Campus Legal Advisor

Interpreting the Law for Higher Education Administrators

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Of Counsel

Weigh the legal, PR risks of your role in official versus unofficial speech

By Jacob H. Rooksby, J.D., Ph.D.

Who speaks for the university? This deceptively simple yet complicated question is one with both legal and PR significance. From a legal standpoint, universities speak through their duly appointed officers, such as presidents and vice presidents, as well as governing board members and anyone they deputize to speak on their behalf, such as attorneys and public relations officials. From the standpoint of public perception, however, who speaks for the university may include a broader array of individuals, including faculty and even students.

A recent case involving Columbia University helps highlight the distinction between official university speech and unofficial faculty speech, which, despite its unofficial character, may be attributed to the university by students and the public. Although only the former binds the institution, even the latter can lead to PR problems and lawsuits.

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Compliance

Take steps to prevent, address sexual harassment in the workplace

By Claudine McCarthy, Co-Editor

The #MeToo movement has likely placed higher ed administrators on high alert to raise awareness about the importance of preventing and addressing sexual harassment in the workplace.

Although roughly three out of four individuals who experience workplace harassment do not report it, according to estimates by the U.S. Equal Employment Opportunity Commission, and although charges of sexual harassment had actually declined during the past seven years, this number has now begun increasing. College officials should also expect to see an uptick in reports of sexual harassment, according to M. Davis O'Guinn, Esq., chief litigation counsel

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Attorney general sues for-profit and parent co.

California Attorney General Xavier Becerra filed a lawsuit against for-profit Ashford University and its parent company, Bridgepoint Education, citing that the institution made false promises to potential students and provided false information in an effort to get prospects to enroll.

According to a press release issued by Becerra's office, Ashford "illegally misled students about their educational prospects and unfairly saddled them with debt." The lawsuit also alleges Ashford University preyed in particular upon student-veterans.

Harassment lawsuit extends to administration

The University of Rochester faces a lawsuit from nine former professors and students, alleging the university, its president, and its provost created a permissive environment for harassment by a professor. The lawsuit comes after *Mother Jones* broke a story with allegations that a professor sexually harassed colleagues, blurred professor/student boundaries, and practiced academic retaliation against women who didn't cooperate with him.

The plaintiffs allege that the university failed to protect students and failed to act in a timely manner on the allegations, according to the *Rochester Democrat and Chronicle*. While the professor was under investigation, he was promoted by the university.

Lawsuit alleges ignoring serial rapists

A federal lawsuit against Howard University states that it allowed two students who were alleged serial rapists to remain on campus, according to *Inside Higher Ed*. Five former students anonymously filed a lawsuit alleging they had been sexually assaulted on campus and that administrators had ignored their reports or lagged in their response.

According to the complaint, their cases dragged on for many months, despite Howard's policy and federal regulations requiring a 60-day timeline. A sixth complainant later joined the lawsuit, alleging that her sexual assault allegations remained unresolved eight months after she reported her rape and that she still sees her alleged attacker around campus, even after multiple reports of sexual assault.

Updated HEA would allow delayed proceedings

An updated draft of the Higher Education Act reauthorization presented to the House of Representatives would allow colleges and universities to delay proceedings into sexual assault inquiries if an outside law enforcement agency requested they do so.

Advocates for sexual assault survivors say the proposed update would delay and derail investigations, leading to slower remedies for victims, according to *Inside Higher Ed*. Others say that little in the language of the HEA would actually change enough to affect due process and investigations on campuses. ■

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The case, *Nungesser v. Columbia Univ.*, 244 F. Supp. 3d 345 (S.D.N.Y. 2017), involved a male undergraduate student, Paul Nungesser, who was accused of sexual assault by a fellow student, Emma Sulkowicz.

After a lengthy disciplinary investigation, Nungesser was found not responsible under Columbia's honor code and sexual assault policy.

Sulkowicz expressed that she felt Columbia's disciplinary system had failed her. She sought advice about her senior thesis from a professor in Columbia's art department. She wanted the professor to help her design a performance piece related to victims' advocacy. The professor helped Sulkowicz design a project in which she would carry her residence hall mattress around campus every day as long as Nungesser remained a student at Columbia.

Sulkowicz's "mattress project" soon gained widespread media attention, and she became a figure of protest against rape culture on university campuses. Even when asked to do so, Columbia University officials declined to make any statements to the press in favor of Nungesser, citing the Family Educational Rights and Privacy Act. Columbia's policy states:

"Both complainants and respondents in the disciplinary investigation and hearing process have the right to confidentiality and privacy to the extent provided under FERPA. The University will make all reasonable efforts to ensure preservation of privacy, restricting information to those with a legitimate need to know."

A journalist soon discovered the name of the professor who supervised Sulkowicz's thesis project. The journalist sought a statement from the professor about the project. The professor commented, regarding Sulkowicz's work, "She is making an enormous statement for change. Carrying around your university bed — which was also the site of your rape — is an amazingly significant and poignant and powerful symbol."

After publication of the statement, Nungesser sued Columbia University, alleging it committed gender-based discrimination in violation of Title IX and breached its obligation to treat complainants and respondents in such proceedings equally and fairly, citing federal law and the university's own policies. His allegation was that, despite the policies, he and Sulkowicz were treated differently: a Columbia University professor commented expressly on the case in favor of Sulkowicz, but the university always declined to say anything in favor of Nungesser, and had informed Nungesser that FERPA disallowed any comment about the case by Columbia.

The court rejected Nungesser's argument and granted Columbia University's motion to dismiss, stating:

"Nungesser has not alleged that Columbia ever spoke in any way about the disciplinary proceedings against Nungesser. In fact, Nungesser alleges at multiple points that Columbia expressly declined to comment on the investigation or proceedings. While Nungesser does allege that Professors made statements in support of Sulkowicz's Mattress Project as a work of art and/or protest, it does not follow that they were 'comment[ing] expressly on the case in favor of Sulkowicz,' and nothing in the complaint implies that they were."

This case shows how universities — rightly concerned with limiting official speech that could lead to lawsuits — may be unable to avoid litigation because of unofficial speech that's attributed to the university.

