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HOT LEGAL TOPICS AT PRIVATE COLLEGES AND UNIVERSITIES

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**Lawrence White
President, Lawrence White Consulting
Philadelphia, Pennsylvania**

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This outline is prepared for classroom purposes. It should not be relied upon as legal counsel or advice, and should not substitute for consultation with institutional or campus counsel.

I. HIGHER EDUCATION'S WASHINGTON AGENDA.

- A. ***Federal Financial Aid Programs.*** Last month, as part of the complex and seemingly never-ending budget reconciliation process, Congress passed and sent to the President a major bill that reduces government subsidies to student lenders and uses the cost savings to finance a significant expansion of the Pell Grants and other federal student aid programs. The “College Cost Reduction and Access Act of 2007” cuts lender subsidies by almost \$21 billion and directs most of the savings toward new funding for student aid programs.

The bill authorizes the appropriation of more than \$15 billion a year for the Pell Grant program, the government's largest aid program for income-qualified college students. The money would be used to raise the maximum Pell Grant from the current \$4,310 to \$4,800 next year and as much as \$5,400 by 2012—an immediate increase of 11 percent and an increase of 25 percent by the time this year's high school senior class reaches its last year of college.

- B. ***Student Loan Programs.*** In 2006, Eliot Spitzer, then New York State's Attorney General, launched an investigation into the origination practices of lenders and institutional financial aid offices. The investigation picked up steam in February 2007 when Spitzer's successor, current Attorney General Andrew Cuomo, sent subpoena-like demands for the production of records to 60 public and private colleges and universities and an undisclosed number of lenders. The Cuomo investigations initially focused on the methods college and university financial aid offices used to compile and manage “preferred lender” lists, the inducements provided by lenders to have their names included on lists, and lenders' arrangements with financial aid officials through such mechanisms as consulting fees, seats on advisory panels, and subsidized attendance at conferences. In March 2007 Attorney General Cuomo instituted a series of enforcement proceedings against individual colleges and lenders, many of which resulted in negotiated settlements under which colleges adopted lending codes of conduct, took disciplinary actions against individual financial aid officials, and agreed to refrain from certain practices involving lenders.

Practices uncovered by the Cuomo investigation led Congressional Democrats to introduce legislation designed to reform the student loan business. As early as February 2007, the chairs of the House and Senate Education Committees sponsored bills to regulate relations between lenders and colleges through disclosure requirements and outright bans on some forms of lender payments. In March, Senate Committee Chairman Edward Kennedy sent information requests to a dozen leading lenders, and a month later both committees held oversight hearings.

Education Department oversight (or not). At the end of the summer the Government Accountability Office issued a highly critical report concluding that the Department of Education was partially to blame for the student lending crisis through its failure to exercise appropriate oversight of the student loan industry and the federal student loan programs. The GAO study—*Federal Family Education Loan Program: Increased*

Department of Education Oversight of Lender and School Activities Needed to Help Ensure Program Compliance (www.)—accuses the Department of oversight laxity dating back to at least 1989, and urges the Department to issue guidance to colleges and lenders and establish standards for responding to violations.

To the undoubted chagrin of Secretary Spellings, her own Inspector General echoed Congressional criticism when, on September 10, the Acting Assistant Inspector General for Audit issued a report criticizing the Department’s financial and operational oversight of student loan programs. U.S. Department of Education, Office of Inspector General, *Final Inspection Report: Review of Federal Student Aid’s Monitoring of Guaranty Agency Compliance with the Establishment of the Federal Fund and the Operating Fund* (September 10, 2007), <http://www.ed.gov/about/offices/list/oig/aireports/i13h0001.pdf>.

- C. ***Accreditation and Accountability and the Spellings Commission.*** On September 19, 2005, in a speech delivered at the University of North Carolina at Charlotte, U.S. Education Secretary Margaret Spellings announced the formation of a new Commission on the Future of Higher Education:

[F]ederal dollars make up about one-third of our nation’s total annual investment in higher education. By comparison, the federal government’s investment in K–12 education represents less than 10 percent of total spending. But unlike K–12 education, we don’t ask a lot of questions about what we’re getting for our investment in higher education. ...

