PATTERNS AND IMPACT OF LITIGATION FOR UNITED STATES HIGHER EDUCATION INSTITUTIONS IN THE YEARS 1999-2003

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Dedication

This dissertation is dedicated to my parents. It is dedicated to the memory of my father, James W. Arnold, who cared greatly about my education. He always treated my education as one of his highest priorities. This work is also dedicated to my mother, Nancy Arnold, who continues to inspire me to continue to learn.

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Abstract of Dissertation

Patterns and Impact of Litigation for United States Higher Education Institutions in the years 1999-2003

The purpose of this two-phase, sequential mixed method study is to understand the state of higher education law in the years 1999-2003. It is to find trends in the body of higher education case law that occurred during that period and seek underlying causes for those trends. It is also to gauge the change that has resulted on campus during that period as a result of case law.

In the first part of the study, 1678 legal cases were obtained from the West's Education Law Reporter. Only cases dealing with United States higher education institutions were considered. Each case was reviewed. Facts about each case were tabulated and compared to a previous study. The facts gathered for each case include state, court system, type of case, issue, role of the college, Carnegie class of college, identity of the non-college litigant, and prevailing party. A Chi-square analysis was performed using the Carnegie classifications. Issues that were found often in this part were carried to the second part.

In the second part of the study, ten questions were generated based on the results found in the first section. The questions were posed to twenty-five officers at United States higher education institutions. The officers represent a variety of colleges from several Carnegie classifications. The responses provided by these officers provided an insight into the changes caused by these cases. The change is presented using the conceptual framework of the evolutionary model as reported by Kezar.

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Chapter I

Introduction

There has been an increase in the number of legal actions in the United States in recent years. Gallanter (1983) refers to the perceived "litigation explosion" as "hyperlexis." He argues that there are actually two phenomena at work:

1) An increase in the per capita number of cases in recent years.
2) A perception on the part of most Americans that the above increase is higher than it is in actuality.

There can be no doubt, though, that organizations have felt a need to protect themselves from potential litigation. Lipka (2005a) provides compelling evidence of this fact by pointing out that legal staffs have continued to grow. In a second article, Lipka (2005b) urges colleges to become more proactive in preventing lawsuits in an "increasingly litigious environment."

Colleges and universities (hereafter referred to collectively as "colleges") are social environments and, as such, are merely microcosms of the society at large (Dewey, 2004). Dewey describes how educational institutions are effected by a society's past, yet affect a society's future. As such, the phenomena found in society make their way into colleges (Benton, 2004). Many of the activities that take place on a college campus mirror those that take place elsewhere in society. For example, colleges buy, sell, hire, fire, enter into contracts, accept charitable gifts, provide services and research, and provide housing. All of these activities have some level of regulation associated with them, whether they occur on a college campus or elsewhere (Kaplin & Lee, 1995). Bickle and Ruger (2004) note that legal issues permeate "almost every corner of campus life."

Benton (2004) suggests that the litigious environment of the larger culture is magnified by the stress of academic life. As an example of how litigious college campuses have become, a recent review reported a simple survey of one edition of *The Chronicle of Higher Education* (Jones, 1997). In the October 24, 1997 edition, there were thirty articles dealing with current or potential legal actions. In that edition, there were a total of seventy-five articles. Thus, forty percent of the articles in this paper dealt with a wide variety of legal issues. A review of the *Chronicle*'s top stories as listed on their on-line version showed that an article on a legal issue or government regulation was present each day for the twelve days surveyed from May 16, 2005 to June 1, 2005. More often, there were three or four articles dealing with legal issues.

As a result, college administrators are spending a great deal of time with, and concern over legal matters. Logan (1997) reported on a survey of dissertations on the law and education, with over 400 dissertations concerning educational litigation. Montgomery (1997) lists some of the issues that occur on campuses that have potential for legal action: hiring and firing, fair treatment of students and employees, and complying with governmental regulations.

Often, a change in societal philosophy leads to changes on campus. Consider the Clarence Thomas hearings and the sexual harassment issue. Those hearings led to a distinct change in workplace ethics and brought sexual harassment to the forefront for open discussion. The college, as a workplace, then responded. For example, Burke-Kelly (1998) compiled a dissertation on sexual harassment in education. It was found that colleges had responded by writing and refining their policies significantly over the past ten years. O'Donnell and Parker (2005) describe how the United States Supreme Court

has rendered rulings that guide employers, colleges included, in how to avoid being culpable in a suit by providing appropriate training. Of note is that if one searches back issues of *The Chronicle of Higher Education* using the term "sexual harassment," and limits the year to 1989, forty-six articles are returned. The majority of these articles do not discuss specific cases. If the year is changed to 2004, a total of 152 articles are returned, with a majority about specific cases, policies or rulings. Even the *Chronicle's* Ms. Mentor column describes how the attitude toward faculty-student relationships was, at one time, much more open (Should your private life be public news, 2004). The article continues by pointing out that in the last twenty-five years, the term "sexual harassment" has come to the forefront. With more awareness of the issue, colleges have developed procedures and changed attitudes toward such relationships.

Another recent change in society concerns relationships between diverse groups of people. An evolving concern of higher education is that of affirmative action. Doyle (1998) conducted a study on the legal issues surrounding affirmative action. It was found that a large number of important cases addressing diversity have occurred since 1990. Colleges must react to these cases to avoid being sued. Based on her research, Doyle also predicted additional cases in this area will come about in the future. This prediction has come true as the United States Supreme Court ruled on two such cases from the University of Michigan in 2003 (Gratz v. Bollinger, 539 U.S. 244, 2003; Grutter v. Bollinger, 539 U.S. 306, 2003). O'Donnell and Parker (2005) point out that the United States Supreme Court in Equal Employment Opportunity Commission v. Board of Regents of the University of Wisconsin System (288 F.3d 296, 2002) set forth guidelines for the training of managers in discrimination laws. Also of note is a recent article

(Pressing legal issues: 10 views of the next 5 years, 2004) in which ten experts in education law were asked about what they see as the important legal issues for the next ten years. Seven commented on diversity in some manner.

One area that is expected to show many changes when compared with the past is that of disability education. Several significant legislative items related to this area have come forth (Hurtabis Sahlen, 2000; Zirkel, 2000). Section 504 of the Rehabilitation Act of 1973 and the ADA have served to increase the number of disabled students on campus. In addition to the increased numbers of such students on campus, there has been an increased range of disabilities and an increase in the number and type of requests for accommodations (Hawke, 2004). Students of the current generation now are expecting the same level of accommodations that they received in primary and secondary schools as a result of the Individuals with Disabilities Education Act (IDEA). There are significant differences between the accommodations made as a result of IDEA and those required of colleges. Of note is that special education law in the primary and secondary schools is an area of much litigation. Walsh (Walsh, McEllistrem, & Roth, 2002) report that a total of nine cases dealing with special education in those grades had been heard by the United States Supreme Court by 2002. There have been 4 such case during 2006-2007 (Willett, 2007). The Journal of Law and Education has a section in which court cases about students with disabilities are presented.

Background

The Nature of Law

Larsen and Bordeau (1997) describe the hierarchy of laws. One type of law is statutory law that is made by representatives and their appointees. In statutory law, constitutions take precedence over statutes. Statutes take precedence over regulations and ordinances. A second type of law is called “common law.” Common law comes from the courts through their decisions and opinions on the interpretation of statutory law. In general, statutory law takes precedence over common law. However, it is noted that the courts interpret statutory law. In some cases, judges can declare statutory law null, as in the case of constitutionality. Thus, any investigation of law should examine both statutory and common law and rely heavily on common law for opinions and interpretations to guide on the current legal status of some issue (Kaplin & Lee, 1995).

The highest law of the land, the United States Constitution, makes no reference to education. It does, however, cede all powers not granted to the federal government to the states in the Tenth Amendment. The powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the states respectively, or to the people (Hudgins & Vacca, 1985).

If we examine the original Constitution of Virginia, we also find no mention of public education. During the colonial period, the attitude toward public education was hostile. Governor Berkeley (Trover, 1979) was quoted as saying, “I thank God that there are no free schools, nor printing, and I hope that we shall not have these for a hundred years” (p.136). It wasn’t until the late 1810s and early 1820s, under the leadership of Thomas Jefferson, that formal public education began to flourish with actions taken by

the legislature. Note that the University of Virginia was founded in 1819. The Constitution of Virginia has changed several times. In the current version, approved in 1971, public education now plays a prominent role in the document. Article VIII describes the schools, who will attend them, how they will be funded, and how they will be governed (Virginia General Assembly, 2002).

It is important to note that states that entered the union later do mention education in their original constitutions. Indiana's original constitution, approved in 1816, incorporates a lengthy article that espouses the value of education and sets a protocol for establishing schools and continuing their funding (Vexler, 1979). Since the enactment of the Constitution of the United States and the original Constitution of Virginia, numerous statutes, ordinances and regulations have been passed at both the federal and state levels. Consequently, those laws have been tried in the court systems and much has been written on their interpretation.

The courts have been involved in higher education in the United States since just before the founding of Harvard University, the first college in America, which was established in 1636. It was brought into existence as a result of court action (Parsons, 1971). The General Court of the Colony of Massachusetts ordered that the college be formed, provided funds and land for the college, and hired and fired presidents. The president was granted the right to serve as an officer of the court in that he was given the right to punish or fine students for misdemeanor offenses.

There was a time when the staff of a college was composed of the faculty and a president (Lucas, 1994). The president handled all of the administrative duties at the college. Colleges now have become much more complex. Colleges have much larger

staffs to handle the growth in education and the new challenges that have occurred along the way. New issues have developed since the colonial days, and some older ones still exist. Admissions, faculty concerns, student concerns, and even advertising all have the potential for legal problems. There are now greater challenges in risk management as a result of these new complexities (Farrel, 2001). Moreover, schools have become more like businesses, with large sums of money being taken in and spent. As such, traditional areas of business law, such as contracts, have become much more important to schools (Danne, 1985). An indication of this is readily seen when one notices that, now, presidents' staffs usually include a cadre of legal counsel. Bickel (1993) suggests that in the early 1960s, the role of attorneys on campus was very limited, with work being done by outside counsel (usually pro bono). By the end of the 1970s colleges were in need of full-time in-house counsel.

Colleges today often are dealing with very tight budgets due to reductions in state funding, reduced giving, and the economy in general. Many schools have developed elaborate departments of finance, fundraising and cost containment. Schools can ill afford to lose limited funds (or have their reputations tarnished) due to lawsuits. In their book on cost containment in higher education, finance researchers Brown and Gamber (2002) comment that "in recent years there have been significant legislative action and laws that affect campus operation" and that "institutions also are called upon to spend increasing amounts of money and time in attending to state and federal regulations and statutes" (p. 97). This opinion is concurred by the higher education legal community, as well. Patricia Peard, a consulting lawyer for Advanced Educational Solutions, states, "I think most schools are facing big budgetary problems. They have started to realize that they can save

a lot of money by working on preventive risk management" (Farrel, 2001, p. A29) With college costs approaching a state of "crisis" (Boehner, 2003), colleges have focused on cost containment as an approach to deal with rising college finance (Kezar, 2000).

The average cost of a university court case is $200,000 (Farrell, 2001). This doesn't include any penalties, fines or reparations should the college be found negligent. Brett Sokolow, who founded the National Center for Higher Education Risk Management, reported that the average settlement for his clients is $500,000 when claims deal with hazing, alcohol, or sexual harassment (Farrel, 2001). Colleges are finding it difficult to cover ever-increasing insurance premiums that are needed to protect themselves. In some cases, insurance rates have increased by 300% in one year (Williams, 2002). Further, they have increased their staffs to include lawyers and risk managers. In 1983, only 47% of colleges had an in-house law office. That exploded to 74% by 1994, the most recent year for which data exist (Ruger, 1997). For those schools that consult with outside counsel, the average annual expenditures nearly tripled over the same time period, from $127,000 to $350,000. This represents not only the effect of increased fees for services rendered, but also an increase in the overall need for services. For schools that housed campus law offices, the annual budget went from $177,000 in 1983, to $402,000 in 1992, to $509,277 in 1994 (Ruger, 1997). If we focus only on colleges with medical schools or foundations, the average annual budget of their law office was $951,335 in 1994 (Ruger, 1997). Clearly, legal representation has become more of a "need" for colleges.

Other factors have affected the number of cases brought forth by or against colleges and universities. Gregory (1991) suggests several institutional and societal

sources for change. Institutional changes include growing government, judicial activism, and inadequate drafting of statutes by Congress. Societal factors include the willingness of some Americans to challenge wrong, changing ideas on the nature of law, willingness to challenge authority, and a declining sense of community.

It is important for colleges to anticipate possible areas of legal attack and prevent problems from arising. In a recent case (Podberesky v. Kirwan, 38 F.3d 147, 4th Cir. 1994), a young man was disqualified from a scholarship program. This action lead to a series of lawsuits that ended up costing the state of Maryland over $500,000 ("U. of Maryland settles with student who sued over scholarship," 1996).

There is an important distinction between the laws that govern public and private colleges. State statutes put forth directions as to how state schools are to be operated. Moreover, funding for state schools comes partially from the state, so the school has a high degree of accountability to the state. Private schools are not bound by such statutes. They are bound by normal laws that would govern any organization. They also rely heavily on the area of contract law with respect to the contracts they make with faculty who teach and students who attend.

A recent review from the *Chronicle of Higher Education* shows how extremely expensive some of these cases have been (Farrell, 2001):

- Trinity College was ordered to pay $12.3 million for a sex discrimination case (later lowered to $3.1 million).
- Farliegh Dickenson University was ordered to pay $5.3 million in a whistle-blowing case.

- University of Pennsylvania was ordered to pay $5 million in a breach of contract case.
- Bennington College was ordered to pay $1.9 million in a contract case.
- University of Arizona was ordered to pay $1.1 million in a wrongful termination case.

Focus of This Study

Helms (1990) completed a comprehensive study that reviewed all higher education cases for the year 1988. Much has changed since that time, and that study needs to be updated to fully understand what has happened since then. The proposed study serves to complement and update Helm's 1990 study. It presents a more current view of the patterns of litigation of higher education institutions throughout the United States. Private and public institutions would be reviewed. In addition, differences between colleges with different Carnegie classifications have been reviewed to determine any patterns.

An additional focus of this study has been to present the changes in schools' standard practices as a result of these cases. This presentation was based on the findings of several interviews of legal officers at colleges of various Carnegie classifications. Kezar's evolutionary model of institutional changes as the conceptual framework was used to explain the changes that have come about.

Problem Statement

It often has been said, "We live in a litigious society." Institutions of higher learning are part of the larger society and are affected, to some degree, by the same forces

that we find in society in general. Colleges and universities have become targets for lawsuits to a greater degree than in the past. Bickel (1997) lists several areas where colleges are finding more litigation in activities on college premises, field experiences, children's programs, formal and informal sports, and college housing. Moreover, he suggests that there is an increasing attitude that schools become more responsible for risk minimization than was thought to be in the past.

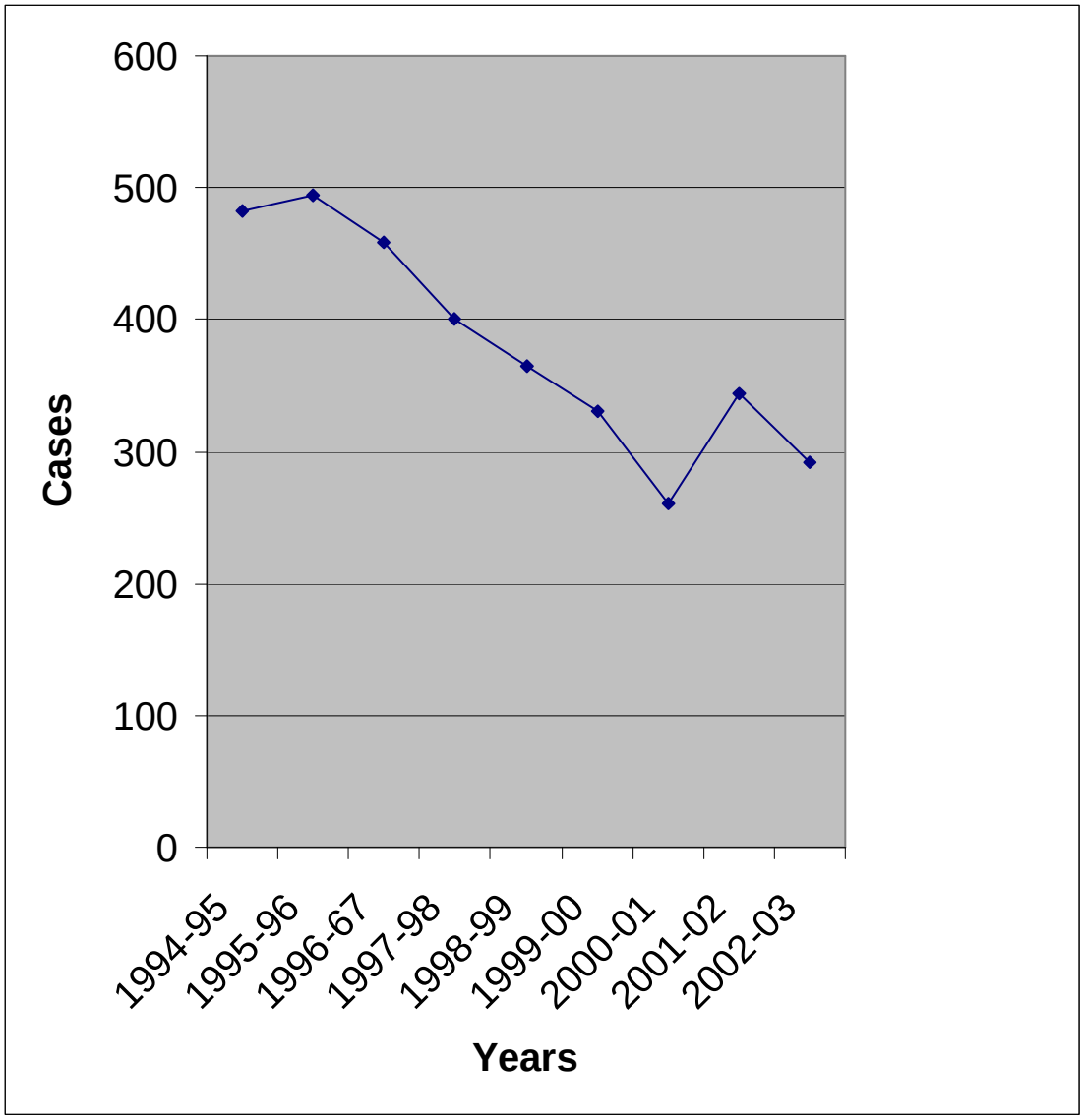
Helms (2001, 2002, 2003 for example) has done and continues to do annual reviews which counted higher education cases. These and other annual reviews are much less comprehensive than the proposed study, but do yield some important data. Figure 1.1 shows that there has been a significant decline in cases since 1994-95, with a minimum during 2001 of 260 cases. However, the total number of cases (Federal and state) has rebounded since. In commentary, Helms suggests that understanding the reason for decline is important. She recommends further study.

