

# Legal Issues in the Classroom

**Disclaimer:** This guide is for instructional purposes only, and should not be regarded as legal advice. If you have specific legal questions, you should seek the advice of counsel.

## TOPICS:

1. Academic Freedom in the Classroom
2. Accommodating Students with Disabilities
3. Grading
4. Intellectual Property
5. Letters of Recommendation
6. Sexual Harassment
7. Student Privacy

## 1. ACADEMIC FREEDOM IN THE CLASSROOM

Speech by professors in the classroom at public institutions is generally protected if the speech is "germane to the subject matter."

However, the right to freedom of speech is not absolute if it compromises a student's right to learn in a hostile-free environment. For example, the courts have held that professor's use of vulgar language is "not germane to the subject matter." The courts have held that instructors must avoid indoctrinating or proselytizing.

Students, too, have a right to academic freedom, including the right to free discussion, free inquiry, and free expression. A major current source of controversy involves balancing student and faculty rights

Professors are allowed to select readings to assign in their courses without having to provide "equal time" for every competing viewpoint, so long as this reflects a genuinely academic decision. Students do not have the legal right to demand that classes be viewpoint neutral or "balanced." An instructor teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.

In general, the courts defer to the professional judgment of faculty to determine what is pedagogically appropriate in the college classroom so long as such academic decisions are not a pretext for some unlawful form of discrimination.

## 2. ACCOMMODATING STUDENTS WITH DISABILITIES

One recent study estimated that one college student in eleven reports having a disability. How should you best handle requests for accommodation by students with special needs?



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Federal law requires public and private colleges and universities to provide the necessary services and support for students with special needs to participate in all campus activities and programs, where these are academic or social. However, the students must notify, and in some cases provide documentation of disability, before they assert the need for an accommodation, and must not wait until the last minute.

As an instructor, you have a responsibility to refer students who request an accommodation to the proper campus office. This office will meet with the student, review the required documentation, and recommend an appropriate accommodation that does not alter the course's academic standards or content.

You are required to make reasonable adjustments necessary to eliminate discrimination on the basis of disability. The EducationQuest website ([www.educationquest.org/swdaccommodations.asp](http://www.educationquest.org/swdaccommodations.asp)) provides a list of potential accommodations:

- Assigning the student a notetaker or tutor.
- Making the course readings available in alternative form, such as Braille, large print, and audio-tapes.
- Giving the student access to educational materials in advance, such as class syllabus and study guides.
- Providing sign language, oral interpreting, and real-time captioning services.
- Giving the student alternatives to the standard way of delivering an examination, such as extended time, taped tests, oral tests, an alternate test site, elimination of computer scored answer sheets, and use of a computer or spell-checking device for quizzes and exams.
- Providing the student with access to adaptive equipment such as closed caption devices, amplified telephone receivers, low vision reading aids, tape recorders, Brailleing devices, and computer enhancements.
- Giving the student the opportunity to make up quizzes, exams, or assignments if the absence was disability-related.
- Providing the student with preferential seating in the classroom.
- Extending the timelines for completion of specific courses or for the completion of certification or degree requirements.
- Giving the student permission to take less than full-time credit and still be eligible to receive financial aid.
- Providing foreign language course substitutions, such as the option to take foreign culture class instead of a foreign language.

### **3. GRADING**

Can I be sued over the grade that I give a student?

A paralegal seeking bachelor's degrees in legal studies and sociology at the University of Massachusetts filed a 15-count lawsuit in US District Court in 2007 after a teaching assistant graded a political philosophy class on a curve and turned the student's A-minus into a C. The student contended that the university violated his civil rights and contractual rights and intentionally inflicted "emotional distress." The suit was ultimately dismissed. But cases like this one have struck fear in many instructors.

Evaluating a student's performance is an integral part of higher education. But as grading has assumed heightened significance (for example, in determining eligibility for scholarships), grading disputes appear to have grown more frequent.

The general counsel for the American Council on Education, which represents more than 1,600 college and university presidents, said such suits are rare and almost never successful, and generally reflect an unrealistic fear that a single grade

can torpedo a student's professional goals. Still, it is essential that grades not be arbitrary and capricious, excessively skewed, or reflect bias. And some courts have held that it is proper for an institution to insist that an instructor comply with a particular college or university grading policy (such as grading on a prescribed curve).

Some courts have ruled that there should be procedures for handling disputed grades; and that an instructor must enforce grading standards evenhandedly. The American Association of University Professors (AAUP) recommends that grading appeals should be heard by faculty members in the department or closely related field and that the standard should be whether the faculty member used "inappropriate criteria" "in determining the grade" or "did not adhere to stated procedures or grading standards.

#### **4. INTELLECTUAL PROPERTY**

Who owns your intellectual property? Who owns your syllabus, lectures, classroom handouts, research data and website?

It is generally assumed that professors own the copyright to scholarly books and articles or creative works that they produce, even if they use university facilities and resources. Thus, any royalties flow to them.

Lectures are also generally assumed to belong to the professor. Thus, companies are generally barred from selling lecture notes without the professor's permission.

Work by students belongs to the students and faculty need the students' permission to distribute their work.

Ownership of syllabi and online and distance education materials, however, is a gray area.

