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ABSTRACT

This guide is intended to provide administrators responsible for setting policies for training and employing international teaching assistants (ITAs) a framework to help determine whether their programs and policies might be in violation of legislation or common law precedents. The paper also discusses how social policies, as formalized in statutory schemes, provide guidance for appropriate goals and policies for ITA program administration and suggests ways that cross-cultural educational research can be used to counter potential legal claims. An overview of the types of claims that might be brought by various parties against institutions and ITA programs is provided. Next, each type of claim is reviewed, as well as the actions that administrators can take to prevent such claims or minimize their impact. A detailed example is provided regarding the requirement to communicate clearly in English, with a chart summarizing state laws in this area. The use of English language qualifying tests that may be over- or under-inclusive are also discussed. The civil rights protections accorded to ITAs are described along with the implications for institutions of higher education. (Contains 23 references.) (Author/JLS)

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How international teaching assistant programs can prevent lawsuits

ABSTRACT

This guide gives administrators responsible for setting policies for training and employing international teaching assistants (ITAs) a framework to help determine whether their programs and policies might be in violation of legislation or common law precedents. Second, this paper reveals how social policies as formalized in statutory schemes provide guidance for appropriate goals and policies for ITA Program administration. Third, this paper points out where cross-cultural education research can be used to counter potential legal claims. An overview of the types of claims that might be brought by various parties against institutions and ITA programs is provided. Next, each type of claim is reviewed as well as the actions that administrators can take to prevent such claims or minimize their impact.

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How international teaching assistant programs can prevent lawsuits

Introduction

When I began working as an administrator of an International Teaching Assistant (ITA) program, I came to the job with special insights because I am also a practicing attorney. As I reviewed the ITA policies and procedures promulgated by the university, it was obvious to me that there were policies and practices that subjected the university to risks of possible lawsuits. After completing my legal research and analysis of the legal issues, I authored this guide to first, give administrators responsible for setting policies for training and employing international teaching assistants (ITAs) a framework to help determine whether their programs and policies might be in violation of legislation or common law precedent. Second, this paper reveals how social policies as formalized in statutory schemes provide guidance for appropriate goals and policies for ITA program administration. Third, this paper points out where cross-cultural education research can be used to counter potential legal claims.

Organizationally, this paper begins by providing an overview of the types of claims that might be brought by various parties against sponsoring institutions and ITA programs. Next, each type of claim is reviewed as well as a discussion of the actions that administrators can take to prevent such claims or minimize their impact. Finally, there are some remarks about how the law may inform educational policy concerning ITA development.

Overview of Potential Claims

TORT CLAIMS

The typical tort complaint is filed by students taught by ITAs who claim that the university failed in its duty to provide the students with adequate instruction.

CONTRACT CLAIMS

The typical complaint is filed by students taught by ITAs who claim that the university did not provide them with the instruction for which they paid.

CIVIL RIGHTS VIOLATION CLAIMS

The typical complaint is filed by prospective and employed ITAs who claim that they are the victims of discrimination.

Overview of the Initiation and Resolution of Claims

Claims are seldom initiated out of the blue. They are preceded by student complaints or ITA complaints to departmental personnel or to university administrators. They are often preceded by editorials in student and city newspapers. By taking such complaints seriously, and demonstrating sincere concern, most legal claims are avoided entirely. They are resolved informally through administrative channels at the university level. The reason why most complaints are settled informally is that administrators' interests are parallel to the interests of both students being taught by ITAs and ITAs. Specifically, administrators want the students to receive helpful instruction. Likewise, administrators want the ITAs to become competent instructors. Consequently, resolution of individual problems can usually be mediated by the parties to settle the complaint to the parties' satisfaction.

In fact, most formal legal complaints are not instigated by students or ITAs. Legal claims in the ITA context are usually instigated by attorneys, legally sophisticated friends or family members. Accordingly, when legal claims arise, administrators need to be aware of the criteria for prevailing on such claims, and how they can take proactive measures to avoid legal liability.

