

# Higher Education Highlights

The Newsletter of the Higher Education Practice Group

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## Finding the “Schoolhouse Gates” in the Social Media World

By James A. Keller and Christina Riggs

In the blink of an eye, advances in technology have blurred the line between on and off campus student speech. For more than four decades, Tinker v. Des Moines Independent Community School District provided stalwart guidance in this area.<sup>1</sup> Guided by Tinker, educational institutions have been able to regulate certain disruptive on-campus speech – in other words, speech within the “schoolhouse gates.”

Times have changed. As the Third Circuit Court of Appeals recently observed:

*For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.*<sup>2</sup>

Where, then, are the “schoolhouse gates” in this social media world? And, should an educational institution still be constrained by those boundaries in regulating speech? Can it be?

In two decisions authored this past summer, the United States Court of Appeals for the Third Circuit tackled these questions, specifically evaluating a public school official’s ability to discipline students for online speech created off-campus. The results of this review were borne out in two appellate decisions that evaluated very similar conduct, but where the trial judges reached opposite conclusions: Layshock v. Hermitage School District, No. 07-4465, 2011 WL 2305970 (3rd Cir. June 13, 2011) and J.S. v. Blue Mountain School District, No. 08-4138, 2011 WL 2305973 (3d Cir. June 13, 2011). Although these cases involved K-12 school districts, they are equally relevant to public colleges and universities.

- 1 393 U.S. at 513; Tinker has long been held to apply to colleges and universities, albeit with certain refinements not applicable here. In fact, Tinker was applied in the university setting after the two decisions evaluated in this article were issued. See Tatro v. Univ. of Minn., 800 N.W.2d 811, 821-22 (Minn. Ct. App. 2011) (upholding a university’s disciplinary actions against a student for her Facebook posts under the Tinker framework). As the court noted in Tatro, although “what constitutes a substantial disruption in a primary school may look very different in a university . . . these differences do not per se remove the Tinker line of cases from the analysis.” 800 N.W.2d at 821 (internal citations omitted).
- 2 Layshock v. Hermitage Sch. Dist., No. 07-4465, 2011 WL 2305970, at \*13 (3rd Cir. June 13, 2011) (concurring opinion).

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### I. THE UNDERLYING DISTRICT COURT DECISIONS AND INITIAL APPELLATE ACTION

#### A. Layshock – Student Prevails

In Layshock, a high school student (“Layshock”) used his grandmother’s computer to create a fake MySpace profile of his principal. The profile stated that the principal used drugs, shoplifted and took steroids. After the profile came to the principal’s attention, the student, Layshock, was suspended for 10 days and forced to participate in the school’s alternate education program. He was banned from all extracurricular activities, as well as graduation ceremonies.

Layshock sued. He claimed, among other things, that the school’s actions violated his First Amendment rights. The district court agreed. See Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007). On appeal, a three-judge panel of the Third Circuit upheld the decision in favor of the student. Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010).

#### B. J.S. – School Prevails

In J.S., a middle school student (“J.S.”) used an off-campus computer to create a fake MySpace profile of her principal. Text in the profile indicated that the principal engaged in various forms of sexual misconduct. After the profile came to the principal’s attention, the student, J.S., was suspended for 10 days.

J.S. sued, alleging that the school district’s action violated her First Amendment rights. Despite the facts being very similar to the prior holding in Layshock, the district court upheld the suspension. See J.S. v. Blue Mountain Sch. Dist., No. 07cv585, 2008 WL 4279517, at \*9 (M.D. Pa. Sept. 11, 2008). On appeal, a three-judge panel of the Third Circuit upheld the decision and ruled in favor of the school district. J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010).

### II. THE THIRD CIRCUIT’S RULINGS EN BANC

Because of the inconsistent opinions issued in two very similar cases, the Third Circuit ordered that both appeals were to be

reheard *en banc* in front of the entire Court of Appeals. On June 13, 2011, the two majority opinions of the *en banc* panels held that administrators are unable to punish a student for expressive speech on a social networking site created “off-campus” if that speech did not substantially disturb the school environment.

