

## CHAPTER 1

# DIFFERENCES BETWEEN PUBLIC AND PRIVATE INSTITUTIONS

This chapter will detail the essential distinctions in approaches to risk and risk management between public or state universities and colleges and those which are private or independent.

### THE CONSTITUTION VERSUS CONTRACTS

A principle difference between public institutions and private ones relates to the areas of law that largely govern their relationships with students (Kaplin & Lee, 2009, pp. 23–49). Public institutions are, effectively, arms of state government. They are established by state authority, funded by state resources, and governed by state authorities. Their employees are employees of the state, and their property is public property. As a result, the principles established by the U.S. Constitution apply to public or state universities and colleges. Since private institutions are not agencies of the state, the U.S. Constitution does not directly establish standards for how they interact with students. The fundamental area of law that governs the relationships between private colleges and universities and students is contract law. The forms of contracts between institutions and students are largely related to published materials and other ways in which services or programs are promised to students. Additionally, contract law greatly applies to state institutions, because a variety of contracts exist between state universities and students. The following section will describe implications of these distinctions.

## IMPLICATIONS

There are several specific ways in which the contract obligations of private institutions present different risk than is the case at public institutions, given their duties associated with the U.S. Constitution (Kaplin & Lee, 2009, pp. 23–49).

### *Standard Setting*

In Part Two, we discuss specific ways in which the Constitution establishes what government cannot do in its interactions with citizens. Among its provisions is the establishment of rules and procedures associated with student conduct and student freedom of expression. Public institutions are limited, therefore, in the restrictions they can place on students, particularly regarding speech issues and procedural due process.

### *Sovereign Immunity, Personal Liability*

Government may establish limits for its exposure to liability. This is referred to as *sovereign immunity*, and it basically protects government and state entities from unlimited risk. The specific standards for sovereign immunity vary from state to state. Individual states have passed legislation to provide definitions of immunity, and judicial decisions have further defined sovereign immunity in individual states. Many states have passed legislation that establishes specific financial limits of exposure by state institutions to claims of liability. Private institutions are not insulated at all by sovereign immunity, unless, in special circumstances, they are acting as agents of the state, as determined by courts that are reviewing their claim of sovereign immunity.

In addition to the protections associated with sovereign immunity, many states have passed laws insulating government employees, including employees of public universities and colleges, from *personal liability*. This normally applies to employees performing their assigned functions within the scope of their responsibilities as assigned. However, state employees are not protected from intentional wrongful acts. We elaborate on the distinctions between personal liability and institutional liability in the next chapter.

### *Religious Expression*

The First Amendment of the Constitution establishes that government cannot restrict the expression of religion, and neither can it create

religion. This applies to public institutions in several ways, some obvious and some not. Chapter Three describes this in some detail, but, fundamentally, public institutions cannot prevent students from expressing religious thought. Neither can public institutions force religion on students. The commonly expressed principle of “separation between church and state” can be confusing and lead administrators to mistakenly violate the former principle associated with preventing student expression.

On the other hand, private institutions have the freedom to require students to participate in religious expression and to limit certain forms of religious expression, but it is safest for them to do so within the context of the institutional mission. Private institutions may require an expression of commitment to faith or student participation in religious ceremonies, for example. In a way, the freedom of expression principle applies to private institutions.

### *Freedom of Expression*

There are several ways in which the First Amendment to the U.S. Constitution establishes how public institutions are obligated to permit the free exchange of ideas, even ones that some may find unpleasant or distasteful. Many institutions have attempted to encourage student civility by establishing codes of conduct that regulate speech. There is risk associated with those standards, because the courts would commonly determine them to be content-based restrictions. Student affairs administrators in public institutions should take care to not restrict student speech based on its content. The authors provide a further discussion of this issue in Part Two.

Although the First Amendment establishes a context for the approach regarding free expression at public universities, public statements in codes of conduct and student handbooks provide direct standards regarding the student expression of ideas. Private colleges and universities have more freedom to restrict student expression on their campuses, particularly when the restriction relates to institutional mission or educational purposes.

