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The
LAW *of*
HIGHER
EDUCATION

ESSENTIALS FOR

**LEGAL AND
ADMINISTRATIVE
PRACTICE**

The Law of Higher Education

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The Law of Higher Education

Essentials for Legal and
Administrative Practice

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Essentials for Legal and Administrative Practice

The authors, in cooperation with the publisher, have made arrangements for two types of periodic updates for this book. First, the National Association of College and University Attorneys (NACUA) has generously agreed to host a website for this book to provide periodic postings of new developments and clarifications that update and supplement the book. This website is available to all readers and may be accessed through the NACUA website <https://www.nacua.org/resource-library/resources-by-type/the-law-of-higher-education>. These updating services are intended as a response to the law's dynamism—to the rapid and frequent change that occurs as courts, legislatures, government agencies, and private organizations develop new requirements, revise or eliminate old requirements, and devise new ways to regulate and influence institutions of higher education.

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Much as it takes a village to raise a child (a saying of obscure origin), it takes an “academical village” (Thomas Jefferson’s phrase) to raise a book—at least a book such as this that arises from, and whose purpose is to serve, a national (and now international) academic community. This book is dedicated to all those members of our academical village, especially the instructors and students, who in numerous and varied ways have helped raise this book from its origins through many subsequent versions, and to all those members who will face the great challenges of law and policy that will shape higher education’s future.

Preface

Operating the colleges and universities of today presents a multitude of challenges for their leaders and personnel. Often the issues they face involve institutional policy, but with continually increasing frequency they have legal implications as well. For example:

- A staff member may decide to become a whistleblower and assert that another college employee is violating the law. If the complaining staff member's performance has been problematic, and "just cause" exists for dismissal, may the college discharge the whistleblowing staff member?
- A tenured faculty member may have been accused of sexually harassing a student by requiring the student to complete a project that the student finds offensive. What standards and processes should be used to determine whether the faculty member should be discharged, disciplined, or reprimanded?
- A student religious organization may approach the dean of students seeking recognition or an allocation from the fund for student activities. If membership is limited to students of a particular faith, or if the student organization does not admit gays or lesbians, how should the administration respond?
- A group of students petitions the administration to develop a "hate speech" code because they believe it will reduce the number of bias incidents on campus. Can a public institution enforce such a provision?
- A wealthy alumna may call the president and offer to make a multi-million dollar donation for a building to be named for a controversial political figure. Should the president accept the donation and follow the potential donor's wishes?

To assist college administrators and their counsel, and students and instructors who wish to study, research, or teach about issues such as these, and innumerable others, we have prepared this book. *The Law of Higher Education: Essentials for Legal and Administrative Practice* provides foundational information, in-depth analysis, and practical suggestions on a wide array of legal issues faced by public and private institutions. The discussions draw on pertinent court opinions, constitutional provisions, statutes, administrative regulations, and related developments. In order to enhance readability and keep the book a manageable size, we have only occasionally included text or footnote citations to resources for further study and research, such as selected journal articles, books, and websites. We have, however, included a bibliography of such resources at the end of this book.

How the Book Was Developed

The precursor to this volume, *The Law of Higher Education* treatise, first published in 1978, has, for over five decades, discussed and analyzed many of the most salient legal issues facing colleges and universities. The law has changed substantially over those fifty-odd years, and the law and many other developments have changed colleges and universities in ways too numerous to mention. At this point, nearly midway through the third decade of the twenty-first century, we have decided to combine the book's original function as a treatise with an additional focus on preparing students of higher education law for current and future challenges as they provide legal advice to institutions of higher education or serve in an administrative role.

Guided by our own experiences in serving in academic leadership roles and in advising higher education clients over many years, we have selected the topics that we believe are of greatest importance and interest to higher education counsel, administrators, and students of higher education law and their instructors. We have given primary consideration to the significance of the topic for the development of higher education law and policy, the topic's currency or timelessness for administrators of colleges and universities and their legal counsel, and its usefulness in illustrating particular legal problems or the application of particular legal principles. The issues we have emphasized for each topic are usually ones that administrators and their legal advisors, faculty members, or students could encounter at virtually any institution of higher education in the country (or, sometimes, in the world). In developing these issues, we have focused not only on the applicable law but also on pertinent policy considerations and on implications for practice.

We had to make difficult choices about which topics to omit or to treat much less expansively than we would have liked (and they would have merited) in order to keep the book to a single volume. For example, we devoted considerable attention to institutional liability for tort claims, faculty employment issues, academic freedom, student affairs, and academic issues concerning students.

