1989 Annual
Higher Education Law Conference
Materials

IHELG Monograph
89–8


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University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHL/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions—with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholars whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

Programs and Resources

IHELG has as its purpose the stimulation of an international consciousness among higher education institutions concerning issues of higher education law and the provision of documentation and analysis relating to higher education development. The following activities form the core of the Institute’s activities:

Higher Education Law Library

Houston Roundtable on Higher Education Law

Houston Roundtable on Higher Education Finance

Publication series

Study opportunities

Conferences

Bibliographical and document service

Networking and commentary

Research projects funded internally or externally
DIFFICULT AND TROUBLED STUDENTS
IHELG 1989 Annual Conference
May 16, 1989

Nancy S. Footer, Associate University Counsel
University of Houston System

1. Introduction

A. The difficult or troubled student is sometimes hard to recognize and even more difficult to treat. Keep in mind that the issue is not the cause of the behavior or the student's condition; rather, you must consider and act on the student's conduct.

B. A student's conduct becomes an issue when it conflicts with accepted institutional norms. Emphasis should be placed on the best interests of the institution and not on the personal perspective of the individual charged with the duty of enforcing the code of conduct.

C. Remember: no matter how diligent you may be in developing a behavioral code, the code is only as fair and reasonable as the individuals responsible for its implementation.

2. In Loco Parentis

A. Until the student protests of the 1960's and early 1970's, universities were required to assume the role of parents. As a result of the many cases which arose from the protests and the reduction of the age of majority from 21 to 18, universities no longer are required to ensure the safety of their students. Buttny v. Smiley, 281 F.Supp. 290 (D. Col. 1968.)

B. Several recent cases involving assaults on campus have raised the issue of in loco parentis again. However, most observers continue to insist that the concept has no place on today's college campus.

3. Developing a Code of Conduct

A. If you wish to regulate in some way the behavior of your students, you must provide them prior notice of the policy and procedure. In addition, whether you may be a private or public institution, you should institute some procedure for dealing with these problems.

B. Due Process – Public Institutions

1. The necessary procedural safeguards

   a. notice of the charges (Goss v. Lopez, 419 U.S. 565 (1975)).
b. Opportunity to be heard (Goss, supra)

c. Confrontation and cross-examination of witnesses is not mandatory (Dixon v. Alabama State Borad of Education, 294 F.2d 150 (5th Cir. 1961) but many courts suggest that some form of questioning should be allowed (Esteban v. Central Missouri State College, 277 F..Supp. 649 (W.D. Mo. 1967).


e. Legal counsel for student not required (University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. App. 1 Dist. 1984) but courts suggest that when criminal charges are involved or the institution proceeds through counsel, the student should be allowed legal counsel (Gabrilowitz v. Newman, 682 F.2d 100 (1st Cir. 1978), Wasson v. Trowbridge, 382 F.Sup. 912 (2nd Cir. 1967).

f. Transcript is not mandatory (Jaska v. Regents of University of Michigan, 597 F.Sup. 1245 (E.D. Mich. 1984) but a good idea especially if the ultimate decision is to be made by someone not present at hearing (Esteban, supra).

g. Public hearing is not required and should not be allowed due to privacy rights of students pursuant to Buckley Amendment unless the student requests an open hearing in writing.

h. Statement of reasons for decision is not required by all courts.

i. When a student's actions create a real threat to campus safety, the student may be suspended pending a hearing. (Picozzi, supra) However, the hearing must be provided swiftly.

2. Other considerations for your policy: the composition of the hearing panel (faculty, students, and/or staff), student's right to challenge the hearing officer or panel for cause, limited right to appeal, and a designation of prohibited conduct.

3. Sanctions available range from expulsion, suspension, and probation to community service, exclusion from certain school functions and activites, and restitution and fines.

C. Contract Theories – Private Institutions


2. Contract theories in the university-setting are not enforced like commercial contracts. However, courts do expect that the college or
university will provide safeguards which ensure that the student is treated fairly.

D. Practical Considerations

1. Is your code written in plain english? Many codes invoke legal terms which are not within the vocabulary of the average 18 year old.

2. Is your code so rigid that it fails to provide the hearing officer some flexibility in meeting out sanctions? Courts routinely allow institutions to deviate from written policies, so long as the student is afforded fundamental fairness in the process.

3. Do you allow hearings to proceed without the accused present? Frequently students will withdraw rather than appear at hearings at which they may be expelled from school. At least provide that a notation may be placed on the student's transcript if they withdraw while disciplinary action is pending.

4. Is the time frame provided for hearings adequate to prepare but not so distant that the witnesses may forget the facts? Courts routinely uphold 3–5 day notice of a hearing. Is this adequate for a disciplinary matter which has criminal implications?

5. Have you mixed behavioral and academic misconduct? These two types of misconduct do not require the same type of treatment; while academic dishonesty is quasi-disciplinary other types of academic misconduct may not require as much process.

6. Is your policy readily available? You can only enforce that which the students have had access to.

7. Is your code too penal in nature? Student codes of conduct are meant to educate and inform as well as punish.

8. Does your catalog or bulletin provide for removal of students who are disruptive to the learning process? This kind of clause can be invaluable to the instructor.

4. Admission and Re–Admission

A. You are not allowed to inquire about handicaps or other such "problems" in the pre–admission process. 34 CFR § 104.42(b)(4). However, you may ask whether the individual has ever been disciplined for behavioral reasons. Or, many institutions merely ask whether the student wishes to share any information which should be considered in evaluating the application.

