successfully complete your courses (see syllabi), your program, and graduate from your college need to be spelled out and readily available at all times to all students.
- Such standards can be high, they can be difficult, but they must comply to federal standards. For example, you cannot violate ADA and excuse the violation as “our standards simply are so high that someone with ______ shouldn’t be in our department anyway.”

Student centered standards

- Be certain you utilize due process when a student issue occurs... students typically know their rights, if they do not, they can readily find them online
  - www.thefire.org started as a first amendment student rights organization, it is branching out into other student rights issues.
  - Googling “student rights” resulted in over 62 million hits in 2010; It now results in a staggering 2.26 BILLION hits in 2022.
Student rights

- Inform students of the school’s grievance process when you cannot resolve an issue with a student.
- Understand that any meetings, notes, emails, regarding the issue can be accessed, especially if you end up in court.
- As the diploma is property, and legal property rights accrue pertaining to it, any and all due process rights in the U.S. Constitution, the Bill of Rights, case law, State laws apply...

Student rights

- Records should be thorough, I no longer accept paper copies of work, everything must be submitted electronically, and I NEVER have deleted these files, particularly of graded assignments.
- Be wary of placing confidential information into databases such as Turnitin, you could become responsible for a breach.
- Borrow a page from the business world, when students mess up, document, remediate, and get it in writing.
- Assume from the beginning that you could end up in a courtroom defending your position (this is unlikely, but if it happens, you will maintain far stricter legal protocols as you proceed with any student).
- Another problem area is non-compliance with ADA.
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Americans with Disabilities Act

1) If you plan to discriminate against a student, a student covered under ADA is your worst possible choice to take this action.
2) ADA requires us to make reasonable accommodations to students with a diagnosed disability. This means we must make accommodations, reasonable is so vague as to be meaningless, and the disability must be diagnosed by a recognized professional in that area (i.e. the student cannot merely state they have a disability, but must present documentation to your disability office)

ADA continued

3) Reasonable is not defined by you or your department, it is defined by your disability office operating under federal law. Ask, ask, and ask again.
4) Follow the written accommodations to the letter, and if possible, exceed them.
5) Design your courses so separate accommodations for students are minimized (Universal Design... again, an entire presentation in itself)
6) Do not make harassing statements, particularly in public... this seems like a no-brainer, but I cannot count the times I’ve heard “that was a dyslexic moment,” “you’d think that person was ____.”
1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The 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. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.

5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The 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.

- If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern. 

‘Charlie Rose’ Show Agrees to Pay Up to $250,000 to Settle Interns’ Lawsuit

- By STEVEN GREENHOUSE 9:09 p.m. | Updated
  Charlie Rose and his production company have agreed to pay as much as $250,000 to settle a class-action lawsuit brought by a former unpaid intern who claimed minimum-wage violations.
- Under the settlement, which was announced on Thursday [Dec. 20, 2012], Mr. Rose and his production company, Charlie Rose Inc., will pay back wages to a potential class of 189 interns.
- The settlement calls for many of the interns to receive about $1,100 each — $110 a week in back pay, up to a maximum of 10 weeks, the approximate length of a school semester.

Some selected cases, winners and losers

- A counseling student at the College of William and Mary filed a suit contending she was dismissed from their counseling program without reason.
- This student was given every opportunity to correct poor behaviors during her internship, signed paperwork agreeing to alter her behaviors, and proceeded to not comply.
- The case made it to federal court, the only reason the University won was extensive documentation.
William and Mary continued

- VICTORIA M. BUTLER, Plaintiff - Appellant, versus
  RECTOR AND BOARD OF VISITORS OF THE COLLEGE OF WILLIAM AND MARY; TIMOTHY J. SULLIVAN, President; VIRGINIA K. MCLAUGHLIN, Dean; THOMAS J. WARD, Associate Dean; TERI B. ANCELLOTTI, Doctor; DENNIS FRANK; CHARLES R. MCADAMS, III, Doctor

This case is also documented in the March 2007 edition of Counselor Education and Supervision “Remediation and Dismissal Policies in Counselor Education: Lessons Learned from a Challenge in Federal Court.”

