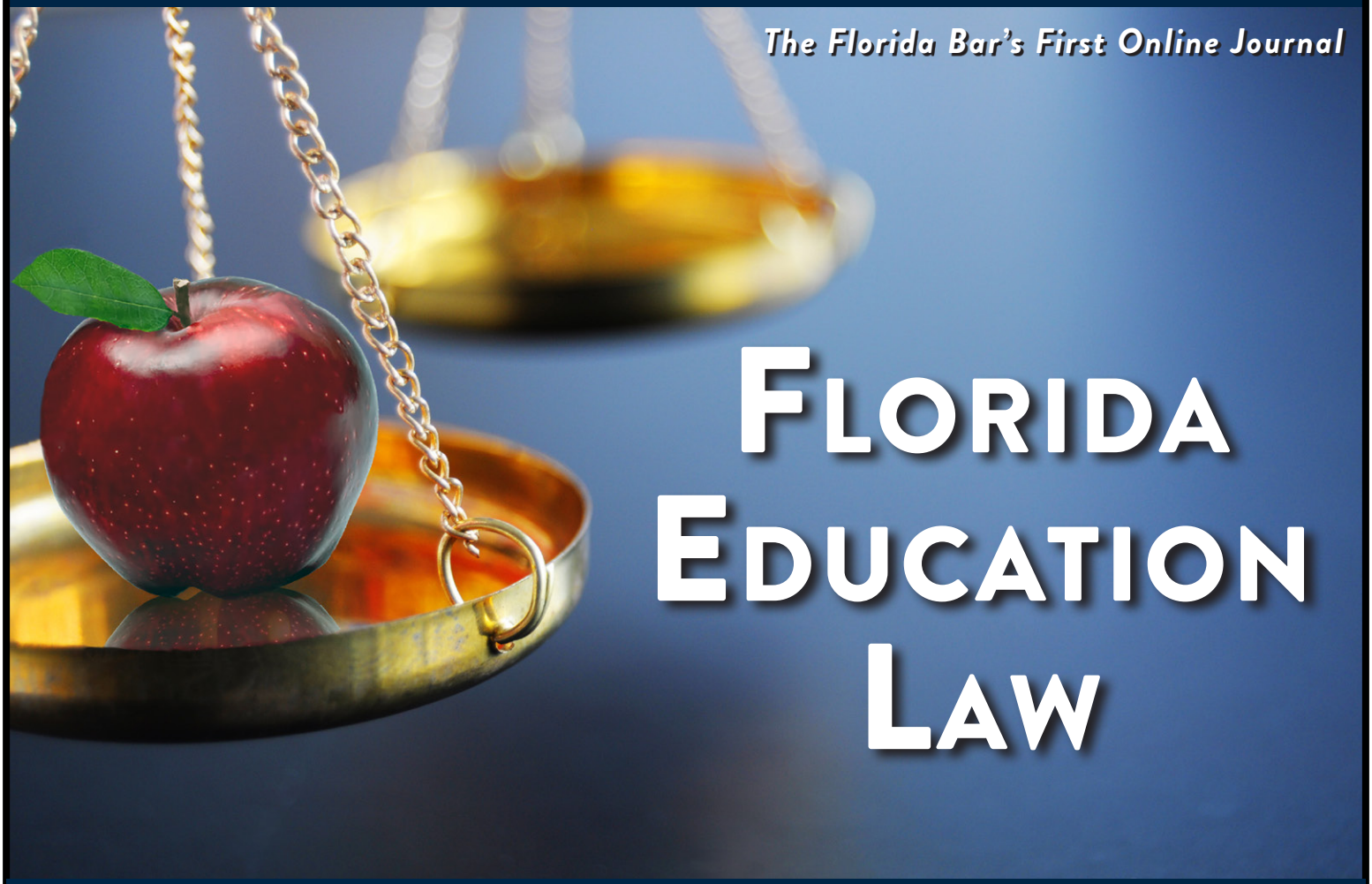
THE FLORIDA BAR EDUCATION LAW COMMITTEE



The Florida Bar's First Online Journal

FLORIDA EDUCATION LAW

Volume 2, Issue 1
Fall 2019

INSIDE:

Message from the Chair

by Nathan A. Adams, IV

Imagine an education law practice where lawyers on both sides of pleadings shared mutual respect out of a common commitment to professionalism in the practice of education law and subject matter mastery. What if there were education law practitioners instead of tribes of IDEA, charter school, school choice, school board, Title IX, and college or university practitioners. Imagine if we could jointly propose or endorse solutions to complex education problems or at least respectfully review each other's proposals. What if the first call that in-house education lawyers made was to other education committee and board certified education lawyers and vice-versa to try to work out problems. Imagine if we hired or referred first to other education lawyers with whom we had developed relationships for education legal problems rather than to attorneys without the same commitment to the practice of education law?

These are some of the goals of the Education Law Committee in 2019-20. Toward these ends, we are single minded in pursuit of **growing the committee** and number of certified education lawyers not for growth's sake but as a means to achieve these important objectives. Simply put, there are not enough of us on the bench to move the needle, but you can make a difference. Participate in an event if you are not yet a member and if you are a member ask your colleague to do so or your attorney association to co-sponsor an event with us.

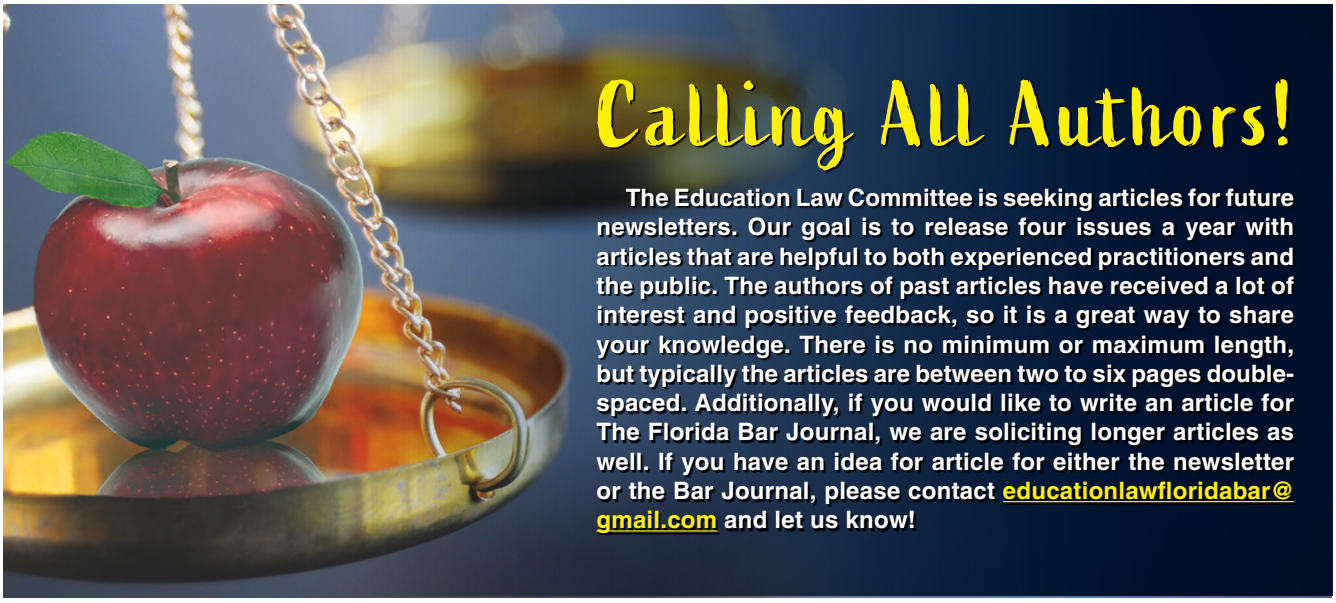
We are going to do our best to make participation easier by coming to where you already are meeting. Look for jointly sponsored CLE with the Florida School Boards Association and Association of Florida Colleges. We will also sponsor an exam preparation session in early 2020 for those who want to take the next step and become board certified in education law. We will do this while still conducting traditional business meetings and CLE at the October and June Florida Bar meetings.