The freedom-of-expression rights of public institution employees are less restricted when the individuals clearly speak as citizens than when they speak as employees. The rights to free expression by private institution employees can be restricted by contract, loyalty oaths, pledges of religious affiliation, or other conditions associated with the mission or fundamental values of the institution.

### *Due Process*

The Fifth Amendment to the U.S. Constitution (a discussion follows later in this text) obligates state institutions to provide “due process of law” in the student conduct setting, as well as in the review of employee performance. Due process has been defined in case law over the years. Its fundamental requirement is twofold: provide notice of allegations about violations of regulations and provide the accused with a hearing as an opportunity to respond to the allegations (Kaplin & Lee, 2009, pp. 456–474). In some jurisdictions courts have expanded the obligations associated with due process, but notice and hearing apply throughout the United States. However, few public institutions limit their procedures to simply notice and hearing. Many public institutions have several levels of appeal or review regarding student conduct, and many permit students accused of misconduct to be accompanied by attorneys. It is also common for those accused of rule violations to be allowed to hear and respond to those who initiate the charges. Although the Fifth Amendment provides the context for due process in public institutions, the direct definition of due process is located in their published materials. Therefore, contract law, more than constitutional law, guides due process at public institutions.

Private institutions of higher education are generally not bound by the Fifth Amendment to the Constitution. Their definitions of due process are found in their codes of conduct and are the promises of the institutions regarding the rights of students and the procedures that are to be followed in student conduct cases (Lake, 2011, pp. 64–76). It is general practice at such institutions to provide a significant level of procedural rights to students in the conduct setting. Colleges and universities do not generally want to be seen as limiting or restricting the freedoms of, or fairness to, students. Codes of conduct, as a result, are generally written so as to give substantial freedoms to students in the conduct process. Again, as established, those published statements of due process are contractual obligations of institutions to the students they serve. When courts review those procedures, the tests they may apply concern the fundamental fairness of the procedures: whether the institution followed its established process; whether the actions taken were not arbitrary or capricious; or whether the sanction imposed was in proportion to the offense. Private institutions will normally survive legal challenges to their conduct procedures as long as they observe the process and procedures that they have published and their decisions are not made arbitrarily or irrationally.

The same standards apply to the procedures for the review of academic misconduct. As long as the private institution follows its procedures as published and as long as those procedures and the case outcomes are not seen as arbitrary or irrational, little risk would arise as a result.

### *Search and Seizure*

The Fourth Amendment of the U.S. Constitution provides a context for the rights of students attending public universities with regard to freedom from searches (Kaplin & Lee, 2009, pp. 365–371). The Fourth Amendment restricts the rights of government officials to search the property of individuals or to search their person without a properly executed warrant. Government officials, in this case, would include the employees of public colleges and universities. Conducting a search in violation of a student's Fourth Amendment rights could expose employees and public institutions to liability for damages. Any evidence collected during such a search would probably be inadmissible in any subsequent criminal proceeding, but, in some jurisdictions, that may not be a driving factor in a campus judicial proceeding.

Employees of private institutions have more leeway in conducting searches in the absence of law enforcement personnel. However, even in those instances when Fourth Amendment or state law constraints do not apply, a room search that is conducted outside of the parameters of the housing contract between the institution and the student may generate litigation associated with a violation of contract. If a room search is conducted in a fashion that is arbitrary or capricious, a claim of invasion of privacy could result. In theory, private institutions could be more aggressive in searching student rooms, but many of them choose not to be.

Waivers of Fourth Amendment protections offer additional parameters for searches at both public and private institutions. In the case of residence hall contracts, students who executed those contracts are often required to waive their rights to restrict entry into their student rooms for specific purposes of protecting the institutions' interests, including health and safety and protection of property. Likewise, athletes participating in sports sponsored by the National Collegiate Athletics Association may enter into voluntary contracts to waive their Fourth Amendment rights to permit drug testing for illegal substances. Drug testing is, in effect, a search of the body of a person.

