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NAM MEDIATORS RANKED IN THE TOP 3 IN THE U.S. 6 YEARS IN A ROW
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NAM VOTED A TOP ADR FIRM IN THE U.S. 6 YEARS IN A ROW
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Having recently celebrated the Fourth of July, the issue of academic freedom seems particularly timely. Attorneys practicing education law are regularly faced with issues concerning academic freedom. What is meant by the term “academic freedom” and what role the law plays are two very important questions.

Apparent, it is not always clear where academic freedom as a set of professional principles ends and the law begins. Academic freedom has been recognized by the United States Supreme Court and by lower federal courts in connection with First Amendment cases involving both universities as institutions and the individual rights of faculty members.

Academic freedom is largely unanalyzed, undefined, and unguided by principled application, leading to its inconsistent invocation. Thus, the relationship between academic freedom and the First Amendment is unclear. Like attorney discipline in the legal profession, the Declaration indicates that non-academics do not possess the full competence to properly judge requirements. Also, they may be seen as acting on motives other than zeal for academic integrity and the maintenance of professional standards.

At the same time, placing this authority exclusively in the hands of faculty members imposes a corresponding obligation to police the standards of their profession.

In 1915, the American Association of University Professors (the “AAUP”) was founded and issued its Declaration of Principles on Academic Freedom and Academic Tenure (the “Declaration”). The Declaration states that the academic freedom of a teacher “comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”

It then discusses three considerations deemed critical to understanding these principles. These three considerations in sum and substance are: (1) the basis of academic authority (education institutions as a public trust); (2) the nature of the academic calling (independence of faculty); and (3) the functions of an academic institution (promoting inquiry and advancement of knowledge). The Declaration affirms that a university must provide a safe haven free from the criticisms of public opinion and punishment for providing thought-provoking discussion.

The Declaration describes what it considers the obligations of those bestowed with such freedoms. Specifically, the teacher: “in giving instruction upon controversial matters, while under no obligation to hide his own opinion under a mountain of equivocal verbiage, should, if he is fit for his position, be person of a fair judicial mind; he should, in dealing with such subjects, set forth justly, without suppression of innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published investigations. Whatever he may think, he should, above all, remember that his doctrine upon the questions at issue; and expressions of the great historic types of investigations, set forth justly, without suppression of innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published investigations of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.”

According to the Declaration, the power to determine when violations of these obligations have occurred, should be vested in bodies composed solely of members of the academic profession.

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In 1940, the AAUP and the Association of American Colleges (today the Association of American Colleges and Universities) agreed to a revised version of the Declaration, known as the 1940 Statement of Principles on Academic Freedom and Tenure (the “1940 Statement”). The 1940 Statement, which reaffirmed the basic principles of the Declaration, together with its 1970 Interpretive Comments, have been endorsed by hundreds of organizations and scholarly bodies.

What is Academic Freedom?

American principles on academic freedom were heavily influenced by the practices of German universities as well as by the growth of nonsectarian universities in the United States during the late 1800s. With the rise of ideological conflicts, especially relating to economic theory, faculty members at many US universities felt the need for protection against their dismissal for views administrators found disagreeable.

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President's Column

Summer is here, and with that begins a brand new membership year at the Nassau County Bar Association. As I reflect on the past year, I am happy to report that the NCBA is thriving. Our membership is increasing at a rapid pace, and we are continuing to provide exclusive member benefits and opportunities designed to help you succeed.

If you are a returning member, we are thrilled to have you back at Domus. If you are a new member, I would like to personally welcome you to the NCBA. We are honored to have you join our professional community of nearly 5,000 attorneys and legal professionals who share the same dedication and passion for the legal field.

As the 117th President of the NCBA, I have stated that one of my main goals for my term is to make the Bar Association stronger than ever through collaborative networking events, the use of modern technology, engagingCLE courses, and exclusive member benefits. An additional goal of mine is to continue to grow our social media platforms. Please like us on Facebook (Nassau County Bar Association) and follow us on Instagram at nassaucountybarassociation. There you will find event photos, CLE updates, dining room menu options and more. We would love to have you join us.

As we commence this new Bar year together, with the support of the Executive Committee, Board of Directors, NCBA staff and you, our valued members, I am excited to reach those goals and to share with you some of the benefits, events and opportunities that there are to look forward to in the months ahead.

The NCBA staff is dedicated to providing you with the opportunities and tools to grow and succeed within the legal profession. We encourage you to take advantage of those benefits. Enjoy a lunch at Domus in our beautiful dining room with your colleagues or clients, join a committee, attend a free CLE program, network with other members at one of our many annual events, showcase your expertise and write an article for the Nassau Lawyer, volunteer your time and skills at an open house or mortgage foreclosure clinic. The opportunities are endless. Among all of the benefits that the NCBA offers, the one that I believe is the most valuable is the volunteer opportunities that are available to members. As attorneys, we dedicate our lives to helping others. We strive to change lives. What better way to catalyze positive change in our community than to take advantage of one of the many volunteer opportunities that the NCBA has to offer?

If you didn’t already know, as a member of the NCBA, there are multiple ways to get involved in the community. Have some free time available? Donate that time to volunteer at one of the numerous mortgage foreclosure clinics that the NCBA hosts each year, or at an open house clinic where residents can receive free legal advice on any legal issue they may be experiencing. Looking to make a difference in the lives of children or teens? You can volunteer to mentor a middle school student in need of guidance through our Student Mentorship Program, or coach or judge a high school mock trial tournament with students who are eager to learn more about the legal system.

In addition to countless volunteer opportunities, the NCBA has many events planned this year that all members should take advantage of. Our annual membership appreciation “BBQ at the Bar” will take place on Thursday, September 5, 2019, on the front lawn at Domus. Returning members can gather to socialize, enjoy some delicious BBQ fare, meet with colleagues and create new friendships. Also, many prospective members and non-member law students will stop by to see what the NCBA is all about — be sure to extend a hearty welcome to them and encourage them to join our ranks (law student membership is free!).

WE CARE will also be hosting some exciting events this fall, including the Tunnel 2 Tower 5K Run/Walk, Las Vegas Night, and the Leukemia & Lymphoma Society’s annual Light the Night Walk. Please stay tuned for additional information and event dates.

I foresee a successful and productive 2019-20 Bar year ahead. I look forward to seeing you at Domus, and encourage you to get involved and take full advantage of the exclusive benefits that come with being a member of the NCBA.

Richard D. Collins
From the President

Esquires Fine Dining offers its guests an a la carte menu daily, as well as a variety of hot buffet options, a salad bar, desserts, and more. The restaurant is also available to cater NCBA Members’ private events at Domus.

Exclusive Perks: Attend an Event, Submit an Article, Give Back to the Community

Events
The NCBA hosts numerous special events each year, including Judiciary Night, BBQ at the Bar, Holiday Party, Law Day, Annual Dinner Dance, Golf Outing, and more.

Monthly Subscription to the Nassau Lawyer
Members are automatically subscribed to the Nassau Lawyer, the official publication of the NCBA, which offers insightful articles on the latest legal issues, laws, and procedures. Only members of the NBCA can contribute articles to Nassau Lawyer, and are encouraged to do so as often as possible.

Business Development
Business development opportunities are available to members, including potential new client referrals, cost-effective mediation and arbitration, and access to legal job openings.

Community Service
Members who are looking to give back to the community can do so by volunteering at free legal clinics hosted by the NCBA. Coach or judge a high school mock trial; mentor a middle school student through the Student Mentorship Program; address community groups, or interpret for non-English speaking residents.

The NCBA takes pride in offering an exclusive member experience. Don’t miss your chance to connect with colleagues and take advantage of the many opportunities available to you.

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Nassau Lawyer welcomes articles written by members of the Nassau County Bar Association that are of substantive and procedural legal interest to our membership. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to Nassau Lawyer, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations and quotations.
College is the start of an exciting new chapter—one of self-discovery, independence and growth. However, for many college students, this transition is accompanied by considerable stress, anxiety, depression and other mental health challenges.

A fall 2018 survey from the American College Health Association found that over 60 percent of college students “felt overwhelming anxiety” and over 40 percent of students “felt so depressed that it was difficult to function” at least once in the last 12 months. Further, 45 percent of students reported experiencing a “more than average” level of stress within the last 12 months.1

With today’s college students experiencing mental health concerns at an alarming rate, colleges and universities are challenged with responding in a manner that balances student needs, autonomy, privacy, campus safety and compliance with disability laws.

The University of California Case

Recent case law makes clear that, when faced with circumstances involving students exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action, including dismissal, exhibiting mental distress, institutions can and should take action.

School administrators learned of the student’s delusions and attempted to provide mental health treatment over the course of many months, but the student ultimately refused to work with the school’s counseling center, refused to take his medication, and refused voluntary hospitalization. Without warning or provocation, during a chemistry lab one morning, the student stabbed Katherine Rosen, a fellow student, in the chest and neck with a kitchen knife. She was taken to the hospital with life-threatening injuries, but ultimately survived. The student pled not guilty by reason of insanity to the criminal charges.