Florida is one of just a few states that has a bar committee dedicated to enhancing the professionalism and practice of education law at all levels. Let's take advantage of it as the list of problems that we all face continues to grow.

I am privileged to serve you and The Florida Bar this year with Vice-Chairs David D'Agata, responsible for CLE; Joy Smith-McCormick, responsible for publications; and Jane Windsor, responsible for membership. Thanks to each of them for their invaluable contribution.

Please feel free to reach out to any of us with your recommendations. In particular, we are always looking for CLE ideas, speakers and articles. For more information on upcoming events, please visit our website at http://bit.ly/FlaBarEdLaw.

***Nate A. Adams, IV**, is a partner with Holland & Knight LLP and Florida Bar board certified education lawyer.*



Showing of Interest Requirements in Adjunct Faculty Unionization Efforts

by Hearing Officer Lyyli Van Whittle

Most post-secondary educational institutions in Florida, such as state colleges and universities, have had unions representing their faculty and professors for decades. Historically, however, adjunct faculty were often excluded from these bargaining units because they did not share a community of interest with the more permanent faculty. Hence, adjunct faculty have not typically been represented by unions. Since 2016, the Service Employees International Union (SEIU), Florida Public Services Union (FPSU), Change to Win (CTW) has been attempting to organize these groups and has sought certification as the bargaining agent for units of adjunct faculty. The Public Employees Relations Commission has certified units at a number of state colleges and universities. After holding elections, adjunct faculty at Hillsborough Community College, the University of South Florida, Broward College, Seminole State College, and Lake Sumter State College voted in favor of forming a union. At South Florida State College and Santa Fe College, adjunct faculty voted against forming a union. Cases involving St. Petersburg College and Valencia College are currently pending before the Commission.

One of the frequently litigated questions in these adjunct faculty cases involves whether the union has demonstrated a sufficient showing of interest. Specifically, section 447.307(2), Florida Statutes (2019), requires representation-certification petitions to include dated statements signed by at least thirty percent of the employees in the proposed unit, indicating that such employees desire to be represented for the purpose of collective bargaining.

Recently, FPSU filed a petition seeking to represent a proposed bargaining unit of part-time adjunct faculty employed by Miami Dade College teaching at least one college-credit bearing course but excluding any adjunct faculty in the School of Nursing. *See Service Employees International Union (SEIU) Florida Public Services Union (FPSU), Change To Win (CTW) v. Miami Dade College v. United Faculty of Miami Dade College, FEA, AFL-CIO, AFT, Local 4253*, Case No. RC-2018-026, 45 FPER ¶ 232 (2019). The College filed a response that challenged the sufficiency of the showing of interest and also contended that an appropriate unit should include part-time instructors, as well as the adjuncts and instructors in the School of Nursing. The College subsequently filed a timely motion for administrative review of the showing of interest but did not include an alphabetized list of employees in the proposed unit on the date that the petition was filed. Although the College was given an opportunity to refile the motion with a list of employees, the College chose not to refile the motion. The United Faculty of Miami-Dade College sought and was granted intervenor status.