#### A. Layshock – *En Banc* Opinion

In Layshock, the school district did not claim there was a Tinker-level substantial disruption. Instead, the school asked the court to expand the exception to Tinker established by the Supreme Court in Bethel School District v. Fraser, 478 U.S. 675 (1986), to allow a school to regulate lewd, vulgar off-campus speech having a *nexus* to the school environment. That is, the school district asked the Third Circuit to recognize that there was a “sufficient nexus” between the profile created off-campus and the school to allow the school to regulate it, regardless of whether the profile caused a substantial disruption.

The school district first claimed a nexus existed between the school and the student’s profile because the student entered, took and misappropriated a picture of the principal from the school’s website. Second, the school district claimed that the student’s speech, even though created off-campus, could be regulated as “on-campus” speech because the profile was aimed at the school district, accessed on-campus, and it was “reasonably foreseeable” that the profile would come to the attention of the school authorities.

In rejecting these arguments, the Layshock court confirmed that Fraser does not apply to “expressive conduct which occur[s] outside of the school context.” The court cautioned:

[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.

*Id.* at \*9. Thus, the court held that the student’s use of the school’s website did not constitute entering the school and did not empower the school district to punish the student’s off-campus expressive conduct.

In conclusion, it is notable that the court suggested, without holding, that Tinker would be outcome determinative in this factual situation. Specifically, the court acknowledged that it “found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.”<sup>3</sup>

**B. J.S. – En Banc Opinion**

In J.S., an 8-6 majority of the Third Circuit “assum[ed], without deciding” that Tinker was applicable to the student’s off-campus speech and held that the fake MySpace profile, while vulgar and offensive, did not meet the standards for substantial disruption set forth in Tinker. J.S., 2011 WL 2305973, at \*7. Specifically, the majority concluded that Tinker’s substantial-disruption test was not met because the “profile was so outrageous that no one could have taken it seriously, and no one did.” That fact, coupled with the student’s efforts to keep the profile private and a filter block on the school computers preventing access to the social networking site, supported the majority’s decision that the fake profile did not cause any major disruption of classroom activities.

The majority also concluded that the Fraser exception to Tinker did not justify the school district’s actions. Fraser allows school officials to restrict lewd, vulgar, and offensive student speech, even in the absence of substantial disruption. In rejecting the application of Fraser to the student’s profile, the majority emphasized the “off-campus” nature of the speech in question:

to apply the Fraser standard to justify the School District’s punishment of [the student’s] speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the

<sup>3</sup> Because the school district did not claim there was a Tinker-level substantial disruption, however, the court did not “define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate.” Layshock, 2011 WL 2305970, at \*12 (emphasis added).

<sup>4</sup> The J.S. majority “assum[ed], without deciding” that Tinker applied to the student’s speech, and the Layshock court was not even faced with this issue because the school district did not claim there was a Tinker-level substantial disruption.

school or a school official, is brought to the attention of a school official and is deemed ‘offensive’ by the prevailing authority.

Id. at \*12 (emphasis in original). Declining to extend Fraser to justify a school’s punishment of a student for use of profane language outside the school, during non-school hours, the majority unequivocally held that “Fraser does not apply to off-campus speech.”

**III. SO . . . DOES TINKER APPLY TO OFF-CAMPUS SPEECH?**

Although Layshock and J.S. both discussed Tinker’s substantial disruption standard, neither majority opinion directly addresses whether Tinker should apply to a student’s online speech, generated off-school property, and during non-school hours.<sup>4</sup> This precise question, however, was addressed in the Layshock concurrence, as well as the J.S. concurrence and dissent.

**A. Six Judges Say “Yes”**

The Layshock concurrence, authored by Judge Jordan and joined by Judge Vanaskie, concluded that Tinker must be applied to off-campus speech to “balance the need for order in our public schools with respect for free speech.” Layshock, 2011 WL 2305970, at \*13-14. As an example, the Layshock concurrence noted:

With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events, and if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student.

