LAW AND ETHICS IN COOPERATIVE EDUCATION

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The law of cooperative education is defined by the existence of a unique tripartite relationship between an institution of higher education, an employer and a student. Each owes certain duties and responsibilities to the other, and is in turn owed others. What those duties and responsibilities *ought to be* describes the *ethics* of cooperative education; what they *must* be, and what happens if they are violated, constitutes its law.

This discussion must begin with the recognition that cooperative education actually encompasses two very different and quite distinct areas of the law. There is the law of higher education, a rapidly evolving field in which the courts are steadily defining and redefining the relationship between the student and his or her institution, and there is the law of the work place, a body of law heavy with statutory standards and pervasive regulation. Unlike other pedagogies, cooperative education must tread across both these areas, and consideration of its legal and ethical imperatives must take into account their contradictions as well as their overlap.

In a broader sense, the law of cooperative education is a part of the law and ethics of the entire field of experiential education, which encompasses, in addition to co-op, such areas as internships, practice, work-study and the like. Indeed, over the years the distinctions between these terms has become blurred: some institutions administer programs that are called internships or experiential education but are functionally indistinguishable from cooperative education programs. The importance of this blurring of semantic lines lies in the recognition that the legal and ethical principles that guide cooperative education are inextricably intertwined with those that govern other forms of experiential education. Developments in any aspect of this growing pedagogy must therefore be considered germane to the entire field.

Legal Considerations

It is the tripartite relationship between the student, the institution and the employer that creates and defines the legal and ethical relationships of

cooperative education. An examination of these relationships must precede any discussion of their consequences.

The Institution

The school or college that provides the co-op experience has a primary obligation, sanctified by the contract of enrollment entered into with the student, to provide the student with a specified educational program. In offering to deliver a part of that learning through the medium of a cooperative education program, the institution represents to the student that he or she will be able to achieve certain learning objectives. The first obligation of the institution, therefore, is to ensure that the cooperative education program does in fact afford the learning opportunity represented to the student.

But the responsibilities of the institution do not end there. To the student, the school owes the responsibility to ensure that participation in the co-op program will not only advance his or her learning, but will not unreasonably expose the student to harm. The school must also be concerned that its students do not cause harm to others, and, further, it must remain vigilant to protect the academic enterprise itself. Finally, school has the added responsibility to treat the student fairly, consistent with his or her abilities, and, conversely, within the limitations of the student's capabilities.

The institution has a similar set of responsibilities to the employer: it must take such steps as are reasonable to ensure that the students it assigns are capable of performing the work to be accomplished, and that those students do not create a risk to the employer or to the public.

The Employer

Many of the responsibilities of the employer are directly related to those of the institution, but in quite different order of priority. If the primary purpose of the school is to provide learning, the prime focus of the employer must be to operate a profitable business. A natural tension therefore exists between the commitment of the employer to afford the student a valuable learning experience and the need to ensure that the work is accomplished. The employer also has the primary responsibility to protect the student from harm, and similarly to protect the integrity of the product, the other employees and the public. In doing this, the employer must respond to an entire body of law separate and distinct from that relating to education: the law of the work place. The employer must not only treat the co-op participant as a learner but also as an employee, with all the consequences of such status.

The Student

The last, but certainly the most important, component of the triumvirate is the student. He or she takes part in a cooperative education program to achieve a learning outcome and to gain experience not available in other educational settings. But the student also takes on the responsibilities of an employee, and it is this duality of role that gives rise to many of the most complex ethical and legal issues of cooperative education.

The student who enrolls in such a program has certain expectations. These include having a co-op placement that appropriately relates to his or her career and educational objectives, and to be able to carry out that placement without unreasonable risk of harm. The student expects to receive the agreed-upon monetary compensation for his or her work *and* the academic rewards that have been agreed to between the student and the institution.

In return, the student has the obligation to perform faithfully the assigned tasks to the best of his or her ability and to carry out the academic responsibilities of the cooperative education program. Finally, the student has the obligation to carry out the work in a fashion that is not likely to injure the employer, the institution, or others.

