

## A CASE STUDY

By: Brett A. Sokolow, JD

*At the Higher Education Law and Policy Institute in December in San Diego, participants analyzed case studies as part of the Institute's tracks. One panel really tackled the following case study with a very thorough analysis, and a colleague suggested that a similar analysis in article form might be of value. Let's see. Below is the fact-pattern with my analysis included in the text in italics. Issue-spot as you read the facts. Did I miss any legal issues? How was my analysis? Marty Block at SDSU developed this fact-pattern originally.*

It has been a tough couple of weeks at State University. I probably should have consulted you sooner, but so much has happened so quickly. Below is a summary. I need your advice.

Two weeks ago our Dean checked a website listing local sexual predators and there he discovered a Student, whom he knew lived in the residence halls, and an Employee who works as a counselor. Both were identified as convicted felons who had served time for sex offenses.

The next day the Dean informed the Student that he would not be allowed to return to school the following semester.

*ISSUE #1: Dismissing a student without Due Process. A summary dismissal likely violates the rights promised in the university conduct code, and with no notice or hearing, will be a due process violation if the student sues. However, if the student lied about his predator status on his application, a summary dismissal is appropriate, as a contract matter, and no process is due. However, if the action is on that basis, it is really declaring the admission void, and the student's status is terminated immediately.*

*ISSUE #2: If the student is dangerous enough to dismiss, why wait until the end of the semester? The Dean has assumed the student is dangerous, and cannot continue at State University. That may or may not be true. If not, then why dismiss him? If so, the need to dismiss immediately will better protect the university.*

*ISSUE#3: There should be a protocol for responding to sex offender notification, and the Dean should have followed that protocol. Being a sex offender does not automatically violate most conduct codes, if the sex offense preceded admission. But, once we find out, subjecting a sex offender to an assessment, checking the level of their offender status, and consulting with any parole/probation liaisons should be done. If the offender is deemed a threat to the health/safety of the community, a due process proceeding can be used to separate that individual from housing, place restrictions on them, or dismiss them from the university.*

He also ordered the Student to move out of the residence halls within seven days.

*ISSUE#4: Deprivation of housing without due process, which is the same issue as discussed above. Due process is owed for dismissal from housing or from the university. Further, if the student is that much of a danger, why the 7 day delay. Pack up and get out.*

In addition the Dean told the Employee that he should find a new job by the end of the month.

*ISSUE#5: Potential wrongful termination. Assuming the employee is an at-will employee, this termination is probably within the Dean's discretion, though state statutes may impose more restrictions. Again, if there is a sense of danger, perhaps termination should be immediate.*

Furthermore, feeling that he had a duty to warn other employees and residence hall residents of the criminal histories of the Employee and the Student, the Dean gave the complete story to the campus newspaper.

*ISSUE#6: Potential Clery Compliance Issue. The Clery Act requires us to make timely warnings to the community about situations that may represent a threat of harm. We do not know here that there was a threat of harm, because the Dean did no due diligence in investigating the crimes of these two offenders, or in assessing their potential for recidivism. So, it is not clear that a timely warning under Clery was necessary. If it was, a story in the campus newspaper would not be been warning enough.*

*ISSUE#7: Potential FERPA violations. While the student offender may claim the Dean revealed information from an education record to the newspaper, if the offense occurred prior to matriculation, and the Dean received the information from a local sex offender website, FERPA is neither implicated nor violated by release of that information. Release is permitted publicly by state law. Redislosure of information from sex offender registries is privileged and does not violate an offender's rights.*

*ISSUE#8: Duty to Warn. If the Dean had a good faith belief (there is no showing here that he did) that these offenders were a danger, notifying police, and making public warnings might have been necessary to meet the duty to warn. A local newspaper article would not be likely to satisfy that duty.*

*ISSUE#9: Invasion of Privacy. Release of information about sex offenses is permitted publicly by state law. Redislosure of information from sex offender registries is privileged and does not violate an offender's rights.*

As soon as this information became public, the Dean received notification that an off-campus group, Parents Against Pedophiles, was going to peacefully picket the Student's residence hall. The Dean had campus police shut down the unauthorized demonstration as soon as it began.

*ISSUE#10: Potential abridgement of freedom of speech and association. This group, PAP, is subject to any registration, application or approval process that any group must use to picket on campus. If they fail to use that process, they can be shut down without fear of violating their constitutional rights. If, however, their protest was approved or there was no registration process, an analysis of their rights is needed. Let's assume they intended to picket outside a*

*residence hall. This is not a traditional public forum. Let's also assume it has not been designated a public forum by the university. In fact, for noise reasons and because of their residential nature, the university considers residence halls to be non-public fora. Therefore, shutting down the demonstration does not violate free speech or association rights. Even if the courts could construe this as some level of public forum, regulation would not be subject to strict scrutiny. The more deferential reasonableness standard would apply to any time, place or manner regulation. This is especially true where, as here, the group engaging in speech is not part of the community, but is a group of outsiders. The campus police actions were permissible.*

The Dean instructed the Employee's direct supervisor to secretly monitor all of the Employee's emails.