After an evidentiary hearing, the hearing officer determined that the employees in the bargaining unit proposed by the FPSU (part-time adjunct faculty who teach

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You can follow the ELC's accounts by searching for @FlaBarEdLaw on Twitter and Facebook. Members of the ELC who are on LinkedIN can send a message to educationlawfloridabar@gmail.com to be added to the ELC LinkedIN group.

credit bearing courses) share a community of interest. The hearing officer reviewed the difference between adjuncts and instructors and concluded that the major difference was that part-time adjunct faculty teach credit-bearing courses while part-time instructors teach non-credit-bearing courses. Accordingly, as these groups shared the same terms and conditions of employment, the hearing officer recommended that instructors be included in the bargaining unit. Next, the hearing officer determined that that School of Nursing adjuncts and instructors share the same terms and conditions of employment as other adjuncts and instructors and should also be included in the bargaining unit. Thus, the hearing officer recommended a bargaining unit that was significantly larger than the FPSU's original proposed unit.

The College asserted that the FPSU's showing of interest should be measured against the number of employees in the expanded unit. The hearing officer rejected this argument, noting that while the Commission had previously required a union to file additional showing of interest cards to equal thirty percent of the membership of an expanded unit found to be appropriate, this requirement was based on an administrative rule that has been repealed. *See Professional Association of City Employees v. City of Jacksonville*, 27 FPER ¶ 32061 (2001) (recognizing that the administrative rule on which the prior requirement was founded had been repealed and there was no statutory authority for the requirement).

In its exceptions, the College challenged the hearing officer's legal conclusions regarding the showing of interest. The Commission first recognized that in addressing exceptions to a conclusion of law, the Commission's principal responsibility is to "interpret[] the statutory provisions consistent with the legislature's intent and objectives." *Public Employees Relations Comm'n v. Dade Co. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985). Thus, the Commission will substitute its conclusions of law for those of a hearing officer in those cases where it finds its resolution of those issues as reasonable or more reasonable than that of the hearing officer.

The Commission denied the College's exception and reaffirmed its prior decision in *City of Jacksonville* based on the clear and unambiguous statutory requirements set forth in section 447.307, Florida Statutes. Specifically, section 447.307(2), Florida Statutes, states, "[t]he petition shall be accompanied by dated statements signed by at least 30 percent of the employees in the proposed unit, indicating that such employees desire to be represented for purposes of collective bargaining by the petitioning employee organization." Thus, the explicit language of the statute limits the showing of interest to the proposed unit set forth in the petition. To the extent that the College asserted that the FPSU should have an additional obligation to establish a sufficient showing of interest if the bargaining unit is subsequently expanded, the Commission rejected such a suggestion based on the explicit language of section 447.307(3)(a), Florida Statutes, which requires that the Commission to immediately define a proposed bargaining unit and order an election when a representation-certification petition is found to be sufficient. The Commission emphasized that it does not have the authority to rewrite unambiguous statutory provisions or impose additional substantive requirements upon unions beyond those set forth by statute.

The Commission also rejected the argument that the failure to allow a challenge to the showing of interest when a bargaining unit is expanded beyond the proposed unit would render the showing of interest requirements meaningless. As the Commission explained, "[t]he purpose of the showing of interest requirements set forth in section 447.307 ensures that employees in the proposed unit are sufficiently interested in organizing before the Commission and the parties invest their time and resources in determining which public employees should be included in the bargaining unit." Permitting a second challenge to the showing of interest at the end of the process – after the bargaining unit is defined by the Commission – would not further this purpose. At that point, the only step left is to hold the election itself, which will establish whether the majority of the employees desire to be represented for purposes of collective bargaining. In fact, as the Commission recognized, permitting multiple challenges to a party's showing of interest throughout the proceedings would add additional time and expense for both the Commission and the parties. Accordingly, the Commission concluded that the bargaining unit recommended by the hearing officer is appropriate for purposes of collective bargaining and ordered that a secret ballot election be conducted as soon as practicable. The intervenor withdrew prior to the election. The election was conducted by mail ballot from February 27 to March 27, 2019. The union won by thirteen ballots, and Certification 1956 was issued on April 12.

***Lyyli Van Whittle** is a hearing officer with the Public Employees Relations Commission. She also serves on the Administrative Law Section's Executive Council. Prior to coming to PERC, she was the career staff attorney for Justice Barbara Pariente.*

An earlier version of this article appeared in the PERC News, Vol 18, Issue 1 (2019).