Id. Recognizing that the above is a drastic hypothetical, the Layshock concurrence nonetheless reasoned that “modern communications technology, for all its positive applications, can be a potent tool for distraction and fomenting disruption.” Consequently,

for this reason, the Layshock concurrence reasoned that Tinker's substantial disruption test should be applied to off-campus speech.

The J.S. dissent, authored by Judge Fisher and joined by Judges Barry, Jordan, Rendell, Scirica and Vanaskie, appears to agree, noting that "student speech that targets school officials, is publicly broadcasted to the school community, and has a reasonably foreseeable substantial disruption on the classroom environment is regulable by schools, *whether it occurs on- or off-campus.*" J.S., 2011 WL 2305973, at \*26 n.4 (emphasis added).

### B. Five Judges Say "No" – Maybe

Judge Smith, authoring the J.S. concurring opinion, and joined by Judges McKee, Sloviter, Fuentes and Hardiman, reasoned that Tinker should not be applied to off-campus speech because this "would empower schools to regulate students' expressive activity no matter where it takes place." J.S., 2011 WL 2305973, at \*18. The J.S. concurrence cautioned against this broad application because although students' speech may be at times "thoughtless," it must be tolerated "in order to provide adequate breathing room for valuable, robust speech — the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination." Id. at \*19.

Despite reaching this conclusion, however, the J.S. concurrence conceded that there may be instances where the disciplinary arm of school officials is permitted to extend beyond the schoolhouse gate. That is, because of the "everywhere at once nature of the internet" the J.S. concurrence "would have no difficulty applying Tinker to a case where a student sent a disruptive email to school faculty from his home computer. Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech." Id. at \*18-19.

Unfortunately, the J.S. concurrence does not explain exactly what may transform a student's off-campus into "on-campus" speech capable of punishment, nor does it reconcile this concession with

its stated prohibition against the application of Tinker to off-campus speech. Perhaps recognizing this inevitable confusion the Layshock concurrence fittingly challenges J.S.:

[i]f the point of the J.S. concurrence is not to question where the speaker was physically so much as to question how to characterize the speech itself, i.e., as having on-campus or off-campus effects, then the definitional exercise only obscures the effort to answer the central dilemma, which is how to balance the need for order in our public schools with respect for free speech. That is the problem Tinker aimed to address and it is the problem we are confronting too, so we should be applying rather than avoiding Tinker.

Layshock, 2011 WL 2305970, at \*13. Having the benefit of the last word on this position, the Layshock concurrence offers a compelling argument for off-campus application of Tinker.

### C. Answering the Ultimate Question

So . . . does Tinker apply to off-campus student speech? The slight majority says yes – and recent precedent agrees.

Since the Third Circuit issued its *en banc* decisions, one appellate court and one district court have cited them in the context of this very question – and both ultimately applied Tinker to off-campus speech. See Kowalski v. Berkeley Cnty. Sch., No. 10-1098, 2011 WL 3132523, at \*8 (4th Cir. July 27, 2011) and T.V. v. Smith-Green Cmty Sch. Corp., No. 1:09-CV-290-PPS, 2011 WL 3501698, at \*12 (N.D. Ind. Aug. 10, 2011).

In Kowalski, the Fourth Circuit explicitly applied Tinker to uphold school administrators' suspension of a high school student for an off-campus creation of a webpage ridiculing another student. In doing so, the court noted that although the conduct occurred off-campus on the student's home computer, it was foreseeable

that the expression would reach the school, and student's conduct involved substantial disruption of and interference with the work and the discipline of the school.

In a slightly different approach, the Northern District of Indiana in T.V. simply "assum[ed] without deciding" that Tinker applies to students' off-campus speech. In applying Tinker, the court concluded that school officials violated two minor plaintiffs' First Amendment rights after suspending the students from extracurricular activities for a portion of the upcoming school year after the students took "raunchy" photos at a summer slumber party and posted them online.

What do these decisions mean? Well, for now, school administrators should assume that courts will apply Tinker when faced with evaluating student discipline for off-campus speech, or, at the very least, will sidestep the issue and "assume without deciding" that Tinker applies – either way, the result is the same. Therefore, although the schoolhouse gate may be eroding and the determina-

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tion of what is "on-campus" is becoming increasingly difficult, Layshock and J.S. suggest that the essence of Tinker remains critical when an educational institution punishes speech – disruption to the educational process, at a minimum, must occur.