What are your rights under "fair use" of copyrighted materials? There are special conditions--including criticism, teaching, and criticism--in which the law allows for limited copying of copyrighted materials without the permission of the rights holder. However, the fair use exemption is vague and unclear, depending on specific facts and circumstances. Under some circumstances, including satire, parody, negative and positive commentary, discussion-triggers, illustration, and archiving, the use of copyrighted material could be legal.

In evaluating whether the use of material is covered by the fair use doctrine, courts weigh four factors:

- (1) Whether the material is being used for commercial or educational and non-commercial purposes;
- (2) Whether the material is factual or informational or whether it is for primarily entertainment purposes.
- (3) The amount of material copied and whether the material constituted the "heart" of a particular item.
- (4) The effect upon the economic value of the copyrighted work.

In online courses, there must be measures in place to ensure that the copyrighted material is not accessible to students who are not enrolled in a particular class. Here are some simple guidelines:

- Keep any excerpts from copyrighted material brief.
- Cite the source of any copyrighted materials.
- Get permission to use the materials.

#### **5. LETTERS OF RECOMMENDATIONS**

What can't I write in a letter of recommendation?

We've all heard the joke: That in letters of recommendation "good" means "mediocre," "shy" means "socially dysfunctional," ambitious means "overreaching," and solid means "plodding" and "unimaginative." There can be no doubt

that for a number of reasons, including fear of defamation suits, hyperbole has become rampant and evasion and puffery abound in letters of recommendation.

Writing a letter of recommendation is an art. At stake is a letter writer's credibility-and a candidate's career prospects. Recipients of letters hope for candor and honesty, but often feel that they must read between the lines and look for code words.

An effective letter discusses a candidate's research, teaching, leadership potential, and impact on the field. It assesses strengths and weaknesses. But given the high stakes involved, many academics resort to euphemism. This is the case even though very few letter writers have ever been sued.

Still, there are things to watch out for. It is one thing to discuss a candidate's research and teaching, but whether you should discuss a candidate's personality or collegiality is unclear. In instances where you might refer to a candidate's ethnicity or special needs, it is essential to obtain the candidate's consent.

Confidentiality is a question mark. Some universities (like those in the University of California system) operate under open-records laws that allow individuals to read letters of recommendation (except for the letterhead, signature and identifying information below the signature. And even in instances where letters are not subject to open-records requests, information about the letters frequently seeps out.

## **6. SEXUAL HARASSMENT**

What constitutes sexual harassment?

Sexual harassment is not confined to a quid pro quo, for example, an exchange of sexual favors for a higher grade. Any conduct that unreasonably interferes with an individual's academic work or which creates a an intimidating, hostile or offensive academic environment may constitute sexual harassment. Thus, abusive speech, lewd or sexually graphic language, gossip, pressure for dates, unwanted sexual looks or gestures, unwanted touching, and materials of a sexual nature in the workplace-all may create a hostile learning environment.

If you receive a complaint or hear even indirectly about a problem in your area that might reasonably be construed as sexual harassment, harassment, or discrimination, in many cases you are required to take some timely action. You may not ignore it.

Be aware of the following:

1. Harassment does not have to be directed at a particular individual. It is sufficient to create a hostile learning environment.
2. What is harmless joking to one person may be grossly offensive to another. Be sensitive to others.
3. Intent is not relevant in determining whether or not a behavior is sexual harassment. All that matters is the impact of the behavior on the work environment.
4. Avoid touching someone else unless you are sure it is welcome.
5. Retaliation after someone makes a claim of sexual harassment is strictly prohibited.
6. Certain forms of academic discourse are protected, if they are germane to the course. This might include reading and discussing literary works or student essays that contain material that might otherwise contain material that might, under other circumstances, be found offensive.

Are consensual romantic relationships between instructors and students permissible?

Various colleges and universities have adopted different approaches to romantic relationships between instructors and students. Some have banned such relationships entirely. Others prohibit relationships where there is a supervisory

relationship. Still others strongly discourage such relationships; some require such relationships to be disclosed to the instructor's supervisor.

The American Association of University Professors has adopted the following policy:

"Sexual relations between students and faculty members with whom they also have an academic or evaluative relationship are fraught with the potential for exploitation. The respect and trust accorded a professor by a student, as well as the power exercised by the professor in an academic or evaluative role, make voluntary consent by the student suspect. . . . In their relationships with students, members of the faculty are expected to be aware of their professional responsibilities and to avoid apparent or actual conflict of interest, favoritism, or bias. When a sexual relationship exists, effective steps should be taken to ensure unbiased evaluation or supervision of the student."

## **7. STUDENT PRIVACY**

What information can't I reveal?

You cannot reveal a student's Social Security number. You can't publicize a student's grades. Nor can you discuss a student's academic performance with the student's parents.

But can you intercede with troubled students? Who, if anyone, can you inform if you suspect that a student has serious emotional problems or exhibits signs of potentially dangerous behavior, while still respecting student privacy?

The Family Educational Rights and Privacy Act (FERPA) provides that identifiable information from student education records cannot generally be released to any third party without the consent of the student.

In *Owasso Independent School District v. Falvo*, the Supreme Court concluded that the common practice of asking students to exchange papers and grade each other's work did not constitute a violation of FERPA. The Court held that peer grading is a legitimate pedagogical tool, allowing students to learn from the grading process. Thus, faculty may use peer grading in the classroom without FERPA concerns.