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TOP TEN LEGAL ISSUES FACING INSTITUTIONS FOR THE NEXT YEAR

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INTRODUCTION

The Association of Governing Boards of Universities and Colleges, commonly called “AGB,” is a national, tax-exempt, nonprofit organization headquartered in Washington, D.C. AGB provides educational, technical and informational services to college and university governing boards, trustees and board professionals. For a sense of the kinds of services provided by AGB to institutional governing boards and their members, see <http://agb.org/about-agb>.

Just last year, AGB published a 56-page guidebook entitled *Top 10 Campus Legal Issues for Boards*, which I wrote prior to my retirement as Vice President and General Counsel at the University of Delaware. Copies of that guidebook are available to AGB member institutions on the AGB web site at <http://agb.org/store/top-10-campus-legal-issues-for-boards>. It’s not the purpose of this session to recapitulate AGB’s work from last year. Rather, I have two goals in mind.

First, I want to update last year’s guidebook by describing significant legal developments relating to three of the items on last year’s list of ten critical issues.

And second, I want to add two new issues to that list, issues that have surfaced over the last twelve months as emerging legal concerns for those of you who serve on (or staff) the boards of Arkansas’s institutions of postsecondary education.

Reproduced at the top of the next page is a list of the issues I identified last year as top-ten legal issues for governing boards. The three highlighted in boldfaced type are the ones I plan to update during the first part of our session.

- **Sexual Violence**—in particular the new procedural and substantive requirements of Title IX.
- Risky Student Behavior—alcohol abuse in particular.
- **Cybersecurity**—focusing on risks associated with the typically decentralized information technology environment on most of our campuses.
- Online Learning—in particular the difficult legal issues that surface when institutions outsource online instruction and complex contracts with vendors must be negotiated.
- Affirmative Action in Admissions and Financial Aid—the 2015 guidebook was written before the Supreme Court’s major decision in *Fisher v. University of Texas at Austin*.
- **Workplace Issues**—the 2015 guidebook was written prior to the promulgation of major changes to the overtime regulations promulgated by the U.S. Department of Labor under the Fair Labor Standards Act.
- Statutory and Regulatory Compliance Issues—focusing on how to design and implement an effective institutional compliance program.
- Federal Cost Accounting and Effort Reporting—focusing on the substantial financial exposure institutions face when they use inadequate systems to account for federal grant and contract monies.
- Construction and Deferred Maintenance—identifying deferred maintenance as “a ticking time bomb” that must be addressed sooner rather than later on many campuses.
- Transparency, Ethical Conduct and Behavior—a source of intense scrutiny by state legislators, state regulators and the media.

UPDATING FOUR ITEMS INCLUDED IN LAST YEAR’S LIST OF TOP 10 CAMPUS LEGAL ISSUES

A. **Sexual Violence—New Enforcement Focus on the Procedural Rights of Accused Students.**

- (1) *An introductory note on nomenclature.* Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex. All public and private institutions of postsecondary education that receive federal funding from any source must comply with Title IX. Enforcement of Title IX is vested in the Office for Civil Rights (“OCR”), part of the U.S. Department of Education. OCR coined and used the phrase

“sexual violence” for the first time in 2011 to refer to a particular sub-species of sexual harassment. OCR used the term in a regulatory guidance (a “Dear Colleague Letter,” or “DCL” in OCR parlance) issued in April of that year and titled simply *Sexual Violence*. U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (with accompanying *Background, Summary, and Fast Facts*) (April 4, 2011), [www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html). For analytic purposes, sexual violence is classified as an extreme form of hostile environment sexual harassment. Sexual violence is defined in the 2011 DCL as—

**physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.** An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

- (2) *Procedural requirements in the DCL.* The DCL incorporates many procedural requirements that are different from the requirements in criminal sexual assault prosecutions. In many respects, procedures that apply to student conduct adjudications in the Title IX context are less protective of the rights of the accused student than the procedures that apply in criminal cases:
  - (a) *Burden of proof at sexual harassment adjudicatory hearings.* According to OCR, the only standard of proof that satisfies Title IX is the “preponderance of the evidence” standard. From the DCL:

... [I]n order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The “clear and convincing” standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.
  - (b) *Cross-examination of complainants.* The DCL contains a strongly worded suggestion that, at hearings on allegations of sexual harassment, the procedures should not allow for the cross-examination of the victim: “OCR strongly discourages schools from allowing the parties personally to question or cross-

examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”