*As this promises to be a hot issue, we will keep a vigilant eye for new decisions. Stay tuned.*



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## It's Not Too Late to Become Green

By Harry Shapiro and Dan Skowronski

As Section 501(c)(3) organizations, colleges and universities have a particular challenge operating or owning a renewable energy source, including solar equipment, wind farms and other equipment used to produce electricity, because a number of key governmental tax incentives are generally not available to them. For example, the federal government offers a 30 percent grant for certain renewable energy equipment, and alternatively allows the owner to elect to receive production tax credits or investment tax credits in amounts up to 30 percent of the cost of renewable equipment in lieu of a grant. Additionally, a renewable facility is also potentially eligible for accelerated depreciation on certain renewable energy equipment, which generally gives the owner the same tax deduction, but over a much earlier period of time. Unfortunately, these benefits generally are not directly available to not-for-profit institutions.

There are, however, several fairly well-defined paths for colleges and universities to gain the value of the government benefits in connection with a renewable energy installation:

- (1) A third party may agree to construct and own a renewable energy facility located on campus and lease the facility to the institution. As a result, the owner can claim the government benefits and set a lower lease price.
- (2) A second approach employs the same general framework, except the owner of the renewable facility sells power to the not-for-profit institution, rather than leasing it the equipment.

(3) The third approach is what is sometimes called a “501(c)(3) blocker.” Here the not-for-profit forms a for-profit affiliate that attracts investors and raises the money necessary to own and operate the renewable energy facility. For obvious reasons, this structure can be problematic.

The federal government’s 30 percent grant expires at the end of 2011 (significant construction must occur before that date to qualify), but the production tax credit is still in effect for wind projects placed in service before the end of 2012. The investment tax credit is in effect until 2017 for both wind and solar. In short, there is still time for colleges and universities to consider renewable energy options, but planning has to start now.

Please contact the authors or any member of Saul Ewing’s Higher Education Practice Group to discuss these options in more detail.



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## Long-Awaited UCLA Copyright “Streaming” Case Decided on Procedural Grounds

By Mark Simpson

In the end, it came down to technicalities. Eagerly anticipated to clarify the copyright doctrine of fair use and the Digital Millennium Copyright Act (DCMA), a highly-publicized lawsuit brought by members of the publishing community against UCLA was instead decided on procedural grounds.

The academic and publishing communities have been waiting many months for a ruling from the U.S. District Court for the Central District of California in Association for Information Media and Equipment, et al. v. The Regents of the University of California, a case pitting Ambrose Video Publishing (AVP) and the Association for Information Media and Equipment (AIME) against UCLA and multiple university officials. It was thought that the decision would provide guidance on the application of the doctrine of fair use to the practice of streaming content to students and faculty via the university network. It was also expected to address the issue of whether the act of ripping DVDs to the university network in order to provide the streamed content violates the anti-circumvention elements of the DCMA.

While UCLA was successful in getting the case dismissed, dismissal was based not on a substantive evaluation of the law, but on issues

of sovereign immunity and standing. In an attempt to destroy the immunity defense, AVP/AIME contended that a clause in the licensing agreement in which UCLA consented to the jurisdiction of the New York federal and state courts amounted to a waiver of sovereign immunity. In its October 3, 2011 ruling, the court rejected the argument, because, among other reasons, the licensing agreement did not expressly waive sovereign immunity as to federal copyright claims. The court also ruled that AIME lacked standing because it did not own any of the copyrights in question. Notably, since much of the decision was based on the sovereign immunity issue, this part of the decision affects only public, not private, universities.

The court was not entirely silent on the copyright issues, however. AVP’s license to UCLA gave it the right to “publicly perform” the DVD, which included the right to show the DVD in a classroom. In the suit, it was asserted that UCLA violated AVP’s copyrights by streaming “The Plays of William Shakespeare,” licensed to it on DVD by AVP and other members of AIME. UCLA used a process known as “ripping” to copy the licensed works from the DVD to memory on the UCLA network, where it was made available (streamed) to students and faculty having password protected access to the network.

