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Higher Education Highlights

The Newsletter of the Higher Education Practice

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HIPAA Phase 2 Audits Are Underway – Is Your Audit Plan in Place?

By Karilynn Bayus

On March 21, 2016, the U.S. Department of Health and Human Services, Office for Civil Rights ("OCR"), announced the launch of the 2016 Phase 2 Health Insurance Portability and Accountability Act of 1996 ("HIPAA") Audit Program ("Phase 2 Audit Program"). The Phase 2 Audit Program will review the policies, procedures, and other activities of covered entities and business associates for compliance with the HIPAA Privacy, Security and Breach Notification Rules. Every covered entity and business associate is eligible to be audited.

Pre-Audit: Information-Gathering Stage

Before deciding which entities will be audited, OCR is engaging in an information-gathering stage. Typically, this stage is triggered by an e-mail letter addressed to the individual at the institution who is responsible for HIPAA compliance according to OCR's records. This initial letter asks the entity to verify contact information. A sample copy of this initial communication is available at http://tinyurl.com/gs7gpje.

After entity contact information is obtained, OCR is e-mailing covered entities and business associates a pre-audit questionnaire. Through the questionnaire, OCR will gather data about the size, type, and operations of potential auditees. This data will be used by OCR to develop pools of potential auditees. OCR has stated that it is seeking to audit a wide range of health care providers, health plans, health care clearinghouses and business associates, factoring information such as size of the entity, affiliation with other healthcare organizations, the type of entity and its relationship to individuals. A sample copy of the pre-audit questionnaire is available at http://tinyurl.com/gsu48rz.

This information-gathering stage is already underway at many institutions and it is likely that your institution has already received these initial communications.

Selection for Audit

OCR will select auditees by random sampling from the audit pools. OCR has not indicated how many entities it intends to audit. If selected for an audit, OCR will notify you – the covered entity or business associate – in

writing. Typically, the letter will be addressed to the contact person identified by your institution in response to the OCR's initial information-gathering letter. Phase 2 Audits move very quickly, so it's important that you are notified as soon as the letter arrives.

Phase 2 Audit

OCR will conduct both desk audits and on-site audits. OCR will conduct the desk audits first, in two separate rounds. A round of on-site audits will follow the desk audits. If you are selected for a desk audit, it does not mean that you will also be selected for an on-site audit, though OCR states it is possible that an entity may be subject to both types of audit.

Entities selected for a desk audit will receive a document request letter from OCR. For desk audits, you will have 10 business days to submit the information requested by OCR through a secure online portal.

According to OCR, the on-site audits will examine a "broader scope of requirements from the HIPAA Rules than desk audits." On-site audits will be conducted over a period of three to five days.

To aid covered entities and business associates with understanding what to expect from a Phase 2 Audit, OCR has released Audit Protocols. The protocols are broken down into the three (3) primary subject areas for HIPAA audits: privacy, security and breach notification. The Protocols are available at http://tinyurl.com/hxskvbo.

Draft Findings, Audit Reports, and Further Investigation

After the conclusion of an audit (whether a desk audit or on-site audit), OCR will provide the auditee with draft findings. The auditee will then have 10 business days to submit any written comments to OCR. OCR will complete an audit report within 30 business days of receiving the auditee's response. Although OCR has indicated that the audits are primarily a compliance improvement activity, OCR may further investigate a "serious compliance issue."

OCR expects to complete desk audits before the close of calendar year 2016. OCR has not specified when it expects to complete on-site audits.

The Time to Prepare for a HIPAA Audit is Now

Ten business days is not a significant response time, especially if several days are spent trying to organize the response team and/or to locate requested documents. Colleges and universities that have covered entity and/or business associate components should have a HIPAA audit plan in place before being selected for an audit. Even if your institution is not selected for a Phase 2 Audit, the plan will provide a roadmap for subsequent HIPAA audits and for general HIPAA compliance.

