

Handbook *for* Student Law *for* Higher Education Administrators



REVISED
EDITION



JAMES OTTAVIO CASTAGNERA

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PETER LANG

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**Handbook *for* Student Law
for Higher Education
Administrators**



M. Christopher Brown II
GENERAL EDITOR

Vol. 9

The Education Management series is part of the Peter Lang Education list.
Every volume is peer reviewed and meets
the highest quality standards for content and production.



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INTRODUCTION: THE SOCIAL AND LEGAL ENVIRONMENT OF STUDENT ADMINISTRATION

Origins of the American System of Higher Education

Four distinct epochs or waves can be discerned in the history of higher education: In the 85 years between the Declaration of Independence and the Civil War, some 800 liberal arts colleges sprang up across the United States. A typical example is Franklin & Marshall College, which owes half its name to a modest amount of seed money donated by the great Benjamin Franklin in 1787. Another example is Case Western Reserve University, today a Research-One institution, which first saw the light of learning as Western Reserve Academy. "The undergraduate college took...the essential step necessary for a broad education for general citizenship.... These institutions were of a size and scale that could be created by a group of private individuals—not requiring great fortunes or state support" (Cox, 2000, p. 14).

The end of the Civil War until the turn of the last century was the era of the great land-grant institutions. This expansion of higher education led to the first shakeout. "By 1900, only 180 of those first 800 small colleges remained

active; larger, subsidized state universities consumed market share by offering more educational services, subsidized prices, and often more pragmatic and career-oriented curricula” (Cox, 2000, p. 14).

Around the turn of the last century, the third great wave broke upon the shores of higher learning. Wealthy industrialists, such as John D. Rockefeller (The University of Chicago), Andrew Carnegie (Carnegie Mellon University), Cornelius Vanderbilt (Vanderbilt University), and Leland Stanford (Stanford University) founded high-quality, private universities. The institutions were often world-class in their curricula, faculty, and architecture, importing many of these elements from their great European counterparts. Thus, with Chicago, “Cambridge inspired the architecture, while Berlin inspired the pedagogy and faculty structure” (Cox, 2000, p. 14).

Fast forward yet another 50 years and we see the GI Bill and the post-war technology boom, fueled in part by the Cold War, driving the creation of the “megaversity.” This term is commonly used to describe a variety of large institutions, all of which share at least the following characteristics: faculty numbering in the thousands and student bodies numbering in the tens of thousands; sprawling and/or multiple campuses containing a large number of undergraduate, graduate, and professional schools and colleges; and a large and cumbersome administrative bureaucracy overseeing these complex operations. (We have also seen the proliferation and maturation of the community college. However, this book, by and large, will focus principally upon four-year institutions, albeit some case citations will concern community colleges.)

American Higher Education Today

The fifth wave is breaking on global shores. “The age of the Internet and other new media forms is giving rise to a new wave of institution building, right before our eyes.... Ours is an extraordinary moment in history” (Cox, 2000, p. 17). What is it we may expect to observe and experience among the phenomena of this new era? Among the main indicia of this new wave are the following:

Some observers predict a shakeout of weaker institutions as the current expansion leads inevitably to a concomitant contraction. Others have noted the persistence of even the weakest among first-wave colleges, as the following article illustrates.

The Mice That Roar: Small, Sectarian Colleges Resist Efforts to Extinguish Them

By Jim Castagnera

The Greentree Gazette, May 2007

I first met Jim Noseworthy early in the present decade at a workshop on serving disabled students. The program was put on by the University of New Hampshire's extension division at a hotel outside Washington, D.C. Serendipity put the Doctor of Ministry, whose prominent proboscis fits his surname, at the same table as I. We lunched together and hit it off, and after that kept in sporadic contact.

In August 2003, after sharing a recent op-ed piece of mine with Jim, he wrote back to me, "I have left the United Methodist Board of Higher Education and Ministry and now serve as president of United Methodist-related Hiwassee College in Madisonville, Tennessee." His missive on Hiwassee College stationery continued, "I moved in February to a situation which is both challenging and delightful. I am glad to be back on campus and working with such marvelous individuals as we shape the future of this two-year college."