Purposes

The purpose of this two-phase, sequential mixed-method study was to understand the state of higher education law in the years 1999-2003. It was to find trends in the body of higher education case law that occurred during that period and seek underlying causes for those trends. Public and private colleges will be examined.

In the first phase, cases from the years 1999 to 2003 that involve institutions of higher education were reviewed. Trends were sought by examining the frequency of each type of case and topic. In addition, there was a comparison of the type of institution (as described by the Carnegie classification system) with the types of cases and topics. A cause for the trends was sought.

Figure 1. Total Number of Cases Involving Institutions of Higher Education



The second phase of this study explored qualitative data in the form of interviews, gathered from several legal officers from colleges at all levels of the Carnegie

classification. This was done to gauge the impact of recent cases on colleges. It also served as a second method to probe for differences between colleges in different Carnegie classifications.

Research Questions

The aim of this study is to understand the state of higher education law in the years 1999-2003. In order to do this comprehensively, several issues must be examined. First, one must understand the number and types of cases that occurred. Second, one must understand the issues in those cases. To complete these aspects fully, comparisons of different types of institutions must be developed. Finally, an understanding of the impact of these cases on institutions of higher education must be developed. Only by viewing each of these facets will a comprehensive understanding of the state of higher education law in the years 1999-2003 be developed. Thus, the formal research questions are:

1 a) What types of cases have institutions of higher education participated in --as either the plaintiff or the defendant-- during the period of 1999-2003?

b) What issues are found in these cases?

c) Are there trends that indicate an increase or decrease in litigation dealing with a specific issue?

d) Are there differences in the types of cases, issues or impact relative to the type of institution?

e) What are the underlying causes for the trends found?

2) What has been the impact of these cases on the general operation of institutions of higher education?

Conceptual Framework

In ancient times, the Greek philosopher Heraclitus wrote, “You cannot dip your toes into the same river twice” (Conner, 1994). Even in ancient times, people faced the need for, and effects of, change.

Changing has changed (Conner, 1994). The volume, momentum, and complexity of change continue to increase exponentially. Volume can be thought of as the number of changes that an individual will face. That number is increasing. Momentum refers to how long it takes to implement a needed change. That time period is becoming shorter and shorter. Meanwhile, society and organizations in general have grown to become much more complex (Conner, 1994).

The study of change in higher education has expanded and become more formalized in the past decade. Its importance is reflected by the fact that 1,734 dissertations have been published on change in higher education. Many important facets of change in higher education have been studied recently, including the curriculum (McDonald, 2004), technology (Yaure, 2004), teaching (Beach, 2003), leadership (Fincher, 2003), and institutional transformation (Foulkes, 2003).

Nair (2003) provides four factors that are causing higher education change to occur at a very rapid rate. These include the growth and rapid change in technology, globalization, increased competition, and greater accountability.

The need for change causes colleges to react. Carlson (2003) completed a study of change in student affairs offices. He found that during a four-year period (1996-1999), 61 percent of the student affairs offices polled underwent some level of restructuring.

Colleges and universities are one type of organization. As such, much of the literature on organizational change can be applied to the manner in which colleges and universities change (Conner & Lake, 1988).

The destabilizing forces can come from inside the organization or outside the organization. Salvola (1984) refers to Duncan's definitions when he states how "the internal environment consists of those relevant physical and social factors within the boundaries of the organization or specific decision unit that are taken directly into consideration in the decision-making behavior of the individuals in that system" (p. 209). Further, "the external environment consists of those relevant physical and social factors outside the boundaries of the organization or specific decision unit that are taken directly into consideration" (p. 209). Kozeracki (1998) points out that change can originate from within an organization or from outside. Often, external forces will force a change. The courts can act as change agents from outside an institution as law affects so many aspects of how colleges operate (Glenny & Daglish, 1973). Individual members of an institution can act as internal change agents by anticipating how the courts may view a current legal question or concern.

The manner in which colleges address change will vary greatly from one institution to another. The most current research on the various models of institutional change is that of Kezar (2001). Six models are presented to describe institutional change.

In the evolutionary model, change occurs due to the external environment. There is a slow, gradual change. In the teleological model, change is internal and based on rational thought. It is linear and purposeful. The life cycle model focuses on changes due to an individual's natural growth and progression. The political model suggests that

change occurs due to tension as a result of differences and values, norms or patterns. In the social cognition model, change occurs due to cognitive dissonance. And finally, in the cultural model, change occurs as a result of other alterations in the human environment. It is slow, nonlinear, and unpredictable. There are times when multiple models are used to best describe how an institution deals with change.

Of these models, the most appropriate to apply as a conceptual framework for the study is the evolutionary model. According to the evolutionary model, change is a slow process. It occurs as a result of environmental demands. Change occurs as a response to those demands, rather than from a plan to change (Kezar, 2001). Evolutionary models can be compared to the classical psychology "stimulus-response" model.

A key activity, according to this model, would be the constant observation of the external environment. Just as an organism would seek to avoid an unpleasant action, so an institution would react to avoid an unpleasant action such as being involved in litigation. Key outcomes, according to the evolutionary model, are new structures and processes (Kezar, 2001).

The courts can act as change agents from outside an institution. When an important case is published, educational administrators impose new structures and processes to avoid future litigation. This may include changes in personnel or procedures. Just as importantly, this most likely will include changes in a resource allocation. In the case of this particular study, a court case would be the stimulus, and the manner in which an institution dealt with that case would be the response.

"During the past few years, much change has taken place on campus due to court decisions and statutes with accompanying guidelines. Higher education administrators

must constantly be aware of these changes and must be ready to make appropriate implementation of them. This can afford an opportunity for constructive change" (Young, 1975, p.1). While one goal of this dissertation is to examine court cases that have affected higher education over the period of five years, the underlying theme of this work will be to capture a sense of how these cases have caused a change in the manner by which campuses operate. The evolutionary model of institutional change as proposed by Kezar will be used to examine the state of colleges before the case, as well as after the case, and will be used to describe the general manner how colleges change as a result of an external stimulus.

Need for the Study

Kaplin and Lee (1995) described the importance of administrators' understanding matters of law:

> The challenge of our age is not to get the law off campus; it is to stay there. The challenge is to make law more of a beacon and less of a fog. The challenge is for law and higher education to accommodate one another, preserving the best of each for the mutual benefit of both. Just as academia benefits from the understanding and respect of the legal community, so law benefits from the understanding and respect of the academic community. (p.xxv)

By examining higher education case law, a better understanding of the law will be obtained to the point that one can see trends in the types of cases brought forth. By observing the trends in higher education law, administrators can then focus resources on preventing various types of cases. This is important for two reasons.

The first reason for studying higher education law is the fiscal impact that a court case may have on an institution. Although this study won't directly address costs, it is believed that a better understanding of legal issues will allow for prevention of legal action, which will lead to lower college costs. The average cost of a university court case is $200,000 (Farrell, 2001). That is simply the cost of taking the case to court. Should the college be found negligent, the costs may increase exponentially as it may have to pay damages.

In 1961, 50 colleges had legal counsel offices on campus. These offices usually were staffed by one attorney. The National Association of College and University Attorneys, a group to which most college lawyers belong, reported a membership of 2,058 in 1981. The current membership is over 3,000 (Bickel & Ruger, 2004). Clearly, legal representation has become more of a "need" for colleges. With the controversy about an "explosion" in education litigation (Zirkel, 1989; Farrell, 2001), concurrently, there has been an explosion in legal costs. The trend appears to be continuing, with rising legal costs expected in the future (Pulley, 2003).

Another way to look at college costs is to see the effect on students. One estimate suggested that Stanford University spends 12.5 cents of every tuition dollar on compliance with state and federal governmental regulations (Langhauser, 2002). The same article discusses the millions of pages of federal statutes and cases. That number continues to grow.

There has been a significant increase in insurance premiums over the past several years. In some cases, premiums went up 400 percent. Also, there are higher deductibles.

In some cases, medical schools have had their coverage dropped (Williams, 2002; June, 2003).

An understanding which leads to a minimization of legal threats is valuable. As Bickle (1974) writes, "the primary thrust of the attorney's responsibility to the university and the primary definition of his or her role within the institution is the providing of preventive advice which will save the institution from formal litigation or other challenges." Colleges are becoming more proactive as a result of lawsuits and the high monetary cost that they extract through awards and higher insurance rates. Forward thinking and training have become instituted on more and more campuses (Santoro & Kaplin, 2003). Franke (2003) describes the proactive approach towards risk as a true necessity.

One strategy that currently is being employed at some schools is the use of mediation (Fogg, 2003). Another strategy that is being applied at many for-profit technical schools is requiring students to waive their rights to file lawsuits against the school as a condition of admission. If a student has a grievance, he or she is required to seek relief using a binding arbitration system (Farrell, 2003). Both mediation and arbitration are methods used to avoid going to court. Mediation occurs when the parties are brought together with a mediator to try to resolve the matter to both sides' satisfaction. It is nonbinding. Arbitration, however, is where both sides present their case and the arbitrator renders a binding decision. Both mediation and arbitration are significantly less expensive when compared to going to court.

The second reason that college administrators want to understand law is because of community morale and effectiveness of leadership. A college president was quoted as

being a defendant in a dozen lawsuits at one time. In addition to the monetary expense, so much litigation can result in "a considerable drain on time and energy" (Gouldner, 1980). Gouldner also talks about the increased secrecy and lack of trust that a litigious atmosphere brings. Also mentioned was the decline of collegiality, and, in fact, an increase in hostility, when such an atmosphere descends on a campus. Moreover, some faculty have changed the way that they teach and administer classes, due to fear of litigation (Benton, 2004). This effect has been noted in the popular press when Time magazine reported that lawsuits are having "a chilling effect on teachers" (Caplan, 2004).

Significance of the Study

This study adds to the body of knowledge by providing another view into higher education law. At this point in time, only three comprehensive surveys exist: Helms' (1987) review of higher education case law for the state of Iowa, Lam's (1988) study of Texas higher education case law, and Helms' (1990) review of higher education case law of 1988. In all three studies, cases were reviewed and classified based on such factors as the type of case, the type of court in which it was tried, the type of school involved, and the outcome of the case.

While these studies have provided an understanding of educational law, there are significant limitations to all three. The first two studies are limited geographically to Iowa and Texas, respectively (Schoenfield & Zirkle, 1989). While one may attempt to extrapolate the findings to another state, the effectiveness of doing so is uncertain.

The major limitation of the third study is that it is dated. Historical research provides a "snapshot" of the culture-- in this case, the legal culture--at a given time. However, as culture changes, new "snapshots" must be taken to understand the new

culture. Moreover, several "snapshots" must be taken in order to see how a culture has developed. There has been no update to the annual review paper by Helms (1990). In the fifteen years that have passed, the law has changed a great deal in some areas. One goal is to analyze how the law has changed since the Helms baseline study was performed. In her study, she provides the following recommendations, which serve to justify the proposed study:

> Only with a broad overview of the overall frequency and distribution of litigation can a framework be constructed to provide a perspective on the role of law in higher education. Continuing review of litigation patterns on a yearly basis provides valuable information in understanding this interaction. (p.11)

Another limitation of these three studies is that no commentary is provided as to the importance of the various cases tabulated or the changes that have come about as a result. Information about changes in higher education as a result of case law can be found in detail in case reviews (for example, Bors, 1999) or in subject reviews (for example, Weber, 1998). Cursory change data can be found in annual reviews (for example, Helms, 2003). The proposed study will provide a comprehensive view of court cases and if they caused changes in higher education. It also will seek to find those events that have caused increases or decreases in litigation in specific areas.

The study of change in higher education is a maturing field and has become quite important. This is reflected in the fact that 1,734 dissertations have been published that examined some aspect of change in higher education. However, relatively few studies have been done in which law is examined as a factor in change. These studies focus on single subjects, such as student grievances (Mullen, 1980), governance (Rhoda, 1985),

and public-private partnerships (Gonzales-Walker, 2003). What is missing is a comprehensive study that examines various types of cases and if their outcomes affect the way that colleges operate. The proposed study will focus on change with a much broader approach than previous studies focusing on law and change in higher education by applying Kezar's evolutionary model.

Delimitations

The study focused on the calendar years of 1999-2003. Cases for study were obtained by using West's Education Law Reporter. By doing so, a few lower-level state cases might have been missed (Helms, 1990) but the study will be analogous to previous studies for proper comparison. In that study, both federal and state cases from throughout the United States were included. Both types of cases were included in this study, as well.

The study did not present discussion on the merits or legal arguments of the cases. Rather, attributes of the cases will be tabulated and that data were compared to previous studies to observe any changes based on differences in frequency of case classification, court of record, school classification, and differences in geographic distribution. Cases were included whether the suit was brought forth by the school or against the school.

Limitations

The major drawback to any case study analysis is that it is very narrowly focused. As such, the lessons learned from studying one group may not be applicable to another group or even the same group at a different time.

As previously noted, surveys of legal cases, such as this study, serve as "snapshots" of the population that is studied at a given time. It shows the state of legal

cases in the United States over a five-year period. As law is a social product, it will be changed as the culture changes. The laws will change over time and the cases in the future may be different from those that are found in this study. This study will need to be augmented by future studies as the law continues to evolve.

This study involved interviewing college legal officers at several colleges to find evidence of change. As such, it is limited by the experiences and points of view of those officers.

This study had a relatively low response rate (7.7 %). This was probably due to the nature of those sought for an interview being very busy. In addition, some perspective subjects expressed reluctance to discuss legal issues. A low response rate, for those possible reasons, limits the study. The study may be missing the richness from input of those most active in the area. It may also be skewed by the participation of those who are doing a good job, as those who have encountered problems may be less likely to participate.

Finally, although fiscal matters are a driving force for this study, the author did not concentrate on the costs of litigation. Costs will need to be inferred by the reader. Finding cost data for legal matters can be quite difficult and thus limits this study. Green (1983) examined costs of litigation in cases involving Missouri public schools. That study concluded that “determining reliable estimates for the direct and indirect costs of school litigation for past years does not seem feasible because of lack of adequate records” (p132-33). Also, many cases are settled before going to court. In such cases, the settlement agreement usually is sealed.

Outline of Methodology

The purpose of this study was to gather data on the legal issues that face institutions of higher learning. A logical source to provide that data would be the written records concerning cases involving institutions of higher education. Additional source of information were those college officers who study and apply the findings of those cases.

For the first part of the study, West's Education Law Reporter was reviewed for five calendar years, from 1999 to 2003. Higher education cases were noted. For each case, data was tabulated on the court that heard the case, the state, the parties, and the issues.

After gathering the court cases for part one, they were be classified as to the type of case and the issue involved. The classifications used were those set forth in the two papers by Helms (Helms, 1987, 1990). A review of frequency of cases was done for that period to determine if changes have occurred during that time. A chi square test for independence was performed to see if there is a relationship between the number of cases, and the type of college. In this instance:

H_o: Whether a college is involved in a case is independent of what type of college it is.

H_1: A college's likelihood of being a party in a case dependent on what type of college it is.

To gauge the impact of these cases, several legal officers from each classification of college were interviewed. Specific attention was paid to possible patterns in types of

cases reported, reasons for changes in the types of litigation, explanations of how the campus has changed, and the overall view as to how the legal department has changed. In addition, this step served as another way to determine differences between colleges at different classifications.

Definition of Terms

Legal terms taken from *Blacks' Law Dictionary* (Garner, 2004).

Civil Law: The law of civil or private rights, as opposed to criminal law or administrative law.

Common Law: The body of law derived from judicial decisions, rather than from statutes or constitutions.

Constitutional Law: The body of law deriving from the United States Constitution and dealing primarily with governmental powers, civil rights, and civil liberties.

Criminal Law: The body of law defining offenses against the community at large, regulating how suspects are to be investigated, charged, and tried, and establishing punishments for convicted offenders.

Defendant: The person sued in a civil proceeding or accused in a criminal proceeding.

Higher education: Institutions of learning beyond the secondary level. This would include colleges, universities, community colleges, junior colleges, and technical schools.

Issue: The broad topic of a court case, such as sexual harassment, negligence, grade dispute, etc.

Plaintiff: The party who brings a civil suit in a court of law.

Statutory Law: The body of law derived from statutes rather than from constitutions or judicial decisions. Also termed “statute law,” “legislative law,” or “ordinary law.”

Type of case: The legal classification of the case, such as tort, contract, constitutional, etc.

Chapter II

Review of the Literature

Description of the Scholarly Literature

The field of higher education law has matured over the past thirty years. There are textbooks written on the subject, such as those written by Kaplin and Lee (1995) or Olivas (1997). Journals have been produced on the subjects, such as the *Journal of College and University Law*, the *Journal of Law and Education*, and the *Brigham Young University Education and Law Journal*. There are several single-subject monographs on various subjects, such as *Higher education law: The faculty* (Poskanzer, 2002) and the *Rights and responsibilities of the modern university: Who assumes the risks of college life* (Bickle & Lake, 1999). And there have been several dissertations produced on such subjects as sexual harassment (Burke-Kelley, 1998; Masters, 1992), affirmative-action (Babich Morrow, 1996; Doyle, 1998; Hirschman, 1997), academic freedom (Batchelor, 1998), athletics (Walker, 1996; Levernz, 1989), and faculty dismissals (Mills, 1997; Letzring, 1994; White, 1991; Seal, 1986).

This study seeks to fill in a gap in the literature by providing a comprehensive review of higher education case law. “Broadly based surveys of the case law in higher education are generally not available”; these are needed in order to provide “a general framework for understanding patterns of litigation” (Helms, 1990, p.1). Schoenfeld and Zirkel (1989) refer to the lack of comprehensive data in the literature while researching sexual harassment cases and finding little research to use as a baseline.

School law, that focusing on K-12, is a little more mature than higher education law. Broad base studies of school case law are more readily available. For example, Hooker (1988) did a study of cases in which teachers were named in a suit for cases from 1965 to 1986. Logan (1997) and Rossi (1998) did studies in which case law was reviewed over a period of five years in the State of Virginia for public schools and private schools, respectively. Green (1983) performed such a study for Missouri public schools, as well. Imber and Gayler (1988) did a statistical analysis of trends in education-related litigation since 1960.