Tort Claims

The three elements that students must prove to prevail on a tort claim are:

> 1) the University owes a duty of reasonable care to see that the courses are taught clearly in English or that instructors speak English fluently;

2) the University failed to exercise reasonable care; and

3) the student was injured by the University's failure to exercise reasonable care.

The question of whether the university owes a duty to the students depends on the state statute or regulation in effect in the university's state as summarized in Table 1.

Table 1

State Statutes and Regulations Concerning TA English Proficiency

State	Statute or Regulation	English Proficiency Assessment
Arizona	Regulation, 1985 Board of Regents 12-407	Assess English proficiency of each TA each semester
Arkansas	Regulation, 1995	University to ensure English proficiency
California	Statute, 1987 Assembly Concurrent Resolution 41, Ch. 103	TSE or a similar test, demonstration with class, or a faculty evaluation
Florida	Statute, 1983 Stat. Ann Sec. 240.246	TSE or a similar test approved by the Board of Regents
Georgia	Regulation, 1987 Chancellor's Memorandum	Statement that the individual is proficient in spoken English
Illinois	Statute, 1986 Public Act 84-1434, Ch. 122, Sec. 3-29.2	University must have a program to assess English proficiency
Iowa	Statute, 1989 SF 2410 Sec. 23-25	Shall include a student evaluation mechanism
Kansas	Regulation, 1985, 1988 Board of Regents	Interviewed and certified by three instructional personnel; achieve a 220 on the TSE or SPEAK test
Kentucky	Statute, 1992 Acts Ch. 407 & 1	Universities shall institute English Language proficiency assessment to demonstrate ability to deliver all lectures and oral presentations
Louisiana	Statute, 1991 SB 327 Sec. 1	Universities to evaluate faculty for fluency in English
Minnesota	Statute, 1986 Ch. 401 Sec. 5	University and state board must ensure proficiency in speaking, reading and writing
Missouri	Statute, 1986 Rev. Stat. Sec 170.012	Tested for ability to communicate orally in a classroom setting
North Dakota	Statute, 1987 Stat. Titl. 70 OS Supp. Sec. 3345.21	Exhibit proficiency in the English Language

Table 1 Continued

State	Statute or Regulation	English Proficiency Assessment
Ohio	Statute, 1986 Code of Laws S.C. Sec. 59-103-160	Establish a program to assess English proficiency
Oklahoma	Statute, 1982 Stat. Titl. 70 OS Supp. Sec 3324-S	Each college and university to provide an annual report setting forth the procedures established to guarantee English proficiency
Oregon	Regulation, 1986 Board of Higher Education Strategic Plan	TAs should be required to provide evidence of satisfactory English-speaking and writing ability.
Pennsylvania	Statute, 1990 SB 539	Appropriate criteria such as personal interview, peer, alumni, student observation and tests to determine English proficiency
Rhode Island	Regulation, 1993 Board of Governors for Higher Education	Establish appropriate policies and programs to assess and when necessary improve the oral English proficiency of all newly hired teaching personnel
South Carolina	Statute, 1991 Code of Laws of S.C. Sec. 59-103-160	Ensure proficiency in both written and spoken English language
Tennessee	Statute, 1984 Sen. Joint Resol. No. 211	Satisfactory grade on the TSE or similar test approved by respective board
Texas	Statute, 1989 House Bill 638	All public universities provide a program or short course to ensure that courses be taught clearly in English language
Wisconsin	Regulation, 1992 U of Wisconsin System	Establish criteria for selection and evaluation

Accordingly, to determine whether the university owes a duty to students concerning the quality of instruction in English, one must refer to the state statute in effect. Equally important, if there are university policies about instructors' oral English proficiency, these university policies can be used by students to prove that the university owes them a duty.

Once the university's duty has been established, the student must prove that the university failed to fulfill its duty. Some of the actions that the university can take to prove that it has fulfilled its reasonable duty of care is to screen all faculty's communicative competence before putting instructors in the classroom. Thereafter, there should be a system where students' evaluations of instructors are monitored, where instructor's

classroom performance is monitored, and there should be a system for addressing student complaints. Even by taking such measures, the university may not be able to prove that it fulfilled its duty in states with statutes that require that "all courses be taught clearly in English" (TX, 1989). Such a high hurdle statute sets up a very high standard that the university must meet to each student's satisfaction.

