Journal of Student Financial Aid

Volume 12 | Issue 3 Article 2

12-1-1982

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Few administrative operations in higher education have as many legal dimensions as the student financial aid office. Because of the increased concern over "creeping legalism" in education, generally, and because of the emerging range of legal issues in student financial aid, specifically, it is critical to address the question of how financial aid administrators can do their jobs effectively with the spectre of the law always hanging over their shoulders.

The immediate answer is that while it is not possible to escape the trend of creeping legalism, the student financial aid officer or counselor can become educated as to how the law affects his/her job, and learn perhaps how to lessen the risk of some legal difficulties.

The basic knowledge which the adminstrator should possess about the law consists of a number of elements. These include: some theoretical understanding of how the legal system works, some knowledge of how to read the requirements and regulations affecting financial aid, some feel for how to interact with lawyers and the legal system, and some awareness of the specific substantive law and legal issues affecting the operation of the office.

Major Sources and Principles of Law

There are many sources of law directly affecting what college administrators do in their jobs. These include the federal and state constitutions, statutes and regulations, case law and administrative rulings. In addition, institutional rules and regulations, institutional contracts, institutional custom and usage are used to determine legal rights and duties in the higher education context.

It can be observed that there are certain operative principles in the law which determine how legal issues or disputes are framed and resolved. Among them are the following:

- — laws and legal principles are formulated, changed and eliminated in response to societal needs;
- — the legal system in its legislative, judicial and administrative dimensions represents a means of determining rights and duties under the law and the existence of legal liability and legal remedies;
- — the judicial system is adversarial in that issues are resolved through the use of advocates;
- — courts are guided by various sources of law in their decision making process, e. g. in the use of case precedent *(stare decisis);*
- — the process of developing case precedent often involves the courts in balancing conflicting social interests and legal principles;
- — courts are often required to interpret statutes and regulations in resolving legal disputes.

Each of these concepts or principles has implications for administration. For instance, both the institution and the students have rights and duties. A student loan

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arrangement, for example, creates mutual obligations which are legally defined. In a student loan agreement the institution must provide the designated support, and the student must repay the loan pursuant to the terms of the agreement, i. e. contract.

It follows that the existence of corresponding legal rights and duties establishes certain guidelines in the administration of programs and in the manner in which institutions deal with students. Further, illustrations of the corresponding rights and duties concept will be demonstrated throughout the article.

Specific Legal Aspects of the Job

1. Dealing with programmatic requirements

A survey by M. Galvez and A. Olinsky[1] indicates that 72% of financial aid administrators polled felt that they needed most training in the area of compliance with state and federal regulations.

The problem seems quite clear. The financial aid administrator must deal with an enormous body of regulations which are periodically and sometimes unexpectedly changed (sometimes without any consideration of how the regulations are to work in a particular context) and which are written in sometimes complicated legalese.

While the problem seems clear, the solution is not as obvious. Perhaps the best that can be offered is some general advice on the matter. Some suggestions for dealing with programmatic requirements are as follows:

- have a system for receiving word about relevant changes, for reviewing those changes (perhaps with counsel), and for educating the staff about them;
- become thoroughly familiar with the regulations;
- read them carefully in the light of common sense and common meaning;
- contact the agency which issued the regulations or institutional counsel, if you do not understand something;
- comment on regulations both before and after they are issued;
- let government officials know when the regulations are unworkable or in conflict with other requirements;
- periodically review (with cousel) all pertinent regulations and procedures for handling them.

2. Interacting with legal counsel

While there are variations in the availability and types of legal advice for any particular financial aid office operation, one fact seems evident. Financial aid officers are the experts in matters of the administration of the programs. Even if institutional counsel is very bright and knowledgeable about the law on financial aid, it will be necessary to educate him or her about the program. In any case it is important that a good working relationship be established with counsel.

Arguably, the main function of institutional counsel is to help the office stay abreast of the regulations and other legal mandates. In addition, he or she can assist the office in establishing preventive measures which can reduce the risk or potential of legal difficulties. A third major function of legal counsel is to help when legal difficulties do actually emerge.