A HIPAA audit plan should include at least the following elements:

- Understand and identify each covered entity and business associate component of your college or university. This may pose a significant challenge as your institution may be conducting many health care activities across multiple departments. Some of these health care activities may be subject to HIPAA, while others may not. Knowing the scope of your HIPAA-covered activities is critical. In December 2015, the OCR entered into a $750,000 settlement with the University of Washington Medicine ("UWM"). One basis for the settlement was that UWM did not ensure that all of its affiliated entities were conducting HIPAA Security Rule-required risk assessments.
- Identify your HIPAA audit response team. Know who will (i) be the key point of contact with OCR and lead the team, and (ii) be a part of the response team and support the point person (e.g., assist in gathering and assembling documents). Given that addressing the audit may encompass significant portions of the team members' time, you may want to consider who will fulfill their job functions while they are otherwise engaged with the audit response. Your team may need to consist of individuals from several departments.
- Prepare a list of each of your college's or university's business associates and their contact information. OCR has provided a template that you may (but are not required to) use, available at: http://tinyurl.com/hjdnhes.
- Locate key HIPAA documents, including: (i) executed business associate agreements; (ii) HIPAA policies, procedures and forms; and (iii) Security Rule risk assessments. Identify and address any compliance gaps.

- Conduct a self-audit. The HIPAA Audit Protocols released by OCR are a valuable tool for conducing your own audit, as they are OCR's HIPAA audit road map.

The Phase 2 Audit Program will not be the end of HIPAA enforcement or HIPAA audits. The Health Information Technology for Economic and Clinical Health ("HITECH") Act required OCR to establish a permanent HIPAA audit program. OCR will analyze and evaluate the results of the Phase 2 Audit Program to help it finalize such a program. In addition to the audits, OCR has been active in its HIPAA enforcement. Through May 31, OCR has collected more than $8.6 million from six (6) public settlements in 2016. Maintaining a comprehensive HIPAA compliance program is essential.

If you have any questions about the Phase 2 Audit Program, HIPAA audit preparation or response, or HIPAA compliance generally, please contact the author or any member of the Saul Ewing Higher Education Practice.

The New Overtime Regulations: How Will They Affect The Higher Education Workplace?

By Catherine E. Walters and Allison L. Feldstein

Summary

As described in "Sent from My Smartphone," an article in Saul Ewing's Spring 2016 Highlights (http://tinyurl.com/j4xcsqa), the Department of Labor ("DOL") unveiled the final version of its highly anticipated overtime regulations on May 18, 2016. In its first increase since 2004, the standard *minimum salary level* for exemption from overtime under the Fair Labor Standards Act ("FLSA") has been increased by just over 100 percent, from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The *salary level for highly compensated employees* ("HCE"s) has also been increased, from $100,000 to $134,004 annually. The changes take effect December 1, 2016 and will have a significant impact on colleges and universities.

Special Issues in Higher Education

Now that the final salary levels have been confirmed, colleges and universities must face the realities and costs of achieving compliance by December 1, 2016. Although the DOL issued its ***Guidance for Higher Education Institutions on Paying Overtime Under the Fair Labor Standards Act*** (http://tinyurl.com/jbn29x3) as part of the May 18 rollout, the Guidance provides no useful solutions for the financial issues created by the new regulations. Numerous positions will have to be reviewed and decisions made about compensation and reclassification of exempt employees to non-exempt status; current time-keeping and compensation practices will have to be reviewed and revised and new practices implemented; and other financial and non-financial costs, such as fundraising, budgeting, service delivery and morale, will have to be addressed.

