10-16-2017

Lawyers have two approaches to higher ed

Aldemaro Romero Jr.
CUNY Bernard M Baruch College

Lawyers have two approaches to higher ed

Dr. Aldemaro Romero Jr.
Letters from Academia

After decades of a culture of social isolationism, we see how colleges and universities have gradually become the battlegrounds of national issues such as race, religion, sexual assault, gun control and free speech. Over the last 50 years more than 120 cases related in one way or another to higher education have been heard by the U.S. Supreme Court. Hundreds of other cases have been filed, only for the justices to deny hearing them.

However, most colleges and universities are not well prepared to deal with litigation. For one thing institutions of higher education have had for decades a culture of what we can call "academic exceptionalism," in which they believe that they are governed by a different set of rules that allow them to do virtually anything they want.

Sometimes this culture of exceptionalism extends to the upper administration. For example, many times one hears from public university lawyers that their institutions are largely protected from legal action by "sovereign immunity," a legal doctrine by which the sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. Without ignoring that doctrine, the Supreme Court and lower courts have decided on more than one occasion that such protection is not absolute.

Another myth among faculty members is the unconditional belief in the concept of academic freedom. Again and again, the Supreme Court has established that such a concept, far from absolute, is rather limited. What the justices have said is that all that faculty members are vested with is in the establishment and the enforcement of standards of behavior that are reasonably and appropriately applied in evaluations of performance in and outside the classroom.

Although we have heard of many cases where the plaintiffs are students, the fact of the matter is that they represent only 15 percent of the cases argued before the Supreme Court. Faculty members bring about a third of all the cases. The reason so few legal complaints by students are heard by the Court is because the justices have again and again reaffirmed the fact that colleges and universities have a broad authority over students' lives and affairs, keeping them under tight institutional control. This is an important point that counters a notion that in some circles has become a fad, and that is that students are "customers" and should be treated as such.

Further, despite the fact that we believe that all people have the same protection under the law, the Supreme Court has decided that rights for students in private institutions are fewer that those in public ones. All of the above leads to a number of conclusions. One is that, against popular belief, the law is highly contextual and cases dealing with a variety of other subject matter will oftentimes have bearing on higher education law.

These days we see two different approaches by lawyers in higher education. On one hand, we find those who feel that they really work for the university and report to the higher ups by trying to implement the desires of the higher administration to better serve the university. That means being supportive in enforcing rules and regulations against people who do harm (whether faculty, staff, students, or external agents). In many cases, they help to find ways to discipline people so their actions are not detrimental to the name and proper functioning of the institution.

The other approach by some lawyers is to be hypersensitive to any and all potential lawsuits and take the most conservative approach to governance and management of the institution, (i.e., attempt to placate all people who threaten legal action). While there are times to adopt a more conciliatory strategy even when the institution is correct, when used continuously by some lawyers it harms the institution in many ways. The fact is that there is well-established law in certain areas of the operation of an institution, and the odds of losing these potential lawsuits is nil.

One threat that is thrown out often is that of students suing the university because of grades. Except in very extreme cases, a good lawyer advises the campus CEO not to feel intimidated by such actions because of two basic things: (1) increasingly courts tend to dismiss such cases (as long as the institution has followed proper procedures) for considering them frivolous lawsuits; and (2) the plaintiffs' lawyers charge by the hour while the university ones charge by the year, meaning that although in many cases the plaintiffs' attorneys either are too expensive to their clients, or they just bet on the possibility of recovering a fee thinking that universities have "deep pockets."

Despite all this, some in higher administration have started to listen too much to these so-called "scary cat" lawyers. As a consequence, we are seeing faculty formally complaining of the evaluations given by their chairs (i.e., their immediate supervisors) about their productivity and quality in their teaching, scholarly work, and service to the university and their profession. What is worse, in some cases, it is the upper administration itself encouraging the filing of grievances, with the support of the university lawyers, in order to be in good graces with the trouble makers of the institution.

Although the need for lawyers in colleges and universities is evident because of the kind of society we live in, those lawyers work for the university or college, not the other way around. That means that the university administrators need not only to listen to them, but also instruct them to provide support for the university mission, policies and practices. Otherwise the institutions become paralyzed and hostage to individuals whose intentions are not the best for higher education.

Dr. Aldemaro Romero Jr. is the Dean of the Weissman School of Arts and Sciences at Baruch College-CUNY. He can be contacted through his website at: http://www.aromerojr.net