The broad-based surveys of higher education law remain scant, with few examples of such studies in the literature. Zirkel (1989) conducted a study that counted the total number of cases involving higher education institutions from the 1940s to the 1980s. A general increase in the number of cases from one decade to another was found from the 1940s to the 1970s with a plateau in the 1980s. A later study indicated an increase in the 1990s (Farrell, 2001). When comparing this data to data that was available for K-12, it was found that the trends were parallel. However, no analysis was performed on the types of cases that were reported.

Helms (1987) studied the various types of cases that had been brought forth for the state of Iowa from 1860 to 1985. It was found that the vast majority of cases have occurred in the recent past, with over one half reported since 1970 and two-thirds having occurred since 1960. The study went further to look at the type of case brought forth relative to the type of institution. It was found that the majority of cases for community colleges were administrative (86%). The majority of cases for public institutions were administrative (44%) with the next likely cause to be constitutional (28%). Private

institutions were equally split between contract (36.5%) and probate (36.5%). The study also looked at the parties to various cases and found that for community colleges, the vast majority of cases involved faculty (71%). For private institutions, the majority of cases were brought forth by donors (43%). For public institutions, the majority of cases were brought forth by external groups (36%) and faculty members (32%).

Lam (1988) conducted a similar study in which cases involving institutions of higher education in Texas were examined over a period from 1878 to 1988. It was found that the majority of cases for private institutions involved contracts and property law. The majority of cases for public institutions involved constitutional law. The majority of cases involving community colleges were cases growing out of constitutional law.

Helms (1989) reviewed all higher education legal cases undertaken in the United States between April 1st, 1988, and March 31, 1989. It was found that a majority of cases were tried in state courts (56%) as opposed to federal courts (44%). The study compared the distribution of higher educations cases to that of K-12 cases. K-12 cases were more likely to be tried in state court at a higher percentage than higher education cases were.

It was found that over half of the cases litigated in 1988 arose from ten states. The state with the most cases during that time period was New York with 62 cases, or 14.4% of the total (431). The majority of cases (40.6%) involved employees, with faculty involved in more than half of these cases. This was followed by students (27.1%), whose major issues in the suits dealt with questions regarding financial aid in loan repayment issues. The remaining cases involved private citizens (12.8%), businesses (10.9%), and governments (8.6%).

Data from this study were compared to that of the states of Iowa and Texas and found that those states had fewer numbers of cases that were litigated involving employees, with 35% and 31%, respectively. In those states, students brought forth 31% and 11% of cases, respectively.

Those cases that deal with issues found in the United States Constitution (such as the First Amendment, Fourteenth Amendment, and the Eleventh Amendment) were more likely to be tried in federal courts, although some such cases involving state constitutions were tried in state courts. Statutory and procedural matters were more likely to be tried in state courts. In terms of statutory issues litigated in federal courts, civil-rights cases arose as a major source of litigation (43%) followed by financial aid and bankruptcy cases (40%). State cases were much more diverse with civil rights (14%), collective bargaining (14%), financial aid (11%), and workmen's compensation (10%). Statutory interpretation, commercial, tax, records meetings, and criminal each were found to be fewer than 10% of the total cases (Helms, 1989).

As a final recommendation, Helms (1989) states that “only with a broad overview of the overall frequency and distribution of litigation can a framework be constructed to provide perspective on the role of law in higher education. Continuing review of litigation patterns on a yearly basis provides valuable information in understanding this interaction” (p. 11). The proposed study will provide part of that broad overview and will provide more insight into the effect of law on higher education.

Literature on Change

A review of case law will fill in gaps in the literature and provide a “snapshot” of the state of education law at a given time. However, an understanding of the effects of

those legal decisions is much more important. Thus, a second component of the proposed study will be an examination of the changes brought about by those cases.

It has been said that the only thing constant is change. However, change has changed. Conner (1994) quantifies change with three descriptors, all of which are accelerating:

> *Volume* refers to the number of changes we have to face. It's higher now than at any previous point in human history. To confirm this, compare a current issue of *The Wall Street Journal* with an issue from five, ten, or twenty years ago. You quickly will see that the number of organizational changes has risen dramatically.
>
> We measure the *momentum* of change by analyzing how long people have to implement a change and the length of time before another change becomes necessary. Both of these times have decreased notably, which means that the momentum of change is increasing.
>
> Meanwhile, the *complexity* of the changes people address today is far greater than in past years. Now, marriages often involve children from previous families, and mergers are announced in the middle of the execution of major acquisitions already taking place. (p.38)

Conner proposes seven reasons for this acceleration of change (p.39). They are (a) faster communications and knowledge acquisition, (b) a growing global population, (c) increasing interdependence and competition, (d) limited resources, (e) diversifying political and religious ideologies, (f) constant transitions of power, and (g) ecological distress. Conner also points out that the factors not only force accelerated change on their own, they interact with each other in a synergistic fashion to produce "massive" change.

Gioia and Thomas (1996) cite recent economic, demographic and political changes as driving forces that have pushed academia into what "looks more and more like a competitive marketplace." Gumport (2000) reports that over the past 25 years, the view of higher education has changed from that of a social institution to that of an industry.

As a result of these changes, schools have adopted management models that are more business-like and have led to significant changes and restructuring on campuses. This is further reflected by Tam (1999), who suggests that institutions of higher education "manage change by changing management." She suggests that schools rethink and reexamine their goals. She quotes Peterson and Dill (1997) in taking a "contextual planning approach" of redefining, redirecting, reorganizing, and renewal. She also quotes Senge (1990) and suggests that institutions of higher education should become "learning organizations" by adopting the five disciplines he put forth in his book, *The Fifth Discipline*. The disciplines he put forth are systems thinking, personal mastery, building mental models, team learning, and building shared vision. Gioia and Thomas (1996) also refer to Milliken (1990) in stating that due to the competitiveness of the educational marketplace, colleges are adopting a more business-like approach to effecting change.

Gioia and Thomas (1996) point out that while colleges and universities have become more accepting of business-like models of management, significant differences do exist. They cite the lack of a "bottom-line" in measuring teaching and learning. Prestige, image, and identity also play different roles in higher education than they would in industry.

Institutions of higher education have grown to accept more change. Kezar (2002) refers to changes at colleges as having accelerated from "tinkering" to comprehensive, transformational change. Kezar also reports similar forces of change at higher education institutions as those that are forcing change in the rest of society. They are (a) financial pressure, (b) growth in technology, (c) changing faculty roles, (d) public scrutiny, (e) changing demographics, (f) competing values, and (g) rapid rate of change in the world, both within and beyond national borders. Nair (2003) suggests similar forces of (a) technology growth in information and communication, (b) globalization, (c) competition, and (d) accountability.

The source of change can be internal or external (Kozeracki, 1998; Salvolo, 1984). Eckle, Green, Hill and Mellon (1999) point out that often the two forces are synergistic. External pressures can be internalized by the internal culture of an organization. The authors point out that there is a difference between the dynamics of a planned change and those of responding to mandate. Smart, Kuh and Tierney (1997) begin their article by stating that: "(t)he effectiveness of a college or university is a function of how it responds to external forces and internal pressures in fulfilling its educational mission" (p.257).

The courts can act as external change agents as "law affects the environment within which the university operates" (Glenny, 1973, p.174). The courts can interpret the laws which affect society as a whole. For example, the courts may interpret the Americans with Disabilities Act. All of American society is bound by their findings. Colleges, being a subset of society, must change to comply with their findings. More narrowly, courts can also interpret statutes dealing specifically with college issues, such

as admissions policies. Individual members of an institution can act as internal change agents by reacting to governmental laws and statutes as well as court decisions so as to prevent lawsuits.

Lueddeke (1999) quotes Levine in saying that the

> likelihood of change is enhanced when there is a crisis in the environment, when people have a shared interest in change, when there is a power imbalance in the environment, when the environment has a structural change, and finally when it is consistent with the *zeitgeist* or spirit of the times.

There are other systems that classify organizations and how they deal with change. Dill and Friedman (1979) employ Gamson's topology, which classifies institutions as having a complex organizations framework, a conflict framework, a diffusion framework, or a planned change framework. The complex organizational framework relates change to the system as a whole. It focuses on variables such as complexity, size, age, formalization, stratification, and centralization. The conflict framework focuses on how social structure and environmental pressure lead to change. The diffusion model considers individuals or groups that accept an innovation as "adopters." The model follows how the change flows through the institution from one set of adopters to another. Finally, the planned change model focuses intervention and innovation. It places greater emphasis on the act of changing rather than the change itself.

The most current set of change models is put forth by Kezar (2001). In her book, she presents six models of change and cites an author who has studied change using that model. The models are evolutionary, telelogic, life cycle, dialectical, social cognition, and cultural. The evolutionary model puts forth change as occurring as a response to

external factors and the environment. The telelogic model can be described as a “planned change” model, where the driving forces for change are the leaders who see a need for change. The life cycle model focuses on organizational growth, development, and decline. It is an outgrowth of the study of child development. The dialectical model centers on differences in ideologies and beliefs. Conflict leads to bargaining, persuasion, influence, or the exertion of power. The social-cognition model focuses on change as a result of learning and studying processes and applying mental models. In the cultural model, change occurs as a result of changes in the human environment. Here, changes occur in the area of beliefs, values and myths.

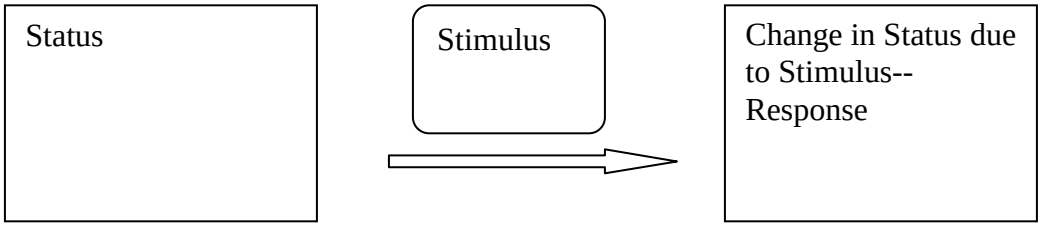
There are times when a better explanation of change is best described by a combination of models. Kezar (2001) points out that different groups may benefit from looking at the same change event using different models. Insight can be gained by viewing the situation through a different lens.

Of these models, the most appropriate to apply as a conceptual framework for the study is the evolutionary model. According to evolutionary models, change is a slow process and occurs as a result of environmental forces. Change occurs as a response to those demands, rather than from a plan to change (Kezar, 2001). Evolutionary models can be compared to the classical psychology “stimulus-response” model (figures 2.1a and 2.1b) or the “natural selection” of Darwinian biology (figure 2.1c).

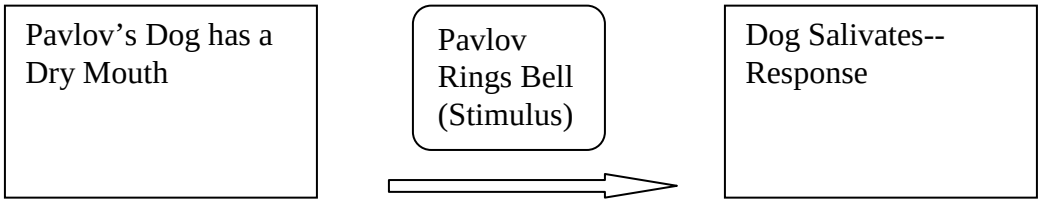
Important activities according to this model would be the constant observation of the external environment and reacting to it. Just as an organism would seek to avoid an unpleasant action, so an institution would react to avoid an unpleasant action such as being involved in litigation. Colleges, like organisms, seek a steady state or *homeostasis*

between themselves and the surrounding environment (Kezar, 2001). Important outcomes, according to the evolutionary models, are new structures and processes as a result of a stress from the environment (Kezar, 2001) (figure 2.1d). This will be the model of change used in this study.

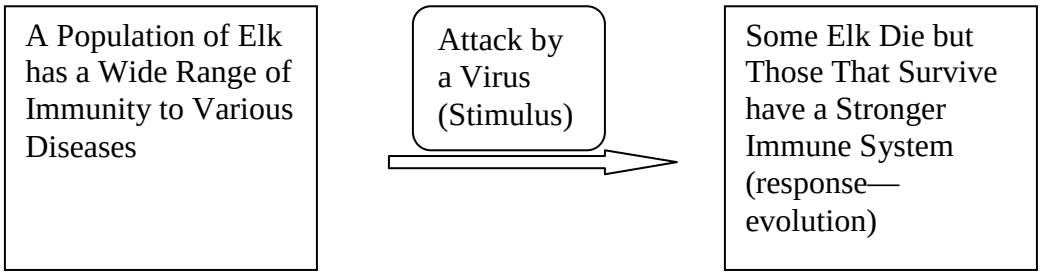
Figure 2. Evolutionary Models



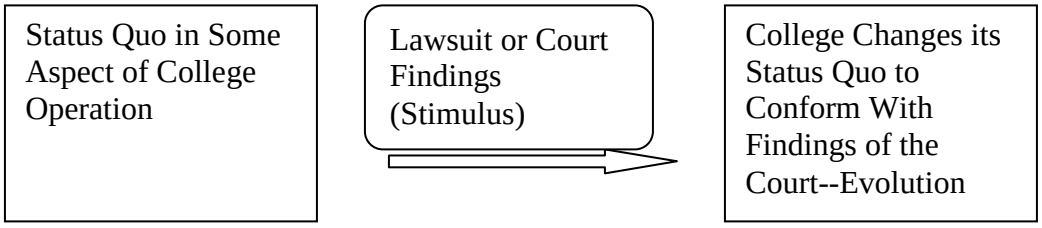
2.1a. Stimulus-response



2.1b. Pavlov's dog



2.1c. Population evolution



2.1d. Evolution applied to colleges

The Use of Social Science Research Techniques in Studying Law.

For any study, the appropriate research techniques must be chosen. For this study, social science research techniques will be applied to matters of law. “Law is ultimately a set of normative constraints on human behavior” (Cohen & Gleason, 1990, p.14). As such, it can be investigated legitimately using the tools of social science that are used in investigating any other area of human behavior.

Today, scholars are relying more on social science tools to analyze court opinions than ever before. While the field of traditional legal research has been the norm for most legal scholars, social science tools have become more important due to the limitations of traditional legal scholarship. These include such limitations as “its focus on one or a few cases that may not be representative, its fascination with arcane matters rather than issues that affect real people with real problems, or its inattention to the effect of a certain case on practitioners” (Lee, 1990, p.523).

The first successful use of social science research applied to the courts occurred in 1908 in the case *Muller v. Oregon* (208 U.S. 412, 1908). The case involved an Oregon statute that forbade women from working more than ten hours a day. An attorney, Louis Brandeis, presented the court with a series of documents that included not only a legal argument, but also social, economic, and public health research. In the decision, the court cited that “over ninety” reports of committees were presented. Brandeis’ view was that legal “propositions are not considered abstractly, but always with reference to facts” (Cohen & Gleason, 1990).

Social science research has played a role in several landmark cases. In the case of *Brown v. Board of Education* (347 U.S. 483, 1954), social science research was used to

examine the effects of a possible legal decision. “Separate but equal” was a legally acceptable approach since *Plessey v. Ferguson* (163 U.S. 537, 1896). However, armed with social research, an argument was made in *Brown* that presented possible problems for a large segment of the population if this precedent were allowed to continue. When the Supreme Court considered the new data as well as additional legal argument, it reversed the *Plessey* legal precedent for one that takes into account the rights of all people (Cohen & Gleason, 1990).

> This use of social science as a means of scientific social policy making and judicial decision making added a new dimension to legal scholarship. Sociological jurisprudence did not replace formalism but it breathed air into the backing of narrow legalistic reasoning characteristic of formalist reasoning. Judges began to take notice of the effects of law and to consider evidence generated by some of the scientists. Advocates of sociological jurisprudence did not call for the abandonment of legal principles and constitutional guarantees. Rather, to quote Roscoe Pound, it was a “movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to listen to first precedence.” In other words, full law cannot remain static in a changing world. (Cohen & Gleason, 1990, p. 45)

Some went further and proposed even more radical change. Karl Llewellyn, in a paper entitled “A Realistic Jurisprudence--the Next Step, published in the *Columbia Law Review,* suggested that this study of law change to become a study of the behavior of judges in their relationship to legal rules. He argued that in cases before the court, judges make decisions based on their own values and beliefs and then rationalize the result in the

context of the law. This movement, the Realist movement, died out in the postwar era (Cohen & Gleason, 1990).

However, the use of social data in the court rooms continued to gain acceptance. A 1978 study found that in approximately one-third of the over 600 cases examined by the United States Supreme Court, "the justices resorted to identifiable social science materials although these were not necessarily crucial to the *ratio decidendi* in a case" (Cohen, 1990).

The situation has evolved now such that we not only use social science to shape the law, we now use social science to understand the law. For example, Field and Holly (1982) performed a study in which sixty-six employment discrimination cases were examined. They looked for factors that may have played a role in the outcome of the case and by performing a Chi square analysis, determined those factors that would be most important in determining the outcome of the case.

Terpestra and Baker (1988) examined several sexual harassment cases. They identified various factors that may have played a role in the outcome of the case and performed a logistical regression on those factors to identify which may have been most important in determining the outcome of the case.

This approach now is being applied to higher education law. Schoenfield and Zirkel (1989) performed an outcome analysis on several sex discrimination cases involving higher education institutions. They suggest that there is a significant lack of empirical research in various areas of higher education law. They also suggest refining these techniques and applying them to other areas of higher education law.

Summary

The field of higher education law has matured over the last thirty years, as has the literature associated with it. There are several textbooks on the subjects as well as journals and loose-leaf services. There are several studies on single subjects within the field. Dissertations have been published on single subjects as well. However, there are significant gaps in the literature in which broad, comprehensive studies of higher education law are missing.

There are many sources of change in society. Colleges are affected by these sources as well. One source of change is due to legal action and the findings of court cases. As colleges are forced to react to this source of change, an applicable model to view these changes is by using Kezar's model of evolutionary change. The methods of social science research are appropriate to gather and analyze data for this study.

Chapter III

Methods

Research Design

In order to properly approach the research questions, a mixed-method research design was employed. Cases were gathered and their results were compared using the same descriptive statistics as the previous study done by Helms. When this was complete, a comparison of college classification was performed to determine if some college types are more prone to litigation or more effective in deterring it. A qualitative review of the impact of cases then occurred, in which several legal officers were interviewed.

