

COLLEGE ATTORNEYS AS ADVOCATES FOR AOD PREVENTION

An outcome that has sent shock waves through the academic community is a recent agreement by the University of Miami to pay \$1 million each to the families of a university football player and a friend who were murdered in a campus apartment.

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Too often, the word from the general counsel's office is that if an institution of higher education (IHE) takes a "hands-off" approach, no one can hold it liable for injuries or damages that occur as a result of alcohol or other drug use on campus or at an off-campus school event.

Times have changed. Having an alcohol and other drug (AOD) policy is mandated by federal law and may in fact help insulate schools from liability. The Drug-Free Schools and Communities Act Amendments (DFSCA) of 1989 and accompanying regulations require IHEs to adopt and enforce policies prohibiting unlawful AOD use. Nonetheless, many college and university administrators continue to fear that creating an AOD prevention program will expose their schools to liability. Such concerns appear to stem from a misunderstanding of the regulations and of U.S. tort law (the law of wrongful acts). IHEs can and should design AOD prevention programs that fully comply with the law and also minimize the risk of institutional liability.

Signed into law in 1989, the Drug-Free Schools and Communities Act is the centerpiece of the federal government's response to the growing

problem of student AOD use on college and university campuses. Under the act, an IHE that receives federal funds in any form must at a minimum adopt an AOD program and policy that clearly prohibit the unlawful possession, use, or distribution of illicit drugs and alcohol on school property or as part of any school activity. Schools that do not comply with the DFSCA regulations may be disqualified from receiving federal funds or participating in student loan programs.

U.S. tort law concepts of duty complement the DFSCA regulations as the background against which colleges and universities must assess their approach to AOD prevention. According to Barbara Bennett, Esq., former associate general counsel for Vanderbilt University, IHE legal duties include the duty to supervise new or inexperienced students. If a school neglects to perform such duties with reasonable care, its negligence may result in liability.

In the past, too many institutions, through either ambivalence or a sense that prevention was of little effect, have shied away from their responsibility to develop an AOD prevention program. Today, the smarter schools recognize that both the law *and* the public require schools to address student behavior that exposes others to the

Prevention Policies That Work

Make students aware of a state's social host (server) liability laws with the goal of discouraging students from serving fellow students to the point of intoxication.

- Develop definitions of events that are considered to be official, sponsored events.
- Adopt a procedure for the registration of these events and place responsibility specifically on the host organization for ensuring compliance with the school's alcohol and drug policies. For example, require fraternities, sororities, and other clubs to demonstrate adequate security and safeguards against underage drinking at events for which the group is seeking the school's approval.
- Adopt restrictions at on-campus and other official events that limit the place and occasion for alcohol use and impose requirements such as a prohibition on common containers (beer kegs). Establish rules that

alternative beverages and food must also be available and a procedure for identifying those 21 and older.

- Adopt procedures for staff who discover students in possession of controlled substances. IHEs should consult with local authorities to agree on methods for confiscation, safekeeping, and notification of authorities.
- Make faculty aware of the seriousness of the school and DFSCA regulations and that they are expected to comply.
- Encourage students to seek treatment whether for addiction or for the immediate health consequences of a night of overindulgence. Make it the policy that no discipline will be imposed on a student for violation of the policies if the only reason the school is aware of the violation is because the student sought medical treatment.

ADVOCATES FOR AOD PREVENTION (CONTINUED)

risk of injury, as evidenced by recent cases that have imposed liability on schools for failure to prevent hazing or provide a secure campus.

DFSCA regulations are more in line with existing case law than most IHEs realize. An article by Robert D. Bickel and Peter F. Lake¹ argues that the regulations hold universities liable for failure to act reasonably with respect to any student conduct (and, in particular, underage drinking) that creates a foreseeable risk to other students.

The regulations do not require that schools ensure compliance with alcohol and other drug laws, only that IHEs adopt rules designed to enforce and promote compliance and that they impose consistent discipline on those the IHEs have reason to know violate these rules. Ideally, concern for student health and the potential for liability will motivate schools to pay closer attention to preventing underage and binge drinking and illicit drug use on campus.

Schools can significantly improve their responses to AOD use and reduce their risk of exposure to liability. For example, while some IHEs may choose to implement well-defined, fully enforced alcohol policies, and a few schools may decide to prohibit alcohol on campus completely, other IHEs may want to examine their relationship with fraternities and sororities and eliminate any programs that offer funding, advertising, or other in-kind support to organizations that sponsor alcohol-related activities.

View from the Bench

A number of recent federal and state cases have considered the liability of IHEs and fraternities for injuries sustained by a student where underage or excessive drinking was involved. While the courts may have moved away from the *in loco parentis* doctrine

under which colleges are viewed as having a duty to police the private behavior of their students, almost all agree that IHEs, as property owners, have a legal duty to maintain a safe campus.

One outcome that has sent shock waves through the academic community is a recent agreement by the University of Miami to pay \$1 million each to the families of a university football player and a friend who were murdered in a campus apartment.² The university agreed to make the payments in lieu of publicly litigating lawsuits that had been filed by the victims' families alleging that the university bore some responsibility for the deaths. Such outcomes send a message that IHEs need to become more fully engaged in promoting campus safety and AOD prevention.

Prophetic are the words of the Boston plaintiff's attorney in *Andrade v. Sigma Phi Epsilon et al.*,³ a recent Massachusetts case, that involved the rape of a University of Massachusetts student at an unsupervised fraternity party by an intoxicated guest. Following disclosure of the \$200,000 settlement to be paid by the defendant fraternity, the attorney noted that "negligent supervision" lawsuits are absolutely viable where the evidence shows past indications of negligence by the university or fraternity, or that the IHE or fraternity violated its own internal policies.

In *Estate of Hernandez-Wheeler v. Arizona Bd. of Regents*,⁴ an Arizona case, the Court of Appeals was asked to consider whether a fraternity and fraternity members who pooled their money to buy liquor breached a duty not to serve alcohol to minors and whether that breach caused fatal injuries to the deceased plaintiff. Applying criminal law principles, the court ruled that the defendants had a duty to ensure that minors were not served alcohol even though no state

statute explicitly established civil liability for social hosts who serve minors. And, individual fraternity members who contributed money to pay for the alcohol that was served to minors at the party could not escape liability by delegating their responsibility to the committee in charge of the party.

IHEs need to protect themselves as well as others; it makes good business sense for schools to take actions that reduce their exposure to lawsuits. Putting teeth in AOD prevention programs is the cost-effective and proper course for IHEs to pursue.

Notes

¹ R. D. Bickel and P. F. Lake, "Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of *In Loco Parentis* and the Restatement (Second) of Torts," *20 Journal of College and University Law* 261 (Winter 1994).

² "Campus Murders: Miami to Pay \$2m," *Boston Globe*, December 8, 1996.

³ See "Is a Fraternity Liable for the Rape of a Party Guest?" *Massachusetts Lawyers Weekly*, October 14, 1996.

⁴ *Estate of Hernandez-Wheeler v. Arizona Bd. of Regents* 838 P.2d 1283 (Ariz. Ct. App. 1990), 866 P.2d 1330 (Ariz. 1994), *remanded sub nom., Hernandez v. Flavia*, 1995 WL 470354 (Ariz. Ct. App. 1995).

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