Rosen sued UCLA and several of its employees, alleging they failed to protect her from the student’s foreseeable violent acts. The lower court held that UCLA had no duty to protect Rosen and the case was ultimately appealed.

The Supreme Court of California, in overruling the Court of Appeals, held that universities owe a duty to protect or warn its students from foreseeable acts of violence by other students in the classroom or during curricular activities. It recognized, however, that the law generally does not place a duty to protect others from the conduct of third parties unless there is a special relationship between the parties. The court found that “[i]n the college-student relationship, there is a special relationship, such as a doctor-patient relationship, which may result in a corresponding duty to protect others from the conduct of third parties unless there is a special relationship between the parties.”

The MIT Case

In Nguyen v Massachusetts Institute of Technology,2 Han Duy Nguyen, a graduate student at MIT, suffered from mental health issues and was receiving treatment from psychiatrists outside of the university. Nguyen informed a psychiatrist that he had previously attempted suicide twice, numerous years prior to joining MIT, but did not feel a suicide prevention protocol if the university has developed such a protocol. The Superior Court of Massachusetts, on appeal, affirmed the ruling. In its decision, however, the court found that colleges and universities have an obligation, under certain circumstances, to prevent suicides.

The court noted that, in certain circumstances, there is a special relationship, such as a student between a university and its student, that may result in a corresponding duty to take reasonable action to prevent suicide. Accordingly, when an institution has "actual knowledge of a student’s suicide attempt that occurred while enrolled at the university or recently before matriculation" or "a student’s stated plans or intentions to commit suicide," the institution has a duty to take reasonable measures under the circumstances to protect the student.

Reasonable measures include initiating a suicide prevention protocol if the university has developed such a protocol. In the absence of such a protocol, reasonable measures require the institution (including...
In Taylor v. City of Saginaw, the Sixth Circuit held that "chalking" tires in municipal parking lots is a search under the Fourth Amendment, and municipalities relying on the practice must therefore comply with Constitutional standards. The Circuit courts of appeals are divided as to whether a search occurs in the context of "chalking" tires. Nevertheless, the Sixth Circuit held that chalking tires to gauge whether cars have overstayed their time is a practice as ubiquitous as it is overlooked. It does raise significant revenue, however, for municipalities in New York and across the country. If the courts ultimately find the practice unconstitutional, then municipalities—and their counsel—will have to find other ways to enforce time limits in their parking lots.

The Fourth Amendment’s Requirements

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." New York’s Constitution contains identical language in Article I, Section 12.

In United States v. Jones, the U.S. Supreme Court explained the two possible definitions of a search under the Fourth Amendment. The traditional definition, tied to common-law trespass, was when the government "physically occupied private property for the purpose of obtaining information." Jones held accordingly that placing a GPS device on a car constituted a search, and New York’s Court of Appeals has agreed.

In Katz v. United States, however, the Court held that wiretapping also constituted a search, broadening the definition beyond physical intrusion: "there is a twofold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." As Jones made clear, however, Katz added to the traditional definition of a search without supplanting it. For a search to be reasonable, it must either be authorized by a warrant or fall within one of the narrow judicial exceptions. As the Katz Court put it: "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable unless they fall within one of the specifically established and well-delineated exceptions." New York courts, however, have in some instances constrained the federal exceptions, granting further protections from warrantless searches. For example, in People v. Scott the Court of Appeals held that landowners’ reasonable expectation of privacy goes beyond the curtilage of the home, rejecting the federal "open fields" doctrine of Oliver v. United States.

In 2017 Allison Taylor brought suit under 42 USC § 1983 against the City of Saginaw, Michigan, and Tabitha Hoskins, a parking enforcement official with the city. She alleged that since 2014 she had received 14 parking tickets for exceeding time limits, and that all of those tickets had been issued by Ms. Hoskins. Each ticket indicated the date and time that a tire of Ms. Taylor’s vehicle had been marked with a "chalk-like substance." Ms. Taylor asked the district court to certify the case as a class action, to declare the practice unconstitutional, and to order the city to cease chalking and refund all related tickets.

The defendants moved to dismiss under Federal Civil Rule 12(b)(6), and the district court granted the motion. "Reasonable minds might disagree regarding whether a search occurred here, but there is no doubt that any such search was not unreasonable in a constitutional sense."3 Chalking tires to determine whether a car has overstayed its time, the court found, meets the two-part test in Jones for a search: a trespass for the purposes of gathering information. Such a search is reasonable, however, under two exceptions. First was the automobile exception, based on the lower expectation of privacy in one’s vehicle. Second was the community-caretaker exception, under which police can, for example, tow away abandoned or disabled vehicles in the interest of public safety.

On appeal the Sixth Circuit reversed and remanded, agreeing that chalking constitutes a search but holding that it might not fall under either exception.

The automobile exception, the court held, permits police to search an automobile without a warrant only if they have "probable cause to believe that the vehicle contains evidence of a crime." In the case of chalking cars, there is no probable cause; indeed, the point is to chalk the cars before they have overstayed their time. The Sixth Circuit also held that chalking cars does not fall under the community-caretaker exception, which only applies "when delay is reasonably likely to result in injury or ongoing harm to the community at large." The city, the court noted, had failed to show how a lawfully parked car poses any safety risk. "Because the purpose of chalking is to raise revenue, and not to mitigate public hazard," the city was not acting in its role as community caretaker.

Accordingly, the Sixth Circuit denied the defendants’ motion to dismiss, but was careful to constrain the effect of its decision: This does not mean, however, that chalking violates the Fourth Amendment. Rather, we hold, based on the pleading stage of this litigation, that two exceptions to the warrant requirement—the "community caretaking" exception and the motor-vehicle exception—do not apply here. Our holding extends no further than this. When the record in this case moves beyond the pleadings stage, the city is, of course, free to argue anew that one or both of these exceptions do apply, or that some other exception to the warrant requirement might apply.

Time’s Up? “Municipalities” Options After Taylor

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Thursday, October 17, 2019
5:30 PM at Domus

Join the Officers, Directors and Members of the Association as we salute the Judges of Nassau County.

$80 NCBA members
$140 Non-members

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Reasonable Expectation?
“Chalking” Tires May Violate the Fourth Amendment

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Taylor: Chalking Tires of Lawfully Parked Cars

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Suspension of Students with Disabilities for Sexualized Utterances and Behaviors

It is not uncommon for the student facing disciplinary suspension to also be a disabled student classified with special needs. In certain matters, the nature of the student’s disability dovetails with sexually charged utterances, behaviors, or both, which of course violate school codes of conduct. Where such a student has been classified, however, their IEP (Individualized Educational Plan) and BIP (Behavioral Intervention Plan) may omit references to the propensity for the sexualized utterances or behaviors incident to the disability. These omissions can result in suspensions. The purpose of this article is to consider the implications of these omissions and suspensions, and how to minimize them through careful planning.

Disabled Students’ Right to an Education

Since the 1970s the movement to mainstream students with disabilities in order to educate them with their typical peers in the least restrictive setting is predominant. Under the IDEA, the Individuals with Disabilities Education Act, students with disabilities are afforded the right to a FAPE, a free and appropriate public education in the least restrictive environment. In New York State, Article 89 of the Education Law and Part 200 of the Commissioner’s regulations serve as the primary vehicle for implementing IDEA regulations.

A FAPE consists of special education and related services provided to an eligible child with a disability at public expense under public supervision and direction and in conformity with an individualized education program. According to the United States Supreme Court, an IEP, individualized education program is to be tailored to meet the unique needs of that student. The Supreme Court rejected the “merely more than de minimis” standard.

The IEP is a written statement outlining the plan for providing an educational program for the disabled student based on his or her unique needs. School districts must make a FAPE available to all eligible children with disabilities, regardless of the severity of their disability. Special education means specially designed individualized or group instruction or special services or programs provided at no cost to the parent to meet the unique needs of the eligible student with a disability.

In addition, related services consist of transportation and such developmental, corrective, and other services which may be required to assist a child with a disability, including identification of the disabling conditions, psychological services, physical and occupational therapy, social work and counseling services, medical services, parent counseling and training and more.

School Disciplinary Procedures and Disabled Students

Every school has a code of conduct. Students with disabilities face disciplinary suspensions for violating school codes of conduct nearly twice as often as their typical classmates. In response to this trend, in 2016 OSERS (U.S. Department of Education Office of Special Education and Rehabilitative Services) issued a guidance document, known as a “Dear Colleague” letter, which emphasized that schools must provide positive behavioral supports to students with disabilities who need them. The OSERS guidance clarifies that repeated use of disciplinary actions may suggest that children with disabilities may not be receiving appropriate behavioral interventions and supports.

Generally speaking, school districts may suspend or remove a disabled student from school in accordance with the procedures and safeguards set forth in both federal and state law and regulations. A school board, superintendent of schools, or a building principal may order the placement of a student with a disability into an appropriate interim alternative educational setting (IAES), another setting, or suspension for a period not to exceed five consecutive school days.

The determination whether a suspension constitutes a disciplinary change of placement based on a pattern of removals is made on a case-by-case basis, depending on the student and factors involved and is subject to review through due process and judicial proceedings. Logically, this is problematic insofar as the very nature of this case-by-case analysis leaves the burden on the family of the student with special education needs to appeal the repeated suspensions in order to demonstrate that the pattern of removals constitutes a change of placement.

