

Contents

Notice to Instructors v

Notice of Web Site and Periodic Supplements for the *Student Version* vii

Preface xvii

Crosswalk for the *Student Version* and *The Law of Higher Education*,
4th Edition xxv

Acknowledgments xxxiii

The Authors xxxvii

General Introduction: The Study of Higher Education Law 1

A. The Universe of Higher Education Law 1

B. The Governance of Higher Education 2

C. Sources of Higher Education Law 3

D. The Legal Relationships Within Institutions of Higher Education 4

E. The Law/Policy Distinction 6

F. The U.S. Legal System as It Relates to Higher Education Law 6

PART ONE PERSPECTIVES AND FOUNDATIONS 9

1 Overview of Higher Education Law 11

1.1 How Far the Law Reaches and How Loud It Speaks 11

1.2 Evolution of Higher Education Law 16

1.3	The Governance of Higher Education	18
1.3.1	<i>Basic concepts and distinctions</i>	18
1.3.2	<i>Internal governance</i>	20
1.3.3	<i>External governance</i>	21
1.4	Sources of Higher Education Law	23
1.4.1	<i>Overview</i>	23
1.4.2	<i>External sources of law</i>	24
1.4.2.1	<i>Federal and state constitutions</i>	24
1.4.2.2	<i>Statutes</i>	24
1.4.2.3	<i>Administrative rules and regulations</i>	25
1.4.2.4	<i>State common law</i>	26
1.4.2.5	<i>Foreign and international law</i>	26
1.4.3	<i>Internal sources of law</i>	27
1.4.3.1	<i>Institutional rules and regulations</i>	27
1.4.3.2	<i>Institutional contracts</i>	27
1.4.3.3	<i>Academic custom and usage</i>	28
1.4.4	<i>The role of case law</i>	30
1.4.5	<i>Researching case law</i>	30
1.5	The Public-Private Dichotomy	31
1.5.1	<i>Overview</i>	31
1.5.2	<i>The state action doctrine</i>	33
1.5.3	<i>Other bases for legal rights in private institutions</i>	41
1.6	Religion and the Public-Private Dichotomy	43
1.6.1	<i>Overview</i>	43
1.6.2	<i>Religious autonomy rights of religious institutions</i>	44
1.6.3	<i>Government support for religious institutions</i>	46
1.6.4	<i>Religious autonomy rights of individuals in public postsecondary institutions</i>	53
1.7	The Relationship Between Law and Policy	55
2	Legal Planning and Dispute Resolution	60
2.1	Legal Liability	60
2.1.1	<i>Overview</i>	60
2.1.2	<i>Types of liability</i>	61
2.1.3	<i>Agency law</i>	61
2.1.4	<i>Enforcement mechanisms</i>	62
2.1.5	<i>Remedies for legal violations</i>	63
2.1.6	<i>Avoiding legal liability</i>	63
2.1.7	<i>Treatment law and preventive law</i>	64
2.2	Litigation in the Courts	65
2.2.1	<i>Overview</i>	65
2.2.2	<i>Judicial (academic) deference</i>	66
2.2.3	<i>Managing litigation and the threat of litigation</i>	72
2.3	Alternate Dispute Resolution	73
2.3.1	<i>Overview</i>	73
2.3.2	<i>Types of ADR</i>	74
2.3.3	<i>Applications to colleges and universities</i>	77