If the Southern Association of Colleges and Schools gets its way, Hiwassee College has no future.

SACS's Commission on Colleges is the accrediting body for higher education institutions in 11 southern states, including Tennessee. Senior Fellow Jon Fuller of the National Association of Colleges and Universities describes SACS as "the most rigid and bureaucratic of the six national accrediting organizations." He adds that SACS has a tough task, because, "The South has more fragile institutions as a percentage of its higher education stock than any other region of the country."

Absent the SACS *imprimatur* a college is cut off from federal financial aid funds. For a college like Hiwassee, whose fewer-than-500 rural students almost all rely on substantial financial aid, such a sanction is fatal. SACS, however, is finding that Hiwassee is hard to kill.

Hiwassee, which awards associate degrees, was first accredited by SACS in 1958. That accreditation was confirmed most recently in 2000. The Reaffirmation Committee noted that at the millennium Hiwassee had many "financial challenges." The committee's report cited deferred

maintenance, projected-revenue shortfalls, and inter-fund borrowing among those “challenges.” SACS required a follow-up report. When that document failed to meet the accreditor’s criteria, Hiwassee was issued a warning and required to submit yet another 12-month status report. In December 2002, following review of this second report, SACS placed Hiwassee on probation. The beleaguered college submitted its third report in December 2003. Meanwhile, a so-called Special Committee conducted a site visit to the Monroe County campus.

The college’s accreditation crisis came to a head on January 16, 2004, the date on a SACS letter which informed the Reverend Noseworthy and his staff, “With its upcoming review in December 2004, your institution will have exhausted its probationary status and its period of continued accreditation for good cause. At that time, the institution must be determined to be in compliance with all of the *Principles of Accreditation* or be removed from membership.” Yet another Special Committee visited Hiwassee in mid-October 2004. The committee’s report was damning. On December 4th Hiwassee defended itself at a Compliance Committee meeting, but the committee voted to remove accreditation. On February 24, 2005, an Appeals Committee affirmed academic capital punishment for Hiwassee.

However, reports of Hiwassee’s demise proved premature. The college took its case to the federal courts. On March 22, 2005, Judge Thomas Vartan of the U.S. District Court for Eastern Tennessee issued a temporary restraining order, restoring Hiwassee’s accreditation. “This is good news,” Rev. Noseworthy modestly understated this early victory. The case then was transferred to the federal court for Northern Georgia, home to SACS headquarters.

On February 5, 2007, following extensive pre-trial discovery and a hearing, Senior District Judge Owen Forrester issued his ruling. In many aspects his honor’s 18-page decision goes against Hiwassee. For example, he rejects the college’s contention that “the entanglement between the (U.S.) Department of Education and SACS in its role as an accrediting agency under the Higher Education Act” makes SACS a “state actor” subject to the 14th Amendment’s “due process” clause. On the other hand, Judge Forrester finds that SACS must be held to common-law principles of fair play.

Having so held, his honor goes on to conclude that a conflict of interest was created when Appeals Committee member Ann McNut suffered a family emergency and was replaced by Jimmy Goodson, a

voting member of the Commission on Colleges. Since he had already voted to withdraw Hiwassee's accreditation, ruled Judge Forrester, "Mr. Goodson did have a conflict of interest and should not have served on the appeals panel."

Comments President Noseworthy, "We have prevailed on one of the several issues of our case." However, Judge Forrester found in favor of SACS on many another issue. More ominous is the district judge's observation that "it is significant to the court that Hiwassee has never front-on challenged the ultimate decision of SACS that Hiwassee failed to come into compliance...." This bit of *dicta* may prefigure the ultimate outcome of the case, which remains pending as this article is written. On March 16th, Jim Noseworthy wrote to me, "We are awaiting additional action by the judge in the case...." With characteristic aplomb, reminiscent of his 2003 letter, he added, "Hiwassee is a great place to be!"

Hiwassee College is not the only great little place under fire for financial instability. SACS has also been gunning for Edward Waters College in Jacksonville. In 2005 the historically black institution, like Hiwassee, won an injunction in federal court, staving off implementation of the accrediting agency's decision to withdraw recognition. News photos depicted some of the school's 900 students marching with signs that said, "EWC must survive!" Fuller of NAICU commented, "A new chapter is opened. It's going to require accreditors to question some of their procedures."