However, we omitted many of the topics and discussions involving the employment of administrators and staff members. We also focused only briefly on government regulation of higher education, providing overviews of each level of government and illustrative examples of regulatory activities at each level. For the federal government, for example, we retained a brief discussion of federal copyright law and a discussion of federal civil rights laws (such as Title IX) prohibiting discrimination in programs that receive federal funding. Similarly, we focused briefly on legal and policy issues related to private educational associations, in particular the American Association of University Professors (AAUP), the accrediting agencies, and the intercollegiate athletics associations, and on college and university relationships with the business world—all of which could fill several chapters, if not another book. But we retained overviews and illustrative examples for each of these topics. We have updated the content from previous editions of *The Law of Higher Education* to account for the most important developments occurring as of the press deadline for this book. In addition, we have prepared study aids designed specifically for students of higher education law and their instructors, and integrated them into this book. These enhancements include the following:

- Introductory materials, titled “General Introduction: The Study of Higher Education Law,” that lay the foundation for, and facilitate the study of, the subject matter, and also include a section providing guidance for students who do not have background or training in the law
- An appendix (Appendix B) that provides an overview of the American system of courts and highlights key distinctions between federal and state courts, and between trial and appellate courts
- Another appendix (Appendix C) that provides practical guidelines for reading and analyzing judicial opinions
- Another appendix (Appendix D) that presents a glossary of legal terms used in this book
- Overviews at the beginning of chapters that introduce the topics and concepts to be addressed in each chapter
- Figures spread throughout the book that illustrate particular legal concepts and distinctions

In addition to these study aids that are incorporated into this book, we have also prepared a separate volume of edited cases and practice problems, which is available to instructors for distribution to students. (See “Notice to Instructors” in the front matter.)

As did previous versions of *The Law of Higher Education*, this book covers all of nonprofit *postsecondary* education—from the large state university to the small private liberal arts college, from the graduate and professional school to the community college and vocational and technical institution, and from the traditional campus-based program to the innovative off-campus or multistate

program, and to online learning as well. The book also reflects the same perspective as the earlier editions on the intersection of law and education. As described in the preface to the first edition:

The law has arrived on the campus. Sometimes it has been a beacon, at other times a blanket of ground fog. But even in its murkiness, the law has not come “on little cat feet,” like Carl Sandburg’s “Fog”; nor has it sat silently on its haunches; nor will it soon move on. It has come noisily and sometimes has stumbled. And even in its imperfections, the law has spoken forcefully and meaningfully to the higher education community and will continue to do so.

Organization and Content of the Book

We have organized this book into twelve chapters. These chapters are in turn organized into five parts: (1) Perspectives and Foundations; (2) The College and Its Governing Board and Staff; (3) The College and Its Faculty; (4) The College and Its Students; and (5) The College and the Outside World. Each chapter is divided into numerous sections and subsections with their own titles.

Chapter 1 provides a framework for understanding and integrating what is presented in subsequent chapters and a perspective for assimilating future legal developments. Chapter 2 addresses foundational concepts concerning legal liability, preventive law, and the processes of litigation and alternative dispute resolution. Chapters 3 through 10 develop the legal concepts and issues that define the *internal* relationships among the various members of the campus community and address the law’s impact on particular roles, functions, and responsibilities of students, faculty members, and trustees and administrators. Chapter 11 is concerned with the postsecondary institution’s *external* relationships with government at the federal, state, and local levels. This chapter examines broad questions of governmental power and process that cut across all the *internal* relationships and administrative functions considered in Chapters 3 through 10. Chapter 12 also deals with the institution’s *external* relationships, but the relationships are those with the private sector rather than with government. This chapter explores the various national and regional education associations with which postsecondary institutions interact, as well as the various research ventures that institutions engage in with private entities from the commercial world.

Prior to the first chapter, we have included a general introduction with six sections. After the last chapter, we have included a bibliography of resources for research and independent study, as well as four appendixes containing various study aids.

A Note on Nomenclature

The book uses the terms “higher education” and “postsecondary education” to refer to education that follows a high school (or K–12) education. Usually, these terms are used interchangeably; but occasionally “postsecondary education” is

used as the broader of the two terms, encompassing formal post-high school education programs whether or not they build on academic subjects studied in high school or are considered to be “advanced” studies of academic subjects. Similarly, this book uses the terms “higher education institution,” “postsecondary institution,” “college,” and “university” to refer to the institutions and programs that provide post-high school (or post-K-12) education. These terms are also usually used interchangeably; but occasionally “postsecondary institution” is used in the broader sense just suggested, and occasionally “college” is used to connote an academic unit within a university or an independent institution that emphasizes two-year or four-year undergraduate programs. The context generally makes clear when we intend a more specific meaning and are not using the above terms interchangeably.