Columbia faced a Hobson's choice:

It could have instructed the faculty member not to speak with the press about Sulkowicz's project, but doing so would have risked giving substance to a claim that it violated the faculty member's academic freedom by dictating what the professor could or couldn't say about a student's academic work (keeping in mind that the professor supported the student's work, and the student didn't object to the professor's expression).

But by doing nothing, and allowing the professor to make the comment, the university risked having the statement attributed to the institution and being sued because of it, which is exactly what happened.

In the realm of Title IX, it's no secret that colleges and universities face difficult choices.

Sometimes saying nothing is the prudent choice, as a matter of both law and policy, and yet the institution may still find itself defending a lawsuit.

But that doesn't mean the institution can't win that lawsuit. ■

About the author

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Limit liability for medical marijuana use on campus

By Claudine McCarthy, Co-Editor

CLEARWATER BEACH, FLORIDA — In just five years, an increasing number of states (at least 10) have approved the legalized recreational use of marijuana. Meanwhile, 29 other states, plus Washington, D.C., Puerto Rico, and Guam, have legalized medical marijuana. Nine of those states passed medical marijuana laws that include explicit anti-discrimination protections for employees who hold a medical marijuana card. And 17 states allow some use of at least one component of the drug, such as THC, according to Katrina Chapman, Esq., a partner with Holland & Knight LLP.

However, marijuana is still illegal under federal law, Chapman stressed, while speaking at Stetson University's Higher Education and the Law annual conference. To further complicate the issue, U.S. Attorney General Jeff Sessions rescinded the former administration's policy of maintaining a hands-off approach with state marijuana laws, and now the U.S. Justice Department allows federal prosecutors to use their discretion in prosecuting cases involving violations of the federal marijuana law, Chapman noted. Federal law conflicts with the law in many states, and some state laws differ.

In light of these factors, it's critical to check state laws, to know how various federal laws impact the use of marijuana on campus, and to consult with general counsel, Chapman recommended. When reviewing your state's laws permitting medical marijuana use, look for provisions that:

➢ Prohibit use of marijuana in the workplace or on school grounds. State laws generally don't require accommodation of the medical use of marijuana in the workplace itself.

➢ Allow employers to implement and enforce workplace policies restricting consumption of intoxicating substances and to discipline employees for violating those policies.

Federal law, including the Drug-Free Schools and Communities Act, the Drug-Free Workplace Act, and the Transportation Employee Testing Act, treats marijuana as a Schedule I illegal drug, Chapman said. In fact, if a school is found out of compliance with federal law, the government can require repayment of federal funding and can withdraw federal grants, funds, and contracts, she warned.

The courts have generally ruled that the ADA doesn't require employers to accommodate marijuana use, Chapman noted. However, some recent case law has required that if an employee has a prescription for medical marijuana to treat a disability, the employer bears the burden of proving the steps taken and the efforts made to explore alternative reasonable accommodations to prevent a disability-discrimination claim, she explained.

Based on recent medical marijuana court cases, you can expect "these cases will go on longer and end up costing more, and the courts will look more closely at the facts of each case," Chapman said. In one case, the court determined that federal law didn't pre-empt the state's law, she noted.

However, colleges can continue to maintain drug-free workplaces, Chapman explained, consistent with federal law, including drug testing for:

- Safety-sensitive positions (campus security).
- Building and grounds (machinery, driving).
- Commercial driver's license holders (as required by Department of Transportation regulations).
- Various screenings (e.g., pre-employment, random, reasonable suspicion, post-accident).

To help ensure compliance and limit liability related to drug use by employees, Chapman recommended these steps:

❑ Communicate drug issues and expectations.

❑ Monitor state law developments concerning marijuana and employee drug testing. Medical marijuana use may raise state law accommodation and disability-discrimination issues. Some states permit a private right of action for adverse employment decisions based solely on the lawful use of medical marijuana under state law.

❑ Respond appropriately to reasonable accommodation requests and notifications about when employees/applicants have been prescribed a medical marijuana card.

❑ Review policies for drug-testing for automatic disqualification provisions. Consider updating policies to direct employees/applicants who use medical marijuana to contact a designated school official before drug testing.

❑ Train personnel to respond to employee requests for accommodations for medical marijuana use.

❑ Engage in an interactive process with employees/applicants to gather relevant facts. Ask: When do you use marijuana? Is there a risk you'll be under the influence at work? Will you bring marijuana to work?

❑ Comply with the duty to explore reasonable alternative accommodations, if the school determines that it can't accommodate a request for medical marijuana use.

❑ Document steps taken to evaluate accommodation requests and the school's response. ■

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and adjunct professor at Indiana University. Even when the conduct isn't against the law, it can still be deemed inappropriate for your institution, he said.

O'Guinn spoke at Stetson University's Higher Education and the Law annual conference, along with Katrina Chapman, Esq., and Joshua Bosin, Esq., both partners at Holland & Knight LLP.

Chapman noted that she has seen more schools taking these matters "very, very seriously," by investigating, offering counseling or other measures, and implementing restorative justice models, for starters.

If your institutional leadership needs more convincing of the seriousness of this issue, then warn them about the automatic liability facing your institution if a supervisor takes an adverse employment action that can be linked to the rejection of or submission to harassment, Bosin advised.

Keep in mind that sexual harassment isn't always physical or verbal in nature. In fact, it can occur in written (e.g., emails, texts sent by a supervisor) or visual (e.g., suggestive cartoons or calendars left by a supervisor in an employee's locker) formats, Bosin said.

To limit liability, institutions must be able to prove it demonstrated prompt, effective, remedial action, such as having and following policies and investigating complaints, Bosin recommended.

If you knew or should have known about an incident of sexual harassment but didn't do anything about it, then you're on the hook legally, Bosin warned. For example, if everyone else knew but you, then that means you should have known, he said. It helps to be able to demonstrate to the courts that you've made sufficient attempts to keep up with what's going on by conducting workplace surveys and quarterly/monthly check-ins, he noted.

"Make sure you're encouraging victims to come forward. In fact, you can even say, 'You must come forward,'" Bosin said.

The presenters shared the following tips to help your institution more effectively prevent sexual harassment:

✓ Develop an explicit policy against sexual harassment.