Both styles are necessary to fully answer the questions posed. Neuman (2000) points out that the best research often combines the features of each technique. He goes on to state that in many cases they are quite complementary to each other. Other terms that describe the techniques to be employed are analytical research, document analysis, historical research, and archival research (McMillen, 1993; McBurney, 2001).

Historical-comparative research involves gathering data on two groups and searching for similarities and differences. Often, the two groups differ in culture or nationality. In addition, the two groups may differ in time periods. In the case of this study, the groups differed in the type of college as defined by the Carnegie classification.

Data Selection Procedures

The data for this study was taken from primary material describing cases that involve institutions of higher education. Cases were obtained from the West Education Law Reporter. This was done for the period of 1999-2003. The reason for this selection was that it allowed the data obtained to be compared directly with previous studies. The data was comparable because the selection and analysis methods are the same as those that were employed in the Helms study, which allowed for comparisons and conclusions with minimal normalization. This source provided a synopsis of each case in which an institution of education is named in a suit. The researcher reviewed each case and included only those dealing with institutions of higher education.

This study is a historical/comparative study in which the legal activities of different types of colleges will be compared. In order to do that, colleges needed to be classified. The appropriate system of classification for this study is the Carnegie classification of 2005. This approach has been an effective way to investigate differences between college types (Chinnery, 2003). In addition to presenting this data, the researcher presented typical cases from each class so that the reader can more fully understand the types of cases and issues presented.

To gauge the impact of recent case law on institutions of higher education, the researcher interviewed several legal officers from different colleges. As the individuals most immediately affected by the impact of a legal case, campus legal officers provided significant insight regarding changes brought about by recent decisions. An important facet of this study is the comparison of types of cases, issues, and the impact on various types of colleges. As such, legal officers from all categories of the Carnegie classification

were chosen for interview. Also, they provided keen insight as to possible underlying reasons for changes in litigation.

Yin (1994), Maxwell (1996), and Creswell (2003) make several suggestions to strengthen qualitative studies that will be applied to this study. Construct validity was ensured by having some of those interviewed review the drafts of the findings. Triangulation occurred by using multiple sources of information. Negative cases and discrepant evidence were identified and analyzed.

Data Collection

The appropriate volumes of the *West Education Law Reporter* were examined. Only those cases that have been classified as involving colleges and universities were examined in the study. After each appropriate case has been identified, the following data was gathered for it: (a) the court in which the case was litigated, (b) the state in which the case was litigated, (c) the parties to the litigation, (d) the type of case, (e) the issue litigated, (f) whether the institution was public or private, and (g) the prevailing party.

Twenty five legal officers from a wide variety of institutions of higher learning were interviewed regarding their impression of the changes that have occurred as a result of recent cases. They were queried as to the general impact of the changes on campus, the changes in the legal division, and which issues have provoked the most change. They were also be queried as to events, changes in society, and changes in the law that may provide the underlying cause as to why changes in trends are found.

Possible subjects were chosen from the Higher Education Directory (Burke, 2005). During the first round, 30-40 college legal officers were asked to participate in the study. In subsequent weeks, another 30-40 officers were chosen to compliment the group

that had already participated. That is, when one geographic region was well-represented, efforts were focused on another. When one class of colleges was well-represented, efforts were focused on another. In this manner, the breadth of input from geographic regions and school categories was maximized.

Data Analysis

Data Analysis was done in several steps:

1) The cases from the *West Education Law Reporter* were gathered and coded for type of case and issue using the characteristics described in the Helms study. Initial analysis were based on frequency counts of the case law data.

2) Once coded, an analysis was done to determine if the type of institution has any bearing on the number of cases. The total number of colleges in a given Carnegie classification was known, as well as the number in a classification that were involved in a case. The analysis was done using a chi square test of independence.

   H_o: Whether a college is that involved in a case is independent of what classification of college it is.

   H_1: A college's likelihood of being a party in a case is dependent on what type of college it is.

3) Interviews of college legal officers were performed. The notes were coded. Specific attention was paid to the impact of recent cases on the college in general. The approach was similar to one described by Maxwell (1996). The majority view will be presented. In addition, key

points from those within or outside the majority will be presented as well.

4) Using the conceptual framework of institutional change, the researcher presented his findings using Kezar's evolutionary model to explain changes brought about by important cases. The relevant conditions at the affected college were presented as they were before the lawsuit. The new conditions were presented as well, with the lawsuit's being presented as the change agent or force for evolution. Commentary also was presented that describes the applicability of these findings to higher education institutions in general.

Chapter 4

Findings

The purpose of this chapter is to present findings on the types of cases reviewed, and analysis of those cases, and a summary.

The purpose of this study was to understand the state of higher education law during the period from 1999-2003. It was to seek trends in the body of higher education law that occurred during that period and seek underlying causes for those trends. To approach reaching this goal, the following research questions were generated

1 a) What types of cases have institutions of higher education participated in --as either the plaintiff or the defendant-- during the period of 1999-2003?

b) What issues are found in these cases?

c) Are there trends that indicate an increase or decrease in litigation dealing with a specific issue?

d) Are there differences in the types of cases, issues or impact relative to the type of institution?

e) What are the underlying causes for the trends found?

2) What has been the impact of these cases on the general operation of institutions of higher education?

These questions will serve as a framework in presenting the data gathered.

To answer these questions, a four-phase approach was employed. First, cases from the appropriate time period were reviewed and tabulated. Second, the case review data was compared to a previous study.

Third, interviews were performed based on the data found in the cases reviewed in the first phase. Fourth, the effect of these cases was gauged as a result of the interviews.

The focus of the study was to determine the state of higher education law in United States. In order to do that, 1678 cases were drawn from West's Education Law Reporter for a five-year period which included the calendar years 1999 to 2003. West's Education Law Reporter presents cases dealing with education at all levels. Only cases with questions involving higher education were included in this study. West's education law reporter began in 1982. It is produced by the West's publishing company which was established in 1872. It is a highly regarded publication by those in the field of education law.

West's Education Law Reporter includes all cases dealing with education that are litigated in the federal court system, including bankruptcy courts. It also includes cases from the state courts. It does not, however, report on cases heard in state trial courts. Also, it does not report on cases heard at the appellate level when the findings simply affirm the findings of the trial courts and no additional opinion is presented.

Phase One-Review of the Cases

The volume of litigation

For the years 1999-2003, a total of 1678 cases involving institutions of higher education were recorded in West's Education Law Reporter. Table 1 presents a breakdown of the number of cases in a given year. This data differs slightly from the data in figure 1 as this data reflects cases reported during the calendar year whereas the data in figure 1 was taken for periods from May 1 in a given year to April 30 of the following year.

Table 1

Cases by Year

Year	Cases
2003	346
2002	332
2001	318
2000	367
1999	315
Total	1678
Average	336

Of the cases reviewed, 1514 cases were reported in which a specific college was named as a litigant. Table 2 shows the distribution of type of college participation in these cases. Colleges are defendants in the vast majority of cases.

Table 2

Distribution of College Role in Litigation

Role	Number	Percent
Defendant	1333	88%
Plaintiff	181	12%
Total	1514	100%

Public and private colleges were included in this study. Table 3 shows the distribution of cases based on college control.

Table 3

Distribution of Colleges based on Control

Control	Number	Percent
Public	1081	71%
Private	433	29%
Total	1514	100%

Court system

Federal courts account for 966 cases (57.6 %) and state courts account for 712 cases (42.4 %). Table 4 shows the distribution by court

Table 4

Distribution by Court

Federal and State Courts	Cases	Percentage
Federal Courts	966	57.6 %
State Courts	712	42.4 %
Total	1678	100 %

Federal Courts	Cases	Percentage
US Supreme Court	38	3.9 %
US Circuit Courts of Appeal	401	41.5 %
US District Courts	527	54.6 %
Total Federal Cases	966	100 %

State Courts	Cases	Percentage
Court of Last Resort	241	33.8 %
Appellate Courts	471	66.2 %
Total State Cases	712	100 %

Note. State court systems vary in the manner in which they name their courts. Appellate courts refers to courts that hear cases on appeal from the trial courts. The term Court of Last Resort refers to the highest court of the state.

Litigants

Cases over these five years have included a broad group of litigants. Table 5 shows a distribution of cases based on litigant.

The percentage of cases involving employees (44.3 %) is the largest category. The study found faculty with 53.1 % of those cases, staff with 37.8 % and administrators with 9.1 %. The percentage of cases involving students is second at 36.4 %.

Other groups were also found to be participants in higher education cases. Businesses participated 4.8 % of the cases. Governmental entities were named in 4.3 %. Private citizens were involved in 9.5 %.

Table 5

Litigant

Party			Number	Per Cent
Students			611	36.4 %
a. Undergraduates	488/611	80.0 %		
b. Graduate Student	123/611	20.0 %		
Subtotal	611	100 %		
Employees			744	44.3 %
a. Faculty	395/744	53.1 %		
b. Staff	281/744	37.8 %		
c. Administrators	68/744	9.1 %		
Subtotal	744	100%		
Businesses			81	4.8 %
Government			72	4.3 %
Unions			11	0.7 %
Private Citizens			159	9.5 %
a. Family/Estate	36/159	22.6 %		
b. Interest groups	42/159	26.4 %		
c. Public	81/159	51.0 %		
Subtotal	159	100 %		
Total			1678	100 %

Prevailing party

Cases were examined to identify the prevailing party (table 6). Colleges were the prevailing party in 936 cases (61.8 %). The non-college litigant prevailed in 357 cases (23.6 %). There was a split decision in 221 cases (14.6 %).

Table 6

Prevailing Party

Party	Cases	Percent
College	936	61.8 %
Non-college	357	23.6 %
Split	221	14.6 %
Total	1514	100 %

Question 1 a) What types of cases have institutions of higher education participated in -- as either the plaintiff or the defendant-- during the period of 1999-2003?

Claim

Table 7 presents the claims made in court. These issues can be broken down for further analysis.

Table 7

Issues Litigated

	Federal		State
Constitutional	160		40
Statutory	729		288
Diversity Jurisdiction	24	Common Law	352
Procedural	34		31
Total	966		712

Question 1b) What issues are found in these cases?

Constitutional

Constitutional cases are more likely to be heard in federal courts, but some are heard in state courts. The majority of cases are First Amendment cases (124), most often brought by employees. This was followed by Fourteenth Amendment cases (51). The

balance of Constitutional cases involved the Eleventh Amendment, Fifth Amendment, Fourth Amendment, or State Constitution.

Suits involving procedural issues account for a relatively small number of cases. These cases normally involve violations of due process in agency rulings.

A large number of cases heard in the state courts are classified as common law cases. The current study shows 340 common law cases. Of those, 160 were contract cases and 176 were tort cases. The second largest number of state cases was statutory cases. There were 298 such cases.

The majority of cases heard in Federal courts were statutory cases. The findings of the current study show a total of 413 Federal civil rights cases (57 % of the statutory cases) and 191 bankruptcy cases (26 % of statutory cases). Additional subjects of Federal and state statutory law are presented in table 8.

Sexual harassment cases are presented with a total of 56 cases heard in both courts. Violations of the False Claims Act were heard in 11 cases in Federal courts. The majority of these cases dealt with university hospitals improperly billing Medicaid for services rendered. Other whistleblower and retaliation cases also were substantial in both courts. Suits involving records and meetings were heard in both courts.

Table 8

Statutory Issues Litigated

	Federal
Civil Rights	
Sex	99
Race	104
Age	37
Disability	75
National Origin	31
Religion	13
Other	8
Sexual Harassment	46
Financial aid/Bankruptcy	191
Intellectual Property	30
Collective Bargaining	7
False Claim Act	11
Meetings/records	13
Retaliation/whistleblower	12
Labor	8

	State
Civil Rights	
Sex	10
Race	17
Age	9
Disability	16
Other	8
Sexual Harassment	10
Financial Aid	13
Collective Bargaining	18
Records/Meetings	33
Retaliation/whistleblower	23
Labor	60

Examples of Cases

A research question posed dealt with the types of cases tried during this period. In order to accurately portray the types of cases that have been tried during this period, several cases are presented. These are either typical of the cases found in the study, or important either to higher education in general or to the body of law. A total of 18 cases are presented. They include Constitutional (4), statutory (9) and common law (5). They

include public colleges (12) as well as private (6). Federal courts (10) and state courts (8) are presented. Doctoral schools (11), bachelors/masters schools (6) and associates schools (1) are presented.

Example of Constitutional Cases

A case in which students seek free expression guaranteed by the First Amendment is that of Pro-life Cougars versus the University of Houston (259 F. Supp. 2d 575,S.D. Tex 2003). In this case, the Pro-life Cougars, a university student organization, wished to display a pro-life exhibit entitled Justice for All on the Butler Plaza of the campus. The planned exhibit was to be composed of eight signs that were 3 ft. by 4 ft. and contain pictures. The purpose of the exhibit was to promote the group's agenda of right to life for all people including the unborn. Subjects of the photographs might include bioethical issues, stem cell research, abortion, and other such matters. Pursuant to university policy, plaintiffs applied for a permit for their exhibit.

Dean Munson, the assistant vice president for student development and dean of students, reviewed their exhibit and felt it would be potentially disruptive. He suggested two more remote sites for the activity. It was noted that months earlier, a different student organization, the Free Speech Coalition, displayed the very same exhibit at the Butler Plaza.

The students chose not to use the sites which Dean Munson had suggested as the sites were too remote. Instead, they sought redress by filing suit in the United States District Court for the Southern District of Texas. They felt that the University's written policy on peaceful assembly on school grounds was a violation of their First Amendment

rights of freedom of expression. They felt it was unconstitutional because it was vague and relies too much on the judgment of one person, in this case being Munson. The University felt that the policy was constitutional as it is neutral with respect to content of activities on the campus.

The court found that the university policy was unconstitutional as it abridged the First Amendment rights of the students. It ordered a cease, desist and refrain action to keep the University from enforcing the policy which kept the students from presenting their display at the Butler Plaza.

One of the most important cases in this study is that of Gratz versus Bollinger (539 U.S.309, 2003). It is a case which involved the 14th amendment. It was heard by the United States Supreme Court. Jennifer Gratz and Patrick Hamacher, both Caucasians and residents of the state of Michigan, were denied admission into the University of Michigan's college of literature, science and the arts. They applied in 1995 and 1997, respectively. The guidelines for admission at those times allowed for a maximum of 150 points to be awarded, with 100 points being required to be guaranteed acceptance. Points were awarded based on high school grades, strength of high school curriculum, leadership, geography, alumni relationship, and race. Twenty points were awarded to all African-Americans, Hispanics, and Native Americans. Those groups were considered by the University to be "under-represented." The University had then changed the admissions policy in 1999.

Plaintiffs alleged that the admissions policy was a violation of the Equal Protection Clause of the 14th Amendment. They sought redress in the United States District Court for the Eastern District of Michigan. The court found for the plaintiffs and

stated that the policy as it existed during the period from 1995-1998 employed quotas. The court ruled that the more recent 1999 standards of admission were acceptable as they were "narrowly tailored."

The case was combined with Grutter versus Bollinger (539 U.S. 306, 2003) by the United States Court of Appeals, Sixth Circuit. During the appeals process, the court published an opinion that the University of Michigan Law School's admissions policy, which included race, was acceptable. Before further findings of that court, the United States Supreme Court granted certiori and divided the cases.

The court affirmed the finding of the district court in that the policy was not "narrowly tailored" and thus violated the 14th amendment. Of note is that in the companion case, Grutter versus Bollinger, race-conscious admissions policies were found to be acceptable when they are "narrowly tailored" for a "compelling interest."

Another Constitutional case, presented as a Fourteenth Amendment issue, is that of Breen versus Texas A&M University (213 F.Supp. 2d 766, S.D. Tex 2002). This was a high profile case, dealing with the Texas Bonfire incident. It had been the tradition for over 90 years to create a bonfire which served to bring the campus community together before the football game with rival University of Texas. While its beginnings were humble as simply burning trash, it grew into a massive undertaking with multiple tiers and weighing in the millions of pounds. The construction of the fire was left to a group of student leaders known as the "redpots." They were not engineers, architects, or builders. Training was not required. Often, they ignored the blueprints and built the fire in the manner that was explained to them. The university did not impose many restrictions on the work of the redpots. The school did appoint a bonfire advisor. They also took action

in response to problems that arose, such as requiring chain saw training in response to a field accident. There was a partial collapse in 1994, yet the university never followed up by testing subsequent fires for structural integrity. In 1999, the bonfire collapsed during construction which resulted in the death of 12 students. The collapse injured 27 others as well.

Christopher Breen died in the collapse. His family sought redress by filing suit in the United States District Court for the Southern District of Texas. They charged that the university violated the Fourteenth Amendment by acting with "deliberate indifference." Claims of negligence in violation of state code were also made. The court declined jurisdiction over the state claim. The university claimed sovereign immunity and sought summary judgment. The District Court found for the university on that basis. The case was consolidated with those of other victims of the accident and appealed to the United States Court of Appeals, Fifth Circuit. The Circuit court affirmed the rulings of the District Court. Of note is that four of the victims filed suit in state court against college officials, a construction company, and the student leaders. They received a settlement of $4.25 million.

Another case dealing with the 14th amendment is that of Central State University versus the American Association for University Professors, Central State University Chapter (119 S. Ct.1162, 1999). The Ohio State Legislature passed a statue which required the state universities to begin to develop standards for the instructional workload of their faculty. The legislation also sought to remove any discussion of faculty workload from collective bargaining. This legislation was passed as a result of a perceived decline in the time spent by faculty in teaching activities rather than in research activities. The

faculty union brought suit against the State of Ohio claiming that this legislation created a group of state employees who were not entitled collective bargaining rights.

The Ohio Supreme Court agreed with the faculty union. The court found that the state had not presented a valid argument for addressing only one group of public employees in this legislation. They held that faculty members were deprived of equal protection under the law. The university appealed to the United States Supreme Court which reversed and remanded the case. The Supreme Court found that there was a valid argument for addressing only one group of public employees; that is, to provide uniformity among professors who worked for the state.

Examples of Statutory Cases

A case dealing with gender discrimination is the case of Cullen versus Indiana University Board of Trustees (338 F. 3d 693, 7th Cir. 2003). Deborah Cullen was hired at Indiana University's Indianapolis campus, IUPUI, in May of 1990. She was appointed to be the director of the respiratory therapy program and awarded the rank of associate professor. She was credited with three years towards tenure and given a base salary of $45,000. The male professor who previously held that position had been paid $36,742. Her academic background was that she held a Bachelor of Science degree in respiratory therapy, a Masters of Arts in education, and a Doctor of Education. She had previously served as a director of a two-year respiratory therapy program at Grossmont College for a total of six years and had a total of 15 years teaching experience before coming to Indiana. She was granted tenure and promoted to full professor in April 1995. She had successfully authored articles, chaired committees, and obtained grants for her program.