Medical Marijuana in the Workplace: What's Next?

by Sally R. Culley and Chase E. Hattaway

Florida employers are facing the challenge of dealing with medical marijuana in the workplace. Florida's schools, colleges, and universities are no exception. In 2016, Florida voters soundly passed Amendment 2, Florida's medical marijuana law, with over 71% of the vote. Since then, two bills have been passed implementing the law, there was one high-profile lawsuit targeting the legislature's initial ban on smoking medical marijuana, and the Office of Medical Marijuana Use was created as part of Florida's Department of Health.

Where are we now?

Only "qualified patients" are entitled to use medical marijuana, which requires certification by a physician of a debilitating medical condition: cancer, epilepsy, glaucoma, HIV, AIDS, PTSD, ALS, Crohn's disease, Parkinson's disease, multiple sclerosis, other medical conditions "of the same kind or class as or comparable" to the ones specifically identified, a terminal condition, and chronic nonmalignant pain.

Florida's law specifically provides that no employment accommodations are required for any on-site medical marijuana use. Thus, an employee can use medical marijuana on-site only if permitted by the employer. Further, in order to qualify for a 5% discount on worker's compensation premiums, employers are required to comply with the Drug Free Workplace Act, which demands a zero tolerance of illegal drug use (including marijuana, which is still illegal under federal law).

According to a June 21, 2019 report from Florida's Office of Medical Marijuana Use, there have been 311,443 total patients in Florida who have been issued a medical marijuana card (more than double the number of total patients from the year before). This roughly translates to about 1 in every 68 people in Florida having been issued a medical marijuana card.

Where are we going?

Based on trends in other states and changing attitudes towards marijuana usage generally, it would not be surprising if, over time, Florida's medical marijuana laws expand and evolve. Here are a few things we may see in the employment context:

- Workers compensation. As noted above, many employers implement a drug-free workplace policy to receive a discount on their worker's compensation insurance. Florida's medical marijuana law does not affect an employer's ability to "establish, continue, or enforce" such a policy. Consequently, employers who enforce a drug-free workplace policy may lawfully prohibit employees taking medical marijuana from work. Additionally, medical marijuana is not reimbursable under workers compensation claims at this time. Moving forward, however, workers compensation may change as medical marijuana becomes more accepted. Some carriers have shown a willingness to reimburse for medical marijuana, and courts in some other states have required it.
- Accommodations for medical marijuana. Marijuana (including medical marijuana) remains a schedule 1 narcotic and thus illegal under the federal Controlled Substances Act. Additionally, Florida's medical marijuana law does not require employers to accommodate employees' use of medical marijuana. Early court decisions in states other than Florida have sided with employers on this issue, but there are some more recent cases that are more employee-friendly. Indeed, there are some states that have written employee protections into their marijuana legalization statutes.
- Less drug testing. Many employers in Florida have stopped testing job applicants for evidence of marijuana usage. This is because they have had trouble recruiting and hiring quality employees when they are forced to reject a significant slice of the population who uses medical or recreational marijuana. Although we can expect employers to continue broad drug testing for employees who perform high-risk or safety-conscious jobs, the movement is to eliminate testing for marijuana usage for other, low-risk occupations.
- Recreational usage of marijuana. To date, there are 11 states plus the District of Columbia which have adopted laws legalizing marijuana for recreational use. A Pew Research Center survey from 2018 found that 62% of Americans believe that marijuana should be legalized – this is double what it was in 2000 (www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/). Thus, the trend certainly is for legalization of marijuana for all uses – medical and recreational. It is not a stretch to believe that Florida will eventually follow this trend.