By contrast, in states that require English proficiency testing, universities can be confident in their ability to fulfill their duty because once the university has tested the English proficiency of the instructors, it has fulfilled its statutory duty. By recognizing that different statutes impose different duties on university administrators, it spotlights the importance of administrators' communication with legislators to enact statutes that foster clear instruction in English, but do not enact a vague, high hurdle standard that the university cannot meet despite good faith efforts to monitor instructor comprehensibility.

Finally, to prevail on a tort claim, the student will have to prove that he/she was injured because the university failed to provide clear instruction in English. The definition of injury in this context is broad. Students might prove injury by presenting evidence that they failed the class, received a low grade, or were forced to drop the class to avoid a low or failing grade.

The damages that the student can claim as a result of such injuries are the cost of tuition, fees, a tutor, or even a psychologist to treat the emotional distress caused by the incomprehensible instruction. Further, the student can claim for the cost of extra study materials and wages lost because the student had to study many excess hours. Also recoverable is compensation for emotional distress, pain and suffering. Finally, punitive damages to punish the university for disregarding its duty could be recovered.

Perhaps the greatest risk in this context to the university is that attorneys would try to bring the suit as a class action. Class action lawsuits allow a group of students to bring one suit. This is much more profitable for attorneys working on a contingency basis. The

potential for judgments in excess of $100,000 increases the likelihood of nuisance and good faith class action lawsuits.

Nonetheless, counsel for the university can oppose the students' counsel's motion to bring the complaint in the form of a class action. University counsel should argue that each student's case is different, and that each individual's claim must be heard separately. In opposition to certification of a class for the purpose of a class action lawsuit, ITA administrators can educate university counsel about the educational research that concludes that teaching effectiveness is a relational attribute between individual students and the instructor (Civikly, 1992; Inglis, 1993). This literature supports that just because one student has difficulty understanding an instructor's speech, not all class members will have difficulties. Comprehension is a complex phenomena based on the listener's prior knowledge, motivation, and self-efficacy. Consequently, by using the educational research on teaching effectiveness, program administrators should be able to avoid all class action law suits which will make it much less attractive to the legal community to bring tort actions on behalf of individual students where the compensable damages would be minimal in comparison to the costs of bringing such litigation.

Contract Claims

Lawsuits complaining about the quality of instructor clarity would also contain a complaint for breach of contract. Students would have to prove that they agreed to pay tuition to receive comprehensible instruction in English. Second they would have to demonstrate that they had been injured because of the instructor's lack of communicative competence in English. Similar to the damages recoverable under a tort complaint, the students could recover the cost of tutors, extra study aids, and lost wages due to extra time spent studying. Also resembling tort complaints, breach of contract claims could be brought as class action lawsuits because the attorneys would argue that the complainants were similarly situated. However, as explained above, counsel should be able to block

certification of the class to avoid a class action lawsuit by presenting the research on how different students are affected by the same instructor differently.

Even though the vulnerability to tort and breach of contract actions brought by students taught by ITAs can be minimized, the social policies underlying such tort and breach of contract actions is helpful for setting program goals. It reminds program administrators that our goal, responsibility, and duty is to see that each student taught by ITAs receives clear instruction as perceived by the student.

At the same time, the legal principal of mitigation of damages also reminds us that instructional effectiveness is a relational process where the students have the duty to minimize any injury and consequential damages. In practice, this means that the students have to try to improve communication between themselves and their ITA. The students can't sit in the back row and complain, or cease to attend the ITA's class. Instead, they have to make their best effort on a continuous basis to benefit from the ITA's instruction. In short, the law helps to inform our administrative practices in terms of our responsibilities toward students, and their responsibilities as learners.

Civil Rights Violations

The essence of civil rights claims in the ITA context is that nonnative English-speakers and students from certain countries are receiving "disparate treatment" or suffering from "disproportionate impact" because of their "national origin". "National origin" is defined by federal statute as "the place where one is born or where an ancestor is born, as well as the physical, cultural, or language characteristics of an ethnic group (Guidelines on Discrimination because of National Origin, 45, FR. 8632 Sec. 1606.1). In sum, ITAs are members of a protected group because they are classified based on their primary language or their immigration status both of which constitute national origin discrimination.