In July 1998, Dr. Sandy Quillen, Ph.D., was hired as they Director for Physical Therapy. He was granted the position of tenured associate professor and his base salary was $90,000. The professor who held the position prior to him, a woman, had a salary of $85,696. Dr. Quillen held five academic degrees that are closely aligned to his teaching area and include a Ph.D. in sports medicine. At the time of his hiring, the physical therapy program was in danger of losing its accreditation.

For the 1998—99 academic year, Doctor Cullen received a salary and $63,240 whereas Dr. Quillin was paid $90,000. A similar disparity was found for the next three years. Professor Paul Carlin conducted a pay equity study in the early 1990s for the University. He found that there was a statistically significant gap between males and females in terms of faculty salaries. He could not rule out discrimination as a possible cause. He repeated his study in 1997 with Patrick Rooney, the special assistant to the Chancellor. In the second study, Dr. Cullen was identified as someone who is paid at a rate of more than one standard deviation below their predicted salary. Her predicted salary was $71,313.60. At the time she was being paid $58,128. One standard deviation from her predicted salary would have been $61,774.29. Again, Professor Carlin stated that he could not rule out gender discrimination as the cause of her lower salary. It was noted that approximately 60% of those who fell in this category of being paid less than one standard deviation from the predicted salary were males. As a result of this finding, a review committee recommended that her salary be increased. Her salary was adjusted from $63,240 to $64,901.

Dr. Cullen then brought forth a case in the United States District Court for the Southern District of Indiana. Her allegations include that the University discriminated

against her. This would be in violation of the equal pay act and a violation of title VII of the Civil Rights Act of 1964. She argued that Dr. Quillen was a similarly situated male and received a higher salary than she did. The District Court summarily found for the University. They found that Dr. Quillen was not a similarly situated male employee in that he had different academic credentials and significantly different responsibilities. She appealed to the United States Court of Appeals for the 7th Circuit. The Court of Appeals upheld the findings of the District Court.

Another case dealing with gender discrimination with students is that of Gossett versus Langston University (245 F. 3d 1172 10th Cir. 2001). In this case, Marty Gossett, a male, was enrolled in the university's nursing program. During the second semester, Gossett had difficulties in a course taught by Kathleen Clark and Pamela DeVito Thomas. He sought assistance from the instructors. He received a grade of D in a course, which according to school policy required his discharge from the nursing program. He appealed his grade and attempted to apply for readmission on several occasions. All were unsuccessful. He sought redress at the United States District Court for the Northern District of Oklahoma. The District Court granted summary judgment in favor of the college.

He appealed to the United States Court of Appeals for the 10th circuit. At that court, he provided statistical evidence that confirmed discriminatory action. In the course in which he received a D, there were 24 students, five of whom were men. All of the women in the course passed. However, three of the five men failed. He also presented an affidavit from a student who would have received a D in the course but was given an incomplete and allowed to continue work ultimately receiving a C. Mr. Gossett was not

given the option of the grade of incomplete and claimed that such grades are given in a sexually discriminatory fashion. He presented an affidavit from Deborah Guy, who served as a professor in the program for four years. She also served as a member of the admissions committee. In an affidavit, she described several instances in which Mr. Gossett, and males in general, were treated differently from the females in the program. With this additional evidence considered, the Court of Appeals reversed the finding of the District Court and remanded back to that court for further proceedings.

Another discrimination case is that of Levin versus Yeshiva University (754 N.E.2d 1099 N.Y. 2001). Sarah Levin and Maggie Jones were enrolled in Yeshiva University's College of Medicine. Each of them was involved in a same-sex relationship. The medical school restricts college-operated housing to medical students, their spouses and children. Vacancies are filled on a first-come first-served basis from a waiting list. However, married couples receive priority for studio apartments. One-bedroom apartments could be shared by a minimum of two students or by a married couple. Two-bedroom apartments required three individuals, with priority going to married couples having children. Yeshiva's housing office required married couples to provide acceptable proof of marriage in order to receive priority.

The plaintiff, Sarah Levin, applied for housing for herself and for her partner. She had been in a relationship for five years. In accordance with its policy, the university required that she produced proof of marriage. She moved in to a three-bedroom apartment for first-year but eventually moved in to an off-campus apartment with her partner. The second plaintiff, Maggie Jones, also applied for housing during her first-year with her life partner. Her request was denied. She moved into on-campus housing

with another student during her first year but then chose to move off campus with her partner thereafter.

Plaintiffs filed an action and the Supreme Court of New York, New York County, stating that the policy of Yeshiva violated New York State and City human rights laws. Yeshiva moved to dismiss the complaint. The Supreme Court dismissed the case. The plaintiffs appealed to the Supreme Court of New York, appellate division who also found for the defendant. Finally, they appealed the case to the Court of Appeals of New York. The Court of Appeals affirmed the findings of the lower court.

Another case dealing with students and disabilities is that of El Kouni versus Boston University (169 F. Supp. 2d 1 D. Mass. 2001). The plaintiff had been enrolled in an M.D./ Ph.D. program at the Boston University School of Medicine. He received failing grades in gross anatomy, neuroscience, and another course and was dropped from the M.D. portion of the program in 1994. Another reason for his being dropped from that portion of the program was his offensive behavior. He was informed that he could apply for reinstatement into the M.D. program if he successfully completed the Ph.D. portion of the program. He was later dropped from the Ph.D. portion of the program due to lack of quality in his laboratory experiments which were necessary for him to complete his thesis.

The plaintiff was diagnosed with anxiety disorder in 1993. He was diagnosed with depression in April of 1994, and then with bipolar disorder in July of 1997. He informed Boston University that he suffered from these disorders in December of 1997 in requesting accommodations at that time. The university allowed him extra time on exams.

He sought redress in the United States District Court for the District of Massachusetts. The court found that the plaintiff was indeed disabled in accordance to the Americans with Disabilities Act. However, they found his case failed on the second point of the act. A person must be able "to perform the essential functions of the position, either with or without the help of a reasonable accommodation, namely, to successfully complete all of the program's requirements." That is, they must be "otherwise qualified." The court found the plaintiff was dismissed from the program not because of his disability but rather because of the quality of his work and his failing grades. Accommodations, in this case, additional time on exams, would not have helped him succeed. Thus, he is not "otherwise qualified." The plaintiff requested a court order to expunge his academic record. This would have allowed him to apply for reinstatement to the M.D./Ph.D. program at Boston University. The court denied that request.

Another disability case, this time dealing with faculty, is the case of Carter versus Wallace Jr. College (173 F.Supp.2d 1204 M. D. Ala. 2004). Plaintiff Carter taught forestry at Wallace Jr. College. After three years, his contract was not renewed. He would have been given tenure had it been renewed for a fourth year as was the tradition at Wallace Jr. College.

Carter had been diagnosed with a learning disorder. He claims that his employer knew of his diagnosis and that is the reason that his contract was not renewed. He sought relief from the United States District Court for the Middle of District of Alabama.

The college president, Seth Hammett, made the decision to not renew Carter contract based on a recommendation by the Dean of the College, James D. Krudop. The Dean claims that he made his decision based upon enrollment in the forestry program.

Neither the President nor the Dean were aware of Carter's disability when the decision was made not to renew his contract. However, the Dean may have been influenced by recommendations from people who were aware of Carter's learning disorder.

The college argued that because Carter earned a Ph.D. from Auburn University, he is not substantially limited by his learning disability. In addition, a nondiscriminatory reason was offered for Carter's nonrenewal. As a result, the court found summary judgment for the college.

A civil rights case dealing with discrimination on the basis of national origin is that of Mora versus the University of Miami (15 F Supp. 2d 1324 S.D. Fla. 1998). Frank Mora was hired as a full-time mechanic by the University and worked at the university's physical plant department. Mora had dental surgery and returned to work for the next four days. He then proceeded to take 10 days of sick time. Leon Lipson was his supervisor and attempted to contact him several times during this period. He then contacted Dr. Hoffman, who performed the surgery, to see when to expect Mora to return to work. Dr. Hoffman stated that the surgery only required one day of recovery. Lipson called Mora and explained that his medical excuse could not be substantiated by the dentists. Mora then called Dr. Hoffman who in return called Lipson and explained that Mora was taking painkillers, although there was no medical reason for this pain, and should not return to work while taking painkillers. Mora filed a grievance against Lipson, asserting that his conduct was harassment. Lipson replied in writing that Mora would receive sick pay for his absences but noted that he would be required to substantiate any further sickness with a note from his doctor. Lipson also denied that his conduct rose to the level of harassment.

During the same year, the university instituted a policy instructing all maintenance personnel to drive vehicles only on paved surfaces. This policy was instituted in writing, with memos being generated and delivered to all personnel. When Mora was seen driving across the university lawn, Lipson issued a written warning to him. Mora filed a grievance claiming never to have seen the written memo.

In 1987, Mora had been transferred along with several others from the physical plant department. His new position was in the dormitories where his responsibilities included dealing with emergencies, working with security, and maintaining work logs. His new supervisor, Jack Sargent, gave him a written warning for the manner in which he dealt with a student employee's complaint. Again, Mora filed a grievance against his supervisor. The university dismissed the grievance against the supervisor.

In 1992, the university transferred Mora back to the physical plant facility. Mora's new supervisor, Alan Rose, requested Mora provide his phone number. This was in keeping with the university's policy. Mora refused to provide his contact information. Alan Weber, acting director of housing maintenance, had two conferences with Mora and discussed discipline as well as any concerns that Mora had regarding discrimination. He explained that if Mora did not provide a contact number, he would be transferred to day shift.

In September of 1993, there was a plumbing emergency at the time in which the plaintiff was on duty. Plant personnel made several attempts to contact the plaintiff but were unable to do so. As a result, the university was forced to call a standby plumber at considerable expense. In January of 1994, the plaintiff refused to investigate the

plumbing problem. Later that month, the plaintiff was counseled regarding his failure to do a job properly when he did not repair a broken window.

In February of 1994, Mora met with several supervisors who discusses deficiencies with him and noted that if he failed to improve on the deficiencies, that could lead to termination. Mora was again asked for a contact number which he finally provided, but with instructions specifically not to share the number with the rest of the department. The university later found that the number was not working. His supervisors and again warned him of his deficiencies. The university transferred Mora to the day shift. Mora filed a grievance claiming discrimination and requesting to return to the evening shift. His supervisor informed him that the decision for him to continue with the day shift would remain. However, the supervisor would review Mora's work at the end of the summer and determine whether the plaintiff could move back to the meetings at that time.

Mora appealed this decision directly to the vice provost, Dr. Steve Ullman. Dr. Ullman transferred the matter to the HR department. John Zanyk of the HR department met with Mora to discuss several options including Mora's wish to take a one-year leave of absence. Zanyk suggested a three-month leave of absence followed by a 13-month layoff. There would be no guarantee that Mora would return to his job at that time. He then scheduled follow-up meetings that Mora missed and rescheduled the follow-up meeting that Mora again missed.

Mora's supervisor sent him a letter restating what he had said earlier: that he could take administrative leave or he could report to work. The second memo was generated which commented on Mora's attendance problems and again noted that he

would need to provide the doctors note for his absences. Mora did not show up for work nor did he provide the university of a decision that he would accept a leave of absence. As a result, the university sent him a Federal Express overnight letter informing him that he needed to provide doctors notes for the time missed. He did not respond to this request. A second overnight letter was sent to Mora stating that since he had not responded to the previous letter, the university would accept his silence as a resignation. Mora responded to this second note saying that he considered himself to have been fired and included doctor's notes for the time that he missed.

Mora filed a discrimination suit in United States District Court for the Southern District of Florida. Mora asserts that by moving him from the night shift to the day shift, and then by firing him, the university displayed the discriminatory attitude against people from Columbia. He further asserts that their conduct was retaliatory in nature. The University sought summary judgment in this matter which was granted.

Sexual-harassment is one subject in which cases have been increased in number significantly over the past several years. A case that deals with the subject is that of Chontos versus Rhea and Indiana University (29 F. Supp. 2d 931 1998). In this case, student Angela Chontos had a private conference with Harold Rhea, her professor. During that meeting in his office, Professor Rhea made unwelcome advances by fondling her and forcibly kissing her. Professor Rhea had a history of acting in an untoward fashion with his female students. The University and taken some actions to correct Rhea's conduct. Chontos filed suit in United States District Court for the Northern District of Indiana. She named both the Professor and Indiana University and her suit.

She charged that the University had approached correcting Professor Rhea's behavior with deliberate indifference.

Indiana University chose to apply for summary judgment. During discovery, it was found that Rhea had a previous history of inappropriate conduct with female students. They found that a reasonable jury could possibly find that the university was in fact deliberately indifferent towards this professor. They denied the university's motion for summary judgment. There have been no further references to this case. Most likely, it was settled out of court.

A whistleblower case involves that of Stebbings versus the University of Chicago (726 N.E. 2d 1136 Mas. App. Ct. 2000). While working as a medical researcher for the university at the Argonne National Lab, Dr. James Stebbings discovered that human subjects had been exposed to levels of radiation that were higher than had been approved. This had been done without the subject's permission. The experiments had been approved by the National Institutes of Health and were conducted under a grant from the Institute. It involved human subjects being exposed to radon gas. The plaintiff contends that during the experiments, test subjects were exposed to levels 10 to 15 times as intense as what has originally been proposed. He reported his findings to the review committee for research involving human subjects. No action had been taken within a month so the plaintiff reported the incident to the Argonne division head. As a result, the Department of Energy issued a stop work order for all experiments involving human subjects in the national laboratory system while they reviewed protection procedures of human subjects. The plaintiff wrote a memo stating that it was his belief that a report needed to be sent to the National Institutes of Health, informing them of the incident. It was his

understanding that this was legally mandated. On August 14, 1990, the plaintiff was fired effective September 30, 1990.

The plaintiff sought redress and filed suit in the Circuit Court of Cook County. His position was that his firing was in violation of various radiation control acts. The university moved for dismissal in claim that the plaintiff's termination was not in violation of any statute or policy the plaintiff withdrew his complaint. He refiled the case a year later with new council and again the university moved to dismiss. Again the plaintiff withdrew his complaint. He filed a third complaint that was dismissed and eventually a fourth amended complaint. The trial court dismissed this complaint as well. The plaintiff then appealed to the Appellate Court of Illinois, first district. The appellate court used a three-prong approach in determining the verdict in this case. First, was the plaintiff fired? Second, was this down in retaliation for his actions? Third, did the firing violate a mandate of public policy? The court found that all three of these conditions were met in this case and a reversed the finding of the Circuit Court and remanded it for further review.

A case dealing with records is that of Butts versus Shepherd College (569 S.E. 2d 456 W. Va. 2002). This case portrays how fearful some people are of violating the law. Joy Butts was a tenured professor at Shepherd College. Her supervisor was Ethel Cameron. In the fall of 1999, Professor Cameron asked the plaintiff, as well as other faculty members in the program she supervises, to provide her with grades for the courses that professors taught in the program. She requested this information so that she could make changes in the program. Professor Butts did not comply with the request. She cited the policy in the college handbook, which stated that students needed to give prior

written consent in order for information to be released. It is noted that the policy also allows faculty members to access records if their use will be for internal educational purposes. The policy also states that the area of responsibility for releasing grades lies with the office of the registrar. Professor Butts claims that she was concerned about violating student privacy and violating the Federal and state laws which govern student privacy. When professor Butts refused to release grades to Professor Cameron, she received reprimands on her record. She filed a grievance regarding those reprimands. An administrative law judge denied her request to have the reprimands removed, affirming the reprimands. The administrative law judge found that Professor Butts' behavior was to be considered insubordination.

Professor Butts appealed the decision to the Circuit Court of Jefferson County. The Circuit Court affirmed the findings of the administrative law judge. The court pointed out that Federal law allows records to be released for legitimate educational purposes. Again, they found Professor Butts refusal to comply with a legal directive of her supervisor to be an act of insubordination.

The Supreme Court of Appeals for West Virginia then accepted the case on appeal. The court approached this case with a two-pronged approach. First, was the request a "valid and reasonable order"? Second, was the participant's refusal to comply willful? The court found that the wording of the college policy was sufficiently vague so as to lead someone the same conclusion that Professor Butts made. That is, that only the registrar's office was allowed to release grades. They found that since the actions of the plaintiff were guided by an interpretation of law, this was not a willful refusal and thus

not insubordination. The Court of Appeals reversed the findings of the Circuit Court. They ordered that the reprimand be removed from her record.

Examples of Common Law Cases

A tort case in which alcohol may have played a role is that of Robertson versus Louisiana Tech University (747 So.2d 1276 La. Ct. App. 1999). Louisiana Tech built a roof to cover their swimming pool. It was built in such a fashion that a person could climb one of many buttresses to get on the roof. After getting on the roof, a person could walk along the roof to get to its highest point which was 56 ft. above the ground. There had been several occasions in which students had been observed on the roof. In one case, in January of 1985, two students were found on the roof. Reports indicated that the students seemed to be under the influence of alcohol. Later that year in September of 1985, four students were seen on the roof. Again, alcohol seems to have it involved. One student fell from the roof and suffered a fractured vertebra. In August of 1989, a student fell from the roof. He broke his wrist and fractured vertebrae. He also had been drinking.

Trey Robertson was a student at Louisiana Tech. On April 5, 1991 he was walking by the swimming pool. He had been visiting a friend that evening and had been consuming alcohol. He climbed onto the roof and fell. It was later found that his blood alcohol level had been 0.073 when he fell, which is below what is considered to be legally drunk. The day after the fall, Robertson discussed his actions with campus police. He stated that he wanted to get a scenic view of the campus. During the interview, he claimed that he stepped from one side of the roof to the other, lost his footing, and slid,

hitting the edge of the roof and then hitting the ground. He died on April 11, 1991 due to head injuries.

His parents sought redress in the Third Judicial District Court for the Parish of Lincoln, Louisiana. Their claim was for wrongful death due to negligence. They claimed that they college should have prevented access to the roof, especially as other students had climbed the roof and sustained injuries during falls. Louisiana Tech filed for summary judgment. The District Court agreed with the position of the university and rejected the claims of the plaintiffs. The court found that the danger of the roof should be easily recognized by everyone. As such, the roof was not “unreasonably dangerous.” They found that the college of "owed no duty to prevent Trey from climbing onto the roof.” As such, no negligence was found. Summary judgment was entered on behalf of the college. His parents appealed to the Court of Appeal of Louisiana. The Court of Appeals affirmed the findings of the trial court.