The term “public institution” generally means an educational institution operated under the auspices of a state, county, or occasionally a city, government. The term “private institution” means a nongovernmental, nonprofit, or proprietary educational institution. The term “religious institution” encompasses a private educational institution that is operated by a church or other sectarian organization (a “sectarian institution”), or is otherwise formally affiliated with a church or sectarian organization (a “religiously affiliated institution”), as well as an institution that has no affiliation with an outside religious organization but nevertheless proclaims a religious mission and is guided by religious values.

Recommendations for Using This Book and Keeping Up-to-Date

There are some precautions to keep in mind when using this book. The legal analyses throughout the book, and the practical suggestions, are not adapted to the law of any particular state or to the circumstances prevailing at any particular postsecondary institution. The book is not a substitute for the advice of legal counsel, nor a substitute for further research into the particular legal authorities and factual circumstances that pertain to any legal problem that an institution, administrator, student, or faculty member may face in real life. Nor is the book necessarily the latest word on the law. There is a saying among lawyers that “the law must be stable and yet it cannot stand still” (Roscoe Pound, *Interpretations of Legal History* 1923, p. 1), and the law moves especially fast in its applications to postsecondary education. Thus, we suggest that instructors and students keep abreast of ongoing developments concerning the topics and issues in this book. Various aids (described next) are available for this purpose.

First, we maintain a website, hosted by the National Association of College and University Attorneys (NACUA), Washington, DC. (www.nacua.org), on which we announce or post pertinent new developments, keying them to this book. For further information on the website and the supplements, see page vii in the front matter of this book.

For news reporting of current events in higher education generally, but particularly for substantial coverage of legal developments, instructors or students

may wish to consult the *Chronicle of Higher Education*, published weekly in hard copy and daily on weekdays online (<https://www.chronicle.com>); or *Inside Higher Ed*, published daily on weekdays online (<https://insidehighered.com>).

Other resources will be helpful not only for keeping abreast of recent developments but also for identifying pertinent research. The database of the Educational Resources Information Center (ERIC) (<https://eric.ed.gov>), sponsored by the US Department of Education, contains books, monographs, research reports, conference papers and proceedings, bibliographies, legislative materials, dissertations, and journal articles on higher education. In addition, the IHELG monograph series published each year by the Institute for Higher Education Law and Governance, University of Houston Law Center, provides papers on a wide variety of research projects and timely topics.

Several specialty journals provide extended legal analysis on recent developments as well as classical concerns. The *Journal of College and University Law*, published by the National Association of College and University Attorneys (NACUA), focuses exclusively on postsecondary education. Several other journals cover legal issues in postsecondary education as well as in elementary and secondary education: the *Journal of Law and Education* is published by the University of South Carolina Joseph F. Rice School of Law; the *BYU Education & Law Journal* is published by the McKay School of Education and J. Reuben Clark Law School at Brigham Young University; and *West's Education Law Reporter* is published by Thomson West and publishes articles on education law, including postsecondary education, along with publishing selected state and federal court opinions.

Endnote

The goal of this book is to provide a base for the debate concerning law's role on campus, for effective relationships between administrators and their counsel, for the effective teaching and learning of higher education law, and for improved understanding between the academic and legal worlds. The challenge of our age is not to remove the law from the campus or to marginalize it. The law is here to stay, and it will be more a beacon and less a fog. The challenge is for law and higher education to accommodate one another, preserving the best values of each for the mutual benefit of both. Just as academia benefits from the understanding and respect of the legal community, so law benefits from the understanding and respect of academia.

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The National Association of College and University Attorneys (NACUA) has hosted a website for several years on which we could post updates to previous editions of *The Law of Higher Education*. Updates to this book will be posted twice yearly. The website also contains our *Instructor's Manual* for faculty members who adopted this book as a classroom text. NACUA and its prior CEO, Kathleen Curry Santora, have supported our work in countless ways for over a decade, and we are most grateful to Kathleen and her staff for their support and encouragement, as we are to Ona Alston Dosunmu, NACUA's current CEO, as well as Natalie Sinacope, Deputy CEO and Executive Director of Legal Resources and Jacquelynn Nichole Rich Fredericks, Senior Legal Resources Attorney. NACUA publications, particularly *The Journal of College and University Law* and *NACUA Notes*, also provided us with important information and guidance in the development of most sections of this book.

Our spouses and families once again tolerated the years of intrusion that successive editions of “the book” have imposed on our personal lives. They encouraged us when this book seemed too overwhelming to ever end. And they looked forward (usually patiently) to the time when the book would finally be finished—and we would get a little breathing space before any of us dare mention the forbidden words “the next edition.”