The higher education workplace includes numerous positions that have, to date, been covered by the executive, professional, administrative, and academic exemptions from the overtime rules. Some specific positions will remain exempt; others will not. The following list and comments, while not comprehensive, is a sampling of the impact the new regulations will have on higher education institutions:

- **Positions that will remain exempt under the new overtime rules despite the position's salary:**
  - **Teachers** whose **primary duty** is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who are employed and engaged in this activity as a teacher in an educational establishment. This typically includes:
    - Faculty members
    - Adjunct instructors
    - Coaches who are primarily engaged in instructing students in how to perform their sport
    - Postdoctoral fellows who are primarily engaged in teaching
    - Students who work under a professor as a teaching or research assistant

- Medical and veterinary interns and residents (medical professionals)
- Academic administrators who are primarily engaged in performing administrative functions directly related to academic instruction or training in an educational establishment. This category is a bit unique. Such employees must either be paid on a salary or fee basis of not less than the new salary level, **or be paid on a salary basis at least equal to the entrance salary of teachers in the same educational establishment. (So, even if the entrance salary is below the new salary level, academic administrative employees will be exempt if their salary equals or exceeds the establishment's entrance salary for teachers.)** This typically includes:
  - Department heads
  - Academic counselors and advisors
  - Intervention specialists
  - Administrators with other similar **academic** duties

- **Positons that may be exempt from the new overtime rules if they meet the salary and duties tests:**
  - Coaches whose primary duties are recruiting students (i.e., are not considered "teachers").
  - Athletic trainers who are not primarily engaged in instruction. Even if the athletic trainer qualifies as a "learned professional," he or she must still meet the salary and duties tests for exemption.
  - Postdoctoral fellows primarily engaged in research (i.e., are not considered "teachers.") Even if the postdoctoral fellow qualifies as a "learned professional," he or she must still meet the salary and duties tests for exemption.
  - Administrative employees who are not covered by the special provisions for academic administrative employees because their work does not cover academic administrative functions; these employees may still meet exemption standards based on salary and duties tests. This typically includes employees who work in the areas of:
    - General business
    - Operations
    - Building management and maintenance
    - Human resources
    - Health of students and staff
    - Resident directors

- **Positions that are not exempt from the new overtime rules:**
  - Employees who do not meet **both** the salary level and duties tests for exemption. Examples include:
    - Part-time employees who perform exempt duties but who do not receive $913 per week
    - Hourly employees

Decisions and Recommended Actions for Higher Education Employers

In preparation for December 1 compliance, higher education employers should consider the following actions:

- **Audit current job titles, pay and recordkeeping practices to identify and resolve compliance issues.** This should include a comprehensive review of: worker classifications (including exempt/non-exempt and employee/independent contractor status); timekeeping, payroll, and recordkeeping practices; compensation components, plans, policies and practices; employee benefits and leave; and current employment policies and practices relating to all of these items.

- **Assess whether to maintain exempt status or reclassify positions as non-exempt.** Start by first identifying all exempt executive, administrative, and professional employees who currently earn less than $913/week. Once identified, higher education employers should determine whether it makes sense, both financially and from an operational perspective, to reclassify employees as non-exempt or increase their salaries in accordance with the new regulations.

- **Revise job descriptions and job titles.** These revisions should be in accordance with decisions to maintain exemptions or reclassify as non-exempt and to ensure compliance with the "duties test."

- **Implement time-keeping procedures for all employees, including exempt employees.** This should be done to comply with recordkeeping guidelines in the event exempt employees are deemed non-exempt and entitled to overtime.

- **Implement electronic device use policies to avoid unapproved compensable time.** Employees who are converted from exempt to non-exempt status are now entitled to compensation (both straight time and overtime) for time spent on work-related matters away from the office, e.g., checking emails. Left unregulated, such additional "work time" quickly can become extremely expensive and result in FLSA violations.
- **Train supervisors.** With so many changes impacting the workplace, higher education employers should train supervisors about the various decisions made and anticipated changes in the workplace, with a focus on emphasizing employer policies and practices, compensable time issues, and recordkeeping.