✓ Clearly and regularly communicate the policy to employees. Ensure it's effectively implemented.

✓ Develop a procedure for resolving sexual harassment complaints. The procedure should be designed to encourage victims of harassment to come forward.

✓ Allow for multiple reporting avenues. Instead of just directing employees to report harassment to their supervisors, you should provide alternatives for reporting just in case their supervisor is the one harassing them.

✓ Ensure confidentiality, as much as possible.

✓ Provide effective remedies, including making clear that the institution won't tolerate adverse treatment of employees because they reported harassment.

✓ Undertake necessary measures to ensure that retaliation doesn't occur.

✓ When a complaint of sexual harassment in the workplace is made pursuant to your institution's procedures, your institution should follow these tips for effective correction, according to the presenters:

❑ Take the complaint seriously.

❑ Investigate any unwelcome behavior, promptly and thoroughly.

❑ Gather facts. Find out if the behavior is unwelcome, severe, or pervasive, or involves a protected class or a supervisor.

❑ Respond and/or discipline, promptly and adequately.

❑ Determine corrective action by considering such key factors as the severity and pervasiveness of the conduct, as well as the likelihood of the conduct being repeated.

❑ Have a plan for handling more complicated complaints. For example, the employee might not have proof, and the accused supervisor might deny it happened and on top of that might respond by telling you she's seen male co-workers demonstrate similar behavior without consequences. In that example, you can thank the supervisor for her response and let her know you will investigate the male co-workers' behaviors. But you must still take action on the original complaint about her. But if you terminate that supervisor, it could appear as retaliation, so tread carefully and consider using outside counsel for the complaint she made in response.

❑ Consider whether a state or local law applies to the situation, besides the federal law.

❑ Bring in outside counsel when internal personnel are witnesses.

If you become aware of questionable behavior, even if there is no complaint, O'Guinn said, you still must:

➢ Take immediate and corrective action. While you're investigating, you can take interim remedial measures.

➢ Inform your higher-level supervisor and legal counsel.

➢ Communicate with human resources, equal employment office, and/or top management.

➢ Document any action taken.

➢ Communicate with the affected employee about what action was taken and explain what she should do if the problem should re-occur.

➢ Advise employees of their rights to use the EEO complaint process.

➢ Make clear verbally and in writing that retaliation won't be tolerated.

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Assess, monitor reputational risks facing your campus

By Kevin B. Scott, Esq.

Higher education officials know firsthand how potential risks can become actual incidents that harm the reputation of their institutions at any point.

In fact, the United Educators recently released a report on reputational risk as it applies to higher education. The report contained a lot of useful information about the types of risks and included a survey finding that 61 percent of their respondents experienced one to three risk incidents during the past three years. Although much has been written about Title IX and sexual assault, other risk flashpoints have included controversial speakers on campus, fraternity and sorority life, and cybersecurity, as well as the type of sexual harassment that has toppled so many high-profile individuals in recent months.

Much of the report's advice and best practices fall squarely within the common sense category, and most institutions have a predetermined team to respond to potential events when they arise. Not every institution, however, has a strategy designed to both assess and monitor reputational risks, and also to decide if, when, and how to report incidents to the board. Ultimately, the president/CEO and the board will have to deal with any event, and if either individual is seen as uninformed or out of touch, the situation can become that much more embarrassing to the institution.

So, the question becomes how to properly assess and monitor these risks and decide which incidents rise to the level of board disclosure. Institutions should start by designating one staff member as the lead point person in such situations, as suggested in a *Harvard Business Journal* article from a decade ago.

Assessing reputation, evaluating reality, identifying and closing gaps, and monitoring changing beliefs and expectations won't happen automatically. The CEO must give one person responsibility for making these things happen. Some of the most fitting candidates would include the COO, the CFO, or the senior-level risk manager, strategic planner, or internal auditor.

Once your institution has chosen a "risk czar," that individual will need help to identify and monitor the risks. The UE report lists the main areas where higher education institutions are vulnerable to gaps in protecting their reputational risk, as shown in the table that follows.

Area	Assess for reputational impact
Athletics	• NCAA compliance. • Student-athlete conduct. • Coach behavior. • Athletic conference.
Campus climate	• Diversity and inclusion of the student body. • Diversity and inclusion of senior administration. • Controversial speakers.
Cybersecurity	• Loss of data due to technology breach. • Phishing, ransomware, and other cyberevents.
Sexual assault/ Title IX	• Prevention and response to student-on-student sexual assault. • Title IX compliance.
Student behavior	• Fraternities/sororities. • Campus safety. • Student mental health. • Inclusion of international students.

The risk czar would appoint a point person in each area who would be responsible for both providing an initial assessment of the risks associated with their area and for developing a plan to monitor those risks going forward. For example, for the risk area of "student behavior," the dean of students would be a logical designee for evaluating and monitoring such things as fraternity and sorority life, campus safety, and current campus hot-button issues. The dean of students would, in turn, assign a particular area to a team member to monitor each subarea. All of that information would find its way back to the risk czar in regular reports to evaluate and assess.

When it comes to reporting the risk findings, the same *Harvard Business Journal* article suggested the following process:

1. The chosen executive periodically reports to top management and the board, identifying key reputational risks and how they're being managed.

2. The CEO or board decides if the risks are acceptable and, if not, what actions to take.

3. Top management and the board periodically review the risk-management process and make suggestions for improving it.

Each institution will want to customize its approach to fit its particular structure and hierarchy. Some institutions might choose to have a small subcommittee of the board work with the risk czar to sort and distill the information before informing the full board. Having a systematic procedure for assessing and monitoring risks campuswide can help institutions stay ahead of the next crisis. ■

About the author

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AT A GLANCE

A REVIEW OF THIS MONTH'S LAWSUITS & RULINGS

ATHLETICS — DISMISSAL

Court rules AD's penalty was not overly severe

Case name: *Miller v. The Office of Administrative Hearings, et al.*, No. B278659 (Cal. Ct. App. 08/30/17).

Ruling: A California Court of Appeals affirmed the dismissal of the Los Angeles Community College athletics director.