- (c) *Interim protective steps for the victim.* This is a controversial feature in the DCL and has proven to be challenging to implement. The DCL requires an institution to take “interim steps before the final outcome of the investigation . . . once it has notice of a sexual harassment or violence allegation.” Examples cited in the DCL include “allow[ing] [the victim] to change academic or living situations as appropriate” and “prohibit[ing] the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation.” At a practical level, it may be difficult to implement interim protective steps that do not run the substantial risk of tarnishing the reputation of the respondent.
  - (d) *A prohibition on the use of mediation to facilitate the resolution of sexual assault complaints.* Some commentators view this as the most significant change effected by the DCL. The DCL categorically prohibits mediation in cases involving sexual assault. “[I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.”
  - (e) *Explicit protection against retaliation.* “Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. *As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants . . . know how to report any subsequent problems,* and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.
  - (f) *Strict time limits for conducting investigations and issuing findings.* The DCL requires institutional policies to incorporate “time frames for all major stages of [their] procedures,” and—without rigidly requiring completion within a maximum number of days—strongly hints that investigations should not take longer than sixty days from receipt of the complaint to completion of the hearing.
- (3) “[P]ro-female, anti-male bias”? Most—not all, but the vast majority of—sexual violence respondents are men. In recent months, male students accused of sexual violence have succeeded in several high-profile cases in persuading factfinders that institutional Title IX processes reflect “pro-female, anti-male bias” and for that reason violate their constitutional and statutory rights. These rulings are “likely to be a source of great concern among women’s rights activists, who have spent years trying

to get universities to act more aggressively in sexual assault cases.” Fred Barbash, *Former Ivy League athlete suspended for alleged sexual assault wins important – and surprising – court victory*, WASHINGTON POST, August 1, 2016, <http://www.readingeagle.com/ap/article/former-ivy-league-athlete-suspended-for-alleged-sexual-assault-wins-important---and-surprising---court-victory>.

- (a) *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016). In this recent case, a former varsity athlete at Columbia University challenged the procedural fairness of the university’s process for adjudicating a sexual assault charge against him. The male student alleged that various university officials were “motivated ... by pro-female, anti-male bias ... [caused by] criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students.”
- (b) *Doe v. Brandeis University*, 2016 Westlaw 1274533 (D. Mass. 2016). In a lengthy opinion, a U.S. District Court judge strongly criticized the fundamental fairness of the adjudication process for sexual assault claims at that university and ruled that the university denied an accused male student “the ‘basic fairness’ to which he was entitled” under institutional policies and pursuant to Title IX.
- (c) *Montague v. Yale University*, Civ. A. 16-CV-00885 (complaint filed June 9, 2016), <https://www.scribd.com/document/315288638/2016-06-09-Montague-Lawsuit>. From Jennifer C. Braceras, *College Sex Meets the Star Chamber: At Yale’s sexual misconduct tribunals, defendants can’t even cross-examine witnesses*, WALL STREET JOURNAL, October 23, 2016, <http://www.wsj.com/articles/college-sex-meets-the-star-chamber-1477001578>:

Jack Montague, former captain of Yale’s men’s basketball team[,] ... was expelled from Yale in February after [the university] decided that a fourth sexual encounter with a female student, known only as “Roe,” constituted “non-consensual” sex. According to Mr. Montague’s attorneys, Yale bureaucrats decided to investigate the basketball star after hearing secondhand that Roe had “a bad experience” with him more than a year earlier—a fact the university does not deny. ...

How bad are the procedures used by Yale to convict Mr. Montague—and dozens of other students and professors accused of non-consensual sex or verbal micro-aggressions? So bad that such traditionally liberal organizations as the American Association of University Professors have compared the procedures used by universities like Yale to those of the Star Chamber. ...

For example, like the Star Chamber and other tribunals of the time, Yale’s sexual misconduct committees do not apply any statute of

limitations and, thus, have the power to probe allegations that are years or even decades old. Yale's arbiters of sexual misconduct, like the judges of the Star Chamber, determine guilt by a majority vote, rather than by a unanimous vote of a jury of one's peers required in criminal courts to protect against the likelihood of wrongful conviction.

Perhaps most concerning, Yale's courts of sexual misconduct do not allow accused persons to cross-examine the witnesses against them. This, despite the fact that American courts have long found the ability to cross-examine witnesses to be a critical component of due process, particularly where, as in Mr. Montague's case, the credibility of contradictory witnesses determines the outcome.

