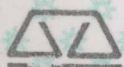


NACUA

THE LAW OF HIGHER EDUCATION

1985-1990 UPDATE

William A. Kaplin
Barbara A. Lee



NATIONAL ASSOCIATION OF COLLEGE
AND UNIVERSITY ATTORNEYS

10/12/20
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PREFACE

This volume updates and supplements an earlier volume, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making (Second Edition, 1985) [hereinafter: "Second Edition"], published by Jossey-Bass, Inc., Publishers, 350 Sansome Street, San Francisco, California 94104-1310. The 1985-1990 Update covers developments from publication of the Second Edition through mid-1990, as well as some late-breaking developments through early November 1990. It includes all material of continuing relevance from the 1988 Update. This new Update will keep the Second Edition current until publication by Jossey-Bass of a planned Third Edition.

We have included discussions of court opinions, statutes, regulations, and related developments, as well as cites to selected law journal articles, books, and other new resources. In selecting recent developments for inclusion, we have considered, primarily, the development's significance for higher education; the development's fit with the subject matter and themes of the Second Edition or our planned directions for the Third Edition; and the development's usefulness for filling specific gaps in, clarifying, or updating specific points in the Second Edition. When selecting cases, we have also considered the completeness and helpfulness of the court's reasoning in the case.

The 1985-1990 Update is divided into two parts. Part I is organized, as was the earlier update, to parallel the Second Edition. Each recent development has been keyed to a particular section or subsection of the Second Edition. Whenever a development modifies or extends a

particular matter already discussed in the Second Edition, a specific page reference to the second edition is provided in brackets: e.g., "[pp. 122-123]." Similarly, whenever a development can be better understood with reference to some background material in the Second Edition, a reference to the pages or subsection of the Second Edition is provided in brackets. Internal cross-references to other sections in Part I of the Update are also used as appropriate: e.g., "sec. 3.7. below" or "sec. 2.3.3. above."

Part II of the 1985-1990 Update includes excerpts from a series of annual articles surveying court cases important to higher education, published in the Journal of College and University Law and authored by Professor Fernand N. Dutile, the Journal's editor. Professor Dutile's learned analysis of these cases has been included as a special feature of this Update in order to supplement and extend our own commentary. The excerpts from Professor Dutile's articles are keyed to the various sections and subsections in Part I and are preceded by citations to the particular Journal volume and pages that contain the excerpt. Internal cross-references to these Part II excerpts are included throughout Part I: e.g., "see Part II, this section, 14 JCUL at 352."

Instructors wishing to order multiple copies of this Update for use as a classroom text should contact Linda Henderson, NACUA, Suite 620, One Dupont Circle, Washington, D.C. 20036, for information on quantity discounts. An instructional supplement (Cases, Problems, and Materials: An Instructional Supplement to The Law of Higher Education (2nd ed. 1989)) is also available for instructor and student use in conjunction with the Second Edition and this Update; inquiries may be made with either of the authors.

As with the Second Edition itself [p. xii], the 1985-1990 Update is not intended as a substitute for the advice of legal counsel. Nor, in a problem-solving context, is it intended as a substitute for research into the primary legal resources or for individualized study of each legal problem's specific circumstances.

November 1990

William A. Kaplin

The Catholic University of America
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We also thank Professor Fernand N. Dutile and NACUA for their kind permission to use the material contained in Part II of this Update, and for their assistance in facilitating the format we have created for these materials.

In addition, we extend our thanks to Mary Quealy, formerly of the law faculty office at Catholic University, for her expert assistance in preparing the predecessor 1988 Update; to Anne Church at the School of Law, Wake Forest University and Dorothy Friedman at the Institute of Management and Labor Relations, Rutgers University, for their equally expert and helpful work in preparing the manuscript for this Update; to Barbara Kaplin, patient spouse of one of the authors, for her conscientious proofreading assistance down the homestretch; to Sally Irvin, Associate Director of Computer Services, Wake Forest, for other "homestretch" assistance assembling the final Wordperfect documents; and to Kevin Lynch, Douglas Snyder, and Kelly Breuer, former law students at Catholic University, and Barbara Allen and Jesse Bone, law students at Wake Forest, for their research assistance with this Update. Special thanks are due Linda Henderson of NACUA, who shepherded the project through to completion in a consistently professional manner.