Victoria

- We could do an entire presentation on “Lessons Learned...”
- Suffice it to say, without a student centered attitude (Victoria was given numerous, and fully documented chances to alter her behaviors), without extensive documentation, without extensive and highly detailed student policies--- Victoria would have won..
- So what did Victoria do?
Victoria, not a model student

- She misrepresented her field site as one that allowed videotaping, and one that had individual counseling available. (i.e. she lied... by the way, was this moral turpitude?)
- Falsified claims of mistreatment by her supervisors.
- Willingly violated three program criteria: ability to deal with conflict, ability to accept and use feedback, ability to accept personal responsibility (keep in mind, remedial opportunities were being offered on an almost daily basis, which she signed off on and then ignored)

Victoria, continued

- She purposely initiated hostile interactions with faculty and administration, attempting to tape record these interactions (now remember, this was 2002, at which time it was expected that people being recorded had been informed in advance).
- Note: Returning nasty student emails in kind is legal suicide, be calm and professional always. Sometimes any reply is a mistake!
- The entire faculty, unanimously, recommended her dismissal for noncompliance to several program protocols (how many of us would have dismissed her for just the act of lying about the internship site?)
Victoria, a brief ending

- This case proceeded through the entire grievance program, Victoria was allowed to hear the proceedings, given transcripts, allowed to rebut, and still went to court.
- She did lose... but the only reason she lost was the extreme student centered attitude of the school, attention to due process, and voluminous record keeping on the part of everyone involved.

Now for a winner...

- Sharick vs. the University of Southeastern Florida
- Opposite to Victoria’s case... Sharick was a medical student complying with all departmental and University requirements.
- There existed virtually no documentation of misconduct on the part of Sharick– a total of 4 incidents [each of which were based on a supposed lack of clinical knowledge] were cited during his residency as grounds for dismissal (keep in mind he had passed all of his classes at this point)
Sharick

- Sharick had an average of 83.2%, and was ranked 75th in his class of 104 medical students.
- He sued and won, did not like the settlement and appealed it.
- He ultimately won lifetime earnings ($4.3 million) as a medical doctor, and the status of a diploma as property was once again affirmed in the court decision.
- Note: A basic understanding of contract law is now essential.

Free Speech “Fire.org”

- More than 60% of targeting incidents resulted in some form of sanction being leveled against the scholar, including 28 investigations, 18 suspensions, and 14 terminations.
- Almost 70% of the incidents came from individuals and groups to the political left of the scholar, compared to 30% that came from the right of the scholar.
- Targeting incidents occurred most often in the disciplines of law, English, political science, and medicine.
- Scholars were most often targeted for comments made in the classroom.
- As in previous years, the topic of race was more likely than any other topic to spark a targeting incident.
Professors continued

- The First Amendment protects scholars at public institutions — and those institutions cannot legally punish scholars for the expression in the report (though they often do).
- Private institutions, though not directly bound by the First Amendment, often make institutional promises of free speech and academic freedom.
- FIRE advocates for targeted faculty at both types of institutions, while FIRE’s Faculty Legal Defense Fund provides “early responder” legal representation for faculty at public colleges and universities.

Free speech students

- Do I have First Amendment rights in school?
  - You have the right to speak out, hand out flyers and petitions, and wear expressive clothing in school — as long as you don’t disrupt the functioning of the school or violate school policies that don’t hinge on the message expressed.
  - What counts as “disruptive” will vary by context, but a school disagreeing with your position or thinking your speech is controversial or in “bad taste” is not enough to qualify. Courts have upheld students’ rights to wear things like an anti-war armband, an armband opposing the right to get an abortion, and a shirt supporting the LGBTQ community.
Students continued

- Schools can have rules that have nothing to do with the message expressed, like dress codes. So, for example, a school can prohibit you from wearing hats — because that rule is not based on what the hats say — but it can't prohibit you from wearing only pink pussycat hats or pro-NRA hats.
- Outside of school, you enjoy essentially the same rights to protest and speak out as anyone else. This means you're likely to be most protected if you organize, protest, and advocate for your views off campus and outside of school hours.
- You have the right to speak your mind on social media, and your school cannot punish you for content you post off campus and outside of school hours.