What it means: Directing the shredding of important documents and the destruction of a computer hard drive while an investigation is pending constitute sufficient grounds to terminate an athletics director.

Summary: Michael Miller became the men's basketball coach at Los Angeles Community College in 1992. A few years later, he was also assigned the position of athletics director.

Auditors for that community college district commenced an internal review in 2009 of possible residency fraud involving teams that Miller coached and also oversaw as AD.

On April 21, the audit director requested copies of every student-athlete's "Form 1" for the three prior seasons. Those forms provided residency and educational information, and were used to determine a student-athlete's eligibility to play a sport at a district community college. Each of those completed original documents were to be retained in the LACC athletics department office.

A couple of days later, Miller allegedly directed the shredding of those forms.

On April 24, the district's IT department received a call from Miller requesting assistance in logging onto his district-issued computer. The responding technician soon discovered that the computer's hard drive had been completely erased. Miller allegedly admitted that he had caused the hard drive to be erased.

Miller was eventually dismissed.

After a 2011 hearing, an administrative law judge decided the college had sufficient grounds to terminate him.

Miller filed a lawsuit arguing his punishment was too severe. He first correctly pointed out that a prediction that his misconduct would continue in the future was required before a dismissal could be imposed. Miller then argued the two incidents in 2009 didn't support the conclusion that he was likely to engage in future wrongdoing, because he had a spotless record for the previous 17 years. The trial judge affirmed the dismissal, stating the conduct was likely to be repeated because of Miller's

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continued attempts to portray the misconduct as being relatively insignificant.

On appeal, the court quoted the Office of Administrative Hearings, which stated that Miller had: (1) expressed regret during the hearing that he had caused the hard drive to be erased, but it was only because of the negative effect on his career; and (2) failed to recognize any wrongdoing at all in connection with the shredding of documents.

The appellate court affirmed the ruling of the trial judge. ■

DEFAMATION — STUDENT AFFAIRS

Court decides ex-fraternity brothers were not defamed by tweet

Case name: *Brunner, et al. v. Holloway, et al.*, No. 2017 CA 0674 (La. Ct. App. 11/02/17).

Ruling: A Louisiana Court of Appeal affirmed a ruling in favor of a national collegiate fraternity.

What it means: A statement of opinion relating to matters of public concern that don't contain a provably false factual connotation is entitled to full constitutional protection.

Summary: Lambda Chi Alpha Director of Chapter Services John F. Holloway traveled in 2011 to Baton Rouge to conduct a membership review of the Louisiana State University chapter. En route, he made an online social media post stating he was on his way, and "The fraternity world of old is dead; beer monkeys and dope heads are extinct. THAT'S THE DEAL."

A few days after Holloway's membership review, a large number of the LSU chapter members were expelled, including some who passed drug tests. Several more were suspended or otherwise disciplined.

Two newspapers published articles regarding those disciplinary actions.

The Baton Rouge *Advocate* stated that members of the LSU chapter had been accused of drug abuse or other violations of fraternity rules following a membership review. The article included a quote by Holloway that reflected that some of the fraternity's members had chosen not to live by the fraternity's core values and ritualistic teachings. It also reprinted Holloway's social media post.

The LSU student newspaper stated some members were evicted from the Lambda Chi Alpha house on campus after being suspended or expelled by the national organization for unspecified actions that violated the fraternity's national standards.

Baptiste Brunner and 24 other expelled Lambda Chi Alpha brothers filed a lawsuit claiming Holloway had defamed them. However, the trial judge dismissed the case.

On appeal, the plaintiffs argued Holloway's tweet constituted defamation.

The appellate court said a statement of opinion relating to matters of public concern that didn't contain a provably false factual connotation would receive full constitutional protection.

It then ruled Holloway's post fell precisely in that category.

The panel also explained that if words didn't refer to a particular individual, no averment or innuendo could make them defamatory. It acknowledged that a group could sometimes be defamed, but said Holloway's post didn't refer to any group in particular when it referenced the "fraternity world of old."

The court affirmed the ruling of the trial judge. ■

RACIAL DISCRIMINATION — ENROLLMENT MANAGEMENT

Judge decides claimed remarks keep university on the hook

Case name: *DeBose v. University of South Florida Board of Trustees, et al.*, No. 8:15-cv-2787 (M.D. Fla. 09/29/17).

Ruling: The U.S. District Court, Middle District of Florida refused to completely dismiss a lawsuit against the University of South Florida.

What it means: A supervisor's alleged reference to racial hostility is evidence of discrimination.

Summary: Angela DeBose became the University of South Florida registrar in 1996.

Not long after Paul Dosal became her direct supervisor in 2011, he transferred responsibility for the university's degree audit system to her office. However, he also allegedly told DeBose that Provost Ralph Wilcox wasn't going to think highly of her because she was black.

Dosal transferred responsibility for the degree audit system from DeBose to another department in 2014, and appointed white female Billie Jo Hamilton assistant vice president.

In February 2015, a consulting firm engaged by USF issued a final report stating the Registrar's Office lacked an "atmosphere of working together" and wasn't willing to encompass change.

After the report was submitted, Wilcox decided against renewing DeBose's contract.

DeBose filed a lawsuit asserting racial discrimination.

The university filed a motion for summary judgment.

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The district judge said USF had proffered non-discriminatory reasons for its actions by claiming that: (1) DeBose wasn't as qualified as Hamilton for the promotion, and (2) she was fired because of the consultant's report.

The district judge said DeBose provided no evidence of racial discrimination as a reason for Hamilton's promotion because the handful of racial statements allegedly uttered by Wilcox were too remote in time to be relevant. Moreover, the judge held that even if Wilcox was allegedly never going to think highly of DeBose, he wasn't the one who promoted someone else.

However, the judge said Wilcox had clearly made the decision to fire DeBose, and said USF had not attempted to deal with the testimony that Wilcox was never going to think highly of DeBose because she was black. Even though those alleged remarks were very remote in time, the judge ruled they couldn't be discounted.

She granted summary judgment in favor of USF on the failure-to-promote claim but denied it on the termination claim. ■

DISABILITY — ADULT LEARNER

Court holds medical school needn't excuse bad performance

Case name: *Profita v. The Regents of the University of Colorado, et al.*, No. 17-1127 (10th Cir. 10/11/17).