For civil rights claims, the ITAs only need to provide evidence on each of three elements to shift the burden of proof to the university. This is in stark contrast to most civil actions where the plaintiffs must prove by a preponderance of the evidence, that their

claims should prevail. By sharp contrast, for civil rights claims, once the ITAs have presented some evidence on each element of their case, it is the defendant, the university that must prove by a preponderance of the evidence that it did not violate the defendants civil rights.

Under a civil rights violation claim based on "disparate treatment", ITAs can meet their burden of production. First, they can put forth evidence that they are members of a protected group. Second, they can put forth evidence that they are applying for positions for which they are qualified. By demonstrating that they possess the academic credentials, they satisfy their burden of production that they are qualified for a TA position. Third, they can provide evidence that they will be rejected for the position which they seek unless they pass a proficiency exam that is not required for all applicants.

Once the ITAs met their burden of producing evidence on these three criteria, the university would have to prove that the disparate treatment of this group was narrowly defined such that the group that received differential treatment was neither under- or over-inclusive. Often program administrators believe that as long as they are testing oral proficiency in English, such a proficiency test could not constitute discrimination. However, in claims of discrimination, the court applies a very rigorous standard of review called strict scrutiny.

ITAs can provide evidence that such a proficiency exam requirement is both over and under-inclusive. First, it is over-inclusive because very often, the determination of who has to take the test is based on the graduate student's immigration status or country of origin. This may require prospective ITAs who are native English-speakers from India, or other nations where English is used widely to be compelled to take an exam from which other native English-speakers are exempt. Similarly, many university programs treat prospective ITAs from various countries differently by exempting prospective ITAs from specific countries such as the Britain, Canada, Australia, and New Zealand without testing their communicative competency. Meanwhile, testing is often mandatory for students who

were educated in English speaking institutions in Israel or South Africa. In short, these program policies open themselves to class actions based on disparate treatment by promulgating policies that treat prospective TAs disparately based on immigration status or country of origin.

Furthermore, many ITA program policies requiring English testing of only nonimmigrants from certain countries are under-inclusive. Often the goal of ITA program administrators is to save costs by only testing certain groups of prospective TAs. Nevertheless, the under-inclusive nature of who is required to be tested can result in civil rights violations. For instance, in a context where prospective TAs suffer from physical disabilities or speech impediments that may affect communicative competence, most universities bend over backwards to see that these protected groups are given the opportunity to serve as TAs. Their oral proficiency is neither tested, nor are these groups denied the opportunity for professional development because of oral proficiency deficits. Instead, these prospective TAs with disabilities are provided with the necessary support so that they can serve as TAs and benefit from professional development support services. These examples reveal that disparate treatment claims may lie against most university programs no matter how well intentioned administrators are in determining who must be tested and who will be exempt.

Not only can ITAs prevail on civil rights claims based on providing evidence of disparate treatment, but they can also bring civil rights claims based on disproportionate impact. To prevail, ITAs must provide evidence on two criteria underlying disproportionate impact. First, they must furnish evidence that the test or requirements are not related to job performance because not all instructors' oral proficiency is tested. Second, they must provide evidence that the oral proficiency exam disqualifies members of a protected group at a higher rate than other applicants. Since only ITAs take the exam and are disqualified from consideration because of the exam, they can prove that the test has a disproportionate impact on them. In summary, under a claim of disproportionate impact, no intent to

discriminate is necessary. Instead, ITAs need only point out that the test is not directly related to job performance because not all applicants are tested, and that they as members of a protected class are prevented from being hired as a TA at a higher rate due to the test.

Civil Rights Claims Procedures

The two statutory frameworks for civil rights discrimination suits are Title VII and Title VI. Title VII, The Equal Opportunity Act, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The other statutory provision that ITAs can file under is Title VI of the 1964 Civil Rights Act, Public law 88-352, 2 July 1964 Section 601 which provides, "No person in the United States shall, on the ground of race color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." To summarize, Title VII applies to discrimination in the employment context. Title VI prohibits discrimination in federally assisted programs.