Yet another case in which alcohol played a role is that of Peterson versus Fordham University (761 N.Y.S. 2d 33 N.Y. App. Div. 2003). In this case, Roger Peterson, who happened to be a senior at Fordham University, was hit in the eye and sustained injuries during a fight which occurred in the dormitory room. It's believed that this fight involved two groups of students and that alcohol was a contributing factor. Security had been called about 10 minutes before the fight broke out. Fordham was holding an annual barbecue at the same time. Peterson claimed at Fordham did not provide the appropriate level of security and that he was injured because of its breach of duty. The Supreme Court of New York, Bronx County denied Fordham University summary judgment. Fordham University appealed to the Supreme Court of New York,

appellate division, which found no evidence that Fordham's actions or inaction or the proximate cause of the injury and entered a judgment in favor of Fordham, dismissing the claims against it.

Another tort case is that of Torri versus Hofstra University (688 N.Y.S.2d 634 N.Y. App. Div. 1999). Eugene Torri was engaged in a shouting match with his girlfriend. In addition, they were also pushing each other. A public safety officer employed by Hofstra University observed this altercation. The officer asked Torri to accompany him to the Hofstra Information Center. Torri accompanied the officer voluntarily. The officer left Torri with the manager of the Information Center. The manager spoke with Torri for 40 minutes and then allowed him to leave.

Approximately one hour later, Torri broke a window on the 14th floor of a dormitory at the Hofstra campus and then proceeded to jump through that window. He sustained injuries. He claimed that the employees of Hofstra University should have detained him longer than they did. He brought forth a suit seeking damages alleging that Hosta University breached a duty it had to him. He claimed that the breach of duty was the proximate cause of his injuries. The case was originally tried in the Supreme Court of New York, Nassau County. That court granted summary judgment in favor of Hofstra University and dismissed the case. Torri appealed to the Supreme Court of New York, Appellate Division, who also upheld the summary judgment in favor of Hofstra University.

Another case in the area of torts is that of Munno versus New York (698 N.Y.S. 2d 107 N.Y. App. Div. 1999). Maria Munno was a student at the State University of New York at Cobleskill. She sustained injuries when falling while walking down a stairwell in

the dormitory in which she resided. She claimed that the school's failure in cleaning up spilled shampoo at the top of the stairwell was the proximate cause of her fall and her injuries. She filed suit in the Court of Claims. During the trial, the plaintiff claimed that her fall was caused by the shampoo. She stated, however, that she was looking down at each step as she descended and did not see any liquid on the steps where she was stepping. No shampoo was found on her shoes or her clothing after her fall. The Court of Claims found in favor of the state. She appealed to the Supreme Court of New York, Appellate Division, who affirmed the findings of the Court of Claims.

A case dealing with breach of contract and promissory estoppel is that of Kashif versus Central State University (729 N.E. 2d 787 Ohio Ct. App. 1999). The plaintiff, Dr. Annette Kashif, accepted a position in 1994 at Central State University. The chair of the department, Dr. Gerry Scott, contacted the plaintiff at her previous position which was as an associate professor at Albany State University. During the discussion, Dr. Scott described the position and what it entailed. The plaintiff accepted a position and began working on October 1, 1994. She had not signed a contract at that time. She was presented with one on October 12, 1994, and signed the contract on October 14, 1994. It is noted that she objected to the terms of the written contract.

The plaintiff was offered a contract for a second year of employment on August 19, 1995. No raise was offered and her proposed salary would be $45,000 per year, which is what she received the year prior to that. The contract was to take effect on September 1 of that year. The plaintiff proposed a counteroffer and indicated that she would accept the position contingent upon a salary of $46,500 or an increase that was the same as that for full-time faculty across-the-board, whichever the two was higher. She

also wished to be placed on the tenure track. Dr. Scott replied to her counteroffer by sending a letter on August 31, 1995 which indicated that since she had not accepted the previous offer, she would not be employed by the university.

In April of 1996, she filed suit against Central State University in The Ohio Court of Claims. She claimed promissory estoppel, wrongful discharge, and negligent infliction of emotional distress. During the trial, she claimed that it was promised that she would have the job for at least three years. She also claimed that this position would be a tenure track position. She claims further that Dr. Scott promised that he would correct the error on her first contract.

The Court of Claims found in favor of the defendant. It found that the contract was written with "clear and unambiguous language" and that "all the essential terms" are present. The plaintiff then appealed to the Court of Appeals of Ohio, 10th Appellate District. The Court of Appeals affirmed the findings of the Court of Claims.

Typical cases have been presented to provide an indication of the types of cases that might be found in which a college participates. Note that the cases include both the Federal and state court system. Colleges at all Carnegie classifications have been included. Public and private colleges were presented. Cases on a wide variety of subjects were presented.

Phase Two-Comparison with Past Study

Question 1c) Are there trends that indicate an increase or decrease in litigation dealing with a specific issue?

In order to explore trends that might exist, a second set of data is needed for comparison with this data set. In this case, a study published by Helms in 1988 will serve as a point of comparison.

The average number of cases for the years 1999-2003 represents a decrease of 95 cases (22 %) from the 431 cases presented by Helms for 1988.

Federal courts account for 966 cases (57.6 %) and state courts account for 712 cases (42.4 %). This distribution is nearly the reverse of that presented by Helms in 1988. In that study, 191 cases (44 %) were heard in federal courts, whereas 240 (56 %) were heard in state courts (table 9).

Table 9

Distribution by Court Comparison

Helms 1988 data in parenthesis

Federal and State Courts	Cases (1999-2003)	Percentage
Federal Courts	966	57.6 % (44 %)
State Courts	712	42.4 % (56 %)
Total	1678	100 % (100%)

Federal Courts	Cases	Percentage
US Supreme Court	38	3.9 % (2.6 %)
US Courts of Appeals	401	41.5 % (46.6 %)
US District Courts	527	54.6 % (50.8 %)
Total Federal Cases	966	100 %

State Courts	Cases	Percentage
Court of Last Resort	241	33.8 % (31 %)
Appellate Courts	471	66.2 % (69 %)
Total State Cases	712	100 %

Note. State court systems vary in the manner in which they name their courts. Appellate courts refers to courts that hear cases on appeal from the trial courts. The term Court of Last Resort refers to the highest court of the state.

There is a great deal of variation in litigation volume from state to state. Table 10 shows the 1988 distribution of cases by state. Helms commented in 1988 that New York

had a disproportionately high number of cases (14.4 %), whereas California had a disproportionately low number (4 %). Helms commented that this also was the pattern for k-12 litigation. The trend holds true in the current study with New York having 13.6 % of the cases studied and California having 4.4 % of the cases studied (See table 26).

Table 10

Top Ten States in 1988

State	Cases	Federal	State
New York	62	24	38
Illinois	27	10	17
Pennsylvania	26	10	16
California	18	7	11
Ohio	18	11	7
Georgia	18	6	12
Alabama	17	11	6
Louisiana	17	5	12
Texas	15	9	6
Florida	14	8	6

There are slight differences in the distribution within the federal system and within the state system when comparing the 1988 data from Helms and that from the current study. Table 11 shows the differences between the distribution of cases within the Federal Circuit Court system.

Table 11

Federal Circuit Court Cases

Circuit	Volume of cases	Rank Order	1988 Volume	1988 Rank Order
1	13	11	3	6
2	27	9	10	2
3	16	10	3	6
4	30	7	7	4
5	39	5	10	2
6	52	1	12	1
7	45	4	6	5
8	49	2	9	3
9	46	3	7	4
10	37	6	6	5
11	29	8	12	1
DC	11	12	4a	
Federal Circuit b	7	13		

Note. a Helms reported 4 cases litigated in the D.C. Circuit Court, but did not present it in a table with rankings with the rest of the courts. b. The Federal Circuit has nationwide jurisdiction over cases involving patents and trademarks.

The percentage of cases involving employees (44.3 %) has increased slightly from Helms' study (40.6 %). It remains the largest category. Interestingly, the breakdown within the employee group is nearly the same as in the 1988 study. The current study lists faculty with 53.1 %, staff with 37.8 % and administrators with 9.1 %. The 1988 study listed faculty with 53 %, staff with 37 % and administrators with 10 %. The percentage of cases involving students also increased since the 1988 study, from 27.1 % to 36.4 percent (table 12).

Other groups listed in the 1988 study had a decrease in percentage. Businesses decreased from 10.9 % to 4.8 %. Government suits decreased from 8.6 % to 4.3 %. Private citizen suits decreased from 12.8 to 9.5 %. The decrease in the first two categories, business and government, may indicate that colleges are doing a better job, and applying needed resources, to interactions where they interface with these two groups.

Table 12.

Litigant Comparison

Litigant	Percentage(1999-2003)	Percentage (1988)
Employees	44.3 %	40.6 %
Students	36.4 %	27.1 %
Business	4.8 %	10.9 %
Government	4.3 %	8.6 %
Private citizens	9.5%	12.8%

Two comprehensive studies present prevailing party data. Helms (1987) published a study that reviewed higher education cases in the state of Iowa during the period 1850 to 1985. In this study, she found that colleges prevailed in 41 cases out of 65 total or 63 % of the cases. Lam (1989) studied Texas higher education cases during the period from 1878 to 1988. She reported that colleges prevailed in 71 cases out of 189 total or 37 %. She also reported that 20 cases (11 %) were split decisions. The current study showed that colleges were the prevailing party in 61.8 % of the cases. They lost in 23.6 %. A split decision was rendered in 14.6 % of the cases.

Question 1d) Are there differences in the types of cases, issues or impact relative to the type of institution?

Carnegie Classification

Of the cases studied, 1514 cases list a specific college as a litigant. Of those, 1439 have litigants that are regionally accredited and have a Carnegie classification. Table 13 presents a description of each Carnegie class. There is wide disparity in the number of cases litigated by schools in each Carnegie class (table 14).

In order to perform a chi-square analysis, table 14 was transformed to a 33 by 2 matrix that separated each Carnegie class into two rows. One row included the number of schools that had not been involved in a lawsuit during this time period. The other row included a number of schools that had been involved in a lawsuit, regardless of the number of suits that particular college had been involved in.

Hypothesis II

H_o:There is no difference between colleges in various Carnegie classes with respect to the likelihood of their being involved in a court case.

H_1:There is a difference between colleges in various Carnegie classes with respect to the likelihood of their being involved in a court case.

Findings. A chi-square analysis was performed (table 16). It showed drastic differences between the various Carnegie classes. The value of chi-square for this matrix is 1118.56. Microsoft Excel computes a significance of this matrix with 32 degrees of

freedom of 2.63×10^{-252}. Thus, I reject the hypothesis and conclude that there are differences in the various Carnegie classes.

A review of table 15 reinforces this conclusion. It is noted that Associates colleges are involve in relatively few suits, whereas very high research activity colleges are involve in many. 5.9 % of all Associates colleges (category 1-14) had been involved in a lawsuit, whereas 95.8 % of all very high research activity colleges had been involved in a suit.

Table 13

Key to the Carnegie Classes

1	Associates, public, rural-serving, small
2	Associates, public, rural-serving, medium
3	Associates, public, rural-serving, large
4	Associates, public, suburban serving, single campus
5	Associates, public, suburban serving, multicampus
6	Associates, public, urban serving, single campus
7	Associates, public, urban serving, multicampus
8	Associates, public, special use
9	Associates, private, not for profit
10	Associates, private, for-profit
11	Associates, public two-year college under four-year universities
12	Associates, public four-year, primarily associate

13 Associates, private, not-for-profit four-year, primarily associate

14 Associates, private, for-profit four-year, primarily associate

15 Research university, very high research activity

16 Research university, high research activity

17 Doctoral/research universities

18 Masters College and University (large program)

19 Masters College and University (medium program)

20 Masters College and University (small program)

21 Baccalaureate college, arts and sciences

22 Baccalaureate college, diverse fields

23 Baccalaureate/associate colleges

24 Special focus institution, faith

25 Special focus institution, medical schools

26 Special focus institutions, other health professions schools

27 Special focus institution, engineering

28 Special focus institution, technology related schools

29 Special focus institution, school of business and management

30 Special focus institution, art music and design

31 Special focus institution, school of law

32 Special focus institution, other special focus institution

33 Tribal colleges

Table 14

Carnegie Class Case Load

Number of Cases Carnegie Class

	1	2	3	4	5	6	7
0	131	291	123	103	88	27	128
1	5	19	19	8	7	4	15
2	2	1	1		2	2	4
3	1	1	1	1			3
4				1			
5							
6							
7							1
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							

___Number of Colleges in the Class Corresponding to the Number of Cases_____

Table 22 (continued)

Number of Cases Carnegie Class

	8	9	10	11	12	13	14
Number of Colleges in the Class Corresponding to the Number of Cases							
0	13	114	527	52	18	19	70
1			3	3	1		1
2			1				
3	1						
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							

Table 22 (continued)

Number of Cases Carnegie Class

	15	16	17	18	19	20	21
Number of Colleges in the Class Corresponding to the Number of Cases							
0	4	29	47	237	169	121	242
1	12	30	18	73	21	13	21
2	9	13	11	24	6	4	6
3	15	6	4	13	2	2	1
4	7	5	1	1		1	1
5	9	12	2	2		1	1
6	11	3		2			
7	4	2					
8	5		1				
9	4	1		1			
10	1						
11	2						
12	5	1					
13	1						
14	1	1					
15	3						
16	1						
17	1						
18							
19	1						

Table 22 (continued)

Number of Cases Carnegie Class

	22	23	24	25	26	27	28
Number of Colleges in the Class Corresponding to the Number of Cases							
0	315	112	311	28	115	8	56
1	22	5	3	13	12		1
2	6	3		10	2		
3	1			1			
4	1			3			
5							
6				1			
7							
8				1			
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							

Table 22 (continued)

Number of Cases Carnegie Class

	29	30	31	32	33
Number of Colleges in the Class Corresponding to the Number of Cases					
0	64	101	28	38	31
1	1	4	4	1	1
2					
3		1			
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					

Table 15

Carnegie Class Distribution

Carnegie Class	Number with no cases	Number with 1 or more cases
1	131	8
2	291	20
3	123	21
4	103	10
5	88	9
6	27	6
7	128	23
8	13	1
9	114	0
10	527	4
11	52	3
12	18	1
13	19	0
14	70	1
15	4	92
16	29	74
17	47	37
18	237	113
19	169	29
20	121	21
21	242	30
22	315	30
23	112	8
24	311	3
25	28	29
26	115	14
27	8	0
28	56	1
29	64	1
30	101	5
31	28	4
32	38	1
33	31	1

Table 16

Chi-square Analysis of Carnegie classes

Zero cases	1 or more cases	degrees of freedom	Chi-square	Significance
3760	600	32	1118.56	2.63×10^{-252}

From the above analysis, it is clear that colleges in different Carnegie classes are not affected by lawsuits in an equal fashion. From table 17, we see that Associate's colleges, categories 1-14, have fewer cases than one might predict based solely on the number of schools or enrollment. Baccalaureate schools, categories 21-23, and Master's colleges, categories 18-20, have case percentages that approximate the number of schools or student population by percentage. Research universities, categories 15-17, show a higher percentage of case. For those with high or very high research activity, categories 16 and 15, the percentage of cases is much higher than might be predicted based on the number of schools and their population.

Medical schools and centers, category 25, is also of note. It has a high percentage of cases relative to the number of schools and on the percent enrollment at those schools.

Table 17

Percentages of Cases, Schools and Enrollment by Carnegie Classification

Carnegie Class	Number of Cases	Percent of cases	Number of Schools	Percent of schools	Percent of total enrollment
1	11	0.76%	139	3.20%	0.70%
2	24	1.67%	311	7.10%	5.40%
3	23	1.60%	144	3.30%	6.20%
4	16	1.11%	113	2.60%	4.90%
5	10	0.69%	97	2.20%	5.90%
6	9	0.63%	33	0.80%	1.60%
7	38	2.64%	151	3.40%	9.90%
8	3	0.21%	14	0.30%	0.20%
9	0	0.00%	114	2.60%	0.30%
10	6	0.42%	531	12.10%	1.50%
11	3	0.21%	55	1.30%	0.80%
12	1	0.07%	19	0.40%	0.80%
13	0	0.00%	19	0.40%	0.10%
14	1	0.07%	71	1.60%	0.30%
15	534	37.11%	96	2.20%	13.50%
16	224	15.57%	103	2.30%	9.60%
17	75	5.21%	84	1.90%	4.90%
18	195	13.55%	350	8.00%	16.10%
19	36	2.50%	198	4.50%	4.30%
20	37	2.57%	142	3.20%	2.20%
21	45	3.13%	272	6.20%	2.80%
22	41	2.85%	345	7.90%	3.20%
23	11	0.76%	120	2.70%	1.50%
24	3	0.21%	314	7.20%	0.60%
25	76	5.28%	57	1.30%	0.50%
26	16	1.11%	129	2.90%	0.30%
27	0	0.00%	8	0.20%	0.10%
28	1	0.07%	57	1.30%	0.20%
29	1	0.07%	65	1.50%	0.50%
30	7	0.49%	106	2.40%	0.70%
31	4	0.28%	32	0.70%	0.10%
32	1	0.07%	39	0.90%	0.10%
33	1	0.07%	32	0.70%	0.10%

Question 1e) What are the underlying causes for the trends found?

States

Geography was examined as a possible factor in the number of cases. There is a great deal of variation in litigation volume from state to state. Table 18 shows the distribution of cases by state. The trend is that states with larger populations have proportionally more cases. Two states that deviate from this trend are New York and California. New York has more cases than one would predict based upon population having 13.6 % of the cases studied. California has fewer cases than one would predict with 4.4 % of the cases studied.

Table 18

Distribution of Cases by State

State	Number	State	Number
New York	228	Vermont	14
Ohio	100	West Virginia	12
Texas	93	Arizona	12
California	74	South Carolina	10
Illinois	66	Utah	10
Pennsylvania	58	Rhode Island	10
Virginia	55	Montana	9
Kansas	46	Alaska	8
Florida	43	Hawaii	8
District of Columbia	42	Maine	7
New Jersey	42	Wyoming	5
Missouri	42	New Hampshire	5
North Carolina	41	Delaware	5
Georgia	41	Idaho	4
Indiana	40	Nevada	3
Alabama	40	Marianas	2
Colorado	38	South Dakota	2
Michigan	37	Virgin Islands	1
Wisconsin	36		
Minnesota	36		
Louisiana	33		
Massachusetts	33		
Tennessee	29		
Connecticut	27		
Mississippi	25		
Iowa	23		
Maryland	22		
New Mexico	21		
Oregon	21		
Oklahoma	20		
Arkansas	19		
Puerto Rico	18		
Washington	18		
Kentucky	18		
Nebraska	14		
North Dakota	14		

In addition to examining cases by state, cases were examined that were heard in the Federal circuits. The Federal circuit courts are regionally based. These data mirror the data found for the states (Table 11).