TABLE OF CONTENTS

Preface	i
Acknowledgments	iv
I. Overview of Postsecondary Education Law	1
1.1. How Far the Law Reaches and How Loud It Speaks: Some Illustrative Cases	1
1.2. Evolution of the Law Relating to Postsecondary Education	4
1.4. The Public-Private Dichotomy	7
1.4.2. The state action doctrine	7
1.5. Religion and the Public-Private Dichotomy	9
1.6. Organizing the Postsecondary Institution's Legal Affairs	12
II. The College and Trustees, Administrators, and Agents .	13
2.2. Sources and Scope of Authority	13
2.2.1. Trustees	13
2.2.2. Other officers and administrators	15
2.3. Institutional Liability for Acts of Trustees, Administrators, and Other Agents	15
2.3.1. Institutional tort liability	15
2.3.1.1. Negligence	16
2.3.2. Institutional contract liability	21
2.3.3. Institutional federal civil rights liability	22

2.4.	Personal Liability of Trustees, Administrators, and Other Agents	29
2.4.1.	Personal tort liability	29
2.4.3.	Personal federal civil rights liability	32
2.5.	Institutional Management of Liability Risks	32
2.5.2.	Risk transfer	32
2.5.4.	Legal limits on authority to transfer risk	33
III.	The College and the Faculty	37
3.1.	The Contract of Employment	37
3.1.1.	Scope and terms of the contract	37
3.2.	Collective Bargaining	44
3.2.1.	The public-private dichotomy in collective bargaining	44
3.2.2.	Organization, recognition, and certification	44
3.2.3.	Bargaining unit eligibility of full-time faculty	49
3.2.4.	Bargainable subjects	51
3.2.7.	Collective bargaining and antidiscrimination laws	52
3.3.	Nondiscrimination in Employment	52
3.3.2.	Nondiscrimination under federal statutes and executive orders.	52
3.3.2.1.	Title VII	52
3.3.2.3.	Title IX	67
3.3.2.4.	Equal Pay Act	68
3.3.2.5.	Age Discrimination in Employment Act	70

3.3.2.6.	Rehabilitation Act of 1973, as amended by the Rehabilitation Act Amendments of 1974 (handicapped)	73
3.3.2.7.	Section 1981	75
3.3.4.	Affirmative action in employment	76
3.4.	Standards and Criteria for Faculty Personnel Decisions	80
3.4.1.	General principles	80
3.4.2.	Terminations of tenure for cause	81
3.5.	Procedures for Faculty Personnel Decisions	82
3.5.2.	The public faculty member's right to constitutional due process	82
3.5.2.1.	Nonrenewal of contracts	83
3.5.2.2.	Denial of tenure	84
3.5.2.3.	Termination of tenure	85
3.6.	Faculty Academic Freedom	86
3.6.1.	Background and general principles.	86
3.6.2.	Academic freedom in the classroom	88
3.6.3.	Academic freedom in institutional affairs	92
3.6.4.	Academic freedom in private life	94
3.6.5.	Administrators' authority over faculty academic freedom	94
3.6.6.	Protection of confidential academic information: "Academic freedom privilege"	95
3.7.	Staff Reduction Due to Financial Exigency and Program Discontinuance	101

IV. The College and the Students	103
4.1. The Legal Status of Students	103
4.1.3. The contractual rights of students	103
4.2. Admissions	106
4.2.1. Basic legal requirements	106
4.2.2. Arbitrariness	106
4.2.4. The principle of nondiscrimination	107
4.2.4.1. Race	107
4.2.4.2. Sex	113
4.2.4.3. Handicap	113
4.2.4.4. Age	115
4.2.5. Affirmative action programs	116
4.2.6. Readmission	117
4.3. Financial Aid	118
4.3.1. General principles	118
4.3.2. Federal programs	119
4.3.3. Nondiscrimination	124
4.3.4. Discrimination against nonresidents	124
4.3.5. Discrimination against aliens	125
4.3.6. Collection of student debts.	125
4.3.6.1. Federal bankruptcy law	125
4.3.6.3. Debt collection requirements in federal student loan programs	127
4.3.7. Related support services	129
4.4. Disciplinary Rules and Regulations	132
4.5. Grades, Credits, and Degrees	140

4.6.	Procedures for Suspension, Dismissal, and Other Sanctions	147
4.6.2.	Public institutions: Disciplinary sanctions	147
4.6.2.1.	Notice	147
4.6.2.2.	Hearing	147
4.6.3.	Public institutions: Academic sanctions	148
4.6.4.	Private institutions	149
4.7.	Student Protest and Demonstrations	150
4.7.2.	Regulation of student protest	150
4.8.	Student Organizations	154
4.8.1.	Right to organize	154
4.8.2.	Right not to organize	157
4.8.3.	Principle of nondiscrimination	158
4.9.	Student Press	160
4.9.2.	Permissible scope of regulation	160
4.9.3.	Obscenity	161
4.10.	Student Housing	161
4.10.1.	Housing regulations	161
4.10.2.	Searches and seizures	163
4.11.	Athletics	163
4.11.1.	General principles	163
4.11.2.	Sex discrimination	165
4.11.4.	Athletic associations and conferences	167
4.12.	Student Files and Records	167
4.12.1.	The Buckley Amendment	167