Tips for Employers:

Employers should give real thought to their businesses, the type of work the employees do, and the risks of employee use of medical marijuana, and then determine whether to limit or prohibit medical marijuana in their drug-free workplace policies. The discount on worker's compensation premiums is a powerful incentive for a zero-tolerance policy, but it may be worth giving up that discount in order to attract a larger number of qualified

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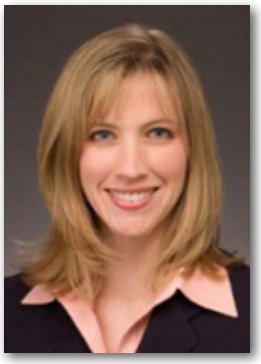
employees. Talking with an employment attorney about these issues can be a worthwhile investment, as an attorney can help to draft a policy that is specific to the employer's needs and ensure that the policy complies with any changes in federal or state laws pertaining to medical marijuana.



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Chase E. Hattaway *is a partner with Rumberger, Kirk & Caldwell in its Orlando office, where he focuses his practice on complex civil litigation matters, including a significant higher education practice. Chase consults with colleges and universities on higher education law. His practice often involves investigations by the Office of Civil Rights, student grievances, the Americans with Disabilities Act and other complex areas unique to educational institutions. He can be reached at chattaway@rumberger.com.*

The Legal Specialness of the University-Student Relationship

by Eric H. Lyerly

To paraphrase a legendary Jedi master: "Duty or duty not. There is no try." Under traditional principles of tort law, an actor who has not created a peril has *no duty* to protect or assist another person. Restatement (Third) of Torts § 37 (2012). The exception to this rule, of course, is when a "special relationship" exists between the affected parties. A special relationship gives rise to a duty of care between two parties. American tort law contemplates several combinations of special relationships: common carriers and passengers; innkeepers and guests; businesses and invitees; employers and employees; schools with students (Pre-K and K-12); landlords and tenants; and custodians and those under their custodial control. Restatement (Third) of Torts § 40 (2012).

The university-student relationship has been conspicuously absent from this list throughout the history of tort law. Traditionally, a university only owed a duty to its students as a landowner to maintain safe premises—a business-invitee or landlord-tenant special relationship. But there has been a disturbance in the Force; and in a galaxy not so far away, colleges and universities may increasingly find themselves in a special relationship with their students that results in a duty to protect. Recent state supreme court cases have held that universities and students enjoy such a relationship—cases that may have unique impacts on the university-student relationship in Florida.

In *Regents of University of California v. Superior Court*, the California Supreme Court held that universities have a duty to "protect [students] from foreseeable violence during curricular activities." 413 P.3d 656, 660 (2018). This special relationship is based on "the unique features of the college environment," not business-invitee or landlord-tenant paradigms. *Id.* at 667–68. The California Supreme Court concluded that the University of California at Los Angeles (UCLA) had a duty of care to protect a female student, Katherine Rosen, from a violent stabbing attack by another student, Damon Thompson, during a chemistry lab. *Id.* at 674. Thompson had a perplexing history of mental health problems that were observable from his earliest days on campus. *See id.* at 660. Given that this gruesome incident happened in the classroom—a space that is manifestly *curricular*—the Court had a clear-cut place to apply its rule. However, it did not address what non-classroom activities might trigger a duty. Under *Regents*, there are seemingly innumerable permutations of when universities can be held liable for the injuries to their students and when they cannot. Indeed, this is a complaint of the concurring opinion. *See id.* at 636. Thus, *Regents* highlights a major problem in the university-student special relationship: articulating its scope.

Less than two months after *Regents* was handed down, the Supreme Court of Massachusetts also held that universities and students are in a special relationship. *Dzung Duy Nguyen v. Massachusetts Inst. of Tech.,* 96 N.E.3d 128, 131 (2018). Accordingly, a university incurs a corresponding duty, in certain circumstances, to take reasonable measures to avert a student's suicide. *Id.* Again, this special relationship *is not* based on business-invitee or landlord-tenant archetypes. *Id.* at 141–42. It exists because of students' vulnerability and their dependence on their colleges to provide a safe campus environment. *Id.* at 142–44.