Elsewhere it's not accreditors but donors who are putting pressure on the Lilliputians of our industry to reform or perish. For instance recent reports out of Omaha, Nebraska, tell of Howard L. Hawks, a major donor to both Midland Lutheran College and nearby Dana College, who has advised the two tiny schools to merge duplicative academic and administrative functions or lose his support.

These developments beg the question, "Do such small-enrollment, under-endowed private colleges have a place in the highly competitive, globalized higher education arena?" I asked that question of NAICU's Jon Fuller. He explained that from Eastern Kentucky's Pikesville College to New Jersey's Bloomfield College, these small schools serve local communities "where people grow up with a limited sense of what's possible." In other words, absent the Bloomfields, Pikevilles, and Hiwassees, many of these minority and/or rural youngsters would never go to college.

Fuller adds that both federal and accreditation standards use financial stability as a place-holder for quality education, since the latter is difficult to measure. “The fed doesn’t want to have to clean up if a college closes suddenly. What isn’t considered is that many of these schools have been around 100 or 150 years, and I doubt they were ever any less fragile than they are today. Yet they always have a hard time meeting such standards.”

I suggested to Fuller that the pluckiness of these colleges reminds me of the tiny nation in the Peter Sellers film, “The Mouse that Roared.” He retorted, “They remind me of bumble bees. Measure the wingspan and the bumble bee shouldn’t be able to fly. Since it does fly, there must be other factors we are failing to measure.”

With regard to the Hiwassees of our world, Fuller cited “deep loyalty” from alumni and “faith communities,” a willingness to sacrifice on the parts of administrators, faculty and even students, and—perhaps most significant where the likes of Jim Noseworthy and Hiwassee are concerned—“an ethic which says, attend to the needs of today and somehow tomorrow will take care of itself.”

Concludes Fuller, “At a time when the Spellings Commission is concerned with degree completion and eight Asian and European nations boast higher percentages of college graduates than the U.S., it’s hard to understand why anyone would want to mess with these colleges.”

Source: The Greentree Gazette, May 2007 (Reprinted with permission of The Greentree Gazette: The Business Magazine of Higher Education.)

In June 2009, the U.S. Department of Education reported that 114 private, non-profit colleges had failed the department’s financial-responsibility test at the close of fiscal 2008–09 (Blumenstyk, 2009). “Although not designed as such, failing the test can be an indicator that a college is in danger of not surviving” (Blumenstyk, 2009). When and if the shakeout is complete, higher education will not be populated exclusively by e-educators. Nor will the landscape of higher education boast only the largest and wealthiest brick-and-mortar institutions. Rather, as in the past, we should anticipate a mix of liberal arts colleges, land-grant universities, and wealthy private universities, including megaversities, co-existing in rationalized competition with the e-educators and other for-profit entrants of this 21st century wave of institution building.

Like Hiwassee and other small, under-funded sectarian colleges, many historically black institutions were in dire straits in 2013. On June 30, 2013, Saint Paul’s College, a historically black school founded in 1888 in Lawrenceville

(VA), closed its doors for good, a proposed merger with another school having fallen through.

American higher education is in the midst of a profound transformation. Some leaders in higher education contend that it is a mature industry, which must co-exist and compete in the global marketplace, while others argue that its primary role remains as ever a public responsibility to create good citizens.

For some, notably Harvard Business School's Clayton Christensen, the Saint Paul's College closure is merely the tip of the iceberg... or the crest of the fifth wave. Christensen has predicted that in 15 years (i.e., by 2028 or so), as many as 50% of all American colleges and universities could be in bankruptcy. How can this possibly be true? The Harvard messiah of disruptive innovation explains that for all its past centuries, higher education has had no "technological core." Consequently, the industry has been strapped to its physical locations. Disruption was extremely difficult.