A Word about Compensatory Time

Although the new regulations did not include provisions enabling private employers to provide compensatory time in lieu of paying overtime, public universities or colleges that qualify as "public agencies" under the FLSA may compensate overtime-eligible employees through the use of compensatory time off (or "comp time") in lieu of cash overtime premiums. A college or university is a public agency under the FLSA if it is a political subdivision of a state. Private higher education institutions must, however, pay their overtime-eligible employees a cash premium for all overtime hours at a rate not less than one and one-half times the regular rate at which the employee is actually employed.

In general, overtime-eligible employees may accrue up to 240 hours of comp time; however, employees engaged to work in a public safety activity, an emergency response activity, or a seasonal activity may accrue as much as 480 hours of comp time. If an overtime-eligible public employee receives comp time instead of overtime pay, the comp time must be credited at the same rate as cash overtime, that is, at a rate of no less than 1.5 hours of comp time for each hour of overtime worked. Additionally, any comp time arrangement, agreement, or understanding must be arrived at between the employer and employee (or employee representatives) prior to performance of the work and should be evidenced in writing.

Watch for our Roundtable Series coming to your city – we will sit down with clients and friends to discuss how the new overtime regulations will affect your workplace and to provide you with practical solutions.

Transgender Protection for Employees

By Dena Calo, Meghan J. Talbot, and Miguel Aguilo-Seara

Institutions of higher education employing transgender personnel should be aware of the evolving legal framework regarding issues of access and discrimination. Recent federal guidance may be in conflict with existing state laws governing transgender employees, or conversely, state laws may provide for additional requirements beyond the federal obligations.

Last month, the Equal Employment Opportunity Commission ("EEOC") issued new guidance for employers who provide bathroom access to transgender employees – the ***Bathroom Access for Transgender Employees Under Title VII of the Civil Rights Act of 1964.*** The Fact Sheet reiterates the federal position that Title VII prohibits employer discrimination on the basis of sex, and that the prohibition includes discrimination against transgender individuals. In the view of the EEOC, denying an employee equal access to a common restroom which corresponds to that individual's gender identity constitutes this type of sex discrimination.

Consistent with recent cases before the EEOC, the Fact Sheet defines "transgender" broadly as "people whose gender identity and/or expression is different from the sex assigned to them at birth." Employers are forbidden from requiring their employees to provide medical proof of transgender status.

There is little doubt that the EEOC's guidance in the Fact Sheet was issued in direct response to North Carolina's passage of House Bill 2. This bill overturned the city of Charlotte's ordinance expanding bathroom access rights for transgendered employees. House Bill 2 further required bathrooms in state agencies and public schools to be designated for use in accordance with the user's "biological sex" – a status defined by the user's birth certificate.

The EEOC's Fact Sheet specifically states that any state laws (such as North Carolina's) that restrict bathroom access for transgendered employees are invalid. This stance has spurred

at least three separate, ongoing lawsuits. North Carolina has sued the federal government in order to seek a declaration that its state law does not violate Title VII, Title IX of the Education Act Amendments of 1972, or the Violence Against Women Reauthorization Act ("VAWA"). The United States, in response, has sued North Carolina and several of its state agencies, arguing that House Bill 2 *does* violate these federal anti-discrimination laws.

In contrast, many other jurisdictions have already instituted *expanded* protections for transgender individuals. Delaware, Maryland, Massachusetts, New Jersey, and Washington, D.C. all have laws prohibiting employment discrimination on the basis of gender identity. Delaware, New York, and Washington, D.C. have also expanded this protection to include all public accommodations, and Massachusetts currently has a bill pending final reconciliation that would provide the same protection. Furthermore, governors from Indiana, Kentucky, Michigan, New York, and Pennsylvania have all issued executive orders banning transgender discrimination against state workers.