[I]t’s time to examine how we can get the most out of our national investment. We have a responsibility to make sure our higher education system continues to meet our nation’s needs for an educated and competitive workforce in the 21st century.

That’s why today I’m announcing the formation of a new commission on higher education to lead this debate. We are calling it “A National Dialogue: The Secretary of Education’s Commission on the Future of Higher Education.” The goal is to launch a national discussion on the future of higher education and how we can ensure our system remains the best in the world and provides more opportunities for all Americans. [A National Dialogue: Commission on the Future of Higher Education—Prepared Remarks for Secretary Spellings at the Meeting of the Commission on the Future of Higher Education in Charlotte, N.C., September 19, 2005, [www.ed.gov/news/speeches/2005/09/09192005\[-\].html](http://www.ed.gov/news/speeches/2005/09/09192005[-].html).]

The Commission ventured early into controversial realms.

- (1) *Test-based accountability. Accountability/Assessment* was the title of one of the Commission’s first working papers. Reproduced below is the critical section from that eight-page paper:

Today, most people must “take on faith” what college quality might be because there is a lack of reliable ways of documenting and assessing what students learn, and how their experiences compare among institutions.

Less than one-third of all colleges nationwide conduct comprehensive evaluations to find out whether they are achieving the purposes of their general education programs.

Faith in the quality of college outcomes masks a gaping information void, in that not much is known about a growing number of our students.

When the Commission issued its final preliminary report in August of this year, it did not—to the relief of many higher education officials—call for mandatory, standardized student assessment tests. It did, however, use pointed language in urging colleges and universities to adopt accountability testing of their own volition:

Postsecondary education institutions should measure and report meaningful student learning outcomes. Higher education institutions should measure student learning using quality-assessment data from instruments such as, for example, the Collegiate Learning Assessment, which measures the growth of student learning taking place in colleges

- (2) *Accreditation.* No issues paper generated more sparks than Robert Dickeson's *The Need for Accreditation Reform*, released to the public in April, 2006. The paper called for the replacement of the nation's six private regional accrediting agencies with a single federally chartered "national accreditation foundation." The paper used attention-grabbing language:

Accreditation of higher education in the United States is a crazy-quilt of activities, processes and structures that is fragmented, arcane, more historical than logical, and has outlived its usefulness. Most important, it is not meeting the expectations required for the future. ...

Any serious analysis of accreditation as it is currently practiced results in the unmistakable conclusion that institutional purposes, rather than public purposes, predominate. [T]he quaint jurisdictional approach to accreditation [is] obsolete. ... Accreditation structure is archaic and contains too many layers and filters. ... [A]ccreditation is the captive of the institution.

Almost immediately its recommendations were assailed. "Accreditors and some college groups are aghast at a proposal to eliminate regional accreditors and replace them with a national accreditation body," reported the CHRONICLE OF HIGHER EDUCATION. "Even with few details, the accreditation proposal has drawn fierce criticism from regional accreditors and from leaders of the American Council on Education and the Council of Independent Colleges." [Burton Bollag, *Federal Panel Floats Plan to Overhaul Accreditation—College Leaders Decry Replacing Regional Boards with a National System*, CHRON. OF HIGHER ED., April 14, 2006, p. A1.] The criticisms apparently registered with the Commission; when it issued its final report in August 2006 the language was more conciliatory, the accreditation

recommendations had been substantially diluted, and all references to a national accrediting body were gone. The Commission recommended merely that

Accreditation agencies should make performance outcomes, including completion rates and student learning, the core of their assessment as a priority over incomes and processes. A framework that aligns and expands existing accreditation standards should be established to (i) allow comparisons among institutions regarding learning outcomes and other performance measures, (ii) encourage innovation and continuous improvement, and (iii) require institutions and programs to move toward world-class quality relative to specific missions and report measurable progress in relationship to their national and international peers.