The distribution of cases by state was examined further to determine if there is a relationship between the number of cases and the political leanings of that state. To examine this, a t-test was performed in which states were categorized as red states or blue states based on their voting pattern in the 2004 presidential election. A red state is one that was in which the popular vote in the presidential election was for the candidate in the Republican Party, George Bush. A blue state is one in which the popular vote was for the candidate in the Democrat Party, John Kerry.

Hypothesis I

There is no significant difference in the number of cases brought forth in states classified as red states in the 2004 presidential election as compared to states classified as blue states.

Findings. No significant difference was found between the numbers of total cases brought forth in red sates as compared to the number brought in states classified as blue states in the 2004 presidential election. No significant difference was found when examining Federal or state cases either. Tables 19, 20, and 21 present the results of the t-test used to determine whether such a relationship might exist.

Table 19

A Comparison of the Total Number of Cases

States	N	Ave	SD	T	P
Red	31	28.0	23.6	-1.124	0.266
Blue	20	39.5	48.7		

Table 20

A Comparison of the Number of Federal Cases

States	N	Ave	SD	T	P
Red	31	17.0	15.2	-0.902	0.372
Blue	20	21.5	20.2		

Table 21

A Comparison of the Number of State Cases

States	N	Ave	SD	T	P
Red	31	11.0	10.8	-1.187	0.241
Blue	20	18.0	29.9		

Phase Three- Interviews with Campus Leaders

Question 2) What has been the impact of these cases on the general operation of institutions of higher education?

In order to obtain a more accurate description of the impact of these cases on higher education campuses, interviews were conducted with those who would likely have observed changes on the campus during the years in question. Questions were drawn up which would complete the findings of the case analyses. They might reflect an area of concern as presented in the literature. Subjects for the interviews included college system general counsels, campus general counsels, equal opportunity/affirmative action officers, vice chancellors, deans, and directors of disability services. A total of 25 interviews were

completed. A total of 323 college legal officers were asked to participate (7.7 % participation). The pool included the mix of private and public institutions. It included a mix of associate, bachelor/masters, and doctoral institutions. Care was taken to ensure a distribution from all geographical regions. No state was represented more than twice. No institution was represented more than once. Each participant was sent the questions beforehand as well as a description of the research and the protocols used to ensure anonymity. The majority of interviews were conducted by phone. Some participants chose to respond by email.

Analysis

Answers to each question were reviewed and the majority finding is presented. The study was complete at the point of saturation. That is, when no new data was revealed in an interview, there was no added value in additional interviewing. Finally, after the results are written, each interview was reviewed to see if additional insight could be found. In some cases, responses that were interesting are presented even though they may not reflect the majority view.

Questions

What follows is each question asked as well as the majority opinion that emerged from the data collected. Additional comments are also presented which may provide additional insight or experience that might be of interest to the reader. Following each question dealing with a legal issue is a synopsis of the change that occurred on campus presented in the framework of the evolutionary model of change presented by Kezar.

1) *I have been studying recent court cases. When I compare the number of cases per year during the period of 1998-2003 to an earlier study done in 1988, I found that there has been a decrease in the number of cases. Have you observed a less litigious atmosphere at your school?*

The majority of respondents indicated that there was an increase in the number of threats to bring forth legal cases. However, there has been an increase in the number of threats that are dealt with before they get to court. Several respondents indicated that because of the cost of going to court, many cases are settled before they get to court to save the college money. Another respondent indicated that on her campus, bad press was to be avoided at all costs. Cases were settled out of court simply to minimize any negative press that would come from going to court.

One respondent indicated that his office would likely hire a lawyer specifically trained in litigation. That lawyer would be in a much better position to ascertain the merits of the case so as to decide whether or not it would be cost effective to go to court. Other respondents indicated mandatory mediation sessions before any cases were allowed to proceed to court. They indicated the strategy had mixed results. Another respondent indicated that he takes a rather collegial approach when a suit is threatened. He simply sits down with the parties involved, gathers the facts, ascertains whether or not the law had actually been broken, and tries to work it out with everyone involved.

Status: Campus legal officers had fewer suits or threats of suits.

Stimulus: More lawsuits and threats of lawsuits.

Response: Policies and procedures have changed in an attempt to minimize these cases. Additional training has been implemented. New strategies have been employed. Additional resources were allotted to minimize the threats.

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2) *I found that employees were involved in more suits than students. Have you seen the same trend? Has the recent phenomena of "helicopter parents" changed the way that your school normally operates?*

All respondents indicated that there were more employee cases rather than student cases. In a few instances, the respondents indicated that the number of student cases was increasing. They suggested that this had occurred because of increased competition for professional schools and an increase in the pressure to succeed.

It was noted that many more students are waiving their privacy rights under FERPA to allow their parents access to their academic records. With respect to "helicopter parents", FERPA seemed to be the major issue. Several respondents indicated that additional mandatory training had been required for all new faculty and for all new staff who work in areas where records are kept.

The use of the term "helicopter parents" and the question brought out drastically different views, depending upon who was asked the question. For example, one respondent indicated her dislike for the term. She indicated that, if anything, she would like to see more parental activity on her campus. Another respondent, when asked this

question, immediately broke out in laughter, as she had just spent the hour before the interview with a parent who she considered to be a “helicopter parent.”

Status: Employees were most likely to be named in a suit.

Stimulus: Students and parent are taking a more involved role in some cases.

Response: Although employees are still most likely to be involved in a suit, colleges have adjusted to meet possible challenges from parents and students. This has lead to increases in training in FERPA. It has also lead to more instruction for parents in their role in their child’s education.

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3) *Although I observed a decrease in the overall number of cases, I found large increases in civil rights cases. Have you observed a surge in such cases? If so, how has the college changed as a result of such cases?*

The majority of respondents indicated an increase in the number of cases involving civil rights. To minimize such cases, most respondents indicated that mandatory training occurs on their campus any time a new manager is hired. Additional mandatory training occurs at other times as well, especially if there is a new trend which is found. One respondent indicated that he had seen an increase in the number of discrimination cases which could be classified as discrimination based on national origin.

Almost all respondents indicated that they periodically review their policies to make sure that the intent is clear.

A remark from a compliance officer at a Midwest college was that when she was hired, she told her supervisor that there would likely be an increase in the number of cases. She was correct and there was an increase in the number of cases after she was hired. She indicated that before she arrived at the campus, people were unaware of their rights and responsibilities. After she arrived, she trained people in their rights and responsibilities. Through the training, people realized that their rights had not been respected and sought to redress. As a result, there was a spike in the number of cases immediately after her hiring. The level has now decreased as managers are now more aware of their responsibilities.

Status: Many members of the campus community felt that they were being discriminated against.

Stimulus: Many lawsuits.

Response: Policies and procedures have changed in an attempt to minimize these cases. Additional training has been implemented.

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4) *I found an increase in disability cases. Have you changed any policies or procedures to prevent disability cases?*

The majority of respondents indicated an increase in the number of disability cases. Those not experiencing an increase indicated that they used best practices to avoid such an increase. In many cases, the respondents indicated that they were very proactive about students with disabilities. They indicated that significant monies had been spent on upgrading facilities, additional training, and outreach.

One respondent indicated that the definition of disability was expanding and that the cases had become more refined in this area. A community college respondent indicated that their requests for additional services and accommodations had nearly doubled in the span of approximately eight years. She put forth the hypothesis, echoed by others, that students are better tested now in high school to identify any possible learning disability. In addition, students (and their parents) in the lower grades have become more aware of their rights and readily carry those expectations over into college, even though the disability rights are not exactly the same in college as in the lower grades.

Status: Many members of the campus community felt that they were being discriminated based on their disabilities.

Stimulus: Many lawsuits.

Response: Policies and procedures have changed in an attempt to minimize these cases. Additional training has been implemented.

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5) *I found a number of cases sexual harassment. Some cases were between employees. Some cases were between employees and students. Have you employed any policies or procedures to reduce possible sexual harassment cases brought by employees or students?*

The majority of respondents indicated that they see an increase in the number of sexual harassment cases. To prevent such cases, they indicated that mandatory training has been occurring on their campuses. A problem that several mentioned was that, as in the case of disabilities, there is an evolving definition of sexual harassment. What may not have been considered sexual harassment twenty years ago might clearly be sexual harassment today. Several respondents indicated that there was more likely to be hostile environment sexual harassment rather than quid pro quo sexual harassment. Cases have become more refined.

Status: Many members of the campus community felt that they were being sexually harassed.

Stimulus: Many lawsuits.

Response: Policies and procedures have changed in an attempt to minimize these cases. Additional training has been implemented.

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6) *Following on questions 3, 4, and 5, I found a number of cases in which a member of the college community feels retaliated against, often for filing a*

discrimination case. Have you implemented any policies to reduce retaliation cases?

A slight majority of respondents indicated that there was an increase in the number of cases of retaliation on their campus. Two respondents indicated that this was the most troubling area of law affecting employees. One respondent indicated that the general approach on their campus is to treat every discrimination case as though it will eventually become a retaliation case.

The vast majority of respondents indicated that training was necessary to deter the number of retaliation cases. They indicated that while discrimination cases happen, retaliation must be prevented before it has an opportunity to take place. They indicated that when a discrimination case occurs, they meet with the manager involved to lie out a plan to prevent any hint of retaliation. Sometimes, the best approach is to separate the manager from the employee as soon as the allegations are made to prevent any possible retaliation.

Status: Several employees felt that they were being retaliated against.

Stimulus: Suits were filed against the colleges.

Response: Policies and procedures have been changed to prevent these cases. Managers have gone through additional training to prevent such cases.

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7) *I found a case in which alcohol played a major role in a student's death. There have been several high profile cases since. Have you noticed an increase in alcohol-related incidents at your campus? Have you changed policies as a result of recent cases?*

A majority of respondents indicated an increase in alcohol-related incidences. Many respondents indicated that this area was the one of greatest concern as far as students were involved. Alcohol abuse had become a concern on nonresidential community colleges as well. Some indicated a decrease in the number of incidences that corresponded with making their policies more rigid.

Many said that changes in policy were occurring constantly. Often, they indicated that their policies had become more stringent. Some campuses have taken a zero tolerance policy with respect to alcohol. Others took a "two strikes and you're out" policy.

Respondents indicated that there was an increase in the number of alcohol abuse awareness activities. They also indicated an increase in the amount of training that occurred on campus with respect to identifying students who may have such problems and working with them. Some had included additional portions in their policy that stated how to find help with such problems. Someone mentioned their concerns for the actions that students take when they are drunk.

The motivation for change on campus often occurred from within rather than from forces outside the college, such as the lawsuit. One respondent indicated that a change in leadership led to a more rigorous alcohol policy. Another indicated that a cross sectional

group from the campus had been constantly reviewing their alcohol policy and making regular changes.

Status: Students were harming themselves while under the influence of alcohol.

Stimulus: Several lawsuits filed against colleges

Response: Policies were reviewed and made more stringent in some cases.

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8) *While doing this study, I found several cases dealing with the Texas A&M Bonfire incident in which several students lost their lives in this tragic accident. Have you seen any changes at your school and at colleges in general, with respect to student safety?*

The vast majority of respondents indicated that more resources were being invested into student safety. This was an area in which the additional money, time, and effort were put forth to be proactive. Some respondents indicated that additional human resources were being hired to expand the safety and security staff. However, more respondents indicated an increase in the use of technology to increase student safety. They stressed better communication systems, which came at a significant cost. They also indicated that additional cameras would be employed to monitor their campus. Some were exploring access cards. They felt that while these changes were expensive, the costs involved were necessary. None of them wanted to explain to a parent why their child was injured in an accident that could have been prevented.

Several respondents indicated that their campuses recently developed emergency response plans and emergency response teams. These teams went through additional training to deal with various types of emergencies, natural or man made. Several respondents cited the creation of such teams as the most significant contribution to student safety that had occurred on their campus in some time.

The majority of respondents indicated that they read the general literature rather than the legal literature as a guide to improve student safety. For example, the Virginia Tech incident brought about changes in the mindset of safety officers and risk managers on campuses. They have responded to the incident rather than to any legal cases which may come about the cause of the incident. Another example given was in the use of fifteen passenger vans. When one college had an accident involving such a vehicle, several colleges responded by discontinuing the use. Again, this was in response to what was read in the open literature rather than waiting to see you what sort of legal cases might evolve from the accident. There was also mention of an increase in the number of student programs dealing with safety. More attention had been paid to topics of personal safety.

Status: An accident occurred on a campus, killing several students

Stimulus: Deaths of students as well as lawsuits dealing with those deaths

Response: Some schools allotted more resources and greater interest in student safety as a result of this case. Subsequent stimuli, the Virginia Tech incident for example, has had a much greater response. Colleges have become much more proactive in terms of student safety as a result.

9) *Keeping on the subject of student safety, I found a case in which a student was suffering emotional distress and harmed himself while attempting to commit suicide. In the recent past, have you increased counseling services for such students?*

The majority of respondents indicated that there was an increase in awareness in these matters at all levels. As a result, there was an increase in the amount of time, effort, and financial resources applied to student mental health. One respondent indicated that policies on their campus had changed to allow for such students to easily exit the college if such need arose. She also mentioned using a team approach, in which the counseling staff and others met four times per semester to discuss those students who might be undergoing emotional issues.

Many respondents indicated that they had increased their counseling staff. Some had indicated that they had expanded their use of referrals to off campus facilities. Others had indicated that they had reduced their referrals by hiring additional in-house staff, preferring to handle such students' issues on campus.

All of the respondents indicated additional training had occurred on their campus. Training was done for people in the counseling office, for the faculty and staff, and more importantly, for the resident assistants who might encounter such students during stressful times.

Status: Some students were causing harm to themselves and others due to mental and emotional issues.

Stimulus: Several suits had been filed against colleges regarding their handling of these students.

Response: Additional resources have been allotted for such students. In addition, several colleges reviewed their policies and practices regarding such students.

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10) *One case that I encountered was Gratz v. Bollinger. You may be aware of it. It was later heard and ruled on by the United States Supreme Court. It dealt with minorities and admissions policies. Have you examined or changed your policy as a result of this case?*

The majority of respondents stated that their college was open admission. As such, there were no changes based on the findings of this case. Those respondents from selective colleges indicated that they had examined their admissions policies and felt that they were either in compliance at that point or needed only slight changes. One respondent indicated that terms involving race were changed to terms involving diversity. Many respondents indicated an increase in outreach and recruiting.

Community colleges, which are generally open admission, often have selective programs within their school. All of the respondents from community colleges stated that admission to those selective programs was based on objective criteria, such as test scores

and grades. Neither race nor diversity played any role in such admissions. One respondent, a dean of student services from a Midwestern community college, indicated that he felt there should be some role for diversity in the admissions into the selective programs. He stated that he had tried to implement the inclusion of such factors in the nursing program admission policy at his campus, but had been unable to get it included.

While the subject of this question, and the case involved, dealt with student admissions, more than one respondent indicated their concern with the lack of a diverse faculty. They stated that they felt that a diverse faculty was important for the health of the campus. They felt that the state of diversity of the student body was much better than the state of diversity of the faculty.

Status: There was uncertainty in the manner in which schools could consider race in admissions and scholarships.

Stimulus: A case went to the United States Supreme Court which provided clearer guidelines regarding race and admissions.

Response: For most schools, there was no response as they are open admissions. For those who have selective admissions, they reviewed their policies on admissions and scholarships to comply with the new guidelines.

Phase Four-Change on Campus

The evolutionary model of change, as presented by Kezar, takes the approach that a system will change when met with a challenge. For clarity, a synopsis of the changes found has been presented with the response to the questions in the above section. In this case, the systems are the colleges, and the challenge is the volume of cases dealing with a specific topic. From the interviews, it is clear that colleges have made significant changes, at considerable expense, as a result of wanting to avoid legal challenges.

From the first two phases, elements of change on the campus present themselves. Colleges have become more aware of possible issues which could become legal problems. They actively review both the legal literature as well as the literature in higher education, to identify potential legal threats. They then actively prevent those threats from occurring. Colleges have become more proactive and preventive in their approach. Moreover, they are more willing to invest the money needed to take the actions needed to prevent legal problems.

Colleges have become better at reducing legal challenges. The subjects interviewed indicate that the number of threats has increased, yet the number of cases taken to court has decreased. This is an indication that colleges have become better at preventing these cases from going to court.

Training has become the most important preventive law tool on campus. The subjects indicated that mandatory training is now required in a number of subjects and by a wide variety of people. Managers are now required to attend training on the rights of employees. Faculty and staff are being trained on FERPA rules and on identifying students with emotional problems.

Safety, in general, has become a major concern on campus. In addition to the training mentioned above, several schools have implemented training to deal with natural or man-made disasters. Many colleges have developed emergency response teams to deal with such emergencies. The teams consist of people who are skilled first responders who can deal with life or death situations. They also have skilled counselors who can minimize the emotional impact of an emergency.

Colleges are now spending more in the area of safety and security. For some colleges, this has meant hiring additional security officers. For others, it has meant investing in expensive systems that allow for campus wide notification or lock down in the event of an emergency, such as that which happened at Virginia Tech. Other colleges have invested in additional psychological counselors to identify students who might be inclined to injure themselves or others.

Also on the subject of safety, most schools are trying new things to deal with alcohol. Most schools were revisiting their alcohol policy on an annual basis, although some have taken the zero tolerance policy. While most colleges focused on the disciplinary aspects of the alcohol, some increased their focus on prevention and counseling. It should be noted that even at some non-residence schools, alcohol had been such an issue that they had instituted counseling programs.

Colleges are more aware of issues dealing with discrimination and have taken steps to minimize it. Again, training is the major key to prevention. Also, policies and procedures have changed to minimize such cases. Retaliation cases were mentioned as a major concern for some colleges, yet others seem to have developed protocols and training that have minimized any such concerns.

Sexual harassment has been an evolving issue on campus. At one point, quid pro quo sexual harassment was the more prevalent form. Colleges have done a good job at preventing that. However, hostile environment sexual harassment has become the more prevalent form, and colleges are now retraining to prevent this form as well. One issue that has arisen is that the legal definition of sexual harassment is not clear and it is still evolving. Colleges must continue to review new cases as they are published so as to distill a more exact definition.

