HIGHER EDUCATION LAW 501
Introduction and Conceptual Overview
(A PowerPoint Presentation)

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Introduction and Conceptual Overview


See also Year 2000 Cumulative Supplement to
The Law of Higher Education (National Association of College and University
Attorneys, 2001).

Illustration: The Education Law Universe

Workshop Materials, p. 3
The Law/Policy Distinction

Workshop Materials, p. 8

**Policy:**
1. What options are available?
2. What are the "best" options?
3. How should we implement the chosen option(s)?

**Law:**
1. How does the law constrain the identification and choice of options?
2. What legal risks must be weighed in choosing the best options?
3. How does the law constrain or channel the implementation of the chosen option?
Academic Freedom As Custom or Policy

• Institutional Customs or Policies
• AAUP Policy Statements
• National Custom or Tradition: customs of higher educational institutions nationwide

Academic Freedom as Law

• U.S. Constitution
  1. Free Speech and Press Clauses (First Amendment)
  2. Due Process Clause (Fourteenth Amendment)
  3. Establishment and Free Exercise Clauses
• Contract Law
  1. Faculty Handbooks
  2. Student Handbooks
  3. Institutional By-laws and Regulations
  4. AAUP Policies Incorporated by Reference
  5. Custom that Fills Gaps in Contracts
Types of Academic Freedom

1. Faculty Academic Freedom: Freedom to Teach
2. Student Academic Freedom: Freedom to Learn
3. Institutional Academic Freedom:
   - Freedom to Determine Who May Teach
   - Freedom to Determine What May Be Taught
   - Freedom to Determine How Subject Matter Will Be Taught
   - Freedom to Determine Who May Be Admitted to Study

Faculty Employment and Tenure

*The Law of Higher Education*, sec. 3.1, 3.5, 3.6, and 3.8

- Contractual Relationship Between Faculty and University
  - Term Contract
  - Contract for Life - Tenure
- All Contracts are CONDITIONAL
  - For Cause
  - Nonausal
Faculty Employment and Tenure

- Tenure Must be Overtly Granted, Not Inadvertently Achieved
  - Teaching
  - Research
  - Service
  - Collegiality

Protections of Tenure

- Classroom Speech
- Freedom of Association
- External Utterances and Actions Over Issues of Public Concern
- Evaluation of Students
Tenure Does Not Protect

- Disruptive Speech
- Unethical Conduct
- Unrelated Classroom Speech
- Sexual Harassment

Bases for Termination

- For Cause
  Incompetence
  Immorality, including Sexual Harassment
  Neglect of Duty
  Insubordination
  Conviction of a Felony
  Physical or Mental Incompetence
Bases for Termination

- Noncausal
  - Program Elimination
  - Program Reduction
  - Financial Exigency

Post Tenure Review

Senior Faculty Follies

Illustration by Bernhard Kunkel, Imperial College
Post Tenure Review

- Contract Term
- Procedures
  - Periodic
  - Trigger
  - Employer/Employee Request
- Faculty Participation
- Developmental or Punitive

Retirement, Resignation, Separation

- No Mandatory Retirement
  - Age Discrimination in Employment Act
- Voluntary Separations
- Buy-Outs
  - Time
  - Money
- Documentation
Governance of Higher Education

External governance  (LHE 3d pp. 13-20)

Private Institutions
- State incorporation laws
- State licensing laws
- State spending laws
- State constitutional laws
- Federal regulatory laws (EPA, IRS)
- Federal spending laws
- Other federal and state laws (employment, criminal)
- Common law (contract)

External governance  (LHE 3d pp. 13-20)

Public Institutions
- Constitutional provisions (federal and state)
- Statutorily-created colleges (considered state agencies?)
- State regulatory laws (general, specific to colleges)- LHE 3d p. 695
- State licensing laws
- Federal regulatory laws
- Federal spending laws
- Other federal and state laws (employment, criminal)
- Common law
Internal governance

Trustees
- Private Institutions
  - Self-perpetuating board of trustees
  - Corporate charter defines board’s authority
  - State corporate law and trust law may impose (LHE 3rd, pp. 83-85)
    - Fiduciary duty
    - Ethical obligations
- Public Institutions
  - Appointed or elected board of trustees
  - Authority is derived from statute or constitution
  - State may delegate authority to board for operating institution
  - State may retain certain powers

Who is the Client?