To date, the Education Department has taken its foot off the regulatory throttle. After a series of low-key meetings with higher education representatives in the spring of 2007, the Department has done little to translate the Commission's recommendations into implementing regulations—and has encountered resistance from Congressional leaders, who pledge to undo legislatively any move by the Department to adopt regulations formalizing the Commission's more controversial recommendations.

But from Doug Lederman, *The Education Department's Activist Agenda*, INSIDE HIGHER ED, November 1, 2007, [www.insidehighered.com/news/2007/11/01/\[-\]](http://www.insidehighered.com/news/2007/11/01/) spellings:

Education Secretary Margaret Spellings continues to try to counter the twin perceptions of her Education Department as lax on enforcement on the one hand and inappropriately meddling in the affairs of colleges on the other.

During a news conference Wednesday, Spellings listed a "litany" of steps her department had taken in recent months on a range of regulatory and policy fronts — "scratching lots of itches," as Spellings put it in her down-home manner of speaking. Several of her efforts — like the release today of final federal rules to govern the relationships between lenders and college officials and a ratcheting up of the department's scrutiny of universities where most students borrow from a single lender — seemed designed to challenge the view (favored by some Democratic members of Congress) that the Bush administration had let abuses in the student loan industry to develop by being asleep at the switch.

II. TWO LOOMING ISSUES: CAMPUS SECURITY AND TUITION INCREASES.

- A. *National Security and the Fight Against Terrorism.* Following the terrorist attacks on the World Trade Center and other American locales on September 11, 2001, Congress enacted the USA PATRIOT Act¹ to provide law enforcement officials with new tools to combat suspected terrorist activity. Many of the provisions in the Patriot Act and subsequently enacted legislation are specifically aimed at college and

¹ Pub. L. No. 107-56, § 507, 115 Stat. 272 (2001).

university campuses, and it is not implausible to imagine a sequence of events leading to greater utilization of these and other investigative and surveillance powers on college campuses in the future.

- (1) *FERPA*. The Family Educational Rights and Privacy Act of 1974—“FERPA” or the “Buckley Amendment” in the parlance of the higher education community—is the principal federal statute protecting the confidentiality of education records.² Animated in part by the fact that Mohamed Atta and Marwan al-Shehhi, two of the September 11 hijackers, entered the country on student visas and received some of their training at a Florida flight school, Congress included amendments to FERPA in the Patriot Act designed to make it easier for government agents to obtain the education records of suspected terrorists.

Section 507 of the Patriot Act amends FERPA in two respects:

- (a) It authorizes the Attorney General to seek an *ex parte* order compelling a college or university to turn over educational records pertaining to any individual suspected of “domestic or international terrorism.” To obtain an order, probable cause is not required—just a showing of “specific and articulable facts giving reason to believe that the education records are likely to contain information” relevant to the investigation. The so-called “reasonable suspicion” standard makes it considerably easier for law enforcement officials to obtain education records.
- (b) One of FERPA’s signature requirements is that a college or university maintain a written log of “all individuals ..., agencies, or organizations which have requested or obtained access to a student’s education records” 20 U.S.C. § 1232g(b)(4). The Patriot Act does away with this notice obligation in two respects: first, by amending FERPA to eliminate the logkeeping requirement for terrorism-related productions; and, second, by allowing the government to obtain orders *ex parte* without providing traditional notice to the subject of the record.

It is no exaggeration to say that the higher education community is anxious about government requests for education records under section 507 of the Patriot Act. In the months following September 11, more than 200 colleges and universities produced records in response to *ex parte* orders obtained by the

² 20 U.S.C. § 1232g. See American Association of Collegiate Registrars and Admissions Officers, *Practical Online Guide to the Family Educational Rights & Privacy Act*, www.aacrao.org/ferpa_guide/enhanced/mainframeset.html; National Academic Advising Association, *FERPA: Basic Guidelines for Faculty and Staff—A Simple Step-by-Step Approach For Compliance* (William R. Van Dusen, Jr., 2004), www.nacada.ksu.edu/Resources/-FERPA-Overview.htm.