PART TWO THE COLLEGE AND ITS GOVERNING BOARD AND STAFF 81

3 The College's Authority and Liability 83

3.1 The Question of Authority 83

3.1.1 Overview 83

3.1.2 Trustee authority 87

3.2 Institutional Tort Liability 87

3.2.1 Overview 87

3.2.2 Negligence 91

3.2.2.1 Premises liability 93

3.2.2.2 Liability for injuries related to on-campus instruction 95

3.2.2.3 Liability for injuries in off-campus courses 96

3.2.2.4 Liability for cocurricular and social activities 99

3.2.2.5 Student suicide 101

3.2.2.6 Liability for injuries related to outreach programs 103

3.2.3 Educational malpractice 104

3.3 Institutional Contract Liability 105

3.4 Institutional Liability for Violating Federal Constitutional Rights (Section 1983 Liability) 109

4 The College and Its Employees 117

4.1 Overview of Employment Relationships 117

4.2 Employment Contracts 119

4.2.1 Defining the contract 119

4.2.2 The at-will doctrine 120

4.3 Collective Bargaining 121

4.3.1 Overview 121

4.3.2 The public-private dichotomy in collective bargaining 121

4.3.3 Collective bargaining and antidiscrimination laws 122

4.4 Personal Liability of Employees 124

4.4.1 Overview 124

4.4.2 Tort liability 125

4.4.2.1 Overview 125

4.4.2.2 Negligence 126

4.4.3 Contract liability 127

4.4.4 Constitutional liability (personal liability under Section 1983) 128

4.4.4.1 Qualified immunity 128

4.4.4.2 Issues on the merits: State-created dangers 132

4.5 Employment Discrimination 135

4.5.1 Overview: The interplay of statutes, regulations, and constitutional protections 135

4.5.2 Sources of law 137

4.5.2.1 Title VII 137

4.5.2.2 Equal Pay Act 147

4.5.2.3 Title IX 148

4.5.2.4 Section 1981 149

4.5.2.5 Americans With Disabilities Act and Rehabilitation Act of 1973 150

- 4.5.2.6 *Age Discrimination in Employment Act* 155
 - 4.5.2.7 *Constitutional prohibitions against employment discrimination* 157
 - 4.5.2.8 *Executive Orders 11246 and 11375* 160
 - 4.5.2.9 *State law prohibitions on sexual orientation discrimination* 161
 - 4.6 *Affirmative Action* 167
 - 4.6.1 *Overview* 167
 - 4.6.2 *Affirmative action under Title VII* 169
 - 4.6.3 *Affirmative action under the equal protection clause* 173
 - 4.7 *Application of Nondiscrimination Laws to Religious Institutions* 177

PART THREE THE COLLEGE AND ITS FACULTY 183

5 Special Issues in Faculty Employment 185

- 5.1 *Overview* 185
- 5.2 *Faculty Contracts* 186
 - 5.2.1 *Overview* 186
 - 5.2.2 *Academic custom and usage* 189
 - 5.2.3 *Part-time faculty* 191
 - 5.2.4 *Contracts in religious institutions* 193
- 5.3 *Faculty Collective Bargaining* 197
- 5.4 *Application of Nondiscrimination Laws to Faculty Employment Decisions* 202
 - 5.4.1 *Overview* 202
 - 5.4.2 *Judicial deference and remedies for tenure denial* 202
- 5.5 *Affirmative Action in Faculty Employment Decisions* 209
- 5.6 *Standards and Criteria for Faculty Personnel Decisions* 213
 - 5.6.1 *General principles* 213
 - 5.6.2 *Terminations of tenure for cause* 215
- 5.7 *Procedures for Faculty Employment Decisions* 219
 - 5.7.1 *General principles* 219
 - 5.7.2 *The public faculty member's right to constitutional due process* 221
 - 5.7.2.1 *Nonrenewal of contracts* 222
 - 5.7.2.2 *Denial of tenure* 226
 - 5.7.2.3 *Termination of tenure* 229
 - 5.7.3 *The private faculty member's procedural rights* 235

6 Faculty Academic Freedom and Freedom of Expression 239

- 6.1 *General Concepts and Principles* 239
 - 6.1.1 *Faculty freedom of expression in general* 239
 - 6.1.2 *Academic freedom: Basic concepts and distinctions* 247
 - 6.1.3 *Professional versus legal concepts of academic freedom* 249
 - 6.1.4 *The foundational constitutional law cases* 251
 - 6.1.5 *External versus internal restraints on academic freedom* 255
 - 6.1.6 *"Institutional" academic freedom* 258