In light of the evolving status of state, local, and federal laws, institutions of higher education must examine their own policies and procedures to ensure compliance with their obligations to transgender employees. In order to do so, a higher education institution may, among other things, do the following: include "gender identity or expression" among the list of protected categories in the institution's non-discrimination and anti-harassment policies; institute protocols for gender transitions that clearly delineate responsibilities and expectations of transitioning employees; allow employees to be addressed by the name and pronoun that corresponds to their gender identity, upon request and regardless of a court-order name or gender change; permit employees to use sex-segregated bathroom and locker room facilities that correspond to their full-time gender presentation, regardless of what stage they are in within their overall transition process; prohibit dress codes that restrict employees' clothing or appearance on the basis of gender; and enter into health insurance contracts that include coverage for transition-related care to employees.

In addition, as this area of the law continues to develop and evolve, institutions must be prepared to face uncharted, factually-unique scenarios. Appropriately navigating those situations in the context of existing guidance can be tricky. Saul Ewing's Higher Education Practice can provide real-time, practical guidance and solutions on how to approach each unique situation. Feel free to contact any of the authors above or another member of the group.

Transgender Protection for Students

By Cory S. Winter

Joining with the U.S. Department of Justice, the U.S. Department of Education, Office for Civil Rights ("OCR"), issued a "Dear Colleague Letter" ("DCL") on May 13, 2016, addressing the rights of transgender students at colleges and universities. Though perhaps most widely known for addressing a transgender student's right to use a restroom facility that corresponds with that student's gender identity, there are other key takeaways from this DCL.

1. A student's "gender identity" is protected under Title IX.

The DCL eliminates any doubt: a student's gender identity is protected under Title IX. "Gender identity," as defined by the DCL, is "an individual's internal sense of gender." The DCL makes clear that a student's gender identity is protected under Title IX in the same way that a student's sex (or "sex assigned at birth") is protected. Colleges and universities, therefore, may not treat a transgender student differently than how it treats other students of the same gender identity. This means that where a college or university has segregated resources or facilities by sex or gender (*e.g.* residence hall), a transgender student may access those resources or facilities based on their gender identity. Colleges and universities that do not treat transgender students according to their gender identity risk creating a hostile environment for those students that could ripen into a Title IX claim.

2. Gender identity does not require any medical diagnosis, treatment, or documentation.

The directive to treat students consistent with their gender identities is unconditional. The DCL makes clear that a college or university cannot require a student to undergo any sort of treatment, receive any particular diagnosis, or otherwise provide medical documentation related to their gender identity before treating the student consistent with their gender identity. The exemplar policies issued with the DCL confirm that colleges and universities must respect a student's gender identity *as expressed by the student*.

3. A student's preferred name and pronoun must be respected, as both reflect gender identity.

Colleges and universities must refer to transgender students consistent with the students' preferred names and genders. Students do not need to have their names legally changed (via court order, for example) before a college or university is required to refer to them by their preferred names and pronouns. However, consistent with the Family Educational Rights and Privacy Act ("FERPA"), students who do change their legal names are able to seek to modify their education records to reflect their changed legal names.

4. A student's gender identity should be treated as confidential.

There are two important privacy implications raised in the DCL.

First, colleges and universities violate Title IX "by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth."[1] Although the DCL does not explain what is "reasonable" in the context of protecting a student's transgender status, there is guidance on what should happen when transgender students disclose their "transgender status" to some members of the campus:

> Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception [which permits disclosure to school officials] to disclose [personally identifiable information] from education records to other school personnel who do not have a legitimate educational interest in the information.

This prohibition is telling. The practical takeaway here is that a student's transgender status should be disclosed only to those within a college or university on a need-to-know basis (it should never be disclosed beyond the college or university without the student's express permission). Breaching a student's privacy with respect to one's transgender status could lead to a private right of action under Title IX brought by the aggrieved student.

Second, and relatedly, a college or university's "directory information," as defined by FERPA regulations, cannot include a student's sex, including transgender status, "because doing so could be harmful or an invasion of privacy." The harm OCR appears to prevent in this context is a college or university inadvertently "outing" a transgender student who has not fully disclosed his or her transgender status or sex assigned at birth.