B. If you obtain information about prior disciplinary problems which you wish to consider in the admission process, you must advise the prospective student and allow him an opportunity to be heard.

2. Your student discipily code, catalog, and application forms should clearly state that falsification of university documents may result in dismissal and/or denial or cancellation of acceptance.

3. Once admitted and enrolled, the student either has a property right or contract for continued enrollment. If you discover the fraud at this point, you must provide all the elements of due process. North, supra. Keep in mind that this is not an academic dismissal but rather, a disciplinary action.

C. Disruptive or troubled students often obtain a leave of absence from school rather than face dismissal. In this instance, you may condition re-admission on the successful completion of certain conditions. These may include drug or alcohol treatment or counseling. North v. State, 400 N.W.2d 566 (Iowa 1987).

5. Case Studies

A. A graduate student exhibits extremely anti-social behavior; for example, the student threatens the life of several faculty members. The student is marginal academically and a disaster in the classroom. Is this an academic or behavioral problem?

B. You discover that a former student committed fraud in the application process. Your faculty are insistent that you discipline this former student. What are your options?

C. You discover that a student studying education has been convicted of child molestation. You know the student will never obtain a teaching certificate. Do you dismiss the student from school?

D. A student living on campus repeatedly threatens suicide. Your housing officials want to inform the parents. Can they or should they? What other obligations do you have to the student?

E. A undeclared freshman is convicted of DWI arising from an incident which occurred off campus. Can you discipline the student? What if the student is living in the dorms and is convicted of rape, also occurring off campus?

F. A student exhibits bizarre behavior in the classroom, scratching his face until he bleeds, moaning, laughing at inappropriate times. Can you require that the student obtain counseling? Can you remove the student from the class?
G. A student voluntarily leaves school to obtain drug rehabilitation. You condition re-admission on satisfactory completion of a particular program. The student completes the program but, you still are not sure whether re-admission is a good idea. Are you bound by the original agreement?

H. A student in one of your professional training programs misrepresents her credentials in her job off campus. How do you discipline the student?
HIGHER EDUCATION LAW CONFERENCE OUTLINE

May 16, 1989

Financial Aid Issues -- Robert B. Sheridan, Presenter

I. Immigration & Naturalization Records Exchange
   A. 1989-90  (Voluntary)
   B. 1990-91  (Mandatory)

II. Selective Service Registration Documentation

III. Omnibus Drug Control Act Requirements
   A. 1989-90  Pell Grant
   B. 1990-91  All Title IV Programs
   C. Drug Free Work-Place Requirements

IV. Pending Default Prevention Initiatives

V. Q and A Session
RESIDENCY DETERMINATION FOR TUITION PURPOSES
The Application of Complex Rules to Complex Student Circumstances

MAY 16, 1989

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Dean of Student Affairs
University of Houston-Downtown

BACKGROUND

By the late 1800s and the early 1900s, many state-supported colleges and universities had begun the practice of assessing higher tuition rates to their nonresident or out-of-state students. Legislators, wanting to advantage their constituents, assessed nonresidents a higher tuition rate (Elliot, 1936, p. 10). They did so despite the principle of accessibility reflected in their states' statutes and constitutions which favored low or minimal tuition (Chambers, 1972, p. 57). Although the additional revenues from charging higher tuition to nonresidents were small, the practice gained popularity and spread across the states. By 1927, University of Oregon registrar Carlton Spencer (p.332) wrote, "Most of the tax supported higher educational institutions of the United States discriminate among their students in the matter of tuition fees, basing this discrimination on the residence of the students; the purpose being to collect an additional fee from nonresidents."

Basing tuition rates upon residency continues to be commonplace and is unique to state-supported colleges and universities. Unlike private institutions which are funded primarily by tuition and private donations, public institutions depend primarily upon funding from the state and secondarily upon the revenues generated by tuition. The primary source of state funds is taxation. In theory, then, residents\(^1\) have contributed to the tax base and therefore to the state's colleges and universities. Logically, they are entitled to a lower tuition than nonresidents who have made little or no monetary contribution prior to enrollment.

\(^{1}\)A resident is: Any person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature (Black's Law Dictionary, 5th Ed., 1979, p. 1177)
THE PROBLEM

The definition of "nonresident" for tuition purposes has remained fairly constant throughout the years. Most state courts, colleges and universities, define "nonresident" students as those who leave their parents' home or their own homes to attend another state's colleges and universities (Chambers, 1972, p. 59). The definition seems simple and straightforward. In practice, however, determining residency can be complex and difficult. How can students who enter a state to attend college be distinguished from those who enter the state primarily to make their home and secondarily to continue their education? Once classified as nonresidents, should students retain that classification throughout their enrollment? Under what conditions can they be reclassified? Is intent to become a resident a significant factor in determining residency? If so, how can purpose or intent be demonstrated? These questions are significant in determining bona fide state residents.

Varying strategies have been adopted by legislatures, governing bodies of higher education, and individual institutions in distinguishing bona fide residents from temporary residents. As society has changed, so too have the strategies so that today, "the basis for making tuition classification decisions is characterized by a bewildering variety of laws, regulations, criteria, and procedures" (Carbone, 1973, p. 7).