See SUSPENSION, Page 20

ATTORNEYS & JUDGES

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Education/Constitutional Law

Municipal Fees and the Eighth Amendment's Excessive Fines Clause

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Unlike other forms of punishment that impose costs on government, fines create revenue. Nassau County, engaged in everything from speed cameras to booting cars, forgeries, and property tax hikes, has become the subject of a constitutional challenge.

**Timbs v. Indiana: Eighth Amendment Excessive Fines Clause Applies to States**

The petitioner in Timbs v. Indiana, Tyson Timbs, was a first-time offender suspected of drug sale. After Timbs pleaded guilty, Indiana moved to forfeit the car he was driving when he was arrested: "a $42,000 Land Rover, which he had bought with money from his father's life insurance policy." In addition to a punishment and the fines paid, Timbs sued, utilizing civil forfeiture after the guilty plea to obtain the car; however, as noted by others, "[e]very often, law enforcement will seize assets of the accused without an actual conviction."

Until Timbs v. Indiana, the Supreme Court of the United States "...decided whether...the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause."

"Timbs is characterized as "a sweeping rule that strengthens property rights and could limit controversial police seizures, such as those done through civil forfeiture, nationwide." Its application to the states in Timbs, like Supreme Court decisions such as Mapp v. Ohio (Fourth Amendment) and McDonald v. City of Chicago (Second Amendment), should reverberate the message that states cannot police for profit. The Excessive Fines Clause was taken verbatim from the English Bill of Rights of 1689. "One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtors' prison." The Supreme Court in Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc observed that "that the [Excessive Fines] Clause derives from limitations in English law on monetary penalties exacted in civil and criminal cases to punish and deter misconduct." The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." This notion of punishment...cuts across the division between the civil and the criminal law."

**Excessive Fines Cases: Relevant Factors**

Cruel and Unusual Punishment prevents the imposition of a punishment which is "grossly disproportionate" to the crime committed. There are three factors relevant to this inquiry: (1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions.

The Supreme Court in Browning-Ferris recognized that the Excessive Fines Clause is an essential check on the government's tendency "to use the civil courts to extract large payments or forfeitures for the purpose of raising revenue." Therefore, the first question in an excessive fines case is whether the fine at issue is punishment. The second step of the excessive fine inquiry is whether the fine is in fact excessive. The Supreme Court in United States v. Bajakajian has explained that a fine imposed as punishment is excessive under the Excessive Fines Clause only "if it is grossly disproportionate to the gravity of a defendant's offense." The touchstone of the constitutional inquiry under the Excessive Fines Clause, moreover, is "the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." While not addressed in the Supreme Court's Timbs decision, Nassau County's costs associated with punishment, are likely to become subject to constitutional scrutiny, thus bringing the issue out of the local court.

In Nassau County of Nassau, Judge Joseph F. Bianco allowed excessive fines claims against the Nassau County Traffic and Parking Violations Agency ("TPV A") to survive a motion to dismiss. In Dubin, the Nassau County TPVA Driver's Responsibility Fee (Nassau County Ordinance 190-2012) was charged as a non-discretionary penalty imposed merely for having been issued a ticket. Bizarre as it might seem, the complaint from which the TPVA sought dismissal from Dubin alleged that the fee is an excessive fine imposed against those whose only improper action is simply being issued a ticket, and that "[b]y charging a penalty after the charges/accusatory information have been dismissed, defendants have violated the Eighth Amendment's prohibition upon excessive fines in comparison to the accused actions." In acknowledging the applicability of the Excessive Fines Clause, Judge Bianco noted it was based upon the allegations and not the argument that the fine was unconstitutional excessive or disproportionate.

**Excessive Fines Case against Nassau County?**

Nassau County citizens are the subject of increased taxation, from recording a deed to fees associated with routine traffic offenses in municipalities that don't have the police department. It leads to baroque corruption, and it also functions as a backdoor way to fund basic services in municipalities that don't have the police department. It may be the misuse of forces that are intended to be the voices of their citizens for tax increases. Ever since Mapp v. Ohio and Browning-Ferris, in which courts ruled that forfeitures can fall outside the scope of the Excessive Fines Clause, forfeiture is unconstitutional if it is grossly disproportional to the gravity of a defendant's offense. Only case law will determine whether it is the question of proportionality (i.e. dollar-value) that will be guiding light of what is or is not excessive in Nassau County. In a country that was founded by Bostonsians who did not want to pay tax for tea, perhaps people in the 21st century will mount a federal court challenge to the regular forfeiture of vehicles in driving while intoxicated cases and the doubling and tripling of traffic fines, the threat of daily fines offered by municipal entities, or the regular booting of cars here in Nassau County.

Cory Morris is a Credentialed Alcoholism and Substance Abuse Counselor-Trainee and adjunct professor at Adelphi University, The Law Offices of Cory Morris, helping individuals facing addiction and criminal issues, accidents and injuries, and lastly, accountability issues. Mr. Morris maintains offices in Dix Hills and in Fort Lauderdale, Florida.

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**Articles are due September 3, 2019**

**The Eighth Amendment to the United States Constitution provides: ”Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Unlike other forms of punishment that impose costs on government, fines create revenue. Nassau County, engaged in everything from speed cameras to booting cars, forgeries, and property tax hikes, has become the subject of a constitutional challenge.**

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**Excessive Fines Case against Nassau County?**

Nassau County citizens are the subject of increased taxation, from recording a deed to fees and penalties associated with routine traffic matters that greatly differ from county to county. Suffolk County is starting to follow this trend perhaps to a greater degree. Indeed, one commentator has noted that “[t]he misuse of forces that are intended to be the voices of their citizens for tax increases. Ever since Mapp v. Ohio and Browning-Ferris, in which courts ruled that forfeitures can fall outside the scope of the Excessive Fines Clause, forfeiture is unconstitutional if it is grossly disproportional to the gravity of a defendant’s offense.” Only case law will determine whether it is the question of proportionality (i.e. dollar-value) that will be guiding light of what is or is not excessive in Nassau County. In a country that was founded by Bostonsians who did not want to pay tax for tea, perhaps people in the 21st century will mount a federal court challenge to the regular forfeiture of vehicles in driving while intoxicated cases and the doubling and tripling of traffic fines, the threat of daily fines offered by municipal entities, or the regular booting of cars here in Nassau County.

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That change is central to the right to due process and is an essential protection for innocent students who are falsely accused.

Discretion to Follow Accuser’s Wishes: The proposed regulations would allow the accuser to decide whether schools should initiate a disciplinary process against an accused student. If the accuser files a formal complaint, the rules would require the school to conduct a preliminary investigation and then notify the accused student of the complaint. If the accuser does not believe that formal proceedings are necessary, the school must offer supportive measures to the alleged victim without punishing a student whose wrongdoing has not been proved.

Disclosures of Evidence: The proposed rules would require the school to prepare an investigative report prior to holding a hearing on a formal charge. The school must give both the accuser and the accused an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint. The rules would give both parties at least 10 days to review and respond to the evidence so that the responses can be included in the final report at least 10 days in advance of a disciplinary hearing.

Discipline Limited to Education Related to Victims: The proposed rules would require that any further discipline be education-related to the victims, meaning that it would not include any punishment that is unrelated to the education-related matters.

Standard of Proof: Schools would be free to choose to adopt a standard that gives greater or lesser weight to allegations that may result in the same punishment.

Cross-examination: Proposed rules would require the accuser to attend the hearing at which a final decision about discipline is made. The accuser would have the opportunity to cross-examine the complainant and to present evidence that may be relevant to the determination of the final decision.

Unbiased Decision-Makers: The proposed regulations would require that the decision-maker be unbiased and have no prior relationship with any of the parties. The decision-maker would be required to be impartial throughout the process and to avoid any conflict of interest.

Moving Forward: The proposed rules are a step in the right direction. If they are adopted, they will enhance the opportunity for accused students to receive a fair hearing.

Many colleges and universities will respond to the new rules by developing or updating their own policies. Combined with representation by a lawyer who has substantial experience in the area of higher education law, the proposed rules will give students a fighting chance to obtain a fair hearing and to avoid losing the opportunity to receive the education they were promised.

Scott Limmer’s practice concentrates in the areas of criminal defense and college disciplinary law, where he advises college and university presidents and college students on the rights that they have. He is not a lawyer, but in his practice, he represents students on-campus, where every month, he and his co-host discuss the issues that face small and solo practitioners.
The Intimate Association Between the First and Fourteenth Amendments

Federal courts in New York have long recognized the United States Constitution's protections of intimate associations. The intimate associations generally protected from government interference include the close family connections such as husband and wife and parent and child. Courts have sometimes described the right of intimate association as arising under the First Amendment, while at other times it is described as arising under the Fourteenth Amendment. This article explores the differences between these rights as recently delineated by the Second Circuit Court of Appeals, and the decision's impacts on intimate association claims in New York.