AVP/AIME argued that streaming does not constitute a public performance because the content from the streamed DVD can be accessed outside of the classroom, even overseas. In essence, AVP/AIME asserted that the public performance right it granted to UCLA was limited to the classroom. The court, however, focused on **how** the content was used, rather than **where**. Noting that access to the UCLA network was required to view the DVD content, the court stated that “[t]he type of access that students and/or faculty may have, whether overseas or at a coffee shop, does not take the viewing of the DVD out of the educational context.” The court determined that the provision in the license agreement permitting UCLA to publicly perform the content gave the University the right to put the DVD content on the UCLA network. The court further explained that the act of ripping the DVD in order to put the content on the network was incidental fair use and thus non-infringing activity. The court also dismissed the DMCA claims as conclusory and insufficient to establish a DCMA violation.

Since the case was dismissed on procedural grounds, the findings of the court with respect to the copyright issues do not have the

full strength of legal precedent. However, they will undoubtedly be cited in and influence future cases dealing with similar issues. Thus, it appears that a door has been opened to allowing streaming of content purchased by a university where the license includes a public performance right. When an institution is contemplating streaming the content, care should be taken in drafting licensing agreements to ensure that the public performance right is clearly included as part of the license.



*This article was written by Mark D. Simpson, a member of the Intellectual Property & Technology Practice Group. Mark can be reached at 215.972.7880 or msimpson@saul.com.*

## *Doe v. Sewanee*: Expanded Liability to Include Claims of Accused Students in Cases Alleging Sexual Assault

By Amy C. Foerster and Cory S. Winter

In our Summer 2011 Newsletter ([http://www.saul.com/common/publications/pdf\\_2943.pdf](http://www.saul.com/common/publications/pdf_2943.pdf)), we discussed the connection between the Office for Civil Rights' April 4, 2011 *Dear Colleague* letter (DCL) regarding Title IX and sexual violence, and student disciplinary proceedings. On September 2, 2011, a federal jury in the Eastern District of Tennessee awarded \$26,000 to a student who challenged University-imposed discipline following an alleged sexual assault. The verdict in *Doe v. The University of the South (Sewanee)* highlights the expanded litigation risks faced by institutions as they strive to comply with the DCL and Title IX obligations amid allegations of sexual misconduct.

### THE UNIVERSITY'S DISCIPLINARY PROCESS

On August 30, 2008, a female student accused Doe of sexual assault. Administrators investigated the charges brought against Doe. On September 18, 2008, a dean at the University met with

Doe, informed him of the charges, and advised him that a disciplinary hearing was set for the next day. The University allegedly discouraged Doe from bringing supporters to the hearing, limited him to a single character witness, refused to permit him to attend portions of the hearing, and failed to record the hearing – all of which were actions Doe later contended violated the University's discipline policies.

Following the hearing, Doe was informed that the hearing panel found him responsible for committing a “Category 1” sexual assault. Doe was given the option of accepting a semester-long suspension and then re-enrolling with the sexual assault finding as part of his record, or withdrawing from the University with the possibility of returning for the Fall 2009 semester, contingent upon the approval of the University's admissions office. Doe appealed, but the panel's decision was affirmed. Doe then withdrew from the University and never sought readmission.

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### DOE'S COMPLAINT

Doe filed a twelve count complaint against the University, challenging its disciplinary process under Title IX, as well as under state common law contract and tort theories.

The court used four tests to evaluate Doe's Title IX claim: (1) erroneous outcome, (2) selective enforcement, (3) deliberate indifference, and (4) archaic assumptions. In order to succeed under the erroneous outcome and selective enforcement tests, a plaintiff must demonstrate that the school had a sexual bias that motivated it to punish the plaintiff-student. Under the deliberate-indifference test, a plaintiff must show that a school official who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct. The archaic-assumptions test requires a plaintiff to establish that a school's discriminatory actions resulted from classifications upon archaic assumptions.