- (d) U.S. Dep't of Education, Office for Civil Rights, *Wesley College*, October 12, 2016, [www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf). (See also OCR, *Students Accused of Sexual Misconduct Had Title IX Rights Violated by Wesley College, Says U.S. Department of Education*, October 12, 2016, <http://www.ed.gov/news/press-releases/students-accused-sexual-misconduct-had-title-ix-rights-violated-wesley-college-says-us-department-education>. The CHRONICLE OF HIGHER EDUCATION characterized this major OCR enforcement decision, issued less than two months ago, as a "landmark" and referred to it as the first time federal officials have ever found a college in violation of Title IX for violating the procedural rights of a student accused of sexual violence. Sarah Brown, *What a Landmark Finding in a Title IX Case Means for Colleges Wrestling With Sex Assault*, CHRON. OF HIGHER ED., October 13, 2016, <http://www.chronicle.com/article/What-a-Landmark-Finding-in-a/238059>. According to the OCR decision, the college violated the accused student's rights in several respects:
- By imposing an interim suspension on the accused student too quickly and without interviewing him first;
  - By failing to interview the student during the investigation of the complaint;
  - By ailing to give him a copy of the incident report prior to the hearing.
  - By depriving him of the right to obtain testimony from witnesses and other evidence at the hearing.
- (e) There have been at least ten other cases in the last year in which accused male students successfully challenged the procedural fairness of institutional sexual assault proceedings. Among the universities on the losing side of such litigation are the University of Southern California, the University of California San Diego, the University of Tennessee, and George Mason University. See Jake New, *Out of Balance: Colleges lose series of rulings in suits brought by male*

*students accused of sex assault*, Inside Higher Ed, April 14, 2016, <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>.

## B. Cybersecurity—Concerns About the “Internet of Things.”

- (1) *The problem.* About two months ago, a cyber-attack of unprecedented size disrupted Internet services on a massive scale in the United States and Europe. The attack knocked out many of the World Wide Web’s most heavily trafficked sites, including Amazon, Netflix, Twitter, Spotify, Reddit, CNN, the New York Times, the Wall Street Journal, and many major banks, cloud computing companies, and consumer-product web sites.

From Nick Statt, *How an army of vulnerable gadgets took down the web today*, THE VERGE, Oct. 21, 2016, <http://www.theverge.com/2016/10/21/13362354/dyn-dns-ddos-attack-cause-outage-status-explained>:

At some point this morning, one of the US’s critical internet infrastructure players was hit with a staggering distributed denial of service (DDoS) attack that has taken out huge swaths of the web. ... [C]lients of a domain registration service provider called Dyn have suffered crippling interruptions and, in some cases, blanket outages.

Details are now emerging about the nature of the attack. It appears the cause is what’s known as a Mirai-based IoT<sup>1</sup> botnet. ... Dyn’s chief strategy officer Kyle Owen, who spoke with reporters this afternoon, later confirmed ... that traffic to its servers was clogged with malicious requests from tens of millions of IP addresses in what the company is calling a "very sophisticated and complex attack."

A Mirai botnet essentially takes advantage of the vulnerable security of Internet of Things devices, meaning any smart home gadget or connected device anywhere that has weak login credentials. Mirai, a piece of malware, works by scanning the internet for those devices that still have factory default or static username and password combinations. It then takes control of those devices, turning them into bots that can then be wielded as part of a kind of army to overload networks and servers with nonsense requests that slow speeds or even incite total shutdowns.

So by wielding a botnet against Dyn, the perpetrator of this particular DDoS attack has been able to target one of the largest pieces of online infrastructure in the country and take down dozens upon dozens of sites. ... The Department of Homeland Security is now looking into the attack,

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<sup>1</sup> “IoT” is the acronym for “Internet of Things.” More on that concept in a moment.



considering how critical a DNS interruption like this one is to internet use around the country.

- (2) *The special vulnerabilities of the “Internet of Things.”* As computing power shrinks in size, manufacturers of consumer goods can embed computing devices in their products. We use the term “Internet of Things” to refer to *electronic gadgets* that are not computers but that contain chips, sensors, or other computer-related devices that, when connected to the Internet, allow those gadgets to be turned on, turned off, reset, or otherwise manipulated through online communication. Common illustrative examples include baby monitors, home security cameras, and home appliances like air conditioners, furnaces, stoves and refrigerators that can be adjusted through web-based software programs. See *The Internet of Things: Riding the Wave in Higher Education*, published by EDUCAUSE Review, June 27, 2016, <http://er.educause.edu/articles/2016/6/~link.aspx?id=916E8399B1E34AAF87449E8F3B29BD48&z=z>.

Over the last half-dozen years IoT devices have proliferated on college and university campuses all over the country. All campuses use Internet-connected security monitoring devices. At many institutions scientific equipment, building maintenance systems, photocopiers, printers—can be accessed remotely. Much academic research—including self-driving automobiles, drone imaging, and many forms of biomedical investigation—uses IoT-enabled equipment.

As IoT spreads rapidly, it does so in what on many campuses is a spectacularly decentralized information-technology environment. The combination of rapid growth in IoT utilization and less-than-optimal attention to security coordination leaves campuses particularly vulnerable to the scale of hacking we witnessed in the Mirai attack last month.