The lowering of the age of majority to 18 in 1971 added to the complexity of residency classification. It meant that students could "declare financial independence...[and] establish residency by means not previously available (as in owning property, acquiring credit, and voting), and...secure a domicile different from their parents" (Olivas, 1983, p. 157). Other changes have also contributed to what Olivas (1983, p. 157) refers to as "a patchwork of residency requirements." The changes have taken the form of special exceptions or exemptions inserted or appended to the original legislation or regulations. This has been especially true regarding "classes of persons who are mobile (military, migrants) or for whom domicile is difficult to determine (aliens, spouses)" (Olivas, 1986, p. 271). Unfortunately, the exemptions and exceptions have themselves become problematic due to their great number and their use to confer residency as a benefit (tuition waivers) without any relation to duration of residence or domiciliary intent (Olivas, 1986, p. 271).

The failure of the states to comprehensively revise residency regulations has increased their complexity without changing their basic structure. As new patterns of mobility, relationships, and expectations about advanced education

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\(^2\)In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense (Black's Law Dictionary, 5th Ed., 1979, p. 160)
evolve, current methods of residency determination are likely to become less capable of distinguishing the unique situations of students and providing them with equitable treatment. The complexity and diversity of residency requirements across the fifty states and the increasingly unique and complex circumstances of students who cross state lines to pursue an education have increased the possibility that within the same state, similarly situated students may be classified differently for tuition purposes. In a 1970 report, the Education Commission of the States (ECS) noted that "the inconvenience and even injustice, to which such dissimilarity [in requirements] gives rise,...is neither in the interest of the students, of the states, nor of the nation" (Carbone, 1970 in Olivas, 1983, p. 158).

THE STUDY


Abstract

The qualitative study examined the process by which the statutes, rules, and regulations governing residency classification in Texas are applied to the complex circumstances of students. A review of the literature on residency classification suggested that the complexity of the residency rules and the complexity of the life situations of students contribute to interclassifier variability in the residency classifications of similarly situated students. The study adopted as an hypothesis that the variability suggested by the literature occurs in the actual practice of classifying similarly situated students.

In addition to the literature on residency, the literature on the behavior of individuals within complex organizations was reviewed. Seven factors were identified that were anticipated to influence the process of residency determination: 1) the complexity of the residency rules, 2) the complexity of student circumstances, 3) coding, 4) structural differences, 5) training, 6) discretion, and

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3Similar: Nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference (Black's Law Dictionary, 5th Ed., 1979, p. 1240). Situation: State of being placed; posture. Position as regards conditions and circumstances; state; condition (p. 1244)
7) satisficing behavior expressed as biases of the residency officers.

A written survey instrument composed of 12 hypothetical students was used to examine the question of whether or not variability occurs in the classification of similarly situated students. The residency officers of 9 Texas public institutions of higher education were asked to classify the hypothetical students for tuition purposes. They were also asked to explain the rationale for each classification they made. Variability was found in the classification of all but one of the hypothetical students.

In addition to examining variability in residency classifications, the study also sought to examine the process by which residency classifications are made. To that end, the residency officers from each of the 9 participating institutions were interviewed by telephone using a moderately scheduled interview. From the data collected, the study identified additional factors that contribute to variability in residency classifications. They included: problems in transmitting residency updates or interpretations; pressure applied to the residency officers by students or individuals such as legislators or college administrators enlisted to advocate on their behalf; lack of clarity in the wording of the statutes, rules, and regulations; the awkward structure of the statutes, rules, and regulations found in the residency manual used by residency officers to make classifications; and the use of "institutionalized rules" by residency officers in their attempt to cope with the complexities of residency determinations.

The study concludes with recommendations for change in the practice of residency classification. Some specific recommendations included: implementation of statewide training sessions for residency officers; the restructuring of the current residency manual; the periodic issuing of updates published and distributed in companion manual form; and the creation of a standard residency questionnaire to be used by all public institutions of higher education in the State of Texas.
SELECTED REFERENCES

Bryan v. Regents of University of California, 188 Cal. 559, 205 Pac. 1071 (1922).


HYPOTHETICAL STUDENT PROFILE SUMMARIES

1a. Sandra H. Livingstone

Facts: The student is a 23 year old married female. She moved to Texas with husband and enrolled in classes within two months as a full-time student. After 12 months in Texas (as a student) she is applying for change of residency based on: 1) 12 months in the state, 2) marriage to a Texas resident (husband was employed full-time and not a student for 14 months after arriving in Texas, 3) claimed by husband as dependent for income tax purposes, 4) lease agreement, 5) voter registration, 6) car registration, and 7) valid Texas Driver's License.

Questions: Does marriage to a Texas resident plus having resided in the state for 12 months qualify her for reclassification despite not having been employed in the state, and having been a full-time student since two months after her arrival? Has she established residency on her own merits as required by the Coordinating Board rule that states, "A nonresident who marries a resident must establish his or her own residency by meeting the standard requirement. (See Individuals over 18)" (p. 8, Rules and Regulations: Residence Status)?
1b. Sandra H. Livingstone

This is the same profile (Sandra H. Livingstone 1a) with one difference. In addition to the facts presented in the first profile, the student and her husband have purchased a home in Texas. She offers documentation of that purchase as further evidence of having established domicile.

2. Gerard L. Brown

Facts: The student is a 22 year old male from Michigan. He has resided in the state for 15 months. He entered state to "look for work," but has been unemployed for 12 of the 15 months in the state. He has local bank account and can produce utility receipts documenting continuous presence in the state. His license plates and registration for his car were issued in Michigan and he is still using a Michigan driver's license.