In a nutshell: Commonsense concerning free speech is no longer a good guide, read school policies, look at court cases, read the current literature.

Lessons learned in court

- Be student centered
- Document student interactions, in writing
- Have detailed handbooks, syllabi, and remediation processes
- Use and follow due process rules
- Use the grievance process properly (do not use it as a kangaroo court where the student always loses)
- Avoid going to court at all (well, most) costs
- Have good liability insurance as a school, and as an individual (do not count on school insurance to pay YOUR legal costs.)
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While we’re at it

☐ Do students have a right to tape record/video record/photograph anything that goes on around them?
☐ The answer is a qualified, yes, most of the time.. Cell phones are typically universal recording devices, and with public webcams a norm, privacy rights have altered.
☐ The only time this would not be allowed is when client cases are discussed, or when student practice counseling (yes you can record for review, but must maintain strict protocols to protect the records) is occurring.

Hyflex is coming:

☐ Would you be comfortable if everything in all your classes were taped? (google “Hyflex”)
☐ What about your office?
☐ Home?
☐ Recreational activities?
☐ More to the point, what about meetings with students... do you say or do things that could be used against you or your institution?
☐ It is a legal expectation that privacy does not extend to any faculty or administrative interaction that could impact a student’s grade or progress at an institution, period.
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What about your career?

- Do students have a right to expect that anonymous end of the semester course evals are truly anonymous?
  - (no they do not, a professor whose denial of tenure was based on poor student evals sued to see them, the court agreed, the school granted tenure rather than allowing him to see the evals)
  - Worse.. He did not sue the school, he sued the individual students in a class where he received poor ratings.
  - Reference: The Trials of Academe, Amy Gajda

Your career continued...

- Do you have a right to expect that what you say in a tenure/promotion meeting about a fellow professor is confidential?
  - Okay, by now you know the answer, but before we started this discussion, you were certain the answer would be “yes.”
  - Again, the answer is no... this is also based on case law, as these discussions affect careers, they are no longer considered confidential discussions, and the professor who is denied promotion or tenure not only has a right to a transcript, but can sue the individual committee members...
  - Denying tenure due to motherhood considerations is a losing battle in court now. A pregnant professor won a $3m suit against UT Austin, TX when denied tenure due to her pregnancy.
Protecting yourself

- It is no longer a good idea to “clean up” your email via mass deletions.
- Build folders for students with issues, and save them (I keep my student issue emails in permanent folders that I copy and save).
- When trouble is brewing administratively, behave like a student: Research similar situations online, chat with an attorney, save all communications, and demand to tape record all meetings concerning your issue.
- Never assume you have no legal options, there are always legal options.

Conclusions

- What we think we know, is not always legally accurate.
- The legal landscape alters daily.
- Your handbooks and syllabi are probably out of date from a legal standpoint.
- It is very unlikely that your administration, and even your school attorney are fully up to date.
- It is up to you to protect yourself and your students.
Conclusions, continued

- Keep up on the legal aspects of being an educator
- Maintain your own liability insurance (it is cheap)
- The best insurance is being fair and student centered.
- The second best insurance is attention to detail, from documentation, to syllabi, to interactions in the hallway.

New in 2022

- Course Hero is being sued to produce names of students who sold it exam copies, the case is still pending.
- Whistleblower protections via civil court are coming. Luke Weinstein was fired in 2011 for filing whistleblower complaints against his dean. The court determined he is owed full backpay for all 11 years.
- Amy Wax and free speech, another pending case, she is in process of being punished for making inappropriate remarks in the eyes of the university (Penn State) and she filed suit. Should the U win, free speech will be restricted, should Doctor Wax win, protocols protecting classrooms as “safe spaces” will be out the window.
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