Adler: Intimate Associations as a First Amendment Right

The Second Circuit closely examined the right to intimate association and the haziness of its contours for the first time in 1999, in Adler v. Pataki.1 The case arose in the context of an employment dispute where a government lawyer alleged that he was fired by the state for making a complaint against a fellow state-employed lawyer. This action, the plaintiff alleged, constituted a violation of his First Amendment right of intimate association.2

At the time of the Adler decision, the Second Circuit observed that “[t]he source of the intimate association right has not been authoritatively determined.”3 The confusion, according to the court, arose because the Supreme Court sometimes suggested that the right to intimate association emanated from the Fourteenth Amendment's guarantees of personal liberty as a component of due process.4 Other Supreme Court cases, the Circuit noted, described the right of intimate association as being comprised of the First Amendment rights of intimate association and expressive associations.5

In Adler, the Second Circuit expressed uncertainty not only about the source of intimate association rights, but also about the appropriate standard to evaluate such claims.6 The Court found no applicable standards applied by the Supreme Court and Circuit Courts: (1) the violation must have the effect of “likely . . . ending the protected relationship,” (2) the state's action must have had the purpose of “affecting the relationship,” or (3) the state's actions must be “arbitrary” or constitute an “undue intrusion . . . into the marriage relationship.”

The Court determined, however, that Adler was not alleging that the state undertook to regulate or to end his marriage, but rather took action against him in retaliation for his wife's conduct.7 Though the matter is not free from doubt, the Adler court decided that such a claim touched on the protections of the First Amendment and that, “[a] relationship as important as marriage cannot be penalized for something as nonsubstantial as a public employer's discomfort about a discrimination lawsuit brought by an employee's spouse.”8 Thus, the concept of a First Amendment intimate association claim was solidified in New York.

Roberts: Intimate Associations Under the Fourteenth Amendment

In addition to the First Amendment, intimate association claims have arisen out of the Fourteenth Amendment's guarantees of substantive due process. In 1984, the Supreme Court in Roberts v. United States Jaycees acknowledged the existence of a “freedom of association” as being a “fundamental element of personal liberty.”9 In Roberts, Justice Brennan noted that some relationships are so important that the constitution protects them from “unwarranted state interference.”10 As this general concept developed in the Second Circuit, courts required a showing of government conduct which was “so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection.”11

As Fourteenth Amendment intimate association claims were litigated across the country, cases diverged along two lines: government regulation of intimate associations as a “fundamental right,” and expressive association.6 In addition to the First Amendment intimate association claims, defendants should look to the Second Circuit's decisions when litigating Fourteenth Amendment intimate association claims, the Circuit clarified that First Amendment claims may arise when the state intrudes into a family relationship to reitate for a family members' exercise of his or her First Amendment rights.20

Thus, Gorman has settled confusion about intimate association claims in New York in at least three ways. First, Gorman makes clear that intimate association claims may arise under the Fourteenth Amendment, depending on the alleged conduct. Second, First Amendment intimate association claims must allege that a family member engaged in protected First Amendment activity and that the state retaliated against the family based on that activity. Third, Fourteenth Amendment intimate association claims must allege that the government intentionally interfered with the family relationship.

Be Clear About Your Claims

New York practitioners should pay close attention to the Gorman decision when litigating intimate association claims. Plaintiffs should recognize the significant differences between claims asserted under the First Amendment versus those asserted under the Fourteenth Amendment. Claims should not be broadly labeled as intimate association, but rather should be linked to the particular amendment applicable to the facts of the case, to avoid confusion and to be sure the allegations meet the legal requirements for the claim.

Defendants should scrutinize intimate association claims for the vulnerabilities identified by Gorman. For First Amendment intimate association claims, defendants should look to the court for failing to identify the protected activity of a family member. When analyzing Fourteenth Amendment intimate association claims, defendants should review whether the claim is supported by allegations showing conduct was intentionally directed at the family relationship.

Intimate association claims may not be commonly litigated, but when they were, confusion swirled around the differences between First and Fourteenth Amendment claims as well as the standards for each claim. After Gorman, New York's District Courts and litigants in those courts, have clearer guidance about constitutional torts which may arise when a government interferes with close family relationships.
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I dedicate this article to the memory of my first law mentor, David Kadane. He was one of the founding professors of the Hofstra University School of Law and more. He drilled into me that a good lawyer does not rely on spouts and conclusory opinions, as they may be erroneous. Instead, a good lawyer continues the research until he finds the heart of the issue and starts from there.

The Second Department's determination that CPLR 5015(a)(3) requires a defaulting defendant to show an excusable default and a meritorious defense came from Justice Mangano's concurring opinion in Shaw v. Shaw. There, it is clear that Justice Mangano improperly merged CPLR 5015(a)(1)'s requirements into CPLR 5015(a)(3) without any explanation, and by doing that, he added to that statute and violated the Separation of Powers Doctrine.

Shaw v. Shaw: Justice Mangano's Concurrence

The plain language of CPLR 5015(a)(3) is clear: "On motion, the court which rendered a judgment or order may relive a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of fraud, misrepresentation, or other misconduct of an adverse party...." Examining that statute, there is no ambiguity or other valid basis for not aiding to or taking away from it. There is no mention of intrinsic or extrinsic fraud. CPLR 5015(a)(3) just says "fraud." There is no mention of a defaulting movant having to show merit or any excuse.

Notwithstanding the plain language of that statute, Justice Mangano, in Shaw v. Shaw, added to CPLR 5015(a)(3) when he wrote: "It is well established that a motion to vacate a default judgment will not ordinarily be granted in absence of (1) a valid excuse and (2) a demonstration of merit." Confusing! Yes! That is because Justice Mangano imposed the requirement for vacating a default, pursuant to CPLR 5015(a)(1), upon vacating a prior judgment or order, which is pursuant to CPLR 5015(a)(3).

The Separation of Powers Doctrine is laid out in People v. Cahill: "Our function as judges is to interpret the law. The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature. The clearest indicator of legislative intent is the statute itself. If the language chosen by the State Legislature is clear and unambiguous, and involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from the meaning. When this doctrine is violated, a court impermissibly encroaches upon the legislative and executive power of the State and thereby violates the foundation of the separation of powers doctrine." In Shaw v. Shaw, that court said:

"[H]owever, defendants' motion to vacate the judgment of divorce is not brought on the ground of excusable default as delineated in paragraph 1 of subdivision (a) of CPLR 5015. Rather, his motion to vacate, being predicated on an accusation that he was lured into a false sense of security with respect to the divorce action, in essence an allegation of extrinsic fraud is brought pursuant to paragraph 3 of subdivision (a) of CPLR 5015. That paragraph allows a judgment to be vacated upon the ground of fraud, misrepresentation or other misconduct. In our opinion, a movant seeking relief from a judgment under this paragraph, at least on the ground of extrinsic fraud, need not show that he has a meritorious defense or cause of action." Shaw v. Shaw, 97 A.D.2d at 403.

Then, in his concurring opinion, Justice Mangano, notwithstanding Oppenheimer v. Westcott wrote: "it is a well established principle that a motion to vacate a default judgment is addressed to the discretion of the court and should not ordinarily be granted in the absence of (1) a valid excuse and (2) a demonstration of merit." Shaw v. Shaw, 97 A.D.2d at 406.

Oppenheimer: The Court of Appeals on CPLR 5015(a)(3)

That is not the law written by the New York State Legislature. To know what the law is and should be, we need go no further than Oppenheimer v. Westcott.

Therein, the Court of Appeals made it clear that there was to be no distinction between intrinsic and extrinsic fraud under CPLR 5015(a)(3). "The inclusion in CPLR (Subd. (A), par. (3) of 'misrepresentation and other misconduct' is based upon the parallel wording of rule 60 (subd. (B), par. (3)) of the Rules of Civil Procedure (U.S. Code, tit. 28, Appen-
dix) and broadens the basis for relief recognized in prior case law, which required the movant to establish the commission of a fraud (5 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 5015.08, p. 50-234).

"Although the Advisory Committee notes make clear that the fraud forming the basis for a CPLR 5015 motion may be either extrinsic or intrinsic (Third Preliminary Report of Advisory Comm on Practice and Procedure, p. 204 (1959)), and the removal of that troublesome distinction has been applied by analogy to an independent action to set aside a judgment (Levine v. O'Malley, 33 A.D.2d 874, 367 N.Y.S.2d 918), it is by no means clear that an independent action can be based upon misrepresentation or misconduct, as can a motion under CPLR 5015 (subd. (A), par. (3)."

Later, the Court of Appeals further expounded on CPLR 5015(a)(3).

