STANDARD 306

There may be a way in which law schools can comply this fall with the letter of the law (Standard 306) if necessary - even if a variance under 107(a)(1) cannot be obtained - while still protecting those at extraordinary risk (primarily older faculty with a variety of medical conditions).

Standard 306, which limits for law schools the number of credits their students can earn through what it calls "distance education," defines that "distance education" with some precision; precision which lawyers may take advantage of by reading it carefully and applying its terms precisely.

Standard 306 says that "A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction AND the instruction involves the use of technology to support regular and substantive interaction among students AND between the students and the faculty member, either synchronously or asynchronously."

To meet the very specific requirements and multi-pronged conjunctive (as contrasted with disjunctive) definitions of "distance education," suppose a law school has students (who are generally young, not in great danger, and probably willing to accept the small risk) seated in a classroom, presumably separated from each other according to social-distancing standards (imposed by governmental requirement or the school) in their seating locations.

In a small nearby room (which can be carefully and thoroughly disinfected before each use) is the professor, who uses a microphone connected to the public address (loudspeaker) system in the larger room where the students are assembled and hopefully eager to hear his words.

Arguably, such instruction is not limited in any way by 306 because it does not meet 306's precise definition of "distance education" for several reasons.

(1) One of the necessary (but not sufficient) conditions for something to constitute "distance learning" is that "the instruction involves the use of technology to support regular and substantive interaction among students." But, since the students, all of whom are seated in the same room, would simply be talking face-to-face to each other, there is no "substantive interaction AMONG students" which "involves the use of technology."

(2) If the professor uses the same microphone and loudspeaker system he would normally use in a classroom where the students are seated, it arguably does not constitute the "use of technology" - any more than the use of a slide projector, movie projector, electric pencil sharpener, etc. in a classroom - since amplified sound systems have been in widespread use in classrooms and elsewhere for more than 50 years and probably are no longer thought of as "technology." The most reasonable - as well as common - reading of "use of technology," especially in this context, would be distance learning over the Internet, which is not occurring in this hypothetical example.

(3) Similarly, the requirement that the students be "separated" from the faculty member can hardly be said to apply if the professor (in another nearby room) is no more than 50-100 feet from the students. In this context "separated" obviously applies to a very significant physical separation - measured in miles and not in feet - which is bridged by Internet connectivity.

After all, in large law school lecture halls, professors may often be more than 100 feet from some students. Also, if a professor is in a classroom full of students, and it is necessary to "pipe" both the video and audio into another different "overflow classroom", few would suggest that it now suddenly constitutes "distance learning," subject to 306, simply because the students in the overflow classroom are not in the same room as the professor.

Although those charged with enforcing 306 may not have intended this type of application (students in one classroom, with the professor in another) to be excluded from its application, they also did not anticipate teaching in a situation in which exposure within a classroom would seriously threaten the life of the professor.

As lawyers, they should be and are bound by the words they chose to put down on paper to guide hundreds of law schools and thousands of law professors, not what they hoped or intended to accomplish.

This is an elementary legal principle.

Lawyers are paid handsomely to find ways to permit a client to do what he wants to do (e.g., reduce taxes) even if a law or regulation seemingly was designed to prevent him from doing it.

And if those enforcing 306 think that even the teaching in a separate nearby room suggested by this hypothetical should be limited to any specific number of law school credit hours, they are certainly free to redraft the rule to make its new words conform to their previously unvoiced intentions.

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