It goes almost without saying that if there is the hint of a real or potential legal problem, institutional counsel should be contacted immediately.

Typically the first thing the attorney will ask is, "What are the specifics of what happened?" While he or she may not be able to give an instant answer to the legal

[1] M. Galvez and A. Olinsky, "Financial Aid Administrators, Who Are They and What Are Their Training Needs" *Journal of Student Financial Aid, 10* (1980), p. 29.

status of the problem, some advice may be given as to what the officer's immediate posture should be. For instance, if a student has said that he will be having his lawyer call the office, counsel may suggest that if he does, he should be instructed to get in touch with the university attorney.

3. Handling a law suit

If the office finds itself in a law suit, the best advice is to refrain from panic. Under no circumstances will the financial aid office be asked to go it alone; and with proper legal representation, everyone will come through it okay.

It is most likely, however, that some extra strain will be placed on the office's already high pressure existence. That means that somehow, someone on the staff will have to find the time to assist in preparation for trial, if it goes that far. For instance, it may be necessary to assemble background documentation, fill out lengthy interrogatories, etc.

As to the risk of personal liability, if financial aid officers are honest and diligent about doing their jobs, it seems unlikely that they will be personally liable, although as agents of the institution they could be listed as co-defendants. It is also likely that they will be "saved harmless" in the case of assessment of liability because officers, as agents of the institution, are typically covered under institutional liability insurance.

Public sector student aid officers should especially be aware of the Civil Rights Act of 1871 (42 U.S.C. 1983) which does provide a personal cause of action against any "person who, under color of [state action] subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured" by the law. Thus, for example, the "arbitrary and capricious" cutting off of a student's aid as a disciplinary measure without notice or hearing could give rise to a section 1983 suit and possible assessment of personal liability against a financial aid officer. (See *Wood v. Strickland*, 420 U. S. 308 (1975).)

Legal Issues in Student Financial Aid Administration

The law of contracts, estates and trusts, and constitutional law, as well as a range of specialized legislation and regulations, form a basic body of substantive law which is applicable to the administration of student financial aid. In the example mentioned earlier of the legal aspects of a student loan, one can observe that such a loan involves a legal relationship which is covered by the law of contracts. The agreement is also subject to a variety of federal and state regulations. For instance, some regulations dictate what information must be given the student regarding the loan. Others describe the effect of a declaration of bankruptcy and discharge of debts on the institution's attempt to secure repayment of a student loan. It may be valuable to look at some specific issues.

1. Nondiscrimination in the administration of the program

Several sources of federal law have dictated that student financial aid programs be administered in a manner which will not discriminate on the basis of criteria such as race, sex, and age. One major source, particularly as it regards public sector higher education, is the fourteenth amendment's equal protection clause, which proscribes the creation of laws which provide for different treatment for different classes. Also, a number of federal statutes have focused specifically on particular types of discrimination. These statutes are equally applicable to the public and private sector schools which receive federal assistance. Among them are:

— The Civil Rights Act of 1964, Title VI (42 U.S.C. 2000d) (race);

— The Education Amendments Act of 1972, Title IX (20 U.S.C. 1681) (sex);
— The Rehabilitation Act of 1973, section 504 (29 U.S.C. 794) (handicap);
— The Age Discrimination Act of 1975 (42 U.S.C. 6101) (age).

Each of these statutes indicates respectively that programs and activities receiving federal funding are not to discriminate on the basis of race, color or national origin (Title VI), or sex (Title IX), or handicap (section 504), or age in the administration of student financial aid. A series of regulations and agency memoranda have been promulgated pursuant to each of them. Their purpose is to spell out how the general policy is to be implemented and describe any so-called exceptions to that policy (e.g., that a scholarship fund established pursuant to a charitable trust or bequest may create a sex restriction and be applied accordingly, provided the overall program is not administered in a discriminatory fashion).

One thorny problem, which faces any school attempting to achieve affirmative action goals, emerges with respect to the prohibition against nondiscrimination. Affirmative action, which is not clearly defined in the regulations, creates a preferential treatment in programs or benefits for minority students. Affirmative action, however, if improperly implemented, can create "unequal treatment," the basis for a charge of reverse discrimination.

