

Practice Area Overview ...

Heating Up: Renewed Federal Focus Fuels Education Law Practices

In late January President Obama signed a memorandum that created a task force focused on finding ways to prevent sexual assaults on college campuses and to respond better to assaults when they do occur. And they're occurring at an alarming rate, as nearly one in five American women have been sexually assaulted in college, according to statistics in a report released on the same day the president launched his initiative.

What this means for students and the colleges they attend is that this traumatic epidemic will receive more attention, starting at the federal level and reaching down to each institution of higher education.

What it means for the legal profession is that those firms that represent colleges had better be prepared for more work as university officials increasingly will be asking for legal counsel. What's more, firms that are not active in this area may want to consider recruiting lawyers trained in education law and forming practice groups to serve this growing need.

Even before the president's proclamation, sexual assaults on campus had been keeping many education lawyers busy advising their higher education clients. "Sexual assault on campus and the response to that takes up a lot of our time both in the preventative side and also in responding to claims and investigations," says Paul Lannon, Jr., cochair of the education law practice group in the Boston office of the New York-based megafirm Holland & Knight (H&K).

In the last several years the Department of Education has been quite active on college campuses, looking into issues around Title IX, the well-known antidiscrimination law, as well as areas regarding financial aid. "They come onto campus to do their investigations and audits, which can really cause havoc," Lannon says. "And, institutions have been anxious to get legal support to deal with this."

Formed in 1999, the H&K education law group is considered a leader in the field and is known for its depth and expertise. About 30 attorneys in the firm perform work in education law with 10 who have education law as a major part of their practice. And it's not surprising that the attorneys in this area stay busy, given their geographic location.

"While there are higher educational institutions all over the country, I would say we have a tremendous concentration here in New England, and Massachusetts in particular," says James D. (J.D) Smeallie, a former chair of the H&K education law group who was instrumental in the team's formation and growth. "Higher ed is one of the big four industries in Massachusetts. It's natural for firm in Boston to think about an industry practice group like we did and create one."

Serving a Range of Compliance Needs

At Philadelphia's Saul Ewing, sexual assault and violence, sexual harassment, and other Title IX issues constitute a large share of the workload for the firm's education team, as does compliance with other laws—in both prophylactic and reactive ways.

“Compliance is keeping us very busy,” says James Keller, the team's cochair. “We're dealing with Title IX issues every day. And we're dealing with the CLERY Act and the more garden variety FERPA and HIPAA issues. So where we spend most of our time these days is on compliance writ large.” (The CLERY Act covers crime and security matters on campuses; the FERPA Act addresses privacy rights; and the HIPAA Act involves health insurance and privacy issues.)

Saul Ewing has some 35 attorneys who serve the firm's higher education clients with 15 of those spending the majority of their time working with colleges. And like most education law teams, the group has a multidisciplinary composition. “We are a mix of litigators, labor and employment attorneys, real estate attorneys, bond lawyers, and bankruptcy lawyers,” Keller says. “Our goal within our footprint, and to some extent outside of our footprint, is to provide our clients with all the services that they need, although we don't do any immigration work.”

Another area in the education law arena that requires more and more legal attention is mental health. “Our clients need help in dealing with students who [suffer] depression or conditions that lead to suicide or suicide ideation or attempts,” says Miriam McKendall, the other cochair of the H&K's education team.

Currently, McKendall and her group are hearing about an increase in eating disorders among students—or at least a hike in the reporting of the illness—as their clients ask for counsel on how to put in place accommodations for these students.

“Then on the flip side, we advise on when and how the colleges can reach out and require counseling and intervention when they see a student with such grave mental health issues deteriorating in front of them,” she says. “And those all

have interplays with disability law, whether it's under the Americans with Disabilities Act or the companion piece under the Rehabilitation Act that applies to most schools and colleges that receive federal funding.”