Ruling: The U.S. Circuit Court of Appeals, 10th Circuit affirmed a ruling in favor of the University of Colorado.

What it means: A university isn't required to accommodate a disabled student by overlooking previous poor academic performance that resulted from his disability.

Summary: Despite his major depressive and anxiety disorders, Taylor Profita was able to complete three years at the University of Colorado Medical School. But he failed the last two third-year clinical rotations, and the dean dismissed him for unsatisfactory academic performance.

Profita then obtained medical care for his psychological conditions.

Representing that his disorders were under control, he asked the school to readmit him as a third-year student. But the university required him to reapply as a new student.

The trial judge dismissed Profita's lawsuit, which had claimed a failure to reasonably accommodate his disability.

On appeal, the court recited the general rule that an employer wasn't required to accommodate an employee by overlooking misconduct that resulted from a disability.

Profita argued the general rule shouldn't apply to him because he wasn't asking the university to overlook past misconduct. He contended instead that he was merely seeking a prospective accommodation, which was the opportunity to complete his medical degree.

But the court said accepting Profita's argument would allow all employees who had been fired for misconduct to always claim to be requesting only prospective relief when seeking to be rehired. It also explained the ADA didn't require a disabled person to be given a greater opportunity for reinstatement than a terminated person who wasn't disabled.

The panel affirmed the ruling of the trial judge. ■

DUE PROCESS — DEFAMATION

Court rules ousted department chair not entitled to a 'name clearing'

Case name: *Crosby v. University of Kentucky, et al.*, No. 16-6598 (6th Cir. 07/17/17).

Ruling: The U.S. Circuit Court of Appeals, 6th Circuit affirmed the dismissal of a lawsuit against the University of Kentucky.

What it means: The 14th Amendment protects an employee's reputation under certain circumstances. But it doesn't protect an employee from an employer's false references about incompetence or malfeasance.

Summary: University of Kentucky tenured professor Richard Crosby was appointed to a four-year term as department chair in 2006. That appointment was renewed in 2010 and 2014. Crosby was paid an additional $5,000 each year that he was chair.

An investigative report ordered by the provost in June 2015 recommended Crosby should be removed as department chair. Upon learning about the report, the dean promptly terminated Crosby's chairmanship.

Crosby filed a lawsuit that was dismissed by the trial judge.

On appeal, Crosby contended UK demeaned his reputation by denying him a "name-clearing" hearing, and by making stigmatizing statements about him.

The appellate court said defamation alone wasn't enough to trigger the protection of the 14th Amendment unless the false statements: (1) were made in conjunction with the plaintiff's termination from employment and (2) effectively foreclosed the plaintiff from the job market.

Accepting for the purpose of argument that the statements were false, the court said there was

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no statute or case dictating that removal from a nontenured administrative position constituted the requisite "termination from employment." The panel also ruled that Crosby wasn't foreclosed from the job market, because his chosen occupation was being a professor.

It affirmed the ruling of the trial judge. ■

DUE PROCESS — SUSPENSION

Court rules disciplinary panel must assess accuser's credibility

Case name: *Doe v. University of Cincinnati, et al.*, No. 16-4693 (6th Cir. 09/25/17).

Ruling: The U.S. Court of Appeals, 6th Circuit affirmed a ruling against the University of Cincinnati.

What it means: In disciplinary proceedings that turn on the issue of credibility, it's essential for the hearing panel to assess the demeanor of both the accused and the accuser.

Summary: In September 2015, University of Cincinnati student Jane Roe reported to the administration that graduate student John Doe had sexually assaulted her.

UC set a disciplinary hearing. Although Doe personally appeared, Roe did not. At the conclusion of the hearing, the panel found Doe responsible for violating the student conduct code and suspended him.

Doe filed a lawsuit claiming a lack of due process because he didn't have an opportunity to cross-examine his accuser, and the trial judge prohibited UC from enforcing that suspension during the pendency of the lawsuit.

On appeal, the university insisted Roe's absence didn't impact the fairness of the proceedings because Doe gave his version of the facts.

The appellate court said that because no other witnesses testified at Doe's hearing, the panel could only choose between believing the accuser or the accused, and it had to resolve that issue without assessing Roe's credibility. It then ruled that cross-examination was essential to due process in a disciplinary case that turned on credibility.

The court acknowledged that allowing an alleged perpetrator to directly question a purported victim could be traumatic, and said that protection of sexual assault victims from harassment was a laudable goal. However, it observed that Doe was only seeking the right to submit questions for the panel to ask Roe.

The court emphasized that the university wasn't required to allow the accused to physically confront his accuser, but ruled it had to provide some means for the hearing panel to evaluate an alleged victim's credibility. The court affirmed the ruling of the trial judge, stating that assessing the demeanor of the accuser might be accomplished without the accuser's presence when facilitated by modern technology such as Skype. ■

TITLE IX — SEXUAL ASSAULT

Judge rules false charge doesn't justify lawsuit

Case name: *Doe v. The University of Chicago*, No. 16 C 08298 (N.D. Ill. 09/20/17).

Ruling: The U.S. District Court, Northern District of Illinois dismissed part of a lawsuit against the University of Chicago.

What it means: A false accusation of sexual assault isn't harassment "based on sex" prohibited by Title IX.

Summary: In 2014, University of Chicago student Jane Roe accused fellow student John Doe of sexual assault. However, a disciplinary proceeding resulted in a finding that the preponderance of the evidence didn't support her charge.

Despite the no-liability finding, Roe allegedly placed his name on an online document that purported to identify people known to commit varying levels of gender-based violence. According to Doe, Roe also falsely told fellow students the university had found him guilty.

Doe brought Roe's actions to the attention of the administration, but nothing was done to her.

He then filed a lawsuit asserting several claims. One of them was that the university had violated Title IX by being deliberately indifferent to Roe's harassment.

The university filed a motion to dismiss.