Question: Does his presence in the state qualify him for residency or must he have worked for a longer period of time? Statute Section 54.052(e) states, "An individual who is 18 years of age or over who has come from outside Texas and who is gainfully employed in Texas for a 12-month period immediately preceding registration in an educational institution shall be classified as a resident student as long as he continues to maintain a legal residence in Texas."

3. Janie M. Schiller

Facts: The student is a 17 year old female who has lived her entire life in Texas. Her parents divorced and her mother was given custody and currently claims her as a dependent for tax purposes. She, however, does not reside with her mother who is now a Florida resident and has been so for almost 2 years. She has continued as a high school student in Texas while living with her grandmother. She has applied for college and is requesting residency for tuition purposes.

Question: Statute Section 54.052(c) states, "An individual who is under 18 years of age or is a dependent and who is living away from his family and whose family resides in another state or has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student." Statute Section 54.055 states, "An individual who is 18 years of age or under who is a dependent and whose parents were formerly residents of Texas is entitled to pay the resident tuition fee following the parents' change of legal residence to another state, as long as the individual remains continuously enrolled in a regular session in a state-supported institution of higher education." She is in transition from high school to college. Does the statute apply?
4. Frank J. Barton

Facts: The student is a 19 year old male. He moved to Texas and entered college two months after entering the state. He is employed full-time as a busboy at a local restaurant and is enrolled as a part-time student. He has resided in the state continuously for the past 14 months and is registered to vote, has his car registered in the state, has a valid Texas driver's license, and has supplied copies of his own income tax records. He is also involved in local civic and charitable organizations.

Questions: Does his employment in the state along with the other documentation he submitted establish his intent to reside in Texas for other than educational reasons? How heavily is full-time employment weighed and does the nature of the employment affect the outcome?

5. Jimmy R. Sanchez

Facts: The student is a 23 year old male. He is a naturalized citizen of the United States who entered the state from Arizona. Almost immediately after his arrival in Texas he secured full-time employment and work for approximately 10 months. After living in Texas for 10 months he enlisted in the military. Three months prior to enlisting he relocated his mother from Arizona to the apartment at which he was residing and paid rent and utilities throughout the period of his military service. While in the military he continued to use the address of the apartment as his permanent mailing address. Upon his discharge he returned to Texas and took up residence in the apartment with his mother. After 2 months back in the state he is registering for classes and is seeking to be classified as a Texas resident for tuition purposes.

Questions: Is the 12 month residency requirement met even though the student physically resided in the state for only 10 months prior to enlisting and 2 months after his discharge. Is the continued payment of rent and utilities sufficient evidence of an intent to be a true resident of the state?

6. Francis N. Ryan II

Facts: The student is a 22 year old male who moved to Texas and enrolled in classes at the university within two months of the move. He paid nonresident tuition for one year and is now seeking reclassification as a Texas resident. Submitted as evidence is a notarized affidavit from an elderly couple stating that they have employed Francis from the time he entered the state. His work responsibilities included care of their lawn and garden, maintenance of two automobiles, regular chauffeur responsibilities, and assisting them with their needs. At any time he was present in the home he was "on
call" and responsible for other routine household chores. The affidavit further states that Francis answered an ad they placed in the newspaper and was one of many candidates they interviewed before making a final selection. They state that they chose to employ him on the strength of the letters of recommendation he presented and on the strength of a personal employment interview they conducted with him. After one year in the state he is seeking reclassification based upon 12 months in the state, being gainfully employed, having registered to vote, and possessing a valid Texas driver's license. Also furnished as evidence are documents showing that he maintains a checking and savings account at a neighboring bank. Because of the non monetary nature of his compensation, he has chosen not to file federal income tax statements.

Questions: Does the nature of his employment qualify as gainful employment? Does the fact of his having been a student while residing in the state for the 12 months combined with the unique nature of his employment negate the possibility of being reclassified to resident status?

7. Natalie M. Pierson

Facts: The student is a 24 year old female. She has been attending college and paying resident tuition because of waivers due to her position as a teaching assistant. After two years on waivers, she has completed her masters and been hired as a member of the schools professional staff. Because she has been in the state for 24 months and now has a full-time professional appointment on the college's staff, she is asking to be classified as a resident while she pursues doctoral courses.

Questions: Is the time in the state while on tuition waivers considered in making a residency determination? Does the acceptance of a full-time professional position establish her intent to be a resident? Must she wait an additional 12 months before being reclassified?

8. Jason H. Bell

Facts: Student is a 19 year old male from outside the state. His father was a military pilot and was killed during an accident. His mother requested him to accompany her to Texas even though he had not been claimed as a dependent and had not been living with his parents for two years. Because of the need to help his mother, he will be living with her. Claiming exemption under Statute Section 54.058(f) which states, "The spouse and children of a member of the Armed Forces of the United States who dies or is killed are entitled to pay the resident tuition fee, if the wife and children become residents of Texas within 60 days of the date of death..." The Coordinating Board rules and regulations, however, state
that "members of the immediate family (which includes spouse or dependent children) of members of the armed forces who dies..." (p. 11). Their classification remains as nonresident but they qualify for a waiver.

Question: Does the fact of the student not having been a dependent for tax purposes or not having lived with his parents disqualify him from obtaining the waiver?