Doe's Title IX claim failed under each test. Although his complaint included numerous *conclusions* purporting to establish a Title IX violation, the court determined it was devoid of *facts* sufficient to support those conclusions. Notably, Doe did not plead facts demonstrating that the University's disciplinary process itself constituted sexual harassment. As a result, the Court dismissed Doe's Title IX claim against the University.

### THE TRIAL AND VERDICT

Doe's breach of contract and negligence claims were tried in front of a jury in late August 2011. During the trial, Doe contended that the University failed to follow its own disciplinary policies by, among other things, not recording the hearing, refusing to allow Doe to present fact witnesses, and prohibiting Doe from attending portions

of the hearing during which he was not testifying. Although the University defeated Doe's contract claim, the jury found in Doe's favor on the negligence claim, apportioning responsibility at 47 percent to Doe and 53 percent to the University. Ultimately, the jury awarded Doe \$26,000.

### WHAT THIS MEANS FOR INSTITUTIONS

Many have speculated that the Office for Civil Rights' DCL on Sexual Violence will spawn a new wave of litigation brought by students disciplined in connection with alleged sexual misconduct. Following the issuance of the DCL, many schools have undertaken review and, when necessary, revision of their disciplinary policies. *Doe v. Sewanee* serves as an important reminder that while schools should take whatever steps are necessary to develop appropriate policies, it is equally important that schools follow their own policies when faced with the difficult situation posed by allegations of sexual misconduct.

We will continue to monitor developments in Title IX litigation and update readers as appropriate.



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## School Pays \$1.6 Million to Resolve Allegations Raised by Whistleblower

By Nicholas J. Nastasi and Amy L. Piccola

On July 22, 2011, the United States Attorney for the Eastern District of Pennsylvania announced that a \$1.6 million settlement agreement had been filed resolving allegations that CHI Institute ("CHI") fraudulently certified compliance with requirements

necessary to participate in Title IV federal student aid programs, resulting in CHI's unlawful receipt of federal funds. The allegations were initially raised by a relator pursuant to the qui tam provisions of the False Claims Act and were

subject to a United States Department of Education program review.

CHI previously offered a diploma in surgical technology (the “surg tech program”). The surg tech program included both classroom time and a mandatory externship at a hospital or surgery center. The majority of students who enrolled in the surg tech program received some form of federal student financial aid.

CHI, as a recipient of Title IV federal funds, was required to enter into a Program Participation Agreement with the Department of Education, in which it agreed to abide by various statutory, regulatory and contractual requirements, including providing an annual certification of compliance in order to receive student loan payments.

In 2007, a former employee of Kaplan Higher Education, the owner and operator of CHI Institute, filed suit against Kaplan Inc. and its parent, the Washington Post Company, for violations of the False Claims Act (the “qui tam action”). The qui tam action alleged that CHI misled students and the federal government about the availability of externships necessary for students to complete the surg tech program. Specifically, the qui tam action and the program review alleged that CHI did not have sufficient externship spots for all of the students who registered for the program. The result was that students paid CHI—largely with federal student financial aid—for an educational program that CHI knew it could not provide. The qui tam action thus alleged that CHI violated the False Claims Act by knowingly making false statements to the United States government to obtain the payment of false or fraudulent claims.

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Pursuant to the settlement agreement, CHI will make total payments of \$1.6 million. Included in that amount are payments to satisfy the student loans of surg tech students who were not provided the required externship opportunity, payments to the federal government for losses associated with the federal student financial aid program, and a payment of \$225,000 to the whistleblower pursuant to the False Claims Act.

The False Claims Act applies to **all** institutions of higher education. An institution’s participation in Title IV federal student aid program constitutes a “contract” with the government, bringing it within the reach of the False Claims Act regardless of whether the institution is for-profit or not. The qui tam provision of the False Claims Act, allowing for financial recovery by relators, including disgruntled former employers, makes higher education institutions particularly vulnerable to such claims.