- 6.2 Academic Freedom in Teaching 260
 - 6.2.1 *In general* 260
 - 6.2.2 *The classroom* 260
 - 6.2.3 *Grading* 274
 - 6.2.4 *Private institutions* 277
- 6.3 Academic Freedom in Research and Publication 278
- 6.4 Academic Freedom in Religious Colleges and Universities 287

PART FOUR THE COLLEGE AND ITS STUDENTS 291

7 The Student/Institution Relationship 293

- 7.1 The Legal Status of Students 293
 - 7.1.1 *Overview* 293
 - 7.1.2 *The age of majority* 294
 - 7.1.3 *The contractual rights of students* 295
 - 7.1.4 *Student academic freedom* 302
 - 7.1.5 *Students' legal relationships with other students* 312
- 7.2 Admissions 317
 - 7.2.1 *Basic legal requirements* 317
 - 7.2.2 *Arbitrariness* 318
 - 7.2.3 *The contract theory* 319
 - 7.2.4 *The principle of nondiscrimination* 321
 - 7.2.4.1 *Race* 321
 - 7.2.4.2 *Sex* 324
 - 7.2.4.3 *Disability* 329
 - 7.2.4.4 *Immigration status* 335
 - 7.2.5 *Affirmative action programs* 338
 - 7.2.6 *Readmission* 358
- 7.3 Financial Aid 361
 - 7.3.1 *General principles* 361
 - 7.3.2 *Federal programs* 363
 - 7.3.3 *Nondiscrimination* 367
 - 7.3.4 *Affirmative action in financial aid programs* 369
- 7.4 Student Housing 374
 - 7.4.1 *Housing regulations* 374
 - 7.4.2 *Searches and seizures* 380
- 7.5 Campus Computer Networks 384
 - 7.5.1 *Freedom of speech* 384
 - 7.5.2 *Liability issues* 390
- 7.6 Campus Security 392
 - 7.6.1 *Security officers* 392
 - 7.6.2 *Protecting students against violent crime* 396
 - 7.6.3 *Federal statutes and campus security* 400
- 7.7 Other Support Services 402
 - 7.7.1 *Overview* 402
 - 7.7.2 *Services for students with disabilities* 403
 - 7.7.3 *Services for international students* 404

8	Rights and Responsibilities of Individual Students	407
8.1	Disciplinary and Grievance Systems	407
8.1.1	<i>Overview</i>	407
8.1.2	<i>Establishment of systems</i>	408
8.1.3	<i>Codes of student conduct</i>	410
8.1.4	<i>Judicial systems</i>	413
8.2	Disciplinary Rules and Regulations	416
8.2.1	<i>Overview</i>	416
8.2.2	<i>Public institutions</i>	417
8.2.3	<i>Private institutions</i>	418
8.2.4	<i>Disciplining students with psychiatric illnesses</i>	419
8.3	Grades, Credits, and Degrees	421
8.3.1	<i>Overview</i>	421
8.3.2	<i>Awarding of grades and degrees</i>	422
8.3.3	<i>Sexual harassment of students by faculty members</i>	429
8.3.4	<i>Evaluating students with disabilities</i>	446
8.3.4.1	<i>Overview</i>	446
8.3.4.2	<i>The concept of disability</i>	447
8.3.4.3	<i>Notice and documentation of disabilities</i>	449
8.3.4.4	<i>Requests for programmatic or instructional accommodations</i>	451
8.4	Procedures for Suspension, Dismissal, and Other Sanctions	458
8.4.1	<i>Overview</i>	458
8.4.2	<i>Public institutions: Disciplinary sanctions</i>	458
8.4.2.1	<i>Notice</i>	463
8.4.2.2	<i>Hearing</i>	464
8.4.3	<i>Public institutions: Academic sanctions</i>	467
8.4.4	<i>Private institutions</i>	470
8.5	Student Protests and Freedom of Speech	475
8.5.1	<i>Student free speech in general</i>	475
8.5.2	<i>The "public forum" concept</i>	477
8.5.3	<i>Regulation of student protest</i>	482
8.5.4	<i>Prior approval of protest activities</i>	487
8.5.5	<i>Posters and leaflets</i>	489
8.5.6	<i>Protests in the classroom</i>	491
8.6	Speech Codes and the Problem of Hate Speech	493
8.6.1	<i>Hate speech and the campus</i>	493
8.6.2	<i>The case law on hate speech and speech codes</i>	494
8.6.3	<i>Guidelines for dealing with hate speech on campus</i>	501
8.7	Student Files and Records	503
8.7.1	<i>Family Educational Rights and Privacy Act (FERPA)</i>	503
8.7.2	<i>State law</i>	507
9	Rights and Responsibilities of Student Organizations and Their Members	513
9.1	Student Organizations	513
9.1.1	<i>The right to organize</i>	513
9.1.2	<i>The right not to join, or associate, or subsidize</i>	518