9. Sandra Mitchelleti

Facts: Student is a 19 year old female. She has been living with her grandmother in the state on a year around basis for two and one-half years. While she has been a student for most of that time, she has resided in a home purchased by her mother who is intending to move to Texas. Because of the nature of her work, the mother has lived both in Texas and in New York and maintains homes in both places. She has resided in the Texas residence for 8 months of the year each of the past two years. She has submitted as proof of her intent to reside in the state a letter of employment documenting her having been assigned to open a branch of the business in the state and manage it. While she maintains a Michigan driver's license, she owns a car that is registered in Texas and owns the home in which her mother and daughter (the student) reside.

Question: Do the unique circumstances provide sufficient proof of the intent of residency in the state by the mother? If so, is residency thereby conferred to the daughter who is a dependent and has been living in Texas, albeit as a student, for the past two years?

10. Lawrence Aronowski

Facts: The student is a 22 year old male who entered the United States as a political exile. He has been working full-time in the state as a construction worker since his arrival. He has resided in the state for 14 months. During the first 6 months in the state and the country, his status was as a pending asylee and for the following 8 months he had asylee status. He is now enrolling for classes as a part-time student and is requesting to pay resident tuition.

Question: Does the 12 month durational residency requirement "clock" begin from the time he entered the state or does it begin after he was officially granted status as a political asylee? Does the fact of full-time employment influence his qualification for residency?
11. Carlos Weisman

Facts: The student is an 18 year old male and an entering freshman. Born in Mexico, his parents brought him to the United States at the age of 8. His parents entered the country without documentation. He attended elementary, junior high, and high schools in the state. His presence in the state has been continuous. He has applied for and been accepted to college.

Question: While not in the United States as a legal resident, he has resided in the state for ten years with his parents. Is his domicile established in Texas? Does he qualify for residency for tuition purposes?

12. Kinto Mogabi

Facts: The student is a 25 year old male from Nigeria. He entered the United States on an F-1 visa which expired when he failed to maintain full-time enrollment. He has been residing in the state for the past 6 years while out of status with the Immigration and Naturalization Service. During that time he has been employed full-time and has purchased a home. He is now returning to school as a part-time student.

Questions: While he has met the durational residency requirement of 12 months and has been gainfully employed, can he qualify for payment of the resident tuition rate despite not being in status for immigration purposes?
CLASSIFICATIONS OF THE TWELVE HYPOTHETICAL STUDENTS

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N = Nonresident    R = Resident    - = No classification

INSTITUTIONS

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Profile 3, Institution IIIC, classification -*

The residency officer participated in the pretest. Ambiguity in this profile was corrected prior to its inclusion with the other subjects in the study.

Profile 9, Institution IA, classification R*

The residency officer operated from an assumption that taxes were filed from a Texas address. No other residency officer made this assumption.
SEX DISCRIMINATION AND SEXUAL HARASSMENT
IHELG 1989 Annual Conference
May 16, 1989

Susan L. Wheeler, Associate University Counsel
University of Houston System

I. Basics

A. Laws prohibiting sex discrimination

1. Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C.A. §2000e) prohibits sex discrimination by private and public employers as to hiring, classifying, firing, pay or employment conditions.


3. Title IX of the Education Amendments of 1972 (20 U.S.C.A. §1681) prohibits sex discrimination by any institution of higher education receiving federal financial assistance as to participation, benefits, and programs and activities.

B. Definitions of sexual harassment as type of sex discrimination

1. Unwelcome sexual advances, requests for sexual favors, verbal or written comments, or physical conduct of a sexual nature may constitute sexual harassment when such conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in a university activity, or when such conduct creates an intimidating, hostile, or offensive university environment.

2. Sexually harassing behavior may include, but is not limited to, unwelcome sexual flirtations, advances, or propositions; verbal or written remarks of a sexual nature (whether directed to an individual or to a group), including sexually explicit or offensive jokes; graphic or degrading verbal or written comments of a sexual nature about an individual or the individual's appearance; the display of sexually suggestive objects or pictures; any suggestive or unwelcome physical contact; or physical assault.

II. Specific problems

A. Common misconceptions about sex discrimination

1. The complaining party need not be female.
I. IRCA/HEA reauthorization

Eligibility of TRS for Title IV aid:

Students undergoing legalization were made eligible for Title IV, provided they hold an I-688 (Dear Colleague letter, June 1987)

INS took a different view:

Notified 4 regional commissioners that Title IV aid used for subsistence would be considered "public cash assistance" (CO-1588-P, 23 September 1987)

Institutions and students discover discrepancy:

In Spring 1988, the different interpretations became evident; ED requests clarifications (ED to INS, 13 April 1987). Articles appear in Chronicle of Higher Education, 1 June 1988; Education Daily, 26 May; Houston Chronicle, 13 June. INS waffles.

MALDEF prepares demand letter, 15 June 1988

Issues

- Congressional intent
- "satisfactory immigration status"
- chilling effect

II. Residency under INA, IRCA, IMCA

How do the Immigration Marriage Fraud Amendments affect residency?

In Texas, AGO-JM-845 ruled that aliens with permanent resident status on a conditional basis (those married to citizens or other permanent residents, subject to 2 year waiting period) are entitled to become Texas residents for domicile tuition purposes. (See also, JM-241: aliens
permitted by Congress to adopt U.S. as domicile must be accorded all privileges as permanent residents)

How are G-aliens (as in Toll v. Moreno) affected? There is a new category (N) for longtime G residents.