Colleges have, in general, been very good in providing accommodations for physical disabilities. Time, effort, and money have been invested into the physical facilities of the campus to ensure that it was compliant with the Americans with Disabilities Act. Colleges have not made as much progress with non physical disabilities, such as learning disabilities. The additional time, money, and effort are now being allotted toward persons with these disabilities as well. This area is another area which is evolving, as the legal definition of disability continues to change. Again, colleges will need to continue reviewing cases.

Question 1e) What are the underlying causes for the trends found?

This question is now expanded with data from the interviews. One trend which was found was a decrease in cases. An underlying cause for this was that college law offices are more adept at disposing of cases before they go to court.

There was an increase in civil rights cases found. A possible explanation for this is that colleges are doing a better job at letting people know what their rights are. One

respondent, an EEO officer, indicated that she predicted an increase in cases after she was hired. The increase occurred because she informed people of their rights. After she continued with training managers, the case load eventually decreased.

An understanding, and misunderstanding, of rights is an underlying cause for more cases involving disabilities. Specifically, students with disabilities enter college with experience in working with high school personnel. Unfortunately, the laws regulating the way colleges approach such matters are different from those regulating the lower grades.

Another explanation for this increase is that the area of law is evolving. This is especially true of sexual harassment and disability cases. Several respondents indicated that definitions of harassment and disability were changing. As such, it was hard to defend against such a suit.

Chapter V

Summary

This chapter presents a summary of research, summary of the findings, discussion of findings and comparison with the literature, significance, recommendations, suggestions for future research, and implications.

Summary of Research

The purpose of this study was to understand the state of higher education law in the United States by reviewing the body of case law for the period of 1999-2003 which involved higher education. It was to find trends in the body of higher education cases, and then seek underlying causes for those trends. The case law was drawn from the West's Education Law Reporter. West's Education Law Reporter presents both higher education cases as well as cases involving k-12 schools. Thus, the first step was to read each case to determine if it was a k-12 case or a higher education case.

This process yielded a total of 1,678 applicable cases. Cases were tabulated for categories that include court system, state, litigant, type of case, issue, and Carnegie class of the college. In most cases, the categories were examined by sorting and presenting the groupings within each category. In the case of the states category, a t-test was performed to see if there was a relationship between cases filed and political identification (blue state or red state) from the 2004 Presidential election. In the case of the Carnegie class data, a Chi square analysis was performed to determine if there were differences in litigation based on class of the college.

In order to obtain a more accurate description of the effect of law on higher education campuses, interviews were conducted with those who would likely have

observed changes on the campus during the years in question. Questions were drawn up which would complete the findings of the case analyses. They might reflect an area of concern as presented in the literature. Subjects for the interviews included college system general counsels, campus general counsels, equal opportunity/affirmative action officers, vice chancellors, deans, and directors of disability services. A total of 25 interviews were completed. The pool included the mix of private and public institutions. It included a mix of associate, bachelor/masters, and doctoral institutions. Care was taken to ensure a distribution from all geographical regions. No state was represented more than twice. No institution was represented more than once.

The response of the interviews was compared to each other and the majority opinion was found. In that process, notes were taken during the interviews. Those notes were coded and compared to other interviews, from which categories emerged. Memos were generated based on the coding. The memos were sorted to place the concepts in some cohesive order. The study was complete at the point of saturation. That is, when no new data was revealed in an interview, there was no added value in additional interviewing. Finally, after the results were written, each interview was reviewed to see if additional insight could be found.

Summary of the Findings

There has been a decrease in the total number of cases filed in which an institution of higher education is a named litigant. Colleges report an increase in threats, which are more often dealt with in some manner before they go to court.

In the majority of cases, colleges are the defendants named in lawsuits. In the majority of cases, public colleges were involved as compared with private institutions. Higher education cases are slightly more likely to be heard in Federal courts than state courts.

There are drastic differences in the number of cases heard by each Federal Circuit. This has changed from the original study by Helms.

There is a great deal of variation in litigation patterns between states. New York has more cases than one would expect based on its population. California has fewer than expected. In terms of ranking by number of cases, the order of states has changed from the 1988 study.

There is no significant difference in the number of cases brought forth in states classified as red states in the 2004 presidential election as compared to states classified as blue states.

The largest group of litigants who file against colleges are employees. This slightly increased from 1988. Faculty are named most often in this category, followed by staff then administrators. This ratio has remained nearly the same as the 1988 study. Students increased in the percentage of cases filed. Business and government cases decreased as a percentage of the total number of cases. Colleges were the prevailing party in 61.8 % of the cases. They lost in 23.6 %. A split decision was rendered in 14.6 % of the cases.

There is a wide disparity in the number of cases litigated by schools when classified by the Carnegie classification system. The trend is that the more complex the

mission, the greater number of cases. Doctoral/research schools have more cases than community colleges.

Constitutional cases were heard in both court systems, but are far more likely to be heard in Federal court. First Amendment cases were most prevalent, usually brought forth by an employee.

The most common type of case heard in state courts was common law. These were usually tort or contract cases. Statutory cases were heard in both courts. State statute cases were very diverse in subject. Federal statutory cases were clustered around civil rights.

Civil rights cases increased significantly since the time of the 1988 study. Sexual harassment cases have increased. The majority are hostile environment rather than quid pro quo harassment. Disability cases have increased. Requests for accommodations have increased as well, especially at community colleges. Definitions of disability are still evolving. Other areas of interest include whistleblower/retaliation cases, false claim cases, and record/meetings cases. Retaliation cases were noted as being especially problematic.

There has been an increase in the awareness of safety and security on campus. Colleges report spending more resources on such matters. Often, they make changes bases on incidences that have happened elsewhere, such as the Virginia Tech tragedy or the problems with fifteen passenger vans. Proactive risk management has become the norm. Many schools report that they have organized crisis reaction teams. There has been an increase in resources applied to counseling.

Many schools revisited their admissions and scholarship policies as a result of Gratz v. Bollinger. Most report that only slight changes, if any, were needed to comply with the law. Open admissions schools did not change.

Alcohol was referred to as the most problematic student issue. Colleges have reported revising their alcohol policies very often. However, this is usually as a result of forces within the college rather than a court case. Their policies are becoming more rigid. Colleges report increasing alcohol awareness activities.

Discussion of Findings and Comparison with the Literature

The decrease in the number of cases litigated that name an institution of higher education was noted in this study. It affirms the data reported by Helms (2003). While this can be taken as positive for colleges, the underlying reason for this change is unknown. It may be that colleges have learned from past cases and have done a better job in preventing litigation or litigious situations. It may be that colleges are disposing of cases before they get to court by settling out of court. The finding that colleges prevail in 61.8 % of cases (with 14.6 % split decisions) may indicate that colleges settle on cases that they believe they would lose, thus going to court with a higher percentage of stronger cases.

The fact that colleges are named as defendant in the majority of cases is indicative of the posture that they should take. Colleges need to be preventive in their approach. Kathleen Curry Santora, chief executive officer for the National Association of College and University Attorneys, stated that preventive law will continue to be more important

over the next ten years (Pressing legal issues:10 views of the next 5 years). In the same article, Peter Kushibab, general counsel for Maricopa County Community College, echoes a similiar thought as he suggests that college leaders will continue to develop a "risk-conscious environment."

There is a great deal of variation in litigation patterns between states. New York has more cases than one would expect based on its population where as California has fewer than expected. The geographic distribution of cases has changed since the 1988 study (Helms, 1989). The distribution of cases among the Federal circuits has also changed since that study. There is no significant difference in the number of cases brought forth in the red states versus blue states. It was thought that the political philosophy of the population of the state may play a role in the likelihood of bringing forth litigation. However, the data shows no such relationship.

There's a wide disparity in the number of cases litigated by schools when classified by the Carnegie classification system. While institutional size may be a factor in the number of suits, it is not the only factor. Doctoral institutions, and those whose missions involve research, have significantly more cases then masters institutions. Masters institutions have more cases than community colleges. This dissertation presents the first time such an analysis has been done.

Public colleges are more likely to be named as a party in a case when compared to private colleges. Julie D. Goodwin, general counsel at Morgan State University, comments that budget constraints, especially at public institutions, could bring about additional suits. She is quoted as saying: "When resources shrink, the struggles over the distribution of those resources increase." She predicts that employment related cases will

grow significantly due to hard choices being made regarding the budget (Pressing legal issues: 10 views of the next 5 years).

Higher education cases are slightly more likely (58 %) to be heard in Federal courts than in state courts. This is the reverse of what Helms found in the 1988 study in which the majority of cases (56 %) were heard in state courts. In Helm's study, she commented on the difference between higher education cases in cases involving k-12, noting that K-12 cases were far more likely to be heard in state courts (77-80 %). Helms also noted drastic differences in the federal to state court ratio from one state to another. The findings of this study would lead one to believe that federal courts were chosen over state courts due to the nature of the claim. There was an increase in civil rights claims, which lend themselves to more appropriately being heard in the federal court system.

A large number of cases heard in the state courts are classified as common law cases. Helms found a similar group of cases, only that in her study, state statutory cases (102) outnumbered state common law cases (85), whereas the current study shows common law cases the reverse, with 298 statutory cases and 340 common law cases. Helms found that the vast majority of cases in this classification were either contract cases (22) or tort (39). The same trend was found in the current study with 160 contract cases and 176 tort cases.

The proportion of student claims has increased since the 1988 study. In the discussion of the campus disability coordinator, this trend was mentioned (Gauk, 2007). She stated that students leave high school and enter college with more awareness of their rights. She found this to be especially true for students with disabilities. Whereas 15 years ago few students requested accommodations, today many students request and

expect accommodations. She believes this attitude and awareness is instilled in k-12 and carries over into college.

The largest group of litigants who file against colleges are employees. The proportion has slightly increased since the 1988 study. Faculty members are the most common litigant in this category followed by staff and then administrators. The ratio of faculty to staff to administration cases has remained nearly the same as the 1988 study. Martin Michelson, a partner in the Washington, D.C., law firm of Hogan and Hartson, comments that employment law has been an area of great concern (Pressing legal issues: 10 views of the next five years). He predicts that "massive national increases projected in the populations of faculty and staff members" could bring about "new trouble in this area."

The majority of cases heard in Federal courts were statutory cases. As Helms found in 1988, state cases are more diverse than federal cases. She found that the majority of federal court statutory cases deal with civil rights with 49 cases (43 % of statutory cases) and bankruptcy with 45 cases (40 % of statutory cases). The findings of the current study show an increase in Federal civil rights cases with 413 cases (57 % of the statutory cases) and a decrease in bankruptcy cases with 191 (26 % of statutory cases). Civil rights cases are of special concern. If one takes into account that Helms study considered only one year, a total of 245 cases would be expected over a five year period. Given that 413 cases were heard during the current studies five year period, that represents a 69 % increase in Federal civil rights statutory cases heard. Also of note is that the average verdict for a discrimination case is $60,000 (Franke, 2005).

A major finding of the study was that civil rights cases increased significantly since the time of the 1988 study. It is important to note that according to EEOC data, with the exception of disability discrimination, there was an increase in each type of discrimination case that reached a maximum during the time period that this study considered. The EEOC data is for society as a whole, not just higher education.

Sexual harassment cases are presented with a total of 56 cases heard in both courts. Pulley (2005) reported that sexual harassment had "overtaken slips and falls to become the No. 1 source of liability claims against higher education institutions." Sexual harassment was ranked fifth a decade earlier. This is especially troubling in light of a recent survey (Rainey, 2006) that reported 62 % of students surveyed had experienced sexual harassment. This survey included both male and female students.

Violations of the False Claims Act were heard in 11 cases in Federal courts. The majority of these cases dealt with university hospitals improperly billing Medicaid for services rendered. However, the applicability of the act is far-reaching. Current cases include the manner in which students are recruited. A novel recent application of the act is to recover money from schools when it is found that the students did not receive the education and training promised (Van Der Werf, 2006).

Whistleblower and retaliation cases also were substantial in both courts. Franke (2005) reported that the average retaliation verdict $70,000. In the same article, two retaliation cases are presented that far exceed the average. One case resulted in a $1-million verdict. The other resulted in a $325,000 verdict. Both of these cases involve retaliation for filing a discrimination lawsuit. Bruce Melton (Selingo, 2006), a lawyer at Babbitt and Melton in Chicago, reviewed 600 cases involving college. He described the

college as “losing big” in twenty cases. Of those twenty, thirteen were employment cases. Of the thirteen, ten involved retaliation. Melton said: There’s no question that retaliation claims are the ones we should be worrying about.” According to Equal Employment Opportunity Commission (2007) data, the number of charges of retaliation filed rose steadily until reaching a maximum in 2002. The number of cases has decreased slightly since then.

Suits involving records and meetings were heard in both courts. Schmidt (2001) reported an example where the Auburn University Board of Trustees “violated open meeting laws at least 39 times in the past three years.” In that article, examples were presented from schools across the country that are not complying with the law. In that article, the Student Press Law Center reported a 25 % increase in the number of complaints of student journalists being denied access to college records.

Significance

This study is significant in many ways. It adds to the body of works describing the state of higher education law. That is, it provides another snapshot of the number and types of cases that colleges are dealing with. It complements earlier studies. As there are few studies in this area, this study serves as a benchmark for studies that may follow.

An important finding is that there is a difference in the likelihood of a school being involved in a case based on which Carnegie class it is assign to. It expands on those studies by describing the change that has occurred on the campus. It provides a sense of what is important in terms of preventing possible cases. What is most important is that it presents positive examples, based on research, of how schools are preventing suits. It

provides approaches of how one might prevent legal challenges at the reader's school. It can be approach as a "best practices" guide.

This study also adds to the body of literature on change on college campuses. The evolutionary model of change was found to be quite appropriate in describing the effect that lawsuits have on campuses. Lawsuits, or the threat of lawsuits, can be an effective stimulus. Colleges provide a response to prevent future suits. As society changes, or evolves, colleges will follow through this route as well.

Recommendations

Based on the findings and conclusions of this study, the following recommendations are made:

- College administrators should continue to be proactive by looking at the physical facilities with safety in mind. The legal literature, as well as education news, is a good source of information about trends and problems that may be prevented. A walk through of the facilities should be done with emphasis on identifying potential hazards. These should be very comprehensive, and should occur at different times throughout the year so as to identify hazards that might be related to the weather. In addition, ADA compliance can be reviewed at the same time.
- College administrators should also do as much as possible to promote diversity on campus. Moreover, they should promote sensitivity on campus,

especially with those in leadership or managerial positions. Training managers is key to preventing cases in this area. Some lawsuits might be avoided if more administrators were trained in conflict resolution. In addition, team building exercises may help bring people to work better together, thus reducing friction that may lead to suits.

- Most colleges require an orientation class. It would be valuable to spend a portion of the class discussing the rights and responsibilities of attending college. While most of the time spent in those classes focuses on academic and social matters, time spent on policy would be an investment in preventing future suits. Alcohol policies should be presented at this time, as well as alcohol prevention programs. An in-depth discussion of FERPA would be useful at this point as well. In addition, students need to be made aware of the services that are available to those who may need them. This is especially true of disability services and psychological services. Help sought from one of these groups early may prevent future legal action.
- The admissions and hiring processes should be reviewed periodically to ensure that they are legal and fair to all applicants. Those who make hiring or admission decisions must be able to document the process in anticipation of challenge. Schools with selective admission policies should verify that their admissions and scholarship criteria comply with the judgments of Gratz v. Bollinger. Each member of the hiring teams needs to be trained as to how hiring interviews and selections are properly carried out. Those who make decisions

about firings and academic dismissals must likewise be trained. Those processes must also be fair and documented.

Suggestions for Future Research

- It would be valuable to repeat this study in the future to better observe any trends that may develop. Studies involving single legal subjects may provide insight and guidance into handling cases. Such subjects include sexual harassment, discrimination of all types, faculty rights, torts, and bankruptcy. Studies have been done on some of these subjects, but they need to be updated to reflect recent changes in the law and in society.

- A more in-depth examination of the college legal counsel office and their procedures would be of value. A significant finding of this study was the disparity between schools of different Carnegie classes. Additional studies of college law offices which focus on the differences between college classes could provide additional insight into the phenomena observed.

Implications

- The data from the interviews in this study show very clearly that the best tool for preventing lawsuits is proper training. Colleges would be prudent to

examine each employee's job description to determine the types of legal challenges that they may be involved in. This should include professional and classified staff. After that, the college can develop a training program for each employee, so that they will be aware of the legal issues associated with their job and how to prevent those possible cases. Retraining should be built into the schedule as well.

- Each school needs to develop policies dealing with such issues as sexual harassment, discrimination, retaliation, and alcohol. Such policies need to view readily available for review by any one in the campus community. Moreover, such policies need to be periodically reviewed an updated based on changes in society or changes in the law. The campus legal officers should review the literature in higher education as well as the literature on the law to identify possible changes or new threats.

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Appendices

Appendix A - Example Case Worksheet

Case	Court of Record	State of origin	Plaintiff/ defendant	Type of institution (Public/private) (Carnegie classification)	Type of case	Issue	Prevailing party

Appendix B-Example Interview Form

Interview Form

1) I have been studying recent court cases. When I compare the number of cases per year during the period 1998-2003 to an earlier study done in 1988, I found that there has been a decrease in the number of cases. Have you observed a less litigious atmosphere at your school?

2) I found that employees were involved in more suits than students. Have you seen the same trend? Has the recent phenomena of “helicopter parents” changed the way that your school normally operates?

3) Although I observed a decrease in the overall number of cases, I found large increases in civil rights cases. Have you observed a surge in such cases? If so, how has the college changed as a result of such cases?

4) I found an increase in disability cases. Have you changed any policies or procedures to prevent disability cases?

5) I found a number of cases sexual harassment. Some cases were between employees. Some cases were between employees and students. Have you employed any policies or procedures to reduce possible sexual harassment cases brought by employees or students?

6) Following on questions 3, 4, and 5, I found a number of cases in which a member of the college community feels retaliated against, often for filing a discrimination case. Have you implemented any policies to reduce retaliation cases?

7) I found a case in which alcohol played a major role in a student's death. There have been several high profile cases since. Have you noticed an increase in alcohol-related incidents at your campus? Have you changed policies as a result of recent cases?

8) While doing this study, I found several cases dealing with the Texas A&M Bonfire incident in which several students lost their lives in this tragic accident. Have you seen any changes at your school and at colleges in general, with respect to student safety?

9) Keeping on the subject of student safety, I found a case in which a student was suffering emotional distress and harmed himself while attempting to commit suicide. In the recent past, have you increased counseling services for such students?

10) One case that I encountered was Gratz v. Bollinger. You may be aware of it. It was later heard and ruled on by the United States Supreme Court. It dealt with minorities and admissions policies. Have you examined or changed your policy as a result of this case?

Thank you for helping me with this study!

Appendix C - Cases Cited

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