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## The America Invents Act: Spotlight on Research and Tech Transfer Offices

By Mark Simpson

The America Invents Act was signed into law on September 16, 2011. As those of us involved in research and tech transfer are aware, the changes impact the entire patent landscape, including when to file for patent protection and when to commence infringement litigation. The substantive change receiving the most publicity is the shifting of the United States from a “first

to invent” patent system, to a “first inventor to file” system that is more consistent with the laws of the rest of the world. This change impacts how priority of invention will be determined and puts an end to interference practice, the procedure utilized under the current U.S. system to determine who first invented a particular invention.

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While the majority of the AIA will have some bearing on the operations and strategies employed by university researchers and tech transfer offices, buried within the 150-page bill are several points that are directed specifically to the higher education community.

- 35 U.S.C. §273 was and remains a section directed to a defense to infringement based on activities carried out by the alleged infringer prior to certain actions by the patentee alleging infringement. Previously limited to business methods, this defense now is available to essentially all technologies. However, there are two exceptions that directly relate to nonprofits, universities and hospitals:
  1. For a nonprofit research laboratory or other nonprofit entity, such as a university or hospital for which the public is the intended beneficiary, this defense may only be asserted for continued and noncommercial use by and in the laboratory or other nonprofit entity. This essentially clarifies that universities can continue to use, for example, certain laboratory procedures even if someone later patents that procedure (subject to all of the conditions of 35 U.S.C. §273).
  2. The defense is not available if the patent owner/assignee asserting the patent is “an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. §1001(a)), or a technology transfer organization whose primary purpose is to facilitate the commercialization of technologies developed by one or more such institutions of higher education.” In other words, subject to the conditions of 35 U.S.C. §273, if a public or nonprofit university located in the United States, or a tech transfer office as defined above, sues an infringer based on a patent that it owns or that is subject to an obligation of assignment to the university or tech transfer office, the alleged infringer cannot utilize this defense.
- 35 U.S.C. §123 has been added, which establishes a new entity for the purpose of patent office fee-reductions, called

a “micro-entity.” Prior to the passage of the AIA, a university qualified as a “small entity” for fee purposes, meaning that the university was entitled to a 50 percent reduction on most fees charged by the patent office. Under the AIA, colleges and universities will now be considered micro-entities and will qualify for a 75 percent reduction on most patent office fees. The actual implementation of the section will be effected after the completion of rulemaking procedures by the U.S. Patent & Trademark Office.

The hefty AIA makes numerous other changes, including with regard to reexamination, prioritized examination, false marking, venue and removal, so-called “tax strategy” inventions, business methods, and declarations. Some changes took effect on enactment, others will within a year, and still others within 18 months. The addition of Section 123 and changes to Section 273 discussed above took effect on September 16, 2011; however, the discounted fees available to micro-entities under Section 123 will not be available until the Patent Office sets/adjusts fees on a future date to be determined.

The AIA will impact current strategies employed by the university/tech transfer community. Institutions may wish to consider a complete review of their procedures and policies to ensure adherence to best practices in light of the AIA. For more information, please contact any member of Saul Ewing’s Intellectual Property & Technology Practice Group.



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## HHS Issues Final Rule On Objectivity In Research

By Allison B. Newhart

On August 25, 2011, the Department of Health and Human Services (“HHS”) issued a Final Rule amending the Public Health Service (“PHS”) regulations covering the Responsibility of Applicants for Promoting Objectivity in Research for which PHS Funding is Sought (42 C.F.R., Part 50, Subpart F) and Responsible Prospective Contractors (45 C.F.R. Part 94). The Rule, which was effective September 26, 2011, will impact college and university research.

### BACKGROUND

When the original regulations were promulgated in 1995, biomedical and behavioral research was a whole different world. Since that time, these fields have evolved in complexity, as have related interactions between the government, research institutions and the private sector. The new regulations are intended to increase compliance and enhance institutional oversight and management of financial conflicts of interest. The regulations also increase accountability to HHS.

The changes will impact colleges, universities, and academic medical centers that receive research funding. As discussed here, the regulations demand more comprehensive (1) disclosure of investigators’ significant financial interests, (2) reporting and management of investigator financial conflicts of interest, and (3) public disclosure of financial conflicts of interest.