Federal Bureau of Investigation, the Immigration and Naturalization Service, and other federal law enforcement agencies,³ prompting some national higher education organizations to express apprehension about the dilution of FERPA protections.

- (2) *Student visa monitoring.* In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 8 U.S.C. § 1372, Congress directed the agency then known as the Immigration and Naturalization Service (now known as United States Citizenship and Immigration Services, part of the Department of Homeland Security) to develop and operate a program to collect current information from universities and exchange programs on nonimmigrant foreign students studying in the United States. Section 416 of the Patriot Act calls for full implementation of the computerized tracking system known as the Student and Exchange Visitor Information System, or “SEVIS” for short, and appropriates \$36 million to assist in the process. In one of the Act’s most obvious references to September 11, Section 416 also expands the SEVIS program to cover “air flight school[s], language training school[s], [and] vocational schools,” which were not covered under the 1996 legislation.

As one observer wrote in an article that appeared in the *CHRONICLE OF HIGHER EDUCATION* in 2004:

[I]nternational-student advisers have been forced into the uncomfortable new role of continuous reporting on our foreign students to the Department of Homeland Security through the new Student and Exchange Visitor Information System, known as Sevis, an Internet-based government-tracking program. While we provide information about those students to the government, we must also serve as their counselors, advisers, and advocates. Balancing those potentially competing roles is far from easy, especially in an enforcement-driven environment.

- (3) In the immediate aftermaths of the deaths of 33 members of the Virginia Tech community on April 16, 2007, the results of a shooting spree by Seung-Hui Cho, a Virginia Tech senior with a history of psychiatric and behavioral problems, Virginia laws were changed to make it more difficult for individuals found by courts to be mentally ill to purchase handguns, and federal legislation was enacted to strengthen the National Instant Criminal Background Check System. Just a few months ago, a gubernatorially-appointed Virginia Tech Review Panel leveled searing charges against Virginia Tech officials for failing to take action that might have reduced casualties. Commonwealth of Virginia, *MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE VIRGINIA TECH REVIEW*

³ American Civil Liberties Union, *How the USA-Patriot Act Puts Student Privacy at Risk* (2002), www.asata.org/resources/articles/civil_rights/ACLU_student_privacy.pdf.

PANEL, www.governor.virginia.gov/TempContent/techPanelReport.cfm (August 2007).

- B. ***Efforts to Rein In Tuition Increases.*** For several years Congressional committees have prepared for the reauthorization of the Higher Education Act by holding hearings on legislators' top higher education priorities. Much of the testimony focused on legislative concern over college and university tuition increases—specifically the *rate* at which tuition has risen and continues to rise. In 2004 California Republican Representative Howard (“Buck”) McKeon made an attention-grabbing proposal that would have barred institutions from participating in the federal financial aid program if they raised tuition at higher than a prescribed rate. He was persuaded to drop his plan, but not before others took up the cause and proposed more modest but still draconian tuition restrictions for inclusion in the reauthorization bill. Next year's version of the reauthorization bill will probably include legislation that, at a minimum, would resemble the “indexing” provision that was in the House-passed bill this year. Under that provision, each college or university would be assigned a “college affordability index” based on its percentage increases in tuition and fees over a three-year period compared with the percentage increase in the Consumer Price Index over the same time period. Institutions with an index score above a Congressionally prescribed minimum would be subject to reporting requirements, and institutions ranking in the top five percent by index score—in other words, the institutions that raised tuition at the highest rates relative to the cost of living—would be required to appoint “quality-efficiency task forces” and would be placed on “affordability alert status,” with all such actions reported to the public through the “College Opportunities Online” website operated by the Department of Education.