Employees of private institutions who conduct searches are generally not considered state actors, and as long as a search is conducted to protect institutional interests, it will normally survive any legal challenge

(Kaplin & Lee, 2009, pp. 365–371). However, at these same institutions, those private security personnel who are licensed or otherwise empowered as agents of the state as peace officers, or special law enforcement personnel, must, as a result, conform to Fourth Amendment restrictions. The purpose for searching a student’s room is the test in legal scrutiny. When it is for the purpose of enforcing the law, Fourth Amendment limits apply. When it is for the purpose of protecting institutional interests, constitutional limitations are less applicable.

## FEDERAL FUNDING

A number of federal regulations apply equally to public and private institutions, because they are tied to federal aid to higher education. Those regulations include those associated with the Drug-Free Schools and Communities Act of 1989, the Campus Security Act of 1990, and the Campus Sex Crimes Prevention Act of 2000. Those standards apply to all institutions whose students receive federal aid, which has been interpreted as applicable to higher educational institutions. Chapter Six of this text more fully explores the relevant regulatory issues. Every one of these standards applies to both public and private institutions.

## PROPERTY OWNERSHIP

There are differences between the rights of those owning private property and rights associated with public property, and these distinctions may come into play for colleges and universities. A private institution may restrict public access to its property. Some private institutions, for example, use guarded entrances to their campuses and regulate visitor traffic. Public institutions are less likely to do so, although access to property can always be regulated, whether it is public or private. For example, public parks and zoos control access by admission only during certain hours, and public college residence halls are typically accessible only to the students who live there and their guests.

A private institution may initiate arrest procedures for any unwelcomed or unauthorized visitor and charge that person with trespass. A public institution—since its property is public—is less able to do so, unless an individual has engaged in unwanted or illegal behavior and has been warned that a subsequent visit to campus may result in a trespass arrest.

## TRANSPORTATION

Student affairs staff at public institutions may operate state-owned vehicles to transport students or other persons on or off campus. The institution will have those vehicles insured with liability protection, and there will be procedures governing the use of the vehicles and the procedures to employ in the event of a mishap. Private institutions may be a bit more relaxed about procedures, but will have liability insurance that protects them. Staff members driving vehicles owned by private institutions should be certain that they are informed about their protections in the event of an accident.

At most institutions, both public and private, those using personal vehicles for transporting themselves and others for duties associated with their employment are expected to be self-insured and carry their own vehicle insurance.

## CONCLUSION

Student affairs staff members at both public and private institutions have to be aware of how institutional control can affect exposure to liability. In the end, public institutions and private ones are more similar than they are different, largely governed by contract law and the promises they make to students, employees, and other constituents. Risk can be mitigated by those in the public sector of higher education by taking care to not limit religious expression, being conscientious about content-based limits of expression, carefully following established standards for due process, attending to reasonable expectations of privacy, and staying alert to their responsibilities for the property they own. Risk can be mitigated by those working in the private sector by following established procedures and standards in all cases and making no exceptions, unless the process permits it. The authors have described some of the other ways in which public and private institutions differ and how these differences affect the work of student affairs administrators.

## REFERENCES

- Kaplin, W.A., & Lee, B.A. (2009). *A Legal Guide for Student Affairs Professionals* (4th ed.) (pp. 23–34, 365–371, 456–474). San Francisco, CA: Jossey-Bass.
- Lake, P.F. (2011). *Foundations of Higher Education Law & Policy* (pp. 47–89). Washington, DC: NASPA: Student Affairs Administrators in Higher Education.

## ADDITIONAL RESOURCE

Pavela, G. (2010, April 23). "Can Students at Private Universities be Dismissed at Will?" In *The Pavela Report*, 15(13). St John, FL: College Administration Publications.