As originally drafted, CPLR 5015 (subd. Par. 3) provided for a power to vacate a judgment only on the ground of fraud (see Third Prelim. Report of Advisory Comm. On Practice and Procedure, N.Y. Legis. Doc., No. 17, 1959, p. 203). In a subsequent draft patterned in Rule 60(b)(3) of the Federal Rules of Civil Procedure, the text of the CPLR paragraph was revised to include fraud, misrepresentation or other misconduct (see Oppenheimer v. Westcott, 47 N.Y.2d 595, 413 N.Y.S.2d 908, 393 N.E.2d 982; Fourth Prelim. Report of Advisory Comm. on Practice and Procedure, N.Y. Legis. Doc., No. 20, 1960, pp. 214-215; 5 Weinstein-Korn-Miller-N.Y. Civ. Prac., par. 5018.08. Misrepresentation and misconduct were added to broaden the basis for granting relief beyond those situations in which it would be inequitable to permit a party to retain the benefits of a judgment where it is shown that the party engaged in nondisputed but wrongful conduct in obtaining the judgment (see 5 Weinstein-Korn-Miller, cit., pars. 5015.08, 5015.09, 7 Moore's Fed. Prac., par. 60.24). Relief is thus authorized when it is established that judgment sought to be vacated is infirm in consequence of fraud, misrepresentation or other misconduct practiced on the court in which the judgment was granted." Civil Ser-

In the Second Department, Shaw Remains the Law

Notwithstanding what the Court of Appeals made clear, the Second Department remains married to Shaw v. Shaw and ruled, in 2019, on a case where the issue of the Separation of Powers Doctrine was orally argued on November 1, 2018, that: [(T)o prevail on a motion pursuant to CPLR 5015(a)(3) where intrinsic fraud is alleged, a defendant must demonstrate a reasonable excuse for her default and a meritorious defense." Bank of New York Mellon Trust Company, N.A. v. Kristin Ross, a ruling with no explanation of how or why it did not violate the Separation of Powers Doctrine.

The Second Department also relies on Bank of New York v. Logakos. This case is cited by the Second Department in Bank of New York Mellon Trust Company, N.A. v. Kristin Ross. Examining Bank of New York v. Logakos it is clear that, notwithstanding other cases cited, its foundation and that of the other cases cited therein is Shaw v. Shaw.

Analyzing Bank of New York v. Logakos we see that it is also in direct conflict with Oppenheimer v. Westcott and Civil Service Bar Assn., Local 237, Intern. Broth. Teamsters v. City of New York. Neither of these Court of Appeals cases is cited therein. and instead, the reliance is on Shaw v. Shaw, like all of the cases relied on by the Second Department. The Second Department's determination in Bank of New York v. Logakos as to CPLR 5015(a)(3) was that the defendants alleged that the plaintiff obtained the underlying default judgment through "intrinsic fraud" and that the plaintiff's allegations as to the defendants' default on the mortgage were false (Morel v. Clacherty, 186 A.D.2d 638, 639), rather than through "extrinsic fraud," which is fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter (Shaw v. Shaw, 97 A.D.2d 403).

The defendants were therefore required to show a reasonable excuse for their default (see Fischman v. Gilmore, 246 A.D.2d 508; Berardo v. Berardo, 205 A.D.2d 1036; Morel v. Clacherty, supra)."

See CPLR, Page 21
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Jaime D. Ezratty has been elected the 30th Dean of the Nassau Academy of Law, the educational arm of the Nassau County Bar Association. Ezratty is a partner at Horing Wilkinson & Rosen P.C., Williston Park, where he practices in the areas of landlord/tenant law.

Jaime Ezratty is a very active member of the Nassau County Bar Association. In addition to his role as Dean, he is also the outgoing Chair of the District Court Committee and is a past Director of the NCBA Board of Directors.

Jaime began his legal career at Reid & Priest in New York City, where he practiced before the New York State and federal courts. His experience includes conducting trials, depositions, and all types of motion practice. In 1991, he went into private practice, concentrating most of his resources in the area of landlord/tenant law.

In addition, the following attorneys were elected to Nassau Academy leadership positions for the 2019-20 membership year: Associate Dean Anthony Michael Sabino of Sabino & Sabino, Mineola; Assistant Deans Terrence L. Tarver, Tarver Law Firm, Garden City and Susan Katz Richman, Attorney-in-Chief, Nassau County District Court Law Department; Secretary Michael E. Ratner of Abrams, Fensterman et al. Lake Success; Treasurer Scott J. Limmer, Mineola, and Counsel Gary Petropoulos of Catalano, Gallardo & Petropoulos LLP, Jericho.

NEW DEAN JAIME D. EZRATTY
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- **Assistant Deans** Terrence L. Tarver, Tarver Law Firm, Garden City and Susan Katz Richman, Attorney-in-Chief, Nassau County District Court Law Department;
- **Secretary** Michael E. Ratner of Abrams, Fensterman et al. Lake Success;
- **Treasurer** Scott J. Limmer, Mineola, and **Counsel** Gary Petropoulos of Catalano, Gallardo & Petropoulos LLP, Jericho.

**NEW DEAN JAIME D. EZRATTY**

Live CLE programs resume in September. Below is a snapshot of upcoming offerings.

changed the time of our lunchtime Dean’s Hours to 12:45–1:45 p.m. so as to accommodate attendees that need to be in court at 2:00 p.m.

**Pre-registration required for all programs.**

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**September 12, 2019**

Dean’s Hour: New York City’s Specialized High Schools in an Age of Diversity and Inclusion

*With the NCBA Education Law and Diversity and Inclusion Committees*

1 credit in diversity, inclusion and elimination of bias

**September 18, 2019**

Dean’s Hour: Statewide Housing Security and Tenant Protection Act of 2019

*With the NCBA District Court Committee*

1 credit in professional practice or skills

**September 24, 2019**

Dean’s Hour: Ethical Obligation to Maintain Confidentiality in an Electronic Age

*With the NCBA Ethics Committee*

1 credit in ethics

**September 25, 2019**

Dean’s Hour: Fireside Chat with Lawrence Byrne, Former Chief Legal Officer of the NYPD

1 credit in professional practice

**September 25, 2019**

Can a Judge Have an Extra-Judicial Life? (An Evening with Hon. Frederic Block)

*With the NCBA Federal Courts Committee*

1 credit in ethics

Sign-in begins 5:30 p.m.; Program 6:00–7:00 p.m.

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**SAVE THE DATE**

**Hon. Joseph Goldstein Bridge-the-Gap Weekend**

**March 14–15, 2020**

16 credits in one weekend! BTG is free for NCBA Members!
Like most Americans, I became aware of Harper Lee’s To Kill a Mockingbird as an ado-
ap. Required reading for the lip-smacking class of L&J and space inherent on the stage. Adapted by Aaron Sorkin and directed by Bartlett Sher, the Lincolnesque performance. Peck portrayed Atticus Finch as an avatar of moral courage and decency in the face of legally-sanctioned bigotry.

To Kill a Mockingbird has now come to Broadway and done so gloriously. The classic tale of childhood innocence amidst the cauldron of race, sex and class in the Old South was brought to the cinema. Gregory Peck won an Academy Award for his Lincoln-esque performance. Peck portrayed Atticus Finch as an avatar of moral courage and decency in the face of legally-sanctioned bigotry.

Ms Richardson Jackson is a graduate of Spellman College. With every breath she draws upon the stage, there is little doubt that she is upholding a tradition nurtured at that histori-
cally black institution.

In fortifying Calpurnia’s role, Sorkin wisely imbues her with a wisdom and dignity that was not seen in earlier characterizations. She stands in stark contrast to an endless litany of condescending stereotypes that have unfortunately defined the roles available to African-American actresses for far too long.

In this production, the relationship between Atticus and Calpurnia is not one of a paternalistic employer and a faithful retainer, but rather there is a bond of mutual respect. Perhaps it is historical to the actual period depicted, as Atticus and Calpurnia are described by Scout as being more like “brother and sister.” But it does seem natural, unforced and in its own way symbolic of the deep-rooted ambiguities of the American South.

Calpurnia is on a par with Atticus as the play’s moral center. In the novel or as realized by Gregory Peck, Atticus has an air of unquestioned righteousness. Daniel’s rendition presents a less traditionally authoritative figure. This is not a projection of frailty on the part of Daniels, but instead a demonstration of a benign blindness on the part of his character.

It is because he is an attorney, has a formal education, and is a white male, that Atticus has the luxury to believe that all people are essentially good. That you all have too to do, as he says often, is live in another person’s skin for a while to understand him. His sta-

tion in life permits him an almost Olympian detachment. Calpurnia occupies a decidedly different place in the social pecking order.

As Scout details, in Maycomb, Alabama in 1934, Blacks occupy the lowest strata, fol-

lowed by white farmers, then by white towns-

people, and above them all is the white profes-

cial class. Calpurnia has no alternative but to see things, not as Atticus would ideally like them to be, but rather as they really are. She cannot afford to close her eyes to the brutal reality that consistently confronts her and every other African-American.

Her cathartic moment comes in the Sec-

ond Act when she learns that Tom Robin-

son, the African-American man who Atticus
defends at trial, has been shot in the head five times while trying to escape from jail. Her pain is profound, born of four centuries of black women shedding tears for black men wrongfully killed.

Unlike Atticus, Calpurnia blames the jurors explicitly for their actions. She calls them “monsters” after rendering an unjust verdict of guilty after only 37 minutes of deliberations. With Tom dead, they are in her eyes now “murderers” for having set things in motion. Clearly, Calpurnia’s voice needs to be heard well beyond the cozy confines of the Shubert.