- (3) *There are obvious antidotes.* From U.S. Department of Homeland Security, United States Computer Emergency Readiness Team, *Alert (TA16-288A): Heightened DDoS Threat Posed by Mirai and Other Botnets*, October 17, 2016, <https://www.us-cert.gov/ncas/alerts/TA16-288A>:

- If a device comes with a default password or an open Wi-Fi connection, consumers should change the password and only allow it to operate on a home network with a secured Wi-Fi router.
- Ensure all default passwords are changed to strong passwords. Default usernames and passwords for most devices can easily be found on the Internet, making devices with default passwords extremely vulnerable.
- Update IoT devices with security patches as soon as patches become available.
- Purchase IoT devices from companies with a reputation for providing secure devices.



### C. Workplace Issues—Revisions to Overtime Regulations Under the Fair Labor Standards Act.

- (1) *Introduction.* The Fair Labor Standards Act (FLSA), administered by the U.S. Department of Labor, prescribes standards for basic wage and overtime pay. The FLSA requires employers to pay covered employees who are not otherwise “exempt” (see below) at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay.<sup>2</sup>

In a nutshell, the FLSA overtime regulations rest on an important distinction between so-called “exempt” and “non-exempt” members of the workforce. **Exempt employees**, typically managerial or professional staff members, are considered to be executive-level employees and are not eligible for overtime pay for hours worked over 40 in a workweek. **Nonexempt employees**, on the other hand, typically hold down clerical or blue-collar jobs. They must be paid time and a half for any hours worked over 40 in a workweek.

The implementing FLSA regulations contain detailed, multi-part tests for determining whether specific job classifications are or are not exempt from overtime eligibility. For our purposes, the salient test is the **income test**. Until they were amended in 2016, the FLSA overtime regulations made full-time workers non-exempt (hence eligible for overtime) if they earned less than \$455 per week or \$23,660 a year. Any employee who earned more than \$23,600 a year was classified as an exempt employee, and was thus ineligible for overtime. The \$23,660 threshold had not been lifted by Congress in a dozen years, and the erosive effect of wage inflation meant that, as years passed, a growing percentage of the workforce saw their salaries increase beyond the threshold for classification as non-exempt workers.

- (2) *The 2015 regulatory changes.* So, in late 2015, the U.S. Department of Labor lifted the income threshold by more than 100 percent, to \$47,476 a year (\$913 a week). The regulatory change resulted in the redesignation of more than 4,000,000 American workers—including hundreds of thousands of hourly workers on college campuses—from non-exempt to exempt. Those workers—many of whom hold responsible positions as professional employees and work considerably more than 40 hours in the

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<sup>2</sup> The FLSA applies to public institutions of higher education only to the extent that such institutions are characterized as “public agencies” under the law. “A college or university is a public agency under the FLSA if it is a political subdivision of a State. In applying the term ‘political subdivision,’ the Department considers whether (1) the State directly created the entity, or (2) the individuals administering the entity are responsible to public officials or the general electorate. For example, a *State university system created by state legislation and administered by a board appointed and removable by the governor is likely a political subdivision of the State, and, therefore, a public agency under the FLSA.*” U.S. Dep’t of Labor, Wage and Hour Division, *Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act*, May 16, 2016, <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>. Public universities or colleges that qualify as a “public agency” under the FLSA may compensate overtime-eligible employees through the use of compensatory time off (or “comp time”) in lieu of cash overtime premiums.

typical work week—will be eligible for overtime pay once the new regulations go into effect on December 1, about two weeks from today.

- (3) *Legal options.* The new regulation poses a dilemma for the Human Resources departments at many colleges. To preserve non-exempt status for employees in dozens of job classifications, and thus spare the institution from the potentially ruinous financial impact of paying those employees time and a half for overtime, institutions have a choice between three options:
- Raise the employee's salary above the \$47,476 threshold, preserving the employee's exempt status and continuing the employee's ineligibility for overtime pay.
  - Reclassifying the employee from exempt to non-exempt and capping (or even eliminating altogether) overtime hours.
  - Restructure the workforce or specific jobs. Restructuring may mean reassigning job duties, combining positions, or taking other steps designed to ensure that nonexempt employees complete their work in 40 hours a week while exempt employees pick up managerial functions previously performed by their subordinates.

The first option obviously has financial implications, and it also runs the risk of creating internal inequities as some employees earn double-digit pay increases for performing the same job functions while other employees—those already above the exempt threshold—do not receive equivalent pay raises. The second option reduces the number of hours a supervisor can expect from the same number of subordinate employees and threatens damage to programs and missions. The third option involves potential loss of efficiency, damage to morale, and all the uncertainty that always accompanies departmental reorganizations.

Other practical consequences:

- (a) HR departments are required to audit all currently exempt positions to determine whether they continue to meet the regulation's salary requirements. Audits are expensive, time-consuming, and disruptive in the workplace.
- (b) Employees who up to now have been exempt must be trained to track their hours—to “punch a clock,” in old-time parlance. This may require (expensive and disruptive) upgrades to existing hour-tracking software.
- (c) Institutions can expect morale issues. ““Employers can expect many employees to feel hurt and underappreciated. Many workers place a premium on the prestige of being considered an exempt or salaried employee—no matter how much we emphasize that it's just a categorization of pay and not a reflection of

importance or level of contribution. [It] may seem like they're being demoted.” Stephen Miller, *How to Prepare for the New Federal Overtime Rule*, July 1, 2016, <https://www.shrm.org/hr-today/news/hr-magazine/0716/pages/how-to-prepare-for-the-new-federal-overtime-rule.aspx>.