While it is tempting to think these decisions came out of nowhere, *Regents* and *Nguyen* are part of a logical progression of case law creating legal responsibilities for the university and legal benefits for the student. Indeed, the law has been "working slowly toward a recognition of the duty to aid or protect in any relation of dependence or mutual dependence." Restatement (Second) of Torts §314A cmt. b (1965). Also, keep in mind that major social pressures were presumably brought to bear on the disposition of these cases: think Larry Nassar and Michigan State University, #MeToo, school shootings, increasing suicides on college campuses, etc. Indeed, these pressures will continue to linger as other courts of last resort dispose of similar cases. The arc of the universe is bending toward student safety.

The Florida Supreme Court may soon join the juridical chorus calling on colleges and universities to do more to protect their students. *Regents* and *Nguyen* could have significant impacts on Florida's vision of the university-student relationship. *Regents* invoked the landmark Florida case of *Nova Southeastern University v. Gross* to support its holding. *See Regents*, 413 P.3d at 669. *Gross* is, in many ways, the original installment (the "*Star Wars: A New Hope*," as it were) of the university-student special relationship saga. In *Gross*, the Florida Supreme Court found that universities can be held negligent for injuries that students sustain during off-campus internships. *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86, 89 (Fla. 2000). The Court observed that the K-12 school-student special relationship does not extend to university students. *Id.* at 89. That this special relationship is limited to minor students does not preclude the university from owing a duty to its students by way of a different special relationship—chiefly

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"an adult [student] who pays fees for services . . . and the provider of those services, the university." *Id.* at 88–89.

Gross articulated that Florida universities and their students are in a special relationship due to the business character of their dealings. It stopped short of creating a special relationship based on the educational/institutional nature of the relationship. However, the Court also stated that the "extent of the duty a school owes to its students should be limited by the amount of control the school has over the student's conduct." *Id.* at 89. This language raises questions about the specialness of the university-student relationship. When are universities in control of their student's conduct? How much control gives rise to a duty of care? Do the *unique features of the college environment* (*Regents*) and *student's dependence on their schools for a reasonably safe campus environment* (*Nguyen*) influence the amount of control a school has over its student's conduct? If so, should there be a special relationship and duty in situations where universities exercise a high degree of control over their students (like a curricular activity)?

It is likely that the Florida Supreme Court will soon revisit the relationship between university and student. It will presumably latch on to language in *Regents* and *Nguyen* as it re-explores the specialness of the relationship. The Court will likely reclaim *Gross* to craft its own version of a special relationship between universities and students and individuate a duty to protect. Florida's next duty case could come into orbit anytime. The question is: are our colleges and universities ready for this? Are our lawyers ready for this?

Eric H. Lyerly *is a 3L at Stetson University College of Law. He is currently the Center Fellow in the Center for Excellence in Higher Education Law and Policy, a Notes and Comments Editor for Stetson Law Review, and President of Stetson's Education Law Association.*

The Education Law Committee of The Florida Bar is now collaborating with Stetson College of Law's Center for Excellence in Higher Education Law and Policy. Eric Lyerly is the first student to contribute to the ELC's Journal.

Endnotes

1 *Star Wars: Episode V – The Empire Strikes Back* (Lucasfilm 1980).

2 The Court defines the special relationship in several different, seemingly dissimilar ways. It extends to: curricular activities; school-sponsored activities over which the college has some measure of control; activities tied to the school's curriculum; foreseeable acts of violence in the classroom *or* during curricular activities. *Regents*, 413 P.3d at 660, 668, 669.

3 The *Nguyen* Court states, "where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm."

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Higher Education Update

Florida Legislative Session 2019

by Bob L. Harris, Esq. and Emily Bolde

With a total of 3,571 bills being filed in the Florida Legislature, the 2019 legislative session showed lawmakers tackling dozens of controversial topics ranging from assignment of benefits abuse to school safety. In the world of higher education, there were over 147 bills filed relating to higher education policy or appropriations. When the legislative session came to an end on Saturday May 4, 2019 only seven of those bills would pass the House and Senate and be signed into law by Governor Ron DeSantis.