The district judge said the problem with Doe's claim was that the alleged harassment wasn't plausibly sex-based. He explained that "actionable sexual harassment" within the meaning of Title IX meant conduct motivated by gender. He then ruled that a false accusation of sexual assault wasn't harassment based on sex. He explained that when somebody accused another person of committing sexual assault, the accuser was actually saying the perpetrator committed a crime.

The judge said Doe's allegations suggested only that Roe harassed him either because she believed he had committed sexual assault or because of some personal animus. He acknowledged that false accusations of sexual misconduct

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were disturbing and harmful, but said the reach of Title IX was limited to discrimination on "the basis of sex."

The judge dismissed that claim. ■

TITLE IX — CAMPUS SECURITY

Court rules gender bias didn't taint college hearing

Case name: *Doe v. Columbia College Chicago, et al.*, No. 17-CV-00748 (N.D. Ill. 10/25/17).

Ruling: The U.S. District Court, Northern District of Illinois dismissed a lawsuit that had been filed against Columbia College Chicago.

What it means: It is unreasonable to infer that a college railroaded accused students in an attempt to preserve its federal funding by appeasing the U.S. Department of Education.

Summary: In 2016, former Columbia College Chicago student John Doe filed a lawsuit claiming he was the victim of "anti-male bias" because he was suspended after a hearing panel found him responsible for sexually assaulting a female student.

The college filed a motion to dismiss.

Doe alleged the anti-male bias began in 2011 when OCR sent a "Dear Colleague Letter" that essentially pressured colleges to make it easier to find accused males responsible in sexual misconduct cases. But the judge ruled it wasn't reasonable to infer a college had a practice of railroading accused students simply to preserve its federal funding by appeasing the U.S. Department of Education.

Doe next argued that CCC afforded preferential treatment to females by allowing occasions such as Take Back the Night, The Clothesline Project, and candlelight vigils. However, the judge ruled that those events weren't gender-biased. She explained they were legitimate preventive programs for survivors and victims, regardless of gender.

Doe next alleged the student manual reflected bias by consistently requiring CCC to "protect the complainant," "minimize the burden to the complainant," and "accommodate the complainant," without any concern for the interests of the accused. But the judge ruled that none of those phrases were indicative of gender bias against males. She also noted with approval that: (1) the manual didn't use gendered pronouns and (2) its policies applied "regardless of the identity of a victim, witness, or Complainant."

The judge dismissed the lawsuit, stating the only bias Doe had demonstrated was in favor of all male and female accusers of sexual assault. ■

ADULT LEARNER — RACIAL DISCRIMINATION

Judge decides former student deserved to be expelled

Case name: *Raithatha v. University of Pikeville, et al.*, No. 7:16-CV-251 (E.D. Ky. 10/13/17).

Ruling: The U.S. District Court, Eastern District of Kentucky dismissed a lawsuit that had been filed against the University of Pikeville.

What it means: A student claiming racial discrimination must demonstrate he was treated differently than a similarly situated member of an unprotected class.

Summary: As a part of his curriculum, University of Pikeville Kentucky College of Osteopathic Medicine student Ravi Raithatha was required to do a clinical rotation at Grandview Medical Center.

Raithatha falsified his case logs for that clinical rotation, and he admitted as much at a 2015 hearing. The panel recommended that Raithatha be: (1) given a failing grade, (2) placed on temporary academic probation, (3) assigned permanent disciplinary probation, (4) suspended for six months, and (5) required to enroll in an ethics course.

Although Raithatha remained on academic and disciplinary probation, he was removed from the suspension five months early. However, he failed a drug test before starting an August clinical rotation. At a September hearing, Raithatha admitted to using drugs while already on academic and disciplinary probation.

After Raithatha was expelled, he filed a lawsuit against the university and others that claimed discrimination based on race and national origin.

The defendants filed a motion for summary judgment.

The district judge agreed Raithatha was a member of protected classes because he was a black male with heritage from the country of India. But he stated that Raithatha had notice that cheating and the abuse of drugs were in violation of university policies, because that information was contained in the student handbook and the clinical rotations manual.

The judge ruled that because either violation on its own was a sufficient ground for expulsion, Raithatha couldn't legitimately claim he was qualified to remain enrolled.

He also decided Raithatha failed to demonstrate the requisite showing that he was treated differently than a similarly situated member of an unprotected class. Although Raithatha had cited three arrested students who weren't expelled, the judge rejected those examples because there were no allegations

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that any of them committed offenses while already subject to disciplinary and academic probation.

The judge granted summary judgment in favor of all defendants. ■

DISABILITY — DISCIPLINE

Student seeking readmission claims discrimination, retaliation

Case name: *Letter to: Carleton College*, Nos. 05-15-2417 and 05-15-2482 (OCR 12/28/15).

Ruling: Carleton College signed an agreement to resolve allegations that it didn't have adequate policies and procedures related to the provision of disability accommodations and disability grievances.

What it means: Institutions should ensure they have adequate policies and procedures governing the provision of disability accommodations and the filing and resolution of disability-related complaints.

Summary: The U.S. Department of Education's Office for Civil Rights responded to a complaint that Carleton College discriminated on the basis of disability and retaliated. Specifically, the complaint alleged that the college: (1) failed to provide the complainant with a modified sanction for her suspension as a reasonable accommodation, (2) banned her from campus and social and extracurricular events because she advocated for a reasonable accommodation, and (3) didn't have adequate grievance policies and procedures to deal with complaints of disability discrimination. A second complaint by the same student alleged that because she filed the first complaint, the college retaliated by denying her request to bring her legal counsel to a meeting to discuss her readmission.

The student enrolled as a freshman in the fall of 2013. She violated the college's drug and alcohol policy on several occasions during her first year. After the student was placed on residential probation in January 2014, college security found her intoxicated at the campus center, and her probation was extended from February 2014 until February 2015.

She was then found smoking marijuana on college grounds in May 2014. During the beginning of her sophomore year, a search of her room stemming from the hospitalization of several of her friends for LSD ingestion produced prescription drugs, marijuana, and assorted drug paraphernalia. The college's judicial board imposed a suspension of one year, allowing her to return in the fall of 2015, if she met a list of conditions. She wasn't banned from the campus but could only attend events with permission and only if they were related to re-enrolling, not socializing.