III. SOME OBSERVATIONS ON NEXT YEAR'S TRENDS IN HIGHER EDUCATION AND THE LAW.

A. ***Opportunities:***

Commitment to incoming-student preparation and retention programs.

Discernible areas of growth (technology, mathematics, health sciences, etc.).

Diversity as an enriching factor.

Possibility of cost containment through technological advances in curricular delivery (distance learning, asynchronous online learning, etc.).

Higher education has never been more coveted or more valued—we offer a product enjoying an unprecedented level of popularity.

Non-traditional students are more mature and take their studies more seriously.

B. ***Threats:***

Capital construction dollars have never been tighter.

Tremendous pressure on operating budgets—constraints on the revenue side.

Diluted attention to the needs of the financially distressed.

Affordability—the product is priced at a prohibitively high level for some.

Non-academic issues as obstacles to academic success—mental health, child care, part-time jobs, disciplinary issues.

Poorly prepared high school graduates, requiring remedial courses that divert dollars from more pressing priorities.

C. ***Trends:*** From Barbara A. Lee and William A. Kaplin, *Top Ten List of Key Trends in Higher Education Law and Practice*, Annual Conference of the National Association of College and University Attorneys, June 26, 2006:

- (1) More federal and state regulation of higher education, justified by government spending, a commitment to non-discrimination, national security concerns, and the need to regulate “commercial” and technological activities of institutions.
- (2) Continuing challenges regarding the operation of education programs and activities in other countries, cooperative instructional and research arrangements between U.S. and foreign universities, and increased mobility of students and faculty entering and leaving the U.S. for educational purposes.
- (3) Continued concerns regarding national security and the impacts on academia of federal national security policies.
- (4) A broadening of the focus on student body diversity, especially socioeconomic diversity, religious diversity, diversity of national origins and ethnicities, and diversity of abilities and disabilities.
- (5) More tension between faculty and administration as attacks on tenure continue, and the proportion of non-tenure track and part-time adjunct faculty increases, and more tension among administrators and staff as institutional functions are reorganized or outsourced.
- (6) Increasingly active involvement of institutional counsel in preventive legal planning, risk management, and policymaking.

- (7) Continuing tensions regarding “student consumerism” and student autonomy, as students seek to shape the college experience to their needs and preferences.
- (8) New attempts to understand and protect the concept and the practice of academic freedom—as a custom or policy within individual institutions, as a national academic custom, and, increasingly, as an international norm.
- (9) Increased attention to the status of intercollegiate athletics and to the rights and responsibilities of student athletes, including concerns regarding admissions standards, academic standards, and disciplinary standards.
- (10) Continuing potential for liability problems and public relations problems arising from blogs, chat rooms, file sharing, and other Internet uses and abuses.

Lawrence White has worked for twenty-five years as a lawyer and administrator in the higher education and nonprofit sectors. In 2005 he founded Lawrence White Consulting, a firm that specializes in providing legal, operational and strategic services to institutions of higher education nationally. From 2003 to 2005 Mr. White served as Chief Counsel to the Pennsylvania Department of Education in Harrisburg, Pennsylvania. Prior to that he worked as University Counsel at Georgetown University, Deputy General Counsel at the University of Virginia, counsel to the Board of Regents of the University of Maryland System, counsel to Morgan State University, and Assistant Secretary and Associate Counsel at the American Association of University Professors. He is an adjunct member of the faculty at the University of Pennsylvania Law School, and has also been an adjunct professor at Georgetown University and the University of Pennsylvania’s Wharton School. Mr. White is a member of the National Association of College and University Attorneys (“NACUA”), served as a NACUA director and officer, and in 2001 was selected as a NACUA Fellow for outstanding contributions to the practice of law on behalf of higher education clients. He received his law degree from the University of Pennsylvania and his bachelor’s degree from Harvard University.

One South Broad Street, Suite 1850
Philadelphia, Pennsylvania 19107
(215) 825-4014 (Telephone)
(215) 825-4001 (Fax)
lwconsulting@gmail.com