University counsel’s client is the Board (or the institution itself) – See “The University Counsel, a Roundtable Discussion,” 87 Academe 26 (November-December 2001).

See LHE 3rd, p. 64
Internal governance

Officers of the Institution

Authority is delegated by the trustees (express, implied, apparent- LHE 3d, p. 77)
Some laws require trustee action which cannot be delegated (LHE 3d, p. 88)
  Express (by vote)
  Implied (knowledge, no action to reverse)

Faculty

Sources of authority
  Institutional rules and regulations
  Contracts
  Institutional custom
  Academic custom and usage

Staff

Agency issues
May have role in institutional governance groups (e.g. senate)
May be unionized
Liability Issues

May be institutional or individual (or both)

Tort (LHE 3d pp. 98-114, 126-131; Year 2000 Supp., pp. 55-72, 81-90)

Negligence

Premises liability

Individual safety

"Educational Malpractice"

Defamation


Federal Civil Rights (LHE 3d, pp. 117-126; 132-137, Year 2000 Supp., pp. 76-81, 90-98)

Student Free Speech

The Law of Higher Education, secs. 4.9, 4.10, 4.11.1, 4.11.2, and 4.13

Soco alco Year 2000 Cumulative Supplement, sec. 4.18 ("Free Speech on Campus Computer Networks")
Student Free Speech: Public Institutions vs. Private Institutions

1. Private Institutions
   • Institution's own Bill of Students' Rights
   • Free speech provisions in state statute or state constitution

2. Public Institutions
   • First Amendment Free Speech Clause
   • Institution's Bill of Rights, state statute, or state constitution supplementing First Amendment

Basic Distinctions in Free Speech Law

I. Content-Based Restriction on Speech vs. Content-Neutral Restriction on Speech

II. Prior Restraint on Speech vs. Subsequent Restraint on Speech
Student Privacy

*The Law of Higher Education*, sec. 4.14, 4.16
- Family Educational Rights and Privacy Act (FERPA)
- Social Security Numbers
- Residence Halls

FERPA/Buckley Amendment

- Provides rights of inspection and prohibitions against unauthorized dissemination of educational records
- Applies to all public and private institutions of higher education that receive federal funds
- Applies to students who are or have been in attendance
Educational Record

- Any personally identifiable information recorded in any way
- Exceptions
  - Records in the sole possession of the maker
  - Records of a law enforcement unit
  - Records related only to employment
  - Records of post enrollment information
  - Records of health care treatment

Student Right to Inspection of Education Records

- Within 45 days of request
- Requires response to reasonable requests for explanations and interpretations
- Confidential letters of recommendations to which access was waived are not disclosable
Student Requests to Amend Records

- Inform student in writing of disagreement and advise of right to a hearing
- If as result of hearing institution agrees with student, amend record and notify student in writing
- If as result of hearing institution disagrees with student, advise student a written statement of contest may be placed in file with contested information

Hearing Requirements

- Hold within reasonable time after request
- Provide reasonable notice of date, place, and time
- Avoid direct interest in outcome by hearing officer
- Provide fair opportunity to present case
- Base decision on the evidence presented
- Render results in writing - including summary of evidence and reasons for the decision - within reasonable time after hearing
Authorized Disclosures Without Student's Prior Consent

- Disclosure of Directory information, unless written request not to disclose
- Disclosures to internal university officials with legitimate educational interest
- Disclosures to authorized representatives of the Comptroller General of the U.S., the Secretary of Education, INS, FBI, or state and local educational authorities
- Disclosure in connection with financial aid
- Disclosures to organizations conducting studies

- Disclosures to accrediting agencies
- Disclosures to parents of a dependent student
- Disclosures in compliance with lawfully issued subpoena or court order
- Disclosure in event of an emergency and information is necessary to protect health and safety
- Disclosure of the results of disciplinary proceedings against alleged perpetrator of any violent crime to alleged victim
Annual Notification

- Right to inspect educational records
- Amendment procedure
- Control disclosures
- Right to file complaint with Department of Education

Enforcement

- Department of Education authorized to investigate FERPA violations
- Penalty for FERPA violation is federal fund cut off
- Questions pending regarding private right of action (Gonzaga v. Doe)
Residence Halls Privacy