Scarce Resources Stress School Districts

At Riverdale, CA-based Best Best & Krieger (BB&K), the education lawyers serve more kindergarten through 12th-grade schools than they do colleges, and the K–12 clients have a whole range of other thorny problems. “We are doing a tremendous amount of work in the student issues area related to special education as well as social media and other expanding areas, which bring up issues about in-school and out-of-school conduct,” says Tyree Dorward, the firm's education law practice group leader.

Dorward and his group's clients have not had it easy since the recession hit, as they confront a scarcity of resources that translates into ever expanding responsibilities for the legal team, which has 10 to 15 attorneys who are regular contributors. “The budget environment is a little bit better here in California than it has been for the past five years, but most districts are knuckled down so far that they are still stretched thin,” Dorward says. “And that reaches across all the major issues that folks deal with from student issues to personnel issues to buildings and facilities issues.”

While regulation in the education field has always been strenuous in California, as well as most other states, it's more vigorous now than it was before, Dorward says, increasing the need for legal services. Moreover, like clients in nearly every industry, school districts and education institutions want and expect more bang for their legal buck.

“Being more efficient has been a point of emphasis for the clients and for us,” he explains. “Particularly in the education field, when clients pick up the phone, there's an increased expectation that you will do the work in the most efficient manner and that the service will be provided by somebody who won't have to reinvent the wheel.”

In addition to budgetary constraints, BB&K's education clients have been experiencing

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significant personnel changes as many educational administrators and staff members were laid off, retired on their own, or were enticed to retire during the recession.

“We also lost a lot of institutional knowledge,” Dorward says, “and that’s been a tremendous loss for our clients, making their job that much more difficult because knowledgeable staff is one more resource. This presents a different challenge for us as it changes the [attorney–client] relationship. It’s different with a person who might have had 30 years of experience than it is with a person who has five years or less experience.”

A Practice Group Model

As mentioned, attorneys at H&K founded the education team in 1999, during a time when practice group formation and management was growing. Combining forces seemed like a natural move for the education lawyers, and they saw that another H&K practice group had been very successful.

“We realized in the late 1990s that we had a number of education clients who we were doing a variety of things for, and at the same time we had a very active, very profitable construction law group,” Smeallie recalls. “We saw that group was getting a lot of work because their clients felt the attorneys really knew the construction industry. We decided to use that model, because we had a critical mass of clients already and several attorneys who understood the education industry. So we created an industry group that served the purposes of both internally organizing us and helping us market ourselves.”

And now a decade and a half later, H&K’s education team is considered a practice group model from which other firms could learn,

according to Jeff Coburn, of Boston-based Coburn Consulting, who helped the firm’s education law attorneys organize into a strategically cohesive group. “The [H&K education law] practice has gone from a strong local practice to a strong national one in the last decade or more,” he says. “It’s got very good leadership and it’s a well-managed practice; it’s really everything you want a practice group to be. Back in 1999 we got all the troops fired up about it and we looked at the market, and they took it from there.”

While Coburn gives the firm credit for the group’s accomplishments in this niche marketplace, the attorneys say his help was crucial to its launch and success. “The plan Jeff laid out for us was very concrete,” co-chair Lannon says. “It wasn’t just a mission statement with some general principles. He was specific: ‘Join this group. Speak at this conference. Talk to this person.’”

The attorneys followed and continue to follow Coburn’s advice about joining and talking, as these are their primary ways to market their practice. Education team members are deeply involved in events and activities organized by the National Association of College and University Attorneys, the Boston Bar Association’s special section that deals with college law and other industry groups.

“When it comes to marketing, I would say that participation in those groups is probably the leading thing that we did after we [formed the team] and that we continue to do,” Smeallie says. “We also produce education alerts on key issues and get those out to people who are on a very broad list that we’ve assembled over the years.”

In Philadelphia, Keller agrees that being involved in industry organizations is important. “These groups are valuable organizations for us both substantively, that is to get smarter, and also for marketing,” he says. “We try to speak at as many conferences as we can, and we try to be on as many committees as we can be on, and we try to write as many articles as we can.” ■

– Steven T. Taylor