## TWO ADDITIONS TO THE LIST OF TOP CAMPUS LEGAL ISSUES

### **A. Promoting a Supportive Campus Climate While Preserving the Right to Free Speech**

- (1) *Appreciating the Conundrum*. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race. All public and private institutions of postsecondary education that receive federal funding from any source must comply with Title VI.

Here is a simple, nontechnical, OCR-endorsed definition of racial harassment:

A racially hostile environment may be created by oral, written, graphic or physical conduct related to an individual's race, color, or national origin that is sufficiently severe, persistent or pervasive so as to interfere with or limit the ability of an individual to participate in or benefit from the recipient's programs or activities. [U.S. Dep't of Education, Office for Civil Rights, *Frequently Asked Questions about Racial Harassment*, <http://www2.ed.gov/about/offices/list/ocr/qa-raceharass.html>.]

Racial harassment can be committed by employees, other students, or even non-employee third parties. It can consist of verbal utterances, nonverbal behavior, or physical conduct. **The definition, in other words, is broad and all-encompassing.**

The seeds of a conundrum are planted within this inclusive definition. A college is obliged to prevent racial discrimination and to punish the perpetrators of racial harassment. But the definition of racial harassment encompasses within it racially offensive *oral* statements. On a publicly supported institution of higher education an individual's right to say whatever he or she wants is protected by the First Amendment. The First Amendment restricts an institution's ability to sanction oral statements, even when those statements are inflammatory and deeply offensive. The same OCR policy statement quoted above recognizes the tension between (on the one hand) an institution's obligation to respond to “severe, persistent or pervasive” verbal harassment and (on the other) the perpetrator's right to speak:

Federal civil rights laws are intended to protect students from discrimination, not to regulate the content of speech. OCR is sensitive to First Amendment concerns that may arise in the course of addressing racial harassment complaints and takes special care to avoid actions that would impair the First Amendment rights of an institution's students and employees.

What, then, is a well-intentioned college to do when the legal requirement to protect students from racially offensive speech collides with the First Amendment rights of hatemongers?

(2) *Campus controversies*. The last year has seen several incendiary examples of that collision in action.

(a) *Ohio University*. From Nadia Dreid, *How 3 Colleges Are Hoping to Head Off the Specter of Costume Controversy*, CHRON. OF HIGHER ED., October 28, 2016 <http://www.chronicle.com/article/How-3-Colleges-Are-Hoping-to/238210>:

Halloween is a big deal in Athens, Ohio.

The city's annual block party dates to 1974, when some Ohio University students let their celebration spill into the street and ended up blocking traffic for several hours. Now the party draws thousands of revelers each Halloween. In the years leading up to 2011, members of an Ohio University group called Students Teaching About Racism and Society, or STARS, began noticing something: A lot of the costumes played on racist stereotypes.

The group wanted to find a way to react to that, Mailé Nguyen, the current president of STARS, said. "Like our posters say, 'You wear the costume for one night, but we wear the stigma for life,'" Nguyen said. "The people who the costumes are aimed at have to live with those stereotypes and negative stigma surrounding them always."

The "We're a Culture, Not a Costume" campaign was born. The posters and slogans have changed over the years, all different iterations of the same theme. In one version, a person in an offensive costume — blackface and an Afro wig and clutching a microphone, or a large sombrero and a poncho and holding maracas — stands in the center, surrounded by the disapproving gaze of four students whose culture is being mocked. The tagline reads, "When this is how the world sees you, it's just not funny."

The poster campaign began five years ago and took off the next year, Nguyen said. Now Nguyen gets calls and emails from colleges all over the country asking for permission to use them in their own cultural-appropriation education.

STARS also gets a lot of hate mail from people accusing the group of being overly sensitive, but Ohio University students have generally been open to listening, if not completely accepting, Nguyen said. "They're not like: 'Yes, I totally understand. I'll never wear these costumes again,'" Nguyen said. Instead, the reaction is "more like: 'Wait a minute, why are

these costumes offensive? I don't really understand.' And then we answer questions and have these discussions with them."



- (b) *University of California at Berkeley*. From Lee Gardner, *How Presidents Try to Stay Ahead of the Social-Media Outrage Machine*, CHRON. OF HIGHER ED., October 9, 2016, <http://www.chronicle.com/article/How-Presidents-Try-to-Stay/238019>:

For Nicholas B. Dirks, departing chancellor of the University of California at Berkeley, the new climate of protest came as a surprise and changed the way he does his job. The name "Berkeley" has been synonymous with campus activism for more than 50 years, and protests are "regular, even routine," says Mr. Dirks, who took office in 2013. But he adds that he has been struck by the growth in the number of issues he is asked — or forced — to respond to. "There's almost always something that seems to be either on a boil or soon to get there," he says.