- Fourth Amendment - protection against unreasonable searches and seizures
- Fourteenth Amendment - no deprivation of life, liberty, or property without due process
- Students subject to lease terms - criminal investigations cannot be subsumed under lease agreements
- Warrant requirements unless illegal items discovered in course of legal administrative inspections or plain view

Social Security Numbers

- Institution may not require student to disclose social security number
  EXCEPT:
  - Financial aid related
  - Employment related
Harassment

Title IX of the Education Amendments of 1972 (20 U.S.C. §
1681 et seq.) forbids discrimination on the basis of sex in
any education program or activity receiving federal financial
assistance (LHE 3d, pp. 816-816)

Enforced by Office for Civil Rights (OCR), U.S. Department
of Education

Sexual Harassment Guidance: Harassment of Students by
School Employees, Other Students, or Third Parties. 62 Fed.
Reg. 12034 (March 13, 1997),

Private right of action to enforce Title IX in federal court by
participants in educational programs includes equitable relief
and money damages (LHE 3d, pp. 816-817)

Harassment

Relief may be awarded for harassment by teacher (or
other staff member) or by peers.

Faculty Harassment:

Gebser v. Lago Vista Independent School District (Year 2000
Supp. pp. 594-599)

1) An official of the school must have had “actual
knowledge” and the authority to “institute corrective
measures”

2) If the official had actual knowledge, h/she must
have “failed to adequately respond” to the harassment
and, in that failure, to have acted with “deliberate
indifference.”
**Peer Harassment:**

*Davis v. Monroe County Board of Education* (Year 2000 Supp., pp. 599-503)

1) the school must have "actual knowledge" of the harassment

2) the school must have responded (or failed to respond) with "deliberate indifference" - a response that is "clearly unreasonable in light of the known circumstances"

3) the school must have had "substantial control" over the student harasser and the context of the harassment

4) the harassment must have been "severe, pervasive, and objectively offensive" to the extent that the victim was deprived of educational opportunities or services

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**"Rick's Revenge"**

**Primary Legal Issues**

- Rick's free speech rights as against State University (rights to cyberspace speech)
- Amy's Title IX rights as against State University (private right of action)
- State University's obligations under Title IX to protect Amy and other women students from sexual harassment via Rick's web page
“Rick’s Revenge”
Sources for Review

• http://law.edu/kaplin.htm
  (Rick’s Revenge Case Study and Review)

• Year 2000 Cumulative Supplement to the Law of Higher Education, secs. 4.18 and 7.2.18 (free speech), and sec. 7.5.3 (Title IX and sexual harassment)

Faculty Academic Freedom

The Law of Higher Education, sec. 3.7
and
Year 2000 Cumulative Supp., sec. 3.7
Faculty Academic Freedom: Venues for Disputes

- In the Classroom
- In Grading
- In Research and Publication
- In Institutional Affairs
- In Private Life

Faculty Academic Freedom: An Example

In the classroom and in institutional affairs:

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001)
Due Process

*The Law of Higher Education, sec. 3.6*

- 14th Amendment
- Property Interest
  - Expectancy of Continued Employment
- Liberty Interest
  - Protect One's Reputation

Bases for Termination

- For Cause
  - Incompetence
  - Immorality, including Sexual Harassment
  - Neglect of Duty
  - Insubordination
  - Conviction of a Felony
  - Physical or Mental Incompetence
Due Process

- Pretermination (Laudermill)
- Notice
  - Of Rule Violated
  - Of Evidence and Witness
  - Of Right to Hearing
- Hearing
  - Impartial Decision Maker
  - Decision Based on Evidence at Hearing
- Review by President or Board
- State Administrative Procedures Act Requirements

Liability for Defamation

Defamation may be oral ( slander ) or written ( libel ). It is a common law tort claim; state case law precedent is used to evaluate defamation claims.