To be clear, the DCL does not alter the fact that FERPA does not create a private right of action. But the DCL does suggest that a college or university could be held liable under Title IX—even if the college or university is otherwise in compliance with FERPA.

5. Participation of transgender students on single-sex sports teams remains unsettled.

Perhaps the most public way a college or university will segregate sexes is through their athletics teams. Title IX regulations generally permit this approach to athletics. The DCL does not clarify how colleges and universities should incorporate transgender students within their athletics programs. In fact, the DCL devotes only one paragraph to the topic.

But the DCL reaffirms that a college or university "may operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport." Colleges and universities cannot implement rules based on "overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e. the same gender identity) or others' discomfort with transgender students." It is appropriate, however, to impose "age-appropriate,

1. In certain circumstances, where a student's transgender status, birth name, or sex assigned at birth is disclosed from a student's education records, that disclosure *could* potentially violate both Title IX and FERPA.

tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport." The DCL does not reconcile these statements or otherwise assist colleges and universities in applying them.

Instead, the DCL cites to the Policy on Transgender Student-Athlete Participation by the National Collegiate Athletic Association ("NCAA"). This policy addresses students who are transitioning their gender through medical treatment or who otherwise have a gender identity different from their sex assigned at birth. Though the DCL does not explicitly approve the NCAA's policy under Title IX, it also does not reject the NCAA's approach. At least for now, and while OCR continues to grapple with this issue, colleges and universities that are NCAA members should follow and implement the NCAA's policy.

* * * * *

Issues related to transgender students will continue to impact the Title IX landscape. Though the DCL addresses some of these issues, like many dear colleague letters before it, the DCL leaves colleges and universities without answers to important questions. May a student change gender identity more than once? Are there ever any circumstances where a college or university is permitted to assess the sincerity of a student's gender identity? How do students who do not ascribe to the binary nature of gender identity impact this analysis? And how must colleges and universities address all of this in the context of athletics, financial aid (e.g. gender-based scholarships), or as part of their overall Title IX compliance? Although these questions remain unanswered, Saul Ewing attorneys can help institutions develop practical steps and solutions in this largely uncharted territory.

Here are two final takeaways. First, though this DCL focuses on the rights of transgender students, it is important for colleges and universities to balance those rights with the rights of other students. This is especially true in the context of student discipline. Unfortunately, OCR has not provided any specific guidance on this point. But based on prior guidance, colleges and universities should take care to comply with their own written policies, which should afford all students a fair process, regardless of their sex or gender.

Second, institutions should be aware of the state-level challenges led by Texas and North Carolina, which confront both the substance of the DCL and OCR's unilateral ability to issue dear colleague letters. Suffice it to say, the latter challenge could not only impact this DCL, but also could impact the effects of OCR's past guidance. Members of the firm's Higher Education Practice are tracking those state-level challenges and their broader nationwide implications.

Accommodating Fido: Service and Assistance Animals on Campus

By Emily Edmunds

With the beginning of a new academic year approaching, this is the time of year that institutions begin to see new requests for students and employees to bring service animals and assistance animals on campus. Below we discuss the rules on when (and where) to permit service animals and assistance animals.

Service animals may be permitted on campus as a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Assistance animals may be permitted in certain limited areas on campus as a reasonable accommodation under Section 504 of the Rehabilitation Act of 1973 ("Section 504").

What is a service animal?

Higher education institutions have an obligation under the ADA to provide reasonable accommodations for individuals with disabilities in places of public accommodation, which extends

to allowing service animals on campus if certain conditions are satisfied. A service animal is "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition." 28 C.F.R. § 36.102. The tasks performed by the service animal must be directly related to the individual's disability. Importantly, a service animal does not provide "emotional support, well-being, comfort, or companionship." (Such "assistance animals" are discussed later in this article.) In certain circumstances, miniature horses can be considered service animals, though requests to bring miniature horses on campus are very rare.