The tensions that exist within this tripartite relationship must be carefully considered and their consequences weighed in balancing legal rights and ethical responsibilities. For example, the coordinator of an institution's cooperative education program has a professional responsibility to seek to place every interested student, but he or she also has an ethical responsibility to ensure that a student is not placed in an inappropriate assignment for the sake of making a placement. Similarly, the employer has a responsibility to his or her firm and its owners and other employees to ensure that the work is performed, regardless of who is doing it. But in accepting a co-op student there is also the responsibility to ensure that the student achieves the learning objectives of the program.

Each of these rights and obligations interrelate with each other. It is the nature of those interrelationships, and the ways through which they can be enforced or give rise to legal rights and obligations, that define the law of cooperative education.

In summary, there are three basic areas in which legal issues of cooperative education arise:

The relationship of the co-op participant to the institution as *student;*

The relationship of the co-op participant to the work place as *employee;* and

The *ascertainment of liability* for harm either to the co-op participant or caused by that participant.

Academic Issues

The aspect of the law of cooperative education that is least firmly established relates to the relationship between the participant and his or her institution. Whereas historically the courts have paid great deference to the exercise of academic discretion, especially at the collegiate level, there is a clear trend towards a more intrusive judicial role. Increasingly, institutions are being held to the terms of an ill-defined *contract of enrollment* that transcends the general language of the catalogue and goes to the entirety of the expectations of and promises made to and by the student.

The implications of this approach for cooperative education programs are several. For example, the representatives of the institution inducing students to attend and to take part in the cooperative education program may become the bases upon which a student brings a legal action against the school for breach of contract. If the institution promises that a student will receive a semester's credit for three months' full-time work carried out under certain circumstances, the school has created an obligation to award that credit if the student carries out his or her part of the bargain. Because there is less academic discretion in such an activity, the courts may be more willing to enforce such an understanding than might be the case with requiring the award of credit for an academic subject. Indeed, based on rulings in related cases, a court might enforce promises made in a brochure promoting the co-op program, even though not a part of the official catalogue, if a student had reason to believe that it accurately set forth the mutual obligations of the program, and the student acted in reliance upon it. There are even indications that *oral* promises or commitments could be enforced, the only problem being that of proof. (Common belief notwithstanding, a contract does *not* have to be written to be binding: all that is required is *mutuality*, that is, one party acting in reliance of the representations of the other.)

The increasing use of *learning contracts* in the context of cooperative education has also increased the likelihood of a conflict between the student and the institution. Where once the institution's only responsibility was to help the student find a placement, and the only reciprocal obligation of the student was to become employed for the requisite period, now more and more co-op programs are emulating practice in other areas of experiential education in requiring participants to execute agreements that set forth certain learning goals. While most institutions do not *intend* these agreements

to represent enforceable contracts, there is every likelihood that a student who performs his or her part could succeed in requiring the school to fulfill its obligations. The intervention of the courts in such an academic setting is not something to be desired, but it is an outcome that can reasonably be predicted as this area of the law matures.

The solution is to make sure that everything that is promised by the institution, or that is *impliedly* promised, is intended. This extends not just to the catalogue but to informational materials, to briefings on the program, and most certainly to any written understandings between the school and the student.

Employment Issues

From the uncertainties of the law of education one comes to the highly circumscribed law of employment. With very few exceptions, co-op placements are employment, and the student is subject to all the laws, limitations and rights that apply to employees and their relationships with their employers. Indeed, to a very substantial extent, the law is blind to the fact that a student is working under a cooperative education program: for most purposes all that is seen is an employee. Thus, the Fair Labor Standards Act will apply, and with it the minimum wage requirements, along with other labor laws dealing with age requirements for hazardous occupations, occupational health and safety, and most certainly the taxation of earnings and the requirement of employers to withhold and pay social security, unemployment and workers compensation taxes.

Unemployment insurance and workers compensation raise two interesting issues. Generally, co-op students *are* covered by workers compensation insurance, but they may also be eligible for *unemployment benefits* at the termination of their co-op placement. This unintended and undesirable outcome is the result of state unemployment laws that fail to adequately exempt all categories of training-related work from the unemployment compensation program. The solution is to seek legislative relief in the state legislature, since the application of these laws is primarily a state function.*

**The many problems faced by other forms of experiential education in the application of the Fair Labor Standards Act and its minimum wage provisions tend to be less severe for co-op programs, since it is assumed that the student is engaged in gainful employment and therefore falls squarely within its ambit.*

Risk Management

Of primary concern to the employer, and certainly worrisome to the institution as well, is the issue of liability and risk for harm to the student, and for the consequences of the student's actions. Defining the issue of risk comes down to answering three basic questions:

Who is responsible (the employer, the school, the student or some other entity or individual)?