For instance, an Ivy League wannabe could follow only one route: intensive investment in facilities, faculty, and the other indicia of a first-tier university. By contract, Christensen contends, today online learning is that missing core technology. Almost anyone now can capture, stream, and distribute Ivy League-level content over the Internet. And this will blow the walls off traditional higher education. [<http://www.bothsidesofthetable.com/2013/03/03/in-15-years-from-now-half-of-us-universities-may-be-in-bankruptcy-my-surprise-discussion-with-claychristensen/>] Put another way, why should a student borrow money, pay exorbitant tuition, and sit in a traditional classroom listening to a mediocre professor, when she can learn the same material from the top expert in the world in a MOOC (Massive Online Open-enrollment Course), for which her college will give her course credit?

College costs have escalated for reasons rooted primarily in organizational culture and market forces. Institutions of higher education often have defined quality in terms of resources acquired rather than results achieved (Guskin, 1994; Lovett, 2005). Colleges and universities have survived profligacy through monopolistic competition, achieving sufficient differentiation from other institutions by geographic location and programs (Bowen, 1980). But high technology, which supplies the capacity to deliver academic programs at a distance from the physical campus, is eroding the product differentiation so long enjoyed by traditional colleges and universities.

The pressure on institutions to control costs has likely never been greater. Tuition at four-year public institutions in the 2003–04 academic year increased at the highest rate in three decades, an average of 14 percent more

than the prior year (Farelle, 2003). State appropriations to public colleges and universities fell 2.1 percent from the 2002–03 fiscal year to the 2003–04 fiscal year—the first decline in 11 years (Hebel, 2004). Colleges and universities, particularly private institutions, are only now recovering from endowment losses in 2002. The National Association of College and University Business Officers' study of endowment for that year showed that institutions of higher education lost six percent on their investments, marking the first time investments had declined for two consecutive years since 1974 (Lyons, 2003). In company with other employers, colleges and universities struggle with the escalating cost of health care for employees. Health insurance premiums rose 13.9 percent in 2003, the third consecutive year of double-digit increases (Basinger, 2003).

Institutions of higher education confront many barriers to cost control. Perhaps the most basic impediment is poor cost information. Progress toward improved costing for higher education was advanced in the 1970s by the work of the National Center for Higher Education Management Systems (NCHEMS), but the cost systems proposed by NCHEMS largely were abandoned in the affluence of the 1980s (Turk, 1992). Day (1993) noted "no general consensus on costing methodology in higher education" (p. 13). Even now internal management reports focus on salaries, travel, and research costs, and generally ignore such indirect costs as facilities and administration.

Higher education is also a labor-intensive endeavor, making gains in productivity more difficult and exposing institutions to the spiral of benefit costs. Moreover, consensus management continues to pervade academic administration and bring inefficiency to the decision-making process (Zemsky and Massy in Adams, 2006).

Faced with these pressures, colleges and universities are:

1. Competing harder than ever for students, as well as grants and gifts;
2. Seeking to control and exploit intellectual property that, once upon a time, was left to faculty to promulgate as they saw fit;
3. Growing and expanding, often at the expense of competing institutions and for-profit providers of post-secondary education;
4. Streamlining operations where possible, such as by bringing Student Life divisions under the umbrellas of Academic Affairs; hiring more adjunct and non-tenure-track full-time faculty; offering accelerated

degree programs, sometimes at the expense of traditional core requirements; and

5. Being all things to all potential students, such as by offering on-line courses, professional certifications, and remote-site alternative facilities.

Legal Implications

One significant implication of these many profound changes is that university legal staffs are growing. A 2006 survey by the National Association of College and University Attorneys (NACUA) disclosed not only that such staffs are getting bigger, but also that a major reason is an average of 33 open litigation files at any given moment in time per institution. The survey revealed that chief legal officers with budgets in excess of \$2,000,000 earned on average \$240,000 per year, while at schools with smaller legal-office budgets, the average hovered around \$130,000. Small schools pay on average \$105,000 per year (Selingo, 2006). In 1961, only about 65 schools had in-house legal counsel, and most of these employed but a single lawyer. Today, membership in NACUA totals more than 3,200. Some of the legal developments that help explain the perceived need for ever-more attorneys in higher education include civil rights and civil liberties issues with their genesis in the sixties and seventies, such as:

- “Attempts by colleges and universities, influenced by state political leaders, to suspend or expel students for protesting racial discrimination in higher education. The courts held that students are entitled to due process of law.”
- “Questions involving the parameters of protest and the protection of unpopular speech and debate about social and political issues. Landmark rulings held that colleges should protect the content of student speech but that reasonable limitations on time, place, and manner of speech and protest—like restrictions that prevent the disruption of academic activities—are appropriate.”
- “Cases revolving around whether students have the right to associate and form organizations that promulgate unpopular political and social topics. Some historic cases involved unsuccessful attempts by colleges to ban gay-rights organizations and political groups, like the Students for a Democratic Society, that were critical of ‘Americanism.’ Student

religious groups also gained access to public campuses' facilities during this period."

- "The freedom of the campus press, redefining it in keeping with the fundamental protections of the First Amendment. Attempts by public colleges to withhold financial support for campus newspapers when their content was deemed distasteful or even loathsome by the administration were rebuffed by the courts."
- "Faculty rights in their most basic sense, in cases that questioned the legitimacy of restrictions on academic freedom. For example, a loyalty-oath requirement was found to violate free speech because it limited the scope of a professor's teaching and research. Faculty members sought the protections of labor laws and the right to bargain collectively."
- "Employment-discrimination laws that considered the disparate treatment of minority groups and women in hiring, pay, job assignments, promotion, and the awarding of tenure."
- "The formal breakup of racially structured systems of public higher education in Alabama, Louisiana, Tennessee and at least nine other states" (Bickel & Ruger).

Issues which today's top university attorneys predict will be on their front burners as the 21st century moves inexorably ahead include:

1. Health & safety issues, including student violence
2. Government investigations
3. Race-conscious admissions
4. Intellectual property rights
5. Computer law and distance learning
6. Conflicts of interest
7. Individual privacy v. public accountability
8. The graying of the workforce
9. Employee benefits
10. Consumer and educational malpractice
11. Alternative income streams and for-profit ventures
12. Organized labor

Obviously, these legal issues are not unique to higher education. Neither are the major branches of the law that dictate the rules by which these issues are analyzed and resolved. The sources of these legal principles and rules are:

a. Constitutions: The U.S. Constitution defines the structure and powers of the three branches of the federal government, its limitations, and the rights remaining to the states and we the people. All states also have constitutions. These mimic the federal document in many ways, but also contain provisions unique to each one of them. For example, while an individual privacy right implicit in the U.S. Constitution's Bill of Rights has been a controversial issue for decades, some states' constitutions expressly accord such a right to citizens within their boundaries.

b. Statutes: Laws are passed by legislative bodies. At the national level, this of course is the Congress. All states have legislatures as well. Most mimic the U.S. Congress in being bicameral, but a few have but one house. Federal statutes must conform to the requirements of the U.S. Constitution. On an equal footing with these federal laws are **Treaties** signed by the executive branch and ratified by the U.S. Senate. At the state level, statutes must comport not only with the state's constitution, but also with the federal constitution and any relevant federal statutes. In some areas federal law almost entirely preempts state law, such as in the fields of intellectual property and employee benefits. In other areas, such as discrimination law, the federal and state legislatures share statutory authority, and states may enact statutes so long as they do not trim back rights provided under federal law. For instance, no federal statute forbids discrimination on the basis of sexual preference, but the laws of a growing number of states do forbid such behavior by employers, landlords, and public services. The New Jersey Law Against Discrimination is one such statute.

c. Rules and Regulations: If the universe of codified law can be compared to an iceberg, then the statutes enacted by federal and state lawmakers are only the tip. The vast body of the berg is comprised of a dizzying variety of rules and regulations promulgated by the agencies and offices of the vast federal bureaucracy, its counterparts in the 50 states, and the governmental entities at the county and municipal levels. From labor to discrimination to environmental protection to corporate accountability to zoning, a vast national bureaucracy—much of it staffed by lifetime appointees under civil service rules and union contracts—develops, disseminates, and enforces countless rules and regulations. Not only does this bureaucracy mimic the legislatures in propagating such quasi-laws (which, of course, must comport with relevant constitutions and statutes); it also mimics the court system in conducting administrative hearings (typically subject to judicial review).