Can fiancées be considered "residents"?

In Texas, as in most states, fiancées are deemed to have the requisite intention to establish a domicile with their future spouse, and can meet residency requirements (1986 memo from INS to Texas Coordinating Board)

Can a school district charge tuition to the children of foreign students (F-1 visa holders)?

In Pena v. Atlanta, 620 F. Supp. 293 (N.D. Ga. 1985), the Court struck down the Atlanta Public School practice of charging tuition to aliens holding B, F, H, I, J, and L visas. In Texas, the Arlington School District attempted to charge tuition to children of F-1 students who resided in the district. The Texas Commissioner of Education ruled that the practice was "not in accordance with Texas law defining residency," and was unconstitutional on 3 grounds: irrebuttable presumption, due process, and equal protection. Islam v. A.I.S.D., Tex. Comm. (ED) 068-R8-1287 (11 May 1988).

Following Arizona AGO 187-139, postsecondary institutions in Arizona were ordered to allow undocumented college students to establish domicile for tuition. Judith "A" and Raul "C" v. Arizona Bd. of Regents, Superior Court, Maricopa County, CV 87-215 79, 23 November 1987.

In Gutierrez v. Hayward, a similar case against the California Community Colleges was settled in 1987; the UC and CSU systems had lost on the same issue in Leticia "A" v. UC Regents (1985). U.S. Dist. Ct. (E.D. Cal., No. 5-800274-EJG, 7 December 1987).

III. Studies Concerning IRCA/Education/Student Loans

1983, Noncitizen Student Loan Defaults (GAO/HRD-83-29), a 1982 study of financial aid awards at Chicago-area colleges:

"We are not able to make general conclusions on the effect of noncitizen defaults from our limited work. However, we believe the effect of noncitizen defaults on overall default rates was not significant at the schools visited. Noncitizen loans made up a small portion of total loan volume, and noncitizens with defaulted loans did not appear to be leaving the country in significant numbers." (p.7)
1987, Immigration Reform: Systematic Alien Verification System Could Be Improved, GAO/IMTEC-87-45BR;


"INS estimated $579,000 in savings during the period for education programs, mostly in Florida and New York. One agency we contacted, the New York State Higher Education Services Corporation, estimated annual savings of over $200,000 for the state's fiscal years 1985 and 1986 (Apr. 1-Mar. 31), resulting from verifying with INS all alien education assistance applicants at selected schools. None of the other institutions we contacted estimated savings related to their verification efforts.

States and federal program officials questioned INS's cost avoidance estimates. These officials told us that INS's cost avoidance data are incorrectly calculated, using a mix of actual, average, and maximum benefit amount and recipiency periods.... Education officials told us that INS's reported savings for individuals in New York that were in excess of the $2,500 maximum amount available to students through the Guaranteed Student Loan program were probably erroneous." (pp. 28-29)

1988:

"The immigration documentation of applicants for higher education assistance is reviewed by financial aid officials at the institution which the applicant attends. At the time our audit work was performed, there was no requirement for the verification of immigration status of applicants for federal higher education assistance with the INS. Only one institution we contacted submitted information concerning alien applicants for financial aid to INS for verification. During the 6 month period which we examined, the status of 124 alien applicants from this institution were verified with INS. Of these, INS found 43 to be in an unsatisfactory immigration status. Since other verification is performed prior to the determination for which particular programs a student is eligible, an analysis by program is unavailable.

Only 2 of the 107 secondary verifications we
In the other, the INS computer data base was incorrect. The applicant was a legal permanent resident who was eligible for assistance."

Letter from Associate Director, GAO to Michael Olivas, 18 February 1988.


IV. Tuition Differentials for Foreign Students

At least 2 states (Massachusetts and Louisiana) have differentials to charge foreign students higher tuition from that charged other non-resident students. (VCHE, 13 May 1988 Survey of Admissions Policies). In Massachusetts, this law is being challenged, as it certainly will be in Louisiana; both states enacted the charges by amending 1987 budget bills. "Foreign Students Now at Mass. Colleges Exempted from Full-Cost Tuition Plan," Chronicle of Higher Education, 16 September 1987, p.28.

V. Revisions to Student (F-1) Regulations

Summary of Changes to CFR 214.2 (f), 214.3 (g):

Designated school official given additional discretion and reporting responsibilities

Practical training period doubled to 24 months

"Curricular" Practical Training is a new category for required or optional practicum coursework.

Transfer of schools has been simplified to allow students to move more easily between institutions; the primary responsibility for notifying INS is with the receiver college.

Change of status from Practical Training to H-1 remains similar to earlier provisions; the proposed regulations to restrict the practice were withdrawn.

Adam Green, The Revised F-1 Student Regulations (Houston: IHELG, 1987); reprinted in Immigration Journal, 10 (September
1987), and (October-December 1987). [In addition, Rep. Mazzoli's "efficiency bill" (H.R. 2921) would substantially alter the H-visa provisions, Sec. 101(a) 32, particularly the "member of the professions" definitions.]

VI. Other Pending Issues for Higher Education

Farzad, Ayuda, and other IRCA litigation (who is "known" and who is "the government"?)

TRS English proficiency instruction


Xenophobia on campus and in legislatures

Ideological exclusions
Laws pertaining to the Handicapped on Campuses

A. 29 U.S.C. § 794 (§504 of the Rehabilitation Act of 1973) provides that "no otherwise qualified handicapped individual in the United States ...shall, solely by reason of...handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 34 CFR 104.4(a).