For *what* kinds of harm (to the student or caused by him or her)?

How can *protection against loss* be afforded?

As noted previously, most co-op students will be protected by workers compensation laws if they are injured on the job. However, it may be possible for a student to escape the provisions of these laws which limit recoveries to lost income and medical expenses, by proving *either* that his or her participation was *not* employment, *or* showing that the cause of the harm was other than the employer, *or* that the employer negligently caused the harm. The ethical responsibility of the employer to protect the student thus can also translate into a legal responsibility to do so.

Can the *institution* be held responsible for injury to the student while performing a co-op assignment? Common sense would argue in the negative, but the cases suggest otherwise. The issue revolves around whether the institution acted reasonably in putting the student in the situation in the first place. If a co-op coordinator knows a placement is inherently dangerous, and yet makes the placement without advising the student of the risks (or if the risk is so great that even notice would not be sufficient), then it is possible for the student to reach back to the institution to seek redress.

The solution used by many institutions is the so-called *waiver of liability.* Through this device, a participant presumably gives up his or her right to seek compensation if the participant is injured while carrying out the work of the co-op placement. That is indeed a pleasant theory, but unfortunately waivers as a rule are quite ineffective in warding off liability: it is an axiom of the law that one cannot waive the consequences of another person's negligence. The reason for this rule is very basic to our theory of law: were it not the case, persons could easily be coerced into taking unreasonable risks without any recourse.

The use of the waiver is an ethical as well as legal question. Notwithstanding the lack of enforceability of a waiver, some argue that its use acts as a *deterrent* against claims. But should an institution attempt to shield itself in this manner, and indeed is such false protection in the interest of the school? The answer should be resoundingly in the negative, not only

because of its inherent deception but its likelihood of lulling the institution itself into a false sense of security. The use of waivers should be abjured, as surely as a school would avoid any other form of academic deception.

That is not to say that a student cannot accept *some* risk in undertaking a co-op assignment. A person is free to assume *known, reasonable* risks, and in doing so relieves the other party for the consequences of being harmed by those risks. A college football player assumes the risk of being pulverized by the opposing side: that is a reasonable and foreseeable risk. However, if that same student is issued a defective helmet and suffers a concussion as a result of that defect, there is *no* assumption of risk and the institution may be held liable for the injury: the assumed risk in playing football does *not* include being issued defective equipment; therefore, injuries caused by that defect are not assumed by the player. Similarly, a co-op student who works in an electronics plant might assume the risk of slight burns from a soldering iron, but not the risk of being electrocuted by that iron because it was defectively insulated.

One area where the institution could well be held liable for injuries to a student arises when the injury is the result of a *characteristic of the student* that is known to the school but not disclosed to the employer. Thus, a student who is known to be asthmatic probably ought not be allowed to work in a flour mill: even if the student wants to do that work, the risk is likely to be too great. The school has an obligation to protect the student against his or her own lack of judgment, although that responsibility declines in direct proportion to the age of the student: the responsibility is greatest for the younger student, and much less for the returning adult. The institution does, however, have an obligation to apprise the student of the risk that his or her own condition may contribute to the situation, regardless of age.

Of course, the converse of this is the right of the student not to disclose facts that should limit his or her participation in a particular work activity and require the school to keep them private. However, while a school is precluded under federal law from barring a student from taking part in any part of its program because of a physical or mental disability, it is fully within its rights to limit a student's participation to the extent that the disability poses an unreasonable risk to the student or to others. A co-op application may therefore ask whether there are any limitations on the student's ability to perform any kinds of work or specified activities. While that information cannot be used to *exclude* the student from the program, it can (and indeed must) be used to find the student a *suitable* placement.