Because her illegal drug use was the basis of the discipline under the college's policies and standards, the college was under no duty to consider accommodation requests related to the discipline imposed, OCR found.

In January 2015, her attorney requested the suspension be shortened as a disability accommodation, because her behavioral problems were caused by her disability, not substance dependence, according to him. The associate dean didn't address the accommodation request. The student requested, and was denied, permission to visit campus for social events/activities. OCR failed to find a causal connection between her protected activity because she had been previously told that her visits to campus were restricted to re-enrollment purposes only.

In May 2015, the associate dean emailed her to schedule a meeting to discuss her progress in meeting the conditions imposed on her for re-enrollment. The student said she would like her attorney to accompany her, to which the associate dean responded that she would notify the college's legal counsel so that he could attend as well. The meeting was canceled because the college attorney wasn't in the office that day, and later said he didn't think he should have to attend a meeting that was about readmission and academic matters. The complainant, her attorney, and the dean met via telephone. She was able to return to the college in the fall of 2015. OCR didn't find that the college took an adverse action because she requested to have her attorney with her during the meeting with the associate dean.

However, OCR sided with the student on her claim that the college didn't have sufficient procedures to address the provision of disability accommodations. The college's grievance procedures also didn't appear on the college website and didn't reference retaliation or the process for filing and resolving complaints. As a result, the college signed a resolution agreement to bring it into compliance in this area. ■

DISABILITY — DISCRIMINATION

Student says prof discriminated, and college retaliated

Case name: *Letter to: Elgin Community College*, No. 05-15-2426 (OCR 12/17/15).

Ruling: The Office for Civil Rights closed a complaint against Elgin Community College after the institution entered into an agreement to resolve discrimination allegations, and after the agency found insufficient evidence of retaliation.

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What it means: Institutions should exercise care to ensure their policies and procedures are sufficiently detailed as to be fair and effective, and that only those in writing are enforced.

Summary: A student at Elgin Community College complained, among other things, that: (1) she was subjected to race and disability discrimination in a class and (2) the college subjected her to retaliation for filing an internal discrimination complaint and complaining to the Office for Civil Rights because the college left her name out of the honor student banner in the spring of 2015.

The student had a documented disability and had been approved to receive accommodations. Her accommodation letter for a botany course provided she was to receive time and a half on tests and quizzes, a separate testing area, and the ability to record lectures. She claimed, however, that the professor didn't provide her with these accommodations, and made inappropriate comments about people with disabilities and African-Americans. She dropped the course shortly after that.

OCR couldn't clearly determine which of the various policies the college had dealing with discrimination and grievance procedures had been applied in evaluating the student's internal complaint. It also found that when the college scheduled a meeting with the student to discuss her complaint, it told her she couldn't bring anyone with her, although it didn't identify any written policy prohibiting students from being accompanied to such meetings. Prior to the conclusion of OCR's investigation, the college signed a resolution agreement that, when fully implemented, would resolve the issues raised in the discrimination allegation.

With respect to the retaliation claim, OCR found insufficient evidence of retaliation. The college provided evidence that the student's name was on the banner when it was initially hung in the summer. Thus, that complaint was closed. ■

DISABILITY — ACCOMMODATIONS

Institute enters into agreement to offer accessible-format materials

Case name: *Letter to: Georgia Institute of Technology*, No. 04-15-2466 (OCR 03/08/16).

Ruling: The Georgia Institute of Technology entered into a resolution agreement to resolve an allegation that it failed to provide a student with accessible-format materials and the use of a computer with a screen reader.

What it means: Institutions have a duty to provide students who have visual impairments with accessible-format materials in a timely manner.

Summary: A graduate student claimed the Georgia Institute of Technology failed to provide him with accessible-format course materials, lab materials, and a textbook, and a functioning computer with a screen reader to use for exams in his fall 2015 statistics course, which he had been previously approved to receive. He also claimed the institute gave him a written packet of job information, which he couldn't read, and underpaid him by about $200 per month in his role as a student-employee.

The institute used the Alternative Media Access Center, a Georgia University System initiative, to provide students with alternate-format materials. The AMAC participation agreement states students are responsible for registering for classes as early as possible, obtaining their reading lists, purchasing books, and submitting the required information to their disability services provider, who then contacts AMAC to request the needed texts in an accessible format.

Shortly after being notified of the complaint, the institution offered to enter into a voluntary resolution agreement. As part of that agreement, it agreed to:

- Either waive the statistics course as a graduation requirement, allow the student to substitute another course for that one, or accept the "pass" grade the student earned in the course for the fall of 2015 to allow him to participate in commencement.
- Provide the student with all the chapters of the course textbook and all lab materials in an accessible format.
- Revise relevant academic documents and records to remove evidence of previous attempts to take the course in question and associated withdrawals, reflecting only the "pass" grade earned during the fall of 2015.
- Calculate the correct pay differential for the student's teaching assistant position, and issue him a reimbursement check for any payment owed to him.

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. Willits, Esq. (*You may contact him at* reelrhw@hotmail.com.)

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

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• Conduct a survey and analysis of its capacity for converting texts and other class materials, as well as employment documents, into alternate formats, and its capability for offering computers with appropriate screen readers.

• Create a plan and procedure based on its survey and analysis to ensure students requiring alternate-format materials and employment documents in an alternate format can receive them in a prompt manner.

• Finalize and distribute the plan and procedure to all faculty and staff involved in implementing disability accommodations, upon receipt of OCR's written approval, and provide training on these to individuals involved in implementing the revised plan and procedures. ■

DISABILITY — ACCESSIBILITY

Automatic door openers must function properly, OCR says

Case name: *Letter to: Mesa Community College*, No. 08-16-2012 (OCR 04/07/16).

Ruling: A site visit by the Office for Civil Rights found various compliance issues related to dysfunctional automatic door openers and the amount of maneuvering space between one door equipped with an automatic opener and a nearby sink and paper towel dispenser.

What it means: Institutions must provide operable electronic door openers to allow students with mobility impairments access to buildings and portions of buildings with heavy doors.