- 9.1.3 *Mandatory student activities fees* 519
- 9.1.4 *Principle of nondiscrimination* 525
- 9.1.5 *Religious activities* 529
- 9.2 *Fraternities and Sororities* 536
 - 9.2.1 *Overview* 536
 - 9.2.2 *Institutional recognition and regulation of fraternal organizations* 536
 - 9.2.3 *Institutional liability for the acts of fraternal organizations* 542
- 9.3 *The Student Press* 546
 - 9.3.1 *General principles* 546
 - 9.3.2 *Mandatory student fee allocations to student publications* 547
 - 9.3.3 *Permissible scope of institutional regulation* 549
 - 9.3.4 *Obscenity* 553
 - 9.3.5 *Libel* 554
 - 9.3.6 *Obscenity and libel in private institutions* 558
- 9.4 *Athletics Teams and Clubs* 558
 - 9.4.1 *General principles* 558
 - 9.4.2 *Athletes' due process rights* 559
 - 9.4.3 *Athletes' freedom of speech* 560
 - 9.4.4 *Pertinent statutory law* 563
 - 9.4.5 *Athletic scholarships* 564
 - 9.4.6 *Sex discrimination* 568
 - 9.4.7 *Discrimination on the basis of disability* 578
 - 9.4.8 *Drug testing* 580
 - 9.4.9 *Tort liability for athletic injuries* 585

PART FIVE THE COLLEGE AND THE OUTSIDE WORLD 591

10 The College and Government 593

- 10.1 *Local Government Regulation* 593
 - 10.1.1 *Overview of local government regulation* 593
 - 10.1.2 *Trespass statutes and ordinances, and related campus regulations* 598
- 10.2 *State Government Regulation* 604
 - 10.2.1 *Overview* 604
 - 10.2.2 *State provision of public postsecondary education* 607
 - 10.2.3 *State chartering and licensure of private postsecondary institutions* 609
- 10.3 *Federal Government Regulation* 613
 - 10.3.1 *Overview of federal constitutional powers over education* 613
 - 10.3.2 *Overview of federal regulation of postsecondary education* 614
 - 10.3.3 *Regulation of intellectual property* 616
 - 10.3.3.1 *Copyright law* 616
- 10.4 *Federal Aid-to-Education Programs* 622
 - 10.4.1 *Functions and history* 622
 - 10.4.2 *Legal structure of federal aid programs* 623
- 10.5 *Civil Rights Compliance* 625
 - 10.5.1 *General considerations* 625

- 10.5.2 Title VI 626
- 10.5.3 Title IX 635
- 10.5.4 Section 504 637
- 10.5.5 Coverage of unintentional discriminatory acts 640

11 The College and External Private Entities 644

- 11.1 Education Associations 644
 - 11.1.1 Overview of the education associations 644
 - 11.1.2 Accrediting agencies 646
 - 11.1.3 Athletic associations and conferences 648
- 11.2 Business Partners 649
 - 11.2.1 Research collaboration 649
 - 11.2.2 The research agreement 652

Appendices

- A. Constitution of the United States of America: Provisions of Particular Interest to Postsecondary Education 659
- B. The American Court System 663
- C. Reading and Analyzing Court Opinions 667
- D. Glossary of Legal Terms 671

Bibliography 679

Statute Index 689

Case Index 693

Subject Index 703