As a result of the Governor's January 2019 executive order, the Senate passed HB 7071 which is arguably the most comprehensive pieces of higher education legislation seen throughout session. Executive Order 19-31 charted a course for Florida to move its national ranking in workforce education from number 24, to number one in the nation. Amending a number of sections within Ch. 446 and Ch. 1009, Florida Statutes, HB 7071 created a career and technical education graduation pathway for students to earn their standard high school diplomas, and set the statewide attainment goal to 60% to increase the number of working age adults with high value postsecondary certificates, degrees, or training by 2030. Annual reviews will also be conducted to ascertain alignment between postsecondary and K-12 education to the workforce needs of Florida.

At the start of September 2018, Speaker of the House of Representatives Jose Oliva, announced his role at the helm of an investigation into the misspent state funds of the University of Central Florida. The discovery that UCF had spent nearly $38 million in leftover operating funds to fund the construction of a new building prompted lawmakers to demand a stricter set of checks and balances be put in place. This was done in part through the passage of SB 190 which made substantial changes to sections within Chapters 1009, 1011, and 1013, Florida Statutes, altering both Florida Bright Futures Scholarship Eligibility, and the use of carry forward funds. Under this new law, realignment of SAT and ACT examination scores to match SAT national percentile ranks took place for the Florida Academic Scholarship (FAS) and the Florida Medallion Scholarship (FMS). Florida's "2+2" Targeted Pathway System of articulation was also strengthened to improve student retention and on-time graduation by requiring each Florida College System Institution to execute at least one "2+2" targeted pathway articulation agreement with one or more State University.

Along with the more comprehensive reforms passed during the legislative session like HB 7071 Workforce Education and SB 190 Higher Education, were several small, yet significant pieces of legislation tackling a wide range of topics arising in both the State University System, and the Florida College System. SB 1080 Hazing, known as "Andrew's Law", revised 1006.63, Florida Statutes, and redefined hazing to include the "initiation, admission, affiliation, perpetuation or furtherance of any organization operating under the sanction of a postsecondary institution." The statute was also amended to provide certain immunity for individuals who remain at the scene with a victim of hazing in need of medical assistance, until such medical assistance arrives.

Under HB 547 Stanley G. Tate Florida Prepaid College Program, which amended 1009.98, Florida Statutes, State Colleges and Universities are now able to transfer funds associated with dormitory residence to qualified non-profit organizations that provide housing for qualified students. Provisions only require that the qualified non-profit organization to be a 501(c)3 organization and that the funds transferred may not exceed the average charged by the State University System, or the Florida College System.

In October of 2018, Hurricane Michael made landfall between Mexico Beach and Panama City, leaving behind devastating damage to dozens of North Florida Communities. Nearing the one-year mark since the following the hurricane, and the U.S. House of Representative's approval of a $19.1 billion disaster relief package, the Florida Legislature continued its efforts to provide support for those affected communities. HB 593 Postsecondary Fee Waivers, which revised 1009.26, F.S., allows Florida College System institutions that were directly impacted by a hurricane, to waive out-of-state fees for the purpose of recruiting students. Institutions whose enrollment dropped 10-percent as a result of the hurricane may waive the fees for a period of 3 years, beginning 180 days after the date on which the hurricane directly impacted the county of which the institution serves. Qualified students can receive the waiver for up to 110-percent of required credit hours.

Although this year's budget did not include any tuition increases for Florida's Colleges and Universities, the Florida College System was allocated $1.3 billion, and the Florida University System $2.6 billion in State funds. Before signing his first budget as Florida's Governor, DeSantis vetoed nearly $131 million in appropriations projects. At the close of the 2019 legislative session, Governor Ron DeSantis signed off on a State budget of $90.98 billion for the 2019-2020 fiscal year.