How does an institution determine if an animal is a service animal?

There are very specific rules about what institutions may ask about the nature or extent of a person's disability in order to determine whether an animal is a service animal. An institution may not question the nature or extent of a person's disability. There are two questions that may be asked when the individual's disability and the worked performed by the animal are not readily apparent: (1) if the animal is required because of a disability, and (2) what work or task the animal has been trained to perform? However, these questions may not be asked when it is readily apparent that a service animal is trained to work or perform tasks for an individual with a disability. 28 C.F.R. § 36.302(c)(6). For example, it would not be permissible to question an individual with a disability about her need for a service animal when it is clearly evident that the individual is blind or has low vision.

What documentation can an institution require?

For requests for service animals, once the two inquiries above are satisfied (if appropriate), individuals with disabilities cannot be asked for documentation that the animal has been certified, trained, or licensed as a service animal. Indeed, one federal court recently held that security guards exceeded the permissible scope of inquiry regarding a female's service dog by demanding its registration papers, even though the dog was wearing a vest identifying the dog as a service animal. *De Leon v. Vornado Montehiedra Acquisition L.P.*, 2016 WL 814825 (D.P.R. Feb. 29, 2016).

Once the institution is satisfied that the animal in question qualifies as a service animal, the animal must be permitted to accompany the individual to all areas of the institution where the individuals goes, subject to the rules on restricting qualified service animals.

When can an institution deny access to a service animal?

Even if an animal qualifies as a service animal, there are three situations in which it is appropriate to deny the animal's access to campus.

1. If the animal is out of control and its handler does not take effective action to control it, the animal can be removed from campus. Animals that exhibit uncontrolled barking, snarling, or jumping, or animals that are not harnessed or leashed, are not under the control of their handler and may be removed.
2. If the animal is not housebroken, it can be removed.
3. If the animal poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification of other policies, practices, or procedures, it may be removed. This often comes up when students or coworkers are allergic to a service animal. In that case, if it is reasonable to rearrange schedules or room assignments to eliminate the issue, the service animal can be permitted to stay on campus in the modified arrangement.

It is impermissible to refuse to permit a service animal on campus because others may fear the dog or because the dog

may be associated with a breed that people normally consider aggressive. This is because the ADA requires an individualized assessment of the service animal's actual conduct, not fears or stereotypes.

What is an assistance animal?

Assistance animals (which are also commonly referred to as emotional support animals, support animals, or therapy animals) are permitted only in housing. Therefore, requests for assistance animals should be considered only for individuals who reside on campus or in housing owned by the institution, and the request should be limited to having the animal in the housing, not other areas of campus. If an animal qualifies as a service animal, the animal is automatically permitted in campus housing, whether it is an assistance animal or not (unless, of course, the service animal falls into one of the three categories noted above for denied access).

Assistance animals are not pets. They are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or that provide emotional support that alleviates one or more identified symptoms or effects of a person's disability. Section 504 does not require an assistance animal to be individually trained or certified. Dogs and cats are the most commonly requested assistance animals, but Section 504 does not limit assistance animals to any particular type of animal.

How does an institution determine if an animal is an assistance animal?

The inquiry permitted for assistance animals is similar to that for service animals. First, the institution may ask: (1) if the individual has a disability, and (2) if the individual has a disability-related need for the animal. If the answer to these questions is no, then the request can be denied. If the answer is yes, the institution must permit the animal to live with the individual, subject to the receipt of documentation (if appropriate).

What documentation can an institution require?

An institution can require some documentation of the need for the assistance animal, unlike service animals. If the disability is not readily apparent or known, the individual can be asked for documentation of the disability and her disability-related need for the animal. If the disability is readily apparent and known, the individual may only be asked for documentation of the need for the animal. For example, documentation can come from a physician, psychiatrist, social worker, or other mental health professional to support a need for emotional support that alleviates a symptom of a disability. Such documentation is sufficient if it establishes (1) a disability, and (2) that the animal will provide some type of disability-related assistance or emotional support.