1. Handicapped Persons

This coverage extends to persons who are handicapped as well as persons who have a history of a handicapping condition and persons perceived by others to be handicapped. 34 CFR 104.3(j).

A handicapped person is anyone with a physical or mental impairment that substantially impairs or restricts one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 34 CFR 104.3(j).

a. Specific examples of physical or mental impairment

speech, hearing, visual and orthopedic impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, diabetes, heart disease, mental retardation, emotional illness, and specified learning disabilities such as perceptual handicaps, brain injury, dyslexia, minimal brain dysfunction and developmental aphasia.
b. alcoholism and drug addiction receive special treatment

The status of alcohol and drug abusers as they relate to employment ". . . does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

c. Diseases as Handicapping Conditions


(2) Exceptions: 29 U.S.C. §706 (7)(8)(C) was amended to read that this section does not apply to ". . . an individual who has a currently contagious disease or infection and who . . . would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job."

(3) Burden of Proof – To determine "otherwise qualified" the court will look at a) The nature of the risk (how the disease is transmitted); b) the severity of the risk; and c) the probability that the disease will be transmitted and will cause varying degrees of harm. School Board of Nassau

4. Applications: A teacher diagnosed with AIDS did not have to disprove every possible harm to get preliminary injunction for reinstatement. Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988); Martinez v. School Board of Hillsborough County, Florida, 861 F.2d 1502 (11th Cir. 1988) (remote, theoretical possibility of transmission of AIDS from tears, saliva and urine of mentally handicapped child with AIDS did not support segregation of child from regular trainable mentally handicapped classroom in elementary school.

2. Program or Activity

The regulation applies to all recipients of Federal financial assistance from the Department of Education. Recipients include state education agencies, elementary and secondary school systems, colleges and universities, libraries, vocational schools and state vocational rehabilitation agencies. 34 CFR 104.3(f); 104.41.

Civil Rights Restoration Act of 1987 amends §504 to provide that a program or activity means all of the operations of a college, university or other post secondary institution on a public system of higher education.

Some specific programs and activities: recruitment, admission, academic programs, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation. 34 CFR 104.42 - 47.

3. "Otherwise Qualified" Persons

§504 covers only those handicapped persons who are otherwise qualified to participate in and benefit from the programs or activities receiving Federal financial assistance.
For purposes of post-secondary and vocational education services, a qualified handicapped person is a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity. 34 CFR 104.3(k)(3). Southeastern Community College v. Davis, 442 U.S. 397 (1979) (an otherwise qualified handicapped person is one who is able to meet all of a program's requirements in spite of the handicap).

a. Meaningful Access and Reasonable Accommodations

Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985) (clarifying Southeastern Community College v. Davis that an otherwise qualified person must be provided meaningful access, and to provide meaningful access, reasonable accommodations in the program or benefits must be made.

b. Burden of Proof

Brennan v. Steward, 834 F.2d 1248 (5th Cir. 1988). Reasonable accommodations is a fact issue, not an issue of law. Defendant must show that the requirements are reasonable. Plaintiff then must show that some reasonable accommodations can be made which would meet his or her special needs without sacrificing the integrity of the program (i.e., a prima facie case). Defendant would then have the burden to show legitimate, non-discriminatory reasons for the denial of accommodations.

Good sense prevails - if course or program can be modified, it must be. If course or program cannot be changed because it is an essential component, then the handicapped person who cannot meet that requirement is not otherwise qualified.
4. Testing

Admissions tests or criteria that have a disproportionate, adverse effect on handicapped persons are prohibited unless validated as a predictor of academic success in the education program or activity in question, and alternate tests or criteria that have a less disproportionate, adverse effect are not available. 34 CFR 104.42(b)(2).

Recipients must assure themselves that any admissions test, administered to an applicant who has a handicap that impairs manual sensory or speaking skills, accurately reflects the applicant's aptitude, achievement level or other factors the test purports to measure, except where those skills are the factors the test is designed to measure. 34 CFR 104.42(b)(3).

5. Specific obligations (34 C.F.R. 104.4(b)).

   Handicapped students must be afforded:

   a. an equal opportunity to participate in and benefit from all post-secondary education programs and activities, including education programs and activities not operated wholly by the recipient. 34 CFR 104.42(a), 104.43.

   b. the opportunity to participate in any course of study, or other part of the educational program offered by the recipient. 34 CFR 104.43.

   c. modification of academic requirements, on a case by case basis, such as length of time permitted for completion of the degree requirements (academic requirements that the recipient can demonstrate are essential will not be regarded as discriminatory). 34 CFR 104.44(a). Institution need not make substantial modifications or fundamental alterations in the nature of the program to allow participation. Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979).
d. the opportunity to tape record lectures, use guide dogs, or use such other auxiliary aids to enable them to benefit from the educational program or activity. 34 CFR 104.44(b).

e. the opportunity to benefit from comparable, convenient and accessible recipient housing, at the same cost as it is available to non-handicapped students. 34 CFR 104.45.

f. the opportunity to benefit from financial assistance, such as scholarships, fellowships, student loans, or other forms of assistance. 34 CFR 104.46(a).

g. the opportunity to benefit from programs that provide assistance in making outside employment available to students. 34 CFR 104.46(b).

h. the opportunity to participate in intercollegiate, club, and intramural athletics. 34 CFR 104.47(a).

i. the opportunity to benefit from counseling and placement services in a non-discriminatory manner. 34 CFR 104.47(b).