TITLE VII EQUAL OPPORTUNITY CLAIMS

If an ITA claims discrimination under Title VII, the Equal Opportunity Act, the ITA would file his/her complaint with the Equal Employment Opportunity Commission (EEOC) in the appropriate jurisdiction. The EEOC would investigate the complaint and if it chose to prosecute, they would represent the ITA. Otherwise, if the EEOC chose not to prosecute, the ITA could file a civil suit.

A civil action under Title VII would probably arise as a class action lawsuit on behalf of all ITAs subjected to disparate treatment or disproportionate impact. At the same time, the ITAs could file a complaint under the Immigration Reform and Control Act (IRCA) alleging that the university discriminated against lawfully admitted aliens by choosing U.S. citizens for employment first, without testing their oral proficiency.

If the ITAs prevailed in their action, they could recover back pay for the time when they were not permitted to work. Even if the ITAs were successful on the merits of their claim, the university could claim that ITAs were students, not employees. Thus, the

university could claim that Title VII did not apply because it was not an employment context.

TITLE VI DISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS CLAIMS

Title VI complaints are filed with the Office of Civil Rights (OCR). The OCR investigates and usually resolves complaints either by finding no violation or if there was a violation, by requiring the program to promise to implement a corrective plan (Piatt, 1990). According to a report on the disposition of Title VI complaints from 1983-1988, in 85% of the cases, no violation was found. In 14.5% of the cases the programs promised to implement a corrective plan, and in .5% of the cases there was an administrative proceeding (U.S. Department of Education, 1988). The reason that the OCR is reticent to find violations is because of the draconian penalties provided by the Civil Rights Restoration Act of 1987 which requires that if a program is found to have discriminated under Title VI, all federal funding be cut off to the entire institution.

In addition, under Title VI in the event that the program was found to have discriminated either by disparate treatment or disproportionate impact, the ITAs could recover back pay for every semester that they were not hired.

The civil rights legislation reminds us as ITA program administrators, that we function within a much bigger system. The civil rights protections remind us about how important it is to avoid testing prospective TAs based on membership in a group. These civil rights provisions remind us that we need to test and appoint TAs based on individual competencies. Likewise, we need to provide training for TAs based on their individual needs. We are the gatekeepers for students who are trying to obtain the academic skills and professional experience to integrate into the mainstream economy. Since we play such a special role in selecting who shall receive professional training, we need to bend over backwards to avoid discriminating on the basis of race, color, language and cultural characteristics. Further, as recipients of government funding, where we undertake to

provide educational opportunities, it must be available to all on equal terms (Brown v. Board of Education, 1954).

Implications for Program Administration

Once we realize that some of our policies may be in violation of federal civil rights protections, we can take proactive measures to reduce our institutions vulnerability to class action civil rights litigation. First, we could follow the University of Cincinnati's lead. They test the oral English proficiency of all graduate students whether they are to serve as research assistants or teaching assistants. By testing the communicative competence of all prospective TAs, we avoid many civil rights complaints.

Our goal is to provide professional development and support services for all TAs. Depending on the individual's needs, our programs can be designed to support their efforts toward improving their communicative competence and instructional clarity. Instead of using testing as a barrier to entry, we can implement tests that diagnose prospective TAs' strengths and weaknesses to provide appropriate professional development services.

Conclusion

Interestingly, by analyzing the types of tort, breach of contract, and civil rights violation claims that can be filed against ITA programs, we are reminded about the multiple stakeholders who ITA programs were initiated to serve. The notion that any student dissatisfied with the clarity of instruction can file a tort or breach of contract claim serves as a potent reminder that we owe a duty to all students to see that clear instruction in English is provided.

Equally important, the civil rights legislation highlights how important it is that we tear down barriers to educational opportunities. Since most of our institutions receive federal funding, we need to set the example that members of our society are not treated differently based on their country of origin, immigration status, culture, or native language. We as educators provide the essential educational opportunities so that prospective TAs

from all races and cultures can acquire the skills that they need fulfill their educational goals.

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