When can an institution deny access to an assistance animal?

The request can be denied if the *specific* assistance animal poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation. If, for example, a roommate of an individual needing an assistance animal has an allergy, perhaps the two can be separated. Also, if the *specific* animal would cause substantial physical damage to the property of others that cannot be reduced or eliminated by an accommodation, it can be removed.

These analyses must be individualized to the animal in question and must be based on the animal's actual conduct, not speculation about the breed or size.

Takeaway

Dealing with requests for animals on campus can be tricky and it's important to ask the right questions – and to know which questions not to ask. There are many gray areas that are not squarely addressed by regulation and Saul Ewing can help you navigate through those issues.

IN THE NEWS....

OCR's Title IX Guidance Under Attack

By Joshua Richards

Backed by the Foundation for Individual Rights in Education ("FIRE"), a former University of Virginia law student filed a federal lawsuit against the Department of Education on June 16, 2016 in a direct challenge to the guidance offered in the Office for Civil Rights' 2011 Dear Colleague Letter. The lawsuit objects to OCR's requirement that institutions use a preponderance of the evidence standard in adjudicating reports of sexual misconduct. Other lawsuits, notably one filed against Louisiana State University by a former professor, have narrowly argued that OCR's Title IX guidance violates First Amendment free speech in the public institution context. This lawsuit, however, attacks the guidance broadly and contends that in promulgating the guidance without a notice and comment period, the Department of Education violated the Administrative Procedures Act, which renders the guidance null and void.

The plaintiff contends in the lawsuit that as a result of the guidance, UVA moved from a "clear and convincing" standard of evidence to the now-required "preponderance" standard. He argues that, but for OCR's improperly-promulgated guidance, he would not have been found responsible, nor disciplined for his alleged conduct. Unlike most similar suits, the plaintiff does not name UVA as a defendant, and instead has sued only the Department of Education, OCR, and its chief officers.

We will continue to track these and other challenges to OCR's Title IX guidance.

Coalition Petitions Department of Education to Create FERPA Data Security Rule for Education Records

By Alexander (Sandy) R. Bilus

A coalition of legal scholars and organizations interested in privacy has petitioned the Department of Education to amend the regulations that implement the Family Educational Rights and Privacy Act ("FERPA") to include a "Data Security Rule" aimed at preventing the unauthorized disclosure of personally identifiable information contained in education records. The proposed rule would require schools and any third parties that possess education records to implement administrative, physical, and technical safeguards, such as encryption and "privacy enhancing techniques" that minimize or eliminate the collection of personally identifiable information, and to notify students and parents of data breaches.

The petitioners argue that many unauthorized disclosures of education records have resulted from the combination of (1) current FERPA regulations that allow easy disclosure of education records to outside parties and (2) weak or nonexistent data security protocols. Under the current regulations, an educational institution can face a reduction or elimination of federal funding if it has a "policy or practice" of releasing PII contained in education records without prior written consent. That consent requirement is subject to certain exceptions, however, including one that allows an institution to disclose records to contractors, consultants, volunteers, or other individuals to whom the institution has outsourced institutional services or functions (such as ed tech providers). While current regulations specify that this exception only applies if the outside party is under the "direct control" of the institution, will not disclose the information to any other party without prior consent or subject to certain exceptions, and must use the information only for the purpose for which the disclosure was made, the petitioners argue that schools are able to give away records without meaningful data security protections. The current regulations do not specify, for instance, any particular data security safeguards that must be used by schools or outside parties to protect education records against unauthorized disclosure, nor do they require institutions or outside parties to issue breach notifications.

The Department of Education has not yet responded to the petition. The petition can be viewed at http://tinyurl.com/j4jgeo3.

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