Similarly, the character of Tom Robinson obtains a new stature. It would have been simpler to have Tom serve as an abstraction, a representation of all victims of racial injus-
tice. Going well beyond the “Yes Sirs” and “No Sirs”, Ghenga Akinnagbe portrays Tom as a fully realized human being. A husband, a father, a man who does not want his kids to see him go to the electric chair if he is convicted.

Akinagbe presents a man so conscripted by racial and sexual mores of such hateful proportions, that every facet of his humanity is as much in question as his very life is in jeopardy. Indeed, what convicts Tom in the eyes of a jury that is never seen on stage, is that he felt genuine sympathy for his accuser. Danziger writes, this time, no black person could ever assert that he or she in any way fathomable was superior to a white person.

As a husband, a father, a man who does not want his kids to see him go to the electric chair if he is convicted.

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For over a decade, WE CARE, the charitable arm of the Nassau County Bar Association, has partnered with Rebuilding Together Long Island, Inc., a charitable organization dedicated to repairing and rebuilding the homes of individuals and families in need in Nassau County, including low-income residents who are elderly, veterans, disabled, or families with children. This year, the group volunteered to assist on another special project that helped to repair the home of a disabled gentleman who is living on his own now that his veteran brother has been moved to a nursing home.

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Jaime Ezratty, installed as the Dean of the Nassau Academy of Law
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Sarah Fastow, daughter of Judith and Fred Fastow, on her forthcoming wedding
Mike Levine, for your kindness and generosity
Maya Weller, granddaughter of Hon. Joseph and Marissa Lorintz
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VOLUNTEER ATTORNEYS NEEDED

OPEN HOUSE

Thursday, October 24, 2019
3:00 p.m. - 7:00 p.m.

The Nassau County Bar Association, Nassau Suffolk Law Services and The Safe Center invite all attorneys to volunteer for an OPEN HOUSE.

Any Nassau resident can come to the Bar Association’s headquarters, located at the corner of 15th & West Streets in Mineola, and speak with an attorney.

Attorneys knowledgeable in the following areas of law are needed to advise these residents.

- Bankruptcy
- Divorce and Family Issues
- Employment
- Mortgage Foreclosure and Housing
- Senior Citizen Issues
- Superstorm Sandy

Attorneys DO NOT provide legal representation.

Attorneys are needed between the hours of 3:00 to 5:00 p.m. and 5:00 to 7:00 p.m.

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LAP is supported by grants from the WE CARE Fund, part of the Nassau Bar Foundation, NCBA’s charitable arm, and the NYS Office of Court Administration.
SUSPENSION ... Continued From Page 7

Where the disabled student’s behavior is found not to be related to the disability, the student may be actually suspended as would a typical nondisabled peer, i.e. for longer than 10 days and up to 45 days in an IAI.11 12 This is a concern for harm to the student or others. Even in the best of circumstances, as with any suspension, the student’s routine and access to education and communication will be disrupted.13

The Manifestation Determination must be made timely and immediate steps must be taken to remedy any deficiencies in the student’s IEP implementation that may have contributed; and the formation of a hypothesis, where the conduct can be shown to result in the blurting and drawing of the very things that grip and occupy the student’s thought process. The BIP could and should have included tools for educators to allow the student to leave the room, to take breaks, as well tools for contextualizing and ignoring the comments and drawings no matter how offensive. Where these were not present in the BIP, the FBA and BIP omitted all of these, the student’s family unilaterally withdrew her from public school, enrolled her in an expensive private school, and then filed a complaint, alleging that she was bullied from there from home school and is sadly back to trying to find a safe placement for the child to learn.

Facing the Problem To Craft A Solution

Rather than avoid or omit sexualized content, students’ IEPs and BIPs should be crafted and subsequently revised to more specifically anticipate and structure the sexualized behavior and to artfully spell out the appropriate behavioral or therapeutic response to mitigate same.

Though sexually charged and challenging behavior, where the conduct can be shown to be substantially related to the student’s disability and/or due to failure to implement the BIP, and poses no imminent physical threat to school personnel or other students, classified students whose disabilities manifest in sexualized behaviors or utterances should not be subjected to extended suspensions. These suspensions are tantamount to a change of placement. In addition, they feel punitive and have no pedagogical value in these instances, and serve only a punitive purpose. Certainly for my clients, the families of students with disabilities, the costs of having to wage appeals to keep their children in school sometimes extend beyond mounting legal fees to further isolation and significant emotional tolls as well.

Rebecca Sassouni is the principal of Rebecca Sassouni, PLLC, offering consultation and representation for students with special education needs as well as students facing discrimination in the workplace. She can be reached at reedlaw@gmail.com or (516) 423-2599.

Michael Carstello III, a Partner in the law firm of Honick & Hamness LLP, who concentrates his practice in all areas of business and commercial litigation, was recently elected to serve on the Board of Directors of the Nassau County Bar Association for a three year term.

Barkett Epstein Kearon Aldea & LoTurco, LLP, a unique boutique criminal defense and post conviction litigation firm, will be featured in the fourth edition of the latest true crime original series, “Exhibit A,” an exploration into the American justice system through the uncertainties of forensic science as a result of the case Ms. Aldea won on appeal by challenging the validity of the prosecution’s DNA evidence.

Elizabeth Forspan is thrilled to announce the formation of Forspan Klear LLP, which is based in Great Neck and focuses on Elder Law, Trusts & Estates, and Health Care Law. Ms. Forspan also recently lectured at the ACGS Engagement Committee’s Las Vegas where she sat on an Estate Tax Planning panel and gave a lecture on “Planning for the Sandwich Generation.”

Karen Tenenbaum of Tenenbaum Law was the moderator at the NYU Tax Controversy Forum on the topic of New York Residency Audits. Ms. Tenenbaum, Leo Gabovich and Hana Boruchov presented at the NYSSEA, Metro Chapter on IRS Audit and Collection. Ms. Tenenbaum was published in Upserve.

Marian C. Rice

At its June 27, 2019 Annual Meeting, the Nassau County Bar Association, which represents 64 incorporated villages with more than 450,000 residents, elected Edward L. Liebman, former Chair of the Village of Sea Cliff, president for 2019-2020.

Assistant District Attorney, René Fichet, Director of Community Affairs for Nassau County District Attorney Madeline Singas, was the recipient of the Community Leadership Award of Value presented by H.E.Y.N. Help End Violence at its 20th anniversary celebration for being one of the originators of the anti-gang organization. Fichet was also presented with the Drug Free Hero Award by the Foundation for a Drug Free World at their Gala for work as a “community leader making the biggest difference in the New York Area,” and the Ann Irvin Award presented at Domus by the Nassau County Coalition of Youth Agencies annual legislative breakfast for a lifetime of work and dedication to the county’s youth.

Richard P. Cronin and Erin A. O’Brien have joined Castellano Balint Ahearn LLP as Partners in the Tax Citiarian and Condemnation Law Practice Group. They were both formerly partners at the firm, Cronin, Cronin, Harris & O’Brien, PC, located in Mineola.

Feather Law Firm, PC, is pleased to announce the appointment of David S. Feuer, a member of the firm, to the faculty of the ABA Section of Dispute Resolution's 12th Annual Arbitration Training Institute, which will be held in Philadelphia on May 16 and 17, 2019. Mr. Feuer led a panel discussion on employment law arbitrations.

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

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IN BRIEF column must be made as WORD DOCUMENTS.
Continued From Page 12

Morél v. Clacherty:* also dealing with CPLR 5015(a)(3), states:

On appeal the husband contends that because he moved to vacate the default judgment of divorce pursuant to CPLR 5015(a)(3), he does not have to present a reasonable excuse for his default. This contention would be correct if the movant alleged that the default judgment was procured through "extrinsic fraud" (Shaw v. Shaw, 97 A.D.2d 403, 467 N.Y.S.2d 231). However, since the plaintiff husband's primary argument is that the defendant wife's allegations and testimony were false (i.e. intrinsic fraud), he is required to make some showing of a meritorious defense and reasonable excuse for defaulting (see, Weinstein-Korn-Miller, N.Y. Civ. Prac. P. 5015.05b; cf Shaw v. Shaw, supra).

Again, the Court of Appeals is ignored and the foundation of the court lies in Justice Mangano's concurring opinion in Shaw v. Shaw. It also erroneously relies on Weinstein-Korn-Miller, N.Y. Civ. Prac. P 5015.05, a provision that specifically deals with CPLR 5015(a)(1). Those paragraphs in Weinstein-Korn-Miller that apply to CPLR 5015(a)(3) are 5015.08 and 5015.09.

Fischman v. Gilmore,:* like others, follows Shaw v. Shaw, and gives only a conclusion. It holds:

In this mortgage foreclosure action, the appellant moved to vacate a judgment of default entered against her based upon "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015(a)(3)). The appellant alleged that the plaintiffs had obtained the underlying judgment of default through "intrinsic fraud" (Morél v. Clacherty, 186 A.D.2d 638, 639, 589 N.Y.S.2d 231), rather than through "extrinsic fraud" (Shaw v. Shaw, 97 A.D.2d 403, 467 N.Y. S.2d 231). Therefore, she was required, inter alia, to show a reasonable excuse for her default (see, Morél v. Clacherty, supra; Berardo v. Berardo, 205 A.D.2d 1036, 614 N.Y.S.2d 935). Again, there is no analysis of the law, the Court of Appeals is completely ignored, and it is all based on Shaw v. Shaw.