Injury or harm caused *by* the co-op student is another area of concern. Here the school has a very strong ethical obligation in addition to a legal

one: if it knows something about the student that should bear on his or her ability to safely perform a particular task, and yet fails to disclose that fact to an employer, then the school could be held liable for the injuries or harm to others that arise from it. For example, if a student is known to be susceptible to seizures, it would be unwise in the extreme to allow the student to be assigned to a co-op placement that involves the operation of motor vehicles. Again, the right of the student to protect his or her privacy must be respected, but against that must be weighed the obligation of the institution to protect not only the student but also the public against harm. The student can rightfully require that such information be kept confidential by the school, but the school can similarly decline to place the student in a situation where his or her disability would pose a threat.

Most risks can be protected against through commercial insurance, and enough has been written about insurance policies for co-op placements and internships in general not to require taking up space in this article. An oft-used alternative to insurance does merit attention: indemnification agreements. Indemnification is simply another form of insurance, but instead of having a commercial insurance company pay for the loss, an indemnification agreement requires another entity to do so. It is common for schools to ask employers to indemnify them against risks of loss arising out of the co-op placement, and vice versa.

Indemnification agreements can be perfectly valid and binding (if properly written), but they often suffer from one fatal flaw. An indemnification agreement is like hiring a bodyguard: it is useful only to the extent the bodyguard is able to ward off the attackers. If the indemnifying entity has little resources behind it (as may be the case with a community group or marginal business), the existence of an indemnification agreement may prove small comfort if a suit is filed. Indemnification agreements thus should be entered into not only with care as to their wording but also with a view towards the ability of the indemnifying entity to protect against an anticipated loss. Note also that most liability insurance policies *include* losses arising out of indemnification agreements.

Civil Rights

In the previous sections the rights of and limitations upon students with physical or mental disabilities to take part in co-op programs were discussed. It is here that there may be a considerable division between the legal and ethical imperatives imposed upon the institutions and those which employers may follow.

Federal law is clear in forbidding institutions from depriving students of access to their programs on the basis of race, sex, or handicap (and to

some extent age as well). But some employers may face a reverse situation: those that have an affirmative action plan that calls for the hiring of a certain number of minorities or women or other protected classes have a quite different imperative. For example, it is not uncommon for an employer to tell a school that it is seeking *only* women (or minorities). Yet the school is precluded from excluding males (or non-minorities) from participation in the program, *and access to that particular placement*, on the basis of race or sex. It must be stressed that if the employer states a *preference*, *encourages* or *invites applications* from minorities and women, that does *not* create a problem for the institution. It is only when the employer flatly states that it will *only* consider students on the basis of a proscribed category that a problem arises. While few would argue with the proposition that no school should send students to employers who will accept only white males, the converse problem is very real and potentially of equal seriousness. The law is clear: the presence of a race- or sex-conscious affirmative action plan on the part of an employer does *not* relieve an institution of the obligation to afford *its* students equality of access.

Handicapped students create a different and more difficult problem. While race can never be a bona fide occupational qualification, and sex only rarely, handicaps can certainly restrict the ability of students to perform certain work. Federal law does require schools to *reasonably accommodate* the needs of handicapped students, and this extends to affording them the opportunity to take part in cooperative education programs. However, this does not mean that every handicapped student should be able to fill every placement. Thus, an institution would be perfectly within its rights in declining to place a blind student as a proofreader in a publishing house. However, the school is under an obligation to make a serious effort to find that student a suitable placement, and to require the employers with whom it works to make reasonable accommodation to the needs of its handicapped students.

Conclusion

Cooperative education is not just employment, any more than it is only instruction. It is an amalgam of the two worlds, and as such it carries with it the legal and ethical consequences of both. At times they are in conflict, with the rights and responsibilities of the institution, the employer and the student at odds with each other. It is the obligation of the program coordinators at the school *and* at the work site to see to it that those conflicting rights and responsibilities are rationalized, as it is the obligation of the participant to carry out responsibly his or her duties as both a student and

an employee.

While cooperative education has been a fixture of American higher education for most of this century, it is only now coming sufficiently into the mainstream of the academic community to demand the attention it has long deserved. That attention must include a resolution of some of the vexing issues of the interface between work and learning that cooperative education so sharply delineates.