Elements of defamation

a. A false and defamatory statement concerning another
b. An unprivileged publication (communication) to a third party
c. Fault amounting at least to negligence on the part of the publisher
d. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication (Restatement (Second) of Torts §558)
Defenses to defamation claims

a. Truth
b. Qualified privilege, based on business needs of the organization
   (the "intra-corporate immunity doctrine"—communication of business information, fair comment and criticism)
c. Absolute privilege (such as testifying in court)
d. Public official privilege (available only if alleged defamer was performing official duties)

Application to letters of recommendation, employment references, personnel decisions.

a. "Pure" opinion is not actionable
b. Letters that rely on facts that are documented (e.g., attendance, disciplinary problems for employees) are easier to defend than letters that contain speculative or unsubstantiated claims
c. If the letter involves a student, remember the provisions of the FERPA regarding disclosure of "educational records" (such as grades or the outcome of student judicial proceedings)

Faculty Contract Issues

What is the contract? (LHE 3d, pp. 150-161; Year 2000 Supp., pp. 109-115)

1. Faculty handbook
2. Collective bargaining agreement
3. AAUP policies and bylaws
4. Institutional policies
5. Past practice
6. Academic custom and usage
7. Oral promises
Faculty Contract Issues

- Notice provisions for renewal or nonrenewal
- Contract rescission
- Where is the locus of tenure?
- Filling in gaps in the contract

Student Discipline and Academic Sanctions: Standards vs. Procedures

The Law of Higher Education, secs. 4.6, 4.7, and 4.8.
Student Discipline: Standards

- The substantive rule or regulation that sets a standard of conduct or responsibility
- E.g., no theft; no assault; no drug use
- E.g., no plagiarism

Student Discipline: Procedures

- The process that must be provided to the accused person before any determination that he/she violated a standard
- E.g., filing and processing a grievance
- E.g., opportunity for a hearing before an impartial body
- E.g., opportunity for mediation and disposition by mediation agreement
Student Discipline: Sources of Law

- Internal Law
- External Law
  - Public institutions
    - Due Process Clause (Fourteenth Amendment)
    - Contract Law
  - Private institutions
    - Contract Law

Judicial Review of Student Discipline Cases

- "Judicial deference" to institution’s standards
- Exceptions for discrimination and infringements on speech
- No judicial deference for procedures
Academic vs. Disciplinary Decisions

Standards of judicial review differ

Academic decisions:

Judicial deference to academic judgement as long as decision-makers did not act arbitrarily and followed their own policies and procedures (LHE 3d, pp. 466-474; 491-497; Year 2000 Supp., 291-296; 320-321)

Mixed cases of misconduct and academic performance should be treated as a disciplinary decision, and due process or contractual rights afforded the student.

Disciplinary decisions:

Public institutions

Due process required (LHE 3, pp. 484-490; Year 2000 Supp., pp. 317-319)
1. notice
2. hearing

Private Institutions

Compliance with institutional policies and procedures required (LHE 3d, pp. 497-600; Year 2000 Supp., pp. 322-327)
Americans w/ Disabilities Act and Accommodation

The Law of Higher Education, sec. 4.2.4.3, 7.5

- ADA Title II (governmental agencies) and Title III (public accommodations)
  - "No individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity (or place of public accommodation), or be subjected to discrimination by any such entity" 42 U.S.C. Sec. 12101

- Section 504 of the Rehabilitation Act of 1973 precludes discrimination by programs receiving federal financial assistance

Documentation of Disabilities

- Student responsible for requesting accommodation
- Student responsible for demonstrating existence of a disability
- Institution can establish documentation standards
- Institution responsible for expense of supplemental assessment when required
Institutional Determinations

- Is Student Disabled?
- Is Student Otherwise Qualified?
  - Essential requirements
- What is Reasonable Accommodation?
  - Not undue financial hardship
  - Not modification to academic program

Common Accommodations

- Alternative formats on syllabi and materials
- Advance notice of tests
- Alternative teaching sites and methods
- Use of assistive technology
- Additional time on assignments and tests
- Classroom adjustments
  - Changing room
  - Notetakers and tape recording
  - Copies of lecture notes and overheads
  - Sign language interpreters
- Braille and TDD’s
- Physical adjustments/barrier removals
Current Legal Issues

- Immunity
  - University of Alabama v. Garrett
  - ADA v. Florida International
  - Hamilton v. CCNY
- Narrow application
  - Toyota Motor v. Williams
  - Albertson's v. Kirkingburg
  - Sutton v. United Airlines

Dennis and the False Prophets

- Is this a discipline or mental health matter?
- Is Dennis a danger?
- Is there a basis for emergency action?
- Who can take action?
Joe Doe and his Student Teaching Assignment

- Is Joe Doe disabled?
- Is Joe Doe otherwise qualified?
- Is Joe Doe's demanded "accommodation" reasonable?