Finally in, Berardo v. Berardo,* the Appellate Division Third Department followed the Second Department, and stated, "Thereafter, defendant moved, pursuant to CPLR 5015(a)(3), for an order vacating judgment... Inasmuch as defendant's request was based on intrinsic fraud, he was required to make some showing of a meritorious defense and a reasonable excuse for defaulting (see, Morél v. Clacherty, 186 A.D.2d 638, 589 N.Y. S.2d 778)." Again we have a complete avoidance of the Court of Appeals.

Strangely, we are left with the Second Department being in direct conflict with the Court of Appeals on CPLR 5015(a)(3), and it appears this will not be resolved until the specific issue finds its way to the Court of Appeals again.

David A. Bythewood, Hofstra Law School “Class of ’81,” has a general practice. He is a former Chair of the NCBA Banking Law Committee.

1. 97 A.D.2d 403 (2d Dept. 1983).
2. 2 N.Y.2d 14, 100 (2003).
4. AD 2017-11049.
5. 27 A.D.3d 678, 679 (2d Dept. 2006).
8. 205 A.D.2d 1036 (3d Dept. 1994).
tioned for en banc rehearing, and the Sixth Circuit has granted leave for the International Municipal Lawyers Association to file an amicus brief.

Regardless of the outcome, Taylor will not govern municipalities in states outside the Sixth Circuit. Indeed, one Pennsylvania borough has already announced that it will continue to chalk tires unless and until forced to collect revenue through more expensive methods, like parking meters, kiosks, or pay stations.23

There seems little reason, however, to think that New York State or Federal courts would not similarly hold that chalkings must comply with constitutional requirements. The Second Circuit has recognized the trespass definition of a search expressed in Jones,24 and New York State courts have construed the automobile- and community-caretaker exception much as in the Sixth Circuit.25

Municipalities in New York may therefore find it prudent to explore alternative means of policing their parking lots. One might think that snapping photos with some cell phone app might do the trick, but that would not prove that a car had been continuously parked in that spot.26 Municipalities could install pay stations, or perhaps use apps to make it easier for patrons to pay for parking. The beauty of chalking, however, is that patrons do not have to pay for parking as long as they do not overstay their time. On company, AutoChalk, promises to solve parking. The beauty of chalking, however, is that patrons do not have to pay for parking as long as they do not overstay their time. On company, AutoChalk, promises to solve parking in a given lot creates consent to search. The protections afforded by the Fourth Amendment may be waived by consent, provided it is freely, voluntarily, and understandingly given.28 The difficulty would be establishing consent without the subject’s signature or other manifestation of express consent and in showing that consent was truly without coercion.

Consent cannot be created, however, by simply posting a sign to the effect that parking in a given lot creates consent to “search” by chalking. Courts have rejected the notion that the State may post a sign at the entrance to a courthouse or hospital and then conclude that everyone who enters has consented to be searched without a warrant or probable cause.29 One might think that chalkings are less intrusive than searchings briefcases, so much so that consent to this limited search, albeit warrantless, may be implied. Jones, however, makes no such distinction: once the state creates a common-law trespass to obtain information, it has effected a search that must conform to the Fourth Amendment. Perhaps some affirmative act could constitute ongoing consent to search-by-chalking. Residents could apply for a permit that allows them to park for free up to the posted time limit, so long as they agree to have their tires chalked. The municipality would have to either restrict lots to residents or provide metered parking for out-of-towners, neither of which seems workable for commercial districts. An option to either pay for parking or affirmatively consent to chalking in exchange for free parking might be feasible, but would require the expense of either an app or pay stations without the revenue of universal paid parking.

Technology may circumvent these concerns, but it cannot negate them. If courts ultimately find that chalkings violate the Fourth Amendment, then municipalities will have to decide whether the revenues from parking tickets justify the expense of enforcement that complies with the Constitution.
June 2019 Open House

The Nassau County Bar Association held its semi-annual Open House on June 13, 2019, where residents of Nassau County were able to register to speak with an attorney to receive an answer to any legal question. Approximately fifty attorneys volunteered to show their support by participating in the Open House at Domus, and answered legal questions for nearly 100 residents. The areas of law included family law, real estate, labor, and mortgage foreclosure, as well as other areas.

Since 2011, NCBA has hosted an Open House jointly with Nassau Suffolk Law Services and The Safe Center L.I. twice a year. The next Open House will be during New York State Pro Bono Week on October 24, 2019. Help is provided on various issues, including mortgage foreclosure, matrimonial and family, bankruptcy, labor and employment, trusts and estates, immigration, and even questions concerning trademarks. The public registers to ask questions on any legal topic they have and receive guidance on how to resolve it.

"Because of the Mortgage Foreclosure Project, the Nassau County Bar Association’s dedicated staff, and the volunteer lawyers who generously donated their time, the Open House was a success,” remarked Kevin McDonough, Co-chair of the Access to Justice Committee. “The people who came for legal assistance were very appreciative and hopefully we were able to help resolve some of their problems or point them in the right direction.”

Our volunteer attorneys met one-on-one with residents to explain complicated legal issues and provide guidance, counsel and referrals. When asked, many of the attorneys who volunteer their time at the NCBA Open House clinics will say that it is a rewarding experience.

Mortgage Foreclosure clinics are held twice a month, and volunteer attorneys are always needed. Please volunteer if you haven’t already done so. In addition, you can also become a member of the Access to Justice Committee to help recruit volunteers. The next meeting is scheduled for Wednesday, September 4, 2019 at 12:30 PM at Domus.

Volunteer attorneys Seth M. Rosner, James R. Klein, and Joseph R. Harbeson, Past Co-Chair of the NCBA Access to Justice Committee, volunteered at the June 2019 NCBA Open House.

Volunteer attorney Rhonda L. Maco consulting with Nassau County residents.

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Academic Freedom After Garrett

In Garrett v. Ceballos, the Supreme Court said that public employers may not enjoy freedom of speech when their speech or expression is made “pursuant to their official duties.”14 The Justices in Garrett rejected a free speech claim made by a prosecutor who had been allegedly fired in retaliation for his testimony on behalf of a criminal defendant that a deputy’s suit fell short of a search warrant.15

The Court in Garrett held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”16 Since the parties stipulated that the speech in question was made pursuant to the prosecutor’s duties, the Court dismissed the complaint.17

In dissenting opinion, Justice Souter expressed a concern that the decision might “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers customarily speak and write ‘pursuant to . . . official duties’.”18 In response, Justice Kennedy wrote:

“Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional matter. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

In subsequent decisions, lower courts have wrestled with the application of Garrett to determining free speech claims by faculty members in public universities. First, it must be determined when faculty members are speaking pursuant to their official duties. Most courts have interpreted this concept to mean “neither purely personal matters nor matters that faculty traditionally do within the university setting, at least where the speech was directed to others within that setting.” By contrast, speech by faculty members directed to audiences outside of the university and not related to the faculty member’s job, have not been viewed as within their official duties.19

Academic Freedom and the Rights of Students

The principles of academic freedom apply differently to students. As discussed above, academic freedom serves to protect the intellectual independence of faculty members in scholarship and related activities. Within the academic community, students attend universities to learn from the faculty. A student’s freedom of speech has nothing to do with “the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching.”20 These goals cannot be said, however, that students do not have any rights relating to the free expression of their views and opinions. Students at public universities are certainly present when the First Amendment imposes restrictions on their rights of free speech and association.21 There have been myriad court cases discussing this freedom.

This freedom of expression by students is subject to two important limitations. First, student expression may not interfere with other activities on the campus or in the classroom. This limitation justifies reasonable restrictions regarding the time, place and manner of protests and other expressive activities brought about by academic or extracurricular cam-puses.22 Second, student speech and writing in the classroom context is subject to the academic authority of the teacher to evaluate their coursework based on legitimate academic factors.23

The Supreme Court has supported this limitation in Hazelwood School District v. Kuhlmeier.24 In Kuhlmeier, the Court upheld a high school principal’s right to delete two pages from a student-run newspaper. The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities.”

Of course, precedents from the First Amendment context are not necessarily applicable to higher education where the age and maturity of students at issue. Also, there is a stronger tradition of free inquiry in a college or university setting which militates in favor of greater student rights. Nevertheless, it is true that a student’s right to free speech in any classroom will be subject to the legitimate academic authority of the faculty and the institution.25

Cynthia Augello is a member of the Law Offices of Cynthia A. Augello, P.C. where she practices in the areas of employment and commercial litigation.