*ISSUE#11: Potential Invasion of Privacy. Most state laws make it clear that employees do not have a reasonable expectation of privacy in their emails, which are often subject to monitoring by employers.*

One email that the Employee sent to his attorney called the Dean an <expletive deleted> and asked for advice on handling a few recent parole violations. Another email, this one to his Alcoholics Anonymous sponsor, complained that, since the story about his past became public, he has been taunted with hateful notes and vile insults every day by women in his office, making his work environment unbearable.

*ISSUE#12: Potential hostile environment claim. Obviously, if he was terminated immediately, this claim would not have been possible. To show a hostile environment, there must be a demonstrable gender-basis to the discrimination. I am not sure that is clear here, but if he is to remain employed, he has a right to a workplace free from discriminatory bias, no matter how much it may be deserved. There is also an issue as to whether by monitoring the email the employer has gained constructive notice of the harassment, such that an obligation to act now exists. After all, the employee did not complain, but noted this environment in a monitored communication to a third-party, his AA sponsor.*

Upon learning that the Employee was not only a sexual predator, but also an alcoholic, the Dean terminated him immediately.

*ISSUE#13: Potential Section 504 violation. Being an alcoholic is a qualified disability. If the employee is otherwise qualified, termination on the basis of having a disability is likely to be found to be unlawful discrimination under Section 504.*

Matters went from bad to worse the following day. When a molestation was reported at the campus child care center, City Police asked the Dean for complete files on the Employee and the Student. The Dean promptly provided the files. These files included information on prescriptions written for the Student by the psychiatrist at Campus Health Services.

*ISSUE#14: Potential invasion of privacy/violation of counselor-client confidentiality. How did the Dean gain access to these files? Revelation of their contents may be shown to be the tort of*

*invasion of privacy. If the psychiatrist was complicit, this may also be actionable as a violation of counselor-client confidentiality.*

*ISSUE#15: Potential HIPAA violation. Prescription information is likely an electronic medical record transmission covered by HIPAA. Revelation of that information without consent of the patient is a HIPAA violation.*

As the police began to investigate the Student, they found that he had applied to the elementary teacher credential program. Investigators informed the admission committee of the Student's background. Not wanting a sexual predator, especially one on psychiatric medication, in the classroom, the committee immediately rejected the Student's application.

*ISSUE#16: Potential invasion of privacy. Again, because revelation of sex offender registry information is privileged, the actions of the police in giving this information to the admission committee is not likely tortuous.*

*ISSUE#17: Potential negligent referral. If the university knew of this information, but did not disclose it to the admissions committee when it asked for a character and fitness certification, failure to disclose what it knew could be actionable as a negligent referral by a third-party victim subsequently injured as a result.*

Within days, the whole matter became a cause celebre on campus. Professor Progressive spent three days in her human sexuality class defending sex with minors, so long as they are over 13 and give their consent. Professor Prude told her "math for teachers" class that the problem of sexual aberration was promoted by the gay friendly campus climate, stated that gays should never be admitted to a teacher credential program

*ISSUE#18: Potential violation of campus non-discrimination policy. If your policy requires non-discrimination on the basis of sexual orientation, and Prude acts to keep gay students from the teacher credential program, this will violate the policy, and perhaps state law as well.*

and informed her students that "psychos on meds" were not welcome in her classes.

*ISSUE#19: Potential ADA violation. If the professor acts to exclude otherwise qualified disabled students from class, that is an ADA violation, and also potentially a Section 504 violation.*

Students from both classes, including gay students and students with disabilities complained to the Dean and asked that both professors be sanctioned.

*ISSUE#20: Potential violation of academic freedom rights if Dean sanctions Prof. Progressive. Professor Progressive has stated some inflammatory ideas, but while unpopular, they are protected speech. The comments about sex with minors did not encourage illegal acts, and were pedagogically appropriate to the course content, and touched directly on a matter of public concern.*

Yesterday, the Student, feeling generally harassed and despondent over his imminent eviction and expulsion and devastated by his rejection from the teacher credential program, jumped from the roof of his residence hall, committing suicide.

What potential liability exists for us at State University?

*ISSUE#21: Potential wrongful death action against State University by his survivors. Was harm foreseeable? Did university owe a duty? Did the university create the risk of harm by its unlawful actions toward Student? See you in court!*

*All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.*

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