The intricacies of this legal dilemma have not only created administrative difficulties but also have resulted in some litigation. (See *Flanagan v. Georgetown College,* 417 F. Supp. 377 (D.D.C. 1976), where affirmative action program of law center which supplied minority students with 60% of total scholarship aid was found to violate Title VI and constituted reverse discrimination.)

How can the two concepts, nondiscrimination and affirmative action, be reconciled? One suggested argument is that nondiscrimination requires neutrality of treatment but that in order to bring conditions into a neutral position, it is necessary to require or permit preferential treatment to remedy past or existing inequalities. In practice, it has been difficult to identify the proper course to follow in this instance simply because guiding legal principles have not been fully developed. Nonetheless, legal counsel can assist in avoiding some of the pitfalls.

2. Student records and the Buckley Amendment

The Buckley Amendment, otherwise known as the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g), and its implementing regulations apply to all public and private institutions receiving federal funds. Its main provisions:

— give the student the right of access to educational records;
— give the student the right to challenge the content of his/her records;
— regulate the disclosure of "personally identifiable" information from the records;
— provide recourse to the student and the federal government for violations of the act or regulations.

It seems that financial aid records have been partly exempted from the disclosure restrictions. Personal information can be disclosed, without a student's consent, to the extent necessary for purposes such as determining student eligibility for financial aid, amounts of aid, imposition of conditions, or enforcing the terms or conditions of aid. (45 C.F.R. 99.31 (a) (4).)

3. Student consumerism issues

The Education Amendments Act of 1976 (20 U.S.C. 1088b) and implementing regualtions (45 C.F.R. 178) require that certain student consumer information be

available upon request by prospective or currently enrolled students. Specifically, institutions which receive federal aid must have a complete list of information regarding the institution's financial aid program. In addition, to this Act, institutions must comply with any state or federal truth-in-lending mandates. The Consumer Credit Protection Act of 1968 (15 U.S.C. 160), for instance, establishes certain federal requirements with respect to truth-in-lending obligations for student loans.

4. Collection of student debts

As stated previously, basic contract law governs student loan agreements, but in addition, special legislation has been enacted regarding the collection of student loans. For instance, whether a loan is collectable may be affected by a discharge of loans under the federal bankruptcy law. As of 1979, some amendments to the law have provided greater protection for college sponsored loans by shielding them from discharge in bankruptcy.

If a defaulted loan is not discharged under the bankruptcy law, the institution may resort to the legal machinery to enforce repayment. Assuming, however, the loan has been discharged in bankruptcy, the institution is precluded from pursuing legal recourse. The question remains whether it may use informal methods, such as withholding certified transcripts, as a means of securing payment. The answer seems to depend on whether the school is public or private. (See *Girardier v. Webster College*, 563 F. 2d 1267 (8th Cir. 1977), where it was held that the act does not prohibit a private institution from withholding a certified transcript; see also, W. Millsap and P. Wright, "Recent Cases on Student Rights After Bankruptcy," *Journal of College and Law*, vol. 6, p. 231, 1979; see further, J. Bissell, "Brief for Appellant in *Handsome v. Rutgers University*," loc. cit., p. 241.)

Summary

This brief introduction to legal issues in the law of student financial aid has not exhausted the range of legal problems which could be encountered. It has, however, supplied some insights into the environment of the law in the context of running a college financial aid program.

One can minimize the risk of legal problems by becoming knowledgeable about the substance and procedures of the legal system and taking preventive measures in line with that knowledge. Once can become educated by reading some of the excellent source materials which are available (see general references), participating in a regular program for discussing the issues such as at professional conferences, and by regularly interacting with institutional legal counsel.

The main advice which should emerge from this article is that financial aid officers should not be like the ostrich. They should not permit some fear of the law to detract from the performance of their high calling. It is only necessary that one uses good common sense and informed judgment in the daily operations of the financial aid office. The legal headaches should be left for the lawyers. After all, that is what they get paid for.

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