B. Employment Implications

Discrimination under §504 is prohibited in employment, as well as in education, offered by recipients. Thus, a recipient that employs any of its students may not discriminate against handicapped students in such employment. 34 CFR 104.11.

1. A qualified handicapped person is a person who, with reasonable accommodation, can perform the essential functions of the job in question. 34 CFR 104.3(k)(1).
2. Examples of employment related decisions to which the Act applies:

Recruitment, hiring, promotion, award of tenure, layoff and rehiring, compensation, job assignments, leave, fringe benefits, training, and employer sponsored activities. 34 CFR 104.11(b).

3. The prohibition applies to employment related decisions made by the recipient directly as well as decisions made by the recipient indirectly through contractual arrangements or other relationships with organizations such as employment agencies, labor unions, organizations providing or administering fringe benefits, and organizations providing training and apprenticeship programs. 34 CFR 104.11(a)(4).

4. Reasonable accommodations must be made for the qualified handicapped employee to enable him or her to perform the essential functions of the job, unless the employer can show that the accommodation would impose an undue hardship on the operation of its program. 34 CFR 104.12.

5. Reasonable accommodations include:

making facilities used by employees accessible to and usable by handicapped persons, job restructuring, modified work schedules, acquisition or modification of existing equipment, provision of readers or interpreters. 34 CFR 104.12(b).

The burden of proof is on the employer to present credible evidence that a reasonable accommodation is not possible in a particular situation. Hall v. U.S. Postal Service, 857 F.2d 1073 (6th Cir. 1988).

6. Use of employment tests or other criteria that screen out or tend to screen out handicapped persons are prohibited unless shown to be job-related for the positions in question and alternative tests or criteria are not available. 34 CFR 104.13.
C. Pre-employment/pre-admission Inquiries

1. Pre-employment or pr-admission inquiries as to whether the applicant is handicapped are not allowed. 34 CFR 104.14(a); 104.42(b)(4).

2. May inquire into applicant's ability to perform job. 34 CFR 104.14(a).

3. May, after admission, make inquiries on a confidential basis as to handicaps that may require accommodations. 34 CFR 104.42(a)(4).

4. When recipient is taking remedial action to correct effects of past discrimination under 104.6(a), or taking voluntary action to overcome effects of conditions that resulted in limited participation by handicapped persons under 104.6(b), recipient may ask applicants to indicate whether and to what extent they are handicapped. 34 CFR 104.42(c); 104.14(b).

5. Safeguards: (1) statement of purpose of question must be made; (2) applicant must be informed that response is voluntary; (3) information will be kept confidential; (4) refusal to answer will have no adverse effect on applicant; and (5) information will be used for no other purpose than for remedial action outlined. 34 CFR 104.14(b)(1),(2); 104.42(c)(1),(2).

6. Can conduct physical examination of handicapped person prior to starting employment provided all applicants are required to have physical. 34 CFR 104.14(c).


1. No state action required.
2. Who is handicapped?

The test for determining if a person is handicapped within the meaning of the Human Rights Act is whether the disability is one which is generally perceived as severely limiting an individual in performing work-related functions. *Chevron Corp. v. Redmond*, 745 S.W.2d 314 (1987) (holding that blindness in one eye and inability to judge distances was not handicap).

3. Reasonable accommodations required?

Language of statute says "...if the person's ability to perform the task required by a job is not impaired by the handicap and the person is otherwise qualified for the job."

E. Section 121.001, et seq. of the Texas Human Resources Code prohibits discrimination of the handicapped in the use and enjoyment of all public facilities available in the state. §121.003(a). Applies to education and employment?

1. Public facilities defined - no state action required.

Public facilities includes "streets, highways, sidewalks, walkways, all common carriers,...public buildings maintained by any unit or subdivision of government, buildings to which the general public is invited, college dormitories and other educational facilities,...and all other places of public accommodation, amusement, convenience, or resort to which the general public or any classification of persons from the general public is regularly, normally or customarily invited." §121.002(3).

2. Handicapped person defined

"...a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health
impairment which requires special ambulatory devices or services. §121.002(4).

3. Public policy

Section 121.003 declares the policy of the state to employ handicapped persons in state offices, political subdivisions of the state, the public schools, and "...in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved."

4. Criminal penalties for violation of the statute punishable by fine of not less than $100 and not more than $300. §121.004(a).

5. Provides for cause of action for damages for deprivation of civil liberties for violation of the statute, with presumption of damages of at least $100.00. §121.004(b).

6. Testing

a. May use test to measure individual abilities, but not specific disabilities. §121.010(a).

b. Alternate form of testing to measure aptitude of examinee by using that person's primary learning mode. §121.010(b).

c. Use of alternate form of testing may include oral or visual administration, oral or manual response, use of readers, tape recorders, removal of time constraints, multiple testing sessions. §121.010(c).

d. Test must reflect the factor it intends to measure and not the examinee's impaired sensory, manual or speaking skills. §121.010(d).
e. Prohibits use of a test that has a disproportionate adverse effect on handicapped persons unless the test has been validated as a predictor of success in the program or activity for which the handicapped person is applying and alternate tests that have a less disproportionate adverse effect do not exist or are not available. §121.010(e).

BIBLIOGRAPHY