He singles out one incident that exemplifies how things have changed for presidents.

In the fall of 2014, Mr. Dirks sent an email to the campus marking the 50th anniversary of the founding of the Free Speech Movement at Berkeley. In the message, he wrote that the meaningful exercise of free speech required treating each other with "civility." The notion, he notes, came directly from the institution's *Principles of Community*, adopted in 2004, which call for "civility and respect in our personal interactions."

Within hours, Mr. Dirks found his choice of terms being picked apart on Twitter, after some took his call for civility as tacit discouragement against speaking out at all. "Honor the IDEAL of free speech GRACIOUSLY, people. Don't tell Dad Dirks to shut up, for instance," @brokenhegemony [tweeted](#). "Letter from Dirks is chilling," said @durgaakv Within days, his words were being parsed by university faculty members and by others all over the internet. Traditional media outlets including the *Los Angeles Times*, *The Washington Post*, and *The Wall Street Journal* weighed in. He was compelled to release another statement affirming the university's support for both academic freedom and civility. The public discussion continued for weeks.

- (c) *East Carolina University*. Ever since the beginning of this year's National Football League season, when San Francisco 49ers quarterback Colin Kaepernick sat on a sidelines bench while other players stood for the playing of the National Anthem, college football stadiums have been the sites of similar expressions of protest. From Eric Kelderman, *Furor Over Band Protest Leads to a Tense Week at East Carolina U.*, CHRON. OF HIGHER ED., October 7, 2016, <http://www.chronicle.com/article/Furor-Over-Band-Protest-Leads/238012>:

Nineteen members of the East Carolina University marching band knelt in support of the Black Lives Matter movement during a performance of the national anthem last Saturday. But the protests were only just beginning.

The band members took a knee before a football game between East Carolina's Pirates and the Knights of the University of Central Florida.

The gesture was similar to demonstrations by professional and college athletes that have swept the country in recent weeks. But the East Carolina band members' actions stood out for the intensity of the reaction they provoked both on and off campus.

Outraged fans, community members, and at least one faculty member have criticized the band members for what they saw as disrespect for the American flag and the United States military.

Tracy Tuten, a professor of marketing, said the students shouldn't have protested while performing as band members and representatives of the university.

Several other faculty members contacted by The Chronicle, however, said they support the protesters. At the same time some said they have seen conflicting messages from the administration and a lack of willingness to denounce the vitriol and abuse hurled at the students.

The university's chancellor, Cecil P. Staton, ... released a statement on Thursday saying the institution is working to preserve the right to free speech and also provide a "safe and secure environment for everyone on our campus."

"As your chancellor, I have the responsibility to hold these two priorities together, even when in tension," he said in a message to the campus.

(3) *Some recurring issues:*

- (a) *Campus "bias response teams."* From Nadia Dreid, *Amid Concerns About Stifling Speech, Colleges Take a New Look at Bias-Response Teams*, CHRON. OF HIGHER ED., September 28, 2016, <http://www.chronicle.com/article/Amid-Concerns-About-Stifling/237918>:

The University of West Florida realized it had a problem.

It wasn't the two nooses found hanging on the campus within the span of a week in the spring of 2012, although that certainly was a problem. It was at the forum held to discuss those incidents where Kevin Bailey, now vice president for student affairs, heard students recount other events that administrators knew nothing about.

"We heard from students that they had things happen in the residence halls or in class and didn't know who to tell," Mr. Bailey said. "So we created the bias-response team as a mechanism to funnel those complaints to a central source and then to disseminate them out to the appropriate parties."

At their best, this is what bias-response teams aim to do, said Kevin Kruger, president of the student-affairs group NASPA. "The intent behind a bias-response team on campus," he said, "is to create a



pathway or an avenue for students who have experienced some kind of act on campus related to race or identity, and to have a way to report that."

But at their worst, critics say, the teams stifle the free exchange of ideas necessary for a flourishing learning environment. That concern has become more prominent in recent months, and was exemplified by a flap at the University of Northern Colorado, where a complaint to a bias-response team resulted in an instructor's being asked not to discuss transgender issues in his classroom. That revelation prompted a swirl of criticism, and the university decided to disband the team this month. Elsewhere, the University of Iowa in August announced it was ditching the idea of a bias-response team.

- (b) *Campus speech codes*. From Arielle Martinez, *In a Time of Tension, Universities Craft New Free-Speech Policies*, CHRON. OF HIGHER ED., July 12, 2016, <http://www.chronicle.com/article/In-a-Time-of-Tension/237086?cid=rclink>:

If things had gone according to the administration's plans, the 24-campus City University of New York would have a new free-speech policy by now. But that didn't happen.