2. AAUP, POLICY DOCUMENTS & REPORTS, supra note 18, at 32.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
11. Id., supra note 18, at 32.
14. 11.
15. Id. at 438.
16. Id. at 445.
17. See, e.g., Grimes v. Sams, 561 F. 137, 147 (1972) (denying student’s request for a judicial hearing); See Adams v. Tr. of Univ. of North Carolina, 640 F.3d 560, 562-63 (4th Cir. 2011) (non-scholarly columns and articles published outside the university are protected by the First Amendment even though they were subsequently submitted by faculty member in support of application for promotion).
18. See, e.g., supra note 11, at 11, supra also Bynum, supra note 28, at 180 (“Student free speech rights against universities reflect political values rather than academic ones.”)
23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35.
Access to Justice — Develops innovative programs to provide free or reduced fee access to legal counsel, advice and information. Co-Chairs: Kevin P. McDonough and Gregory S. Lisi

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Lawyer Assistance Program — Provides confidential assistance to attorneys struggling with alcohol, drug, gambling and other addictions & mental health issues affecting one’s professional conduct. *Application & Presidental approval required* Chair: Henry E. Kruman Vice Chair: Annabel Bazante

Lawyer Referral — Advises the NCBA Lawyer Referral Service; addresses policy questions regarding fees, law categories and membership. *Presidential approval required* Chair: Peter H. Levy

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Matrimonial Law — Promotes the standards and improves the practice of matrimonial law. Chair: Samuel J. Ferrara Vice Chairs: Jeffry L. Catterson and Karen L. Bodner

Medical Legal — Reviews issues relating to medical malpractice litigation for plaintiffs and defendants. Co-Chairs: Mary Anne Walling and Susan W. Darlington Vice Chair: Christopher J. DelliCarpini

Mental Health Law — Provides programs on legal issues concerning mental illness and developmental disabilities, including but not limited to, capacity, civil rights, access to treatment and due process, as well as discusses relevant statutes, case law and legislation. Co-Chairs: David Z. Carl and Jamie A. Rosen

Municipal Law — Reviews trends and developments concerning zoning and planning, elections, employee relations, open meetings law, and preparation and enforcement of ordinances and local laws. Co-Chairs: John C. Farrell and Chris J. Cocchiarno

New Lawyers — Structured events and activities of benefit and interest to newer attorneys (within ten years of admission) and law students, including social and professional activities. Establishes support network for new lawyers. Co-Chairs: Steven V. Dalton and Glenn R. Jersey, III

Paralegal — Promotes the exchange of information between paralegals and attorneys and provides and establishes a networking opportunity between paralegals and attorneys. Chair: Maureen Dougherty Vice Chair: Cheryl Gardona

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Real Property Law — Considers current developments relating to the practice of real estate law. Co-Chairs: Mark S. Borten, Anthony W. Russo, and Bonnie Link

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Veterans & Military Law — Reviews legislation and regulations associated with military law and veterans’ affairs, in particular, the needs of reservists and National Guard called to active duty. Chair: Gary Port Vice Chair: C. William Gaylor, III

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Workers’ Compensation — Discusses current legislation related to Workers’ Compensation regulations and benefits. Chair: Adam L. Rosen
non-clinicians) to contact the appropriate officials at the university empowered to assist the student in obtaining medical care or, if the student refuses such care, to notify the student's emergency contact.11

Importantly, “[t]he duty is not triggered merely by a university’s knowledge of ideations without any stated plans or intentions to act on thoughts. The duty hinges on foreseeability.”

**Ferris State Case**

In *Mbawe v Ferris State University*, a student in FSU’s pharmacy program began to experience various paranoia, including that people were spying on him, following him and injecting him with foreign substances while he slept. When FSU learned about these issues, it began to extensively interact with the student, recommended various counselors, and also recommended that he withdraw from the program while he sought help. The student rejected the recommendations of the institution, even as his delusions increased, and he continued to struggle academically.

Eventually, the student was involuntarily committed to a psychiatric hospital. Subsequently, FSU involuntarily withdrew the student from the pharmacy program. The student sued, alleging that FSU unlawfully discriminated against him in violation of Title II of the Americans with Disabilities Act (the ADA) and § 504 of the Rehabilitation Act of 1973 (§ 504) and deprived him of adequate 14th Amendment procedural due process.

In granting FSU’s motion for summary judgment, the court held that the student’s ADA claim failed because he was not “otherwise qualified” to continue his studies in the pharmacy program, with or without a reasonable accommodation. Moreover, because Mbawe’s dismissal was academic rather than disciplinary, FSU did not deprive Mbawe of adequate procedural due process by failing to afford him a formal hearing prior to withdrawing him from the program.12 Additionally, the court found that the FSU officials were careful and deliberate in attempting to integrate Mbawe, who was given “professionalized attention by faculty members at all levels in effort to protect patients while helping [Mbawe] improve his chances of success.”

**ADA and § 504**

As indicated in *Mbawe*, while colleges and universities have a duty to protect students experiencing mental distress or the campus community, they must carefully consider how to proceed in a manner that does not run afool of antidiscrimination laws. Two federal laws, the ADA and § 504, prohibit discrimination on the basis of disability, and provide a framework for decision making in complex cases. Title II of the ADA (Title II) applies to public colleges and universities and provides: "...no qualified individual with a disability shall, solely by the basis of disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public program or activity conducted by any Executive agency or any agency, department, or component of the federal government; ...”[13]

Moreover, because Mbawe’s dismissal was academic rather than disciplinary, FSU did not deprive Mbawe of adequate procedural due process by failing to afford him a formal hearing prior to withdrawing him from the program. Additionally, the court found that the FSU officials were careful and deliberate in attempting to integrate Mbawe, who was given “professionalized attention by faculty members at all levels in effort to protect patients while helping [Mbawe] improve his chances of success.”

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In 2011, the U.S. Department of Justice enacted a new Title II regulation that called this practice into question. The regulation, effective March 15, 2011, provides that public institutions are not required to permit an individual to participate “when that individual poses a direct threat to the health or safety of others.”[14]

Still, based on OCR guidance, institutions believed that “direct threat” included threats both to others and to self, and that, when faced with situations involving students who threatened their own health or safety, institutions could take action, including dismissing the student from the institution, to protect the student and campus community without violating antidiscrimination laws.[15]

In 2011, the U.S. Department of Justice enacted a new Title II regulation that called this practice into question. The regulation, effective March 15, 2011, provides that public institutions are not required to permit an individual to participate “when that individual poses a direct threat to the health or safety of others.”[14]

The regulation does not address situations wherein individuals pose a direct threat to themselves. The omission of language relating to a threat of self-harm left individuals to abandon the “direct threat to self” term if medical experts, and provided a right to the student to appeal the decision.

Thus, despite the absence of “threat to self” language from the regulations, OCR has, on several occasions, affirmed institutions’ ability to monitor and, if necessary, act in such circumstances to protect students, provided certain guidelines and best practices are met. In a 2018 briefing hosted by the National Association of College and University Attorneys, then-acting Assistant Secretary for Civil Rights Candice Jackson confirmed this process when she advised institutions to abandon the “direct threat to self” termology and framework, and recommended that institutions “focus on generally applicable health and safety requirements and conduct individualized assessment of a student’s risk of self-harm.”

Real life situations involving student safety are complex and factually driven. If, after conducting an individualized assessment, an institution reasonably believes that a student poses a risk of harm to self or to others, appropriate action should take appropriate action to protect the student and the campus community. In doing so, the institution will minimize exposure and ensure that students in their support they need to successfully complete their college journeys.

Dina L. Vespa is a Partner in the Corporate Department at Cullen and Dykman LLP, and the chair of the Higher Education Practice Group at Cullen and Dykman LLP. Thank you to Jeremy Musella and Floyd Howard, III, Associates at Cullen and Dykman LLP, for their assistance with this article.

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1. OCR Letter to Princeton University, Complaint No. 02-12-20155 (Jan. 18, 2013).
2. 28 CFR § 36.208(a).
3. See also 34 CFR § 104.4(a).
4. 28 CFR § 35.139(a); 28 CFR § 36.208(a).
5. 42 USC § 12132(a); 26 CFR § 36.306(a).
6. Undergraduate or postgraduate private schools or other places of education are considered “a place of public accommodation.” 42 USC § 12181(7)(I).
7. 28 USC § 1794(e).
8. Subsection (b) provides that the term “program or activity” means “all of the operations of a college, university, or other postsecondary institution, or of a public system of higher education.” 29 USC § 794(b) (2018). See also 34 CFR § 104.6(a).
9. 42 USC § 12132(a). A “major life activity” includes, but is not limited to “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 USC § 12132(a).
10. Dina and Hayley are also members of the Higher Education Practice Group at Cullen and Dykman LLP.
11. Id. at 842.
13. Id. at 194.
14. 42 USC § 12132(a); 28 CFR § 36.306(a).
15. A “major life activity” includes, but is not limited to “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 USC § 12132(a).
16. Id. at 12182.
17. OCR Letter to Woodbury University, Complaint Number 09-00-2059 (June 29, 2001).
18. OCR Letter to Spring Arbor University, Complaint No. 13-00-2008, 15 (Dec. 16, 2010).
20. Id.
21. OCR Letter to Rutgers University, Complaint Number 02-12-20155 (Jan. 18, 2013).
22. OCR Letter to Princeton University, Complaint No. 02-10-20155 (Dec. 20, 2010).
23. Id.
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