4.13.	Disciplinary and Grievance Systems	169
4.13.1.	Establishment of systems	169
4.13.2.	Codes of student conduct	169
4.14.	Campus Security	170
4.14.1.	Security officers	170
4.14.2.	Protection against violent crime on campus	172
V.	The College and the Community	175
5.2.	Zoning and Land Use Regulation	175
5.2.1.	Overview	175
5.3.	Local Government Taxation	176
5.3.2.	Property taxes	176
5.3.3.	Sales and admission taxes	177
5.4.	Student Voting in the Community	177
5.4.1.	Registering to vote	177
5.5.	Relations with Local Police	178
5.6.	Community Access to Institutional Property	178
5.6.4.	Soliciting and canvassing	178
5.6.4.1.	Commercial solicitation	178
5.7.	Community Activities of Faculty Members and Students	179
VI.	The College and the State Government	181
6.1.	General Background	181
6.2.	State Provision of Public Postsecondary Education	181

6.2.2.	Constitutionally based institutions	181
6.3.	State Chartering and Licensure of Private Postsecondary Institutions	183
6.3.1.	Scope of state authority	183
6.4.	State Regulation of Out-of-State Institutions	184
6.5.	Other State Regulatory Laws Affecting Postsecondary Education Programs	185
6.5.1.	Open meetings and public disclosure	189
6.5.3.	Unemployment compensation laws	193
6.5.4.	Workers' compensation laws	194
VII.	The College and the Federal Government	197
7.1.	Federal Constitutional Powers over Education	197
7.2.	Federal Regulation of Postsecondary Education	197
7.2.3.	Fair Labor Standards Act.	201
7.2.4.	Employee Retirement Income Security Act	201
7.2.5.	Employment discrimination laws	203
7.2.5.2.	Applicability to religious institutions	203
7.2.6.	Immigration laws	205
7.2.7.	Laws governing research on human subjects	208
7.2.8.	Copyright laws	209
7.2.9.	Patent laws	213
7.2.10.	Antitrust laws	214
7.3.	Federal Taxation of Postsecondary Education	214
7.3.1.	Income tax laws	214
7.3.2.	Social Security taxes	217

7.3.3.	Unemployment compensation taxes	217
7.4.	Federal Aid to Education Programs	218
7.4.1.	Distinction between federal aid and federal procurement	218
7.4.2.	Legal structure of aid programs	218
7.4.3.	Enforcing compliance with aid conditions . .	227
7.5.	Civil Rights Compliance	229
7.5.2.	Title VI	229
7.5.3.	Title IX	231
7.5.4.	Section 504	231
7.5.7.	Scope and coverage problems	233
7.5.7.2.	Coverage of unintentional discriminatory acts	233
7.5.7.4.	Scope of the phrase "program or activity."	233
7.5.8.	Administrative enforcement	234
7.5.9.	Other enforcement remedies	235
7.6.	Dealing with the Federal Government	236
7.6.1.	Handling federal regulations	236
VIII.	The College and the Accrediting Agencies	239
8.2.	Accreditation and the Courts	239
8.2.2.	State action doctrine	240
8.2.3.	Antitrust law	241
8.3.	Accreditation and the U.S. Department of Education	241
8.4.	Dealing with Accrediting Agencies	242

PART II 243

TABLE OF CASES 341

TABLE OF STATUTES 363

I

Overview

of

Postsecondary Education Law

Sec. 1.1. How Far the Law Reaches and How Loud It Speaks: Some Illustrative Cases

A plethora of legal and policy issues has confronted colleges and universities since 1985. Not only are institutions of higher education increasingly vulnerable to legal challenge for actions taken (or not taken), but new legal claims are being created by statutes and regulations or being recognized by the courts, and old claims are being given new interpretations.

Campus traditions are being modified, partly in response to legal challenges when such traditions have resulted in serious injury, death, or other illegal conduct such as discrimination. Hazing by fraternities and at military academies, for instance, has been challenged in court and addressed in new state statutes. All-male bastions, such as Virginia Military Institute and the Citadel, are being asked to admit women; litigation may force these military colleges to become co-educational.

The spread of AIDS has challenged institutions in numerous ways and has raised a variety of new legal issues, from tort liability to privacy rights to non-discrimination. Drug abuse problems also continue to affect