### HIGHLIGHTS OF THE RULE

#### Significant Financial Interests

Under the 1995 regulations, an Investigator was required to disclose any financial interest that he or she had in a product or study if the interest was \$10,000 or greater in payments or equity interests.<sup>1</sup> The new regulations decrease the disclosure threshold to \$5,000 and expand the definition of “significant financial interest” to include payment for services and any equity interest in non-publicly traded entities. Further, if the \$5,000 threshold is reached, an

Investigator must disclose ***all significant financial interests that are related to the Investigator’s institutional responsibilities.*** The 1995 regulations required disclosure only where the Investigator deemed the financial interest related to the PHS-funded research.

The broader definition of “Significant Financial Interests” might now also include reimbursements for travel or sponsored travel related to institutional responsibilities. The burden is on the institution to determine whether the monetary value of the travel warrants disclosure.

There are several exceptions to the definition of Significant Financial Interest and the corresponding disclosure requirement. Investigators do not have to count salary, royalties, or other remuneration that the institution paid to the Investigator towards the determination of a Significant Financial Interest if the Investigator is currently employed or otherwise appointed by the Institution. Additionally, an Investigator is not required to disclose income from seminars, lectures, or teaching engagements sponsored by a federal, state or local government agency, or service on an advisory or review panel for a government agency, an institution of higher learning as defined in 20 U.S.C. § 1001(a), an academic teaching hospital, a medical center, or a research institute that is affiliated with an institution of higher learning.

#### Financial Conflicts of Interest

Prior to dispensing any PHS funding obtained for research, institutions are required to review all investigator disclosures of Significant Financial Interests to determine whether any significant financial conflicts of interest arise that are related to the PHS-funded research. A financial conflict of interest is defined as “a significant financial interest that could directly and significantly affect the design, conduct, or reporting of PHS-funded research.” If the institution determines that a financial conflict of interest exists, the institution must then develop and implement a management plan to manage or reduce the conflict, and must also report it to the PHS awarding component. The required report is in two parts: an initial report, which contains specific information about the conflict, its status, value and the institution’s plan to manage or reduce the conflict; and an annual report setting forth the status of the conflict and any changes to the institution’s management plan.<sup>2</sup>

<sup>1</sup> 42 C.F.R. § 50.603 (1995) (original version).

<sup>2</sup> 42 C.F.R. § 50.605(b)(4) (2011).

**Higher Education Highlights**

**Sub-recipients of Funding**

The regulations also impact sub-recipients of PHS funding. Specifically, institutions must incorporate into their agreements with sub-recipients whether the sub-recipient's Financial Conflict of Interest policy applies to sub-recipient investigators. The written agreement also must set forth time periods to allow for financial conflict of interest disclosure and reporting requirements.

**Accessibility, Transparency, and Accountability**

The new regulations also increase public access to conflict of interest disclosures. Institutions are now required to maintain a public web site containing information on financial conflicts of interest of senior or key personnel. Alternatively, an institution may set up a process for providing this information in response to a request for it, as long as the response is made within five business days of the request.

The regulations also require that institutions make investigators aware of their policy on Financial Conflicts of Interest, and further provide mandatory training for investigators every four years. The investigators must undergo training immediately in certain circumstances, including when an institution's Financial Conflict of Interest policies change, when a new investigator comes to the institution, or when an institution discovers that an investigator has not complied with its management plan or financial conflict of inter-

est policy. Similarly, the institution is required to undertake a retrospective review if there is non-compliance with the regulations. Further, if an institution discovers non-compliance, it is required to self-report the non-compliance to the PHS entity awarding the funding and to submit a mitigation report. The 1995 regulations did not contain any training or retrospective review requirements.

**EFFECTIVE DATE**

The Rule requires that all institutions applying for or receiving PHS funding from a grant, cooperative agreement or contract be in full compliance with the new requirements no later than August 24, 2012, and immediately upon making their financial conflict of interest policies publicly accessible, if this is done before August 24, 2012. Colleges and universities are encouraged to begin evaluating their policies now so as to avoid any interruption in PHS funding for research projects.



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