CUNY's Board of Trustees was to vote on a proposed policy at its June 27 meeting, but the decision has been postponed indefinitely. "It was clear from testimony at the public hearing on June 20, 2016, and other communications that there are questions and concerns about the proposed policy," the online calendar for the meeting reads. "A proposed policy will be considered by the Board of Trustees at a later time, following additional consultation and discussion."

The policy would, among other things, regulate the use of university property and facilities for "expressive conduct" like demonstrations and leafleting.

Supporters say the proposal would advance the university's commitment to protecting free speech, but opponents say it contains restrictions that would inhibit demonstrations.

Frederick P. Schaffer, CUNY's senior vice chancellor for legal affairs and general counsel, points to Black Lives Matter and the Boycott, Divestment, and Sanctions movement as contributing to his university's proposal.

"There's just been a number of incidents and controversies across the country that have raised questions where people have said either, 'My

free-speech rights are being violated,’ or other people have said, ‘There should be limits,’” he said.

A working group — led by Mr. Schaffer with representatives from the University Faculty Senate, the University Student Senate, and college presidents in the system — began laying the groundwork for the proposal in the fall.

But the Doctoral Students’ Council, the student government representing CUNY’s Graduate Center, has renounced the proposal and petitioned on Change.org for its dismissal.

"We are advocating for a policy that guarantees free speech and does not have any restrictions on time, place, and manner," said Hamad Sindhi, the council’s co-chair for communications. "We denounce any efforts by the police to suppress protests."

## **B. Free Tuition or Some Other Form of Mandated Tuition Regulation**

- (1) *Introduction.* In 2017, Congress will endeavor to reauthorize the Higher Education Act. That fact, plus the arrival of a new President and administration, suggest that life may be breathed into proposals emanating from presidential candidates, incumbent members of Congress, and state legislatures to control college costs by imposing limits on institutions’ ability to raise tuition—or even limits on their right to charge tuition at all.
- (2) *The proposals.*
  - (a) *Free community college.* From President Obama’s 2015 State of the Union Address:

... [T]o make sure folks keep earning higher wages down the road, we have to do more to help Americans upgrade their skills. America thrived in the 20th century because we made high school free, sent a generation of GIs to college, trained the best workforce in the world. We were ahead of the curve. But other countries caught on. And in a 21st century economy that rewards knowledge like never before, we need to up our game. We need to do more.

By the end of this decade, two in three job openings will require some higher education—two in three. And yet, we still live in a country where too many bright, striving Americans are priced out of the education they need. It’s not fair to them, and it’s sure not smart for our future. That’s why I’m sending this Congress a bold new plan to lower the cost of community college—to zero.

Keep in mind 40 percent of our college students choose community college. Some are young and starting out. Some are older and looking for a better job. Some are veterans and single parents trying to transition back into the job market. Whoever you are, this plan is your chance to graduate ready for the new economy without a load of debt. Understand, you've got to earn it. You've got to keep your grades up and graduate on time.

Tennessee, a state with Republican leadership, and Chicago, a city with Democratic leadership, are showing that free community college is possible. I want to spread that idea all across America, so that two years of college becomes as free and universal in America as high school is today. Let's stay ahead of the curve. [[https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 – annotations:8511434.](https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015-annotations:8511434)]

For a helpful summary of Obama administrative initiatives on college cost containment, *see* Executive Office of the President, AMERICA'S COLLEGE PROMISE: A PROGRESS REPORT ON FREE COMMUNITY COLLEGE (September 2015), <https://www.whitehouse.gov/sites/default/files/docs/progressreportoncommunitycollege.pdf>.

(b) *The RED Act.* In early 2016 a coalition of Senate Democrats led by Elizabeth Warren (Massachusetts) and Chuck Schumer (New York) introduced legislation titled the RED Act, with "RED" standing for "Reducing Educational Debt." The RED Act is the amalgamation of three bills that have been introduced in one form or another over the last half-decade:

- The America's College Promise Act, which would subsidize states' investment in free community college. Under the legislation, the federal government would appropriate and award three dollars in matching grants for every one dollar set aside by state legislatures to fund tuition waivers for eligible students.

Perhaps the most important impact of this legislation, even before a single dollar of federal money has been appropriated for the purpose, is the spur it has given to state and local programs to eliminate community college tuition. Just last year Sinclair Community College in Dayton launched its new Sinclair Scholars program under which as many as 550 recent high school graduates who meet eligibility requirements and are Pell-Grant-eligible are able to attend that college for up to two years, tuition-free. *Sinclair Launches the First Tuition Free Program of Its Kind Among Ohio Community Colleges*, <https://www.sinclair.edu/news/article/sinclair-launches-the-first-tuition-free-program-of-its-kind-among-ohio-community-colleges/>.