Summary: The Office for Civil Rights received a complaint that entryways in Mesa Community College's art building weren't fully accessible. The building was originally erected in 1982 and didn't undergo any alteration to its construction related to the doors. The Ceramics Studio was added in 1987 and has undergone no renovations. Both the doors to the studio and the building must comply with the 2010 Standards for Accessible Design.

Three doors in the building are equipped with electronic door openers, one of which is an interior door. All the doors are recessed when accessed from outside, are flush with the walls, and use a closer mechanism. The outside electronic opener button of one door wasn't functioning during OCR's site visit. A paper towel dispenser and sink just past the door didn't provide the required space of maneuvering clearance. Another door didn't have a functioning electronic opener. On the third door, the electronic opener button worked from the outside, but the interior button didn't function properly, OCR found.

The college agreed to voluntarily resolve the violations found during the course of OCR's investigation through a resolution agreement, and OCR advised the college that it would monitor the agreement's implementation. ■

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Was a university liable for assaults at off-campus fraternity?

By Aileen Gelpi, Esq.

Kansas State University student Sara Weckhorst attended a KSU fraternity party in 2014 at an off-campus location known as "Pillsbury Crossing." After she became extremely intoxicated, a fraternity member allegedly raped her, transported her to the fraternity's off-campus house, and raped her again. In addition, another fraternity member also purportedly raped her at that time.

When Weckhorst reported the incidents, KSU investigator Ameerah McBride allegedly told her the university would do nothing because the alleged rapes occurred off campus.

Weckhorst filed a lawsuit that asserted several claims. One of them was a violation of Title IX because KSU was deliberately indifferent to her sexual assault report.

KSU filed a motion to dismiss.

It first argued that Title IX didn't apply because the fraternity party wasn't one of its requisite "programs or activities."

Next, KSU argued it was unreasonable to require KSU to monitor activities that occurred at every college student party spot around the world.

Weckhorst v. Kansas State University, No. 16-CV-2255 (D. Kan. 03/14/17).

Did the court agree with KSU and dismiss the student's lawsuit?

A. Yes. The court dismissed the lawsuit, ruling that Title IX doesn't require that colleges and universities police students' off-campus activities.

B. Yes. The court dismissed the complaint, holding that the student's intoxication was a major contributing factor to the alleged sexual assault.

C. No. The court denied KSU's motion to dismiss, holding that KSU was liable for its students' on- and off-campus actions.

D. No. The court denied KSU's motion to dismiss, holding that KSU had the authority to sanction chapters for on- and off-campus activities; and its student-members were subject to KSU's disciplinary control.

Correct answer: D.

The district judge said Title IX specifically applied to a "program or activity" of a university, and ruled that the phrase included its "operations."

She then held that the off-campus fraternity was an "operation" of the university because of Weckhorst's allegations that: (1) KSU devoted significant resources to the promotion and oversight of fraternities; (2) the fraternity was considered a "Kansas State University Organization," open only to KSU students, and directed by a KSU instructor; and (3) KSU had the authority to sanction chapters for conduct that occurred at the off-campus fraternity houses.

The judge acknowledged a university couldn't be present to stop all assaults at all locations, but ruled that KSU could be liable if Weckhorst's allegations were proven, because they reflected that both the fraternity and the alleged assailants were subject to pre-assault oversight and post-assault disciplinary control by KSU.

The judge refused to dismiss the Title IX claim. ■

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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 OCR findings involving web accessibility

Overview

All pages of an institution's website must be accessible to individuals with disabilities. Review recent Office for Civil Rights findings involving web accessibility.

Key Rulings

• A complainant claimed to OCR he was unable to register through Mt. Hood Community College's website for a summer 2014 online class because the website was inaccessible to him as a screen-reader user and didn't offer any alternative way to register for the class. The college signed a resolution agreeing to take steps to resolve the complaint, including ensuring that all online programs, services, and activities are accessible to individuals with disabilities. *Letter to: Mt. Hood Community College*, No. 10142224 (OCR 09/11/14).

• OCR performed a compliance review of accessibility of the University of Cincinnati's websites, focusing on the needs of individuals with sensory impairments who may require assistive technology to access the sites. OCR's review identified several compliance issues, including a lack of a formal process to ensure compliance with policies; an absence of policies or procedures concerning the purchase of technology and/or its compatibility with assistive technology; and multiple technical deficiencies in website accessibility, including images lacking alternative text equivalents. *Letter to: University of Cincinnati*, No. 15-13-6001 (OCR 12/18/14).

• A complainant alleged that Bay Mills Community College discriminated by failing to make all its webpages accessible to individuals with certain kinds of disabilities, including visual, print, physical, and hearing impairments. The agency used an accessibility tool as well to conduct a preliminary review of some of the pages listed in the complaint. Its review raised some red flags, including a lack of skip navigation, keyboard controls that didn't allow equivalent ease of use, and lack of meaningful alternate text. Before OCR could complete its investigation and issue a finding, the institution entered into a resolution agreement to resolve the issues identified. *Letter to: Bay Mills Community College*, No. 15-16-2187 (OCR 10/14/16).

• A complainant claimed that Michigan Virtual University discriminated because some of its webpages weren't accessible to individuals with disabilities like visual impairments. OCR conducted a preliminary accessibility review of those pages, resulting in various accessibility alerts, which pointed to issues with the skip navigation, keyboard controls, nontrivial graphics' alternate text, link labeling, and visual contrast. Even though OCR's preliminary investigation, while pointing to areas of concern, didn't determine that sufficient evidence existed that a violation of Title II had occurred, the institution offered to resolve the complaint voluntarily. The agreement's provisions included that it would ensure that the institution's online content is fully accessible by established accessibility standards and that the institution would designate at least one individual as a web accessibility coordinator and provide that person with the resources and authority needed to implement the accessibility policy. *Letter to: Michigan Virtual University*, No. 15-16-2146 (OCR 10/13/16). ■

What You Should Know

• Web-based campus services such as registration must be accessible to students with disabilities.

• An institution's website must be accessible to individuals with sensory impairments who require assistive technology to access web content.

• Websites should include features such as skip navigation, keyboard controls that allow equivalent ease of use, and meaningful alternate text.

• Institutions must establish policies and procedures for ensuring web accessibility. ■

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