- The Bank on Students Emergency Loan Refinancing Act. Championed by Senator Warren, this bill would allow student loan holders to refinance through the Federal government at subsidized, discounted rates.
  - Pell grant reform. This idea, originally put forward by Democratic Senator Mazie Hirono (Hawaii), would alter the manner in which the federal budget treats Pell Grant appropriations. At present Pell Grants are funded largely through discretionary spending. In general, Republicans in Congress support cuts to funding, while Democrats have a history of trying to stabilize and raise it. Sen. Hirono's bill would incorporate a mandatory cost-of-living adjustment for inflation, which would not be subject to alteration or repeal every time Congress reauthorizes the Pell Grant program.
- (c) *Mandatory endowment spend-down rules.* “Representative Tom Reed of New York, a Republican, plans to introduce legislation that would require colleges with endowments of more than \$1 billion to pay out 25 percent of their annual earnings to reduce the cost of attendance for ‘working families,’ those earning between 100 and 600 percent of the poverty line. ...” Michael Stratford, *Billion-Dollar Targets: Lawmakers are again raising questions about wealthy universities’ endowments – and tossing around ideas to crack down on them*, INSIDE HIGHER ED, February 16, 2016, <https://www.insidehighered.com/news/2016/02/16/congress-returns-scrutiny-wealthy-university-endowments>.
- (d) *State legislation.* From National Conference of State Legislatures, *Tuition Policy*, September 8, 2015, <http://www.ncsl.org/research/education/tuition-policy.aspx>:

Tuition policy is a primary tool states have to influence college affordability and access. In most states, legislatures do not directly set tuition rates. Rather, they indirectly influence tuition rates through the annual budget process and by establishing broad policy parameters institutions and governing boards must follow when setting tuition. Tuition policy is often a delicate balancing act between restraining tuition increases, and considering institutions’ revenue needs. If tuition policy is too restrictive and limits revenue, the educational quality of institutions may decline, institutional bond ratings may be downgraded, and unintended consequences may arise should institutions aggressively seek alternative revenue sources, such as enrolling more nonresident students. If tuition rates rise faster than family incomes, students will likely need to borrow to finance their education, and price-sensitive students may attend an institution that does not match their academic credentials or may forego attending college entirely.

According to the NCSL, state legislatures have adopted several approaches to try to contain tuition increases:

- *Legislated limits on institutions' ability to raise tuition from year to year.* “Missouri implemented one of the strongest limitations in 2008-2009 when it tied tuition increases to inflation measured by the Consumer Price Index (CPI). ... If institutions exceed the maximum allowed tuition increase, they must return 5 percent of their state appropriations.”
- *Linking tuition to institutional performance.* “Texas Senate Bill 778 proposed limiting tuition increases to the rate of inflation at institutions that do not meet target levels on the majority of 11 performance measures. ... The proposed performance measures ... include number of degrees awarded, number of students making progress toward degrees, graduations rates and administrative costs.”
- *Tuition stabilization funds.* “Maryland created a Higher Education Investment Fund in 2007 to ... ‘keep tuition affordable for Maryland students and families.’ ... If higher education appropriations are lower than the previous year, the funds from the stabilization account can be used to offset the decline in appropriations and therefore limit tuition increases.”
- *Tuition freezes.* “Tuition freezes are fairly common following the large tuition increases that tend to occur during recessions. Freezes frequently are informal agreements negotiated during the budget process between institutions and legislatures. In exchange for increasing state support by a certain amount, institutions agree not to raise tuition for a certain period.”
- *Tuition Tax Credits.* “South Carolina offers a maximum refundable tax credit of \$850 for students who are attending four-year institutions and \$350 credit for those attending community colleges. New York offers a refundable tax credit that varies based on how much tuition a student must pay.”
- *Guaranteed or Fixed Tuition.* “Fixed or guaranteed tuition policies set a single tuition price for each incoming class that cannot increase for a certain period—usually four years. Under such policies, once enrolled, students do not face rapid tuition increases from one year to the next, allowing families to better plan for college costs. .... Policies in at least six states allow or require state institutions to offer guaranteed tuition rates. Among these states, Illinois requires all public institutions to offer a plan.”
- *Linking Tuition with Financial Aid.* “To counter the negative effects of tuition increases among low-income students, some states require a certain

amount of all tuition increases be reserved for need-based aid. Prior to implementing a tuition reduction, Washington required institutions that increased tuition above the amount expected in the appropriations bill to set aside 5 percent of tuition revenue for need-based aid.”

- *Resident and Non-Resident Tuition Tradeoffs*. “In response to lower state appropriations per student, many institutions have increased nonresident student enrollment in an effort to boost revenue. Several public research institutions have kept resident enrollment flat, while substantially increasing the number of non-resident students.”